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

Proceeding	91186148
Party	Defendant The Great Atlantic & Pacific Tea Company, Inc.
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Submission	Motion to Amend/Amended Answer or Counterclaim
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Signature	/Arlana S. Cohen/
Date	01/15/2013
Attachments	Motion to Amend.pdf (10 pages)(68470 bytes) Gabriel Declaration Executed.pdf (4 pages)(25485 bytes) Gabriel Declaration Exhibits A-N.pdf (58 pages)(3270164 bytes)

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

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PUBLIX ASSET MANAGEMENT COMPANY,	:		
	Opposer,	:	Opposition No. 91186148 Opposition No. 91186863
v.	:		
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,	:		
	Applicant.	:	

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**MEMORANDUM IN SUPPORT OF MOTION BY APPLICANT FOR LEAVE TO
AMEND ITS ANSWER(S) AND ASSERT COUNTERCLAIMS**

Upon the annexed Declaration of Michael G. Gabriel, dated January 15, 2013 (“Gabriel Decl.”), and the exhibits thereto, Applicant, The Great Atlantic & Pacific Tea Company, Inc. (“Applicant”), by and through its undersigned attorneys, hereby move for an order, pursuant to 37 C.F.R. § 2.133, 37 C.F.R. § 2.107 and Fed. R. Civ. P. 15(a), granting Applicant leave to amend its Answers in Opposition Nos. 91186148 and 91186863 to assert counterclaims for partial cancellation on the ground of non-use, namely that the subject registrations as set forth further herein are not now and/or have never been used on goods sold outside of Opposer’s stores, and thus to seek to have such registrations restricted to such channel of trade. Such draft Amended Answer with Counterclaims is attached hereto as Exhibit A to the Gabriel Decl. at ¶2. Further, Applicant has sought the consent of Opposer to so lodge its amended answer and counterclaims answer, and Opposer declined its consent. (*See* Gabriel Decl. at ¶16).

The subject registrations pertaining to the present motion are Registration Nos. 2,732,403; 2,729,423; 3,328,951; 3,546,815; 3,813,937; 4,020,054; 3,813,946; 3,813,868;

3,813,886; 3,813,890; and 3,753,274 (“Publix’ Registered Marks”),¹ which are for goods wherein allegedly the use preceded the filing dates by Applicant of its GREEN WAY marks.²

Background

This case is a consolidated opposition filed by Opposer, Publix Asset Management Company (“Opposer”) against Applicant, The Great Atlantic & Pacific Tea Company, Inc. with respect to two applications to register the mark GREEN WAY, namely, Application Serial No. 77/349246 (“the ’246 Application”) filed December 11, 2007 for “olive oil, canned tomatoes, canned beans, broth, soups, applesauce, jams, fruit preserves, peanut butter, soybean milk, milk, butter, cheese, frozen entrees consisting primarily of meat or cheese, frozen vegetables, namely, peas, broccoli, cauliflower, green beans and mixed vegetables, frozen fruits, pre-cut vegetable salad” in Class 29; “balsamic vinegar, pasta, pasta sauce, salad dressing, salsa, macaroni and cheese, breakfast cereals, coffee, tortilla chips, cheese flavored snacks, namely, cheese puffs and cheese curls, popcorn, pretzels, crackers, cookies, ravioli, frozen entrees consisting primarily of rice or pasta, burritos, enchiladas, ice cream, ice cream sandwiches, sorbets; frozen corn” in Class 30; “fresh vegetables” in Class 31; “fruit juices and fruit drinks, soft drinks” in Class 32 and Application Serial No. 77/409725 (“the ’725 Application”) dated February 29, 2008 for “shampoos and hair conditioners; skin moisturizers; human body conditioners; skin treatment

¹ Among the marks asserted by Opposer in its Oppositions are the service marks PUBLIX GREENWISE MARKETS for **retail store services**, which clearly identify themselves as services emanating from “Publix” stores, and the service mark GREENWISE for **retail store services** (which are actually always used as “Publix Greenway Market”), all for services emanating from its own stores, Publix. Applicant is not seeking to use or register its mark, GREEN WAY, for retail store services, therefore the retail store service marks do not pertain to this motion.

² Registration Nos. 3,813,937; 4,020,054; 3,813,946; 3,813,868; 3,813,886; 3,813,890; and 3,753,274 were each filed subsequently to the filing of Applicant’s GREEN WAY marks.

lotions and creams; anti-aging and stretch mark creams; non-medicated lotions and creams for hands, nails, skin, face, hair, foot and leg muscles and joints; depilatory lotions and creams; shaving lotions and creams; non-medicated skin care preparation, namely, lotions and creams for treating dry and damaged skin, anti-aging, firming, anti-wrinkle, stretch marks, under eye and eyelid firming; gels, namely, depilatory gels, shaving gels, shower gels; oils, namely, body oils, non-medicated human body serums; soaps; liquid soaps; bar soaps; anti-bacterial liquid soaps; anti-bacterial bar soaps; body washing soaps; bubble bath; body and facial scrubs; masks, namely, beauty masks, facial masks, body masks, gel eye masks, skin masks, and skin moisturizer masks; non-medicated skin care preparations, namely, face peels; cosmetic sun protection creams and lotions, sun creams and lotions; sun block; soaps and detergents for household use for the purposes of cleaning and maintenance without harm to the environment“ in Class 3; “Charcoal; white birch firewood; fire wood chips for use as fuel; fireplace logs” in Class 4; “Hand sanitizing preparations; dietary food supplements” in Class 5; “disposable forks, knives, and spoons” in Class 8; “Batteries” in Class 9; “Compact fluorescent electric light bulbs” in Class 11; “Paper towels; paper table cloths; paper napkins; bathroom tissue; notebooks; notebook paper; and facial tissues” in Class 16; “Reeds, namely, diffuser reeds” in Class 20; “Paper plates and paper cups” in Class 21; “ hamburger patties; processed edible seeds; processed nuts; dried fruits; raisins; trail mix, namely, snack mixes primarily consisting of processed fruits, processed nuts, pretzels; potato chips “ in Class 29; “Teas; sesame sticks; chocolate coated nuts; yogurt coated nuts; macaroni and cheese; pesto sauce; bread; tortillas; tortillas chips” in Class 30; “pet food” in Class 31; “soda pop” in Class 32. Both the ’246 Application and the ’725 Application were allowed without objection by the Patent and Trademark Office, were published, and then opposed by Opposer.

The Trial period in this case has not yet begun. Discovery has closed, but the parties have continued to produce documents pursuant to their obligations to do so. All the documents show that Opposer has only ever sold “Greenwise” products in its own stores, the Publix supermarkets and markets.³ Further, as further shown herein, *every* specimen filed with each registration, and *every* use of “Greenwise” produced by Opposer, shows that “Greenwise” is *always* used with the word “Publix” preceding it. In fact, all but one specimen filed with each registration shows “Greenwise” followed by the word “Market,” as in “Publix GREENWISE Market”.

Although Applicant does not believe there is any likelihood of confusion herein (and it so moved for summary judgment, which was denied), it believes that any remaining doubts as to any likelihood at all is completely obviated by the fact that Opposer only sells its “Greenwise” goods at stores which it owns, namely “Publix” stores, operated by Publix Super Markets, Inc. That is, without limitation, since none of Opposer’s goods are sold outside of Publix stores, the potential for consumers to encounter both Opposer’s and Applicant’s goods is impossible—since Applicant does not sell its goods in Opposer’s stores. Further, since all of Opposer’s goods bear the word “Greenwise” also always bear the word “Publix” first, it is clear to any consumer coming into contact with such a good that it is a Publix good found in a Publix store.

