

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 15, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Original Grain, LLC*

Serial No. 87511343

George S. Blasiak of Heslin Rothenberg Farley & Mesiti, P.C.,  
for Original Grain, LLC.

Susan A. Richards, Trademark Examining Attorney, Law Office 103,  
Stacy Wahlberg, Managing Attorney.

Before Cataldo, Goodman, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Original Grain, LLC (“Applicant”) seeks registration on the Principal Register of  
the proposed mark shown below:



for “restaurant services” in International Class 43.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive of the services identified in the application. When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed.<sup>2</sup> We reverse the refusal to register.

### **I. Record on Appeal<sup>3</sup>**

The record includes Applicant’s several specimens of use, one of which is reproduced below:

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<sup>1</sup> Application Serial No. 87511343 was filed on June 29, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark at least as early as August 30, 2016 and first use of the mark in commerce at least as early as December 20, 2016. Applicant describes its mark as “consist[ing] of stylized letters for ‘ORIGINAL GRAIN’ in a circle.”

<sup>2</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. Applicant’s request for reconsideration and the Examining Attorney’s denial of the request are listed on TTABVUE at 4 TTABVUE, and 5-13 TTABVUE, respectively, but certain materials made of record by the Examining Attorney in denying the request do not appear in the TTABVUE entries, so we will cite the application record in discussing the request and its denial.

<sup>3</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).



and the following additional materials:

1. Online articles regarding the offering of grains in restaurants as healthy food options,<sup>4</sup> made of record by the Examining Attorney;
2. Articles about and reviews of Applicant's restaurant,<sup>5</sup> and pages from Applicant's website,<sup>6</sup> made of record by the Examining Attorney;
3. Definitions of the words "original" and "grain" from THE AMERICAN HERITAGE DICTIONARY,<sup>7</sup> definitions of the word "starch" from THE COLUMBIA ENCYCLOPEDIA and the ILLUSTRATED DICTIONARY OF SCIENCE,<sup>8</sup> and pages from the websites of the Department of Agriculture and the National Institute on Aging regarding the grain food group,<sup>9</sup>

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<sup>4</sup> September 28, 2017 Office Action at TSDR 2-3.

<sup>5</sup> *Id.* at TSDR 4-15; December 4, 2018 Denial of Request for Reconsideration at TSDR 96-97, 102-103.

<sup>6</sup> *Id.* at TSDR 16; May 4, 2018 Final Office Action at TSDR 42, 191.

<sup>7</sup> September 28, 2017 Office Action at TSDR 17-18.

<sup>8</sup> May 4, 2018 Final Office Action at TSDR 8, 20.

<sup>9</sup> *Id.* at TSDR 26-33, 43.

made of record by the Examining Attorney,<sup>10</sup> and a definition of the word “grain” from DICTIONARY.COM,<sup>11</sup> made of record by Applicant;

4. Third-party registrations from the USPTO’s Trademark Electronic Search System (“TESS”) database of marks containing the word ORIGINAL or GRAIN for restaurant or food-related services,<sup>12</sup> made of record by Applicant, and third-party registrations from the TSDR database of marks containing the words ORIGINAL, GRAIN, or GRAINS for food products or restaurant services that have been registered on the Principal Register with a disclaimer of ORIGINAL, GRAIN, or GRAINS, or that have been registered on the Supplemental Register,<sup>13</sup> made of record by the Examining Attorney;
5. Internet webpages displaying various grain products, including grain bowls;<sup>14</sup> made of record by the Examining Attorney; and

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<sup>10</sup> The Examining Attorney attached to her brief a definition of the adjective “original” from the OXFORD ENGLISH DICTIONARY as “[t]hat is the origin or source of something; from which something springs, proceeds, or is derived; primary” and “[b]elonging to the beginning or earliest stage of something; existing at or from the first; earliest; first in time.” 19 TTABVUE 12. We grant her request that we take judicial notice of this definition. *Id.* at 7 n.3. *See In re Jonathan Drew, Inc.*, 97 USPQ2d 1640, 1642 n.4 (TTAB 2011).

<sup>11</sup> March 28, 2018 Response to Office Action at TSDR 66-71; November 2, 2018 Request for Reconsideration at TSDR 66-71.

<sup>12</sup> March 28, 2018 Response to Office Action at TSDR 2-64; November 2, 2018 Request for Reconsideration at TSDR 3-64.

<sup>13</sup> December 4, 2018 Denial of Request for Reconsideration at TSDR 124-255, 257-404, 406-456, 458-495; 507-647.

<sup>14</sup> May 4, 2018 Final Office Action at TSDR 2-7, 9-19, 21-25, 34-41, 192-196.

6. Numerous articles from searches of the LexisNexis database using a search term consisting of or containing the words “original grain,”<sup>15</sup> made of record by the Examining Attorney.

## **II. Analysis of Mere Descriptiveness Refusal**

### **A. Applicable Law**

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has been shown to have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). A mark is “merely descriptive” within the meaning of § 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “A mark need not immediately convey an idea of each and every specific feature of the goods [or services] in order to be considered merely descriptive; it is enough if it describes one significant attribute,

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<sup>15</sup> *Id.* at TSDR 44-190; December 4, 2018 Denial of Request for Reconsideration at TSDR 2-123; 496-506; 648-733. A number of these articles appeared in publications that are either expressly identified as, are known to be, or appear to be, foreign publications. May 4, 2018 Final Office Action at TSDR 48-50, 62-63, 78-84, 92-94, 110-113, 176-182; December 4, 2018 Denial of Request for Reconsideration at TSDR 2-4, 7, 9, 12, 15, 17, 29-30, 39, 46, 54, 59-60, 62, 70-71, 88, 90-91, 98, 100, 496-497, 500, 649, 658-659, 662, 667-669, 673, 676-678, 681-682, 684, 688, 692, 696, 699, 715, 721, and 723. Because there is no evidence of the extent (if any) to which these publications and the subject articles have been exposed to consumers in the United States, we have given them no consideration. *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1491 n.92 (TTAB 2017).

function or property of the goods [or services].” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). To be merely descriptive, a term must forthwith convey an immediate idea of a quality, feature, function, or characteristic of the relevant goods or services with a “degree of particularity.” *The Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2003) (citing *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use,’” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *Bayer*, 82 USPQ2d at 1831), and “not in the abstract or on the basis of guesswork.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to

reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant's proposed mark includes two stylized words, ORIGINAL GRAIN, and a background design. We "must consider the *commercial impression* of a mark as a whole," *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)), including both the words and the design element. *DuoProSS*, 103 USPQ2d at 1756.<sup>16</sup> "In considering [a] mark as a whole, [we] 'may not dissect the mark into isolated elements,' without 'consider[ing] . . . the entire mark,'" *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757), but we "may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components." *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are "required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive." *DuoProSS*, 103 USPQ2d at 1758.

If the words ORIGINAL and GRAIN in the proposed mark are individually descriptive of the identified restaurant services, we must then determine whether their combination "conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts." *Fat Boys*, 118 USPQ2d at 1515-16

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<sup>16</sup> Applicant argues that the words ORIGINAL GRAIN are not merely descriptive, but that if they are, "the stylization and design features of the mark, irrespective of the meaning of the words, are inherently distinctive," 17 TTABVUE 21, such that the mark as a whole is registrable. *Id.* at 21-26; 20 TTABVUE 10. We must address this argument only if we conclude that the words ORIGINAL GRAIN are descriptive.

(quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the [services], the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. The Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods [or services].’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

Applicant and the Examining Attorney agree that the word GRAIN in the proposed mark refers to a type of food.<sup>17</sup> Applicant does not seek registration of its proposed mark for food per se, but rather for restaurant services. The Board has previously held, however, that “a mark for restaurant services which comprises the generic name of a food which is the specialty of the house is merely descriptive of the restaurant services . . . .” *In re France Croissant, Ltd.*, 1 USPQ2d 1238, 1239 (TTAB

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<sup>17</sup> The Examining Attorney and Applicant offered similar definitions of “grain.” September 28, 2017 Office Action at TSDR 18 (“grain” means, inter alia, a “small, dry, one-seeded fruit of a cereal grass” and a “cereal grass” such as wheat (THE AMERICAN HERITAGE DICTIONARY)); March 28, 2018 Response to Office Action at TSDR 66 (“grain” means, inter alia, “a small, hard seed, especially the seed of a food plant such as wheat, corn, rye, oats, rice, or millet,” and “the gathered seed of food plants, especially of cereal plants” (DICTIONARY.COM)).



1986) (LE CROISSANT SHOP held merely descriptive of an eating establishment where croissants were the principal attraction, even though other items are available) (citing *In re Le Sorbet, Inc.*, 228 USPQ 27, 28 (TTAB 1985) (LE SORBET held merely descriptive for restaurant and carry-out services where sorbet was the principal attraction)). *See also In re Cordua Rests. LP*, 110 USPQ2d 1227, 1234 (TTAB 2014) (evidence that “churrascos” is generic term for cooked meat warranted finding that applied-for mark “CHURRASCOS” is generic for barbecued steaks and at least highly descriptive of, if not generic for, restaurant services), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Brewski Beer Co. v. Brewski Bros. Inc.*, 47 USPQ2d 1281, 1287 (TTAB 1998) (the words “beer” and “brewski” considered highly descriptive as applied to bar services).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *Gyulay*, 3 USPQ2d at 1010). “If such a showing is made, the burden of rebuttal shifts to the applicant. *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). “The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.*

## **B. The Examining Attorney’s and Applicant’s Arguments**

We will summarize the arguments of the Examining Attorney and Applicant in some detail because doing so enables us to discuss the key portions of the extensive record.

**1. The Examining Attorney's Arguments**

The Examining Attorney argues that the term ORIGINAL GRAIN is merely descriptive of restaurant services for two reasons: (1) “it immediately informs consumers of a quality, characteristic or feature of the Applicant’s services,” and (2) “it is laudatory of the Applicant’s services.” 19 TTABVUE 2.

**a. ORIGINAL GRAIN as Merely Descriptive of a Quality, Characteristic, or Feature of Applicant's Services**

In support of her first descriptiveness theory, the Examining Attorney argues that “the word ‘grain’ is a generic term for a food group and is used generically to identify food products that are either made from or contain wheat, rice, oats, cornmeal, or another cereal grain and it consists of two subgroups, whole grains and refined grains.” *Id.* at 3. She argues that “[o]riginal grain,’ in turn, is a unitary expression that refers to a type of grain or a particular type of grain within this food group, namely, whole grains or unrefined grains or food products with grains that retain 100% of the original kernel, namely, all of the bran, germ and endosperm.” *Id.*

The Examining Attorney states that the “evidence of record includes Internet printouts and printouts from governmental agencies, as well as printouts from third party restaurant menus, restaurant reviews, the Applicant’s *own* menu and its catering menu, dictionary definitions, and printouts from publications that include newspapers throughout the United States.” *Id.* at 6. She notes the consuming public’s interest in healthy food options at restaurants, and argues that “Applicant’s menus, as well as printed articles concerning the introduction of Applicant’s restaurant, confirm that the Applicant’s restaurant features grains and original grains, including

whole grain bread, multi-grain bread and toast, grain bowls and grain bases.” *Id.* at

4. She cites Applicant’s Catering Menu, reproduced below:



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<sup>18</sup> September 28, 2017 Office Action at TSDR 16 (emphasis supplied by the Examining Attorney).

as well as Applicant's store menu, the pertinent portion of which is reproduced below:

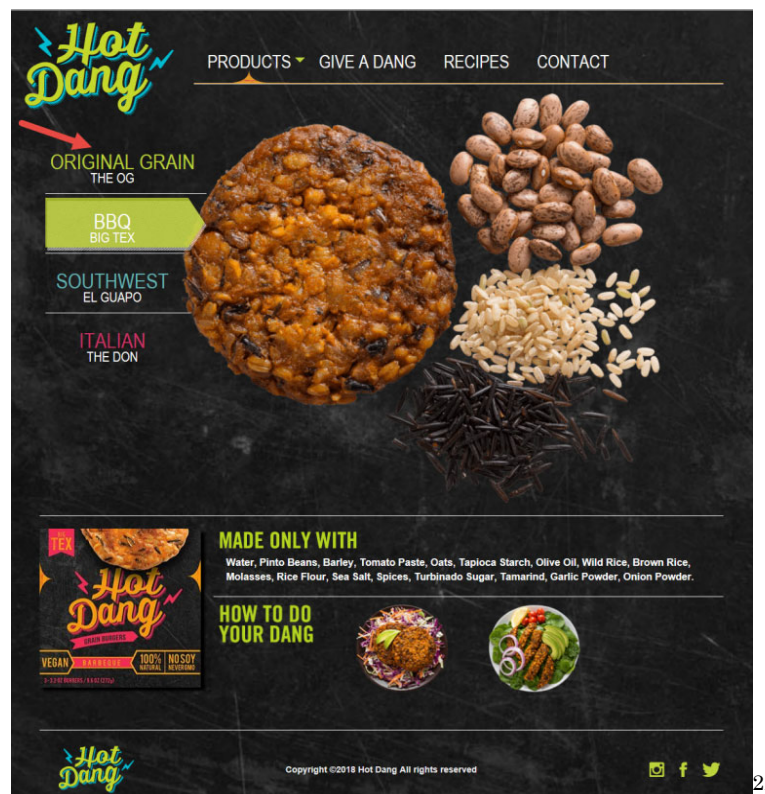


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<sup>19</sup> May 4, 2018 Final Office Action at TSDR 42 (emphasis supplied by the Examining Attorney).

The Examining Attorney also cites an article about Applicant's restaurant that refers to "original grain bowls" and an "original grain blend."<sup>20</sup> As noted above, the record contains other articles and reviews of Applicant's restaurant.<sup>21</sup>

The Examining Attorney argues that "[o]thers in the food and beverage industry also used the term 'original grain' to describe foods containing whole grains or unprocessed grains," *id.* at 5, and that such "descriptive use of 'original grain' [is] not only in connection with restaurants, but also in connection with retail food products." *Id.* She cites the webpage of the Hot Dang restaurant, which offers an "Original Grain" burger as shown below:



