

ESTTA Tracking number: **ESTTA119890**

Filing date: **01/16/2007**

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

Proceeding	91161044
Party	Defendant Rarick, John C. Rarick, John C. 749 Portola Street Suite A SF Presidio, CA 94129
Correspondence Address	Rarick, John C. PEAK HARVEST FOODS, LLC 9079 Allegheny Road Corfu, NY 14036-9765 UNITED STATES jr@peakharvestfoods.com
Submission	Defendant's Notice of Reliance
Filer's Name	John Rarick
Filer's e-mail	jr@peakharvestfoods.com, lawjet@aol.com
Signature	/41jcr44/
Date	01/16/2007
Attachments	AP Notice of Reliance.pdf ( 17 pages )(621600 bytes ) APNR EX-A thru D.pdf ( 5 pages )(236562 bytes ) APNR EX-E thru H.pdf ( 7 pages )(523324 bytes ) APNR EX-I thru L.pdf ( 9 pages )(589624 bytes ) APNR EX-M thru Q.pdf ( 6 pages )(486544 bytes ) APNR EX-R thru U.pdf ( 7 pages )(733237 bytes ) APNR EX-V thru Z.pdf ( 6 pages )(406044 bytes ) APNR EX-AA thru FF.pdf ( 8 pages )(1844776 bytes ) APNR EX-GG thru HH.pdf ( 3 pages )(41353 bytes ) APNR_EX-II_01.pdf ( 1 page )(153172 bytes ) APNR_EX-II_02.pdf ( 1 page )(149474 bytes ) APNR Ex-JJ.pdf ( 2 pages )(27398 bytes ) APNR EX-KK thru MM.pdf ( 8 pages )(747951 bytes ) APNR EX-NN thru OO.pdf ( 15 pages )(1682326 bytes ) APNREX-PP-SS.pdf ( 7 pages )(1005254 bytes ) APNR EX-TT thru ZZ.pdf ( 8 pages )(1041005 bytes ) APNR EX-AAA thru CCC.pdf ( 6 pages )(643040 bytes ) APNR EX-DDD thru EEE.pdf ( 10 pages )(525117 bytes ) APNR EX-FFF thru III.pdf ( 8 pages )(987944 bytes ) APNR EX-JJJ thru NNN.pdf ( 9 pages )(1286844 bytes )

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

In the Matter of Application Serial No.78/287067 for the Mark "QUALITY YOU CAN CRUNCH" Published in the Official Gazette of June 1, 2004

IN-N-OUT BURGERS,	)	OPPOSITION NUMBER: 91161044
Opposer,	)	SERIAL NUMBER: 78287067
-vs-	)	
	)	January 16, 2007
John C. Rarick, Applicant with	)	
PEAK HARVEST FOODS, LLC by	)	
assignment	)	
Applicant.	)	
_____	)	

**APPLICANT'S FIRST NOTICE OF RELIANCE**

To the Trademark Trial and Appeal Board:

Applicant submits the herein FIRST NOTICE OF RELIANCE in the above-captioned matter in accordance with 37 CFR §2.122 (e), further relying among other trademark rules; §2.120 (5), §2.120 (j), §2.122 (d)(2), or the Board's inherent authority on behalf of the Applicant John C. Rarick with Peak Harvest Foods, LLC by assignment.

Applicant understands the voluminous nature of the record and the fact that the examining attorney Andrew P. Baxley replaced Peter Cataldo. Therefore, Applicant provides the following notices of reliance and copies of pages in the record enumerated in APNR EX-A (copy of TTABVUE document listing) a.k.a. Opposition No. 91161044 with In-n-Out as "Opposer"/Plaintiff and John C. Rarick/Peak Harvest Foods, LLC as "Defendent" a.k.a Applicant to support its Affirmative Defenses accepted by the Board (TTABVUE Doc No. 5).

Whereby, Applicant requests that the TTAB take judicial notice of the items contained herein in the context of the cited trademark rules and decided and affirmed court decisions with respective judicial references and notations herein recorded.

### Record Item Requiring No Action

The file of Application Serial No. 78/287,067—(a) Approved for publication on the Principal Register 2004-03-13 by the Examining Attorney. (b) Applicant's use dates back to at least April 13, 2003; and (c) Applicant's Mark is unique to the Applicant's goods and goods that would be reasonably bridged.

Furthermore, Applicant's Mark QUALITY YOU CAN CRUNCH has not heretofore been seen or used in commerce with respect to other products of a similar nature and when used in conjunction with Applicant's existing registered trademarks (PEAK HARVEST FOODS ® and CRUNCHY APPLE STIX ®); forms a uniqueness that is unparalleled in the classes of Applicant's goods and classes easily bridged by Applicant.

The Applicant's Notices are made in conjunction with the Testimonies of Ed Lilly and John C. Rarick, both properly noticed and accepted by the Board (APNR EX-A). Once there is resolution to the present proceeding and given the Applicant's background and access to financial, marketing, and other resources requisite for an international specialty foods company, the Applicant will redirect its resources (heretofore directed to the present opposition) to finalize packaging, expand production, sales, marketing, and R&D of specialty foods. Applicant can then create and execute investment-grade documents to attract the appropriate capital and resources requisite for companies similar in nature to the potential of Applicant.

### Preamble and General Notations for the attached notices

The documents are herein provided as a guide to the notices the Applicant would use in case of an oral hearing for which the Applicant may provide notice for the same. In any event, various courts of the United States have put forth various opinions and guidance for the prosecution of proceedings similar in nature to the

present, upon which the Applicant relies in providing the documents contained herein and promulgated under its Board-Accepted Affirmative Defenses.

Based upon *Humble Oil & Refining Company v. Standard Oil Company*, 229 F. Supp 586, 141 USPQ 153 (S.D. Miss 1964), reversed 363 F.2d 945, 150 USPQ 312 (5<sup>th</sup> Cir. 1996), the Applicant provides supporting documentation that will corroborate its claims, but does not have the financial and other resources to provide exhaustive documentation that would merely state the same or similar information that would have the same or similar effect; i.e. fame, marketplace or corporate similarity.

On a similar note, with respect to marketplace, courts have generally provided that purchases of merchandise are not made in a vacuum and consider the point-of-sale to have significant import in the analysis of similar or exact portions of subject trademarks especially since in the present case the similar portion is linguistically meaningless to an ordinary person. { A) *Ye Olde Tavern Cheese Products, Inc v. Planters Peanuts Division, Standard Brands Incorporated*, 261 Supp. 203 151 USPQ 244 (N.D. Ill 1966), affirmed, 394 F.2d 833, 155 USPQ 481 (7<sup>th</sup> Cir. 1967), B) *Quaker Oats Co. V. General Mills Inc.*, 134 F 2d 429, 432, 56 USPQ 400, 435 (7<sup>th</sup> Cir. 1943), and C) *Camacho Cigars, Inc v. Compania Insular Tabacalera, S.A.* 171 USPQ 673 (D.D.C. 1971). }

Because the Opposer has only partly supplied Applicant's Answers to the Opposer's Interrogatories, the Applicant enters additional answers (allowed under Trademark rule §2.120 (5)) so as to not make the Opposer-provided information misleading (as in the case of APNR EX-S). Applicant describes the use of the Exhibits under the "fairness" doctrine of the same rule. Lastly, Applicant respectfully asks the Board to use its inherent authority to accept these evidentiary

items and consider the applicability of the evidentiary item attached hereto to the legal factors of proceedings of a similar nature.

The above-mentioned notices for evidentiary consideration are:

**Evidentiary Items**

APNR EX-A TTAB VUE Document reference list/title page for Opposition No. 91161044 as of printed date thereon 1/15/2007.

APNR EX-B TTAB VUE Document No. 10. Board order requesting parties to “refrain from including exhibits” already part of the record as set forth in APNR EX-A.

APNR EX-C Applicant’s Board-accepted Affirmative Defenses (cover page only only; full text is TTAB VUE Document 5), please note APNR EX-B.

APNR EX-D TTABVUE Doc No. 9 provides Applicant’s statement of Executive and managerial responsibilities as well as constant travel schedule and presence in and around the greater Corfu, NY area, since at least June 21, 2004.

APNR EX-E Nevada State Secretary of State declaration for Peak Harvest Foods, LLC as legally chartered Limited Liability Company accompanied by evidence of Applicant’s participation in commerce with all previously provided material, products etc. as of at least 11/14/2003.

APNR EX-F U.S. Trademark Registration 3,156,007 registered October 17, 2006 for PEAK HARVEST FOODS®, with all requisite rights contained in said registration with continuous use since at least the dates contained therein. Opposer has a service mark that is clearly distinguishable from Applicant’s Trademark for a product. No

renewal dates have yet been necessary. Opposer did not oppose ~~M~~ark. Applicant has used its mark with no confusion with Opposer's ~~M~~arks since at least 11-1-2002.

APNR EX-G U.S. Trademark Registration 2,857,102 registered June 22, 2004 for CRUNCHY APPLE STIX ® with all requisite rights contained in said registration with continuous use since at least since 11-9-2002. Applicant has used its mark with no confusion with Opposer's marks since said time. A product is very easily distinguished from a service, despite the linguistically meaningless portions of the marks in questions being similar (see Camacho Cigars, Inc... cited in the preamble). No renewal periods yet required.

APNR EX-H Assignment of interest from John C. Rarick to Peak Harvest Foods, LLC, reel/frame 002853/0001 on 10/27/2003 for application No. 78287067.

APNR EX-I Board order reminding parties of their duty to supplement discovery responses, even in the absence of a motion to compel or by stating objections to interrogatories. A party may be precluded from adducing testimony or its rebuttal if it has not so complied.

APNR EX-J J1—Email from John Rarick to Edward Ansell providing information on the continuation of John C. Rarick's Testimony from the previous day. The email was sent during normal business hours at 8:43 a.m. Pacific Standard Time. J2A—Email from John Rarick to Edward Ansell, correcting date from 2009 to 2007. J2B— Email (contained in J2 above and also contains AP NR J2B) from Mr. Ansell on Tuesday January 09, 2007, the day after the start of John Rarick's

Testimony. It appears that the Opposer thought that the Testimonies of Ed Lilly and John Rarick were on the same day. So Opposer was not present for, nor made itself available for the Testimony of John Rarick and cannot now claim that Applicant prevented the Opposer from attending. Mr. Ansell admits that he has been authorized by the Board to "attend the depositions by telephone". The Board did not grant videoconferencing or other visual-telecommunication attendance. Failure to attend a deposition under 37 CFR §2.123 (e) deems all exhibits in John Rarick's testimony to have already been offered into evidence.

APNR EX-K Opposer's FIRST NOTICE OF RELIANCE TTABVUE Document No. 25 dated 6/02/2005 alleging the ordinary usage of "tomato" is as a "fruit" contrary to Supreme Court rulings. (See next).

APNR EX-L US Supreme Court — Nix v. Hedden, 149 U.S. 304 (1893) 149 U.S. 304 in which Supreme Court ruled that the ordinary usage of tomato is as a VEGETABLE and not a fruit as claimed by Opposer (see page L2).

APNR EX-M Selected page from Opposer's FIRST NOTICE OF RELIANCE TTABVUE Document No. 25 dated 6/02/2005 and served upon Applicant on May 27, 2005, alleging connection of hamburgers with fruit products in general and those of McDonald's in particular, consistent with the Testimony of Mr. Wensinger that opposer's products are similar to those of McDonald's (see next EX-N).

APNR EX-N Copy of page of Mr. Wensinger's Testimony stating the similarity of In-N-Out's products of hamburgers and cheeseburgers with those of McDonald's,

APNR EX-O A copy of Opposer's NR Exhibit No 12. There is no mention of Applicant's goods, i.e., Organic Crunchy Apple Stix ® or similar products i.e. dried fruits, fruit chips, low-moisture fruit chips in Opposer's exhibit.

APNR EX-P Selected page from Opposer's FIRST NOTICE OF RELIANCE TTABVUE Document No. 25 dated 6/02/2005 and served upon Applicant on May 27, 2005, alleging proximity of the parties' establishments.

APNR EX-Q Refutes Opposer's claim of proximity using Opposer's own criteria. Yahoo map verifying Corfu, NY address showing the distance between the parties' establishments is approximately 2,454.4 miles. As corroborated with the Testimony of Ed Lilly, hardly a distance an ordinary person would drive for the Opposer's products when similar products are available in and around the greater Corfu, NY area.

APNR EX-R Selected pages of Opposer's FIRST NOTICE OF RELIANCE TTABVUE Document No 25.

APNR EX-S Copy of Opposer's NR EXHIBIT NO. 16 (S-1) & 17(S-2) showing the Applicant's answers to be exactly opposite of Opposer's own Exhibits again contradicting Opposer's own exhibits.

Item	Opposer's claim	Applicant's REAL Response
------	-----------------	---------------------------



Item	Opposer's claim	Applicant's Real Response
S1—AP's response to Opposer's Interrogatory No. 14	Admit	<u>Partially</u> Admit
S2—AP's response to Opposer's Interrogatory No. 15	Admit	Applicant <u>Denies</u>

APNR EX-T Opposer's response to Applicant's request for documents, i.e. "surveys" in which Opposer claims: "No documents or things responding to Request No. 8 were found".

APNR EX-U Copy of a portion from Opposer's NR EXHIBIT 24 discussing a SURVEY that supplies a source for Opposer's alleged fame in apparent contradiction to Opposer's previous answers to Applicant's Request No. 8 (APNR EX-T).

APNR EX-V Invoice for automatic renewal of PEAKHARVESTFOODS.COM web site with PHF's home page (V2) at godaddy.com for the internet channel. Cannot be updated until completion of present proceeding to complete ©, ®, and funding for web-site funding.

APNR EX-W Invoice from Opposer (EX-10-4 of supplemental responses) in response to Applicant's Interrogatories. The Opposer has stopped the payment of its web maintenance contract since 7/29/2005 showing that the Opposer no longer uses and has abandoned the web channel or internet for its Marks. *see also* APNR EX-I.

APNR EX-X Opposer supplied Exhibit EX-2-1 in response to Applicant's Interrogatories and Request for Documents and Things. Shows URL in lower left corner of the subject page.

APNR EX-Y Google Search page (using browser FireFox) for URL contained in AP NR EX-X showing that there are no matching documents

corroborating APNR EX-W and Applicant's claim of Opposer's abandonment of the internet channel, even if Opposer could send its services or hamburgers through the internet.

APNR EX-Z "Internet Explorer HTTP 404 Not Found" error page confirming APNR EX- W, -X, and -Y and Applicant's claim that Opposer has abandoned its Mark on, through or by the internet channel.

APNR EX-AA Copy of Page of Testimony of Mr. Wensinger claiming that Applicant did not provide Board-ordered Supplemental responses.

APNR EX-BB Opposer's MOTION TO PROVIDE COMPLETE RESPONSE, contradicting Opposer's own position in EX-AA above.

APNR EX-CC Board Order establishing Opposer's contradictory statements (EX-AA and EX-BB) and denying Opposer's MOTION TO PROVIDE COMPLETE RESPONSES.

APNR EX-DD Cover page to Applicant's Supplemental Responses with Copy of Certificate of Mailing from Tulsa, Oklahoma. As with other dates the Opposer seems to have missed that June has 30 days. Applicant complied with the subject Board Order contradicting claim promulgated by Opposer.

APNR EX-EE B&W Photo of box and packaging sent with APNR EX-DD supporting prices given to Opposer showing Applicant's packaging flexibility for its various fulfillment sizes.

APNR EX-FF Representative poly-fill packaging corroborating Ed Lilly's Testimony. Very similar to EL-7 of Mr. Lilly's Testimony. Similar in nature to fulfillment possibilities with APNR EX-EE.

APNR EX-GG Copy of envelope in which Applicant received the transcript of Mr. Wensinger (TTAB VUE Document No. 34 dated 5/19/2006) served August 26, 2005 along with Certificate of Service (GG-2).

APNR EX-HH Copy of page 67/176 of TTABVUE Document No 34, "Transcript Errata Sheet". This page is not part of the "true and exact" copy sent to Applicant by Opposer on May 26, 2005. Applicant's original Copy can be brought into the oral hearing when and if scheduled. The present discrepancy leads the Applicant to form the belief that the copy of the Testimony of Arnold Wensinger taken July 29, 2005 that Applicant received may not have been a "true and correct copy" of the transcript submitted to the Board by the Opposer and so certified by Mr. Ansell in APNR EX-GG.

APNR EX-II Exhibits showing the differences in the marketplaces between the parties' goods, services and products. As per Supreme Court rulings, the point of purchase is a very important consideration and the marketplace for Opposer's services (II-1) do not show or contain Applicant's goods and vice versa (Applicant's marketplace II-2); thereby alleviating any actual, potential or likely confusion.

APNR EX-JJ Email from Soldiers' Angels expressing need for and connection with Soldiers desiring vegetarian products or lifestyle based food purchases. Opposer could not participate in the same action as it does not have restaurants in Iraq, nor would it send its hamburgers to the troops. Product and market differentiation along with logistical opportunities unavailable to Opposer.

APNR EX-KK Documents pertaining to compromised International business opportunities for products similar in nature to Applicant's. Given the nature of this proceeding Applicant has not been able to finalize packaging requisite for international business, thereby diminishing its ability to compete in the marketplace and delay and jeopardize business success. Relates to damages incurred by Applicant (5 pages, including Polish translation).

APNR EX-LL Referencing APNR EX-N in which Opposer describes the similarity of Opposer's hamburgers and cheeseburgers to McDonalds, here Opposer admits by reference that its products are of low quality and comparable to McDonald's.

APNR EX-MM British Broadcasting News service article. "Why fast food makes you get fat" published 10/22/2003. Article describes the prehistoric and genetic nature of human dietary evolution and why fast food in general and cheeseburgers in particular contribute to the overall societal weight gains, obesity and other health problems that parallel the rise in fast food consumption (see APNR EX-NN).

APNR EX-NN Obesity: Responding to the Global Epidemic, Thomas A. Wadden, University of Pennsylvania School of Medicine discussing the "Toxic Environment" of fast foods (NN-3 & 4) (the Opposer's goods and services). The author recommends on page NN-11 to "Prohibit Fast Foods and soft drinks from Schools" in the section titled "Policy as Means for Prevention" (of Obesity in young adults and children): (see APNR EX-MM above). Page NN-12 indicates "obesity is a problem out of control" and the true cost to the healthy-care system

will be enormous. Corroborates the Testimony of John C. Rarick and *Fast Food Nation, the DARK SIDE of the American Meal*, the book provided to Applicant by Opposer as NR Exhibit 24 or APNR EX-U2).

APNR EX-OO Articles: a) Describing man suing Fast Food company and together with the previous exhibits, distinguishes Applicant's healthy, organic goods from Opposer's fatty, salty and generally accepted as unhealthy goods and services; b) "Fat Suit Vs. McDonald's Reinstated". Coupled with Opposer's testimony makes Opposer → *potentially* liable for similar suits.

APNR EX-PP Documents showing Applicant's involvement with schools and the community through public non-profit organizations like Kids First and Hands On, San Francisco both of whom are seeking to include Applicant's products and exclude Opposer's products and services (see also APNR EX-NN).

APNR EX-QQ Emails from Opposer to Applicant showing 1) the Opposer does not have plans "...to change our menu,..." (greatly decreasing the probability that Opposer will bridge the gap between its services and the Applicant's products (QQ-1), 2) it does not offer organic foods, and 3) that Opposer does not link to other web sites (QQ-2).

APNR EX-RR Email from Soldiers' Angels suggesting a 'link' between Applicant [www.peakharvestfoods.com](http://www.peakharvestfoods.com) and [www.soldiersangels.com](http://www.soldiersangels.com). Shows Applicant interact with other companies in a manner that Opposer does not. Based upon Opposer's policy, there can be no confusion between Marks as the Opposer does not allow links to

its site. As stated in the emails, Opposer's stated policy is no-partnership, no-link and non-organic.

APNR EX-SS Page from Opposer supplied information about Opposer's alleged patents. Opposer's alleged patent involves the "toasting" of buns. Nowhere in the document does the patent indicate that it makes the Opposer's services and related goods "Crunch", become "Crunchy", or provide "Crunchiness" or a crunchy product characteristic, the very unique selling point (USP) of Applicant's Crunchy Apple Stix ®.

APNR EX-TT Applicant marketing piece expressing customer presence in "Tahoe" area as well as the ingredients, nutritional content, country of origin and other product characteristics, i.e. no sulfur, preservatives, fat or cholesterol.

APNR EX-UU Opposer-supplied exhibit EX-4-3 showing presence in "Tahoe". Applicant travels route 80 and 50 and forms the belief that said billboard no longer exists. Nonetheless Opposer has provided no substantiated confusion as a result of Applicant's Mark in the vicinity of Opposer's services.

APNR EX-VV Contradiction of Opposer's claim it uses its mark on billboards. The photo demonstrates the apparent abandonment of Opposer's Mark with respect to its billboards according to Applicant's tenth affirmative defense. Applicant has numerous other addresses showing the same.

APNR EX-WW Declaration of Edward O. Ansell dated April 19, 2005 states on page 2

**"This three-day window"** (emphasis added) does not afford Opposer adequate time to prepare its evidence, consult with its witnesses, and make other necessary arrangements..."

APNR EX-WW seems to indicate that the Opposer misleads the Board with its submissions.

APNR EX-XX **Opposer's Notice of taking Testimony with just three-days Board-counted notice in apparent conflict to Opposer's statements that such notice was insufficient for Opposer (APNR EX-WW).**

APNR EX-YY Letter from customer for fame of Applicant, expressing gratitude for low-sugar snacks and the increasing fame under which Applicant sells Crunchy Apple Stix ®. Numerous other documents state the same.

APNR EX-ZZ Attests to the character/fame of Applicant.

APNR EX-AAA Modern litigation anxieties. Wall Street Journal article "Rule of Law", Stephen C. Dillard, dated November 25-26, 2006, the costs court actions have on company performance and the allocation of resources from productive R&D or product line expansion (very similar to the predicament suffered by Applicant due to this proceeding and Opposer's rejection of Applicant's offer to settle).

APNR EX-BBB Photocopy of page of daily planner showing Applicant's calendar log of representative hours spent in preparation for TTAB-submitted documents and the reading of the online laws and rules. Every other motion and cross-motion required similar time, copying, online, mailing and related financial expenses with the

subject events. Applicant realized over 46 hours of opposition related to the July filings.

APNR EX-CCC Chapter Three from consultants handbook. "*Building Blocks for a Successful Natural Foods/Specialty Business—Pricing and Margins*": Documents that show the price premium of Organic foods to conventional foods and the pricing premium enjoyed by Organic foods. Obtained from Consultant Bob Burke (<http://www.ota.com/about/2005investors.html>) and <http://www.bob-burke.com/>

APNR EX-DDD White Castle Fact Sheet along with financial statements contained in White Castle Media Mailing. Provides comparison between quasi-public company (White Castle System, Inc.) and privately held In-N-Out Burgers, supporting Applicant's belief that Opposer has significantly greater financial and legal resources than Applicant

APNR EX-EEE Documents that elucidate Applicant's significant experience with, knowledge of, and likely connection with valuable investment banking contacts and related resources. Corroborates John Rarick's Testimony.

APNR EX-FFF Transcript of Settlement call transcribed by Opposer. The call was between John Rarick and Debbie VanDerWaag on August 13, 2004.

APNR EX-GGG Opposer's Exhibit to January 5, 2007 Motion to Quash showing that Mr. Ansell keeps, studies, analyses and forms conclusions from envelopes mailed to Opposer by Applicant.



APNR EX-HHH Applicant receipts and Certificates of Mailing showing the postmarks that were on Applicant's mailings to Opposer. Combined with APNR EX-GGG shows Opposer aware of Applicant's Travel Schedule established in TTAB VUE Document No. 9.

APNR EX-III Information available online from Seneca Foods Corporation, a publicly traded corporation, describing its products, apple chips, ingredients and nutritional information. Expresses similarity to Applicant's products except that Seneca chips are fried in oil a negative selling point for this competing product providing 7 grams of fat versus Applicant's legal absence of fat. Seneca uses "crispy" to describe its fresh apples, **not** "Crunchy" as Opposer contends.

APNR EX-JJJ Pages from Seneca Foods Corporation Form 10-k for the year-ending March 31, 2004, available from the US Securities and Exchange Commission online through EDGAR ([www.sec.gov](http://www.sec.gov)) at the URL listed on the exhibit. Shows decline in fruit chip sales due to the fact that they are fried in oil. Sales go down from \$19,982,000 in 2002 to \$15,347,000 in 2004. Expresses Applicant's missed opportunity due to this proceeding and its inability to move forward with color packaging.

APNR EX-KKK Pages from Seneca Foods Corporation Form 10-K for the year ending March 31, 2006, available from the Securities and Exchange Commission online through EDGAR ([www.sec.gov](http://www.sec.gov))

the URL listed on the exhibit. Shows ongoing decline in fruit chip sales despite the accounting restatements therein.

APNR EX-LLL Financial model consistent with the Testimony of John Rarick demonstrating Applicant's lost opportunity due to this proceeding. Shows financial statements consistent with generally accepted investment banking terms, criteria, calculations and assumptions along with precedent arrows to demonstrate said calculations.

APNR EX-MMM Certificate of Mailing showing Applicant's presence in Corfu, NY on January 8<sup>th</sup>, 2007.n

APNR EX-NNN Photo of Opposer's roadway sign showing similarity to other fast food establishments. Also shows a regional fast-food restaurant, *Rally's* using Opposer's registered words Double in association with hamburgers and cheeseburgers in apparent infringement of Opposer's *Mark, Double Double.*

Respectfully submitted,

/s/

  
John Rarick, Executive Manager

Peak Harvest Foods, LLC  
Applicant


January 16, 2007 ✓

**CERTIFICATE OF SERVICE—IN-N-OUT BURGER V. PEAK HARVEST FOODS, LLC—OPPOSITION NUMBER 91161044.** I HEREBY CERTIFY that on this 16<sup>th</sup> day of January 2007, I caused to be served By the US Postal Service, postage prepaid

**APPLICANT'S FIRST NOTICE OF RELIANCE**

to: EDWARD O. ANSELL, ESQ. Attorney for Opposer  
427 NORTH YALE AVENUE SUITE 204 CLAREMONT, CALIFORNIA 91711-4340

John Rarick





Search: \_\_\_\_\_

### Opposition

**Number:** 91161044

**Filing Date:** 06/21/2004

**Status:** Pending

**Status Date:** 06/24/2004

**Interlocutory Attorney:** ANDREW P BAXLEY

#### Defendant

**Name:** Rarick, John C.

**Correspondence:** Rarick, John C.  
PEAK HARVEST FOODS, LLC  
9079 Allegheny Road  
Corfu, NY 14036-9765  
jr@peakharvestfoods.com

**APNR EX-A**

**Serial #:** 78287067

**Application Status:** Opposition Pending

**Mark:** QUALITY YOU CAN CRUNCH.

#### Plaintiff

**Name:** IN-N-OUT BURGER

**Correspondence:** EDWARD O. ANSELL  
427 N. YALE AVE, # 204  
CLAREMONT, CA 91711-4340

**Serial #:** 73095009

**Registration #:** 1090096

**Application Status:** Renewed

**Mark:** QUALITY YOU CAN TASTE

#### Prosecution History

#	Date	History Text	Due Date
48	01/08/2007	<u>D'S REQUEST FOR RECON DENIED/TRIAL DATES REMAIN AS SET</u>	
47	01/08/2007	<u>DEF'S REQUEST FOR RECONSIDERATION</u>	
46	01/05/2007	<u>MOTS TO STRIKE DENIED/D MOT DISMISS DENIED/D EXT OF TIME GRANTED/P'S MOT TO QUASH DENIED</u>	
45	01/05/2007	<u>P'S MOTION TO QUASH</u>	
44	12/27/2006	<u>DEFENDANT'S NOTICE OF TAKING TESTIMONY</u>	
43	12/14/2006	<u>DEFENDANT'S NOTICE OF TAKING TESTIMONY</u>	
42	12/14/2006	<u>D'S MOTION TO STRIKE</u>	
41	09/27/2006	<u>D'S MOT FOR PARTIAL RECON DENIED; P'S MOT TO COMPEL DENIED; T.D. RESET</u>	
40	06/19/2006	<u>PAPER RECEIVED AT TTAB</u>	
39	06/07/2006	<u>APPL'S CORRECTION</u>	
38	06/06/2006	<u>APPL'S OPP TO OPP'S CROSS MOTION</u>	
37	05/31/2006	<u>SUSPENDED</u>	
36	05/30/2006	<u>PAPER RECEIVED AT TTAB</u>	
35	05/15/2006	<u>APPL'S MOTION FOR RECONSIDERATION</u>	
34	05/19/2006	<u>OPP'S FILING OF CERT TRANSCRIPT AND EXH</u>	
33	04/27/2006	<u>CHANGE OF CORRESPONDENCE ADDRESS</u>	
32	04/18/2006	<u>OPPOSER'S MOTION IS GRANTED SOLELY TO EXTEND TRIAL DATES ARE RESET</u>	

A<sub>1</sub>

**Prosecution History**

#	Date	History Text	Due Date
31	08/03/2005	<u>D'S COMMUNICATION</u>	
30	07/30/2005	<u>DEFENDANT'S MOTION</u>	
29	08/04/2005	<u>SUSPENDED PENDING DISP OF OUTSTNDNG MOT</u>	
28	07/07/2005	<u>P'S MOTION TO DISMISS</u>	
27	06/28/2005	<u>TRIAL DATES RESET</u>	
26	06/11/2005	<u>SUSPENDED PENDING DISP OF OUTSTNDNG MOT</u>	
25	06/02/2005	<u>PLAINTIFF'S NOTICE OF RELIANCE</u>	
24	06/06/2005	<u>D'S REPLY IN SUPPORT OF MOTION</u>	
23	05/13/2005	<u>D'S MOTION TO COMPEL DISCOVERY</u>	
22	05/19/2005	<u>P'S MOTION FOR AN EXTENSION OF TIME</u>	
21	05/11/2005	<u>OPPOSITION TO D'S MOTION TO COMPEL OF APRIL 28, 2005</u>	
20	05/16/2005	<u>D'S OPPOSITION/RESPONSE TO MOTION</u>	
19	04/28/2005	<u>D'S MOTION TO COMPEL DISCOVERY</u>	
18	04/20/2005	<u>P'S MOT TO COMPEL FURTHER RESP TO P'S SEC SET OF INTERROGATORIES TO D'S &amp; REQUEST FOR PRODUCTION OF</u>	
17	04/19/2005	<u>D'S INTERROGATORIES; REQ FOR PRODUCTION OF DOCUMENTS &amp; THINGS &amp; REQ FOR ADMISSIONS</u>	
16	03/28/2005	<u>OTHER FILING</u>	
15	03/31/2005	<u>#14 GRANTED; TD REMAIN AS SET</u>	
14	02/25/2005	<u>P'S MOTION FOR AN EXTENSION OF TIME</u>	
13	01/03/2005	<u>DFS RESPONSE</u>	
12	12/09/2004	<u>EXHIBIT TO 011</u>	
11	12/09/2004	<u>D'S RESPONSE TO 010</u>	
10	11/24/2004	<u>PLS MOT FOR DISC WILL BE GIVEN NO CONSIDERATION, MOT TO STRIKE DENIED, PARTIES ALLOWED 30 DAYS, TDR</u>	
9	11/08/2004	<u>DF'S RE: COMMUNICATION</u>	
8	10/06/2004	<u>SUSPENDED PENDING DISP OF OUTSTNDNG MOT</u>	
7	09/22/2004	<u>PLS MOTION TO STRIKE</u>	
6	09/22/2004	<u>PLS MOT FOR JUDGMENT</u>	
5	08/30/2004	<u>ANSWER</u>	
4	08/30/2004	<u>PLS RE: COMMUNICATION</u>	
3	06/24/2004	<u>PENDING, INSTITUTED</u>	
2	06/24/2004	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	08/03/2004
1	06/21/2004	<u>FILED AND FEE</u>	

Search:

A<sub>2</sub>

from striking its defenses, the sufficiency of which should be determined on their merits.

Accordingly, opposer's motion to strike is denied.

Parties Advised Regarding Exhibits to Motions

It is noted that opposer has enclosed as exhibits to the above motions copies of the parties' pleadings and motions previously filed herein, as well as orders previously issued by the Board in this case. The Board understands the necessity on the part of the parties to refer to these papers in their motions and responses. However, by their very nature, the pleadings and motions previously filed by the parties as well as orders issued by the Board herein already form part of the case file for this proceeding. As such, their inclusion as exhibits to the parties' motions and other filings is at best duplicative, and the parties are requested to refrain from including such exhibits with future filings in this case.<sup>2</sup>

Information for Applicant

It is noted that applicant intends to represent itself in this proceeding. While Patent and Trademark Rule 10.14

---

<sup>2</sup> The parties are further advised that the evidence submitted in connection with a motion is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); and *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

**APNR EX-C**

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

In the Matter of Application Serial No.78/287067 for the Mark "QUALITY YOU CAN CRUNCH" Published in the Official Gazette of June 1, 2004

IN-N-OUT BURGERS,	)	OPPOSITION NUMBER: 91161044
	)	SERIAL NUMBER: 78287067
Opposer,	)	
	)	06-21-2004
vs-	)	
	)	
PEAK HARVEST FOODS, LLC,	)	APPLICANT'S ANSWER TO) OPPOSER'S
	)	NOTICE OF OPPOSITION
Applicant.	)	
	)	

Now comes the Applicant, Peak Harvest Foods, LLC, in answer to the Opposer's Notice of Opposition, admits, denies and alleges as follows:

- (1) This answering Applicant admits the allegations contained in paragraph 8 of the Opposer's Notice of Opposition.
- (2) This answering Applicant lacks sufficient information, knowledge and/or belief to either admit or deny the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the Opposer's Notice of Opposition and based upon such lack of information, knowledge and/or belief this answering Applicant denies generally and specifically each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the Opposer's Notice of Opposition.
- (3) This answering Applicant denies generally and specifically each and every allegation contained in paragraphs 9 and 10 of the Opposer's Notice of Opposition.

**FIRST AFFIRMATIVE DEFENSE**

- (4) The Opposer's Notice of Opposition fails to set forth facts sufficient to state a claim upon which relief may be granted.

