

ESTTA Tracking number: **ESTTA633958**

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	Flemmings, Marie Affidavit.pdf(1387099 bytes ) Exhibit A.pdf(1116337 bytes ) Exhibit B.pdf(2545375 bytes )

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

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

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BALANCE BAR COMPANY

Opposer

v.

Opposition No. 91212477

GFA BRANDS, INC.

Applicant.

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**AFFIDAVIT OF MARIE FLEMMINGS**

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I, Marie Flemmings, 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 have worked as an investigator for Marksmen, Inc. for approximately one year.
3. I have conducted investigations domestically and internationally.
4. In spring 2014, Marksmen asked me to visit several designated retail stores, in the Glendale, California area 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. Before investigating a store, I first determined whether the store carried Balance Bar products. If so, after locating the Balance Bar product, I conducted the further investigation by searching the grocery and supplement/pharmacy

section of the store for any packaged food item or nutritional supplement that contained the term “balance” on the product label.

5. On May 21, 2014, at approximately 1 a.m. (PST), I visited the Whole Foods Market located at 331 N. Glendale Avenue, Glendale, CA 91206. I attempted to locate and purchase all products bearing some form of the term “Balance.”

6. During this visit to Whole Foods Market, I located and purchased 11 products bearing some form of the term “balance.” Products I located and purchased during this visit to Whole Foods Market include: Balancing Act Half Caffeinated City Roast (coffee), Balanced B Complex (dietary supplement), Ayurvedic Balanced Tea, and Sugar Balance Tea (herbal tea supplement).

7. During this visit to Whole Foods Market, I also located and purchased a Balance Bar snack bar and the following Earth Balance products: Earth Balance Vegan Cheddar Flavor Squares, Earth Balance Kettle Chips, Earth Balance White Cheddar Popcorn and Earth Balance Aged White Cheddar Puffs.

8. Attached as Exhibit A is a document bearing production numbers GFA\_EB002354, GFA\_EB002356–62, and GFA\_EB002367. This document consists of true and correct copies of photographs of products I purchased from Whole Foods Market on May 21, 2014. I sent these photographs to Marksmen after I concluded my investigation.

9. On May 27, 2014, at approximately 12:30 p.m. (PST), I visited the Target store located at 100 West Broadway, #700, Glendale, CA 91210. I attempted to locate and purchase all products bearing some form of the term “Balance.”

10. During this visit to Target, I located and purchased 22 products bearing some form of the term “balance.” Products I located and purchased during this visit to Target include:

Simply Balanced Cherry Almond Greek Yogurt Granola Bars, Simply Balanced Nut and Seed Bars, Simply Balanced Organic Maple Syrup, Simply Balanced Fruit Strips, Simply Balanced Organic All Purpose Unbleached Flour, Simply Balanced Strawberry Slices (dried fruit), Simply Balanced Gluten Free Multi-Seed Brown Rice Crackers, Simply Balanced High Protein Cinnamon Crisp Cereal, Simply Balanced Peach Slices (dried fruit), Simply Balanced Montmorency Cherries (dried fruit), Simply Balanced Organic Tortilla Chips Yellow Corn, Simply Balanced Whole Grain Popcorn Lightly Salted, Simply Balanced Twisted Fruit Ropes Strawberry Banana, Simply Balanced Gluten Free Multi-Grain Brown Rice Crackers, Simply Balanced Organic Hot Cereal Multigrain Blend, Simply Balanced Organic Black Tea Traditional Chai, Simply Balanced Organic Green Tea Soothing Ginger, and Simply Balanced Fruit Twists Blueberry Pomegranate.

11. During this visit to Target, I also located and purchased a Balance Bar snack bar and the following Smart Balance products: Smart Balance Non-Stick Cooking Spray and Smart Balance Natural Creamy Peanut Butter.

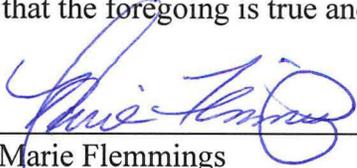
12. Attached as Exhibit B is a document bearing production numbers GFA\_EB002312–25, and GFA\_EB002327–33. This document consists of true and correct copies of photographs of products I purchased from Target on May 27, 2014. I sent these photographs to Marksmen after I concluded my investigation.

