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Filing date: **05/14/2014**

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

| | |
|------------------------|---|
| Proceeding | 91186148 |
| Party | Defendant The Great Atlantic & Pacific Tea Company, Inc. |
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NOTICE OF FILING TRIAL TESTIMONY

Opposition No. 91186148, 91186863

(Consolidated as 91186148)

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

-----X

PUBLIX ASSET MANAGEMENT COMPANY, :

Opposer, : Opposition No. 91186148
Opposition No. 91186863
(Consolidated as 91186148)

v. :
THE GREAT ATLANTIC & PACIFIC TEA :
COMPANY, INC., :

Applicant. :

-----X

NOTICE OF FILING TRIAL TESTIMONY

PLEASE TAKE NOTICE that pursuant to Trademark Rule 2.125, Applicant The Great Atlantic & Pacific Tea Company, Inc. ("A&P") is filing the trial testimony of Whole Foods Market, Inc., by Jay Warren, taken on September 25, 2013 and the accompanying Applicant's Exhibits EE-CCC.

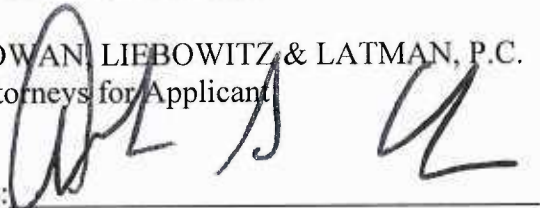
Portions of the testimony were designated as "Confidential Document Subject to Protective Order Filed Under Seal Pursuant to 37 CFR 2.126(d)" pursuant to the Protective Order and are being filed simultaneously under seal.

Dated: New York, New York
May __, 2014

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Applicant

By:



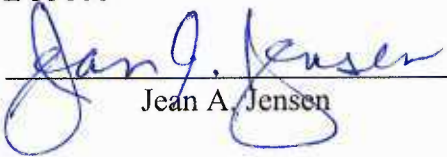
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NOTICE OF FILING TRIAL TESTIMONY
Opposition No. 91186148, 91186863
(Consolidated as 91186148)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Filing Trial Testimony has been served on opposer by first class mail, postage prepaid on May __, 2014 addressed to its attorneys as follows:

James Lake, Esq.
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601 South Boulevard
Tampa, FL 33606



Jean A. Jensen

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CERTIFIED COPY

In The Matter Of:

PUBLIX ASSET MANAGEMENT COMPANY

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

JAY WARREN - Vol. 1

September 25, 2013

MERRILL CORPORATION

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225 Varick Street
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New York, NY 10014
Phone: 212.557.7400
Fax: 212.692.9171

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

CERTIFIED COPY

Publix Asset Management)
Company,)

Opposer)

vs.)Opposition No. 91186148
)Opposition No. 91186863

THE GREAT ATLANTIC &)
PACIFIC TEA COMPANY, INC.,)

Applicant)

ORAL DEPOSITION

JAY WARREN

SEPTEMBER 25, 2013

ORAL DEPOSITION OF JAY WARREN, produced as a witness at the instance of the Applicant and duly sworn, was taken in the above-styled and numbered cause on the 25th day of September, 2013, from 10:06 a.m. to 12:15 p.m., via telephone, before David Bateman, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Pirkey Barber, PLLC, 600 Congress Avenue, Suite 2120, Austin, Texas 78701, pursuant to Trademark Rule 2.123, as part of trial testimony, and the provisions stated on the record or attached hereto.

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1 JAY WARREN,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MS. COHEN:

5 Q. Good morning, Mr. Warren.

6 A. Good morning.

7 Q. Mr. Warren, where are you employed?

8 A. Whole Foods Market in Austin, Texas.

9 Q. And is that the full name of the entity by
10 which you're employed?

11 A. The entity that employs me is Whole Foods
12 Market Services, Inc.

13 Q. And what is your position there?

14 A. I am global litigation counsel for Whole Foods
15 Market Central.

16 Q. And let's break that down. What is Whole Foods
17 Market Central if you could?

18 A. Central is the corporate headquarters in
19 Austin, Texas. It supports the numerous regions that
20 Whole Foods is broken up into in the United States and
21 the United Kingdom and Canada.

22 Q. So you're an attorney?

23 A. Yes, ma'am.

24 Q. And do you have responsibilities -- does your
25 responsibilities include overseeing trademarks of Whole

1 Foods?

2 A. It actually does not. But I have been involved
3 in trademark litigation at times.

4 Q. Does someone who is in charge of trademarks
5 report to you?

6 A. No, ma'am.

7 Q. And who would that person report to then?

8 A. The attorney that was in charge of trademarks
9 is no longer with Whole Foods Market.

10 Q. I see. Can you tell me the relationship
11 between Whole Foods Market Services, Inc. and Whole
12 Foods Market IP, LP?

13 A. Yeah, generally. Whole Foods Market IP, LP and
14 Whole Foods Market Services, Inc. are both wholly-owned
15 subsidiaries of Whole Foods Market, Inc., which is the
16 holding company. There are numerous entities underneath
17 Whole Foods Market, Inc. that are wholly-owned
18 subsidiaries.

19 So in common nomenclature I think you
20 would call Whole Foods Market Services, Inc. and Whole
21 Foods Market IP, LP Inc. sister corporations.

22 MS. COHEN: Okay. Thank you.

23 Q. (BY MS. COHEN) And is Whole Foods Market, Inc.
24 a non-operating holding company?

25 A. That's correct.

1 MS. COHEN: Thank you.

2 Q. (BY MS. COHEN) Mr. Warren, you are here by
3 subpoena today. Is that correct?

4 A. That's correct.

5 Q. And as you know, I think you were subpoenaed or
6 Whole Foods was subpoenaed as a third-party witness in a
7 matter between Publix and the Great Atlantic and Pacific
8 Tea Company Inc. also known as A&P.

9 Is that your understanding?

10 A. That's my understanding.

11 Q. And I suppose you also understand generally
12 that the testimony pertains to the fact that Whole Foods
13 has a couple of products called Green Mission and
14 some -- a store called Greenlife?

15 A. Yes, ma'am.

16 Q. Okay. So we're going to talk about both a
17 little bit. What is the business of Whole Foods?

18 A. Whole Foods is a nationwide natural and organic
19 retailer. It's the first certified organic retailer in
20 the United States. They operate approximately 350 to
21 370 stores in the U.S., Canada and the United Kingdom
22 selling standard grocery items.

23 Q. So Whole Foods sells both standard grocery
24 items and natural and organic items?

25 A. That's correct. Natural and organic is

1 inclusive in the grocery items.

2 Q. They're among the grocery items?

3 A. Yeah. Everything we sell is either natural or
4 organic.

5 MS. COHEN: I see.

6 Q. (BY MS. COHEN) So you might sell a national
7 brand grocery item but it would be a natural version?

8 A. Correct.

9 Q. Who is -- who are the competitors of Whole
10 Foods?

11 A. Just about any grocery chain in the United
12 States, including Publix and A&P, Albertson's, HEB in
13 the Southwest. I don't know if Sun Harvest is still
14 there. Sprouts I think is now Sun Harvest.

15 MS. COHEN: Yes. It's hard to keep track.
16 It's -- it's -- these days.

17 THE WITNESS: It is.

18 Q. (BY MS. COHEN) Do you have stores in Florida?

19 A. Yes, ma'am.

20 Q. And when did Whole Foods first operate?

21 A. The original store -- I'm not great with the
22 history. But the original store I believe started in
23 Austin around 1981 and then began expanding. And I
24 don't know precisely when it expanded outside of Texas.
25 But we do operate in most of the states. I would say

1 probably 46 to 47 states in the U.S.

2 MS. COHEN: Okay. Thank you.

3 Q. (BY MS. COHEN) Are you familiar with a product
4 line known as Green Mission?

5 A. I am.

6 Q. And are you able to state when the first
7 product known as Green Mission was sold?

8 A. I -- I am not. I'm sorry.

9 MS. COHEN: Okay. I'd like to see if
10 Jered could help me and show Mr. Warren Exhibit WFM
11 0008.

12 MR. MATTHYSSE: 0008?

13 MS. COHEN: Yeah.

14 THE WITNESS: I'm looking for it right
15 now. I have the -- the Whole Foods Market production
16 with the Bates labels in front of me. If you want to
17 reference those, I can take a look at them.

18 MS. COHEN: Thank you.

19 MR. MATTHYSSE: Yeah. We have those in
20 front of Jay and also the same document set in front of
21 the reporter.

22 MS. COHEN: Great.

23 THE WITNESS: I have WFM 0008 in front of
24 me.

25 Q. (BY MS. COHEN) Okay. And for the record, this

1 is a -- and I suppose everyone will agree. This is a
2 copy of a registration certificate with -- for Green
3 Mission, registration number 3121198 registered July
4 21st, 2006 for compost.

5 Do you see that?

6 A. I do. I actually have it as registered July
7 25th, 2006.

8 MS. COHEN: Oh, thank you. That's
9 correct.

10 Q. (BY MS. COHEN) And underneath where it says for
11 compost do you see there it says first use?

12 A. I do.

13 Q. And -- and what date does it bear?

14 A. It looks like it references October 2004.

15 MS. COHEN: Thank you.

16 Q. (BY MS. COHEN) And would that help with respect
17 to the dates from which you've been selling Green
18 Mission brand compost?