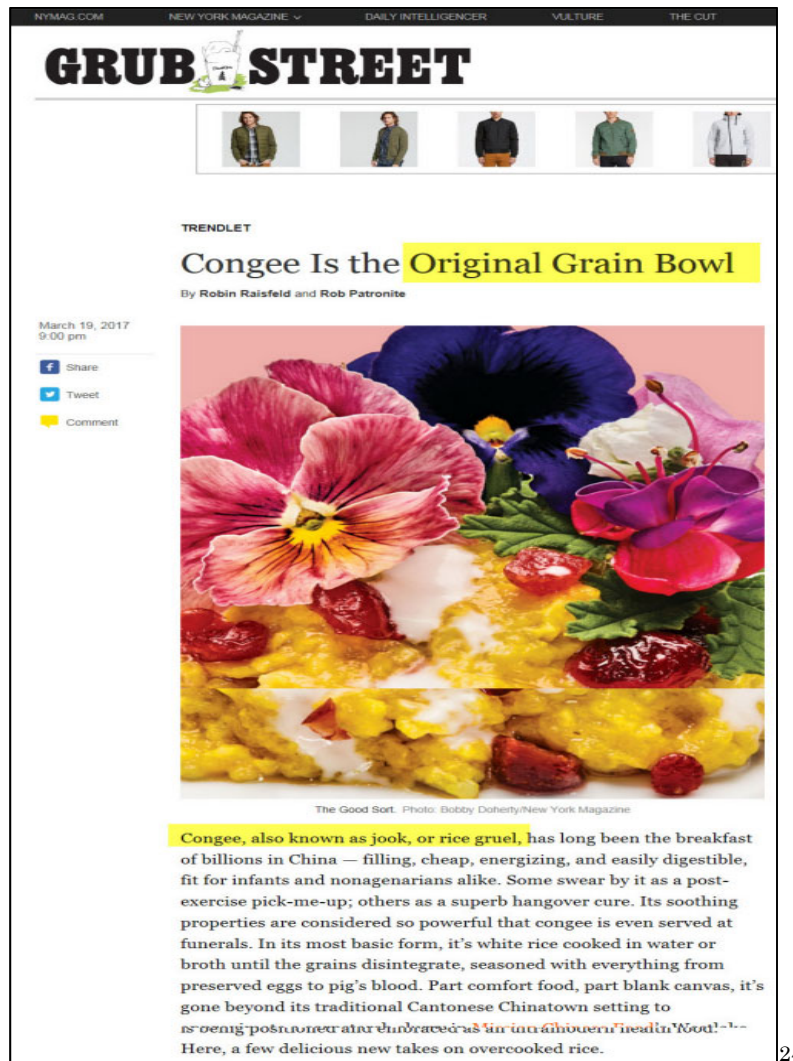
<sup>20</sup> September 28, 2017 Office Action at TSDR 7 (November 17, 2016 edition of *syracuse.com*).

<sup>21</sup> *Id.* at TSDR 4-6, 8-10, 13-15.

<sup>22</sup> May 4, 2018 Final Office Action at TSDR 194-196.



and articles about that restaurant referring to its “original grain burger.”<sup>23</sup> She also cites a description of a bowl of congee as “the Original Grain Bowl”:



<sup>23</sup> *Id.* at TSDR 145; December 4, 2018 Denial of Request for Reconsideration at TSDR 76 (May 5, 2014 edition of *Austin Business Journal* (stating that “Martha Pincoffs created the original grain burger back in 2011,” that the “original grain burger is made of barley, wild rice, brown rice, cashews, oats, and navy beans,” and that “[t]his year, Hot Dang is releasing three more patty flavors each made with a blend of nuts, grains, beans and cheese.”); *id.* at TSDR 42 (February 4, 2016 edition of *Small Business Trends* (stating that “[a]side from Pincoffs’ original grain burger creation, which they call ‘The OG,’ [Hot Dang] sells a barbecue flavored patty called ‘Big Tex,’ a southwest flavored patty called ‘El Guapo’ and an Italian flavored one call ‘The Don’”).

<sup>24</sup> May 4, 2018 Final Office Action at TSDR 41 (highlighting supplied by the Examining Attorney).

as well as the use of the term “original grain” in articles to describe snack foods. 19 TTABVue 5-6 (“Good Natured Selects [snacks] are available now in Original Grains with Sea Salt, Artisan Cheddar Cheese, which is naturally colored with Beta-Carotene, or Tuscan Garden Medley, a blend of carrots, onion and celery, flavored with a touch of roasted garlic, tomato and bell pepper”).<sup>25</sup>

The Examining Attorney also cites and quotes from examples of “printouts from the Lexis Advance Lexis Nexis search of (‘original grain’ or ‘original grains’)” that “identify articles from a cross-section of sources,” which she argues are evidence of the consuming public’s understanding of “original grain.” *Id.* at 6. We set forth below representative excerpts from articles in United States publications from January 1, 2013 to the present (all emphasis supplied by the Examining Attorney):<sup>26</sup>

- An article in the June 5, 2018 edition of *The Cheat Sheet* states that “[a]ccording to Livestrong.com, bread made with whole grains contains all

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<sup>25</sup> December 4, 2018 Denial of Request for Reconsideration at TSDR 63-64.

<sup>26</sup> We have reviewed, but not included in our summary, articles in which the term “original grain” is used in a context that is not relevant to the issues here, such as in association with grain-based alcoholic beverages. We have also reviewed and considered in reaching our decision, but have not included in our summary, articles that appeared prior to January 1, 2013, a date nearly six years before this appeal was filed. Earlier articles in the record, many of which are from the 1990s and the 2000s, have less probative value in determining any current meaning of the term. *See Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1449 (Fed. Cir. 1990) (“descriptiveness is determined in cases of this type ‘on the basis of the factual situation as of the time when registration is sought,’ meaning now.”); *cf. Royal Crown*, 127 USPQ2d at 1049 (holding that Board erred in relying on acquired distinctiveness survey conducted more than five years before the close of trial because the survey was “not contemporaneous with the question of whether registration should be permitted here.”).

the vitamins and minerals in the **original grain** it's made from — but that's not all;”<sup>27</sup>

- An article in the March 27, 2018 edition of *China Daily-US Edition* quotes a Finnish food chemist as saying that “[t]he main challenge is to make sure the nutrients of an industrialized product don’t decrease compared to the **original grains**;”<sup>28</sup>
- Articles in the February 16, 2018 edition of the *Fergus Falls Daily Journal* (Minnesota), the May 25, 2015 edition of the *Abilene Reporter-News*, and the January 5, 2013 edition of *Eat Drink Better* state that “Whole grains or foods made from them contain all the essential parts and naturally-occurring nutrients of the entire grain seed. If the grain has been processed (e.g., cracked, crushed, rolled, extruded, and/or cooked), the food product should deliver approximately the same rich balance of nutrients that are found in the **original grain** seed;”<sup>29</sup>
- An article in the December 11, 2017 edition of *ReleaseWire* states that “wheat can be converted from the **original grain** to food products like breads, flour, and cakes;”<sup>30</sup>

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<sup>27</sup> December 4, 2018 Denial of Request for Reconsideration at TSDR 87.

<sup>28</sup> *Id.* at TSDR 89.

<sup>29</sup> *Id.* at TSDR 26, 52, 57, 701. The *Fergus Falls Daily Journal* article states that this “official definition of whole grains” was “approved and adopted by the Whole Grains Council in May 2004.” *Id.* at 57.

<sup>30</sup> *Id.* at TSDR 58.



- An article in the April 6, 2017 edition of *Creators Syndicate* states that a “whole grain is defined as one that has all three original parts – bran, germ and endosperm – in the same relative proportions as the **original grain**,”<sup>31</sup>
- Articles in the April 4, 2017 edition of the *Spokesman Review* (Spokane, Washington) and the March 17, 2017 edition of *Washington Post Blogs* state that “the more intact the **original grain**, the longer it takes to digest,”<sup>32</sup>
- Articles in the April 1, 2017 and April 1, 2015 editions of the *Tufts University Health & Nutrition Letter* state that “a food must retain the same relative proportions as they exist in the intact grain to be called a ‘whole grain’” and that “[t]his means that 100% of the **original grain**--all of the bran, germ and endosperm--must be present to qualify as a whole grain;”<sup>33</sup>
- An article in the September 1, 2016 edition of the *Tufts University Health & Nutrition Newsletter* states that “[i]f you substitute whole-grain for refined-grain products in your diet, besides getting the nutrients of the **original grain**, you’ll add dietary fiber in the bargain;”<sup>34</sup>
- An article in the July 1, 2016 edition of *Shape* contains a recipe for **Original Grain** Free Granola, which the article describes as a “healthy take on

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<sup>31</sup> *Id.* at TSDR 67.

<sup>32</sup> *Id.* at TSDR 66, 69.

<sup>33</sup> *Id.* at TSDR 48, 65.

