

TTAB

Norris
McLaughlin
& Marcus, P.A.
ATTORNEYS AT LAW

875 Third Avenue
8th Floor
New York, NY 10022
P: 212-808-0700
F: 212-808-0844

Direct Dial: 917-369-8885
Email: abhett@nmmlaw.com

January 23, 2015

VIA EXPRESS MAIL

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Re: *Frito-Lay North America, Inc. v. Real Foods Pty Ltd.*
Consolidated Oppositions No. 91212680 & No. 91213587

Dear Clerk:

On behalf of Applicant Real Foods Pty Ltd., we enclose the following documents for filing in support of Real Foods' motion for summary judgment:

1. Applicant's Motion for Summary Judgment and Memorandum of Law in Support Thereof (Express Mailing No. 276692620);
2. Declaration of Michael Pels in Support of Applicant's Motion for Summary Judgment and accompanying exhibits (Declaration and Exhibits in Express Mailing Nos. 276692620 and 276692616);
3. Sealed (Confidential) Supplemental Declaration of Michael Pels in Support of Applicant's Motion for Summary Judgment (Express Mailing No. 276692620);
4. Declaration of Sarah Butler in Support of Applicant's Motion for Summary Judgment and accompanying exhibits (Express Mailing No. 276692633);
5. Declaration of Jessie Roberts in Support of Applicant's Motion for Summary Judgment and accompanying exhibits (Express Mailing No. 276692616);



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6. Declaration of Hal Poret in Support of Applicant's Motion for Summary Judgment and accompanying exhibits (Express Mailing No. 276692633); and
7. Sealed (Confidential) Declaration of Michael Movitz in Support of Applicant's Motion for Summary Judgment and accompanying exhibits (Express Mailing No. 276692620).

Please note that the Sealed Supplemental Declaration of Michael Pels in Support of Applicant's Motion for Summary Judgment and the Sealed Declaration of Michael Movitz in Support of Applicant's Motion for Summary Judgment and its accompanying exhibits are to be filed under seal pursuant to the governing protective order in this matter. These declarations have been provided in separate, sealed envelopes and marked as such.

Thank you for your assistance with this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,
NORRIS MCLAUGHLIN & MARCUS, P.A.



Arni Bhatt

Enclosures

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

FRITO-LAY NORTH AMERICA, INC.

Opposer,

vs.

REAL FOODS PTY LTD.

Applicant.

Opposition No. 91212680 (Parent)

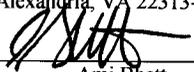
Opposition No. 91213587

CERTIFICATE OF EXPRESS MAILING

NUMBER EM 276692620 US

DATE OF DEPOSIT: January 23, 2015

I hereby certify that this paper is being deposited with the United States Postal Service "EXPRESS MAIL POST OFFICE TO ADDRESSEE" service under 37 C.F.R. § 1.10 on the date indicated above and is addressed to: Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313-1451


Ami Bhatt

**APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Applicant Real Foods Pty Ltd. ("Real Foods"), by its attorneys, Norris, McLaughlin & Marcus, P.A., hereby moves the Trademark Trial and Board (the "Board") for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, 37 C.F.R. § 2.127(d), and Section 528 of the Trademark Trial and Appeal Board Manual of Procedure dismissing consolidated Opposition Nos. 91212680 and 91213587 (the "consolidated proceeding") brought by Opposer Frito-Lay North America, Inc. ("Frito-Lay").

PRELIMINARY STATEMENT

Fourteen years ago, Real Foods, a small producer of wholesome and natural food products based in Australia, began selling its CORN THINS brand of popped corn cakes in the U.S. Manufactured using proprietary technology, its popped corn cakes are considerably slimmer than traditional cakes, with slices under 0.8 centimeters in depth, as compared to the usual 1.6 centimeters in size. Seeking to convey to consumers something about its innovative product profile and its consumption as part of a light and healthy diet—namely that the products are all natural and each slice has a lower calorie content than a typical popped corn or rice cake slice—Real Foods coined

the name CORN THINS. In 2007, capitalizing on the success of its CORN THINS brand, Real Foods introduced its RICE THINS line of rice cakes in the United States, having selected the name and introduced the product in Australia in 2000. Its CORN THINS and RICE THINS lines are the only products Real Foods sells.