///



08-30-2004

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

In the Matter of Application Serial No.78/287067 for the Mark "QUALITY YOU CAN CRUNCH" Published in the Official Gazette of June 1, 2004

IN-N-OUT BURGERS, )  
 )  
 Opposer, )  
 )  
 vs- )  
 )  
 PEAK HARVEST FOODS, LLC, )  
 Applicant. )  
 \_\_\_\_\_ )

OPPOSITION NUMBER: 91161044  
SERIAL NUMBER: 78287067

APNR EX-D

Peter Cataldo  
U.S. Department of Commerce  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Dr.  
Arlington, VA 22202-3513

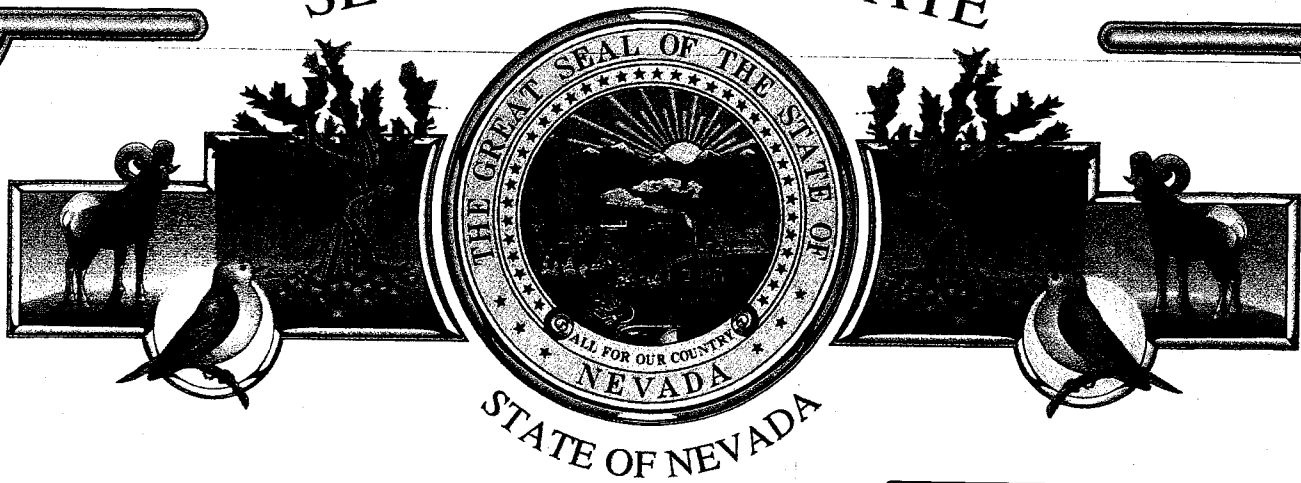
APPLICANT'S RESPONSE TO USPTO LETTER DATED 10/6/2004

Dear Mr. Cataldo:

I, John Rarick, am the executive manager of Peak Harvest Foods, LLC ("PHF"). PHF is a start-up company operating in the very competitive specialty food industry. I am a single person conducting the activities of at least eight (8) persons. In addition to my executive duties, I am also the production manager, the packaging manager, the sales manager, the marketing manager, the fulfillment manager, the financial manager, the demo manager, the business development manager, and now with the Opposition the *pro per* legal manager. During the month of July, August and September, I spent approximately 90% of my time on the road between (among other places) Lake Tahoe, NV; Sacramento, CA; San Francisco, CA; Santa Cruz, CA; Los Angeles, CA; San Diego, CA; Columbus, OH; Buffalo, NY; and Lyndonville NY. In fact, during the month of September, I was only "home" for three (3) days and will start another business trip 10/30/04. PHF has limited financial and legal resources



# SECRETARY OF STATE



APNR EX-E

## LIMITED-LIABILITY COMPANY CHARTER

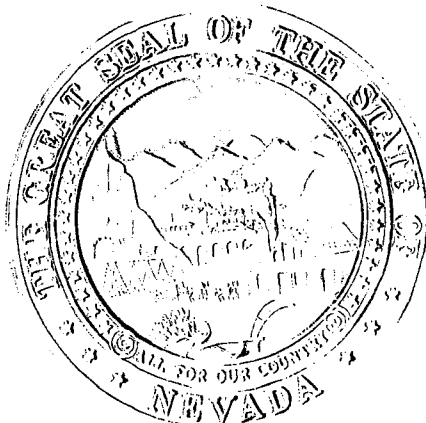
I, DEAN HELLER, the Nevada Secretary of State, do hereby certify that **PEAK HARVEST FOODS, LLC** did on **August 1, 2003**, file in this office the Articles of Organization for a Limited-Liability Company, that said Articles are now on file and of record in the office of the Nevada Secretary of State, and further, that said Articles contain the provisions required by the laws governing Limited-Liability Companies in the State of Nevada.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State, at my office in Carson City, Nevada, on **August 1, 2003**.

DEAN HELLER  
Secretary of State

By

Certification Clerk



E<sub>1</sub>





**CONFIDENTIAL**  
Kaley Bowl  
2020 Oregon  
(510) 843-6929  
Berkeley, CA 94703

Card #4

UNION BANK OF CALIFORNIA  
East Bay Commercial Bank Office  
1800 Harrison Street Oakland, CA 94612

51466

11-49/1210

DATE

11/14/2003

AMOUNT

\$89.55

PAY  
TO THE  
ORDER  
OF

Eighty Nine Dollars And 55 Cents

PEAK HARVEST FOODS  
1285 BARING BLVD.  
SUITE 166  
SPARKS NV 89434

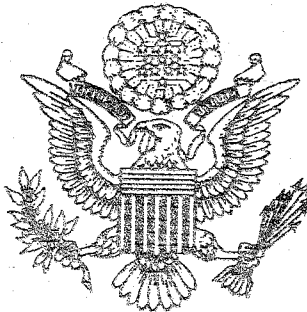
*Jayne Oshus*  
SAFEGUARD SAFEGUARD

THIS DOCUMENT CONTAINS HEAT SENSITIVE INK. TOUCH OR PRESS HERE - RED IMAGE DISAPPEARS WITH HEAT.

⑈051466⑈ ⑆121000497⑆ 4300003368⑈

Ex-E2

# The United States of America



## CERTIFICATE OF REGISTRATION PRINCIPAL REGISTER

*The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.*

*The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.*

*A copy of the Mark and pertinent data from the application are part of this certificate.*

*To avoid CANCELLATION of the registration, the owner of the registration must submit a declaration of continued use or excusable non-use between the fifth and sixth years after the registration date. (See next page for more information.) Assuming such a declaration is properly filed, the registration will remain in force for ten (10) years, unless terminated by an order of the Commissioner for Trademarks or a federal court. (See next page for information on maintenance requirements for successive ten-year periods.)*



*Jon W. Dudas*

Fi

Int. Cl.: 29

Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 3,156,007  
Registered Oct. 17, 2006

TRADEMARK  
PRINCIPAL REGISTER

PEAK HARVEST  
FOODS

RARICK, JOHN C. (UNITED STATES INDIVIDUAL)  
1285 BARING BLVD  
SUITE 166  
SPARKS, NV 89434

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FOODS", APART FROM THE MARK AS SHOWN.

FOR: DRIED AND COOKED FRUITS AND VEGETABLES; JELLIES, JAMS, FRUIT SAUCES AND MARINADES, IN CLASS 29 (U.S. CL. 46).

SER. NO. 78-287,115, FILED 8-13-2003.

FIRST USE 11-1-2002; IN COMMERCE 4-1-2003.

SHARI SHEFFIELD, EXAMINING ATTORNEY

1/2

# The United States of America



APNR EX-G

## CERTIFICATE OF REGISTRATION SUPPLEMENTAL REGISTER

*The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.*

*The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.*

*A copy of the Mark and pertinent data from the application are part of this certificate.*

*This registration shall remain in force for TEN (10) years, unless terminated earlier as provided by law, and subject to compliance with the provisions of Section 8 of the Trademark Act of 1946, as Amended.*



*Jon W. I. Dudas*

G1

Acting Director of the United States Patent and Trademark Office

Int. Cl.: 29

Prior U.S. Cl.: 46

**United States Patent and Trademark Office**

Reg. No. 2,857,102

Registered June 22, 2004

**TRADEMARK  
SUPPLEMENTAL REGISTER**

Crunchy Apple Stix

RARICK, JOHN C. (UNITED STATES INDIVIDUAL)  
749 PORTOLA STREET SUITE A  
SF PRESIDIO, CA 94129

FOR: DRIED FRUITS, IN CLASS 29 (U.S. CL. 46).

FIRST USE 11-9-2002; IN COMMERCE 4-1-2003.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "APPLE STIX", APART FROM THE MARK AS SHOWN.

SER. NO. 78-287,029, FILED P.R. 8-13-2003; AM. S.R. 2-23-2004.

REBECCA SMITH, EXAMINING ATTORNEY

G2



APNR EX-H

UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

MAY 19, 2004

PTAS



\*102587429A\*

JOHN RARICK  
1285 BARING BOULEVARD, SUITE 166  
SPARKS, NEVADA 89434

UNITED STATES PATENT AND TRADEMARK OFFICE  
NOTICE OF RECORDATION OF ASSIGNMENT DOCUMENT

THE ENCLOSED DOCUMENT HAS BEEN RECORDED BY THE ASSIGNMENT DIVISION OF THE U.S. PATENT AND TRADEMARK OFFICE. A COMPLETE MICROFILM COPY IS AVAILABLE AT THE ASSIGNMENT SEARCH ROOM ON THE REEL AND FRAME NUMBER REFERENCED BELOW.

PLEASE REVIEW ALL INFORMATION CONTAINED ON THIS NOTICE. THE INFORMATION CONTAINED ON THIS RECORDATION NOTICE REFLECTS THE DATA PRESENT IN THE PATENT AND TRADEMARK ASSIGNMENT SYSTEM. IF YOU SHOULD FIND ANY ERRORS OR HAVE QUESTIONS CONCERNING THIS NOTICE, YOU MAY CONTACT THE EMPLOYEE WHOSE NAME APPEARS ON THIS NOTICE AT 703-308-9723. PLEASE SEND REQUEST FOR CORRECTION TO: U.S. PATENT AND TRADEMARK OFFICE, ASSIGNMENT DIVISION, BOX ASSIGNMENTS, CG-4, 1213 JEFFERSON DAVIS HWY, SUITE 320, WASHINGTON, D.C. 20231.

RECORDATION DATE: 10/27/2003

REEL/FRAME: 002853/0001  
NUMBER OF PAGES: 2

BRIEF: ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL.

ASSIGNOR:

RARICK, JOHN C.

DOC DATE: 10/15/2003  
CITIZENSHIP: UNITED STATES  
ENTITY: INDIVIDUAL

ASSIGNEE:

PEAK HARVEST FOODS, LLC  
1285 BARING BOULEVARD, SUITE 166  
SPARKS, NEVADA 89434

CITIZENSHIP: NEVADA  
ENTITY: LIMITED LIABILITY

APPLICATION NUMBER: 78287067  
REGISTRATION NUMBER:

FILING DATE: 08/13/2003  
ISSUE DATE:

MARK: QUALITY YOU CAN CRUNCH.  
DRAWING TYPE: STYLIZED WORDS, LETTERS, OR NUMBERS

Opposition No. 91161044

response thereto. Further, applicant cites to applicable authority that the general objections interposed in the preface of opposer's discovery responses are impermissible or otherwise render deficient opposer's responses to applicant's specific discovery requests. In short, applicant points to no deficiencies in opposer's discovery responses, aside from vague assertions that do not reference specific discovery requests or information improperly withheld from opposer in its responses thereto.

In view of the foregoing, applicant's motion to compel is denied.

#### Discovery Reminders

The parties are reminded of their duty to supplement discovery responses in proceedings before the Board in accordance with Fed. R. Civ. P. 26(e)(2). See Trademark Rule 2.116(a). Under that rule, a party which has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired under the particular circumstances specified in paragraph (e)(2).

The parties are cautioned that if proper discoverable matter is withheld during discovery, the withholding party may be precluded from relying on such information and from adducing testimony with regard thereto during its testimony period. See *Shoe Factory Supplies Co. v. Thermal*

All times Pacific Standard  
\*except as noted, which is local

John Rarick

**From:** John Rarick [jr@peakharvestfoods.com]

**Sent:** Tuesday, January 09, 2007 8:43 AM

**To:** Edward Ansell

**Subject:** RE: Opposition No. 91161044 -- In-N-Out Burgers v. Peak Harvest Foods, LLC joined by assignment with John C. Rarick as party defendant

Normal Business hours

As per the Notice of Taking Testimony that was accepted by the Board, John C Rarick's testimony will continue on Tuesday January 9th, 2009 at 2:00 p.m.\* (which may be altered due to the Court reporters schedule and weather).

as per the same board order, the Testimony of Ed Lilly will take place at its regularly scheduled time.

APNR EX-J

John Rarick  
Executive Manager  
Peak Harvest Foods, LLC  
www.peakharvestfoods.com  
415.606.1689

**IMPORTANT NOTICE:** This message and any attachments are solely for the intended recipient and may contain confidential information which is, or may be, legally privileged or otherwise protected by law from further disclosure. If you are not the intended recipient, any disclosure, copying, use, or distribution of the information included in this e-mail and any attachments is prohibited. If you have received this communication in error, please notify the sender by reply e-mail and immediately and permanently delete this e-mail and any attachments.

-----Original Message-----

**From:** Edward Ansell [mailto:anselaw@verizon.net]

**Sent:** Thursday, January 04, 2007 8:57 PM

**To:** jr@peakharvestfoods.com

**Subject:** Opposition No. 91161044 -- In-N-Out Burgers v. Peak Harvest Foods, LLC joined by assignment with John C. Rarick as party defendant

Dear Mr. Rarick:

Your attention is directed to the attached Motion to Quash etc.

Edward O. Ansell

J1



John Rarick

All times Pacific Standard

From: Edward Ansell [anselaw@verizon.net]

(Normal Business Hours)

Sent: Tuesday, January 09, 2007 12:17 PM

(except as noted), local time.

To: jr@peakharvestfoods.com

Subject: Re: FW: Opposition No. 91161044 -- In-N-Out Burgers v. Peak Harvest Foods, LLC joined by assignment with John C. Rarick as party defendant

I have been authorized by the previous TTAB to orders attend the depositions by telephone. My telephone number is 909-625-1244.

Edward O. Ansell

John Rarick <jr@peakharvestfoods.com> wrote:

well 2007, a bit ahead of myself

and the testimony will continue at 2:00 pm

John Rarick

Executive Manager

Peak Harvest Foods, LLC

www.peakharvestfoods.com

415.606.1689

J2 A+B  
w/ J1

IMPORTANT NOTICE: This message and any attachments are solely for the intended recipient and may contain confidential information which is, or may be, legally privileged or otherwise protected by law from further disclosure. If you are not the intended recipient, any disclosure, copying, use, or distribution of the information included in this e-mail and any attachments is prohibited. If you have received this communication in error, please notify the sender by reply e-mail and immediately and permanently delete this e-mail and any attachments.

-----Original Message-----

From: John Rarick [mailto:jr@peakharvestfoods.com]

Sent: Tuesday, January 09, 2007 8:43 AM

To: Edward Ansell

Subject: RE: Opposition No. 91161044 -- In-N-Out Burgers v. Peak Harvest Foods, LLC joined by assignment with John C. Rarick as party defendant

As per the Notice of Taking Testimony that was accepted by the Board, John C Rarick's testimony will continue on Tuesday January 9th, 2009 at 2:00 p.m. (which may be altered due to the Court reporters schedule and weather).

as per the same board order, the Testimony of Ed Lilly will take place at its regularly scheduled time.

John Rarick

Executive Manager

Peak Harvest Foods, LLC

J2

J2A  
J2B  
APPREX- J1

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

IN THE MATTER OF APPLICATION SERIAL NO. 78/287,067  
FOR THE MARK "QUALITY YOU CAN CRUNCH"  
PUBLISHED IN THE OFFICIAL GAZETTE OF JUNE 1, 2004



IN-N-OUT BURGERS )  
 )  
OPPOSER )  
 )  
v. )  
 )  
PEAK HARVEST FOODS, LLC )  
 )  
APPLICANT )  
\_\_\_\_\_ )

OPPOSITION NO. 91161044

OPPOSER'S FIRST NOTICE OF RELIANCE

To the TTAB:

Opposer submits the herein FIRST NOTICE OF RELIANCE in the above-captioned matter in accordance with 37 CFR § 2.122(e) and requests the TTAB to take judicial notice of the items therein.

Record Item Requiring No Action

The file of Application Serno. 78/287,067 - (a) Applicant's use is presumed to date back to the filing date of August 123, 2003; (b) Applicant's admission that the mark is descriptive.

Evidentiary Items

NR EXHIBIT NO. 1 U.S. Service Mark Registration 1,090,096, registered April 25, 1978, for QUALITY YOU CAN TASTE -- two copies of said registration prepared and issued by the U.S.P.T.O. showing current status and current title. Opposer's use is presumed to date back to the filing date of its application, in the absence of testimony

K  
L

~~establishing earlier use, Opposer's registered mark is presumed in continuous use from its application filing date to the present; the filing date of Opposer's registered mark provides nationwide priority.~~

~~NR EXHIBIT NO. 2 -- U.S. Trademark Registration 2,604,277, registered August 6, 2002 for QUALITY YOU CAN TASTE -- two copies of said registration prepared and issued by the U.S.P.T.O. showing status and current title. Opposer's use is presumed to date back to the filing date of its application, in the absence of testimony establishing earlier use; Opposer's registered mark is presumed in continuous use from its application filing date to the present; the filing date of Opposer's registered mark provides nationwide priority.~~

~~NR EXHIBIT NO. 3 -- U.S. Service Mark Registration 2,634,516, registered October 15, 2002, for QUALITY YOU CAN TASTE -- two copies of said registration prepared and issued by the U.S.P.T.O. showing current status and current title. Opposer's use is presumed to date back to the filing date of its application, in the absence of testimony establishing earlier use; Opposer's registered mark is presumed in continuous use from its application filing date to the present; the filing date of Opposer's registered mark provides nationwide priority.~~

~~NR EXHIBIT NO. 4 -- U.S. Trademark Registration 2,839,491, registered May 1, 2004, for QUALITY YOU CAN TASTE -- two copies of said registration prepared and issued by the U.S.P.T.O. showing current status and current title. Opposer's use is presumed to date back to the filing date of its application, in the absence of testimony establishing earlier use; Opposer's registered mark is presumed in continuous use from its application filing date to the present; the filing date of Opposer's registered mark provides nationwide priority.~~

~~NR EXHIBIT NO. 5 -- Copy of complaint (Notice of Opposition) filed June 21, 2004, accompanying two copies each of Evidentiary Items 1 - 4 *supra*.~~

~~NR EXHIBIT NO. 6 -- Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition, Published 2003, page 1279 -- definition of "taste." Relevant to the similarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.~~

~~NR EXHIBIT NO. 7 -- Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition, Published 2003, page 1315 -- definition of "tomato." Relevant to similarity and nature of~~

the goods described in the application with the goods and services with which Opposer's prior mark is in use, i.e., product relatedness.

~~NR EXHIBIT NO. 8 -- Printout of third party Registration 2,221,669 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry out restaurant services in conjunction with hamburgers and fruit products.~~

~~NR EXHIBIT NO. 9 -- Printout of third party Registration 1,595,503 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of marks for restaurant carry-out food services in conjunction with hamburger and cheeseburger sandwiches and fruit products.~~

~~NR EXHIBIT NO. 10 -- Printout of third party Registration 2,799,292 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry out food services in conjunction with hamburger sandwiches and fruit products.~~

~~NR EXHIBIT NO. 11 -- Nexis printout of Los Angeles Times, June 6, 1987, part 1; page 30; column 1 - "FROM A SINGLE STAND TO AN INTERNATIONAL NETWORK; W. HAMLIN; ORANGE JULIUS CREATOR" - Admissible and probative for what it shows on its face and relevant to similarity of goods, i.e., hamburger sandwiches and fruit products.~~

~~NR EXHIBIT NO. 12 -- Printout of third party Registration 1,308,185 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for hamburgers and cheeseburgers in connection with fruit products.~~

~~NR EXHIBIT NO. 13 -- Nexis printout of The New York Times of February 20, 2005, Section 3; Column 1; Sunday Business; Page 1 "YOU WANT ANY FRUIT WITH THAT BIG MAC?" Admissible and probative for what it shows on its face and relevant to similarity of goods and services, i.e. fruit (apples) and hamburgers.~~

~~NR EXHIBIT NO. 14 -- Reno/Sparks Carson City Street Atlas 2002-2003 edition, published 2002 by Map Link, Santa Barbara, CA 93227, pages 45, 49, 50 and 59. Relevant to establish close geographic proximity between Applicant's establishment and three of Opposer's business establishments, i.e. same geographic market area.~~

# U.S. Supreme Court

APNR EX-L

**NIX v. HEDDEN, 149 U.S. 304 (1893)**

**149 U.S. 304**

**NIX et al.**

**v.**

**HEDDEN, Collector.**

**No. 137.**

**May 10, 1893**

At law. Action by John Nix, John W. Nix, George W. Nix, and Frank W. Nix against Edward L. Hedden, collector of the port of New York, to recover back duties paid under protest. Judgment on verdict directed for defendant. 39 Fed. Rep. 109. Plaintiffs bring error. Affirmed.

Statement by Mr. Justice GRAY: This was an action brought February 4, 1887, against the collector of the port of New York to recover back duties paid under protest on tomatoes imported by the plaintiff from the West Indies in the spring of 1886, which the collector assessed under 'Schedule G.-Provisions,' of the tariff act of March 3, 1883, (chapter 121,) imposing a duty on 'vegetables in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem;' and which the plaintiffs contended came within the clause in the free list of the same act, 'Fruits, green, ripe, or dried, not specially enumerated or provided for in this act.' 22 Stat. 504, 519.

At the trial the plaintiff's counsel, after reading in evidence definitions of the words 'fruit' and 'vegetables' from Webster's Dictionary, Worcester's Dictionary, and the Imperial Dictionary, called two witnesses, who had been for 30 years in the business of selling fruit and vegetables, and asked them, after hearing these definitions, to say whether these words had 'any special meaning in trade or commerce, different from those read.'

One of the witnesses answered as follows: 'Well, it does not classify all things there, but they are correct as far as they go. It does not take all kinds of fruit or vegetables; it takes a portion of them. I think the words 'fruit' and 'vegetable' have the same meaning in trade to-day that they had on March 1, 1883. I understand that the term 'fruit' is applied in trade only to such plants or parts of plants as contain the seeds. There are more vegetables than those in the enumeration given in Webster's Dictionary under the term 'vegetable,' as 'cabbage, cauliflower, turnips, potatoes, peas, beans, and the like,' probably covered by the words 'and the like.'

The other witness testified: 'I don't think the term 'fruit' or the term 'vegetables' had, in March, 1883, and prior thereto, any special meaning in trade and commerce in this country different from that which I have read here from the dictionaries.'

41

The plaintiff's counsel then read in evidence from the same dictionaries the definitions of the word 'tomato.' The defendant's counsel then read in evidence from Webster's Dictionary the definitions of the words 'pea,' 'egg plant,' 'cucumber,' 'squash,' and 'pepper.'

The plaintiff then read in evidence from Webster's and Worcester's dictionaries the definitions of 'potato,' 'turnip,' 'parsnip,' 'cauliflower,' 'cabbage,' 'carrot,' and 'bean.'

No other evidence was offered by either party. The court, upon the defendant's motion, directed a verdict for him, which was returned, and judgment rendered thereon. The plaintiffs duly excepted to the instruction, and sued out this writ of error.

Edwin B. Smith, for plaintiffs in error.

Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question in this case is whether tomatoes, considered as provisions, are to be classed as 'vegetables' or as 'fruit,' within the meaning of the tariff act of 1883.

The only witnesses called at the trial testified that neither 'vegetables' nor 'fruit' had any special meaning in trade or commerce different from that given in the dictionaries, and that they had the same meaning in trade to-day that they had in March, 1883.

The passages cited from the dictionaries define the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the tariff act.

**There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.** Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But **in the common language of the people**, whether sellers or consumers of provisions, **all these are vegetables** which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The attempt to class tomatoes as fruit is not unlike a recent attempt to class beans as seeds, of which Mr. Justice Bradley, speaking for this court, said: 'We do not see why they should be classified as seeds, any more than walnuts should be so classified. Both

are seeds, in the language of botany or natural history, but not in commerce nor in common parlance. On the other hand in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, **they are used as a vegetable**, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced.

Judgment affirmed

the goods described in the application with the goods and services with which Opposer's prior mark is in use, i.e., product relatedness.

NR EXHIBIT NO. 8 -- Printout of third party Registration 2,221,669 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry-out restaurant services in conjunction with hamburgers and fruit products.

NR EXHIBIT NO. 9 -- Printout of third party Registration 1,595,593 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of marks for restaurant carry-out food services in conjunction with hamburger and cheeseburger sandwiches and fruit products.

NR EXHIBIT NO. 10 -- Printout of third party Registration 2,799,292 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry-out food services in conjunction with hamburger sandwiches and fruit products.

NR EXHIBIT NO. 11 -- Nexis printout of *Los Angeles Times*, June 6, 1987, part 1; page 30; column 1 - "FROM A SINGLE STAND TO AN INTERNATIONAL NETWORK; W. HAMLIN; ORANGE JULIUS CREATI  
for what it shows on its face and relevant to similar  
sandwiches and fruit products.

APNR EX-M

NR EXHIBIT NO. 12 -- Printout of third party Registration 1,308,185 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for hamburgers and cheeseburgers in connection with fruit products.

NR EXHIBIT NO. 13 -- Nexis printout of *The New York Times* of February 20, 2005, Section 3; Column 1; Sunday Business; Page 1. "YOU WANT ANY FRUIT WITH THAT BIG MAC?" Admissible and probative for what it shows on its face and relevant to similarity of goods and services, i.e. fruit (apples) and hamburgers.

NR EXHIBIT NO. 14 -- Reno/Sparks Carson City Street Atlas 2002-2003 edition, published 2002 by Map Link, Santa Barbara, CA 93221, pages 45, 49, 50 and 59. Relevant to establish close geographic proximity between Applicant's establishment and three of Opposer's business establishments, i.e. same geographic market area.



APNR EX-N

1 enter Opposer Exhibit No. 12.

2 (The document was marked for  
3 identification and is attached hereto.)

4 Q BY MR. ANSELL: Mr. Wensinger, does McDonald's  
5 have a menu similar to In-N-Out Burgers that is with  
6 respect to hamburgers and cheeseburgers and french fries?

7 A Yes.

8 Q And how do you know?

9 A I've been there.

10 Q Does McDonald's list fruit on the menu?

11 A Yes. They have apple dippers and I think some  
12 type of fruit parfait as well.

13 Q And you know this from personal observance?

14 A Yes, I do.

15 Q Mr. Wensinger, I show you Opposer's Exhibit  
16 No. 13 and ask you to identify it? It's an article from?

17 A This is a New York Times article dated February  
18 20th, 2005 from LexisNexis, entitled, "You Want Any Fruit  
19 With That Big Mac?"

20 Q Thank you.

21 MR. ANSELL: I ask you to enter Opposer's  
22 Exhibit No. 13, this reprint of an article from the New  
23 York Times, February 20th, 2005.

24 (The document was marked for  
25 identification and is attached hereto.)



Trademarks > Trademark Electronic Search System (TESS)

### Trademark Electronic Search System(Tess)

TESS was last updated on Sat Apr 16 03:47:14 EDT 2005

OPPOSITION 91161044  
IN-N-OUT BURGERS v.  
PEAK HARVEST FOODS

- PTO HOME
- TRADEMARK
- TESS HOME
- NEW USER
- STRUCTURED
- FREE FORM
- BROWSE DICT
- BOTTOM
- HELP
- CURR LIST
- NEXT DOC
- PREV DOC
- NEXT DOC
- LAST DOC

**APNR EX-O**

**Logout** Please logout when you are done to release system resources allocated for you.

**Start** List At:  OR **Jump** to record:  **Record 65 out of 74**

**Check Status**

*(TARR contains current status, correspondence address and attorney of record for this mark. Use the "Back" button of the Internet Browser to return to TESS)*



**Word Mark** M MCDONALDS  
**Goods and Services** IC 032. US 045 046. G & S: Carbonated and Non-Carbonated Soft Drinks and Fruit Juices for Consumption On or Off the Premises. FIRST USE: 19681000. FIRST USE IN COMMERCE: 19681000

IC 030. US 046. G & S: HAMBURGER AND CHEESEBURGER SANDWICHES AND SPECIAL COMBINATION SANDWICHES FEATURING **HAMBURGERS** AND CHEESEBURGERS, ROASTBEEF SANDWICHES, HOT CHOCOLATE, PREPARED CATSUP, COOKIES, HOTCAKES, TABLE SYRUP, **FRUIT PIES**, SPECIAL COMBINATION EGG SANDWICHES, ICE TEA, [ SOFT SERVE ICE CREAM OR ICE CREAM SUBSTITUTE, ICE CREAM OR ICE CREAM SUBSTITUTE SUNDAES, ] \* SOFT SERVE ICE MILK, SOFT SERVE ICE MILK SUNDAES, \* DONUTS, PASTRIES, CHICKEN SANDWICHES, PORK SANDWICHES, BISCUITS AND HAM SANDWICHES AND BISCUIT AND SAUSAGE SANDWICHES AND COFFEE FOR CONSUMPTION ON OR OFF THE PREMISES. FIRST USE: 19681000. FIRST USE IN COMMERCE: 19681000

IC 029. US 046. G & S: Chicken, Hashbrown Potatoes, Prepared Eggs \* , MILK, FRESH SALADS AND INGREDIENTS THEREOF \* [ AND MILK ] FOR CONSUMPTION ON OR OFF THE PREMISES. FIRST USE: 19681000. FIRST USE IN COMMERCE: 19681000

**Mark Drawing Code** (5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM

**Serial Number** 73395989

**Filing Date** September 30, 1982

**Current Filing Basis** 1A

**Original Filing**

01

12

**Basis** 1A  
**Published for Opposition** September 25, 1984  
**Change In Registration** CHANGE IN REGISTRATION HAS OCCURRED  
**Registration Number** 1308185  
**Registration Date** December 4, 1984  
**Owner** (REGISTRANT) MCDONALD'S CORPORATION CORPORATION DELAWARE MCDONALD'S PLAZA OAK BROOK ILLINOIS 60521  
**Attorney of Record** JOHN R. HORWITZ  
**Prior Registrations** 0796852;1236868;AND OTHERS  
**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Affidavit Text** SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20050401.  
**Renewal** 1ST RENEWAL 20050401  
**Live/Dead Indicator** LIVE

[PTO HOME](#) [TRADEMARK](#) [TSS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#) [DOC LIST](#) [CURR LIST](#) [NEXT LIST](#)  
[FIRST DOC](#) [PREV DOC](#) [NEXT DOC](#) [LAST DOC](#)

[| HOME](#) [| SITE INDEX](#) [| SEARCH](#) [| @BUSINESS](#) [| HELP](#) [| PRIVACY POLICY](#)

02



the goods described in the application with the goods and services with which Opposer's prior mark is in use, i.e., product relatedness.

NR EXHIBIT NO. 8 -- Printout of third party Registration 2,221,669 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry-out restaurant services in conjunction with hamburgers and fruit products.

NR EXHIBIT NO. 9 -- Printout of third party electronic records of the U.S.P.T.O. automated search system

**APNR EX-P**

marks for restaurant carry-out food services in conjunction with hamburger and cheeseburger sandwiches and fruit products.

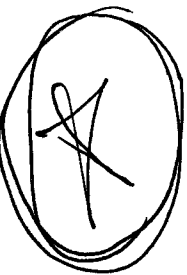
NR EXHIBIT NO. 10 -- Printout of third party Registration 2,799,292 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for restaurant and carry-out food services in conjunction with hamburger sandwiches and fruit products.

NR EXHIBIT NO. 11 -- Nexis printout of *Los Angeles Times*, June 6, 1987, part 1; page 30; column 1 - "FROM A SINGLE STAND TO AN INTERNATIONAL NETWORK; W. HAMLIN; ORANGE JULIUS CREATOR" - Admissible and probative for what it shows on its face and relevant to similarity of goods, i.e., hamburger sandwiches and fruit products.

NR EXHIBIT NO. 12 -- Printout of third party Registration 1,308,185 from electronic records of the U.S.P.T.O. automated search system. Relevant as evidence of registration of marks for hamburgers and cheeseburgers in connection with fruit products.

NR EXHIBIT NO. 13 -- Nexis printout of *The New York Times* of February 20, 2005, Section 3; Column 1, Sunday Business, Page 1. "YOU WANT ANY FRUIT WITH THAT BIG MAC?" - Admissible and probative for what it shows on its face and relevant to similarity of goods and services, i.e. fruit (apples) and hamburgers.

NR EXHIBIT NO. 14 -- Reno/Sparks Carson City Street Atlas 2002-2003 edition, published 2002 by Map Link, Santa Barbara, CA 93227, pages 45, 49, 50 and 59. Relevant to establish close geographic proximity between Applicant's establishment and three of Opposer's business establishments, i.e., same geographic market area.



# YAHOO! DRIVING DIRECTIONS

→ **A** 1285 Baring Blvd Sparks, NV 89434

APNR EX-Q

1. Start at **1285 BARING BLVD, SPARKS** - go **0.1** mi
2. Turn **L** on **SPARKS BLVD** - go **2.2** mi
3. Turn **L** onto **I-80 EAST** - go **509.9** mi
4. Take the **LAS VEGAS/CHEYENNE** exit onto **I-80 EAST** - go **2.8** mi
5. Take exit **#304** onto **I-80 EAST** toward **CHEYENNE** - go **1052.5** mi
6. Take exit **#123B** onto **I-35 NORTH** toward **CHICAGO/MINNEAPOLIS** - go **15.0** mi
7. Continue on **I-80 EAST** - go **151.3** mi
8. Take exit **#290** onto **I-280 EAST** toward **ROCK ISLAND/MOLINE** - go **17.9** mi
9. Continue on **I-74 EAST** - go **9.5** mi
10. Continue on **I-80 EAST** - go **168.0** mi
11. Take exit **#16** onto **I-80 EAST** toward **OHIO** - go **287.2** mi
12. Take exit **#151** onto **I-480 EAST** - go **26.2** mi
13. Take **L** fork onto **US-422 EAST** toward **WARREN/ERIE PA** - go **1.2** mi
14. Take the **I-271 EXPRESS LN** **L** exit toward **ERIE PA** - go **4.6** mi
15. Take the **BRAINARD RD/CEDAR RD** exit onto **I-271 NORTH** - go **8.6** mi
16. Continue on **I-90 EAST** - go **195.0** mi
17. Take exit **#48A/RT-77** toward **MEDINA/PEMBROKE** - go **0.6** mi
18. Turn **R** on **ALLEGHANY RD[RT-77]** - go **1.8** mi
19. Arrive at **9079 ALLEGHANY RD, CORFU**, on the **L**

→ **B** 9079 ALLEGHANY RD, CORFU, NY 14036-9765

Total Distance: 2454.4 miles, Total Travel Time: 34 hours 14 mins

shows "Admit" to No 13 ~~but~~ not No 14

NR EXHIBIT NO. 15 -- Applicant's admissions 8, 9, 10, 11, 12 and 13 served April 8, 2005 in response to Opposer's Request for Admissions served February 26, 2005. Relevant to establish "Applicant's Goods" (i.e., dried fruits and any other products or services that Applicant offers, performs or sells --- under or by reference to "Applicant's Mark" [QUALITY YOU CAN CRUNCH]) have been sold to customers and provided to persons in Nevada, California and Arizona. Relevant as establishing Applicant's markets in the same geographic market area as Opposer.

see 5  
or  
OP's NO 16  
Below

partial Admi

NR EXHIBIT NO. 16 -- Applicant's admission 14, served April 8, 2005 in response to Opposer's Request for Admission served February 26, 2005. Relevant to show that "Applicant's Goods" (i.e., dried fruits and any other products or services that Applicant offers, performs or sells --- under or by reference to "Applicant's Mark" [QUALITY YOU CAN CRUNCH]) are sold via the same media as Opposer utilizes to advertise its goods and services under or by reference to Opposer's Mark, i.e. QUALITY YOU CAN TASTE.

Applicant Denied

NR EXHIBIT NO. 17 -- Applicant's admission 15, served April 8, 2005 in response to Opposer's Request for Admission served February 26, 2005. Relevant to show the similarity of purchasers of Applicant's Goods and Opposer's goods and services.

