

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE TTAB**

Hearing: October 22, 2015

Mailed: March 31, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Balance Bar Company

v.

GFA Brands, Inc.

Opposition No. 91196954  
to Serial No. 77864206  
Opposition No. 91197748  
to Serial No. 77864268  
and Opposition No. 91212477  
to Serial No. 85751520

R. Glenn Schroeder, of Schroeder Law PC,  
for Balance Bar Company.

David R. Cross, Marta S. Levine and Johanna M. Wilbert,  
of Quarles & Brady LLP,  
for GFA Brands, Inc.

Before Seeherman, Ritchie and Adlin, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

On November 3, 2009, GFA Brands, Inc. (“Applicant”) applied to register SMART BALANCE, in standard character form, for “vitamins, supplements, vitamin enriched beverages, meal replacement bars, liquid meal

**Opposition Nos. 91196954, 91197748 and 91212477**

replacements” in International Class 5.<sup>1</sup> On the same day, Applicant also applied to register the same mark for “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.<sup>2</sup> On October 11, 2012, Applicant then applied to register EARTH BALANCE, in standard character form, for, among other things, “nut and seed-based snack bars,” in International Class 29.<sup>3</sup>

Balance Bar Company (“Opposer”), filed oppositions against all three applications on the ground that use of Applicant’s marks would be likely to cause confusion with Opposer’s previously used and registered mark BALANCE “and variations” thereof. These include the registered marks BALANCE, in typed format,<sup>4</sup> for “protein-based, nutrient-dense snack bars”<sup>5</sup>;

---

<sup>1</sup> Application Serial No. 77864206, filed under Section 1(b) of the Trademark Act, alleging a bona fide intent to use the mark in commerce.

<sup>2</sup> Application Serial No. 77864268, filed under Section 1(b) of the Trademark Act, alleging a bona fide intent to use the mark in commerce.

<sup>3</sup> Application Serial No. 85751520, filed under Section 1(b) of the Trademark Act, alleging a bona fide intent to use the mark in commerce. The application includes other goods and other classes, but they were not opposed, and are not subject to this proceeding.

<sup>4</sup> “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. . . . A typed mark is the legal equivalent of a standard character mark.” TMEP § 807.03(i) (January 2015).

**Opposition Nos. 91196954, 91197748 and 91212477**

BALANCE BAR, in typed format, for “nutritional food supplements”<sup>6</sup> and “protein-based, nutrient-dense snack bars”<sup>7</sup>; BALANCE GOLD, in typed format, for “snack bars”<sup>8</sup>; BALANCE BAR GOLD, in standard character format, for “protein-based, nutrient-dense snack bars”<sup>9</sup>; and BALANCE BARE, in standard character format, for “protein-based, nutrient-dense snack bars” and “grain-based food bars also containing fruits and nuts”<sup>10</sup>; as well as a pleaded application for BALANCE, in standard character format, for “nutritional supplements; dietary food supplements,” and for “cereal-based, rice-based, or granola-based snack bars and snack foods,”<sup>11</sup> which matured into a registration during the pendency of 91196954 and 91197748.

Among other allegations, Opposer asserted in the SMART BALANCE oppositions that its BALANCE mark is “famous.” 1 TTABVUE 7, 91196954.<sup>12</sup>

---

<sup>5</sup> Registration No. 2745850, in International Class 29, registered August 5, 2003. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

<sup>6</sup> Registration No. 2659753, in International Class 29, registered August 5, 2003, and disclaiming exclusive rights to the term “BAR” apart from the mark as shown. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

<sup>7</sup> Registration No. 3036771, in International Class 29, registered December 27, 2005, and disclaiming exclusive rights to the term “BAR” apart from the mark as shown. Sections 8 and 15 affidavits accepted and acknowledged.

<sup>8</sup> Registration No. 2636101, in International Class 30, registered October 15, 2002. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

<sup>9</sup> Registration No. 2999244, in International Class 29, registered September 20, 2005, and disclaiming exclusive rights to the term “BAR” apart from the mark as shown. Sections 8 and 15 affidavits accepted and acknowledged.

<sup>10</sup> Registration No. 3436917, in International Classes 29 and 30, registered May 27, 2008.

<sup>11</sup> Registration No. 3937988, in International Classes 5 and 30, registered March 29, 2011. This registration was issued before the filing of the notice of opposition in 91212477, and was pleaded as a registration, rather than as an application, therein.

<sup>12</sup> The notices in 91196954 and 91197748 included a claim for dilution, which Opposer did not pursue on brief. Accordingly, we deem this claim to be waived. *See Alcatraz Media Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB

**Opposition Nos. 91196954, 91197748 and 91212477**

Applicant denied the salient allegations of the notices. Applicant also asserted various affirmative defenses, including that the marks “peacefully coexist.” 4 TTABVUE 8.

With the consent of both parties, the two oppositions against the SMART BALANCE marks were consolidated on February 7, 2011, with Opposition No. 91196954 being the parent case. Proceedings continued separately in Opposition No. 91212477 against the EARTH BALANCE mark.

After trial, both parties filed briefs, and Opposer filed a reply brief in both 91196954/91197748 (SMART BALANCE) and 91212477 (EARTH BALANCE).

Hearings were requested by Applicant in both proceedings, and the parties jointly requested that the oral hearings be combined. The request was granted, and an oral hearing was heard by this panel on all three cases on October 22, 2015.

Since the oppositions all deal with common questions of law and fact, we consolidate the three, and determine them in this single decision. Where relevant, we have taken into account relevant factual differences in the cases.

