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

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
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Attachments	2013-09-13 Notice of Filing of Kraft CORRECTED Trial Testimony and Exhibits.pdf(13423 bytes) Kraft CORRECTED Deposition.pdf(2017221 bytes) Kraft Depo Ex 70.pdf(2755272 bytes) Kraft Depo Ex 71.pdf(2727199 bytes) Kraft Depo Ex 72.pdf(2892815 bytes) Kraft Depo Ex 73.pdf(2908074 bytes) Kraft Depo Ex 74.pdf(2908082 bytes) Kraft Depo Ex 75.pdf(2928131 bytes) Kraft REDACTED Depo Ex 76.pdf(2333877 bytes)

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

PROMARK BRANDS INC., & H.J. HEINZ COMPANY,	**Opposition Nos. 91194974 (Parent) and Opposition No. 91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE**
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE**
Applicant.	

APPLICANT'S NOTICE OF FILING OF CORRECTED CERTIFIED TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF TIMOTHY KRAFT

Pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Applicant GFA Brands, Inc. hereby files with the Board, and notifies Opposers of the filing of, the corrected certified testimony deposition transcript and accompanying exhibits of Timothy Kraft, whose testimony deposition was taken on April 26, 2013.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by the officer before whom the deposition was taken. The executed and notarized Errata Sheet listing the corrections has also been included at the end of the transcript.

Pursuant to 37 C.F.R. §§ 2.125(e), 2.126(c), TBMP 703.01(p), and the Stipulated Protective Order, approved by the Board on July 26, 2011, the following testimony deposition exhibit has been designated as "Confidential—Attorneys' Eyes Only" and is being filed with the Board under seal, under separate cover: Exhibit No. 76.

Dated this 13th day of September, 2013.

_/s/ Johanna M. Wilbert_____
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Marta S. Levine
Johanna M. Wilbert
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Attorneys for Applicant,
GFA Brands, Inc.

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 e-mail, on this 13th day of September, 2013, to Counsel for the Opposers:

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/s/ Johanna M. Wilbert
Attorney for Applicant

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
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3 PROMARK BRANDS, INC.
4 & H.J. HEINZ COMPANY,
5 Opposers,
6 vs. Opposition No. 91194974
7 GFA BRANDS, INC.,
8 Applicant.

9
10
11 Deposition of TIMOTHY R. KRAFT
12 Friday, April 26th, 2013
13 9:29 a.m.
14 at
15 QUARLES & BRADY LLP
16 411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin
17
18
19
20
21
22 Reported by Sarah A. Hart, RPR/RMR/CRR
23
24
25

1 Deposition of TIMOTHY R. KRAFT, a witness in the
2 above-entitled action, taken at the instance of the
3 Applicant, before Sarah A. Hart, RPR/RMR/CRR and
4 Notary Public, State of Wisconsin, at QUARLES & BRADY
5 LLP, 411 East Wisconsin Avenue, Suite 2040,
6 Milwaukee, Wisconsin, on the 26th day of April, 2013,
7 commencing at 9:29 a.m. and concluding at 10:05 a.m.
8 A P P E A R A N C E S:
9 JONES DAY, by
Mr. Kevin C. Meacham
10 500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
11 Appeared on behalf of the Opposers.
12 QUARLES & BRADY LLP, by
Ms. Johanna M. Wilbert
13 411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin 53202
14 Appeared on behalf of the Applicant.
15
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1 I N D E X

2

3 E X A M I N A T I O N

6

7 E X H I B I T S

15 (Original exhibits were attached to original transcript;

16 copies to transcript copies.)

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1 TRANSCRIPT OF PROCEEDINGS
2 TIMOTHY R. KRAFT, called as a witness herein,
3 having been first duly sworn on oath, was examined
4 and testified as follows:
5 EXAMINATION
6 BY MS. WILBERT:
7 Q What is your name?
8 A Timothy Richard Kraft.
9 Q And where do you work?
10 A I work at GFA Brands, Inc.
11 Q What is your job title at GFA Brands?
12 A I'm senior vice-president, associate general counsel.
13 Q Are you an attorney?
14 A I am.
15 Q Where are you licensed to practice?
16 A I'm licensed in the state of Wisconsin, and I also
17 have a single-client license in the state of
18 Colorado.
19 Q Please describe your general responsibilities.
20 A Generally, I'm responsible for all day-to-day legal
21 work; so ranging from contract review and negotiation
22 to managing our intellectual property portfolio to,
23 you know, handling various investment opportunities
24 and the like.
25 Q You mentioned the IP portfolio. Are you responsible