~~NR EXHIBIT NO. 18 -- Nexis printout of Los Angeles Times article of March 6, 2001, Orange County Edition, BUSINESS, Part C: Financial desk, page 3. "CHAINS NOT ONLY IN NORTHERN ISLANDS ON TOP IN A SURVEY" Relevant to fame of Opposer and Opposer's Mark.~~

~~NR EXHIBIT NO. 19 -- Nexis print of The San Francisco Chronicle, March 9, 2001, Final Edition, BUSINESS, page D1. "In N Out Burger Boofs Up the Wharf" Relevant to fame of Opposer.~~

~~NR EXHIBIT NO. 20 -- Nexis Printout of the Boston Globe, January 9, 2002, Third Edition, TRAVEL; page E7. "THIS BURGER CHAIN'S SUCCESS IS NO SECRET" Relevant to fame of Opposer.~~

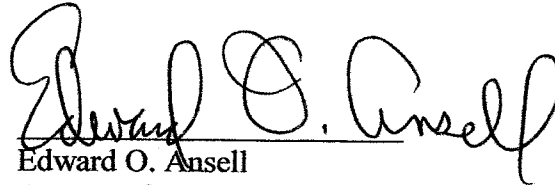
~~NR EXHIBIT NO. 21 -- Nexis printout of The New York Times, April 14, 2002, Late Edition Final: Section F, Column 1, DINING IN, DINING OUT/ STYLE DESK: page 1. "THE SECRET BEHIND A BURGER CULT." Relevant to fame of Opposer.~~

NR EXHIBIT NO. 22 -- Nexis printout of *The New York Times*, March 7, 2004, Late Edition, Final, Section 9, Column 3, STYLE DESK; page 2; "THE RED CARPET LEADS TO A DRIVE-THROUGH." Relevant to fame of Opposer.

NR EXHIBIT NO. 23 -- Nexis printout of *The Dallas Morning News*, February 26, 2005, Second Edition, OVERNIGHT; OSCAR DIARY, page 9 B, "THE ART OF BURGERS." Relevant to fame of Opposer.

NR EXHIBIT NO. 24 -- *FAST FOOD NATION* by Eric Schlosser, published 2001 by Houghton Mifflin Co., pages 259-260. Relevant to fame of Opposer.

Respectfully Submitted  
In-N-Out Burgers

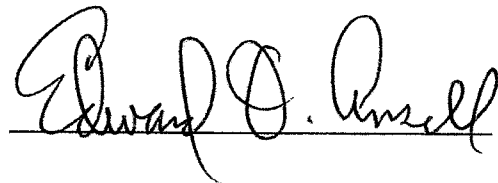


Edward O. Ansell  
Attorney for Opposer

Date: May 27, 2005

Law Office of Edward O. Ansell  
427 N. Yale Ave., Suite 204  
Claremont, CA 91711  
Tel: (909) 621-1985/625-1244  
Fax: (909) 624-1664  
Email: anselaw@verizon.net

PROOF OF SERVICE: I hereby certify that a true copy of the foregoing OPPOSER'S FIRST NOTICE OF RELIANCE was sent by First Class Mail, postage prepaid, to Applicant Peak Harvest Foods, LLC, John C. Rarick, Executive Manager, 1285 Baring Blvd., Suite 166, Sparks, NV 89434 on 05/27/2005.



RESPONSE:

Admit.

APNR EX-S

14. "Applicant's Goods" are sold pursuant to orders submitted to it on the Internet.

RESPONSE:

Partially Admit. The Applicant receives orders from other sources other than exclusively from the internet.

15. Customers of grocery stores, individuals, specialty markets and stores are also customers of restaurants.

RESPONSE:

The Applicant does not possess sufficient information and belief to either admit or deny this request for admission and therefore denies this request for admission. Not all Customers of grocery stores, individuals, specialty markets and stores are also customers of restaurants. Therefore the Applicant denies this request for admission as set forth by the Opposer.

16. The pages attached as D are genuine reproductions of Applicant's Web pages.

RESPONSE:

Deny.

17. The advertising on said Applicant's Web pages does not contain "Applicant's Mark."

RESPONSE:

Deny.

18. The pages attached as E, entitled "You Want Any Fruit With That Big Mac?" are true copies of pages from The New York Times Sunday Business, Section 3, of Sunday, February 20, 2005.

RESPONSE:

The Applicant objects to this request for admission on the grounds that the request for



OPPOSITION 91161044  
IN-N-OUT BURGERS v.  
PEAK HARVEST FOODS

RESPONSE:

Admit.

14. "Applicant's Goods" are sold pursuant to orders submitted to it on the Internet.

RESPONSE:

Partially Admit. The Applicant receives orders from other sources other than exclusively from the internet.

15. Customers of grocery stores, individuals, specialty markets and stores are also customers of restaurants.

RESPONSE:

The Applicant does not possess sufficient information and belief to either admit or deny this request for admission and therefore denies this request for admission. Not all Customers of grocery stores, individuals, specialty markets and stores are also customers of restaurants. Therefore the Applicant denies this request for admission as set forth by the Opposer.

16. The pages attached as D are genuine reproductions of Applicant's Web pages.

RESPONSE:

Deny.

17. The advertising on said Applicant's Web pages does not contain "Applicant's Mark."

RESPONSE:

Deny.

18. The pages attached as E, entitled "You Want Any Fruit With That Big Mac?" are true copies of pages from The New York Times Sunday Business, Section 3, of Sunday, February 20, 2005.

RESPONSE:

The Applicant objects to this request for admission on the grounds that the request for

REQUEST NO. 8:

Copies of the results of any survey, poll or similar investigation conducted by or on behalf of Opposer relating to recognition of Opposer's Mark by the public or the trade.

RESPONSE:

No documents or things responding to Request No. 8 were found.

REQUEST NO. 9:

A sample of each different print media advertisement, newspaper insert, direct mail piece, brochure, or other item of promotional material which Opposer has prepared, cause to be prepared and/or distributed in connection with the advertising and promotion of Opposer's Goods offered under or by reference to Opposer's Mark.

RESPONSE:

See Exhibits 9-1, 9-2, 9-3. See also Response to Request No. 4 and Exhibit 7-1.

REQUEST NO. 10:

Documents which evidence, refer to or otherwise relate to any monetary expenditures which Opposer has made in connection with the advertising or promotion of Opposer's Goods offered under or by reference to Opposer's Mark..

RESPONSE:

No evidence relating specifically to monetary expenditure made in connection or promotion of Opposer's Goods offered under or by reference to Opposer's Mark were found with the exception of EX 10-1, which relates to radio spot announcements for 2005. These 4 radio spots, broadcast in the San Francisco, Los Angeles and Las Vegas markets are recorded as audio/wav files on the enclosed CD, Exhibit 9/14, which also contains databases relating to restaurant and nutrition services. See also responses to Requests No. 8 and 14.

REQUEST NO. 11:

All documents, other than those subject to attorney-client privilege, relating or referring to creating and selection of Opposer's Mark.

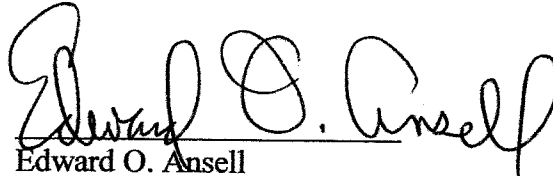
~~NR EXHIBIT NO. 22 -- Nexis printout of *The New York Times*, March 7, 2004, Late Edition, Final, Section 9, Column 3, STYLE DESK; page 2: "THE RED CARPET LEADS TO A DRIVE THROUGH." Relevant to fame of Opposer.~~

~~NR EXHIBIT NO. 23 -- Nexis printout of *The Dallas Morning News*, February 26, 2005, Second Edition, OVERNIGHT; OSCAR DIARY, page 9 B, "THE ART OF BURGERS." Relevant to fame of Opposer.~~

NR EXHIBIT NO. 24 -- *FAST FOOD NATION* by Eric Schlosser, published 2001 by Houghton Mifflin Co., pages 259-260. Relevant to fame of Opposer.

APP Exhibit  
AAA

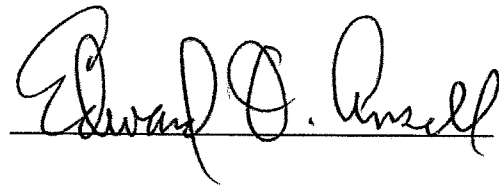
Respectfully Submitted  
In-N-Out Burgers

  
Edward O. Ansell  
Attorney for Opposer

Date: May 27, 2005

Law Office of Edward O. Ansell  
427 N. Yale Ave., Suite 204  
Claremont, CA 91711  
Tel: (909) 621-1985/625-1244  
Fax: (909) 624-1664  
Email: anselaw@verizon.net

PROOF OF SERVICE: I hereby certify that a true copy of the foregoing OPPOSER'S FIRST NOTICE OF RELIANCE was sent by First Class Mail, postage prepaid, to Applicant Peak Harvest Foods, LLC, John C. Rarick, Executive Manager, 1285 Baring Blvd., Suite 166, Sparks, NV 89434 on 05/27/2005.



u

OPPOSER'S  
From NR-7

\$80,000 a year. The managers have, on average, been with the chain for more than thirteen years. The high wages at In-N-Out have not led to higher prices or lower-quality food. The most expensive item on the menu costs \$2.45. There are no microwaves, heat lamps, or freezers in the kitchens at In-N-Out restaurants. The ground beef is fresh, potatoes are peeled every day to make the fries, and the milk shakes are made from ice cream, not syrup.

In March of 2000, the annual *Restaurants and Institutions Choice in Chains* survey found that among the nation's fast food hamburger chains, In-N-Out ranked first in food quality, value, service, atmosphere, and cleanliness. In-N-Out has ranked highest in food quality every year that the chain has been included in the survey. According to the consumers polled by *Restaurants and Institutions* in 2000, the lowest-quality food of any major hamburger chain was served at McDonald's.

### scientific socialists

THERE IS NOTHING INEVITABLE about the fast food nation that surrounds us — about its marketing strategies, labor policies, and agricultural techniques, about its relentless drive for conformity and cheapness. The triumph of McDonald's and its imitators was by no means preordained. During the past two decades, rhetoric about the "free market" has cloaked changes in the nation's economy that bear little relation to real competition or freedom of choice. From the airline industry to the publishing business, from the railroads to telecommunications, American corporations have worked hard to avoid the rigors of the market by eliminating and absorbing their rivals. The strongest engines of American economic growth in the 1990s — the computer, software, aerospace, and satellite industries — have been heavily subsidized by the Pentagon for decades. Indeed, the U.S. defense budget has long served as a form of industrial policy, a quasi-socialist system of planning that frequently yields unplanned results. The Internet at the heart of today's "New Economy" began as the ARPANET, a military communications network created in the late 1970s. For better or worse, legislation passed by Congress has played a far more important role in shaping the economic history of the post-war era than any free market forces.

The market is a tool, and a useful one. But the worship of this tool is

John Rarick

From: support@godaddy.com  
 Sent: Monday, January 09, 2006 1:41 AM  
 To: jrarick@mindspring.com; jr@peakharvestfoods.com  
 Subject: Confidential (PeakHarvestFoods.com Renewal)

**CONFIDENTIAL**

**CONFIDENTIAL**

**APNR EX-V**

**Special Notice from GoDaddy.com**

Dear John Rarick,

Per our agreement(s), we have automatically renewed the following items:

Product Name	Unit Price	Qty	Total Price
Economy Hosting w/ PHP - Renewal Billing for 01/09/2006. PEAKHARVESTFOODS.COM	\$ 3.95	1	\$ 3.95
	Subtotal:	\$	3.95
	Tax:	\$	.00
	Shipping:	\$	.00
	<b>TOTAL:</b>	<b>\$</b>	<b>3.95</b>

Your customer number **CONFIDENTIAL**

[Review our legal agreements here.](#)

If you have questions regarding your account or billing for this account, please feel free to contact us:

- [Online Support](#)
- Phone: 480-505-8877

Sincerely,  
GoDaddy.com

Copyright 2006 GoDaddy.com. All rights reserved.

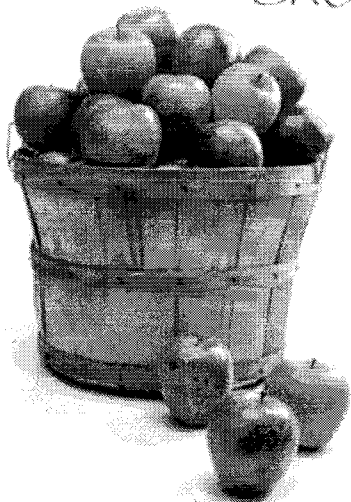
V1



[Home](#) [Products](#) [About Us](#) [Contact Us](#)

# Crunchy Apple Stix®

Quality You Can  
CRUNCH!™



Welcome to Peak Harvest Foods'  
garden of goodness.

We are proud to introduce Crunchy Apple Stix®, only available here. Crunchy Apple Stix® are a mouthwatering all natural snack with no sulfur or preservatives. Just apples, cored, cut and air-dried.

Contact us to find out more about Crunchy Apple Stix® and visit us often to discover what's new.

[Home](#) | [Products](#) | [About Us](#) | [Contact Us](#)

© 2006 Peak Harvest Foods

V2

A/P VENDOR INVOICE INQUIRY

Company: 900 Vendor: 109418 DREAMBOX CREATIONS, INC. Total: 38596.00

Invoice	Inv Date	Amount	Chk #	Check Date	Discount	Ctr	Per
5311	6/04/2004	480.00	484992	7/09/2004			
5315	6/28/2004	880.00	484992	7/09/2004		919	7
5371	8/27/2004	13440.00	493816	10/01/2004		919	7
5538	3/08/2005	16572.00	511444	3/18/2005			10
5566	4/04/2005	4740.00	515119	4/19/2005		825	3
5592	5/05/2005	630.00	518522	5/19/2005		903	4
5616	6/01/2005	798.00	521568	6/20/2005		903	5
5646	7/06/2005	1056.00	526068	7/29/2005		903	7
						903	8

Last Payment

APNR EX-W

Esc-Exit, F6-G/L Dist., F11-Disp Picture

[Ref: AP807003] Pv-chk:

WEBSITE MAINTENANCE

NEX-00D-19A



Point-to-Point  
Driving Directions

*Quality you can taste®*



**IN-N-OUT**  
BURGER

**Store Hours:**

Sunday through Thursday 10:30 a.m.-1:00 a.m.\*  
Friday and Saturday 10:30 a.m.-1:30 a.m.\*

\*Except for our Mill Valley, San Jose(on Santa Teresa), and Porter Ranch locations.

In-N-Out Burger is not a franchise organization.  
© 2004 In-N-Out Burgers. All rights reserved.  
In-N-Out®, In-N-Out Burger®, in-n-out®, in-n-out burger® and the Arrow Logo  
are registered trademarks of In-N-Out Burgers, a California Corporation.  
[Terms & Conditions](#) | [Privacy Policy](#)

**APNR EX-X**

**EX-2-1**

*from Opposer*



[Sign in](#)

[Google](#)

[Web](#) [Images](#) [Video](#) [News](#) [Maps](#) [more »](#)

[Advanced Search](#)  
[Preferences](#)

## Web

Tip: Try removing quotes from your search to get more results.

Your search - "[http://www.in-n-out.com/html/frm\\_bman.html](http://www.in-n-out.com/html/frm_bman.html)" - did not match any documents.

### Suggestions:

- Make sure all words are spelled correctly.
- Try different keywords.
- Try more general keywords.

---

[Google Home](#) - [Advertising Programs](#) - [Business Solutions](#) - [About Google](#)

©2007 Google

**APNR EX-Y**





## The page cannot be found

The page you are looking for might have been removed, had its name changed, or is temporarily unavailable.

---

Please try the following:

- If you typed the page address in the Address bar, make sure that it is spelled correctly.
- Open the [www.in-n-out.com](http://www.in-n-out.com) home page, and then look for links to the information you want.
- Click the  Back button to try another link.
- Click  Search to look for information on the Internet.

APNR EX-Z

HTTP 404 - File not found  
Internet Explorer

1 It shows the Double-Double as being, again,  
2 \$2.75. It also has a circle R next to the Double-Double,  
3 fortunately.

4 Q And what -- okay. All right.

5 MR. ANSELL: All right. Would you please enter  
6 this Opposer's Exhibit No. 51.

7 (The document was marked for  
8 identification and is attached hereto.)

9 MR. ANSELL: Off the record.

10 (A break was taken.)

11 Q BY MR. ANSELL: I would like to read into the  
12 record that the Trademark Trial and Appeal Board in a  
13 ruling mailed June 28th, 2005, ruled that John C. Rarick,  
14 the applicant in this case, was to forward to the Opposer  
15 a price list among other things of its products.

16 That order -- I gave the date of the order, did  
17 I not? That was to be supplied within 30 days, which it  
18 was not, that was as of yesterday. And it has not been  
19 ~~complied with that order to deliver a price list for his~~  
20 ~~product as well as some identification and class of~~  
21 customers in Los Angeles, and -- I believe in Los Angeles  
22 and Orange County. I say this as more or less as a  
23 background or a foundation to the rest of this testimony.

24 Mr. Wensinger, I ask you, do you have a price  
25 list for applicant's products?

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

APNR EX-BB

IN THE MATTER OF APPLICATION SERIAL NO. 78/287,067  
FOR THE MARK "QUALITY YOU CAN CRUNCH"  
PUBLISHED IN THE OFFICIAL GAZETTE OF JUNE 1, 2004

IN-N-OUT BURGERS )  
 )  
 OPPOSER )  
 )  
 v. )  
 )  
 PEAK HARVEST FOODS, LLC )  
 joined by assignment with )  
 JOHN C. RARICK )  
 as party defendant )  
 )  
 APPLICANT )  
 )

OPPOSITION NO. 91161044



Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

05-23-2006  
U.S. Patent & TMO/TM Mail Rcpt Dt. #30

Opposer's Opposition to Applicant's Motion for Reconsideration of Decision on Motions;  
And Cross-Motion to Direct Applicant to Provide a Complete Response to the Previous  
Order of the Board Compelling Discovery

To the TTAB:

Opposer hereby moves the TTAB to deny Applicant's Motion for Reconsideration of the Board's April 18, 2006 decision on the motions of the parties, served on May 12, 2006.

REMARKS

There was no error in the Board's decision with respect to Applicant's excessive length submission. Trademark Rule 2.127(a) clearly states that the brief in support of a

BB<sub>1</sub>

channels of trade, and to extend Opposer's time for testimony sufficiently to permit Opposer to submit Applicant's complete response into evidence.

REMARKS

Opposer filed a motion to compel Discovery on April 28, 2005. By Order mailed June 28, 2005, the Interlocutory Attorney granted Opposer's motion to compel further responses as to Interrogatory 15 and Request for Production 17. Interrogatory No. 15 reads as follows:

"Identify in detail the prices charged for Applicant's Goods."

Request for Production of Documents and Things, No. 17, reads as follows:

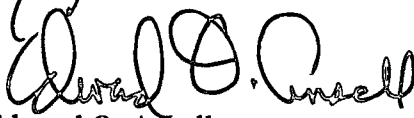
"Price lists for each size of 'Applicant's Goods' sold to customers in each of Applicant's channels of trade."

As can be seen from Exhibit 1, hereto, Applicant's Supplemental Response to Opposer's Interrogatory No. 15 reads as follows:

"The Applicant's goods are further sold in amounts desired by purchasers and include various weights between 1.6 oz and 10 pounds. See Response to Production No. 17 coming next."

Applicant's Response to Opposer's Request No. 17 is a one-and-one half page table of numbers, displaying two columns, one headed "Price with shipping included" and the other "Price without shipping included." *Nowhere in the exhibit is a correlation of the numbers with the sizes of Applicant's goods associated with the numbers or which prices apply to Applicant's customers in each of its channels of trade, identified by Applicant in its December 24, 2004 responding to Opposer's First set of Interrogatories' Interrogatory No. 8 as:*

Respectfully submitted,



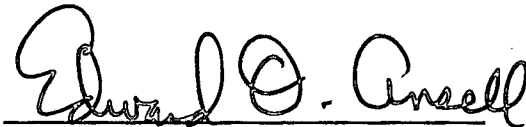
Edward O. Ansell  
Attorney for Opposer

Date: May 23, 2006

Attachments:

427 N. Yale Ave. #204  
Claremont, CA 91711  
Tel: (909) 621-1985  
Fax: (909) 624-1664  
email: anselaw@verizon.net

**PROOF OF SERVICE:** I hereby certify that on 05/23/06 a true copy of the foregoing OPPOSER'S MOTION was sent by First Class Mail, postage prepaid, to Applicant John C. Rarick, Peak Harvest Foods, LLC, 9079 Allegheny Road, Corfu, NY 14036-9765.



Edward O. Ansell

BB3

should have filed the motion to compel or a motion to extend testimony periods, and thus delay the commencement of trial, by not later than May 1, 2006. Opposer, however, did not file its motion to compel until three weeks after such commencement. In view thereof, opposer's motion to compel is untimely and denied on that basis.<sup>6</sup>

The Board deems the service upon opposer of applicants' motion for partial reconsideration on May 12, 2006, the eleventh day of opposer's testimony period, to have tolled the running of dates herein. Proceedings herein are resumed. Under the circumstances, the Board deems it appropriate to allow opposer a testimony period equal to the number of days remaining in its testimony period when applicants served their motion for partial reconsideration, i.e., nineteen days. Accordingly, remaining testimony periods are reset as follows.<sup>7</sup>

Plaintiff's 19-day testimony period to close: **11/9/06**

Defendant's 30-day testimony period to close: **1/8/07**

---

<sup>6</sup> Nonetheless, applicant is reminded that, when a party, without substantial justification, fails to disclose information required, or fails to amend or supplement a prior response, as required, that party may be prohibited from using as evidence the information not so disclosed. See Fed. R. Civ. P. 37(c)(1).

<sup>7</sup> As noted *supra*, trial herein commenced on May 2, 2006. The trial schedule as reset by this order cannot serve to render timely an untimely filed motion, e.g., a motion to compel or a motion for summary judgment. See *La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234, 235 (Comm'r 1976); Trademark Rules 2.120(e)(1) and 2.127(e)(1); TBMP Sections 523.03 and 528.02 (2d ed. rev. 2004).

IN THE UNITED STATES  
BEFORE THE TRADEMARK

In the Matter of Application Serial No.  
Published in the Official Gazette of July 28, 2005

IN-N-OUT BURGERS,

Opposer,

-vs-

PEAK HARVEST FOODS, LLC,

Applicant.

U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**  
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT  
PROVIDE FOR INSURANCE—POSTMASTER

Received From: **PEAK Harvest Foods**  
**John Rarrck**  
**1285 Baring Blvd #166**  
**Sparks, NV 89434** USPS

One piece of ordinary mail addressed to:  
**Edward O. Ansell** **Box**  
**427. N Yale Ave #209**  
**Claremont, CA**  
**91711-4340**

TULSA OK SHERIDAN  
9399  
JUL 28 2005  
U.S. POSTAGE  
PAID  
TULSA, OK  
74133-05  
JUL 28 2005  
RMOUNT  
\$0.90  
00090519-07

PS Form 3817, Mar. 1989

APNR EX-DD

**BOARD ORDERED SUPPLEMENTAL RESPONSES TO INTERROGATORY No. 15 AND  
REQUEST FOR PRODUCTION No. 17 AND "IN PART" SUPPLEMENTAL RESPONSES TO  
INTERROGATORIES 16 AND 17; AND SUPPLEMENTAL RESPONSE TO REQUEST FOR  
PRODUCTION No. 16;**

Applicant now turns to supplement Applicant's answers to Opposer's INTERROGATORIES No. 15 and PRODUCTION No. 17 and "the classes of customers" addressed in INTERROGATORIES 16 and 17 as per Board order dated June 28, 2005.

As per the Board:

- (1) "Opposer's motion to compel is **granted** as to Interrogatory 15 and Request for Production of Document 17, and **granted in part** as to Interrogatory No. 16 and 17 to the extent that applicant must identify the classes of customers of its goods under the involved mark in the specified geographical area.

**Opposer's Interrogatory No. 15.**

Identify in detail the prices charged for Applicant's Goods

**Applicants Supplemental Response to Opposer's Interrogatory No. 15.**

The Applicant's goods are further sold in amounts desired by purchasers and include various



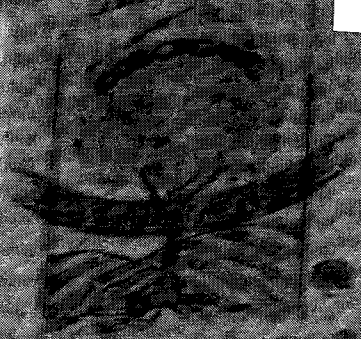
APNR EX-EE

PEACH HARVEST



Product of USA

PEACH HARVEST

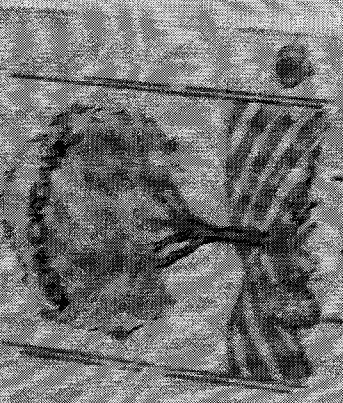


Cranbury Apple Stix

CRANBURY

CRANBURY

PEACH HARVEST



Cranbury Apple Stix

As per order, which may contain multiple bags

APNR EX-FF



0000

# Crunchy Apple Slices

Quality you can crunch!

2.50 Oz.

No Sugar

Ⓟ copy of actual packaging.

**PRIORITY MAIL**

UNITED STATES POSTAL SERVICE

www.usps.com

PRIORITY MAIL  
POSTAGE REQUIRED  
DOMESTIC USE ONLY



0000



89434

U.S. POSTAGE  
PAID  
CLAREMONT, CA  
91711-05  
PERMIT  
NO. 5528-05  
**\$6.50**

APNR EX-GG

**EDWARD O. ANSELL**  
427 N. Yale Ave. #204  
Claremont, CA 91711

John C. Rarick  
% Peak Harvest Foods LLC.  
1285 Baring Boulevard, Suite 166  
Sparks, NV 89434

GG

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

IN-N-OUT BURGERS

Opposer,

)  
)  
) Opposition No. 91161044

v.

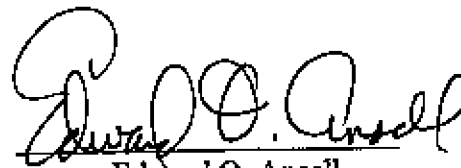
JOHN C. RARICK

Applicant

**FILING AND SERVICE OF TESTIMONY IN ACCORDANCE WITH  
TRADEMARK RULE § 2.125**

To: John C. Rarick:

Enclosed is one copy of the transcript of testimony, with copies of exhibits, of Arnold M. Wensinger, taken July 29, 2005.



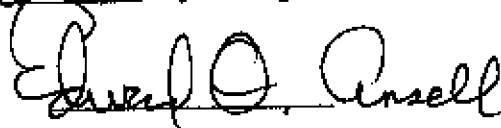
Edward O. Ansell

Attorney for In-N-Out Burgers

Date: August 26, 2005

**CERTIFICATE OF SERVICE**

I, hereby, certify that a true and correct copy of the foregoing transcript of testimony, with copies of exhibits, of Arnold M. Wensinger, taken July 29, 2005 was sent by Priority U.S. Mail to John C. Rarick, % Peak Harvest Foods LLC., 1285 Baring Boulevard, Suite 166, Sparks, NV 89434, this 26<sup>th</sup> day of August, 2005.



Edward O. Ansell

662

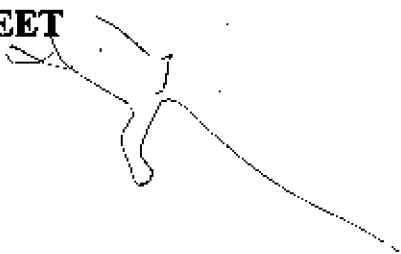
Job #:

Job Date:

### TRANSCRIPT ERRATA SHEET

The reasons for making changes are as follows:

- (1) To clarify the record;
- (2) To conform to the facts;
- (3) To correct major transcription errors.



Page/Line	Change from	Change to	Reason

Signature of Deponent

Dated

APNR EX-II 1

29

APNR  
your over

OPPOSITION 91107044  
WITHOUT BURGERS V  
JOHN C. PATRICK

STAFF



APNR EX-II 2



John Rarick

APNR EX-JJ

From: Soldiers Angels [soldiersangels@gmail.com]  
Sent: Wednesday, December 20, 2006 10:26 AM  
To: jr@peakharvestfoods.com  
Cc: Lisa Nyberg; Richard M. John  
Subject: Re: help

OHHH I get it,  
yes,  
The answer is yes,  
we can work with you on this,  
We do similar thing with the beef jerky  
I need to get you with our treasurer Lisa Nyberg and Rick John for approval,  
but if it helps our heroes then we would love to help,  
Patti

On 12/20/06, John Rarick [jr@peakharvestfoods.com] wrote:  
Patti,

No, we do not want money, although we could use a bundle to help us along, we try to give thanks along the way through donations.

i am asking if you accept donations and then send them on to the soldiers. the last organization with whom we worked gave us the names of soldiers, but when i went to send the packages, they cost hundreds of dollars, regrettably a cost that we cannot afford

so do i send the package to you in CA, then do you put together larger shipping containers? or what is the procedure.

We cannot afford to send the donations to Iraq, Kuwait or other ME territory. We can afford to send them to CA.

Please let me know if you can send the donations to you in CA and they you can forward them along overseas.

Thanks for your patience and understanding.

John Rarick  
Executive Manager  
Peak Harvest Foods, LLC  
www.peakharvestfoods.com  
+15.606.1689

JJ1

IMPORTANT NOTICE: This message and any attachments are solely for the intended recipient and may

1/12/2007



**From:** Soldiers Angels [soldiersangels@gmail.com]  
**Sent:** Wednesday, December 20, 2006 7:32 AM  
**To:** jr@peakharvestfoods.com  
**Subject:** Re: help

here is a hero that we JUST GOT IN

Soldier Information

Soldier Information

**First name:** Jeffrey  
**Last name:** Ledesma  
**Street:** HHC DSTB 1CD PAO  
**Street Line 2:** CAMP LIBERTY  
**City:** APO AE 09344  
**State:**  
**Zip:**  
**Email:**

**Comments:**

Thanks for taking the time making the effort to do something so selfless. I am a vegetarian so please don't send me anything with canned meat - tuna etc. Thanks again for everything.  
0000-00-00 00:00:00

**Date of Signup:**

**Administration Notes:**

**Assigned Angel ID Number:**

79716

Angel Information

**First name:**  
**Last name:**  
**Street:**  
**Street Line 2:**  
**City:**  
**State:**  
**Zip:**  
**Email:**

**Phone Number:**

**Date of Signup:** 2006-12-20 09:40:36

**Approved:** yes

**Date Approved:** 2006-12-20 09:30:31

**Comments:**

**Administration Notes:**

**Assigned Soldier ID Number:**

40916

JJ2

**Approved By (enter your initials):**

**CONFIDENTIAL**

**APNR EX-KK**



**GAYA-MENSANA SP. ZO.O.  
Peak Harvest Foods, LLC**

**Letter of Authorization to Register Production Facility with United States  
Federal Drug Administration (FDA)**

December 5, 2003

John Rarick  
Executive Manager  
Peak Harvest Foods, LLC  
1285 Baring Blvd - Suite 166  
Sparks, Nevada  
89434

**CONFIDENTIAL**

Dear John,

Whereas, The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), passed by the United States Congress and administered by the United States Federal Drug Administration ("FDA"), requires the registration of food facilities, both domestic and foreign that manufacture/process, pack, or hold food for human or animal consumption in the United States;

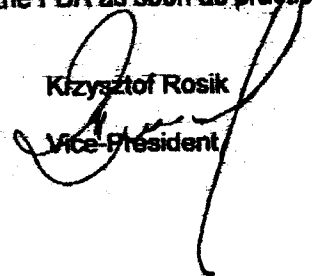
Whereas, Gaya Mensana Sp. zo.o. ("Gaya") (Pradnicak 4, 60-401 Poznan, Poland) and Peak Harvest Foods, LLC ("Peak Harvest") (1285 Baring Blvd, Suite 166 Sparks, Nevada, 89434 USA) are in separate discussions to conclude an exclusive marketing and distribution agreement and purchase contract agreement;

Now therefore, let it be resolved that Gaya hereby appoints Peak Harvest as United States Agent for the sole purposes of complying with the Bioterrorism Act and authorizes Peak Harvest to register Gaya with the FDA as a *Foreign Food Facility* according to the rules and regulations promulgated by the FDA to comply with the Bioterrorism Act.

Gaya does not grant any other rights to Peak Harvest other than the appointment as US Agent and authorization to register Gaya with the FDA.

The undersigned has full and legal authority to execute this agreement for and on behalf of Gaya and directs Peak Harvest to register Gaya with the FDA as soon as practical.

  
Pawel Zdzarski  
President

  
Krzysztof Rosik  
Vice-President

KK

GAYA - MENSANA Sp. z o.o.  
60-401 Poznań, ul. Pradnicka 4  
tel. (061) 8432611, fax 8432615  
NIP 782-20-44-872, Regon 631140913

GAYA - MENSANA Sp. z o. o.  
60-401 Poznań, ul. Pradnicka 4  
tel.: 0-61 843 26 11  
fax: 0-61 843 26 15  
REGON 631140913

# PRODUCT MARKETING AND DISTRIBUTION AGREEMENT

concluded on ..... in ..... between:

**Gaya Mensana Sp. z o.o.**, ("Gaya Mensana" or "GM" or "Seller") a Polish company having its registered seat in Poznań ul. Szkolna 15/7, 61-832 Poznan, Poland, registered at the National Court Register („KRS”) carried out by Department XXI of the Local Court in Poznań under the following number KRS 0000014482, represented by:

Paweł Żdzarski – the President of the Board  
Krzysztof Rosik – member of the Board,

and

**Peak Harvest Foods, LLC** ("Peak Harvest" or "PHF" or "Buyer") having its registered seat at P.O. Box 3390 276 Kingsbury Grade Road, Suite 2000 Lake Tahoe, Nevada 89449-3390 and represented by:

John Rarick- Executive Manager  
Larry Honig- Finance and Technology Manager

**Whereas:**

- H ob
- (1) GM on the basis of the patented technology under the name "Producing of diet fruit chips" registered in the National Patent Office, Poznan Poland (??) under number 176824 and patent application for technology of production of fruit and vegetables chips, (the "Process") produces fruit and vegetable diet chips (collectively and individually, the "Product"); based on the PCT agreement the rights to the aforementioned technologies are protected in the territories which are set forth in Appendix A.
  - (2) Gaya Mensana and Peak Harvest desire to enter into this Agreement pertaining to the manufacture, marketing, purchase, sale and distribution of the Product in the Territory described in this Agreement.