To this day, and despite the fact that numerous producers including store brands and companies related to Frito-Lay compete in the popped corn and rice cake markets, Real Foods is the only popped corn cake producer in the U.S. selling its product under the CORN THINS brand and the only rice cake producer in the U.S. selling under the RICE THINS brand.

Since first sale of its CORN THINS products in the United States in 2000, Real Foods' CORN THINS and RICE THINS brands have earned it millions of dollars in sales through 2014, with sales continuing to grow across the years. Though it is only a fraction of the size of Frito-Lay and of necessity has a much lower marketing budget, Real Foods' CORN THINS and RICE THINS products collectively hold the second largest share of the combined popped corn and rice cakes market in the natural food store market in the U.S., comprised of stores selling food and snack products using exclusively all natural (not artificial or genetically modified) ingredients. Likewise, 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. 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.

Like other rice and popped corn cake manufacturers, but unlike producers of snack foods in other categories (such as crackers and chips), which typically package their products in boxes or in bags, Real Foods sells its products in stacks which are packaged cylindrically. Additionally, unlike crackers, which are made from ground ingredients and are traditionally baked, Real Foods' products are manufactured by placing rice or corn grains into a mold, to which heat and pressure is applied,

resulting in the popping of the corn and puffing of the rice and their formation into cakes. Accordingly, popped corn cakes and rice cakes comprise a unique product category.

Frito-Lay, an enormous purveyor of snack foods, apparently not content with the already dominant position of its sister company, Quaker Oats, in the market for rice and popped corn cakes, brought these proceedings, which were subsequently consolidated, challenging Real Foods' rights in its CORN THINS and RICE THINS brands, because it wants to use these marks itself, and to effectively destroy Real Foods' business. To that end, Frito-Lay argues that Real Foods' marks are incapable of functioning as source identifiers because, according to Frito-Lay, the marks merely describe the rice and corn cake products and/or the product category. Frito-Lay's arguments ignore the long-standing practice of the U.S. Patent and Trademark Office's ("PTO" or "USPTO") in registering marks for snack foods which pair an ingredient name with the term "THINS"—including the well-known brand WHEAT THINS, one of the earliest registrations to establish this practice. Further, Frito-Lay ignores the suggestive nature of Real Foods' CORN THINS and RICE THINS marks, originating from their double entendre in communicating to consumers the light, healthy and dietetic properties of the products. Accordingly, Frito-Lay's consolidated opposition must be dismissed, and Real Foods' trademark applications should be permitted to register on the Principal Register.

STATEMENT OF UNDISPUTED FACTS

A. The Parties

In 1980, Michael Pels founded Real Foods, and is now its Managing Director. Real Foods employs 100 people in its manufacturing facility in Sydney, Australia. *See* Declaration of Michael Pels in Support of Real Foods' Motion for Summary Judgment, dated January 22, 2015, ("Pels Dec.") at ¶ 10. It has experienced rapid growth since the development and launch of its major

product line, CORN THINS popped corn cakes, a natural and low-fat crispbread made from popped corn, which it introduced in the United States in 2000. *Id.*

Frito-Lay is one of the largest snack food manufacturers in the world, selling billions of dollars of snack foods around the world annually. *Id.* at ¶ 11.

Frito-Lay opposes Real Foods' applications to register CORN THINS and RICE THINS on three alternative grounds; specifically Frito-Lay contends the marks are (1) too descriptive to be capable of acquiring secondary meaning, (2) have not acquired secondary meaning, or (3) are generic. Despite its large size and comparatively limitless resources, Frito-Lay has not sought to depose a single fact witness or any of the three expert witnesses Real Foods has engaged in its defense of this consolidated proceeding.

