

This Opinion is Not a
Precedent of the TTAB

Mailed: February 21, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Frito-Lay North America, Inc.

v.

Real Foods Pty. Ltd.

Opposition No. 91212680
Opposition No. 91213587¹

William G. Barber and Paul Madrid of Pirkey Barber PLLC, for Frito-Lay North America, Inc.

Bruce S. Londa, Jeanne M. Hamburg and Ami Bhatt of Norris McLaughlin & Marcus P.A., for Real Foods Pty. Ltd.

Before Zervas, Mermelstein and Masiello,
Administrative Trademark Judges.

¹ The Board granted the parties' stipulation to consolidate Opposition Nos. 91212680 and 91213587 on March 3, 2014. 11 TTABVUE.

Citations in this opinion are to the record in Opposition No. 91212680 and to the TTABVUE docket entry number and the electronic page number where the document or testimony appears. Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to non-confidential parts of the record include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which does not appear on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

Opinion by Zervas, Administrative Trademark Judge:

Real Foods Pty. Ltd. (“Applicant”) is the owner of the following two applications on the Principal Register for standard character marks:

- Application Serial No. 79111074² for CORN THINS filed on January 19, 2012, for “crispbread slices predominantly of corn” in International Class 30, based on a request for extension of protection filed under Section 66(a) of the Trademark Act of 1946, 15 U.S.C. § 1141f(a); and
- Application Serial No. 85820051³ for RICE THINS filed on January 10, 2013, for “crispbread slices primarily made of rice” in International Class 30, based on Section 1(a) of the Trademark Act, 15, U.S.C. § 1051(a), and claiming first use and first use in commerce in 2007.

The terms CORN and RICE have been disclaimed in the respective applications.

In the respective amended notices of opposition, Frito-Lay North America, Inc. (“Opposer”) alleges that RICE THINS and CORN THINS are (i) generic names for Applicant’s respective goods; (ii) so highly descriptive of Applicant’s goods as to be incapable of acquiring distinctiveness; and (iii) merely descriptive of thin slices of crispbread made of rice or corn, as the case may be, and Applicant has not provided proof that THINS has acquired distinctiveness.⁴

Applicant denied Opposer’s salient allegations in its amended answers (filed May 13, 2015) to each of Opposer’s amended notices of opposition and claimed acquired distinctiveness in the marks CORN THINS and RICE THINS as an affirmative

² Application Serial No. 79111074 is the subject of Opposition No. 91213587.

³ Application Serial No. 85820051 is the subject of Opposition No. 91212680.

⁴ 6 TTABVUE.

defense in its amended answers.⁵ Applicant also pleaded that the amended notices of opposition fail to state claims upon which relief may be granted. Applicants did not pursue this defense by motion under Fed. R. Civ. P. 12(b)(6) and, accordingly, it is deemed waived. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014).⁶

Accelerated Case Resolution

On November 4, 2015, the parties filed a stipulation,⁷ which the Board approved on November 10, 2015, to forego a traditional trial and instead resolve this dispute via the Board's Accelerated Case Resolution ("ACR") procedure.⁸ The parties agreed, *inter alia*, that the Board may resolve this consolidated proceeding based on (1) the parties' cross-motions for summary judgment, responses and reply briefs filed in support thereof, and evidence and testimony submitted with, the cross-motions; (2) the parties' briefs on a motion filed by Applicant to amend the identifications of goods in its involved applications; and (3) supplemental briefing, but limited to particular topics. Additionally, the parties agreed that all objections to the admissibility of the evidence and testimony submitted with the cross-motions for summary judgment are waived, but without prejudice to the parties' rights to rely on arguments concerning the probative value of such evidence made in briefs filed in connection with the cross-

⁵ 62 TTABVUE (in Opp. No. 91212680) and 12 TTABVUE (in Opp. No. 91213587). Applicant did not claim acquired distinctiveness pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), in either application, as filed or during prosecution.

⁶ 7 TTABVUE.

⁷ 70 TTABVUE.

⁸ 71 TTABVUE.

motions for summary judgment or the right to assert arguments concerning the probative value of such evidence raised by the parties' supplemental briefing.⁹ Further, the parties agreed that the Board may resolve any issues of fact arising from the parties' summary judgment briefs and evidence.

The Record

In addition to the pleadings, Applicant's opposed applications are automatically of record pursuant to Trademark Rule 2.122(b), 37 CFR § 2.122(b). The other evidence of record consists of:

Submitted by Opposer:

- Declaration of Diana L. Rausa, paralegal with Opposer's law firm, and accompanying exhibits;
- Expert report of David W. Stewart, Ph.D., Professor of Law and Marketing at Loyola Marymount University, and accompanying exhibits;
- Declaration of Robert D. Frank, Ph.D., President of Illuminor LLC, a firm which specializes in trademark research, consulting and expert witness testimony, and accompanying exhibits, including his report;
- Declaration of Dr. Isabella Cunningham, Chair of the Department of Advertising and Public Relations at the University of Texas at Austin, and accompanying exhibits, including her report;
- Declaration of Paul Madrid, one of Opposer's attorneys, and accompanying exhibits; and
- Declaration of Jeanette Zimmer, Assistant Secretary of Opposer, and accompanying exhibits.

⁹ Opposer therefore has waived its objections to the admissibility of the declaration of Michael Movitz, to ¶¶ 6 and 21 of Michael Pels' declaration referring to Mr. Movitz's testimony, and to the declaration of Jessie Roberts. See pp. 4-5 of Opposer's response to Applicant's summary judgment motion. 47 TTABVUE 5-6.

Submitted by Applicant:

- Declaration of Michael Pels, founder and Managing Director of Applicant, and accompanying exhibits;
- Confidential supplemental declaration of Michael Pels;
- Declaration and rebuttal declaration of Sarah Butler, Vice President, Intellectual Property and Survey and Sampling Practices, NERA Economic Consulting (“NERA”), and accompanying exhibits;
- Declaration of Jessie Roberts, an attorney and a former Trademark Examining Attorney and Administrator at the USPTO, and accompanying exhibits;
- Declaration of Hal Poret, Senior Vice President at ORC International, a market research firm, and accompanying exhibits;
- Confidential declaration of Michael Movitz, Vice President of Sales Operations for SPINS LLC, a provider of retail consumer data, analytics and consulting, particularly in the Natural, Organic and Specialty Products industries, and accompanying exhibits; and
- Declaration of Ami Bhatt, one of Applicant’s attorneys, and accompanying exhibits.

Standing

Applicant stipulated on April 21, 2015¹⁰ that Opposer has standing to oppose the applications for CORN THINS and RICE THINS, and the Board approved the stipulation on May 12, 2015.

¹⁰ 59 TTABVUE. (Parties’ stipulation resolving Opposer’s cross-motion for summary judgment on standing and applicant’s equitable affirmative defenses.)

Applicant's Motion to Amend the Goods

On September 2, 2014, Applicant filed a motion with the Board to amend the identification of goods in both of its applications.¹¹ In its application for CORN THINS, Applicant seeks to amend its identification of goods from “crispbread slices predominantly of corn,” to “crispbread slices predominantly of corn, namely popped corn cakes”; and in its application for RICE THINS, Applicant seeks to amend the identification of goods from “crispbread slices primarily made of rice,” to “crispbread slices primarily made of rice, namely rice cakes.” The Board, in denying the cross-motions for summary judgment, deferred consideration of Applicant’s motion to amend the identification of goods in each application until final decision.¹²

Applicant maintains in its motion to amend that “the amendments are narrowing.”¹³ In its summary judgment motion, Applicant explains, “after commencement of this proceeding, Real Foods [Applicant] realized that its use of the term ‘crispbreads’ would likely not be understood by American consumers to refer to rice cakes and corn cakes (as opposed to Australian consumers who commonly use the term).”¹⁴ Applicant is an Australian company and the application for CORN THINS is based on an Australian registration. Opposer contests the motion to amend,

¹¹ 14 TTABVUE.

¹² 63 TTABVUE 10.

¹³ 14 TTABVUE 2.