13. When I concluded my investigation I sent the 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 20, 2014

  
\_\_\_\_\_  
Marie Flemmings

STATE OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, ss:

*SEE ATTACHED*

\_\_\_\_\_  
Notary Public

My commission expires

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



earth  
balance

vegan aged white cheddar

popcorn

plant-based  
diet  
friendly

BEST BY  
EXPIRES 12/14/20  
12/14/20

NATURAL



AYURVEDIC BALANCED TEA

**Herbal  
cup™**

Enjoy healing herbs  
in a cup!

***Bednite***

For Restful Sleep\*



HERBAL TEA  
CAFFEINE FREE

16 Tea Bags  
Net Wt. 0.88 Oz (25g)

HERBAL TEA SUPPLEMENT

NUTRITIONAL NOURISHMENT  
SLO-FOOD PROCESS  
MADE WITH LOVE SINCE 1973  
FRESH & LOCAL FOOD  
MADE WITH SINCE 1973  
AUTHENTIC SLO-FOOD

# MegaFood™

*Fresh From Farm To Tablet™*

## Balanced B Complex

**Nourish • Energize • Replenish**



**60**  
TABLETS  
**60**  
SERVINGS

WHOLE FOOD MULTIVITAMIN  
DIETARY SUPPLEMENT

365  
EVERY DAY VALUE

Balancing Act  
half caffeinated  
CITY ROAST

COFFEE BEANS  
Ground  
COFFEE BEANS

NET WT 11 OZ (312g) ©



earth  
balance™

vegan aged white cheddar flavor  
puffs

BEST BY  
16 SEP 2014 BP  
4079069 07-08





# earth balance™

vegan cheddar flavor

# squares



Vegan

0g  
Trans  
Fat

Non-  
GMO

NET WT 6 OZ. (170g)

Herbal Tea  
All Natural  
CAFFEINE-FREE



ANCIENT  
CHINESE  
MEDICINALS

# SUGAR BALANCE™

& WOMEN'S TONIC WITH DONG QUAI

Helps Maintain Normal Blood Sugar Levels\*  
Promotes Healthy Menstruation & Menopause\*