B. Real Foods' Adoption, Use and Applications for Registration of CORN THINS and RICE THINS

In or about 1996, Real Foods coined the mark CORN THINS in Australia. Pels Dec. at ¶ 13. At the time, Real Foods had already been producing traditional rice cakes for both itself and other customers for several years. *Id.* Real Foods had also been experimenting with methods to develop an alternative to the traditional rice cake with its thickness of about 1.6 centimeters, which would have a lower calorie count per slice. *Id.* It also began to use different types of grain from which to make its products, most notably corn. *Id.* By early 1996, Real Foods started to produce a cake product made of popped corn, typically with a thickness of under 0.8 centimeters, as compared to the usual 1.6 centimeters in size. *Id.* As noted, seeking to suggest to consumers something about its innovative product profile and its consumption as part of a light and healthy diet, namely that the products are all natural and each slice has a lower calorie content than a typical popped corn cake slice, Real Foods coined the name CORN THINS. *Id.* It also chose to feature "CORN" in the name to distinguish its product from a traditional cake product which is typically made predominantly of rice. *Id.* In 2007, capitalizing on the success of its CORN THINS brand, Real Foods introduced its

RICE THINS line of rice cakes in the United States, having coined the name and introduced the product in Australia in 2000. Its CORN THINS and RICE THINS lines are the only products Real Foods sells. *Id.*

Real Foods' advertising is strongly focused on the light, healthful and dietetic benefits of its CORN THINS and RICE THINS cakes. Many specimens of packaging, advertisements and other promotional materials, produced in discovery and identified by corresponding bates-number as set forth below, demonstrate the touting by Real Foods of the low-calorie, "light", fat free, healthy, and wholesome benefits of its RICE THINS and CORN THINS brands. *See Pels Dec.* at ¶ 14, Ex. A. A few examples are as follows:

- **RF000056** – sample product packaging noting that Original CORN THINS cakes are only 22 calories per slice, fat free, gluten free and high in fiber;
- **RF000657** – sample flier noting that CORN THINS cakes make "healthy eating" easy and that they have 80% less fat than corn chips;
- **RF000668** – sample flier noting that cakes are "natural" and touting that they are low in calories, fat free, and high in fiber;
- **RF000681** – sample flier noting that Real Foods produces "wholesome and natural products," and explaining the company's Food Philosophy of only producing the "highest quality products" that are "wholesome and appealing," naturally made and minimally processed, as well as explaining the healthful attributes of the cake products;
- **RF003551** – Excerpts of Real Foods' website, which includes numerous references that reinforce the healthful benefits of its products, including in the recipe section, entitled "Deliciously Light," and which notes that the company's food philosophy is to provide wholesome, natural food; and
- **RF004154** – Real Foods' Facebook page, which also highlights that CORN THINS and RICE THINS are healthy and low in calories and includes postings that encourage consumers to switch to CORN THINS cakes instead of potato chips to lose weight because CORN THINS products are lower in carbohydrates.

Collectively then, as well as individually, Real Foods' marketing materials and advertisements also suggest the "double entendre" nature of its marketing of its CORN THINS and RICE THINS products to connote both the healthful and light nature of the product, and their

consumption as part of a low-calorie diet, as well as their slim dimensions. *Id.* at ¶ 15. Indeed, virtually all of Real Foods’ marketing and promotional materials tout the low calories and healthy benefits of its products. *Id.*

Real Foods has highlighted its CORN THINS and RICE THINS brands on its packaging as well as marketing materials. As noted, Real Foods is strongly focused on innovation and it offers its CORN THINS products in a range of flavors. For example, CORN THINS cakes are sold in the “original”, “soy & linseed (flax & soy)”, “multigrain”, “sesame”, “honey soy”, “tasty cheese”, “sour cream & chives” flavors. *Id.* at ¶ 16. Real Foods’ packaging of its CORN THINS and RICE THINS products clearly features its brand names and uses different fonts and much smaller letters to describe the flavors and varieties of its popped corn and rice cakes. Representative examples of its product packaging are shown below:



See Id.

