

ESTTA Tracking number: **ESTTA633944**

Filing date: **10/20/2014**

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

Proceeding	91212477
Party	Defendant GFA Brands, Inc.
Correspondence Address	JOHANNA M WILBERT QUARLES & BRADY LLP 411 E WISCONSIN AVE, SUITE 2040 MILWAUKEE, WI 53202-4497 UNITED STATES tm-dept@quarles.com, johanna.wilbert@quarles.com, david.cross@quarles.com, DRC@quarles.com, marta.levine@quarles.com, andrea.fowler@quarles.com
Submission	Testimony For Defendant
Filer's Name	Johanna M. Wilbert
Filer's e-mail	johanna.wilbert@quarles.com, deena.rafinski@quarles.com
Signature	/s/ Johanna M. Wilbert
Date	10/20/2014
Attachments	Suskind, Michael Affidavit.pdf(151789 bytes) Exhibit A.pdf(1140210 bytes) Exhibit B.pdf(283168 bytes) Exhibit C.pdf(640490 bytes)

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

In the Matter of Application Serial No. 85/751,520: EARTH BALANCE
Published for Opposition March 19, 2013

BALANCE BAR COMPANY

Opposer

v.

Opposition No. 91212477

GFA BRANDS, INC.

Applicant.

AFFIDAVIT OF MICHAEL L. SUSKIND

I, Michael L. Suskind, being duly sworn, declare as follows:

1. I am over the age of 18 and currently reside in Chicago, Illinois. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
2. I am a licensed private detective in the State of Illinois (#115.002114).
3. I previously worked as a private investigator for Marksmen, Inc. for approximately 6 years, from 2000 to 2006.
4. I am currently President of Michael Suskind Investigations, Inc., an agency that specializes in intellectual property investigations.
5. My responsibilities at Michael Suskind Investigations include purchasing product samples, locating witnesses, and determining the ownership of domain names.
6. Since 2000, I have completed more than 6000 in-use trademark investigations.

7. My experience includes investigating a wide range of entities, from single proprietors to large multinational corporations, throughout the U.S., Europe, Latin America and Asia.

8. In fall 2012, Marksmen retained me for the purpose of visiting several designated retail stores, in Chicago, Illinois to locate and purchase consumable items that contained some form of the term "Balance" on the packaging.

9. On September 20, 2012 at approximately 1 p.m. (CST) I visited the CVS store located at 1200 N. Ashland Avenue, Chicago, Illinois 60622. I attempted to locate and purchase all products in the health and nutrition sections of the store that bear some form of the term "Balance."

10. During this visit to CVS, I located and purchased eight products bearing some form of the term "balance." Products I located and purchased during this visit to CVS include: Balanced B-100 Complex (dietary supplement), Ensure Complete Balanced Nutrition (nutrition shake), Boost Balanced Nutritional Drink (nutrition shake), Balanced B-150 (dietary supplement), and Balanced B-50 (dietary supplement).

11. During this visit to CVS, I also located and purchased a Balance Bar snack bar.

12. Attached as Exhibit A is a document bearing production numbers GFA025778, GFA025784, GFASB025785, GFASB025803, GFASB025807, and GFASB025809. This document consists of true and correct copies of photographs of products I purchased from CVS on September 20, 2012. I sent these photographs to Marksmen after I concluded my investigation.

13. On September 21, 2012 at approximately 1 p.m. (CST) I visited the Kramer's Health Foods Store located at 230 S. Wabash Avenue, Chicago, Illinois 60604. I attempted to

locate and purchase all products in the health and nutrition sections of the store that bear some form of the term "Balance."

14. During this visit to Kramer's, I located and purchased 12 products bearing some form of the term "balance." Products I located and purchased during this visit to Kramer's include: Natural Balance Colon Clenz (cleansing formula) and Natural Balance Ultra Colon Clenz (cleansing formula).

