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

Proceeding	91212477
Party	Plaintiff Balance Bar Company
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Attachments	Opposer's_Seventh_Notice_of_Reliance.pdf(337424 bytes )

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

In re Application Serial No. 85/751,520  
Published for Opposition on March 19, 2013  
Trademark: EARTH BALANCE

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BALANCE BAR COMPANY,	:	
	:	
Opposer,	:	
v.	:	Opposition No. 91212477
	:	
GFA BRANDS, INC.,	:	
	:	
Applicant.	:	

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**OPPOSER'S SEVENTH NOTICE OF RELIANCE**

Pursuant to Rule 2.120(j) of the Trademark Rules of Practice, Opposer, Balance Bar Company, hereby submits, makes of record in connection with this opposition proceeding, and notifies Applicant of its reliance upon the discovery deposition transcript of Adriane E. Little, a Rule 30(b)(6) witness on behalf of Applicant. The testimony of Ms. Little is relevant to this proceeding because, among other things, it is directed to the strength and recognition of the term "balance" in the marketplace, and the likelihood of confusion with the mark in dispute.

A true and correct copy of pages 1-11, 29-31 and 49-56 of the Rule 30(b)(6) discovery deposition is attached hereto as Exhibit G1, and a true and correct copy of accompanying exhibit 2 is attached hereto as Exhibit G2.

Respectfully submitted,

BALANCE BAR COMPANY

Dated: 20 August 2014

By:   
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Attorney for Opposer

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing OPPOSER'S SEVENTH NOTICE OF RELIANCE has been served via e-mail and first-class mail this 20<sup>th</sup> day of August, 2014 upon the following:

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R. Glenn Schroeder

# **EXHIBIT G1**

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Opposition No. 91212477

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30(b)(6) DEPOSITION OF GFA BRANDS, INC.,  
AS GIVEN BY ADRIANE E. LITTLE

June 10, 2014

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BALANCE BAR COMPANY,

Opposer,

vs.

GFA BRANDS, INC.,

Applicant.

---

APPEARANCES:

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Appearing on behalf of Applicant

Also Present: Jessica Morgan

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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1                   Pursuant to Notice and the PTO Rules of  
2 Procedure, the 30(b)(6) deposition of GFA BRANDS,  
3 INC., as given by ADRIANE E. LITTLE, called by  
4 Opposer, was taken on Tuesday, June 10, 2014,  
5 commencing at 9:32 a.m., at the Boulder Marriott,  
6 2660 Canyon Boulevard, Boulder, Colorado, before  
7 Pamela J. Hansen, Registered Professional Reporter  
8 and Notary Public within and for the State of  
9 Colorado.

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I N D E X

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30(b)(6) DEPOSITION OF GFA BRANDS, INC.,  
AS GIVEN BY ADRIANE E. LITTLE

13

EXAMINATION BY:

PAGE

14

Mr. Schroeder

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(Confidential portion beginning on Page 16.)

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**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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P R O C E E D I N G S

ADRIANE LITTLE,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SCHROEDER:

Q Good morning. Please state your full name and address for the record.

A Adriane Elizabeth Little. My business address --

Q That's fine.

A -- is 1600 Pearl Street, Boulder, Colorado 80302.

Q And are you currently employed?

A Yes.

Q And the name of your employer?

A Boulder Brands.

Q Do you understand why you're here today?

A Yes.

Q Do you understand you're here today to give testimony on behalf of the company GFA?

A Yes.

MR. SCHROEDER: Let's go ahead and mark this first document as Exhibit 1.

(Exhibit 1 marked.)

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1 Q (BY MR. SCHROEDER) I'm handing you what's  
2 been marked as Exhibit 1. Have you seen this  
3 document before?

4 A Yes.

5 Q Okay. And it's been represented to us  
6 that you are here today to testify to each one of  
7 these categories. Is that your understanding as  
8 well?

9 A Yes.

10 Q And are you comfortable testifying to each  
11 one of these categories to the best of your  
12 knowledge?

13 A Yes.

14 Q Thank you. Have you ever been deposed  
15 before?

16 A No.

17 Q I'm sure that Ms. Wilbert reviewed the  
18 rules with you, but basically we'll be asking you  
19 questions today. We'll be showing you some  
20 documents. I'd ask you to answer any questions to  
21 the best of your ability as honestly as possible. If  
22 you have any questions, please feel free to ask me.  
23 If I say something that's not clear, I'll try to  
24 rephrase it for you.

25 A Okay.

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1 Q And we'll take breaks, and this shouldn't  
2 go too long so it should be okay.

