UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

HEALTHSMART FOODS, INC.,	)	CASE NO. 3:23-cv-00060
	)	
Plaintiff,	)	
	)	**COMPLAINT FOR TRADEMARK INFRINGEMENT**
v.	)	(Trademark Infringement, Unfair Competition, Trademark Dilution, and Deceptive Trade Practices)
	)	
BETH PORTER and SWEET NOTHINGS, INC.,	)	
	)	
Defendants.	)	**DEMAND FOR JURY TRIAL**

Plaintiff HealthSmart Foods, Inc. ("HealthSmart"), by counsel, states the following for its Complaint against Beth Porter ("Porter") and Sweet Nothings, Inc. ("Company") (Porter and Company hereinafter, "Defendants").

INTRODUCTION

1. For six (6) years, HealthSmart has advertised, marketed, promoted, formulated, manufactured, distributed, and sold health food snacks, including but not limited to snack bars, snack bites, shakes, and candies. HealthSmart's products include its wide selection of health snack clusters, crisps, and patties that are sold under the distinctive trademark of the SWEET NOTHINGS ® brand, registered with the U.S. Patent and Trademark Office (registration no. 5,306,700) (the "Mark"), and related copyrights and trademarks to its advertising material (collectively, "HealthSmart IP").

2. In promoting and branding its products, HealthSmart has continually used the Mark and HealthSmart IP in advertising campaigns throughout the country, including through its website at https://healthsmartfoods.com/collections/sweet-nothings-candies, Amazon.com,

and in-store displays where it has been actively involved in its efforts to further promote its brand. As a result of these efforts and others, HealthSmart's customers and the public have come to recognize HealthSmart as an established and successful brand for certain food products.

3. Examples of HealthSmart employing the Mark and HealthSmart IP are shown at HealthSmartFoods.com and here below:

4. Despite HealthSmart's senior rights in the Mark and HealthSmart IP, HealthSmart became aware of Defendants' use of the Mark in Defendants' promotion of competing chocolate confections and candies, including nut butter food snacks with chocolate and peanut butter flavors and chocolate banana peanut butter flavors (the "Infringing Goods"), examples of which from online promotions are attached hereto as Exhibit 1.

5. With full knowledge of HealthSmart's existing products, Defendants have used a mark identical in appearance, sound, and meaning for substantially similar products. Defendant's Infringing Goods create the same connotation and overall commercial impression as HealthSmart's goods.

6. Well over a year after HealthSmart obtained registration of its Mark from the U.S. Patent and Trademark Office ("PTO"), Porter sought to obtain federal registration of the exact same mark.

7. **The PTO twice refused registration of her application because of a likelihood of confusion with HealthSmart's existing Mark**. In two separate office actions, the PTO rejected Porter's application after analyzing the similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods.

8. To overcome the PTO's rejections, Porter carved out any professed use similar to HealthSmart's products and submitted verified statements before the PTO stating her goods would be exclusively frozen, contain fruit as a primary ingredient, and be filled with superfood items such as chia seeds, flax seeds, and dates.

9. In fact, however, Defendant's actual use was very different. One of Defendant's most prominent products bearing the Mark—a confection or candy called "Nut Butter Bites"—is neither frozen, nor contains fruit as a primary ingredient, nor is filled with superfood items.

10. With full knowledge of HealthSmart's existing products, Defendants willfully used HealthSmart's Mark in association with confections and candy substantially similar to HealthSmart's, creating confusion in the marketplace and deceiving the PTO about Porter's true intentions.

11. Additionally, with full knowledge of HealthSmart's existing products and activities, Defendants traded its Infringing Goods under HealthSmart's Mark in the same trade channels as HealthSmart, despite clear and explicit verified statements to the PTO that Porter would not do so.

12. Porter deceptively told the PTO that her products would be sold in the frozen food or health food sections of grocery stores, and then falsely told the PTO that HealthSmart's goods would only be sold in either the grocery store bakery department or candy aisle. These statements constitute fraud and deception before the PTO.

13. Defendants are in competition with HealthSmart and now utilize blatant tactics to trade on the goodwill and commercial magnetism of HealthSmart's Mark and to free ride on HealthSmart's work and investment.

14. The Infringing Goods imitate HealthSmart's brand in a manner that is likely to cause consumer confusion and deceive the public regarding the source, sponsorship, and/or affiliation of those goods. Defendants' Infringing Goods are therefore unlawful and are causing irreparable harm to HealthSmart's brand.

15. HealthSmart brings this action at law and in equity for trademark infringement and dilution, unfair competition, and unfair business practices arising under the Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq. (2009) ("Lanham Act"); the anti-dilution laws of several states; the fair business practices and unfair and deceptive trade practices acts of several states; and the common law. Among other relief, HealthSmart asks this Court to: (a) preliminarily enjoin Defendants from distributing, marketing, or selling goods bearing a confusingly similar imitation of the Mark; (b) permanently enjoin Defendants from distributing, marketing, or

selling goods using or bearing a confusingly similar imitation of the Mark; (c) award HealthSmart monetary damages and to treble that award; (d) require Defendants to disgorge all profits from sales of the Infringing Goods; and (e) award HealthSmart punitive damages, attorneys' fees, and costs, and all other remedies and relief proper under these premises.

PARTIES

16. Plaintiff HealthSmart is an Indiana corporation existing under the laws of the State of Indiana, having its office and principal place of business at 1325 Newton Avenue, Evansville, Indiana 47715. Plaintiff's headquarters and operations are based in Evansville, Indiana, where it also employs nearly all its approximately 25 employees.

17. On information and belief, Defendant Porter is an individual with a business and mailing address of 715 College Avenue, Menlo Park, California 94025. Both individually and with the Company she created, Porter sells various snacks and other food products, including the Infringing Goods.

18. On information and belief, Defendant Company is a business corporation organized and existing under the laws of the State of Delaware and having a place of business at 715 College Avenue, Menlo Park, California 94025. Company, together with Porter, markets and sells the Infringing Goods, which includes nut butter health food snacks with chocolate and peanut butter flavors and chocolate banana peanut butter flavors.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction under section 39 of the Lanham Act, 15 U.S.C. § 1121, and under 28 U.S.C. §§ 1331 and 1338. Subject matter jurisdiction over

HealthSmart's related state and common law claims is proper pursuant to 28 U.S.C. §§ 1338 and 1367.

20. This Court has personal jurisdiction over Defendants because, on information and belief, (a) Defendants have marketed, distributed, offered for sale, and/or sold the Infringing Goods to persons within the State of Indiana; (b) Defendants regularly transact and conduct business within the State of Indiana; and/or (c) Defendants have otherwise made or established contacts within the State of Indiana sufficient to permit the exercise of personal jurisdiction.

21. The Southern District of Indiana is a proper venue pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the acts or omissions giving rise to HealthSmart's claims occurred in this District.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

A. HealthSmart's Mark

22. HealthSmart is currently, and for years has been, one of the country's leading manufacturers of delicious, healthy snack foods that cater to restricted diets and lifestyles. HealthSmart's products work with diets such as low fat, low calorie, low carb, low glycemic, Weight Watchers, Calorie Counting, Atkins, South Beach, Zone, Sugar Busters, 40/30/30, Glycemic Revolution, F Factor, and people with diabetes.

23. At least as early as March 7, 2017, HealthSmart began using the SWEET NOTHINGS ® mark and obtained a federal trademark registration, Reg. No. 5,306,700, issued by the United States Patent and Trademark Office ("PTO") on October 10, 2017, for the Mark in international class 030 for "Candy; chocolate confections; baked goods, namely, bakery squares,

cupcakes, and cakes." A copy of the PTO Certificate of Registration for the Mark is attached as Exhibit 2.