¹⁴ 30 TTABVUE 10, citing Pel. Decl. ¶ 20, 31 TTABVUE 9.

but concedes that “the evidence and admissions in the record indisputably show that popped corn and rice cakes are kinds of crispbread and, thus, kinds of crackers.”¹⁵

Pursuant to Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a), an “applicant may amend the application to clarify or limit, but not to broaden, the identification of goods” Because Opposer has conceded in its brief that “the evidence and admissions in the record indisputably show that popped corn and rice cakes are kinds of crispbread,”¹⁶ Applicant’s motion to amend is granted, and the operative identifications of goods in this proceeding are “crispbread slices predominantly of corn, namely popped corn cakes” for the CORN THINS application, and “crispbread slices primarily made of rice, namely rice cakes” for the RICE THINS application.

Genericness

It is Opposer’s burden to establish that RICE THINS and CORN THINS are generic by a preponderance of the evidence. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (“In an opposition or cancellation proceeding, the opposer or petitioner bears the burden of proving genericness by a preponderance of the evidence.”) (*citing Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d, 1750, 1761 (TTAB 2013), *aff’d*, 565 Fed. Appx. 900 (Fed. Cir. 2014)).

¹⁵ 72 TTABVUE 3.

¹⁶ Opposer’s Supp. Reply Br. at 2, 74 TTABVUE 1.

There is a two-part test used to determine whether a designation is generic: (1) what is the genus of goods or services at issue, and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services. *H. Marvin Ginn Corp. v. Int’l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). The relevant public’s perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Grp. Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence of the public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Id.* at 1533; *Dan Robbins & Assocs, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979).

The genus of the goods at issue

The genus of the goods is determined by focusing on the identification of goods in the subject applications. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016); *Magic Wand*, 19 USPQ2d at 1552 (“[A] proper genericness inquiry focuses on the description of [goods] set forth in the certificate of registration.”); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1350 (TTAB 2013). We hence consider the genus in each application to be established by the amended identifications of goods. Therefore, the genera in the two applications are, respectively, popped corn cakes and rice cakes. Accordingly, we must consider whether:

- CORN THINS is a generic name for popped corn cakes;
and

- RICE THINS is a generic name for rice cakes.

The relevant public

The second part of the genericness test is whether the relevant public understands the designation primarily to refer to the genus. The relevant public for a genericness determination is the purchasing or consuming public for the identified goods. *Magic Wand Inc. v. RDB Inc.*, 19 USPQ2d at 1553, citing *In re Montrachet S.A.*, 878 F.2d 375, 11 USPQ2d 1393, 1394 (Fed. Cir. 1989); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *Marvin Ginn*, 228 USPQ at 530; *Dan Robbins & Assocs., Inc. v. Questor Corp.*, 202 USPQ at 105. The relevant public is the general consuming public who consume and eat the snack foods identified.

Public perception

In determining the proper analysis of the terms before us, we look to *Princeton Vanguard, supra*.¹⁷ The court stated:

[E]ven in circumstances where the Board finds it useful to consider the public's understanding of the individual words in a compound term as a first step in its analysis, the Board must then consider available record evidence of the public's understanding of whether joining those individual words into one lends additional meaning to the mark as a whole.

Princeton Vanguard, 114 USPQ2d at 1832-33. *See also 1800Mattress.com IP*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (explaining that the Board appropriately considered the separate meanings of "mattress" and ".com" when determining that

¹⁷ The parties' supplemental briefing in this case extensively discussed the Federal Circuit's holding in *Princeton Vanguard, supra*.

the combination “mattress.com” was generic); *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1535 (Fed. Cir. 2009) (affirming the Board’s finding that “the composite term HOTELS.COM communicates no more than the common meanings of the individual components.”).

We therefore set forth the pertinent evidence as introduced by the parties into the record for this proceeding, which includes dictionary definitions of the components of the composite marks, uses of “thins,” “rice thins” and “corn thins” in websites and articles, Applicant’s promotional materials, third-party registrations, Internet search results and a consumer survey. *See Alcatraz Media*, 107 USPQ2d at 1762 (“Competent sources to show the relevant purchasing public’s understanding of a contested term include purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications.” (citations omitted)).¹⁸

Opposer’s Evidence

Dictionary definitions

“Thin” is defined in the sole probative definition of record from dictionary.com as “having relatively little extent from one surface or side to the opposite; not thick.”¹⁹

There are no definitions from dictionaries which appear in printed form in the record

¹⁸ The extensive material in the record from the prosecution files of third-party trademark applications has limited probative value. *See In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014) (“Although the United States Patent and Trademark Office strives for consistency, each application must be examined on its own merits. ... [T]he Board is [not] bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.”).

¹⁹ Exh. 44 Rausa Decl., 47 TTABVUE 407.

The definitions in the record from www.collinsdictionary.com are of limited probative value because they indicate they are “British English,” and not “American English.”

for “thins,” as a noun. On the other hand, much of the evidence shows use of the term as a noun.

Opposer’s use of “Thins”

Opposer has used “Thins” as a noun for cracker products, including:

- (i) Rold Gold Pretzel Thins,²⁰



- (ii) Stacy’s Pretzel Thins,²¹



²⁰ Exh. F Zimmer Decl., 51 TTABVUE 267.

²¹ Exh. F Zimmer Decl., 51 TTABVUE 25.

(iii) Tostitos Cinnamon Thins;²²



and Tostitos Tex-Mex Thins.²³ Opposer also used “thins” for DORITOS Tortilla Thins.²⁴

Third party snack manufacturers’ use of THINS

The following third-party uses of “thins” as a noun for various cracker products are in the record;

²² Exh. F Zimmer Decl., 51 TTABVUE 264.

²³ Zimmer Decl. ¶ 11, 50 TTABVUE 287.

²⁴ Zimmer Decl. ¶ 11, 50 TTABVUE 287, 51 TTABVUE 172-73.

- (i) Sesmark Rice Thins, Sesmark Sesame Thins And Sesmark Brown Rice Thins;²⁵



- (ii) Nabisco Vegetable Thins;²⁶



²⁵ Exh. C Frank Decl., 49 TTABVUE 531.

²⁶ Exh. 26 Rausa Decl., 47 TTABVUE 131.

(iii) Keebler Town House Pretzel Thins;²⁷

Keebler® Town House® Pretzel Thins Oven Baked Crackers Sea Salt

Introducing New Town House Pretzel Thins. Classic baked pretzel taste in a thin, crispy cracker perfectly seasoned with sea salt. Whether you're having a get-together or simply craving an afternoon snack, Town House Pretzel Thins are perfect for sharing with guests or enjoying solo. Just open, pour, and serve!

[Where to Buy](#)
[Nutrition Facts](#)
[View All Keebler® Products](#)
[View All Town House® Products](#)

Product Point Values
Keebler® Town House® Pretzel Thins



The image shows the packaging for Keebler Town House Pretzel Thins. The box is red and white with the Keebler logo and 'TOWN HOUSE Pretzel Thins' text. A 'new!' sticker is in the top right corner. Below the box is a photograph of several golden-brown, round crackers on a wooden surface, with a blue bowl containing more crackers in the background.

(iv) Gratify Sea Salt Thins;²⁸



The image is a screenshot of the Gratify website's product page for 'Sea Salt Thins'. The page features a blue header with the Gratify logo and navigation links. The main content area includes a large image of the product (a bowl of dip with crackers) and a list of other gluten-free pretzel products. The 'Sea Salt Thins' section contains a description, ingredients list, and a 'WHEAT FREE' label.

GLUTEN FREE
Gratify

Products | Where to Buy | Recipes | Offers & Promotions | Blog | Contact | Search Gratify...

GLUTEN FREE PRETZELS

- Sea Salt Twists
- Sea Salt Sticks
- Sea Salt Thins**
- Sesame Seed Thins
- Milk Chocolate Covered Twists
- Yogurt Covered Twists

Sea Salt Thins

Our latest innovation combines the crunchiness you expect in a pretzel with a dip-worthy and addictive new shape! Topped with a hint of natural sea salt, these gluten free Sea Salt Thins are rich with flavor and texture and make a yummy platform for cheeses, spreads and dips of all kinds.

INGREDIENTS

Corn Starch, Rapeseed Oil, Rice Flour, Sugar, Soy Flour, Soy Protein, Sea Salt, Cellulose Gum, Soy Lecithin, Yeast Extract, Sodium Bicarbonate, Sodium Acid Pyrophosphate, Citric Acid, Sodium Hydroxide.

CONTAINS: Soy
MAY CONTAIN: Traces of Sesame

✓ WHEAT FREE

²⁷ Exh. F Frank Decl., 49 TTABVUE 1541.

²⁸ Exh. F Frank Decl., 49 TTABVUE 632.