<sup>34</sup> *Id.* at TSDR 72.

granola” with “no oats or grains” that are “full of satiating superfoods like chia and hemp seeds, as well as coconut oil, cashew butter, and nuts;”<sup>35</sup>

- An article in the April 4, 2016 edition of *USNEWS.com* states that “if you care enough about the health of the planet to eat organic, why choose products whose manufacture requires discarding 30 percent of the **original grain** kernel?;”<sup>36</sup>
- An article in the February 1, 2016 edition of *O, The Oprah Magazine* states that “Refined white flour-used in everything from gooey brownies to fluffy pancakes-has its drawbacks: namely, that it’s lacking in nutritional value. (In the process of making white flour, most of the **original grain’s** fiber and essential nutrients are stripped away.);”<sup>37</sup>
- An article in the December 9, 2015 edition of *Diet Nutrition Advisor* states that a process used “to create enriched flour strips the **original grain** of important nutrients, fiber and protein;”<sup>38</sup>
- An article in the October 1, 2015 edition of *Prepared Foods* states that “Many marketers, chefs and food scientists believe sprouted grain is sweeter and less bitter than the **original grain**;”<sup>39</sup>

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<sup>35</sup> *Id.* at TSDR 74.

<sup>36</sup> *Id.* at TSDR 38.

<sup>37</sup> *Id.* at TSDR 43.

<sup>38</sup> *Id.* at TSDR 40.

<sup>39</sup> *Id.* at TSDR 41.

- An article in the April 28, 2015 edition of the *Columbia Basin Herald* (Moses Lake, Washington) discusses the historical growing of grain in the Pacific Northwest and states that a lecturer “also will be talking about efforts to find and grow some of those **original grain** varieties;”<sup>40</sup>
- An article in the March 25, 2015 edition of *The Coeur d’Alene Press* (Idaho) states that “[a]s a rule, ancient grains are defined as being ‘unchanged’” and “[t]his translates to keeping their **original grain** and seed form without genetic modification or change in science;”<sup>41</sup>
- An article in the March 22, 2015 edition of *Amazing Fitness Tips* states that “[i]f you grind your own grains or use items that are made from the entire grain without discarding anything, you get all or many of the nutrients of the **original grain**;”<sup>42</sup>
- An article in the November 15, 2014 edition of *Food & Beverage News* states that “Whole grains may be cracked, rolled or crushed, but they must contain 100 per cent of the **original grain** to be considered true whole grains;”<sup>43</sup>
- An article in the November 2014 edition of *The Southside Times* (Beech Grove, Indiana) states that “[t]he whole wheat you eat today has little in common with the **original grain**;”<sup>44</sup>

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<sup>40</sup> *Id.* at TSDR 47.

<sup>41</sup> *Id.* at TSDR 50.

<sup>42</sup> *Id.* at TSDR 51.

<sup>43</sup> *Id.* at TSDR 45.

<sup>44</sup> *Id.* at TSDR 55.

- An article in the July 3, 2014 edition of *Florida Today* (Brevard County, Florida) discusses various myths about whole grains, and states as “Claim No. 1: The wheat we are consuming today is genetically altered and contains different proteins that the **original grain**;<sup>45</sup>
- An article appearing in the January 3 and 20, 2014 editions of *The Arizona Republic* and the February 6, 2014 edition of the *Arizona Business Gazette* discusses the process of bringing wheat seeds from Ukraine to the United States and states that “[a]fter the advent of industrial grain, the **original grain** was mostly dispersed, but is still found in pockets;<sup>46</sup>
- An article in the September 16, 2013 edition of *Global IP News Food & Beverage Patent News* cites a Chinese patent or patent application for a method for preparing full-grain flour, which “has the following obvious advantages in nutritional effect that nutrient and physiologically active ingredients which are rich in **original grain** are maintained;”<sup>47</sup>
- An article appearing in the February 6, 2013 editions of the *Herald-Standard* (Uniontown, Pennsylvania), *The Chronicle* (Williamantic, Connecticut), *The Wayne Independent* (Honesdale, Pennsylvania), *The Journal* (International Falls, Minnesota), *The Herald* (Circleville, Ohio), the *Spokesman Review* (Spokane, Washington), and the *Abilene Reporter-*

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<sup>45</sup> *Id.* at TSDR 20.

<sup>46</sup> *Id.* at TSDR 19, 21-22.

<sup>47</sup> *Id.* at TSDR 23-24.

*News* (Abilene, Texas) answers the question “What is whole grain?” in part with the statement “What actually makes the grain ‘whole’ is keeping 100 percent of the **original grain** seed/kernel as it is found in nature;”<sup>48</sup> and

- Articles in the January 1, 2013 edition of *The Oregonian* and the May 1, 2013 edition of *Alternatives Journal* mention the title of the book *Beautiful Corn: America’s Original Grain From Seed to Plate*, by Anthony Boutard.<sup>49</sup>

The Examining Attorney argues that this evidence collectively “confirms that the terms ‘grain’ and ‘original grain’ have a recognized meaning as applied to foods,” and that “original grain” is “a unitary expression for whole grains or unrefined grains . . . that is used by and understood by the others in the food and beverage industry and by the public to refer to whole grains or unrefined grains.” 19 TTABVue 6. She concludes that “the term original grain immediately informs consumers that the Applicant’s restaurant services feature fare made from or with original grains, such as evidenced by its grain bowls with original grains, its ‘build-a-bowl with original grains, and its original grain blend.” *Id.* at 7.

#### **b. ORIGINAL GRAIN as a Laudatory Term**

In support of her second descriptiveness theory, the Examining Attorney argues that a “consideration of the commercial impression of the mark as a whole from the viewpoint of a consumer confirms that ORIGINAL GRAIN would be perceived as puffery as applied to the Applicant’s restaurant services for several reasons.” *Id.* She

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<sup>48</sup> *Id.* at TSDR 25, 31-36.

<sup>49</sup> *Id.* at TSDR 27-30.

argues that “the term ‘original,’ which the [Board] has noted connotes a ‘product or a particular variety or style of a product that is the first-of-its-kind,’ may also connote ‘first of its kind’ in the sense of being the origin or source of something or the earliest stage of something.” *Id.* She further argues that “[i]n this sense, ‘original grain’ conveys to potential customers that the Applicant’s restaurant feature[s] foods with ‘original grains,’ in the sense of grains that have not been processed or refined, but instead are considered the earliest forms of grains, namely, whole grains and unrefined grains.” *Id.* According to the Examining Attorney, “original grain” “may also be construed by consumers as touting that the Applicant’s restaurant features grains, such as its grain bowls or bases that are . . . prepared from the Applicant’s new or ‘original’ recipes for grains.” *Id.*

## **2. Applicant’s Arguments**

Applicant argues that the refusal is unfounded because the Examining Attorney “has proposed multiple different meanings for the mark in the context of the recited services [and the Examining Attorney] is now foreclosed from discounting one of the different asserted meanings of ‘ORIGINAL GRAIN’ (‘first of its kind’ or ‘whole grain’) as an association in the context of the services that the public would not make fairly readily.” 17 TTABVUE 6. In its reply brief, Applicant presents a table purporting to show “[t]he different meanings of the mark as presented by the Examining Attorney” during prosecution and on appeal. 20 TTABVUE 4.

**a. ORIGINAL GRAIN as Merely Descriptive of a Quality, Characteristic, or Feature of Applicant's Services**

Applicant begins by arguing that the Examining Attorney's theory that ORIGINAL GRAIN connotes "whole grain" is suspect because it did not occur to the Examining Attorney until after the first Office Action. 17 TTABVUE 12. Applicant then dismisses the Examining Attorney's documentary evidence of the use of "original grain" to refer to "whole grains" because it does not establish such an understanding on the part of ordinary consumers. *Id.* at 13. Applicant claims that consumers "tend not to have significant understanding of 'grain' related terminology on a scientific or technical level," *id.*, and "need to have basic definitions of such terms as 'grain' and 'whole grain' expressed and repeated." *Id.* Applicant also notes that in some of the articles made of record by the Examining Attorney, the uses of the words "original" and "grain" "are out of context and do not support the assertion that 'original grain' has the connotation of 'whole grain.'" *Id.*

Applicant argues that to the extent that ORIGINAL GRAIN "has any meaning along the lines of 'whole grain' as has been asserted by the Examining Attorney subsequent to a mass document repository search engine keyword search, that meaning is obscure at best and not generally known by ordinary consumers of restaurant services." *Id.* at 14-15. In its reply brief, Applicant calls the asserted meaning "obscure and vague at best." 20 TTABVUE 9.