24. In examining the scope of a mark's identified goods, the PTO states one should consider, "[t]he common understanding of words or phrases used in an identification determines the scope and nature of the goods or services. *In re Fiat Grp. Mktg. & Corporate Commc'ns S.p.A.*, 109 USPQ2d 1593 (TTAB 2014); TMEP §1402.07(a). A basic and widely available dictionary should be consulted to determine the definition or understanding of a commonly used word." TMEP 1402.03.

25. According to *Merriam-Webster.com Dictionary*, the term *confection* means "something confected" and *confected* means to put together from varied material.[1] The *Oxford Companion to Food* notes that *confectionery* is a term "generally indicating a delicacy which is sweet, is usually eaten with the fingers, and keeps for some time."[2] Thus, for purposes of HealthSmart's registered Mark, "chocolate confections" means food put together from varied material, including chocolate, which is sweet, usually eaten with the fingers, and keeps for some time.

26. The term *candy* refers to a particular type of confection which includes sugar or other sweet ingredients. According to *Merriam-Webster.com Dictionary*, the term *candy* means "crystallized sugar formed by boiling down sugar syrup," "a confection made with sugar and

[1] "Confect." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/confect. Accessed 7 Apr. 2023.

[2] Alan Davidson, *The Oxford Companion to Food* (Oxford University Press, 2014), p. 213.

often flavoring and filling; a piece of such confection," and "something that is pleasant or appealing in a light or frivolous way."[3]

27. HealthSmart's Sweet Nothings ® brand is a new line of products for candy and chocolate confections, including white almond clusters, white caramel crisps, caramel crisps, caramel pecan clusters, peanut butter patties, cookies n' cream, chocolate covered caramels, and peanut nougat clusters.

28. HealthSmart's Sweet Nothings ® branded products are significantly reduced in fat, saturated fat, sugar, and calories. HealthSmart made this possible through an innovation that allows previous chocolate fats to be replaced with a new fat source called Epogee, which reduces fat and saturated fat by roughly sixty-seven percent (67%). With less fat, HealthSmart's products contain fewer calories and calorie carbohydrates—often reduced by half the calorie count of typical candy and chocolate confections.

29. HealthSmart's Mark is well-known within the industry and HealthSmart has invested over $150,000.00 in marketing and promoting its Sweet Nothins ® trademark in association with its products.

30. In all communication with manufacturers, retailers, and consumers, the HealthSmart Mark is prominently displayed, further cementing HealthSmart's Mark and brand association with candy, chocolate confections, and snacks.

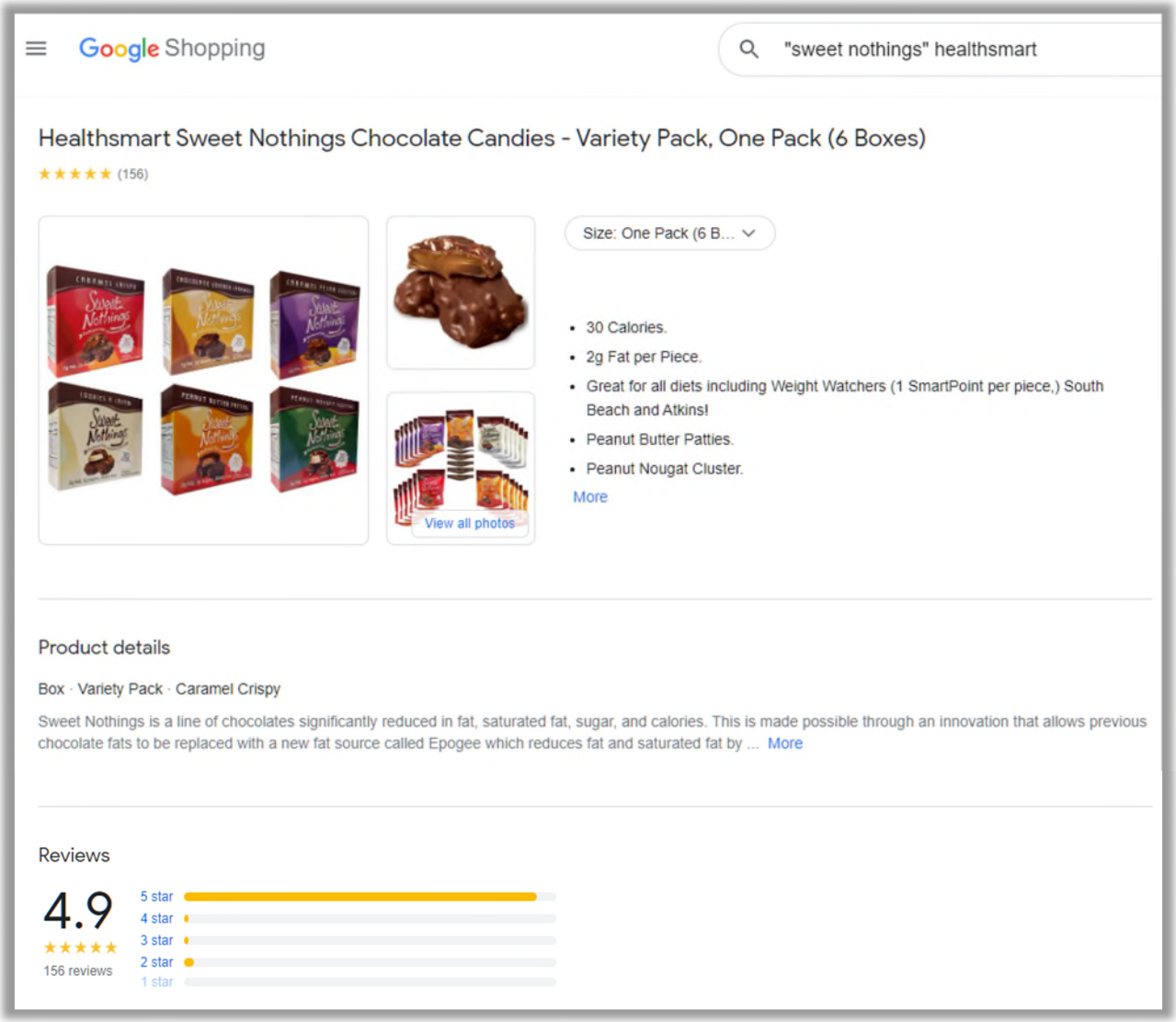
[3] "Candy." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/candy. Accessed 7 Apr. 2023.

31. As a result of HealthSmart's extensive promotional efforts, and its commitment to food and snack products, the public and the food industry associate the Mark with candy, chocolate confections, and snacks.

32. In 2022, annual sales and revenue from the Mark totaled more than One Hundred and Sixty-Nine Thousand Dollars ($169,000.00) dollars. HealthSmart has plans to significantly grow its market share and expand using the Mark with other confections and candies.

33. As a result of HealthSmart's continuous and exclusive use of the Mark in connection with its food products, the Mark enjoys public and food/diet industry acceptance and association with HealthSmart. The Mark has come to be recognized widely and favorably by the public and others as a product originating from HealthSmart. For example, a collection of 156 reviews on Google Shopping of HealthSmart's variety pack of Sweet Nothings ® chocolate candies garnered an average rating of 4.9 out of 5 stars:[4]

[4] See https://www.google.com/shopping/product/6154286928577533673?q=%22sweet+nothings%22+healthsmart&biw=1920&bih=961&sxsrf=APwXEdc7EMjom0P6Isu8siy-m5ZD96JIUQ:1680891909768&prds=eto:14659338571719937284_0,pid:6170746868219694656,rsk:PC_9725036868134665690&sa=X&ved=0ahUKEwi-mLaDt5j-AhWsEFkFHWHkAmUQ8wIImgw#reviews (accessed April 7, 2023).