NOW, THEREFORE, in consideration of the above premises and the mutual covenants contained herein, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

## 1. Definitions

The following terms shall have the following meanings:

the „Agreement” – shall mean the present Product Marketing and Distribution Agreement,  
the „Product” – shall mean Crunchy Apple Chips ® as listed in Appendix B.1 and specified in Appendix F, as may be modified by Buyer from time to time. all diet fruit and vegetable chips produced by GM,  
the „Additional Products” – shall mean new products not listed in Appendix B.1 or F, added to this Agreement by signed written consent of the Buyer and Seller, including but not limited to existing and contemplated fruit and vegetable chips, natural energy drinks and other dried fruits. 1) all new diet fruit and vegetable chips not yet produced by GM and 2) all other new products that GM is contemplating to produce now or during the Term of this Agreement; including, but not non limited to natural energy drinks.  
~~New Product shall mean products that GM does not now produce nor intends to produce in the near term including, but not limited to dried mango, papaya, melon, or kiwi~~

KK<sub>2</sub>

Agenda  
 Gaya-Mensana & Peak Harvest Foods  
 Conference Call Monday, March 29, 2004  
 Allotted Time 1- Hour

Agenda Changes  
 Ground rules

Comment freely, but please keep discussion focused  
 If a party feels that the discussion may have a "translation/meaning" issue  
 please ask for a translator conference

Time frame- Short

**CONFIDENTIAL**

1. Meeting Particulars;  
 Ana Canillas
2. Introductions (5-8 minutes):

Gaya-Mensana (Biotica)	Peak Harvest Foods
[Redacted] Zdzarski (SVP/Board) [Redacted] Rosik (VP/Board) Dominika Tritt (VP Sales)  <b>BB Investment Ltd.</b>  Piotr Karmelita Member of the Management Board	John Rarick (Executive Manager) [Redacted] Meyers (Board Member, Founder Smart Food) [Redacted] Honig (Finance and Technology Manager, Founder--Basic Telepresence) [Redacted] (Translator-- Peak Harvest) [Redacted] (Meeting Facilitator)

3. Peak Harvest Foods Milestones and Accomplishments (8 minutes)  
 John Rarick  
 Goal:
  - a. Verbal agreement to proceed
  - b. Agree to craft language for sections
  - c. Picture Gallery/Competitive Assessment

4. Questions and Answer for Peak Harvest (8-10 minutes)

5. US Snack Market (5 minutes)  
 [Redacted] Meyers

**CONFIDENTIAL**

6. Discussion on Sales Agreement

- a. Existing Points of Discussion
  - i. EXW Czerniejewo versus FCA Czerniejewo
- b. Additional Points of Discussion

KK<sub>3</sub>

® **BIOTICA**

SMAK, NATURA, ENERGIA



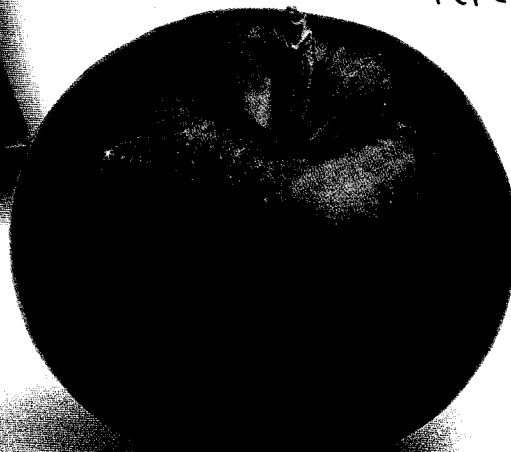
CHIPSY JABŁKOWE  
APPLE CRUNCHIPS



CHIPSY JABŁKOWE O SMAKU CYNAMONOWYM  
APPLE CRUNCHIPS CINNAMON



CHIPSY JABŁKOWE O SMAKU WANILIOWYM  
APPLE CRUNCHIPS VANILLA



KK4



Szanowni Państwo

W imieniu Zarządu Spółki "Gaya Mensana" mamy przyjemność przedstawić Państwu produkty oferowane przez naszą firmę.

Naszą misją jest dostarczenie konsumentowi produktów gotowych do spożycia, produkowanych w oparciu o naturalne, nieskażone chemicznie składniki i zdrowe technologie, a także dostarczających oprócz wartości odżywczych i walorów smakowych dodatkowych składników wzmacniających organizm i przeciwdziałających powstawaniu niektórych schorzeń (np. witaminy, minerały, zioła). Nasze produkty sygnowane marką BIOTICA skierowane są do osób świadomych roli wyżywienia dla zdrowia i kondycji organizmu, osób prowadzących aktywne i zdrowe życie.

Produkty, które Państwu oferujemy powstają dzięki unikatowym technologiom opatentowanym przez naszą firmę lub wynalezionym przez firmy z nami współpracujące. Oferujemy państwu oryginalne produkty, spełniające wszelkie wymogi stawiane naturalnej żywności typu BIO lub ORGANIC.

Zapraszamy Państwa do współpracy. Pozwólmy naszym przyjaciołom i klientom odżywiać się smacznie i zdrowo.

Dear Sir/ Madam,

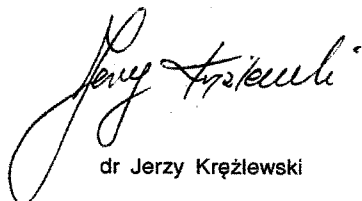
On behalf of the Management Board of "Gaya Mensana" we have the pleasure of introducing the products offered by our Company.

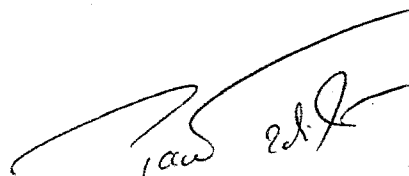
Our mission is to provide the consumer with ready-to-serve products made of natural ingredients, manufactured with the use of healthy technologies. Such products should not only provide nutrition and taste well, but should also be the source of substances which strengthen the human body and prevent certain diseases (e.g. vitamins, minerals, herbs).

Our products branded as BIOTICA are meant for conscious consumers who realise the importance of food for human health and well-being, i.e. for those who choose a healthy and active lifestyle.

Such products are manufactured with the use of unique technologies patented by our Company or invented by our co-operating partners. We offer original products meeting all the requirements established for natural food products belonging to the BIO or ORGANIC categories.

We look forward to co-operating with you. Let us give our friends and customers a chance to switch to healthy and tasty food.

  
dr Jerzy Krężlewski



Paweł Żdźarski

KK5

1 atmosphere, and cleanliness. In-N-Out has  
2 ranked highest in food quality every year that  
3 the chain has been included in the survey.  
4 according to the consumers polled by Restaurants  
5 and Institutions in 2000, the lowest-quality  
6 food of any major chain was served at  
7 McDonald's.

8 Q I thank you.

9 MR. ANSELL: Would you please mark this  
10 three-page document Opposer's Exhibit No. 44.

11 (The document was marked for  
12 identification and is attached hereto.)

13 Q BY MR. ANSELL: Okay. Mr. Wensinger, I hand you  
14 Opposer's Exhibit No. 45.

15 A This is another LexisNexis printout of a New  
16 York Times article entitled, "The Red Carpet Leads to a  
17 Drive-Thru" by Patrick McGeehan, M-C-G-E-E-H-A-N.

18 Q What is the date of that article?

19 A March 7, 2004.

20 Q Okay. If you'll hand me this, there is some  
21 things I want you to read into the record.

22 Would you read into the record the second, third  
23 and fifth paragraph, please.

24 A Sure.

25 Jennifer Garner, the star of "Alias," who

## Why fast food makes you get fat

**The nutritional make up of fast food encourages people to gorge on it unintentionally, increasing their risk of obesity, research suggests.**

Experts at the Medical Research Council found most fast food is very dense in calories - you only need a small amount to bump up your calorific intake.

They found that these "energy dense" foods can fool people into consuming more calories than the body needs.

The research is published in the journal Obesity Reviews.

**Our bodies were never designed to cope with the very energy dense foods**

Professor Andrew Prentice

A typical fast food meal has a very high energy density. It is more than one and a half times higher than an average traditional British meal and two and a half times higher than a traditional African meal.

The researchers concluded that a diet high in fast foods will increase a person's risk of weight gain and obesity - even though they may feel that they are eating no more than they would if they ate an average meal.

### **Subconscious ability**

Researcher Professor Andrew Prentice, of the London School of Hygiene and Tropical Medicine, said: "We all possess a weak innate ability to recognise foods with a high energy density.

"We tend to assess food intake by the size of the portion, yet a fast food meal contains many more calories than a similar-sized portion of a healthy meal.

"Since the dawn of agriculture, the systems regulating human appetite have evolved for the low energy diet still being consumed in rural areas of the developing world where obesity is almost non-existent.

"Our bodies were never designed to cope with the very energy dense foods consumed in the West and this is contributing to a major rise in obesity."

Professor Prentice drew particular attention to the consequences of a diet high in fast foods for children.

"Children have not yet developed any of the learned dietary restraint that needs to be exerted by anyone wishing to remain slim in the modern environment.

MM,



"It's surely a stark paradox that the strategy used to achieve rapid weight gain in malnourished children in Africa - the frequent offering of energy-dense foods - has now become the norm for many overweight children in affluent societies."

### **Limited choice**

Dr Susan Jebb, of the MRC Human Nutrition Research Centre, said: "In many outlets, the choice is so limited that it's virtually impossible to select a combination of items with even a moderate energy density.

"You'd need to eat well below the portion size offered to avoid greatly exceeding recommended energy and fat requirements.

"Fast food companies could play a major part in halting the rise in obesity if they adopted a more positive attitude to healthy eating such as providing meals of lower energy density, appropriately marketed and with point-of-sale nutrition labelling."

Dr Jebb said many supermarket ready-meals and convenience foods were also very energy dense.

"If we're going to stem the tide of obesity, it's important that we don't just swap one unhealthy meal for another.

"Research has shown time and again that to maintain a healthy weight, we need to eat foods with less fat and added sugars and to take more exercise."

Story from BBC NEWS:  
<http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/3210750.stm>

Published: 2003/10/22 00:29:51 GMT

© BBC MMV

MM2



## Gary D. Foster

Department of Psychiatry, University of Pennsylvania School of Medicine

Preparation of this article was supported, in part, by National Institutes of Health Grants DK56114 and DK56124. We thank Shirley Wang for her superb editorial assistance.

Correspondence may be addressed to: Thomas A. Wadden, Department of Psychiatry, University of Pennsylvania School of Medicine, 3535 Market Street Suite 3029, Philadelphia, Pennsylvania 19104. Electronic mail may be sent to [wadden@mail.med.upenn.edu](mailto:wadden@mail.med.upenn.edu).

Research on obesity has increased exponentially during the past decade and has yielded remarkable discoveries in the regulation of body weight. This same period, however, has witnessed an unparalleled increase in the prevalence of obesity, making it one of our nation's most pressing health problems. This article reviews the epidemiology and complications of obesity and the factors that have contributed to its sharp increase. Consistent with previous reviews, we examine advances in treatment including behavioral, pharmacologic, and surgical interventions (Brownell, 1982; Brownell & Wadden, 1992). Advances in treatment, however, must be complemented in the next decade by innovative public policy designed to prevent the development of obesity.

### Epidemiology and Complications of Obesity

Obesity refers to an excess of body fat, which normally accounts for about 25% of weight in women and 18% in men (Bray, 1998). Body fat can be measured by a number of methods but is now usually estimated by the body mass index (BMI), which is calculated as weight in kilograms divided by height in meters squared (i. e. ,  $\text{kg/m}^2$ ; Bray, 1998). (


 ccp703510fig1a.jpg

Figure 1 - A table for estimating body mass index (BMI) from height and weight. Overweight is defined as a BMI of 25. 0 to 29. 9  $\text{kg/m}^2$

Figure 1 provides for this calculation using pounds and inches. ) The BMI is highly correlated with measures of body fat and has replaced the more traditional measure of percentage over ideal weight (VanItallie & Lew, 1992).

The World Health Organization (WHO; 1998) has defined obesity as a  $\text{BMI} \geq 30 \text{ kg/m}^2$ , as has the National Institutes of Health/National Heart, Lung, and Blood Institute (NIH/NHLBI; 1998). By this criterion, in 1994 (the last period for which most complete analyses are available), 25% of U. S. women and 20% of men were obese (Flegal, Carroll, Kuczmarski, & Johnson, 1998). An additional 25% and 39%, respectively, were considered overweight, defined as a BMI of 25. 0 to 29. 9  $\text{kg/m}^2$ . Thus, 55% of adult Americans were either overweight or obese; only a minority had a BMI in the desired range of 18. 5-24. 9  $\text{kg/m}^2$ . As alarming are findings that the prevalence of obesity and overweight is continuing to increase precipitously. The most recent data, obtained in 1999, found that fully 61% of adult Americans were either overweight (34%) or obese (27%; National Center for Health Statistics, 1999). Similar trends have been observed in other developed nations, leading the WHO to declare obesity a global epidemic (WHO, 1998). In the United States, minority women are the most affected. In the 1994 survey, 37% of African American and 33% of Mexican American women were obese; an additional one third of each group met criteria for overweight (Flegal et al. , 1998). From ages 20 to 60 years, BMI increases in both sexes, across all ethnic groups.

Obesity is associated with an enormous burden of physical, economic, and emotional suffering (NIH/NHLBI, 1998). The criterion for defining obesity (i. e. ,  $\text{BMI} \geq 30 \text{ kg/m}^2$ ) was selected principally on the basis of the strong relation between BMI and mortality, shown in


 ccp703510fig2a.jpg

Figure 2 - Mortality ratios in relation to the body mass index of nonsmoking men and women (of all ages) who participated in the American Cancer Society study (*Treatment of the Seriously Obese Patient* (p. 28), T. A. Wadden and T. B. VanItallie (Eds. ), 1992, New York: Guilford Press. Reprinted with permission.

Figure 2. At a BMI of 30 kg/m<sup>2</sup>, the risk of mortality increases by approximately 30% and at a BMI  $\geq$  40 kg/m<sup>2</sup> by 100% or more (Manson et al., 1995). Death is attributable primarily to obesity's association with cardiovascular disease and type 2 diabetes, as well as with several cancers (Pi-Sunyer, 1993). Other complications include sleep apnea, gallbladder disease, and the exacerbation of osteoarthritis. In 1995, obesity-related complications were estimated to cost our nation \$99 billion (Wolf & Colditz, 1998).

Although often overlooked, obesity disproportionately affects people of low income, particularly women. One study found it was six times more common in women of low as compared with high socioeconomic status (Moore, Stunkard, & Srole, 1962). Differences in social class contribute to the discrepancy in prevalence rates between majority and minority women, the latter of whom fall disproportionately in the lowest income levels (Kumanyika, 1987). A prospective study of female adolescents clearly revealed the social and economic perils of excess fat (Gortmaker, Must, Perrin, Sobol, & Dietz, 1993). Obese as compared with nonobese girls completed significantly fewer months of high school (despite equal grades), were significantly less likely to marry, and had lower household incomes. Other findings have confirmed that overweight individuals are subjected to prejudice and discrimination when seeking college admissions, a job, or a place to live (Wadden, Womble, Stunkard & Anderson, 2002). It is remarkable, in the face of such obstacles, that a majority of overweight individuals in the general population have essentially normal psychological functioning (Wadden et al., 2002). Those, however, who seek weight reduction are more likely to report depression, anxiety, binge eating, and other complications (Fitzgibbon, Stolley, & Kirschenbaum, 1993; Friedman & Brownell, 1995).

## **Etiology of the Obesity Epidemic**

Bray (1998) has succinctly summarized the etiology of obesity: "Genes load the gun, the environment pulls the trigger." Genes are currently thought to explain 25%-40% of the variance in BMI (Bouchard, 1994; Price, 2002) and contribute to differences among people in resting metabolic rate, in weight gain in response to overfeeding, and in where excess fat is stored (i. e., body fat distribution; Bouchard, 1994; Bouchard et al., 1989, 1990; J. A. Levine, Eberhardt, & Jensen, 1999). Thus, some individuals appear to be born with a genetic predisposition to obesity that is readily nurtured by our nation's lifestyle, as discussed later.

### ***The Leptin Pathway***

The specific genes that contribute to common types of human obesity have yet to be identified, and there are likely to be dozens that potentially interact (Chagnon, Perusse, Weisnagel, Rankinen, & Bouchard, 2000; Price, 2002). Investigators, however, have found at least five single-gene defects that produce obesity in laboratory animals. The past decade's most exciting discovery was that of the ob gene and its protein product leptin (Zhang et al., 1994). Leptin is secreted from adipose tissue and has been shown in the mouse to act on neural networks in the hypothalamus that regulate energy intake and expenditure (Campfield, Smith, Guisez, Devos, & Burn, 1995).

The ob/ob mouse, as a result of a genetic mutation, produces no leptin (Campfield et al., 1995). The animal's marked overeating, sedentariness, and resulting obesity are all reversed by the administration of recombinant leptin. Investigators expected to find that severely obese humans would be deficient in leptin. To date, however, only a handful of such individuals have been found worldwide; they too have lost weight when given the protein (Montague et al., 1997). Surprisingly, the vast majority of obese individuals have high leptin levels, commensurate with their increased body fat (Considine et al., 1996). This finding has led investigators to speculate that some obese individuals may be insensitive to leptin, in the same manner that persons with type 2 diabetes are insensitive to insulin (Campfield et al., 1995). Clinical trials of leptin are currently under way, and investigators are searching for abnormalities in other neuropeptides that are related to leptin (Schwartz, Woods, Porte, Seeley, & Baskin, 2000).

### ***The Toxic Environment***

Research in genetics holds promise for significantly obese individuals who have physiologic, metabolic, or related abnormalities. Such research, however, is unlikely to solve our nation's obesity epidemic. This is because changes in our eating and activity habits, not our gene pool, appear to lie at the heart of this epidemic (Hill & Peters, 1998; Price, 2002). Studies that have tracked individuals who moved from less to more modernized countries have shown increased rates of obesity. For instance, Bhatnagar et al. (1995) followed individuals who migrated to West London from Punjab, India and found significantly increased body weights in the individuals in London compared with their siblings remaining in Punjab. Another clear example is provided by Pima Indian women living in Arizona compared with their relatives remaining in Mexico (Ravussin, Valencia, Esparza, Bennett, & Schulz, 1994). Women in Arizona were found to have an average dietary fat intake of 41% of total calories, body weight of 90 kg, and BMI of 37 kg/m<sup>2</sup>, as compared with 23% of calories from fat, body weight of 70 kg, and BMI of 25 kg/m<sup>2</sup> for women remaining in Mexico. Although studies of this type do not control perfectly for genetics, the staggering effects of changing environments (or cultures) cannot be dismissed. We agree with the conclusions of the Institute of Medicine (1995) that, "there has been no real change in the gene pool in this period of increasing obesity. The root of the problem, therefore, must lie in the powerful social and cultural forces that promote an energy-rich diet and a

sedentary lifestyle." (p. 152)

Brownell and colleagues (Battle & Brownell, 1997; Brownell, 1994; Horgen & Brownell, 1998, 2002) have referred to these forces as a "toxic" environment. Toxic in this case refers to unprecedented exposure to energy-dense, heavily advertised, inexpensive, and highly accessible foods. These foods have been combined with an increasingly sedentary lifestyle in which children, for example, watch an average of 28 hr of television a week; the more hours of viewing, the greater the likelihood of obesity (Gortmaker et al., 1996). Additional examples of the toxic environment include the explosion of fast food restaurants, large and ever-growing portion sizes, buffet restaurants, gasoline stations remodeled to have minimarkets, fast food franchises in school cafeterias, school districts signing contracts with soft drink companies, and powerful food advertising. What occurs in schools is especially concerning, with decreased emphasis on physical education classes, poor food available in cafeterias, vending machines, and food advertising on educational television. All signs are that the environment is worsening, so an increased prevalence of obesity, even from the high rates seen now, might well be expected (Foreyt & Goodrick, 1995b).

Genetics may help to explain why particular individuals become obese (or severely obese) when exposed to the toxic environment (Price, 2002). Such research should ultimately aid treatment but alone is unlikely to prevent the continued growth of obesity. We believe that the management of this epidemic will require better treatments for individuals who are already obese, but of more importance, it will require that greater resources and efforts be aimed at the prevention of this disorder. Such efforts must target the toxic environment that lies at the heart of the problem. In the remainder of this article, we first examine advances in the assessment and treatment of individuals who are already obese. We then discuss public health and policy initiatives designed to prevent the development of obesity.

## **Assessment of Obesity**

### **Assessment of Health Risks**

An expert panel convened by the NIH/NHLBI (1998) recently issued comprehensive guidelines for assessing obesity. Step 1, as shown in

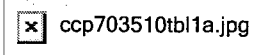


Table 1, is to calculate the individual's BMI. In general, the greater the increase above a value of 25 kg/m<sup>2</sup>, the greater the risk of health complications (Bray, 1998; Manson et al., 1995). Step 2 is to determine the waist circumference, which provides an estimate of body fat distribution (NIH/NHLBI, 1998). Excess fat in the upper body (particularly in the intra-abdominal cavity) is more likely to be associated with hypertension, type 2 diabetes, dyslipidemia, and other complications than is the same amount of fat carried in the lower body (Lapidus et al., 1984; Sjöström, 1993). In women, a waist circumference  $\geq$  35 in. is indicative of upper body obesity, with the corresponding value in men  $\geq$  40 in. Table 1 shows that upper body obesity compounds the risk of health complications in the presence of a BMI of 25-34.9 kg/m<sup>2</sup>. Individuals with a disease risk equal to or greater than "high," as determined by the table, should have a thorough medical examination to determine whether they have already developed hypertension or other conditions that require treatment.

### **Assessment of Behavioral and Psychosocial Factors**

Assessment of health risks should be complemented by an evaluation of behavioral and psychosocial complications, as described previously (Wadden & Phelan, 2002). Of these, binge eating may be the most significant. Approximately 10%-30% of obese individuals who seek weight reduction suffer from binge eating disorder, in which they consume large amounts of food in a short period of time and experience loss of control during these episodes (Spitzer et al., 1993; Stunkard, 2002). They do not, however, purge after overeating. Binge eating is frequently associated with depression, negative body image, and other complications that may require treatment, independent of the individual's obesity (Marcus, 1993; Yanovski, 1993). Binge eating can be assessed by the Questionnaire on Weight and Eating Patterns (Yanovski, 1993) or by the Eating Disorder Examination-Questionnaire (Fairburn & Cooper, 1993). Options for treating this disorder are discussed later.

Methods of assessing routine eating and activity habits have been described previously (Allison, 1995; St. Jeor, 1997). Patients are likely to underestimate their calorie intake by as much as 50% when keeping food records (Lichtman et al., 1992). These records, however, are helpful clinically because they highlight patterns of eating and track progress in treatment. Physical activity is the other behavior that must be assessed, especially considering its relationship to long-term weight reduction (Pronk & Wing, 1994). Activity can be assessed by a structured interview (Sallis et al., 1985) or by a questionnaire (Paffenbarger et al., 1993); in research studies, it is frequently evaluated by counting minutes of planned exercise. Alternatively, a new generation of pedometers provides an accurate but inexpensive method of tracking the daily number of steps walked (Bassett et al., 1996).

NN-4

# Methods and Goals of Weight Reduction

## A Treatment Algorithm

✖ ccp703510fig3a.jpg

Figure 3 - A conceptual scheme showing a three-stage process for selecting treatment. The first step, the classification decision, divides people into four levels based on body mass index (BMI). This level indicates which of four classes of interventions are likely to be most appropriate in the second stage, the stepped-care decision. All individuals are encouraged to control their weight by increasing their physical activity and consuming an appropriate diet. When this approach is not successful, more intensive intervention may be warranted, with the most conservative treatment (i. e. , lowest cost and risks of side-effects) tried next. The thick solid arrow between two boxes shows the class of treatments that is usually most appropriate for an individual when less intensive interventions have not been successful. The third stage, the matching decision, is used to make a final treatment selection, based on the individual's prior weight loss efforts, treatment preferences, and need for weight reduction (as judged by the presence of comorbid conditions or other risk factors). The dashed lines point to treatment options for persons with a reduced need for weight reduction because of a reduced risk of health complications. The thin solid arrows show the more intensive treatment options for persons, who despite relatively low BMI levels, have increased risks of health complications. Adjunct nutritional or psychological counseling is recommended for patients who report marked problems with meal planning, depression, body image, or similar difficulties.

Figure 3 presents an algorithm for selecting treatment. It is similar to one developed by the NIH/NHLBI (1998) in that interventions are recommended on the basis of an individual's BMI and risk of health complications. Less intensive (and expensive) approaches are generally recommended for persons with lower BMIs. The goal for individuals with a BMI < 27 kg/m<sup>2</sup> may be simply to prevent weight gain by increasing physical activity and decreasing intake of high-fat, high-sugar foods. Self-directed efforts and/or advice from a primary care physician may be sufficient in this regard. Individuals with higher BMIs also are encouraged to adopt healthier eating and activity habits, but if unable to lose weight, they have the option of using more aggressive (and costly) interventions. Pharmacotherapy, for example, is an option for individuals with a BMI ≥ 30 kg/m<sup>2</sup> and bariatric surgery for those with a BMI ≥ 40 kg/m<sup>2</sup> (NIH/NHLBI, 1998). Such interventions often carry a greater risk of side effects than a traditional program of diet and exercise, but their greater efficacy in reducing excess weight and its associated health complications may warrant the risks. We believe that heavier individuals should always try less-intensive approaches before progressing to these latter interventions; many will respond satisfactorily, at least in the short term, to a comprehensive behavioral program. As shown by the algorithm's matching component, treatment selection may be modified on the basis of the individual's medical or behavioral complications. For example, pharmacotherapy may be used with a patient with a BMI of 27 kg/m<sup>2</sup> who has a significant comorbid condition (i. e. , hypertension, dyslipidemia, etc. ). By contrast, the absence of health complications in an older woman with lower body obesity and a BMI > 30 kg/m<sup>2</sup> might suggest the use of diet and exercise alone, despite the patient's eligibility for pharmacotherapy. The goal in selecting treatment is to maximize improvements in weight and health while minimizing risks associated with therapy. Treatment selection also must consider the individual's prior weight loss efforts and current treatment preferences.

The proposed algorithm is based on our review of the literature and on our best clinical judgment (Clark, Guise, & Niaura, 1995). We note, however, that there have been few randomized controlled trials with long-term follow-up evaluations (i. e. , ≥ 2 years) that have directly compared the efficacy of different interventions with persons in the same BMI class, let alone with individuals in different BMI classes (i. e. , treatment matching). For example, although surgery appears to be the most successful intervention for persons with BMI ≥ 40 kg/m<sup>2</sup>, no trials have directly compared it with long-term pharmacotherapy. Similarly, for persons with a BMI ≥ 30 kg/m<sup>2</sup>, there are not definitive long-term data that show that a comprehensive behavioral program is more effective when combined with weight loss medication or that either of these approaches is more effective, after 2 years, than a commercial or self-help program. Ultimately, long-term data from controlled trials are needed to validate this and similar algorithms that have been proposed for the management of obesity.

## New Goals of Obesity Treatment

Regardless of the treatment selected, both patient and provider must have realistic goals for weight reduction. Traditionally, all obesity treatments sought to help patients achieve an ideal weight (Foster, 1995). A greater appreciation of the biological factors that regulate body weight and the difficulty of maintaining large weight losses prompted a number of expert panels to conclude that weight losses of only 5%-15% of initial weight are a successful outcome (Institute of Medicine, 1995; NIH/NHLBI, 1998; U. S. Department of Agriculture, 1995). Losses of this size are frequently sufficient to improve health complications of obesity including hypertension, type 2 diabetes, and hypercholesterolemia (Blackburn, 1995; Goldstein, 1992). Thus, attainment of a healthier weight has replaced the ideal weight of years past (Brownell & Wadden, 1992; Foster & Kendall, 1994). A landmark randomized trial recently found that a 7 kg weight loss, combined with 150 min a week of physical activity, reduced the incidence of developing type 2 diabetes by 58% in overweight individuals with impaired glucose

tolerance (Diabetes Prevention Program, 2002). A follow-up study of 5,000 overweight (or obese) individuals who already have type 2 diabetes was recently initiated to determine whether modest weight loss and increased physical activity will reduce the occurrence of heart attack, stroke, and related health complications (Yanovski, Bain, & Williamson, 1999). Observational studies have suggested that intentional weight loss is associated with reduced mortality (Williamson et al., 1995; Williamson et al., 2000).

Unfortunately, a significant disparity exists between the 10% weight losses recommended by professionals and the 20%-35% reduction in initial weight desired by overweight patients (Foster, Wadden, Vogt, & Brewer, 1997; Jeffery, Wing, & Randall, 1998; O'Neil, Smith, Foster, & Anderson, 2000). This discrepancy can lead to unrealistic and negative evaluations of treatment outcomes. For example, before treatment, obese women characterized a loss of 25% of initial weight as "one that I would not be happy with" and a 17% weight loss as "one that I could not view as successful in any way" (Foster, Wadden, Vogt, & Brewer, 1997). Thus, the average 10% weight loss produced by the best nonsurgical approaches may be very disappointing to patients and lead them to abandon the diet and exercise regimen needed to maintain weight loss. This belief, that dissatisfaction with outcome adversely affects the maintenance of weight loss, is based on the broader literature of goal setting (Carver & Scheier, 1982; Cervone, Jiwani, & Wood, 1991), as well as our clinical experience. One study (Jeffery, Wing, & Randall, 1998), however, found no relationship between reaching goal weight and maintenance of weight loss, but no ratings of satisfaction were obtained and very few patients (i. e., 17%), mostly men, reached their goal. Further studies of this issue are needed.

## **Advances in the Treatment of Obesity**

The next several sections review advances in behavioral, pharmacologic, and surgical interventions. Lack of adequate data precludes us from making evidence-based recommendations concerning commercial or self-help programs (shown in the algorithm). This situation may improve in the next decade with the Federal Trade Commission's (1999) call for commercial weight loss programs to provide information on the costs of their programs, as well as their results of treatment. Weight Watchers recently showed that its group program, which offers social support and sensible diet and exercise recommendations at a cost of approximately \$12 a week, induced a loss of 5 kg in 6 months (Heshka et al., 2000). Overeaters Anonymous, a group self-help program, is free of charge and frequently appeals to obese individuals who report binge eating and/or emotional distress (Malenbaum, Herzog, Eisenthal, & Wyshak, 1988). The LEARN Program for Weight Management offers another self-help option (Brownell, 2000). Unfortunately, little if anything is known about the effectiveness of diet books, such as the ever-popular *Dr. Atkins' Diet Revolution* (Atkins, 1999), which are purchased by millions of persons each year (Freedman, King, & Kennedy, 2001). Data are similarly needed to help consumers (and practitioners) make informed decisions about a host of off-the-shelf products, most notably herbal supplements (Allison, Fontaine, Heshka, Mentore, & Heymsfield, 2001).

### **Group Behavioral Treatment**

The results of group behavioral treatment for obesity are well known and have not changed substantially over the past 15 years. A 20-week program induces an average loss of 8.5-9.0 kg (i. e., 9% of initial weight; Foreyt & Goodrick, 1993; Wadden & Foster, 2000; Wilson, 1994; Wing, 2002). Without further treatment, patients regain one third of lost weight in the year following treatment, with increasing regain over time. Recent efforts have focused on inducing larger weight losses and improving the maintenance of weight loss.

### **Inducing larger weight losses.**

The most reliable method of increasing short-term weight loss is restricting calorie intake more severely. Numerous randomized trials have shown that very-low-calorie diets (VLCDs), providing 400-800 kilocalories per day (kcal/day), produce short-term weight losses nearly double those resulting from a standard 1,200-1,500 kcal/day diet of conventional foods (used in traditional behavioral programs). VLCDs, however, are associated with rapid weight regain, such that 1 year after treatment there are not statistically significant differences in weight loss between the two dietary approaches (Ryttig, Flaten, & Rossner, 1997; Torgerson, Lissner, Lindross, Kruijer, & Sjostrom, 1997; Wadden, Foster, & Letizia, 1994; Wing, Blair, Marcus, Epstein, & Harvey, 1994). This has led investigators to use less calorically restricted diets but to retain the use of portion-controlled servings, a prominent feature of liquid VLCDs (Wadden et al., 1997). Jeffery et al. (1993), for example, found that patients who were prescribed a 1,200-kcal/day diet, and were provided much of the food they were to eat, lost significantly more weight after 6 and 18 months of treatment than did patients prescribed the same calorie intake but who consumed a self-selected diet of conventional foods. A follow-up study showed that simply giving patients detailed menu plans was as effective in increasing weight loss as was providing the prescribed foods (Wing et al., 1996). Two studies of a popular meal-replacement plan (i. e., SlimFast) showed similar benefits of using a portion-controlled diet (Ditschuneit, Flechtner-Mors, Johnson, & Adler, 1999; Rothacker, 2000). In the most successful study, conducted in Germany, patients who replaced one meal and one snack a day with portion-controlled servings had a mean loss of 8% of initial weight at the end of 4 years (Flechtner-Mors, Ditschuneit, Johnson, Suchard, & Adler, 2000). These very favorable findings await replication in the United States and other nations.

NN-6 -

Increasing the length of treatment also increases weight loss, but not by as much as expected. Three studies found that weekly behavioral treatment of 40 to 52 weeks produced losses of 12%-14% of initial weight, whereas losses of approximately 18%-25% were anticipated on the basis of results obtained during the first 4-6 months (Perri, Nezu, Patti, & McCann, 1989; Wadden et al., 1994; Wing et al., 1994). The repeated finding that most patients cannot lose more than 10%-15% of initial weight has led to the more modest weight loss goals discussed previously.

### ***Improving long-term weight loss.***

Improving the maintenance of weight loss remains the critical challenge for all obesity treatments (Foreyt & Goodrick, 1993). Two developments have facilitated progress. The first is the recognition that obesity, for most individuals, is a chronic disorder that requires long-term care. Perri and colleagues (Perri et al., 1988; Perri, Nezu, & Viegner, 1992) showed in a series of studies in the 1980s that continuing behavioral care, whether provided by phone, by mail, or in clinic, improved the maintenance of a 10%-15% weight loss, achieved with a 1,200-1,500 kcal/day diet. The shortcoming of this approach is that participation in maintenance sessions declines over time (Wadden et al., 1997; Wing, Venditti, Jakicic, Polley, & Lang, 1998). Innovative approaches, including the use of the Internet and television, are needed to facilitate patients' participation in long-term care (Meyers, Graves, Whelan, & Barclay, 1996; Tate, Wing, & Winett, 2001).

The second development concerns new methods to facilitate patients' increased physical activity, which is the best predictor of weight loss maintenance (Pronk & Wing, 1994). Two studies found that patients who exercised at home, as compared with on-site (i. e., health club or clinic), adhered better to their activity program and/or lost more weight (King, Haskell, Young, Oka, & Stefanick, 1995; Perri, Martin, Leermakers, Sears, & Notelovitz, 1997). Home exercise appears to reduce barriers to adherence. Similarly, multiple short bouts of activity (i. e., 10 min) have been found to be as effective in facilitating exercise adherence and weight loss, as a single long bout (i. e., 40 min; Jakicic, Wing, Butler, & Robertson, 1995; Jakicic, Winters, Lang, & Wing, 1999). Short bouts provide more opportunity to fit exercise into a busy day, as does increasing lifestyle activity, which involves burning more calories throughout the day as a result of small changes, such as using stairs rather than escalators or walking rather than riding (Epstein, Wing, Koeske, & Valoski, 1985). Two recent studies showed the benefits of lifestyle activity, as compared with traditional structured exercise, for improving cardiorespiratory fitness and weight control (Andersen et al., 1999; Dunn et al., 1999). In both cases, the lifestyle intervention was as effective as the traditional exercise intervention. Lifestyle activity would appear to be the perfect alternative for obese individuals who hate to exercise. Moreover, modest improvements in physical fitness, consistent with those that can be achieved with lifestyle activity, may be sufficient to decrease cardiovascular mortality (Blair et al., 1989; Lee, Blair, & Jackson, 1999).