Applicant argues that its "menu and other asserted use by restaurants of third parties fail[ ] to establish that the mark is merely descriptive for the recited services." 17 TTABVUE 16. With respect to its menu, Applicant argues that the "words raising

concern on the part of the Examining Attorney are not identical to the words of the mark,” *id.*, apparently a reference to the fact that “original grains” appears in the plural on the menus, and “original grains” “are presented on pages with the applied for mark prominently featured,” such that “any wording similar to the wording of the mark would be understood by consumers as a reference to the mark.” *Id.*

Applicant also points to multiple marks incorporating the words “ORIGINAL” or “GRAIN” that have been registered for restaurant or food related services. *Id.* at 17-19.

Applicant further argues that ORIGINAL GRAIN is a “double entendre” because the “term ‘GRAIN’ . . . has multiple meanings . . . including, e.g., ‘any small, hard particle, as of sand,’ evocative of nature; ‘the arrangement of fibers in wood’ evocative of nature; and well-known idioms such as ‘grain of salt’ ‘against the grain’ and ‘grain of truth.’” *Id.* at 19. Applicant claims that the Board must “regard a wide range of suggestive meanings (including broadly evocative concepts) to have relevance to particularly recited goods or services,” *id.* at 20, and offers as apparent examples of alternative meaning of the mark as a whole “that a person who is ‘ORIGINAL’ will go ‘against the GRAIN,” that “[d]etail oriented service providers pay attention to ‘granular’ details,” and that “[b]y the correspondence in meanings of the term ‘truth’ and ‘ORIGINAL’ the connotation ‘GRAIN of truth’ is emphasized.” *Id.* at 19.

#### **b. ORIGINAL GRAIN as a Laudatory Term**

Applicant argues that the Examining Attorney’s claim that ORIGINAL GRAIN is a laudatory term is unfounded because “[i]n cases in which ‘ORIGINAL’ as set forth in a mark has been interpreted to have a ‘first of its kind’ meaning the Board has



regarding the word ‘ORIGINAL’ to be a term *that modifies a term succeeding the term ‘ORIGINAL’* in accordance with ordinary language usage.” *Id.* at 6. Applicant claims that the Examining Attorney “applies the asserted laudatory word ‘ORIGINAL’ as a modifier of the term ‘restaurant services’ and not ‘GRAIN’ even though ‘GRAIN’ (not ‘restaurant services’) is the term succeeding ‘ORIGINAL’ in the mark and even though ‘restaurant services’ is not even a term included in the mark . . .” *Id.* at 7.

Applicant also argues that the “only conceivable literal meaning of ‘ORIGINAL GRAIN’ in the ‘first of its kind’ context relied on by the Examining Attorney is grain made entirely new in a first of its kind form, perhaps – to highlight the incongruity-by genetic synthesis.” *Id.* at 8. Applicant argues that the “phrase ‘ORIGINAL GRAIN’ is incongruous in meaning in accordance with its asserted ‘first of its kind’ meaning and defines a unitary phrase,” *id.* at 7, and that “this incongruous meaning would require consumers to exercise a mental pause and consider the meaning of ORIGINAL GRAIN in connection with the services (e.g. ‘how can grain be first of its kind?’).” *Id.* at 8.

### **C. Analysis of Mere Descriptiveness**

In assessing the possible descriptiveness of the proposed mark as a whole, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758. The components include the words ORIGINAL GRAIN, the stylized script in which they appear, and the circle background design on which they appear:



In *DuoProSS*, the Federal Circuit addressed the descriptiveness of the word mark SNAP SIMPLY SAFER and the composite mark **Snap!** for various forms of syringes. With respect to the latter mark, the court held that the Board “improperly separated the SNAP! design mark (**Snap!**) into the literal element SNAP and the broken exclamation point,” and should have considered those elements together. *DuoProSS*, 103 USPQ2d at 1756. The court held that when the composite mark was viewed in the context of the respondent’s goods, it “does nothing other than depict the snapping of a syringe plunger, the prominent functional feature of the goods.” *Id.* at 1757.

Unlike the “broken exclamation point” in *DuoProSS*, the modest design elements of the proposed mark here are far less relevant than the words themselves on the issue of the descriptiveness of the mark as a whole. With respect to the circle, we agree with the Examining Attorney that “consumers would be likely simply to view it as background for the wording.” 19 TTABVUE 9. *See, e.g., In re Benetton Grp. S.p.A.*, 48 USPQ2d 1214, 1215-16 (TTAB 1998) (“common geometric shapes such as circles, squares, rectangles, triangles, and ovals, when used as backgrounds for the display of word marks, are not regarded as trademarks for the goods to which they

are applied absent evidence of distinctiveness of the background design alone”). The stylized lettering similarly serves only as a means to depict the words in script, and their display does not materially impact their meaning. Accordingly, in assessing the descriptiveness of the proposed mark as a whole, we will focus on the words ORIGINAL GRAIN.

We turn first to the noun GRAIN. As noted above, Applicant and the Examining Attorney agree that one of the meanings of “grain” is a type of food,<sup>50</sup> but Applicant argues that it has “multiple meanings . . . including, e.g., ‘any small, hard particle, as of sand,’ evocative of nature; ‘the arrangement of fibers in wood’ evocative of nature; and well-known idioms such as ‘grain of salt’ ‘against the grain’ and ‘grain of truth.’” 17 TTABVue 19. Applicant’s argument is true as far as it goes, but we must assess the descriptiveness of the applied-for mark from the standpoint of a consumer who knows that it is used in connection with restaurant services, and in the commercial context of Applicant’s use. *N.C. Lottery*, 123 USPQ2d at 1709-10.

We find that as part of the ORIGINAL GRAIN mark for Applicant’s restaurant services, the word GRAIN unequivocally means a type of food that is identified in several places on Applicant’s menus, including as the name of a category of items called “Grain Bowls.”<sup>51</sup> The fact that the word “may have other meanings in different contexts is not controlling,” *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1597 (TTAB 2018), and, “[i]n any event, [i]t is well settled that so long as any one of

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<sup>50</sup> See n.17 *supra*.

<sup>51</sup> May 4, 2018 Final Office Action at TSDR 42.

the meanings of a term is descriptive, the term may be considered as merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (RECOIL found to “immediately convey information regarding the ability of [medical and athletic cohesive tape] to rebound or return to its original length or close to it” even though record contained six dictionary definitions of the word) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)). The word GRAIN in the applied-for mark immediately and accurately describes a feature or characteristic of Applicant’s restaurant services, namely, that they include menu items containing the food group known as grains.