---

2013); *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

### **The Record and Evidentiary Issues**

The record consists of the pleadings; the files of the involved applications; and the following evidence submitted by the parties:

By Opposer in 91196954/91197748:

1. Notice of Reliance on copies of pleaded registrations;
2. Notice of Reliance on copies of web pages from Opposer's website, *balance.com*;
3. Notices of Reliance on Applicant's discovery responses;
4. Notice of Reliance on Applicant's trial brief in Opposition No. 91194974, discussed *infra*,<sup>13</sup> to show "admissions against interest";
5. Notice of Reliance<sup>14</sup> regarding Opposer's policing of its marks;
6. Notice of Reliance on "Likelihood of Confusion Studies and the Straitened Scope of Squirt" by Jerre B. Swann, published in Vol. 98 of The Trademark Reporter, May-June 2008.
7. Testimony deposition of Erin Lifeso, Opposer's Senior Director, Marketing, dated April 30, 2014;
8. Testimony deposition of Patrick Cornacchiulo, Vice-President of Marketing for NBTY,<sup>15</sup> dated May 1, 2014;

---

<sup>13</sup> That opposition was determined in the precedential Board case *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232 (TTAB 2015). Two applications owned by Applicant were opposed in that case, including the application in current proceeding No. 91197748 (Serial No. 77864268). The opposition was dismissed.

<sup>14</sup> This submission consists of printouts from the Board's TTABVUE system, showing oppositions brought by Opposer.

<sup>15</sup> Mr. Cornacchiulo testified that NBTY purchased the Balance Bar Company in November of 2012. 125 TTABVUE 15.

**Opposition Nos. 91196954, 91197748 and 91212477**

9. Testimony deposition of expert Jacob Jacoby, dated August 27, 2014, and including as an exhibit his expert reports.

By Applicant in 91196954/91197748

1. Notice of Reliance on Applicant's registrations of SMART BALANCE and EARTH BALANCE for various goods;
2. Notice of Reliance on "product packaging" showing third-party use of the term "BALANCE."<sup>16</sup>
3. Notice of Reliance on third-party websites showing use of "BALANCE";
4. Notice of Reliance on third-party cookbooks showing descriptive use of the term "BALANCE";
5. Notice of Reliance on third-party registrations containing the term "BALANCE";
6. Notice of Reliance on the Rule 30(b)(6) discovery deposition of Peter B. Wilson, Applicant's President and Chief Executive Officer, dated December 11, 2012;
7. Notice of Reliance on Opposer's discovery responses;
8. Notice of Reliance on Applicant's websites for SMART BALANCE and EARTH BALANCE;
9. Affidavit of William B. Shanks, licensed private investigator, dated July 18, 2014;<sup>17</sup>

---

<sup>16</sup> Although this is not suitable material for notice of reliance, pursuant to 37 CFR 2.122(e), Opposer treated the material as being of record. *See* 129 TTABVUE 11, and 25. Therefore, we consider it to be of record pursuant to stipulation.

**Opposition Nos. 91196954, 91197748 and 91212477**

10. Affidavit of Kiersten P. Van Horne, licensed private investigator, dated July 25, 2014;
11. Affidavit of Michael L. Suskind, licensed private investigator, dated July 25, 2014;
12. Testimony deposition of Adriane Little, Category Manager, Earth Balance, for Boulder Brands,<sup>18</sup> dated July 23, 2014;
13. Testimony deposition of Timothy Kraft, Senior Vice-President and Associate General Counsel, for Boulder Brands, dated July 23, 2014;
14. Testimony deposition of William E. Hooper, director emeritus and senior advisor to the marketing team for Boulder Brands, dated July 15, 2014;
15. Testimony deposition of expert Philip Johnson, dated July 21, 2014, including an expert report submitted as an exhibit thereto.

By Opposer in 91212477:

1. Notice of Reliance on copies of pleaded registrations;
2. Notice of Reliance on copies of web pages from Opposer's website, *balance.com*;

---

<sup>17</sup> The parties stipulated that testimony could be introduced by Applicant via affidavit in lieu of live deposition for certain witnesses, including William B. Shanks, Kiersten P. Van Horne, and Michael Suskind. 100 TTABVUE 2, 91196954. The parties made the same stipulation in 91212477 for these witnesses as well as for Chris Rodermond, Marie Flemmings, and for both parties' expert witnesses. 22 TTABVUE 2, 91212477. The parties also stipulated to the admissibility of various entries from 91196954 into the record in 91212477. *Id.* at 3.

<sup>18</sup> Ms. Little stated that Boulder Brands is the "overarching company" for Applicant's GFA Brands. 114 TTABVUE 9.

**Opposition Nos. 91196954, 91197748 and 91212477**

3. Notices of Reliance on Applicant's discovery responses;
4. Notice of Reliance on Applicant's trial brief in Opposition No. 91194974 to show "admissions against interest";
5. Notice of Reliance on the Rule 30(b)(6) discovery deposition of Adrienne Little, dated June 10, 2014;
6. Testimony deposition of Patrick Cornacchiulo, dated July 30, 2014;
7. Testimony deposition of Erin Lifeso, dated July 30, 2014.
8. Affidavit of expert witness Jacob Jacoby, dated December 2, 2014, with report.

By Applicant in 91212477:

1. Notice of Reliance on Applicant's registrations of SMART BALANCE and EARTH BALANCE for various goods;
2. Notice of Reliance on "product packaging" showing third-party use of the term "BALANCE."
3. Notice of Reliance on third-party websites showing use of "BALANCE";
4. Notice of Reliance on third-party cookbooks showing descriptive use of the term "BALANCE";
5. Notice of Reliance on third-party registrations containing the term "BALANCE";
6. Notice of Reliance of Opposer's discovery responses;
7. Notice of Reliance on Applicant's websites for SMART BALANCE and EARTH BALANCE;

**Opposition Nos. 91196954, 91197748 and 91212477**

8. Notice of Reliance on various testimonial depositions from 91196954/91197748.
9. Notice of Reliance on the 30(b)(6) discovery deposition of Patrick Cornacchiulo, dated June 19, 2014;
10. Affidavit of William B. Shanks, licensed private investigator, dated October 13, 2014;
11. Affidavit of Kiersten P. Van Horne, licensed private investigator, dated October 14, 2014;
12. Affidavit of Marie Flemmings, licensed private investigator, dated October 20, 2014;
13. Affidavit of Chris Rodermond, licensed private investigator, dated October 7, 2014;
14. Affidavit of Michael L. Suskind, licensed private investigator, dated “October \_\_, 2014”;<sup>19</sup>
15. Testimony deposition of Howard Seiferas, Applicant’s Senior Vice President Sales Services and Logistics, dated September 19, 2014;
16. Testimony deposition of Adriane Little, dated October 15, 2014;
17. Affidavit of expert Philip Johnson, dated October 17, 2014, including an expert report submitted as an exhibit thereto.

