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

Proceeding	91196358
Party	Defendant GFA Brands, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of

U.S. Trademark Application No. 77/864,268
For the Mark SMART BALANCE
Published in the Official Gazette on August 10, 2010

PROMARK BRANDS, INC.,

Opposer,

Opposition No. 91196358

v.

GFA BRANDS, INC.,

Applicant.

Commissioner of Trademarks
Box TTAB
P.O. Box 1451
Alexandria, VA 22313-1451

ANSWER OF GFA BRANDS, INC.

GFA Brands, Inc. (“Applicant”) answers the Notice of Opposition as follows:

1. Opposer, ProMark Brands Inc. (“Opposer”), a corporation duly organized and existing under the laws of Idaho and having a place of business at 2541 North Stokesberry Place, Suite 100, Meridian, ID 83646, believes that it will be damaged by the registration of the mark SMART BALANCE (“Applicant’s Mark”) shown in trademark application Serial No. 77/864,268 (the “Application”) and hereby opposes same pursuant to 15 U.S.C. §§ 1052 and 1063.

ANSWER: Applicant admits that it filed Serial No. 77/864,268 for the mark SMART BALANCE. Applicant denies that Opposer will be damaged by registration of Applicant's SMART BALANCE mark. Applicant is without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 1 and therefore denies the same.

2. To the best of Opposer's knowledge, the name and address of the current owner of the Application is GFA Brands, Inc. ("Applicant"), 115 W. Century Rd., Suite 260, Paramus, NJ 07652, United States.

ANSWER: Applicant admits that it owns Application Serial No. 77/864,268 for the SMART BALANCE mark and that its address is 115 W. Century Rd., Suite 260, Paramus, NJ 07652, United States.

As grounds for opposition, it is alleged that:

The Application

ANSWER: To the extent that this heading amounts to an allegation, Applicant is without sufficient information to form a belief as to the truth of the allegation and therefore denies the same.

3. Applicant filed the Application on an intent-to-use basis to register the mark SMART BALANCE to identify:

- a. soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts, raisins and/or seeds; nut and seed-based snack bars in International Class 029 and
- b. 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 in International Class 30.

ANSWER: Applicant admits that Application Serial No. 77/864,268 for the SMART BALANCE mark is an intent-to-use application. Applicant admits that the application identifies soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts,

raisins and/or seeds; nut and seed-based snack bars in International Class 29 and 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 in International Class 30. Applicant is without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 3 and therefore denies the same.

4. The Application was published in the Official Gazette on August 10, 2010.

ANSWER: Applicant admits its application was published in the USPTO’s Official Gazette on August 10, 2010.

5. Applicant has not filed an amendment to allege use as of September 2, 2010.

ANSWER: Applicant admits that it had not filed an Amendment to Allege Use as of September 2, 2010.

Opposer's Registered Marks

ANSWER: To the extent that this heading amounts to an allegation, Applicant is without sufficient information to form a belief as to the truth of the allegation and therefore denies the same.

6. Opposer is the owner of the following registrations in the United States Patent and Trademark Office for SMART ONES (“Opposer’s Marks”), which registrations have not been cancelled, are valid and in full force and effect:

Trademark	Registration/Serial No.	Registration/Filing Date	International Class/Goods
SMART ONES	1,911,590	August 15, 1995	29 – Frozen entrees consisting primarily of chicken, beef, fish and/or vegetables.
SMART ONES	2,204,080	November 17, 1998	30 – Frozen desserts consisting of milk based or milk

			substitute based desserts, cakes, pies and mousses.
SMART ONES	2,916,539	January 4, 2005	30 – Pre-cooked ready-to-eat frozen bread or wrap having a meat and or vegetable filling with or without cheese.
SMART ONES	2,916,538	January 4, 2005	30 – Pizza
SMART ONES	3,462,182	July 8, 2008	30 – Frozen foods, namely, breakfast sandwiches and muffins

Registration Nos. 1,911,590 and 2,204,080 have become incontestable as a matter of law under 15 U.S.C. § 1065.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 6 and therefore denies the same.

7. Opposer's ownership in Registration Nos. 1,911,590 and 2,204,080 results from the following chain of title:

Assignment	by Weight Watchers International, Inc. to H.J. Heinz Company (recorded at Reel 1971/Frame 0642)
Assignment	by H.J. Heinz Company to ProMark International, Inc. (recorded at Reel 2327/Frame 0405)
Merger	of ProMark International with H.J. Heinz Company (recorded at Reel 2633/Frame 0413)
Assignment	By H.J. Heinz Company to ProMark Brands Inc.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 7 and therefore denies the same.