1 for overseeing any of GFA Brands' trademarks?
2 A I am.
3 Q What trademarks are you responsible for overseeing?
4 A So I'm in charge of the company's entire trademark
5 portfolio. That includes Smart Balance,
6 Earth Balance, Best Life, Glutino, Udi's Gluten Free,
7 Gluten Free Pantry, and a slew of additional marks.
8 Q Are you generally familiar with the history of the
9 Smart Balance trademark?
10 A I am.
11 Q How did you become familiar with the history of the
12 Smart Balance trademark?
13 A Well, I joined GFA in 2009. And, you know, with my
14 responsibilities including management of the
15 trademark portfolio, I definitely reviewed the
16 history of the mark, reviewed files, sat with
17 external counsel, sat with our general counsel.
18 Q When was the Smart Balance trademark introduced into
19 the market?
20 A In the late 1990s.
21 Q So about 15 years ago?
22 A Correct.
23 Q And it was introduced to the United States market?
24 A Correct.
25 Q Since its introduction, have the number of products

1 sold in connection with the Smart Balance trademark
2 increased or decreased?
3 A Increased.
4 Q Can you give me an example of some of the products
5 sold in connection with the Smart Balance trademark
6 today?
7 A Sure. We have our flagship buttery spreads and
8 buttery substitutes, we have enhanced milk, popcorn,
9 peanut butter, mayo, we've also had eggs, sour cream.
10 Q Is the Smart Balance trademark important to
11 GFA Brands?
12 A Absolutely.
13 Q Why?
14 A Products sold under the Smart Balance mark constitute
15 the lion share of our profits. So it's a very
16 important piece of our consumer base, consumers'
17 loyalty to the Smart Balance brand.
18 Q Does GFA Brands monitor the market for potential
19 infringement?
20 A Yes.
21 Q What steps does GFA Brands take to monitor the
22 market?
23 A So we partner with outside counsel, and we have -- we
24 generate search reports on, I believe, a weekly basis
25 to monitor what's happening in the marketplace. And

1 we also have salespeople in the field that will raise
2 questions to the legal department if they come across
3 potentially problematic marks.
4 Q Does GFA Brands have any guidelines for assessing
5 whether another trademark is likely to cause
6 confusion with the Smart Balance mark?
7 A We do.
8 Q Can you think of an example where GFA applied these
9 guidelines and concluded it needed to take action to
10 enforce its trademark rights?
11 A Sure. Not long ago, there was a mark being used in
12 the spreads category under the SmartBlend mark, and
13 we analyzed that and decided that we should take
14 enforcement action against it.
15 Q What was it about the SmartBlends mark that caused
16 you to take action?
17 A Well, we looked at the category of goods, and we also
18 looked at what was coupled with the term "Smart." So
19 not just the fact that Smart was used, but it was
20 SmartBlend, so it was a B word. Blend and Balance I
21 think are somewhat synonymous. So we decided that
22 would be problematic.
23 Q Can you give us an example of when GFA would not
24 pursue infringement?
25 A Sure. Hypothetically, if I were at a ski shop and

1 came across children's skis marketed as Smart Balance
2 skis, that's a class of goods that's so far removed
3 from food or beverage that we would likely not take
4 action to oppose the use of that mark.
5 Q Have the enforcement strategies and guidelines that
6 GFA uses to evaluate the likelihood of confusion
7 associated with other trademarks changed over time or
8 remained the same?
9 A Changed.
10 Q How have GFA's enforcement strategies changed over
11 time?
12 A Well, quite significantly. Let me explain why. If
13 you look at today's marketplace, there are really two
14 factors that are key to our evolving approach.
15 One is just the strength of the Smart
16 Balance mark in today's marketplace. The brand
17 equity is very high, consumer recognition of our
18 brand is very high.
19 So you take that factor, coupled with
20 what's happening not only in the food and beverage
21 space, but beyond, and the proliferation of "Smart"
22 marks in general -- so you have smart appliances,
23 smart cars, smart phones.
24 So when you couple those two factors,
25 you know, Smart Balance having very strong brand

1 equity, together with the fact that the marketplace
2 is seeing this rampant proliferation of the use of
3 "Smart" marks, our strategy has had to evolve.
4 When you contrast that with what was
5 happening, say, 15 years ago, where we had an upstart
6 brand that was not widely known, did not have very
7 strong brand equity at the time, in a marketplace
8 with very few "Smart" marks, you can see why you
9 would have a different enforcement strategy under
10 those circumstances.
11 So in today's marketplace, we don't
12 think it's as practical to try to police every use of
13 the word "Smart." I think, in my judgment, you need
14 to apply additional rigor to the analysis.
15 Q Now, you've mentioned the proliferation of other
16 "Smart" marks. Are you familiar with other "Smart"
17 marks in the packaged consumer goods industry?
18 A I am.
19 Q What are some examples of some of the other marks
20 that you personally are familiar with?
21 A Just by shopping in any store, you'll find
22 Smartwater, SMART POP!, SMART START. There are quite
23 a few.
24 Q Are you familiar with Simply Smart as a trademark
25 used on consumer goods?