34. HealthSmart's extensive use and promotion of the Mark has led to valuable goodwill that is symbolized by the Mark. The purchasing public and food/diet industry has come to associate the Mark with HealthSmart.

B. Defendants' Mark

35. Porter first applied for the "Sweet Nothings" mark with the PTO in her personal, individual capacity on November 15, 2018 (serial no. 88,195,615) ("Defendants' Mark"). Porter's verified statement with the PTO asserted that, "[t]o the best of the signatory's knowledge and

belief, no other persons, except, if applicable, concurrent users, have the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other persons, to cause confusion or mistake, or to deceive." A copy of the Porter's PTO application is attached as Exhibit 3.

36. Porter applied under an intent-to-use (section 1(b)) basis for use in international class 030 for "Whole fruit-based, frozen, non-dairy, no added sugar, superfood-rich breakfast foods, snack foods, and treats."

37. On February 26, 2019, the PTO examining attorney issued an office action refusing registration of Defendants' Mark citing concerns over likelihood of confusion with HealthSmart's existing Mark.

38. The PTO examining attorney focused on three factors in issuing its refusal: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. A copy of pertinent portions of this office action is attached as Exhibit 4.

39. In issuing its refusal to register on February 26, 2019, the PTO noted both marks are identical in appearance, sound, and meaning. And because they are identical, "these marks are likely to engender the same connotation and overall commercial impression when considered in connection with applicant's and registrant's respective goods and/or services."

40. While comparing goods of HealthSmart and Porter, the PTO expressed concern that Porter used broad wording to describe its goods (e.g., "treat") that also encompass HeathSmart's existing Mark.

41. Regarding the similarity of trade channels, the PTO concluded that Porter's goods and HealthSmart's goods "are of a type that are commercially related, and are found in similar trade channels and commonly emanate from a single source." See Exhibit 4.

42. About one month after the PTO issued its office action rejecting her application, Porter switched counsel and amended her identified goods.

43. The amendment stated that Porter's goods were not class 30 "sweets" and explicitly excluded HeathSmart's registered goods of "[c]andy; chocolate confections; baked goods, namely, bakery squares, cupcakes, and cakes." A copy of Porter's amendment is attached as Exhibit 5.

44. Porter submitted a response to the PTO's office action refusal on April 26, 2019, stating that her goods, "being superfood rich food products, will be sold in the 'frozen food' or 'health food' sections of stores," whereas HeathSmart's goods, "being dessert and candy items, will be sold in the candy/desserts section of stores and/or the bakery department."

45. Porter also argued that there are a number of highly similar marks registered and in use for closely related goods, and that no evidence of actual confusion exists. A copy of pertinent portions of this response is attached as Exhibit 6.

46. Unpersuaded by Porter's arguments, the PTO issued a final office action refusing the registration on May 18, 2019, which once again focused on three factors in issuing its refusal: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. A copy of pertinent portions of this final PTO office action is attached as Exhibit 7.

47. The PTO highlighted these issues when deeming Porter's arguments as unpersuasive:

a. The PTO noted that, contrary to Porter's assertions, HealthSmart's identification of goods does not contain a "dessert" limitation, and unlike Porter's identification, HealthSmart did not narrow its goods "to only include those identified goods that contain superfoods, whole fruit or to be goods that are frozen, non-dairy and do not contain any added sugar. Thus, the [HealthSmart's] identification is broad enough to encompass chocolate confections and bakery squares, cupcakes, and cakes that can contain superfoods, whole fruit, those that are frozen, non-dairy and do not contain any added sugar."

b. To further underscore its likelihood of confusion concerns, the PTO wrote, "Frozen sections of health food stores contain baked goods. For example, Whole Foods provides Garden Lites muffins containing blueberries and veggies among other 'superfood' ingredients as well as frozen whole fruit that can be eaten as a snack in the freezer cases. . . Moreover, frozen fruit snacks contain chocolate, which is considered a superfood, and is also one of [Porter's] goods."

c. "The attached evidence of record demonstrates that the goods are commercially related, such that they could give rise to the mistaken belief that the goods emanate from the same source."

d. In response to Porter's arguments that other registrations exist for similar marks with similar goods, the PTO responded, "It should be noted initially that these registrations are for goods that are predominantly different from those identified in applicant's application, which emphasizes that the goods are frozen and comprised of whole fruit. Additionally, evidence comprising only a small

number of third-party registrations for potentially similar marks, as in the present case, is generally entitled to little weight in determining the strength of a mark."

48. In response to this final office action, Porter amended her application a second time for the following goods in international class 030: "Whole fruit-based, frozen, non-dairy, no added sugar, superfood-rich snack foods; whole fruit-based, frozen, non-dairy, no added sugar, superfood-rich snack foods in the nature of prepared snacks consisting primarily of fruit, and also containing nuts, seeds or both nuts and seeds; none of the foregoing comprising or including candy, chocolate confections, bakery squares, cupcakes, or cakes." A copy of pertinent portions of that application is attached as Exhibit 8.

49. On July 17, 2019, Porter submitted a Request for Reconsideration following the PTO's final action rejecting her application. Porter began by arguing there was wide use of the mark among third parties so HealthSmart's mark is entitled to limited scope of protection. She then (falsely) argued that HealthSmart's and Porter's goods are dissimilar in nature and travel in different channels of trade: "Here, [Porter] provides frozen, fruit-based superfood-rich snack foods. [HealthSmart] provides candy, chocolate confections, bakery squares, cupcakes, and cakes." Porter also relied heavily on her revised description of the goods. A copy of pertinent portions of that Request for Reconsideration is attached as Exhibit 9.

50. On July 30, 2019, the PTO relented and published Porter's mark in the *Official Gazette*.

51. The PTO then issued a Notice of Allowance on October 29, 2019, and Porter submitted a Statement of Use on January 28, 2020.

52. Porter's specimen in her Statement of Use was of frozen fruit snacks, not the nut butter chocolate confections and candy it subsequently used with the mark.

53. Porter asserted that her first use in commerce occurred in September 2019.

54. Porter's mark officially registered with the PTO on April 21, 2020.

55. On January 18, 2023 (shortly after HealthSmart raised concerns about the Infringing Goods), Porter filed an assignment of her mark to the Company via a *Confirmatory Assignment Agreement* ("Assignment Agreement"). A copy of the Assignment Agreement is attached as Exhibit 10.