The best maintenance of weight loss is likely to be achieved by combining lifestyle and structured exercise to raise activity-related energy expenditure to approximately 1,500-2,500 kcal per week, as compared with the 1,000 kcal/week traditionally targeted in behavioral programs. Post hoc analyses of several studies revealed the benefits of this higher goal (Andersen et al., 1999; Jakicic et al., 1999; Jeffery, Wing, Thorson, & Burton, 1998). Similarly, participants in the National Weight Control Registry, who had lost at least 14 kg and kept it off for 1 year, reported that they expended approximately 2,800 kcal/week (Klem, Wing, McGuire, Seagle, & Hill, 1997). It is important to note that, although this may be a desired level, any increase in physical activity is better than none. Obese individuals must initially set modest activity goals that they can achieve rather than such ambitious goals that they are destined to fail. Individuals of all weights should be encouraged to increase their physical activity to improve their physical health and emotional well-being, regardless of the effects on body weight (Blair, 1991).

### ***Generalization of treatment effects.***

It should be noted that nearly all of what we know about the behavioral treatment of obesity comes from studies conducted in academic research centers. It could be argued that persons who enroll in such studies have more refractory obesity and, therefore, are more difficult to treat than those in community samples. Alternatively, such individuals may be more motivated, as indicated by their willingness to commit to long-term participation in research trials. In either case, such differences highlight the need to conduct effectiveness studies to determine whether the findings obtained in tertiary care centers extend to the greater numbers of persons who are treated in community settings (Brownell & Wadden, 1991; Womble, Wang, & Wadden, 2002). The efficacy-effectiveness distinction is important in all areas of clinical research, but particularly with obesity, given its widespread prevalence.

We also note that most treatment studies have been of predominantly Caucasian samples. This is troubling given the significantly higher rates of obesity among African Americans and Hispanic Americans (Flegal et al., 1998), particularly in women. With most weight loss methods, including balanced-deficit diets, VLCDs, and bariatric surgery, African Americans lose significantly less weight than do Caucasians (Kumanyika, 2002). Reasons for the smaller losses are not well understood. Cultural and social factors are likely to influence attitudes and behaviors concerning eating, activity, and weight reduction. Lack of attention to these factors when designing and evaluating interventions is a serious gap in our current knowledge. The few programs to date that have been designed specifically for African Americans have yielded modest weight losses (Kumanyika, 2002).



## **Pharmacologic Treatment of Obesity**

Pharmacotherapy is likely to play an increasingly important role in the treatment of obese individuals, specifically those with a BMI  $\geq 30$  kg/m<sup>2</sup> (or 27 kg/m<sup>2</sup> in the presence of health complications; 1996; Yanovski & Yanovski, 2002). In particular, medications could help facilitate the maintenance of weight loss if patients took them long-term, in the same manner that antihypertensive or antidiabetic agents are taken (Hill et al., 1999; Stunkard, 1982). Investigators no longer expect the short-term use of weight loss medications to cure obesity any more than they expect a 3-month trial of medication to cure diabetes. Long-term pharmacotherapy is needed in both cases (Bray & Greenway, 2000).

To be prescribed long-term, weight loss medications must be both safe and effective. Two agents, sibutramine (Meridia) and orlistat (Xenical), are approved by the Food and Drug Administration "for weight loss and the maintenance of weight loss." Sibutramine is a combined serotonin-norepinephrine re-uptake inhibitor that appears to act on receptors in the hypothalamus that control satiation (i. e., feelings of fullness). In randomized trials, sibutramine plus diet produced a 7% reduction in initial weight at 1 year, as compared with a 2% loss for patients treated by placebo plus diet (Lean, 1997). Losses of 10%-15% were achieved when sibutramine was combined with a more intensive program of diet and exercise modification, suggesting that behavior therapy may improve the effects of weight loss medication (James et al., 2000; Wadden, Berkowitz, Sarwer, Prus-Wisniewski, & Steinberg, 2001). Sibutramine is associated with small increases in heart rate and blood pressure and, thus, should not be used in patients with uncontrolled hypertension or cardiovascular disease. Sibutramine also is not recommended for use in combination with several medications, including selective serotonin re-uptake inhibitors (SSRIs) for depression (Abbott Laboratories, 2001).

Orlistat is a gastric lipase inhibitor that blocks the absorption of about one third of the fat contained in a meal (Sjöström et al., 1998). The undigested fat (oil) is passed in stool, leading to the loss of about 150-180 kcal/day. In addition, orlistat requires the consumption of a low-fat diet. If patients consume more than 20 g of fat per meal, or a total of 70 g/day, they increase the risk of adverse gastrointestinal events that include oily stools, flatus with discharge, and fecal urgency. Thus, patients are negatively reinforced to eat a low-fat diet, which further reduces their caloric intake. In randomized trials, orlistat plus diet produced a 10% reduction in initial weight at 1 year as compared with a 6% loss for placebo plus diet (Davidson et al., 1999; Sjöström et al., 1998). Patients who remained on the drug for an additional year maintained a loss of 8% of weight at the end of this time. Because orlistat does not affect the central nervous system, it may be used with patients who take SSRIs or other centrally acting medications.

The next decade will witness an intensified search for medications that decrease energy intake and/or increase energy expenditure (Bray & Greenway, 2000). The results of initial leptin trials have been disappointing; the highest doses of the protein induced losses of only about 8% of initial weight (Heymsfield et al., 1999). Further research, however, on the genetics of body weight regulation is likely to identify additional candidates for intervention. We make two points in this regard. First, trials of 2 years or more are needed to compare pharmacologic treatment with strong behavioral interventions. Current medications do not appear to be more effective than group behavior therapy in inducing weight loss but may maintain weight loss more effectively and efficiently. Second, more research is needed on methods of combining pharmacologic and behavioral interventions. An early study suggested that these two interventions together were more effective than either used alone (Craighead, Stunkard, & O'Brien, 1981). This may be because the two approaches have different but complementary mechanisms of action (Craighead & Agras, 1991). Behavior therapy appears to help obese individuals control the external environment, whereas pharmacotherapy modifies the internal environment by enhancing satiety (as with sibutramine) or by causing malabsorption (as with orlistat; Phelan & Wadden, in press; Wadden, Berkowitz, et al., 2001).

## **Surgical Treatment of Obesity**

The significant health hazards of extreme obesity (BMI  $\geq 40$ ) and the modest weight losses produced by conservative treatments led to the development of surgical interventions. The first widely used procedure was an intestinal (jejunoileal) bypass that produced drastic weight losses (45 kg in 80% of patients) but was abandoned because of the high complication rate, including liver failure, protein-calorie malnutrition, and vitamin and mineral deficiencies (Albrecht & Pories, 1999). In search of a safer procedure, Mason and Ito (1969) developed a gastric bypass (GB) procedure that remains widely used today. The GB creates a small (50 ml) gastric pouch at the base of the esophagus to limit intake. In addition, the stomach and part of the intestine (duodenum) are bypassed by attaching the small pouch and the jejunum. Various modifications, including a smaller gastric pouch of 20-30 ml, have produced average weight losses of approximately 30% of initial weight during the first 18 months, with maintenance of a 25% loss up to 14 years later (Albrecht & Pories, 1999).

A second frequently used procedure is vertical banded gastroplasty (VBG). VBG also creates a small pouch to limit intake, but no alterations are made in the gastrointestinal tract. Weight loss appears to be greater for GB than for VBG (30% vs. 25%, respectively), probably because of the slight malabsorption associated with the former procedure (Sugerman, Londrey, & Kellum, 1989). GB may be particularly effective for sweet eaters because it induces an unpleasant "dumping syndrome" following the ingestion of refined carbohydrates. Patients experience nausea and other adverse gastrointestinal events that discourage future consumption of sweets. Both procedures and their resultant weight loss are associated with significant

improvements in medical conditions (Kral, 1998) and psychosocial functioning (Powers, Rosemurgy, Boyd, & Perez, 1997; Stunkard, Stinnet, & Smoller, 1986), although some studies found regression in mood over time, even with maintenance of weight loss (Karlsson, Sjöstrom, & Sullivan, 1998; Waters et al., 1991).

Surgical treatment is only appropriate for patients with a BMI  $\geq 40$  kg/m<sup>2</sup> or  $\geq 35$  kg/m<sup>2</sup> in the presence of significant health complications (Kral, 1998). In addition, patients should undergo a comprehensive assessment by a multidisciplinary team (i.e., psychologist, nutritionist, and internist) to identify any contraindications and, as important, to give patients realistic expectations about the procedure and its outcome. A comprehensive behavioral evaluation for surgical patients has been described elsewhere (Wadden, Sarwer, et al., 2001).

## **Binge Eating, Obesity, and Nondietering Approaches**

### **Binge Eating**

As noted previously, approximately 10%-30% of obese persons who seek weight reduction suffer from binge eating (Spitzer et al., 1993; Stunkard, 2002). A central question is whether these individuals, in view of their disordered eating and psychopathology, need different treatment than obese nonbingers. Some investigators, for example, believe that binge eaters should not diet because of a possible link between food restriction and binge eating (Polivy & Herman, 1985). (The term *dieting*, as used here, refers to the intentional and sustained restriction of food intake to induce negative energy balance and, thus, weight loss.) Several studies, however, found that consumption of a 1,200-1,500 kcal/day diet, as prescribed in behavioral programs, was associated with decreases, not increases, in binge eating symptoms (National Task Force on the Prevention and Treatment of Obesity, 2000). Other investigations, summarized by Gladis et al. (1998), showed that binge eaters and nonbinge eaters responded equally well to weight loss interventions, although there have been exceptions (Marcus, Wing, & Hopkins, 1988; Yanovski, Gormally, Lesser, Gwirtsman, & Yanovski, 1994).

Both cognitive-behavioral therapy (CBT), designed specifically to control disordered eating, and interpersonal therapy, originally intended for depression, significantly reduce binge episodes (Telch, Agras, Rossiter, Wilfley, & Kenardy, 1990; Wilfley et al., 1993), as do exercise (M. D. Levine, Marcus, & Moulton, 1996), self-help (Carter & Fairburn, 1998), and nondieting approaches (Goodrick, Kimball, Reeves, Poston, & Foreyt, 1998). The few controlled studies of pharmacotherapy have shown little significant effect compared with placebo (McCann & Agras, 1990; Stunkard, Berkowitz, Tanrikut, Resiss, & Young, 1996; Wilfley & Cohen, 1997). Despite reducing binge eating, none of these treatments, including CBT, reliably results in weight loss. It is possible that patients reduce the number of binge episodes but compensate by increasing food intake during nonbinge episodes. Agras, Telch, Arnow, Eldredge, and Marnell (1997) found that abstinence from binge eating was associated with greater weight loss than was only partial remission from bingeing.

As a whole, the literature suggests that moderate caloric restriction, in the context of a standard behavioral weight loss program, not only improves binge eating but also induces weight loss (National Task Force on the Prevention and Treatment of Obesity, 2000). CBT and nondieting approaches improve binge eating but without inducing significant weight loss; thus, the adverse medical consequences of excess weight remain. Identification of the optimal treatment for obese binge eaters will require long-term comparisons of weight-reducing and non-weight-reducing approaches. Patients should be assessed on changes in eating behavior, weight, and physical and psychosocial health.

### **Nondietering Approaches for Obesity**

Extending beyond binge eating disorder, some investigators have proposed that dieting should not be used in the treatment of obesity itself (Garner & Wooley, 1991; Polivy & Herman, 1992). This argument is based on the generally poor long-term results of weight loss efforts, as well as concerns that dieting may be associated with adverse physical or psychological effects, in addition to binge eating (Polivy & Herman, 1985). Few studies of obese dieters support the latter concerns (National Task Force on the Prevention and Treatment of Obesity, 2000). Nonetheless, several nondieting or undieting approaches have been proposed that, although differing in their specific methods, generally seek to (a) increase awareness about dieting's ill effects, (b) provide education about the biological basis of body weight, (c) help patients stop restricting their caloric intake and avoiding prohibited foods, (d) encourage the use of internal cues such as hunger and fullness to guide eating rather than external cues such as calories or fat grams, (e) improve self-esteem and body image through self-acceptance rather than through weight loss, and (f) increase physical activity (Foreyt & Goodrick, 1995a; Foster & Johnson, 1998; Foster & McGuckin, 2002; Hirschmann & Munter, 1988; Polivy & Herman, 1992).

Two uncontrolled trials of this approach showed significant improvements in mood and self-esteem (Polivy & Herman, 1992; Roughan, Seddon, & Vernon-Roberts, 1990). Participants in one study gained 5.9 kg over 10 weeks (Polivy & Herman, 1992), whereas those in a second lost 1.8 kg in 8 weeks (Roughan et al., 1990). In a controlled evaluation, Tanco, Linden, and Earle (1998) showed that an 8-week nondieting approach, compared with standard weight loss treatment and a wait-list control, showed greater improvements in mood and some measures of eating-related psychopathology. Both the nondieting and weight loss groups lost small amounts of weight (2.6 and 1.8 kg, respectively). A more recent study found that a

program that combined elements of nondieting with a moderately restricted diet of 1,800 kcal/day produced better weight loss at 1 year than did a traditional behavioral weight loss program that included a 1,200 kcal/day diet (Sbrocco, Nedegaard, Stone, & Lewis, 1999).

Nondieting approaches merit further investigation in randomized controlled trials. Such trials will need to clearly define what is meant by "dieting" and "nondieting," as the nondieting approaches and standard behavioral interventions for weight loss have more in common than might be thought (e. g. , eating a variety of foods in moderation, using stimulus control, increasing physical activity). Moreover, it may be possible to blend these approaches, as Sbrocco et al. (1999) apparently did. Optimal interventions are likely to be at least 6-12 months in duration, to include follow-up evaluations of 2 years or more, and to compare participants on changes in weight, health complications, and psychosocial status. Measures of body image dissatisfaction (Sarwer, Wadden, & Foster, 1998) should be included, given that this complication improves with weight loss (Cash, 1994; Foster, Wadden, & Vogt, 1997) but also with CBT interventions that do not produce weight reduction (Rosen, Orosan, & Reiter, 1995).

## **Child and Adolescent Obesity**

This review has focused principally on the treatment of obese adults. Obesity, however, is also on the rise in America's youth. In children ages 6 to 11 years, the prevalence of overweight nearly doubled from 1980 to 1994 (i. e. , from 6. 5% to 11. 4% in boys and from 5. 5% to 9. 9% in girls; Troiano & Flegal, 1998). Similar increases were observed in adolescents (i. e. , from 4. 7% to 11. 4% in boys and from 4. 9% to 9. 9% in girls). Although the medical consequences of childhood obesity are less severe than in adults, excess weight in childhood and adolescence is associated with hyperlipidemia, especially in youth with upper body fat distribution (Dietz, 1998). The increase in type 2 diabetes observed among adolescents (Pinhas-Hamiel et al. , 1996) is thought to be largely attributable to the corresponding increase in obesity (Dietz, 1998). Independent of any deleterious effects during childhood or adolescence, obesity persists. Approximately 25%-50% of obese adolescents become obese adults (Charney, 1998; Guo, Roche, Chumlea, Gardner, & Siervogel, 1994; Must & Strauss, 1999). Moreover, the medical consequences of excess weight among adults are greater in those who were overweight as adolescents (DiPietro, Mossberg, & Stunkard, 1994; Must, Jacques, Dallal, Bajema, & Dietz, 1992).

In contrast to the treatment of adult obesity, family-based behavioral treatments for obese children produce significant long-term reductions in percentage overweight. Pooling results from four studies, Epstein (1994) reported that 10 years after treatment children had experienced an average reduction in percentage overweight of 8%, and nearly 30% were no longer obese. Studies are now needed to determine whether methods used in state-of-the-art university-based programs can be successfully implemented in community settings.

The results of behavioral treatment programs for obese adolescents are usually less successful than those for children (Brownell, Kelman, & Stunkard, 1983; Epstein, Myers, Raynor, & Saelens, 1998; Mellin, Slinkard, & Irwin, 1987). This finding suggests the potential advantage of addressing obesity in childhood, while parental influence is still strong and before obesity-promoting behaviors have become well ingrained (Epstein et al. , 1998). Increased focus on physical activity may prove particularly beneficial. It is well known that sedentary behavior (e. g. , watching television, playing video/computer games) is associated, both cross-sectionally and longitudinally, with obesity in children and adolescents (Andersen, Crespo, Bartlett, Cheskin, & Pratt, 1998; Dietz & Gortmaker, 1985; Gortmaker et al. , 1996). Epstein, Saelens, and O'Brien (1995) have evaluated the reinforcement value of various types of sedentary and active behaviors within the context of behavioral choice theory. This emerging body of research suggests that sedentary behavior is intrinsically more reinforcing than various forms of physical activity (Epstein, Saelens, Myers, & Vito, 1997; Epstein et al. , 1995). Notably, making highly desired and frequently occurring sedentary behavior contingent on increasing physical activity appears to increase physical activity and decrease sedentary behavior (Saelens & Epstein, 1998). Future research on the reinforcing value of sedentary and active behaviors may lead to theory-driven and empirically validated methods to decrease sedentary behavior among children and adolescents.

## **Tackling the Obesity Crisis: Prevention and Policy**

There is always the hope that the obesity epidemic will be reversed with advances in treatment. Given, however, that obesity is multiply determined and driven by such a powerful environment, we doubt that behavioral and pharmacologic interventions alone will halt, let alone reverse, the current epidemic. If the environment is the primary cause of the obesity epidemic, it is reasonable to search for environmental solutions, and because obesity is so difficult to treat, prevention may be more reasonable than remedy. At this point, relatively few researchers are working on prevention, and relatively little funding is directed at this problem. Far greater effort is needed.

## **Prevention of Obesity**

One approach is to adopt a clinical model but apply it to the prevention of weight gain rather than to weight loss. Jeffery and French (1999) did this with the Pound of Prevention Study. Participants given an educational program on diet and activity

aimed at weight gain prevention were compared with those who received no program. At the end of 3 years, no advantage was observed for the intensive educational-behavioral program, as compared with the control group. Klem, Viteri, and Wing (2000) have reported more promising results with the use of an intensive, small-group intervention, and thus, such approaches deserve further study. The costs, however, of such interventions must be carefully assessed to determine whether they could be reasonably implemented with the millions of Americans at risk of becoming obese.

Large-scale lifestyle intervention programs may also play a role in prevention. Although there are examples of successful programs for adults, effects are typically small and tend to be transitory, as shown in programs in both communities and work sites (Howard-Pitney, Winkleby, Albright, Bruce, & Fortmann, 1997; Luepker et al., 1994; Patterson et al., 1998). Schools are also a likely venue for prevention. Several studies have shown positive effects of school-based interventions that focused on diet (Manios & Kafatos, 1999) and physical activity (Sallis et al., 1997). For the most part, however, effects have been modest and short-lived. Small effects spread across large numbers of people could potentially have a public health impact, but the question arises whether such school programs could ever be implemented on a broad scale. Teachers and administrators, who find it difficult to teach even basic subjects, are now beset by demands to provide instruction in diversity, AIDS, sexuality, alcohol, drugs, and social development, to name but a few issues. It will be a challenge to raise obesity prevention to the top of the priority list.

This brief synopsis suggests that traditional approaches to prevention, which emphasize increasing education in schools and extending clinical interventions to the general population, may be helpful for some individuals and should be developed further. In their current form, however, they alone are unlikely to reverse the obesity epidemic.

### Policy as Means for Prevention

One approach to prevention is to examine public policy as a means for changing diet and physical activity (Battle & Brownell, 1997; Brownell, 1994; Horgen & Brownell, 1998, 2002; Jacobson & Brownell, 2000; Nestle & Jacobson, 2000; Schmitz & Jeffery, 2000; Sherwood & Jeffery, 2000). Proposals in this area are in their infancy and are largely untested, but they are worthy of further discussion and testing (Brownell, 1994; Nestle & Jacobson, 2000; Sallis, Bauman, & Pratt, 1998). Those that follow are drawn from Horgen and Brownell (2002).

- *Regulate food advertising aimed at children.* The average American child sees 10,000 food advertisements on television each year; 90%-95% of these are for sugared cereals, fast food, soft drinks, and candy (Horgen, Choate, & Brownell, 2001). There is clear evidence that exposure relates to food preferences and that the content of food ads aimed at children overwhelmingly favors foods of poor nutritional quality (Horgen et al., 2001). Direct regulation might be possible, but perhaps more feasible would be offering equal time for pronutrition messages. This issue is of particular concern in schools, where commercial television now couples food advertisements with education and news programming. There is evidence that early intervention can increase preferences for healthy foods (Birch, 1999).

- *Prohibit fast foods and soft drinks from schools.* Increasingly, school systems are importing fast food franchises into cafeterias and signing contracts with soft drink companies that increase exposure to foods low in nutrition. Encouraging consumption of healthy foods by enhancing education is only part of the picture. Education by modeling, by having healthy foods predominate in cafeterias and vending machines, is also necessary.

- *Subsidize the sale of healthy foods.* Decreasing the price of healthy foods, at least in small, controlled environments, increases sales of these foods. Several well-controlled studies of vending machine purchases, for example, have shown that reducing prices of healthy options leads to a significant increase in sales of these items (French, Jeffery, Story, Hannan, & Snyder, 1997; Jeffery, French, Raether, & Baxter, 1994). More of such research is needed to develop policy-level proposals. Broad subsidies of healthy foods at the national level, thus increasing availability and perhaps desirability of foods high in nutrient density, should be explored.

- *Tax unhealthy foods.* A tax on unhealthy food, if done in the service of raising money for food subsidies, might have the dual effect of enabling subsidies and decreasing consumption of food poor in nutrition. Jacobson and Brownell (2000) have speculated that small taxes placed on snack foods and soft drinks, a number of which are now in effect, are acceptable to consumers and could raise considerable funds to be earmarked for nutrition education or perhaps even subsidies. It is not known how high the taxes must be to affect consumption.

- *Provide resources for physical activity.* Given the strong contribution to obesity of physical inactivity, easy access to opportunities to be physically active, additional physical activity requirements and opportunities in the schools, and other initiatives must be considered (Sallis et al., 1998). Whether additional facilities and opportunities to be active increase activity in sedentary individuals must be studied. Simple low-cost interventions, such as posting signs encouraging use of stairs, should be explored on a broad level (Andersen, Franckowiak, Snyder, Bartlett, & Fontaine, 1998; Brownell, Stunkard, & Albaum, 1980).

It is not known whether any or all of these policy initiatives would be effective, would be acceptable to the public, even if

NN-11

effective, or would have unanticipated negative consequences. We call here not for the adoption of specific policy initiatives, but we propose in the strongest terms that policy research, based on viewing obesity as a public health issue, be funded and become a central area of study in the obesity field. This approach can be dismissed as unrealistic and politically naive. Similar reactions, however, initially greeted calls to equip cars with seat belts, to regulate cigarette advertising, and to get tough on drunk driving.

## Summary and Conclusions

Obesity is a problem out of control. Despite the best efforts of health officials, low-calorie products galore, and ubiquitous pressure to be fit and thin, the problem grows in magnitude and does so in country after country. There is no sign of the problem abating. In the absence of bold prevention and policy initiatives, we expect that prevalence will increase still more in years to come. The cost to the health and well-being of tens of millions of individuals worldwide, and to the health care systems supporting them, will be enormous.

We applaud advances in genetics and biology and hope that treatments will continue to improve. These offer our best hope of helping obese individuals; these individuals deserve safe and effective treatments. These advances, however, are not likely to help an obese nation. At best, they subtract a small number of persons from the obese pool, while many multiples of this number are being recruited into the pool by a toxic environment. A focus on prevention, with innovative policy initiatives, may be our most promising approach.

## References:

1. Abbott Laboratories. (2001). MERIDIA (sibutramine hydrochloride monohydrate). Prescribing information. *Physician's Desk Reference*. Abbott Park, IL: Drug Information Services Group.
2. Agras, W. S., Telch, C. F., Arnow, B., Eldredge, K. & Marnell, M. (1997). One-year follow-up of cognitive-behavioral therapy for obese individuals with binge eating disorder. *Journal of Consulting and Clinical Psychology*, 65, 343-347.
3. Albrecht, R. J. & Pories, W. J. (1999). Surgical intervention for the severely obese. *Bailliere's Clinical Endocrinology and Metabolism*, 13, 149-172.
4. Allison, D. B. (1995). *Handbook of assessment methods for eating behaviors and weight-related problems*. Thousand Oaks, CA: Sage.
5. Allison, D. B., Fontaine, K. R., Heshka, S., Mentore, J. L. & Heymsfield, S. B. (2001). Alternative treatments for weight loss: A critical review. *Critical Reviews in Food Science and Nutrition*, 41, 1-28.
6. Andersen, R. E., Crespo, C. J., Bartlett, S. J., Cheskin, L. J. & Pratt, M. (1998). Relationship of physical activity and television watching with body weight and level of fatness among children: Results from the third national health and nutrition examination survey. *Journal of the American Medical Association*, 279, 938-942.
7. Andersen, R. E., Franckowiak, S. C., Snyder, J., Bartlett, S. J. & Fontaine, K. R. (1998). Can inexpensive signs encourage the use of stairs? Results from a community intervention. *Annals of Internal Medicine*, 129, 363-369.
8. Andersen, R. E., Wadden, T. A., Bartlett, S. J., Zemel, B. S., Verde, T. J. & Franckowiak, S. C. (1999). Effects of lifestyle activity vs. structured aerobic exercise in obese women: A randomized trial. *Journal of the American Medical Association*, 281, 335-340.
9. Atkins, R. C. (1999). *Dr. Atkins' new diet revolution*. New York: Avon Books.
10. Bassett, D. R. L., Ainsworth, B. E., Leggett, S. R., Mathien, C. A., Main, J. A., Hunter, D. C. & Duncan, G. (1996). Accuracy of five electronic pedometers for measuring distance walked. *Medicine and Science in Sports and Exercise*, 28, 1071-1077.
11. Battle, E. K. & Brownell, K. D. (1997). Confronting a rising tide of eating disorders and obesity: Treatment vs. prevention and policy. *Addictive Behaviors*, 21, 755-765.
12. Bhatnagar, D., Anand, I. S., Durrington, P. N., Patel, D. J., Wander, G. S. & Mackness, M. I. (1995). Coronary risk factors in people from the Indian subcontinent living in west London and their siblings in India. *Lancet*, 345, 405-409.

APNR EX-00



We Report. You Decide.

Sign Up Now! Get e-mail alerts when news breaks

ON FNC: FOX NEWS LIVE 2:00pm EST Hezbollah a Potential Threat to U.S.?

SCHEDULE

- HOME U.S. WORLD POLITICS BUSINESS HEALTH SCIENCE TECH FOXLIFE VIDEO VIEWS MYNEWS SPORTS RADIO MOBILE FOX & Friends FOX Online Your World Big Story Special Report FOX Report O'Reilly Factor Hannity & Colmes On the Record FNC iMag FOX Fan

U.S. & WORLD

NEWS ARCHIVE

HOT TOPICS

YEAR IN REVIEW

VIDEO: FOX NEWS FLASH

FOX NEWS ELECTION COVERAGE

Send news tip to FOXNews.com

SUBMIT

ADVERTISEMENT

FOXNEWS.COM HOME > WORLD > NATIONAL

Ailing Man Sues Fast-Food Firms



Wednesday, July 24, 2002

By Michael Y. Park FOX NEWS

E-MAIL STORY RESPOND TO EDITOR PRINTER FRIENDLY VERSION

NEW YORK — Want a class-action lawsuit with that burger?

A New York City lawyer has filed suit against the four big fast-food corporations, saying their fatty foods are responsible for his client's obesity and related health problems.

Samuel Hirsch filed his lawsuit Wednesday at a New York state court in the Bronx, alleging that McDonald's, Burger King, Wendy's and KFC Corporation are irresponsible and deceptive in the posting of their nutritional information, that they need to offer healthier options on their menus, and that they create a de facto addiction in their consumers, particularly the poor and children.

"You don't need nicotine or an illegal drug to create an addiction, you're creating a craving," Hirsch said. "I think we'll find that the fast-food industry has not been totally up front with the consumers."

The suit does not specify the amount of damages Hirsch and his client are seeking.

Industry officials lambasted the legal action.

"It's senseless, baseless and ridiculous," National Restaurant Association spokeswoman Katharine Kim said. "There are choices in restaurants and people can make these choices, and there's a little personal responsibility as well."

(Story continues below)

ADVERTISEMENTS

ADVERTISEMENTS

Alternative to Open Back Surgery

Minimally invasive, corrects most spinal disorders, 21st century laser techniques, outpatient surgery.

www.laserspineinstitute.com

STORIES

Lawyers See Fat Payoffs in Junk Food Lawsuits

KFC spokeswoman Amy Sherwood said her company couldn't comment on the lawsuit because it hadn't yet been served, but dismissed the idea that the fried-chicken chain ought to be held responsible for anyone's health problems.

"Eating sensibly combined with exercise is the best solution for a healthy lifestyle," she said. "KFC offers a variety of menu offerings for those who want a more healthy choice."

Walter Olson, a Manhattan Institute fellow specializing in legal-system issues, called the suit a blatant attempt to cash in on the recent publicity over obesity and the tobacco settlements. He also said it disregarded the idea that people are responsible for their own actions.

"Most people are aware if eating double cheeseburgers, it's not the same as celery," he said. "We all have appetites, but people have no trouble walking down the street and buying a different kind of food. They're not somehow forced to keep going back and keep supersizing. Overeating is a bad habit and is one of the pitfalls of human nature."

So far, there's only a single complainant named in the suit, but Hirsch said at least two other clients would be filing soon in what he aims to make into a class-action lawsuit. All were regular fast-food consumers who suffer from ailments ranging from obesity to diabetes.

The lead plaintiff, 46-year-old maintenance supervisor Caesar Barber, ate at fast-food restaurants four or five times a week and blames his fatty diet for his obesity, diabetes, high blood pressure and cholesterol and the two heart attacks he has suffered.

"I trace it all back to the high fat, grease and salt, all back to McDonald's, Wendy's, Burger King — there was no fast food I didn't eat, and I ate it more often than not because I was single, it was quick and I'm not a very good cook," Barber said in an interview with Foxnews.com.

"It was a necessity, and I think it was killing me, my doctor said it was killing me, and I don't want to die."

Frances Winn, a 57-year-old retired nurse, said her habit of eating at fast-food restaurants at least twice a week since 1975, caused her to go from a size 6 to a size 18, and inflicted her with hypertension, high cholesterol and a hyperthyroid problem.

Israel Bradley, 59, said his ritual of eating a pound of french fries a week gave him high blood pressure, diabetes, made him obese and forces him to walk with a cane. In 1993, he passed out and had to be rushed to the emergency room because of the medical problems caused by his diet.

FOX NEWS VIDEO

TOP VIDEO



\$10,000 Reward Sean Hannity offers reward for conviction of thugs who assaulted Yale choir member

Latest Fox News Headlines

FOXLIFE

- Victoria Beckham's American ambition 'Curb Your Enthusiasm' star Cheryl Hines Jack Hanna on 'FOX & Friends' Yale attacked after singing anthem Jack Bauer in the FOXlight

ADVERTISEMENT

MOST READ TOP EMAILED TOP VIDEOS

- Air Force Staff Sergeant Relieved of Duties After Posing Nude in Playboy Police: Blast at U.S. Embassy in Athens is 'Act of Terrorism' Texas High School Teacher Charged Under 'Peeping-Tom' Law for Videotaping Girls Wrestling 14 Carter Center Advisers Resign Over Former President Jimmy Carter's Book Over-the-Counter Cold and Cough Medicines Can Kill Babies, CDC Says James Brown's 5-Year-Old Son Left Out of His Will Man Arrested in Indiana Workplace Shooting Says He Shot Disabled Workers Over 'Respect' Duke Lacrosse 'Rape' Accuser Changes Story Again, Says Seligmann Didn't Touch Her Justin Timberlake and Cameron Diaz Breakup Rosie O'Donnell's Row With Barbara Walters Predates Trump North Korea Seeks Giant Rabbits for Meat Production to Alleviate Food Shortage Mummies of Lost Andean Tribe to Go on Display in Peru Afghan Warlord Says He Helped Bin Laden Escape Tora Bora Activists Blast Decision to Keep Brain-Damaged Girl's Growth Stunted Sign-Language Teacher Gets 90 Days in Jail for Sex With 16-Year-Old Student Giant Black Hole at Center of Milky Way Grabs Planet-Sized Snack

00,

"I got addicted to it," he said.

Winn and Bradley would both file New York state suits soon, Hirsch said.

The aim of the legal action is to force the fast-food industry to "offer a larger variety to the consumers, including non-meat vegetarian, less grams of fat, and a reduction of size" of their meals, along with federal legislation that would require warning labels on fast food similar to those on tobacco products, Hirsch said.

"Hopefully it will change the eating habits of the American public," he said.

In December, then Surgeon General David Satcher declared obesity America's soon-to-be number one killer, and urged for there to be a healthier range of food available to consumers.

See Next Story in U.S. & World >

E-MAIL STORY | RESPOND TO EDITOR | PRINT-FRIENDLY VERSION

- U.S. • WORLD • POLITICS • BUSINESS • HEALTH • SCIENCE • TECH • FOXLIFE •

U.S. Section

Top News Story



In Detroit, it's the Mexicans welcoming visitors to America. An enclave known as Mexicantown on the city's southwest side is putting the final touches on a \$17 million welcome center; meanwhile, U.S....

Featured Content

- War on Terror
- Homeland Security
- Law
- Crime
- See more

- Anti-War Activists Rush to Hold Protests
- Harvard Releases 50-Year Expansion Plan
- Video Keepsakes of Dying Mother Stolen
- Sergeant in Trouble for Playboy Spread
- Obituaries in the News
- Prison Talk Leads to Lawman's Arrest
- Man Builds Memorial to Fallen Troops
- Big Easy Residents Protest Killings
- Teacher Arrested Under Peeping-Tom Law
- N.J. Veterans Angry Over Education Bill
- News Archive

MARKETPLACE

- TRAVEL
- AUTOS
- REAL ESTATE
- MORTGAGES
- PERSONALS
- RELATIONSHIPS

I am a  Man  Women Seeking  Between  and  Zip Code

25 45

Find a Flight	Hire the Best	Foreclosures	Find a Date	Find a Mortgage
Find a Car	Find Love	Free Credit Score	Fox News Shop	

SEARCH

News Alerts | RSS Feeds | Podcasts | Make FOXNews.com Your Home Page

- Home | U.S. | World | Politics | FOX News Polls | Business | Health | Science | Tech | Foxlife | Video | Views | MyNews | Sports | Weather
- Radio | Mobile | FOX & Friends | FOX Online | Your World | Big Story | Special Report | FOX Report | O'Reilly Factor | Hannity & Colmes | On the Record | FNC
- IMag | FOX Fan | News Archive | FOX Around The World | FOX Sports | Contact US | Upgrade Central | FAQs

Advertise on Fox News Channel, FOXNews.com and FOX News Radio. Jobs at FOX News Channel, Internships At Fox News (Now Accepting Summer Applications)

Terms of use. Privacy Statement. For FOXNews.com comments write to [foxnews@foxnews.com](mailto:foxnews@foxnews.com). For FOX News Channel comments write to [comments@foxnews.com](mailto:comments@foxnews.com)

© Associated Press. All rights reserved.

SMARTMONEY © 2007 SmartMoney. SmartMoney is a joint publishing venture of Dow Jones & Company, Inc. and Hearst SM Partnership. All Rights Reserved.

