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

Proceeding	91194974
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

OPPOSERS' TRIAL BRIEF

PUBLIC VERSION –

This document contains redactions of confidential information that is subject to a protective order or agreement.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. DESCRIPTION OF THE RECORD	2
A. Testimonial Deposition Transcripts	2
B. Heinz’s Notices Of Reliance	3
C. Applicant’s Notice Of Reliance	4
D. Application Files And Pleadings	5
III. OBJECTIONS TO APPLICANT’S EVIDENCE	5
IV. STATEMENT OF THE ISSUES	6
V. RECITATION OF FACTS	6
A. Heinz And The SMART ONES Mark	6
B. The SMART ONES Goods	7
C. Heinz’s Sales, Advertising, And Promotion Of SMART ONES Products	10
D. The Strength Of Heinz’s SMART ONES Mark	12
E. Applicant’s SMART BALANCE Mark And Products	16
F. Similarity Of The Parties’ Marks In Sight, Sound, And Meaning	17
G. The Similarities Of The Parties’ Goods (Frozen Entrees, Appetizers, Cakes)	18
H. The Overlap In The Parties’ Channels Of Trade And Target Market	19
I. The SMART ONES Likelihood of Confusion Survey	21
VI. ARGUMENT	22
A. Heinz Has Standing To Oppose Registration Of Applicant’s SMART BALANCE Mark And Has Priority Of Use	22
B. Applicant’s Proposed SMART BALANCE Trademark Is Likely To Cause Confusion With Heinz’s Famous SMART ONES Mark	22
1. <i>Heinz’s SMART ONES Trademark Is Strong And Famous</i>	23
2. <i>The Goods Identified In The SMART BALANCE Applications Include Goods Identical To Heinz’s SMART ONES Goods</i>	25
3. <i>Applicant’s Proposed Goods Will Be Marketed And Sold In The Same Trade Channels And To The Same Classes of Purchasers As Heinz’s Goods</i>	26
4. <i>The Level Of Care Exercised In Purchasing The Goods At Issue Is Relatively Low</i>	27
5. <i>The Mark SMART BALANCE Is Similar To Heinz’s Registered SMART ONES Trademarks</i>	28

TABLE OF CONTENTS

(continued)

	Page
6. <i>Heinz’s SMART ONES Mark Is Exclusive</i>	31
7. <i>The Extent Of Potential Confusion Is Great</i>	32
8. <i>Other Probative Facts—Applicant Has Essentially Admitted That Confusion And Dilution Are Likely</i>	34
9. <i>Analysis Of The Relevant Factors Establishes That Confusion Is Likely</i>	36
C. Applicant’s Proposed SMART BALANCE Trademark Is Likely To Cause Dilution Of Heinz’s Famous SMART ONES Mark.....	37
1. <i>Heinz’s SMART ONES Trademark Is Famous And Distinctive</i>	38
2. <i>Heinz’s SMART ONES Trademark Was Famous Before Applicant’s Filing Date</i>	39
3. <i>Applicant’s SMART BALANCE Mark Is Likely To Blur The Distinctiveness Of Heinz’s SMART ONES Trademark</i>	39
D. Applicant’s Affirmative Defenses Are Untenable	42
VII. CONCLUSION.....	43

INDEX OF CASES CITED

	Page
CASES	
<i>Blue Cross and Blue Shield Ass’n v. Harvard Cmty. Health Plan Inc.</i> , 17 U.S.P.Q.2d 1075 (T.T.A.B. 1990)	33
<i>Bose Corp. v. QSC Audio Prods., Inc.</i> , 293 F.3d 1367, 63 U.S.P.Q.2d 1303 (Fed. Cir. 2002)	23, 24, 29
<i>Broderick & Bascom Rope Co. v. Goodyear Tire & Rubber Co.</i> , 531 F.2d 1068, 189 U.S.P.Q. 412 (C.C.P.A. 1976)	37
<i>Brown Shoe Co., Inc. v. Robbins</i> , 90 U.S.P.Q.2d 1752 (T.T.A.B. 2009)	27
<i>Century 21 Real Estate Corp. v. Century Life of Am.</i> , 970 F.2d 874, 23 U.S.P.Q.2d 1698 (Fed. Cir. 1992)	29, 31
<i>China Healthways Inst., Inc. v. Wang</i> , 491 F.3d 1337, 83 U.S.P.Q.2d 1123 (Fed. Cir. 2007)	24
<i>Clinique Labs LLC v. Absolute Dental, LLC</i> , 2011 WL 1652171 (T.T.A.B. Apr. 28, 2011)	25
<i>Colgate-Palmolive Co. v. Warner-Lambert Co.</i> , 184 U.S.P.Q. 380 (T.T.A.B. 1974)	29
<i>Cunningham v. Laser Golf Corp.</i> , 222 F.3d 943, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000)	43
<i>Fort James Operating Co. v. Royal Paper Converting, Inc.</i> , 83 U.S.P.Q.2d 1624 (T.T.A.B. 2007)	33
<i>Giant Food, Inc. v. Nation’s Foodservice, Inc.</i> , 710 F.2d 1565, 218 U.S.P.Q. 390 (Fed. Cir. 1983)	30
<i>Hewlett-Packard Co. v. Packard Press, Inc.</i> , 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002)	37
<i>Hilson Research Inc. v. Society for Human Resource Mgmt.</i> , 27 U.S.P.Q.2d 1423 (T.T.A.B. 1993)	33
<i>HSN LP v. Chan</i> , 2009 WL 1896060 (T.T.A.B. June 15, 2009)	25

INDEX OF CASES CITED
(continued)

	Page
<i>In re Aladdin's Eatery, Inc.</i> , 2006 WL 402558 (T.T.A.B. Feb. 7, 2006)	33
<i>In re Albert Trostel & Sons Co.</i> , 29 U.S.P.Q.2d 1783 (T.T.A.B. 1993)	31
<i>In re Chatam Int'l Inc.</i> , 380 F.3d 1340, 71 U.S.P.Q.2d 1944 (Fed. Cir. 2004)	29
<i>In re E. I. du Pont de Nemours & Co.</i> , 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973)	22, 23, 28, 34
<i>In re Hyper Shoppes (Ohio), Inc.</i> , 837 F.2d 463, 6 U.S.P.Q.2d 1025 (Fed. Cir. 1988)	33
<i>In re Majestic Distilling Co., Inc.</i> , 315 F.3d 1311, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003)	23
<i>In re Martin's Famous Pastry Shoppe, Inc.</i> , 748 F.2d 1565, 223 U.S.P.Q. 1289 (Fed. Cir. 1984)	26, 27
<i>In re Rexel Inc.</i> , 223 U.S.P.Q. 830 (T.T.A.B. 1984)	25
<i>In re Smith and Mehaffey</i> , 31 U.S.P.Q.2d 1531 (T.T.A.B. 1994)	27
<i>In re West Point-Pepperell, Inc.</i> , 468 F.2d 200, 175 U.S.P.Q. 558 (C.C.P.A. 1972)	28
<i>In re White Swan, Ltd.</i> , 8 U.S.P.Q.2d 1534 (T.T.A.B. 1988)	28
<i>Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.</i> , 963 F.2d 350, 22 U.S.P.Q.2d 1453 (Fed. Cir. 1992)	25
<i>King Candy Co. v. Eunice King's Kitchen, Inc.</i> , 496 F.2d 1400, 182 U.S.P.Q. 108 (C.C.P.A. 1974)	22
<i>Mattel, Inc. v. Funline Merchandise Co., Inc.</i> , 81 U.S.P.Q.2d 1372 (T.T.A.B. 2006)	30, 31
<i>Message in a Bottle, Inc. v. Cangiarella</i> , 2010 WL 2604981 (T.T.A.B. Jun. 15, 2010)	32

INDEX OF CASES CITED
(continued)

	Page
<i>Miles Labs Inc. v. Naturally Vitamin Supplements Inc.</i> , 1 U.S.P.Q.2d 1445 (T.T.A.B. 1987)	33
<i>National Pork Board v. Supreme Lobster and Seafood Co.</i> , 96 U.S.P.Q.2d 1479 (T.T.A.B. 2009)	39, 40, 41
<i>Nike, Inc. v. Maher</i> , 100 U.S.P.Q.2d 1018 (T.T.A.B. 2011)	40
<i>Nike, Inc. v. WBNA Enterprises, LLC</i> , 2007 WL 763166, 85 U.S.P.Q.2d 1187 (T.T.A.B. 2007)	27
<i>Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.</i> , 889 F.2d 1070, 12 U.S.P.Q.2d 1901 (Fed. Cir. 1989)	23, 29
<i>On-line Careline, Inc. v. Am. Online, Inc.</i> , 229 F.3d 1080, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000)	26
<i>Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772</i> , 396 F.3d 1369, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005)	29, 31
<i>Presto Products Inc. v. Nice-Pak Products Inc.</i> , 9 U.S.P.Q.2d 1895 (T.T.A.B. 1988)	30
<i>R.J. Reynolds Tobacco Co. v. R. Seelig Hille</i> , 201 U.S.P.Q. 856 (T.T.A.B. 1978)	24
<i>Recot, Inc. v. Becton</i> , 214 F.3d 1322, 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000)	23, 28
<i>Research in Motion Ltd. v. Defining Presence Mktg. Group, Inc.</i> , 102 U.S.P.Q.2d 1187 (T.T.A.B. 2012)	38
<i>Ritchie v. Simpson</i> , 170 F.3d 1092, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999)	22
<i>Safety-Kleen Corp. v. Dresser Indus., Inc.</i> , 518 F.2d 1399, 186 U.S.P.Q. 476 (C.C.P.A. 1975)	26
<i>Specialty Brands v. Coffee Bean Distrib., Inc.</i> , 748 F.2d 669, 223 U.S.P.Q. 1281 (Fed. Cir. 1984)	23, 27, 30, 37
<i>Tea Board of India v. The Republic of Tea, Inc.</i> , 80 U.S.P.Q.2d 1881 (T.T.A.B. 2006)	38

INDEX OF CASES CITED
(continued)

	Page
<i>Thane Int'l, Inc. v. Trek Bicycle Corp.</i> , 305 F.3d 894, 64 U.S.P.Q.2d 1564 (9th Cir. 2002)	39
<i>Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.</i> , 648 F.2d 1335, 209 U.S.P.Q. 986 (C.C.P.A. 1981)	26
<i>Weatherford/Lamb, Inc. v. C&J Energy Servs., Inc.</i> , 96 U.S.P.Q.2d 1834 (T.T.A.B. 2010)	38
 STATUTES	
15 U.S.C. § 1052(d)	2, 22
15 U.S.C. § 1125(c)	2, 37, 38, 40
 OTHER AUTHORITIES	
37 C.F.R. § 2.122(b)	5
6 J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> , § 32:188 (4th ed. 2009)	33

I. INTRODUCTION

Since 1992, Opposers ProMark Brands Inc.¹ and H. J. Heinz Company (collectively, “Heinz”), through their predecessors and licensee, have distributed and sold frozen foods throughout the United States bearing the SMART ONES trademark. Heinz’s rights in and to the SMART ONES mark are reflected, in part, in U.S. Trademark Registration Nos. 1,911,590, 2,204,080, 2,916,539, 2,916,538, and 3,462,182, which cover various types of frozen foods, including entrees, desserts, ready-to-eat wraps, pizzas, and breakfast foods.

As a result of Heinz’s extensive, continuous, and very commercially successful use of the SMART ONES mark in connection with such products, as well as the substantial amounts of time, money, and effort invested in marketing, advertising, and promoting its SMART ONES products, the mark has come to symbolize extensive goodwill and consumer recognition. Indeed, the SMART ONES mark is widely and highly recognized by the general consuming public as a unique and famous identifier of Heinz’s goods.

More than 15 years after Heinz began using the SMART ONES mark, Applicant GFA Brands, Inc. (“Applicant”) filed two intent-to-use trademark applications for the mark SMART BALANCE: one for use in connection with frozen appetizers and entrees (Ser. No. 77/864,305, “the ‘305 Application”) and the other for use in connection with various snack foods and desserts, including frozen cakes (Ser. No. 77/864,268, “the ‘268 Application”). Heinz has opposed Applicant’s applications because they will unquestionably damage the distinctiveness and value of the SMART ONES mark.

¹ ProMark Brands, Inc. is a wholly owned subsidiary of H. J. Heinz Company. (Hudson Tr. 7:19-8:4.) At the time the oppositions were filed, ProMark Brands owned all rights and interests in the SMART ONES mark. (*Id.*) Since then, the rights and interests have been assigned to H. J. Heinz Company. (*Id.*)

Indeed, given the enormous strength and fame of the SMART ONES mark, the marked overlap between the goods for which Heinz uses its SMART ONES mark and the goods for which Applicant intends to use its SMART BALANCE mark, the fact that the parties' goods are sold in the identical channels of trade to the same classes of purchasers, the circumstances surrounding those purchases, and the close similarity of the parties' respective marks, confusion between the parties' respective marks is not only likely, but *inevitable*. Furthermore, Applicant's SMART BALANCE mark, when used on or in connection with the goods claimed in Applicant's applications, would be likely to cause dilution, by blurring the distinctiveness of Heinz's famous SMART ONES mark. Accordingly, this opposition should be sustained and Applicant's applications to register the mark SMART BALANCE as shown in Application Serial Nos. 77/864,305 and 77/864,268 should be refused under Sections 2(d) and 43(c) of the Lanham Act, 15 U.S.C. §§ 1052(d), 1125(c).

II. DESCRIPTION OF THE RECORD

The evidence of record consists of the following²:

A. Testimonial Deposition Transcripts

The certified transcripts of the testimonial depositions of the following witnesses:

- Sabrina J. Hudson, Associate Director - Corporate Counsel at H. J. Heinz Company, taken on February 20, 2013, and filed with the Board on March 22, 2013 (including public and confidential portions), including Opposers' Exhibits 1-35 and Applicant's Exhibits 1-8;
- Eric Michael Gray, Associate Director for the SMART ONES brand at H. J. Heinz Company, taken on February 20, 2013, and filed with the Board on March

² A detailed index of the evidence made of record by Heinz is attached as Appendix B.