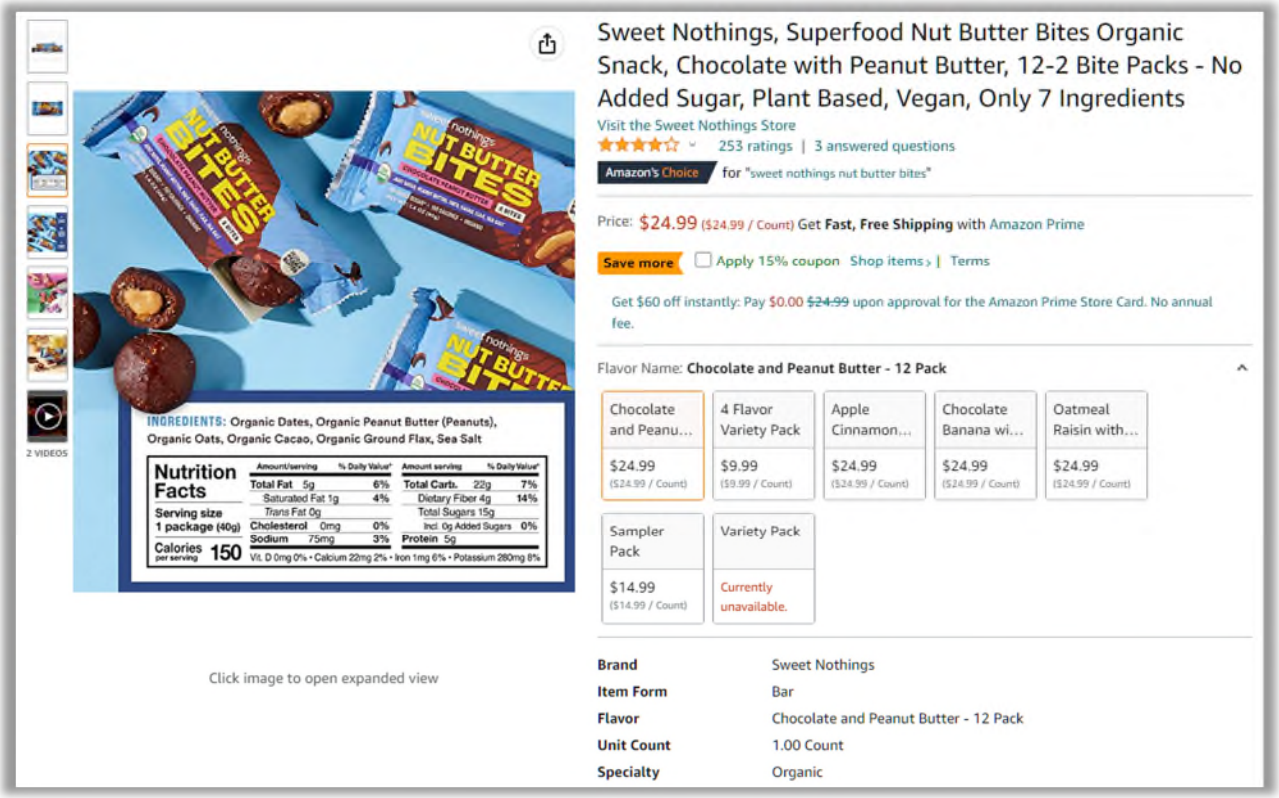
56. The Assignment Agreement's recitals state that Porter intended to assign the mark and other intellectual property to the Company, but "may not have formally and/or completely assigned such Intellectual Property Rights" to the Company.

57. The parties stated the Assignment Agreement reflected their original intent.

58. Porter apparently backdated this Assignment Agreement effective January 18, 2019, to align with the Company's formation date.

C. Defendants' Infringing and Unlawful Activities

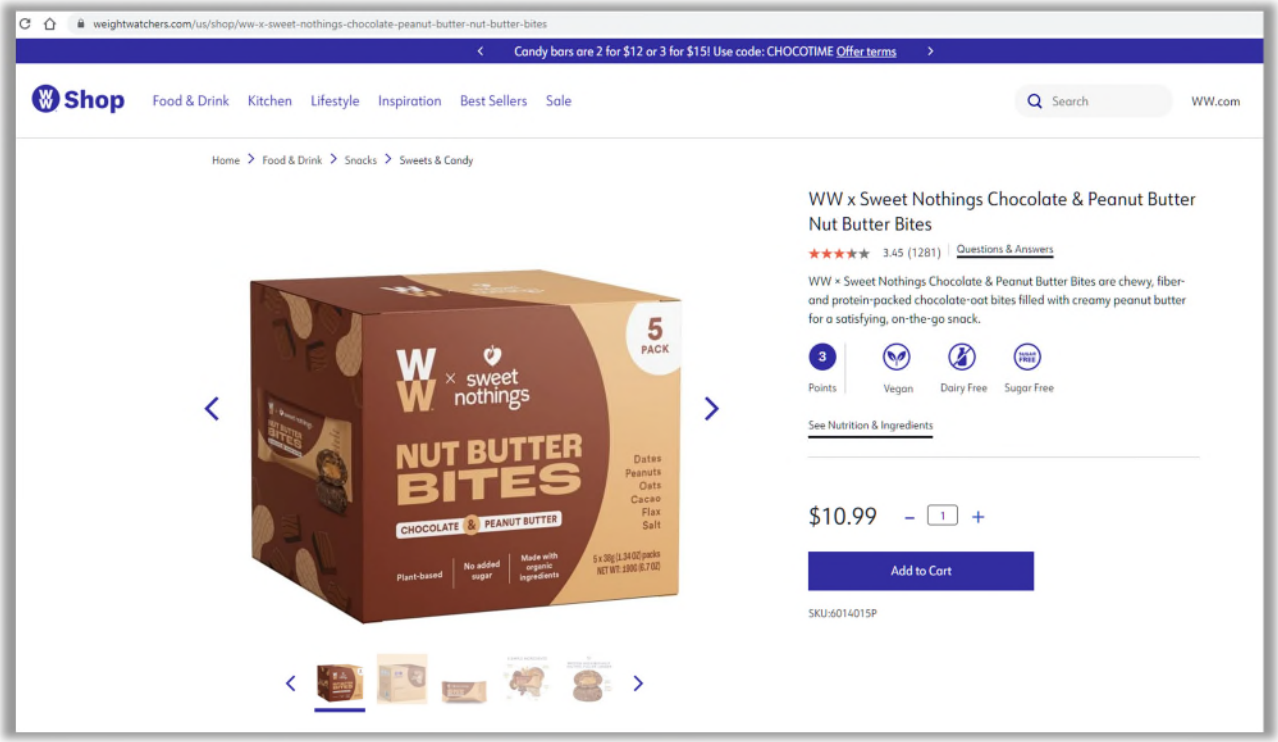
59. In blatant disregard of HealthSmart's senior rights to the Mark, Defendants are manufacturing, producing, distributing, marketing, and selling in interstate commerce the Infringing Goods, which includes chocolate confections, candy, and other food products bearing the Sweet Nothings ® brand. The Infringing Goods, as depicted on its SweetNothings.com website, below on Amazon.com, and in the attached Exhibit 1, mirror the Mark used by HealthSmart:



60. Defendants' Infringing Goods contain several prominent overlapping ingredients. For example, Defendants' Nut Butter Bites Organic Snack, Chocolate with Peanut Butter, feature very similar ingredients to HealthSmart's Peanut Nougat Clusters, including chocolate (cacao) and peanut butter (peanuts).

61. Likewise, the shape and consumer experience of HealthSmart's products and the Infringing Goods significantly mirror one another in that both are bite-sized snacks made with an outer shell and an inner center filled with a softer or creamier ingredient.

