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

Proceeding	91202219
Party	Plaintiff Eat Right Foods Ltd.
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1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3 **CERTIFIED COPY**

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5 EAT RIGHT FOODS LTD.,

6 Opposer,

OPP. NO. 91202219

7 vs.

SERIAL. NO. 77/868,068

8 KEVIN LEVILLE,

9 Applicant.
_____/

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13 DEPOSITION OF REBECCA DOUGLAS-CLIFFORD

14 SAN FRANCISCO, CALIFORNIA

15 WEDNESDAY, SEPTEMBER 12, 2012

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21 BY: ANDREA M. IGNACIO HOWARD, CSR, RPR, CCRR, CLR

22 CSR LICENSE NO. 9830

23 JOB NO. 53045

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WEDNESDAY, SEPTEMBER 12, 2012

9:38 A.M.

DEPOSITION OF REBECCA DOUGLAS-CLIFFORD, taken
at Shartsis Friese LLP, One Maritime Plaza,
Eighteenth Floor, San Francisco, California,
pursuant to Notice, before me,
ANDREA M. IGNACIO HOWARD, CLR, CCRR, RPR,
CSR License No. 9830.

1 A P P E A R A N C E S:

2

3

4 FOR THE OPPOSER:

5 SHARTSIS FRIESE

6 By: JOSEPH V. MAUCH, Esq.

7 One Maritime Plaza

8 San Francisco, California 94111

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1 SAN FRANCISCO, CALIFORNIA
2 WEDNESDAY, SEPTEMBER 12, 2012

3 9:38 a.m.

4
5 REBECCA DOUGLAS-CLIFFORD,
6 having been sworn as a witness,
7 by the Certified Shorthand Reporter,
8 testified as follows:
9

10 EXAMINATION BY MR. MAUCH

11 MR. MAUCH: Good morning. I'm Joseph Mauch
12 of ^{Shartsis}~~Sartsis~~ Friese, counsel for the opposer, Eat Right
13 Foods, Limited.

14 Q Good morning.

15 A Good morning.

16 Q And can you state your name for the record,
17 please.

18 A My name is Rebecca Douglas-Clifford.

19 Q And can you state your address for the
20 record, please, Ms. Clifford, Ms. Douglas-Clifford?

21 A My home address?

22 Q Please.

23 A My home address is 7 Rangiora,
24 R-A-N-G-I-O-R-A, Terrace, Nelson, New Zealand.

25 Q Now, Rebecca, I know you've never been

1 previously deposited; is that correct?

2 A Yes.

3 Q So let me talk a little bit about the ground
4 rules for what we're going to do today.

5 First of all, and this is -- it's important
6 that this -- to understand that this is being recorded
7 by a court reporter. So we need to be careful of
8 speaking slowly and crisply so that all our words are
9 transcribed by the court reporter.

10 And I in particular, and many people, often
11 like to gesture with their hands or nod as a way of
12 communicating. Although that works in conversation,
13 it doesn't work for this process. So please be sure
14 to always answer with a verbal response; do you
15 understand?

16 A Yes, I do.

17 Q If, at any time, Rebecca, you don't
18 understand any of the questions I ask, please ask me
19 to repeat them or clarify them, and I will; do you
20 understand?

21 A Yes, I do.

22 Q There is no counsel for the applicant,
23 Mr. Kevin LeVelle, today. So there won't be any
24 objections posed. So once I've asked the question,
25 you can respond; okay?

1 A Thank you.

2 Q Rebecca, can you tell me about your role in
3 the opposer Eat Right Limited?

4 A I'm the managing director, a company that I
5 cofounded with my husband Timothy.

6 Q And where is Eat Right Foods located?

7 A We do business at the address of
8 P.O. Box 1525, Nelson, New Zealand.

9 Q And describe for me your background prior to
10 founding Eat Right Foods.

11 A I have a bachelor of food technology degree
12 and also an MBA. I had worked for several companies,
13 including food and wine companies, and more recently I
14 had started two businesses, and they were service
15 industry businesses, businesses that I was actually
16 the intellectual property of.

17 So, in my desire to -- to stay in Nelson, in
18 New Zealand, I wanted to build a company which, in
19 fact, instead of myself being the intellectual
20 property, that they -- the intellectual property was
21 actually within the business.

22 So right from the very start, I set up
23 systems, which was the intellectual property of the
24 business. I was -- I rigorously applied for
25 trademarks. I employed staff who could run the

RDC 1 business, ^{rather than} ~~brought them~~ myself, being there on a
2 day-to-day basis.

3 Q You mentioned that you received a degree in
4 food technology; what does that degree entail?

5 A It's a four-year degree. It's a degree
6 that's similar to perhaps an engineering equivalent
7 U.S. degree, an engineering based degree. It's
8 focused on food, specifically on food.