15. During this visit to Kramer's, I also located and purchased a Balance Bar snack bar.

16. Attached as Exhibit B is a document bearing production number GFASB025787. This document consists of a true and correct copy of a photograph of products I purchased from Kramer's on September 21, 2012. I sent this photograph to Marksmen after I concluded my investigation.

17. On September 22, 2012 at approximately 1 p.m. (CST) I visited the Walgreens store located at 1554 E. 55th Street, Chicago, Illinois 60615. I attempted to locate and purchase all products in the health and nutrition sections of the store that bear some form of the term "Balance."

18. During this visit to Walgreens, I located and purchased 11 products bearing some form of the term "balance." Products I located and purchased during this visit to Walgreens include: Balanced B-100 Complex (dietary supplement) and Ensure Complete Balanced Nutrition (nutrition shake).

19. During this visit to Walgreens, I also located and purchased a Balance Bar snack bar.

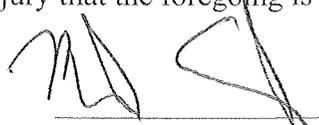
20. Attached as Exhibit C is a document bearing production numbers GFASB025802, GFASB025806, and GFASB025810. This document consists of true and correct copies of photographs of products I purchased from Walgreens on September 22, 2012. I sent these photographs (including photographs of the three receipts) to Marksmen after I concluded my investigation.

21. When I concluded my investigation I sent purchased products to Quarles & Brady. I maintained a strict chain of custody of the products.

AFFIRMATION

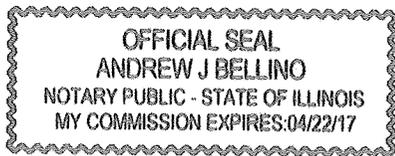
I declare under the penalty of perjury that the foregoing is true and correct.

Dated: October ____, 2014



Michael L. Suskind

STATE OF Illinois, COUNTY OF COOK, ss:





Notary Public

My commission expires 2/22/17

Signature of Officer Administering Oath _____ Title _____

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2014, I served upon counsel of record the foregoing
by causing the same to be delivered by U.S. mail and email to:

R. Glenn Schroeder
Schroeder Law PC
110 Cooper Street #605
Babylon, NY 11702
gschroeder@schroederlawpc.com

Dated this 20th day of October, 2014.

/s/ Johanna M. Wilbert
Johanna M. Wilbert
Quarles & Brady LLP
411 E. Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497
Phone: (414) 277-5000
Facsimile: (414) 978-8942
johanna.wilbert@quarles.com

Exhibit A

COOKIES PEANUT BUTTER
 To Help Minimize Blood Sugar Spikes
 4g Sugar, 4g Protein, 80 Calories
 Naturally and Artificially Flavored
 WITH OTHER MEDICAL SUPERADDITIVES

ATKINS Advantage
 12 - 1.7 OZ (48g) BARS • NET WT 20.4 OZ (579g)

02170 0 868162
 SP ROCKY RD BRWNS 1.75
 UNIT PRICE \$1.24
 YOU PAY \$2.19

04104 F 416812
 ATKNS ADV CHCP GRN 480
 UNIT PRICE \$1.70
 WAS \$2.87

02101 F 146242
 ATKNS ADV BR CHCPB 211
 UNIT PRICE \$1.36
 YOU PAY \$2.87

75% OFF
 71%
 clearance

ATKINS PURE PROTEIN
 19g Protein
 1g Sugar
 180 Calories

Balance bar
 Nutrition Bar for Lasting Energy
 cookie dough
 9 Bars

Balance bar
 Nutrition Bar for Lasting Energy
 yogurt honey peanut
 9 Bars

ATKINS Advantage
 SNACK/ LIGHT MEAL
 10g Protein
 1g Sugar
 180 Calories
 Only 3g Net Carbs

UNIT PRICE \$2.19

86% 2/3.00
 UNIT PRICE \$1.77

86% 2/3.00
 UNIT PRICE \$1.77

UNIT PRICE \$1.09
 \$8.49

50% off
 sale

ZONE Perfect
 Fudge Graham
 19g Protein
 1g Sugar
 180 Calories

ZONE Perfect
 Chocolate Peanut Butter
 19g Protein
 1g Sugar
 180 Calories

ATKINS Advantage
 NEW LOOK
 37g Protein
 1g Sugar
 200 Calories
 Only 3g Net Carbs