3 A Okay.

4 Q Is there any reason why you can't testify  
5 truthfully today? Are you taking any medications,  
6 prescriptions, anything like that?

7 A No.

8 Q Thank you.

9 Now, you mentioned earlier that you worked  
10 for GFA Brands, correct?

11 A I mentioned that I worked for Boulder  
12 Brands --

13 Q Boulder Brands, I'm sorry.

14 A -- which is the parent company of GFA.

15 Q Boulder Brands. And how long have you  
16 worked there for?

17 A I have worked with the Earth Balance brand  
18 for four years. I've been a full-time employee of  
19 GFA for two years.

20 Q Okay. Explain that difference.

21 A The first two years were contract.

22 Q And have you always held the same position  
23 at Boulder Brands?

24 A Yes.

25 Q And your current position is?

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1           A       Category manager, Earth Balance.

2           Q       And what types of job responsibilities do  
3 you have in that role?

4           A       I manage the marketing for the brand, so  
5 all of our marketing activities and everything  
6 associated with that.

7           Q       Was there a position -- was there a person  
8 in that position before you started with the company?

9           A       There was not a person in a category  
10 manager role. It was the general manager. That was  
11 the only person on the business before I came in.

12          Q       And who would that person be?

13          A       I came in working for Duane Primozich.  
14                   (Exhibit 2 marked.)

15                 MS. WILBERT: And maybe before questions  
16 start, I just wanted to note that this document is  
17 marked confidential. Throughout the day I assume  
18 there are a number of documents that will be marked  
19 confidential, for purposes of our court reporter, if  
20 you could treat them as such as you bind the  
21 deposition.

22                 MR. SCHROEDER: I don't think any of this  
23 testimony at this point is confidential, but if we  
24 get into confidential, we can certainly mark the  
25 transcript that way.

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1 MS. WILBERT: Okay. That's fair.

2 Q (BY MR. SCHROEDER) Are you familiar with  
3 this document, Exhibit 2 that I just handed to you?

4 A Yes.

5 Q And can you explain to me what it is?

6 A It is our organizational chart.

7 Q And please note that I attached simply  
8 two pages to this document. It's Bates No. 667 and  
9 Bates No. 674. I understand the document was -- was  
10 a multi-page document originally.

11 And Bates No. 674 was Page 8, which refers  
12 to the blow-up of the block on Page 1. Is that your  
13 understanding?

14 A Yes.

15 Q Okay. So turn back to Page 1. Just  
16 generally, I see at the top of the chart is Stephen  
17 Hughes?

18 A Yes.

19 Q And then there's a block below that, which  
20 reads, Executive Vice President and General Manager,  
21 Balance Brands, Duane Primozich?

22 A Yes.

23 Q Did I pronounce that correctly?

24 A Primozich.

25 Q Primozich. Then if we refer to the second

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1 page of this document, I see then that under Duane's  
2 name, it breaks out a category VP Marketing Earth  
3 Balance?

4 A Yes.

5 Q And that says, Open?

6 A As of Friday, the company made an  
7 announcement that Steve Silva, the VP of marketing  
8 for Smart Balance, will be filling that role. So he  
9 will be managing both Smart Balance and Earth  
10 Balance. So I will now be reporting to him.

11 Q Thank you.

12 Below your name on the second page,  
13 Assistant Manager Earth Balance, to be -- is that  
14 TBD?

15 A Yeah. Correct.

16 Q Okay. So there's no one below you at this  
17 -- at this point?

18 A We hired someone, who officially starts  
19 July 1st.

20 Q Now, if we refer back up to the upper  
21 block that mentions Duane's name, I see in that block  
22 a reference to Balance Brands. What does that  
23 encompass?

24 A Our company is segmented into two groups.  
25 Balance Brands, which consists of Smart Balance,

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1 Earth Balance, and Level, and then the Natural  
2 Brands, which is Glutino, Udi's, and EVOL.

3 Q So the Balance Brands would include Smart  
4 Balance, Earth Balance, and the third one you  
5 mentioned was?

6 A Level.

7 Q Level. Do you typically refer to the  
8 Smart Balance and Earth Balance brands as the Balance  
9 Brands?

10 A Yes.

11 Q Thank you.

12 Before you started at Boulder Brands,  
13 where did you work? Did you work, I should ask?

14 A I worked for myself. I had my own LLC.

15 Q In the marketing line of work?

16 A Yes.

17 Q And how long did you have that business  
18 for?

19 A 3-1/2 years.

20 Q Was that your first position?

21 A No. Prior to that I worked at an  
22 advertising agency.

23 Q For how many years?

24 A For one year.

25 Q Okay. Which advertising agency was that?

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1 Q Thank you.