22, 2013 (including public and confidential portions), including Opposers' Exhibits 36-47;

- Barry A. Sabol, Ph.D., Chief Executive Officer at Strategic Consumer Research, taken on March 12, 2013, and filed with the Board on April 5, 2013 (including public and confidential portions), including Opposers' Exhibits 1-5 Sabol;
- William E. Hooper, Senior Advisor to the Marketing Groups and Board Member of GFA Brands, taken on April 12, 2013, and served on May 9, 2013 (including public and confidential portions), including Applicant's Exhibits 1-18 and Opposers' Exhibits 48-53;
- Philip Johnson, Chief Executive Officer at Leo J. Shapiro & Associates, taken on April 18, 2013, and served on May 9, 2013, including Applicant's Exhibits 1-5;
- Timothy Kraft, Senior Vice-President, Associate General Counsel at GFA Brands, taken on April 26, 2013, and served on May 17, 2013, including Applicant's Exhibits 70-76;
- Leon Kaplan, President and CEO at Princeton Research and Consulting Center, taken on April 23, 2013, and served on May 17, 2013, including Opposers' Exhibits 1-2; and
- William Shanks, Investigations Manager and Designated Lead Investigator at Marksmen, Inc., taken on April 23, 2013, and served on May 17, 2013, including Applicant's Exhibits 6-13.

B. Heinz's Notices Of Reliance

Heinz's Notices of Reliance, filed March 12, 2013, including the exhibits submitted therewith, which introduced the following:

- GFA Brands, Inc.'s Response to ProMark Brands Inc.'s First Set of Interrogatories Nos. 5, 6, 7, 21, 29, 30, and 31;
- GFA Brands, Inc.'s Response to ProMark Brands Inc.'s Requests for Admission Nos. 1-136;
- Select pages from the website www.eatyourbest.com, as of March 11, 2013;
- The April 24, 2012 discovery deposition transcript and accompanying exhibits of Dr. Leon B. Kaplan, who testified as an expert witness on behalf of Applicant GFA Brands, Inc; and
- The December 18, 2012 discovery deposition transcript and accompanying exhibits of Philip Johnson, who testified as an expert witness on behalf of Applicant GFA Brands, Inc.

C. Applicant's Notice Of Reliance

Applicant's Notice of Reliance, filed April 29, 2013, including the exhibits submitted therewith, which introduced the following

- USPTO records for Applicant's SMART BALANCE registrations (U.S. Reg. Nos. 2,200,663, 2,276,285, 2,952,127, 3,649,833, 3,747,526, 3,865,917, and 3,958,463);
- USPTO records for various third party registrations (U.S. Reg. Nos. 3,140,426, 3,945,900, 2,916,503, 2,338,871, 2,773,155, 2,686,279, 1,874,796, 3,522,138, 1,555,954, 3,420,245, 1,367,966, 4,183,609, 3,592,893, 2,107,921);
- Printouts from the website of third parties General Mills, Betty Crocker, Prego, Plum Smart, HP Hood LLC, Lightlife Foods, Orville Redenbacher, Kellogg Co., Glaceau, Smartfood, Inc., Gerber, New World Pasta Company, and Little Debbie;

- Printouts from Amazon.com and Barnesandnoble.com for various third party cookbooks and other books using the term “smart”;
- Packaging for various third party products, including BISQUICK HEART SMART pancake and baking mix, PREGO HEART SMART Italian sauce, SUNSWEET PLUM SMART plum juice cocktail, HOOD SIMPLY SMART chocolate milk, LIGHTLIFE SMART DELI veggie protein slices, ORVILLE REDENBACHER’S SMART POP! gourmet popping corn, KELLOGG’S SMART START cereal, GLACEAU SMARTWATER bottled water, SMARTFOOD POPCORN popcorn, GERBER SMARTNOURISH ORGANIC baby cereal, RONZONI SMART TASTE enriched white pasta, and LITTLE DEBBIE fig bars; and
- The January 17, 2012 discovery deposition transcript and accompanying exhibits of Marion Findlay.

D. Application Files And Pleadings

Pursuant to 37 C.F.R. § 2.122(b), the files of the trademark applications (U.S. Ser. Nos. 77/864,268 and 77/864,305) involved and the pleadings in this consolidated opposition are deemed to be of record.

III. OBJECTIONS TO APPLICANT’S EVIDENCE

Pursuant to Trademark Rules 2.122 and 2.123 and the Federal Rules of Evidence, attached as Appendix A is a brief containing Heinz’s evidentiary objections to certain testimony and exhibits offered by Applicant.

IV. STATEMENT OF THE ISSUES

1. Whether Applicant's proposed SMART BALANCE mark so resembles Heinz's asserted trademarks³ as to be likely, if registered in connection with "Frozen appetizers primarily containing poultry, meat, seafood or vegetables; frozen entrees primarily containing poultry, meat, seafood or vegetables; frozen entrees consisting primarily of pasta or rice" and "soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts, raisins and/or seeds; nut and seed-based snack bars; cake mix, frosting, cakes, frozen cakes, cookies, coffee, tea, hot chocolate, bread, rolls, crackers, pretzels, corn chips, snack mixes consisting primarily of crackers, pretzels, nuts and/or popped popcorn, spices, granola-based snack bars; pita chips," to cause confusion, or to cause mistake, or to deceive; and

2. Whether Applicant's proposed mark SMART BALANCE, when used on or in connection with the foregoing goods, would be likely to cause dilution, by blurring the distinctiveness of Heinz's famous SMART ONES mark.

V. RECITATION OF FACTS

A. Heinz And The SMART ONES Mark

Heinz—the original Pure Food Company—has been in business for more than 140 years. (Gray Tr. 8:5-16.) It was founded by H. J. Heinz, who launched the company in 1869 when he

³ The asserted trademarks, as identified in the Notices of Opposition, are the following registered trademarks, all owned by H. J. Heinz Company: U.S. Trademark Reg. No. 1,911,590 (issued August 15, 1995; Section 8 and 15 affidavits accepted and received, respectively; renewed); U.S. Trademark Reg. No. 2,204,080 (issued November 17, 1998; Section 8 and 15 affidavits accepted and received, respectively; renewed); U.S. Trademark Reg. No. 2,916,538 (issued January 4, 2005; Section 8 and 15 affidavits accepted and received; respectively); U.S. Trademark Reg. No. 2,916,539 (issued January 4, 2005; Section 8 and 15 affidavits accepted and received, respectively); and U.S. Trademark Reg. No. 3,462,182 (issued July 8, 2008); all for the mark SMART ONES. These registrations are before the Board by way of the testimonial deposition of Sabrina J. Hudson. (Hudson Tr. 19-27 and Exhibits 2-6.)

began selling condiments, sauces, and relishes in clear bottles. (*Id.*) Over time, Heinz expanded into frozen products, including frozen potatoes, frozen meals, and frozen snacks, as well as other categories around the world. (*Id.*) Today, Heinz continues to sell condiments and sauces, including ketchup, vinegar, pickles, and relish, as well as pasta sauces and gravy, and frozen products, including ORE-IDA brand frozen potatoes and SMART ONES brand frozen meals and snacks. (*Id.* at 8:17-25; Hudson Tr. 9:3-15.)

Heinz began using the SMART ONES mark in the United States in 1992. (Hudson Tr. 11:2-6.) Heinz's Associate Director for the SMART ONES brand, Eric Michael Gray, explained in his testimony deposition that, in his opinion, SMART ONES "is a brand that consumers value for its nutritional quality, its quality of food in general. It's a brand of products that are a convenient way to remain healthy and manage your weight." (Gray Tr. 11:15-21.) Over the last five years, the SMART ONES brand has evolved into one that supports its customers' nutritional and dietary needs throughout the day—breakfast, lunch, dinner, and dessert. (Gray Conf. Tr. 69:13-21.) The SMART ONES brand is one of Heinz's most valuable brands in the United States. (Hudson Tr. 9:16-24, 12:10-20; *see also id.* at 78:18-79:10.)

B. The SMART ONES Goods

The SMART ONES trademark is used by Heinz for a range of frozen food products, including frozen meals, frozen breakfast items, frozen snacks and appetizers and frozen desserts. (Gray Tr. 11:22-12:6; *see also* Gray Tr. Ex. 43 and Opp'rs Not. of Rel. Ex. C, printouts from Heinz's SMART ONES website, www.eatyourbest.com, showing the variety of products for which the SMART ONES mark is used.) Heinz has used the SMART ONES trademark in connection with these products continuously since the products were first launched more than 20 years ago. (Gray Tr. 25:9-26:10 and Ex. 38, samples of historical packaging for SMART ONES

products.) From an industry perspective, there are generally two categories of frozen entrees: full fat entrees and nutritional entrees. (Hudson Tr. 14:8-15:2.) The SMART ONES products fall under the frozen nutritional category—frozen products that consumers turn to when they are trying to live a healthier lifestyle and/or trying to manage their weight. (Gray Tr. 9:22-10:5.) Frozen nutritional meals could include portion-controlled meals or meals that are lower in calories, lower in fat, lower in bad nutritional, and higher in good nutritional, such as whole grains. (Hudson Tr. 12:21-13:17.) The top three brands in the United States in the frozen nutritional category are SMART ONES, LEAN CUISINE, and HEALTHY CHOICE. (Gray Tr. 10:23-11:2; Findlay Tr. 49:9-13.)

As of February, 2013, there were approximately 80 different products offered under the SMART ONES brand. (Gray Tr. 20:7-10.) Indeed, the number of products offered under the brand has vastly expanded since the brand's introduction in 1992. (*Id.* at 20:11-19; *see also id.* at 23:17-25; Hudson Tr. 11:7-22.)

The SMART ONES products are divided into segments, including Smart Beginnings, Smart Anytime, Classic Favorites, Smart Creations, and Smart Delights. (Gray Tr. 12:8-14:16 and Ex. 37.) The Smart Beginnings segment covers SMART ONES brand breakfast foods; the Smart Anytime segment covers snacks and handheld entrees (smaller-portioned meals); the Classic Favorites segment covers home-style (comfort food) meals; the Smart Creations segment covers nutrient-packed culinary recipe meals; and the Smart Delights segment covers desserts. (*Id.*) Breakfast foods sold under the SMART ONES brand include omelets, egg scrambles, pancakes, French toast, and waffles, as well as hand-held items such as breakfast sandwiches, breakfast quesadillas, and breakfast wraps. (*Id.* at 20:20-21:9.) Snacks and handheld entrees sold under the SMART ONES brand include mini cheeseburgers, chicken sliders, quesadillas,

mini wraps, and similar items. (*Id.* at 21:18-25; *see also* Gray Tr. Ex. 37f.) Entrees sold under the SMART ONES brand include a wide variety of meals, including Italian, Mexican, and Asian dishes, as well as classic comfort foods such as home style beef pot roast. (Gray Tr. 22:9-17; Hudson Tr. 16:20-17:10; *see also* Gray Tr. Exs. 37a-d.) Desserts sold under the SMART ONES brand include ice cream sundaes, strawberry shortcake, and double fudge cake. (Gray Tr. 22:18-25.)

Heinz's best selling SMART ONES product is its Three Cheese Ziti Marinara frozen meal. (*Id.* at 15:7-16:4 and Ex. 37a.) In fact, this particular product is the best selling frozen nutritional meal *of any brand* in the United States. (*Id.* at 15:23-16:4.)

Sabrina J. Hudson, Associate Director - Corporate Counsel at Heinz, authenticated the registration certificates for, and the ownership, use, and registration status of, each of the SMART ONES marks during her testimony deposition, and she used those documents to identify and list dates of first use for the following goods:

- SMART ONES frozen entrees consisting primarily of chicken, beef, fish, and/or vegetables, first used at least as early as May 1992 (Reg. No. 1,911,590) and currently in use, owned by H. J. Heinz Company;
- SMART ONES frozen entrees consisting primarily of pasta and/or rice alone or in combination with other foods, first used as least as early as May 1992 (Reg. No. 1,911,590) and currently in use, owned by H. J. Heinz Company;
- SMART ONES frozen desserts consisting of milk based or milk substitute based desserts, cakes, pies and mousses, first used at least as early as November 1997 (Reg. No. 2,204,080) and currently in use, owned by H. J. Heinz Company;

- SMART ONES pizza, first used at least as early as November 1997 (Reg. No. 2,916,538) and currently in use, owned by H. J. Heinz Company;
- SMART ONES pre-cooked ready-to-eat frozen bread or wrap having a meat and/or vegetable filling with or without cheese, first used at least as early as April 2001 (Reg. No. 2,916,539) and currently in use, owned by H. J. Heinz Company; and
- SMART ONES frozen foods, namely, breakfast sandwiches and muffins, first used at least as early as December 1997 (Reg. No. 3,462,182) and currently in use, owned by H. J. Heinz Company.

(Hudson Tr. 19:2-27:7 and Ex. 2-6.)

