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Filing date: **10/09/2012**

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

| | |
|---|---|
| Proceeding | 91202219 |
| Party | Plaintiff<br>Eat Right Foods Ltd. |
| Correspondence Address | JOSEPH V MAUCH<br>SHARTISIS FRIESE LLP<br>ONE MARITIME PLAZA, 18TH FLOOR<br>SAN FRANCISCO, CA 94111<br>UNITED STATES<br>jmauch@sflaw.com, skatz@sflaw.com, jmartin@sflaw.com, calendar@sflaw.com |
| Submission | Testimony For Plaintiff |
| Filer's Name | Joseph V. Mauch |
| Filer's e-mail | jmauch@sflaw.com, jmartin@sflaw.com, calendar@sflaw.com |
| Signature | /s/ Joseph V. Mauch |
| Date | 10/09/2012 |
| Attachments | Corrected Transcript R.Douglas-Clifford with Exhibits_Part6.pdf ( 15 pages )(4885721 bytes ) |

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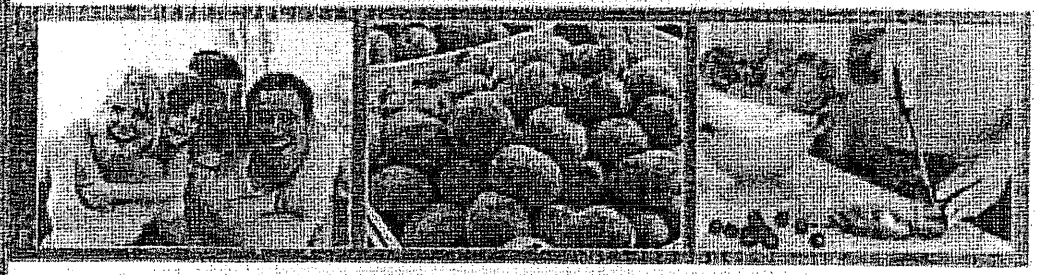

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eatRIGHTcafé

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For more information concerning Eat Right America, please contact Sheri Caldwell, Hy-Vee Store Dietitian.

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# Original Date and Nut Bars

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× Price: $14.95

× ×

A delicious and healthy bar made from dates, nuts and seeds.

**Box includes:**
15 bars - 40 grams per bar

***BENEFITS:***
The Eat Right America Program is one of the nation's most "personalized" weight management an programs. Developed over the past twenty-years by one of the world's most well know physicians, The program has produced unprecedented results. A 2008 Published Peer Review in Alternative T produced an average weight loss of 38lbs in 18 months. Based on a universally accepted philosopl eat, the Eat Right America Program is designed to meet the needs of an undernourished nation.

According to the USDA, despite all of our over-eating, the vast majority of Americans do not get t requirement of nutrients. A combination of over-eating, food and sugar cravings and find it hard tc keep it off. Therefore, it only makes sense that a properly nourished body will seek its ideal weigh fruits, nuts and seeds are an important part of the Eat Right America lifestyle, so they have develo healthy bar made from dates, nuts and seeds.



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*HOW TO USE:*
Two a day will give the proper balance of nuts each day.

*INGREDIENTS:*
**Original:** Dates, Cashew, Almonds, Sunflower Seeds, Walnuts, High Oleic Sunflower Oil, Organ
May also contain traces of: Peanuts, Wheat, Egg, Milk

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Home

# Chocolate Flavored Date and Nut Bars

[x] Price: $14.95

[x] [x]

Clifford
EXHIBIT NO. 31
9.12.12
Andrea Ignacio, CSR 9830

Choclate flavoured bar - delicious and healthy bar made from dates, nuts and seeds.

**Box includes:**
15 bars - 40 grams per bar

***BENEFITS:***
The Eat Right America Program is one of the nation's most "personalized" weight management an programs. Developed over the past twenty-years by one of the world's most well know physicians, The program has produced unprecedented results. A 2008 Published Peer Review in Alternative T produced an average weight loss of 38lbs in 18 months. Based on a universally accepted philosopl eat, the Eat Right America Program is designed to meet the needs of an undernourished nation.

