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1 actually -- or to -- on the first site, the registered  
2 mark is EATRIGHT, not EATRIGHT AMERICA, and it's also  
3 the two words joined together.

4 So when I first saw this back in early 2010,  
5 I just thought it was an exact copy of our particular  
6 mark. To me, it was just a blatant copy.

7 Q So if you keep Exhibit 17 out and turn to  
8 Exhibit 1, very first exhibit we looked at,  
9 Exhibits 1, 2, and 3.

10 So Exhibits 1, 2 and 3 are again your  
11 registered word and design mark --

12 A Yes.

13 Q -- is that right?

14 A Yes.

15 Q And a moment ago you testified that the --  
16 the EATRIGHT AMERICA mark depicted in Exhibit 17, you  
17 said it has two different fonts for the words EAT and  
18 RIGHT like ours.

19 Can you explain, looking at Exhibits 1 and  
20 17, what you mean by that?

21 A Well, the -- the -- gosh, there's so many  
22 things here. It's all one word EAT, EATRIGHT, and the  
23 EATRIGHT AMERICA mark. It is a gold, orange, and  
24 green color.

25 Q Just to be clear, for the record, right now

1 when you're talking about this, you're looking at and  
2 referring to the EATRIGHT AMERICA mark on Exhibit 17?

3 A Yes; I'm looking at the EATRIGHT AMERICA  
4 mark, the mark by application or by applicant,  
5 Mr. Kevin LeVille, and so this is the mark that he's  
6 using in commerce.

7 One example of his use of the EATRIGHT  
8 AMERICA mark in commerce, as well as having the two  
9 different fonts, as we have in our registration for  
10 our EATRIGHT mark. He has -- has used in commerce the  
11 two different fonts for EAT and RIGHT.

12 Q And how about the word AMERICA that is the  
13 third word, the end of the mark of Exhibit 17?

14 A To me, he -- it's just an add-on, because  
15 it's actually -- he's got it here as EAT and RIGHT,  
16 and he's got TM, and then it says AMERICA, and AMERICA  
17 is much smaller letters.

18 In this particular photo, you can't see it.  
19 Other photos, you can't see it at all, and sometimes  
20 it's just not prevalent -- prevalent at all. It's not  
21 present. Sorry.

22 Q So we can keep Exhibits 1, 2 and 3 out for  
23 reference, but we can put Exhibit 17 aside.

24 (Document marked Exhibit 18  
25 for identification.)

1 MR. MAUCH: We marked Exhibit 18.

2 Q Do you recognize Exhibit 18?

3 A Yes, I do.

4 Q What is this?

5 A So this is the EATRIGHT AMERICA mark, and  
6 it's being used on, in this particular instance, raw  
7 walnuts at a Whole Foods Market store.

8 Q So this image here in Exhibit 18, can you  
9 describe to me where this image comes from?

10 A It's a photo taken either by myself or my  
11 husband at a Whole Foods Market store during our visit  
12 in February of this year.

13 Q And in this photograph in Exhibit 18 --

14 A Oh, yeah.

15 Q -- can you describe for me what the EATRIGHT  
16 AMERICA mark is being used on?

17 A Yeah. This -- this particular -- the product  
18 actually is very confusing. It says that it's for  
19 cashews, EATRIGHT AMERICA says it's for cashews, but  
20 the -- the nutritional label down below and what  
21 appears in the actual <sup>bin</sup>~~then~~ is walnuts.

22 Obviously, for a company who sells products  
23 in Whole Foods Market's stores, nut-free products,  
24 this is a huge allergin concern in terms of if the  
25 consumer was totally confused by whether it's actually

1 cashews and walnuts and thought it was an EATRIGHT  
2 product, the actual reaction of anaphylaxis would be  
3 quite severe.

4 (Document marked Exhibit 19  
5 for identification.)

6 MR. MAUCH: I marked Exhibit 19 for the  
7 record.

8 Q Do you recognize Exhibit 19?

9 A Yes, I do.

10 Q What is Exhibit 19?

11 A So this is again a photo taken by myself or  
12 my husband Tim at a Whole Foods Market store. It's of  
13 the EATRIGHT AMERICA mark being used on -- the product  
14 is actually almonds, and on the right-hand side it's  
15 saying it's split peas.

16 Q So the product in the bin shown in the  
17 picture is almonds, but the label, the EATRIGHT  
18 AMERICA label says split peas; is that what you're  
19 saying?

20 A For the right-hand side, yes.

21 Q Do you recall when this photo was taken?

22 A That was approximately February of this year,  
23 and that was at a Mill Valley store. It's the newest  
24 Mill Valley store.

25 Q And can you again describe the EATRIGHT

1 AMERICA mark as it's being used here on these food  
2 products.

3 A So the EATRIGHT AMERICA mark is -- the words  
4 EAT and RIGHT are joined together. The two fonts  
5 which are used, two different fonts for the word EAT  
6 and the word RIGHT, there is a TM at the end of the  
7 EAT RIGHT.

8 It's hard to see in this particular photo.  
9 And see the AMERICA is to the right-hand -- right-hand  
10 side in this particular shot, and it's a much smaller  
11 font.

12 Q So how does -- how does the -- the mark here  
13 in Exhibit 19 compare to the mark as used in  
14 Exhibits 17 and 18?

15 A In this particular instance, it is used on --  
16 all of them are food products, and all of them are the  
17 same in this particular shot.

