

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

DIETGOAL INNOVATIONS LLC

v.

**ARBY'S RESTAURANTS GROUP,
INC., ET AL**

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CIVIL ACTION NO. 2:11-CV-418-DF

**DEFENDANT WHOLE FOODS MARKET, INC.'S
ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO
PLAINTIFF DIETGOAL INNOVATIONS LLC'S
THIRD AMENDED COMPLAINT FOR PATENT INFRINGEMENT**

Defendant Whole Foods Market, Inc. ("Whole Foods") files its Answer, Affirmative Defenses and Counterclaims to Plaintiff DietGoal Innovations LLC's ("DietGoal's") Third Amended Complaint for Patent Infringement ("Complaint") as follows:

PARTIES

1. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint and, therefore, denies them.

2. The allegations of paragraph 2 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2, and therefore denies them.

3. The allegations of paragraph 3 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 3, and therefore denies them.

4. The allegations of paragraph 4 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4, and therefore denies them.

5. The allegations of paragraph 5 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5, and therefore denies them.

6. The allegations of paragraph 6 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6, and therefore denies them.

7. The allegations of paragraph 7 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7, and therefore denies them.

8. The allegations of paragraph 8 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8, and therefore denies them.

9. The allegations of paragraph 9 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9, and therefore denies them.

10. The allegations of paragraph 10 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10, and therefore denies them.

11. The allegations of paragraph 11 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11, and therefore denies them.

12. The allegations of paragraph 12 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12, and therefore denies them.

13. The allegations of paragraph 13 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13, and therefore denies them.

14. The allegations of paragraph 14 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 14, and therefore denies them.

15. The allegations of paragraph 15 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15, and therefore denies them.

16. The allegations of paragraph 16 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16, and therefore denies them.

17. The allegations of paragraph 17 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17, and therefore denies them.

18. The allegations of paragraph 18 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18, and therefore denies them.

19. The allegations of paragraph 19 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19, and therefore denies them.

20. The allegations of paragraph 20 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20, and therefore denies them.

21. The allegations of paragraph 21 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21, and therefore denies them.

22. The allegations of paragraph 22 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22, and therefore denies them.

23. The allegations of paragraph 23 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23, and therefore denies them.

24. The allegations of paragraph 24 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24, and therefore denies them.

25. The allegations of paragraph 25 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 25, and therefore denies them.

26. The allegations of paragraph 26 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26, and therefore denies them.

27. The allegations of paragraph 27 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27, and therefore denies them.

28. The allegations of paragraph 28 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28, and therefore denies them.

29. The allegations of paragraph 29 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29, and therefore denies them.

30. The allegations of paragraph 30 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30, and therefore denies them.

31. The allegations of paragraph 31 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31, and therefore denies them.

32. The allegations of paragraph 32 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32, and therefore denies them.

33. Whole Foods admits the allegations contained within paragraph 33.

34. The allegations of paragraph 34 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34, and therefore denies them.

35. The allegations of paragraph 35 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35, and therefore denies them.

36. The allegations of paragraph 36 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36, and therefore denies them.

37. The allegations of paragraph 37 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 37, and therefore denies them.

38. The allegations of paragraph 38 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38, and therefore denies them.

39. The allegations of paragraph 39 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 39, and therefore denies them.

40. The allegations of paragraph 40 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40, and therefore denies them.

41. The allegations of paragraph 41 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 41, and therefore denies them.

42. The allegations of paragraph 42 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 42, and therefore denies them.

43. The allegations of paragraph 43 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43, and therefore denies them.

44. The allegations of paragraph 44 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 44, and therefore denies them.

45. The allegations of paragraph 45 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45, and therefore denies them.

46. The allegations of paragraph 46 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 46, and therefore denies them.

47. The allegations of paragraph 47 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 47, and therefore denies them.

48. The allegations of paragraph 48 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 48, and therefore denies them.

49. The allegations of paragraph 49 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 49, and therefore denies them.

50. The allegations of paragraph 50 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 50, and therefore denies them.

51. The allegations of paragraph 51 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 51, and therefore denies them.

52. The allegations of paragraph 52 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 52, and therefore denies them.

53. The allegations of paragraph 53 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 53, and therefore denies them.

JURISDICTION AND VENUE

54. Whole Foods admits that this action arises under the patent laws of the United States, Title 35 of the United States Code.