1 A I am.
2 Q And what product are you familiar with that mark in
3 the context of?
4 A So that's on milk products. I think that brand is
5 sold on the East Coast. And when I've spent time in
6 New Jersey, I would shop for Smart Balance milk, and
7 I would also find Simply Smart marketed in the same
8 space.
9 MS. WILBERT: Could you please mark this as
10 Applicant's Exhibit 70.
11 (Applicant's Exhibit 70 marked for identification.)
12 BY MS. WILBERT:
13 Q I'm handing you what's been marked as Applicant's
14 Exhibit 70. This is a picture of --
15 MR. MEACHAM: Do you have an extra copy?
16 MS. WILBERT: I don't. Sorry. We gave you
17 guys copies last time around.
18 MR. MEACHAM: I mean, if you had told me
19 which ones you would be using, I would be able to
20 have a copy. I mean, I'm not going to bring every
21 single copy of every single exhibit.
22 MS. WILBERT: I apologize. I don't have
23 another copy. I can show it to you before I hand it
24 to the witness.
25

1 BY MS. WILBERT:
2 Q I've handed you what's been marked as Exhibit 70.
3 What is Exhibit 70?
4 A It's a carton of Simply Smart milk.
5 Q Does the picture accurately reflect the product as
6 you saw it in the store?
7 A Yeah, the picture of the carton reflects what I've
8 seen on the shelf.
9 (Applicant's Exhibit 71 marked for identification.)
10 BY MS. WILBERT:
11 Q I'm handing you what's been marked as Applicant's
12 Exhibit No. 71. Applicant's Exhibit 71 is another
13 photograph of some milk products. Does Exhibit 71
14 accurately reflect, when you were shopping, the
15 images of the sort that you saw in the stores with
16 respect to the Smart Balance milk product and the
17 Simply Smart milk products?
18 A It does.
19 Q And, again, when you were shopping, you personally
20 saw the Simply Smart milk in stores?
21 A Correct.
22 (Applicant's Exhibit 72 marked for identification.)
23 BY MS. WILBERT:
24 Q I've handed you what's been marked as Applicant's
25 Exhibit 72. What is Applicant's Exhibit 72?

1 A It is a photo of Kellogg's SMART START cereal.
2 Q Have you seen Kellogg's SMART START cereal with this
3 packaging in any stores?
4 A I have.
5 Q When?
6 A Every time I've shopped for cereal. It's a very
7 prominent package, and I've seen it several times on
8 shelves.
9 Q I believe you also mentioned Smartwater. Have you
10 seen Smartwater in stores?
11 A I have.
12 (Applicant's Exhibit 73 marked for identification.)
13 BY MS. WILBERT:
14 Q I'm handing you what's been marked as Applicant's
15 Exhibit 73. Does Exhibit 73 accurately reflect the
16 Smartwater that you have seen before in stores?
17 A It does.
18 (Applicant's Exhibit 74 marked for identification.)
19 BY MS. WILBERT:
20 Q I believe you also mentioned SMART POP!. What is
21 SMART POP!?
22 A It's a microwave popcorn sold by Orville
23 Redenbacher's, I believe.
24 Q And have you seen SMART POP! in stores?
25 A I have.

1 Q I'm handing you what's been marked as Exhibit 74.
2 Does Exhibit 74 accurately depict the product
3 packaging that you have seen in stores?
4 A It does.
5 Q Are you familiar with HeartSmart Bisquick pancake and
6 baking mix?
7 A I am.
8 Q In what context are you familiar with HeartSmart
9 Bisquick?
10 A We've purchased it before.
11 (Applicant's Exhibit 75 marked for identification.)
12 BY MS. WILBERT:
13 Q I'm handing you what's been marked as Applicant's
14 Exhibit 75. Does the picture of HeartSmart Bisquick
15 accurately reflect the product that you have
16 purchased in stores before?
17 A It does.
18 Q Can you think of any other "Smart" marks that you
19 have seen in commerce?
20 A Yes.
21 Q What are some other "Smart" marks that you have seen
22 in commerce?
23 A In the food industry or beyond?
24 Q In the food industry.
25 A Okay. So I've seen the Smart Ones line of products