18 Q All of the marks are the same?

19 A All the marks are the same, yes.

20 Q Okay.

21 (Document marked Exhibit 20  
22 for identification.)

23 MR. MAUCH: This is Exhibit 20.

24 Q Do you recognize Exhibit 20?

25 A Yes, I do.

1 Q What is this?

2 A So this is a promotional flier or, sorry, a  
3 poster at the Whole Foods Market store, and it's -- at  
4 the bottom it's showing the EATRIGHT TM AMERICA.

5 Q Okay. And just to be clear, is Exhibit 20  
6 the poster, or what is Exhibit 20?

7 A It's a photo of a poster.

8 Q Okay. And who took this photo?

9 A Either Tim or myself.

10 Q Okay. And where and when was the photo  
11 taken?

12 A It was taken February of this year. It was  
13 at a Whole Foods Market store. The exact store, I --  
14 sorry, but I can't recall.

15 Q And describe for me the -- what's depicted in  
16 this photograph.

17 A So it's a -- it's the EATRIGHT AMERICA mark,  
18 and on a number of food products, and it's identifying  
19 the nutrient index value, or as was originally owned  
20 by nutritional excellence what is called an aggregate  
21 nutrient density index. That mark is now owned by  
22 Whole Foods Market.

23 Q And in the bottom right-hand corner of the  
24 poster depicted in the photograph of Exhibit 20, what  
25 mark is in that lower right-hand corner?

1           A    That's the EATRIGHT AMERICA mark as it's used  
2   in commerce and for promotional material like this  
3   particular poster.

4                   (Document marked Exhibit 21  
5                   for identification.)

6           MR. MAUCH: We've marked Exhibit 21.

7           Q    Can you -- do you recognize this exhibit?

8           A    I do.

9           Q    What is -- what is Exhibit 21?

10          A    So this is a photo of a -- of signage in a  
11   Whole Foods Market store. In particular, it has the  
12   EATRIGHT AMERICA mark being used on 30 super foods.

13          Q    Who took the photo?

14          A    Tim and myself took this photo.

15          Q    And when was it taken?

16          A    In February of this year.

17          Q    And how was the mark, in particular, the  
18   EATRIGHT AMERICA mark, in particular, being used on  
19   the sign in this photograph?

20          A    It's -- it's being used with the words EAT  
21   and RIGHT joined together. The word EAT giving a  
22   different font to the ~~right~~ <sup>RIGHT,</sup> just as we do in our  
23   registration, and then the TM after the EATRIGHT, and  
24   then in smaller letters as the AMERICA. Almost like  
25   an add-on. It's being used identifying some super

1 foods. And, in fact, the Eat Right Foods products in  
2 the Midwest region were also part of our super foods  
3 promotion.

4 Q A super foods promotion done by whom?

5 A By Whole Foods Market.

6 Q And what -- to the extent you have an  
7 understanding, what are the super foods promoted by  
8 Whole Foods?

9 A Super foods are -- it's an umbrella  
10 description of the fact they're more nutritious than  
11 their additional -- oh, than the comparative products.

12 So, in this particular instance, it's talking  
13 about the really nutritious fruits and vegetables in  
14 respect to -- to the Eat Right Foods promotion of  
15 products in the Whole Foods Midatlantic stores. We  
16 were the super food biscuits and cookies.

17 Q Biscuits being the British term for food or  
18 cookies?

19 A Cookies, yes.

20 (Document marked Exhibit 22  
21 for identification.)

22 MR. MAUCH: I've marked Exhibit 22.

23 Q Do you recognize Exhibit 22?

24 A I do.

25 Q What is Exhibit 22?

1           A    It's a photo of the signage on -- in the  
2 Whole Foods Market store taken February of this year,  
3 and it shows -- unfortunately, it's dark in this  
4 photo, but it's showing the EATRIGHT AMERICA mark on  
5 this particular instance, Fuji Apples.

6           Q    And who took this photograph?

7           A    Tim and myself.

8           Q    Tim is your husband?

9           A    Tim is my husband, yes.

10          Q    And when you saw this use of the EATRIGHT  
11 AMERICA mark on Fuji Apples, as depicted in  
12 Exhibit 22, what were your thoughts?

13          A    I also saw it actually just yesterday,  
14 actually, also on Fuji Apples, and Fuji Apples  
15 actually come from New Zealand.

16                Look, I just -- it's so confusing in respect  
17 to we have EAT RIGHT apple products, snack packs, and  
18 this is a --

19          Q    And by "we" you mean?

20          A    Eat Right Foods, and this is a -- this is the  
21 EAT-RIGHT-AMERICA-seeming product in this particular  
22 photo, and I just think it's just too -- too close,  
23 too confusing. The fact that it's adding the word  
24 AMERICA just makes it confusing. Because at the end  
25 of the day, who is to know it's not Eat Right Foods

1 who are doing that in a geographical -- you know, this  
2 is American based, an American company who is actually  
3 selling/promoting this particular apple product.

4 Q So, in your opinion, the inclusion of the  
5 word "America" after the words "EATRIGHT" doesn't make  
6 it less confusing to a consumer?

7 A It makes it more confusing to a consumer. A  
8 consumer could quite easily go and say this is Eat  
9 Right Foods. This is the American subsidiary of Eat  
10 Right Foods.

11 (Document marked Exhibit 23  
12 for identification.)