Applicant objected in its brief to the Cornacchiulo testimony “regarding purported facts and documents of which he has no personal knowledge.” In

---

<sup>19</sup> The date was not filled in on the affidavit.

particular, Applicant notes that:

Balance Bar is attempting to use the testimony of Mr. Cornacchiulo to introduce evidence about Balance Bar Company even though Mr. Cornacchiulo was never a Balance Bar Company employee and has no personal knowledge of Balance Bar company records.

Appendix B to Applicant's Brief

Mr. Cornacchiulo testified in his May 2014 testimony deposition that he has worked for "over nine years" at NBTY, and that he oversees marketing and advertising for Balance Bar (as well as some other brands), which the company purchased in November 2012. 125 TTABVUE 14-15, 91196954. Mr. Cornicchiulo also testified about policing efforts made by the Balance Bar Company before its purchase by NBTY. Such testimony includes the following:

Q: Are you aware of the policing activities that Balance Bar Company took in the past with respect to its Balance and Balance Bar trademarks?

A: Yes.

Q: To the extent of your knowledge, can you describe generally what those policing activities were?

A: The Balance Bar polices [corrected] very close into the bar category. So, obviously, you know that's the category that Balance Bar stands in. So, they were very strong on anybody infringing in the bar category, highly. And . . . from vitamins to supplements to drinks or anything that would be in that category.

125 TTABVUE 21, 91196954

Mr. Cornicchiulo was also asked to authenticate documents in the nature of agreements and letter agreements made by the Balance Bar

**Opposition Nos. 91196954, 91197748 and 91212477**

Company before its purchase by NBTY. These were identified as Exhibits 33 through 44 (settlement agreements) and 45-48 (attorney letters) to the deposition. In addition to its objections that the policing testimony is not based on firsthand knowledge, Applicant objects to Exhibits 33-48 as hearsay.

Regarding the policing testimony, although Mr. Cornicchiulo spoke about activities that took place before he joined the company, given his position and duties there is no reason to believe that the testimony he gave is beyond the scope of his personal knowledge, as he was specifically asked the question “to the extent of [his] knowledge.” Accordingly, that objection is overruled, and such testimony is admissible for whatever probative value it may have.

Regarding the documents, a month after that testimonial deposition, on June 19, 2014, Applicant took a discovery deposition in Opposition No. 91212477, with Mr. Cornacchiulo serving as Opposer’s Rule 30(b)(6) witness, and it included the following exchange:

Q: I spoke to your attorney before this deposition, and we would like to stipulate on the record for purposes of speeding the process along that the documents you authenticated on behalf of the company will be considered authentic documents for this proceeding. Do you understand that?

A: Yes, yes.

Q: So, in that context is there anything that you would like to change about the testimony that you previously gave?

A: No.

**Opposition Nos. 91196954, 91197748 and 91212477**

38 TTABVUE 23, 91212477

This was effectively a stipulation to the admission of the objected-to documents. To hold otherwise would be unfair and prejudicial, since Mr. Cornacchiulo was told that the documents were being stipulated as “authentic documents for this proceeding.”<sup>20</sup> He was asked in that context if he wished to change his testimony. He would have no reason to change his testimony if he were led to believe that the parties were accepting the documents into the record. Accordingly, Applicant’s objection is overruled.<sup>21</sup>

### **Priority and Standing**

Standing is a threshold issue that must be proven in every *inter partes* case. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].”). To establish standing in an opposition, an opposer must show both a real interest in the proceedings as well as a reasonable basis for his belief of damage. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-1028 (Fed. Cir. 1999).

---

<sup>20</sup> Based on their request for oral hearing, the parties themselves contemplated that 91212477 would be consolidated with 91196954/91197748. Also, since the May 1, 2014 Cornacchiulo deposition was submitted in both proceedings, Applicant made its objections in both.

<sup>21</sup> We note that the outcome of these proceedings would be the same whether or not we considered these documents.

The status and title copies of Opposer's pleaded registrations establish its standing. And because Applicant has not counterclaimed for cancellation of any of the registrations, priority is not at issue in these proceedings with respect to the goods identified in Opposer's pleaded registrations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) and *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the relevant, probative evidence in the record related to a likelihood of confusion. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be most relevant. *See Han Beauty, Inc. v. Alberto-Culter Co.*, 263 F.3d 1333, 57 USPQ2d 1557, 1559-1560 (Fed. Cir. 2001). In this case, our analysis centers on the relatedness of the goods and channels of trade; the similarities of the marks and their commercial impressions; the number and nature of third-party uses of similar marks on similar goods; concurrent use of the marks on the parties'

**Opposition Nos.** 91196954, 91197748 and 91212477

goods without actual confusion; the degree of purchasing care likely to be exercised by consumers; and survey results directed to a likelihood of confusion. *See ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1241 (TTAB 2015). We conclude that Opposer has not established a likelihood of confusion.

### **Goods and Channels of Trade**

Applicant seeks registration for the following goods (emphasis added):

“vitamins, **supplements**, vitamin enriched beverages, **meal replacement bars**, liquid meal replacements,” (Application Serial No. 77864206);

“soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts, raisins and/or seeds; **nut and seed-based snack bars**,” 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,” (Application Serial No. 77864268); and

“**nut and seed-based snack bars**,” (Application Serial No. 85751520)

Opposer’s registrations include some of the same goods, including its BALANCE Registration No. 2745850 for “**protein-based, nutrient-dense snack bars**” and its BALANCE Registration No. 3937988 for “**nutritional supplements**; dietary food supplements,” and for “cereal-based, rice-based, or **granola-based snack bars** and snack foods,” as well as its other BALANCE-formative marks, including BALANCE BARE for “protein-based, nutrient-dense snack bars,” “protein-based, nutrient-dense snack bars” and

**Opposition Nos. 91196954, 91197748 and 91212477**

**“grain-based food bars also containing fruits and nuts”** (Registration No. 3436917) (emphasis added). These goods are legally identical.