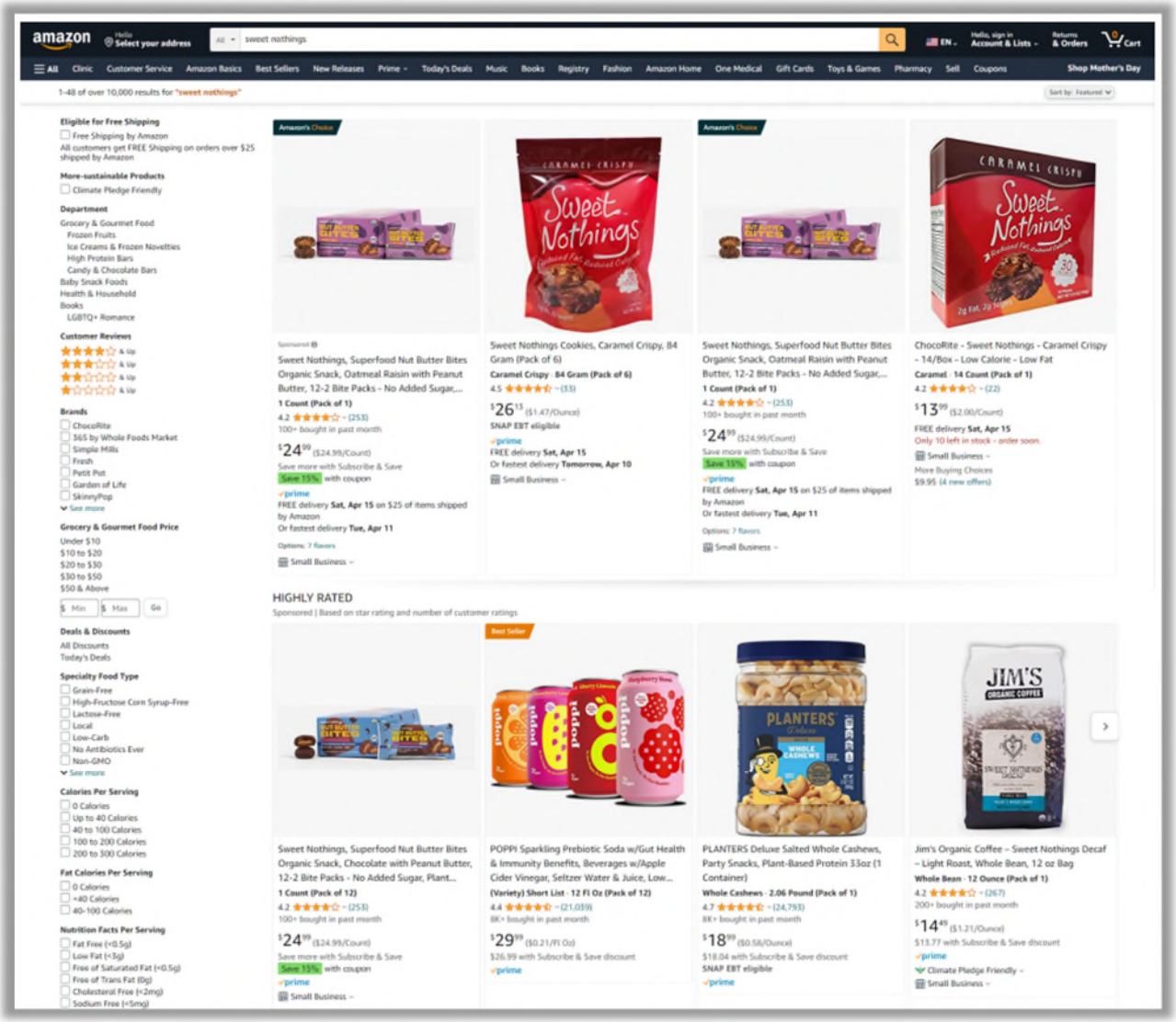
62. Defendants advertise the Infringing Goods on WW (formerly Weight Watchers) (accessed April 9, 2023) as "Sweets & Candy":



63. The Infringing Goods carry the identical mark in association with substantially similar chocolate confections and candy products. The Infringing Goods also cater to the same consumers and travel in the same trade channels as HealthSmart's products bearing the Mark.

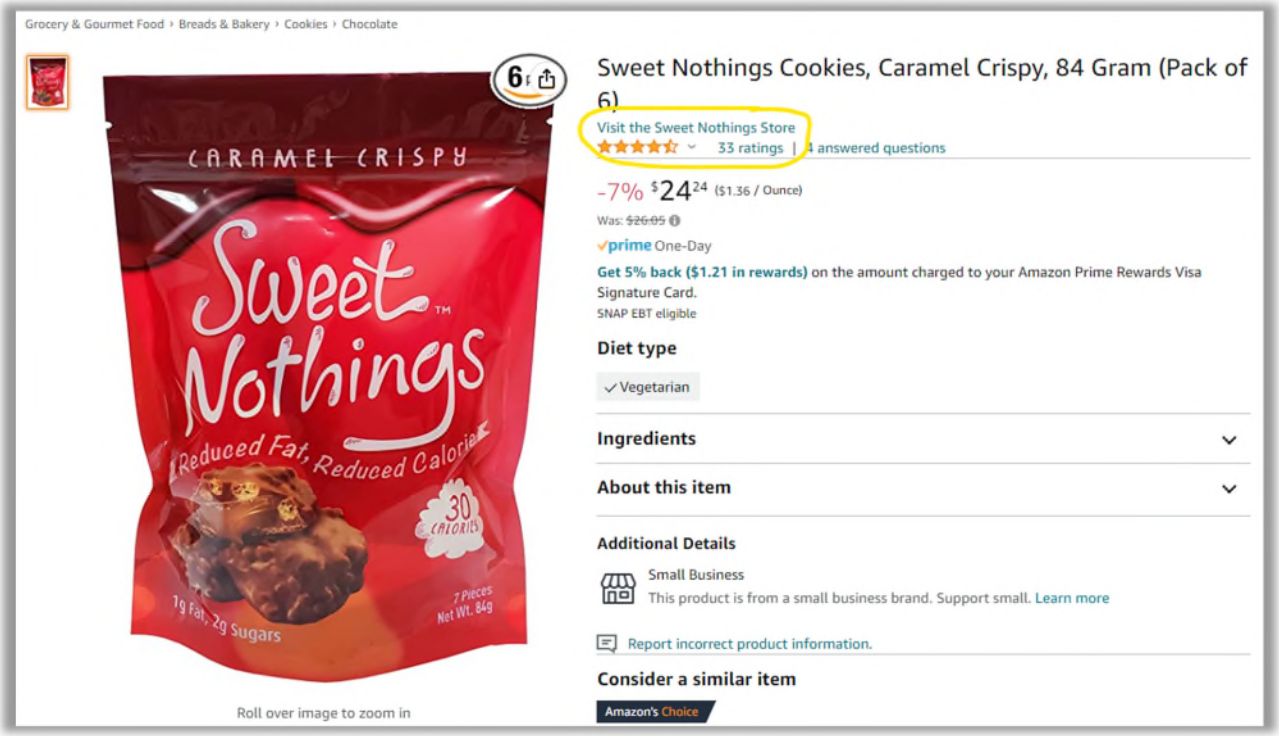
64. As HealthSmart's direct competitor, Defendants are offering the Infringing Goods to the same consumers as HealthSmart and Defendants' Infringing Goods travel on the same channels as HealthSmart's, utilizing confusingly similar marks and shapes. On information and belief, Defendants sell the Infringing Goods in brick-and-mortar grocery stores as well as through national retailers Amazon, Thrive Market, and the WW Marketplace.

65. A search of "Sweet Nothings" on Amazon.com (accessed on April 9, 2023) yields Infringing Goods in three of the top five results:



66. Defendants' use of HealthSmart's Mark has caused actual confusion in the marketplace. For example, Amazon.com provides a link on HealthSmart's product pages titled

"Visit the Sweet Nothings Store," [5] but due to confusion created by Defendants' infringement, that link takes consumers to an Amazon page dedicated to Defendants' Infringing Products.[6]



Screen shot of a HealthSmart product page with the "Visit the Sweet Nothings Store" link circled in yellow

[5] An example of such product page may be found at https://www.amazon.com/dp/B07G3LYQ1B (accessed April 10, 2023).