13 MR. MAUCH: I've marked Exhibit 23.

14 Q Do you recognize this exhibit?

15 A I do. So this is a photo taken by Tim or  
16 myself at a Whole Foods Market store. It is photos of  
17 the EATRIGHT AMERICA mark being used on a salad bar,  
18 processed food salad bar products.

19 In this particular instance, red peppers to  
20 the left and cucumbers to the right. It is also  
21 showing that EATRIGHT AMERICA is somehow connected  
22 with the Whole Foods Market Health Starts program.

23 Q And do you have an understanding of what the  
24 Health Starts program is at Whole Foods?

25 A I don't have a full detailed understanding of

1 it. I understand it is -- it was a -- an initiative  
2 which had two health partners of which EATRIGHT  
3 AMERICA and its company Nutritional Excellence was one  
4 partner. The other partner was Engine 2 Diet. It is  
5 part of a diet program that Whole Foods Market is  
6 endorsing or was endorsing.

7 Similar to, I suppose, a different version of  
8 a Jenny Craig or a type of diet program. So it's  
9 actually saying here that the EATRIGHT AMERICA mark is  
10 -- these are the foods that you eat on the EATRIGHT  
11 AMERICA diet program.

12 Q And directly below the EATRIGHT AMERICA mark  
13 on the two product signs is the words ANDI score and  
14 then a number?

15 A Yes.

16 Q Do you have an understanding of what the ANDI  
17 score is?

18 A So this is a nutrient index score, and the  
19 higher the number, the -- supposedly the better that  
20 particular food product is.

21 So on the EAT RIGHT diet program, you are to  
22 consume foods of -- which have a high nutrient index  
23 scoring.

24 Q And the -- the ANDI score was what was  
25 depicted -- it was explained in the poster on

1 Exhibit 20; is that correct?

2 A Yes, some -- some of them. There are a --  
3 it's the top ten vegetables. There are multiple  
4 scores on multiple products.

5 Q For example, on Exhibit 23 that we were just  
6 looking at, there's a score on red peppers and on  
7 cucumbers?

8 A Yes.

9 Q And the EATRIGHT AMERICA mark is also being  
10 used with that score on those products; is that  
11 correct?

12 A Yeah, my understanding was that the EATRIGHT  
13 AMERICA mark had to be used with an ANDI score.

14 Q And how do you have that understanding?

15 A There is a license agreement that I've seen  
16 in the public domain which was a license agreement  
17 between Nutritional Excellence and Whole Foods Market,  
18 and it was for the use of the EATRIGHT AMERICA mark  
19 which Nutritional Excellence purported to say that  
20 Whole Foods Market could use the EATRIGHT AMERICA mark  
21 in conjunction with the ANDI score on packaging, and  
22 on food product signage.

23 (Document marked Exhibit 24  
24 for identification.)

25 MR. MAUCH: So I now marked Exhibit 24.

1 Q Do you recognize this exhibit?

2 A I do.

3 Q What is Exhibit 24?

4 A So this is a photo taken by Tim or myself at  
5 a Whole Foods Market store in February of this year.  
6 It is in the process foods salad bar area. This is  
7 how the EATRIGHT AMERICA mark can actually look like  
8 on food products.

RDC 9 In the instance of the organic <sup>corn</sup> ~~corner~~ and  
10 organic edamame, what you can actually see is the EAT  
11 RIGHT part of the trademark. You cannot see AMERICA.

12 Q And why can't you see the AMERICA portion of  
13 the mark?

14 A It is either so small or it's not there.

15 Q And you see instances where the EATRIGHT  
16 AMERICA mark is used in Whole Foods Market stores and  
17 actually doesn't include the word AMERICA; is that  
18 correct?

19 A Yes; it's just EAT RIGHT TM.

20 Q And what products is the EATRIGHT AMERICA  
21 mark being used on?

22 A So organic peas, organic corn and organic  
23 edamame.

24 Q And what portion of the Whole Foods Market  
25 store was this photograph taken?

1 A The processed -- oh, sorry. What's called  
2 the prepared food salad bar area.

3 Q And when was this photograph taken?

4 A February 2012.

5 Q By you or your husband?

6 A Yes

7 (Document marked Exhibit 25  
8 for identification.)

9 MR. MAUCH: We've marked Exhibit 25.

10 Q Do you recognize this, this exhibit?

11 A Yes, I do.

12 Q What is Exhibit 25?

13 A So this was a photo taken in Whole Foods  
14 Market Monterey store, and it was taken on Sunday.  
15 Like how many days ago? Three days ago.

16 Q So that was Sunday, September 9th?

17 A September 9th, yes.

18 Q Of this year, 2012?

19 A Yes.

20 Q And who was it taken by?

21 A It was taken by Tim or myself.

22 Q And describe this photograph for me?

23 A So this is a photo of the EATRRIGHT AMERICA  
24 mark being used on green chard, but what actually is  
25 here is only the words EAT RIGHT TM. There is no

1 geographical reference AMERICA.

2 Q And describe for me what the words "eat"  
3 "right" looked like in comparison to the EATRIGHT mark  
4 as registered for in Exhibit 1?

5 A This has the two words joined together.

6 Q And just for the record, to be clear, when  
7 you're referring to "this"?

8 A So this is Exhibit No. 25. Exhibit No. 25,  
9 the words "eat" and "right" are joined together. The  
10 words "eat" and "right" are in two different fonts.