1 in the frozen food aisle.
2 Q Anything else?
3 A "Smart" is used on a lot of baby foods and toddler
4 foods. I'm sure there are others.
5 Q I believe you said you are familiar with the Smart
6 Ones brand; is that correct?
7 A Yes.
8 Q Please tell me what you know about the Smart Ones
9 brand.
10 A Just as a consumer, I've seen it in the frozen food
11 sections. Appears to be a line of frozen entrees I
12 think sold in conventional grocery stores across the
13 country.
14 Q What is your understanding of who owns the Smart Ones
15 trademark?
16 A I believe it's owned by ProMark, which is somehow
17 affiliated with Heinz.
18 Q As a consequence of your work responsibilities, have
19 you had occasion to compare the Smart Balance
20 trademark to the Smart Ones trademark?
21 A Yes.
22 Q To date, are you aware of any instances of actual
23 confusion that have occurred as a result of GFA's use
24 of the Smart Balance mark and Heinz's use of the
25 Smart Ones mark?

1 A No.
2 Q To date, are you aware of any instances of actual
3 confusion that have occurred as a result of GFA's use
4 of the Smart Balance mark and any other "Smart" mark
5 in the market?
6 A No.
7 Q In particular, can you look at the exhibits that we
8 have marked of the product pictures.
9 A (Witness complies.)
10 Q Of the products that we have marked, which include
11 Simply Smart, SMART POP!, SMART START, HeartSmart,
12 and Smartwater, are you aware of any instances of
13 confusion with GFA's Smart Balance trademark?
14 A No.
15 Q Does GFA Brands care about whether the use of "Smart"
16 by another party results in confusion?
17 A Absolutely.
18 Q Why?
19 A Our Smart Balance mark is very important to our
20 company, and we would not want our consumer base to
21 be confused with any similar marks.
22 Q Have you heard of a company called Brand Sense before
23 today?
24 A Yes.
25 Q What is Brand Sense?

1 A I believe it's a marketing and licensing firm.
2 Q Has GFA formed any relationship with Brand Sense?
3 A Yes.
4 Q What is that relationship?
5 A I believe we entered into an agreement with them in
6 2010 in which they were going to evaluate the Smart
7 Balance mark and identify potential licensing
8 opportunities with third-parties in the CPG industry.
9 Q Did you personally have any interaction with Brand
10 Sense?
11 A Yes.
12 Q What was your personal interaction?
13 A They had a kick-off meeting in which they went to
14 various stakeholders within the company, and I sat
15 with them, with two representatives, for about 20
16 minutes.
17 Q I believe in response to one of your answers, you
18 referenced CPG. What does CPG stand for?
19 A Consumer packaged goods.
20 Q Did Brand Sense ever consider a licensing opportunity
21 with Heinz and its Smart Ones brand?
22 A I'm sure they did.
23 Q What was the consequence of Brand Sense considering
24 this licensing opportunity?
25 A Brand Sense went out on our behalf and contacted,

1 likely, all of the major CPG companies. And Heinz is
2 a very prominent CPG company, so I'm sure they were
3 contacted by Brand Sense.
4 Q Do you have any firsthand knowledge regarding whether
5 Heinz was contacted?
6 A No.
7 (Applicant's Exhibit 76 marked for identification.)
8 BY MS. WILBERT:
9 Q I'm handing you what's been marked as Applicant's
10 Exhibit 76. Do you recognize Exhibit 76?
11 A Yes.
12 Q What is Exhibit 76?
13 A This is a presentation of Brand Sense's key findings
14 as they went through the process of analyzing
15 opportunities for the Smart Balance brand.
16 Q Who prepared Exhibit 76?
17 A I believe it was prepared by Brand Sense.
18 Q Could you please turn to page ten.
19 A (Witness complies.)
20 Q Under "Challenges," the document states, "Potential
21 IP constraints in certain categories."
22 What's your understanding of the
23 meaning of this phrase?
24 A So Brand Sense was trying to do their homework, and
25 they raised a number of questions so that they

1 understood their parameters.
2 So one of the questions they posed to
3 the team was whether there were certain intellectual
4 property constraints, specifically trademark
5 constraints, in certain categories.
6 MR. MEACHAM: Excuse me, what page are you
7 on?
8 THE WITNESS: Ten.
9 BY MS. WILBERT:
10 Q Did GFA Brands respond to Brand Sense's question?
11 A We certainly analyzed things within the legal
12 department and gave direction internally to our
13 marketing team, but we would not have given direction
14 to Brand Sense.
15 Q What happened after Brand Sense gave this
16 presentation containing their ideas and questions?
17 A I believe they went out into the marketplace and made
18 contacts with potential licensing partners on our
19 behalf.
20 Q Thank you. I have no further questions.
21 EXAMINATION
22 BY MR. MEACHAM:
23 Q Now, Mr. Kraft, you are partially responsible for
24 determining when GFA Brands opposes marks, correct?
25 A Correct.