9 So it's all aspects of food. It is the
10 health and nutrition side of food, but it's also the
11 manufacturing side of food, it's the operation,
12 quality systems, and the marketing, food marketing,
13 food labeling. It's -- it's -- it's a very intense
14 degree, but it's a very enjoyable degree. At the
15 time, there was only one university that did that
16 degree in New Zealand.

17 Q Describe for me the founding of your company
18 Eat Right Foods?

19 A It was founded on the 17th of June 2001 at --
20 as I said, I was putting in place business plans
21 with -- had very big expectations in respect to the --
22 to the development of the business. One of my
23 aspirations was, in fact, to be the Goodman Fielder of
24 the health food industry.

25 Goodman Fielder is the equivalent of a Heinz

1 company here in the states or Kraft Company. I had
2 big aspirations in respect to the company.

3 So although the company started off with a
4 niche product, particularly just cookies, healthy
5 cookies, always with organic, using organic
6 ingredients which is my particular passion area. It
7 was always my intention to -- to develop a whole raft
8 of particular products under our company brand.

9 Q And can you explain for me a little bit more
10 what you mean when you say that organic healthy food
11 was -- is your passion?

12 A It stems from just my upbringing. I had a
13 very healthy -- health conscious mother and knew all
14 what to eat, and I've always lived by that philosophy.
15 So I just -- I was particularly interested in the
16 nutritious properties actually of food, the higher
17 availability of nutrients, the lack of pesticides.

18 So all of our products actually stem from a
19 use of 75 percent plus organic ingredients.

20 Q And can you describe the products that Eat
21 Right Foods began to market ~~itself~~ ^{and sell} after the founding?

22 A So after -- after we were doing the cookies,
23 we started into cakes, a range of snack products. For
24 instance, energy bars, some -- some fruit and nut
25 snack packs, some crackers. We developed some really

1 unique fruit and vegetable jam products for one of our
2 retail customers here in the states.

3 We also did some work actually on the
4 development of a chocolate -- very unique chocolate
5 product. We also did some work on a particular soup
6 product for development or, you know, presentation to
7 an American retailer.

8 We have looked into and done quite a bit of
9 work actually, ground work, on a variety of products.
10 Some of those are in development stages in certain
11 other regions, and some others are on the shelf ready
12 to go.

13 Q Does Eat Right Foods intend to expand its
14 use, its production of products, into other areas?

15 A Oh, very much so. One of the products which
16 we've got, if you'd like, in development or, you know,
17 prelaunch situation of a bioavailable nutrient
18 product. It's very exciting for me. It's a range of
19 products which we received technology in New Zealand
20 grant funding for the research and development on, and
21 there was quite a few of us involved in the
22 development of that.

23 It is -- it's -- we believe it's a world
24 first, and so we're keeping it under wraps until we're
25 completely able to launch that range of products.

1 Q And can you explain to me what bioavailable
2 nutrient food is?

3 A Okay. It's basically going and saying, at
4 the moment, there's a couple of binders naturally
5 occurring, particularly in plants.

6 Q You said binders? Is that what you said?

7 A Yes, binders. And it's a processing
8 technology that we are intending to use to make the --
9 the nutrients, the vitamins, minerals actually
10 occurring available so somebody actually does not have
11 to take additional supplements. The actual food is,
12 in fact, complete food. It actually has a huge source
13 of vitamins and minerals actually within it without
14 having to add it either by supplementation or added by
15 addition to a product recipe.

16 Q And Eat Right Foods is working on a plan to
17 market ^{and sell} ~~itself~~ foods that include these bioavailable
18 nutrients?

19 A Yes, we are.

20 Q What type of consumer does Eat Right foods
21 try to market its products to?

22 A Our consumers are well-educated. They're
23 very healthy food conscious. They really are looking
24 for a very nutritious product. They are typically
25 very well-educated, live in the large cities. They're

1 often a mother or a -- somebody who's -- who's perhaps
2 got particular food intolerances or allergies
3 themselves. They may be purchasing for children who
4 actually also have food intolerances, food allergies,
5 specific dietary and/or medical reasons which can be
6 anything from diabetes to -- to candida.

7 They -- it is typically a female who is doing
8 the buying choices. They are very savvy in respect to
9 reading the nutritional panel on a label, very
10 conscious at looking at the ingredients, actually more
11 nowadays looking at the ingredients and making sure
12 that it's a whole ingredient which is actually within
13 that.

14 It's looking for things such as is it ^{cocoa} cooked
15 butter, ^{in the} is it using chocolate, or is it ^{chocolate} a compound is
16 it ^{with} a Palm oil. It's that specific.

17 Q And why are consumers with dietary needs or
18 food allergies especially being marketed to or why are
19 they purchasing Eat Right Foods's products?