11 And in Exhibit 25, after the word -- after  
12 the single EATRIGHT word or EATRIGHT trademark, there  
13 is TM.

14 Q And how does that compare to Eat Right Foods  
15 registered or design mark as set forth in Exhibits 1,  
16 2 and 3?

17 A In Exhibits 1, 2 and 3, it's virtually  
18 identical. It's the district trademark. In  
19 Exhibits 1, 2 and 3, "Eat" and "right" are joined  
20 together as one word and two different fonts used.  
21 One font for the "eat" and one font for the "right."

22 Q And turning back to the photograph in  
23 Exhibit 25, can you describe where in the Whole Foods  
24 Market store -- in the Whole Foods Market store in  
25 Monterey this photograph was taken?

1           A    This was in the fruit and vegetable section  
2 of the store.

3           Q    So it appears there's some close-up and  
4 there's some sort of shelving that holds the produce,  
5 and this is a sign on the shelving; is that correct?

6           A    Yes, it is, and on all of the -- pretty much  
7 all of the shelving was pretty much similar. So this  
8 is one shelf of the green chard. It could have been  
9 broccoli, and it would have shown exactly the same  
10 EATRIGHT only mark.

11          Q    So did the EATRIGHT only mark appear on  
12 signage for other produce products for --

13          A    Multiple, multiple products. So not just  
14 vegetables, yeah.

15          Q    What other products did you see it on in the  
16 store?

17          A    From memory, it was from red peppers. It was  
18 strawberries, it was blueberries, it was on flowers.

19          Q    And when you saw the EATRIGHT AMERICA mark,  
20 not even including the term "America" as used in the  
21 Whole Foods Market store, particularly on the fruits  
22 you described, what were your thoughts?

23          A    Very confusing. To a consumer, how -- how is  
24 a consumer going to know the difference? It's --  
25 look, the stores themselves, I'm sure some of the

1 personnel at Whole Foods Market must have spoken to  
2 the development Whole Foods people about, hey, this is  
3 so similar to Eat Right Foods of New Zealand, what are  
4 you doing here?

5 So I don't know how long this has been going  
6 on for. We haven't -- we haven't endorsed it. We  
7 haven't authorized it. We haven't been paid for the  
8 <sup>use of this</sup> ~~greatest~~ trademark on food. I'm just --

RDC  
9 Q Does your company Eat Right Foods market and  
10 sell any products that include or in any way  
11 incorporate fruit?

12 A Yes.

13 Q What products are those?

RDC  
14 A So those are our snack packs, so that  
15 includes dried apple rings, and we have some fruit and  
16 <sup>balls,</sup> ~~nut bowls,~~ <sup>balls.</sup> energy ~~bowl.~~ <sup>ball.</sup> It's called an energy ~~bowl.~~  
17 It's -- so it's got <sup>fruits,</sup> ~~raisins,~~ seeds and nuts, which is  
18 fine. The EATRRIGHT AMERICA is being used in the bulk  
19 section at Whole Foods.

20 Q Any other Eat Right Foods products that  
21 incorporate food -- fruit? Excuse me.

RDC  
22 A A cookie ~~cracker~~ <sup>J</sup> -- our cookie products  
23 include fruit, yes.

24 Q How about any Eat Right Foods products that  
25 incorporate vegetables, for example, green chard or

1 any vegetables?

2 A EATRIGHT Super-Seeded Cracker, I brought this  
3 one here, has carrots in it. It has more carrots in  
4 it.

5 The EATRIGHT jams that we were producing is  
6 one particular one which was 95 percent fruit and  
7 vegetables. That was actually a carrot. It was a  
8 carrot jam product, so it had grape juice and carrots.

9 (Document marked Exhibit 26  
10 for identification.)

11 MR. MAUCH: I've marked Exhibit 26.

12 Q Do you recognize this exhibit?

13 A Yes. This was taken at the same store as  
14 Whole Foods Market Monterey, Exhibit No. 25. Again,  
15 it was taken by myself or Tim, and it was taken on  
16 Sunday the 9th of September of this year. So just a  
17 few days ago.

18 Q And what does the photograph in Exhibit 26  
19 depict?

20 A This shows another example of Mr. LeVille's  
21 ~~market~~ <sup>mark</sup> as it's used in commerce, and with just the  
22 words "eat" and "right" and then a TM. There's no  
23 America to be seen.

24 Q And what product is the mark being -- is the  
25 EATRIGHT AMERICA mark being used on here?

1 A So this has been used on kale.

2 Q And you testified earlier that you saw the  
3 EATRIGHT AMERICA with no AMERICA mark being -- it was  
4 used on a variety of signs on the produce shelves.

5 Is this one of the examples you were  
6 referring to?

7 A One of the things, multiple examples, yes.

8 We did actually take a photo of the EATRIGHT  
9 mark being used on carrots as well, just in that  
10 particular store.

11 (Document marked Exhibit 27  
12 for identification.)

13 MR. MAUCH: This is Exhibit 27.

14 Q Do you recognize this exhibit?

15 A I do.

16 Q What is Exhibit 27?

17 A So this is a photo taken by Tim or myself in  
18 a Whole Foods Market store very recently, and it's for  
19 organic mangos. And this is actually showing, in this  
20 instance, the EATRIGHT. It shows EATRIGHT TM, and  
21 then actually underneath the mark in smaller letters  
22 is the word AMERICA.

