

ESTTA Tracking number: **ESTTA531961**

Filing date: **04/12/2013**

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

Proceeding	91196954
Party	Defendant GFA Brands, Inc.
Correspondence Address	DAVID R CROSS QUARLES BRADY LLP 411 EAST WISCONSIN AVENUE, SUITE 2350 MILWAUKEE, WI 53202-4497 UNITED STATES marta.levine@quarles.com, david.cross@quarles.com, tm-dept@quarles.com, johanna.wilbert@quarles.com
Submission	Reply in Support of Motion
Filer's Name	Johanna M. Wilbert
Filer's e-mail	david.cross@quarles.com, johanna.wilbert@quarles.com, andrea.fowler@quarles.com
Signature	/Johanna M. Wilbert/
Date	04/12/2013
Attachments	Ex. F to Second Decl. of Johanna Wilbert.pdf ( 14 pages )(286998 bytes )

**Exhibit F**

to Second Declaration of Johanna M. Wilbert  
in Support of GFA Brands, Inc.'s Motion to Compel

Opposition Nos. 91196954 & 91197748

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

---

In the Matter of Application Serial Nos. 77/864206 and 77/864268: SMART BALANCE  
Published in the *Official Gazette* on April 20, 2010, and August 10, 2010, respectively

---

BALANCE BAR COMPANY

Opposer,

v.

**Opposition Nos.** 91196954  
91197748

GFA BRANDS, INC.

Applicant.

---

**GFA BRANDS, INC.'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO BALANCE BAR COMPANY**

---

Pursuant to 37 C.F. R. § 2.120(d) and Fed. R. Civ. P. 34, Applicant GFA Brands, Inc. ("GFA"), by and through its undersigned counsel, hereby directs Opposer Balance Bar Company ("Balance Bar") to produce the following documents within thirty (30) days of service.

**DEFINITIONS**

1. "Balance Bar," "Opposer," "you" or "your" shall mean Opposer Balance Bar Company as well as any of its parents, subsidiaries, divisions, officers, directors, employees, representatives, agents, advertising agents, consultants, attorneys, volunteers, representatives, affiliates and all other persons acting or purporting to act on behalf of or under the control of any of the foregoing.

2. "GFA" or "Applicant" shall mean Applicant GFA Brands, Inc. as well as any of its parents, subsidiaries, divisions, officers, directors, employees, representatives, agents, advertising agents, consultants, attorneys, volunteers, representatives, affiliates and all other

persons acting or purporting to act on behalf of or under the control of any of the foregoing.

3. The terms “Opposer’s Marks,” “Balance Bar’s Marks,” or “BALANCE marks at issue” shall mean the following United States Trademarks, and any other mark owned by Balance Bar that includes in the mark the term BALANCE:

Trademark	Registration No.	International Class/Goods
BALANCE	2745850	IC 029. US 046. G & S: Protein based, nutrient-dense snack bars.
BALANCE BAR	2659753	IC 005. US 006 018 044 046 051 052. G & S: nutritional food supplements.
BALANCE GOLD	2636101	IC 030. US 046. G & S: SNACK BARS.
BALANCE BAR GOLD	2999244	IC 029. US 046. G & S: Protein-based, nutrient-dense snack bars.
BALANCE BAR	3036771	IC 029. US 046. G & S: Protein-based, nutrient-dense snack bars.
BALANCE BARE	3436917	IC 029. US 046. G & S: Protein based, nutrient-dense snack bars; IC 030. US 046. G & S: Grain-based food bars also containing fruits and nuts.
BALANCE	3937988	IC 005. US 006 018 044 046 051 052. G & S: Nutritional supplements; dietary food supplements; IC 030. US 046. G & S: Cereal-based, rice-based, or granola-based snack bars and snack foods.
BALANCE BAR	4062171	IC 030. US 046. G & S: Cereal-derived, rice-based and granola-based snack bars.

4. The term “Applicant’s Marks” or “GFA’s Marks” shall mean the marks identified in United States Trademark Application No. 77/864,206 for the mark “SMART BALANCE,” United States Trademark Application No. 77/864,268 for the mark “SMART BALANCE,” and any other mark owned by Applicant which includes the term “SMART BALANCE.”

5. “Person” shall mean any natural person, group of natural persons, corporation, partnership, association, joint venture, sole proprietorship, firm or business enterprise, and any

other artificial business or legal entity, as well as all divisions, subdivisions, bureaus, offices or other units thereof.