As for channels of trade, with legally identical goods, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). Moreover, Applicant’s witnesses testified as to various channels through which its products are sold, including conventional grocery stores, mass merchants, club stores, and food service. *See* 120 TTABVUE 26, 91196954 and Ex 13 (Hooper); and 114 TTABVUE 24-25, 91196954 (Little). Opposer’s witness also testified to some of same channels (with more specific information on the confidential record). 124 TTABVUE 28, and 234-235, 91196954 (Lifeso).

In short, we presume and Applicant has established that it sells its supplements and snack bars through the same channels of trade to the same consumers as Opposer. Accordingly, we find these *du Pont* factors to weigh strongly in favor of a finding of likelihood of confusion.

### **The Marks**

We begin by observing that the parties’ marks must be compared in their entireties with regard to appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison*

**Opposition Nos.** 91196954, 91197748 and 91212477

*Fondee En 1772*, 73 USPQ2d at 1692. Opposer's marks are BALANCE, BALANCE BAR, BALANCE GOLD, BALANCE BAR GOLD, and BALANCE BARE. Opposer's BALANCE mark gives the commercial impression of providing ingredient or nutritional "balance." Ms. Lifeso referred to the products as providing a balanced lifestyle.

Q: That's because it is intended to communicate the core of the company?

A: Providing balance to the consumer in [corrected] their busy on-the-go lives.

54 TTABVUE 35, 91212477

In the year 2000, Opposer won a Gold Effie award for its advertising slogan, "Never be out of Balance." 122 TTABVUE 17, 91196954, and Ex. 1. Other slogans used by Opposer on Facebook and on its website at balance.com include "Get some Balance in your life™", "Find your Balance", "Have you found your Balance™" and "The Perfect Balance of Great Taste, Quality Nutrition & Lasting Energy." *Id.*, at Exs. 2 and 3. Regarding its variant marks, Ms. Lifeso noted that BALANCE GOLD is intended to communicate "a more indulgent flavor profile" while BALANCE BARE would seem to communicate the "bare or visible" ingredients. *Id.*, at 36.

Applicant's marks are SMART BALANCE and EARTH BALANCE. Applicant's witness, Mr. Kraft, observed that the marks are a unified whole, without undue weight on individual terms: "Again, my testimony is that I don't put undue weight on either in isolation. I look at them together." 116

**Opposition Nos.** 91196954, 91197748 and 91212477

TTABVUE 34, 91196954. Another witness, Ms. Little, testified that the different terminology in SMART BALANCE and EARTH BALANCE is perceived differently, with SMART BALANCE having a focus on heart health, while EARTH BALANCE has natural, plant-based, vegan, non-GMO products. *See* 46 TTABVUE 19, 91212477. The following exchange occurred in the testimonial deposition of Mr. Hooper, senior advisor to Applicant's marketing team:

Q: What is the connotation or message to consumers that GFA Brands is trying to communicate by using Smart Balance as a trademark?

A: That it is an intelligent choice, and it is a good balance. It is a great balance of taste and nutrition.

120 TTABVUE 32, 91196954

Opposer observes that Applicant refers internally to its SMART BALANCE and EARTH BALANCE brands as the "BALANCE brands," as mentioned during the Rule 30(b)(6) deposition of Ms. Little in 91212477.

Q: Do you typically refer to the Smart Balance and Earth Balance brands as the Balance Brands?

A: Yes.

21 TTABVUE 16, 91212477

However, Ms. Little confirmed that this is strictly an internal reference.

45 TTABVUE 65, 91212477.

Q: Does GFA Brands ever use the term "Balance" standing alone as a trademark?

A: No.

We agree that, while Opposer's and Applicant's marks share the term "BALANCE," on the whole they have more phonetic and visual dissimilarities than similarities, and that their connotations and commercial impressions are dissimilar. The differences in commercial impression are especially significant given the weakness of the shared term "BALANCE." In this regard, Applicant submitted evidence of multiple third-party registrations and numerous uses of marks comprising or incorporating the term "BALANCE" for healthy foods or dietary supplements (discussed below). This indicates the term has a suggestive or commonly understood meaning as applied to the goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. August 19, 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Promark v. GFA Brands, Inc.*, 114 USPQ2d at 1244 ("Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field and that marks containing the term have been registered and used for related goods because the remaining portions of the marks may be sufficient to distinguish the marks as a whole from one another.").

Given their differences visually and phonetically, the weakness of the shared term "BALANCE," their different connotations, and their differing

overall commercial impressions, we find that the parties' marks are sufficiently different to weigh against a finding of likelihood of confusion.

**Number and Nature of Third-Party Uses of Shared Term**

Applicant further argues that consumers will recognize the differences between the marks due to the number and nature of similar marks in use on similar goods. See *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 116 USPQ2d at 1136 (“extensive evidence of third-party use and registrations is ‘powerful on its face,’”); quoting *Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d at 1675. In particular, Applicant points to third-party Internet uses of the term “BALANCE” for healthy foods or dietary supplements.