55. Whole Foods admits that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

56. Solely with respect to Whole Foods, Whole Foods admits that this Court has personal jurisdiction over Whole Foods. Whole Foods denies the remaining allegations contained in paragraph 56.

57. Solely with respect to Whole Foods, Whole Foods admits that venue is proper under 28 U.S.C. §§ 1391 and 1400(b). Whole Foods denies that it has committed and/or induced acts of patent infringement in this district.

THE PATENT-IN-SUIT

58. Whole Foods admits that, on its face, Exhibit A appears to be U.S. Patent No. 6,585,516 (“the ‘516 patent”), entitled “Method and System for Computerized Visual Behavior Analysis, Training, and Planning”, issued on July 1, 2003. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 58, and therefore denies them.

59. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 59, and therefore denies them.

60. The allegations of paragraph 60 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 60, and therefore denies them.

61. The allegations of paragraph 61 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61, and therefore denies them.

62. The allegations of paragraph 62 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62, and therefore denies them.

63. The allegations of paragraph 63 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 63, and therefore denies them.

64. The allegations of paragraph 64 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 64, and therefore denies them.

65. The allegations of paragraph 65 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 65, and therefore denies them.

66. The allegations of paragraph 66 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 66, and therefore denies them.

67. The allegations of paragraph 67 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 67, and therefore denies them.

68. The allegations of paragraph 68 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 68, and therefore denies them..

69. The allegations of paragraph 69 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 69, and therefore denies them.

70. The allegations of paragraph 70 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 70, and therefore denies them.

71. The allegations of paragraph 71 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 71, and therefore denies them.

72. The allegations of paragraph 72 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 72, and therefore denies them.

73. The allegations of paragraph 73 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 73, and therefore denies them.

74. The allegations of paragraph 74 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 74, and therefore denies them.

75. The allegations of paragraph 75 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 75, and therefore denies them.

76. The allegations of paragraph 76 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 76, and therefore denies them.

77. The allegations of paragraph 77 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 77, and therefore denies them.

78. The allegations of paragraph 78 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 78, and therefore denies them.

79. The allegations of paragraph 79 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79, and therefore denies them.

80. The allegations of paragraph 80 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 80, and therefore denies them.

81. The allegations of paragraph 81 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 81, and therefore denies them.

82. The allegations of paragraph 82 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 82, and therefore denies them.

83. The allegations of paragraph 83 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 83, and therefore denies them.

84. The allegations of paragraph 84 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 84, and therefore denies them.

85. The allegations of paragraph 85 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85, and therefore denies them.

86. The allegations of paragraph 86 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 86, and therefore denies them.

87. The allegations of paragraph 87 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 87, and therefore denies them.

88. The allegations of paragraph 88 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 88, and therefore denies them.

89. The allegations of paragraph 89 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 89, and therefore denies them.

90. The allegations of paragraph 90 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 90, and therefore denies them.

91. Whole Foods admits that it has a website www.wholefoodsmarket.com. Whole Foods denies the remaining allegations contained paragraph 91 and denies that it has been or now is directly infringing one or more claims of the '516 patent.

92. The allegations of paragraph 92 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 92, and therefore denies them.

93. The allegations of paragraph 93 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 93, and therefore denies them.

94. The allegations of paragraph 94 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 94, and therefore denies them.

95. The allegations of paragraph 95 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 95, and therefore denies them.

96. The allegations of paragraph 96 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 96, and therefore denies them.

97. The allegations of paragraph 97 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 97, and therefore denies them.

98. The allegations of paragraph 98 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 98, and therefore denies them.

99. The allegations of paragraph 99 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 99, and therefore denies them.

100. The allegations of paragraph 100 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 100, and therefore denies them.

101. The allegations of paragraph 101 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 101, and therefore denies them.

102. The allegations of paragraph 102 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102, and therefore denies them.

