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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92044880
Party	Plaintiff Specialty Nutrition Products, LLC Specialty Nutrition Products, LLC One South Ocean Boulevard, Suite 300 Boca Raton, FL 33432
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Date	06/09/2006
Attachments	Consent Motion and Stipulation to Consolidate.pdf ( 6 pages )(102476 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

Specialty Nutrition Products, LLC,	:		
	:		
and	:	Cancellation No.:	92044880
	:		
INCommerce Corporation,	:	Opposition No.:	91167676
	:		
Opposers / Petitioners,	:	Opposition No.:	91168654
	:		
vs.	:	Opposition No.:	91168747
	:		
Jarrow Formulas, Inc.,	:		
	:		
Applicant / Registrant.	:		

**CONSENT MOTION AND STIPULATION TO CONSOLIDATE**

COMES NOW the Opposers / Petitioners, Specialty Nutrition Products, LLC and INCommerce Corporation (hereinafter “Opposers / Petitioners”), by counsel, The Swyers Law Firm, PLLC, and pursuant to § 511 of the TBMP, hereby file the instant Consent Motion and Stipulation to Consolidate the above-captioned matters. In support thereof, Opposers / Petitioners state as follows:

**Statement of the Case**

Jarrow Formulas, Inc. (hereinafter “Registrant / Applicant”) is the registrant of U.S. Registration No. 2,735,038 for the mark JOINT SUSTAIN and applicant for the marks identified in U.S. Serial No. 78/454,350 for the mark PROTEIN SUSTAIN, U.S. Serial No. 78/512,271 for the mark NAC SUSTAIN, and U.S. Serial No. 78/459,788 for the mark MELATONIN SUSTAIN.

Opposers / Petitioners are the applicants for the marks identified in U.S. Serial No. 76/626,806 for the mark SUSTAIN CALM, U.S. Serial No. 76/626,808 for the mark SUSTAIN JOINTS, U.S. Serial No. 76/626,809 for the mark SUSTAIN SPORT, U.S. Serial No.

76/626,810 for the mark SUSTAIN DIGEST, U.S. Serial No. 76/626,812 for the mark SUSTAIN YOURSELF, U.S. Serial No. 78/545,080 for the mark SUSTAIN MSR, U.S. Serial No. 78/548,564 for the mark SUSTAIN IMMUNE, U.S. Serial No. 78/548,567 for the mark SUSTAIN SLIM, U.S. Serial No. 78/548,571 for the mark SUSTAIN FOCUS, and U.S. Serial No. 76/626,811 for the mark SUSTAIN MULTI.

Each of the above-referenced pending applications filed by the Opposers / Petitioners have either been refused registration under Section 2(d) of the Trademark Act of 1946 and/or have been suspended consistent with the United States Patent and Trademark Office's policy in regard to prior pending marks which may mature into a Section 2(d) refusals in regard to one or more of the Registrant / Applicant's marks listed above.

In this regard, Opposers / Petitioners instituted the following cancellation proceeding and/or opposition proceedings against the registration and/or continued registration of Registrant / Applicant's marks:

JOINT SUSTAIN (U.S. Reg. No. 2,735,038): Cancellation No. 92044880;

PROTEIN SUSTAIN (U.S. Ser. No. 78/454,350): Opposition No. 91167676;

NAC SUSTAIN (U.S. Ser. No. 78/512,271): Opposition No. 91168654; and

MELATONIN SUSTAIN (U.S. Ser. No. 78/459,788): Opposition No. 91168747.

### **Argument**

When cases involving common questions of law or fact are pending before the Board, the Board may order the consolidation of the cases. TBMP § 511 (*citing* Fed. R. Civ. P. 42(a)(*citations omitted*)). Cases may be consolidated despite variations in the marks or the goods upon which they are used so long as the questions of law or fact common to those cases are the

same. *See Ritchie v. Simpson*, 41 USPQ2d 1859 (TTAB 1996), *rev'd on other grounds*, 170 F.3d 1092, 50 USPQ2d (Fed. Cir. 1999). Moreover, cancellation and opposition proceedings may be consolidated into one matter. *See Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993).

In deciding upon a motion to consolidate, the Board should weigh the savings in time, effort, and expense, which may be gained from consolidation, against any prejudice or inconvenience that may be caused thereby. TBMP § 511 (*citing World Hockey Ass'n v. Tudor Metal Products Corp.*, 185 USPQ 246 (TTAB 1975)(consolidation ordered where issues were substantially the same and consolidation would be advantageous to both parties)).

Although consolidation is discretionary by the Board, it may be ordered upon a motion granted by the Board or upon a stipulation of the parties approved by the Board. TBMP § 511.

When matters are consolidated, the oldest of the consolidated cases will be treated as the “parent” case and the Board should reset the trial and discovery dates for the consolidated proceeding by adopting the trial dates set in the most recently instituted of the cases being consolidated. TBMP § 511.

Applying the above to the matters at issue, in each of the four proceedings sought to be consolidated Opposers / Petitioners have plead and intend to rely upon the identical theory of prosecution, namely, that the term SUSTAIN as used in each of Registrant / Applicant’s marks is merely descriptive of the respective goods upon which it is used. As such, it is Opposers / Petitioners’ contention that Registrant / Applicant’s marks not be permitted to register and/or maintain its current registration due to their merely descriptive nature.

Correspondingly, Registrant / Applicant will defend the instant proceedings, *inter alia*, on the grounds that its marks, and specifically use of the term SUSTAIN in each mark, is inherently

distinctive and/or has acquired distinctiveness vis-à-vis Registrant / Applicant's goods. Registrant / Applicant also defends the instant proceedings based on its prior rights in its marks vis-à-vis Opposers / Petitioners' rights in their marks and if there is a likelihood of confusion between Registrant / Applicant's marks and Opposers / Petitioners' marks, then Opposers / Petitioners are infringing Registrant / Applicant's prior rights.

Accordingly, all proceedings will involve the same question of law of as well as a significant overlap of the facts supporting the application of the law to the matters before the Board.

In evaluating the instant motion, Opposers / Petitioners assert that in the interests of judicial economy the requested consolidation will serve to significantly decrease both the Board's time and effort in presiding over these matters as well as the parties' respective efforts and expense in prosecuting and/or defending the same. *See World Hockey Ass'n*, 185 USPQ 246. Moreover, the parties have consented to and have stipulated to the instant consolidation.

WHEREFORE for good cause shown it is hereby requested that the instant proceedings be consolidated under the oldest matter, Cancellation No. 92044880, and that trial dates be rescheduled for the new consolidated matter consistent with the most recently instituted matter consolidated Opposition No. 91168747 said dates being as follows:

Discovery Period to Close:	August 08, 2006
30-day testimony period for party in position of plaintiff to close:	November 06, 2006
30-day testimony period for party in position of defendant to close:	January 5, 2007
15-day rebuttal testimony period for plaintiff to close:	February 19, 2007

Respectfully submitted this 9<sup>th</sup> day of June, 2006.

The Swyers Law Firm, PLLC

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Counsel for Opposers / Petitioners

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Applicant / Registrant.	:		

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing pleading was sent,  
via U.S. Mail, first-class, postage prepaid, this 9<sup>th</sup> day of June, 2006 to the following:

Mark D. Giarratana, Esq.  
Alexandra B. Stevens, Esq.  
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CityPlace I  
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    /Matthew H. Swyers/      
Matthew H. Swyers