(v) Blue Diamond Artisan Nut Thins;²⁹ and



(vi) Pepperidge Farm Baked Naturals Pretzel Thins.³⁰



²⁹ Exh. F Frank Decl., 49 TTABVUE 606.

³⁰ Exh. F Frank Decl., 49 TTABVUE 629.

In addition, Opposer's contributions to the record include examples of the following uses of "thins" as a noun in marks taken from websites for snack food products, especially crackers and crispbread products:³¹ Back To Nature Multi-Seed Gluten Free Rice Thins; Nabisco Rice Thins and Wheat Thins; Stoned Wheat Thins; Ryvita Thins; Nature Valley Granola Thins; barkTHINS;³² Pocket Thins Flatbread; and Gratify Gluten Free Cracker Thins and Pretzels Sesame Seed Thins.³³ Examples of "Thins" used as a noun in connection with other products include Potato Thins; Newton's Fruit Thins; Oroweat Sandwich Thins Rolls; Thomas Bagel Thins; Warburtons Sandwich Thins; Dempster's Thins; Annas Swedish Thins; and Mandy's Cookie Thins.

³¹ See also Zimmer Decl., ¶ 12, 50 TTABVUE 287, identifying Sesmark Rice Thins, Sesame Thins, and Brown Rice Thins; Nabisco Rice Thins and Vegetable Thins; Keebler Town House Pretzel Thins; Nonni's Thin Addictives Almond Thins; Gratify Sea Salt Thins; Blue Diamond Artisan Nut Thins; World Table Rice Thins; Pepperidge Farm Baked Naturals Pretzel Thins; and Ritz Munchables Pretzel Thins, as cracker products competing with Opposer.

Ms. Zimmer's testimony in her declaration is based on a search she conducted of the Global New Products database maintained by Mintel Group Ltd. of food products in the United States. No information is provided about the Mintel Group Ltd. or how it maintains its database, and particularly whether material appearing in the database reflects current uses of marks. Her testimony based on material she obtained from the Mintel Group Ltd. database therefore has extremely limited probative value, because it does not discuss products she knew or had determined were for sale.

³² barkTHINS appears to be a chocolate-coated pretzel. Exh. F Frank Decl., 49 TTABVUE 605.

³³ Exhs. 1-42, Rausa Decl., 47 TTABVUE, 42 - 384.

Because the material submitted by Opposer to show third-party use of "thins" from Rude Health reflects a London address, or includes pricing in British pounds and not U.S. dollars, the Rude Health material in the record does not appear to be evidence of use in the United States and hence is of questionable probative value. The same holds true for the material from Pureharvest; the web address has an ".au" suffix and the spelling of certain words is not American English. See, e.g., "fibre" and "flavour" at Exh. 9-10 Rausa Decl., 47 TTABVUE 73-80.

Dr. Frank's Declaration

Opposer retained Dr. Robert Frank, President and founder of Illuminor LLC, which provides trademark research, consulting and expert witness testimony, to conduct a search of industry sources and news media for use of the term THINS in the marketplace and prepare an expert report. Dr. Frank's research yielded, *inter alia*, the following, which use "thins" with a lower case "t":

Buffalo-style 'wings' that don't bite back, Daily Herald (Arlington Heights, IL) (Sept. 4, 2013):

On a recent trip to the grocery store we also discovered Buffalo flavored potato chips and pretzel *thins*, so we had plenty of breading options with which to experiment.³⁴

Guiding a neighborhood's appetite: The New York Times (May 18, 2011):

She reached over to hold his hand. Then she ate one of the baked potato *thins* she invented years ago, which are now a store favorite.³⁵

Super bowls for Sunday: Snack away with health dips while watching the big game: Pittsburg Post-Gazette (Pittsburgh, PA) (Feb. 3, 2011):

She suggests serving it with Marbled Rye Toasts, Baked Pita Chips, Crostini (all recipes in the book) or pretzel *thins*.³⁶

Festive Whoopee Pie Appetizer: Daily Herald (Arlington Heights, IL) (Dec. 29, 2010):

Crackers, such as thin white cheddar rice or savory rice *thins*[.]³⁷

³⁴ Exh. B Frank Decl., 49 TTABVUE 373.

³⁵ Exh. B Frank Decl., 49 TTABVUE 393.

³⁶ Exh. B Frank Decl., 49 TTABVUE 395.

³⁷ Exh. B Frank Decl., 49 TTABVUE 396.

Savoring a small snack with Nature Valley Granola Thins; Most of our tasters like the squares, but wish there was more to them: The Florida Times Union (Oct. 7, 2010):

Sales representative Angie Tekin said she and her office crew all enjoyed the granola *thins*, which she described as crunchy and a tad crumbly. “They’re thin like a graham cracker”

\$3.29 for 10 *thins*[.]³⁸

Sylvia Says: Nature Valley Granola Thins are just right; St. Joseph News-Press (St. Joseph, MO) (July 3, 2010):

Boxes of 10 *thins* are sold nationwide for a suggested retail price of \$3.59.³⁹

If you need some crunch; Crispy Homemade Crackers add a Little Snap to dishes; The Record (Bergen County, NY) (May 1, 2002):

Soup and crispy, savory crackers ... Homemade crackers taste fresher than anything from a factory, and when you make them yourself, you choose the quality of ingredients that go into them.

Herbed sourdough *thins*[.]⁴⁰

Something for every taste; The Fresno Bee ((Fresno, CA) (July 22, 2001):

They even have garlic almonds and lots of other almond products, like nut *thins*, a cracker made from almonds.⁴¹

Health on wheels; Loading vehicle with the right stuff makes trip more fulfilling; The Gazette (Colorado Springs, CO):

³⁸ Exh. B Frank Decl., 49 TTABVUE 399.

³⁹ Exh. B Frank Decl., 49 TTABVUE 402.

⁴⁰ Exh. B Frank Decl., 49 TTABVUE 432.

⁴¹ Exh. B Frank Decl., 49 TTABVUE 436.

First stop, the pretzel rack. A connoisseur's selection: old-fashioned, sourdough, *thins*, rods, twists. Don't forget to pick up a jar of mustard for dunking.⁴²

Nature Valley Granola thins (Candy Industry, February 2012):

An indulgent 380-calorie granola snack, Nature Valley granola thins are available in both dark chocolate and dark chocolate peanut butter. The thins are 100% natural, made with delicate, crispy toasted granola and dark chocolate.⁴³

Many additional newspaper and magazine articles in the record refer to trademarks containing the term "thins," with "thin" in initial capitalization and with an additional term to identify a material aspect of the product. *See*, for example, the following representative articles:

The Stacy's Brand Introduces New Line of Pretzel Thins, (Entertainment Close-up, Feb. 10, 2014):

Building on its offering of delicious pita and bagel chips, the Stacy's brand on February 5 introduced Stacy's Pretzel Thins a new line of baked snacks.

According to a release, combining a classic pretzel flavor with a thin and crispy texture, Stacy's Pretzel Thins offer a fun and tasty twist on everyday snacking.⁴⁴

Blue Diamond Artisan Nut Thins, (Nutraceuticals World, June 2013):

Blue Diamond ... has introduced Artisan Nut Thins, a wheat and gluten-free cracker crafted with almonds, brown rice and seeds.⁴⁵

⁴² Exh. B Frank Decl., 49 TTABVUE 440.

⁴³ Exh. B Frank Decl., 49 TTABVUE 498.

⁴⁴ Exh. C Frank Decl., 49 TTABVUE 488.

⁴⁵ Exh. C Frank Decl., 49 TTABVUE 472.

Frito-Lay Debuts Tostitos Thins Tortilla Chips (Food & Beverage Close-Up, May 9, 2012):

To celebrate the introduction of Tostitos Thins tortilla chips, the latest addition to the Tostitos family⁴⁶

Consumers go for recycled packaging (Official Board Markets February 19, 2005):

The consumers of Nut[] Thins crackers⁴⁷

Recipes

Opposer's contributions to the record also contain recipes, or references to recipes, for "almond thins," "brownie thins," "chocolate-mint thins," "lemon thins" and "mint thins."⁴⁸

Opposer's Evidence of Use of "Thins" By Applicant, its Consumers and Others

Email to Applicant dated January 10, 2008:

"I'm down to my last 2 thins and buy 8 bags at a time so please respond A.S.A.P."⁴⁹

Applicant's advertising:

"[T]hey are the best thin since sliced bread."⁵⁰

• Applicant used "Corn Thins" in the same typeface "and rendering"⁵¹ as the rest of the phrase "Delicious Golden Corn Thins With Real Flavoring" on one version of Applicant's packaging.⁵²

⁴⁶ Exh. C Frank Decl., 49 TTABVUE 35.