20 A That's what we are -- that's what our
21 particular range of products and our brand actually
22 stands for.

23 Q Can you explain that further? Are other
24 products -- does Eat Right Foods market products that
25 address certain dietary needs or food allergies?

1 A Absolutely. Most of our products have some
2 specific dietary functional food aspect to them:
3 Gluten free, to high in fiber, to 75 percent less
4 sugar. Lots of specifics. Our claim to fame is
5 "We've got more benefits in every bite."

6 Q And that's your -- the tag line?

7 A That's my tag line, yes.

8 Q What channels of trade does Eat Right Foods
9 market its products in?

10 A Primarily to retailers, specialty health
11 foods, organic health food stores, to here in the
12 states to the likes of Whole Foods Market, Andronicos.

13 In respect to also the Internet, online --
14 online shops, both our own online shop, and we also
15 have third party online shops which actually sell our
16 products on an international basis.

17 So, for instance, New Zealand Natural
18 ~~Products~~ ^{Exports} sells products on our behalf. We have
19 distributors too, which are virtually looking after
20 our products here in the states. We have -- we have
21 presence on social media networks. We have, you know,
22 various publications which get ahold of a story and
23 write about Eat Right Foods.

24 We have various, I suppose, interested
25 medical health websites which tend to put our products

1 actually on there. So, for instance, I think it's
2 nutfreebusiness.com is one. There's one of the Celiac
3 websites. It's not Celiac.com, but it's something
4 Celiac Associate. I've forgotten the exact -- those
5 types of websites.

6 There's also caloriecount.com which
7 nutrients -- sorry -- nutritional information on
8 there, and I think Fitness Pal as well, My Fitness
9 Pal, yes. My Fitness Pal has details or nutritional
10 information on their website.

11 Q You mentioned third-party websites.

12 Do those sites market and sell your products
13 in the United States?

14 A They can and do, yes.

15 Q You also mentioned publications.

16 In particular, what publications have
17 advertised or marketing Eat Right Foods products in
18 the past?

19 A There was a big story by New Hope Media. It
20 was in conjunction with the Expo West.

21 Q What is Expo West?

22 A Expo West is a very -- it is the largest
23 natural food and supplement show, if you'd like, expo,
24 in the states, United States, and we've been
25 exhibiting at that particular show or involved in that

1 show both on our own and/or New Zealand trade and
2 enterprise, government trade organization. And we've
3 been doing that pretty much every February/March of
4 every year for the last -- oh, since 2004, 2005.

5 Q Besides Expo West, does Eat Right Foods
6 market its products in any other trade shows or
7 expositions?

8 A We have. In fact, Fancy Food Show, we went
9 to Fancy Food Show here in San Francisco. It was one
10 show that we -- that we had a presence in. That was
11 in early 2006.

12 Q So as far as food channels, you mentioned
13 retail markets, you mentioned Internet sites, and you
14 mentioned food shows or expos; is that correct?

15 A Yes.

16 Q Any other trade channels?

17 A Not that I could think of, no.

18 Q You also mentioned Celiac and a website
19 related to Celiac?

20 A Celiac disease is intolerance to gluten.
21 Gluten, ~~in fact,~~ being found in ~~the body~~ ^{barley, oats, rye, and wheat.}

22 Q And does Eat Right Foods market and sell
23 gluten-free products?

24 A Yes, we do. In fact, all of the products
25 which we sell ^{to Whole Foods} in the states at the moment are all

1 gluten free, egg free and nut free.

2 Q And what price or prices does Eat Right Foods
3 market its -- market and sell its products?

4 A As a wholesaler, a dollar typically for a
5 75-gram pack. Those packs are typically found at the
6 checkout impulse purchase area of a store, and then we
7 have the larger take-home 300-gram, 2.4-ounce units.
8 And those we -- we wholesale at 3.50. They're
9 typically sold at 8.99. And the packs, the 75-gram
10 packs, are sold at \$2.

11 Q To the consumer?

12 A To the consumer.

13 Q Retail?

14 A Yes, retail.

15 Q Does Eat Right Foods own any trademarks?

16 A Yes, we do. We have trademarks registered in
17 New Zealand. We have registrations in Australia,
18 U.K., Europe and here in the United States.

19 Q Rebecca, I'm going to mark a few exhibits for
20 you to take a look at.

21 (Documents marked Exhibits 1 - 3
22 for identification.)

23 THE WITNESS: Thank you.

24 MR. MAUCH: Rebecca, I've placed in front of
25 you Exhibits 1, 2 and 3.

1 Q Starting with Exhibit 1, do you recognize
2 this document?

3 A Yes, I do. That's a trademark registration
4 for our EATRIGHT brand on the Class 30 products.

5 Q And when was this trademark registered?

6 A It was registered on the 17th of
7 January 2006.

8 Q And for what goods was this trademark
9 registered?

10 A For organic, allergy-sensitive cake -- cakes
11 and cookies.

12 Q So this was registered soon after you
13 began -- you founded the company in June of 2001; is
14 that correct?

15 A The use of our trademark was used on products
16 from -- from the word^{go} that we actually started to
17 produce the products, which was the 1st of
18 August 2001. For sale to the United States, to United
19 States customer, was soon after that. It was
20 September 2001.