[6] The product page Amazon directs consumers toward may be found at https://www.amazon.com/stores/SweetNothings/page/371857C7-10B8-4107-892B-3534815114F8?ref_=ast_bln (accessed April 10, 2023).

Screen shot of Defendants' Amazon product page that consumers are directed to after clicking on the highlighted link above

67. Despite Defendants' knowledge of HealthSmart's products, and despite Defendants' prior assertions made to the PTO, Defendants expressed plans in press and publications to use the Mark in Defendants' products "across aisles" and indeed "across every isle of the grocery store." See Exhibit 11. [7] [8]

[7] Ryan Daily, "Sweet Nothings expands shelf-stable snack portfolio with help of e-com partner," *FoodNavigator*, 30 March 2023, available at https://www.foodnavigator-usa.com/Article/2023/03/30/sweet-nothings-expands-shelf-stable-snack-portfolio-with-help-of-e-com-partners (accessed April 12, 2023).

[8] Monica Watrous, "Sweet Nothings expands beyond the freezer aisle," *Food Business News*, 8 September 2021, available at https://www.foodbusinessnews.net/articles/19543-sweet-nothings-expands-beyond-the-freezer-aisle (accessed April 12, 2023).

68. As early as November 11, 2022, HealthSmart informed Defendants of their infringement and ordered Defendants to cease and desist from any further use of the Mark. See Exhibit 12.

69. Nevertheless, Defendants chose to proceed with manufacturing, producing, distributing, marketing, and selling its Infringing Goods.

70. Defendants even retaliated against HealthSmart for raising concerns by filing a complaint in California for an unfair business practices.

71. Without doubt, Defendants possessed knowledge of and were very familiar with HealthSmart's Mark when it began designing, organizing, distributing, marketing, promoting, offering for sale, and selling the Infringing Goods.

72. Defendants intentionally adopted and used a confusingly similar imitation of the Mark and sold the Infringing Goods in the same trade channels.

73. The Infringing Goods were designed, marketed, promoted, offered for sale, and sold by Defendants and not by HealthSmart.

74. Defendants are not associated, affiliated, or connected with HealthSmart, or licensed, authorized, sponsored, endorsed, or approved by HealthSmart in any way.

75. HealthSmart used the Mark extensively and continuously before Defendants began: (i) using the Infringing Goods in candy, chocolate confections, and other food products; or (ii) designing, distributing, marketing, promoting, offering for sale, and selling the Infringing Goods.

76. The likelihood of confusion, mistake, and deception engendered by Defendants' infringement of HealthSmart's Mark is causing irreparable harm to the goodwill symbolized by the Mark and the reputation for quality that it embodies.

77. Defendants' activities are likely to cause confusion before, during, and after the time of purchase because consumers, prospective consumers, retailers, wholesalers, and others considering HealthSmart's products at the points of sale are likely—due to Defendants' use of a confusingly identical imitation of HealthSmart's Mark—to mistakenly attribute the products to HealthSmart. By causing a likelihood of confusion, mistake, and deception, Defendants are inflicting irreparable harm on the goodwill symbolized by HealthSmart's Mark and the reputation for quality that it embodies.

78. On information and belief, Defendants continue to use the Infringing Goods in connection with the sale of chocolate confections, candy, and other food products that directly compete with the products offered by HealthSmart. Defendants began selling the Infringing Goods well after HealthSmart had established protectable rights in the Mark and well after the Mark had become well-known within the industry.

79. On further information and belief, Defendants knowingly, willfully, intentionally, and maliciously adopted and used a confusingly similar imitation of HealthSmart's Mark.

D. Porter's Individual Liability

80. Both individually and with the Company she founded, Porter sells the Infringing Goods and various other snacks and food products. Online descriptions of the Company prominently display Porter as co-founder of the Company.

81. Porter applied for Defendants' mark in her individual name.

82. During much of the relevant period of infringement, Defendants' mark was federally registered in Porter's individual name.

83. On information and belief, Porter created or directed the creation of the Company's branding, website, and marketing, including Company's use of the Mark. Porter is responsible (directly or indirectly) for adding and updating the content found on the Company's website. Through Company's website, consumers may purchase the Infringing Goods.

84. The United States Court of Appeals for the Seventh Circuit Court has long held that while corporate officers are not ordinarily liable for the infringement of their corporation, that only existed "in the absence of some special showing." *Dangler v. Imperial Mach., Co.*, 11 F.2d 945, 947 (7th Cir. 1926).

85. An officer is personally liable for the torts in which she has participated or which she has authorized or directed. *4SEMO.com Inc. v. S. Illinois Storm Shelters, Inc.*, 939 F.3d 905, 912 (7th Cir. 2019); *Dwyer Instruments, Inc. v. Sensocon, Inc.*, 873 F. Supp. 2d 1015, 1023 (N.D. Ind. 2012).

86. Additionally, a corporate officer is individually liable if she personally participates in the manufacture or sale of an infringing article, uses the corporation as an instrument to carry out her own willful and deliberate infringements, or knowingly uses an irresponsible corporation with the purpose of avoiding personal liability. *4SEMO.com Inc.*, 939 F.3d at 912–13.

87. A prime example of making a "special showing" is provided in *Texas Roadhouse, Inc. v. Texas Corral Restaurants, Inc.*, 2017 WL 1197262, *3 (N.D. Ind. 2017). Among other claims, plaintiff Texas Roadhouse sued the owner of Texas Corral, Paul Switzer, in his individual capacity for trademark infringement. *Texas Roadhouse, Inc.*, 2017 WL 1197262, *3. Texas Roadhouse alleged Switzer was the domain name registrant for the Texas Corral website, created or directed the creation of that website, was responsible for the content found on the website that included the accused logos, and was responsible for adding and updating the website. Thus, the court determined Texas Roadhouse had pleaded the facts necessary to make a "special showing" in support of the individual liability claim, and the claim survived a 12(b)(6) motion to dismiss. *Id*.

88. A similar result was reached by the court in *Dwyer Instruments Inc. v. Sensocon, Inc.*, No. 3:09-CV-00010-TLS-CAN, 2012 WL 3207254 (N.D. Ind. Mar. 23, 2012). In that case, the founder and shareholder of the defendant corporation was found liable in his individual capacity for infringement of the plaintiff's intellectual property given that he "participated directly in the activities that the Plaintiff claim[ed] constitute[d] infringement of its intellectual property rights in the [the protected mark]." *Id*. at *22. For example, the individual shareholder and founder contacted the company that ultimately manufactured the infringing product, approved the product's design, and contacted and/or was contacted by potential customers as a salesperson. *Id*. "He thus 'personally participate[d] in the manufacture [and] sale of the infringing article,' *Dangler*, 11 F.2d at 947, and the special showing for personal liability [was] established." *Id*.

89. Other federal court decisions also support that HealthSmart need not to pierce the Company's corporate veil to hold Porter personally liable for the Lanham Act misconduct. "While a corporate officer is not necessarily individually liable for torts committed on behalf of the corporation," *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F. Supp. 899, 913-14 (E.D.N.Y. 1988), it is, nonetheless, well-established in federal courts that under the Lanham Act, a corporate officer may be held personally liable for trademark infringement and unfair competition "if the officer is a moving, active, conscious force behind the corporation's infringement." *FC Online Mktg., Inc. v. Burke's Martial Arts, LLC*, No. 14-cv-3685 (SJF)(SIL), 2015 WL 4162757, at *5 (E.D.N.Y. July 8, 2015) (collecting cases); see also *Krevat v. Burgers to Go, Inc.*, No. 13-cv6258 (JS)(AKT), 2015 WL 1412707, at *4 (E.D.N.Y. Mar. 23, 2015); *Chloe v. Queen Bee of Beverly Hills, LLC*, No. 06-cv-3140 (RJH), 2011 WL 3678802, at *5 (S.D.N.Y. Aug. 19, 2011) ("The case law is clear that if a corporate officer was *either* the sole shareholder and employee, and therefore must have approved of the infringing act, *or* a direct participant in the infringing activity, the officer is a moving, active, conscious[] force behind the corporation's infringement.") (emphasis added; further citations omitted).