19 A. I have no reason to dispute this document.

20 Q. Okay. And I -- sorry. Do you know if you've
21 ever received any objection from Publix regarding the
22 Green Mission compost?

23 A. I have personally not seen any.

24 Q. Do you know from any review of your records if
25 there were any?

1 A. No, ma'am. I'm not aware.

2 Q. You're not aware of any?

3 A. No.

4 Q. Would you know where the Green Mission compost
5 is sold?

6 A. I do generally speaking. Just for background
7 if I -- if I may explain a little bit about how Whole
8 Foods works if you'll allow me, is that all right?

9 Q. Absolutely.

10 A. Whole Foods is separated into multiple regions
11 across the United States. I believe we have 11 regions.
12 Each one of those regions operates independently with
13 its own president, vice-president, grocery team,
14 etcetera.

15 Those independent regions make decisions
16 as to what products are put on their shelves and how
17 they're sold. I am aware at least through my own
18 experiences that I know we sell Green Mission products
19 in Pacific Northwest, which covers Oregon and Washington
20 because I've personally seen them there.

21 I know we sell them in our Mid Atlantic
22 region, which is our largest region. That encompasses
23 Pennsylvania, Ohio, Kentucky, Washington DC, Virginia,
24 West Virginia and portions of Connecticut I believe.

25 I also know that we sell them in the

1 Southwest region, which is Louisiana, Oklahoma and Texas
2 which is also another very large region because I've
3 seen them in the stores.

4 As to the other regions I can't say
5 specifically that we do or don't. But my assumption
6 would be that we do.

7 Q. Does Whole Foods offer its products on -- for
8 online shopping?

9 A. Currently I don't believe -- I don't believe
10 that we do. There are times during the year where we
11 offer gift baskets for Christmas, Thanksgiving and I
12 think Easter that they have some online shopping. And I
13 believe some of the individual regions have online
14 shopping available for home delivery. But nationwide as
15 a Whole Foods policy I don't believe we do.

16 MS. COHEN: Okay. I'm going to show you a
17 few pages of what you have produced, WFM 62, 63, 69 and
18 70 if -- if -- if someone can find those.

19 MR. MATTHYSSE: Yeah. We're -- we're
20 flipping through them right now.

21 THE WITNESS: All right. I have 62 in
22 front of me.

23 Q. (BY MS. COHEN) And do you know what 62 is? Is
24 62 a photocopy of a bag of compost as it's sold?

25 A. That's what it appears to be, yes.

1 Q. Excuse me. A bag of Green Mission compost?

2 A. Correct.

3 Q. And is 63 another bag of Green Mission compost
4 packaging?

5 A. Yes, ma'am.

6 Q. And 69 and 70, is that the top and bottom of
7 a -- of a Green Mission bag of compost or the front and
8 back of a bag?

9 A. It is.

10 MS. COHEN: Okay. Thank you.

11 Q. (BY MS. COHEN) And this is how the Green
12 Mission compost appears in your stores?

13 A. This is the packaging that I've seen, yes.

14 Q. Do you know where in the store the Green
15 Mission compost would be sold?

16 A. Each store is generally allowed to merchandise
17 in the manner they would like. But in typical fashion
18 where I have seen this would tend to be towards the
19 front of the store if they have an outdoor area near one
20 of the entrances and exits. It would probably be in
21 that area. If they have a garden supply section in the
22 store, it might also be located there.

23 MS. COHEN: Okay. Thank you. If you
24 could find WFM 66 and 67?

25 THE WITNESS: I have them.

1 MS. COHEN: Thank you.

2 Q. (BY MS. COHEN) WFM 66, is that photograph
3 showing the Green Mission compost by the store entrance?

4 A. That's correct. And that's what I was
5 referring to earlier. This would be typically where you
6 would see it in most stores.

7 Q. And 67, is that a Green Mission compost display
8 in a garden section of a store?

9 A. It is along with a couple of other competitive
10 brands or planting mix.

11 MS. COHEN: Thank you.

12 Q. (BY MS. COHEN) I also see in WFM 67 that there
13 is potting soil sold under Green Mission. Is that
14 correct?

15 A. That is correct.

16 MS. COHEN: Okay. Court reporter, I want
17 to mark some exhibits before I move on too far. If we
18 could mark WFM 008 as Applicant's Exhibit EE?

19 THE REPORTER: Okay.

20 (Exhibit EE marked)

21 MS. COHEN: Do you have those stickers
22 there?

23 THE REPORTER: Yes, I do.

24 MR. MATTHYSSE: Do you need the pages?

25 MS. COHEN: And I'd like to offer

1 Applicant's Exhibit EE into evidence.

2 THE REPORTER: Okay. Do you -- do you
3 want to go off the record while I mark each one of these
4 or how do you want to handle that? I -- I need to find
5 it.

6 MS. COHEN: I think that it's up to you.

7 THE REPORTER: Okay. When you -- how
8 about this? When you ask me to mark something let's
9 pause and go off -- I mean kind of go off the record and
10 I'll mark them and then I'll let you know when I find it
11 and it's marked.

12 MS. COHEN: Okay. Thank you.

13 THE REPORTER: You bet.

14 MS. COHEN: And Mr. Lake, can we just
15 offer all of these exhibits into evidence at the same
16 time?

17 MR. LAKE: You mean the ones he's already
18 identified?

19 MS. COHEN: No, the ones I'm going to
20 identify throughout the morning.

21 MR. LAKE: I'm sorry. Ask your question
22 again. Arlana, I was --

23 MS. COHEN: I'll just -- I'll just offer
24 them one at a time. That's okay. Do you have any
25 objection to EE?

1 MR. LAKE: I don't have any objection to
2 any of the ones you've discussed so far.

3 MS. COHEN: Okay. Thank you.

4 And if you could mark WFM 0062, 63, 69 and
5 70 as FF, please.

6 (Exhibit FF marked)

7 MS. COHEN: Thank you. I'd like to order
8 (sic) FF into evidence.

9 MR. LAKE: No objection.

10 THE REPORTER: Did you say --

11 MS. COHEN: Okay.

12 THE REPORTER: -- no objection?

13 MS. COHEN: David, if you would please
14 mark WFM 67 and 66 -- I'm sorry -- WFM 66 and 67 as GG.

15 (Exhibit GG marked)

16 THE REPORTER: Okay. And Mr. Lake, you
17 kind of cut out and I couldn't understand if you said
18 objection or no objection to --

19 MR. LAKE: Thank you. I said no
20 objection.

21 THE REPORTER: Okay. GG is marked.

22 MS. COHEN: Thank you. I'd like to offer
23 GG into evidence. Mr. Lake?

24 MR. LAKE: No -- no objection.

25 MS. COHEN: Thank you.

1 Q. (BY MS. COHEN) Do you have any knowledge of the
2 dollar volume of the compost and potting soil sold under
3 Green Mission?

4 A. I do not. I'm actually looking into that right
5 now. I've got someone at work who's trying to check
6 some sales volume for me. I may be able to circle back
7 to that later.

8 MS. COHEN: Okay. Thank you very much.

9 Q. (BY MS. COHEN) And does Whole Foods advertise
10 goods bearing Green Mission?

11 A. Yes.

12 Q. And what are the means of advertising that
13 Whole Foods uses?

14 A. Standard advertising for Whole Foods is
15 generally, again, fairly store-specific with stand-up
16 displays in the stores, shelf talkers, maybe banner ads.
17 We also do some advertising weekly with coupons and our
18 own coupon book that comes out.

19 Q. And that's circulated to your customers?

20 A. It is. And I believe generally the only way
21 I've ever seen the coupon books themselves are in the
22 stores. But it's my understanding that some of the
23 regions do put coupons in some of the local newspapers.

24 Q. And is Whole Foods active with social media and
25 advertising on social media?

1 A. We do use social media. And yes, sometimes we
2 will promote products on social media.

3 MS. COHEN: I read in your annual report
4 that you have one million likes on Facebook.

5 THE WITNESS: Yeah. I did 900,000 of
6 those.

7 Q. (BY MS. COHEN) And your kids and your family.
8 Right?

9 A. Yeah.

10 Q. Would you say that the Green Mission compost
11 and potting soil are green products?

12 A. Yes.

13 Q. So just for the end of the -- this portion, so
14 it's your understanding that the compost is still in
15 sales as of today?

16 A. That's correct.

17 MS. COHEN: And I'm going to show you an
18 exhibit that I sent to the court reporter.

19 So now David, if you could locate some
20 documents?

21 THE REPORTER: Sure.

22 MS. COHEN: That would be A&P 2471 to
23 2493, please. Actually, it's 2471, 2472, 2473 and then
24 there's 2483. I don't know what this -- let's just --
25 sorry. I was doing perfect. 2483 to 2493.

1 THE REPORTER: Okay. Just 2483 to 2493?

2 MS. COHEN: Yes.

3 THE REPORTER: And how would you like to
4 mark that?

5 MS. COHEN: Well, I just want to have Mr.
6 Warren look at it.

7 THE REPORTER: He has it.

8 MS. COHEN: Okay. Thank you.

9 Q. (BY MS. COHEN) Mr. Warren, I'm going to show
10 you a document that is entitled Combined Declaration of
11 Use and Incontestability Under Sections 8 and 15.