Additionally, Real Foods’ product packaging denotes caloric content by “slice” of product and does not elsewhere use term “thins” as a generic noun, rather than as part of the brand names, as shown below:

Nutrition Facts	
Serving Size 1 slice (5.8g)	
Servings Per Container 26	
Amount Per Serving	
Calories	Calories from Fat
	% Daily Value*
Total Fat g	
Saturated Fat g	
Trans Fat N/A* g	
Cholesterol mg	
Sodium mg	
Total Carbohydrate g	
Dietary Fiber g	
Sugars g	
Protein g	
Vitamin A	Vitamin C
Calcium	Iron
*Percent daily values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:	
	Calories 2,000 2,500
Total Fat	Less Than 65g 80g
Sat Fat	Less Than 20g 25g
Cholesterol	Less Than 300g 300g
Sodium	Less Than 2,400mg 2,400mg
Total Carbohydrate	300g 375g
Dietary Fiber	25g 30g
Calories per gram	
Fat 9	Carbohydrate 4 Protein 4

Though it first began selling CORN THINS and RICE THINS cakes in the U.S. many years ago, Real Foods did not seek to register the marks in the U.S. until 2012. It was prompted to do so by its discovery that SunFoods, LLC, an entity related to Ricegrowers, Ltd., a competitor of Real Foods in Australia, had secured U.S. trademark registrations on the Principal Register for both CORN THINS and RICE THINS for identical products, namely rice and corn cakes. Real Foods petitioned to cancel the SunFoods registrations and SunFoods failed to answer the cancellations, resulting in judgment in Real Foods' favor. Pels. Dec. at ¶ 18.

Prior to commencing its cancellation proceedings, Real Foods also engaged counsel to enforce its rights in the CORN THINS and RICE THINS brands, and, as a result, SunFoods ceased using either designation in connection with the sale of its corn and rice cakes in the U.S. *Id.* at ¶ 19, Ex. B. At around the same time, Real Foods filed its U.S. trademark application for CORN THINS, seeking an extension of protection of its International Registration which in turn was based on an Australian application that issued in 2006. *Id.* One year later, Real Foods filed a use-based application for RICE THINS. Notably, neither the Examining Attorney assigned to the Real Foods' applications nor the Examining Attorney for the SunFoods' CORN THINS and RICE THINS

applications required either party to demonstrate acquired distinctiveness, and a preliminary descriptiveness refusal of the SunFoods' applications was withdrawn by the Examining Attorney after SunFoods submitted a response thereto. *Id.*

Finally, after commencement of this proceeding, Real Foods 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). Pels Dec. at ¶ 20. Accordingly, Real Foods moved the Board to permit it to amend its identification of goods in its application for RICE THINS to specify that its products are "crispbread slices primarily made of rice, **namely rice cakes**" and its application for CORN THINS to identify the goods as "crispbread slices predominantly of corn, **namely popped corn cakes**".¹ Frito-Lay refused to consent to the amendment, so, as a precaution, Real Foods filed new applications for RICE THINS for rice cakes and CORN THINS for popped corn cakes. Both of those applications were passed for publication with the requirement only that "RICE" or "CORN" be disclaimed, and no requirement that THINS be disclaimed. *Id.*, Ex. C.