103. The allegations of paragraph 103 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 103, and therefore denies them.

104. The allegations of paragraph 104 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 104, and therefore denies them.

105. The allegations of paragraph 105 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 105, and therefore denies them.

106. The allegations of paragraph 106 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 106, and therefore denies them.

107. The allegations of paragraph 107 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 107, and therefore denies them.

108. The allegations of paragraph 108 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 108, and therefore denies them.

109. The allegations of paragraph 109 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 109, and therefore denies them.

110. The allegations of paragraph 110 are not directed to Whole Foods, and therefore no answer is required. Whole Foods is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 110, and therefore denies them.

111. Whole Foods denies the allegations contained in paragraph 111.

112. Whole Foods denies the allegations contained in paragraph 112.

113. Whole Foods denies the allegations contained in paragraph 113.

DEMAND FOR JURY TRIAL

114. Paragraph 114 does not require a response by Whole Foods.

PLAINTIFF'S PRAYER FOR RELIEF

Whole Foods denies that Plaintiff is entitled to any of its requests for relief against Whole Foods.

AFFIRMATIVE DEFENSES

Whole Foods' Affirmative Defenses are provided below. Whole Foods reserves the right to amend its Answer to add additional Affirmative Defenses, including instances of inequitable conduct, consistent with the facts discovered in the case.

FIRST DEFENSE

115. Whole Foods does not infringe and has not infringed any claim of U.S. Patent No. 6,585,516 ("the '516 patent") under any theory, including directly (whether individually or jointly), indirectly (whether contributorily or by inducement), literally, or under the doctrine of equivalents.

SECOND DEFENSE

116. The '516 patent is invalid and/or unenforceable for failure to satisfy one or more of the conditions of patentability specified in 35 U.S.C. § 100 et seq., including, but not limited to §§ 101, 102, 103, and 112.

THIRD DEFENSE

117. Any claim by DietGoal for damages are limited under 35 U.S.C. §§ 286 or 287. DietGoal is barred under 35 U.S.C. § 287 from recovering damages prior to the date of the

filing of the Original Complaint. DietGoal is barred by 35 U.S.C. § 288 from recovering costs associated with their action.

FOURTH DEFENSE

118. To the extent that DietGoal asserts that Whole Foods indirectly infringes, either by contributory infringement or inducement of infringement, Whole Foods is not liable to DietGoal for the acts performed before Red Robin allegedly knew that its actions would cause direct infringement.

FIFTH DEFENSE

119. DietGoal's claims are barred, in whole or in part, by the doctrine of laches, equitable estoppels and/or waiver.

SIXTH DEFENSE

120. DietGoal is estopped from construing any valid claim of the '516 patent to be infringed literally or by the Doctrine of Equivalents due to prosecution history estoppel, including but not limited to admissions or statements made to the United States Patent and Trademark Office ("USPTO") during prosecution of the patent in suit or because of the disclosure or language of the specification or claims thereof.

SEVENTH DEFENSE

121. DietGoal's claims for patent infringement are precluded in whole or in part (i) to the extent that any allegedly infringing products or components thereof are supplied, directly or indirectly, to Whole Foods or are imported, sold by, offered for sale by, made by, or made for, any entity or entities having express or implied licenses to the patent-in-suit and/or (ii) under the doctrine of patent exhaustion.

COUNTERCLAIMS

Whole Foods asserts the following declaratory relief counterclaims against DietGoal:

PARTIES

122. Defendant and Counterclaimant Whole Foods Market, Inc. (“Whole Foods”) is a Texas corporation having its principal place of business in Austin, Texas.

123. On information and belief DietGoal Innovations LLC (“DietGoal”) is a Texas limited liability company having its principal place of business in Austin, Texas.