20 TEA BAGS    HERBAL DIETARY SUPPLEMENT    NET WT. 1.34 OZ. (38G)



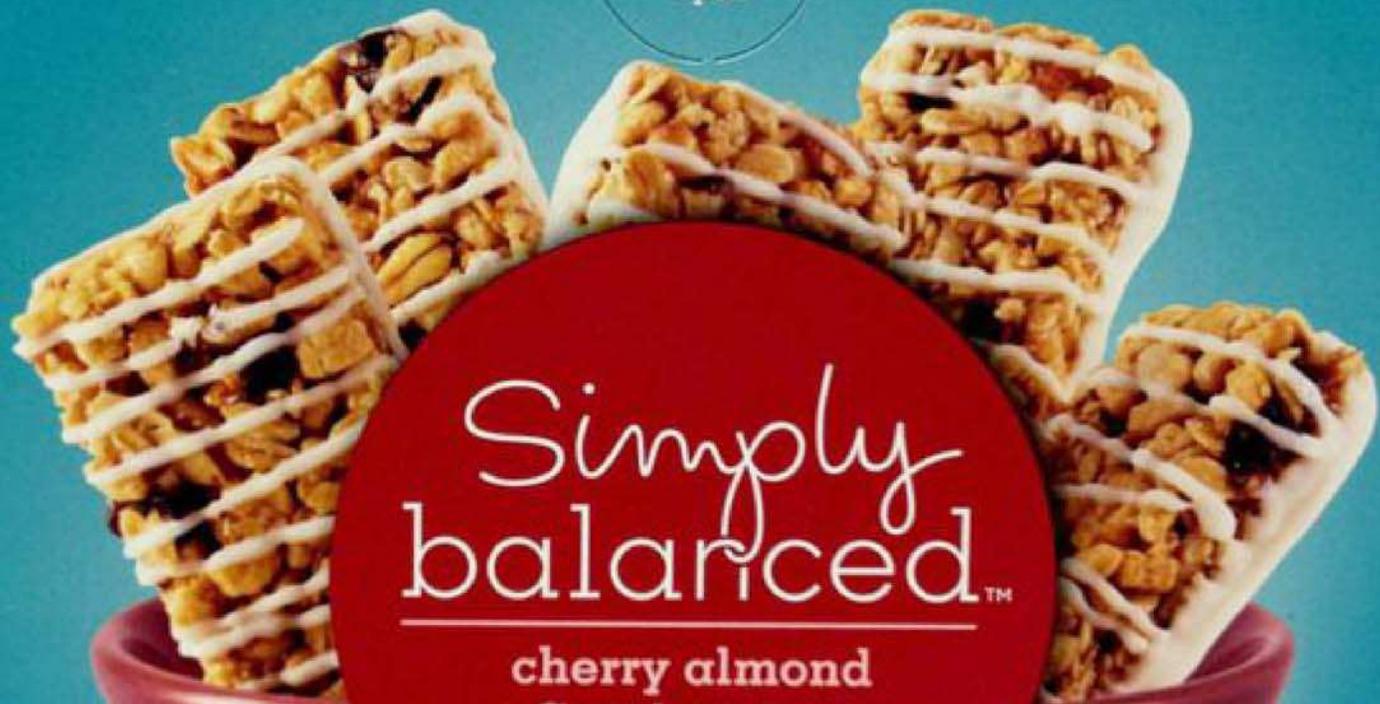
GFA\_EB002367

# Exhibit B



5 count

push to  
open



Simply  
balanced™

cherry almond  
Greek yogurt  
granola bars



Serving suggestion

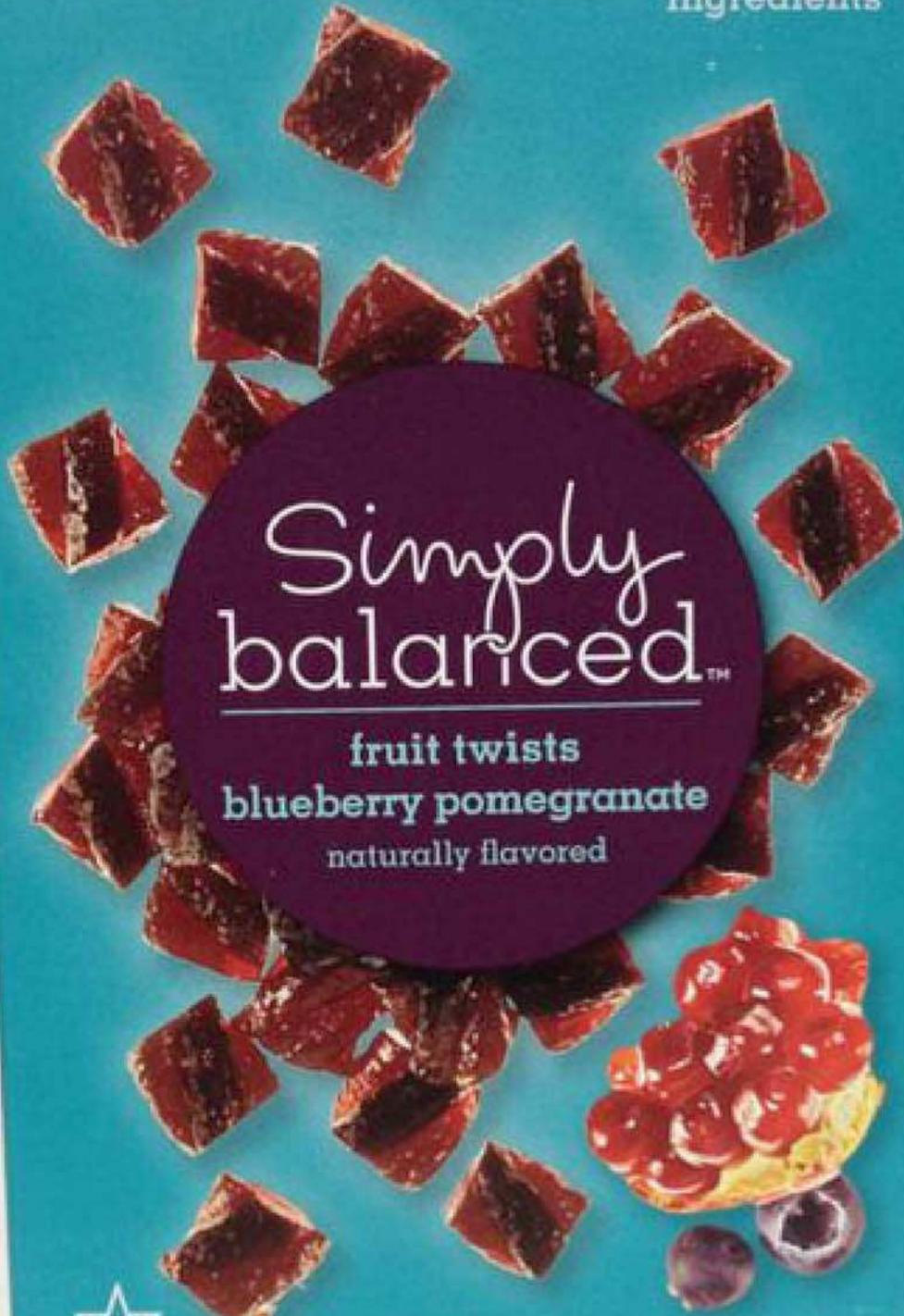
NET WT 6.2 OZ (175g) / 5—1.2 OZ (35g) BARS