8. Opposer, through its predecessors and licensee, since at least as early as May 1, 1992, has been, and is now, using the mark SMART ONES throughout the United States in connection with the goods described above.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 8 and therefore denies the same.

9. Opposer's use of Opposer's Marks, as described above, has been valid and continuous since the date of first use.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 9 and therefore denies the same.

10. Opposer's continuous, exclusive and commercially-successful use of the mark SMART ONES is symbolic of extensive good will and consumer recognition built up by Opposer through substantial amounts of time, money and effort in manufacturing, advertising and promotion.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 10 and therefore denies the same.

11. Upon information and belief, Applicant's SMART ONES mark is widely and highly recognized by the general, consuming public of the United States as a designation of source of Opposer's goods.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 11 and therefore denies the same.

12. Upon information and belief, the mark SMART ONES has come to serve as a unique and famous identifier of Opposer's goods.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 12 and therefore denies the same.

Dilution And Confusion Are Likely

ANSWER: To the extent that this heading amounts to an allegation, Applicant is without sufficient information to form a belief as to the truth of the allegation and therefore denies the same.

13. Opposer's use of the mark SMART ONES predates any alleged use by Applicant for Applicant's Mark.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 13 and therefore denies the same.

14. Opposer's use of the mark SMART ONES predates the filing date of the Application.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 14 and therefore denies the same.

15. Opposer's Marks were well established and famous long before the filing date of the Application and at the time that Applicant filed the Application.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 15 and therefore denies the same.

16. Upon information and belief, Applicant's Mark SMART BALANCE, to be used in connection with the goods covered by Application No. 77/864,268, is confusingly similar to Opposer's Marks as used and registered by Opposer.

ANSWER: Applicant admits that it intends to use its SMART BALANCE mark with the goods listed in Application No. 77/864,268. Applicant denies the remainder of the allegations in paragraph 16.

17. Upon information and belief, the products to which Applicant's Mark SMART BALANCE will be used are related to, or identical to, various products on and in connection with which Opposer and its predecessors-in-interest have used, and are using, the mark SMART ONES.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 17 and therefore denies the same.

18. Upon information and belief, the goods to which Applicant's Mark SMART BALANCE will be applied, and the products on and in connection with which Opposer uses its mark SMART ONES, are products that are offered for sale and sold in identical channels of trade.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 18 and therefore denies the same.

19. Upon information and belief, the goods to which Applicant's Mark SMART BALANCE will be applied, and the products on and in connection with which Opposer uses its mark SMART ONES, are products that are offered for sale and sold to the same class of purchasers.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 19 and therefore denies the same.

20. Upon information and belief, both Opposer's goods and Applicant's goods are relatively low-priced and may be purchased on impulse by consumers.

ANSWER: Applicant is without sufficient information to form a belief as to the truth of the allegations in paragraph 20 and therefore denies the same.

Applicant Has Essentially Admitted That Dilution And Confusion Are Likely

ANSWER: To the extent that this heading amounts to allegation, Applicant is without sufficient information to form a belief as to the truth of the allegation and therefore denies the same.

21. In numerous proceedings before the Trademark Trial and Appeal Board, Applicant has challenged applications arguing that its registrations and applications for "smart" related marks that predate other "smart" related marks should bar registration.

ANSWER: Applicant admits that it has opposed applications for registration containing the word “smart” on the grounds that registration of such marks may have caused likely confusion, mistake or deception as to the source of Applicant’s goods. As to the remainder of the allegations in paragraph 21, Applicant is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

22. Specifically, Applicant has argued that permitting other “smart” marks to register would interfere with its use of its marks and would seriously damage Applicant.

ANSWER: Applicant admits that it has opposed applications for registration containing the word “smart” on the grounds that registration of such marks may have caused likely confusion, mistake or deception as to the source of Applicant’s goods. As to the remainder of the allegations in paragraph 22, Applicant is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

23. Opposer’s use of the mark SMART ONES predates any alleged use by Applicant for Applicant’s Mark. Further, Opposer’s SMART ONES mark became famous before Applicant filed the Application. Thus, based upon Applicant’s own admissions, as set forth in multiple pleadings before the Trademark Trial and Appeal Board, in this instance, permitting Applicant’s Mark to register would interfere with Opposer’s use of Opposer’s Marks and would seriously damage Opposer.