1 Q So you help decide when to file formal trademark
2 oppositions?
3 A Correct.
4 Q Okay. So you are familiar with and have knowledge
5 with the formal trademark opposition filed by
6 GFA Brands?
7 A I am aware of them.
8 Q And in that role, you are also familiar with the
9 products sold by GFA Brands?
10 A Correct.
11 Q To your knowledge, GFA Brands does not market or sell
12 chili under the Smart Balance mark, correct?
13 A Not today.
14 Q Okay. And has GFA ever done so?
15 A Not to my knowledge.
16 Q Okay. To your knowledge, GFA Brands does not market
17 or sell vegetable-based meat substitutes under the
18 Smart Balance mark?
19 A Not presently.
20 Q Has GFA Brands ever done so?
21 A No.
22 Q And to your knowledge, GFA Brands does not market or
23 sell frozen entrees containing vegetable-based meat
24 substitutes under the Smart Balance mark, correct?
25 A Not today.

1 Q And has it ever done so?
2 A GFA has never sold products within that class of
3 goods, but we've certainly entertained licensing in
4 that category.
5 Q Okay. But you've never actually sold them --
6 A Correct.
7 Q -- through any channel of trade?
8 A Frozen entrees?
9 Q Yes.
10 A Not to my knowledge.
11 Q And to your knowledge, GFA Brands does not market or
12 sell cookies under the Smart Balance mark?
13 A Not currently.
14 Q Okay. Has it ever done so?
15 A Not in the past, to my knowledge.
16 Q Okay. And to your knowledge, GFA Brands does not
17 market or sell chicken nuggets under the Smart
18 Balance mark, does it?
19 A No.
20 Q Okay. And has GFA Brands ever done so?
21 A No.
22 Q Okay. And to your knowledge, GFA Brands does not
23 market or sell soy-based products used as meat
24 substitutes under the Smart Balance mark, correct?
25 A Could you repeat that?

1 Q To your knowledge, GFA Brands does not market or sell
2 soy-based products used as meat substitutes, correct?
3 A Correct.
4 Q Okay. And has GFA Brands ever done so?
5 A Not to my knowledge.
6 Q Okay. To your knowledge, GFA Brands does not market
7 or sell yogurt under the Smart Balance mark, correct?
8 A We've entertained licenses for it, but we have never
9 sold it under the Smart Balance mark.
10 Q Okay. And GFA Brands does not market or sell
11 soy-based food products used as yogurt substitutes
12 under the Smart Balance mark, correct?
13 A Correct.
14 Q And GFA Brands has never done so, right?
15 A Not to my knowledge.
16 Q And GFA Brands does not currently market or sell
17 frozen entrees under the Smart Balance mark, correct?
18 A Correct.
19 Q And to your knowledge, GFA Brands does not market or
20 sell lunch entrees consisting of soy-based meat and
21 cheese substitutes under the Smart Balance mark?
22 A Correct.
23 Q And has GFA Brands ever done so?
24 A Not to my knowledge.
25 Q And to your knowledge, GFA Brands does not market or

1 sell pudding under the Smart Balance mark, correct?
2 A Correct.
3 Q Okay. And GFA Brands has never done so, correct?
4 A Not to my knowledge.
5 Q GFA Brands does not market or sell soy-based food
6 products used as pudding substitutes under the Smart
7 Balance mark, correct?
8 A Correct.
9 Q Okay. And has GFA Brands ever done so?
10 A Not to my knowledge.
11 Q To your knowledge, GFA Brands does not market or sell
12 juices under the Smart Balance mark, correct?
13 A That's correct.
14 Q And GFA Brands has never done so, correct?
15 A Not to my knowledge.
16 Q Again, you are partially responsible for determining
17 whether GFA Brands opposes a mark, correct?
18 A Correct.
19 Q And if Heinz were to apply to use the Smart Ones mark
20 in connection with a butter substitute, you would
21 advise GFA to oppose the mark, correct?
22 A Are you asking for a legal conclusion or
23 recommendation or ...
24 Q I'm just asking you to answer the question whether
25 you would advise -- you've testified that you are