Therefore, Applicant moves herein to amend its Answer(s) herein to assert counterclaims for the partial cancellation of certain of Opposer’s registered marks for “Greenwise” (which are the only marks which Opposer owns for goods which have alleged first use dates which

³ The Opposer herein holds the trademarks which are licensed to its own commonly owned companies.

precede Applicant's) on the ground that these marks have never been used in general commerce and instead only in stores it owns.

ARGUMENT

Applicant, by this motion seeks to amend its Answer(s) herein to assert counterclaims for partial cancellation on the grounds of non-use under Section 18 of the Trademark Act, 15 USC §1068.

It is well-established that motions to amend in the Trademark Trial and Appeal Board are governed by Rule 15 of the Federal Rules of Civil Procedure. Under these rules, and under the case law applicable in the Trademark Trial and Appeal Board, motions to amend are to be “freely granted.” “Pleadings in a cancellation (opposition) proceedings may be amended in the same manner and to the same extent as in a civil action in a United States district court.” 37 C.F.R. § 2.115. Pursuant to Fed. R. Civ. P. 15(a), leave to amend should “freely” be given. *See also*, TBMP § 507.01. Consistent with this standard, the Board “has recognized that ‘amendments to pleadings should be allowed with great liberality at any stage of the proceeding where necessary to bring about a furtherance of justice unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of any opposing parties.’” *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503, 1505 (T.T.A.B. 1993), *quoting Am. Optical Corp. v. Am. Olean Tile Co., Inc.*, 168 U.S.P.Q. 471, 473 (T.T.A.B. 1971)) (emphasis added). *See also, Polaris Indus., Inc. v. DC Comics*, 59 U.S.P.Q.2d 1798, 1799 (T.T.A.B. 2000).

Applicant has met these standards. Here, there is no delay occasioned by the lodging of the proposed amended answer and counterclaims. Further, as discussed below, the proposed

amendment is in keeping with existing and applicable law. Moreover, Applicant's amended pleading, which seeks to have Opposer restrict its mark(s) to reflect actual use under Section 18, eliminates, or at worst narrows any issues as to likelihood of confusion herein. Furthermore, Opposer would not be prejudiced by such an amendment as the amendment seeks only to have Opposer's registrations match Opposer's actual use it itself has made.

**A Motion to Amend And Assert Partial
Cancellation on the Ground of Non-Use is Proper**

An Applicant need not prove its case on this motion to amend nor prove a likelihood of success on the merits. Rather, it need only satisfy the liberal pleading standards of Rule 12(b)(6) of the Federal Rules of Civil Procedure. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

It is well-settled now that pursuant to Trademark Act Section 18, 15 U.S.C. §1068, a registration may be cancelled in whole *or in part*. This Board explained the impetus for the amendment, namely a study by the *Trademark Review Commission*, a special commission of the USTA, (now INTA), and published in 77 Trademark Rep. 375 (1987) in *Eurostar v. "Euro-Star" Reitmoden GmbH & Co. KG*, 34 U.S.P.Q. 2d 1266 (TTAB 1994). In particular, the Board explained that "prior to the amendments to Section 18, the Board was constrained to decide cases presenting the issue of likelihood of confusion based on the recitation of goods or services that appeared in...the registration, rather than on the evidence adduced at trial as to the actual goods or services or the channels of trade of those goods or services." *Eurostar*, 34 U.S.P.Q. 2d at 1268.

Therefore, since then, a party seeking to avoid a finding of a likelihood of confusion based on an adverse party's pleaded registrations may do so by alleging that (1) the finding of

likelihood of confusion will be avoided by the restriction of goods sought in the petition to cancel and that (2) the opposer is not using the mark on the goods sought to be excluded by the proposed restriction. *Eurostar*, 34 U.S.P.Q. 2d at 1270. Applicant's proposed amendments meets these requirements.

Here, it cannot be denied by Opposer that it has only sold GREENWISE products in its own stores. In fact, Opposer admits, albeit obliquely, it sells its GREENWISE products only within its own Publix stores. (*See*, Exhibit M to Gabriel Decl. at ¶14). Nevertheless, no document disclosed in discovery evidences any sale outside of a Publix store. In fact, each specimen used in support of the Publix Registered Marks themselves always include the word "Publix" prior to "Greenwise". (*See*, Exs. B-L to Gabriel Decl. at ¶¶3-13). Furthermore, on almost every specimen the TM and/or ® symbol follows the full phrase "Publix Greenwise Market", not "Greenwise". (*See Id.*). In fact, on Opposer's own website, on a page entitled "Publix Greenwise Market Products" listing it "wide selection: of products, each and every one of the 71 products listed used the full phrase "Publix Greenwise Market". (*See*, Ex. N to Gabriel Decl. at ¶15).

Therefore, Applicant asserts, that not only are the Publix Registered Marks associated in the minds of the public with Opposer, Publix only, and that, Applicant's mark GREEN WAY is not confusingly similar thereto, due to non-use/abandonment of channels of trade in the asserted Publix Registered Marks outside of Publix, then, the scope of these registrations should be so limited.

Since this limitation would be consistent with the realities of Opposer's use, it should not prejudice or harm Opposer. In fact, without the proffered limitation, there is instead prejudice to Applicant, as it would not otherwise be able to claim the channels of trade asserted by Opposer

are in fact, much more limited than that shown in its registrations. In addition, this true limitation has great bearing on the analysis of the potential likelihood of confusion analysis herein. That is, since the only marks asserted herein which are for goods which allegedly have been sold from dates which precede the filing date and use of Applicant's marks are for goods only sold in Opposer's stores, then the analysis of the confusion factors changes completely. The question then becomes, whether there a likelihood of confusion between Opposer's GREENWISE products **sold only in Publix stores**, and goods bearing the Applicant's GREEN WAY sold in *different* stores. On the other hand, without the proffered amendment, the question is whether there is a likelihood of confusion with regard to GREENWISE products sold anywhere vs. GREEN WAY products sold anywhere. Since this is not the proper analysis, Applicant's motion to assert its counterclaims which seek to limit the Publix Registered Marks to reflect their true limited channels of trade should be granted. Where, as here, the marks themselves are different, and the marks share a overwhelmingly weak term "green" for products which are organic and/or healthful, a distinction based on channels of trade is of even more importance in the confusion analysis and, in fact, is determinative.

CONCLUSION

Based on the foregoing, Applicant respectfully requests that the Board issue an order granting it leave to file the amended answers to assert claims for partial cancellation of Registration Nos. 2,732,403; 3,545,815; 3,328,951; 3,813,937; 4,020,054; 3,813,946; 3,813,868; 3,813,886; 3,813,890; 3,753,274; and 2,729,423, so as to add the limitation "**sold only in Publix stores**" on the ground of non-use in channels of trade other than within Opposer's own stores.

Dated: New York, New York
January 15, 2013

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By: /Arlana S. Cohen/

Arlana S. Cohen

Michael G. Gabriel

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New York, New York 10036-6799

(212) 790-9237

Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 15, 2013, he served the foregoing Motion by Applicant For Leave To Amend its Answers and Assert Counterclaims for Partial Cancellation on counsel for Opposer by mailing a true and correct copy to the following address:

James Lake, Esq.
Thomas & LoCicero, PL
601 South Boulevard
Tampa, FL 33606

/Michael G. Gabriel/
Michael G. Gabriel

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

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PUBLIX ASSET MANAGEMENT COMPANY,	:	
	:	
Opposer,	:	Opposition No. 91186148
	:	Opposition No. 91186863
	:	
v.	:	
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,	:	
	:	
Applicant.	:	

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DECLARATION OF MICHAEL G. GABRIEL, ESQ.