C. Heinz's Sales, Advertising, And Promotion Of SMART ONES Products

SMART ONES brand frozen entrees and other products have had a very high sales volume. (Hudson Tr. 17:11-21.) Confidential data regarding Heinz's sales was introduced during Mr. Gray's testimony deposition and is found in Confidential Exhibits 39 and 40, and the confidential testimony related thereto. (Gray Conf. Tr. 38-48.) From Fiscal Year 2007 to Fiscal Year 2011, SMART ONES products had a net sales value of no less than [REDACTED]. (*Id.* at 38:8-40:10 and Ex. 39.) For Fiscal Year 2012, Heinz's annual operating plan projected a net sales value of [REDACTED]. (*Id.* at 40:5-10.) Heinz's net sales have generally increased over time. (*Id.* at 40:15-20.) Over the course of the five years from Fiscal Year 2007 to Fiscal Year 2012, Heinz has seen an increase in net sales of [REDACTED], despite the challenging U.S. economy in that time period. (*Id.*)

The SMART ONES brand has been extensively promoted over the more than 20 years since it was first introduced. (Hudson Tr. 17:11-21.) Confidential data regarding Heinz's

investment spending for the SMART ONES brand was introduced during Mr. Gray's testimony deposition and is found in Confidential Exhibits 40 and 45, and the confidential testimony related thereto. (Gray Conf. Tr. 41-48, 62-63.) From Fiscal Year 2008 to Fiscal Year 2011, Heinz's investment spending for the SMART ONES brand totaled [REDACTED]. (*Id.* at 41-48 and Ex. 40.) Investment spending is the money Heinz spent to support the brand, including trade spending,⁴ advertising, promotions, and marketing expenses.⁵ (*Id.* at 41:7-24.)

Heinz has a robust marketing plan comprised of print, online, coupons, and in-store promotions that are aimed at getting more consumers to try SMART ONES products.

Heinz promotes its SMART ONES products through print advertising, such as in *Cooking Light*, *Real Simple*, *EveryDay with Rachel Ray*, and *O, The Oprah Magazine*—major magazines that SMART ONES customers read, as well as through online advertising, such as in banner ads that appear on various websites, and on its own website, www.eatyourbest.com. (Gray Tr. 50:10-51:5; *see also id.* at 52:12-53:18 and Ex. 42, for examples of Heinz's various marketing activities for the SMART ONES brand.) Additionally, the brand is promoted through a significant social media presence on platforms such as Pinterest and Facebook. (Gray Tr. 50:10-51:5.)

On Heinz's SMART ONES website, www.eatyourbest.com, consumers can find information about all of the products offered under the SMART ONES mark. (*Id.* at 53:19-54:15; *see also id.* at 56:3-57:15 and Ex. 43, printouts from the [eatyourbest.com](http://www.eatyourbest.com) website.) The

⁴ [REDACTED]

⁵ Exhibit 40, explained by confidential testimony at Gray Conf. Tr. 41-48, breaks down the annual investment spending into trade spending and total marketing dollars, including sub-categories for advertising, other promotions, and other marketing.

site has greatly expanded over time to be more than just a static resource. (Gray Tr. 54:7-15.) Today, the site includes images of SMART ONES products, consumer reviews, and general lifestyle information, among other things. (*Id.* at 56:10-16.) The website is frequently updated to add new products and new features to the site. (*Id.* at 57:8-15.) Consumers of SMART ONES products can also register with the eatyourbest.com website to receive targeted marketing and promotions. (*Id.* at 51:24-52:11.)

On social media sites Facebook and Pinterest, Heinz promotes its SMART ONES brand and products by using its “eatyourbest” accounts on those sites to tell consumers about SMART ONES product news, to link to recipes, and to offer promotions. (*Id.* at 54:16-56:2.)

Heinz also uses coupons to drive awareness and trial of new products. (*Id.* at 49:10-17.) Coupons for the SMART ONES products are used to drive consumer loyalty to the brand and to increase the buy rate of SMART ONES products, by giving consumers an incentive to purchase more product than they normally would. (*Id.*) Representative samples of some of the coupons that have been issued in connection with the SMART ONES brand were introduced during Mr. Gray’s testimony deposition. (*Id.* at 49:3-22 and Ex. 41.)

D. The Strength Of Heinz’s SMART ONES Mark

SMART ONES is a strong brand, with a strong reputation among its customers. (Gray Conf. Tr. 69:22-25, 24:11-14.) The brand is a very valuable one to Heinz. (Hudson Tr. 78:18-79:5.) It carries a tremendous amount of equity and has a significant relationship to Heinz’s health and wellness platform. (*Id.*)

Consumers know and recognize the SMART ONES brand. (Hudson Tr. 17:11-21.) In fact, the SMART ONES brand is one of the top three most recognized of Heinz’s U.S. brands. (Hudson Tr. 79:6-10; *see also id.* at 79:11-81:18 and Ex. 35.) Remarkably, a brand awareness

study conducted of the SMART ONES portfolio in 2010 by one of the most formidable advertising research agencies in the United States, Ipsos ASI, found that SMART ONES frozen entrees have a [REDACTED] unaided awareness level among consumers. (Gray Conf. Tr. 63:21-65:9 and Ex. 46.) Aided awareness increases the results to [REDACTED] among the general public, and [REDACTED] among female consumers. (*Id.* at 63:21-65:14 and Ex. 46.) In Heinz’s primary target market for SMART ONES entree products, *Ipsos found an unaided awareness level of [REDACTED] and an aided awareness level of [REDACTED]*. (*Id.* at 65:25-66:8 and Ex. 46.) Significantly, Applicant admitted [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, Applicant’s own in-house counsel admitted during his testimony deposition that a 75% or greater awareness of a particular brand would be high brand recognition and would indicate a strong brand. (Kraft Tr. 25:22-26:8.) He also admitted that the SMART ONES brand is a well-known brand. (*Id.* at 26:16-20.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6 [REDACTED]

[REDACTED]

Data from the agency that manages the SMART ONES website also confirm that the brand is well known by consumers. In Fiscal Year 2011, Heinz's SMART ONES website, eatyourbest.com, had more than [REDACTED] visits to its website, more than [REDACTED] of which were unique visitors, and had more than [REDACTED] page hits. (Gray Conf. Tr. 58:3-59:60:21 and Ex. 44.)

According to Mr. Gray, SMART ONES customers are "very passionate" about the SMART ONES products because the products: offer "convenient ways" to help the customers "stay on track with their diets"; "taste good"; and are "high quality." (Gray Tr. 24:11-19.) The SMART ONES website includes a community of about 3 million consumers who converse with each other about the brand and the SMART ONES brand products. (*Id.* at 53:19-54:15.) Hundreds of thousands of consumers have "liked" the SMART ONES brand Facebook page, and Heinz's first two promotions on its SMART ONES brand Pinterest site far exceeded industry benchmarks for interactions from consumers. (*Id.* at 54:16-56:2.)

Retailers of SMART ONES brand products also "greatly value" the SMART ONES brand. (*Id.* at 24:20-25:4.) The SMART ONES brand has been afforded a considerable share of the freezer case for frozen nutritional meals by retailers—generally two or three freezer case doors are entirely devoted to SMART ONES products. (Gray Conf. Tr. 69:13-70:5.)

From a sales volume perspective, the SMART ONES brand is also one of Heinz's top three brands in terms of sales. (Hudson Tr. 81:19-82:5.) The products sold under the brand have high sales. (*Id.*) Heinz sells approximately [REDACTED] SMART ONES products per year. (Gray Tr. 34:14-21; *see also* Gray Conf. Tr. 62:5-63:8 and Ex. 45, setting forth the number of physical cases of SMART ONES products shipped annually since Fiscal Year 2008.) In terms of volume of products sold, the SMART ONES brand currently has

about a 33 percent market share in the frozen nutritional meals category and it is the number two brand in the marketplace in the nutritional frozen meals category. (*Id.* at 34:22-25.)

In light of the above, there can be little doubt that SMART ONES is an extraordinarily strong trademark and it has clearly become famous.

E. Applicant's SMART BALANCE Mark And Products

Applicant has been using the SMART BALANCE mark in connection with butter substitutes and similar goods since the late 1990's. (Kraft Tr. 5:18-20; *see also* Reg. No. 2,200,663.) According to William Hooper, Senior Advisor and Board Member at GFA Brands, the SMART BALANCE trademark is intended to "communicate a -- the balance, the appropriate, right balance of great taste and good health, with primary emphasis on heart health." (Hooper Tr. 25:5-11.) Applicant's current SMART BALANCE products include buttery spreads and buttery substitutes, milk, popcorn, peanut butter, mayo, eggs, and sour cream. (Kraft Tr. 6:4-9; Hooper Tr. 10:9-17; *see also* Gray Tr. 26:11-20.)

The mark SMART BALANCE was first registered in 1998 (Reg. No. 2,200,663) for use in connection with butter substitutes, margarine, margarine substitutes, shortening, vegetable oils, cheese, and snack food dips. The mark was later registered for use in connection with: mayonnaise, mayonnaise substitutes, and salad dressings (Reg. No. 2,276,285); popcorn (Reg. No. 2,952,127); peanut butter (Reg. No. 3,629,833); eggs (Reg. No. 3,747,526); milk (Reg. No. 3,865,917); sour cream (Reg. No. 3,878,157); and olive oil (Reg. No. 3,958,463).

Heinz does not currently consider Applicant to be a competitor because Applicant does not sell any products in the same product categories. (Hudson Tr. 17:22-25; Gray Tr. 9:8-12.) Indeed, Heinz has never sold butter substitutes, margarine, shortening, cheese, vegetable oils, mayonnaise, popcorn, peanut butter, eggs, milks, sour cream, or olive oil under its SMART

ONES mark and Applicant has never offered or sold any frozen appetizers, entrees or other frozen foods under the SMART BALANCE mark. (Hooper Tr. 56:20-57:6; Kraft Tr. 19:22-20:10, 21:16-18, 28:17-20; *see also* Gray Tr. 27:9-11.) To date, there have not been any product categories in which the SMART BALANCE and SMART ONES products overlap. (Kraft Tr. 28:1-7.)

If Applicant began offering frozen entrees under the SMART BALANCE mark, however, those products would fall into the frozen nutritional category. (Hudson Tr. 14:8-15:2.) If Applicant began offering frozen products, Heinz would consider those SMART BALANCE products to be in direct competition with the SMART ONES products. (Hudson Tr. 18:2-18:9; Gray Tr. 9:15-21.)

F. Similarity Of The Parties' Marks In Sight, Sound, And Meaning

Heinz first used its SMART ONES trademark for frozen entrees as early as 1992. The mark was registered as early as 1995, and it achieved incontestable status in 2002. Applicant filed the applications at issue for the SMART BALANCE mark more than 15 years after Heinz began using the SMART ONES mark.

The first part of the marks SMART ONES and SMART BALANCE are identical. Although "ONES," the last part of Heinz's SMART ONES mark, and "BALANCE," the last part of Applicant's SMART BALANCE mark, are not identical, they are similar in meaning. Both marks connote health conscious products.

Mr. Gray, the associate director of the SMART ONES brand, testified that, as someone who talks to the retailers and customers as part of his job responsibilities, he considers the SMART ONES trademark and the SMART BALANCE trademark to be similar in appearance, sound, meaning, and commercial impression. (Gray Tr. 27:12-28:10.) Likewise, Ms. Hudson,

an experienced trademark attorney and in-house counsel at Heinz, believes that the SMART ONES and SMART BALANCE trademarks are similar in appearance, sound, meaning, and commercial impression. (Hudson Tr. 15:6-16:7.)

G. The Similarities Of The Parties' Goods (Frozen Entrees, Appetizers, Cakes)

With the applications at issue, Applicant seeks to register SMART BALANCE for “*frozen appetizers* primarily containing poultry, meat, seafood or vegetables; *frozen entrees* primarily containing poultry, meat, seafood or vegetables; *frozen entrees* consisting primarily of pasta or rice” (Ser. No. 77/864,305) and “soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts, raisins and/or seeds; nut and seed-based snack bars; cake mix, frosting, cakes, *frozen cakes*, cookies, coffee, tea, hot chocolate, bread, rolls, crackers, pretzels, corn chips, snack mixes consisting primarily of crackers, pretzels, nuts and/or popped popcorn, spices, granola-based snack bars; pita chips” (Ser. No. 77/864,268).

If these applications are permitted to register, there would be an obvious and significant overlap in the goods sold under the SMART ONES and SMART BALANCE marks. Indeed, Heinz’s first SMART ONES registration, issued in 1995, covers various frozen entrees. (See Reg. No. 1,911,590.) Heinz’s second SMART ONES registration, issued in 1998, covers various frozen desserts, including cakes. (See Reg. No. 2,204,080.) And Heinz’s fourth SMART ONES registration, issued in 2005, covers frozen snacks and handheld entrees, i.e., frozen appetizers⁸. (See U.S. Reg. No. 2,916,539.)

⁸ Applicant’s own documents confirm that Heinz uses its SMART ONES mark for frozen appetizers and is a market dominator in that category. [REDACTED]

H. The Overlap In The Parties' Channels Of Trade And Target Market

Heinz's SMART ONES products are sold throughout the United States in traditional grocery stores, such as Kroger, Safeway, Publix, SUPERVALU, Shaw's, Giant Eagle and Meijer, mass merchandisers, such as Wal-mart and Target, and club stores, such as Costco. (Gray Tr. 28:17-29:6; *id.* at 74:16-75:4.) Because they are frozen foods, Heinz's SMART ONES products are necessarily located in retailers' freezer cases and tend to be grouped with other frozen nutritional meals, such as LEAN CUISINE and HEALTHY CHOICE products. (*Id.* at 30:8-31:9.) Applicant's current SMART BALANCE products are sold throughout the United States in the exact same type of grocery stores, including Kroger, Safeway, Publix and SUPERVALU, mass merchandisers such as Wal-mart, and club stores, such as Costco and Sam's Club. (Opp'rs Not. of Rel. Ex A (App. Resps. to Interrogs.) Nos. 5, 7, and 21; Hooper Tr. 21:16-22-7, 24:2-9, 25:2-4; *see also* Hooper Conf. Tr. 23:19-21 and Ex. 11.) Thus, Applicant's SMART BALANCE frozen entrees and snack foods would be sold in the same retail channels, and in the same retail locations in which the SMART ONES products are currently sold.