2 Are you aware of any other parties using  
3 the mark Balance in the marketplace?

4 A Yes, I'm familiar with Smart Balance, our  
5 sister brand. I'm familiar with a Target brand  
6 called Simply Balance.

7 Q Any others?

8 A And those are the only two that come to  
9 mind.

10 (Exhibit 9 marked.)

11 Q (BY MR. SCHROEDER) I've handed you what's  
12 been marked as Exhibit 9. Is this the brand you just  
13 referred to in response to an earlier question?

14 A Yes.

15 Q And you mentioned that this is sold at  
16 Target?

17 A To my knowledge, yes.

18 Q Have you ever seen this product?

19 A Yes.

20 Q In a store?

21 A Yes.

22 Q Is there other products besides the one  
23 shown in this picture?

24 A Yes. I know they have other bars. I  
25 think they may have breakfast items, like cereal.

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1 But I'm -- I'm just familiar with their bars.

2 Q Do you know where this product appears in  
3 the Target stores, where it's sold?

4 A In the bar section, with other bars.

5 Q Does a product like this give you any  
6 concern with respect to the Earth Balance brand?

7 A Not at this time. We have not yet  
8 launched bars, although it is something that we've  
9 actively considered, but at this time it's not  
10 something that gives me concern.

11 Q Do you consider the terms "balance" and  
12 "balanced" to be the same?

13 A I find them similar, but they are  
14 two versions of one word so they are different.

15 Q Is anyone using the term "balance" or  
16 "balanced" with respect to -- let me start that over.

17 Is anyone using the term "balance" or  
18 "balanced" on any of the products on which you -- one  
19 more time.

20 Is anyone using the term "balance" or  
21 "balanced" on any products which bear the --  
22 currently bear the Earth Balance mark? So, for  
23 example, are you aware of anyone using "balance" or  
24 "balanced" on any sort of spread?

25 A Outside of Smart Balance, none that I know

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1 of.

2 Q Is that true with respect to the other  
3 product categories as well?

4 A I can't say that I'm aware of every item  
5 that exists in each category that we're in, but  
6 there's no other that I'm aware of that use the word  
7 "balance."

8 Q Would that be a concern to you if there  
9 were other "balance" or "balanced" marks on similar  
10 types of products?

11 A I don't know. It would depend on what  
12 they were, where they were distributed, if they were  
13 in fact someone competing in the same space or not.

14 Q Is the term "balance" an indicator of  
15 source to you? Does it have strength?

16 A I would say it does. It just depends on  
17 how it's used.

18 Q How about the term "earth"?

19 A Yes, depending on how it's used.

20 Q Are there any other companies using the  
21 term "earth" on similar products to those sold under  
22 the Earth Balance brand?

23 A Not that I'm aware of.

24 (Exhibit 10 marked.)

25 Q (BY MR. SCHROEDER) I'm showing you what's

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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1 filed a trademark application for the mark Balance,  
2 which covered cheese, dairy-based beverages, dips,  
3 butter, breakfast cereals, and snack foods, GFA  
4 objected. I know that was before your time, but if  
5 an application would be filed today for the  
6 trademark, Balance, let's say, for example, to cover  
7 buttery spreads, would that be a concern to you?

8 A It would depend on who was filing it. It  
9 would certainly bring attention, but I can't say to  
10 what degree we would be concerned about it.

11 Q Let me ask you to take a look back at  
12 Exhibit 4, and particularly at Interrogatory No. 26,  
13 and I'd ask you to read the question and the  
14 response, if you would.

15 You've read 26?

16 A 26?

17 Q 26, yes.

18 A Oh, I thought you said 6. I'll read it  
19 now.

20 Q Okay. If I could ask you to -- on  
21 Page 20, the second full paragraph, the statement is  
22 made that, The Earth Balance marks have been and  
23 continue to peacefully co-exist with Opposer's Marks,  
24 both on the USPTO's Principal Register and in  
25 commerce, without customer confusion.

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1 Do you see that there?

2 A Yes.

3 Q And do you agree with that statement?

4 A Yes.

5 Q Do you believe that the Balance Bar  
6 products and the Earth Balance products currently  
7 compete in the marketplace?

8 A Earth Balance is a plant based vegan,  
9 non-GMO brand, primarily sold in natural stores. We  
10 are in the conventional channel, but I feel that our  
11 products and our consumers are different than Balance  
12 Bar.

13 Q So does that mean you feel that the  
14 products do not currently compete? Existing products  
15 I'm talking about.