I, Michael G. Gabriel, hereby declare:

1. I am a senior attorney in the law firm of Cowan, Liebowitz & Latman, P.C., attorneys for Applicant, The Great Atlantic & Pacific Tea Company, Inc. (“Applicant”). I respectfully submit this declaration in support of Applicant’s motion, pursuant to 37 C.F.R. § 2.107, 37 C.F.R. § 2.133 and Fed. R. Civ. P. 15(a), for leave to amend its answer(s) to the notices of opposition in Oppositions Nos. 91186148 and 91186863, to assert a counterclaim in each of the afore-mentioned proceedings that restricts the broad channels of trade set forth in certain of Opposer’s registered marks asserted herein to state that such goods are “sold only in Publix stores.”

2. A true and correct copy of Applicant’s [Proposed] First Amended Answer To The Amended Notice of Opposition with Counterclaims is attached hereto as **Exhibit A**.

3. A true and correct copy of Opposer’s specimen in Registration No. 2,732,403 is attached hereto as **Exhibit B**.

4. A true and correct copy of Opposer's specimen in Registration No, 3,546,815 is attached hereto as **Exhibit C**.
5. A true and correct copy of Opposer's specimen in Registration No. 3,328,951 is attached hereto as **Exhibit D**.
6. A true and correct copy of Opposer's specimen in Registration No. 3,813,937 is attached hereto as **Exhibit E**.
7. A true and correct copy of Opposer's specimen in Registration No. 4,020,054 is attached hereto as **Exhibit F**.
8. A true and correct copy of Opposer's specimen in Registration No. 3,813,946 is attached hereto as **Exhibit G**.
9. A true and correct copy of Opposer's specimen in Registration No. 3,813,868 is attached hereto as **Exhibit H**.
10. A true and correct copy of Opposer's specimen in Registration No. 3,813,886 is attached hereto as **Exhibit I**.
11. A true and correct copy of Opposer's specimen in Registration No. 3,813,890 is attached hereto as **Exhibit J**.
12. A true and correct copy of Opposer's specimen in Registration No. 3,753,274 is attached hereto as **Exhibit K**.
13. A true and correct copy of Opposer's specimen in Registration No. 2,729,423 is attached hereto as **Exhibit L**.
14. Attached hereto as **Exhibit M** is a true and correct copy of Opposer's Objections and Answers to Applicant's First Set of Interrogatories.
15. Attached hereto as **Exhibit N** is a true and correct copy of an August 30, 2012 printout of pages from Opposer's website bearing Bates Nos. A&P 001395 - 396.

16. On January 11, 2013, during a meet and confer with counsel for Opposer, counsel for Applicant informed counsel for Opposer that Applicant would seek leave to amend and sought Opposer's consent, and such consent was denied on January 15, 2013.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct. Executed this 15th day of January 2013, at New York, New York.

s/ Michael G. Gabriel

Michael G. Gabriel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15 day of January, 2013, he served the foregoing DECLARATION OF MICHAEL G. GABRIEL, ESQ. by mailing a true and correct copy thereof to Opposer's attorneys located at:

James Lake, Esq.
Thomas & LoCicero, PL
601 South Boulevard
Tampa, FL 33606

s/Michael G. Garbriel
Michael G. Gabriel

EXHIBIT A

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

	x	
PUBLIX ASSET MANAGEMENT COMPANY,	:	
Opposer,	:	OPPOSITION NO. 91186148
v.	:	OPPOSITION NO. 91186863
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,	:	APPLICANT'S [PROPOSED]
Applicant.	:	FIRST AMENDED ANSWER
	:	TO AMENDED NOTICE OF
	:	OPPOSITION and
	:	COUNTERCLAIMS

Applicant, The Great Atlantic & Pacific Tea Company, Inc. (“Applicant”), by its undersigned counsel hereby Answers the Amended Notice of Opposition (“Amended Notice”) filed by Opposer, Publix Asset Management Company, (“PAM”), as follows:

In response to the introductory unnumbered paragraph of the Amended Notice, Applicant denies that Opposer is damaged herein.

1. Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Amended Notice. Applicant objects to the collective use of the term “Publix” therein and throughout the Amended Notice as Publix Super Markets, Inc. did not file any extensions to oppose, has not opposed, and thus has no standing herein.

2. Applicant admits the allegations set forth in paragraph 2 of the Amended Notice.

3. Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the Amended Notice.

4. Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 4 of the Amended Notice.

5. Applicant admits Opposer PAM owns the registrations listed in paragraph 6 however, Applicant is without information sufficient to form a belief as to the validity of the registrations, or the dates of first use set forth therein or as set forth in paragraph 5 of the Amended Notice.

6. Applicant denies that the ownership of registrations and/or applications is evidence of use and denies any allegations to the extent they are made by any party other than Opposer PAM. Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 6 of the Amended Notice.

7. Applicant denies that the ownership of registrations and/or applications is evidence of use and denies any allegations to the extent they are made by any party other than Opposer PAM. Without waiving the foregoing, Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 7 of the Amended Notice.

8. Applicant admits the allegations set forth in paragraph 8 of the Amended Notice.

9. Applicant admits the allegations set forth in paragraph 9 of the Amended Notice.

10. Applicant fails to comprehend the citation from 1972 in the Amended Notice nor any other inference or allegations raised in paragraph 10 of the Amended Notice. Without waiving the foregoing, Applicant admits it intends to use and/or uses the mark applied for herein on the goods set forth in the Application.

11. Applicant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 11 of the Amended Notice.

12. Applicant admits the allegations set forth in paragraph 12 of the Amended Notice.

13. Applicant admits the allegations set forth in paragraph 13 of the Amended Notice.

14. Applicant admits the products set forth in its Application could be sold in supermarkets. Applicant also objects to any allegations made on behalf of Publix Super Markets, Inc., who has not filed an opposition herein.

15. Applicant admits the allegations set forth in paragraph 15 of the Amended Notice but states that it has made use of the mark with respect to some of the goods.

16. Applicant denies the allegations set forth in paragraph 16 of the Amended Notice.

17. Applicant denies the allegations set forth in paragraph 17 of the Amended Notice.

18. Applicant denies the allegations set forth in paragraph 18 of the Amended Notice.

19. Applicant denies the allegations set forth in paragraph 19 of the Amended Notice and particularly Applicant objects to any allegations made on behalf of Publix Super Markets, Inc., who has not filed an opposition herein.

20. Applicant denies the allegations set forth in paragraph 20 of the Amended Notice and particularly Applicant objects to any allegations made on behalf of Publix Super Markets, Inc., who has not filed an opposition herein.

21. Applicant denies the allegations set forth in paragraph 21 of the Amended Notice.

22. Applicant denies the allegations set forth in paragraph 22 of the Amended Notice.

23. Applicant denies the allegations set forth in paragraph 23 of the Amended Notice.

24. Applicant denies the allegations set forth in paragraph 24 of the Amended Notice.

AFFIRMATIVE DEFENSES

1. There is no likelihood of confusion herein.

**AS AND FOR A FIRST COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 2,732,403**

25. Applicant repeats and realleges its responses set forth in paragraphs 1 through 24 above.

26. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 2,732,403, in particular, natural and/or organic and/or earth-friendly products namely breakfast cereals, grain-based chips, sauces, honey, and tomato sauce, in general commerce, but only in its own stores.

27. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

28. Therefore, Registration No. 2,732,403 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

29. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 2,732,403 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

30. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A SECOND COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,546,815**

31. Applicant repeats and realleges its responses set forth in paragraphs 1 through 30 above.

32. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,545,815, namely laundry bleach, in general commerce, but only in its own stores.

33. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

34. Therefore, Registration No. 3,545,815 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores.**

35. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,545,815 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

36. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A THIRD COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,328,951**

37. Applicant repeats and realleges its responses set forth in paragraphs 1 through 36 above.

38. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,328,951, in particular, paper products, namely, bathroom tissue, facial tissue, paper napkins, and paper towels, in general commerce, but only in its own stores.

39. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

40. Therefore, Registration No. 3,328,951 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

41. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,328,951 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

42. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A FOURTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,813,937**

43. Applicant repeats and realleges its responses set forth in paragraphs 1 through 42 above.

44. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,813,937, in particular, food products, namely, ketchup, mustard, salsa, vinegar, flavored vinegar, wine vinegar, crackers, and candy, namely, chocolate covered raisins, in general commerce, but only in its own stores.

45. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

46. Therefore, Registration No. 3,813,937 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

47. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,813,937 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of

“green” overwhelmingly common for food products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

48. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A FIFTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 4,020,054**

49. Applicant repeats and realleges its responses set forth in paragraphs 1 through 48 above.

50. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 4,020,054, in particular, coffee beans, ground coffee, in general commerce, but only in its own stores.

51. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

52. Therefore, Registration No. 4,020,054 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

53. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 4,020,054 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

54. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A SIXTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,813,946**

55. Applicant repeats and realleges its responses set forth in paragraphs 1 through 54 above.

56. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,813,946, in particular, cat litter, unprocessed vegetables and fruits, unprocessed mushrooms, in general commerce, but only in its own stores.

57. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

58. Therefore, Registration No. 3,813,946 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

59. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,813,946 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

60. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A SEVENTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,813,868**

61. Applicant repeats and realleges its responses set forth in paragraphs 1 through 60 above.

62. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,813,868, in particular, wood chips for smoking and grilling, charcoal briquettes, in general commerce, but only in its own stores.

63. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

64. Therefore, Registration No. 3,813,868 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

65. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,813,868 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

66. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A EIGHTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,813,886**

67. Applicant repeats and realleges its responses set forth in paragraphs 1 through 66 above.

68. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,813,886, in particular, food products, namely, soy milk, applesauce, garden salad mix, processed vegetables and fruits, processed mushrooms, canned vegetables, packaged fresh entrees consisting primarily of meat, fish, poultry or vegetables, in general commerce, but only in its own stores.

69. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

70. Therefore, Registration No. 3,813,886 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

71. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,813,886 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

72. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A NINTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,813,890**

73. Applicant repeats and realleges its responses set forth in paragraphs 1 through 72 above.

74. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,813,890, in particular, fruit juices, tomato juice, in general commerce, but only in its own stores.

75. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

76. Therefore, Registration No. 3,813,890 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

77. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,813,890 eliminates any potential likelihood of confusion

because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for food products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

78. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A TENTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 3,753,274**

79. Applicant repeats and realleges its responses set forth in paragraphs 1 through 78 above.

80. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 3,753,274, in particular, vitamins and nutritional supplements, in general commerce, but only in its own stores.

81. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

82. Therefore, Registration No. 3,753,274 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

83. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 3,753,274 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

84. Justice and equity also is in favor of such restriction in that the restriction properly states the channel in which the goods travel.

**AS AND FOR A ELEVENTH COUNTERCLAIM FOR PARTIAL
CANCELLATION OF REGISTRATION NO. 2,729,423**

85. Applicant repeats and realleges its responses set forth in paragraphs 1 through 84 above.

86. As of this date, and since the filing date thereof, Opposer has never sold the goods set forth in Registration No. 2,729,423, in particular, food products, namely, eggs, milk, flavored milk, chocolate milk, fresh and processed seafood and shellfish, processed nuts, edible processed seeds, dried fruits, dried beans, fresh and processed meat and poultry, and tomato paste, in general commerce, in general commerce, but only in its own stores.

87. Accordingly, Opposer has abandoned its mark with regard to channels of trade other than its own stores.

88. Therefore, Registration No. 2,729,423 should be partially cancelled whereby the restriction as to its actual channels of trade is added, namely, **sold only in Publix stores**.

89. Although Applicant believes there is no likelihood of confusion herein, the restriction of Registration No. 2,729,423 eliminates any potential likelihood of confusion because, *inter alia*, not only are the marks of Applicant and Opposer different, and the use of “green” overwhelmingly common for natural and/or organic and/or earth-friendly products, but the channels of trade also differ, i.e, the respective products are sold only in different stores.

90. Justice and equity also is in favor of such restriction in that the restriction properly

states the channel in which the goods travel.

WHEREFORE, Applicant respectfully requests that the Opposition be dismissed in its entirety and Applicant's requested restrictions set forth in its cancellations be imposed.

Dated: New York, New York
January 15, 2013

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By: /Arlana S. Cohen/
Arlana S. Cohen
Michael G. Gabriel
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9237
Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 15, 2013 he caused a true copy of **Applicant's Answer to Amended Notice of Opposition** to be served by mailing a true and correct copy thereof to Opposer's attorneys to:

James B. Lake, Esq.
Thomas & LoCicero, PL
400 N. Ashley Drive, Suite 1100
Tampa, FL 33602

/Michael G. Gabriel/
Michael G. Gabriel

EXHIBIT B

PUBLIX
GreenWise
MARKET™

**FLAX
FLAKES**
ALL NATURAL CEREAL

RASPBERRIES ARE
SERVING SUGGESTION

LOW FAT
NO TRANS FAT
HEART HEALTHY
(See side panel for details)



Compare to Nature's Path Flax Plus

NET WT 13.25 OZ (375g)

PUBLIX
GreenWise
MARKET®



100% PURE
**ORGANIC
HONEY®**
US GRADE A



NET WT 16 OZ (1 LB) 454g

EXHIBIT C

PUBLIX
GreenWise
MARKET®

CHLORINE FREE BLEACH

NON-CORROSIVE
ODORLESS, BIODEGRADABLE
PERFUME & DYE FREE
COLOR SAFE, ULTRA CONCENTRATED
BREAKS DOWN TO WATER AND OXYGEN
NO PHOSPHATES



CAUTION: EYE IRRITANT.
KEEP-OUT OF REACH OF CHILDREN.
SEE BACK PANEL FOR ADDITIONAL
PRECAUTIONARY STATEMENTS

NET WT 96 FL OZ (3 QT) 2.84L

This product does not contain chlorine. It uses hydrogen peroxide as its bleaching agent. Hydrogen peroxide degrades to water and oxygen. The use of this product reduces harmful chemicals entering our sewage systems and is harmful to the environment (than traditional chlorine based products).

LAUNDRY USE: Soften laundry color. Add 1/4 cup of chlorine free bleach and detergent to wash cycle for regular size washers. Use 1/2 cup for extra-large washers. Add laundry and wash.



A-70002731

FOR BEST RESULTS:

- Use bleach dispenser.
- Dilute 3/4 cup of bleach in 1 quart water.
- Add to wash 5 minutes after wash cycle has begun.
- For heavily soiled loads use slightly more chlorine free bleach.

CAUTION: EYE IRRITANT. Contains Hydrogen Peroxide, Citric Acid and Water. May cause skin and eye irritation. Do not mix with chlorine bleach or other household chemicals.