12 Do you see that?

13 A. I do.

14 MR. LAKE: Quickly let me interject an
15 objection. These documents were disclosed last night.
16 And I don't believe it's proper to -- to use these as
17 exhibits when they were disclosed only the night before.

18 Subject to that objection go ahead.

19 MS. COHEN: Okay. And I'm just going to
20 respond by saying that these documents have been on the
21 Trademark Office PTO public website since two thousand
22 and...

23 THE REPORTER: Since two thousand?

24 MS. COHEN: Two thousand and -- sorry.
25 Well, since two thousand -- when it was filed in January

1 of 2013.

2 Q. (BY MS. COHEN) But in any event, if you can
3 look at that document and it seems that it was signed by
4 Roberta Lang. Who is Roberta Lang?

5 A. Roberta Lang is general counsel for Whole Foods
6 Market. She's my boss.

7 Q. And it -- she -- she signed here as president?

8 A. Roberta serves in numerous capacities,
9 including general counsel. But she is also an officer
10 and I think maybe even board member on several of the
11 subsidiaries of Whole Foods Market, Inc. And I'm
12 assuming that Whole Foods Market IP, LP she is one of
13 the officers.

14 Q. Okay. And do you see on page 2488 where she
15 signed the document?

16 A. Yeah. I see a signatory name. I don't see a
17 physical signature.

18 Q. Yeah. Any signature? I'm sorry.

19 A. Yes. I see signatory name under declaration,
20 Roberta Lang.

21 Q. And do you see attached to this 2490, 2491,
22 2492 and 2493?

23 A. I do.

24 Q. Okay. Is 2490, 91 and 92, are those photos of
25 the Green Mission compost as sold?

1 A. They are.

2 MS. COHEN: Okay. I'd like to mark this
3 as Applicant's HH, all of these pages.

4 (Exhibit HH marked)

5 THE REPORTER: Okay. It's marked.

6 MS. COHEN: Thank you. I'd like to offer
7 it into evidence.

8 MR. LAKE: And I'll just reiterate our
9 objection. I don't believe this document was disclosed
10 timely.

11 MS. COHEN: That's fine.

12 Okay. Let's look at the next document.

13 If you would look at, please, WFM 005.

14 THE WITNESS: I have that document.

15 MS. COHEN: Excuse me?

16 THE WITNESS: I have the document.

17 MS. COHEN: Thank you.

18 Q. (BY MS. COHEN) And if you'll see that and agree
19 that is a copy of a registration certificate for Green
20 Mission registration number 3,264,496, registration date
21 July 17th, 2007 for Green Mission paper plates and paper
22 bowls? Is that correct?

23 A. That's correct.

24 Q. And do you know when Whole Foods began offering
25 Green Mission paper plates and paper bowls?

1 A. I do not personally. But according to this
2 document first use occurred in October -- it would be
3 October 29th, 2005. And I have no reason to dispute
4 this document.

5 MS. COHEN: Thank you.

6 Q. (BY MS. COHEN) If you will, look at WFM 52, 53,
7 54, 55, 56, 57, 59. Do you see those?

8 A. I have the documents.

9 Q. If you'd look at those, are those photographs
10 of the Green Mission paper plates and paper bowls as
11 they are sold by Whole Foods?

12 A. They are.

13 MR. LAKE: I'm sorry, Arlana. Could --
14 could you give me the Bates numbers again? I know
15 they're close to in order but it looks like not exactly.

16 MS. COHEN: Yes. 52, 53, 54, 55, 56, 57
17 and 59.

18 MR. LAKE: Okay. Thank you.

19 Q. (BY MS. COHEN) And do you know where the Green
20 Mission paper plates and bowls are sold?

21 A. Again, it's regionally determined what products
22 are sold. My assumption is that they're sold
23 nationwide. I know for a fact they're sold in the
24 Southwest region, Mid Atlantic region and Pacific
25 Northwest region.

1 MS. COHEN: Thank you. And if you could
2 find WFM 0060.

3 THE WITNESS: I have the document.

4 MS. COHEN: Thank you.

5 Q. (BY MS. COHEN) And what is this showing? This
6 is a photograph.

7 A. This is a store display of Green Mission
8 compostable plates. It looks like it's set up at the
9 end of an aisle.

10 MS. COHEN: Thank you.

11 Q. (BY MS. COHEN) And does Whole Foods advertise
12 Green Mission plates and bowls?

13 A. They do. And this photo is an example of that
14 advertisement.

15 Q. The -- the standing display?

16 A. Correct.

17 MS. COHEN: Thank you.

18 Q. (BY MS. COHEN) And do you have any idea of the
19 dollar volume of the sales of the Green Mission plates
20 and bowls?

21 A. Again, I don't have that yet. This is one of
22 the things that I'm -- I'm having someone check on for
23 me. Hopefully I'll have that before the end of the
24 deposition.

25 MS. COHEN: Thank you.

1 Q. (BY MS. COHEN) And is it your understanding
2 that the Green Mission plates and bowls are still
3 currently on sale at Whole Foods?

4 A. That is my understanding.

5 MS. COHEN: Okay. I'd like to mark as
6 Applicant's Exhibit II WFM 005, David.

7 (Exhibit II marked)

8 THE REPORTER: Okay. It's marked.

9 MS. COHEN: Thank you.

10 I'd like to offer Applicant's II into
11 evidence.

12 MR. LAKE: No objection.

13 MS. COHEN: And then I'd like to mark as
14 one exhibit WFM 52, 3, 4, 5, 6, 7 and 9 as JJ, David.

15 (Exhibit JJ marked)

16 THE REPORTER: Okay. They're marked.

17 MS. COHEN: Thank you.

18 I'd like to offer JJ into evidence.

19 MR. LAKE: No objection.

20 MS. COHEN: And then I'd like to mark WFM
21 60 as Applicant's Exhibit KK.

22 (Exhibit KK marked)

23 THE REPORTER: Okay.

24 MR. LAKE: No objection.

25 MS. COHEN: I'll offer KK into evidence as

1 well.

2 THE REPORTER: Okay. It's marked.

3 MS. COHEN: Thank you.

4 Q. (BY MS. COHEN) Mr. Warren, would you say that
5 the Green Mission plates and bowls are green products?

6 A. I would.

7 MS. COHEN: One moment. Sorry. Okay. If
8 you could find WFM 001.

9 THE WITNESS: I'm sorry. Could you repeat
10 that?

11 MS. COHEN: WFM 001.

12 THE WITNESS: I have that one in front of
13 me.

14 MS. COHEN: Thank you.

15 Q. (BY MS. COHEN) And sir, as you will see, this
16 appears to be or is a copy of a registration certificate
17 for Green Mission registration number 4,197,402
18 registered August 28th, 2012 for various cleaning
19 preparations.

20 And they are: Household cleaning
21 preparations, laundry detergent, fabric softeners,
22 dishwashing preparations, all-purpose cleaning
23 preparations, toilet cleaning preparations,
24 pre-moistened disposable household cleaning wipes,
25 comma, all being environmentally friendly.

1 Do you see that?

2 A. I do.

3 Q. And do you have any idea when these products
4 all bearing Green Mission were first sold by Whole
5 Foods?

6 A. I do not. But according to this document first
7 use was September of 2011. And I have no reason to
8 dispute this document.

9 MS. COHEN: Thank you. And if you could
10 find WFM 41.

11 THE WITNESS: I have that document in
12 front of me.

13 MS. COHEN: Thank you.

14 Q. (BY MS. COHEN) And this appears to be
15 photographs of the various Green Mission cleaning
16 products. Is that correct?

17 A. That's correct. And paper towel, also.

18 Q. So this Exhibit WFM 41 are photographs of the
19 Green Mission organic fabric softener. Correct?

20 A. Correct.

21 Q. And the Green Mission organic laundry
22 detergent?

23 A. Correct.

24 Q. Correct? And the Green Mission organic
25 dishwasher gel?

1 A. Correct.

2 Q. And the Green Mission organic all-purpose
3 spray?

4 A. Correct.

5 Q. And in the middle is the -- the bottom is the
6 Green Mission paper towels?

7 A. Correct.

8 Q. And then last the Green Mission surface
9 cleaning wipes?

10 A. Correct.

11 Q. And is it your testimony that these products
12 are all currently sold by Whole Foods?

13 A. That's correct.

14 Q. Do you know where in the store these products
15 would be shelved?

16 A. Depending on how the stores want to label their
17 aisles, there is some freedom given in that. Typically,
18 these items would be found under a heading of something
19 along the lines of household items, cleaning products or
20 paper disposable products.