16 A I do not feel that our existing products  
17 compete with Balance Bar's existing products.

18 Q Okay. Now, if Earth Balance were to  
19 launch a nutrition bar, do you feel like that would  
20 be a competitive product with the Balance Bar  
21 products?

22 A I can tell you that our consumers that  
23 purchase -- currently purchase Earth Balance and that  
24 we would market to are likely very different. It's  
25 hard to say how much they would compete, but based on

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1 where we're at right now, I don't feel that it would  
2 be an issue.

3 Q Do you think that the lack of any  
4 confusion to date might be due to the noncompetitive  
5 nature of the goods currently in the marketplace?

6 A I believe that, you know, our brands are  
7 different. Earth Balance is a vegan brand. We --  
8 our consumers are very conscious eaters, label  
9 readers. They're looking for natural products, which  
10 I believe is different than Balance Bar.

11 Q You mentioned label reader. What is a  
12 label reader?

13 A Someone who looks at the ingredients and  
14 the nutrition facts. They're looking for ingredients  
15 they recognize and know.

16 Q Now, is a label reader one who reads the  
17 front of the package or the back of the package, or  
18 is there a difference?

19 A Both.

20 Q They read both front and back?

21 A Yeah.

22 Q All right. Still on Page 20, the  
23 statement is made that, The BALANCE portion of both  
24 parties' mark is used in ordinary parlance. The  
25 BALANCE portion of the mark thus has a normally

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1 understood and well-recognized descriptive meaning.

2 Do you see that?

3 A Yes.

4 Q Do you agree with those two statements?

5 A Yes.

6 Q Can you explain to me why you believe the  
7 term "balance" has a normally understood and  
8 descriptive meaning?

9 A It's a word that's commonly used in the  
10 English language. I feel that the strength with  
11 Earth Balance comes with the combination of the  
12 two words, earth and balance, which separates it --  
13 us from other brands.

14 Q Okay. Along those lines, it's also stated  
15 here that, GFA's and Balance Bar's marks are  
16 sufficiently distinctive and different as to avoid  
17 confusion, deception and mistake as to source,  
18 sponsorship or association.

19 Do you see that?

20 A Where are you looking?

21 Q I'm on Page 20. It's the first sentence  
22 of the first full paragraph.

23 A I agree with that.

24 Q And I believe you just testified earlier  
25 that that belief is based in part on the combination

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1 of earth and balance?

2 A Yes.

3 Q Are you aware that the Balance Bar Company  
4 has a line of Balance marks?

5 A No, I'm not aware of the marks they have.

6 Q And if I ask you to turn back to Page 19,  
7 the last full paragraph appearing on that page refers  
8 to many third-party uses. Do you see that?

9 A Yes.

10 Q Are you aware of the many third-party uses  
11 and can you expand on that at all?

12 A It -- what comes to mind are the brands  
13 that I mentioned earlier, Smart Balance and the  
14 Simply Balance, but I -- there may be many other  
15 brands and products that use the word "Balance" that  
16 I'm not aware of.

17 Q Thank you.

18 When we looked earlier at Exhibit 12, and  
19 we looked at the total brand awareness of Smart  
20 Balance versus Earth Balance. Do you see that?

21 A Yes.

22 Q Do you have any thoughts as to whether  
23 that difference in total brand awareness may make it  
24 easier or, say, likely or less likely for that brand  
25 to be confused with the Balance Bar marks? So, for

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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1 example, is it more likely that Smart Balance would  
2 be confused or not confused and more likely that  
3 Earth Balance would be confused or not confused?

4 A Well, I'd like to start out by mentioning  
5 that this chart just covers butter, margarine, and  
6 blends --

7 Q Okay.

8 A -- so it's just for those products. But I  
9 can't say whether or not the levels of total brand  
10 awareness for either Smart Balance or Earth Balance  
11 increase or decrease confusion with Balance Bar. To  
12 our knowledge, there's no confusion.

13 Q Is there any concern on your part that if  
14 you were to launch an Earth Balance brand of  
15 nutrition bars, that you might have people looking  
16 for your product and mistakenly buying a Balance Bar  
17 product?

18 A It's hard to say, and I can't say, but as  
19 I mentioned before, our consumers are natural-minded.  
20 They're looking in natural food stores or more  
21 natural sections of conventional stores where a  
22 Balance Bar may or may not be. So I don't know.

23 Q Do you have any thoughts on whether  
24 confusion will be more likely or less likely in a  
25 natural food -- natural food store setting?

**\*\*CONTAINS CONFIDENTIAL TESTIMONY\*\***

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1           A           I can't say, but I can say that Earth  
2           Balance consumers use Earth Balance because our  
3           products are plant based, they're vegan, they're not  
4           GMO. They're made with all natural and organic  
5           ingredients. Those qualities are very important.  
6           And any bar that we would launch would include those.