21 Q So looking at the left-hand column of this
22 document --

23 A Yes.

24 Q -- where it says -- where does it say for
25 "first use"?

1 A 1st of October 2001.

2 Q And so that's the first use in commerce.

3 What about first use?

4 A First use was August 2001.

5 Q What was that use on?

6 A That was for cakes and cookies.

7 Q And how was the mark being used?

8 A It was being used on the product packaging.

9 Q And then --

10 A And the actual Internet orders as well.

11 Q So the mark was appearing on your website?

12 A Yes, it was, and it still is.

13 Q And then the first use in commerce was when,
14 based on this registration?

15 A For the United States, 1st of October 2001.

16 Q And that was on cakes and cookies?

17 A Yes.

18 Q And turning to Exhibit 2, do you recognize
19 this document?

20 A Yes.

21 Q What is this?

22 A This is an EATRIGHT registered trademark for
23 Class 5 products. Specifically food preparations
24 adapted for medical purposes.

25 Q And when was this registration received?

RDC
1 A This was -- it was registered on the 13th of
2 ~~2001~~ 2009.
October

3 Q And based on this registration, when was the
4 first use?

5 A 1st of October 2001.

6 Q And then if you could turn to Exhibit 3, do
7 you recognize this document?

8 A Yes, I do.

9 Q What is this?

10 A So this is the EATRIGHT trademark registered
11 in Class 29.

12 Q And what goods --

13 A So specifically --

14 Q -- are included?

15 A -- for fruit and nut/seed-based snack foods,
16 food bars.

17 Q And when was the first use in commerce for
18 this mark?

19 A 3rd of December 2002.

RDC
20 Q So by December of 2002, EATRIGHT was using ⁱⁿ ~~a~~
21 commerce, its mark, on all its food and services in
22 all three of these areas; is that correct?

23 A Yes.

24 Q And just to be clear, that use and commerce
25 wasn't for goods being marketed and sold in the

1 United States; correct?

2 A Yes.

3 Q Do you recall when the -- the sale of the
4 first Eat Right Foods product in the United States
5 was?

6 A For sale to the United States customer was
7 September 2001.

8 Q And that was --

9 A That was on an online shop.

10 Q And since that time, you've been marketing
11 and selling Eat Right Food products with the -- the
12 marks registered that we just discussed? So you've
13 been doing that since that time?

14 A Yes.

15 Q In the United States?

16 A Yes

17 (Document marked Exhibit 4
18 for identification.)

19 MR. MAUCH: I just marked Exhibit 4, Rebecca.

20 Q Do you recognize this document?

21 A I do.

22 Q What is this?

23 A So this is a screen shot of an Eat Right
24 Foods website with EATRRIGHT trademark on the top left
25 hand, and it's just describing about us, about our

1 products, contact details, specific benefits in some
2 of the food products.

3 Q And the mark on the banner in the top
4 left-hand corner is the mark used -- is the mark --
5 same mark as registered in Exhibits 1, 2 and 3;
6 correct?

7 A That is right.

8 (Document marked Exhibit 5
9 for identification.)

10 MR. MAUCH: This is Exhibit 4.

11 Q Do you recognize this document? I'm sorry.
12 Exhibit 5. Excuse me.

13 A Sorry. Yes, I do.

14 Q And what is Exhibit 5?

15 A So this is, again, a snapshot of an Eat Right
16 website, and this is -- this time it's of our product
17 page. And so it's listing some of the food products
18 you can purchase on our online shop. It's also got
19 some comments from some of our customers, including a
20 quote from one of our U.S. customers who had purchased
21 ~~on an~~ ^{from our} online shop.

22 Q And the products listed on Exhibit 5 on your
23 website, these are all available for sale currently in
24 the United States; is that correct?

25 A Yes.

1 Q There is an image in the right-hand corner of
2 the web page. Can you describe what that image is?

3 A So those are products in the product
4 packaging that somebody can actually purchase off the
5 website. So it also has some products out of the
6 product packaging just to show that line and the like.

7 But the products will actually be sent
8 through with the packs. So the cellophane, cellophane
9 Choc-holics single pack. There's a -- that's a
10 75-gram with that trademark at the top.

11 There is a ginger cookie pack which is a
12 300-gram take-home pack. Again, with our EATRIGHT
13 trademark, ^{also} ~~or so~~ ^{BioGro} ~~the bio-grow~~ organic standard
14 actually on it as well on the pack.