21 MS. COHEN: Okay. Thank you.

22 Q. (BY MS. COHEN) And is it your testimony that
23 Whole Foods advertises the Green Mission cleaning
24 products?

25 A. Yes.

1 Q. Do you believe consumers are familiar with the
2 Green Mission brand?

3 MR. MATTHYSSE: Objection, form.

4 MR. LAKE: I'll join that objection.

5 A. I believe our customers are familiar, yes.

6 Q. (BY MS. COHEN) Do you have any idea about the
7 dollar volume of the Green Mission household cleaning
8 products?

9 A. Again, I don't at this time. But I have
10 someone who's hopefully going to have that information
11 to me shortly.

12 MS. COHEN: Thank you.

13 Okay, David. I'd like to mark some of
14 these.

15 THE REPORTER: Okay.

16 MS. COHEN: WFM 002 -- oh, sorry. Wrong
17 one. I'm jumping ahead. WFM 001 as LL.

18 (Exhibit LL marked)

19 THE REPORTER: Okay. It's marked.

20 MS. COHEN: Thank you. I'd like to offer
21 LL into evidence.

22 Jim?

23 MR. LAKE: Oh, no objection.

24 MS. COHEN: Thank you. And I'd like to
25 mark WFM 41 as MM.

1 MR. LAKE: No objection.

2 (Exhibit MM marked)

3 THE REPORTER: Okay. It's marked.

4 MS. COHEN: Thank you.

5 I'd like to offer Applicant's MM.

6 MR. LAKE: No objection.

7 Q. (BY MS. COHEN) Mr. Warren, would you say that
8 the Green Mission household cleaning products are green
9 products?

10 A. I would.

11 MS. COHEN: Okay. I'd like you to find
12 WFM 002.

13 THE WITNESS: I have that document in
14 front of me.

15 MS. COHEN: Thank you.

16 Q. (BY MS. COHEN) And that is a copy of a
17 registration certificate for Green Mission registration
18 number 4,075,113 dated December 20th, 2001 for paper
19 towels and bathroom tissue. Correct?

20 A. I have it as 2011 but otherwise correct.

21 MS. COHEN: Okay. Thank you.

22 Q. (BY MS. COHEN) And do you know when these
23 products were -- how long these products have been sold
24 by Whole Foods?

25 A. Not personally. But according to this document

1 first use occurred in February of 2011. And I have no
2 reason to dispute this document.

3 MS. COHEN: Thank you. And if you would
4 please look at WFM 50 and 51.

5 THE WITNESS: I have those documents in
6 front of me.

7 MS. COHEN: Thank you.

8 Q. (BY MS. COHEN) WFM 50, is that a photograph of
9 the Green Mission paper towels?

10 A. It is.

11 Q. And if you look at WFM 51, is that a photograph
12 of the Green Mission toilet paper?

13 A. It is.

14 Q. And are these as the products are currently
15 sold in -- in Whole Foods?

16 A. They are.

17 MS. COHEN: Thank you. I'd like to mark
18 as NN WFM 002, David.

19 (Exhibit NN marked)

20 THE REPORTER: Okay. Okay. It's marked.

21 MS. COHEN: And offer into evidence

22 Applicant's NN.

23 MR. LAKE: No objection.

24 MS. COHEN: And I'd like to mark WFM 50
25 and 51 as Applicant's OO, please.

1 (Exhibit OO marked)

2 THE REPORTER: Okay. It's marked.

3 MS. COHEN: And I'd like to offer

4 Applicant's OO into evidence.

5 MR. LAKE: No objection.

6 MS. COHEN: I have a document if you could
7 find -- it's quite a few pages -- WFM 71 to WFM 129.
8 It's entitled Whole Foods Market's Green Mission Report
9 2012.

10 THE WITNESS: I have that document.

11 MS. COHEN: Thank you.

12 Q. (BY MS. COHEN) What -- what is this Green
13 Mission report if you know?

14 A. Green Mission itself is a Whole Foods
15 initiative where they're attempting to -- where we're
16 attempting to reduce carbon footprints. Reuse, reduce,
17 recycle is the common catch phrase we use. So the Green
18 Mission is building of new stores using recyclable,
19 reusable materials, as much organic as we can, reducing
20 usage of electricity for solar power.

21 It also encompasses the programs we have
22 for reusable grocery bags as opposed to single-use
23 plastic bags, composting programs and also our own line
24 of Green Mission products.

25 This report appears to be something that

1 may have been written as part of the annual report as to
2 what Green Mission has accomplished in 2012. I have not
3 read the entire report. So I do not know specifically.

4 MS. COHEN: Okay. Thank you. I will ask
5 you if you could find WFM 130 and 131 and 132.

6 THE WITNESS: I have those documents in
7 front of me.

8 MS. COHEN: Thank you.

9 Q. (BY MS. COHEN) And these appear to be pages
10 from the Internet site of Whole Foods which refer to the
11 Green Mission?

12 A. That's correct.

13 Q. And it also, if you see further down, has a --
14 on the page of 130 the 2012 Green Mission Report, a copy
15 of that report is -- is shown there as being a
16 downloadable report on your website.

17 Do you see that?

18 A. I do.

19 Q. If you'd look at page WFM 105 in the green in
20 the bottom, it refers to a Green Mission Congress. Do
21 you know anything about that?

22 A. I do not.

23 Q. You see where it states that apparently it was
24 started in 2008 as a Whole Foods program among its
25 employees it appears. Do you see that?

1 A. I do see that.

2 MS. COHEN: Okay. I'd like to have marked
3 as Applicant's PP the Whole Foods Market's Green Mission
4 Report dated 2012.

5 MR. LAKE: I do want to object to any use
6 of this document for the truth of anything that's
7 asserted in it. Mr. Warren said he's not even read the
8 entire document. But subject to that objection I don't
9 object to its admission.

10 MS. COHEN: Thank you.

11 MR. MATTHYSSE: So this is -- this is
12 Jered here. 71 through 129?

13 MS. COHEN: Yes. That is in order, yes.
14 (Exhibit PP marked)

15 THE REPORTER: Okay. It's marked as PP.

16 MS. COHEN: Thank you. I'd like to offer
17 PP into evidence subject to what Mr. Lake said.

18 And I'd also like to have marked WFM 130
19 and 131 and 132 as Applicant's QQ.

20 (Exhibit QQ marked)

21 THE REPORTER: Okay. It's marked.

22 MS. COHEN: Thank you. I'd like to offer
23 QQ.

24 MR. LAKE: No objection.

25 Q. (BY MS. COHEN) With regard to the advertising

1 of Green Mission, if you would look at WFM 40 and tell
2 me what that is.

3 A. WFM 40 appears to be a photograph -- it looks
4 to be a photograph --

5 Q. It would be a photograph of a store display?

6 A. That's what it appears to be.

7 MR. LAKE: Objection, leading.

8 A. It appears to be a photograph of a display or
9 sign in a store regarding Green Mission that discusses
10 many of the things that are discussed on the website and
11 what they did in this particular store to accomplish the
12 Green Mission.

13 MS. COHEN: Thank you.

14 Q. (BY MS. COHEN) And if you will look at WFM 43
15 if you could tell me what that is if you have that?

16 A. WFM 0043 is a photograph of one of our
17 reusable -- it appears to be a reusable paper bag that
18 is one of the Green Mission bags. And at the bottom is
19 printed the three Rs I mentioned before: Reduce, reuse,
20 recycle.

21 Q. And where would these bags be available?

22 A. At just about any checkout stand at any Whole
23 Foods.

24 MS. COHEN: Thank you.

25 Q. (BY MS. COHEN) And I'm going to show you WFM

1 44. I'm -- I'm -- not really sure what that is. Do you
2 know?

3 A. WFM 0044 appears to be a photograph of -- it
4 looks to be --

5 MS. COHEN: Now I can kind of see.

6 A. It looks to either be the spice section or
7 maybe a grain section in a Whole Foods store. I don't
8 know which store.

9 And in the center they discuss reuse and
10 refill. That usually refers to in those particular
11 sections of them trying to get the customers to actually
12 use some type of reusable plastic bag to refill their
13 spices or grains rather than buy a new bag each time.

14 Q. (BY MS. COHEN) And that store display bears the
15 Green Mission trademark?

16 A. It does at the bottom, yes.

17 MS. COHEN: And I'm going to show you WFM
18 64 if you could find that.

19 THE WITNESS: I have that document.

20 MS. COHEN: Thank you.

21 Q. (BY MS. COHEN) And is that an advertisement for
22 Green Mission composting?

23 A. It appears to be. I don't know precisely where
24 this came from, if it was website or not. But this
25 certainly appears to be something that we would provide

1 to our customers describing the composting system and
2 Green Mission.

3 MS. COHEN: Thank you. And I'd also like
4 to show you WFM 65.

5 THE WITNESS: I have that document.

6 MS. COHEN: Thank you.

7 Q. (BY MS. COHEN) And can you tell me what that is
8 a photograph of?

9 A. This appears to be a photograph of some Whole
10 Foods recyclable containers outside of or near a Whole
11 Foods Market store. I don't know which store. There
12 are receptacles for recycling plastic, composting and
13 regular garbage. And above it to the left is the Green
14 Mission sign discussing recycling.

15 Q. And would you believe that a similar sign would
16 be at various locations of the Whole Foods stores?

17 A. I can't say that it's at all of them. But I
18 have seen them at several Whole Foods.

19 Q. Across the country?

20 A. Across the country.

21 MS. COHEN: Okay. David, I'd like to mark
22 WFM 40 as Applicant's RR.

23 (Exhibit RR marked)

24 THE REPORTER: Okay. It's marked.

25 MS. COHEN: I'd offer Applicant's RR into

1 evidence.