FIRST AID:

EYES: Flush eyes open and rinse slowly and gently with water for at least 15 minutes. Remove contact lenses if present and continue rinsing. **IF ON SKIN OR CLOTHING:** Take off contaminated clothing and wash skin with plenty of water. **IF ALLOWED:** Do not induce vomiting unless told to do so by the poison control center or a poison bank. Large amount of water. Do not give anything by mouth to an unconscious person.

STORAGE AND DISPOSAL:

Keep out of reach of children. Store in a cool, dry area away from direct sunlight and heat to avoid deterioration. Do not reuse empty container. This package is recyclable. Contains no phosphorus. Not harmful to aquatic life.

KEEP BOTTLE UPRIGHT AND TIGHTLY CAPPED.

DISTRIBUTED BY
PUBLIX SUPERMARKETS, INC.
LAKELAND, FL 33802

PUBLIC GUARANTEE:

We will never knowingly sell you a product if you reason your purchase does not give you complete satisfaction. If not, purchase price will be cheerfully refunded in full immediately upon request.

EXHIBIT D

PUBLICX
GreenWise®

100% RECYCLED FIBER*

PAPER TOWELS

This is more than just three rolls of paper towels. This is three rolls of tightly wound, squeaky clean, ready to be unleashed upon unsuspecting countertops, fresh spills, and wet hands and feet. No inks or fragrances. Just pure, undiluted absorption.



PUBLIX

GreenWise®

100% RECYCLED

PAPER

EXHIBIT E



PUBLIX
GreenWise
MARKET

ORGANIC

**SPICY
BROWN**

MUSTARD



NET WT 12.0Z (340g)

EXHIBIT F

PUBLIX
GreenWise
MARKET

ORGANIC
COLOMBIAN
COFFEE

GLUTEN-FREE



NET WT 10 OZ (283g)

PUBLIX
GreenWise

MARKET

ORGANIC

**HOUSE
BLEND**

COFFEE

GLUTEN-FREE



DECAFFEINATED



NET WT 10 OZ (283g)



EXHIBIT G

PUBLIX
GreenWise
MARKET™



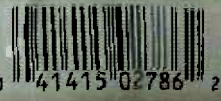
PINE
CAT LITTER

ALL NATURAL • NO ADDED CHEMICALS



PUBLIX
GreenWise
MARKET
ORGANIC WHITE
WHOLE MUSHROOMS

REFRIGERATED
DISTRIBUTED BY
PUBLIX SUPERMARKETS, INC.
LAUREL, PA 19028
PRODUCT OF USA
CERTIFIED ORGANIC BY
PENNSYLVANIA CERTIFIED ORGANIC



NET WT 8 OZ (227g)

EXHIBIT H

FUBLIX
GreenWise
MARKET

**MESQUITE
WOOD**
SMOKING CHIPS

100%
NATURAL

ADDS SUPERIOR
MESQUITE
FLAVOR

GREAT FOR
ALL GRILLS



NET CONTENTS 179 cu. in. (2933 cm³)

08/27/2008 21:05

EXHIBIT I

PUBLIX GREENWISE MARKET™ ORGANIC SWEET PEAS ARE AN ALL-NATURAL PRODUCT, GROWN AND PROCESSED WITHOUT USING SYNTHETIC FERTILIZERS, PESTICIDES OR PRESERVATIVES.

Rich in vitamin C, add Publix Greenwise Market™ Organic Sweet Peas to salads, soups, stews and casseroles for a nutritious twist on old favorites. Publix Greenwise Market™ vegetables are certified organic, picked at the very peak of ripeness for the best flavor. We guarantee our organic vegetables taste delicious.

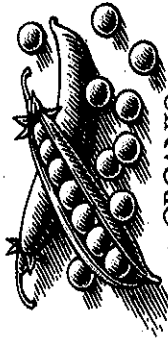
STOVE TOP: Just heat, season to taste and serve.

MICROWAVE: Empty contents into microwave dish; cover; heat 3-4 minutes. Stir, season to taste, and serve.

STORAGE: Refrigerate any unopened portion in a glass or plastic covered container.



PUBLIX
Greenwise
MARKET™



ORGANIC
SWEET PEAS



RICH IN VITAMIN C - A LOWFAT FOOD

INGREDIENTS: ORGANIC PEAS, WATER, ORGANIC DEHYDRATED CAMEL JUICE, SEA SALT

DISTRIBUTED BY:
PUBLIX SUPER MARKETS, INC.
LAKELAND, FL 33802

CERTIFIED ORGANIC BY THE:
ORGANIC GROWTH PROMOTION
ASSOCIATION (OGA)
SUPPLY A-001

PUBLICLY GUARANTEE:

We will never knowingly disappoint you. If for any reason your purchase does not give you complete satisfaction, the full purchase price will be cheerfully refunded immediately upon request.

Nutrition Facts

Serving Size 1/2 cup (125g)

Servings Per Container about 3.5

Amount Per Serving

Calories 70 Calories from Fat 5

% Daily Values*

Total Fat 0.5g **1%**

Saturated Fat 0g **0%**

Trans Fat 0g **0%**

Cholesterol 0mg **0%**

Sodium 320mg **13%**

Total Carbohydrate 12g **4%**

Dietary Fiber 3g **12%**

Sugars 6g

Protein 4g

Vitamin A 6% • **Vitamin C** 20%

Calcium 2% • **Iron** 8%

*Percent Daily Values are based on a

2,000 calorie diet.

NET WT 15 OZ (425g)



ZIP-PAK
EASY TO OPEN
EASY TO SEAL
EASY TO REUSE

PUBLIX
Greenwise
MARKET



ORGANIC
CARROT CHIPS
HAND-RIIDGED • LOW-FAT • NO PRESERVATIVES • HIGH IN FIBER
GOOD SOURCE OF BETA-CAROTENE • FAT AND CHOLESTEROL FREE • 100% VEGETARIAN

NET WT 16 OZ (1 LB) 454 g

EXHIBIT J

GreenWise
MARKETS



100% ORGANIC

APPLE JUICE



PASTEURIZED • HIGH CONCENTRATE

NET 64 FL OZ (2 QTS) 1.89 L

EXHIBIT K



PUBLIX

GreenWise
MARKET

NATURAL

VITAMIN
A & D
COMPLEX

100 Softgels
Dietary Supplement

EXHIBIT L

CAGE FREE

NO HORMONES OR
ANTIBIOTICS

GOOD SOURCE
PROTEIN

0 TRANS-FATS

5 CARB PER EGG

FOR NUTRITIONAL
INFORMATION, SEE INSIDE

PUBLIX
GreenWise
MARKET®

ONE DOZEN ORGANIC

GRADE A LARGE BROWN EGGS

PRODUCED AT A CERTIFIED ORGANIC FARM

PUBLIX
GreenWise
MARKET®

ONE DOZEN ORGANIC
GRADE A LARGE BROWN EGGS

PUBLIX
GreenWise
MARKET®

USDA
CHOICE BEEF

Raised Without Antibiotics
No Added Hormones
Vegetarian Diet
No Artificial Ingredients or Preservatives

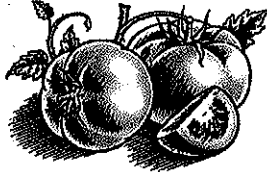
KEEP REFRIGERATED

PUBLIX GREENWISE MARKET™ ORGANIC TOMATO PASTE IS AN ALL-NATURAL PRODUCT, GROWN AND PROCESSED WITHOUT USING SYNTHETIC FERTILIZERS AND PESTICIDES OR PRESERVATIVES.