23 Q So -- so the mark used in commerce here in  
24 this photograph is slightly different than the mark  
25 we've seen in previous exhibits?

1           A    Yeah, and unfortunately it's also different  
2    than Exhibit No. 23, where the AMERICA was on the same  
3    line as the -- the mark EAT and RIGHT.  EATRIGHT is  
4    one word.  This one has got EATRIGHT joined together  
5    and the AMERICA underneath.  Again, though, in small  
6    fonts.

7           Q    And when you -- when you saw the EATRIGHT  
8    AMERICA mark being used, as depicted here in  
9    Exhibit 27, what were your thoughts?

10          A    The dominant words is still EATRIGHT.  It's  
11    still what you see.  It's the AMERICA part that is --  
12    it's -- it almost seems like an add-on.

13          Q    Other than in Whole Foods stores, have you  
14    seen the EATRIGHT AMERICA mark being used on products  
15    in other trade channels?

16          A    Yes, I have.

17          Q    Can you describe those other channels?

18          A    So I've seen it being used in a magazine of a  
19    Hy-Vee Magazine.  The magazine was called Josephine.

20                I've seen the mark being used on multiple  
21    websites.  Not only websites which are -- have got  
22    some ownership by either Mr. LeVille, EATRIGHT AMERICA  
23    or Nutritional Excellence.  I've actually also seen  
24    them on nutritional websites, the use of his mark  
25    EATRIGHT AMERICA on nutritional websites, such as

1 myfitnesspal.com

2 Q And myfitnesspal.com was also a website that  
3 you've testified you've seen Eat Right Food products  
4 being marketed as well?

5 A Yes.

6 Q So you've seen both Eat Right Food products  
7 being marketed on the website along with Mr. LeVille's  
8 Nutritional Excellence food products?

9 A Yes, I have. I can't remember if it was that  
10 exact website. But between -- it's either  
11 myfitnesspal.com, caloriecount.com, or another one is  
12 sparkspeople.com that have nutritional -- one of those  
13 websites has both Eat Right Foods products, as well as  
14 Mr. LeVille's EATRRIGHT AMERICA food products actually  
15 on the same websites with -- with comparative  
16 nutritional information.

17 (Document marked Exhibit 28  
18 for identification.)

19 MR. MAUCH: So this is Exhibit 28.

20 Q Do you recognize this exhibit?

21 A Yes. It's what I printed off, and it is from  
22 a -- from the Hy-Vee Josephine magazine. As I  
23 understand it, it was an advertisement on the inside  
24 cover of that particular magazine.

25 Q Okay. So let me make sure I understand where

1 this Exhibit 28 comes from.

2 So how did you go about -- where does this  
3 come from?

RDC 4 A I was ~~missing~~ <sup>policing</sup> the use of our EATRIGHT mark  
5 for various stores. And in particular Hy-Vee was one  
6 store that I was continuing to monitor the use of the  
7 EATRIGHT mark, and so --

8 Q And Hy-Vee is a -- what kind of store is  
9 Hy-Vee?

RDC 10 A It's a grocery -- it's a chain of grocery  
11 stores, and they had actually been using our EATRIGHT  
12 mark on food products, and ~~they're~~ on the website.  
13 And so I had actually done a Google search for  
14 EATRIGHT and Hy-Vee, and this came up.

15 Q And what is your understanding of what  
16 this -- this particular image is of Exhibit 28?

17 A This is showing the mark which is owned by  
18 Mr. Kevin LeVelle, and it's showing in this particular  
19 instance another example of EATRIGHT and then an  
20 add-on.

21 In this instance, it's got -- the add-on is  
22 actually EATRIGHT and it's CAFE, Cafe being the  
23 add-on. It also has EATRIGHT and the add ons, you  
24 know, being AMERICA.

25 Q And can you explain what you mean by

1 "add-on"? What do you mean by that?

2 A Well, the use of -- of the mark by  
3 Mr. LeVille in commerce is -- he seems to use EATRIGHT  
4 and lots of other add ones, and lots of different  
5 parts of it. It's almost like he believes he owns the  
6 mark EATRIGHT, and then he chooses to, depending on  
7 what application it is, it's either EATRIGHT MENU, or  
8 it's EATRIGHT AUSTRALIA, or it's EATRIGHT  
9 NUTRITIONAL -- nutrient index.

10 In this instance, it's EATRIGHT CAFE. It's  
11 just -- but the dominant word is always EATRIGHT.

12 Q And besides those that you just mentioned,  
13 what other add-on words have you seen being used in  
14 conjunction with EATRIGHT?

15 A I've seen CAFE -- sorry, CANADA, UNITED  
16 KINGDOM, EUROPE, AUSTRALIA, I mentioned, and BITES.

17 Q You said BITES, B-I-T-E-S?

18 A Yeah, EATRIGHT BITES.

19 There is also -- there is also one which has  
20 a religious connotation. Again, it's EATRIGHT in  
21 this. It's not EATRIGHT Ministries, but it's  
22 something similar to that.

23 Q Okay. And turning back to the specifics of  
24 Exhibit 28. Sorry. I just want to understand.

25 So you -- you found this on the Internet, on

1 a web page, and your understanding is it depicts what  
2 exactly? What is this?