According to the USDA, despite all of our over-eating, the vast majority of Americans do not get t requirement of nutrients. A combination of over-eating, food and sugar cravings and find it hard tc keep it off. Therefore, it only makes sense that a properly nourished body will seek its ideal weigh fruits, nuts and seeds are an important part of the Eat Right America lifestyle, so they have develo healthy bar made from dates, nuts and seeds.

***HOW TO USE:***
Two a day will give the proper balance of nuts each day.

***INGREDIENTS:***
**Chocolate:** Dates, Cashews, Cocoa Powder, Almonds, Sunflower Seeds, Walnuts, High Oleic Sur
Extract, Organic Flax Seeds.
May also contain traces of: Peanuts, Wheat, Egg, Milk .

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# Apple Cinnamon Flavored Date and Nut Bars

Clifford
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Andrea Ignacio, CSR 9830

[x] Price: $14.95

[x] [x]

An Apple Cinnamon flavoured bar - delicious and healthy bar made from dates, nuts and seeds.

**Box includes:**
15 bars - 40 grams per bar

***BENEFITS:***
The Eat Right America Program is one of the nation's most "personalized" weight management an programs. Developed over the past twenty-years by one of the world's most well know physicians, The program has produced unprecedented results. A 2008 Published Peer Review in Alternative T produced an average weight loss of 38lbs in 18 months. Based on a universally accepted philosopl eat, the Eat Right America Program is designed to meet the needs of an undernourished nation.

According to the USDA, despite all of our over-eating, the vast majority of Americans do not get t requirement of nutrients. A combination of over-eating, food and sugar cravings and find it hard tc keep it off. Therefore, it only makes sense that a properly nourished body will seek its ideal weigh fruits, nuts and seeds are an important part of the Eat Right America lifestyle, so they have develo healthy bar made from dates, nuts and seeds.

*HOW TO USE:*
Two a day will give the proper balance of nuts each day.

*INGREDIENTS:*
**Apple Cinnamon:** Dates, Cashew, Apple, Almonds, Sunflower Seeds, Walnuts, High Oleic Sunfl
Cinnamon, Organic Flax Seeds.
May also contain traces of: Peanuts, Wheat, Egg, Milk.

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# HEALTH STARTS HERE™ LAUNCHES AT WHOLE FOODS MARKET®

Companywide Healthy Eating Initiative Features Educational Tools, Recipes & Programs to Improve Health; Team Member Support & Additional Store Discounts Provide Incentives for Optimum Employee Health

**AUSTIN, Texas. (Jan. 20, 2010)** — To help shoppers and Team Members who want to improve their health easily and naturally, Whole Foods Market, a leader in natural and organic foods, announced today that it has launched its "Health Starts Here" initiative at all 289 locations in Canada, the United Kingdom and the United States.

"We opened our first store 30 years ago to provide natural foods as a delicious and healthy alternative to the increasing amounts of highly processed foods with artificial ingredients," says Margaret Wittenberg, global vice president of quality standards and leader of Health Starts Here at Whole Foods Market. "Over the years, we realized that providing the healthiest foods available is simply not enough. We are now deepening our commitment to healthy eating by providing education and support tools to inspire interest in foods that help improve and maintain health and vitality."

Health Starts Here is the first major program to be launched since Whole Foods Market added a new core value to its mission in October 2009: ***"Promoting the health of our stakeholders through healthy eating education."*** The new program is based on the following simple principles for everyday healthy eating:

- **Plant based** – Eat more plants, like raw and cooked vegetables, fruits, legumes and beans, nuts, seeds and whole grains to ensure the best nutrients for the body, which leads to feeling satiated
- **Real foods** – Choose foods that are real, fresh, natural, organic, local, seasonal and unprocessed. Eliminate refined, highly processed foods and foods containing ingredients void of nutrients, such as artificial flavors, colors, preservatives, sweeteners and hydrogenated fats.
- **Low fat** – Get healthy fats from plant sources, such as nuts and avocados. Minimize extracted oils and processed fats. If eating a diet that includes animal products, choose leaner meats and seafood as well as low-fat dairy products.
- **Nutrient dense** – Choose foods that are rich in nutrients when compared to their total caloric content. Build menus around plant-based foods to emphasize nutrient-rich meals containing a variety of vitamins, minerals, phytonutrients and antioxidants.