15 Q So what trademark is on the packaging?

16 A On all of it, it's EATRIGHT trademark.

17 (Document marked Exhibit 6
18 for identification.)

19 MR. MAUCH: I marked Exhibit 6.

20 Q Rebecca, what is Exhibit 6?

21 A This is again an EATRIGHT website. This time
22 it's actually the online shop page, and it's showing
23 the various cookie products that you can purchase.
24 It's showing just a little bit about what the products
25 are. It's showing the U.S. retail prices for some of

RDC 1 these, ~~on~~ the cost to the consumer in the states.

2 Q So this is the price that a U.S. consumer who
3 goes online to your shop would pay for these products?

4 A Yes, plus freight.

5 Q And what mark appears on this online shop?

6 A Our EATRIGHT registered trademark.

7 Q And these are all the cookie products;
8 correct?

9 A That particular screen shot has all of our
10 cookie products, yes.

11 (Document marked Exhibit 7
12 for identification.)

13 MR. MAUCH: So this is Exhibit 7.

14 Q Do you recognize this document?

15 A I do. It's a photo of Giant Afghans, and
16 it's from our online shop.

17 Q And what is the Giant Afghan?

RDC 18 A So this is one of the very first cookie
19 products that we made. So it's using, again,
20 ~~70 percent~~, 75 percent certified organic ingredients.

21 This product is actually a wheat product. I
22 suppose in the evolution of the company we have got
23 more specific in terms of the functional food side of
24 products.

25 Q Can you describe what you mean when you say

1 you've gotten more specific in the functional food
2 aspect of your products? What does that mean?

3 A It's -- it's more the dietary needs area that
4 we've really focused on, and the nutritious and the
5 healthful side, medical side, if you'd like, of the
6 particular products.

7 Q And what mark is on the page of the Giant
8 Afghan cookie?

9 A EATRIGHT registered trademark.

10 Q And that's depicted in the image here?

11 A Yes.

12 Q So is this the packaging that a U.S. consumer
13 would see when he or she purchased the Giant Afghan
14 cookie?

15 A It would have a slightly different product
16 label on it. It would actually have the nutritional
17 panel for the U.S.

18 Q So the nutritional panel would be different?

19 A Slightly different, yes.

20 Q But the -- the rest of the label would be the
21 same?

22 A Yeah. The trademark would be the same. The
23 product name would be the same. Obviously all of the
24 ingredient information would be the same. We just
25 have different nutritional panel requirements from our

1 country to yours.

2 Q And on the kind of lower left-hand side of
3 the label the Giant Afghan cookie depicted on
4 Exhibit 7, I see egg free, nut and peanut free.

5 Can you describe what that part of the label
6 is for?

7 A That's identifying what the actual benefits
8 are to a consumer. Particularly for somebody who has
9 got some specific allergin requirements.

10 (Document marked Exhibit 8
11 for identification.)

12 THE WITNESS: Thank you.

13 MR. MAUCH: I've marked Exhibit 8.

14 Q Do you recognize this exhibit?

15 A I do.

16 Q What is this Exhibit 8?

17 A This is a Choc-holics cookie. This is a
18 particularly unique product, and why it was a product
19 that was selected to be stocked at Whole Foods.

20 So this is -- it's got specific aspects, such
21 as 65 percent less sugar than an average cookie. It's
22 gluten/wheat free, it's dairy free. It's also high in
23 fiber. It's low in sodium, yeah.

24 Q And what mark is -- is used on the
25 Choc-holics cookie?

1 A The EATRRIGHT mark.

2 Q And that's depicted in the image on
3 Exhibit 8?

4 A Yes, on both the large pack and the single,
5 single pack.

6 Q So you testified previously about the single
7 impulse buy pack and the larger 300-gram pack; is that
8 what is depicted here?

9 A Yes, it is.

10 Q And looking at both Exhibit 7 and Exhibit 8,
11 you testified previously that Exhibit 7 was an image
12 of the Giant Afghan cookie on the website; is that
13 correct?

14 A Yes.

15 Q And Exhibit 8, where does Exhibit 8 come
16 from?

17 A That is also from online shop on our Eat
18 Right Foods -- sorry, ^{eatright.co.nz}~~eatright.co~~ website.

19 Q So can you explain, just so we understand,
20 where Exhibits 7 and 8 come from?

21 Looking at Exhibit 6, how would -- how do you
22 get from the -- the online page depicted in Exhibit 6
23 to view the images in Exhibit 7 and Exhibit 8?

24 A You just click on the actual photo on the
25 online shop and enlarge -- this is an enlarged view of

1 that -- of the Exhibit 6 photos.