All quotes delayed by 20 minutes. Delayed quotes provided by ComStock.

Historical prices and fundamental data provided by Henscott, Inc.

Mutual fund data provided by Lipper. Mutual Fund NAVs are as of previous day's close.

Earnings estimates provided by Zacks Investment Research.

Upgrades and downgrades provided by Briefing.com

This material may not be published, broadcast, rewritten, or redistributed. © 2007 FOX News Network, LLC. All rights reserved. All market data delayed 20 minutes.

002



BACK PRINT

## Fat Suit Vs. McDonald's Reinstated

NEW YORK, Jan. 25, 2005

(AP) A court Tuesday revived a class-action lawsuit blaming McDonald's for making people fat, reinstating claims pertaining to deceptive advertising.

The 2nd U.S. Circuit Court of Appeals said New York's general business law requires a plaintiff to show only that deceptive advertising was misleading and that the plaintiff was injured as a result. A lower court judge twice previously tossed out the lawsuit.

In a statement, Oak Brook, Ill.-based McDonald's Corp. said "common sense tells you this particular case makes no sense," adding the ruling "simply delays the inevitable conclusion that this case is without merit."

A message left for the lawyer representing two children named in the lawsuit was not immediately returned.

The lawsuit alleges that tens of thousands of children have suffered obesity, diabetes, heart disease, high blood pressure, elevated cholesterol and other health problems after being misled about McDonald's products.

In an earlier ruling, U.S. District Judge Robert Sweet said consumers cannot blame McDonald's if they choose to eat at its fast-food restaurants.

"If a person knows or should know that eating copious orders of supersized McDonald's products is unhealthy and may result in weight gain," Sweet had written, "it is not the place of the law to protect them from their own excesses."

©MMV, The Associated Press. All Rights Reserved. This material may not be published, broadcast, rewritten, or redistributed.

[Feedback](#) [Terms of Service](#) [Privacy Statement](#)

003





*"We guide communities to improve  
the nutritional & physical wellbeing of our children"*

**APNR EX-PP**

May 1, 2006

Dear Healthy Foods Producer/Distributor,


Kids First invites you to showcase your healthy products at the upcoming Northeast Regional Healthy Foods Marketplace!

**Northeast Regional Healthy Foods Marketplace**  
Friday, August 10, 2006  
10:00AM - 3:00PM  
Crowne Plaza Hotel  
Warwick, Rhode Island

This third time Northeast event promises to be an even greater success! The Northeast Regional Healthy Foods Marketplace has become **the place** for vendors to make business contacts with food buyers from New England public and private K-12 schools, colleges/universities, hospitals, childcare centers, corporations and community organizations such as YMCAs and Boys & Girls Clubs.

Our communities need better access to healthier foods! Many school districts and other

PP

**KIDS FIRST**  
5 Richmond Square  
Providence, RI 02906



John Rarick  
Peak Harvest Foods, LLC  
1285 Baring Blvd, Suite 166  
Sparks, NV 89434


**Dated Material**  
**Aug 10<sup>th</sup> Tradeshow**



# HANDS ON san francisco

May 27, 2004

John Rarick, Executive Manager  
Peak Harvest Foods, LLC  
1285 Baring Blvd., Suite 166  
Sparks, NV 89434

John -  
It was a  
pleasure to work  
with you. Thanks  
for providing the  
great snacks for  
our volunteers!  


Dear John:

Thank you for supporting Hands On San Francisco Day 2004 with your generous donation of 1700 packages of Crunchy Apple Stix. This year was our largest event to date—we had 1350 volunteers participate. In fact, the response was so great that we organized several projects the week before the event, so that we would have enough volunteer opportunities for everyone who pre-registered.

Hands On San Francisco Day creates a special community atmosphere with the events at Yerba Buena Gardens in the morning and afternoon and with volunteer projects in every district of San Francisco. The results of Hands On San Francisco Day come from a large number of people joining together to better their community and share in the spirit of volunteerism. We, however, want to give credit where it is due: to you and Peak Harvest Foods. Thank you for making the day a special and successful day for all the non-profit agencies that we partnered with and the San Francisco community at large. We would like to share some feedback that we received from the event.

I just wanted to thank you for the 20 wonderful volunteers you sent to Sunnyside Elementary School on Saturday, May 8th. What a terrific group! They literally SAVED us. This being our first school carnival in 8 years our parent volunteer turnout was very low, and I just don't know how we would have made it without your help. And many of the Hands On volunteers even stayed longer than they were scheduled to be there and helped us clean up!  
--Erik Westby, PTA President, Sunnyside Elementary School

I was enjoying a cup of coffee at Café Roma this morning in the North Beach area of San Francisco and I noticed a group of women and a man cleaning litter from the gutters near Columbus and Stockton. I spoke to one of the women to find out what was happening and learned about Hands On Bay Area. I wanted to let you know I appreciate what you're doing. You are doing very good work. And I thank you. As a resident of San Francisco – a beautiful city, but troubled with littered streets – I sincerely appreciate your efforts.  
--Received via e-mail from a San Francisco resident who saw volunteers working on a project

These are only two of the thousands of stories that happened on Saturday, May 8<sup>th</sup>, 2004. Thank you for making sure these stories came about. This is just the start of what Hands On Bay Area does each year; every month, we develop 120 projects throughout the entire Bay Area. Hands On San Francisco Day is a step forward in making our city a cleaner, more-livable city with brighter and safer educational spaces and with cleaner public gardens and parks. Thank you once again for all you did to make the day a success.

Sincerely,



Amy Smith  
Associate Executive Director  
Hands On Bay Area

PP<sub>2</sub>

Please keep this receipt with your tax records. In compliance with IRS regulations, this letter verifies that you received no goods or services in return for your contribution to Hands On Bay Area. Hands On Bay Area is a 501(c)3 not-for-profit organization, Tax ID # 77-01955144.

**John Rarick**

---

**From:** Customer Service [CustomerService@innout.com]  
**Sent:** Tuesday, March 15, 2005 6:01 PM  
**To:** 'jr@peakharvestfoods.com'  
**Subject:** Regarding your inquiry at the IN-N-OUT Burger® Web Site.

Dear Mr. John Rarick:

**APNR EX-QQ**

Thank you for your e-mail. Our customers have made us the Company we are today, and we appreciate your comments.

Thank you, too, for your suggestion to use organic foods in our menu. Although we have no immediate plans to change our menu, we are always looking for ways to enhance the quality of food and service we provide. With this goal in mind, we are happy to share your suggestion with our Management Team.

Sincerely,

Jeff Dreher  
Customer Service Representative

QQ-1

**John Rarick**

---

**From:** Customer Service [CustomerService@innout.com]  
**Sent:** Wednesday, March 16, 2005 4:29 PM  
**To:** 'jrarick@mindspring.com'  
**Subject:** Regarding your inquiry at the IN-N-OUT Burger® Web Site.

Dear Mr. Rarick:

Thank you for contacting In-N-Out Burger regarding a link to our site from your homepage. We are flattered when customers such as yourself are so enthusiastic about In-N-Out. Since the launch of our website we have received many requests for links to our homepage. While we are excited about the interest in our site, we are cautious about the use of our name and logo in situations we are unable to control. Unfortunately, we are unable to monitor the ongoing activity of these sites and as such, are unable to grant permission for a link to our site.

In response to your second question, as you may know, In-N-Out Burger® is privately held and family operated. We also hold the trade and service mark rights for our name and logo throughout the world. Therefore, in order to protect these rights, it is necessary for us to enforce them consistently, regardless of the user or purpose for which it is intended.

We hope you will understand our position. Thanks again for thinking of us.

Sincerely,

Sarah VanKirk  
Customer Service Representative

Q Q-2

**John Rarick**

**APNR EX-RR**

**From:** Soldiers Angels [soldiersangels@gmail.com]  
**Sent:** Wednesday, December 20, 2006 7:30 AM  
**To:** jr@peakharvestfoods.com  
**Subject:** Re: help

what I would do if I were you,'  
is

I would put up a link saying we are working with Soldiers Angels to send healthy treats to troops, Please help by donating postage money and have them donate for a box and I can send you names of deployed heroes.

On 12/20/06, **John Rarick** <jr@peakharvestfoods.com> wrote:

Dear Ms. Bader;

I appreciate and understand your efforts to help the soldiers defending our culture and values. it is a shame that the government does not provide all of the necessary items to help them ease the seperation and risks the soldiers undertake.

i must however complain that in trying to send healthy, organic, vegan, vegetarian, special-diet acommodating snacks is may more costly that my company can afford especially given the cost of starting, establishing, maintaining and growing the company to the point of even providing for a livelihood, we cannot afford \$400 in shipping costs.

please visit my web site [www.peakharvestfoods.com](http://www.peakharvestfoods.com) and if you have a suggestion or methodology to send my products more cheaply, i will be eager to send what we can and me all-the-more appreciative and thankful for all of you and your staff's tremendous efforts.

healthy regards,

John Rarick  
Executive Manager  
Peak Harvest Foods, LLC  
[www.peakharvestfoods.com](http://www.peakharvestfoods.com)  
415.606.1689

**IMPORTANT NOTICE:** This message and any attachments are solely for the intended recipient and may contain confidential information which is, or may be, legally privileged or otherwise protected by law from further disclosure. If you are not the intended recipient, any disclosure, copying, use, or distribution of the information included in this e-mail and any attachments is prohibited. If you have received this communication in error, please notify the sender by reply e-mail and immediately and permanently delete this e-mail and any attachments.

RR1

--  
May no soldier go unloved.  
May no soldier walk alone.  
May no soldier be forgotten,  
Until they all come home.

SoldiersAngels.org

RR2

1

FLOATING CLAMSHELL GRIDDLE TOASTER

CROSS-REFERENCE TO RELATED INVENTIONS

Continuation-in-part of Ser. No. 60/323,470, filed Sep. 18, 2001, the contents of which are incorporated by reference.

STATEMENT REGARDING FEDERALLY SPONSORED RESEARCH OR DEVELOPMENT

Not Applicable

MICROFICHE APPENDIX

Not Applicable

BACKGROUND OF THE INVENTION

This invention relates to an improved toasting apparatus... In the 1950's most buns were toasted by placing them face down on a flat griddle. They absorbed the heat radiated off the griddle surface, and were toasted in about four to six minutes. Subsequent decades brought mechanized bun toasters of two basic types. The first is radiant toasters (e.g., home toasters) which utilize heat elements that never directly touch the bun, but toast through radiant heat transfer. Modern commercial radiant toasters utilize a conveyor belt to allow quicker processing of buns. A second type of toaster is the contact toaster, which uses a conveyor to run a bun over a hot surface. These toasters use an opposing surface to compress the bun and get good contact of the lower surface of the bun with the hot surface.

While both radiant and contact toasters allow quicker and easier toasting, they do not impart the same quality of toast as the old fashioned method of placing buns on a flat griddle. Quality oriented fast-food restaurants continue to use the old fashioned toasting method because of the flavor and texture it imparts to the bun. However, most contact toasters use pressure to accelerate the toasting process, typically, by using an opposing plate to compress the bun. The disadvantages of this method include distortion of the shape of the bun by compressing it at its highest points, and allowing condensation to form on the top surface of the bun, which changes texture.

The prior art discloses contact toasters wherein weights are placed upon the bun surface opposite the surface placed upon a griddle to be toasted. Relevant prior art includes U.S. Pat. No. 2,225,068, Bun Toasting Machine, issued Dec. 17, 1940, and U.S. Pat. No. 3,126,813, Self-Adjusting Weights for Toasting Machine, issued Mar. 31, 1964.

Each of these references discloses weights arranged on conveyor chains which move buns forward along a toasting plate. In U.S. Pat. No. '068, FIGS. 4 and 5, the weights are seen to be discs said to be 2/3 the diameter of the bun, the curvature of the plurality of discs conforming "approximately to the average curvature of the top of the bun". U.S. Pat. No. '813 discloses chain-suspended weights which are self-adjusting to the extent of accommodating themselves to articles of variable size, shape or thickness as articles are conveyed across a toasting plate. The weights are formed in roughly a "U" shape with a flat bottom of approximately four square inches between an upwardly curved front wall and an upwardly extending rear wall, with a central cut-out portion so as to be formed with side suspension arms having apertures to receive a hinge shaft transversely connected to

2

the conveyor chains. When then the weight is hanging freely from the hinge shaft, the bottom wall is positioned in a substantially horizontal plane.

The weights described in the references are for use with conveyor contact toaster systems. In each of the patents, the weights are such that the bun is conformed to the shape of the weight. Sliding the bun surface across the toasting griddle tends to promote caramelization. Caramelization is defined as the process of changing the sugar content of a food into caramel, an amorphous brittle brown and somewhat bitter substance, by heating sugar, thereby changing bun texture as well as taste. Further, the large contact surface of the weights disclosed present a relatively large surface area thus being susceptible to condensation which wets the upper surface of the bun and changes the texture thereof. Further, for a given "footprint," the space necessarily dedicated to the conveyor mechanism leaves much less working space.

It is, therefore, an object of the present invention to provide improved weighted means which can exert downward pressure on articles being toasted, and which are self-adjusting to the extent of accommodating themselves to contours and dimensions of articles of said various sizes, shapes or thickness.

It is another object of this invention to provide a means of simultaneously and uniformly toasting articles of differing contours and dimensions without distortion of the upper surface contour thereof, while avoiding the caramelization of the article surface contacting the griddle;

It is a further object of the present invention to provide a maneuverable and compact apparatus having a minimum "footprint" for use at cooking stations where space is limited.

And yet another object is to provide improved weights for a clamshell griddle toaster which will float upon and exert downward pressure on the upper surface of articles being toasted, which will be self-adjusting to the extent of accommodation to articles of varying dimensions and contours as placed upon the griddle, and which will present a minimal footprint.

BRIEF SUMMARY OF THE INVENTION

the present invention relates to a method and apparatus for simultaneously and evenly toasting articles of differing shapes and sizes on a flat metal surface griddle. By way of example, a hamburger bun is sliced horizontally through its midsection, the top portion hereinafter being identified as the "crown," and the lower portion as the "heel." The apparatus comprises a hinged clamshell plate perforated with a multitude of passageways, into each of which is slideably arranged an improved weighted finger or pin, which plate can be lowered over a griddle surface to a position whereby each finger, moving independently, floats, i.e., rests upon, and places a gentle pressure upon the upper surface of the articles arranged upon the griddle, such as bun crowns and heels, irrespective of their differing contours.

It is a feature of the present invention that, in operation, the clamshell plate containing the improved weighted fingers from a generally vertical disengaged position travels downwardly, in an arcuate clockwise path, transitioning to a generally horizontal orientation parallel to the plane of the griddle, whereupon the plate continues its descent in a vertical path to a stand-off position above the griddle. The small, weighted fingers are lowered gradually from the clamshell plate and rest on the bun surface. Each finger

Toasting of Buns

toasting operation.

APNR EX-TT

Testimonial:

"Hi John. I don't even do this type of thing, actually write something so random. HOWEVER, I drove to Tahoe this weekend and stopped at Ikeda's store in Auburn and I picked up a bag of your crunchy apple stix. They were SO good, that I went out of my way to make sure that I could stop by the same store on the way back to San Francisco from Tahoe to pick up another five bags. I think they are delicious."

Alison, San Francisco (March 29, 2004)

PEAK HARVEST



# Crunchy Apple Stix®

Quality you can CRUNCH!™

Available in Organic and Organic Cinnamon

The 1.6 oz package contains two medium-sized apples or over one pound of fresh fruit and has a long shelf life.

98% Fat Free

Cored, Cut & Air Dried  
100% US Grown Apples  
NO Sulfur or Artificial Flavors  
Made in Small Batches  
NO Artificial Colors

Rich In Fiber and Energy



Item	1.6 Ounce
Ingredients	100% apples
UPC Codes	
- Organic	8-91668 00005-1
- Organic Cinnamon	8-91668 00007-1
Case Count/Weight	12 / 1.5 lbs
Case Size (ft.²)	10x7x6 (.30)
Pallet	168 cases/7 tiers/320 lbs
Displays	Clip-Stop, Counter Top & Shelf

Order or request information:

1-888-88 CRUNCHY (27862)

email: sales@peakharvestfoods.com www.peakharvestfoods.com

Peak Harvest Foods™, LLC reserves a portion of its profits to assist organizations that support the organic movement.

**Nutrition Facts**  
Serving Size 30g  
Servings Per Container About 1.6

Amount Per Serving		% Daily Value*
Calories 104	Calories from Fat 0	
		% Daily Values*
Total Fat	0.15g	0.2%
Saturated Fat	0g	0%
Cholesterol	0mg	0%
Sodium	3.6mg	0.2%
Total Carbohydrate	28g	9%
Dietary Fiber	2.4g	10%
Sugars	20g	
Protein	0.3g	

\*Percent Daily Values are based on a diet of other people's secrets.

Contains less than 2% of the Daily Value of Vitamin A, Vitamin C, Calcium, and Iron.

†Percent Daily Values are based on a diet of other people's secrets.

Distributed by:  
Peak Harvest Foods™, LLC  
www.peakharvestfoods.com  
888-88CRUNCHY (888-882-7862)

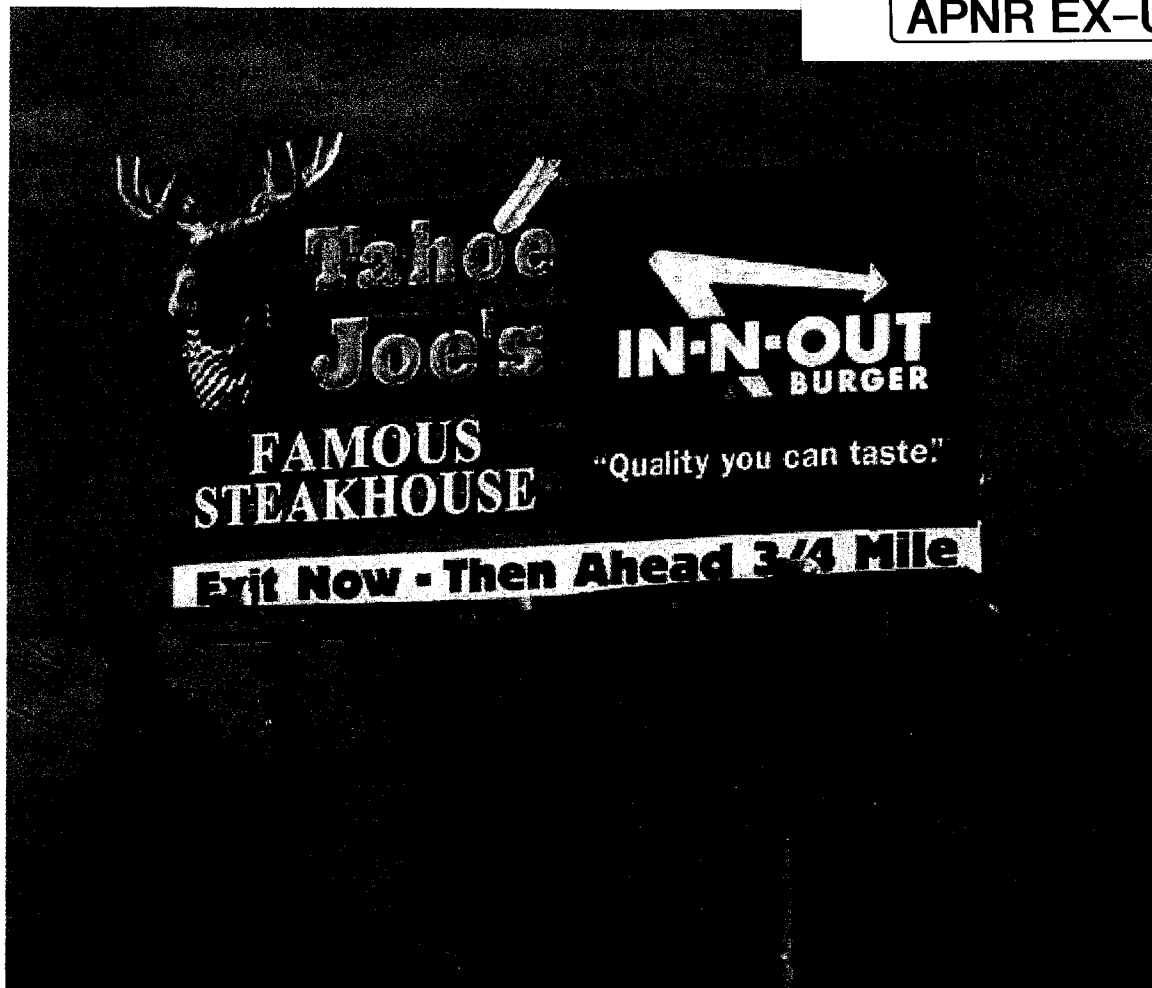
INGREDIENTS: CERTIFIED ORGANIC APPLES AND CERTIFIED ORGANIC CINNAMON. NO SULFUR, NO PRESERVATIVES. Product of USA. May contain peanuts and other particles due to the packaging process.

1 68 00001 1

PEAK HARVEST PHF 0007



APNR EX-UU



EX-4-3

STORE 103 VACAVILLE, CA



APNR EX-VV

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

IN THE MATTER OF APPLICATION SERIAL NO. 78/287,067  
FOR THE MARK "QUALITY YOU CAN CRUNCH"  
PUBLISHED IN THE OFFICIAL GAZETTE OF JUNE 1, 2004

IN-N-OUT BURGERS )  
 )  
OPPOSER )  
 )  
v. )  
 )  
PEAK HARVEST FOODS, LLC )  
 )  
APPLICANT )  
\_\_\_\_\_ )

OPPOSITION NO. 91161044

**DECLARATION OF EDWARD O. ANSELL**

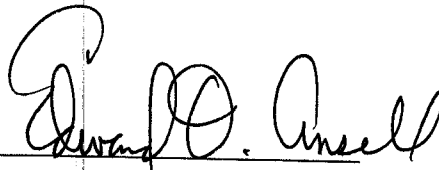
I, EDWARD O. ANSELL do hereby declare and state:

1. I am a citizen of the United States, a member of the bar of the United States District Court in the central District of California, and a resident of the County of Los Angeles in the State of California. I am attorney of record for Petitioner/Opposer in the above entitled action, and my business address for this Opposition is 427 N. Yale Avenue, Suite 204, Claremont, CA 91711.
2. I served Opposer's Second Set of Interrogatories to Applicant and Request for Production of Documents and Things, and First Request for Admissions on February 28, 2005.
3. On April 7, 2005 Opposer received an email from John Rarick, Applicant's Executive Manager, requesting "a few days" delay in delivery of a response, which I agreed to by return email the same date.
4. Applicant's responses were served on April 8, arriving at my office on April 11, 2005.

WW1

ATTACHMENT 1

5. After review, I am of the opinion that the said responses are, in part, incomplete, evasive, or otherwise not in accordance with the Federal Rules of Civil Procedure and the Rules of Practice in Trademark Cases.
6. On the morning of April 18, 2005, I reached Mr. Rarick by telephone and informed him of my wish to discuss what I perceived as deficiencies in Applicant's Responses.
7. Mr. Rarick stated that "this was not the best time to talk" and that he was "not in a position to spend much time right now." He informed me that he was presently "in New York" and didn't have his files with him. He stressed that he was "trying to build a nationally-branded company": and was "constantly on the road," "was only one person," and didn't carry his files around with him.
8. When I pressed him for a time during which a discussion could be held, he said a time could be "set-up" after April 26 when he would be returning to Los Angeles.
9. The testimony period for Opposer opens 30 days prior to May 29, i.e., April 29, 2005. This three-day window does not afford Opposer adequate time to prepare its evidence, consult with its witnesses and make other necessary arrangements, inasmuch as counsel for Opposer will be on travel status on the East Coast from May 14 through May 24.
10. The motions herein are made in good faith and not filed for any improper purpose, the legal contentions are warranted by existing law, and all factual contentions made by declarant in the motions and brief are supported by evidence.
11. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

  
Edward O. Ansell

Date: April 19, 2005

WWZ

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

IN-N-OUT BURGERS )  
Opposer )  
v. )  
JOHN C. RARICK )  
Applicant )

OPPOSITION NO. 91161044

NOTICE OF TAKING TESTIMONY

To: John C. Rarick

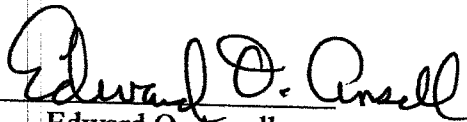
Please take notice that testimony will be taken on behalf of the Opposer, In-N-Out Burgers, in the above entitled proceeding, on July 29, 2005, commencing at 2:00 p.m. at the offices of In-N-Out Burgers, located at 4199 Campus Drive, 9<sup>th</sup> Floor, Irvine, CA 92612. Witnesses who will be examined are:

Arnold M. Wensinger, 4199 Campus Drive, Irvine California

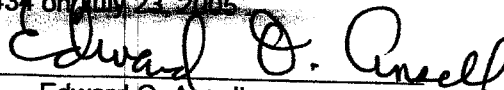
The testimony will be continued until completed. You are invited to attend and cross-examine.

Please note that on July 7, 2005 a Motion to Dismiss was filed with the TTAB and served on you. Should the Motion be addressed by the Board before July 29, the taking of testimony may be postponed or otherwise treated in accordance with the resulting TTAB Order as posted on the USPTO TTABVUE, the Trademark Trial and Appeal Board Inquiry System.

July 22, 2005

  
Edward O. Ansell  
Attorney for In-N-Out Burgers

CERTIFICATE OF SERVICE A copy of the foregoing Notice of Taking Testimony was sent, by First Class Mail, postage prepaid, to John C. Rarick, c/o Peak Harvest Foods, LLC, 1285 Baring Blvd., Suite 166, Sparks, NV 89434 on July 23, 2005.

  
Edward O. Ansell

April 15, 2005

Peak Harvest Foods  
Sparks, NV. 89434

APNR EX-YY

Dear John,

How generous of you to send me your delicious product! Thank you so much! I am seriously addicted to Crunchy Apple Stix! I have to eat at least one package a day (I must confess, sometimes two), but since they're so low in calories and so good for you (I love that your cinnamon is also organic now) I don't feel guilty having more than one package. They definitely curb my sugar cravings, which I get during my afternoon work day slump. My co-worker now loves them too. And my husband, who usually rolls his eyes at all my organic foods, also loves them. Customer's come in my office and see them on my desk and ask about them - I give them a sample and tell them where to buy them in town.

Good luck in promoting a healthy, delicious alternative to all the "junk" snacks out there!

Sincerely,



**CONFIDENTIAL**  
**CONFIDENTIAL**

P.O. Box 102  
Stone Village, NV. 89450

**CONFIDENTIAL**

MASAKO MATSUNAGA  
Hiro  
S... -ku Tokyo 1150  
JAPAN

**CONFIDENTIAL**



Mr. John Rarick

APNR EX-ZZ

Dear John,

6/22/05

I'd like to thank you from the bottom of my heart for finding and returning my files to me. If it weren't for your kindness, I would have been in so much trouble! People like you are a rare jewel, and I'm so lucky to have encountered you. Thank you so much again.

P.S. - I apologize for my delayed message; I had to leave for Japan the next day.

Sincerely,

Masako Matsunaga  
**CONFIDENTIAL**

Rule of Law / By Stephen C. Dillard

APNR EX-AAA

## Litigation Nation

For the past three years our law firm has surveyed U.S. corporate law departments to better understand which kinds of disputes keep general counsels awake at night, and which ones are most likely to lead to all-out litigation. We also ask companies how many lawsuits they face and how much of their overall legal budgets they spend on disputes.

The latest Litigation Trends Survey makes it plain that litigation is now a major feature of the business landscape—even we were surprised by the volume and scope of legal actions across all major industries and regardless of company size. Consider a few key findings based on reporting by 310 in-house counsel, more than half of whom work for public companies with revenues over \$1 billion:

Some 89% of companies report being hit with at least one new lawsuit in the past year, compared with only two-thirds in the 2005 survey. Meanwhile, U.S. companies face an average of 305 lawsuits pending world-wide. For companies with sales of \$1 billion or more, the average number of cases jumps to 556, with 50 fresh suits emerging each year for nearly half of these firms. While the majority of actions are in U.S. courts, a third of the respondents said that at least 20% of their litigation now originates in foreign venues.

Some industries are clearly tagged more than others, none more so than insurance, where participants reported a whopping average of more than 1,600 pending cases (although representing a small pool of the survey, insurers are frequently drawn into disputes with policyholders over claims that run from environmental clean-up and hurricane damage to directors and officers liability and more recently, losses due to terrorist acts). Energy companies averaged 364 cases, retail 333, financial services 300, manufacturers 206, and so on across 13 separate sectors. At the lower end, facing fewer than 25 cases per company, were education providers, nonprofits and trade associations—but even the latter reported an average of four pending lawsuits.

Half of the in-house counsel reported that their companies also faced at least one new arbitration and one new regulatory proceeding in 2005-06. Biggest government

instigators? The SEC and OSHA. But state attorneys general are also regular players, as are the FTC, EPA, the FDA and multiple other federal agencies with the power to subpoena. Pharmaceutical companies reported the highest incidence of regulatory scrutiny, followed by energy firms, insurers, retailers and manufacturers. A number of companies faced more than 50 regulatory proceedings.

One byproduct of America's litigation and enforcement culture is the internal investigation. Some 63% of the law departments surveyed said their companies had

### What tops the corporate lawyer worry list?

launched at least one internal probe requiring outside counsel in the past year alone—more than a quarter of the billion-dollar companies undertook three or more investigations. And our survey was completed before the recent rash of investigations into stock options backdating.

Of course, every lawsuit has at least two sides and our survey reveals how active U.S. business is in playing offense: More than 70% of companies commenced at least one action as plaintiff in 2005-06, and nearly half filed up to five new cases. Manufacturers and retailers were the most frequent plaintiffs: 90% of the companies in both industries initiated at least one suit in the past year. Next in line were real estate and insurance firms. Even a full third of nonprofits filed at least one lawsuit, as did half of the companies with under \$100 million in revenue.

Are these statistics a confirmation of America's vicious, tail-chasing lawsuit crisis? Or are they a vote of high confidence in the judicial system as a means of enforcing contracts, safeguarding intellectual property and brand assets, and stopping fraud? It's worth thinking about.

So what is tops on the corporate lawyer worry-list? Securities-related cases may grab the headlines, but more than half of the in-house counsel cited employment as their top litigation concern. The workplace has become a legal minefield over issues ranging from pay and promotion to harassment and discrimination, and claims of

wrongful termination. Disgruntled workers are a fact of life, with aggrieved employees quicker to sue than almost any other group—and disputes over wages and hours can be brought as class actions in many jurisdictions, creating more waves of litigation.

Contract disputes were the second most-cited litigation concern—old-fashioned, not very sexy, but a time-honored source of business disagreements. From there followed the litany of modern litigation anxieties: IP/patent disputes; personal injury filings; regulatory actions; product liability; toxic torts; and securities and anti-trust issues. Only a small percentage of counsel reported dwelling on bankruptcy, real estate or tax problems, although litigation on these issues could increase in the next economic cycle.

What about financial exposure? Many cases on company dockets are mere bagatelles, disputes valued in thousands of dollars. But nearly four in 10 of our respondents were hit with at least one \$20 million suit in the past year; and for billion-dollar firms, it was almost seven in 10. A number of companies admitted they were looking at least 50 new lawsuits involving at least \$20 million, representing more than \$1 billion in claims.

Meanwhile, companies report spending an average of \$12 million on litigation annually, apart from any judgments or settlements. That compares with only \$8 million a year ago, reflecting in part the growth of our sample but also, we think, bigger-stakes cases and better tracking of litigation costs. For some industries—engineering and insurance—spending on litigation exceeded \$35 million. Especially striking was the portion of overall company legal budgets taken up by lawsuits—an average of 71%.

Nevertheless, one of the more curious survey findings is that 94% of U.S. companies reporting said they had at least one legal action currently pending in an American court. To which we feel compelled to inquire, "Who are the other 6%?" Something to explore for next year.

Mr. Dillard is global chair of the litigation department at Fulbright & Jaworski. The full report is online at [www.fullbright.com](http://www.fullbright.com).



APNR EX-BBB

**JULY**  
**2005**  
 ANNUAL EDITION  
 @ppm/llw

25 MONDAY  
206

Priorities: OK City heading on 3:30  
 Rear 3000 less out/rip  
 @llw.

26 TUESDAY  
207

Stay OK.  
 Priorities: OK city demo Sat 2  
 7m-on/rip  
 10 hrs.  
 opp/rip  
 resp.

27 WEDNESDAY  
208

Drive Tulsa, OK  
 Memo 1 @ 3:30 pm - 7 pm  
 7m-on/rip  
 opp/rip  
 7m  
 @llw.

28 THURSDAY  
209

Tulsa  
 Memo @ 3:30  
 Mail Supplemental  
 @llw.  
 @llw.

JUNE

S	M	T	W	T	F	S
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

JULY

S	M	T	W	T	F	S
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

AUGUST

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

29 FRIDAY  
210

Springfield, Mo  
 Memo 3-7  
 opp/rip  
 7m prep  
 @llw.

30 SATURDAY  
211

last day to mail  
 mail, operation  
 to Wash DC  
 copy & finalize thru mail  
 opp/rip  
 @llw.

31 SUNDAY  
212

Topeka, KS  
 festivity.  
 opp/rip  
 @llw.

**Chapter 3:**  
**Building Blocks for a Successful Natural Foods/Specialty Business – Pricing and Margins**

**Defining gross margin:**

One of the most critical components to predicting business success is the “gross margin” for your product line. “Gross margin” is the difference between the costs related to manufacturing the product and the net price at which you sell product to your customers. There are many accounting variations to determining gross margin for your product(s). For the purpose of this exercise, we prefer the following formula be used:

Factors that go into determining “cost of goods:”

Ingredient costs

Packaging costs

Labor costs or co-packing fee

Manufacturing overhead (portion of rent, insurance, utilities,  
and other expenses related to manufacturing product)

Freight/storage costs to F.O.B. point

**Determining gross margin percentage:**

Gross sales

Less: Promotional discounts

Less: Cash discounts

Less: Returns, spoils, etc.

= Net sales

$$1 - \frac{\text{Cost of goods}}{\text{Net Sales}} = \text{Manufacturing gross margin percentage}$$

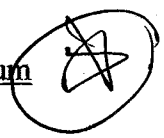
CCC<sub>1</sub>

The truth lies somewhere in between. Obviously, all natural, organic, healthy products cost more to produce and these costs will trickle down to the consumer in terms of higher prices. Also, since most natural products reach the store through distributors, the supply chain costs tend to be higher than products that go direct through supermarket warehouses. However, there is a price point at which you discourage trial from potential consumers. The secret is to discover the balance between meeting your margin needs to grow your business and establishing a price point that is not too far out-of norm.

The following pricing survey compares conventional mass-market products with their all-natural counterparts marketed through natural food stores. Ounce-for-ounce retail comparisons, rather than straight retail price comparisons, were used due to the tendency for natural companies to “downsize” the packaging weights (see “downsizing” below) to hit critical price points.