6. "Entity" or "entities" means firms, partnerships, corporations, organizations, and associations as well as all divisions, departments or other units thereof.

7. "Document" has the full meaning ascribed to it in Federal Rule of Civil Procedure 34 and includes all writings and records of every kind or description, however produced or reproduced, whether in hard copy or electronic form, whether draft or final, and whether original or reproduction, in the possession, custody or control of you or your attorneys, agents, representatives or assigns. Any document that contains any notation, addition, comment or marking of any kind that makes it different from the original in any way is a separate document.

8. "Relate to" "related to" "relates to" "regarding" or "concerning" will be used in their broadest sense and shall mean directly or indirectly mentioning or describing, pertaining to, constituting, evidencing, being connected with, or reflecting upon a stated subject matter, including but not limited to the particular category of information requested.

9. "And" and "or" shall be construed disjunctively or conjunctively, as necessary, in order to bring within the scope of each individual request all information which might otherwise be construed to be outside the scope.

10. "Communication" means any conversation, discussion, letter, memorandum, meeting, note, or other transfer of information whether written, oral, or by any other means and includes any documents which abstract, digest, transcribe, or record any such communication.

11. The use of the singular form of any word includes the plural and vice versa.

## INSTRUCTIONS

1. In responding to these discovery requests, you should produce all information available to you and all persons acting on your behalf, including, but not limited to your attorneys consultants, investigators, accountants, employees, agents and legal assistants. To the extent that any document is not presently within the possession, custody or control of the these parties or persons, you are hereby requested to execute such consents or other documents as may be required to permit production of such documents from third parties, or, in the alternative, to take such steps as may be necessary to procure their production.

2. Please identify all documents called for herein, that have been destroyed, and state when and for what reason those documents were destroyed.

3. Your obligation under these discovery requests shall be continuing, such that you must produce any information called for herein that becomes available to you or any person acting on your behalf at any time after you first respond to these requests for production.

4. Please produce responsive documents electronically in single page tiff format with a Summation Dii load file with the metadata for the following fields, if available: To; From; CC; Bcc; Subject; Email Body; Date Sent; Time Sent; Date Created; Date Modified; File Author; Parent ID; Child ID.

5. If you contend that any requested information is privileged, the response should state the following: (1) the privilege asserted and the particular basis for asserting the privilege; (2) the author(s) and date of any allegedly privileged documents at issue; (3) the addressee(s) and persons to whom copies of any allegedly privileged documents were delivered; (4) the identity of all other persons who have seen the allegedly privileged documents or information; (5) the nature and general subject matter of the allegedly privileged documents or information; (6) the date the allegedly privileged document was created, sent and received.

6. If you believe any of these discovery requests are ambiguous, identify the ambiguity and set forth the construction chosen or used in responding to the request.

### **DOCUMENT REQUESTS**

**DOCUMENT REQUEST NO. 1:** Produce all documents that reflect or refer to any comparison of any GFA products, their packaging, marketing or advertising sold in connection with the SMART BALANCE marks with any products offered by Balance Bar under the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 2:** Produce all documents that reflect or refer to any instance when a person or persons were actually or apparently confused, mistaken or deceived as to the source or identity of any of GFA's products offered in connection with the SMART BALANCE trademark.

**DOCUMENT REQUEST NO. 3:** Produce all documents that reflect or refer to any instance of actual or apparent confusion, mistake or deception resulting from GFA's use of SMART BALANCE and any other entity's use of the word BALANCE in any trademark.

**DOCUMENT REQUEST NO. 4:** Produce all documents that reflect or refer to any instance when a person or persons were actually or apparently confused, mistaken or deceived about the source or identity of any Balance Bar product offered in connection with the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 5:** Produce all documents that reflect or refer to any instance of actual or apparent confusion between Balance Bar's use of the BALANCE marks at issue and any other entity's use of BALANCE.

**DOCUMENT REQUEST NO. 6:** Produce all documents relating or referring to any advertising or marketing materials containing the SMART BALANCE mark.

**DOCUMENT REQUEST NO. 7:** Produce all documents that tend to support or refute any allegation made in Balance Bar's Notices of Opposition.

**DOCUMENT REQUEST NO. 8:** Produce all documents that tend to support or refute your allegation that Applicant's use of the SMART BALANCE mark is likely "to cause confusion, mistake or to deceive consumers."

**DOCUMENT REQUEST NO. 9:** Produce all documents that tend to support or refute your allegation that "Opposer's BALANCE trademark is famous and became famous before November 3, 2009."