C. Success of the CORN THINS and RICE THINS brands

CORN THINS and RICE THINS products are available in a variety of stores, with a focus on stores that sell all natural and gourmet foods and the "naturals" aisle of mainstream supermarkets and drugstores. For example, Whole Foods is a major retailer of CORN THINS and RICE THINS products, but the products are also sold in mainstream supermarkets such as Wegmans, Hannafords Supermarket and Stop & Shop. Pels Dec. at ¶ 21. As a result, in particular because of their production using all natural ingredients and never using ingredients containing GMOs (genetically modified organisms) and careful testing to ensure this, and based on the most recent market share data available to it, CORN THINS and RICE THINS collectively hold the second largest combined

¹ Applicant's motion to amend is still pending, and will be decided by the Board when it renders its decision in this proceeding.

market share for rice and popped corn cakes in the natural foods subset of mainstream supermarkets/drug stores in the U.S. and in natural foods stores, and the third largest share in specialty gourmet food stores. *See* Declaration of Michael Movitz in Support of Real Foods’ Motion for Summary Judgment, dated January 23, 2015, (“Movitz Dec.”) at ¶ 14. Real Foods’ products compete with those offered by Frito-Lay’s sister company, Quaker Oats and Quaker Oats-owned Mother’s brand of rice cakes and popped corn cakes—both of which use generic descriptors for their cylindrically packed corn and rice cakes. *See* Pels Dec. at ¶ 22, Ex. D. Because it does not have a large marketing budget, or the resources of a snack food giant like Frito-Lay, Real Foods relies primarily on grass root marketing strategies, such as giving product samples to groups and individuals that focus on healthy or gluten-free lifestyles as well as providing samples for events that encourage such lifestyles, such as 5-K races or supermarket events promoting natural, organic or gluten-free foods. Pels Dec. at ¶ 23. Real Foods’ marketing efforts are therefore primarily based on word of mouth through careful product placement, although it has placed several advertisements in publications directed to consumers living gluten-free or healthy lifestyles, such as the *Celiac Disease Foundation Newsletter* and *Today’s Dietitian Magazine*. *Id.* Notwithstanding that its marketing budget is small, in proportion to its size, Real Foods’ CORN THINS and RICE THINS products have generated millions of dollars in sales revenues in the U.S. *See* Trade Secret/Commercially Sensitive Supplemental Declaration of Michael Pels in Support of Real Foods’ Motion for Summary Judgment, dated January 20, 2015, (“Pels Supp. Dec.”) at ¶ 2; *see also* Pels Dec. at ¶ 24.

D. References to CORN THINS and RICE THINS on the Internet and Popularity of CORN THINS and RICE THINS

Real Foods’ CORN THINS brand also dominates the web results on a search for the name. Pels Dec. at ¶ 25. The first ten pages of a Google search for CORN THINS are replete with references to Real Foods’ brand. Several social media sites, including YouTube, and blogs, feature reviews of CORN THINS and RICE THINS products. *Id.* Additionally, CORN THINS has an

attractive website which draws, on average, over 1,900 unique visitors per month and has over 16,000 likes on Facebook as of the date of this filing. *Id.* Finally, thousands of loyal U.S. consumers have written to Real Foods about its CORN THINS or RICE THINS products since they were introduced, frequently complimenting the products and asking where they can be found in the U.S. *Id.*

E. Use of CORN THINS and RICE THINS Marks In the Relevant Market

No other party known to Real Foods, including Frito-Lay, uses the designations CORN THINS and RICE THINS in connection with the sale in the U.S. of popped corn and rice cakes, respectively. *Id.* at ¶ 26. Quaker Oats, a sister company to Frito-Lay, and the largest producer of rice cakes and popped corn cakes in the U.S., has for many years sold numerous flavors of rice cakes and popped corn cakes, none of which use the designations CORN THINS and RICE THINS. *Id.* Likewise, Quaker Oats' Mother's brand of rice and popped corn cakes does not use the designations CORN THINS or RICE THINS. *Id.* Rather, these companies and others like it that compete in the rice cake and popped corn cake market predominantly use the generic names "rice cakes" or "popped corn/corn cakes." *Id.*, Ex. F.

Although Real Foods has policed its trademark rights, most notably against SunFoods, its efforts have not precluded others from effectively competing in the rice and popped corn cakes market. None of its competitors, including Frito-Lay or its sister company Quaker Oats, have found it necessary to use "RICE THINS" or "CORN THINS" to describe slender rice or corn cakes. *Id.* at ¶ 27.