ANSWER: Applicant denies the fame of Opposer’s Marks and admits that it has opposed applications for registration containing the word “smart” on the grounds that registration of such marks may have caused likely confusion, mistake or deception as to the source of Applicant’s goods. As to the remainder of the allegations in paragraph 23, Applicant is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

COUNT I
LIKELIHOOD OF CONFUSION

24. ProMark incorporates each and every allegation of Paragraphs 1-23 of this Notice as though fully set forth herein.

ANSWER: Applicant incorporates each and every admission and denial of paragraphs 1-23 of this Notice of Opposition as though fully set forth herein.

25. In view of the fame of Opposer's Marks, the similarity of the respective marks, similarity of the channels of trade, related nature of the goods and the relatively low-priced nature of the goods, the mark shown in the Application so resembles Opposer's Marks so as to be likely to cause confusion, or to cause mistake, or to deceive as to source by suggesting that Applicant's goods are associated with or approved, endorsed, affiliated, authorized or sponsored by Opposer.

ANSWER: Applicant denies the allegations in paragraph 25 of the Notice of Opposition

26. In view of the fame of Opposer's Marks, the similarity of the respective marks, similarity of the channels of trade, related nature of the goods and the relatively low-priced nature of the goods, the mark shown in the Application so resembles Opposer's Marks so as to be likely to cause confusion, or to cause mistake, or to deceive as to source by suggesting that Applicant's goods are associated with or approved, endorsed, affiliated, authorized or sponsored by Opposer.

ANSWER: Applicant denies the allegations in paragraph 26 of the Notice of Opposition.

COUNT II
TRADEMARK DILUTION

27. ProMark incorporates each and every allegation of Paragraphs 1-26 of this Notice as though fully set forth herein.

ANSWER: Applicant incorporates each and every admission and denial of paragraphs 1-26 of this Notice of Opposition as though fully set forth herein.

28. SMART ONES has become famous in accordance with the standard set forth in 15 U.S.C. § 1125(c).

ANSWER: Applicant denies the fame of Opposer's Marks.

29. Applicant filed the Application for SMART BALANCE after Opposer's SMART ONES mark became famous.

ANSWER: Applicant denies the fame of Opposer's Marks. As to the remainder of the allegations in paragraph 29, Applicant is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

30. Applicant's Mark is likely to cause the dilution of the distinctiveness of the Opposer's famous SMART ONES mark.

ANSWER: Applicant admits that it filed an application for SMART BALANCE. Applicant denies the fame of Opposer's Marks. As to the remainder of the allegations in paragraph 30, Applicant is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

AFFIRMATIVE DEFENSES

1. Opposer fails to state a claim upon which relief can be granted.

2. Opposer is not likely to be damaged by registration of Applicant's Mark and therefore, Opposer lacks standing to oppose registration of same.

3. Opposer's claims are barred, in whole or in part, by the doctrines of laches and acquiescence.

4. Applicant's Mark is sufficiently distinctive and different from Opposer's Mark as to avoid confusion, deception, or mistake as to the source, sponsorship or association of Applicant's goods with Opposer.

5. Applicant's Mark does not share a common or similar commercial impression with Opposer's Marks, and therefore there is no likelihood for consumer confusion between Applicant's Mark and Opposer's Marks.

6. Applicant's registrations for the identical mark, SMART BALANCE, the subject of U.S. Registration Numbers 2,200,663, 2,276,285, 2,952,127, 3,747,526, 3,649,833, 2,958,216, have been and continue to peacefully co-exist with Opposer's Marks both on the USPTO's Principal Register and in commerce without consumer confusion. Thus, there is no likelihood for consumer confusion between Applicant's and Opposer's Marks.

7. At all times relevant to the allegations made in Opposer's Notice of Opposition, Applicant has acted in good faith.

WHEREFORE, Applicant prays that:

- A. The Board refuse to sustain the Opposition of the Opposer;
- B. The Board find that there is no basis in fact or law to support the Opposition of the Opposer;
- C. The Board dismiss this Opposition; and
- D. The Board grant such other and further relief as may be appropriate.

Dated this 12th day of October, 2010.

GFA BRANDS, INC.

By: 

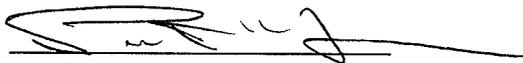
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the ANSWER OF GFA BRANDS, INC. was served on October 12, 2010 by first class mail, postage prepaid on:

Timothy P. Fraelich
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114


Patrick M. Bergin