3 A So this is an advert in a Hy-Vee magazine.

4 Q So the magazine is called Hy-Vee?

5 A No, the magazine is called Josephine, but the  
6 magazine is owned by Hy-Vee.

7 Q By "advert," you mean advertisement?

8 A Yes, and it's showing the use of EATRIGTH  
9 here with the add-on of CAFE.

10 Q And who downloaded this Document 28?

11 A I did.

12 Q From the Internet?

13 A From the Internet.

14 (Document marked Exhibit 29  
15 for identification.)

16 MR. MAUCH: We've marked Exhibit 29.

17 Q Do you recognize this exhibit?

18 A Yes, I do.

19 Q What is Exhibit 29?

20 A So this is a print off of the shopnbc.com  
21 website, and it is showing the EATRIGTH AMERICA  
22 chocolate nutrient bars, food bars.

23 Q So this was a product that was marketed and  
24 sold by Nutritional Excellence?

25 A Under the Shop NBC site, yes.

1 Q And who -- who printed out or downloaded this  
2 Document 29?

3 A I did.

4 Q From the Internet?

5 A From the Internet.

6 Q And does the EATRIGHT AMERICA mark appear on  
7 this product?

8 A It does. It's very dominant at the top. The  
9 dominant words are EATRIGHT, all one word, two  
10 different fonts for EAT and RIGHT.

11 And although you can't see it in this  
12 particular photo, it has a TM at the end of it. Then  
13 there is a line under the EATRIGHT, and it says in  
14 smaller letters, and virtually illegible in this  
15 particular photo, the word AMERICA.

16 Q And when you saw and downloaded this  
17 depiction of EATRIGHT AMERICA mark being used on this  
18 food product, what were your thoughts?

19 A It's non-permissible. At the time, these  
20 EATRIGHT AMERICA snack bars had been declined by the  
21 United States Patent and Trademark Office and  
22 Nutritional Excellence's application.

23 Q And does Eat Right Foods market and sell a  
24 related product?

25 A We have a chocolate cookie product. This is

1 the chocolate snack bar. They have a range of other  
2 snack bars, and not just snack bars, which have  
3 virtually identical names as ours, our products.

4 (Document marked Exhibit 30  
5 for identification.)

6 MR. MAUCH: I've marked exhibit -- for the  
7 record, Exhibit 30 also bears a label showing that it  
8 was Exhibit 24 in the deposition of Kevin LeVille, and  
9 it bears a Bates stamp of ERA77 on the first page, and  
10 just for the record, the previous exhibit, Exhibit 29,  
11 bears a label showing that it was Exhibit 23 in the  
12 deposition of Kevin LeVille.

13 Q So, for example, 30, Rebecca, do you  
14 recognize this exhibit?

15 A Yes, I do.

16 Q What is Exhibit 30?

17 A This is a screen shot from Nutritional  
18 Excellence's website on their online shop.

19 Q And who made this screen shot?

20 A I did, and it's of an EATRIGHT AMERICA date  
21 and nut bar. We have an EATRIGHT date and apple  
22 cookie.

23 Q And does the EATRIGHT AMERICA mark appear on  
24 the original date and nut bar?

25 A As it was used in commerce, yes, and as it

1 was in the -- in the actual screen shots of the -- of  
2 the product on this website originally.

3 Q So this document was, in fact, produced by --  
4 by Mr. LeVille, based on the Bates stamp; is that your  
5 understanding?

6 A Yes.

7 Q But you also went to the EATRRIGHT AMERICA  
8 website; right?

9 A Yes, I did.

10 Q And you saw the online shop for  
11 eatrightamerica.com where one can purchase these date  
12 and nut bars; is that right?

13 A Yes.

14 (Document marked Exhibit 31  
15 for identification.)

16 MR. MAUCH: Exhibit 31 bears a label showing  
17 that it was Exhibit 25 in the deposition of Kevin  
18 LeVille, and it bears the Bates stamp ERA79 on the  
19 first page.

20 Q Do you recognize Exhibit 31, Rebecca?

21 A Yes, I do.

22 Q What is Exhibit 31?

23 A So again, this is from the Nutritional  
24 Excellence website, and it's showing this time a  
25 chocolate flavored date and nut bar. It's showing the

1 price of the actual -- for 15 bars of 14.95.

2 Q And it --

3 A So roughly a dollar a bar.

4 Q And is this, to your understanding, the same  
5 chocolate bar that's featured on Exhibit 29 under the  
6 shopnbc.com?

7 A This is a slightly different modification --  
8 sorry -- slightly different product, but it is --  
9 this -- this one is a chocolate flavored date and nut  
10 bar. The one on 29 was just chocolate.

11 Q Understood.

12 A Chocolate bar.

13 Q Understood.

14 A But the similarities in terms of the  
15 ingredients and the disclaimer by -- on the package  
16 which, you know, may contain traces of peanuts, wheat,  
17 for example, and milk are actually on the website.

18 Q And you visited the eatrightamerica.com  
19 website; correct?

20 A Yes.

21 Q And you visited their online shop; correct?

22 A Yes.

23 Q Did you see the chocolate date and nut bar  
24 there?

25 A Yes.

1 Q And it was for sale with the EATRIGHT mark;  
2 correct?

3 A Actually on the packaging, yes.

4 Q And that's the same mark that we've looked at  
5 in previous exhibits?

6 A Yes

7 (Document marked Exhibit 32  
8 for identification.)