These Internet uses include:

Mission Carb Balance® Whole Wheat Tortillas (amazon.com);  
Swanson® EPA-DHA Balance® Omega-3 Fish Oil (swansonvitamins.com);  
Jarrow Formulas Mineral Balance® supplements (Vitacost.com);  
Jarrow Formulas Zinc Balance® supplements (hihealth.com);  
Morton Salt Balance® Salt Blend (Walmart.com);  
balance® mind water (amazon.com);  
Doctor Wilsons Thyro-Balance® supplements (drwilsons.com);  
Nature's Plus Super B-50 Balanced B Complex – 180 Vegetarian Capsules (LuckyVitamin.com);  
Solaray® Nutritionally Balanced B-Stress™ Dietary Supplement (sears.com);  
Triple Leaf Tea Sugar Balance (Walmart.com);  
Health Concerns® SKIN BALANCE Herbal Supplement (holisticchineseherbs.com);  
windhawk: Balanced Naturals™ (windhawk.com);  
gaia herbs: Women's Balance (mynaturalmarket.com);  
Youngevity Ultimate™ BALANCE FX™ (youngevity.net);  
Sunrider International Metabalance 44® (Amazon.com);

**Opposition Nos. 91196954, 91197748 and 91212477**

Zand'bring balance to your body™ Blue-Berries Blend Lozenges-Dietary Supplement (wegmans.com);  
SGN Nutrition Emerald Balance (amazon.com);  
Celestial Metabo Balance™ Green Tea Supplement (amazon.com);  
Better Stevia Balance™ (amazon.com);  
CholesterolBalance® (futurebioticsstore.com);  
Lifestyle Awareness™ Slim Balance™ Herbal Tee (amazon.com);  
familia Swiss Balance All Natural Blueberries and Quinoa (amazon.com);  
nochtli Emerald Body Balance Superiorfruit Concentrate, Daily Dietary Supplement (amazon.com);  
Esutras Organics Ideal Balance Gourmet Finishing Oil (amazon.com);  
Kay's Natural – Better Balance™ Honey Almond Protein Cereal:  
Build Muscle not fat (amazon.com);  
Kay's Naturals – Better Balance™ Chili Nacho Cheese Protein Chips: Gluten Free: High Protein: No trans fats (amazon.com);  
Old Orchard; Healthy Balance Apple Cranberry Juice with Splenda (amazon.com);  
Simply balanced™ coconut granola bars with ancient grains (target.com);  
Simply Balanced™ Date, Raisin and Soybean Fruit & Nut Bars (target.com);  
Simply Balanced™ Cherry Almond Greek Yogurt granola Bars (target.com)  
106 TTABVUE, 91196954

Applicant also hired private investigators, who attested to the following additional uses:

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);  
Natural Balance Colon Clenz; Natural Balance Ultra Colon Clenz;  
Female Balance (dietary supplement);  
Behavior Balance (dietary supplement);  
Immune Balance Compound (herbal supplement);  
Balanced B Complex (dietary supplement);  
Super B-50 Balanced B-Complex (dietary supplement);  
UltraFlora Balance (probiotic supplement);  
GoodSense Balanced Nutritional Drink (nutritional drink);  
Whole Body Yeast Balance (herbal/dietary supplement);  
Chamomile Female Balance (supplement);  
Metagenics: UltraFlora Balance (probiotic);  
Sweet Balance™ (dietary supplements);

**Opposition Nos. 91196954, 91197748 and 91212477**

Balancing Act Half Caffeinated City Roast (coffee);  
Ayurvedic Balanced Tea;  
Sugar Balance Tea

The investigators confirmed that these items were all sold in the same stores as Opposer's Balance Bars. 101, 102, and 103 TTABVUE 91196954, and 26 and 27 TTABVUE 91212477.

Opposer argues that none of these uses includes the term "BALANCE" on nutrition or snack bars specifically. 125 TTABVUE 35-36, 91196954; 122 TTABVUE 127, 91196954. We note, however, that both parties' witnesses testified to being aware of use by Target of the mark Simply Balanced for fruit and nut bars. 54 TTABVUE 37-39, 91212477 (Lifeso); 116 TTABVUE 13, 91196954 (Kraft). Furthermore, the sixth *du Pont* factor asks us to inquire into not the use of the same mark on the exact same goods, but rather, "the number and nature of *similar* marks in use on *similar* goods." *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. (emphasis added).

Due to the large number of uses of the term "BALANCE" as a source identifier on similar goods, this factor weighs against finding a likelihood of confusion.

**Actual Confusion and Potential for Confusion**

The parties discussed the lack of actual confusion and the extent of potential confusion. Applicant argues that there have been no instances of actual confusion, pointing to testimony from several witnesses for both parties.

**Opposition Nos.** 91196954, 91197748 and 91212477

From Little July 23, 2014 testimonial deposition:

Q: Are you aware of any confusion between the snack products offered under the Earth Balance trademark and any of the Balance Bar products?

A: No.

114 TTABVUE 42, 91196954

From Cornacchiulo 30(b)(6) discovery deposition:

Q: So is it accurate to say that historically the two marks have been able to coexist without there being customer confusion?

A: Within their sections, yes.

38 TTABVUE 24, 91212477

However, although Applicant currently offers various snack foods under the marks SMART BALANCE and EARTH BALANCE beyond its original offerings of “butter substitutes,”<sup>22</sup> it does not currently sell nutrition or snack bars nor nutritional supplements under these marks.<sup>23</sup> Thus, the parties do not engage in concurrent use in the marketplace.

From Mr. Cornucchiulo’s May 1, 2014 testimonial deposition:

Q: Do you currently consider GFA Brands a competitor of the Balance Bar Company?

A: Currently, right now no.

---

<sup>22</sup> See Registration Nos. 2200663, registered October 27, 1998; and 2237867, registered April 6, 1999.

<sup>23</sup> Applicant did test launch Earth Balance fruit bars in 2005 but discontinued the product within the year because, according to the Senior Vice President for Sales Services and Logistics, “We did not feel that the sales were significant to justify additional rollout.” 43 TTABVUE 16, 17 91212477; *see also* 114 TTABVUE 48 and Ex 40, 91196954 (Little) (“It was launched as a test in the Northeast and didn’t meet our sales goals.”).

**Opposition Nos.** 91196954, 91197748 and 91212477

Q: Why not?

A: They're not in our category. They are not in our section or even a close in section. So, at this point in time I don't consider them a competitor.

125 TTABVUE 34-35, 91196954

From Little 30(b)(6) discovery deposition:

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

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

21 TTABVUE 21, 91212477

We find that the record is unclear as to the amount of meaningful opportunities for confusion to have occurred among purchasers. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1202 (TTAB 2007).

Accordingly, we find these *du Pont* factors to be neutral.

### **Conditions of Sale**

Opposer urges us to consider the relatively low level of purchasing care likely to be exercised by consumers of these products. This argument focuses mainly on the relatively low price of the products at issue.