1 involved in determining whether to challenge a mark.
2 And I'm asking you the question: If Heinz were to
3 apply to use the Smart Ones mark in connection with a
4 butter substitute, you would advise GFA Brands to
5 oppose the mark, correct?
6 A That is not correct.
7 Q Okay. You wouldn't advise them to oppose the mark?
8 A That would not fall within our current enforcement
9 criteria.
10 Q Why not?
11 A Well, we carefully scrutinize the mark in question.
12 And Smart Ones, spelled S-M-A-R-T, space, O-N-E-S?
13 Is that correct? Is that the hypothetical?
14 Q I'm saying Smart Ones, yes.
15 A Okay. So we would look at what the word "Smart" is
16 being coupled with. And to me, in my assessment,
17 based on our criteria, "Ones" is not confusing or
18 similar to "Balance." So when paired together, I
19 don't think it would be problematic under our current
20 criteria.
21 Q So your testimony is that if Heinz introduced a
22 butter substitute under the Smart Ones mark, you
23 would not oppose that application?
24 A Based on the two factors I raised in my earlier
25 testimony, the strength of the Smart Balance brand

1 and its brand equity, together with the proliferation
2 of "Smart" marks, I would probably pass.
3 Q Okay. So -- and if Heinz were to apply to use the
4 Smart Ones mark in connection with a milk product,
5 would you also pass on enforcing your mark?
6 A Probably.
7 Q And if Heinz were to apply to use the Smart Ones mark
8 in connection with a peanut butter, would you also
9 pass on opposing that mark?
10 A Probably.
11 Q Yes or no?
12 A In that hypothetical, yes.
13 Q And if you were to apply -- if Heinz were to apply to
14 use the Smart Ones mark in connection with a cooking
15 oil, would you advise GFA to oppose that one?
16 A I would not.
17 Q And if Heinz were to apply to use the Smart Ones mark
18 in connection with popcorn products, would you advise
19 GFA to oppose that application?
20 A I would not.
21 Q And if Heinz were to apply to use the Smart Ones mark
22 in connection with mayonnaise, would you advise GFA
23 to oppose that application?
24 A I would not.
25 Q In the process of determining whether to oppose a

1 mark, you consider a variety of factors, correct?
2 A Correct.
3 Q And one of those factors considered is the strength
4 or the fame of the mark that you want to protect,
5 correct?
6 A Correct.
7 Q So you would agree with me that you have experience
8 in evaluating the strength or fame of a mark?
9 A Yes.
10 Q And would you agree with me that one of the ways the
11 strength or fame of a mark is evaluated is through
12 brand awareness surveys?
13 A Yes.
14 Q And if more than 75 percent of respondents in a
15 survey indicated awareness of a particular brand, you
16 would agree with me that that indicates a high level
17 of awareness, correct?
18 MS. WILBERT: Objection. That's calling
19 for a legal conclusion.
20 THE WITNESS: Can you repeat the question?
21 BY MR. MEACHAM:
22 Q If more than 75 percent of respondents in a survey
23 indicated awareness of a particular brand, you would
24 agree with me that that is a high level of awareness,
25 correct?

1 A I'm not an expert in conducting or evaluating
2 surveys, but it would appear to me that that would be
3 high brand recognition.
4 Q And would you agree with me that that is a strong
5 brand?
6 A Again, I don't know the specific question that's been
7 asked, but 75 percent awareness of a brand would
8 appear to be a strong brand.
9 Q And would you agree with me that that is a famous
10 brand?
11 A That's got a legal meaning, and I think there are
12 additional criteria that need to be considered.
13 Q Okay. Would you agree with me that it's a widely
14 recognized brand?
15 A Yes.
16 Q You're familiar with the Smart Ones brand, correct?
17 A I am.
18 Q And you would agree with me that Smart Ones is a
19 strong brand, correct?
20 A It's a well-known brand, yes.
21 Q Okay. And you would agree with me that Smart Ones is
22 a famous brand, correct?
23 A That would require further analysis. I think it's as
24 strong as the Smart Balance brand, for example.
25 Q If over 75 percent of respondents to a brand

1 awareness survey were aware of Smart Ones, that would
2 indicate a high level of awareness, correct?
3 A I think we've established that, yes.
4 Q Okay. Can we take a short break?
5 (A break was taken at 9:58 a.m.)
6 (Back on the record at 10:01 a.m.)
7 BY MR. MEACHAM:
8 Q So you testified that protecting the Smart Balance
9 mark is important to GFA Brands, correct?
10 A Absolutely.
11 Q Okay. But you've reviewed several exhibits that show
12 that Smart Balance allows for competitors in the same
13 exact product category; is that correct?
14 A I don't understand the question.
15 Q Through the review of the several picture exhibits,
16 you admitted that you -- Smart Balance permits other
17 products within that same category to carry the word
18 "smart," correct?
19 A I don't understand what you mean when you say "same
20 category." I was making an observation of what I've
21 seen as a consumer.
22 Q Okay. You testified that you're not aware of any
23 confusion between Smart Balance and Smart Ones,
24 correct?
25 A Correct.