⁴⁷ Exh. C Frank Decl., 49 TTABVUE 75.

⁴⁸ Exh. 51 Rausa Decl., 48 TTABVUE 215.

⁴⁹ Exh. 7 Madrid Decl., 50 TTABVUE 153.

⁵⁰ Exh. 7 Madrid Decl., 50 TTABVUE 4.

⁵¹ Opposer's Br. at 9, 47 TTABVUE 10.

⁵² Exh. 7 Madrid Decl., 49 TTABVUE 1365, 50 TTABVUE 134.

- Applicant’s employee Madelein Anderson, Marketing Manager, in one email dated September 15, 2013, provided nutrition information as “23 Cal per Corn Thin” and “Calories per slice (per Corn Thin).”⁵³
- Applicant’s employee Anitha Velkur, “Customer Service,” and Charlotte Marbus, “Account Executive – North America,” informed customers in emails dated August 10, 2011 and May 27, 2009 that “Corn and Rice Thins,” “Rice and Corn Thins,” and “Corn & Rice Thins” were available at various locations.⁵⁴
- Ms. Anderson, “Marketing Manager,” in an email dated December 20, 2010, informed a customer that “a peanut butter flavored Corn Thin” was not yet available.⁵⁵
- Applicant’s advertising states, “1 Corn Thin” and “1 Rice Thin” both have “¼ of the calories of one slice of white bread” and that it sells “a Rice Thin.”⁵⁶
- Consumer references to “corn thins” as: “your delicious corn thins,” “the corn thins you donated,” “your sample corn thins,” “instead of reaching for some chips, I grab a corn thin,” “I couldn't wait to try out this corn thin because I love food with sesame seeds in them whether it's a bagel, crackers or corn thins!” “original and flavored corn thins,” “it’s fun to experiment with toppings on a whole corn thin,” “I couldn’t wait to try out this corn thin,” “I love these corn thins,” “Real Foods corn thins,” “[i]f you are wondering what a corn thin is, think rice cake but thinner,” “if there was a way for me to sample your corn thins,” “where are the corn thins available in New York state?” and “your corn thins are the best.”⁵⁷
- Wholesaler communications with Applicant as: “Thank you for your donation of 250 samples of corn thins,” “your corn thins product,” “I would like to sell corn thins,” “I am

⁵³ Exh. 7 Madrid Decl., 50 TTABVUE 190, 192.

⁵⁴ Exh. 7 Madrid Decl., 50 TTABVUE 125, 154.

⁵⁵ Exh. 7 Madrid Decl., 50 TTABVUE 162.

⁵⁶ Exh. 7 Madrid Decl., 50 TTABVUE 138-151.

⁵⁷ Exh. 7 Madrid Decl., 49 TTABVUE 1367-69, 50 TTABVUE 15, 21, 26, 31, 43, 100, 158, 169-70.

a gourmet shop and interested in carrying your corn thins,” “We order corn thins from Azure foods,” “I’m interested in purchasing the corn thins for my store,” “the sesame corn thins,” “organic rice thins,” “your corn thins,” “BBQ or Cheese flavored corn thins,” “flavored corn thins,” “samples of your corn thins,” “Original corn thins flax and soy corn thins multigrain corn thins sesame corn thins whole grain rice thins,” “your corn thin products,” “flavors of corn thins,” “we found the rice thins a good sub for bread,” and “I will look for the rice thins.”⁵⁸

Registrations on the Principal Register by Others⁵⁹

- Reg. No. 3870613 for the mark BLUE THINS, registered on November 2, 2010, for “cookies, biscuits, crackers.” THINS is disclaimed.⁶⁰
- Reg. No. 4043300 for the mark NEWTON’S FRUIT THINS, registered on Oct. 18, 2011, for “cookies.” FRUIT THINS disclaimed.⁶¹
- Reg. No. 4566507 for the mark CANTINA THINS, registered on July 15, 2014, for “chips, namely, tortilla chips.” THINS is disclaimed.⁶²

⁵⁸ Exh. 7 Madrid Decl., 49 TTABVUE 1274, 50 TTABVUE 103, 106, 108, 110, 112, 114, 116, 119-21, 127, 131, 133, 135, 179, 174.

⁵⁹ Two registrations in the record have limited probative value; THINS is not part of the COCOTHIN and Design mark, Exh. 82 Rausa Decl., 49 TTABVUE 194, and Reg. No. 2863802 for EMMA’S THINS is not a live registration. Exh. 67 Rausa Decl., 49 TTABVUE 528.



⁶⁰ Exh. 65 Rausa Decl., 49 TTABVUE 522.

⁶¹ Exh. 54 Rausa Decl., 49 TTABVUE 276.

⁶² Exh. 50 Rausa Decl., 49 TTABVUE 208.

*Applicant's Evidence*Registrations by Others⁶³

The marks in the following live Principal Register registrations incorporate the term “thins,” are not based on Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and do not include a disclaimer of the term THINS: ⁶⁴



Mark	Reg. Number	Goods	Registration Date	Disclaimer
BAKED POTATO THINS	2883979	Potato—based snack foods, namely potato crisps	September 14, 2004	Baked potato
FALAFEL THINS	4050610	Wheat, corn, fava beans and chick peas based snack chips	November 1, 2011	Falafel
GARDEN CHICKEN THINS	1590093	Breads, pastries, biscuits, cakes, snack food products, namely, crackers	April 3, 1990	Chicken
	4144043	Nut-based snack foods	May 15, 2012	“PB” “Peanut Butter Crackers”
GOURMET THINS	1339385	Crisp bread	June 4, 1985	None
	4144045	Nut-based snack foods	May 15, 2012	“PB”
PITA THINS	1982930	Flat bread	June 25, 1996	Pita
SANDWICH THINS	3637950	Bread	June 16, 2009	Sandwich

⁶³ We have not included those registrations for marks which are displayed as a single term, such as QTHINS, WATERHINS and BARKHINS because they would not likely be subject to a disclaimer requirement, given the USPTO practice of not requiring disclaimers of parts of compound or unitary marks. See TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMPEP”) § 1213.05 (Jan. 2017).

⁶⁴ Exh. 9 Bhatt Decl., 55 TTABVUE 40-68.

Mark	Reg. Number	Goods	Registration Date	Disclaimer
STONED WHEAT THINS	1718484	Crackers	September 22, 1992	Stoned wheat
VEGETABLE THINS	1244724	Crackers	July 5, 1983	Vegetable
WHEAT THINS	1022799	Crackers	October 14, 1975	Wheat

See also the following live registrations in the record, which demonstrate the use of “thins” in connection with other food products:

Mark	Reg. Number	Goods	Registration Date	Disclaimer
CINNAMON THIN	4250188	Bakery goods	November 27, 2012	Cinnamon
COUNTRY THINS	4094572	Bakery products	January 31, 2012	None
GRILLIN THINS	4013885	Bread, namely, buns and rolls	August 16, 2011	Grilling
PITA THINS	1982930 ⁶⁵	Flat bread	June 25, 1996	Pita
POCKET THINS	4126741	Bakery goods	April 10, 2012	Pocket
SANDWICH THINS	3637950	Bread	June 16, 2009	Sandwich
SWEET THINS	1926608	Baked goods; namely, cakes and cookies	October 10, 1995	Sweet
	4151778	Candy; chocolate; cookies	May 29, 2012	None
	4339742	Coffee based candy	May 21, 2013	Coffee

In addition, Supplemental Reg. No. 4259364 for the standard character mark BAGEL THINS, for “bakery products, not including cookies,” which registered on

⁶⁵ The PITA THINS and the SANDWICH THINS registrations are repeated because they fall into both groups of registrations.

December 11, 2012, is in the record. BAGEL is disclaimed in this registration, meaning that BAGEL was considered a generic term while THINS was not considered as a generic term, and was considered capable of becoming a source indicating term.⁶⁶ See TMEP § 1213.03(b).