**DOCUMENT REQUEST NO. 10:** Produce documents sufficient to determine Balance Bar's present officers, head of sales, head of marketing, head of advertising, and head of production.

**DOCUMENT REQUEST NO. 11:** Produce representative samples of brochures and promotional materials distributed in connection with the products marketed or distributed by Balance Bar, or on behalf of Balance Bar, in connection with the word BALANCE or any derivation of that word, either by itself, or in combination with any other word, phrase or design.

**DOCUMENT REQUEST NO. 12:** Produce representative samples of the product packaging used in connection with any products sold in the United States by or on behalf of Balance Bar in connection with Balance Bar's Marks.

**DOCUMENT REQUEST NO. 13:** Produce all documents that reflect or refer to

Balance Bar's intentions or business plans regarding the use of Balance Bar's Marks in connection with any product or service.

**DOCUMENT REQUEST NO. 14:** Produce all documents that reflect or refer to the manner in which products sold in connection with Balance Bar's Marks are distributed.

**DOCUMENT REQUEST NO. 15:** Produce all documents that reflect or refer to any survey, public opinion poll, marketing study, analysis or other research that has been commissioned, commenced, initiated, conducted, compiled or completed by you in connection with any claim or defense in this Opposition proceeding or in connection with the strength of your or any other person's use of BALANCE or the likelihood of confusion arising from the use of BALANCE in connection with the sale of any product or service.

**DOCUMENT REQUEST NO. 16:** Produce all documents that reflect or refer to any survey, public opinion poll, marketing study or other market research performed by or for Balance Bar in connection with any products or services marketed or sold in connection with Balance Bar's Marks.

**DOCUMENT REQUEST NO. 17:** Produce all documents that reflect or refer to any survey, public opinion poll, marketing study, analysis or other research performed by or for Balance Bar in connection with any products or services marketed or sold in connection with the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 18:** Produce all documents that reflect or refer to Balance Bar's adoption and commencement of use of Balance Bar's Marks as a trademark.

**DOCUMENT REQUEST NO. 19:** Produce all documents that reflect or refer to any

meetings or discussions regarding the decision to file an application for federal registration of any of Balance Bar's Marks or any mark using the word BALANCE.

**DOCUMENT REQUEST NO. 20:** Produce all documents that reflect or refer to any communication of reservation or disapproval regarding the decision to file an application for federal registration any of Balance Bar's Marks or any mark using the word BALANCE.

**DOCUMENT REQUEST NO. 21:** Produce all documents reflecting or referring to the relevant consuming public for products that you sell, market or distribute using the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 22:** Produce documents sufficient to determine the amount of money received by Balance Bar as revenue for goods or services sold in connection with Balance Bar's Marks or as income generated through licenses of Balance Bar's Marks or other agreements granting a third party rights to use Balance Bar's Marks for the last five years.

**DOCUMENT REQUEST NO. 23:** Produce documents sufficient to determine the amount of money spent by Balance Bar in each calendar year for the last five years advertising or promoting any product in connection with Balance Bar's Marks.

**DOCUMENT REQUEST NO. 24:** Produce all documents that reflect or refer to any identification or profile of consumers who purchase the products you have sold, marketed or distributed in connection with the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 25:** Produce documents sufficient to determine the places you have advertised your goods using any of Balance Bar's Marks over the past five years.

**DOCUMENT REQUEST NO. 26:** Produce documents sufficient to determine where Balance Bar sells product sold in connection with the BALANCE marks at issue.

**DOCUMENT REQUEST NO. 27:** Produce documents sufficient to determine the channel(s) of trade by and through which Balance Bar offers, sells, markets or distributes any goods or services in connection with Balance Bar's Marks.

**DOCUMENT REQUEST NO. 28:** Produce all documents that reflect or refer to the channel(s) of trade by and through which GFA offers, sells, markets or distributes, or plans to offer, sell market or distribute, any goods or services in connection with GFA's Marks.

**DOCUMENT REQUEST NO. 29:** Produce all documents that reflect or refer to any assertion of rights by Balance Bar of Balance Bar's Marks, including all such instances where a lawsuit or other proceeding was initiated by Balance Bar or a third party and any instances concerning an assertion of rights where no legal action was taken.