"These commonsense criteria offer great health benefits, no matter what dietary path you follow," said Wittenberg. "We are excited to promote wellness and encourage healthier lifestyles by emphasizing the value of eating nutrient-rich foods and showing people how simple it can be. I like to think of it as 'Take charge, eat well, feel great,' as eating for health can truly be delicious, nutritious and enjoyable."

## Healthy Eating Partners

Whole Foods Market is featuring two unique third-party healthy eating partner programs to provide easy-to-follow guidance for shoppers and Team Members. Both offer 28-day "getting started" plans while providing plenty of room for personal choices to help those who are interested in starting on their own journey down the road to optimum health.

- **Eat Right America's** Chief Medical Officer, Joel Fuhrman, M.D., has discovered through years of research on thousands of patients that a body rich in micronutrients will quickly seek its ideal weight and stay there, while reversing most diet-related chronic conditions. He has also equipped patients with eating plans to help improve their overall health, conquer food cravings, reverse chronic conditions and have more energy. The secrets of superior nutrition, along with many menus and delicious recipes, are offered in a series of books, including "Eat for Health," as well as audio CDs and DVDs. Also available at Whole Foods Market, or online at www.wholefoodswellnessclub.com/wfm, is Eat Right America's personalized nutritional assessment tool, called "Nutrition Prescription," which offers individual nutrition and health assessments combined with personalized eating plans.
- **The Engine 2 Diet** is a plant-strong plan that can help with weight loss, lower cholesterol and reduce the risk of disease. Rip Esselstyn, former pro athlete and firefighter, outlines the plan in his "Engine 2 Diet" book and has always taken great interest in achieving optimal health through food. In his book, he combines the wisdom of some of his medical heroes —including his father, Caldwell B. Esselstyn, M.D.— with the real-life account of Rip helping his former firehouse colleagues change their health for the better by eating differently. The book can be purchased at all Whole Foods Market stores. More information can be found at www.engine2academy.com.

## In-Store Education

Whole Foods Market will feature free information, recipes, in-store lectures, events and support groups. A selection of supporting educational books and cookbooks will also be for sale alongside the "Engine 2 Diet" book and "Eat Right America" program materials.

To help shoppers identify healthy, nutrient-dense foods, stores will post signs with Aggregate Nutrient Density Index (ANDI) scores. Created by Dr. Fuhrman, the ANDI scoring scale evaluates levels of micronutrients, including vitamins, minerals, phytochemicals and antioxidants per calorie in various foods. The higher the concentration of micronutrients in a food, the higher that food will score. For instance, a serving of kale, a dark leafy green, scores 1,000, placing it at the top of the index, while a serving of soda only scores 1. Individual ANDI scores will be placed on all fruits and vegetables because they are the most nutrient-dense foods. For departments like meat, seafood and cheese, the top 10 ANDI scores in each category will be displayed. A complete list of ANDI rankings can be found in The Nutritarian Handbook, available at Whole Foods Market stores in late February, and they are available to Eat Right America members online.

"Through in-store signage and education about nutrient-dense foods, including information about how to prepare and incorporate them into your everyday life, we want to help our communities attain optimum health and well-being," says Wittenberg.

Wittenberg explains, "What I love about eating healthfully, other than feeling great, is that the menu possibilities are endless, and cooking can be so easy. For example, in the morning I may have a fresh fruit smoothie, or a cooked whole grain such as steel-cut oats with fresh or dried fruit and nuts. For lunch I typically have a big salad loaded with several kinds of greens and veggies of all colors, topped with beans, or tofu, finished with a splash of fresh lemon juice or balsamic vinegar and served with a piece of whole grain bread. At dinner time, I enjoy steamed or oven-roasted veggies, along with whole grain pastas paired with a hearty stew or casserole made with beans. Occasionally, the dinner menu includes baked fish or a chicken stir-fry made with lots of vegetables and cooked with minimal oil."

Shoppers can expect to see information in some stores immediately, while other locations will incorporate this initiative throughout 2010. More information about Health Starts Here can be found now at www.wholefoodsmarket.com/healthstartshere.