We turn now to the adjective ORIGINAL, which modifies GRAIN in the applied-for mark. The dictionary definition of “original” cited by the Examining Attorney in her brief is “the origin or source of something; from which something springs, proceeds, or is derived; primary” and “[b]elonging to the beginning or earliest stage of something; existing at or from the first; earliest; first in time.” 19 TTABVUE 7 n.3 (OXFORD ENGLISH DICTIONARY). She invokes this meaning primarily in support of her second theory that the word ORIGINAL in the proposed mark “may also be construed by consumers as touting that the Applicant’s restaurant features grains, such as its grain bowls or bases that are . . . prepared from the Applicant’s new or ‘original’ recipes for grains.” *Id.*

This suggested meaning of ORIGINAL in Applicant’s proposed mark is obviously in considerable tension with the Examining Attorney’s first theory that ORIGINAL GRAIN is a “unitary term” that connotes “whole grain,” a theory based almost

entirely on materials that are extrinsic to Applicant and, in large part, long preceded Applicant's use of its mark. In any event, the attribution of this dictionary meaning to ORIGINAL as it appears in the proposed mark is unsupported by the record, most significantly Applicant's promotional materials and menus. These materials do not communicate, as "puffery" or otherwise, that Applicant's menu items involving grains are "prepared from the Applicant's new or 'original' recipes for grains," *id.*, or are otherwise the "earliest" or the "first in time," or new or unique to Applicant. *Cf. Gen. Foods Corp. v. Ralston Purina Corp.*, 220 USPQ 990, 994 (TTAB 1984) (finding on the basis of "how ORIGINAL BLEND has been used by applicant on and in connection with its cat food, and its advertising," including applicant's initial packaging stating that its cat food was an "ORIGINAL BLEND OF FISH MEAT & MILK," that "the designation ORIGINAL BLEND possesses nothing more than a merely descriptive significance, that of conveying the information to purchasers that the cat food to which it applies is the first in a line of flavor varieties and the fact that this first-of-its-kind variety is a blend of flavors"). We find that the word ORIGINAL in the proposed mark is not used in the laudatory sense argued by the Examining Attorney on her second descriptiveness theory, and that the mark, as a whole, is not merely descriptive under that theory.

With respect to the Examining Attorney's first theory, we must determine what else, if anything, ORIGINAL means when it modifies GRAIN in the applied-for mark. As discussed above, the Examining Attorney contends that the use of ORIGINAL causes the mark as a whole to be "a unitary expression for whole grains or unrefined

grains . . . that is used by and understood by the others in the food and beverage industry and by the public to refer to whole grains or unrefined grains,” 19 TTABVue 6, such that the proposed mark “immediately informs consumers that the Applicant’s restaurant services feature fare made from or with original grains, such as evidence by its grain bowls with original grains, its ‘build-a-bowl’ with original grains, and its original grain blend.” *Id.* at 7. The record reflects some use of “original grain” in the sense urged by the Examining Attorney, but we find that the evidence is insufficient to show that ORIGINAL GRAIN as used in connection with restaurant services would immediately, and with the required degree of particularity, be understood essentially as a synonym for “whole grains” or “unrefined grains.”

The Examining Attorney relies heavily on LEXIS NEXIS articles to show that the mark has the meaning that she attributes to it. A considerable number of those articles were published many years prior to Applicant’s first use of the involved mark and, as noted above, have less probative value regarding consumers’ current understanding of the term.<sup>52</sup> *Remington Prods.*, 13 USPQ2d at 1449. Many of the

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<sup>52</sup> A few examples are articles in the October 1, 2012 edition of *Emerald Coast Magazine* (Fort Walton Beach, Florida) and the January 1, 2012 edition of *Tallahassee Magazine* (Florida), December 4, 2018 Denial of Request for Reconsideration at TSDR 693, 700; an article in the July 21, 2010 edition of *States News Service* *id.* at TSDR 666, 706; an article in the December 22, 2007 edition of *The Examiner* (Independence, Missouri), *id.* at TSDR 661; articles in the July 19, 2007 and December 19, 2007 editions of *The Myrtle Beach Sun-News* (South Carolina), *id.* at TSDR 498, 650; articles in the March 29, 2006 edition of the *Monterey County Herald* (California), the May 13, 2006 edition of *The Lexington Herald Leader* (Kentucky), and the April 4, 2006 edition of *The Miami Herald*, *id.* at 81-82, 84; and an article in the July 13, 1995 editions of the *Orlando Sentinel* and *The Kansas City Star*. *Id.* at TSDR 13, 18. Several of these articles refer to USDA or undefined federal guidelines regarding whole grains, but the pages from federal government websites in the record that discuss whole grains do not mention “original grains.” May 4, 2018 Final Office Action at TSDR 26-33, 43.

entire collection of articles appeared in regional, local, or specialty publications rather than publications with a national reach, and a number of them use the term “original grain” in an entirely different sense from its asserted status as a synonym for “whole grain” or “unrefined grain.” Examples from the post-January 1, 2013 articles summarized above are the article in the December 11, 2017 edition of *ReleaseWire*, which states that “wheat can be converted from the **original grain** to food products like breads, flour, and cakes;” the article in the July 1, 2016 edition of *Shape*, which contains a recipe for “**Original Grain** Free Granola,” in which the phrase “Original Grain Free” is a portion of a larger phrase that describes a granola without grain; the article in the April 28, 2015 edition of the *Columbia Basin Herald*, which discusses the historical growing of grain in the Pacific Northwest and states that a lecturer “also will be talking about efforts to find and grow some of those **original grain** varieties;” the article in the March 25, 2015 edition of *The Coeur d’Alene Press*, which states that “[a]s a rule, ancient grains are defined as being ‘unchanged’” and “[t]his translates to keeping their **original grain** and seed form without genetic modification or change in science;” the article appearing in the January 3 and 20, 2014 editions of *The Arizona Republic* and the February 6, 2014 edition of the *Arizona Business Gazette*, which discusses the process of bringing wheat seeds from Ukraine to the United States and states that “[a]fter the advent of industrial grain, the **original grain** was mostly dispersed, but is still found in pockets;” and the articles in the January 1, 2013 edition of *The Oregonian* and the May 1, 2013 edition of *Alternatives Journal*, which mention the title of the book *Beautiful Corn: America’s*

*Original Grain From Seed to Plate*, by Anthony Boutard. Examples from the articles prior to January 1, 2013 include an article in the September 14, 2009 edition of *States News Service* that states that “[a]ll grains start out as whole grains, but the ‘milling’ process removes part of the **original grain**,”<sup>53</sup> and an article appearing in the October 1, 2004 editions of the *Saint Paul Pioneer Press*, the *Columbus Ledger-Enquirer*, and *The Wichita Eagle*, and in the November 1, 2004 edition of *Dairy Foods*, that states that “From now on, however, other popular products such as Trix, Lucky Charms, Golden Grahams and Rice Chex also will be made from flours that contain all the nutrient value of the **original grains**.”<sup>54</sup>

The uses of the term “the original grain burger” and the description of congee as the “Original Grain Bowl” cited by the Examining Attorney and shown above,<sup>55</sup> similarly use the term “original grain” in unrelated contexts not to refer to “whole grain” or “unrefined grain,” but rather as modifiers of “burger” and “bowl,” respectively, in the “first-of-its kind” sense of the word “original.” The same is true of the cited uses of “original grain” in articles to describe snack foods. 19 TTABVue 5-6 (“Good Natured Selects [snacks] are available now in Original Grains with Sea Salt, Artisan Cheddar Cheese, which is naturally colored with Beta-Carotene, or Tuscan Garden Medley, a blend of carrots, onion and celery, flavored with a touch of roasted garlic, tomato and bell pepper”).

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<sup>53</sup> May 4, 2018 Final Office Action at TSDR 652.

<sup>54</sup> *Id.* at 5-6, 10-11, 16.

<sup>55</sup> See nn. 22-24 and accompanying text *supra*.