2 MR. LAKE: No objection.

3 MS. COHEN: I'd like to have marked WFM 43
4 as SS.

5 (Exhibit SS marked)

6 THE REPORTER: Okay. It's marked.

7 MS. COHEN: I'd like to offer Applicant's
8 SS into evidence.

9 MR. LAKE: No objection.

10 MS. COHEN: I'd like to have marked WFM 44
11 as TT.

12 (Exhibit TT marked)

13 THE REPORTER: Okay. It's marked.

14 MS. COHEN: I'd like to offer into
15 evidence Applicant's TT.

16 MR. LAKE: No objection.

17 MS. COHEN: And I'd like to have marked
18 WFM 64 as UU.

19 MR. LAKE: I would object on this one. I
20 believe Mr. Warren's testimony was he doesn't know where
21 this came from.

22 MS. COHEN: Correct. But I believe his
23 testimony is he knows it's an advertisement.

24 But in any event, David, if you can mark
25 it.

1 (Exhibit UU marked)

2 THE REPORTER: Okay. It's marked.

3 MS. COHEN: I'd like to offer UU subject
4 to what Mr. Lake said.

5 And on WFM 65 I'd like to mark as VV.

6 (Exhibit VV marked)

7 THE REPORTER: Okay. It's marked.

8 MS. COHEN: And I'd like last but not last
9 in the deposition I'd like to mark WFM 65 as VV.

10 MR. MATTHYSSE: I think -- I think we just
11 marked that one.

12 MS. COHEN: Oh, I had -- okay. Fine. I
13 didn't put my sticker on. I'm playing along here.

14 And I'd like to offer Applicant's VV into
15 evidence.

16 MR. LAKE: No objection.

17 MS. COHEN: I'd like to show you WFM 136,
18 137, 138 and 139.

19 THE WITNESS: I have those documents.

20 MS. COHEN: Thank you.

21 Q. (BY MS. COHEN) And this appears to be a story
22 about "Austin's Green Mission Teams Adopt the Colorado
23 River Wildlife Sanctuary," which is apparently on the
24 Whole Foods Market blog. Is that correct?

25 A. That is correct.

1 Q. So Whole Foods Markets maintains a blog on
2 which from time to time stories about Green Mission are
3 placed?

4 MR. LAKE: Objection, leading.

5 A. On the Whole Foods Market website there are
6 numerous departments and sections. Several of those
7 departments or sections have their own blog. This is
8 one of those blogs.

9 Q. (BY MS. COHEN) And would the blog from time to
10 time have information about the Green Mission?

11 A. It would.

12 MS. COHEN: Mr. Warren?

13 THE WITNESS: Oh, I'm sorry. I'm probably
14 too far away from the speaker. I said it would.

15 MS. COHEN: Okay. Thank you. All right.
16 I'd like to have marked as WW WFM 136, 7, 8 and 9.

17 (Exhibit WW marked)

18 THE REPORTER: Okay. It's marked.

19 MS. COHEN: Thank you. I'd like to offer
20 Applicant's WW.

21 MR. LAKE: No objection. So that was
22 marked WW. Is that right?

23 MS. COHEN: Correct.

24 MR. LAKE: Okay. Thanks.

25 Q. (BY MS. COHEN) Mr. Warren, does Whole Foods own

1 a supermarket with green in its name?

2 A. Yes.

3 Q. And what supermarket is that?

4 A. The South region in the U.S. to my
5 understanding had two supermarkets with the name
6 Greenlife that were acquired by Whole Foods.

7 One of those supermarkets has now got the
8 banner Whole Foods. I believe Greenlife is not on the
9 storefront, although they may still be using some terms
10 Greenlife inside of the store. And we have another
11 store that is in Asheville, North Carolina that still
12 operates under the banner Greenlife.

13 Q. And were these stores recently acquired by
14 Whole Foods?

15 A. I don't know the actual acquisition date. But
16 yes, I think recently is -- is correct, yes.

17 Q. (BY MS. COHEN) I'd like to show you two
18 documents, WFM 07 and WFM 03. Do you have those?

19 A. I have those documents.

20 MS. COHEN: Hold on.

21 Q. (BY MS. COHEN) Okay. And if you'll look first
22 at WFM 007, it appears to be a -- it is a copy of a
23 trademark registration for Greenlife Grocery
24 registration number 2,836,248 registration date April
25 27, 2004.

1 A. That's correct.

2 Q. And it is for retail grocery stores. Do you
3 see that?

4 A. I do.

5 Q. And if you see further down, it states that the
6 first use of Greenlife Grocery was July 1999. Do you
7 see that?

8 A. I do.

9 Q. Do you have any understanding of how long
10 Greenlife Grocery has been around?

11 A. According to this document since July 10th of
12 '99. And I have no reason to dispute that document.

13 MS. COHEN: Thank you.

14 Q. (BY MS. COHEN) And if you look on WFM 007, that
15 appears to be the name of Greenlife Grocery, LLC. Is it
16 your understanding that that was assigned to Whole
17 Foods?

18 A. That is my understanding.

19 Q. And if you look at the next page -- excuse
20 me -- WFM 003 is a registration for Greenlife Grocery in
21 stylized form registration number 4,241,576 dated
22 November 13th, 2012 for retail grocery store services
23 and retail delicatessen services.

24 Do you see that?

25 A. I do.

1 Q. And if you also see, that shows a date of first
2 use of July 1999.

3 A. I see that.

4 Q. And is it your understanding that that is how
5 long the Greenlife Grocery has been operating?

6 A. I have no reason to dispute the document.

7 Q. I'd like to show you WFM 09 and WFM 10 if you
8 would, please.

9 A. I have those documents.

10 Q. And can you tell me what those appear to be? I
11 think it -- well, go ahead. W 09 first.

12 A. 009 appears to be a sign. I can't tell
13 precisely where it's located. It -- this type of sign
14 looks like it would be outside. But it is Greenlife
15 Grocery Community Center. It's advertising one day til
16 Valentine's.

17 MS. COHEN: Thank you.

18 Q. (BY MS. COHEN) And WFM 10 appears to be outside
19 of a store?

20 A. It does.

21 Q. And that's outside of a Greenlife Grocery
22 store?

23 A. That's correct.

24 Q. And it's also showing on an awning
25 greenlifegrocery.com?

1 A. It does show that on a -- looks like a portable
2 awning outside of the entrance of the store.

3 Q. And is it your understanding that there is a
4 website greenlifegrocery.com that are -- is operated by
5 Whole Foods?

6 A. I don't know for certain. I -- I know that the
7 Whole Foods website goes to or links to the Greenlife
8 Grocery store. I -- I don't know how that works. I
9 mean I've only accessed it through the Whole Foods site.

10 Q. Okay.

11 A. But on the Whole Foods site it specifically
12 says Greenlife.

13 Q. And is it your understanding that -- well,
14 never mind. Scratch that.

15 Let's look at WFM 11. Do you see that?

16 A. I have it in front of me.

17 Q. Is that an advertisement for Greenlife Grocery?

18 A. It is.

19 Q. And where would a advertisement such as this be
20 displayed?

21 A. This appears to be a coupon type of book that
22 we would usually have in the stores near the entrances.
23 It could also appear in a local newspaper.

24 Q. I'm wondering if you could find WFM 13.

25 A. I have the document.

1 Q. And is that a Facebook page for Greenlife
2 Grocery Asheville?

3 A. It is.

4 Q. And I'd like to show you if you would look at
5 WFM 16.

6 A. I have that document.

7 Q. And this appears to be photographs of Greenlife
8 scallops?

9 A. That's correct.

10 Q. And I'd --

11 MR. LAKE: Objection to form.

12 Q. (BY MS. COHEN) -- like to show you WFM 24. Is
13 that a photograph of a Greenlife fresh fruit display? I
14 mean fresh fish display.

15 A. It is.

16 Q. And I'd like to show you WFM 28. Can you tell
17 me what that is?

18 A. This is a display or what we might call a shelf
19 talker that appears to be inside of a Greenlife Grocery.
20 I don't know if this was Chattanooga or Asheville. But
21 it appears to be one of those stores.

22 Q. And it's showing a display, a fruit display and
23 a bread display?

24 A. It is showing that. And it says Greenlife on
25 the display.

1 MS. COHEN: Okay. I'd like to have marked
2 as Applicant's XX WFM 7.

3 (Exhibit XX marked)

4 THE REPORTER: Okay. It's marked.

5 MS. COHEN: Thank you. I'd like to offer
6 WFM 7.

7 MR. LAKE: No objection.

8 MS. COHEN: And I'd like to mark as
9 Applicant's YY WFM 003.

10 (Exhibit YY marked)

11 THE REPORTER: Okay. It's marked.

12 MS. COHEN: Thank you. I'd like to offer
13 YY into evidence.

14 MR. LAKE: No objection.

15 MS. COHEN: And I'd like to mark WFM 09
16 and 10 as ZZ.

17 (Exhibit ZZ marked)

18 THE REPORTER: Okay. They're marked.

19 MS. COHEN: I'd like to offer this into
20 evidence, ZZ.

21 MR. LAKE: I would object to that.
22 Mr. Warren described what these appear to be photos of.
23 But he didn't testify to any knowledge as to this store
24 or what's shown in the photos.