ARGUMENT

Real Foods' motion for summary judgment should be granted because there is no genuine dispute as to any material fact that its CORN THINS and RICE THINS marks are suggestive in that they convey not only a suggestion about the products' profile but also about their light, healthful and

dietetic properties, inclusive of their low calorie content. Fed. R. Civ. P. § 56(a), *Loglan Inst., Inc. v. Logical Language Group, Inc.*, 962 F.2d 1038, 1040 (Fed. Cir. 1992). Even assuming the marks are considered descriptive, they have acquired secondary meaning. To be sure, the marks are most certainly not generic. Real Foods is therefore entitled to judgment as a matter of law. Frito-Lay's oppositions should be dismissed because it has failed to establish that the CORN THINS and RICE THINS names do not identify a single source of popped corn and rice cakes. Even when the facts are viewed in the light most favorable to Frito-Lay, Frito-Lay cannot meet its burden of identifying a genuine issue of material fact as to whether RICE THINS and CORN THINS are merely descriptive or generic.

I. The CORN THINS and RICE THINS Marks Are Suggestive

Despite Frito-Lay's contentions to the contrary, CORN THINS and RICE THINS are both suggestive marks. Suggestive marks are marks which require some leap of imagination for the consumer to reach a conclusion about the nature of a product (*e.g.* TIDY BOWL for toilet bowl cleaners or COPPERTONE for sun tan oil). See *Douglas Laboratories Corp. v. Copper Tan, Inc.*, 210 F.2d 453, 455 (2d Cir. 1954); see also *Baroness Small Estates, Inc. v. Am. Wine Trade, Inc.*, 104 U.S.P.Q.2d 1224, 1230 (TTAB 2012); *Plyboo Am. Inc. v. Smith & Fong Co.*, 51 U.S.P.Q.2d 1633, 1640 (TTAB 1999). Suggestive marks are inherently distinctive and do not require a showing of secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 770 (1992); *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 391 (2d Cir. 1995).

In this case, CORN THINS and RICE THINS undoubtedly require consumers to use their imagination to understand the nature of the products sold under those marks. There is no such thing as a "corn thin" or a "rice thin" as neither a corn nor a rice grain can be thinly sliced and served as a snack food. Moreover, there is no dictionary definition of the noun THINS. Thin, in the singular form, is identified in dictionaries as an adjective or a verb, but never a noun. As attested to in the

report of Jessie Roberts, a former high level administrator with the PTO who also served as an Examining Attorney and trained other examining attorneys, as a matter of PTO practice the absence of a dictionary definition for CORN THINS, RICE THINS, or THINS, is compelling evidence the marks CORN THINS and RICE THINS are trademarks and not descriptors. *See* Declaration of Jessie Roberts in Support of Real Foods’ Motion for Summary Judgment, dated January 16, 2015, (“Roberts Dec.”) at ¶¶ 13, 40. Ms. Robert’s conclusions are corroborated by the conclusions of *three* separate Examining Attorneys assigned to a total of *six* trademark applications for RICE THINS and CORN THINS. Specifically, the Examining Attorney assigned to the (now abandoned) SunFoods’ RICE THINS and CORN THINS applications ultimately did not require a disclaimer of THINS; nor did a (different) Examining Attorney assigned to the applications in issue in this consolidated opposition proceeding; nor did yet a third Examining Attorney assigned to Real Foods’ RICE THINS and CORN THINS applications filed subsequent to the institution of this proceeding. Pels Dec. at ¶ 19.