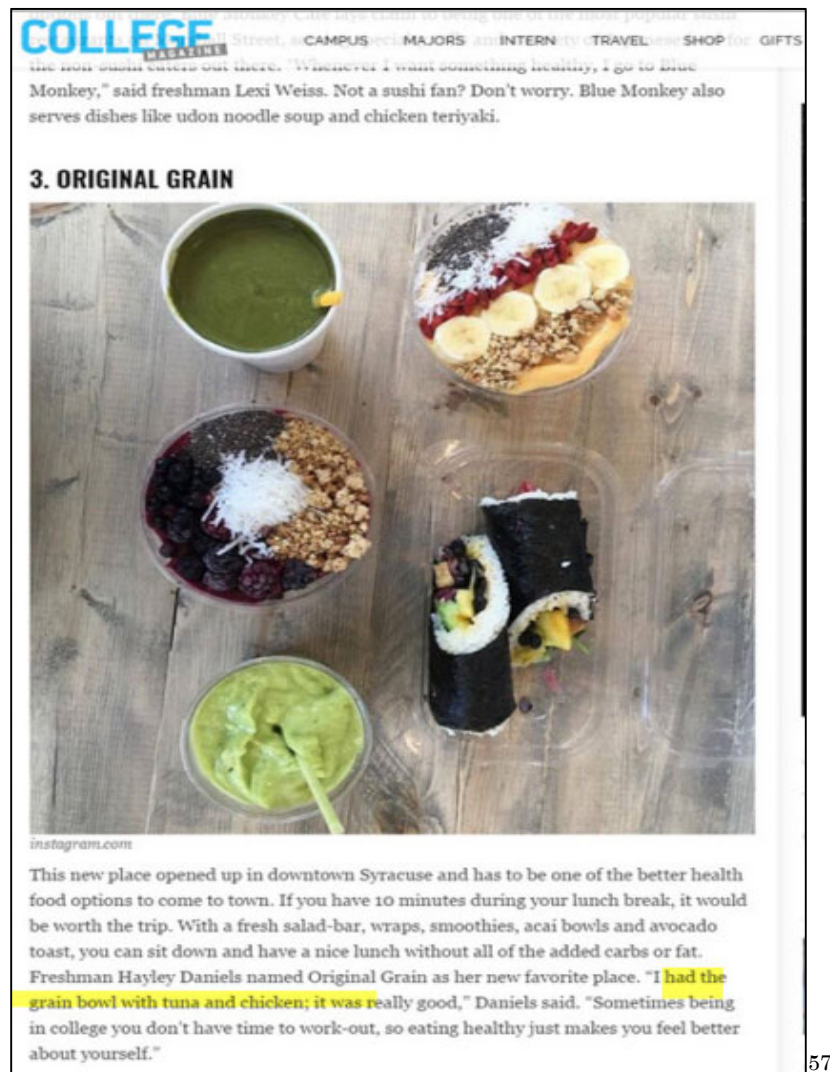


We find that the articles and the third-party uses of the term “original grain(s)” do not show that the relevant purchasing public in 2020 would understand that ORIGINAL GRAIN immediately describes restaurant services featuring whole grain or unrefined grain items.

The Examining Attorney also cites and discusses Applicant’s uses of the plural term “original grains” on menus and other materials, which reflect the commercial context of the use of the mark, and which we may consider in determining the public’s perception of it. *N.C. Lottery*, 123 USPQ2d at 1709. Applicant’s several uses of “original grains” to identify base options in creating food bowls do not communicate that whole grains or unrefined grains are the “specialty of the house” or the “principal attraction” of the ORIGINAL GRAIN restaurant. *France Croissant*, 1 USPQ2d at 1239 (citing *Le Sorbet*, 228 USPQ at 28). *Cf. N.C. Lottery*, 123 USPQ2d at 1710 (lottery applicant’s promotional materials’ “explanatory text accompanying the mark FIRST TUESDAY is not complicated” and “simply uses the same two words as the mark—‘first Tuesday’—along with words like ‘new’ and ‘every month’ to describe the relevant feature or characteristic of N.C. Lottery’s scratch-off lottery games.”).

Our conclusion that ORIGINAL GRAIN does not immediately describe that whole grains or unrefined grains are the “specialty of the house” or the “principal attraction” of Applicant’s restaurant is buttressed by the multiple reviews of the restaurant in the record. Because reviewers are exposed to Applicant’s use of the ORIGINAL GRAIN mark on signage as well as the use of the mark and the plural term “original grains” on Applicant’s menus and related materials, we find that these reviews, as

part of the record as a whole, are “competent source[s]” from which to infer the public’s understanding of ORIGINAL GRAIN. *Real Foods*, 128 USPQ2d at 1374. We reproduce the reviews below (all emphasis supplied by the Examining Attorney):<sup>56</sup>



<sup>56</sup> The pages comprising some of the reviews appear to be out of sequence. We have tried to present them in what we believe to be the correct order. We have omitted portions of the reviews that do not discuss Applicant's restaurant.

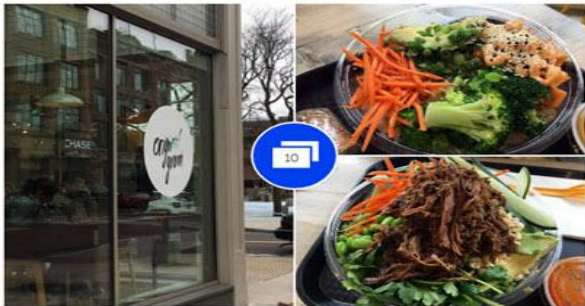
<sup>57</sup> September 28, 2017 Office Action at TSDR 4.

SYRACUSE & CENTRAL NY RESTAURANTS

## At Original Grain, it's all about the bowl (Dining Out review)

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Posted on February 2, 2017 at 7:25 AM



Gallery: Lunch at Original Grain

By **Jared Paventi**, [jaredpaventi@gmail.com](mailto:jaredpaventi@gmail.com)  
Contributing writer

48 shares

We were not the only people confused when entering [Original Grain](#) for the first time. No one, not the people in front or behind us, nor the people that would enter while we were eating, had any idea how to


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By **Jared Paventi**, [jaredpaventi@gmail.com](mailto:jaredpaventi@gmail.com)  
Contributing writer

We were not the only people confused when entering [Original Grain](#) for the first time. No one, not the people in front or behind us, nor the people that would enter while we were eating, had any idea how to order. The counter facing South Salina Street looks like the right spot, but the overhead menu board lists only drinks, smoothies and breakfast items. It was not until we craned our necks to the right towards the angled side of the counter that we saw the heart of the menu.

The concept of Original Grain, which opened last August in the former [Tim Horton's](#) location at the corner of South Salina and West Fayette Streets, is appealing: health conscious food in a hip, urban setting. Its tagline, "Cali Vibes. NY Fresh," is evident in a funky decor accented by cassette tapes of the bygone mixtape era. Loud upbeat music fills the space, as did a neverending stream of people that entered during lunch on a recent visit.

Once we figured out where to order, we were on track. Original Grain's menu includes bowls, toast, and sandwiches and wraps. The bowl takes on many forms, encompassing breakfast choices, salads, grain bowls and noodles. Most are priced between \$10 and \$14 each, with an upcharge for meats like shredded short-rib and chicken. Smoothies are also available.



The counter facing South Salina Street handles the all-day breakfast and beverage side Original Grain. Brekkie Bowls combine seeds, fruits and vegetables with yogurt and coconut milk. For instance, the Green Thumb (\$9) starts with matcha, kale, bee pollen, yogurt and coconut milk blended together and creating a foundation for chunks of fresh mango, apple, banana, pumpkin and hemp seeds. Add-ins of coconut oil (50 cents), whey or pea protein (\$1) and acai and maca (\$2) are

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<sup>58</sup> *Id.* at TSDR 10.

<sup>59</sup> *Id.* at TSDR 9.

The counter facing South Salina Street handles the all-day breakfast and beverage side Original Grain. Brekkie Bowls combine seeds, fruits and vegetables with yogurt and coconut milk. For instance, the Green Thumb (\$9) starts with matcha, kale, bee pollen, yogurt and coconut milk blended together and creating a foundation for chunks of fresh mango, apple, banana, pumpkin and hemp seeds. Add-ins of coconut oil (50 cents), whey or pea protein (\$1) and acai and maca (\$2) are also available.

Four toasts, priced at \$6 to \$7, are artfully heaped with ingredients. [Sweet Praxis-baked breads](#) serve as the base for each of the selections, including the Lox on Lox on Lox (\$7). A slice of toasted **multi-grain bread** was topped with ricotta cream cheese, house-cured salmon, avocado slices and pickled red onion. Fronds of dill weed and a drizzle of Green Goddess dressing finished the open face sandwich that deconstructed the Philly roll, a popular choice on sushi menus in America. A fork-and-knife was required to attack the carefully assembled and beautifully presented dish.