9 MR. MAUCH: Exhibit 32 bears a label that  
10 shows that it was Exhibit 26 in the deposition of  
11 Kevin LeVille, and it bears on the first page Bates  
12 stamp ERA81.

13 Q Do you recognize Exhibit 32, Rebecca?

14 A I do.

15 Q What is Exhibit 32?

16 A So this is from the Nutritional Excellence  
17 online website, and it shows for sale the apple  
18 cinnamon date and nut bars and the EATRIGHT AMERICA  
19 brand.

20 From memory, on the 4th of May, 2011,  
21 Mr. LeVille and Mr. LeVille's counsel, Mr. Tristan  
22 Fall wrote us a letter to say that he never sold  
23 products on the -- food products with the -- under the  
24 EATRIGHT mark, but this clearly showed -- shows that  
25 he did.

1 Q And you visited the eatright.com website;  
2 correct?

3 A Yes, I did.

4 Q And you visited the online shop?

5 A Yes.

6 Q Did you see the apple cinnamon date or nut  
7 bars for sell?

8 A I did.

9 Q What mark do they bear?

10 A The EATRRIGHT AMERICA mark with the dominant  
11 EATRRIGHT on it.

12 (Document marked Exhibit 33  
13 for identification.)

14 MR. MAUCH: Exhibit 33 bears a label that it  
15 was showing Exhibit 15 to the deposition of  
16 Mr. LeVille.

17 Q By the way, before we turn to Exhibit 15,  
18 Rebecca, what is your -- do you have an understanding  
19 of who Mr. Kevin LeVille is in relation to Nutritional  
20 Excellence LLC?

21 A I understand he's the chief -- chief  
22 executive, and he is one of the original founders of  
23 Nutritional Excellence.

24 Q And do you have an understanding regarding  
25 who currently is the owner of the application that is

1 being contested by Eat Right Foods? I believe it's in  
2 Exhibit 16.

3 A I understand that it is now Mr. Kevin  
4 LeVille.

5 Q And when you say "now," what do you mean?

6 A My understanding is that it was assigned from  
7 Nutritional Excellence to Mr. Kevin LeVille.

8 Q So turning to Exhibit 33, do you recognize  
9 this exhibit?

10 A I do.

11 Q What is Exhibit 33?

12 A This is a screen shot from a website that was  
13 printed off by myself. It looks like the Whole Foods  
14 Wellness Club website, although it could also be the  
15 Nutritional Excellence site. It is very confusing as  
16 to who owns what.

17 Q And you went onto the Internet and went to  
18 this page and printed it out; is that right?

19 A I printed this page out.

20 Q And what does the -- what does the page  
21 depict or describe?

22 A So this talks about the Whole Foods Market  
23 partners, one of which is EATRIGHT AMERICA, and it  
24 talks about this particular page. It talks about  
25 EATRIGHT AMERICA's personalized eating plans.

1 Q And a moment ago you testified that it was  
2 confusing to know whether this came in the Whole Foods  
3 Market website or the EATRRIGHT AMERICA website.

4 Why is it confusing? Can you explain what  
5 you meant when you said that?

6 A Whole Foods -- Whole Foods Market Wellness  
7 Club website has the same imaging and has the same --  
8 often a lot of the same content as the Nutritional  
9 Excellence EATRRIGHT site, but there is actually a  
10 wholefoodsmarketwellness.com or web.ca, meaning  
11 .Canada website.

12 Q Okay.

13 (Document marked Exhibit 34  
14 for identification.)

15 MR. MAUCH: Exhibit 34 bears a label that  
16 shows it was Exhibit 40 in the deposition of Kevin  
17 LeVille.

18 Q Rebecca, do you recognize Exhibit 34?

19 A I do.

20 Q What is Exhibit 34?

21 A So this is a screen shot from the Nutritional  
22 Excellence website. It shows the EATRRIGHT AMERICA  
23 mark used in commerce at the top left-hand side. It  
24 also refers to the EATRRIGHT nutrient index scores, and  
25 it refers to the actual foods and food rankings.

1 Q And do you have an understanding of what the  
2 EATRIGHT nutrient index score is?

3 A Not enough to -- to endorse it, no.

4 Q What do you mean by that?

5 A I don't know enough of the mechanics of the  
6 actual -- how it's being developed and whether it's  
7 something which can be authenticated. It may well be  
8 a diet program which -- and -- and years to come as  
9 something that's found materially wrong with -- with  
10 the way that the -- the nutrients are actually scored,  
11 and it may give a false indication to a person.

12 So it may encourage somebody to eat a  
13 particular product which is not necessarily very good  
14 for that particular person or for people -- so it's  
15 encouraging people to eat, for instance, foods which  
16 are particularly -- in this particular instance, it  
17 could be -- it says it's encouraging people to eat  
18 kale, because it's got a very high nutrient index  
19 scoring.

20 100 on this particular page, 1,000 in the  
21 Whole Foods ANDI nutrient index scoring system. Who  
22 is to say that kale is the best food for consuming any  
23 particular time in the future, now or in the future.

24 Q And when you say you don't know enough to  
25 endorse it, have you been asked to endorse this

1 product or this service?

2 A No, but anybody who sees the EATRIGHT mark,  
3 as it's depicted here, and in other Whole Foods Market  
4 stores, and in other publications, anyone would highly  
5 assume, because it's actually the words EATRIGHT, it's  
6 virtually the trademark, the trademark owned by Eat  
7 Right Foods.