Our organic tomato paste is prepared from organically grown tomatoes that have been washed, hand-sorted for quality, strained and concentrated.



PUBLIX
GreenWise
MARKET®



ORGANIC
TOMATO PASTE

Nutrition Facts

Serving Size 2 Tbsp (33g)
Servings Per Container about 5

Amount Per Serving		Calories from Fat 0	% Daily Value*
Calories 30			
Total Fat 0g		0%	
Saturated Fat 0g		0%	
Trans Fat 0g			
Cholesterol 0mg		0%	
Sodium 20mg		4%	
Potassium 150mg		4%	
Total Carbohydrate 6g		2%	
Dietary Fiber 1g		6%	
Sugars 3g			
Protein 2g			
Vitamin A 10%	Vitamin C 10%		
Calcium 0%	Iron 0 4%		

INGREDIENTS:
ORGANIC TOMATOES.
DISTRIBUTED BY:
PUBLIX SUPER
MARKETS, INC.
LAKELAND, FL 33802
**CERTIFIED ORGANIC BY THE CALIFORNIA
CROP IMPROVEMENT
ASSOCIATION**
ONE SHIELDS AVENUE
DAVIS, CA 95618-0601
PUBLIX GUARANTEE:
We will never knowingly
disappoint you. If for any
reason your purchase
does not give you
complete satisfaction,
we'll purchase your
will be cheerfully
refunded immediately
upon request.

NET WT 6 OZ (170g)

EXHIBIT M

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

PUBLIX ASSET MANAGEMENT COMPANY,

Opposer,

v.

Opposition No.: 91186148
Opposition No. 91186863

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.,

Applicant.

**OPPOSER'S OBJECTIONS AND ANSWERS TO
APPLICANT'S FIRST SET OF INTERROGATORIES**

Opposer PUBLIX ASSET MANAGEMENT COMPANY ("Opposer") serves the following objections and answers to the First Set of Interrogatories from Applicant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. ("Applicant" or "A&P").

General Objections

1. Opposer objects to the definitions and instructions to the extent that the definition of Opposer includes all of Opposer's "officers, directors, shareholders, employees, successors, assigns, predecessors-in-interest, parents, subsidiaries, affiliates and any other entities which it directs or controls," because the requests would then be overly broad and unduly burdensome and would seek work-product privileged and attorney-client privileged communications.

2. Opposer objects to each interrogatory to the extent that interrogatory seeks privileged information, proprietary information or other information that has been gathered or prepared in the course of litigation or which is otherwise subject to the lawyer-client privilege, the accountant-client privilege, the joint-defense privilege, the husband-wife privilege, the work product doctrine, reporter's privilege, or any other applicable privilege or immunity, including trade secrets, proprietary information, information that is confidential pursuant to a statute or court order, confidential business information, or other information subject to an expectation of privacy or confidentiality. Information described by this paragraph is referred to herein as "privileged."

3. Opposer objects to each interrogatory to the extent that interrogatory conflicts with, or seeks to impose any obligation beyond, the applicable rules and law.

4. Opposer objects to each interrogatory to the extent that interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

5. Opposer objects to each interrogatory to the extent that interrogatory is unduly burdensome.

6. Opposer specifically reserves the right to object, as appropriate, to the admission of these answers as evidence at trial or for any other purpose.

7. An objection does not mean that Opposer possesses information responsive to the objectionable paragraph.

8. Opposer has not completed discovery and reserves the right to supplement or to amend its answers.

Answers and Objections to Interrogatories

INTERROGATORY NO. 1:

With respect to Opposer's Mark, separately identify each type of product on or in connection with which Opposer has used such mark or provided services under Opposer's Mark.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is overly broad and unduly burdensome, in that the GREENWISE® mark has been used in connection with many different products and services, and requiring Opposer to list all of them is unnecessary. Subject to and without waiving this objection, Opposer states that Opposer has used the GREENWISE® mark through one or more related companies on numerous products and services, including (but not necessarily limited to) salads, romaine hearts, spinach, fruits, vegetables, beef, chicken, seafood, shellfish, shrimp, packaged entrees, soy crumbles, vegetarian and soy burgers, cereal, chips, apple sauce, tomato paste, tomato sauce, salsa, beans, ketchup, mustard, vinegar, honey, candy, raisins, ginger, nuts, seeds, dried fruits, soymilk, milk, eggs, juice, bleach, paper products, cat litter, wood chips for grilling, charcoal briquettes, a newsletter, retail grocery store services, delicatessen services, bakery services, café services, coffee-bar services, and retail store services featuring chocolate confectionary, candy, edible gifts, organic wines, and beers. The GREENWISE® retail grocery store services include sales of the products listed in this answer as well as numerous other organic, all-natural and earth-friendly products.

INTERROGATORY NO. 2

With respect to each type of product or service identified in Interrogatory No. 1 separately state:

(a) the date the product or service was first used, or is intended to be used, in interstate commerce;

(b) whether the mark is currently used on such products or services.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is overly broad and unduly burdensome. The GREENWISE® mark has been used in connection with many different products, and the first-use date of the mark on each of those products is not material to this proceeding. Requiring Opposer to research and to report to Applicant the first-use date and current status of each GREENWISE® product and service, therefore, is unduly burdensome. Subject to and without waiving these objections, Opposer states that the GREENWISE® mark is currently used on essentially all of the products listed in the answer to the proceeding interrogatory. Additional information responsive to this interrogatory, including approximate first-use dates, may be determined by examining business records. The burden of deriving or ascertaining the answer would be substantially the same for either party. Opposer agrees to give Applicant a reasonable opportunity to examine the records and to make copies, compilations, abstracts or summaries.

INTERROGATORY NO. 3

State the facts surrounding Opposer's selection of Opposer's Mark, including but not limited to, the reason the mark was selected, and identify each document that refers or relates to the adoption or selection by or decision of Opposer to use Opposer's Mark upon or in connection with each product or service identified in response to Interrogatory No. 1.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. In particular, the reason for Opposer's selection of the GREENWISE® mark is immaterial to the issues in this proceeding. In addition, this request seeks information protected by the attorney-client privilege and attorney work-product doctrine and seeks confidential and proprietary business information. Subject to and without waiving these objections and the General Objections, and without waiving the attorney-client privilege and attorney work-product doctrine, Opposer agrees to produce trademark search reports relating to selection of the GREENWISE® mark.

INTERROGATORY NO. 4

Identify by name, address and position of employment (if applicable), each person who was responsible for or who participated in the adoption or selection by or decision of Opposer to use Opposer's Mark for each product or service identified in response to Interrogatory No. 1.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. In particular, the reason for selection of the GREENWISE® mark is immaterial to the issues in this proceeding. In addition, this

request seeks information protected by the attorney-client privilege and attorney work-product doctrine and seeks confidential and proprietary business information. Subject to and without waiving these objections and the General Objections, Opposer states that Mark Irby was responsible for selection of the GREENWISE® mark and has general supervisory responsibility for the scope of use of that mark. Mr. Irby is president of Publix Asset Management Company. Mr. Irby's address for purposes of this proceeding is c/o James B. Lake, Thomas, LoCicero & Bralow PL, 400 N. Ashley Dr., Suite 1100, Tampa, FL 33602.

INTERROGATORY NO. 5

Identify each document that comprises, refers or relates to each trademark search or other inquiry conducted by or for Opposer concerning the use or prospective use of Opposer's Mark.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. In particular, the reason for selection of the GREENWISE® mark is immaterial to the issues in this proceeding. In addition, this request seeks information protected by the attorney-client privilege and attorney work-product doctrine. Subject to and without waiving these objections and the General Objections, and without waiving the attorney-client privilege and attorney work-product doctrine, Opposer agrees to produce trademark search reports relating to selection of the GREENWISE® mark.