## Team Member Support and Incentives

To reiterate the company's commitment to its newest core value and its long-time ***"Supporting Team Member happiness and excellence"*** core value, Whole Foods Market's Health Starts Here initiative also includes two internal programs for Team Members.

- **The Team Member Healthy Discount Incentive** offers increased discounts for full- and part-time Team Members (enrolled in the company's medical plan) who do not use nicotine products and satisfy certain healthy biometric criteria for blood pressure, total cholesterol (or LDL) levels and Body Mass Index (BMI). Team Members already receive a 20 percent discount on purchases at Whole Foods Market stores as an employment benefit, but now, those who voluntarily opt to participate in the incentive plan could receive up to an additional 10 percent discount.
- **The Total Health Immersion Program** offers Team Members intensive health and wellness education programs geared toward sustaining long-term, positive lifestyle changes, including healthy eating, fitness and empowerment. There will be two rounds of immersion programs offered annually at three different locations in the United States. Participating in the immersion program will allow Team Members, who qualify and who are ready to take charge of their own health, to receive more direct support in making positive lifestyle and dietary changes under the guidance of a medical professional, and at no cost to them.

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# NUTRIENT SCORES

## ERNI Nutrient Scores

As a nutritarian, it's important that you know the nutrient density of your food. Not merely vitamins and minerals, but adequate consumption of phytochemicals are essential for a normal immune system and to enable our body's detoxification and cellular repair mechanisms that protect us from cancer and other diseases.

Nutritional science in the last twenty years has demonstrated that colorful plant foods contain a huge assortment of protective compounds, mostly unnamed at this point. Only by eating an assortment of natural foods that are nutrient-rich, can we access these compounds and protect ourselves from the common diseases that afflict Americans. Our modern, low-nutrient eating style leads to an overweight population with common diseases of nutritional ignorance and medical costs spiraling out of control. We need to flip our traditional thinking upside down, and begin eating a diet rich in vegetables, fruits, nuts, seeds, and grains

In order to measure nutrient density, Eat Right America created rankings of foods according the nutrients they pack.

Because phytochemicals are largely unnamed and unmeasured, these rankings underestimate the healthful properties of colorful natural plant foods compared to processed foods and animal products. One thing we do know is that the foods that contain the highest amount of known nutrients are the same foods that contain the most unknown nutrients too. So even though these rankings may not consider the phytochemical number sufficiently they are still a reasonable measurement of their content.

### A Sample of Eat Right America's ERNI Nutrient Density Scores

| | | | | | |
|---|---|---|---|---|---|
| Kale | 100 | Kidney Beans | 10 | Walnuts | 3 |
| Collards | 100 | Sweet Potato | 8 | Grapes | 3 |
| Bok Choy | 82 | Sunflower Seeds | 8 | White Potato | 3 |
| Spinach | 74 | Peach | 7 | Banana | 3 |
| Brussel Sprouts | 67 | Apple | 7 | Chicken Breast | 3 |
| Arugula | 56 | Green Peas | 7 | Eggs | 3 |
| Cabbage | 48 | Cherries | 7 | Peanut Butter | 3 |
| Romaine | 39 | Flax Seeds | 6 | Whole Wheat Bread | 2 |
| Broccoli | 37 | Sesame Seeds | 6 | Low Fat Yogurt | 2 |
| Cauliflower | 29 | Pineapple | 6 | Feta Cheese | 2 |
| Green Pepper | 26 | Edamame | 6 | Whole Milk | 2 |
| Artichoke | 24 | Oatmeal | 5 | Ground Beef | 2 |
| Carrots | 24 | Mango | 5 | White Pasta | 2 |
| Asparagus | 23 | Cucumber | 5 | White Bread | 2 |
| Strawberry | 21 | Pistachio Nuts | 5 | Apple Juice | 2 |
| Pomeg. Juice | 19 | Corn | 4 | Swiss Cheese | 2 |
| Tomato | 16 | Salmon | 4 | Potato Chips | 1 |
| Blueberries | 13 | Almonds | 4 | Cheddar Cheese | 1 |
| Iceberg | 11 | Shrimp | 4 | Vanilla Ice Cream | 1 |
| Orange | 10 | Tofu | 4 | Olive Oil | 1 |
| Lentils | 10 | Avocado | 4 | French Fries | 1 |
| Cantaloupe | 19 | Skim Milk | 4 | Cola | 0 |