Roberts Declaration⁶⁷

The declaration of Jessie Roberts, former Examining Attorney and Administrator at the USPTO, challenges many statements in the Frank declaration.⁶⁸ Of note, however, are the results of Ms. Roberts' search on the Google search engine for "corn thins" (but not for "rice thins") which she discusses in her declaration.⁶⁹ From her review of the first ten pages of the Google search results, which are submitted with her declaration, she states that 78 references of the first 100 are to Applicant's goods.⁷⁰ This claim is exaggerated because several references appear to be

⁶⁶ Exh. 73, Rausa Decl., 48 TTABVUE 686.

⁶⁷ Roberts Decl., 38 TTABVUE 9.

⁶⁸ Ms. Roberts offers legal opinions or legal conclusions in her declaration. We do not consider any legal opinions or conclusions proffered by Ms. Roberts because legal determinations are solely within the province of the Board. *See* Fed. R. Evid. 702 ("A witness who is qualified as an expert ... may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.").

⁶⁹ Roberts Decl. ¶ 5, 38 TTABVUE 3.

⁷⁰ Ms. Roberts states at ¶ 15 of her declaration:

Of the remaining twenty-two, fourteen presented use of the phrase as a generic term at noncommercial sites, such as, recipe sites and health or nutritional analysis sites that are of little or no probative value ...; three were ambiguous as to whether they were referring to Real Foods' product or not; three appeared to be use of the term as a product identifier by other entities which, if in use in the United States, would go to infringement rather than descriptiveness or genericness; and I was unable to access the remaining two referenced sites. As an Examining Attorney, I would have been highly persuaded that these search results

duplicative. Other references are from foreign websites. In addition, we are not privy to the algorithm by which Google selects and displays the results of a search, and we cannot simply presume that the order of search results has trademark significance. Ms. Roberts' search results, however, do exhibit several uses of "corn thins" to identify certain goods. *See*, for example, "what brocho do you make on corn thins?" (www.needanetzah.com); "The Berachot Site – I believe corn thins and soy or crisps are made in such a way that the grains ..." (www.berachot.org); "Homemade 'corn thins' – Previously I have assumed that making corn thins at home would be impossible" (cookingwithandwithout.com); "Sainsbury's Dark Chocolate Corn Thins Review – the taste of dark chocolate [-] these corn thins have the flavor" (www.newproductreviews.com); and "Christmas Corn Thins – All you need are Real Food corn thins[,] melted chocolate, sprinkles" (gfreekid.com).

Applicant's *Teflon* Survey

Sarah Butler, at Applicant's request, conducted an online genericness survey for CORN THINS (but not RICE THINS) with a nationwide sample of adults aged 18 or older who were past or prospective purchasers of popped corn cakes. The survey was designed as a *Teflon* survey to evaluate the extent to which relevant consumers view CORN THINS as a brand name for a product.⁷¹ Of the 221 qualified respondents

supported Real Foods' use of CORN THINS as a source identifying trademark.

38 TTABVUE 9.

⁷¹ Ms. Butler instructed participants on the difference between a brand name and a common name and gave them a "mini test" to ensure their understanding. Only those who correctly answered questions in the "mini-test" were eligible to complete the survey. *Id.* at 24.

surveyed, all of whom were past or future popped corn cake purchasers, 52 percent, or a total of 114 respondents, indicated that CORN THINS was a brand name, 32 percent indicated it was a common name,⁷² and 16 percent indicated they did not know or had no opinion.⁷³ For the 84 percent of respondents that had an opinion, 62 percent indicated that CORN THINS was a brand name, rather than a common name and 38 percent indicated that CORN THINS was a common name.⁷⁴

Dr. David Stewart, one of Opposer's witnesses, testified that Ms. Butler's survey "suffers serious and fatal flaws in both its design and in the analysis of its results."⁷⁵ In addition, Opposer maintains that the Fourth and Seventh Circuits recognize that *Teflon* surveys have limited probative value in the context of common terms already in use, citing *Hunt Masters, Inc. v. Landry's Seafood Restaurant Inc.*, 240 F.3d 251, 57 USPQ2d 1884 (4th Cir. 2001); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 195 USPQ 281, 283 (7th Cir. 1977); and *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 203 USPQ 642, 644 (7th Cir. 1979).⁷⁶ The Federal Circuit, however, in *Princeton Vanguard*, 114 USPQ2d at 1834, instructed the Board on remand to "give appropriate consideration to the proffered" *Teflon* surveys in the trial

⁷² Participants were told what a common name is. Specifically:

CHEESE NIPS is a brand name whereas CRACKERS is a common or generic name for a type of snack food. SUN CHIPS is a brand name whereas CHIPS is a common or generic name for a type of snack food.

Butler Decl. at ¶ 20, 33 TTABVUE 10.

⁷³ Butler Decl. at ¶ 30, 33 TTABVUE 12.

⁷⁴ Butler Decl. at ¶ 31, 33 TTABVUE 12.

⁷⁵ Stewart Decl. at ¶ 15, 49 TTABVUE 220.

⁷⁶ Opposer's Supplemental Brief at 9 - 11, 72 TTABVUE 10-11.

record, including a *Teflon* survey submitted by our Opposer, in that case, but now arguing against consideration of our Applicant's *Teflon* survey. Regardless of Opposer's challenges to the *Teflon* survey in this case, we have not considered the survey results because, as will be demonstrated, it is not necessary for the disposition of this case.

Analysis

"Genericness is a fact-intensive determination and the Board's conclusion must be governed by the record which is presented to it." *In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1832 (TTAB 2011); *In re Tennis Industry Ass'n*, 102 USPQ2d 1671, 1680 (TTAB 2012). We initially analyze the component terms of the applied-for composite marks individually. As required by *Princeton Vanguard* and *Marvin Ginn*, however, we ultimately evaluate genericness of each proposed mark as a whole.

Regarding the terms "rice" and "corn" in the proposed marks, they appear in the respective identifications of goods and identify the key or primary ingredients of the goods. "Corn" is defined as a "grain,"⁷⁷ and "rice" is defined as "small white or brown grains that come from a Southeast Asian plant and that are used for food."⁷⁸ Thus, the terms RICE and CORN in the applied-for marks are, respectively, the generic

⁷⁷ We take judicial notice of this definition from *Merriam Webster Dictionary*, accessed at <http://www.merriam-webster.com/dictionary/com>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁷⁸ *Merriam Webster Dictionary*, accessed at <http://www.merriam-webster.com/dictionary/rice>. We also take judicial notice of this definition.

names of the key ingredients of the respective goods. Applicant has not contended otherwise.

With regard to the public's understanding of the term "thins," we find that there is evidence of the term "thins" used by consumers of Applicant's goods to identify cracker products, and other food products which have a thin cross-section. *See, e.g.*, articles submitted with Dr. Frank's declaration, the uses of "thins" by Applicant and Applicant's consumers, and several of the Google search results submitted by Applicant's witness, Ms. Roberts. The record also includes evidence of uses of "thins" in a generic manner for various cookies. *See, e.g.*, "almond thins," "brownie thins," "chocolate-mint thins," "lemon thins" and "mint thins."⁷⁹ However, there is ample evidence of the use of "thins" as a source indicator. *See, e.g.*, Wheat Thins, Nabisco Vegetable Thins, Sesmark Sesame Thins, Gratify Sea Salt Thins and Coffee Thins.⁸⁰ Thus, we are not persuaded that the present record establishes by a preponderance of the evidence that "thins" is a generic term for rice cakes or popped corn cakes. While it is widely used for crackers, snack foods and other food products, many of these uses are in the form of composite terms which the users apparently intend to serve the purpose of a mark, and are presented with appropriate capitalization to indicate use for this purpose. Though the wide use may indicate the scope of protection for each of these brands to be limited, it does not follow that the use is so ubiquitous as to render these uses, or Applicant's, no better than generic.

⁷⁹ Exh. 51 Rausa Decl., 48 TTABVUE 215.

⁸⁰ Exhs. C and F Frank Decl., 49 TTABVUE 531, 632 and 611, Exh. 26 and 49 Rausa Decl., 47 TTABVUE 130-31.

We now consider the proposed marks as a whole. *See Princeton Vanguard*, 114 USPQ2d at 1833-34.