However, even if the Board were to find “THINS” had some meaning in directly conveying (as opposed to suggesting) something about the products’ slender profile, CORN THINS and RICE THINS also were chosen by Real Foods to convey, and do convey, the lightness of the product and its low caloric content, and therefore its consistency with a healthy lifestyle. This double entendre compels 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.” 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (hereinafter “McCarthy”) § 11:19 (4th ed. 2014); *see also No Nonsense Fashions, Inc. v. Consol. Foods Corp.*, 226 U.S.P.Q. 502, 507-08 (TTAB 1985). This second meaning of the CORN THINS and RICE THINS marks is also heavily emphasized in promotional materials for Real Foods’ products. *In re*

Grand Metropolitan Foodservice, Inc., 30 U.S.P.Q.2d 1974, 1975 (TTAB 1994) (noting that double meaning of MUFFUN mark for muffins emphasized in promotional materials).

Courts and the PTO have long extended protection, without a showing of secondary meaning, to marks that contain a double entendre where one meaning is descriptive and the other is not. As early as 1955, one court found “Moving Air is Our Business” for electric fans was not merely descriptive because it “had a certain double entendre which removes it from that category”. *Ex parte Robbins & Myers, Inc.*, 104 U.S.P.Q. 403, 405 (Comm’r Pat. 1955). The Board has held that where a mark “possesses a degree of ingenuity in its phraseology which is evident in the double entendre that it projects,” it should not be held to be merely descriptive. *See In re Delaware Punch Co.*, 186 USPQ 63, 64 (TTAB 1975); *see also In re Ocusoft, Inc.*, Serial No. 76378707, 2005 WL 1463854, *2 (TTAB, June 10, 2005) (finding “NIGHT AND DAY” for eye gel suggestive without any other evidence but court’s conclusion that the mark evoked both the famous Cole Porter song “Night and Day” and the phrase “I’ve been working night and day”); *In re Best Software, Inc.*, Serial No. 75457359, 2001 WL 256151, *2 (TTAB, Feb 27, 2001) (based on plaintiff’s sales brochure and LEXIS/NEXIS search results, “BUDGET DIRECTOR” suggestive where it referred to a person in charge of budgets as well software’s ability to direct budget); *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 700 (2d Cir. 1961) (mark POLY PITCHER for polyurethane pitchers was not merely descriptive because while “poly” signified polyurethane it also conjured the Revolutionary War figure Molly Pitcher); *In re Colonial Stores, Inc.*, 394 F.2d 549, 552 (C.C.P.A. 1968) (SUGAR & SPICE, while describing ingredients in the baked goods sold thereunder, also evoked well-known nursery rhyme).

Particularly instructive is the case of *Estee Lauder, Inc. v. The Gap, Inc.*, 932 F.Supp. 595 (S.D.N.Y. 1996), *rev’d on other grounds*, 108 F.3d 1503 (2d Cir. 1996). There, the federal district court found that Estee Lauder’s mark “100% TIME RELEASE MOISTURIZER” was capable of

three possible interpretations “(1) this bottle contains nothing but time release moisturizer, (2) this product moisturizes 100% of the time, and (3) this is 100% (the brand) time release moisturizer.” *Id.* at 608. Though the court found only that the last of these three listed interpretations was suggestive, it concluded that a mark consisting of a double or triple entendre with at least one meaning that was suggestive was “protectable without proof of secondary meaning.” *Id.* at 610.

Thus, even if the Board finds that CORN THINS and RICE THINS suggest something about the profile of Real Foods’ products so directly that they are descriptive, it should also find that they have a second meaning—one of which is suggestive, namely that the products are light and healthy as a result of their low calorie content. It is this double entendre that makes the marks suggestive.

II. THE CORN THINS and RICE THINS Marks Are Not Generic as a Matter of Law

A term is generic if the relevant purchasing public understands it to describe the genus of the goods being sold. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001). The touchstone is to determine the term’s primary significance to the public. *See* 15 U.S.C. § 1064(3); *H. Marvin Ginn Corp. v. Int’l Assoc. of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986). A consideration of all relevant evidence compels the conclusion that the term CORN THINS and RICE THINS are not generic as a matter of law.