8 Q And where it says E-R-N-I towards the top of  
9 this page, what is your understanding of what those  
10 letters stand for?

11 A Eat Right Nutrient Index.

12 Q So it's an acronym for those words?

13 A Yes, it is. Just like ANDI is an acronym.

14 Q And what is ANDI an acronym for?

15 A Aggregate Nutrient Density Index.

16 Q We'll go for a couple of minutes and take one  
17 last break and be done.

18 (Document marked Exhibit 35  
19 for identification.)

20 Exhibit 35 bears a label that shows that it  
21 was Exhibit 44 in the deposition of Kevin LeVile.

22 Q Rebecca, do you recognize Exhibit 35?

23 A I do.

24 Q What is Exhibit 35?

25 A This is a printout from the Shop NBC site

1 that I printed out, and it shows the -- it shows  
2 EATRIGHT America Mato Zest.

3 Q And what is this product?

4 A This product is a <sup>Soup-base</sup>~~super-base~~ starter.

5 Q And what mark appears on this product?

6 A It's appearing above the product with  
7 implications with the fact that it's owned by EATRIGHT  
8 AMERICA somehow.

9 Q And you went on the Internet and made the  
10 screen shot of this page?

11 A Yes, I did.

12 Q And printed it out?

13 A Yes.

14 (Document marked Exhibit 36  
15 for identification.)

16 MR. MAUCH: Exhibit 36 bears the label that  
17 shows Exhibit 27 in the deposition of Kevin LeVille.

18 Q Rebecca, do you recognize this document?

19 A I do.

20 Q What is this document?

21 A So this is a printout that I made. It is  
22 from a website which is -- it's an archiving. It's an  
23 archive.org website, and it is showing what this  
24 particular website looked like on the 21st of  
25 October 2010.

1 Q And based on the domain name in the upper, I  
2 guess, upper middle of the page, what web -- what  
3 website were you researching its prior history for?

4 A This was for the website  
5 eatrightunitedkingdom.com, and this particular page of  
6 that eatrightunitedkingdom.com is the online ~~shop~~ <sup>shop</sup>  
7 page, or as it's actually referred to the store page.

8 And this is showing available for sale under  
9 an EATRIGHT TM UNITED KINGDOM mark, nutrition  
10 prescription handbooks, nutrarian handbook, apple  
11 cinnamon date nut bars, chocolate flavored date and  
12 nut -- date and nut bars, original date and nut bars,  
13 Eat for Health, two book set, audio CD, nutrarian DVD,  
14 and various other DVDs and books.

15 Q And those three bars that you just testified  
16 regarding that are depicted on Exhibit 36 on the  
17 eatrightunitedkingdom.com online store, do those  
18 appear to be the same bars that were for sale on the  
19 eatrightamerica.com website?

20 A Yes. In fact, this is similar or identical  
21 to the ~~eatrightamerica.com/storeallergy~~ <sup>eatrightamerica.com/store we see.</sup>

22 Q And when you saw and printed out this web  
23 page, what were your thoughts?

24 A Mr. LeVille lied in a letter sent to me on  
25 the 4th of May 2011.

1 Q And you're referring to the statement that  
2 Nutritional Excellence and Mr. LeVille had never sold  
3 food products with the EATRIGHT AMERICA mark on them?

4 A Yes. But more importantly, this is  
5 actually -- this is an EATRIGHT AMERICA mark. This is  
6 actually an EATRIGHT mark with another geographical  
7 tag line or add-on which, in this particular case, is  
8 United Kingdom.

9 Q And were you concerned about customer  
10 confusion when you saw the EATRIGHT United Kingdom  
11 website?

12 A Yes. In fact, I had an e-mail from a -- from  
13 another New Zealand company asking if we were somehow  
14 involved with EATRIGHT United Kingdom.

15 (Document marked Exhibit 37  
16 for identification.)

17 THE WITNESS: Thank you.

18 MR. MAUCH: Exhibit 37 bears a label showing  
19 it was Exhibit 45 in the deposition of Kevin LeVille.

20 Q Do you recognize -- and it's a three-page  
21 exhibit.

22 Starting with the first page, do you  
23 recognize this document --

24 A Yes.

25 Q -- Rebecca?

1 A Yes; I printed this off the Internet, these  
2 three pages.

3 Q And what do these three pages depict?

4 A These photos which are on the Flickr website,  
5 they are photos which are being taken on a tour by  
6 Mr. John ~~Maggie~~ <sup>Mackey,</sup> the CEO and founder of Whole Foods  
7 Market, a tour in Ontario in March 2010.

8 This first page shows EATRIGHT. And in this  
9 particular instance, the -- the add-on is the  
10 geographical reference Canada. It is showing the  
11 EATRIGHT Canada mark on a poster. It is showing  
12 various books and various fliers/pamphlets.

13 Q And turning to the second page of Exhibit 37.

14 A So this is showing the EATRIGHT TM, smaller  
15 letters, Canada, mark being used, in this particular  
16 instance, spinach with a nutrient index score of 739.

17 Q And the third page of Exhibit 37?

18 A This was showing EATRIGHT TM Canada, and on  
19 a -- looks like salmon, a salmon dish somebody is  
20 about to eat, a meal.

21 Q And again you went to the flickr.com website  
22 and took screen shots of these three pages; correct?

23 A Yes, I did.

24 Q And printed them out?

25 A Yes.