The evidence in the record includes a few uses of “Corn and Rice Thins,” “Rice and Corn Thins,” and “Corn & Rice Thins” by two of Applicant’s employees⁸¹, some consumer references to “corn thins,” some wholesaler uses of “corn thins” and “rice thins,” and a handful of third party uses of “Rice Thins.” This evidence offered to show generic use of “corn thins” and “rice thins” is not impressive and fails to persuade us that either term refers to a genus of goods. Much of the evidence comes from Applicant rather than from actual purchasers of Applicant’s goods. Further, many of the instances where Applicant’s consumers refer to “corn thins” and “rice thins” without initial capitalization are made in the context of a discussion of Applicant’s goods, so the lower case lettering does not indicate the authors are unaware of a single source for the goods (“To refresh your memory, in the past, you have donated 8 boxes of 72 sample-sized packages of your delicious corn thins,”⁸² “Real Foods company makes a product called Corn Thins. ... The flaxseed/soy, sesame, original and flavored corn thins are gluten free,”⁸³ “Both are great plain or broken to pieces and used for a snack or dipping, but it’s fun to experiment with different toppings on a whole corn thin. I contacted Real Foods (the manufacturer) about a minor concern I had with one of the

⁸¹ According to Opposer, such uses are generic uses, notwithstanding the use of initial capital letters, because they are not uses of brand names (the brand names are CORN THINS and RICE THINS). Opposer’s Br. at 9, 47 TTABVUE 10.

⁸² 49 TTABVUE 1367.

⁸³ 50 TTABVUE 21.

packages I bought,”⁸⁴ “I also like Real Foods corn thins”).⁸⁵ Other instances reflect mixed upper-case and lower-case uses (“Real Foods has experienced rapid growth over the last 12 years since the development and launch of its major product line, Corn Thins, a natural, low-fat crispbread made from popped corn.’ GUILT FREE FOODS. I am literally in heaven over these corn thins.”).⁸⁶ The reference in Applicant’s advertising to “1 Rice Thin” is not strongly indicative of genericness because the reference can be construed as a reference to Applicant’s product through a trademark, such as “a Coke” or “a Pepsi.” The uses by wholesalers who are actual or prospective purchasers are more indicative of genericness, but still equivocal. In considering this evidence, we weigh it against other evidence demonstrating use of both “corn thins” and “rice thins” in a prominent position on product packaging, and uses apart from packaging but with initial capitalization, and we find that Opposer has failed to demonstrate by a preponderance of the evidence that CORN THINS and RICE THINS considered as a whole would be perceived by consumers as generic for, respectively, popped corn cakes and rice cakes. Rather, the evidentiary record presents a record with mixed uses of CORN THINS and RICE THINS, as well as THINS, in trademark and non-trademark form. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 4 USPQ2d at 1144 (where “recognition in a substantial number of publications that the source of the CASH MANAGEMENT ACCOUNT” was the applicant, the court found that “[t]he mixture of usages unearthed by the

⁸⁴ 50 TTABVUE 26.

⁸⁵ 60 TTABVUE 43.

⁸⁶ 50 TTABVUE 15.

NEXIS computerized retrieval service does not show, by clear evidence, that the financial community views and uses the term CASH MANAGEMENT ACCOUNT as a generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term.”); *Alcatraz Media*, 107 USPQ2d at 1763 (“However, when considered in conjunction with the testimony of respondent’s competitors, these uses result in at best a mixed record of use of the phrase both generically and as part of what appear to be trademarks or trade names. This ambiguous evidence thus fails to establish that the primary significance of ANNAPOLIS TOURS to the relevant public is guided tour services of cities, rather than a guided tour service of cities provided by a particular entity.”). *See also, In re America Online*, 77 USPQ2d 1618, 1623 (TTAB 2006) (“the evidence of generic use is offset by applicant’s evidence that shows not only a significant amount of proper trademark use but also trademark recognition” by third parties).

Opposer’s genericness claim is dismissed in regard to each application.

Mere Descriptiveness and No Acquired Distinctiveness

We next turn to Opposer’s claim that RICE THINS and CORN THINS are merely descriptive terms for rice cakes or popped corn cakes, respectively, and Opposer’s claim that Applicant has not provided proof that the term THINS has acquired distinctiveness.⁸⁷ Because Applicant has disclaimed the terms “rice” and “corn” and these clearly are generic terms for goods made of those foods, Opposer must show

⁸⁷ Opposer has alleged in its amended notice of opposition that Applicant has not shown acquired distinctiveness in the term THINS.

that THINS is descriptive and that its combination with the other terms in the respective applications does not create non-descriptive composites.

Applicant, on the other hand, can rely on a claim of acquired distinctiveness in the term THINS and/or the two composites, to defeat Opposer's claim that Applicant's mark is merely descriptive, even though the applications were published without resort to Section 2(f). *See Coca-Cola Co. v. Seven-Up Co.*, 497 F.2d 1351, 182 USPQ 207, 209 (CCPA 1974) ("The first ground of attack, without citation of authority, is based on appellee's not having filed its application under Section 2(f) of the Act. The attack must fail. Because the examiner had never raised a question of descriptiveness and appellee never considered its mark to be descriptive, there was no reason to have filed under Section 2(f) or to have amended the application to bring it under that section"); *Perma Ceram Enters. Inc. v. Preco Indus. Ltd.*, 23 USPQ2d 1134, 1139 n.13 (TTAB 1992) ("Although the application did not include a Section 2(f) claim, the defense of acquired distinctiveness clearly could have been raised"). In this case, Applicant pleaded acquired distinctiveness in its amended answers as to the composite marks. Before considering that defense, we first must consider whether THINS and the composite marks have been shown to be merely descriptive.

A mark is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *see also, In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a proposed mark is merely descriptive is determined in relation to the goods for which registration is sought and

the context in which the mark is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, we evaluate whether someone who knows what the goods are will understand the asserted mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). A proposed mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. See *In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). The determination that a mark is merely descriptive is a finding of fact and must be based upon a preponderance of the evidence. *Princeton Vanguard*, 114 USPQ2d at 1830 n.2 (“We agree with the Board that the burden was on Frito-Lay to prove genericness by a preponderance of the evidence.”).

Where a mark consists of multiple descriptive words, the mere combination of these words does not necessarily create a nondescriptive word or phrase. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004). However, a combination of merely descriptive components is registrable as a mark if the combination of terms creates a mark with a nondescriptive meaning, or a double entendre with one meaning being

non-descriptive, or if the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”).

Applicant’s products are popped corn cakes in the CORN THINS application and rice cakes in the RICE THINS application. We find that a consumer will immediately understand, when encountering the proposed marks, that a feature or characteristic of Applicant’s goods is that they are thin in cross section and made primarily of corn in one instance and rice in the other. “Rice” and “corn,” of course, identify the primary ingredients of the crispbread or cakes, and are descriptive of the respective goods. The term “thins” is the pluralized form of “thin,” which characterizes the thickness of Applicant’s goods. “Thins” in the proposed marks has been transformed into a noun as evidenced by the addition of the letter “s.” While the record reflects use of “thins” as a noun by purchasers and others, there is no definition from a traditional dictionary for “thins” as a noun. However, a “mere change of form of a descriptive term will not automatically remove it from the descriptive category.” 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:29 (4th ed. 2017). *See also Scholler Brothers, Inc. v. Hans C. Bick, Inc.*, 110 USPQ 431, 432-33 (Comm’r Pats. 1956) (“when ‘Nylon’ is the common name of a fiber and the common name of the principal ingredient of the finishing bath for treating fabrics and hosiery, and when that common noun is made into a verb by the addition of ‘ize’ to describe a treatment with

nylon, it does not assume service mark stature merely because it is registered and advertised as a service mark”).

In addition, the record reveals “thins” used as a noun in many articles in connection with thin food products, and by many other producers of food items:

The Florida Times Union (Apr. 4, 2013):

We chose the Fried Oreos with vanilla ice cream (\$5.99) and the Caramel Delight, churro-type tortilla *thins* dusted in cinnamon with a caramel dipping sauce (\$4.99). The Oreos resembled four beignets and were hard to put down. The *thins* were the better bet for large-group sharing and were light and crisp.⁸⁸

Fruit’s popularity on the rise, snack study shows Source: Daily Herald (Arlington Heights, IL) (Jan. 16, 2013):

Every time I head to the grocery store I see evidence that snacking is on the rise. On my last trip alone I spotted snack packs of seasoned nuts, cookie *thins* and peanut pretzels on the shelves.⁸⁹

Everything’s coming up pumpkin, from Pop Tarts to Pringles to ... air freshener? Pittsburgh Post-Gazette (Pittsburgh, PA) (Oct. 18, 2012):

If you’d rather wake up to a bagel, Brueggers, Einsteins and Panera Bread all feature pumpkin varieties this time of year. So does muffin-maker Thomas’, though its Pumpkin Spice bagels and bagel *thins* are a far cry from the chewy-on-the-outside, fluffy-on-the-inside taste you love in a fresh bagel hot out of the oven.⁹⁰

⁸⁸ Exh. 86, Rausa Decl., 49 TTABVUE 376.