7                        I can't say whether or not Balance Bar has  
8           all of those things. My guess is no. So I think our  
9           consumers are very different.

10           Q           Have you ever seen any Balance Bar  
11           products in a retail setting?

12           A           Yes.

13           Q           Which -- which location, if you recall?

14           A           I can't say an exact location, but being  
15           in conventional grocery stores, I know I've seen them  
16           before.

17           Q           Do you recall what part of the store you  
18           saw them in?

19           A           It was likely a bar, nutritional section.

20           Q           Have you ever seen nutrition bars located  
21           in the checkout counter of a store?

22           A           Sometimes. I know sometimes they're in  
23           fitness centers and gyms.

24           Q           Do you have any thoughts on whether bars  
25           located at, say, the checkout counter, would be more

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1 likely to be picked up by a consumer without actually  
2 reading the label?

3 A It's hard to say. It just depends on the  
4 consumer, what they're looking for.

5 Q Do you have any thoughts on how your Earth  
6 Balance bars would be priced in the marketplace?

7 A They would probably be priced on the  
8 higher end of the spectrum, as most of our products  
9 are on the higher end of the spectrum of each  
10 category they're in.

11 Q And any thoughts on whether they would be  
12 sold individually or within a box of multiple bars?

13 A I can't say now, but I can say that the  
14 bar products that Boulder Brands makes currently are  
15 in boxes with multiple bars within them. So we have  
16 knowledge and expertise in that area.

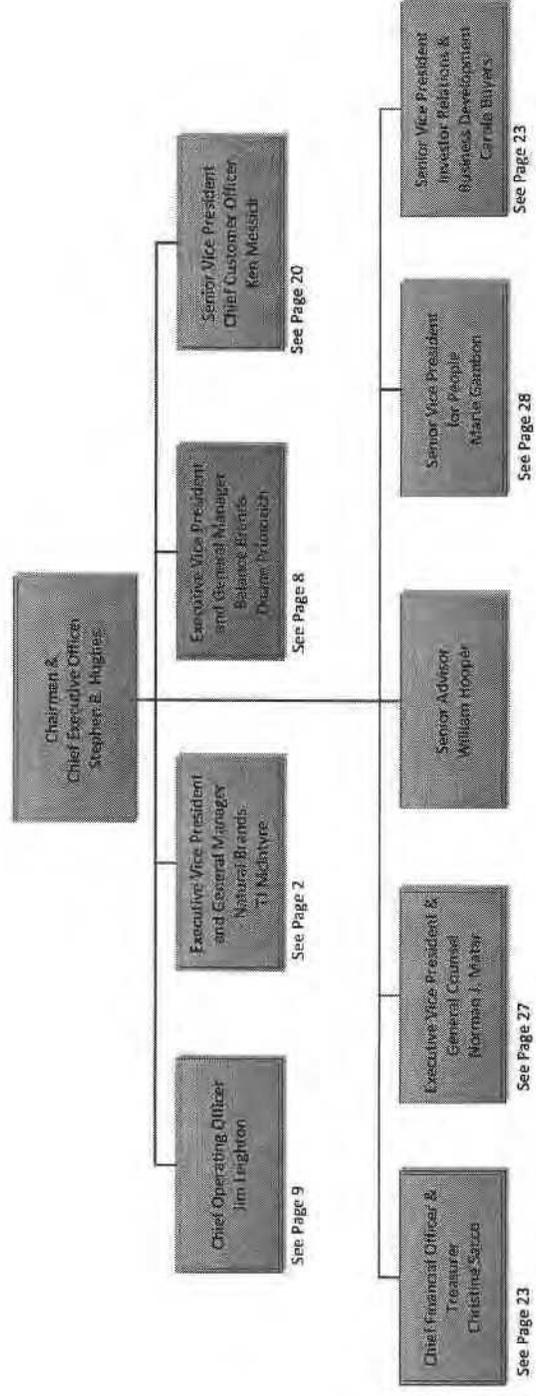
17 Q Do you have any thoughts on whether a  
18 consumer who was familiar with the Balance Bar line  
19 of products might see a new product or, say, a new  
20 nutrition bar, for instance, Earth Balance, and think  
21 that maybe that was an extension of the Balance Bar  
22 line of products?

23 A I can't say.

24 MR. SCHROEDER: Let's take a 5-minute  
25 break now. That would be good.

# **EXHIBIT G2**

Executive Team



*little*  
 EXHIBIT **2**  
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