1 Q And you also testified that Smart Balance doesn't
2 market or sell any frozen entrees, correct?
3 A Correct.
4 Q Okay. So there are no categories -- product
5 categories currently that Smart Balance and Smart
6 Ones overlap in, correct?
7 A On a category basis, I believe that's correct.
8 Q And you're not aware of any confusion between Smart
9 Balance and any other "Smart" marks that you viewed
10 here today, correct?
11 A Correct.
12 Q And have you monitored for that confusion?
13 A So typically, issues would arise in two manners:
14 Consumer affairs, if we were receiving calls, would
15 notify me; and our sales team in the trade would
16 likely notify me.
17 Q Okay. Would you agree with me that Smart Balance
18 does not market any products in the frozen foods
19 section of the supermarket?
20 A I believe that's correct.
21 Q Mr. Kraft, I'm handing you what's been marked as
22 Exhibit 73. To your knowledge, does GFA Brands sell
23 or market any water product?
24 A We sell a milk product, but not a water product.
25 Q Okay. I'm going to hand you Exhibit 75. To your

1 knowledge, does GFA Brands sell any pancake mix?
2 A We sell several shelf-stable foods, but no pancake
3 mixes.
4 Q Which ones did I give you?
5 A Seventy-three and 75.
6 Q Okay. For Exhibit 70 through 75, did you personally
7 take these pictures?
8 A I did not.
9 Q Okay. All right. I think that's all I have.
10 EXAMINATION
11 BY MS. WILBERT:
12 Q Has GFA sold popcorn products?
13 A Yes.
14 Q And has GFA's popcorn products been advertised
15 alongside the SMART POP! popcorn product?
16 A Yes.
17 Q And despite coexisting in the market for the same
18 product, has the use of the SMART POP! mark resulted
19 in any actual confusion that you're aware of?
20 A No.
21 Q Exhibit 71 shows the Smart Balance mark for milk
22 being sold alongside the Simply Smart mark for milk.
23 Despite the fact that these products are sold side by
24 side and both cover milk, is Smart Balance -- is GFA
25 aware of any confusion between the Smart Balance and

1 Simply Smart mark?
2 A Not to my knowledge.
3 Q No more questions.
4 (Deposition concluded at 10:05 a.m.)
5 (Original exhibits were attached to original transcript;
6 copies to transcript copies.)
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1 STATE OF WISCONSIN)
) SS:
2 MILWAUKEE COUNTY)
3
4 I, Sarah A. Hart, RPR/RMR/CRR and Notary
5 Public in and for the State of Wisconsin, do hereby
6 certify that the preceding deposition was recorded by
7 me and reduced to writing under my personal
8 direction.
9 I further certify that said deposition
10 was taken at QUARLES & BRADY LLP, 411 East Wisconsin
11 Avenue, Suite 2040, Milwaukee, Wisconsin, on the 26th
12 day of April, 2013, commencing at 9:29 a.m.
13 I further certify that I am not a
14 relative or employee or attorney or counsel of any of
15 the parties, or a relative or employee of such
16 attorney or counsel, or financially interested
17 directly or indirectly in this action.
18 In witness whereof, I have hereunto
19 set my hand and affixed my seal of office on this
20 30th day of April, 2013.
21
22 Sarah A. Hart
SARAH A. HART, RPR/RMR/CRR
23 Notary Public
24 My commission expires September 27, 2015.
25

STATE OF Colorado)
) SS:
COUNTY OF Boulder)

I, Timothy R. Kraft, do hereby certify that I have read the foregoing transcript of proceedings, taken on the 04/26/2013, and the same is true and correct except for the list of corrections noted on the annexed page.

Dated at _____

this 16th day of May, 2013.

Timothy R. Kraft

Signed and subscribed to before me
this 16th day of May, 2013.

Notary

JESSICA ANNE MORGAN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID # 20134012447
MY COMMISSION EXPIRES FEBRUARY 28, 2017

CORRECTIONS TO DEPOSITION

The witness, Timothy R. Kraft, states he/she wishes to make the following changes in testimony as originally given:

PAGE	LINE	SHOULD READ	REASON
6	15	"Products" should read "Profits"	Error in transcription

Timothy R. Kraft
Signature

5/19/13
Date

A

B

C


Walmart
Save money. Live better.
Hood
Simply Smart
1% Lowfat Milk
with the Taste of Whole Milk
No Artificial Growth Hormones*
25% More Protein
20% More Calcium
Applicant's
EXHIBIT 70
Promark v. GFA Brands
GRAMANN REPORTING, LTD.

