

ESTTA Tracking number: **ESTTA633948**

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	Van Horne, Kiersten Affidavit.pdf(642406 bytes ) Exhibit A.pdf(1137322 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 KIERSTEN P. VAN HORNE**

---

I, Kiersten P. Van Horne, being duly sworn, declare as follows:

1. I am over the age of 18 and currently reside in Los Angeles, California. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
2. I am a licensed private investigator in the State of California (#27084).
3. I have worked as a private investigator for Marksmen, Inc. on and off since 1999.
4. My areas of expertise include trademark and patent investigations. I have conducted investigations domestically and internationally.
5. In fall 2012, Marksmen asked me to visit several designated retail stores, in Los Angeles, California to locate and purchase consumable items that contained some form of the term "Balance" on the packaging. I did not know the specific company that retained Marksmen or the trademarks at issue in the dispute.

6. On September 19, 2012 at approximately 5 p.m. (PST) I visited the Lassen's Natural Foods & Vitamins store located at 280 Hillhurst Avenue, Los Angeles, California 90027. 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."

7. During this visit to Lassen's Natural Foods & Vitamins, I located and purchased two products bearing some form of the term "balance." Products I located and purchased during this visit to Lassen's Natural Foods & Vitamins include: Female Balance (dietary supplement) and Whole Body Yeast Balance (herbal/dietary supplement).

8. Lassen's Natural Foods & Vitamins also sold Balance Bar nutrition bars in its health and nutrition section.

9. On September 19, 2012 at approximately 2:15 p.m. (PST) I visited the Erewhon store located at 7660 Beverly Boulevard, Los Angeles, California 90036. 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 Erewhon, I located and purchased two products bearing some form of the term "balance." Products I located and purchased during this visit to Erewhon include: Women's Balance (dietary supplement) and Sweet Balance (dietary supplement).

11. Attached as Exhibit A is a document bearing production numbers GFA025904–  
13. This document is a letter prepared by Mr. William Shanks that includes true and correct copies of photographs of products I purchased from Lassen's and Erewhon on September 19, 2012. I sent these photographs to Marksmen after I concluded my investigation.

12. When I concluded my investigation I sent purchased products, receipts, and photographs of the purchased products to Marksmen. I maintained a strict chain of custody of the products, receipts, and photographs.

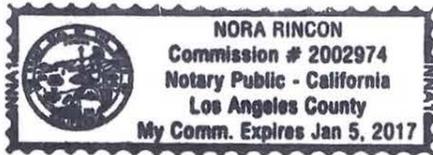
**AFFIRMATION**

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

Dated: October 14, 2014

  
Kiersten P. Van Horne

STATE OF California, COUNTY OF Los Angeles, ss:



Nora Rincon  
Notary Public

My commission expires 1-5-17

Signature of Officer Administering Oath Mellon Title Notary Public

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

CIVIL CODE § 1189

State of California

County of Los Angeles }

On 10-14-14 before me, Nora Rincon, Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Kiersten Peattie Vanhorne  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature: [Handwritten Signature]

Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**

Title or Type of Document: Affidavit

Document Date: \_\_\_\_\_ Number of Pages: 1

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

Corporate Officer — Title(s): \_\_\_\_\_

Individual

Partner —  Limited  General

Attorney in Fact

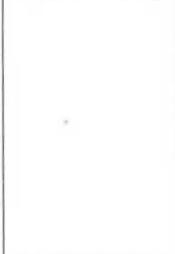
Trustee

Guardian or Conservator

Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

RIGHT THUMBPRINT OF SIGNER  
Top of thumb here



Signer's Name: \_\_\_\_\_

Corporate Officer — Title(s): \_\_\_\_\_

Individual

Partner —  Limited  General

Attorney in Fact

Trustee

Guardian or Conservator

Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

RIGHT THUMBPRINT OF SIGNER  
Top of thumb here



**CERTIFICATE OF SERVICE**

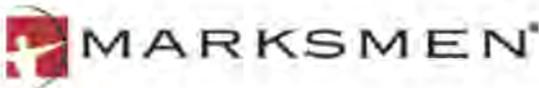
I hereby certify that on October 20, 2014, I served upon counsel of record the foregoing  
by causing the same to be delivered by U.S. mail and email to:

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



PO Box 10038  
Glendale, CA 91209

Voice: 800.558.8838  
Fax: 888.558.4558

International  
Voice: +818.637.8050  
Fax: +818.637.8054

www.marksmen.com  
License PI 23992

**PRIVILEGED AND CONFIDENTIAL**

September 28, 2012

**Johanna Wilbert**  
Quarles & Brady LLP  
411 East Wisconsin Avenue  
Suite 2040  
Milwaukee, WI 53202-4497  
UNITED STATES

**Re: BALANCE ONSITE (LOS ANGELES)**  
**Registrant/Company Info: Various Retail Locations**  
**Provided address/phone:**  
**Client Matter: QBLLP-ACTIVE.FID35301250**  
**File Number: 67889**

Dear Johanna:

Our office received your request on September 12, 2012, instructing us to conduct onsite purchases of products bearing use of the term BALANCE in the Los Angeles, California area.

- **Balance referenced product found at Lassen's Natural Foods: 2**
- **Balance referenced product found at GNC: None**
- **Balance referenced product found at Erewhon: 2**

**INVESTIGATION CONCLUDED PENDING ADVISEMENT.**

**(1) Lassen's Natural Foods & Vitamins - Store #09 - 280 Hillhurst Avenue, Los Angeles, CA 90027, www.lassens.com - (323) 660-0052**

Marksmen, Inc. independent contractor Kiersten Van Horne (CA PI 27083) visited Lassen's Natural Foods & Vitamins, at the above captioned address, on September 19, 2012, at approximately 5:00 - 6:00pm (PST). We found Lassen's to primarily be a boutique natural foods store, with large sections designated for vitamins & minerals, as well as cereals. Investigator Van Horne attempted to locate and purchase any and all products in the health and nutrition sections of the healthfood store that bear use of the term BALANCE. Investigator Van Horne purchased the following products listed by item number / product name / manufacturer / type of product:

**Item 1 - Female Balance** - Siddatech - Dietary Supplement

**Item 2 - Whole Body Yeast Balance** - Enzymatic Therapy, Inc. - Herbal/Dietary Supplement

We found BALANCE BARS for sale in a single rack display of nutrition bars, near the check out counters. Due to the cramped nature of the store, and the poor lighting, the quality of the photographs is less than optimal.

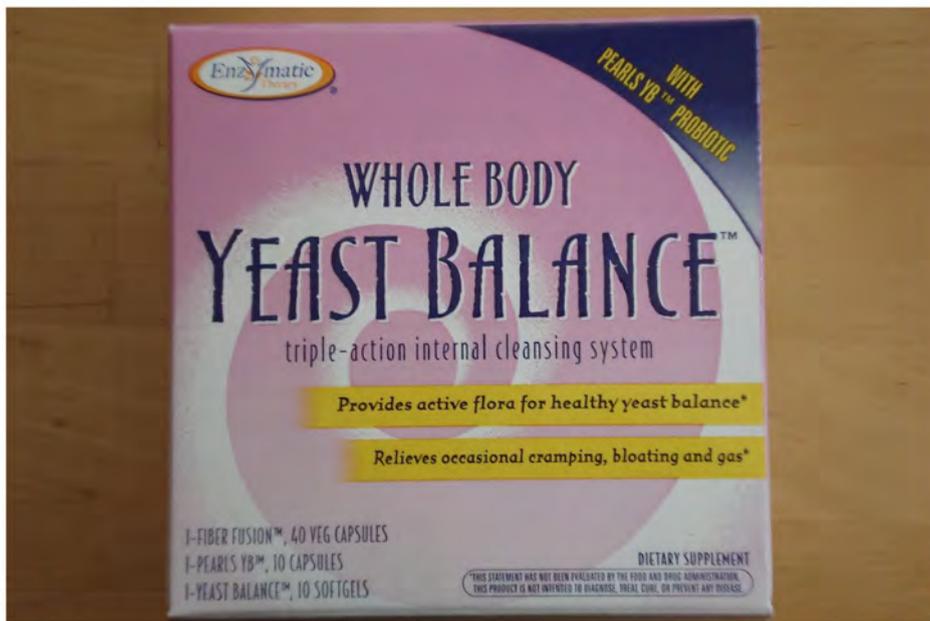


In addition to the BALANCE BARS, we found the following items for sale in the vitamins and minerals section of the store - several rows away from the nutrition bar display - using the word BALANCE in the name:

Item 1. Sidda Flower Essence's FEMALE BALANCE, which is described on the packaging as a "dietary supplement" used to "balance hormones & libido, ease stress related to PMS." We purchased this product for \$19.99 USD plus sales tax.



Item 2. Enzymatic Therapy's WHOLE BODY YEAST BALANCE, which is described on the product's packaging as a "triple-action internal cleansing system," which "provides active flora for healthy yeast balance" and "relieves occasional cramping, bloating and gas," and is "with Pearls YB Probiotic." We purchased this product for \$20.79 USD plus sales tax.

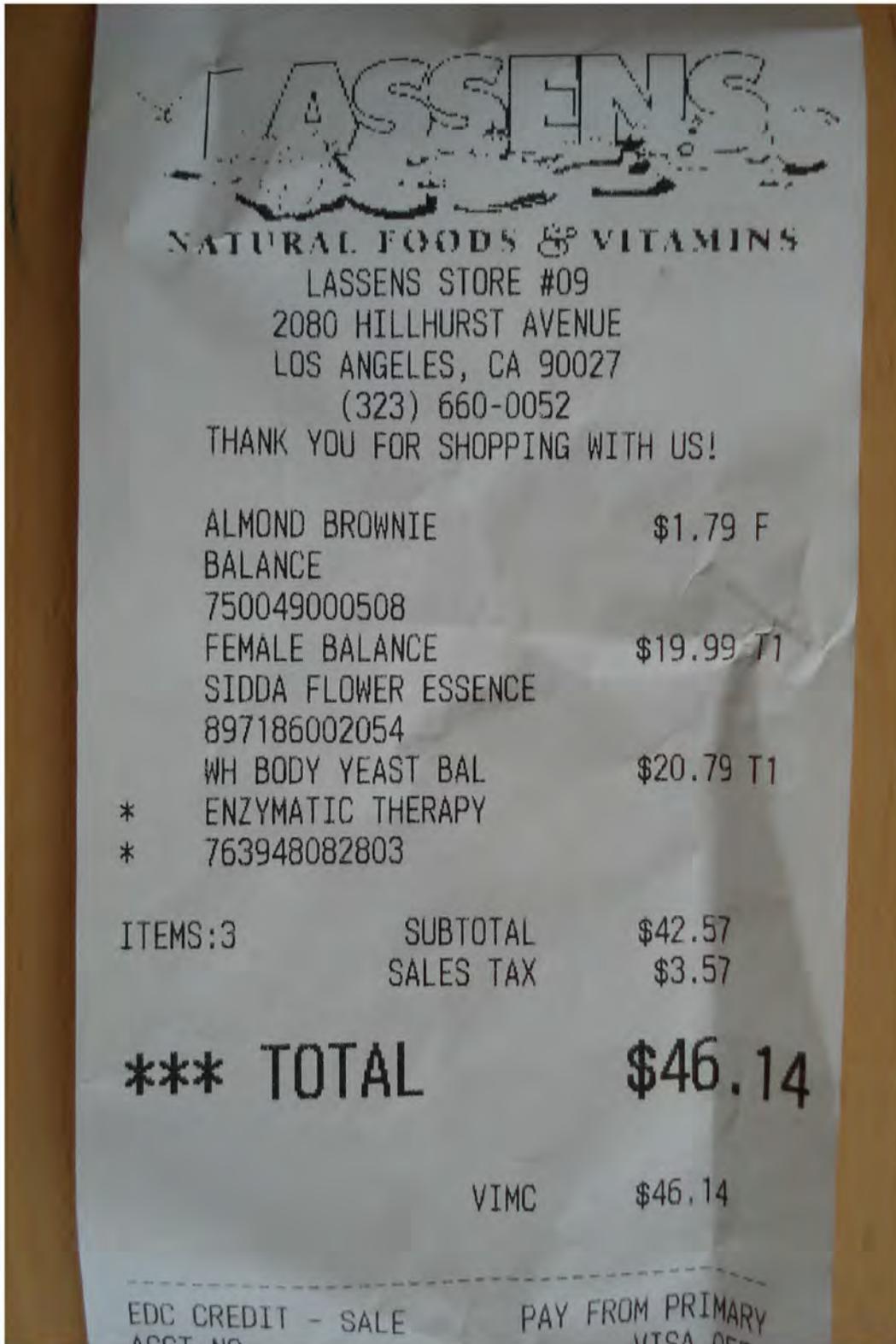


We found one bottle of Plantlife's BALANCE Aromatherapy Massage Oil. While it was not included amongst your targeted categories, it was within a few feet of the nutrition bar display where we found the BALANCE BARS. We did not make a product purchase as it was not included amongst the targeted categories.



We found no additional items in any of the targeted categories utilizing the word BALANCE as part of the product name, tagline, or display.

We purchased one of each of the above products, excepting the massage oil, in addition to one (1) Yogurt Honey Peanut BALANCE BAR:



**(2) GNC - Store #8017 - 5419 Hollywood Blvd., Suite B, Los Angeles, CA 90027, www.gnc.com - (323) 871-8802**

Marksman, Inc. independent contractor Kiersten Van Horne visited GNC, at the above captioned address, on September 19, 2012, from approximately 4:15pm-4:45pm (PST). Investigator Van Horne found this location to concentrate largely on supplements and powders, with less than one aisle designated to nutrition bars.

We spoke with a salesperson who told us that he had worked at GNC for "seven months" and that, in that time, GNC has never sold BALANCE BARS. He noted that "my sister was [working] here before me, so they might have sold them [BALANCE BARS] then."

When we found the following shelving with the BALANCE BAR name on it, the salesperson noted, "those [shelves] have been here since I've been working here." He then reiterated that he, himself, has not sold BALANCE BARS

while working for GNC, but noted "I guess we must've" sold BALANCE BARS:





**(3) Erewhon - (sole location) - 7660 E. Beverly Blvd., Los Angeles, CA 90036, www.erewhon.com - (323) 937-0777**

We called Erewhon, at the above-captioned address, where we spoke with a male in customer service, who told us that he "thinks" they carry BALANCE BARS. "I'm pretty sure."

We then visited Erewhon, at the above captioned address, on September 19, 2012, from approximately 2:15 - 3:45pm. We found Erewhon to primarily be a natural foods store, with large sections designated for vitamins, minerals, supplements, nutrition bars, cereal, and all targeted categories provided in your investigation request.

We found no BALANCE BARS for sale anywhere in the store. We found all nutrition bars isolated to a very large, single display rack toward the front of the store, immediately behind the check out aisles and registers.

Investigator Van Horne purchased the following products listed by item number / product name / manufacturer / type of product:

**Item 1 - WOMEN'S BALANCE** - Gaia Herbs - Dietary Supplement



Item 2 - SWEET BALANCE - Natural Max (Nutraceutical Corp.) - Dietary Supplement



Here is a record of our purchase of one of each of the above products we found at Erewhon:



Our entire file of Los Angeles, CA onsite photos, products purchased photos and spread sheet can be downloaded [here](#).

As you requested, we will be forwarding the purchased samples, receipts and via air courier upon your instruction. Kiersten Van Horne has maintained a strict chain of custody with regard to the products purchased from the retail locations noted in this report.

Please advise if you would like us to make further attempts at purchase in the Los Angeles area.

Please note that the Excel spreadsheet gives each product an item number, which correspond to the numbers assigned each product above.

Pending further advisement from you, we have concluded our investigation of BALANCE ONSITE (LOS ANGELES). If you have further need of our services on this or any other matter, please contact us.

Best Regards,

Bill Shanks

Marksmen Contact: Bill Shanks  
Email: bshanks@marksmen.com  
Phone: (800) 558-8838

KVH