1 fruit  
serving  
per pouch\*

6 count

made with  
natural  
ingredients



Simply  
balanced™

fruit twists  
blueberry pomegranate  
naturally flavored



Serving suggestion

NET WT 6 — 0.85 OZ (24g) POUCHES / NET WT 5.1 OZ (144g)



made with  
natural  
ingredients

Simply  
balariced™

gluten free multi-seed  
brown rice crackers



Serving suggestion  
Enlarged to show detail



NET WT 3.5 OZ (100g)



ingredients

Simply  
balanced™

twisted fruit ropes  
strawberry banana  
naturally flavored



Serving suggestion

8 — 0.63 OZ (18g) ROPES / NET WT 5 OZ (144g)

GFA\_EB002317

tear here

4 fruit  
servings\*  
per pouch

Simply  
balariced™

strawberry slices  
freeze dried fruit  
all natural

Serving suggestion

NET WT 1.137 (28g)





25g  
whole grains  
per serving

a blend of oats, rice,  
barley & wheat

Simply  
balanced™

organic hot cereal  
multigrain blend

NET WT 2.071 510g

20 count

a peaceful blend  
of ginger root and  
lemongrass

Simply  
balanced™

organic green tea  
soothing ginger



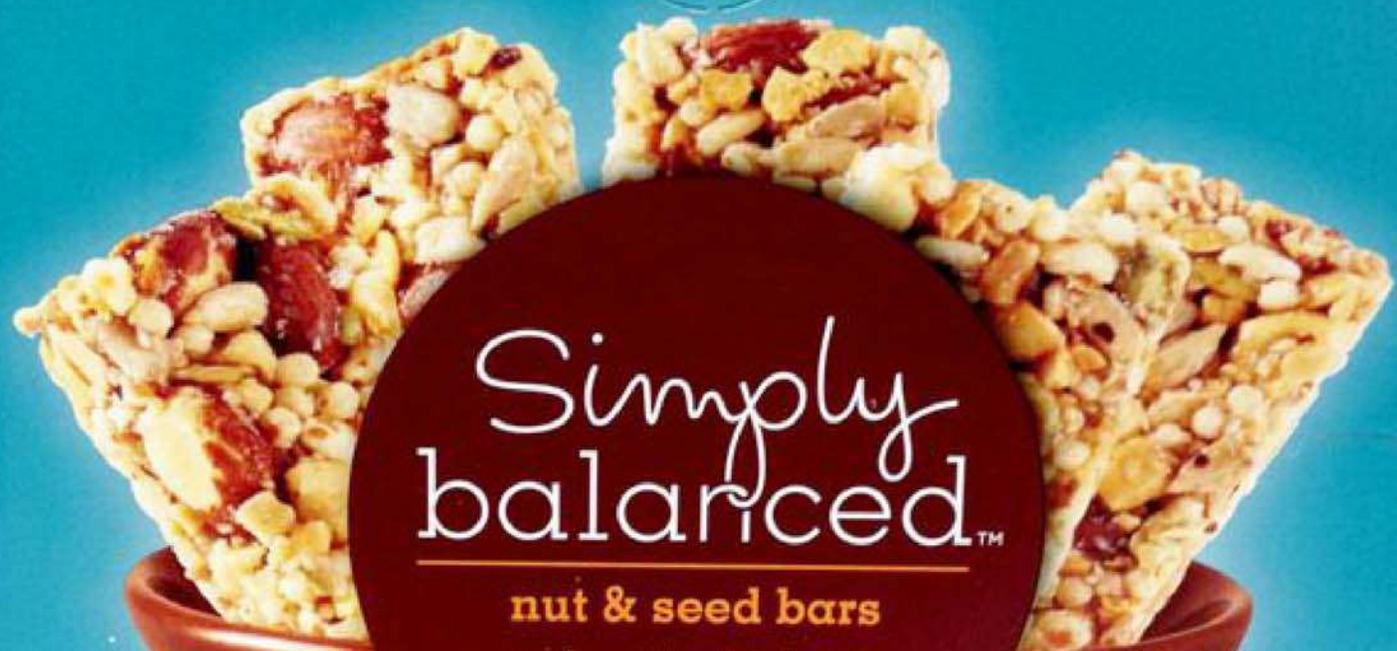
Serving suggestion

NET WT 1.41 OZ (40g) ®



5 count

push to  
open



Simply  
balariced™

**nut & seed bars**  
made with mixed nuts,  
sunflower  
& pumpkin seeds



Serving suggestion

NET WT 6.2 OZ (175g) / 5—1.2 OZ (35g) BARS



pull to open

reclosable for freshness

gluten free

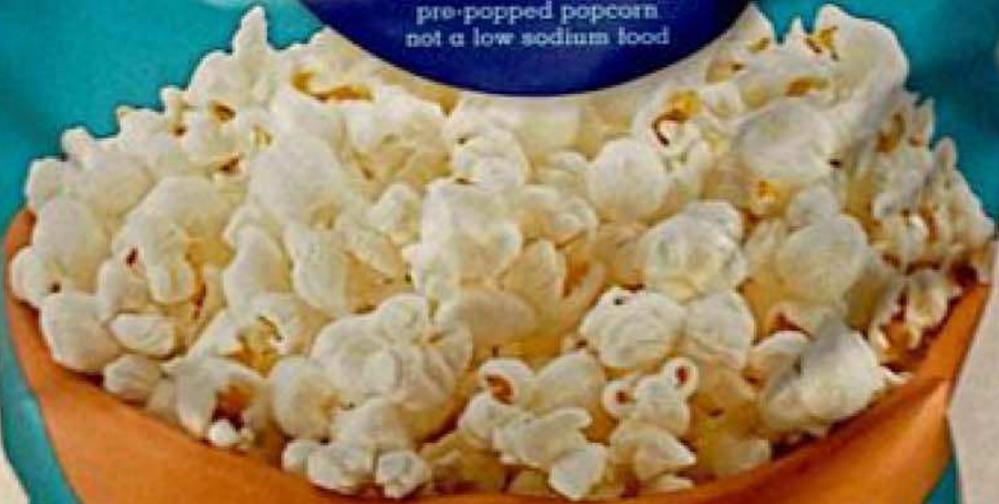
**45**  
calories  
per cup

BEST BY  