INTERROGATORY NO. 6

Describe each written or oral opinion of counsel regarding the use of Opposer's Mark on any or all of the products identified in response to Interrogatory No. 1 by stating the author(s), recipient(s) and date thereof and the conclusions of the author(s) and the general grounds therefore.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information protected by the attorney-client privilege and attorney work-product doctrine. In addition, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 7

Identify any and all documents that set forth, refer or relate to any written or oral opinions of counsel regarding the use of Opposer's Mark on any or all of the products identified in response to Interrogatory No. 1.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information protected by the attorney-client privilege and attorney work-product doctrine. In addition, the request for “all documents that set forth, refer or relate to any written or oral opinions” is vague, ambiguous, overly broad, and unduly burdensome. In addition, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 8

Identify each document in Opposer’s possession, custody or control that refers or relates to Applicant’s Mark.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory seeks information protected by the attorney-client privilege and attorney work-product doctrine. Subject to these objections and the General Objections, Opposer agrees to produce copies of these documents (if any) in its possession, custody and control at a mutually convenient time and place.

INTERROGATORY NO. 9

Identify each state to which Opposer sells its goods under Opposer’s Mark.

ANSWER: Subject to the General Objections, Opposer states that GREENWISE® products are sold through related companies without any restriction on their resale, distribution, or use by consumers. Consequently, the sale of GREENWISE® products is not limited to a particular state or states. Opposer’s related companies sell GREENWISE® products in retail stores in Alabama, Florida, Georgia, South Carolina, and Tennessee.

INTERROGATORY NO. 10

Describe in detail the trade channels through which Opposer’s products or services bearing Opposer’s Mark identified in response to Interrogatory No. 1 are or are intended to be sold.

ANSWER: Subject to the General Objections, Opposer states that GREENWISE goods and services are distributed through retail stores, by U.S. Mail, and online.

INTERROGATORY NO. 11

Identify all advertisements, catalogs, flyers, price lists, or other items of advertising or promotional material of Opposer which use or refer to Opposer’s Mark.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is vague, overly broad, and unduly burdensome insofar as the interrogatory seeks identification of all advertising or marketing materials that use or refer to the GREENWISE® mark. That mark regularly appears in numerous print and online publications and advertising and promotional materials. Subject to and without waiving these objections, Opposer agrees to provide examples at a mutually convenient time and place.

INTERROGATORY NO. 12

State whether Opposer owns or operates any retail supermarkets in the United States.

ANSWER: Subject to the General Objections, no. However, Opposer licenses various trademarks to related companies that own or operate retail supermarkets in the United States.

INTERROGATORY NO. 13

Describe the relationship between Opposer and Publix Supermarkets Inc., and identify all documents evidencing the same.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is vague, overly broad, and unduly burdensome insofar as the interrogatory seeks identification of "all documents evidencing" the relationship between two corporations. Subject to these objections and the General Objections, Opposer states that Publix Asset Management Company licenses various trademarks to Publix Super Markets Inc., in a written license agreement.

INTERROGATORY NO. 14

State whether Opposer sells any product identified in Interrogatory No. 1 in stores other than those owned by Opposer or by Publix Supermarkets, Inc.

ANSWER: Subject to the General Objections, Opposer states that, at this time, GREENWISE® products are sold by Publix Super Markets, Inc., and related companies pursuant to license agreements. However, GREENWISE® products are sold without any restriction on their resale, distribution, or use by consumers. Consequently, the sale of GREENWISE® products is not limited to sales by Opposer alone.

INTERROGATORY NO. 15

State whether Opposer is aware of any grocery product other than Opposer's products sold under Opposer's Mark or Applicant's products sold or intended to be sold under Applicant's

Mark which includes that word "green" and list all such product names and identify all documents relating to or evidencing same.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is vague, overly broad, and unduly burdensome, in that the interrogatory seeks to compel Opposer to conduct a survey and research concerning third-party trademarks. In addition, insofar as this interrogatory seeks discovery of Opposer's legal research, this request seeks information protected by the attorney work-product doctrine. Furthermore, the request that Opposer "identify all documents relating to or evidencing" third-party goods is vague, ambiguous, and overly broad. Subject to these objections and the General Objections, Opposer states that information concerning some other "green" marks may be found in certain business records. The burden of deriving or ascertaining the answer would be substantially the same for either party. Opposer agrees to give Applicant a reasonable opportunity to examine the records and to make copies, compilations, abstracts or summaries.

INTERROGATORY NO. 16

State whether Opposer has taken action against the owner of any trademark or service mark containing or comprised of the phrase "green."

ANSWER: Subject to the General Objections, yes.

INTERROGATORY NO. 17

If the answer to Interrogatory No. 16 is anything other than an unqualified "no," for each such action taken by Opposer, state:

- (a) the mark or marks against which action was taken;
- (b) the goods and/or services for which each such mark or marks were used, or in the case of an application filed with the U.S. Patent and Trademark Office on the basis of a future intent-to-use, the goods and/or services upon which that mark or marks were intended to be used;
- (c) the owner of each said mark or marks;
- (d) the nature of the action taken against each such mark or marks (*i.e.*, cease and desist letter, trademark opposition, lawsuit, etc.);
- (e) the outcome of each such action; and

- (f) identify all documents related to (a)-(c) above.

ANSWER: Opposer reiterates the General Objections and, in particular, objects that this interrogatory is vague, overly broad, and unduly burdensome, in that the interrogatory seeks to compel Opposer to conduct research concerning third-party trademarks. In addition, Opposer objects insofar as this interrogatory seeks attorney-client communications and attorney work product. Subject to and without waiving this objection Publix states that information concerning the actions described in this interrogatory may be determined by examining certain business records. The burden of deriving or ascertaining the answer would be substantially the same for either party. Opposer agrees to give Applicant a reasonable opportunity to examine the records and to make copies, compilations, abstracts or summaries.

INTERROGATORY NO. 18

(a) Identify any persons or entities Opposer has authorized, licensed or otherwise granted the right to use any of Opposer's Marks cited in its Notice of Opposition in the United States.

(b) For each of Opposer's Marks for which third-party use has been authorized or licensed, describe the nature of the authorized use or license.

ANSWER: Opposer objects that this interrogatory calls for the production of confidential business information. Subject to this objection and the General Objections, Opposer states that information responsive to this interrogatory may be determined by examining business records. The burden of deriving or ascertaining the answer would be substantially the same for either party. Upon the entry of an appropriate protective order, Opposer agrees to give Applicant a reasonable opportunity to examine the records and to make copies, compilations, abstracts or summaries.

INTERROGATORY NO. 19

(a) Describe any instance of actual confusion between any of Opposer's Marks cited in its Notice of Opposition and Applicant's Mark, including, without limitation, any misdirected mail, telephone calls or orders and any inquiries concerning association between the parties.

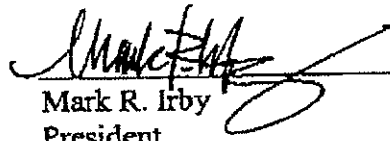
(b) Identify the person or persons most knowledgeable about any such instances of confusion identified in response to Interrogatory No. 18(a) above.

ANSWER: Subject to the General Objections, and given the recent, limited use by

Applicant of its claimed GREEN WAY mark, Opposer is not aware of any actual confusion at this time.