2 So, for instance, in Exhibit 6, the first one
3 is the Giant Afghan. So if you clicked on that, you
4 would see the exact image on Exhibit 7

5 Q And likewise for the Choc-holics cookie
6 depicted on Exhibit 6, you would then pull up the
7 image on Exhibit 8?

8 A Exhibit 8, yes.

9 (Document marked Exhibit 9
10 for identification.)

11 MR. MAUCH: I've marked Exhibit 9.

12 Q Do you recognize Exhibit 9?

13 A I do.

14 Q What is this?

15 A So that's a screen shot of our online
16 EATRIGHT online shot for our cracker products.

17 Q And these are the crackers currently
18 available for purchase to consumers in the United
19 States?

20 A Yes, although we are just doing some
21 redevelopment of the Batch Bread Cracker.

22 Q And what mark is depicted on the website?

23 A Our EATRIGHT registered trademark.

24 Q And that's up in the left-hand corner of
25 Exhibit 9?

1 A Yes.

2 (Document marked Exhibit 10
3 for identification.)

4 THE WITNESS: Thank you.

5 MR. MAUCH: I've marked Exhibit 10, Rebecca.

6 Q Do you recognize Exhibit 10?

7 A I do.

8 Q What is this?

9 A So that's our Super-Seeded Cracker.

10 I brought some along, if you're hungry,
11 Andrea.

12 Q And can you describe where this image in
13 Exhibit 10 comes from?

14 A So it comes from our EATRIGHT website on the
15 online shop. So if you click on the image in Exhibit
16 No. 9, on the actual cracker itself, this is the
17 enlarged view.

18 Q And what mark is used on the Super-Seeded
19 Cracker?

20 A EATRIGHT registered trademark.

21 Q And what -- can you tell me -- what can you
22 tell me about the -- this particular product?

23 A This is -- again, it's a very specialized,
24 very unique product. It -- it's got many aspects to
25 it. So it's fully certified organic ~~fiber~~ in

an I.F.O.A.M.

certifier.

RJC 1 New Zealand, which is ~~high form~~ accredited ~~certified~~
2 It is gluten/wheat free. It's -- it's got no added
3 oils. It's got no added salt. All of the seeds are
4 presprouted. It is a source of omega-3s, it's a
5 source of protein. It's a very decent sort of -- it
6 is a great product for anybody who has yeast infection
7 or candida, yeah.

8 Q Great.

9 (Document marked Exhibit 11
10 for identification.)

11 MR. MAUCH: Exhibit 11 has been marked.

12 Q Do you recognize this exhibit, Rebecca?

13 A I do. This is Kings Fruit cake. It is from
14 the online shop on our eatright.co.nz website.

15 Q So just to be clear, the actual document,
16 what does it depict?

17 A What you can actually purchase with respect
18 to the Kings Fruit Cake.

19 Q This is a particular screen shot for that
20 particular --

21 A Yes, it is, of the particular page.

22 Q And what mark is depicted on the web page?

23 A EATRRIGHT registered trademark.

24 (Document marked Exhibit 12
25 for identification.)

1 THE WITNESS: Thank you.

2 MR. MAUCH: I've now marked Exhibit 12.

3 Q Do you recognize this exhibit?

4 A Yes, I do.

5 Q What is Exhibit 12?

6 A So this is the enlarged photo from online
7 shop page, and it's of our Kings Fruit Cake. Both on
8 the package that you would purchase it, and also a
9 photo of it out of the package.

10 Q So how would one get to this image depicted
11 in Exhibit 12?

12 A You would click on the photo of the product
13 photo in Exhibit 11.

14 Q And can you describe for me this particular
15 Eat Right Foods product?

16 A So this is a cake. It's a fruit, fruit cake.
17 It's a low fat, gluten-free fruit cake. We also
18 rebrand this as a Christmas cake. It's EATRIGHT
19 Christmas cake over the holiday period.

20 Q And what is the -- what type of consumer are
21 you marketing the Kings Fruit Cake to?

22 A Somebody, again, who is very interested in
23 nutritional benefits of products, in particular, who
24 are looking to share in this particular instance.
25 It's often used with tea or with a beverage.

1 (Document marked Exhibit 13
2 for identification.)

3 MR. MAUCH: This is Exhibit 13 that has now
4 been marked.

5 Q Do you recognize this exhibit?

6 A I do. It's again of our online shop page,
7 and it's of three different Christmas products and
8 packs that you can purchase.

9 Q And on the web page, what mark is depicted?

10 A EATRIGHT registered trademark.

11 Q And on the three Christmas special products,
12 what mark appears underneath the packaging of each of
13 those products?

14 A EATRIGHT registered trademark.

15 (Document marked Exhibit 14
16 for identification.)