The salmon was fork-tender with a gentle fish flavor, which paired nicely with the cream cheese and avocados.

The West Fayette Street side of the restaurant focuses on the remainder of the menu. Original Grain offers three bowl styles: greens, which come with its house Killer Kale blend or mixed greens; kelp noodles; and the self-titled Original Grain. Egg (\$1) or meats (\$2 to \$4) can be added to each bowl. **The meats and grains are warm, but all of the vegetables are cold on the cafeteria-style assembly line.**

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Four greens bowls (\$10 to \$12) provide a salad option to diners. The ssam salad (\$10) came with the cucumber, carrots, edamame, avocado, peanuts, cilantro and scallion. We topped it with shredded short rib (\$3) for extra protein. Everything tasted fresh, right down to the peanuts. A Korean-style ssam sauce, made with gochujang, miso and soy sauce, served as the dressing and added a spicy complement to the cool vegetables.

**Original grain bowls (\$10 to \$14)** start with a base of bamboo rice or the house original grain blend of quinoa and brown rice. It creates the base for dishes like the veggie poke (\$10). Sweet potato stood in for the traditional poke's raw fish, and was presented with broccoli, carrot, avocado, scallion, sesame seeds. A sweet citrus and seaweed ponzu sauce was served on the side.

The counter staff was helpful during the construction of the bowl. **suggested the original grain blend over the bamboo rice** due to its higher protein content.

The bowls were aesthetically beautiful, but functionally difficult. Given that you are eating off of trays from tightly packed plastic bowls that are top heavy with ingredients, it became difficult to mix ingredients around. Maybe tossing contents of the bowls or using larger containers would help diners that wanted to blend things together without fear of food falling on dirty surfaces.



Lunch was nicely complemented by a bowl of roasted red pepper soup (\$3.50). This otherworldly soup burst with sweet red peppers and a hint of smoke from their roasting. The cream base finished the soup nicely. A tiny piece of multi-grain bread was served alongside.

Bottled water, coffee, tea, bottled kombucha, draft beers and

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<sup>60</sup> *Id.* at TSDR 8.

<sup>61</sup> *Id.* at TSDR 7.



nicely. A tiny piece of multi-grain bread was served alongside.

Bottled water, coffee, tea, bottled kombucha, draft beers and smoothies round out the beverage menu. Five different varieties of smoothies, blended with yogurt and coconut milk, are available. Fresh, not frozen fruit, provide the flavors, including acai berries, blueberries, blackberries and banana for the Antioxidant Boost (\$7), while the immune boost had pineapple, mango, banana and sweet potato. No sugar or honey was added to the drinks, letting the flavors of the produce shine through.

Portions are just the right size for dinner and lids are available to take away leftovers. Portions are right-sized with prices to match. If you find value in high quality ingredients, exceptionally fresh produce and thoughtful menu planning and presentation, you will appreciate Original Grain.

**The Details**

**The Restaurant:** [Original Grain](#), 302 S. Salina St., Syracuse, N.Y. 13202; (315) 299-5011.

**Reservations?** No

**Access to Disabled?** Everything is at ground level.

**Credit Cards?** Yes

**Vegetarian Options Available?** Most items are vegetarian or vegan.





**Allergy Issues?** Gluten-free choices are highlighted on the menu and most dishes are dairy-free.

**Hours:** Seven days a week, 7:30 a.m. to 9 p.m.

**Cost:** Two people can eat lunch or dinner for less than \$30. For our review, we ordered as much of a variety across the menu as was reasonable in order to showcase the cuisine. Lunch for three with tax was \$43.74.

[View Comments \(10\)](#)

62

    2.1k shares

By [Don Cazentre](#), [dcazentre@nyup.com](mailto:dcazentre@nyup.com)

SYRACUSE, NY -- A new "fast casual" restaurant serving healthy food like grain and sushi bowls, blended teas and more is aiming to open early this summer in the former Tim Horton's location in downtown Syracuse.

The eatery, called [Original Grain](#), will serve cafeteria style for both take out and dine-in. It will be open seven days a week.

It's a partnership of three young, pro-downtown Syracuse entrepreneurs: Matt Godard, owner of the Cafe Kubal coffee roasters and retail shops; [Eric Hinman](#), owner of Urban Life Athletics fitness gym; and Chris Bily, a former partner in the [Modern Malt gastro diner](#) in Armory Square.

"Both the fast casual and healthy dining categories are expanding fast," Godard said. "We think it's a great fit for downtown."

Fast casual refers to the type of cafeteria-style, build-your-own service found at such places as Panera and Chipotle.

The grain bowls, featuring bases like quinoa, and other healthful options will be familiar to those who have been to [CoreLife Eatery](#), an "active lifestyle" restaurant that opened adjacent to the Chuck Hafner's Farm Stand at Taft and Buckley roads in North Syracuse last



Partners in the new Original Grain restaurant opening downtown, from left: Matt Godard, Eric Hinman and Chris Bily.

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<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.* at TSDR 14.

The grain bowls, featuring bases like quinoa, and other healthful options will be familiar to those who have been to [CoreLife Eatery](#), an "active lifestyle" restaurant that opened adjacent to the Chuck Hafner's Farm Stand at Taft and Buckley roads in North Syracuse last year.

Godard calls that a "fair comparison," but says Original Grain will bring a more "West Coast" influence to the idea.

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That will include bowls featuring items like acai berries, yellowfin tuna and kelp noodles.

"We'll have things that we've seen on the West Coast but not in Syracuse, like the kelp noodles and poke sushi bowls," Godard said.

Patrons will be able to create their own combinations as they move down the line.

Beverages will include Cafe Kubal coffees, plus blended teas, juices, lemonades, spa waters and more.

The location is ideal, said Godard, citing the recent boom in people living in downtown apartments and the relocation of cutting-edge and high-tech companies from the suburbs to the center of the city. One recent example: The [Arcadis engineering firm is relocating](#) from DeWitt to One Lincoln Center, directly across the street from the Original Grain location.

The location is also mostly built out as a restaurant already, he said, will which make the transition fairly quick.

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None of the reviews mention whole grains or refined grains. There are references to grain bowls and an "original grain blend" of quinoa and brown rice, but the reviews do not reflect a perception that ORIGINAL GRAIN is synonymous with whole grain or unrefined grain. The record shows that ORIGINAL GRAIN may be suggestive of wholesome grain-based menu items or healthy eating based on the grains served at Applicant's restaurant, but ORIGINAL GRAIN does not immediately describe, with the required degree of particularity, that menu items containing whole grains or unrefined grains are the "specialty of the house" or its "principal attraction." *France Croissant*, 1 USPQ2d at 1239.

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<sup>64</sup> *Id.* at TSDR 13.

Finally, as noted above, the Examining Attorney made of record numerous third-party registrations of ORIGINAL- and GRAIN-formative marks for various goods and services in which the terms were disclaimed as a requirement for registration on the Principal Register, or the marks were registered on the Supplemental Register. She correctly acknowledges, however, that both the Applicant's and her "third-party registrations are not dispositive on the issue of descriptiveness [because] each case must be considered on its own facts . . . ." 19 TTABVUE 8 n.4. Against the backdrop of the record as a whole, the third-party registrations made of record by the Examining Attorney are insufficient to sustain the refusal to register.

On the present record, we find that the USPTO has not established a prima facie case that Applicant's ORIGINAL GRAIN mark is merely descriptive of its restaurant services. To the extent that any "doubts exist as to whether [the] term is descriptive as applied to the . . . services for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established." *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994); *see also In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.3d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987) (citing *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972)).

**Decision:** The refusal to register is reversed.