Opposer's Senior Director, Marketing testified that "typically Balance Bars will be selling between a dollar and two dollars depending on the channel, the retailer you are selling for." 122 TTABVUE 131, 91196954. It's clear that both parties target mostly health-oriented consumers. Mr.

**Opposition Nos. 91196954, 91197748 and 91212477**

Cornacchiulo observed, regarding Opposer’s consumers, “Balance Bar is more of a back label reader in that they are more concerned about wellness. We call them wellness enthusiasts.” 39 TTABVUE 64, 91212477. Ms. Little also referred to partnering with Whole Foods and “the natural channel.” 114 TTABVUE 24, 91196954.

Our precedent dictates, however, that even with items that are directed to healthy consumers, we must assume that, based on the unlimited identifications, the relevant class of purchasers is the public at large and not simply health-conscious consumers. *See Promark Brands Inc. v. GFA Brands, Inc.* 114 USPQ2d 1232 at 1243. We must base our determination on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (affirming that TTAB properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”). We find that the ordinary consumer, whether or not concerned about a healthy lifestyle, would exercise a moderate to low degree of care in purchasing the parties’ products. Moreover, it is well-established that even sophisticated consumers are not immune from source confusion. *Id.*

We find this fourth *du Pont* factor to be neutral.

Other Considerations

Opposer asks us to consider, among other factors, that “These same issues have already been disputed by the parties.” *See* briefs, 91196954 and 91212477. In particular, Opposer refers to an intent-to-use application filed by Opposer for the mark BALANCE for, among other things, butter and butter substitutes, in August of 1999. When the mark was published for opposition, GFA’s then-counsel sent a letter to Opposer’s then-counsel, stating that “use by Balance Bar of the BALANCE mark would cause confusion, deception or mistake among consumers.” *See* 95 TTABVue 8, 91196954.<sup>24</sup> Opposer also refers to other letters written by Applicant regarding objections to third-party use of marks containing the term “BALANCE.”

Opposer additionally references Applicant’s 2005 product testing of EARTH BALANCE fruit bars, noting that, at the time, Opposer’s counsel contacted Applicant to register an objection to the registration and use of the mark in connection with fruit bars. Opposer argues that Applicant’s prior positions are contrary and constitute an admission, in that Applicant has objected to Opposer’s and third-party use of the term “BALANCE” in their marks. In this regard, Opposer also notes that Applicant argued that the term “SMART” was weak, and thus “BALANCE” was source-identifying, in the recently decided *Promark Brands Inc. v. GFA Brands, Inc.* 114 USPQ2d

---

<sup>24</sup> We note that although the letter is in the confidential record, the reference and quote is in the public record at 129 TTABVue 29, 91196954.

1243-1244 (“Applicant argues that the word ‘SMART’ is laudatory and therefore, descriptive in nature”).

To the extent Applicant’s prior positions are inconsistent, they may contribute to the “shade and tone in the total picture,” but do not constitute “admissions.” See *Specialty Brands v. Coffee Bean Distr., Inc.*, 748 F.2d 669, 676, 223 USPQ 1281, 1283 (Fed. Cir. 1984); *Domino’s Pizza Inc. v. Little Caesar Enters., Inc.*, 7 USPQ2d 1359, 1365 (TTAB 1988), both citing *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978) (“Facts alone may be ‘admitted,’” not legal conclusions such as likelihood of confusion.)

With regard to its prior enforcement strategy, Applicant sent letters to Opposer in 2000 and subsequently, the most recent of which appears to be from the year 2006. 95 TTABVUE, 67, 91196954. Applicant’s witnesses have testified that Applicant has a different enforcement strategy now, as testified by Associate General Counsel, Mr. Kraft:

Q: Does GFA Brands have any guidelines for assessing whether another trademark is likely to cause confusion with the Smart Balance trademark?

A: We do.

Q: What are those guidelines generally?

A: For the Smart Balance mark, generally speaking, we are interested in S Balance marks and Smart B marks. And for us, order matters.

**Opposition Nos. 91196954, 91197748 and 91212477**

Mr. Kraft also observed that this enforcement strategy has “[c]hanged over time” based on “the realities of the marketplace.” *Id.* at 15-16. “You see a lot of Smart marks. You see a lot of Balance marks in the food space.” *Id.* When asked if he would send the cease and desist letter to Opposer today, he responded in the negative, noting “our enforcement strategy is intended to reflect the realities of today’s marketplace. The term ‘Balance,’ as demonstrated through these tracking studies, can be used differently, and consumers are able to distinguish various uses of the term ‘Balance.’” *Id.* at 25.

Regarding its position in the *Promark* case, we note that Applicant argued in that case that the Board should, as it must, consider and compare the marks in their entireties. *See* 116 TTABVUE 34, 91196954 (Kraft) (“Again, my testimony is that I don’t put undue weight on either in isolation. I look at them together.”). As for the termination of its EARTH BALANCE product launch in 2005, Applicant’s witnesses gave adequate and credible testimony that there were insufficient sales to justify the continuation of the product at that time. They did not indicate that the product was terminated due to any agreement or understanding with Opposer. 43 TTABVUE 16, 91212477 (Seiferas) (“The feedback that I was aware of was that the price point was too high, it was not a compelling item for the consumer at that price point.”); 114 TTABVUE 48 and Ex 40, 91196954 (Little) (“It was launched as a test in the Northeast and didn’t meet our sales goals.”).

We do not find these considerations to be availing in our analysis.

Survey

Applicant submitted the testimony and report of its expert, Philip Johnson, who conducted a survey “to measure the extent to which, if at all, the Smart Balance name is or is not likely to cause confusion with Balance Bar when relevant consumers are exposed to it in connection with nutrition or energy bars.”<sup>25</sup> 118 TTABVUE 93, 91196954 and Ex 26.