17 MR. MAUCH: I've now marked Exhibit 14.

18 Q Do you recognize this exhibit?

19 A Yes.

20 Q What is this?

21 A So this is fully certified organic products
22 available on our -- for purchase on our EATRIGHT
23 website.

24 Q So this is the screen shot of that particular
25 page on the website?

1 A Yes, it is.

2 Q And tell me about the organic product --
3 products that are marketed and sold by EATRIGHT?

4 A So these -- these, by definition of the
5 organic certification, they include at least
6 95 percent or more certified organic ingredients. We
7 rigorously test and go through quite an extensive
8 auditing procedure to receive the accreditation.

9 Q And why is it important for Eat Right Foods
10 to market and sell organic products?

11 A Not only is it something that I'm passion --
12 personally passionate about, but it's also consumers
13 of our products are passionate about, and very, very
14 mindful of what nutritional benefits that they are
15 actually putting in their mouths.

16 (Document marked Exhibit 15
17 for identification.)

18 THE WITNESS: Thanks.

19 MR. MAUCH: So this is now Exhibit 15 that's
20 been marked.

21 Q Do you recognize this exhibit?

22 A I do.

23 Q And what is Exhibit 15?

24 A So this is organic dried apples, and it is
25 the enlarged view from the online shop. So if you

1 click on the -- the photo of organic dried apples on
2 the online shop page, this is the enlarged picture.

3 Q And the picture you're just referring to,
4 you're pointing to it on Exhibit 14; is that correct?

5 A Yes, it is.

6 Q So if you click on the smaller picture on
7 Exhibit 14, it brings you to a new page which is the
8 image on Exhibit 15?

9 A Yes.

10 Q And tell me about the -- the Slow Dried Apple
11 rings.

12 A So these are dehydrated rather than -- and
13 they're processed at less than 40 degrees, and it's to
14 keep the nutritional nutritious properties within the
15 actual apples as intact as possible, yeah. It's fully
16 certified organic. It's a local Nelson Apple.

17 Q And are these apple rings one of the raw food
18 products marketed and sold by EATRIGHT?

19 A It's under the raw food philosophy. There
20 are some differences in respect to some of the raw
21 food details. We -- we definitely produce these under
22 the philosophy of it.

23 Q And can you tell me anything more about the
24 type of consumer you market the Apple Rings to?

25 A Again, somebody who is very nutritious or

1 nutritionally minded, very health conscious. Again,
2 often purchasing these for children for snack packs
3 for school, or schools. Particularly the benefits on
4 the left-hand side, as well as the nutritional panel
5 on the right-hand side.

6 Q Okay. You can put Exhibit 15 aside for the
7 moment, Rebecca. Thank you.

8 Can you tell me about the -- the proceeding
9 that Eat Right Foods has filed against Mr. Kevin
10 LeVille?

11 A When I first became aware of it, I was
12 surprised that it was ^{for} ~~full~~ food products. I was
13 grateful for the United States patent and trademark
14 office. Having an initial, what's the word, denial
15 of -- in fact, some of the specific products.

16 Q And when you're referring to "food products,"
17 you're referring to -- when you said the printout,
18 it -- you're referring to -- what are you referring to
19 when you say that?

20 A Well, on the application, which at the time
21 was made by Nutritional Excellence, it was for a range
22 of food products. I can't remember the exact details,
23 but there was -- there was food products in three
24 classes.

25 (Document marked Exhibit 16

1 for identification.)

2 MR. MAUCH: So I've marked Exhibit 16.

3 Q Do you recognize this document?

4 A Yes, I do.

5 Q What is Exhibit 16?

6 A So this is the application for the EATRIGHT
7 mark by, at the time, Nutritional Excellence, and it
8 was for a range of goods and services. In particular,
9 in Class 5 for supplement products. Class 29, frozen
10 vegetable ~~trays,~~ ^{entrees,} soups, ⁱⁿ ~~and~~ Class 30.

11 This, however, was not the original
12 application. There were also some applications for
13 additional products, I believe, in Class 5 and also in
14 Class 20, 29, and 30, which the U.S. PTO denied
15 Nutritional Excellence.

16 And the response of Nutritional Excellence
17 and/or attorneys is to just delete them from the list
18 of goods and services. Although, they were still
19 actually being used for commerce, still sold in
20 commerce.

21 Q So a moment ago in your testimony, when you
22 referred to being, I think your words were,
23 "surprised" that the -- the mark was being used on
24 food products, is this the application you were
25 referring to in terms of food products?

1 A Yes, yeah. This is the application number.
2 This is the recent list of food products. It's not
3 the original list of food products.

4 Q I understand.

5 So it's your understanding that at some point
6 the original application was amended to reflect the
7 current list of claimed goods; is that correct?

8 A Yes.

9 Q And this is the application that you -- that
10 Eat Right Foods Limited is opposing in this
11 proceeding?

12 A Absolutely.

13 Q We're going to be looking more at Exhibit 16
14 a little later, but if you can put that to the side
15 for the moment, and the -- the mark that's being
16 applied for in Exhibit 16, what mark is that?

