UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

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Mailed: June 29, 2007

Cancellation No. 92045402
Cancellation No. 92045413

Ultimate Nutrition Inc.

v.

Awareness Corporation

By the Trademark Trial and Appeal Board:

On review of the pleadings, the Board notes that in each proceeding petitioner brings the same claim of priority of use and likelihood of confusion with petitioner's mark DAILY COMPLETE FORMULA, the subject of application Serial No. 78786807, by respondent's marks DAILY COMPLETE in standard characters (Registration No.3003931, the subject of Cancellation No. 92045402) and in stylized form (Registration No. 2545289, the subject of Cancellation No. 92045413). Because the parties are the same, and the two proceedings involve common issues of law and fact, the Board believes that the interest of judicial economy will be served by consolidation of Cancellation No. 92045402 and

92045413. *See* Fed. R. Civ. P. 42(a) and TBMP §511 (2nd ed. rev. 2004).

Accordingly, Cancellation No. 92045402 and 92045413 are consolidated, and may be presented on the same record and briefs. The record will be maintained in Cancellation No. 92045402 as the "parent" case, but all papers filed in these cases should include both proceeding numbers in ascending order. *Id.*

The Board notes that, except with necessary variations relating to the subject registrations, the petitions to cancel are identical, and respondent brought identical motions to dismiss for failure to state a claim alleging that petitioner failed to plead that its prior use of its mark has not abandoned. In Cancellation No. 92045402, on August 12, 2006, the Board denied the motion to dismiss on the ground that non-abandonment of its prior use by petitioner does not have to be affirmatively pleaded as part of the likelihood of confusion claim. Respondent's answer to the petition to cancel was filed May 17, 2007.

In Cancellation No. 92045413, the motion to dismiss remains pending. The Board regrets the delay. Proceedings are considered to have been suspended in Cancellation No. 92045413 with the filing of the motion to dismiss. *See* Trademark Rule 2.127(d). For the reasons set forth in the Board's August 12, 2006 order in Cancellation No. 92045402,

respondent's motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) is denied.

Notwithstanding the consolidation of these proceedings, respondent must file a separate answer in Cancellation No. 92045413 and is allowed until thirty days from the mailing date of this order in which to do so.

Discovery and trial dates for this consolidated proceeding are reset below:

DISCOVERY PERIOD TO CLOSE:	**December 15, 2007**
Thirty-day testimony period for party in position of plaintiff to close:	**March 14, 2008**
Thirty-day testimony period for party in position of defendant to close:	**May 13, 2008**
Fifteen-day rebuttal testimony period to close:	**June 27, 2008**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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