**1. Methodology and Conclusion by Johnson**

Mr. Johnson designed the survey in accordance with what is known as the *Eveready* format, deriving from the case *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 188 USPQ 623 (7<sup>th</sup> Cir. 1976). In accordance with this format, personal interviews were conducted between June 1 and 21, 2012 with 407 adults who are current or prospective purchasers of nutrition or energy bars. These personal interviews were conducted in shopping mall-based research facilities located in 8 markets geographically distributed throughout the United States. 118 TTABVUE 94, 91196954, Ex. 26.

About half the participants were split into a test cell (202), with the rest in the control cell (205). They were assigned at random. The test cell was shown a card, approximately five by seven inches, with the term “SMART BALANCE” in all capital letters, while the control cell was shown a similar card with the term “SMART BAR.” *Id.* at 29, and Ex. 26.

Qualified participants were given a card (test or control) and told:

Question 1: “[HAND RESPONDENT EXHIBIT CARD. SAY:]  
This is the name of a nutrition or energy bar that you might see if you were out shopping for such products at a store. Feel free to comment, if you wish, on anything about this [RECORD ANY SPONTANEOUS COMMENTS MADE].”

Once the respondent was done looking at the card, the interviewer was instructed to take it away and put it out of sight for the remainder of the interview. *Id.* at 30-31, and Ex. 26.

Next, the sequence of questions was as follows:

Question 2a:

“Based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you OR do you not have a belief?”

Question 2b:

“What makes you say that <Insert Response Given in Q2a> makes the nutrition or energy bar with the name that I showed you? PROBE: Anything else?”

Question 3a:

“What other products or brands, if any, do you believe come from the same company who makes the nutrition or energy bar with the name that I showed you OR do you not have a belief?  
PROBE: Any others?”

Question 3b:

“ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q3a: What makes you say that <Insert Response Given in Q3a> comes from whoever makes the nutrition or energy bar with the name that I showed you? PROBE: Anything else?”

Question 4a:

“What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever

---

<sup>25</sup> Although Opposer comments in its brief that the survey should not have been limited to the “Balance Bar” mark, it was of course not so limited since the open-ended *Eveready* format tests for confusion with any other source, as discussed *infra*.

makes the nutrition or energy bar with the name that I showed you OR do you not have a belief? PROBE: Any others?"

Question 4b:

"ASK FOR EACH BRAND OR COMPANY GIVEN IN Q4a:  
What makes you say that <Insert Response Given in Q4a> is related to, associated with, or has a licensing agreement with whoever makes the nutrition or energy bar with the name that I showed you? Anything else?"

Of those surveyed, just one participant in the test cell, or .5% of the total, reported a false belief that Balance Bar was the source or related to the source of the "SMART BALANCE" nutrition or energy bar. *Id.* at 37 and Ex. 26. None in the control cell reported this belief. *Id.* Independent validation was conducted by telephone, with eight failing, leaving 407 of the original 415 participants. *Id.* at Ex. 26.

Based on the results of his survey, Mr. Johnson concluded that "There is no likelihood of confusion whatsoever between the Smart Balance mark use for nutrition or energy bars that would suggest that people would associate it in some way with Balance Bar." 118 TTABVUE 16, 91196954, and Ex 26.

## **2. Criticism and Conclusion by Jacoby**

Opposer retained expert Jacob Jacoby to rebut Mr. Johnson's survey. Although he did not conduct his own survey, in his two reports and August 27, 2014 deposition, Mr. Jacoby provided a number of criticisms of Mr. Johnson's survey. The only one discussed by Opposer in its brief, however, was the survey format.<sup>26</sup> In particular, Dr. Jacoby criticized the *Eveready*

---

<sup>26</sup> In fact, as Dr. Jacoby observed, the effect of his other criticisms were not fatal to the survey and resulted in harmless error.

survey format used by Mr. Johnson, stating that “leading authorities are now, I think, including courts, are coming around to believing that, that is an improper protocol and should not be used for testing an absence of confusion between two marks.” 127 TTABVUE 18, 91196954. He pointed out that “historic data from Kraft,” former owner of Balance Bar, shows unaided awareness of the Balance mark at only eight percent, with total awareness (that is, aided plus unaided), at sixty-three percent. *Id.* at 20. More recent data, from 2013, showed even lower unaided awareness, at four percent. *Id.* at 21 and Ex. 28. He cited a 2008 article by Jerre Swann, warning that the *Eveready* survey is not appropriate for marks that are not readily accessible in memory. *Id.* at 22.

Dr. Jacoby concluded that “Mr. Johnson’s surveys and reports cannot be relied on to indicate that there is an absence or likelihood of an absence of confusion between marks at issue in the present matters.” 127 TTABVUE 17, 91196954.

### **3. Response to criticism by Johnson**

In response to the criticism by Dr. Jacoby, Mr. Johnson replied that the *Eveready* survey was appropriate in this case due to the fame claimed by Opposer, as well as the high level of total awareness. “The aided awareness level is useful to tell you what the market penetration is of a product, which is very high in the case of Balance Bar.” 118 TTABVUE 50, 91196954. Mr.

**Opposition Nos.** 91196954, 91197748 and 91212477

Johnson denied that the unaided awareness of a product should be the deciding factor as to the appropriateness of an *Eveready* survey. *Id.*

#### **4. Earth Balance**

Mr. Johnson also conducted a survey inquiring into the likelihood of confusion, if any, between EARTH BALANCE and the BALANCE marks. 28 TTABVUE, 91212477. Again, this was conducted as a *Eveready* format, with similar methodology and questions as the survey in the other proceeding. Although the affidavit and report of Mr. Johnson are in the confidential record, Applicant's brief cites his affidavit in noting that "only 4% of respondents would be confused by the use of EARTH BALANCE on all natural snack bars and BALANCE BAR or any of its brands." 58 TTABVUE 20, 91212477. As noted, based on these results, Mr. Johnson concluded that there would be no likelihood of confusion. *Id.*

Opposer retained Jacob Jacoby to rebut Mr. Johnson's findings for this survey as well. 42 TTABVUE 91212477. Again, Dr. Jacoby testified that the *Eveready* format was not appropriate since the BALANCE marks had not been shown to be readily accessible in memory (*i.e.*, in unaided awareness). As noted above, Mr. Johnson denied that the unaided awareness of a product should be the deciding factor as to the appropriateness of an *Eveready* survey. 118 TTABVUE 50, 91196954.