In addition to overlap in the channels of trade, there also is overlap in marketing methods and the classes of customers to whom Heinz and Applicant market their products. The general demographic for Heinz's SMART ONES products are middle-aged females that may have a little higher income. (Gray Tr. 34:2-5.) The target consumers are people, regardless of gender, that

(continued...)



are dieters (whether losing weight or maintaining weight) and/or people that want to live a healthy lifestyle. (Findlay Tr. 14:4-16:5.) The target customer for Applicant's SMART BALANCE products [REDACTED]

[REDACTED] And both parties promote and market their products in similar ways. Applicant uses "all forms of mass media," including "national magazines as well as digital media, which would be search, digital online display, social media, Facebook, et cetera," as well as "consumer promotional vehicles, freestanding inserts that carry coupons, [and] in-store programs" to promote and market its SMART BALANCE products. (Hooper Tr. 26:9-19; *see also id.* at 33:13-24, 34:16-36:10.) Applicant's advertisements for its SMART BALANCE products appear in national magazines such as "*Cooking Light, Prevention, conceivably Woman's Day, Good Housekeeping, Better Homes and Gardens*; those books . . . that are directed to primarily female readership and cooking applications, as well as health, like *Prevention.*" (Hooper Tr. 26:22-27:3.) As discussed above, Heinz also markets and promotes its SMART ONES products through these same channels, and in the exact same publications. (*See* Gray Tr. 50:10-51:5 and Hooper Tr. 26:22-27:3, in which both parties testified that they promote their products in *Cooking Light*; *see also* Hooper Tr. 52:9-55:20 and Opp'rs Exs. 49 and 50, showing two promotional advertisements in which both parties' products appear). Indeed, Mr. Hooper conceded that the parties' products are sold in the same channels of trade. (Hooper Tr. 55:17-20.)

In light of the foregoing, it is plain that there is a very substantial overlap in channels of trade and target customers between Applicant and Heinz with respect to frozen food products.

I. The SMART ONES Likelihood of Confusion Survey

For purposes of this proceeding, Heinz engaged marketing research firm Strategic Consumer Research Inc. to develop and conduct a survey to determine whether and to what extent consumers are likely to be confused by Applicant's intended use of the mark SMART BALANCE for frozen meals. (*See* Sabol Tr. 10:23-12:15 and Sabol Ex. 1.) The results of this survey confirm that there is a considerable potential for consumer confusion if Applicant were to introduce SMART BALANCE branded frozen meals.

The survey, designed by Dr. Barry A. Sabol, Chief Executive Officer of Strategic Consumer Research Inc., found a statistically significant likelihood of confusion. Specifically, of the 250 respondents surveyed, 32% stated that upon encountering a brand of frozen meals bearing the SMART BALANCE mark, they would think the brand was associated with, licensed by, owned by, or in some other way connected to SMART ONES. (Sabol Tr. 28:11-29:24 and Ex. 1 at 12-13.) Dr. Sabol opined, based on these results, that there is a "significant" likelihood of confusion between the SMART ONES mark and the SMART BALANCE mark if both marks were to be used for frozen meals. (*Id.* at 29:25-30:11, 32:19-33:12.)

Dr. Sabol's survey was also able to measure the level of awareness of the SMART ONES brand. The survey found an 82% aided awareness level of the SMART ONES brand among those survey respondents and potential respondents who had purchased a frozen meal from the frozen food section of a supermarket in the past 30 days. (Sabol Tr. 26:9:27:10 and Ex. 1 at 6-8.) Based on these results, Dr. Sabol concluded that the SMART ONES brand of frozen meals is "very well known" and that the data "qualifies SMART ONES as a 'famous' brand." (*Id.*; Sabol Tr. Ex. 1 at 15.) This conclusion aligns closely with the data that resulted from the Ipsos Brand Awareness survey, which was not commissioned in connection with this proceeding.

VI. ARGUMENT

Section 2(d) of the Lanham Act prohibits the registration of marks that consist of or comprise a mark that “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive” 15 U.S.C. § 1052(d). Based upon the facts set forth above, it is apparent that confusion, mistake, or deception would be likely, and that Heinz would be damaged, if registration of Applicant’s SMART BALANCE mark were permitted in connection with the goods identified in the applications at issue herein. Therefore, Heinz urges that Opposition Nos. 91194974 and 91196358 be sustained and that registration of the SMART BALANCE mark in connection with these goods be rejected.

A. Heinz Has Standing To Oppose Registration Of Applicant’s SMART BALANCE Mark And Has Priority Of Use.

Heinz plainly has standing to oppose the applications at issue and its priority of use is not in dispute. For an opposer to have standing, it must have a “real interest” in the outcome of the proceeding, and a “reasonable” belief that its rights would be damaged if the mark at issue were registered. *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1026 (Fed. Cir. 1999). Heinz has strong, prior rights in the SMART ONES mark, and it has made of record its pleaded registrations. (Hudson Tr. 19:2-27:7 and Ex. 2-6.) Furthermore, in view of these registrations, Heinz’s priority is not in issue as to the goods covered thereby. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 U.S.P.Q. 108 (C.C.P.A. 1974).

B. Applicant’s Proposed SMART BALANCE Trademark Is Likely To Cause Confusion With Heinz’s Famous SMART ONES Mark.

Whether a likelihood of confusion exists is a question of law, determined on a case-specific basis, applying the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476

F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). However, not all of the *du Pont* factors are relevant or given equal weight in the analysis, and any one factor may be dominant in a given case. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003); *In re du Pont*, 476 F.2d at 1361-62, 177 U.S.P.Q. at 567-68. In the present case, the following factors are the most relevant and of record: (1) the strength and fame of Heinz's mark; (2) the similarity of the goods; (3) the similarity of the trade channels and target markets; (4) the conditions under which the goods are sold and the level of care with which the goods are purchased; (5) the similarity of the marks; (6) the nature and number of similar marks in use on similar goods; (7) the extent of potential confusion; and (8) Applicant's effective admission that confusion and dilution are likely. As set forth below, each of the relevant factors weigh in favor of a finding of likelihood of confusion.

I. Heinz's SMART ONES Trademark Is Strong And Famous.

"A famous mark is one 'with extensive public recognition and renown.'" *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371, 63 U.S.P.Q.2d 1303, 1305 (Fed. Cir. 2002) (quoting *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992)). "Fame of an opposer's mark or marks, if it exists, plays a 'dominant role in the process of balancing the *du Pont* factors.'" *Id.* (quoting *Recot, Inc. v. Becton*, 214 F.3d 1322, 1327, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000)). "Famous marks thus enjoy a wide latitude of legal protection." *Recot*, 214 F.3d at 1327.

The fame of an opposer's mark is often judged by indirect factors, such as the volume of sales and advertising expenditures. *Bose Corp.*, 293 F.3d at 1371, 63 U.S.P.Q.2d at 1305; *see also Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1073-74, 12 U.S.P.Q.2d 1901, 1903 (Fed. Cir. 1989); *Specialty Brands v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 674, 223

U.S.P.Q. 1281, 1284 (Fed. Cir. 1984); *R.J. Reynolds Tobacco Co. v. R. Seelig Hille*, 201 U.S.P.Q. 856, 860 (T.T.A.B. 1978). Sales and advertising data are “consistently accepted” as indicia of fame: “when the numbers are large, [the Federal Circuit has] tended to accept them without any further supporting proof.” *Bose Corp.*, 293 F.3d at 1371; *see also China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 1341, 83 U.S.P.Q.2d 1123, 1126 (Fed. Cir. 2007) (“Evidence of large sales volume and length of use is highly relevant, whatever the market share.”).

Heinz has marketed and sold products bearing the SMART ONES mark for more than 20 years, both to retailers and to consumers purchasing the goods. (Hudson Tr. 82:12-83:12.) The brand has been heavily advertised and promoted in the same channels of trade, and to the same classes of customers as those associated with Applicant’s proposed frozen entree, frozen appetizer, and frozen cake products. (*See id.*) The confidential investment spending data discussed above demonstrates the fame of the SMART ONES mark, as does the enormous amount of sales of SMART ONES products over the past two decades.

Moreover, as discussed above, independent consumer research conducted in 2010 by advertising research agency, Ipsos ASI, found that SMART ONES frozen entrees have a [REDACTED] unaided awareness level and an [REDACTED] aided awareness level among the general public.⁹ (Gray Conf. Tr. 63:21-65:14 and Ex. 46.) Moreover, among the primary target market for SMART ONES entree products, Ipsos found an unaided awareness level of [REDACTED] and an aided awareness level of [REDACTED]. (Gray Conf. Tr. 65:25-66:8 and Ex. 46.) The Board has credited such data obtained as part of a party’s regular course of business activity in the past and should do so here,

⁹ Dr. Sabol’s consumer survey corroborates these results. His survey, conducted in December, 2011, found an aided awareness level of 82% among the general public. (Sabol Tr. 26:9:27:10 and Ex. 1 at 6-8.)

as well. *See HSN LP v. Chan*, Opp. Nos. 91173579 and 91177186, 2009 WL 1896060, at *4-5 (T.T.A.B. June 15, 2009) (relying heavily on brand awareness survey conducted in ordinary course of business); *Clinique Labs LLC v. Absolute Dental, LLC*, Opp. No. 91181263, 2011 WL 1652171, at *6 (T.T.A.B. Apr. 28, 2011) (crediting Ipsos brand awareness survey and finding confidential unaided and aided awareness levels reported therein to be “quite impressive”).

Furthermore, the record is totally devoid of any evidence showing use of similar SMART-formative marks in connection with similar products. On the contrary, the record reflects that Heinz has diligently and consistently policed its mark against any perceived third-party attempts to register what Heinz believes are similar “SMART” marks.

Because the SMART ONES mark is so well-known, the mark receives more legal protection and “casts a long shadow which competitors must avoid.” *Kenner Parker Toys*, 963 F.2d at 353, 22 U.S.P.Q.2d at 1456. Despite having been aware of Heinz’s SMART ONES mark for more than 15 years, Applicant now seeks to register a mark that incorporates the dominant portion of Heinz’s famous SMART ONES mark for identical, overlapping goods.

2. *The Goods Identified In The SMART BALANCE Applications Include Goods Identical To Heinz’s SMART ONES Goods.*

When considering the similarities between the parties’ goods, the issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 U.S.P.Q. 830 (T.T.A.B. 1984). Here, the identifications of goods in the applications at issue are identical or closely related to the goods for which Heinz’s SMART ONES mark are registered. It is beyond dispute that Heinz uses its SMART ONES mark, and Applicant intends to use its SMART BALANCE mark, in connection with all of the goods claimed in the ‘305 Application, and in connection with the frozen cakes claimed in the ‘268 Application. As to the remaining goods in the ‘268 Application, consumers

may be likely to believe that Heinz has expanded the use of its mark from frozen desserts and cakes to the cake mix, frosting, cakes, and cookies set forth in the '268 Application. Likelihood of confusion must be found if the public is likely to believe that the opposer has expanded its use of the mark, directly or under license, with respect to *any item* that comes within the identification of goods in the application opposed. *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 1336, 209 U.S.P.Q. 986, 988 (C.C.P.A. 1981). Accordingly, Heinz submits that the Board need not consider any arguments as to why the remaining snack foods goods in the '268 Application are different from Heinz's goods.¹⁰ Given the legal identity of the goods claimed in the '305 Application and the legal identity and near identity of the goods claimed in the '268 Application, this factor weighs heavily in favor of a finding of likelihood of confusion.

3. *Applicant's Proposed Goods Will Be Marketed And Sold In The Same Trade Channels And To The Same Classes of Purchasers As Heinz's Goods.*

The evidence of record also confirms that Applicant's proposed SMART BALANCE frozen entree, frozen appetizer, and frozen cake goods will be sold in the same channels of trade as Heinz's SMART ONES products. (Gray Tr. 28:17-29:6; *id.* at 74:16-75:4; Opp'rs Not. of Rel. Ex. A (App. Resps. to Interrogs.) Nos. 5, 7, and 21; Hooper Tr. 21:16-22-7, 24:2-9, 25:2-4;

¹⁰ To the extent the Board is inclined to consider the differences between the remaining goods in the '268 Application and Heinz's goods, Heinz submits that the goods are sufficiently related such that confusion is still likely. The relevant goods on which the parties use or seek to use their marks need not be identical or directly competitive to prove a likelihood of confusion, but need only be related in the sense that consumers encountering the marks would have the mistaken belief that the goods emanate from the same source. *See On-line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1086, 56 U.S.P.Q.2d 1471, 1475 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-67, 223 U.S.P.Q. 1289, 1289-90 (Fed. Cir. 1984); *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1403-04, 186 U.S.P.Q. 476, 479-80 (C.C.P.A. 1975).

see also Hooper Conf. Tr. 23:19-21 and Ex. 11.) In fact, the products will be sold in the exact same stores and compete for the same shelf space. (Gray Tr. at 30:8-31:9.) Further, the parties have some of the very same retail customers for their products and both target health conscious end consumers. (Opp’rs Not. of Rel. Ex. A (App. Resps. to Interrogs.) Nos. 5, 7, and 21; Hooper Tr. 21:16-22-7, 24:2-9, 25:2-4; *see also* Hooper Conf. Tr. 23:19-21 and Ex. 11.) Thus, this factor weighs heavily in favor of a likelihood of confusion.¹¹

4. *The Level Of Care Exercised In Purchasing The Goods At Issue Is Relatively Low.*

The exercise of a low level of care by consumers in purchasing the goods at issue supports a determination of a likelihood of confusion. *See In re Martin’s Famous Pastry Shoppe*, 748 F.2d at 1567, 223 U.S.P.Q. at 1290. If the goods are of relatively low cost, purchasers are less likely to use a great deal of care when buying the goods. *Nike, Inc. v. WBNA Enterprises, LLC*, 2007 WL 763166, at *9, 85 U.S.P.Q.2d 1187, 1196 (T.T.A.B. 2007) (holding goods in the range of \$15-\$100 were “relatively inexpensive” such that “[i]t is unlikely that these products would be purchased with the exercise of a great deal of care.”); *see also Specialty Brands*, 748 F.2d at 672, 223 U.S.P.Q. at 1282 (“Purchasers of [relatively inexpensive] products have been held to a lesser standard of purchasing care.”).