JURISDICTION AND VENUE

124. This Court has jurisdiction over Whole Food’s Declaratory Judgment claims pursuant to 28 U.S.C. §§ 2201-2202 and subject matter jurisdiction over patent infringement and validity pursuant to 28 U.S.C. §§ 1331 and 1338(a). An actual, substantial, and continuing justiciable controversy exists between Whole Foods and DietGoal based on DietGoal having filed a Complaint against Whole Foods alleging infringement of U.S. Patent No. 6,585,516 (“the ‘516 patent”), with respect to which Whole Foods requires a declaration of its rights by this Court. Specifically, the controversy concerns the invalidity and noninfringement of the patent-in-suit and the right of DietGoal to maintain suit for alleged infringement of the patent-in-suit.

125. The Court has personal jurisdiction over DietGoal, *inter alia*, because DietGoal has submitted to the personal jurisdiction of this Court by filing the Complaint here.

126. Venue is proper in this District pursuant to 28 U.S.C. §§1391(b) and 1400(b), *inter alia*, because DietGoal has submitted to the venue of this Court by filing its Complaint here.

FIRST COUNTERCLAIM
(Declaratory Judgment of Non-Infringement)

127. Whole Foods has not directly or indirectly infringed, contributed to or induced infringement of any valid or enforceable claim of the patent-in-suit, and has not otherwise committed any acts in violation of 35 U.S.C. §271.

128. An actual controversy exists between Whole Foods and DietGoal based on DietGoal having filed its Complaint against Whole Foods alleging infringement the patent-in-suit.

129. Whole Foods has been injured and damaged by DietGoal filing its Complaint asserting a patent that Whole Foods does not infringe.

130. Whole Foods therefore seeks a declaration that it has not infringed, and does not infringe, literally or under the doctrine of equivalents, directly or indirectly, and valid and enforceable claim of the patent-in-suit.

131. This is an exceptional case entitling Whole Foods to an award of its attorney's fees incurred in connection with this action pursuant to 35 U.S.C. §285.

SECOND COUNTERCLAIM
(DECLARATORY JUDGMENT OF INVALIDITY)

132. The patent-in-suit is invalid for failing to meet the conditions for patentability as set forth in 35 U.S.C. §§ 100, 101, 102, 103 and 112.

133. An actual controversy exists between Whole Foods and DietGoal based on DietGoal having filed its Complaint against Whole Foods alleging infringement the patent-in-suit.

134. Whole Foods has been injured and damaged by DietGoal filing its Complaint asserting an invalid patent.

135. Whole Foods therefore seeks a declaration that the patent-in-suit are invalid for failing to meet the conditions for patentability as set forth in 35 U.S.C. § 1 *et seq.*

136. This is an exceptional case entitling Whole Foods to an award of its attorney's fees incurred in connection with this action pursuant to 35 U.S.C. §285.

137. Whole Foods continues to investigate this matter and reserves the right to amend its Answer and/or Counterclaims to assert any additional defenses or counterclaims that come to light upon further investigation and discovery.

PRAYER FOR RELIEF

WHEREFORE Whole Foods prays that:

138. the Court dismiss the Complaint against Whole Foods with prejudice;

139. the Court declare that Whole Foods has not infringed and does not infringe U.S. Patent No. 6,585,516;

140. the Court declare that U.S. Patent No. 6,585,516 is invalid;

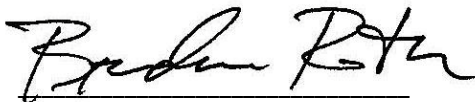
141. the Court declare that DietGoal is not entitled to any remedy or relief whatsoever against Whole Foods;

142. the Court award Whole Foods its costs, together with reasonable attorneys fees and all of its expenses for this suit because this is an exceptional case under 35 U.S.C. §285; and

143. the Court award Whole Foods such other relief as this Court may deem just and proper.

Dated: April 25, 2012

Respectfully submitted,



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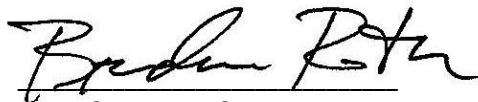
Telephone: (903) 935-1665

Facsimile: (903) 935-1797

**ATTORNEYS FOR DEFENDANT
WHOLE FOODS MARKET, INC.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) this 25th day of April, 2012. Any other counsel of record will be served by facsimile transmission and/or first class mail.



Brendan C. Roth