90. "Demonstrating that a corporate officer 'authorized and approved the acts of unfair competition which are the basis of the corporation's liability is sufficient to subject the officer to personal liability.'" *Study Logic, LLC v. Clear New Plus, Inc.*, No. 11-cv-4343, 2012 WL 4329349, at *11 (E.D.N.Y. Sept. 21, 2012) (quoting *Bambu Sales*, 683 F. Supp. at 913).

91. Moreover, "[i]n determining whether the officer's acts render him individually liable, it is immaterial whether he knows that his acts will result in an infringement." *Bambu Sales*, 683 F. Supp. at 913-14 (quotations, alterations and citation omitted).

FIRST CLAIM FOR RELIEF
(Federal Trademark Infringement)

92. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

93. Defendants' use of a confusingly similar imitation of HealthSmart's Mark is likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendants' services are manufactured or distributed by HealthSmart, or are associated or connected with HealthSmart, or have the sponsorship, endorsement, or approval of HealthSmart.

94. Defendants' Infringing Goods are confusingly similar to HealthSmart's federally registered mark in violation of 15 U.S.C. § 1114. Defendants' activities are causing and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public, and, additionally, injury to HealthSmart's goodwill and reputation as symbolized by HealthSmart's Mark, for which HealthSmart has no adequate remedy at law.

95. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with HealthSmart's Mark to HealthSmart's great and irreparable harm.

96. Defendants caused and are likely to continue causing substantial injury to the public and to HealthSmart, and HealthSmart is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees under 15 U.S.C. §§ 1114, 1116, and 1117.

SECOND CLAIM FOR RELIEF
(Federal Unfair Competition)

97. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

98. Defendants' use of a confusingly similar imitation of HealthSmart's Mark has caused and is likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendants' goods are organized or distributed by HealthSmart, or are affiliated, connected, or associated with HealthSmart, or have the sponsorship, endorsement, or approval of HealthSmart.

99. Defendants have made false representations, false descriptions, and false designations of, on, or in connection with its services in violation of 15 U.S.C. § 1125(a). Defendants activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public, and, additionally, injury to HealthSmart's goodwill and reputation as symbolized by HealthSmart's Mark, for which HealthSmart has no adequate remedy at law.

100. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with HealthSmart's Mark to the great and irreparable injury of HealthSmart.

101. Defendants' conduct has caused, and is likely to continue causing, substantial injury to the public and to HealthSmart. HealthSmart is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees under 15 U.S.C. §§ 1125(a), 1116, and 1117.

THIRD CLAIM FOR RELIEF
(Federal Trademark Dilution of the Mark)

102. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

103. For nearly six years, HealthSmart has exclusively and continuously promoted and used the Mark throughout the United States. The Mark became a well-known symbol of HealthSmart and HealthSmart's products before Defendants began using the Mark or offered the Infringing Goods for sale.

104. Defendants are making use in commerce of the Infringing Goods, which dilutes and is likely to dilute the distinctiveness of HealthSmart's Mark by eroding the public's exclusive identification of the well-known Mark with HealthSmart, tarnishing and degrading the positive associations and prestigious connotations of the Mark, and otherwise lessening the capacity of the Mark to identify and distinguish HealthSmart's services.

105. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with HealthSmart's Mark or to cause dilution of the Mark to the great and irreparable injury of HealthSmart.

106. Defendants have caused and will continue to cause irreparable injury to HealthSmart's goodwill and business reputations, and dilution of the distinctiveness and value of HealthSmart's well-known and distinctive Mark in violation of 15 U.S.C. § 1125I. HealthSmart therefore is entitled to injunctive relief and to Defendants' profits, actual damages, enhanced profits and damages, and reasonable attorneys' fees under 15 U.S.C. §§ 1125I, 1116, and 1117.

FOURTH CLAIM FOR RELIEF
(Unfair and Deceptive Trade Practices)

107. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

108. Defendants have been and are passing off their goods as those of HealthSmart, causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval of Defendants' services, causing a likelihood of confusion as to Defendants' affiliation, connection, or association with HealthSmart, and otherwise damaging the public.

109. Defendants' conduct constitutes unfair and deceptive acts or practices in the course of a business, trade, or commerce in violation of the unfair and deceptive trade practices statutes of several states, including California CAL. BUS. & PROF. CODE § 17200, et seq. (West 2009); Colorado, COLO. REV. STAT. ANN. §§ 6-1-101 to 6-1-115 (West 2009); Delaware, DEL. CODE ANN. Tit. 6, §§ 2531 to 2536 (2009); Georgia, GA. CODE ANN. §§ 10-1-370 to 10-1-375 (2009); Hawaii, HAW. REV. STAT. §§ 481A-1 to 481A-5 (2009); Illinois, ILL. COMP. STAT. ANN. Ch. 815, 510/1 to 510/7 (2009); Indiana, IND. CODE § 24-5-0.5-1 *et seq.*; Maine, ME. REV. STAT. ANN. Tit. 10, §§ 1211 to 1216 (West 2009); Minnesota, MINN. STAT. ANN. § 325D.43 to .48 (West 2009); Nebraska, NEB. REV. STAT. §§ 87-301 to 87-306 (2009); New Mexico, N.M. STAT. ANN. §§ 57-12-1 to 57-12-22 (Michie 2009); New York, N.Y. GEN. BUS. Law § 349 (McKinney 2009); Ohio, OHIO REV. CODE ANN. §§ 4165.01 to 4165.04 (Baldwin 2009); and Oklahoma, OKLA. STAT. ANN. Tit. 78, §§ 51 to 55 (West 2009).

110. Defendants' unauthorized use of a confusingly similar imitation of HealthSmart's Mark has caused and is likely to cause substantial injury to the public and to

HealthSmart. HealthSmart, therefore, is entitled to injunctive relief and to recover damages and, if appropriate, punitive damages, costs, and reasonable attorneys' fees.

FIFTH CLAIM FOR RELIEF
(Common Law Trademark Infringement and Unfair Competition)

111. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

112. Defendants' acts constitute common law trademark infringement and unfair competition, and have created and will continue to create, unless restrained by this Court, a likelihood of confusion to the irreparable injury of HealthSmart. HealthSmart has no adequate remedy at law for this injury.

113. On information and belief, Defendants acted with full knowledge of HealthSmart's use of, and statutory and common law rights to, HealthSmart's Mark and without regard to the likelihood of confusion of the public created by Defendants' activities.

114. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with HealthSmart's Mark to the great and irreparable injury of HealthSmart.

115. As a result of Defendants' acts, HealthSmart has been damaged in an amount not yet determined or ascertainable. At a minimum, however, HealthSmart is entitled to injunctive relief, to an accounting of Defendants' profits, damages, and costs. Further, in light of the deliberate and malicious use of a confusingly similar imitation of HealthSmart's Mark, and the need to deter Defendants from engaging in similar conduct in the future, HealthSmart additionally is entitled to punitive damages.

SIXTH CLAIM FOR RELIEF
(State Trademark Dilution and Injury to Business Reputation)

116. HealthSmart repeats and incorporates by reference the allegations in the preceding paragraphs.

117. HealthSmart has extensively and continuously promoted and used the Mark throughout the United States, and the Mark became a distinctive and well-known symbol of HealthSmart's services well before Defendants began using the Infringing Goods or offering the Infringing Goods for sale.