The evidence of record suggests that purchases of frozen entrees, appetizers, and desserts are often impulse purchases, and that they typically are not attended by great care and deliberation. Purchasers of frozen nutritional meals tend to purchase the meals on impulse.

¹¹ Furthermore, to the extent that the parties’ goods are identical or otherwise closely related, and there are no limitations in either the asserted registrations or the applications at issue, the Board must presume that they are to be marketed and sold in the same channels of trade and to the same classes of purchasers. *See In re Smith and Mehaffey*, 31 U.S.P.Q.2d 1531, 1532 (T.T.A.B. 1994); *Brown Shoe Co., Inc. v. Robbins*, 90 U.S.P.Q.2d 1752, 1754-55 (T.T.A.B. 2009).

(Gray Tr. 33:6-12, 33:21-25.) Such products are typically purchased on a weekly or biweekly basis, during regular grocery shopping. (*Id.* at 32:14-24.) The products are relatively inexpensive—they normally sell in the range of \$2.00-\$4.00. (*Id.* at 33:13-20, 34:11-13.) Even the highest price in this range, \$4.00, is hardly a sum that would instill great care and deliberation in a retail purchaser. Moreover, hundreds of frozen nutritional meals may be purchased by a single purchaser in a year because purchasers use them to try to meet their health and wellness goals, and many consumers eat the products every single day. (*Id.* at 32:14-24.)

Given the low degree of care and the relatively low price of the goods, consumers are more likely to be confused when they encounter Heinz's SMART ONES mark and Applicant's SMART BALANCE mark in the marketplace for the same goods, or when they encounter Applicant's SMART BALANCE mark for closely related goods. Accordingly, this factor supports a finding of likelihood of confusion.

5. *The Mark SMART BALANCE Is Similar To Heinz's Registered SMART ONES Trademarks.*

To gauge their similarity, the marks are compared in terms of their appearance, sound, connotation, and commercial impression. *In re E. I. du Pont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567; *Recot Inc.*, 214 F.3d at 1329-30, 54 U.S.P.Q.2d at 1899. A finding of similarity in any one of these aspects is sufficient to support a determination that there is a likelihood of confusion. *In re White Swan, Ltd.*, 8 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988).

The ultimate question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods such marks identify have a common origin. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 U.S.P.Q. 558, 558 (C.C.P.A. 1972).

The marks at issue are sufficiently similar in sight, sound, and meaning to cause confusion. As discussed above, Applicant's SMART BALANCE mark is similar in sight, sound, and meaning to Heinz's SMART ONES mark. Indeed, both marks begin with the word "SMART." Both the Federal Circuit and the Board have regularly found confusing similarity between marks that share a common word or syllable. *See, e.g., Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005) (finding likelihood of confusion between VEUVE ROYALE and VEUVE CLICQUOT); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1341, 71 U.S.P.Q.2d 1944, 1945 (Fed. Cir. 2004) (affirming likelihood of confusion finding between JOSE GASPARGOLD for tequila and GASPARGOLD'S ALE for beer); *Bose Corp.*, 293 F.3d at 1378, 63 U.S.P.Q.2d at 1311 (holding POWERWAVE mark for amplifiers similar in sound and connotation to ACOUSTIC WAVE for loudspeaker systems and WAVE for radios and stereos); *Nina Ricci*, 889 F.2d at 1073-74, 12 U.S.P.Q.2d at 1903-04 (holding VITTORIO RICCI confusingly similar to NINA RICCI); *Colgate-Palmolive Co. v. Warner-Lambert Co.*, 184 U.S.P.Q. 380, 383 (T.T.A.B. 1974) (finding reasonable likelihood purchasers of ULTRA-DENT denture cleanser tabs would mistakenly believe product emanated from producer of ULTRA BRITE toothpaste). The present case is no different. SMART BALANCE is similar in overall sight, sound, and meaning to SMART ONES.

Further, SMART is the dominant part of Applicant's proposed SMART BALANCE mark because it is the first word of the mark, making the use of such mark even more likely to cause confusion with Heinz's SMART ONES mark. *See, e.g., Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992) (holding CENTURY LIFE OF AMERICA was likely to cause confusion with CENTURY 21 and noting

that when consumers encounter the marks, they first notice the identical lead word); *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 U.S.P.Q.2d 1895, 1897 (T.T.A.B. 1988) (finding that purchasers would likely be confused between KIDWIPES and KID STUFF towelettes in part because “both start with the term ‘KID’ (a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered)”). *See also Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 U.S.P.Q. 390, 395 (Fed. Cir. 1983) (noting there were differences between applicant’s GIANT HAMBURGERS mark and opposer’s GIANT and GIANT FOOD marks, but greater force and effect must be given to the dominant GIANT portion of the mark such that similarities in appearance, sound, and impression outweighed dissimilarities).

In addition, SMART BALANCE and Heinz’s SMART ONES mark share a common syntax, *i.e.*, the word “SMART” plus a word that connotes wholeness or well-being, which also increases the likelihood of confusion. *See, e.g., Specialty Brands*, 748 F.2d at 672-73, 223 U.S.P.Q. at 1284 (holding similarity of commercial impressions in the format of SPICE VALLEY and SPICE ISLANDS weighed heavily against the applicant when applied to identical goods). Of course, the test for likelihood of confusion is not based on a side-by-side comparison, but rather evaluates whether marks create the same overall impression based on the recollection of the average purchaser who typically retains a general impression of trademarks. *Mattel, Inc. v. Funline Merchandise Co., Inc.*, 81 U.S.P.Q.2d 1372, 1374 (T.T.A.B. 2006). Here, the overall similarity of the commercial impression of the marks is particularly likely to lead to such an assumption because both parties’ goods are inexpensive and likely to be purchased on impulse, and without careful examination of the marks. *See Specialty Brands*, 748 F.2d at 672, 223

U.S.P.Q. at 1282 (finding that purchasers of inexpensive, comestible goods subject to frequent replacement have been held to a lesser standard of purchasing care).

Finally, when the marks “would appear on legally identical goods, the degree of similarity between the marks which is necessary to support a finding of likelihood of confusion declines.” *Mattel*, 81 U.S.P.Q.2d at 1374; *see also Century 21 Real Estate*, 970 F.2d at 877. The goods on which Applicant proposes to apply the SMART BALANCE mark, i.e., frozen entrees, frozen appetizers, and frozen cakes, are legally identical to the goods on which Heinz’s SMART ONES are applied. Thus, for all of the foregoing reasons, this factor favors a finding of likelihood of confusion.

6. *Heinz’s SMART ONES Mark Is Exclusive.*

“The probative value of third-party trademarks depends entirely upon their usage.” *Palm Bay Imports*, 396 F.3d at 1373, 73 U.S.P.Q.2d at 1693. In this case, there is nothing in the record showing the use of a SMART-formative mark by a third party in connection with frozen meals. Heinz’s use of the SMART ONES mark is, without question, exclusive for the goods for which it is registered.

Third-party registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them. *See In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783 (T.T.A.B. 1993). Accordingly, the TSDR pages submitted by Applicant for various third-party registrations (App. Not. of Rel. Exs. 8-21) do not prove that the marks identified therein are in use, or that the public is familiar with them.

Similarly, neither the website excerpts nor the product packaging samples submitted by Applicant (App. Not. of Rel. Exs. 22-69) or entered as exhibits during Ms. Hudson’s deposition establish that Heinz’s rights in the strong and famous SMART ONES mark are in any way

diminished. (See Hudson Tr. 93:23-96:10 and App. Exs. 4-8, in which Ms. Hudson testifies that she is not aware of any instances of actual confusion between the SMART ONES products and each of the referenced exhibits; see also Gray Tr. 76:17-77:6, same.) Moreover, not a single one of the website excerpts, or product packaging samples submitted shows use of a “SMART” mark in connection with frozen meals, whether entrees, appetizers, or desserts, to the extent such excerpts show trademark use of a “SMART” mark at all.¹² (See *id.*)

Heinz has used the SMART ONES mark extensively for more than 20 years. Heinz actively polices its SMART ONES trademark and takes appropriate action to stop third parties from using trademarks that it believes are confusingly similar to the SMART ONES mark. (Hudson Tr. 28:2-29:25.) In determining whether a third party use is problematic, Heinz considers the similarity of the marks in terms of sight, sound, and meaning, the similarity of the goods, the strength of the SMART ONES mark, and the similarity of the marketing channels. (*Id.*) The record shows that Heinz consistently polices and opposes applications for “SMART” marks for use in connection with frozen meals or related products. (See Hudson Tr. 33:7-56:21 and Exs. 8-23.) The absence of any federal trademark registrations for similar marks on frozen foods, or any other goods for which the SMART ONES mark is registered indicates that Heinz’s policing efforts have been successful.

7. *The Extent Of Potential Confusion Is Great.*

Because frozen entrees, frozen appetizers, and frozen cakes are widely available consumer items, the extent of potential confusion is high. See *Message in a Bottle, Inc. v. Cangiarella*, Opp. No. 91162780, 2010 WL 2604981, at *10 (T.T.A.B. Jun. 15, 2010) (finding

¹² Printouts from Amazon.com and Barnesandnoble.com for various third party cookbooks and other books using the term “smart” do not reflect trademark use. (See App. Not. of Rel. Exs. 36-57.)

that the extent of potential confusion is high because the goods and services are offered to the general public); *In re Aladdin's Eatery, Inc.*, Ser. No. 76020517, 2006 WL 402558, at *7 (T.T.A.B. Feb. 7, 2006) (“The potential for confusion from the use of virtually identical marks in connection with legally identical services that could be offered to the general public across the United States is substantial.”).

Indeed, although the Board does not require surveys in Board proceedings, Heinz's consumer survey corroborates the high level of confusion that may result if Applicant were to begin selling SMART BALANCE brand frozen meals. *See Fort James Operating Co. v. Royal Paper Converting, Inc.*, 83 U.S.P.Q.2d 1624, 1629 (T.T.A.B. 2007); *Hilson Research Inc. v. Society for Human Resource Mgmt.*, 27 U.S.P.Q.2d 1423 (T.T.A.B. 1993); *Miles Labs Inc. v. Naturally Vitamin Supplements Inc.*, 1 U.S.P.Q.2d 1445, 1457 (T.T.A.B. 1987). The 32% confusion level found by Dr. Sabol's survey supports to the undeniable conclusion that the potential likelihood of confusion between the SMART ONES and SMART BALANCE marks for frozen meals is substantial. *See Miles Labs, Inc.*, 1 U.S.P.Q.2d at 1456-57 (finding that “there is no question . . . that a 29% level of confusion is significant”); *Blue Cross and Blue Shield Ass'n v. Harvard Cmty. Health Plan Inc.*, 17 U.S.P.Q.2d 1075, 1078 (T.T.A.B. 1990) (finding 14% level of confusion probative of likely confusion); *see also* 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 32:188 (4th ed. 2009) (likelihood of confusion survey results in the range of “25% to 50% have been viewed as solid support for a finding of a likelihood of confusion”).

As the newcomer, Applicant has the opportunity of avoiding confusion. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 U.S.P.Q.2d 1025 (Fed. Cir. 1988). Given the probability

of such confusion here, Applicant is particularly obligated to do so, and this factor weighs in favor of a finding of likelihood of confusion.

8. *Other Probative Facts—Applicant Has Essentially Admitted That Confusion And Dilution Are Likely.*

The final enumerated *du Pont* factor permits consideration of any other established fact probative of the effect of use. Heinz submits that Applicant’s enforcement strategy as to its SMART BALANCE marks is high probative, and essentially an admission, of a likelihood of confusion and dilution between Heinz’s SMART ONES mark and Applicant’s SMART BALANCE mark for directly overlapping goods.

Applicant has long taken the position that third parties should not be permitted to register marks beginning with or containing the term “SMART” for grocery store goods in view of its rights in the mark SMART BALANCE for buttery spreads and related goods. For example, Applicant has filed proceedings to oppose third-party applications to register marks such as SMART GOODNESS, SMARTCAKES!, SMART@HEART, SMART SALT, SMART CHILI, SMART BBQ, SMART VEGGIE, SMART LUNCH, SMART CHEESE, SMART PUDDING, SMART LINKS, SMART SAUSAGE, SMART BAKE, SMART YOGURT, SMART VEGAN, SMART JUICE, COOKSMART, SMARTFREEZE, and SMART NUGGETS.¹³ (Opp’rs Not. of Rel. Ex. B (App. Resps. to Reqs. for Admis.) Nos. 1-136.) In each of these instances, Applicant stridently opposed those third-party applications, arguing that its registrations for

¹³ Although the U.S. Patent and Trademark Office’s online Trademark Trial and Appeal Board Inquiry System indicates that Applicant has also opposed registration of the marks SMART CHOICE (Opp. No. 91107193), SMART TREATS (Opp. No. 91109843), SMARTBRAN (Opp. No. 91106618), and SMART MILK (Opp. No. 91092046), “[b]ased on the lack of readily accessible electronic or paper records,” Applicant could neither admit nor deny that it opposed those marks. (Opp’rs Not. of Rel. Ex. B (App. Resps. to Reqs. for Admis.) Nos. 83, 119, 125, and 131.)

SMART BALANCE predate other “SMART” marks and should bar registration of such third-party applications in connection with goods that were similar to those sold under the SMART BALANCE mark. (*See, e.g.*, Hudson Tr. Exs. 24-34.)