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Keep in mind that nutrient density scoring is not the only factor that determines good health. For example, if we only ate foods with a high nutrient density score our diet would be too low in fat. So we have to pick some foods with lower nutrient density scores (but preferably the ones with the healthier fats) to include in our high nutrient diet. Additionally, if a thin person or highly physically active individual ate only the highest nutrient foods they would become so full from all of the fiber and nutrients that would keep them from meeting their caloric needs and they would eventually become too thin. This of course gives you a hint at the secret to permanent weight control.

**Eat Right America's Nutrient Density Scoring System**

To determine the scores above almost all vitamins and minerals were considered and added in. Nutrient Data from Nutritionist Pro software for an equal caloric amount of each food item was obtained. We included the following nutrients in the evaluation: Calcium, Carotenoids: Beta Carotene, Alpha Carotene, Lutein & Zeaxanthin, Lycopene, Fiber, Folate, Glucosinolates, Iron, Magnesium, Niacin, Selenium, Vitamin B1 (Thiamin) Vitamin B2 (Riboflavin), Vitamin B6, Vitamin B12, Vitamin C, Vitamin E, Zinc, plus ORAC score X 2 (Oxygen Radical Absorbance Capacity is a method of measuring the antioxidant or radical scavenging capacity of foods).

Nutrient quantities, which are normally in many different measurements (mg, mcg, IU) were converted to a percentage of their RDI so that a common value could be considered for each nutrient. Since there is currently no RDI for Carotenoids, Glucosinolates, or ORAC score, goals were established based on available research and current understanding of the benefits of these factors. (limited references below). The % RDI or Goal for each nutrient which the USDA publishes a value for was added together to give a total. All nutrients were weighted equally with a factor of one except for the foods ORAC score. The ORAC score was given a factor 2 (as if it were two nutrients) due to the importance of antioxidant nutrients so that measurement of unnamed anti-oxidant phytochemicals were represented in the scoring. The sum of the food's total nutrient value was then multiplied by a fraction to make the highest number equal 1000 so that all foods could be considered on a numerical scale of 1 to 1000.

**NOTE**

Eat Right America's nutrient density food rankings, scoring system, and point determinations of foods is a patented process.

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## Eat Right America MatoZest - C62265

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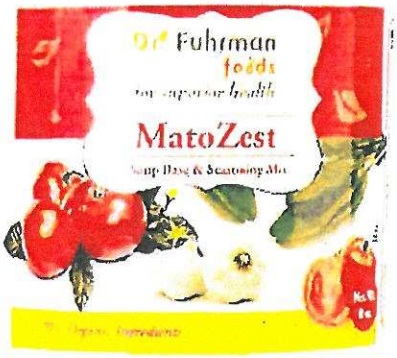


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**Eat Right America MatoZest - 8oz**

Dr. Fuhrman's MatoZest is tomato based with more of a zesty Italian flair featuring sun-dried tomatoes, garlic and onion.

**Benefits:**

- MatoZest is great tasting, certified organic and kosher
- Flavor all your soups, salad dressings and dips
- Use alone in hot water as a weight-loss aid and phytochemical food supplment
- Sprinkle on any dish as a seasoning, replacing salt
- Get phytonutrients, amino acids, antioxidants, plant enzymes and trace minerals to complement your healthy lifestyle
- MatoZest has been formulated without the addition of possible allergy producing ingredients such as: sugar, starch, salt, honey, lactose, eggs, milk, colors and fructose

**How to Use:**
Use as an all purpose seasoning or soup base starter.

**Ingredients:** Dried Vegetables (Tomato (including Sundried Tomato), Carrots, Organic Onion, Organic Spinach, Organic Garlic), Organic Soy Grits, Organic Date Sugar, Nutritional Yeast, Spices, Organic Canola Oil, Organic Parsley, with not more than 2% Silicon Dioxide added as a processing aid.

**Please Note:**
Contains the allergen soy.

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