## **5. Discussion**

As noted by our precedent, “[s]urvey results may act as circumstantial evidence of likelihood of confusion, if the survey is designed and conducted using generally-accepted principles and methodology.” *Promark Brands, Inc. v. GFA Brands, Inc.*, 114 USPQ2d at 1247, citing 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:184 (4<sup>th</sup> ed. 2014). Professor McCarthy has discussed the *Eveready* survey format as being “especially appropriate when the senior mark is strong and widely recognized.” *Id.* at § 32:173.50 (4<sup>th</sup> ed., updated March 2016). Professor McCarthy further refers to remarks by Jerre Swann, made in the article referenced by Dr. Jacoby, with Professor McCarthy noting “Swann has remarked of the ‘*Eveready*’ format that: ‘In cases involving strong marks, the *Eveready* test should be considered the gold standard for fundamental cognitive and marketing reasons.’” *Id.*

Both parties cite case law to support their positions. Opposer refers to a recent case in the Southern District of New York, where cross motions for summary judgment were denied, and genuine disputes of material fact were found, in part based on the judge’s determination that, when viewed in the light most favorable to the other party, a reasonable juror could discount the *Eveready* survey since although it is “generally acceptable,” and it is the “gold standard for cases involving strong marks,” also, “by design it will underestimate confusion for marks that are not highly accessible in a

consumer’s memory.” *Akiro LLC v. House of Cheatham, Inc.*, 946 F.Supp.2d 324, 339 (S.D.N.Y. 2013) [not reported in BNA]; *see also Kreation Juicery, Inc. v. Shekarchi*, 2:14-cv-00658-DMG-AS (C.D. Cal. 2014) at n.4 (Court discounted *Eveready* survey where “Defendants have not met the burden of showing that [the mark] is well known under the *Eveready* standard.”).

For its part, Applicant refers to other cases in which courts have found the *Eveready* survey to be probative. In one trade dress case, the court accepted an *Eveready* survey by the defendant, although it found plaintiff’s mark to be simply a “strong mark.” *See E.J. Gallo v. Proximo Spirits Inc.*, 103 USPQ2d 1640, 1654 (E.D.Cal 2012) (in granting summary judgment for defendant, court declared *Eveready* “survey results and conclusion are highly probative of likelihood of confusion or the absence thereof.”) [not reported in F.Supp.]

The Board has also accepted the probative value of appropriately-conducted *Eveready* surveys. Generally, in these cases, the Board has found the plaintiff’s mark to be famous. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1822 and 1829 (TTAB 2015) (Opposer’s *Eveready* survey admitted and given probative weight despite applicant’s objections, and *Eveready* finding of 24% “supports Opposer’s claim” of likelihood of confusion where finding that “these marks are famous”); *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741, 1751 and 1753 (TTAB 2006) (finding opposer has “truly a famous mark” and that “almost half” of survey participants believed opposer to be the source of applicant’s goods weighed in

**Opposition Nos.** 91196954, 91197748 and 91212477

favor of likelihood of confusion); *Miles Labs Inc. v. Naturally Vitamin Supplements, Inc.*, 1 USPQ2d 1445, 1453 and 1456 (TTAB 1986) (finding opposer has an “extremely well known mark” and *Eveready* finding of 29% “is significant”), although in one case, only localized fame was found. *Carl Karcher Enters., Inc. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1130 (TTAB 1995) (“The evidence does not establish that opposer’s marks are nationally famous. Rather, opposer has established local notoriety in its trading area.”).

It is based on this backdrop that we must decide whether the *Eveready* survey was appropriate where Opposer alleged fame in its pleadings and testimony (or, in EARTH BALANCE 91212477 only in its testimony).

However, in the EARTH BALANCE opposition proceeding, Opposer’s witness referred to the fame of the mark.

Q: Do you believe that Balance Bar’s trademark is famous?

A: Depends on how you define famous . . . It was one of the first nutritional items that really made a mark on the industry. So, in the sense of famous, if you want to call it that in that sense, yes, for our category it would be considered one of the longstanding brands.

Q: And for your category in addition to being a longstanding brand, would you say that it’s a strong, well-known brand within the category?

A: Yes, it’s definitely a well-known brand within the category.  
38 TTABVUE 60-61, 91212477 (Cornucchiulo 30(b)(6) discovery deposition)

Testimony from Ms. Lifeso, submitted for both proceedings, also refers to significant sales and exposure nationally through various channels of trade,

**Opposition Nos.** 91196954, 91197748 and 91212477

as well as sixty-three percent aided market awareness and “a little lower on the all unaided.” 122 TTABVUE 99-101, 91196954 (other testimony on confidential record).

Accordingly, Opposer seeks on the one hand to allege fame in its notice of opposition and via testimony of its witnesses, and on the other hand to exclude a survey because Opposer’s marks are not famous. The case law shows that where a certain amount of fame is present, the *Eveready* survey is appropriate (see above). A defendant, on notice from pleadings or witness allegations, may have reason to assume that a plaintiff is alleging such fame. We find that the *Eveready* survey format is acceptable where, as here, fame or category strength is alleged by Opposer in the notice of opposition or by testimony of its own witnesses. We find no major error with the methodology or findings regarding universe, validation, or otherwise. Overall, we find that the survey evidence weighs against a finding of likelihood of confusion.

#### Conclusion

Balancing all of the factors, we find that the differences in the parties’ marks in sight, sound, connotation and overall commercial impression outweigh the identity of the goods and channels of trade when considering the weakness of the term “BALANCE” as used by third parties for healthy foods and nutritional supplements. The survey evidence corroborates this, although even without the survey, we would reach the same result.

**Opposition Nos.** 91196954, 91197748 and 91212477

Accordingly, we find that Opposer has failed to carry its burden of proving a likelihood of confusion by a preponderance of the evidence.

**DECISION:** The oppositions are dismissed.