In numerous proceeding before the Board, Applicant argued that permitting registration of other “SMART” marks for other grocery products, regardless of whether they directly overlapped with Applicant’s products, would interfere with its use of its SMART BALANCE mark and would seriously damage Applicant. (*Id.*; *see also* Opp’rs Not. of Rel. Ex. A (App. Resps. to Interrogs.) Nos. 29 and 30, explaining that Applicant opposed the marks SMART BALANCE GOLF, SMART GOODNESS, and SMART@HEART, and others containing the word “SMART,” because “under the circumstances of the use and its business objectives at the time,” Applicant “believed its business interests would be harmed by potential confusion between its SMART BALANCE mark and the mark it opposed.”) For example, Applicant opposed a third party’s registration of the mark SMART CHILI for “vegetable based meat substitutes and frozen entrees containing vegetable based meat substitutes” (Hudson Tr. Ex. 27), despite the fact that it has never marketed or sold chili, vegetable-based meat substitutes, or vegetable-based meat substitutes under the SMART BALANCE mark (Kraft Tr. 19:11-20:10). Likewise, Applicant opposed a third party’s registration of the mark SMART BAKE for “cookies” (Hudson Tr. Ex. 28), despite the fact that it has never marketed or sold cookies under the SMART BALANCE mark (Kraft Tr. 20:11-15). The list goes on. (*See* Hudson Tr. Exs. 30-33; Kraft Tr. 20:16-22:15, testifying that Applicant has never marketed or sold yogurt, yogurt substitutes, frozen entrees, lunch entrees, pudding, pudding substitutes, or juices.) Applicant has, for many years, used the Board’s resources as a club to bludgeon others from registering a mark that contains the word “SMART.” It now seeks to register its own mark containing the word

“SMART,” notwithstanding Heinz’s prior SMART ONES registration for identical goods. The Board should be suspicious of this sudden change of heart and complete reversal by Applicant with respect to the manner in which it now regards marks incorporating the word “smart.”

Without question, Heinz’s use of the mark SMART ONES predates the filing date of the applications that are at issue in this proceeding. Furthermore, the SMART ONES mark became famous before the filing date of the applications. The Board need look no further than Applicant’s own statements, set forth in multiple pleadings before the Board over many years, for support of Heinz’s position that permitting Applicant to register its SMART BALANCE mark as set forth in the ‘305 Application and the ‘268 Application would interfere with Heinz’s use of the SMART ONES mark and would seriously damage Heinz. Such registration would allow Applicant to directly compete with Heinz using a similar mark that is likely to cause confusion among consumers and diminish the goodwill and the distinctive quality of Heinz’s SMART ONES mark. (Hudson Tr. 16:8-19, 18:2-19:11.) To allow Applicant to now advance a position that is completely contradictory to the one it repeatedly advanced to the Board for many years, would be contrary to settled and venerable principles of equity and estoppel.

9. *Analysis Of The Relevant Factors Establishes That Confusion Is Likely.*

In sum, the evaluation of all the evidence of record demonstrates the existence of a likelihood of confusion between Heinz’s SMART ONES mark and Applicant’s SMART BALANCE mark, when that mark is used in connection with frozen entrees, frozen appetizers, frozen cakes, and related goods. Given the fame and strength of the SMART ONES mark and because the goods are identical in part and related as to the remaining part, sold in the same channels of trade, and subject to impulse purchase, Applicant’s registration of the closely similar SMART BALANCE mark as set forth in the applications at issue is likely to cause confusion

with Heinz's prior SMART ONES mark. As previously stated by the Federal Circuit, "there is . . . no excuse for even approaching the well-known trademark of a competitor." *Specialty Brands*, 748 F.2d at 676, 223 U.S.P.Q. at 1285. All doubt as to whether confusion, mistake, or deception is likely must be resolved against the newcomer, especially where the established mark is famous and applied to an inexpensive product bought by all kinds of people without much care. *Id.*; see also *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002); *Broderick & Bascom Rope Co. v. Goodyear Tire & Rubber Co.*, 531 F.2d 1068, 1070, 189 U.S.P.Q. 412, 413 (C.C.P.A. 1976). In short, consumers familiar with Heinz's SMART ONES goods, who then encounter Applicant's SMART BALANCE mark being used on identical and closely related goods, are likely to be confused as to the source of the goods.

C. Applicant's Proposed SMART BALANCE Trademark Is Likely To Cause Dilution Of Heinz's Famous SMART ONES Mark.

Registration of the SMART BALANCE mark for the goods claimed in the applications at issue is not only likely to cause consumer confusion with the SMART ONES mark, but also to dilute the distinctiveness of the SMART ONES mark. Accordingly, Heinz's opposition should be sustained on this ground as well.

Section 43(c) of the Lanham Act prohibits the use of a mark by a junior party that is likely to cause dilution by blurring the distinctiveness of a senior party's famous mark. 15 U.S.C. § 1125(c)(1). Dilution by blurring is defined as an "association arising from the similarity between a mark . . . and a famous mark that impairs the distinctiveness of the famous mark." 15 U.S.C. § 1125(c)(2). To establish a claim of dilution by blurring, Heinz must show that (1) it is the owner of a famous and distinctive mark; (2) its mark was famous before

Applicant began using the SMART BALANCE mark; and (3) Applicant's use of its mark in commerce is likely to cause dilution of Heinz's mark. 15 U.S.C. § 1125(c)(1).

1. Heinz's SMART ONES Trademark Is Famous And Distinctive.

As established above, Heinz's SMART ONES mark has achieved fame as a result of its volume of sales and Heinz's extensive promotional and advertising expenditures for SMART ONES products. Although a higher standard of fame is required in the likelihood of dilution analysis than is the case in the likelihood of confusion analysis, the SMART ONES mark has attained the requisite level of fame even under this higher standard. *See Research in Motion Ltd. v. Defining Presence Mktg. Group, Inc.*, 102 U.S.P.Q.2d 1187 (T.T.A.B. 2012).

In addition, because Heinz's SMART ONES mark has been registered without a Section 2(f) claim on the Principal Register, it is entitled to a presumption that it is inherently distinctive for the goods. *See Tea Board of India v. The Republic of Tea, Inc.*, 80 U.S.P.Q.2d 1881, 1899 (T.T.A.B. 2006) ("A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods."); *see also Weatherford/Lamb, Inc. v. C&J Energy Servs., Inc.*, 96 U.S.P.Q.2d 1834, 1838 (T.T.A.B. 2010). Furthermore, the record reflects that SMART ONES mark does not have any meaning in the industry other than as Heinz's trademark. (Gray Tr. 11:12-14.)

Heinz has used the SMART ONES mark continuously for more than 20 years. The SMART ONES mark is prominently displayed on each product sold under the mark and in all of the advertising and marketing materials used to promote the SMART ONES brand and the SMART ONES brand products. Moreover, Heinz's non-litigation related consumer survey demonstrates a high degree of recognition of the mark. (Gray Conf. Tr. 63:21-66:8 and Ex. 46.)

The Ipsos brand awareness study showed an [REDACTED] awareness level of the SMART ONES brand among the general adult population. (*Id.*) Given the volume of sales, Heinz's extensive promotional and advertising expenditures, and the degree of recognition among consumers, the SMART ONES mark has become a "household name" in connection with frozen nutritional meals and is famous for dilution purposes. *See Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 911, 64 U.S.P.Q.2d 1564, 1575 (9th Cir. 2002).

2. *Heinz's SMART ONES Trademark Was Famous Before Applicant's Filing Date.*

The applications at issue in this proceeding were filed by Applicant with the U.S. Patent and Trademark Office on November 3, 2009. The record shows that in Fiscal Year 2007 and Fiscal Year 2008, Heinz had net sales of SMART ONES products of [REDACTED] and [REDACTED], respectively. (Gray Conf. Tr. 38:8-40:10 and Ex. 39.) Furthermore, the record shows that in Fiscal Year 2008, Heinz's investment spending for the SMART ONES brand totaled more than [REDACTED]. (Gray Conf. Tr. 41-48 and Ex. 40.) Given the volume of sales, Heinz's extensive promotional and advertising expenditures, the fame of the SMART ONES mark was established before the filing date of the applications at issue, or any other date that Applicant may be able to claim. (Hudson Tr. 83:13-84:19.)

3. *Applicant's SMART BALANCE Mark Is Likely To Blur The Distinctiveness Of Heinz's SMART ONES Trademark.*

Over time, the gradual whittling away of distinctiveness will cause the trademark holder to suffer "death by a thousand cuts." *See Nat'l Pork Board v. Supreme Lobster and Seafood Co.*, 96 U.S.P.Q.2d 1479, 1497 (T.T.A.B. 2009). The Lanham Act sets forth the following, non-exclusive factors for determining whether a mark is likely to cause dilution by blurring: (i) the degree of similarity between the mark and the famous mark; (ii) the degree of distinctiveness of the famous mark; (iii) the extent to which the owner of the famous mark is engaging in

substantially exclusive use of the mark; (iv) the degree of recognition of the famous mark; (v) whether the user of the mark intended to create an association with the famous mark; and (vi) any actual association between the mark and the famous mark. 15 U.S.C. § 1125(c)(2)(B).

Consideration of these factors supports a conclusion that the SMART BALANCE mark is likely to dilute the SMART ONES mark.

As set forth above, Heinz's SMART ONES mark is inherently distinctive, and Heinz has shown that its use of the SMART ONES mark is substantially exclusive and that the SMART ONES mark is highly and widely recognized among not only Heinz's target market for SMART ONES products, but among the general consuming public. Furthermore, Heinz has shown that there is a high degree of similarity between the SMART BALANCE mark and the famous SMART ONES mark. *Cf. Nike, Inc. v. Maher*, 100 U.S.P.Q.2d 1018 (T.T.A.B. 2011) (finding the mark JUST JESU IT to be highly similar to the famous mark JUST DO IT for dilution purposes). Accordingly, each of the first four factors of the dilution analysis weigh in favor of a finding of dilution.

As to the fifth factor, Applicant has used the SMART BALANCE marks in connection with other food products and there is nothing in the record to suggest that Applicant intended to create an association with the SMART ONES mark when it first began using the SMART BALANCE mark in the late 1990's. Accordingly, this factor does not weigh in favor of a finding of dilution.

As to the sixth and final factor, there has not yet been any actual association between the SMART BALANCE mark and the famous SMART ONES mark. However, evidence of actual association is not necessary to prove a likelihood of dilution. *See Nat'l Pork Bd.*, 96 U.S.P.Q.2d at 1498 (treating this factor as neutral). Moreover, any actual association between the SMART

BALANCE mark and Heinz's famous SMART ONES mark would not come to light until after Applicant begins using its mark in connection with such goods. Accordingly, this factor is neutral, but consistent with a likelihood of dilution by blurring. *See id.*

When consumers enter a grocery store to purchase frozen meals, they head toward the grocer's freezer cases, where the frozen products are displayed. In the freezer cases dedicated to frozen nutritional meals, consumers generally encounter several freezer doors full of frozen meals. Of those products, the record reflects that there are three primary, but distinctive brands: **SMART ONES**, **LEAN CUISINE**, and **HEALTHY CHOICE**. These three brands compete fairly in the frozen nutritional meals category because there is no similarity between the brand owners' respective marks. Indeed, there are no other frozen nutritional products on the market sold under a designation that begins with the word SMART and no third party owns a registration for a mark that begins with the word SMART for frozen nutritional products. To be sure, the record is completely devoid of any such use or registrations.

If Applicant were permitted to register its SMART BALANCE mark for these frozen nutritional products, its products would appear in the same stores as Heinz's SMART ONES products, in the same freezer cases as Heinz's SMART ONES products, and would be sold to the same customers as Heinz's SMART ONES products. Grocery store freezer cases dedicated to frozen nutritional meals would contain HEALTHY CHOICE, LEAN CUISINE, SMART ONES, and SMART BALANCE products. The presence of a second brand of frozen nutritional products bearing a mark that begin with the word SMART (i.e., SMART BALANCE) would necessarily impair and blur the distinctiveness of Heinz's famous SMART ONES mark, which currently enjoys exclusive use for frozen nutritional products, and Heinz would be severely damaged as a result.

Balancing the enumerated statutory factors supports Heinz's position: that Heinz is likely to suffer impairment of the distinctiveness of its SMART ONES mark if Applicant's SMART BALANCE mark were allowed for registration for the goods claimed in the applications at issue. Four of the factors weigh strongly in favor of a finding of dilution, one weighs against, and one is neutral, but is consistent with a likelihood of dilution by blurring. Thus, Heinz has shown a likelihood of dilution by blurring as to the applications opposed and its oppositions should be sustained on that basis.

D. Applicant's Affirmative Defenses Are Untenable.

Applicant's Answer sets forth seven purported affirmative defenses, including: that Heinz fails to state a claim; that Heinz lacks standing; that Heinz's claims are barred by laches or acquiescence; that confusion is unlikely because the parties' marks are different, do not have the same commercial impression, and the parties co-exist with respect to Applicant's existing SMART BALANCE registrations; and that Applicant has acted in good faith. None of these so-called defenses is tenable.

As to Applicant's third Affirmative Defense, i.e., that "Opposer's claims are barred, in whole or in part, by the doctrines of laches and acquiescence" (Answer at 11), Applicant has yet to make a showing as to how either of these doctrines apply to the present matter. Nonetheless, there can be no laches or acquiescence with respect to the applications at issue because Heinz timely and properly opposed registration of the intent-to-use applications during the opposition period following publication.

Heinz plainly has standing to oppose registrations of these applications.¹⁴ Heinz's claims that registration of the SMART BALANCE mark for the goods set forth in the applications at issue is likely to cause confusion and likely to cause dilution are both well-founded, as set forth above. Accordingly, Applicant's remaining "affirmative defenses" necessarily fail.

VII. CONCLUSION

For more than 15 years prior to Applicant's filing of the applications at issue, Heinz had been building its famous SMART ONES mark as a means to promote its ever expanding line of frozen nutritional products. Allowing Applicant to register the SMART BALANCE mark for frozen entrees, frozen appetizers, frozen cakes, and related goods clearly would create a likelihood of confusion, mistake, or deception, would erode the distinctiveness of the SMART ONES mark as a unique identifier of the source of the products sold by Heinz, and would injure both Heinz and the consuming public.