25 MS. COHEN: Okay. And I'd like to have

1 marked as Applicant's Exhibit Triple A WFM 11. David?

2 (Exhibit AAA marked)

3 THE REPORTER: Okay. It's marked.

4 MS. COHEN: Thank you. I'd like to offer
5 Triple A.

6 MR. LAKE: Same objection. I don't
7 believe Mr. Warren's testified to any knowledge about
8 what this document is other than what it appears to be
9 to him as he looks at it today perhaps for the first
10 time.

11 MS. COHEN: Well, that's fine.

12 And David, I'd like to mark WFM 16 and 24
13 together as BBB.

14 (Exhibit BBB marked)

15 THE REPORTER: Okay. It's marked.

16 MS. COHEN: I'd like to offer Applicant's
17 BBB into evidence.

18 MR. LAKE: Same objection. Mr. Warren
19 hasn't testified as to knowledge about what's in these
20 photos or any familiarity with the store.

21 MS. COHEN: Well, I think he testified
22 that these are -- one is a picture of scallops in the
23 store and one is a picture of flounder in the store.

24 MR. LAKE: I've stated my objection. I
25 think he's looking at the photos and telling us what he

1 sees and I appreciate that. But I don't think that's
2 sufficient to authenticate what's in the photographs.

3 MS. COHEN: Well, your objection is noted.

4 Q. (BY MS. COHEN) And I -- Mr. Warren, do you see
5 the packaging on WFM 16?

6 A. I'm sorry. Just give me one second. I'll pull
7 it up. I do. I do see it.

8 Q. And is it your understanding that your attorney
9 prepared this photograph in response to the subpoena?

10 MR. MATTHYSSE: Objection to the extent it
11 calls for any attorney-client communications that are
12 privileged. But his understanding of how the documents
13 were collected he can answer.

14 MS. COHEN: Thank you.

15 A. It's my understanding that this was turned over
16 subject to the subpoena. I have seen this type of
17 sticker before. It's commonplace in Whole Foods. It is
18 representative of what we would typically put on our
19 products. And this one appears to have Greenlife listed
20 on it rather than Whole Foods.

21 MS. COHEN: Thank you.

22 Q. (BY MS. COHEN) And would WFM 24 also be a
23 document or photograph that was provided by your
24 attorneys pursuant to the subpoena?

25 MR. MATTHYSSE: Same objection.

1 A. It's my understanding that this document was
2 also produced subject to the subpoena. Again, this type
3 of shelf talker is something that we commonly use at
4 Whole Foods. The style and shape reflect precisely the
5 type that we would typically put in our stores. This
6 one depicts Greenlife rather than Whole Foods.

7 MS. COHEN: Thank you.

8 Q. (BY MS. COHEN) And would you say that the
9 Greenlife is a green supermarket?

10 A. I would.

11 Q. How about Whole Foods? Is it a green
12 supermarket?

13 A. It is.

14 MS. COHEN: I have sent to David the 2010
15 Annual Report of Whole Foods. The first page I don't
16 know if it has a number on it. The second page is 2328.

17 Q. (BY MS. COHEN) Do you see that? The annual
18 report on the cover says Whole Foods 2010 Annual Report.

19 A. I do.

20 MR. MATTHYSSE: Arlana, do you mind if we
21 take a quick break, bathroom break?

22 MS. COHEN: Absolutely would not mind at
23 all.

24 (Recess from 11:24 a.m. to 11:32 a.m.)

25 Q. (BY MS. COHEN) Back to A&P 2374, do you see

1 that?

2 A. 2374?

3 Q. In your annual report page 42.

4 A. I have it.

5 MS. COHEN: Thank you.

6 Q. (BY MS. COHEN) And if you see on that page
7 number three, it states that Whole Foods acquired
8 Greenlife Grocery on May 24th, 2010?

9 A. I see that.

10 Q. So would that refresh your recollection of when
11 Whole Foods completed the purchase of Greenlife?

12 A. I was not employed by Whole Foods at the time.
13 But I have no reason to dispute this document.

14 MS. COHEN: Off the record a moment.

15 (Brief recess)

16 MR. MATTHYSSE: So as you know, we've
17 objected to producing sales information. We -- we have
18 been able to ascertain some information about quantities
19 of sales of Green Mission products which our witness is
20 able -- Jay is able, will be able to give you so long as
21 it is subject to the confidentiality provisions of the
22 protective order that is applicable in this proceeding.

23 MS. COHEN: That would be fine with me.

24 Mr. Lake?

25 MR. LAKE: Yeah, that's fine. No

1 objection.

2 MR. MATTHYSSE: Okay. Go ahead, Jay.

3 MS. COHEN: I'm not sure if that included
4 in-house counsel. But I'm not sure if Gabrielle is
5 still on the phone. Gabby?

6 MS. SCALISE: Yeah. Sorry. When you guys
7 called a break I went downstairs to pick up my lunch and
8 I just got back.

9 MS. COHEN: And now you have to get off
10 the phone. I'm kidding.

11 MS. SCALISE: No. Just let me know what
12 you need me to do.

13 MR. MATTHYSSE: Well, the protective
14 order -- the confidentiality provision of the protective
15 order, that allows for dissemination to the parties
16 themselves or is it just to the counsel?

17 MS. COHEN: I don't recall if it was a
18 two-tier protective order.

19 MR. LAKE: You know, I think it is,
20 Arlana. I mean I -- I don't want to kick Gabrielle out
21 of the room unnecessarily. But I remember we did that
22 during Mr. Irby's testimony.

23 MR. MATTHYSSE: So if y'all wouldn't mind
24 just during this small part to have her off the phone.
25 And then once we're done we can have her join again.

1 MS. SCALISE: Okay. I'm going to
2 literally like say good-bye and hang up. And then,
3 Arlana, just text me or e-mail me when to dial back in.
4 So you're going to hear me disconnect now.

5 MS. COHEN: Okay. Thank you very much.

6 MS. SCALISE: You're welcome.

7 MR. MATTHYSSE: Thanks. Great.

8 MS. COHEN: Okay. So are we on?

9 MR. MATTHYSSE: Yes. And this part is
10 subject -- is confidential subject to the protective
11 order.

12 MS. COHEN: Okay. Yes. David, so if you
13 would have perhaps a separate section of which would
14 keep this aspect of the deposition confidential pursuant
15 to the protective order, please.

16 THE REPORTER: Can we go off the record
17 for a second?

18 MS. COHEN: Go ahead.

19 (Recess from 11:36 a.m. to 11:38 a.m.)

20 (Begin Confidential Portion)
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(End Confidential Portion)

MS. COHEN: Yes. Thank you. I'm sorry if I don't recall.

Q. (BY MS. COHEN) But Mr. Warren, did you state how many stores Whole Foods operates nationwide?

A. Whole Foods has somewhere between 360 and 380 stores right now. We're currently opening at a pace of about three every two weeks. So I don't have an accurate number. But it is somewhere between those two numbers.

MS. COHEN: Thank you. And I think Gabrielle is getting back on.

(Phone noise)

MR. MATTHYSSE: There we go.

MS. COHEN: Gabrielle, is that you?

MS. SCALISE: Yes. I'm going to have to drop off because I have a hard stop at one. But I'll be on for a few more minutes.

MS. COHEN: Okey-dokey.

Q. (BY MS. COHEN) Mr. Warren, are you aware of any objection by Publix to the name Greenlife Grocery?

A. I am not.

Q. Did -- are you aware if Whole Foods ever made an objection to Publix relating to the use of green as

1 part of a supermarket name?

2 MR. MATTHYSSE: Objection to the extent it
3 calls for any communications with attorneys. But to the
4 extent it asks for Publix -- objections to Publix you
5 can answer.

6 A. I'm not aware of any.

7 MS. COHEN: All right. Well, I have no
8 further questions for you. And I thank you for
9 participating in this.

10 THE WITNESS: Thank you.

11 MR. LAKE: Mr. Warren, I have just a few
12 questions. And -- and at the moment I have you on
13 speakerphone. But I don't want to do that if -- if it
14 makes it difficult for anyone to hear. Can everyone
15 hear me all right?

16 THE WITNESS: I can hear you fine.

17 MS. COHEN: Yes.

18 MR. MATTHYSSE: Yeah, you're fine on this
19 end.

20 MS. COHEN: Okay. Thank you.

21 MR. LAKE: All right. Just -- and I do
22 have just a few here.

23 EXAMINATION

24 BY MR. LAKE:

25 Q. But let me ask you a little bit more about

1 Greenlife Grocery. I know you testified a moment ago
2 that you were not at Whole Foods in 2010. Is that
3 correct?

4 A. That's correct.

5 MR. LAKE: You may have covered this at
6 the beginning and, if so, I apologize.

7 Q. (BY MR. LAKE) When did you join Whole Foods?

8 A. August of 2011.

9 Q. Okay. So you don't have any knowledge beyond
10 the registration certificate Ms. Cohen showed you today
11 as to when Greenlife Grocery was first used as a
12 trademark, do you?