⁸⁹ Exh. 86, Rausa Decl., 49 TTABVUE 378.

⁹⁰ Exh. 86, Rausa Decl., 49 TTABVUE 380.

Tidbits: Star Tribune (Minneapolis, MN) (Oct. 27, 2011):

There's a new development in the world of so-called sandwich *thins*—very thin rolls, sliced so each can make a sandwich.⁹¹

New batch of cookbooks signals baking season: Daily Herald (Arlington Heights, IL) (Oct. 12, 2011):

Paging through the book reveals tempting recipes for Mint *Thins* and Lemony Chewies alongside advice for decorating with flair and suggested variations.⁹²

Brown bagging it doesn't always have to be boring: Frederick News-Post (Frederick, MD) (Sept. 14, 2011):

To prevent “bread boredom,” Shea suggests swapping sliced bread for a bagel, pita pocket, sandwich *thins* or a wrap.⁹³

Make school lunch from a bag nutritious: The Atlanta Journal-Constitution (Atlanta, GA) (Aug. 31, 2011):

The new breed of whole-grain sandwich or bagel “*thins*” might be a better fit with 100 calories and 5 grams of fiber.⁹⁴

A tisket, a tasket ... Putting it all in a gift basket: The Boston Herald (Dec. 8, 1998):

For the xenophile, there's the International Seasonal Selection (\$65), which includes popular foods from around the world. Among them are Pfeffernusse gingerbread, Biscotti di Natale, ginger *thins*, Mozart Kugeln and more.⁹⁵

Nature Valley granola thins: Candy Industry (Feb. 2012):

An indulgent 80-calorie granola snack, Nature Valley granola *thins* are available in both dark chocolate and dark

⁹¹ Exh. 86, Rausa Decl., 49 TTABVUE 384.

⁹² Exh. 86, Rausa Decl., 49 TTABVUE 388.

⁹³ Exh. 86, Rausa Decl., 49 TTABVUE 390.

⁹⁴ Exh. 86, Rausa Decl., 49 TTABVUE 391.

⁹⁵ Exh. 86, Rausa Decl., 49 TTABVUE 446.

chocolate peanut butter. The *thins* are 100% natural, made with delicate, crispy toasted granola and dark chocolate.⁹⁶

“Thins” has been used in connection with food products that are thin in shape, and which are touted for being thin, but often with capitalization and with apparent intent that the use be perceived as part of a composite mark. The term has been used in connection with (i) cracker products (*e.g.*, “Keebler® Town House® Pretzel Thins Oven Baked Crackers Sea Salt,” “Introducing New Town House Pretzel Thins. Classic baked pretzel taste in a thin, crispy cracker perfectly seasoned with sea salt.”);⁹⁷ (ii) thinly-sliced breads (*e.g.*, Bagel Thins and Sandwich Thins Rolls (“The benefits of whole wheat and a delicious soft pita-style flatbread – what’s more to love?”)); (iii) candies (*e.g.*, barkTHINS snacking chocolate and COFFEE THINS); and (iv) cookies (*e.g.*, Anna’s Ginger Swedish Thins).⁹⁸

Even if we assume that the uses on other products are intended to be perceived as marks, or may have acquired distinctiveness, the ubiquity of use for food products illustrates the term “thins” is not inherently distinctive for thin food products. This evidence demonstrates that the term “thins” describes a common characteristic of each of these products, *i.e.*, its thin shape.

Applicant argues that it chose CORN THINS and RICE THINS to “convey the lightness of the product and its low caloric content, and therefore its consistency with a healthy lifestyle”; and that each asserted composite mark presents a “double

⁹⁶ Exh. 86, Rausa Decl., 49 TTABVUE 498.

⁹⁷ Exh. F Frank Decl., 49 TTABVUE 624.

⁹⁸ In our descriptiveness inquiry, we consider the use of “thins” in connection with breads and cookies, as the parties have done.

entendre [that] compel[s] a finding of suggestiveness because where a mark has two meanings, one descriptive and the other suggestive, then the mark can be called suggestive, as the mark is not ‘merely’ descriptive.”⁹⁹ We find it unlikely that consumers will understand “thins” in the applied-for terms as describing the lightness of the goods and the low caloric content, and Applicant has not submitted persuasive evidence that established such an understanding. As for the asserted double entendre, we find this interpretation of the marks unlikely, especially in light of the evidence of use of “thins” by other manufacturers on cookies, which are not known for having a low caloric content, and other snack foods such as pretzels, even chocolate-coated pretzels. Applicant’s advertising and packaging focusing on the healthful and dietetic benefits of its cakes do not persuade us otherwise.¹⁰⁰ Moreover, there is no persuasive evidence in the record that confirms consumer comprehension of Applicant’s asserted double entendre.¹⁰¹

⁹⁹ Applicant’s summary judgment brief at 12, 30 TTABVUE 14.

¹⁰⁰ See Exh. A Pels Decl., 31 TTABVUE 15, 16 17, 23, 86.

¹⁰¹ The packaging for SESMARK Rice Thins states, “[l]ight, crisp and delicate, Rice Thins are gently seasoned ... Rice Thins are a flavorful, low fat alternative to most chips and crackers, so enjoy them without guilt.” Exh. F Frank Decl., 49 TTABVUE 633. Additionally, the webpage at weightloss.answers.com (“Make Sandwich Thins Your New Bread”) provides:

Sandwich thins are the new products on the bread market. They are sleek, round, flat breads that put a healthy spin on getting your good carbs. Sandwich thins make it easy for those watching their weight to get in their required number [of] carbs without having to overdo it. There are a number of different brands each offering something slightly different in both taste and nutrition. Sandwich thins are a great healthy alternative to regular hamburger buns and dinner rolls.

Exh. F Frank Decl., 49 TTABVUE 621. Neither of these, or similar, statements, convey the double entendre advanced by Opposer, and do not reflect appreciation on the consumer’s part of the double entendre.

In view of the foregoing, and because each component of the applied-for composites retains its merely descriptive significance in relation to the claimed goods, each combination results in a composite that is itself merely descriptive. *See In re Oppedahl*, 71 USPQ2d at 1371. We therefore find the terms “corn thins” and “rice thins” are merely descriptive of a feature of Applicant’s respective goods.

We turn, then, to Applicant’s showing of acquired distinctiveness. It is Applicant’s burden to establish that its proposed marks have acquired distinctiveness. *Yamaha Int’l Corp. v. Hoshino Gakki Co. Ltd.*, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988) (“As this court observed ... the ‘one seeking to register [the proposed trademark] bears the burden of showing secondary meaning under Section 2(f).’”).¹⁰²

Applicant points out the following to demonstrate that its applied-for marks have established acquired distinctiveness in the term THINS:

- Applicant introduced CORN THINS and RICE THINS into the United States market in 2000 and 2007, respectively;¹⁰³
- Applicant’s goods can be found in grocery stores such as Whole Foods, Wegmans, Hannafords Supermarket and Stop & Shop;
- Applicant has the second largest share of the combined popped corn and rice cakes market in natural food stores selling food and snack products made from all natural (not artificial or genetically modified) ingredients, in the U.S.;¹⁰⁴

¹⁰² Bracketed material in original text.

¹⁰³ Pels Decl. ¶ 13, 31 TTABVUE 5.

¹⁰⁴ Pels Decl. ¶ 21, 31 TTABVUE 10; Movitz Decl. ¶ 14, 29 TTABVUE 4-5. Mr. Movitz’s declaration was filed under seal. The material attributed to Mr. Movitz is from Applicant’s brief which was not filed under seal.

- Applicant’s CORN THINS and RICE THINS products hold the second largest combined popped corn and rice cake market share in “naturals” food aisles of mainstream supermarkets and drugstores;¹⁰⁵
- Applicant’s CORN THINS and RICE THINS products also comprise the third largest market share of those rice and popped corn cake products sold in specialty gourmet food stores;¹⁰⁶
- Sales of Applicant’s CORN THINS and RICE THINS products have been in the millions;¹⁰⁷ and
- Thousands of visitors each year visit Applicant’s website, Applicant has over 16,000 Facebook “likes” and its products have been featured on several blogs.¹⁰⁸

Applicant also relies on the results of Ms. Roberts’ search on the Google search engine; for the same reason we found above that the results have limited probative value on the question of genericness, *i.e.*, that they include legal opinions or legal conclusions, include duplicative references as well as references from foreign websites, and are dependent on the algorithm used by the Google search engine, to which we are not privy, we find that they have little probative value on the question of acquired distinctiveness.