**Cost Survey for Conventional versus Natural/Organic Products**  
 (cost is “per ounce” conventional versus organic unless otherwise noted)

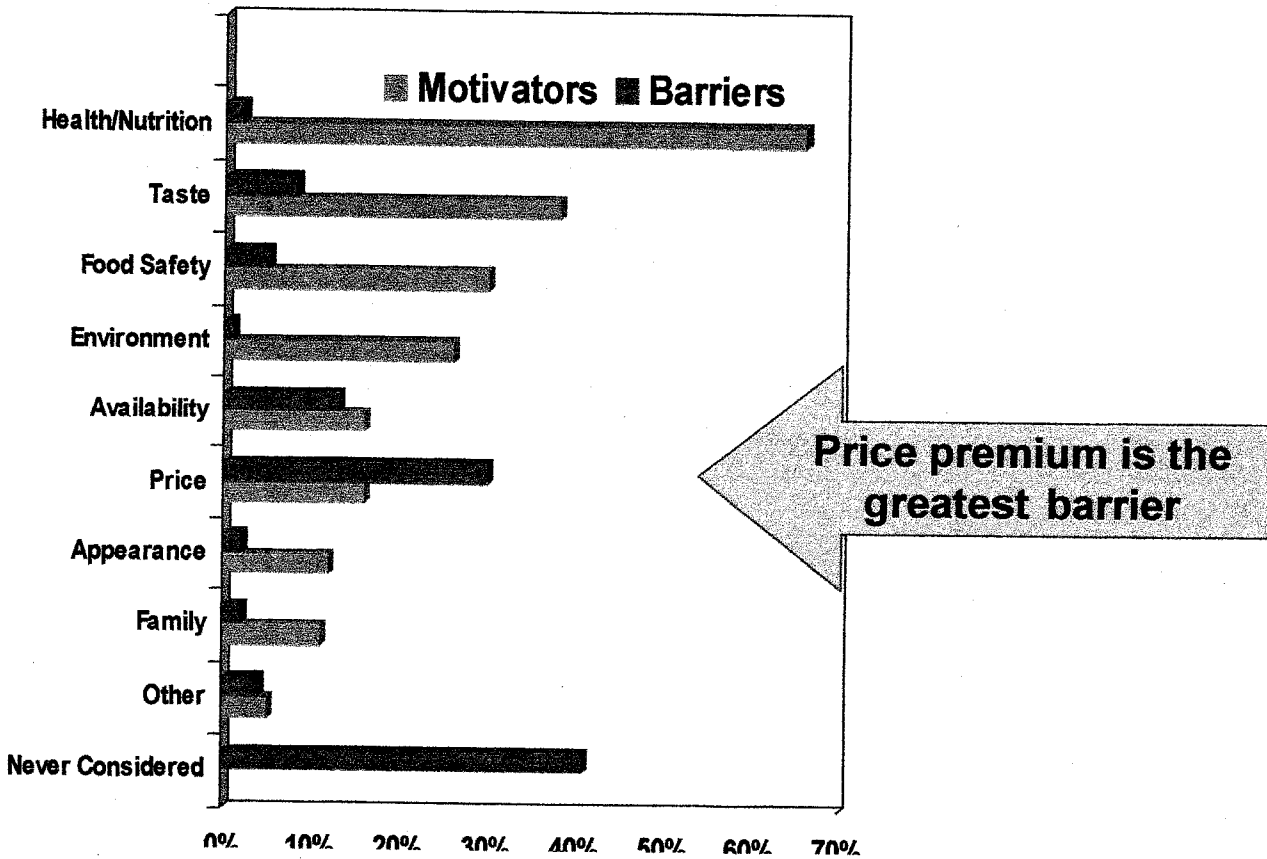
	<u>Conventional</u>	<u>Organic/ Natural</u>	<u>% premium</u>
Milk	\$.024	\$ .051	75%
Butter (per stick)	\$.65	\$1.17	80%
Eggs (per egg)	\$.19	\$ .39	105%
Yogurt	\$.25	\$ .29	16%
Baby Food (4oz jars)	\$.11	\$ .17	55%
Cranberry Juice (from concentrate)	\$.05	\$ .12	140%
Frozen Waffles	\$.24	\$ .35	46%
Pretzels	\$.18	\$ .27	50%
Canned Chicken Noodle Soup	\$.07	\$ .16	129%
Salad Dressing	\$.25	\$ .37	48%
Pasta Sauce	\$.11	\$ .11	16%
Boxed Mac & Cheese	\$.13	\$ .33	154%
Frozen pizza	\$.25	\$ .41	64%
93% Lean Ground (vs. natural)	\$.22	\$ .31	41%



Split Chicken Breast (vs. natural)	\$ .17	\$ .24	41%
Deodorant	\$ .99	\$1.88	90%
Tooth Paste	\$ .54	\$ .68	26%
Laundry Detergent (vs. natural)	\$ .06	\$ .105	75%
Diapers (per diaper, versus natural)	\$ .27	\$ .32	19%



It is not surprising that all-natural and organic products cost more than conventional products. As a general rule, "all-natural" products can get far closer to price parity with their conventional counterparts than can organic products. In the survey above, conducted in the Spring, 2003 by the Natural Products Consulting Institute, the average premium for natural and organic products was 64% (the median was 55%). While it is obvious that organic product sales have boomed over the past few years, study after study shows that "price premium" continues to be the biggest obstacle for potential new customers.



Source: Hartman and New Hope, "The Evolving Organic Marketplace", 2000

CCC<sub>3</sub>

Distributors use their rigid formulas for determining wholesale and retail "list" prices because it creates a level playing field from which to offer discounts to their best customers. Most distributors have "volume" discounts for their best customers that are multi-tiered and based upon volume purchased. These "volume discounts" can range from 5% - 15% for independent retailers. Natural distributors have been tremendously aggressive over the years in terms of offering discounts to the chain accounts.

Over time, competition between distributors for the "cream of the crop," high-volume chain accounts such as Whole Foods and Wild Oats have resulted in distributors moving to "cost-plus" arrangements. These are similar to those used by the large wholesale grocers such as Supervalu and Fleming, when they work with supermarket chains.

OPP  
cl  
PHF  
Counber

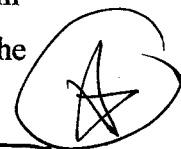
The big question is, "How do I determine an SRP for my product when some retailers work on full margin from the distributor, while others work with a "volume discount" and chain accounts have a "Cost Plus" program? The same \$2.00 cost to the distributor will result in three different retail prices:

Catalog S.R.P. = \$4.27

Independent retailer with a 10% "Volume Discount" = \$3.84

Chain Account with "Cost Plus" a markup of 8% = \$3.22

There is a full \$1.00 difference between the resulting list price and chain SRP price points! The answer is a complicated one. When determining the price you think your consumer will pay for your product, you want to be far more concerned with the every-day shelf price in the chain accounts and "A" -ranked retailers than what you catalog or list price will show. The volume is being done in the chains and with the "A" - ranked retailers. If your pricing is not competitive in these stores, you have a major problem.



### What price point should I target for my product?

One guiding principal is that your pricing should reflect the "positioning" of your brand. Are you the category leader, or the number two or three brand? Are you striving for parity pricing with

CCC4



**MANAGEMENT CO.**  
**WHITE CASTLE SYSTEM, INC.**  
**FACT SHEET**  
February 2005

**APNR EX-DDD**

CONTACT INFORMATION

White Castle Marketing  
555 West Goodale Street  
Columbus, OH 43215

P.O. Box 1498 Columbus, OH 43216-1498

PH 614.228.5781  
FX 614.228.8841  
www.whitecastle.com  
1-800-THE CRAVE

**History of the Crave**

- Founded in 1921 in Wichita, Kansas by E.W. "Billy" Ingram and Walt Anderson. Anderson sold his interest in the company to Ingram in 1933.
- Recognized as the original quick-service hamburger restaurant chain, White Castle made fast food acceptable by making 100% USDA inspected beef hamburgers. The famous steam-grilling technique makes White Castle hamburgers unique.
- E.W. (Bill) Ingram III is Chairman of the Board, President and CEO.
- White Castle currently operates nearly 393 restaurants located in Chicago, Cincinnati/Dayton, Columbus, Cleveland, Detroit, Indianapolis, Minneapolis/St. Paul, Louisville/Lexington, Evansville, Nashville, New Jersey, New York City, and St. Louis.
- White Castle does not franchise its restaurants. All units are owned and operated by the family-held company.
- The Home Office has been located in Columbus, Ohio since 1934. White Castle owns and operates 3 bakeries, 3 meat processing plants and 2 frozen sandwich plants.

**Revenue of the Crave**

- Restaurant sales in 2004 exceeded \$511 million.

**Expansion of the Crave**

- Adding 20 to 25 new stores each year in existing, and limited new market areas, White Castle prides itself on slow and steady growth. Expansion is funded chiefly from corporate profits, with little reliance on borrowing to raise capital.

DDD,

### **The Taste You Crave**

- The signature White Castle hamburger is a 100% USDA inspected, 2 1/2-inch square beef patty with 5 evenly spaced holes, steam-grilled on a bed of onions and served on a soft white bread bun with a single dill pickle slice.
- Church's Chicken products, which have been marketed in some White Castle restaurants since 1996, are currently offered at approximately 50 White Castle locations.

### **White Castle Distribution LLC**

- A subsidiary of White Castle System, Inc., White Castle Distributing LLC was created in 1986 in response to the demand for the product where White Castle restaurants did not exist. Market research revealed that White Castle customers were "Buying 'em by the Sack" to take home, freeze and reheat in their oven or microwave. Initially the company shipped frozen cooked hamburgers by air express across the country. They began producing and selling frozen hamburgers and cheeseburgers via retail grocery outlets in 1986. Frozen White Castle hamburgers and cheeseburgers have been sold in vending machines and convenience stores since 1995.

### **Team Member Growth Opportunities**

- White Castle adheres to a policy of promotion from within. White Castle Regional Directors of Restaurant Operations (the highest level) typically began their careers with the company behind the griddle, cooking and serving hamburgers. With several new stores projected to open in the next decade, the advancement outlook for team members is excellent.
- Currently there are 400 team members on the active payroll who have 25 or more years of service with the company. Over 2,000 team members have more than 10 years of continuous service. White Castle employs over 12,000 people.
- White Castle provides every team member with a comprehensive benefits package. Even at entry-level, the same kinds of benefits are offered for full-time team members as those provided to senior level team members.

### **Marketing and Advertising You Crave**

- White Castle concentrates its promotional efforts with regional radio and television advertising. Its current campaign theme, creative, and media placement is handled by J. Walter Thompson Advertising Agency - Detroit. The theme, "White Castle, What You Crave" has been in use since 1993, successfully positioning the brand's uniqueness in the quick service hamburger category.

### **PSB Company**

- PSB Company is a wholly owned and operated subsidiary of White Castle. Its capabilities include sheet metal fabrication, welding, assembly, powder painting and electrocoating. PSB Company specializes in manufacturing stainless steel fixtures and equipment. PSB facilities are located in Columbus and Dayton, Ohio, and in Rome, Georgia.

INFORMATION RELEASE -- WHITE CASTLE SYSTEM, INC.  
 YEAR-END 2004

CONSOLIDATED NET SALES (RESTAURANTS, PSB, AND WCD)		<u>\$ 573,229,000</u>
RESTAURANT DIVISION NET SALES		<u>\$ 511,218,000</u>
AVERAGE GROSS SALES PER UNIT	DAILY	\$ 3,620
	ANNUAL	\$ 1,317,680
GROSS DOLLAR AMOUNT OF THE ANNUAL SERVICE CREDIT BONUS		<u>\$ 5,635,000</u>
NUMBER OF CASTLES AT YEAR END 2004	WHITE CASTLE ONLY	326
	CO-BRAND WITH CHURCH'S	69
	TOTAL	<u>395</u>
APPROXIMATE NUMBER OF NEW CASTLES PLANNED FOR 2005	WHITE CASTLE ONLY	11
	CO-BRAND WITH CHURCH'S	1
	TOTAL	<u>12</u>
NUMBER OF HAMBURGERS SOLD IN 2004 (RESTAURANTS AND WCD COMBINED)		<u>564,177,000</u>
NUMBER OF TEAM MEMBERS AT YEAR-END 2004	TOTAL CORPORATION	11,815
	RESTAURANT DIVISION ONLY	10,928
TEAM MEMBERS BY REGION/LOCATION	SEE SEPARATE WORKSHEET	
NUMBER OF LONG SERVICE TEAM MEMBERS (10 YRS OR MORE OF CONTINUOUS SERVICE)		1,896
AVERAGE PERCENTAGE DRIVE-THRU SALES (Based on sales of only Castles with drive-thru access, not on all restaurant sales)		68%
AMOUNT OF PROFIT SHARING CONTRIBUTION		<u>\$ 417,000</u>
TOTAL DOLLAR VALUE OF PROFIT SHARING ASSETS (APPROXIMATE)		<u>\$ 241,000,000</u>
TOTAL DOLLAR VALUE OF PENSION PLAN ASSETS (APPROXIMATE)		<u>\$ 102,000,000</u>
EMPLOYEE BENEFITS, TOTAL CORPORATION		
	HEALTH INSURANCE	\$ 22,487,000
	VACATIONS & HOLIDAYS	12,309,000
	DENTAL & VISION INSURANCE	254,000
	PENSION PLAN	9,311,000
	PROFIT SHARING PLAN	417,000
	TOTAL	<u>\$ 44,778,000</u>
ANNUAL BAKERY PRODUCTION	(in dozens)	<u>53,501,000</u>

ADD<sub>3</sub>



**INFORMATION RELEASE  
YEAR-END 2003**

<b>CONSOLIDATED NET SALES (RESTAURANTS, PSB, AND WCD)</b>		<b>\$ 551,218,000</b>
<b>RESTAURANT DIVISION NET SALES</b>		<b>\$ 489,301,000</b>
<b>AVERAGE GROSS SALES PER UNIT</b>	<b>DAILY</b>	<b>\$ 3,556</b>
	<b>ANNUAL</b>	<b>\$ 1,294,384</b>
<b>GROSS DOLLAR AMOUNT OF THE ANNUAL SERVICE CREDIT BONUS</b>		<b>\$ 5,384,000</b>
<b>NUMBER OF CASTLES AT YEAR END 2003</b>	<b>WHITE CASTLE ONLY</b>	<b>315</b>
	<b>CO-BRAND WITH CHURCH'S</b>	<b>71</b>
	<b>TOTAL</b>	<b>386</b>
<b>APPROXIMATE NUMBER OF NEW CASTLES PLANNED FOR 2004</b>	<b>WHITE CASTLE ONLY</b>	<b>12</b>
	<b>CO-BRAND WITH CHURCH'S</b>	<b>0</b>
	<b>TOTAL</b>	<b>12</b>
<b>NUMBER OF HAMBURGERS SOLD IN 2003 (RESTAURANTS AND WCD COMBINED)</b>		<b>574,709,000</b>
<b>NUMBER OF TEAM MEMBERS AT YEAR-END 2003</b>	<b>TOTAL CORPORATION</b>	<b>12,133</b>
	<b>RESTAURANT DIVISION ONLY</b>	<b>11,208</b>
<b>NUMBER OF TEAM MEMBERS BY REGION/PLANT -- SEE ATTACHED SHEET</b>		
<b>LONG SERVICE TEAM MEMBERS (10 YRS OR MORE OF CONTINUOUS SERVICE)</b>		<b>2,026</b>
<b>AVERAGE PERCENTAGE DRIVE-THRU SALES</b>		<b>64%</b>
<i>(Based on sales of only Castles with drive-thru access, not on all restaurant sales)</i>		
<b>AMOUNT OF PROFIT SHARING CONTRIBUTION</b>		<b>\$ 326,000</b>
<b>TOTAL DOLLAR VALUE OF PROFIT SHARING ASSETS (APPROXIMATE)</b>		<b>\$ 230,000,000</b>
<b>TOTAL DOLLAR VALUE OF PENSION PLAN ASSETS (APPROXIMATE)</b>		<b>\$ 89,000,000</b>
<b>EMPLOYEE BENEFITS, TOTAL CORPORATION</b>	<b>HEALTH INSURANCE</b>	<b>\$ 20,938,000</b>
	<b>VACATIONS &amp; HOLIDAYS</b>	<b>\$ 12,005,000</b>
	<b>PENSION PLAN</b>	<b>\$ 8,796,000</b>
	<b>PROFIT SHARING PLAN</b>	<b>\$ 326,000</b>
	<b>TOTAL</b>	<b>\$ 42,065,000</b>
<b>ANNUAL BAKERY PRODUCTION</b>	<b>(in dozens)</b>	<b>55,151,000</b>

0004

**INFORMATION RELEASE  
YEAR-END 2002**

<b>CONSOLIDATED NET SALES (RESTAURANTS, PSB, AND WCD)</b>		\$ 544,333,000
<b>RESTAURANT DIVISION NET SALES</b>		\$ 489,454,000
<b>AVERAGE GROSS SALES PER UNIT</b>	DAILY	\$ 3,723
	ANNUAL	\$ 1,355,172
<b>GROSS DOLLAR AMOUNT OF THE ANNUAL SERVICE CREDIT BONUS</b>		\$ 5,297,000
<b>NUMBER OF CASTLES AT YEAR END 2002</b>	WHITE CASTLE ONLY	304
	CO-BRAND WITH CHURCH'S	68
	TOTAL	<u>372</u>
<b>APPROXIMATE NUMBER OF NEW CASTLES PLANNED FOR 2003</b>	WHITE CASTLE ONLY	10
	CO-BRAND WITH CHURCH'S	1
	TOTAL	<u>11</u>
<b>NUMBER OF HAMBURGERS SOLD IN 2002 (RESTAURANTS AND WCD COMBINED)</b>		578,922,000
<b>NUMBER OF EMPLOYEES AT YEAR-END 2002</b>	TOTAL CORPORATION	12,261
	RESTAURANT DIVISION ONLY	11,339
<b>NUMBER OF EMPLOYEES BY AREA/PLANT</b>	SEE ATTACHED WORKSHEET	
<b>NUMBER OF LONG SERVICE EMPLOYEES (10 YRS OR MORE OF CONTINUOUS SERVICE)</b>		1,978
<b>AVERAGE PERCENTAGE DRIVE-THRU SALES</b> (Based on sales of only Castles with drive-thru access, not on all restaurant sales)		61%
<b>AMOUNT OF PROFIT SHARING CONTRIBUTION</b>		\$ 1,213,000
<b>TOTAL DOLLAR VALUE OF PROFIT SHARING ASSETS (APPROXIMATE)</b>		\$ 197,000,000
<b>TOTAL DOLLAR VALUE OF PENSION PLAN ASSETS (APPROXIMATE)</b>		\$ 71,000,000
<b>EMPLOYEE BENEFITS, TOTAL CORPORATION</b>	HEALTH INSURANCE	\$ 16,405,000
	VACATIONS & HOLIDAYS	\$ 11,404,000
	PENSION PLAN	\$ 4,904,000
	PROFIT SHARING PLAN	\$ 1,213,000
	TOTAL	<u>\$ 33,926,000</u>
<b>ANNUAL BAKERY PRODUCTION</b>	(in dozens)	53,754,000

0005

**INFORMATION RELEASE  
YEAR-END 2001**

<b>CONSOLIDATED SALES (RESTAURANTS, PSB, AND WCD)</b>		\$ 531,817,000
<b>RESTAURANT DIVISION SALES</b>		\$ 471,632,000
<b>AVERAGE SALES PER UNIT</b>	<b>DAILY</b>	\$ 3,730
	<b>ANNUAL</b>	\$ 1,357,720
<b>GROSS DOLLAR AMOUNT OF THE ANNUAL SERVICE CREDIT BONUS</b>		\$ 5,077,000
<b>NUMBER OF CASTLES AT YEAR END 2001</b>	<b>WHITE CASTLE ONLY</b>	278
	<b>CO-BRAND WITH CHURCH'S</b>	81
	<b>TOTAL</b>	<u>359</u>
<b>APPROXIMATE NUMBER OF NEW CASTLES PLANNED FOR 2002</b>	<b>WHITE CASTLE ONLY</b>	10
	<b>CO-BRAND WITH CHURCH'S</b>	3
	<b>TOTAL</b>	<u>13</u>
<b>NUMBER OF HAMBURGERS SOLD IN 2001 (RESTAURANTS AND WCD COMBINED)</b>		568,434,000
<b>NUMBER OF EMPLOYEES AT YEAR-END 2001</b>	<b>TOTAL CORPORATION</b>	12,444
	<b>RESTAURANT DIVISION ONLY</b>	11,524
<b>NUMBER OF EMPLOYEES BY AREA/PLANT</b>	SEE ATTACHED WORKSHEET	
<b>NUMBER OF LONG SERVICE EMPLOYEES (10 YRS OR MORE OF CONTINUOUS SERVICE)</b>		1,943
<b>AVERAGE PERCENTAGE DRIVE-THRU SALES</b> (Based on sales of only Castles with drive-thru access, not on all restaurant sales)		61%
<b>AMOUNT OF PROFIT SHARING CONTRIBUTION</b>		\$ 644,000
<b>TOTAL DOLLAR VALUE OF PROFIT SHARING ASSETS (APPROXIMATE)</b>		\$ 221,000,000
<b>TOTAL DOLLAR VALUE OF PENSION PLAN ASSETS (APPROXIMATE)</b>		\$ 78,000,000
<b>EMPLOYEE BENEFITS, TOTAL CORPORATION</b>	<b>HEALTH INSURANCE</b>	\$ 17,707,000
	<b>VACATIONS &amp; HOLIDAYS</b>	\$ 10,627,000
	<b>PENSION PLAN</b>	\$ 2,078,000
	<b>PROFIT SHARING PLAN</b>	\$ 644,000
	<b>TOTAL</b>	<u>\$ 31,056,000</u>
<b>ANNUAL BAKERY PRODUCTION</b> (in dozens)		54,168,000

DD06

**CONFIDENTIAL****APNR EX-EEE****DISCLAIMER AND CONFIDENTIALITY AGREEMENT**

Wells Fargo Bank, National Association ("Wells Fargo" or the "Agent") has been requested to arrange \$39,000,000 in senior secured revolving and term credit facilities (the "Senior Facilities") for MarketFare Foods, Incorporated ("MarketFare or the "Company").

Wells Fargo has assembled this information memorandum from information furnished and approved by MarketFare. The Company has requested that Wells Fargo distribute this memorandum to selected financial institutions. Wells Fargo is doing so on the following express understandings, which each recipient of this memorandum acknowledges by accepting and retaining this memorandum.

The information in this memorandum has not been independently verified in any respect by Wells Fargo. No representation or warranty, express or implied, is made by Wells Fargo, any of its affiliates, nor any of their respective employees, agents or representatives, as to the accuracy or completeness of any information in this memorandum or in any other written or oral materials concerning the Company or the Facilities. Wells Fargo has no responsibility to distribute any additional information concerning the Company to any recipient of this memorandum, other than information furnished and approved by the Company for distribution.

Each recipient of this memorandum must make its own independent assessment of the Company and the credit Facilities after making such investigations as it deems necessary, and must determine whether or not to participate in the Facilities based on that assessment. This memorandum is not intended to provide the sole basis for that assessment. No recommendation is made by Wells Fargo, any of its affiliates, nor any of their respective employees, agents or representatives, that any recipient of this memorandum approve or participate in the Facilities.

By accepting and retaining this memorandum, each recipient agrees with the Company and Wells Fargo (1) to keep confidential the information in this memorandum concerning the Company and its affiliates ("Confidential Information"), (2) to disclose Confidential Information only to employees, agents, advisers, attorneys and other representatives of the recipient who are evaluating the recipient's participation in the Facilities and who are informed of the confidential nature of the information contained herein, (3) to use Confidential Information only in connection with such evaluation, and (4) if the recipient declines to participate in the Facilities, promptly to return this memorandum and all copies thereof to Wells Fargo and destroy or retain in the recipient's confidential files all materials derived from Confidential Information. Confidential Information does not include information that is generally available to the public or becomes available to the recipient on a non-confidential basis. Confidential Information may, however, be disclosed by a recipient, if required, to any agency or other entity exercising supervisory or regulatory control over the recipient, or pursuant to a subpoena or other legal process (but the recipient will endeavor to notify the Company promptly thereof if such notification is permitted by law).

EEEI

**WELLS FARGO CONTACTS**

**Wells Fargo Capital Markets Group**

---

555 Montgomery Street, 17th Floor  
San Francisco, California  
94111  
Fax: (415) 362-5081

**Mike Johnson**  
Executive Vice President  
(415) 396-2565

**Syndications & Placements**

**CONFIDENTIAL**  
Vice President  
(415) 396-3835

---

**John Rarick**  
Assistant Vice President  
(415) 222-2324

**Structured Finance**

---

**[REDACTED]**  
Senior Vice President  
(415) 396-6036

**[REDACTED]**  
Assistant Vice President  
(415) 396-2299

**CONFIDENTIAL**

EEE2

Search Investment Banking

Go



Home > Investment Banking > Mergers & Acquisitions > Biographies

CORPORATE

- ▼ Mergers & Acquisitions
  - Expertise
  - ▶ Equity Capital Markets
  - ▶ Debt Capital Markets
  - ▶ Private Placement
  - ▶ Leveraged Finance
  - ▶ Foreign Exchange Capital Markets
  - ▶ Buy-Side Insights Group
  - ▶ Industry Experience
    - ▶ Reg Japan
      - Non-Japan Asia
      - Australia
      - Canada
      - Europe
      - United States

Mergers & Acquisitions - Biographies



**Marc D. Granetz**  
Managing Director

Marc D. Granetz is a Managing Director of Credit Suisse and Global Co-Head of the Investment Banking department, based in New York. Mr. Granetz is also Global Head of the Mergers & Acquisitions Group. Mr. Granetz is a member of the Investment Banking Management Committee and the Investment Banking Management Council.

Mr. Granetz joined Credit Suisse First Boston in 1985. He spent three years in the Financial Institutions Group, two years heading the Mergers & Acquisitions Group's takeover defense team, five years in, including two years as Co-Head of, the Energy Group, six years as a generalist, two years as Head of the Global Media & Telecom Group and has been Head of the Global M&A and Strategic Advisory Group since 2004. Mr. Granetz has advised numerous companies in a broad range of industries on strategic matters including domestic and cross-border mergers, acquisitions, joint ventures, divestitures, spin-offs, proxy contests, dual class and targeted stock plans.

Mr. Granetz is a graduate of Harvard College and Harvard Law School, and served as the John Harvard Scholar to Emmanuel College, Cambridge University.

Related Links

- Biographies
- Transactions
- Highlights 2005
- Highlights 2004
- Highlights 2003

[Back to Top](#)



**Steven Koch**  
Co-Chairman of Global Mergers & Acquisitions

Steven Koch is a Vice Chairman of Credit Suisse and Co-Chairman of the Investment Banking division's Global Mergers and Acquisitions group, based in Chicago. He is a member of the Chairman's Board and the Investment Banking Committee.

Mr. Koch joined Credit Suisse First Boston in 1985 and was named a Managing Director in 1989, Co-Head of the Mergers and Acquisitions Group in 1993 and Co-Chairman of the Mergers and Acquisitions Group in 2000. He has advised clients in all major financial markets in a wide variety of industries.

Mr. Koch received his B.A. from Hampshire College, his M.B.A. from the University of Chicago Graduate School of Business and his J.D., cum laude, from the University of Chicago Law School. He was a Henry Luce Scholar and served as a law clerk to Judge Richard Cudahy of the U.S. Court of Appeals for the Seventh Circuit in Chicago. Mr. Koch helped organize, and serves on the faculty of, the Director's Consortium, a semi-annual seminar sponsored by the Wharton School, the University of Chicago Graduate School of Business and the Stanford Law School. He also serves as a member of the Board of Trustees of Mount Sinai Hospital Medical Center in Chicago, the Board of Directors of the Greater Chicago Food Depository, the Visiting Committee of The University of Chicago Law School and the Board of NYC2012.

EEE3

[Back to Top](#)



D. Scott Lindsay

Co-Chairman of Global Mergers & Acquisitions Scott Lindsay is a Vice Chairman of Credit Suisse and Co-Chairman of the Global Mergers and Acquisitions group within the Investment Banking division, based in New York. He is a member of the Investment Banking division's Chairman's Board and the Investment Banking department's Executive Board.

Mr. Lindsay joined the Mergers and Acquisitions Group of Credit Suisse First Boston in 1982. He headed the Takeover Defense Team and later Cross-Border M&A before becoming a Group Head in 1993 and Co-Chairman in 2000. While serving as Co-Head of Global M&A Mr. Lindsay also chaired the Firm's Investment Banking Advisory Committee which oversees the rendering of M&A opinions and formal advice. Mr. Lindsay has advised companies located throughout the world in a variety of industries.

Mr. Lindsay was an economist prior to joining the Bank. He was a member of the economics and finance faculties of the University of California, Los Angeles and the University of Southern California, an econometrician with the Rand Corporation, and a senior economic advisor in The Executive Office of the President during the Reagan administration. Mr. Lindsay received his Ph.D. in Economics from the University of California, Los Angeles.

EEE<sub>4</sub>

**Customer Service Department  
Call Sheet**

**APNR EX-FFF**

06/18/05

**Divisional Manager : Marice Caruso**

**Store Number : 918**

General Info

Call Code : 2T - Misc. Inquiry

Address Info

Call Number : 2421967

House Number :

Customer Name : Mr. John Rarick

Street :

Care of : Peak Harvest Foods

Apt. / Suite :

Home Phone : (415) 606-1689

City :

Business Phone : (775) 831-0402 Extension : id

State : CA

Time of Call : 01:49 pm

Zip :

Date of Call : 08/13/04

Zip 4 :

Details of call:

Time of Visit

Date of Visit

Walk / Drive

Walk up

Resolution

Follow Up Date

CSR Name

08/27/04

Debbie VanDerWang

No Follow up will be performed

FFF



JOHN RARICK  
PEAK HARVEST FOODS  
(415) 606-1689  
caller id # (775) 831-0402

Caller stated that he wants our legal department to drop opposition of his request to register "Quality You Can Crunch" for his organic health food company, Peak Harvest Foods. He cannot design the packaging as planned so long as we litigate opposition of his trademark.

He feels certain that our corporate office isn't even aware of the legal action we are "spearheading" against him and his business. He believes that our legal department simply used "USPTO" and conducted a search to identify and blindly sue every company that was linked to the search.

He has received several letters from us and he feels confident that we "have no legal ground to stand on." He cited the fact that our slogan is different, we sell very different products, and there are plenty of burger places in the US that are using our slogan without repercussion.

While he believes he has the means to prevail in a lawsuit, he "despises" lawyers, and he would much rather spend the money on a worthy charity than on lawyers. He would also prefer not to waste his own valuable time by responding to our interrogatories. However, he will if needed. And, he has vowed to give equal time to campaigning against In-N-Out.

He has an interview with a reporter from the Reno Gazette scheduled later this month, and an interview with a writer in San Francisco that will submit the article to hundreds of newspapers and magazines to be published. He would rather devote his time to promoting his company, but will gladly accept the publicity he'll receive as "the ant being squashed by the 20,000 pound gorilla" in a lawsuit filed by In-N-Out.

He stated that he has personally resolved issues presented by other companies opposing his trademark. For example, Harvest Peak® Coffee required him to submit in writing a guarantee that he will never be in the coffee business, and they haven't "harassed" him since.

He will gladly prepare a similar statement for In-N-Out promising he will never attempt to sell burgers or anything "french-fried, or anything unhealthful for that matter."

He hopes this matter can be resolved quickly, and he asked for my name and address to "verify our contact." I assured him I would remember and I will document the call, but he still wanted the information. I gave it to him, and asked for his name and number for future reference. He obliged.

FFF2  
EX-1

APNR EX-GGG

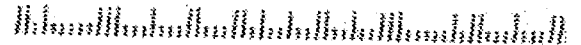
shows Op's counsel ~~a~~-keeps, studies, analyses  
and forms conclusions from envelope markings of

which point of mailing and other  
information can be gleaned.

Peak Harvest Foods, LLC  
1285 Baring Blvd, Suite 166  
Sparks, NV 89434

EDWARD O. ANSELL, ESQ.  
427 NORTH YALE AVENUE SUITE 204  
CLAREMONT, CALIFORNIA 91711-4340

917114340 0003



~~Q~~ From Op "MOTION to Quash"  
submitted 1-5-2007 (Denied) - page 9/12  
~~Q~~ of TTABVue Doc. No. 45.

ATTACHMENT C



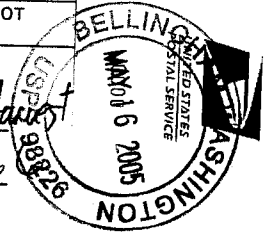
United States Patent and Trademark Office  
Home | Site Index | Search | Contact Us

Your submission has been received by  
The content of your submission is listed  
You may print a copy of this receipt for:

U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**  
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE—POSTMASTER

Received From: *op. mot.*  
John Rarick / Peak Harvest  
1285 Baring Blvd Ste 166  
Sparks NV 89434

One piece of ordinary mail addressed to:  
Edward O. Ansell Esq.  
427 N. Yale Ave #204  
Claremont, CA  
91711-4340.



U.S. POSTAGE  
PAID  
BELLINGHAM, WA  
MAY 16, 2005  
AMOUNT  
\$0.90  
00086434-12

PS Form 3817, Mar. 1989

ESTATE  
Filing date

**APNR EX-HHH**

IN THE UNITED STATES PATENT AND TRADEMARK  
BEFORE THE TRADEMARK TRIAL AND APPEALS BOARD

<b>Proceeding</b>	91161044
<b>Party</b>	Defendant Rarick, John C. Rarick, John C. 749 Portola Street Suite A SF Presidio, CA 94129
<b>Correspondence Address</b>	Rarick, John C. PEAK HARVEST FOODS, LLC 1285 Baring Blvd., Suite 166 SPARKS, NV 89434
<b>Submission</b>	Opposition/Response to Motion — /
<b>Filer's Name</b>	john rarick
<b>Filer's e-mail</b>	jr@peakharvestfoods.com
<b>Signature</b>	/jrarick/
<b>Date</b>	05/16/2005
<b>Attachments</b>	OpposMotCompel_v2_text.txt ( 6 pages )



\*\*\*\*\* WELCOME TO \*\*\*\*\*  
MT BAKER STATION  
MOUNT BAKER STATION  
BELLINGHAM, WA 98226-9997  
05/16/05 03:36PM

Store USPS Trans 117  
Wkstn sys5004 Cashier KYGMQW  
Cashier's Name LILLIE  
Stock Unit Id SIALIL  
PO Phone Number 800-275-8777  
USPS # 5476210209

1. First Class 0.90  
Destination: 91711  
Weight: 1.70 oz.  
Postage Type: Affixed  
Affix. Post.: -0.60  
Total Cost: 1.50  
Base Rate: 0.60

SERVICES  
Cert of Mailing 0.90  
2. \$1 Wisdom PSA 3.00  
3 @ 1.00  
3. 10c Am Clock PSA 0.10  
4. 3c Star PSA 0.03

Subtotal 4.03  
Total 4.03

Cash 10.03  
Change Due  
Cash 6.00

Order stamps at USPS.com/shop or call 1-800-Stamp24. Go to USPS.com/clicknship to print shipping labels with postage. For other information call 1-800-ASK-USPS.

Number of Items Sold: 6

5 FREE Premium Postcards  
Register online at usps.com  
Use source code D0032  
Full-color, Full-gloss finish  
Send your FREE cards today!

APNR EX-III



Seneca Foods Corporation  
"Always In Season"

Company Profile	Product Information	Buy Online	Recipes	FAQ's	Events
History	Directors	Employment	Plant Operations	Investor Information	Corporate Governance

### Company Profile

From our first days in 1949, Seneca Foods has been dedicated to providing quality food products and service excellence to our customers. We began by concentrating on one product, concord grape juice, and carved out a successful niche in a growing market. Today, the breadth of our operations encompasses a vast array of fruit and vegetable products.

