

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

DIETGOAL INNOVATIONS LLC,

*Plaintiff,*

v.

ARBY'S RESTAURANTS GROUP,  
INC., *et al.*,

*Defendants.*

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

C.A. No. 2:11-cv-00418-MHS-CMC

**JURY TRIAL DEMANDED**

**DIETGOAL INNOVATIONS LLC'S ANSWER TO DEFENDANT  
WHOLE FOODS MARKET, INC.'S COUNTERCLAIMS**

Plaintiff DietGoal Innovations LLC ("DietGoal") hereby answers the Counterclaims of Defendant Whole Foods Market, Inc. ("Whole Foods") filed on April 25, 2012, Dkt. No. 438, by corresponding paragraph number as follows.

**ANSWER TO COUNTERCLAIMS**

Unless otherwise addressed herein with an admission, Plaintiff DietGoal generally denies all allegations in the Counterclaims. Each specific allegation is addressed as follows:

**PARTIES**

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

**ANSWER:** DietGoal does not have knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 122 of the Counterclaims and, therefore, denies the same.

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

**ANSWER:** Admitted.

### **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.

**ANSWER:** DietGoal acknowledges that this Court has subject matter jurisdiction, that a controversy exists between the parties, and that Whole Foods purports to seek a declaration of non-infringement and invalidity, but denies the remaining allegations of Paragraph 124. DietGoal further denies that Whole Foods is entitled to any relief.

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.

**ANSWER:** Admitted.

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.

**ANSWER:** Admitted.

**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.

**ANSWER:** Denied.

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.

**ANSWER:** DietGoal admits that an actual controversy exists between the parties, but denies that Whole Foods is entitled to any relief.

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

**ANSWER:** Denied.

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 [sic] valid and enforceable claim of the patent-in suit.

**ANSWER:** DietGoal admits that Whole Foods purports to seek a declaration of non-infringement, but denies that Whole Foods is entitled to any relief.

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.

**ANSWER:** Denied.

**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.

**ANSWER:** Denied.

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.

**ANSWER:** DietGoal admits that an actual controversy exists between the parties, but denies that Whole Foods is entitled to any relief.

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

**ANSWER:** Denied.

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.*

**ANSWER:** DietGoal admits that Whole Foods purports to seek a declaration of invalidity, but denies that Whole Foods is entitled to any relief.

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.

**ANSWER:** Denied.

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.

**ANSWER:** DietGoal admits that Whole Foods may amend its Answer and/or Counterclaims in this matter, but denies that DietGoal is entitled to any relief herein.

**WHOLE FOODS' PRAYER FOR RELIEF**

With respect to Whole Foods' prayer for relief, DietGoal denies that Whole Foods is entitled to any of the relief sought by its Counterclaims.

**AFFIRMATIVE DEFENSES TO COUNTERCLAIMS**

As affirmative defenses, DietGoal alleges as follows:

1. Whole Foods failed to state a claim upon which relief can be granted with respect to its counterclaims.
2. Whole Foods failed to state facts or a legal basis sufficient to permit recovery of its attorneys' fees or expenses for defending this suit.
3. DietGoal intends to rely upon any other defense that may become available in this case and hereby reserves the right to amend this Answer to assert any such defense.

Dated: May 21, 2012

Respectfully submitted,

**BUETHER JOE & CARPENTER, LLC**

By: /s/ Christopher M. Joe

Christopher M. Joe (Lead Counsel)

State Bar No. 00787770

Chris.Joe@BJCIPLaw.com

Eric W. Buether

State Bar No. 03316880

Eric.Buether@BJCIPLaw.com

Brian A. Carpenter

State Bar No. 03840600

Brian.Carpenter@BJCIPLaw.com

Monica Tavakoli

State Bar No. 24065822

Monica.Tavakoli@BJCIPLaw.com

Mark D. Perantie

State Bar No. 24053647

Mark.Perantie@BJCIPLaw.com

Niky Bukovcan

State Bar No. 24078287

Niky.Bukovcan@BJCIPLaw.com

1700 Pacific Avenue

Suite 4750

Dallas, Texas 75201

Telephone: (214) 466-1272

Facsimile: (214) 635-1828

***ATTORNEYS FOR PLAINTIFF  
DIETGOAL INNOVATIONS LLC***

**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) on this 21<sup>st</sup> day of May 2012. Any other counsel of record will be served by facsimile transmission.

/s/ Christopher M. Joe

Christopher M. Joe