27 AUG 2014  
41254 10 07 46  
AD0173

Simply  
balanced™

whole grain popcorn  
lightly salted

55% less sodium  
than the average seasoned  
pre-popped popcorn  
not a low sodium food



NET WT 5.5 OZ (156g)



made with  
natural  
ingredients

25 count

Simply  
balanced™

fruit strips  
strawberry  
naturally flavored



Serving suggestion

25 — 0.5 OZ (14g) STRIPS / NET WT 12.5 OZ (350g)



Simply  
balanced™

high protein cinnamon  
crisp cereal

made with natural  
ingredients

Serving suggestion

NET WT 13 OZ (369g) ®

made with  
natural  
ingredients

# Simply balanced™

gluten free multigrain  
with flax  
brown rice crackers



Serving suggestion  
Enlarged to show detail



NET WT 3.5 OZ (100g)



20 count

a classic, aromatic  
blend with cinnamon,  
cardamom and nutmeg

Simply  
balanced™

organic black tea  
traditional chai



Serving suggestion

NET WT 1.41 OZ (40g)



Simply  
balariced™

organic all purpose  
unbleached flour





tear here

available for freshness

6 fruit  
servings\*  
per pouch

Simply  
balanced™

peach slices  
freeze dried fruit

made with  
natural ingredients

Serving suggestion

NET WT 1.75 OZ (50g)



pull to open  
reclosable for freshness

no preservatives  
gluten free

best by  
08 APR 2014

Simply  
balanced.  
organic tortilla chips  
yellow corn



Serving suggestion  
NET WT 12 OZ (340g)



7.19

Gluten Free

7.19



BALANCE 6PK 6.49

BALANCE 6PK 6.49

Gluten Free