118. Defendants' conduct dilutes and is likely to dilute the distinctiveness of HealthSmart's Mark by eroding the public's exclusive identification of the Mark with HealthSmart, tarnishing and degrading the positive associations and prestigious connotations of the Mark, and otherwise lessening the capacity of the Mark to identify and distinguish HealthSmart's goods.

119. Defendants are causing and will continue to cause irreparable injury to HealthSmart's goodwill and business reputation and dilution of the distinctiveness and value of HealthSmart's well-known and distinctive mark in violation of several state anti-dilution laws, including Alabama, ALA. CODE § 8-12-17 (2009); Alaska, ALASKA STAT. § 45.50.180 (Michie 2009); Arizona, ARIZ. REV. STAT. ANN. § 44-1448.01 (West 2009); Arkansas, ARK. CODE ANN. § 4-71-213 (2009); California, CAL. BUS. & PROF. CODE § 14247 (West 2009); Connecticut, CONN. GEN. STAT. ANN § 35-11iI (West 2009); Delaware, DEL. CODE ANN. Tit. 6, § 3313 (2009); Florida, FLA. STAT. ANN. § 495.151 (West 2007); Georgia, GA. CODE ANN. § 10-1-451 (2009); Hawaii, HAW. REV. STAT. ANN. § 482-32 (Michie 2009); Idaho, IDAHO CODE

§ 48-513 (Michie 2009); Illinois, 765 ILL. COMP. STAT. ANN. 1036/65 (2009); Iowa, IOWA CODE ANN. § 548.113 (West 2009); Indiana, IN. CODE 24-2-13.5 (West 2009); Kansas, KAN. STAT. ANN. § 81-214 (2009); Louisiana, LA. REV. STAT. ANN. § 51:223.1 (West 2009); Maine, ME. REV. STAT. ANN. Tit. 10, § 1530 (West 2000); Massachusetts, MASS. GEN. LAWS. ANN. Ch. 110H, § 13 (West 2009); Minnesota, MINN. STAT. ANN. § 333.285 (West 2009); Mississippi, MISS. CODE. ANN. § 75-25-25 (2009); Missouri, MO. ANN. STAT. § 417.061(1) (West 2009); Montana, MONT. CODE ANN. § 30-13-334 (2009); Nebraska, NEB. REV. STAT. ANN. § 87-140 (Michie 2009); Nevada, NEV. REV. STAT. 600.435 (2007); New Hampshire, N.H. REV. STAT. ANN. § 350-A:12 (2009); New Jersey, N.J. STAT. ANN. 56:3-13.20 (West 2009); New Mexico, N.M. STAT. ANN. § 57-3B-15 (Michie 2009); New York, N.Y. GEN. BUS. Law § 360-l (2009); Oregon anti-dilution statute, O.R.S. § 647.107 (2009); Pennsylvania, 54 PA. CONS. STAT. ANN. § 1124 (West 2009); Rhode Island, R.I. GEN. LAWS § 6-2-12 (2009); South Carolina, S. C. CODE ANN. § 39-15-1165 (2009); Tennessee, TENN. CODE ANN. § 47-25-513 (2009); Texas, TEX. BUS. & COM. CODE ANN. § 16.29 (Vernon 2009); Utah, UT. CODE ANN. § 70-3a-403 (2009); Washington, WASH. REV. CODE ANN. § 19.77.160 (West 2009); West Virginia, W.V. STAT. ANN. 47-2-13 (Michie 2009); and Wyoming, WYO. STAT. ANN. § 40-1-115 (Michie 2009).

120. HealthSmart, therefore, is entitled to injunctive relief, damages, and costs, as well as, if appropriate, enhanced damages, punitive damages, and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, HealthSmart Foods, Inc., prays for judgment against Defendants, Beth Porter and Sweet Nothings, Inc., as follows:

1. Defendants and all of their agents, officers, employees, representatives, successors,

assigns, attorneys, and all other persons acting for, with, by, through or under authority from Defendants, or in concert or participation with Defendants, and each of them, be enjoined from:

(a) advertising, marketing, promoting, offering for sale, distributing, or selling the Infringing Goods;

(b) using the Mark on or in connection with any of Defendants' Infringing Goods;

(c) using the Mark or any other copy, reproduction, colorable imitation, or simulation of HealthSmart's Mark on or in connection with the Infringing Goods;

(d) using any trademark, name, logo, design, or source designation of any kind on or in connection with Defendants' goods or services that is a copy, reproduction, colorable imitation, or simulation of, or confusingly similar to any of HealthSmart's trademarks, trade dresses, names, or logos;

(e) using any trademark, name, logo, design, or source designation of any kind on or in connection with Defendants' goods that is likely to cause confusion, mistake, deception, or public misunderstanding that such goods or services are produced or provided by HealthSmart, or are sponsored or authorized by HealthSmart, or are in any way connected or related to HealthSmart;

(f) using any trademark, name, logo, design, or source designation of any kind on or in connection with Defendants' goods that dilutes or is likely to dilute the distinctiveness of HealthSmart's trademarks, trade dresses, names, or logos;

(g) passing off, palming off, or assisting in passing off or palming off Defendants' goods as those of HealthSmart, or otherwise continuing any and all acts of unfair competition as alleged in this Complaint; and

(h) advertising, promoting, offering for sale, or selling the Infringing Goods or other similar services.

2. Defendants be ordered to cease offering for sale, marketing, promoting, and selling and to recall all Infringing Goods, or any other goods bearing the Mark or any other a confusingly similar imitation of HealthSmart's Mark that is in Defendants' possession or have been organized or promoted by Defendants or under its authority, to any customer, including, but not limited to, any wholesaler, distributor, retailer, consignor, or marketer, and also to deliver to each such store or customer a copy of this Court's order as it relates to said injunctive relief against Defendants;

3. Defendants be ordered to deliver up for impoundment and for destruction, all marketing material, signs, packages, advertising, promotional materials, stationery, or other materials in the possession, custody, or under the control of Defendants that are found to adopt, infringe, or dilute any of HealthSmart's trademarks or that otherwise unfairly compete with HealthSmart and its products;

4. Defendants be compelled to account to HealthSmart for any and all profits derived by Defendants from the sale or distribution of the Infringing Goods;

5. HealthSmart be awarded all damages caused by the acts forming the basis of this Complaint;

6. Based on Defendants' knowing and intentional use of a confusingly similar imitation of HealthSmart's Mark, the damages awarded be trebled and the award of Defendants' profits be enhanced as provided for by 15 U.S.C. § 1117(a);

7. Defendants be required to pay to HealthSmart the costs and reasonable attorneys' fees incurred by HealthSmart in this action pursuant to 15 U.S.C. § 1117(a) and the state statutes cited in this Complaint;

8. Based on Defendants' willful and deliberate infringement and/or dilution of HealthSmart's Mark, and to deter such conduct in the future, HealthSmart be awarded punitive damages;

9. HealthSmart be awarded prejudgment and post-judgment interest on all monetary awards; and

10. HealthSmart be granted such other and further relief as the Court may deem just.

JURY DEMAND

HealthSmart respectfully demands a trial by jury on all claims and issues so triable.

Respectfully submitted,

/s/ Joshua A. Claybourn
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2023, the foregoing document was filed electronically using the Court's electronic filing system (EFS). Notice of this filing will be sent to all parties by operation of the Court's EFS. Parties may access this filing through the Court's system.

/s/ Joshua A. Claybourn
Joshua A. Claybourn