Applicant admits that it “does not have a large marketing budget,” and that it relies primarily on giving product samples to groups and individuals that focus on healthy or gluten-free lifestyles and donating samples for events that encourage such lifestyles. Applicant has advertised in publications directed to consumers living

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Pels Decl. ¶ 5, 31 TTABVUE 3; Pels Supplemental Decl. ¶ 2, 28 TTABVUE 2.

¹⁰⁸ Pels Decl. ¶ 25, 31 TTABVUE 11.

gluten-free or healthy lifestyles, such as the *Celiac Disease Foundation Newsletter* and *Today's Dietitian Magazine*.¹⁰⁹ No information, however, is in the record regarding the distribution of, or the frequency of advertising in, these publications.

There is no evidence of any other competitor currently using CORN THINS in the United States, although Mr. Pels stated in his declaration that one of Applicant's competitors had secured U.S. trademark registrations on the Principal Register for both CORN THINS and RICE THINS for corn cakes and rice cakes, respectively; and that those registrations were cancelled by default judgment in a cancellation proceeding initiated by Applicant.¹¹⁰ There is also evidence of use by "Sesmark" of "Rice Thins" and "Savory Rice Thins" for "a flavorful, low fat alternative to most chips and crackers."¹¹¹

Opposer counters Applicant's evidence with Dr. Cunningham's online survey, which sought to determine whether CORN THINS¹¹² had acquired distinctiveness.¹¹³ Dr. Cunningham asked participants whether they associate "corn thins" with only one company, more than one company, no company or "don't know."¹¹⁴ She included as participants only those "who had purchased crispbread/crispbread slices and/or crackers/flatbread in the previous three months or who planned to purchase crispbread/crispbread slices and/or crackers/flatbread in the following three

¹⁰⁹ Pels Decl. ¶ 23; 31 TTABVUE 10-11.

¹¹⁰ Pels Decl. ¶ 18, 31 TTABVUE 8-9.

¹¹¹ Exh. 12 Rausa Decl., 47 TTABVUE 87; Exh. F Frank Decl., 49 TTABVUE 633.

¹¹² CORN THINS has been used longer, and has had greater sales, than RICE THINS.

¹¹³ Cunningham Decl. ¶ 5, 49 TTABVUE 372

¹¹⁴ Exh. 1 Cunningham Decl., 49 TTABVUE 678-80.

months.”¹¹⁵ The survey demonstrated that a net of 10.3% of respondents perceived CORN THINS as associated with one company.¹¹⁶ When considering only those respondents who had purchased or planned to purchase crispbreads (as opposed to crackers/flatbreads), the results demonstrated 10.9% of such persons associated CORN THINS with one company.¹¹⁷ A little more than a half of those who indicated that they associated CORN THINS with only one company specified the name of a company other than Applicant as that company.

Applicant criticizes Dr. Cunningham’s selection of survey participants, stating that the wrong purchasers were surveyed. According to Applicant’s witness, Mr. Poret, “The large majority of the respondents answered that they do not purchase crisp bread/crisp bread slices, and almost certainly qualified for the survey only because they purchase some type of ‘cracker’ that has little or no relation to the relevant product category. The survey entirely failed to narrow the universe to purchasers of the correct product type, which could easily explain why most respondents associated CORN THINS with no company or did not know.”¹¹⁸ Dr. Cunningham responds:

I defined the universe for this survey as all those individuals who had purchased or might purchase in the future products in the broad category of “crispbread slices,” which in my opinion would reasonably include such products as crisp breads, crackers, and flatbreads. By defining the universe as only those people that would have or had purchased “crispbread/crispbread slices” the survey

¹¹⁵ Exh. 1 Cunningham Decl., 49 TTABVUE 679-80.

¹¹⁶ Cunningham Decl. ¶ 12, 49 TTABVUE 674, 681.

¹¹⁷ Cunningham Decl. ¶ 12, 49 TTABVUE 674.

¹¹⁸ Poret Decl. ¶ 16, 34 TTABVUE 6.

universe would have been under[-]inclusive. No evidence was given that buyers of crispbread slices were exclusively buyers or potential buyers of this product; rather, by including all the customers and potential customers of the entire product category, the universe was properly defined. The survey therefore included all individuals who purchased or planned to purchase crispbreads, crispbread slices, crackers and flatbreads.¹¹⁹

We find that the survey suffers because it included purchasers of “crackers,” rather than purchasers of “rice cakes,” and “corn cakes.” “Cracker” is defined as “a dry thin crispy baked bread product that may be leavened or unleavened.”¹²⁰ A “cracker” hence may include goods that differ in ingredient composition, purpose, and use from Applicant’s “rice cakes” and “popped corn cakes.”

Opposer also points us to a prior unpublished Board decision in which the Board considered the term BAGEL THINS for “bakery products, not including cookies” and found the term to be descriptive and without acquired distinctiveness (but not generic). *In Re Grupo Bimbo, S.A.B. DE C.V.*, Opp. No. 77798364, 2012 WL 3561622 (TTAB August 10, 2012). The Board added that “Bagel Thins” “may be an apt name for thinly-sliced bagels.” Nonetheless, our determination in this case must be based on the evidence in this record. A non-precedential decision in an *ex parte* appeal involving a different mark and different goods, issued prior to the Federal Circuit’s most recent decision on genericness, is not helpful to our analysis of this case at this time.

¹¹⁹ Cunningham Decl. ¶ 8, 49 TTABVUE 673.

¹²⁰ <http://www.merriam-webster.com/dictionary/cracker>, November 20, 2012 Office Action, application Serial No. 79111074, TSDR 10.

Upon careful consideration of all the evidence in the record, and the arguments of the parties, we find that Applicant's applied-for marks are highly descriptive of a feature or characteristic of the goods, and that Applicant has not demonstrated that its applied-for marks have acquired distinctiveness. Of particular concern to us is the fact that Applicant has done little or no advertising of CORN THINS or RICE THINS. Further, Applicant's sales figures, while not insignificant, are not high. The record demonstrates use of the term "thins" by many third parties; thus the use of THINS is not limited to Applicant. The terms "rice" and "corn," as discussed earlier in our opinion, are generic names for crispbreads made primarily of either rice or corn. Also, the Cunningham survey, despite its problems, still has some probative value in demonstrating limited recognition of CORN THINS as a mark. *Roselux Chemical Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627 (CCPA 1962) (10% of survey sample which gave trademark significance to a descriptive term held insufficient proof of secondary meaning). Opposer's claim that Applicant's applied-for marks are merely descriptive and that Applicant has not established acquired distinctiveness in either the term THINS, or, more properly, in the terms CORN THINS or RICE THINS, is sustained.

Terms Are So Highly Descriptive - Incapable Of Acquiring Distinctiveness

In some very unusual cases, a phrase or slogan can be so highly laudatory or descriptive as to be incapable of acquiring distinctiveness as a trademark. *See In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058-59 (Fed. Cir. 1999) ("The Best Beer in America," although not the generic name of the goods, is such a commonly used laudatory phrase that it is incapable of registration as a trademark). This is not

one of those cases. On this record, we cannot find that “corn thins” and “rice thins” are so highly descriptive of the qualities of Applicant’s goods that they could not function as a trademark to distinguish Applicant’s goods and serve as an indication of origin. There is limited third-party use of “rice thins” and “corn thins.” The record before us does not support a finding that Applicant’s proposed marks are so highly descriptive that they are incapable of acquiring distinctiveness. Opposer’s claim on this point is therefore dismissed.

Decision: Applicant’s motions to amend are *granted*, and the operative identifications of goods in this proceeding are “crispbread slices predominantly of corn, namely popped corn cakes” for the CORN THINS application, and “crispbread slices primarily made of rice, namely rice cakes” for the RICE THINS application.

Opposer’s claims of genericness and incapability of acquiring distinctiveness as a trademark are both *dismissed*.

The oppositions to the registration of Applicant’s proposed marks CORN THINS and RICE THINS are *sustained* on the ground that they are merely descriptive and have not acquired distinctiveness.