ATKINS Advantage
 SNACK/ LIGHT MEAL
 10g Protein
 1g Sugar
 180 Calories

GFASB025778







Nestlé
Nutrition

**190
Calories!**

BOOST[®]
Balanced Nutritional Drink

**CALORIE
SMART**[™]

With **190** Calories and **4g** of Sugars

Rich in High-Quality Protein to Help Maintain Muscle

24 Essential Vitamins & Minerals

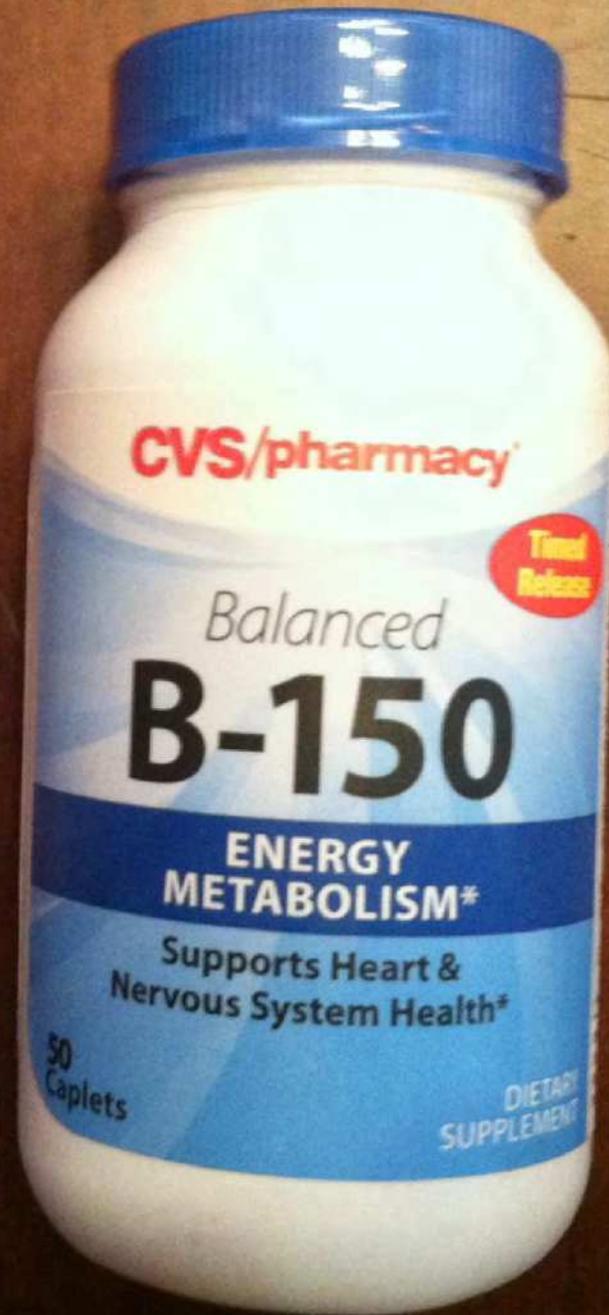




Exhibit B



NATURAL BALANCE®

**Colon
Clenz**

Gentle and Delicate

NATURAL BALANCE

ULTRA
**Colon
Clenz**

Exhibit C



Nature Made

**Balanced B-100
Complex**

TIMED RELEASE

DIETARY SUPPLEMENT

60 TABLETS

**Helps
Convert
Food Into
Energy†**



#1
Doctor
Recommended
Brand

Ensure
balanced nutrition

nutrition
shake

#1
Doctor
Recommended
Brand

Ensure
complete, balanced nutrition

nutrition
shake

Abbott

Ensure
complete, balanced nutrition

nutri
cha

07122466 01862733409
0 18627 73340 9