17 A That's for EATRIGHT AMERICA.

18 Q And when did you first learn of the EATRIGHT
19 AMERICA mark?

20 A It was February/March 2010 that I saw the
21 mark, and I saw it in Whole Foods. At that time, it
22 was being used on books, DVDs and some promotional
23 files.

24 Q So explain to me in a little more detail
25 this -- this first awareness of EATRIGHT AMERICA you

1 said at the Whole Foods store. Explain to me how that
2 happened.

3 A I was visiting a Whole Foods store as I --
4 here in the San Francisco Bay Area on a typical sales
5 trip that I make at least once a year, and -- and I
6 was talking to our buyers and the store team leaders,
7 about our products, how they were going, those types
8 of things.

9 I physically saw the EATRIGHT mark being used
10 by -- in the store on this other promotional material.

11 Q And I believe you said the EATRIGHT mark.
12 You mean the -- which mark do you mean?

13 A Oh, sorry. The mark that was owned, which at
14 the time was owned by Nutritional Excellence.

15 Q What was the actual mark that you saw, the
16 words?

17 A The words were EATRIGHT, and then underneath
18 it was a smaller portion, which said AMERICA.

19 Q And at that time did you know who the owner
20 of the mark was?

21 A No.

22 Q When did you come to learn that?

23 A Later in 2010, and it was actually when -- I
24 believe it was when this application was -- was ~~made~~ ^{refused.}

25 Q Since the trip you described a moment ago in

1 February or March of 2010, when you viewed the
2 EATRIGHT AMERICA mark being used on, you said, books
3 and DVDs in the Whole Foods store, since that time,
4 have you seen the EATRIGHT AMERICA mark being used on
5 other products in the Whole Foods Market stores?

6 A Yeah. I've seen it going from, if you'd
7 like, nutritional information and literature, through
8 to being used on a huge number of different food
9 products.

10 Everything from nuts, chicken, to salads, to
11 cottage cheese, to granolas. You name it.

12 Q And describe to me how you came to see the
13 mark being used on this product in this way?

14 A By visiting the stores and actually
15 physically citing it. Also, I did look at some online
16 photos which have been taken from Whole Foods, Whole
17 Foods Market stores, but most of it was actually going
18 to the store and observing it myself, looking on the
19 actual food products, looking at food products.

20 Q And where were these stores located?

21 A A variety of states. Specifically here in
22 California, in Northern California, around the
23 San Francisco Bay Area. Also in Dallas, Texas, and
24 also down in LA.

25 Q So you actually physically visited these

1 stores and saw the EATRIGHT AMERICA mark being used on
2 the variety of products that you just described?

3 A Yes. And, in fact, as recently as -- as
4 yesterday, and the day before, and the day before
5 that.

6 Q So you actually saw the EATRIGHT AMERICA mark
7 being used on product -- food products in Whole Foods
8 stores just in the last few days?

9 A Yes. My husband actually saw over a hundred
10 uses of the EATRIGHT AMERICA mark on food products in
11 the Franklin Street Whole Foods store. In fact, I
12 think he gave up counting 100 different products in
13 100 different uses.

14 Q How about you? What stores did you visit in
15 the last few days?

16 A So I've been to the likes of Capitola. Whole
17 Foods Capitola, Whole Foods Monterey. In Monterey,
18 interestingly it wasn't EATRIGHT AMERICA that I
19 actually saw. It was just actually EATRIGHT and no
20 additional, like, geographical reference.

21 Q How are you doing? Do you want to take a
22 short break now?

23 A Yes, please.

24 Q Yes. Go off the record for a few minutes.

25 (Recess taken.)

RJC
1 MR. MAUCH: Q. During your visits to Whole
2 Foods stores beginning in February 2010, when you
3 first saw the EATRIGHT AMERICA ^{mark up} ~~markup~~ to the last few
4 days, did you ever take a picture of the EATRIGHT
5 AMERICA mark in the Whole Foods stores?

6 A Yes, myself and/or my husband, too.

7 Q And you were always with your husband when he
8 was taking those photos?

9 A Yes

10 (Document marked Exhibit 17
11 for identification.)

12 MR. MAUCH: I've marked Exhibit 17.

13 Q Do you recognize this exhibit?

14 A I do.

15 Q What is Exhibit 17, please?

16 A So this is a photo that was taken either by
17 myself, or my husband Tim, of the EATRIGHT AMERICA
18 mark on Pinto beans, and this particular shot was
19 taken at Whole Foods Market in Novato, California, and
20 it's showing the EATRIGHT mark. Importantly, the
21 dominant parts are the EAT and the RIGHT. They're in
22 two different fonts, just like ours, the EATRIGHT
23 registered trademark is.

24 It also has the TM here at the end of it, EAT
25 and the RIGHT, indicating to me that their mark is