VERIFICATION

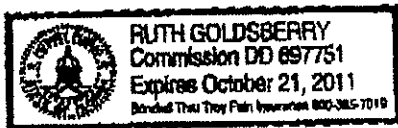
I verify under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of April, 2009.



Mark R. Irby
President
Publix Asset Management Company

STATE OF FLORIDA
COUNTY OF POLK

BEFORE ME, the undersigned authority, personally appeared Mark R. Irby, who, being first duly sworn and being personally known to me, deposes and says that he has read and signed the foregoing interrogatory answers and that the answers are true and correct to the best of his knowledge, information, and belief.

SWORN TO and subscribed before me this 28th day of April, 2009.




Notary Public State of Florida
Printed Name: Ruth Goldsberry
Commission No.: DD 697751

My Commission Expires: 10-21-2011

EXHIBIT N



Publix GreenWise Market Products

Publix GreenWise Market Products

These days, more and more people are looking for naturally delicious and environmentally friendly products. We've created our Publix GreenWise Market to meet this need, and to give all of our customers a greater range of choices. Our ever-expanding family of Publix GreenWise Market items offers our customers excellent quality and value across three categories. Our organic items are raised without added growth hormones or synthetic antibiotics, steroids, pesticides, or fertilizers and are all-natural with no GMOs (genetically modified organisms). The three different organic levels are explained [here](#). Minimally processed, our all-natural items have no artificial colors, flavor, preservatives or sweeteners. Our earth-friendly products are produced in such a way to minimize any negative impact on the environment. For a complete list and more information on Publix GreenWise Market brand products, see below.

But don't forget, our Publix GreenWise Market also carries other trusted brands of organic, all-natural and earth-friendly products. Click [here](#) to see our wide selection.

Apple Sauce

- [Publix GreenWise Market Organic Apple Sauce](#)
- [Publix GreenWise Market Organic Unsweetened Apple Sauce](#)

Bagged Salads

- [Publix GreenWise Market Organic Baby Arugula Salad](#)
- [Publix GreenWise Market Organic Baby Lettuce Salad](#)
- [Publix GreenWise Market Organic Baby Romaine Salad](#)
- [Publix GreenWise Market Organic Baby Spinach Blend Salad](#)
- [Publix GreenWise Market Organic Baby Spinach Salad](#)
- [Publix GreenWise Market Organic Hearts of Romaine Salad](#)
- [Publix GreenWise Market Organic Herb Mix Salad](#)
- [Publix GreenWise Market Organic Mixed Baby Greens Salad](#)
- [Publix GreenWise Market Organic Romaine Hearts \(3 stalks per bag\)](#)
- [Publix GreenWise Market Organic Spinach](#)

Beef

- [Publix GreenWise Market Ground Chuck](#)
- [Publix GreenWise Market Ground Round](#)
- [Publix GreenWise Market USDA Choice Beef](#)

Breakfast

- [Publix GreenWise Market 100% Organic Old Fashioned Oats](#)
- [Publix GreenWise Market 100% Organic Original Instant Oatmeal](#)
- [Publix GreenWise Market Maple & Brown Sugar Instant Oatmeal](#)

Canned Tomatoes

- [Publix GreenWise Market Organic Crushed Tomatoes](#)
- [Publix GreenWise Market Organic Diced Tomatoes Seasoned with Basil, Garlic & Oregano](#)
- [Publix GreenWise Market Organic Diced Tomatoes in Organic Tomato Juice](#)
- [Publix GreenWise Market Organic Tomato Paste](#)
- [Publix GreenWise Market Organic Tomato Sauce](#)

Canned Vegetables

- [Publix GreenWise Market Organic Black Beans](#)
- [Publix GreenWise Market Organic Cut Green Beans](#)
- [Publix GreenWise Market Organic Garbanzo Beans](#)
- [Publix GreenWise Market Organic Kidney Beans](#)
- [Publix GreenWise Market Organic Pink Beans](#)
- [Publix GreenWise Market Organic Soy Beans](#)
- [Publix GreenWise Market Organic Sweet Peas](#)
- [Publix GreenWise Market Organic Whole Kernel Corn](#)

Chicken

- [Publix GreenWise Market Boneless, Skinless Chicken Breast Fillets](#)
- [Publix GreenWise Market Boneless, Skinless Chicken Breasts with Rib Meat](#)
- [Publix GreenWise Market Boneless, Skinless Chicken Thighs](#)
- [Publix GreenWise Market Boneless, Skinless Thin Sliced Chicken Breast Cutlets](#)
- [Publix GreenWise Market Chicken Breast Tenderloins](#)
- [Publix GreenWise Market Chicken Drumsticks](#)
- [Publix GreenWise Market Chicken Split Breast with Ribs](#)
- [Publix GreenWise Market Chicken Thighs](#)
- [Publix GreenWise Market Chicken Wing Drumettes](#)
- [Publix GreenWise Market Chicken Wings](#)
- [Publix GreenWise Market Skinless Chicken Drumsticks](#)
- [Publix GreenWise Market Skinless Chicken Split Breast with Ribs](#)
- [Publix GreenWise Market Skinless Chicken Thighs](#)
- [Publix GreenWise Market Young Chicken without Giblets](#)

Condiments

- [Publix GreenWise Market Organic Tomato Ketchup](#)

Dairy Case

- [Publix GreenWise Market Chocolate Soy Milk](#)
- [Publix GreenWise Market Organic Eggs](#)
- [Publix GreenWise Market Organic Fat-Free Milk](#)
- [Publix GreenWise Market Organic Reduced-Fat Milk](#)
- [Publix GreenWise Market Organic Whole Milk](#)
- [Publix GreenWise Market Plain Soy Milk](#)



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☑ Natural and Organic Shelf Tags

At Publix, it's easy to see exactly what you're looking for, especially when it comes to natural and organic foods -- it's right on the [shelf tags](#).

☑ Health Focus

This school year, give your kids a [breakfast brain boost](#).

☑ The Right Foods for You

Use our [shopping lists](#) for your specific dietary needs.

☑ How to Read a Label

[Nutrition facts labels](#) are a great resource, but the terminology can be confusing. Learn about each component, including the FDA's recommendations for a healthy diet.

☑ Prepare Food Safely

To ensure that your food stays safe after leaving Publix and while you're preparing it, be sure to follow these four simple [food safety guidelines](#).

- [Publix GreenWise Market Vanilla Soy Milk](#)
- Honey
 - [Publix GreenWise Market 100% Pure Organic Honey](#)
- Household
 - [Publix GreenWise Market Chlorine-Free Bleach](#)
- Juices
 - [Publix GreenWise Market Organic Apple Juice](#)
 - [Publix GreenWise Market Organic Cranberry Juice](#)
 - [Publix GreenWise Market Organic Grape Juice](#)
 - [Publix GreenWise Market Organic Lemonade](#)
 - [Publix GreenWise Market Organic Tomato Juice](#)
- Paper Goods
 - [Publix GreenWise Market Bath Tissue](#)
 - [Publix GreenWise Market Double Roll Bath Tissue](#)
 - [Publix GreenWise Market Facial Tissue](#)
 - [Publix GreenWise Market Napkins](#)
 - [Publix GreenWise Market Paper Towels](#)
- Pet Products
 - [Publix GreenWise Market Cat Litter](#)
- Snacks
 - [Publix GreenWise Market Blue Corn Tortilla Chips](#)
 - [Publix GreenWise Market Medium Organic Salsa](#)
 - [Publix GreenWise Market Mild Organic Salsa](#)
 - [Publix GreenWise Market Yellow Corn Tortilla Chips](#)
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