**DOCUMENT REQUEST NO. 30:** Produce all documents that reflect or refer to any search or investigation of any records, such as, but not limited to, the United States Patent and Trademark Office records, state trademark records, trademark or trade publications, electronic databases, business directories or records of any trademark or service organization, performed by or on behalf of Balance Bar to ascertain the registrability of Balance Bar's Marks or ascertain whether the use of Balance Bar's Marks might infringe the trademark rights of others.

**DOCUMENT REQUEST NO. 31:** Produce all communications between Balance Bar and any third parties regarding the use of the word BALANCE in any trademark.

**DOCUMENT REQUEST NO. 32:** Produce all documents that reflect or refer to any permission or consent to use the word BALANCE in any trademark.

**DOCUMENT REQUEST NO. 33:** Produce all documents that reflect or refer to any communication of reservation or disapproval by any entity or individual regarding the decision to file an application for a trademark or service mark containing the word BALANCE, or any derivation of that word, by itself or in combination with any other word or phrase.

**DOCUMENT REQUEST NO. 34:** Produce all documents that reflect or refer to the validity, and/or enforceability of Balance Bar's Marks.

**DOCUMENT REQUEST NO. 35:** Produce all documents that reflect or refer to the existence, validity, and/or enforceability of GFA's Marks.

**DOCUMENT REQUEST NO. 36:** Produce all non-privileged documents that reflect or refer to: (a) GFA, (b) this Opposition proceeding, (c) GFA's Marks, and/or (d) any products or services sold, marketed or distributed by GFA in connection with GFA's Marks.

**DOCUMENT REQUEST NO. 37:** Produce all documents that reflect or refer to any license or other grant of permission to use any mark owned by Balance Bar or licensed by Balance Bar or to Balance Bar that incorporates the word "BALANCE," or any derivation of that word, by itself or in combination with any other word or phrase.

**DOCUMENT REQUEST NO. 38:** Produce all documents that reflect or refer to any agreements or contracts regarding the distribution of Balance Bar's products sold in connection with the word BALANCE, or any derivation of that word, by itself or in combination with any other word or phrase.

**DOCUMENT REQUEST NO. 39:** Produce all contracts or written agreements between Balance Bar and any third party referring or relating to products and services sold, marketed, or distributed in connection with the word BALANCE.

**DOCUMENT REQUEST NO. 40:** Produce all documents that reflect or refer to any agreements or contracts regarding the location in stores of Balance Bar products sold in connection with the word BALANCE, or any derivation of that word, by itself or in combination with any other word or phrase.

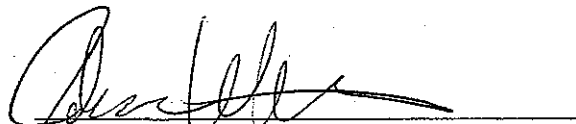
**DOCUMENT REQUEST NO. 41:** Produce all documents that Balance Bar intends to use, refer to, or rely upon at any deposition, trial, or hearing in this matter.

**DOCUMENT REQUEST NO. 42:** Produce all documents that any person whom Balance Bar intends to call to testify as an expert by affidavit, deposition, or at any trial or hearing in this matter has relied upon, prepared or referred to in forming their opinions.

**DOCUMENT REQUEST NO. 43:** Produce a copy of Balance Bar's document retention policy.

**DOCUMENT REQUEST NO. 44:** Produce all documents identified (or asked to be identified) in response to Applicant's interrogatories to Opposer.

Dated this 28th day of March, 2012.



---

David R. Cross

Marta S. Levine

Johanna M. Wilbert

Quarles & Brady LLP

411 East Wisconsin Avenue

Suite 2040

Milwaukee, Wisconsin 53202-4497

Telephone: (414) 277-5495

Facsimile: (414) 978-8942

Email: [DRC@quarles.com](mailto:DRC@quarles.com)

Email: [marta.levine@quarles.com](mailto:marta.levine@quarles.com)

Email: [jwilbert@quarles.com](mailto:jwilbert@quarles.com)

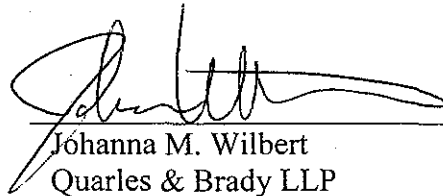
*Attorneys for Applicant GFA Brands, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2012, I served upon counsel of record the foregoing by causing the same to be delivered by U.S. mail and email to:

Keith Sharkin  
Dickstein Shapiro LLP  
1633 Broadway  
New York, NY 10019-6708  
sharkin@dsmo.com

Dated this 28th day of March, 2012.



---

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