13 A. No, sir.

14 Q. Okay. And but it is your understanding, isn't
15 it, that Whole Foods did not actually select that name?
16 Correct?

17 A. I don't know whether they did or not. I don't
18 know.

19 Q. Okay. And I think you've told us that the
20 store that was known as Greenlife Grocery in Chattanooga
21 no longer uses that name as the store name. Isn't that
22 right?

23 A. I received that information in a news story. I
24 have not been to that store. But yes, it's my
25 understanding that in December of last year they stopped

1 using the banner name Greenlife outside of the store.

2 Q. Okay. And so to your knowledge Greenlife
3 Grocery today identifies only one store in the whole
4 world, the one in Asheville. Is that right?

5 A. The only one I'm aware of operating with a
6 banner outside of the store is Asheville.

7 MR. LAKE: That's right.

8 Q. (BY MR. LAKE) Okay. And Greenlife is not a
9 private label brand for Whole Foods that you use in
10 other stores, is it?

11 A. It is not.

12 Q. Okay. So it's not a brand name for paper
13 towels that are sold in other Whole Foods stores.
14 Correct?

15 A. Not under Whole Foods private label. I don't
16 know if there are independent companies using that name
17 or not.

18 Q. Okay. Yeah. I'm asking you just about Whole
19 Foods. And we talked about the two trademark
20 registrations for Greenlife Grocery that were marked
21 earlier.

22 You're not aware of any registrations that
23 your company has for Greenlife Grocery for any products,
24 are you?

25 A. I'm not.

1 Q. Okay. Just a few questions about Green
2 Mission. That's registered as we discussed for cleaning
3 and paper products and for compost. Is that right?

4 A. Yeah.

5 MS. COHEN: I object. We -- we listed a
6 whole bunch of products.

7 MR. LAKE: Okay. Well, thank you. Could
8 you answer the question, please, Mr. Warren?

9 A. Yeah. Those and including also some picnic
10 products. I suppose that may be included in paper but
11 plates, bowls, napkins, cleaning products, paper towels,
12 compost and -- yeah.

13 MR. LAKE: Okay.

14 A. That's about it.

15 Q. (BY MR. LAKE) So -- so there are no Green
16 Mission food products. Correct?

17 A. None that I'm aware of that Whole Foods owns.

18 Q. Okay. And -- and likewise again just talking
19 about Whole Foods, Whole Foods doesn't have any Green
20 Mission branded dairy products. Correct?

21 A. None that I'm aware of.

22 Q. Okay. And no Green Mission meat products?

23 A. None that I'm aware of.

24 Q. Okay. No fruits or vegetable branded Green
25 Mission by Whole Foods?

1 A. No, sir.

2 Q. Okay. No juices branded Green Mission by Whole
3 Foods?

4 A. None that I'm aware of.

5 Q. Okay. No services -- well, I'm sorry. Strike
6 that.

7 No -- no pet products branded Green
8 Mission by Whole Foods. Is that correct?

9 A. I have not seen any, no.

10 Q. Okay. And there are not any stores that Whole
11 Foods calls the Green Mission store. Is that correct?

12 A. Operating as a retail store?

13 Q. Correct.

14 A. No, sir.

15 Q. Okay. I know you talked briefly earlier in
16 your testimony about the -- about organic products. Is
17 the word Green Mission used to signal to consumers that
18 a product is organic?

19 MS. COHEN: Objection. I -- I'm not sure
20 you -- do you know what that means? You can answer.

21 A. It's not my understanding that Green Mission is
22 meant to signal organic as much as it is the three Rs,
23 the reusable, recycle and the other R that I just
24 forgot.

25 MR. LAKE: Okay. That's fine. I'm with

1 you. Just a moment. Let me look back through my notes.

2 I may be about done here.

3 Let me ask you to refer, Mr. Warren, to a
4 couple of exhibits.

5 (Phone noise)

6 MR. LAKE: I'm sorry, folks. My -- just a
7 moment. I don't know if y'all could hear that but off
8 the record my cell phone was ringing. So I'm turning
9 that off.

10 MR. MATTHYSSE: It was a good song.

11 MR. LAKE: All right. Okay. Now let me
12 get my place again. Okay. Yes.

13 Q. (BY MR. LAKE) Mr. Warren, the exhibits that
14 were already marked, do you have those in a way that
15 it's easy for you to identify them by the exhibit
16 letters? Should I refer by exhibit letters or the Bates
17 numbers?

18 A. Either one's fine. I've got them in front of
19 me.

20 MR. LAKE: Okay. If you would take a look
21 at Exhibit SS? It's numbered Whole Foods 43.

22 MR. MATTHYSSE: S as in Sam?

23 MR. LAKE: Yes. S as in Sam.

24 MR. MATTHYSSE: Bates numbers might be
25 easier using.

1 THE WITNESS: Yeah. Actually, no.
2 They're not in order, though.

3 MR. MATTHYSSE: Yeah. Well --

4 MS. COHEN: SS is the shopping bag.

5 MR. LAKE: Yes. That's correct.

6 THE WITNESS: Got it.

7 MR. MATTHYSSE: You got it?

8 MR. LAKE: Okay.

9 Q. (BY MR. LAKE) I believe you indicated that
10 those are available at the checkout stand at Whole Foods
11 stores. Is that correct?

12 A. That's correct.

13 Q. And do you know whether -- I believe that bag
14 has -- has on it Green Mission. Are those bags that
15 have that Green Mission label used today?

16 A. I have seen them in stores. I don't -- I can't
17 say that they are in every store. And part of the
18 reason I can't say that is different state laws have
19 different requirements on the bags.

20 Q. Sure. Sure. Do you know when use of bags that
21 display Green Mission began?

22 A. I don't know specifically, no.

23 Q. Okay. And -- and I understand your previous
24 answer, too, that you're -- you've seen them in the
25 store but you're not certain that bags that display

1 Green Mission are available in stores today either?

2 A. Well, I know they're available in stores today.
3 I don't know if they're available in every store.

4 MR. LAKE: Okay. Okay. Thank you.

5 Q. (BY MR. LAKE) If you would look a couple of
6 exhibits further to -- to the one we marked VV, it's the
7 photo of the recycling containers.

8 A. Yes, sir.

9 Q. Okay. I believe you said that you've seen that
10 sign at several stores across the country. Could you
11 tell us which states you remember seeing that sign in?

12 A. My regions for litigation cover Florida, the
13 Southwest, South Pacific, Pacific Northwest, Mid
14 Atlantic, North Atlantic, Northeast and Midwest.

15 So I've been in stores, probably 60 to 70
16 in states such as Illinois, New York, Massachusetts,
17 Florida, Texas, Louisiana, Hawaii, Los Angeles, San
18 Diego, Colorado, Denver and Boulder, Atlanta. And I
19 have seen this sign or a similar sign to it in all of
20 those places.

21 Q. Okay. If you would turn to Exhibit Triple A?

22 A. I have it.

23 Q. Okay. I think you said that this appears to be
24 a coupon book that would perhaps be distributed in
25 stores or in the local newspaper. Is that right?

1 A. That's correct.

2 Q. Okay. And have you actually seen this -- and
3 I'm going back to Greenlife Grocery.

4 Have you seen this particular ad in those
5 places, that is in-store coupons or in local newspapers
6 or are you just basing your testimony on what Whole
7 Foods customarily does?

8 A. Yeah. I have not seen this specific ad where
9 it says Greenlife on it nor have I been in the Greenlife
10 stores. This particular style of ad stylistically looks
11 precisely the way that Whole Foods writes their coupons
12 out. From font to the size it just looks precisely like
13 a Whole Foods ad.

14 Q. Okay. Do you know why Whole Foods seeks
15 federal trademark registrations?

16 MR. MATTHYSSE: Objection.

17 MS. COHEN: Objection.

18 MR. MATTHYSSE: A number of reasons,
19 relevance, calls for a legal conclusion. And to the
20 extent it seeks attorney-client communications I would
21 instruct him not to answer.

22 But otherwise subject to those objections
23 he can answer.

24 A. I'm not involved in the trademark
25 registrations. But I assume for the same reason that

1 anybody else seeks trademark protection, which is
2 protection of their brand and they don't want it to
3 somehow fall into the hands of someone who might not
4 protect their brand or to confuse customers.

5 Q. (BY MR. LAKE) Okay. And so you would not
6 some -- want someone else using a confusingly similar
7 name anywhere in the U.S. Is that right?

8 MR. MATTHYSSE: Same objections and also
9 calls for speculation, hypothetical.

10 A. I -- I don't know how --

11 MS. COHEN: I object as well.

12 A. Confusingly similar, I really don't know how to
13 define that.

14 MR. LAKE: Okay. Let me just have one
15 more minute to look back through my notes.

16 MR. MATTHYSSE: Sure.

17 MS. COHEN: And I may have some on
18 redirect.

19 Q. (BY MR. LAKE) Mr. Warren, you were -- you were
20 asked to describe a little bit the way Whole Foods
21 advertises. Do you know whether the Green Mission mark
22 in particular is advertised on television?

23 A. My understanding of Whole Foods advertising
24 from any discussion I've had with that department is
25 Whole Foods doesn't advertise on television for

1 anything.