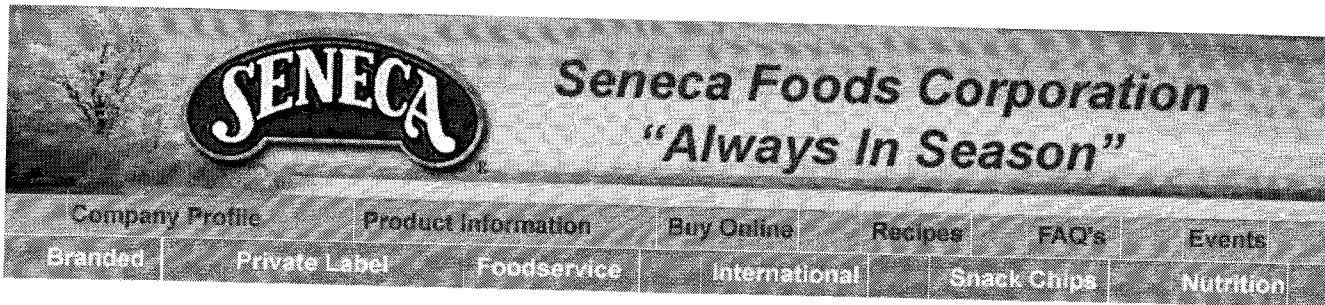


Seneca Foods Corporation is an independent, publicly-traded, food processing company. We are a fully integrated producer, having made significant investments in facilities and technologies to enhance manufacturing processes, increase line speeds and guarantee premium quality. At Seneca, we even develop crop seeds and manufacture our own cans to give us an additional competitive advantage. These capabilities have led many of the industry's leading food companies to Seneca to manufacture their products. Our geographically diverse processing plants and breadth of operations assure these companies that we possess the critical resources and means to deliver. Because we are not weather-dependent on any one region of the country, our customers know they can depend on us.

Today, Seneca Foods remains committed to delivering high-quality products that our customers can trust and depend on.

Home	Contact Us	Site Map	Privacy Act
------	------------	----------	-------------

III,  
\_\_\_\_\_



**SENECA**  
Seneca Foods Corporation  
"Always In Season"

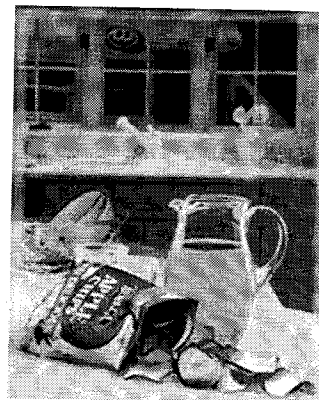
Company Profile		Product Information		Buy Online	Recipes	FAQ's	Events
Branded	Private Label	Foodservice	International	Snack Chips		Nutrition	

[Overview](#)   [Apple Chips](#)   [Sweet Potato Chips](#)

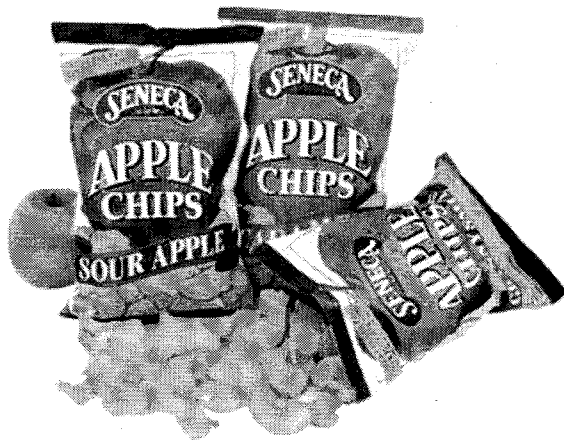


## Apple Chips

Perfectly attuned to the hectic routines and on-the-go eating habits of today's busy families, apple chips meet the quest for a tasty yet healthy snack alternative. Less fat, low sodium, no cholesterol and great taste combine to make Apple Chips the preferred choice among health-conscious individuals.



We use only the freshest, most crispy Washington State Apples and insist on using only High-Oleic Canola Oil in our proprietary vacuum cooking process. High-Oleic Canola Oil insures our apple chips have no cholesterol or trans fatty acids. While these ingredients cost more, it insures we have the healthiest and tastiest apple chips available.



With six unique varieties of Apple Chips, Seneca offers more choices in 3 oz. packaging. From traditional favorites (Original and Golden Delicious) to sweet alternatives (Caramel and Cinnamon), tart (Granny Smith), and every kids favorite (Sour Apple), we have the variety available to meet specific tastes. Our apple chips are also available in convenient one-ounce bags in four delicious flavors – Caramel, Original, Cinnamon, and Golden Delicious.

So meet your family's need to snack with a healthy and delicious alternative – buy Seneca Apple Chips.

<a href="#">Home</a>	<a href="#">Contact Us</a>	<a href="#">Site Map</a>	<a href="#">Privacy Act</a>
----------------------	----------------------------	--------------------------	-----------------------------

III<sub>2</sub>

**Seneca Foods Corp.**

**Nutritional Data**

**APPLE CHIPS**

<b>Nutrition Facts*</b>	
Serving Size 1 oz (28g/about 12 chips)	
Servings Per Container see below	
Amount Per Serving	
<b>Calories</b>	140
	Calories from fat 60
	<b>%Daily Value*</b>
<b>Total Fat</b>	7g <b>11%</b>
<b>Saturated Fat</b>	0.5g <b>3%</b>
<b>Trans Fat</b>	0g
<b>Cholesterol</b>	0mg <b>0%</b>
<b>Sodium</b>	15mg <b>1%</b>
<b>Potassium</b>	85mg <b>2%</b>
<b>Total Carbohydrate</b>	20g <b>7%</b>
<b>Dietary Fiber</b>	2g <b>9%</b>
<b>Sugars</b>	11g
<b>Protein</b>	0g
Vitamin A 0%	Vitamin C 30%
Calcium 0%	Iron 0%
*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:	
	Calories 2,000 2,500
Total Fat	Less than 65g 80g
Sat Fat	Less than 20g 25g
Cholesterol	Less than 300mg 300mg
Sodium	Less than 2,400mg 2,400mg
Potassium	3,500mg 3,500mg
Total Carbohydrates	300g 375g
Dietary Fiber	25g 30g
Calories per gram:	
Fat 9 · Carbohydrates 4 · Protein 4	

~ 42% of the  
Calories comes from  
Fat v.  
0% for.

Crunchy Apple Stix®

- Original: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, CITRIC ACID, ASCORBIC ACID (VITAMIN C).
- Golden Delicious: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, SUGAR, DEXTROSE, CITRIC ACID, ASCORBIC ACID (VITAMIN C), MALIC ACID, GUM ARABIC, EXTRACTIVES OF APPLE AND OTHER NATURAL FLAVORS.
- Cinnamon: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, SUGAR, MALTODEXTRIN, CINNAMON, CITRIC ACID, ASCORBIC ACID (VITAMIN C), NATURAL FLAVOR.
- Caramel: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, SUGAR, MALTODEXTRIN, CITRIC ACID, ASCORBIC ACID (VITAMIN C), NATURAL FLAVOR, MODIFIED CORN STARCH.
- Sour Apple: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, DEXTROSE, MALIC ACID, CITRIC ACID, ASCORBIC ACID (VITAMIN C), MALTODEXTRIN, SALT, NATURAL FLAVOR.
- Granny Smith: INGREDIENTS: APPLES, CANOLA AND/OR SUNFLOWER OIL, CORN SYRUP, CITRIC ACID, ASCORBIC ACID (VITAMIN C).

Container Size/Wt.	# Servings
1.0 oz. (28g)	1
3.0 oz. (85g)	3

III3

## TREATS AND SNACKS LIST (developed for SSDS Food Allergy Policy)

Here is a list of kosher treats and snacks that are acceptable for many peanut/nut allergic kids. Serving foods from this list at school functions can reduce the risk to nut allergic children. **However, as some foods may not be suitable for all allergic children, please DO NOT SERVE to an allergic child without parental approval.** *Always double-check labels for kashrut & peanut/nut ingredients.*

### Pareve Treats

Dum Dums, Astro-Pops, and Saf-T-Pops lollipops (Spangler company)  
 EnjoyLife Products (nut-free cookies, bagels, granola, etc. – available at Fruitful Yield & Sunset Foods)  
 Fluffy Stuff Cotton Candy  
 Fruit Gushers, Fruit Roll Ups, Fruit by the Foot (Betty Crocker)  
 Hot Tamales (Just Born company)  
 Icee Squeeze Tube frozen treats  
 Laffy Taffy (Nestle)  
 Licorice –Twizzlers, Nibs  
 Luigi Italian Ice cups (all varieties)  
 Minute Maid Juice Bars frozen treats  
 Minute Maid Frozen Lemonade  
 Mike and Ikes (Just Born company)  
 Organic Ah!Laska Chocolate Syrup and Cocoa (available at Whole Foods)  
 Paskesz – Hanukkah Gelt (Elite is **not** safe), Candy Buttons, Fruit Roll-ups, licorice (only these Paskesz products)\*

### Pareve Snacks

All fresh fruits or fruit cups - such as Mandarin oranges (please no kiwi, mango, papaya)  
 Frito-Lay corn chips; Original Corn Chips, Sun Chips, Tostitos  
 Frito-Lay potato chips; Lays, Ruffles, Munchos, or Pringles  
 Lender's Bagels (all varieties; mini and regular)  
 Manischewitz Tam Tams (all varieties)  
 Mott Fruitsations (or any Mott applesauce product)  
 Nabisco Crackers (**only** those which have NO nut ingredients or "may contain traces" statement and are Kosher)  
 Old London Crackers (all varieties)  
 Olive Oil Potato Chips (by Good Health Natural Foods; Kosher varieties)  
 Pretzels - Rold Gold  
 Sahara Pita (mini & regular)  
 Seneca Apple Chips (all pareve varieties)  
 Soy Nut Butter (I.M. Healthy company **only**; all six varieties, and pretzel snack packs)  
 Sunbutter (sunflower seed butter available at <http://www.sunbutter.com/product.html>)  
 Sunsweet dried fruit - such as Fruit Morsels (only this brand; most dried fruit has risk of cross-contamination)  
 Sunsweet or SunMaid Raisins (except 1oz. bags)

### Dairy Treats

Andes Mints\*  
 After Eight Mints\*  
 Chocolate Chips (**only** Guittard's, Hershey's, or Whole Foods 365 label – if no "may contain" statements)\*  
 Entenmann's Baked goods (**only** those which have NO nut ingredients or "may contain traces" statements)\*  
 Hershey plain chocolate bars (**regular 1.55 oz. size only**, with no "may contain traces" statement)\*  
 Kozy Shack puddings & Horizon Organic puddings (all varieties)  
 Nabisco Nilla Wafers  
 Nestle products (**only** those which have NO nut ingredients or "may contain traces . . ." and are Kosher)\*  
 Oreo's (**only plain or double stuff; regular size**, with no "may contain traces" statement)\*  
 York Peppermint Patties\*

### Dairy Snacks

Breton Crackers  
 Bugles (Frito Lay)  
 Macabee products (e.g. pizza bagels, cheese sticks)  
 Nabisco Crackers (**only** those which have NO nut ingredients or "may contain traces" statement and are Kosher)  
 Nabisco Newton's (fig, apple, raspberry)  
 Quaker Fruit & Oatmeal Cereal Bars  
 Robert's American Gourmet snacks (all Booty varieties, Veggie Chips, Popcorn – but NOT potato chip products)  
 Thomas English Muffins (all varieties)  
 Snyders Pretzels (all varieties)

D.I.Y.

**All of the above foods must be in the original sealed packaging, and ALL THE LABELS MUST BE READ every time in case ingredients have changed. Any labels that list "may contain traces of peanuts or nuts" or "produced in same facility as peanut/nut products" are NOT acceptable for classrooms of nut-allergic children .**  
**\* Baked goods and chocolates are more likely to be cross-contaminated with nuts in processing. Although these companies are allergy conscious, these products should not be served to an allergic child without parental approval.**

*This list will be periodically reviewed and updated; please do not use if more than one year from date at top.*

<DOCUMENT>  
<TYPE>10-K  
<SEQUENCE>1  
<FILENAME>a10k04.txt  
<TEXT>

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

**APNR EX-JJJ**

Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant to Section 13 or 15(d) of  
The Securities Exchange Act of 1934

For the fiscal year-ended March 31, 2004 Commission File Number 0-01989

**SENECA FOODS CORPORATION**

(Exact name of registrant as specified in its charter)

New York

16-0733425

(State or other jurisdiction of  
incorporation or organization)

(I.R.S. Employer Identification No.)

3736 South Main Street, Marion, New York

14505

(Address of principal executive offices)

(Zip Code)

Registrant's telephone number, including area code  
(315) 926-8100

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
None	None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock Class A, \$.25 Par  
Common Stock Class B, \$.25 Par  
(Title of Class)

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained herein, and will not be contained, to best of the Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to the Form 10-K. X

Check mark indicates whether Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that registrant was required to file such reports), and (2) has been subject to the filing requirements for at least the past 90 days.

Yes  No

Check mark indicates whether the Company is an accelerated filer (as defined in Exchange Act Rule 12b-2).

Yes  No

The aggregate market value of the Registrant's voting and non-voting common equity held by non-affiliates based on the closing sales price per market reports by the National Market System on September 27, 2003 was approximately \$108,120,000.

Common shares outstanding as of May 30, 2004 were Class A: 3,950,380, Class B: 2,764,005.

Documents Incorporated by Reference:

- (1) Proxy Statement to be issued in connection with the Registrant's annual meeting of stockholders (the "Proxy Statement") applicable to Part III, Items 10-14 of Form 10-K.

JJJ



under the laws of the State of New York. In the spring of 1995, the Company initiated a 20-year Alliance Agreement with the Pillsbury Company, which was acquired by General Mills Operations, Inc. ("GMOI"), that created the Company's most significant business relationship. Under the Alliance Agreement, the Company has packed canned and frozen vegetables carrying GMOI's Green Giant brand name.

Since the onset of the Alliance Agreement, vegetable production has been the Company's dominant line of business. In fiscal 1999, the Company sold its fruit juice business and its applesauce and industrial flavors business. As a result of these fiscal 1999 divestitures, the Company's only non-vegetable food products are a line of fruit products.

On May 27, 2003, the Company completed the acquisition of the sole membership interest in Chiquita Processed Foods, L.L.C. from Chiquita Brands International, Inc.

Available Information

The Company's Internet address is www.senecafoods.com. The Company's annual report on Form 10-K, the Company's quarterly reports on Form 10-Q, current reports on Form 8-K and any amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 are available on the Company's web site, as soon as reasonably practicable after they are electronically filed with or furnished to the SEC. All such filings on the Company's web site are available free of charge.

In addition, the Company's website includes items related to corporate governance matters, including charters of various committees of the Board of Directors and the Company's Code of Business Conduct and Ethics. The Company intends to disclose on its website any amendment to or waiver of any provision of the Code of Business Conduct and Ethics that would otherwise be required to be disclosed under the rules of the SEC and NASDAQ.

Financial Information about Industry Segments

The Company's business activities are conducted in food and non-food operations. The food operation constitutes 99% of total sales, of which approximately 98% is vegetable processing and 2% is fruit processing. The non-food operation is mostly trade sales of cans and ends, which represents 1% of the Company's total sales.

JJJ<sub>2</sub>

Narrative Description of Business

Principal Products and Markets

Food Processing

The principal products of this segment include canned vegetables, frozen vegetables and fruit products. The products are sold to retail and institutional markets. The Company has divided the United States into four major marketing sections: Eastern, Southern, Northwestern, and Southwestern. Food processing operations are primarily supported by plant locations in New York, Wisconsin, Washington, Idaho, Illinois, and Minnesota.

The following table summarizes net sales by major product category for the years ended March 31, 2004, 2003, and 2002:

<TABLE>

Classes of similar products/services:  
<CAPTION>

	2004		2003		2002
	(In thousands)				
<S>	<C>	<C>	<C>	<C>	<C>
Net Sales:					
GMOI					
Canned vegetables	\$	247,992	\$	252,059	\$ 258,412
Frozen vegetables		584,010		328,907	333,048
Fruit and chip products		28,900		30,422	25,165
Other		15,347		20,784	19,982
		11,507		12,207	14,468
	\$	887,756	\$	644,379	\$ 651,075

</TABLE>

Source and Availability of Raw Materials

#### Food Processing

The Company's food processing plants are located in major vegetable producing states and in one fruit producing state. Fruits and vegetables are primarily obtained through contracts with growers. The Company's sources of supply are considered equal or superior to its competition for all of its food products.

#### Intellectual Property

The Company's most significant brand name, Libby's, is held pursuant to a trademark license granted to the Company in March 1982 and renewable by the Company every 10 years for an aggregate period expiring in March 2081. The original licensor was Libby, McNeill & Libby, Inc., then an indirect subsidiary of Nestle, S. A. ("Nestle") and the license was granted in connection with the Company's purchase of certain of the licensor's canned vegetable operations in the United States. Nestle, one of the world's major food companies, is successor-licensor. The license is limited to vegetables which are shelf-stable and thermally processed, and includes the Company's major vegetable varieties - corn, peas and green beans - as well as certain other thermally processed vegetable varieties plus sauerkraut.

The Company's required to pay an annual royalty, initially set at \$25,000 and adjustable up or down in subsequent years based upon changes in the "Employment Cost Index-Private Nonfarm Workers" published by the U. S. Bureau of Labor Statistics or an appropriate successor index as defined in the license agreement. For the year which began in March 2004, the royalty was \$55,491. Nestle may terminate the license for non-payment of royalty, use of the trademark in sales outside the licensed territory, failure to achieve a minimum level of sales under the licensed trademark during any calendar year or a material breach or default by the Company under the agreement (which is not cured within the specified cure period).

#### Seasonal Business

##### Food Processing

While individual fruits and vegetables have seasonal cycles of peak production and sales, the different cycles are usually offsetting to some extent. Minimal food processing occurs in the Company's last fiscal quarter ending March 31, which is the optimal time for maintenance, repairs and equipment changes in its processing plants. The supply of commodities, current pricing, and expected new crop quantity and quality affect the timing of the Company's sales and earnings. When the seasonal harvesting periods of the Company's major vegetables are newly completed, inventories for these processed vegetables are at their highest levels. For peas, the peak inventory time is mid-summer and for corn, the Company's highest volume vegetable, the peak inventory is in mid-autumn. An Off Season Allowance is established during the year to minimize the effect of seasonal production on earnings. The Off Season Allowance is zero at fiscal year-end.

JJJ<sub>3</sub>

#### Backlog

##### Food Processing

In the food processing business, the end of year sales order backlog is not considered meaningful. Traditionally, larger customers provide tentative bookings for their expected purchases for the upcoming season. These bookings are further developed as data on the expected size of the related national harvests becomes available. In general, these bookings serve as a yardstick rather than as a firm commitment, since actual harvest results can vary notably from early estimates. In actual practice, the Company has substantially all of its expected seasonal production identified to potential sales outlets before the seasonal production is completed.

#### Competition and Customers

##### Food Processing

Competition in the food business is substantial with imaginative brand registration and promotion, quality, service, and pricing being the major determinants in the Company's relative market position. The Company is aware of approximately 18 competitors in the U.S. processed vegetable industry, many of which are privately held companies. The Company believes that it is a major producer of canned vegetables, but some producers of canned, frozen and other modes of vegetable products have sales which exceed the Company's sales.

During the past year approximately 10% of the Company's processed foods sales were packed for retail customers under the Company's branded labels of Libby's(R), Blue Boy(R), Aunt Nellie's Farm Kitchen(R), Stokely(R), Read(R), Festal(R), Diamond A(R), and Seneca(R). About 18% of processed foods sales were packed for institutional food distributors and 44% were retail packed under the private label of customers. The remaining 28% is sold under the Alliance

10-K 1 a10k033106.htm 10-K MARCH 31, 2006

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

**APNR EX-KKK**

**FORM 10-K**

Annual Report Pursuant to Section 13 or 15(d) of  
The Securities Exchange Act of 1934

For the fiscal year-ended March 31, 2006

Number 0-01989

Commission File

**SENECA FOODS CORPORATION**  
(Exact name of registrant as specified in its charter)

KKK1

New York

16-0733425

(State or other jurisdiction of

(I.R.S. Employer

Identification No.)  
incorporation or organization)

3736 South Main Street, Marion, New York  
(Address of principal executive offices)

14505

Code)

(Zip

Registrant's telephone number, including area code

(315) 926-8100

Securities registered pursuant to Section 12(b) of the Exchange Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Stock Class A, \$.25 Par	NASDAQ National Market
Common Stock Class B, \$.25 Par	NASDAQ National Market

Securities registered pursuant to Section 12(g) of the Act:

None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.

Yes  No

Company's operations, markets, products, services and prices, and other factors discussed in the Company's filings with the Securities and Exchange Commission, in the future, could affect the Company's actual results and could cause its actual consolidated results to differ materially from those expressed in any forward-looking statement made by, or on behalf of, the Company.

**PART I**  
**Item 1**

**Business**

**General Development of Business**

SENECA FOODS CORPORATION (the "Company") was organized in 1949 and incorporated under the laws of the State of New York. In the spring of 1995, the Company initiated a 20-year Alliance Agreement with the Pillsbury Company, which was acquired by General Mills Operations, Inc. ("GMOI"), that created the Company's most significant business relationship. Under the Alliance Agreement, the Company has packed canned and frozen vegetables carrying GMOI's Green Giant brand name.

Since the onset of the Alliance Agreement, vegetable production has been the Company's dominant line of business. In fiscal 1999, the Company sold its fruit juice business and its applesauce and industrial flavors business. As a result of these fiscal 1999 divestitures, the Company's only non-vegetable food products are a line of fruit and chip products.

On May 27, 2003, the Company completed the acquisition of the sole membership interest in Chiquita Processed Foods, L.L.C. from Chiquita Brands International, Inc.

**Available Information**

The Company's Internet address is [www.senecafoods.com](http://www.senecafoods.com). The Company's annual report on Form 10-K, the Company's quarterly reports on Form 10-Q, current reports on Form 8-K and any amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 are available on the Company's web site, as soon as reasonably practicable after they are electronically filed with or furnished to the SEC. All such filings on the Company's web site are available free of charge.

In addition, the Company's website includes items related to corporate governance matters, including charters of various committees of the Board of Directors and the Company's Code of Business Conduct and Ethics. The Company intends to disclose on its website any amendment to or waiver of any provision of the Code of Business Conduct and Ethics that would otherwise be required to be disclosed under the rules of the SEC and NASDAQ.

**Financial Information about Industry Segments**

The Company's business activities are principally conducted in food processing operations. The food operation constitutes 99% of total sales, of which approximately 99% is vegetable processing and 1% is fruit processing. The non-food operation is mostly trade sales of cans and ends, which represents 1% of the Company's total sales.

**Narrative Description of Business**

**Principal Products and Markets**

**Food Processing**

The principal products include canned vegetables, frozen vegetables and fruit products. The products are sold to retail and institutional markets. The Company has divided the United States into four major marketing sections: Eastern, Southern,

KKK<sub>2</sub>

The following table summarizes net sales by major product category for the years ended March 31, 2006, 2005, and 2004:

Classes of similar products/services:	2006	2005	2004
(In thousands)			
Net Sales:			
GMOI	\$240,490	\$225,527	\$247,992
Canned vegetables	573,779	574,802	579,103
Frozen vegetables	29,464	28,304	29,410
Fruit and chip products	26,640	23,358	22,838
Other	13,450	12,283	11,507
	\$883,823	\$864,274	\$890,850

#### Source and Availability of Raw Materials

The Company's food processing plants are located in major vegetable producing states and in one fruit producing state. Fruits and vegetables are primarily obtained through contracts with growers. The Company's sources of supply are considered equal or superior to its competition for all of its food products.

#### Intellectual Property

The Company's most significant brand name, Libby's, is held pursuant to a trademark license granted to the Company in March 1982 and renewable by the Company every 10 years for an aggregate period expiring in March 2081. The original licensor was Libby, McNeill & Libby, Inc., then an indirect subsidiary of Nestlé, S. A. ("Nestlé") and the license was granted in connection with the Company's purchase of certain of the licensor's canned vegetable operations in the United States. Corlib Brands Management, LTD, acquired the license from Nestlé during 2006. The license is limited to vegetables which are shelf-stable and thermally processed, and includes the Company's major vegetable varieties - corn, peas and green beans - as well as certain other thermally processed vegetable varieties plus sauerkraut.

The Company is required to pay an annual royalty, initially set at \$25,000, and adjustable up or down in subsequent years based upon changes in the "Employment Cost Index-Private Non-farm Workers" published by the U. S. Bureau of Labor Statistics or an appropriate successor index as defined in the license agreement. For the year which began in March 2006, the royalty was \$58,584. Corlib Brands may terminate the license for non-payment of royalty, use of the trademark in sales outside the licensed territory, failure to achieve a minimum level of sales under the licensed trademark during any calendar year or a material breach or default by the Company under the agreement (which is not cured within the specified cure period).

#### Seasonal Business

KKK3

While individual fruits and vegetables have seasonal cycles of peak production and sales, the different cycles are usually offsetting to some extent. Minimal food processing occurs in the Company's last fiscal quarter ending March 31, which is the optimal time for maintenance, repairs and equipment changes in its processing plants. The supply of commodities, current pricing, and expected new crop quantity and quality affect the timing of the Company's sales and earnings. When the seasonal harvesting periods of the Company's major vegetables are newly completed, inventories for these processed vegetables are at their highest levels. For peas, the peak inventory time is mid-summer and for corn, the Company's highest

**Financial Model of Hypothetical Company with trend setting Product**  
**EBITDA, IRR rates, Sales Multiples, Terminal Value, & Net Present Value (NPV)**  
**For the years ending December 31, 2003 -2008**

“\$ actual

	2003	2004	2005	2006	2007	2008
Sales	\$ 100,000	\$ 500,000	\$ 1,000,000	\$ 5,000,000	\$ 10,000,000	\$ 15,000,000
Product Cost	46,988	236,146	441,376	2,229,897	4,411,765	6,717,343
CGS	27,314	137,271	256,571	1,296,236	2,564,552	3,904,782
Gross Margin	25,698	126,583	302,052	1,473,868	3,023,683	4,377,875
Margin %	25.7%	25.3%	30.2%	29.5%	30.2%	29.2%
SG&A	\$ 73,000	\$ 176,000	\$ 280,000	\$ 1,150,000	\$ 1,700,000	\$ 2,550,000
Launch/Pack(Media)	11,000	19,000	15,000	60,000	105,000	265,000
Miscellaneous	20,000	54,000	60,000	30,000	175,000	200,000
EBITDA	(78,302)	(68,417)	(52,948)	233,868	1,043,683	1,362,875
Launch No-Sales						

	2003	2004	2005	2006	2007	2008
EBITDA	(178,302)	(68,417)	(52,948)	233,868	1,043,683	1,362,875
	(178,302)	(68,417)	(52,948)	233,868	1,043,683	23,962,875
	(178,302)	(68,417)	(52,948)	233,868	1,043,683	31,362,875
	(178,302)	(68,417)	(52,948)	233,868	1,043,683	38,862,875

Terminal Value  
 "+ Term. EBITDA

Risk Rate	NPV	Sales Multiple	Terminal Value at YE '08
8%	\$10,927,817	1	\$ 15,000,000
12%	12,579,089	1.5	22,500,000
18%	11,962,162	2	30,000,000
24%	10,929,537	2.5	37,500,000

Investment

~~NOT~~ MTA to Kecon

U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER

Received From: John Pariek,  
PEAK HARVEST FOODS, LLC  
1285 Boring Blvd Ste 160  
SPARKS, NV 89434.

One piece of ordinary mail addressed to:  
Edward Ansell Esq  
Attorney for In-n-Out Burgers  
427 N Yale Ave #204  
Claremont, CA 91711-4340

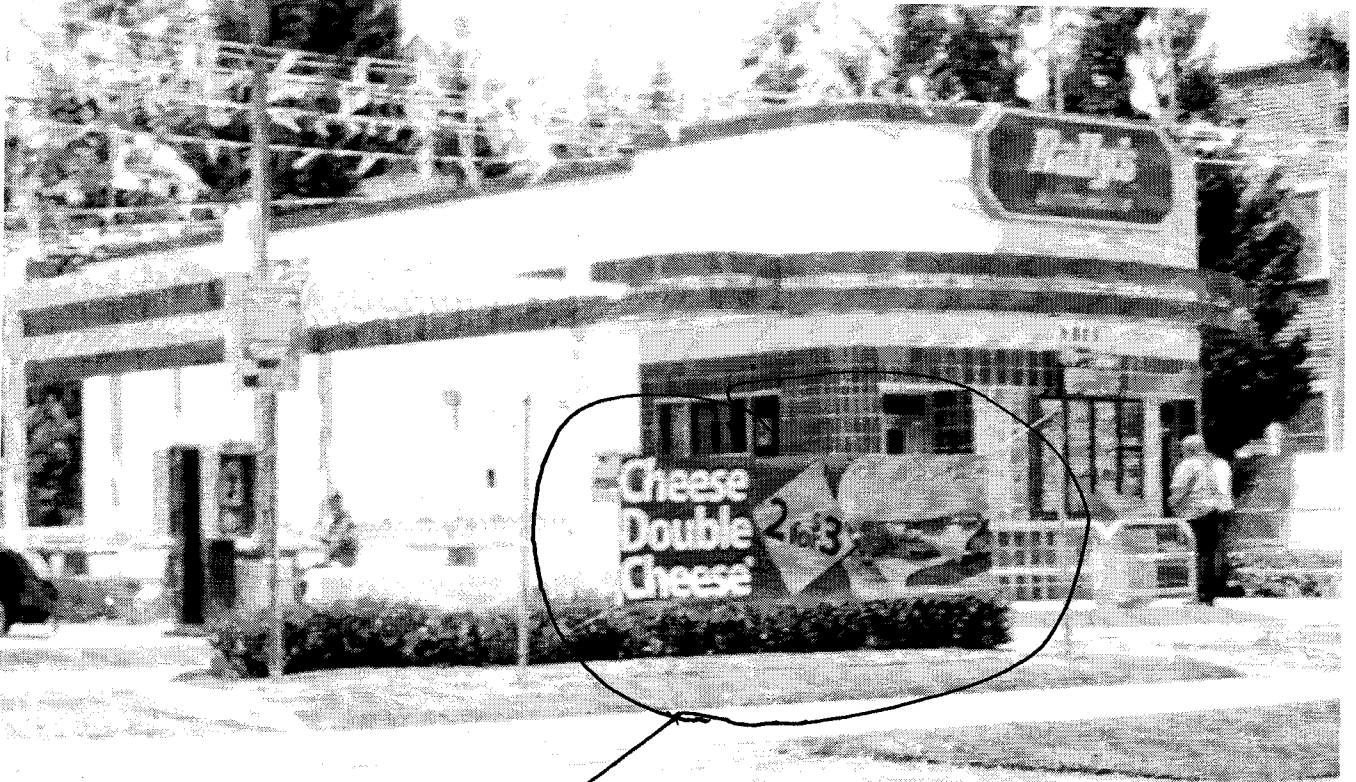
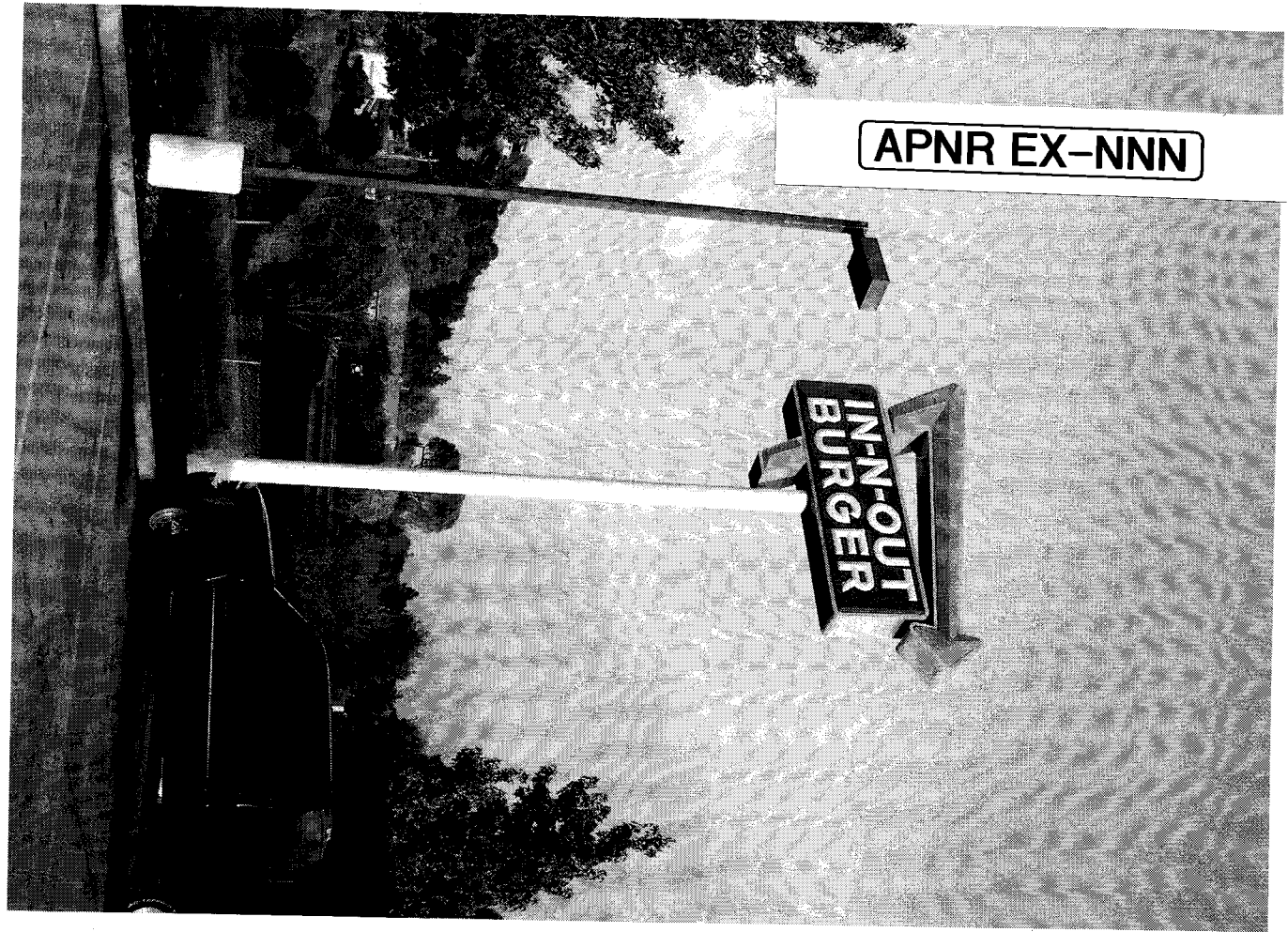
0000  
 LIMITED EXTER  
 POSTAL SERVICE  
 8 - MAR  
 PAID BY  
 CORP NY  
 14038  
 08 07  
 MOUNT  
 U.S. POSTAGE  
 PAID BY  
 CORP NY  
 14038  
 08 07  
 MOUNT  
 0.95  
 00017859-01

**APNR EX-MMM**

PS Form 3817, January 2001

APNR EX-NNN

IN-N-OUT  
BURGER



★