Accordingly, Heinz respectfully requests the Board to sustain this consolidated opposition proceeding and refuse registration of Applicant's applications.

¹⁴ In addition to making its pleaded registrations of record, Heinz has presented testimony and evidence that it has used the SMART ONES brand for various frozen entrees, frozen breakfast items, frozen snacks and appetizers, and frozen desserts for many years prior to any date on which applicant filed its intent-to-use applications at issue. (Hudson Tr. 19:2-27:7 and Ex. 2-6; Gray Tr. 11:22-12:6; *see also* Gray Tr. Ex. 43 and Opp'rs Not. of Rel. Ex. C.) The registration of the SMART BALANCE mark for the goods claimed in the applications at issue would cause harm to Heinz, and, thus, Heinz has a real interest in the outcome of this proceeding. Accordingly, Heinz has established its standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000).

Respectfully submitted,

Dated: August 12, 2013

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via email, on this 12th day of August, 2013, to Counsel for Applicant:

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APPENDIX A

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

OPPOSERS' EVIDENTIARY OBJECTIONS

Opposers ProMark Brands Inc. and H. J. Heinz Company (collectively, "Heinz") hereby submit their objections to certain documents and testimony that are sought to be introduced in this proceeding by Applicant GFA Brands, Inc. First, Heinz objects to the so-called "rebuttal" expert report and testimony of Philip Johnson, in its entirety, as improper rebuttal. Second, Heinz objects to the testimony of Dr. Leon B. Kaplan and Mr. Johnson, to the extent that such testimony expresses opinions that are not set forth in their expert reports. Heinz respectfully requests that the Board strike and exclude the challenged evidence.

I. FACTUAL BACKGROUND

A. Evidentiary Issues With Mr. Johnson's Expert Report And Testimony

On January 9, 2012, Heinz disclosed Dr. Barry A. Sabol as its expert witness in this proceeding and served Dr. Sabol's expert report on Applicant in compliance with the Board's deadline for expert disclosures. Applicant elected to not make any expert disclosures.

By operation of the TTAB rules, a rebuttal expert disclosure and report, if any, was due within 30 days after Heinz's disclosure. 37 C.F.R. § 2.120(a)(2); Fed. R. Civ. P. 26(a)(2); TBMP § 401.03.

On February 3, 2012, Applicant requested an extension of the rebuttal expert disclosure deadline and the discovery deadline, which at that time was set to close on February 7, 2012. Heinz agreed to a 30-day extension. A stipulation was filed with the Board to that effect, and a 30-day extension was granted. (TTABVUE Doc. Nos. 23 and 24.) Two days after the Board granted the extension, on February 8, 2012, the Board, in response to a separate notification of Heinz's January 2012 expert disclosure of Dr. Sabol, independently issued an order staying the proceedings "for the taking of expert discovery," and indicated that proceedings would resume on March 2, 2012, with discovery re-set to close on March 9, 2012. (TTABVUE Doc. No. 25.)

On February 28, 2012, with only days remaining until the proceedings resumed and with discovery set to close in a mere ten days, Applicant indicated that it would not be able to provide its rebuttal expert disclosure until May 1, 2012, and sought Heinz's approval for this *additional* extended stay. Heinz refused to consent to such an extension. Both Heinz and Applicant filed motions to resolve the dispute over the timing of Applicant's expert disclosures. (TTABVUE Doc. Nos. 26 and 27.)

Thereafter, on March 16, 2012, the Interlocutory Attorney heard argument on the pending motions. During the discussion, Applicant "advised that it [wa]s now prepared to disclose its first testifying expert and this expert's critique." (See TTABVUE Doc. No. 29 at 2.) Later that

morning, Applicant disclosed to Heinz the report, dated March 12, 2012, of Dr. Leon Kaplan, Applicant's rebuttal expert witness.¹

Applicant went on to indicate, however, that it needed more time to complete a second rebuttal report from another expert. Applicant then described the general contours of what that second expert would be doing and what the report was expected to contain. Upon hearing the general description, Heinz responded immediately that the proposed second report did not sound like a rebuttal report, but rather, appeared to be a new survey, wholly independent of Dr. Sabol's report. Nonetheless, that report was permitted by the Interlocutory Attorney, despite being untimely under the original schedule, based upon certain representations made by Applicant that the content of that report would be *rebuttal, and not case-in-chief*, evidence. (See TTABVUE Doc. No. 29 at 3.)

That second report, the Johnson report, was finally provided to Heinz on Saturday, April 28, 2012. The Johnson report is entitled, "A Study of Likelihood of Confusion," and is a brand-new, independent survey that has nothing to do with rebutting Dr. Sabol's report (submitted by Heinz five months earlier, in January 2012). Indeed, a review of the Johnson report demonstrates:

- Mr. Johnson was not asked to prepare a rebuttal report and survey. Paragraph 5 of the Johnson report provides, "Counsel asked whether I could design and conduct a study that would measure the extent, if any, to which the Smart Balance name that had been objected to by ProMark, is or is not likely to cause confusion when relevant consumers are exposed to it in connection with frozen meal

¹ Heinz does not dispute that Dr. Kaplan's report, and the testimony related thereto, qualifies as rebuttal material to the extent that Dr. Kaplan's report comments on and critiques Dr. Sabol's report and to the extent his opinions related thereto are reflected in his report.

products. I agreed and proceeded to design and conduct such a study.” (*See* Johnson Tr. 85:2-25 and Ex. 2.)

- Nowhere in the report does Mr. Johnson discuss, let alone mention or reference, Dr. Sabol’s report, as would be expected if this were a rebuttal report. (*See* Johnson Tr. Ex. 2; *see also* Johnson Tr. 86:1-15.)
- Nowhere in the report does Mr. Johnson characterize his report as a rebuttal.

Upon receipt of the Johnson report, Heinz promptly filed a Motion to Strike the report, on the grounds that it was improper rebuttal. (TTABVUE Doc. No. 32.) Although the Motion was fully briefed by the parties, the Interlocutory Attorney refrained from ruling on the admissibility of the Johnson report, stating that “any substantive, non-procedural objection relating to improper rebuttal is normally raised in a party’s brief on the case.” (TTABVUE Doc. No. 35 at 2-3.) Thus, the Interlocutory Attorney denied Heinz’s motion to strike the Johnson report and granted Heinz’s motion to re-open discovery “for the purpose of expert discovery only with respect to Mr. Johnson” (i.e., to enable Heinz to take Mr. Johnson’s deposition). (*See id.* at 3.) Heinz subsequently took a discovery deposition of Mr. Johnson.

B. Evidentiary Issues With Dr. Kaplan’s and Mr. Johnson’s Testimony

Heinz served its Pretrial Disclosures on January 8, 2013, and its Amended Pretrial Disclosures on January 17, 2013; its Trial Period ended on March 12, 2013. Applicant served its Pretrial Disclosures on March 19, 2013. During Applicant’s Trial Period, Applicant elicited testimony from Dr. Kaplan relating to opinions held by Dr. Kaplan that were not previously disclosed and that were not expressed in Dr. Kaplan’s expert report. Such testimony was elicited in an effort to substantiate the method and procedures implemented in the Johnson survey and to discredit Dr. Sabol (*see, e.g.*, Kaplan Tr. 35:12-37:15, 46:6-24, 55:22-58:22). Likewise, during

Mr. Johnson's testimony deposition, Applicant repeatedly elicited testimony from Mr. Johnson relating to opinions held by Mr. Johnson concerning Dr. Sabol's and Dr. Kaplan's reports, none of which were previously disclosed or expressed in Mr. Johnson's expert report (*see, e.g.*, Johnson Tr. 4:4-22, 15:11-16:27:6, 31:10-14, 38:3-39:6, 44:3-20, 48:15-49:20, 56:19-60:13).

In light of the foregoing, Heinz hereby renews its evidentiary objection to the Johnson Report, and objects to Mr. Johnson's testimony in its entirety. Furthermore, Heinz objects to Dr. Kaplan's and Mr. Johnson's testimony to the extent it reflects opinions that are beyond the scope of those disclosed in their respective expert reports.

II. ARGUMENT

A party's planned use of an expert witness is largely governed by Federal Rule of Civil Procedure 26(a)(2). *RTX Scientific, Inc. v. Nu-Calgon Wholesaler, Inc.*, 106 U.S.P.Q.2d 1492 (T.T.A.B. 2013). Trademark Rule 2.120(a)(2) provides that "[d]isclosure of expert testimony **must** occur in the **manner and sequence** provided in Federal Rule of Civil Procedure 26(a)(2)" 37 C.F.R. § 2.120(a)(2) (emphasis added). Furthermore, an expert "disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). That report must contain "a *complete* statement of *all opinions* the witness will express *and the basis and reasons* for them." *Id.* Moreover, a party who has made an expert disclosure has a duty to supplement that disclosure to include additions or changes to the information originally disclosed. Fed. R. Civ. P. 26(e)(2). Any supplements must be filed before the parties' pretrial disclosures are due. *Id.* If a party fails to disclose information required under Federal Rule

26(a), that party is prohibited from using any such undisclosed information at trial. Fed. R. Civ. P. 37(c).

Applicant belatedly retained two experts in this proceeding—Dr. Kaplan (who provided a true rebuttal inasmuch as his report critiques and comments on Dr. Sabol’s report) and Mr. Johnson (who prepared and submitted an independent, affirmative survey that had nothing to do with Dr. Sabol’s report, whatsoever). In explaining why Applicant could not meet the deadlines originally set by the Board, Applicant argued that it had “encountered difficulties in locating a survey expert.” (TTABVUE Doc. No. 29 at 2.) Significantly, however, Applicant’s true rebuttal expert, Dr. Kaplan, testified in his deposition that, despite the fact that he has conducted responsive surveys in the past, he was not even asked to conduct a rebuttal survey and that such conduct was apparently “an oversight” on Applicant’s part. (Kaplan Tr. 21:13-22:4, 73:4-19.)

The reason both opening expert disclosures and rebuttal expert disclosures are required by the Board is to avoid the use of so-called rebuttal experts to introduce evidence that should have been introduced as part of a party’s case-in-chief. The Board has the authority to strike such reports and/or testimony as beyond the scope of proper rebuttal. *Hard Rock Cafe Int’l (USA) Inc. v. Elsea*, 56 U.S.P.Q.2d 1504 (T.T.A.B. 2000) (sustaining party’s objection to so-called rebuttal survey that should have been offered as part of other party’s case-in-chief).

Although survey evidence is sometimes submitted in rebuttal, such evidence must deny, explain, or discredit the information provided by the other party’s expert in its opening report. *See Bridgestone Firestone N. Am. Tire, LLC v. Fed. Corp.*, Opp. No. 91168556, 2010 WL 985350, at *2 (T.T.A.B. Feb. 24, 2010), *rev’d* 673 F.3d 1330 (Fed. Cir. 2012) (finding that second survey and testimony regarding that survey “are proper rebuttal *to the extent that they*

bear on the validity and probative value of the first survey”). Furthermore, such survey evidence and testimony cannot be considered for purposes of supporting a party’s case-in-chief. *Id.*

As Heinz suspected during the call with the Interlocutory Attorney and despite Applicant’s representations on that call to the contrary, the Johnson survey is not proper rebuttal, but rather, a brand new report, that is clearly case-in-chief evidence. Because Applicant “hedged its bets” and waited to prepare an expert report long after the deadline, and then claimed it was “rebuttal,” it is appropriate for the Board to strike the report in its entirety. Moreover, permitting the Johnson report to stand will establish a precedent by which no litigant will feel compelled to abide by the Board’s expert discovery schedule, as long as it attaches the word “rebuttal” to whatever information it is attempting to shoehorn into the proceeding.

In addition, during the testimony depositions of Dr. Kaplan and Mr. Johnson, Applicant improperly elicited opinion testimony from each witness that was not disclosed in either witness’s expert report. To the extent that Applicant desired to use Dr. Kaplan to substantiate the methods and procedures implemented by Mr. Johnson in his “rebuttal” survey, Applicant should have submitted Mr. Johnson’s report first. At the very least, Applicant could have submitted a supplemental report from Dr. Kaplan expressing his opinions on Mr. Johnson’s survey. *See Fed. R. Civ. P. 26(e)(2)* (requiring expert reports to be supplemented if there are any additions or changes to the original report). Dr. Kaplan admitted during his deposition that he had not prepared a supplemental report to disclose any opinions not contained in his original report. (Kaplan Tr. 128:16-19.)

III. CONCLUSION

For the reasons stated above, the Johnson “rebuttal” report and testimony should be stricken and excluded from consideration in this proceeding in their entirety. Additionally, the testimony of both Dr. Kaplan and Mr. Johnson should be stricken and excluded to the extent that such testimony expresses opinions that were not properly disclosed in their respective expert reports.