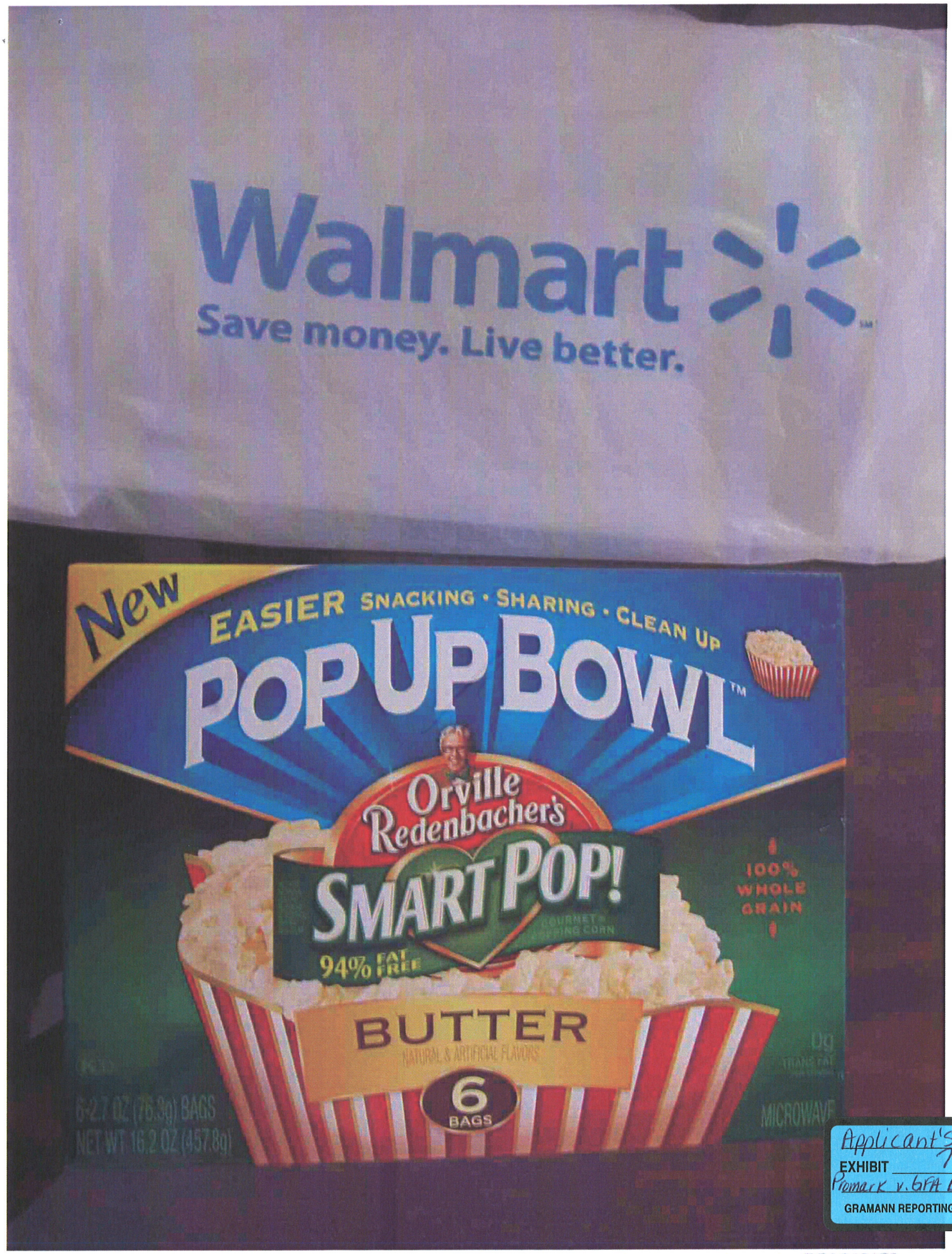
GFA043120

Applicant's
EXHIBIT 21
GRAMANN REPORTING, LTD.

Applicant's
EXHIBIT 72
Promark v. GFA Brands
GRAMANN REPORTING, LTD.

GFA043152

Applicant's
EXHIBIT 73
Promark v. GFA Brands
GRAMANN REPORTING, LTD.



Applicant's EXHIBIT 74
Promark v. GFA Brands
GRAMANN REPORTING, LTD.

Applicant's
EXHIBIT 75
Promark v. GFA Brands
GRAMANN REPORTING, LTD.

SMART BALANCE®

Brand Extension Program

February 3, 2010

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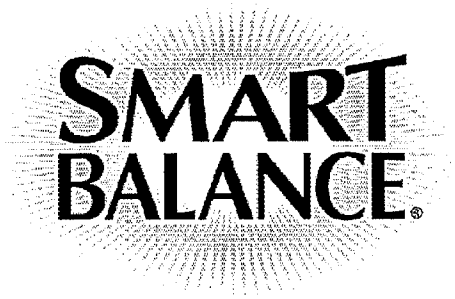

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