2 Q. Okay. How about on radio?

3 A. I don't know if it's been used on the radio.

4 And honestly, I don't know if Whole Foods advertises on
5 the radio.

6 MR. LAKE: Okay. That's all I have.

7 MS. COHEN: I have a few things.

8 Mr. Court reporter, David, I had sent you
9 a couple of documents. One of which is a press release
10 entitled "Whole Foods Market and Greenlife Grocery
11 Create Stronger Grocer in Chattanooga." Can you find
12 that?

13 MR. LAKE: Arlana, is there a Bates number
14 for that?

15 MS. COHEN: No. I have no idea why there
16 isn't but there isn't.

17 MR. LAKE: Okay.

18 MS. COHEN: It's dated 9-24 two thousand
19 and -- excuse me -- 2013 dated yesterday.

20 MR. LAKE: Is that one of the documents
21 you emailed me last night?

22 MS. COHEN: I think so.

23 MR. LAKE: Okay.

24 MS. COHEN: You have a bunch of press
25 releases?

1 THE REPORTER: Will you tell me again what
2 it looks like?

3 (Recess from 11:57 a.m. to 12:02 p.m.)

4 FURTHER EXAMINATION

5 BY MS. COHEN:

6 Q. Mr. Warren, looking at this page I've shown you
7 it's entitled "Whole Planet Foundation Launches Make
8 Change Not Waste Green Lifestyle Mobile Application."
9 Do you see that?

10 A. I do.

11 Q. And it's dated May 11, 2012. Do you have any
12 idea what this Green Lifestyle mobile app is about?

13 MR. LAKE: I'm going to object. This is
14 outside the scope of cross. And I'm going to object to
15 this document. It wasn't produced until last night.

16 MS. COHEN: Okay.

17 A. Not really. The Whole Planet Foundation works
18 on the same floor I work on. I heard someone discuss
19 this app -- this app that was going to be put on one
20 time. I have no idea what its functionality is or what
21 it does.

22 MS. COHEN: Okay. Fair enough. All
23 right. I just want to go back to a couple of exhibits
24 on direct. If you will look at Applicant's Exhibit TT.

25 THE WITNESS: I have it.

1 MS. COHEN: Thank you.

2 Q. (BY MS. COHEN) And would you agree that that
3 shows the use of Green Mission with regard to a food
4 product?

5 A. I would agree.

6 Q. And if you would look at Applicant's Exhibit
7 SS?

8 A. I have it.

9 Q. Would it be the purpose of a shopping bag to
10 hold food products as well as non-food products?

11 A. It would.

12 MR. LAKE: Objection.

13 THE WITNESS: We were kind of speaking
14 over each other. I'm sorry. I said it would.

15 MS. COHEN: Thank you. Okay. I sent the
16 one-page press release. I don't know if you've received
17 it.

18 MR. MATTHYSSE: Let me check my phone. If
19 so, I'll go off and print it real quick.

20 MS. COHEN: Thanks.

21 MR. MATTHYSSE: Yeah.

22 MS. COHEN: Off the record.

23 (Recess from 12:05 p.m. to 12:10 p.m.)

24 Q. (BY MS. COHEN) Mr. Warren, you have in front of
25 you a page which on the bottom says

1 http://mediawholefoodsmarket.com/news the date 9-23-13.

2 Do you see that?

3 A. Yeah. Mine says 9-24-2013 but I think that's
4 just the printout mark. It's the "Whole Foods Market
5 and Greenlife Grocery Creates Stronger Grocer in
6 Chattanooga" document?

7 Q. Yes.

8 A. I have that document.

9 MS. COHEN: Thank you. Could you look at
10 that or -- or read it if you will a moment?

11 MR. LAKE: And while he's doing that I'll
12 go ahead and register my objection. This document was
13 just e-mailed to me. So we haven't had a chance to
14 review. It wasn't --

15 MS. COHEN: Okay.

16 MR. LAKE: -- produced in discovery.

17 MS. COHEN: Okay.

18 MR. LAKE: Or identified in the pre-trial
19 disclosures.

20 MS. COHEN: Okay.

21 THE WITNESS: All right. I have read
22 that.

23 MS. COHEN: Thank you.

24 Q. (BY MS. COHEN) And does this document entitled
25 "Whole Food Market and Greenlife Grocery Create a

1 Stronger Grocer in Chattanooga" appear to be a press
2 release that had been issued in the normal course by
3 Whole Foods?

4 A. This is typically what our press releases look
5 like. It also has Scott Allshouse, who's the president
6 of that particular region, on the bottom. So this does
7 appear to be a press release.

8 Q. And the document showing on the bottom with the
9 Whole Foods website, does that not appear to be a
10 genuine press release on your website?

11 A. Yeah. This appears to have come from the
12 wholefoodsmarket.com website.

13 Q. And if you see on there the -- the document
14 states that the original Greenlife Grocery -- this is in
15 the second paragraph -- the original Greenlife Grocery
16 was opened by founder Chuck Pruett on July 10th, 1999 on
17 Hixson Pike in Chattanooga.

18 Do you see that?

19 A. I do.

20 Q. And do you have any reason to believe that that
21 is not accurate?

22 A. I do not.

23 Q. Did you answer?

24 A. I did. I said I do not have any reason to
25 dispute that.

1 Q. And does Whole Foods employ somebody to write
2 its press releases and check the accuracy of its press
3 releases?

4 A. They do.

5 Q. And what department would that person be in?

6 A. Media relations.

7 Q. And Whole Foods is a publicly-traded company.
8 Is that correct?

9 A. That is correct.

10 MS. COHEN: Okay. I have no further
11 questions.

12 MR. LAKE: I just have --

13 MS. COHEN: Wait.

14 MR. LAKE: -- one more --

15 MS. COHEN: Wait. Wait. Wait. Wait.

16 Wait. I got to mark this press release.

17 MR. LAKE: Oh, all right.

18 MS. COHEN: That you're going to object
19 to. We're going to mark this press release as -- which
20 was the last one we were up to?

21 THE WITNESS: BBB I think.

22 MR. MATTHYSSE: Yeah. Looks like Triple B
23 was the last one.

24 MS. COHEN: Yes. Correct this is going to
25 be Triple C.

1 (Exhibit CCC marked)

2 THE REPORTER: Okay. It's marked.

3 MS. COHEN: I offer the -- thank you. I'm
4 going to offer the press release as Triple C into
5 evidence.

6 MR. LAKE: Objection. This wasn't
7 disclosed in a timely manner.

8 MS. COHEN: Okay. All righty. Do you
9 have anything else, Jim?

10 MR. LAKE: Yes. I just have a question
11 about this document subject to our objection.

12 FURTHER EXAMINATION

13 BY MR. LAKE:

14 Q. The date on this, Mr. Warren -- I think you
15 already told us. But it's -- the date line in the first
16 paragraph of the news release is 2010. Do you see that?

17 A. I do.

18 Q. And -- and just so we're clear on all this, is
19 it your understanding that that store in Chattanooga,
20 although it may have been called Greenlife Grocery in
21 2010, that its signage no longer says Greenlife Grocery?

22 A. The banner signage outside the store no longer
23 says Greenlife Grocery. That's my understanding.

24 Q. It's been rebranded a Whole Foods Market. Is
25 that right?

1 A. That is correct.

2 MR. LAKE: Okay. That's all I have.

3 MR. MATTHYSSE: All right. Is that it?

4 MS. COHEN: I have nothing further.

5 MR. LAKE: Thank you, gentlemen. I

6 appreciate it.

7 MS. COHEN: And lady.

8 MR. LAKE: Thank you Gabrielle and Arlana.

9 (Proceedings concluded at 12:15 p.m.)

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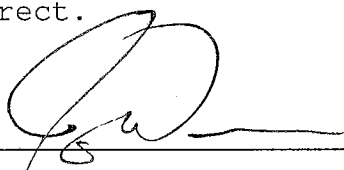
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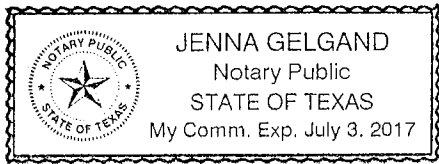
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| 21 | I declare under penalty of perjury that the | | |
| 22 | foregoing is true and correct. | | |
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JAY WARREN

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SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by the witness, JAY WARREN, on this the 21 day of October, 2013.



[Signature]
NOTARY PUBLIC IN AND FOR
THE STATE OF Texas

My Commission Expires: 2013

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REPORTER'S CERTIFICATE
ORAL DEPOSITION OF JAY WARREN
SEPTEMBER 25, 2013

I, David Bateman, the undersigned Certified
Shorthand Reporter in and for the State of Texas,
certify that the facts stated in the foregoing pages are
true and correct.

I further certify that I am neither attorney or
counsel for, related to, nor employed by any parties to
the action in which this testimony is taken and,
further, that I am not a relative or employee of any
counsel employed by the parties hereto or financially
interested in the action.

SUBSCRIBED AND SWORN TO under my hand and seal of
office on this the _____ day of _____,
_____.



David Bateman, Texas CSR 7578
Expiration: 12/31/2013

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|---------------------------|-------------------------------|
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