Respectfully submitted,

Dated: August 12, 2013

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via email, on this 12th day of August, 2013, to Counsel for Applicant:

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APPENDIX B

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

OPPOSERS' EVIDENCE OF RECORD

I. HEINZ'S TESTIMONY DEPOSITIONS

A. Sabrina J. Hudson, Associate Director - Corporate Counsel at H. J. Heinz Company, taken on February 20, 2013, and filed with the Board on March 22, 2013 (including public and confidential portions)

Public exhibits:

Opposers' Exhibit 1	Opposers' Notice of Testimony Deposition Pursuant to 37 C.F.R. § 2.123 for Sabrina Hudson
Opposers' Exhibit 2	U.S. Registration No. 1,911,590 for SMART ONES, and TARR Status Info HEINZ 000844, HEINZ 000786-HEINZ 000788
Opposers' Exhibit 3	U.S. Registration No. 2,204,080 for SMART ONES, and TARR Status Info HEINZ 000900, HEINZ 000845-HEINZ 000847
Opposers' Exhibit 4	U.S. Registration No. 2,916,538, for SMART ONES, and TARR Status Info HEINZ 000955, HEINZ 000940-HEINZ 000942
Opposers' Exhibit 5	U.S. Registration No. 2,916,539 for SMART ONES, and TARR Status Info HEINZ 000920, HEINZ 000902-HEINZ 000904
Opposers' Exhibit 6	U.S. Registration No. 3,462,182 for SMART ONES, and TARR Status Info HEINZ 000978, HEINZ 000975-HEINZ 000977
Opposers' Exhibit 7	TTABVUE Docket and Notice of Opposition for Opposition No. 91194974 and TTABVUE Docket and Notice of Opposition for Opposition No. 91196358, both filed by Heinz against SMART BALANCE HEINZ 000542-HEINZ 000615

Opposers' Exhibit 8	TTABVUE Docket and Notice of Opposition for Opposition No. 91199995, filed by Heinz against SMART CHOICE HEINZ 000767-HEINZ 000779
Opposers' Exhibit 9	TTABVUE Docket and Notice of Opposition for Opposition No. 91198512, filed by Heinz against SMART ONE HEINZ 000736-HEINZ 000748
Opposers' Exhibit 10	TTABVUE Docket and Notice of Opposition for Opposition No. 91197932, filed by Heinz against SMART PICKS HEINZ 000706-HEINZ 000719
Opposers' Exhibit 11	TTABVUE Docket and Notice of Opposition for Opposition No. 91197483, filed by Heinz against SMARTNOURISH HEINZ 000680-HEINZ 000693
Opposers' Exhibit 12	TTABVUE Docket and Notice of Opposition for Opposition No. 91197301, filed by Heinz against SMART SENSE HEINZ 000644-HEINZ 000656
Opposers' Exhibit 13	TTABVUE Docket and Notice of Opposition for Opposition No. 91193347, filed by Heinz against SMART OPTION HEINZ 000453-HEINZ 000465
Opposers' Exhibit 14	TTABVUE Docket and Notice of Opposition for Opposition No. 91191738, filed by Heinz against SMART FRY HEINZ 000430-HEINZ 000442
Opposers' Exhibit 15	TTABVUE Docket and Notice of Opposition for Opposition No. 91191739, filed by Heinz against SMART SALMON HEINZ 000381-HEINZ 000392
Opposers' Exhibit 16	TTABVUE Docket and Notice of Opposition for Opposition No. 91191494, filed by Heinz against SMART BREAKFAST HEINZ 000352-HEINZ 000364
Opposers' Exhibit 17	TTABVUE Docket and Notice of Opposition for Opposition No. 91189852, filed by Heinz against SMART BURRITO HEINZ 000300-HEINZ 000311
Opposers' Exhibit 18	TTABVUE Docket and Notice of Opposition for Opposition No. 91188379, filed by Heinz against SMARTER CHOICES HEINZ 000261-HEINZ 000272
Opposers' Exhibit 19	TTABVUE Docket and Notice of Opposition for Opposition No. 91183119, filed by Heinz against SMART TASTE HEINZ 000170-HEINZ 000177
Opposers' Exhibit 20	TTABVUE Docket and Notice of Opposition for Opposition No. 91178730, filed by Heinz against SMARTON'S HEINZ 001269-HEINZ 001277
Opposers' Exhibit 21	TTABVUE Docket and Notice of Opposition for Opposition No. 91178746, filed by Heinz against SMART SELECTIONS HEINZ 001245-HEINZ 001253
Opposers' Exhibit 22	TTABVUE Docket and Notice of Opposition for Opposition No. 91175302, filed by Heinz against SMART SOLUTIONS HEINZ 001206-HEINZ 001212

Opposers' Exhibit 23	TTABVUE Docket and Notice of Opposition for Opposition No. 91176390, filed by Heinz against SMART BOWLS HEINZ 001217-HEINZ 001223
Opposers' Exhibit 24	TTABVUE Docket and Notice of Opposition for Opposition No. 91193087, filed by GFA Brands against SMART GOODNESS
Opposers' Exhibit 25	TTABVUE Docket and Notice of Opposition for Opposition No. 91185689, filed by GFA Brands against SMART@HEART
Opposers' Exhibit 26	TTABVUE Docket and Notice of Opposition for Opposition No. 91183204, filed by GFA Brands against SMARTCAKES!
Opposers' Exhibit 27	TTABVUE Docket and Notice of Opposition for Opposition No. 91166719, filed by GFA Brands against SMART CHILI
Opposers' Exhibit 28	TTABVUE Docket and Notice of Opposition for Opposition No. 91162269, filed by GFA Brands against SMART BAKE
Opposers' Exhibit 29	TTABVUE Docket and Notice of Opposition for Opposition No. 91153369, filed by GFA Brands against SMART NUGGETS
Opposers' Exhibit 30	TTABVUE Docket and Notice of Opposition for Opposition No. 91152648, filed by GFA Brands against SMART YOGURT
Opposers' Exhibit 31	TTABVUE Docket and Notice of Opposition for Opposition No. 91152649, filed by GFA Brands against SMART LUNCH
Opposers' Exhibit 32	TTABVUE Docket and Notice of Opposition for Opposition No. 91152706, filed by GFA Brands against SMART PUDDING
Opposers' Exhibit 33	TTABVUE Docket and Notice of Opposition for Opposition No. 91123458, filed by GFA Brands against SMART JUICE
Opposers' Exhibit 34	TTABVUE Docket and Notice of Opposition for Opposition No. 91118815, filed by GFA Brands against COOKSMART
Opposers' Exhibit 35	Various news articles on Warren Buffet's acquisition of Heinz
Applicant's Exhibit 2	Printout from Heinz's SMART ONES website – Products
Applicant's Exhibit 3	Printout from Heinz's SMART ONES website – Products – Classic Favorites
Applicant's Exhibit 4	Photograph of PREGO HEART SMART Italian Sauce GFA043181
Applicant's Exhibit 5	Photograph of KOZY SHACK SMARTGELS flavored gels GFA043165
Applicant's Exhibit 6	Photograph of BREYERS CARBSMART almond bar GFA043158
Applicant's Exhibit 7	Photograph of RONZONI SMARTTASTE enriched white pasta GFA043150
Applicant's Exhibit 8	Photograph of GLACEAU SMARTWATER drinking water GFA043152

Confidential exhibits:

Applicant's Exhibit 1	ATTORNEYS' EYES ONLY - Heinz 2011 Focus: Stellar Execution; SMART ONES brand presentation HEINZ 031400-HEINZ 013503
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B. Eric Michael Gray, Associate Director for the SMART ONES brand at H. J. Heinz Company, taken on February 20, 2013, and filed with the Board on March 22, 2013 (including public and confidential portions)

Public exhibits:

Opposers' Exhibit 36	Opposers' Notice of Testimony Deposition Pursuant to 37 C.F.R. § 2.123 for Rick Gray
Opposers' Exhibit 37	SMART ONES Segmentation Visuals slide, showing various product segments for SMART ONES brand products HEINZ013772
Opposers' Exhibit 37A	Packaging for SMART ONES Three Cheese Ziti Marinara frozen entree
Opposers' Exhibit 37B	Packaging for SMART ONES Chicken Parmesan frozen entree
Opposers' Exhibit 37C	Packaging for SMART ONES Angel Hair Marinara frozen entree
Opposers' Exhibit 37D	Packaging for SMART ONES Home Style Beef Pot Roast frozen entree
Opposers' Exhibit 37E	Packaging for SMART ONES Creamy Rigatoni with Broccoli & Chicken frozen entree
Opposers' Exhibit 37F	Packaging for SMART ONES Turkey Bacon Melt Quesadilla frozen snack/appetizer
Opposers' Exhibit 38	Representative samples of historical packaging for various SMART ONES products HEINZ 001977-HEINZ 001978, HEINZ 001981, HEINZ 004199-HEINZ 004200, HEINZ 004202-HEINZ 004203, HEINZ 004241, HEINZ 004251, HEINZ 004269, HEINZ 004277, HEINZ 004309, HEINZ 004315-HEINZ 004316, HEINZ 013433-HEINZ 013434, HEINZ 013442
Opposers' Exhibit 41	Representative samples of various coupon vehicles for SMART ONES products HEINZ 001989, HEINZ 001995-HEINZ 002003, HEINZ 003873-HEINZ 003874, HEINZ 003877
Opposers' Exhibit 42	SMART ONES Advertising Examples slides (dated September 20, 2011) HEINZ 014306-HEINZ 014313
Opposers' Exhibit 43	Printouts from Heinz's SMART ONES website, www.eatyourbest.com HEINZ 000015-HEINZ 000032, HEINZ 000034-HEINZ 000040, HEINZ 000042, HEINZ 000044-HEINZ 000045, HEINZ 000047, HEINZ 000071, HEINZ 000074, HEINZ 000077, HEINZ 000082-HEINZ 000083, HEINZ 000085, HEINZ 000095, HEINZ 000099, HEINZ 000110

Confidential exhibits:

Opposers' Exhibit 39	ATTORNEYS' EYES ONLY - Net Sales Volume for SMART ONES products from FY 2007-FY 2012 HEINZ 014439
Opposers' Exhibit 40	ATTORNEYS' EYES ONLY - Sales figures and investment spending for SMART ONES products from FY 2008-FY 2011 HEINZ 004763
Opposers' Exhibit 44	ATTORNEYS' EYES ONLY - EatYourBest.com Website Analytics HEINZ 014342
Opposers' Exhibit 45	ATTORNEYS' EYES ONLY - Marketing dollars spent for SMART ONES products from FY 2008-FY 2012 HEINZ 014794
Opposers' Exhibit 46	ATTORNEYS' EYES ONLY - Slides from Ipsos research report identifying brand awareness for SMART ONES portfolio in 2010 HEINZ 014450-HEINZ 014451
Opposers' Exhibit 47	ATTORNEYS' EYES ONLY – Slides from Ipsos research report comparing brand awareness for SMART ONES and its competitors in August 2010 to August 2009 HEINZ 014459-HEINZ 014460

C. Barry A. Sabol, Ph.D., Chief Executive Officer at Strategic Consumer Research, taken on March 12, 2013, and filed with the Board on April 5, 2013 (including public and confidential volumes)

Public exhibits:

Opposers' Exhibit 1 Sabol	Report Authored by Barry A. Sabol, Ph.D. - "Likelihood of Brand Confusion Between SMART ONES and SMART BALANCE Resulting from the Introduction of SMART BALANCE Frozen Meals": A Brand Confusion Survey, dated December 2011
Opposers' Exhibit 2 Sabol	Report Authored by Leon B. Kaplan, Ph.D. - "Critique of Likelihood of Brand Confusion Between SMART ONES and SMART BALANCE Resulting from the Introduction of SMART BALANCE Frozen Meals," dated March 12, 2012
Opposers' Exhibit 4 Sabol	Report Authored by Philip Johnson - "A Study of Likelihood of Confusion," dated April 26, 2012
Opposers' Exhibit 5 Sabol	Curriculum Vitae and Expert Testimony Compensation, Barry A. Sabol, Ph.D.

Confidential exhibits:

Opposers’ Exhibit 3 Sabol	ATTORNEYS’ EYES ONLY - Slides from Ipsos research report identifying brand awareness for SMART ONES portfolio in 2010 and comparing brand awareness for SMART ONES and its competitors in August 2010 to August 2009 HEINZ 014440, HEINZ 014450-HEINZ 014451, HEINZ 014459-HEINZ 014460
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II. HEINZ’S NOTICES OF RELIANCE

A. First Notice of Reliance – Discovery Responses

Opposers’ Not. of Rel. Ex. A	GFA Brands, Inc.’s Response to ProMark Brands Inc.’s First Set of Interrogatories Nos. 5, 6, 7, 21, 29, 30, and 31
Opposers’ Not. of Rel. Ex. B	GFA Brands, Inc.’s Response to ProMark Brands Inc.’s Requests for Admission Nos. 1-136

B. Second Notice of Reliance – Website Pages

Opposers’ Not. of Rel. Ex. C	Select pages from www.eatyourbest.com, as of March 11, 2013
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C. Third Notice of Reliance – Discovery Deposition of Dr. Kaplan

Opposers’ Not. of Rel. Ex. D	Discovery Deposition of Dr. Leon B. Kaplan, taken April 24, 2012
Opposers’ Not. of Rel. Ex. E-1	Exhibit 1 Kaplan - Report Authored by Leon B. Kaplan, Ph.D. - “Critique of Likelihood of Brand Confusion Between SMART ONES and SMART BALANCE Resulting from the Introduction of SMART BALANCE Frozen Meals,” dated March 12, 2012
Opposers’ Not. of Rel. Ex. E-2	Exhibit 2 Kaplan - Report Authored by Barry A. Sabol, Ph.D. - “Likelihood of Brand Confusion Between SMART ONES and SMART BALANCE Resulting from the Introduction of SMART BALANCE Frozen Meals”: A Brand Confusion Survey, dated December 2011
Opposers’ Not. of Rel. Ex. E-3	Exhibit 3 Kaplan - Non-confidential Findings of Factor and Non-Confidential Conclusions of Law in <i>Champagne Louis Roederer v. J. Garcia Carrion, S.A. and CIV USA</i> , No. 06-213 (JNE/SRN) (D. Minn. Aug. 10, 2010)
Opposers’ Not. of Rel. Ex. E-4	Exhibit 4 Kaplan - “Reference Guide on Survey Research,” Authored by Shari Seidman Diamond, from the Reference Manual on Scientific Evidence

D. Fourth Notice of Reliance – Discovery Deposition of Philip Johnson

Opposers’ Not. of Rel. Ex. F	Discovery Deposition of Philip Johnson, taken December 18, 2012
Opposers’ Not. of Rel. Ex. G-1	Exhibit 1 Johnson - Notice of Deposition of Philip Johnson
Opposers’ Not. of Rel. Ex. G-2	Exhibit 2 Johnson - GFA Brands, Inc.’s Disclosure of Expert, Philip Johnson