A. The Survey Evidence Establishes CORN THINS Is A Brand Name and Frito-Lay Has Not Introduced Any Survey Evidence to Establish Either CORN THINS or RICE THINS Is Generic

Surveys are one of the most compelling ways to determine genericness as they directly ask consumers themselves how they perceive a name (as a brand or as a common name). McCarthy § 12:14. In this case, Real Foods’ expert found, based on a well-designed survey (the “NERA Survey”), compelling evidence that a clear majority of consumers regarded CORN THINS as a brand name, rather than a common name. *See* Declaration of Sarah Butler in Support of Real Foods’ Motion for Summary Judgment, dated January 20, 2015, (“Butler Dec.”) at ¶ 4. By contrast, Frito-

Lay conducted no genericness survey at all for either CORN THINS or RICE THINS. Therefore, Frito-Lay has not met its burden to show CORN THINS and RICE THINS are generic.

As set forth in greater detail in her accompanying declaration, Real Foods' expert found that of 221 qualified respondents surveyed, all of whom were past or future popped corn cake purchasers, 52 percent, or a total of 114 respondents, indicated CORN THINS was a brand name, 32 percent indicated it was a common name, and 16 percent indicated they did not know or had no opinion. Butler Dec. at ¶ 30. Of those surveyed who had an opinion, 62 percent indicated that CORN THINS was a brand name, rather than a common name. *Id.* at ¶ 31.

In designing the NERA Survey, Ms. Butler, who has many years of experience designing and implementing consumer surveys in trademark cases, appropriately included instructions for survey respondents that educated them on the difference between a brand name and a common name and a test to ensure their understanding (a so-called "mini-test"). Specifically, the main questionnaire began with an explanation of terms that might be associated with snack foods and instructed that "a brand name refers to a snack food from one company or source and a common or generic name refers to a type of snack food." *Id.* at ¶ 19. The questionnaire then provided examples of brand names for snack foods (namely, Cheese Nips and Sun Chips) and common/generic snack food names (namely, crackers and chips). *Id.* at ¶ 20. Finally, potential survey respondents were asked to identify Cheez Doodles as a common name or brand name and graham cracker as a brand name or common name. *Id.* at ¶ 21. Only those who answered both questions in this "mini-test" correctly were eligible to complete the survey. *Id.* at ¶ 24.

Accordingly, the survey evidence establishes that, as a matter of law, CORN THINS is perceived by consumers as a brand, rather than common name. Moreover, since Frito-Lay did not conduct a genericness survey for RICE THINS, it has not met its burden to establish that RICE THINS is perceived by consumers as a common name.

B. The CORN THINS and RICE THINS Marks Are Used Exclusively to Refer to Real Foods' Products

CORN THINS and RICE THINS are used exclusively by Real Foods to refer to its popped corn cake and rice cake products. Frito-Lay has not produced a scintilla of evidence to show otherwise. Specifically, Frito-Lay has not established any competitor, market or consumer usage in the United States of the designation CORN THINS other than to refer to Real Foods' popped corn cakes. Its "evidence" of market usage of RICE THINS is limited to an entirely different product category or to use outside the United States, neither of which is relevant to the issue at hand.

Faced with this dearth of evidence of consumer or market usage of either CORN THINS or RICE THINS, Frito-Lay has attempted to fabricate its own. Specifically it commissioned a voluminous report, relying upon mountains of media and consumer "evidence" culled from third party sources that purportedly addresses consumer understanding of the term THINS (rather than the composite terms CORN THINS or RICE THINS). This report was produced by Robert Frank, a self-described "master" trademark searcher who is neither an attorney nor a survey expert.

The probative value of Frank's report has been extensively rebutted by Jessie Roberts, who worked in the PTO for over 30 years, first as an Examining Attorney and then as a high-level administrator. Ms. Roberts has opined based on extensive searching of relevant PTO records and her own searching and analysis that Frank's report is not relevant to any issue presented in this proceeding. *See Roberts Dec.* at ¶ 8. She finds that there is substantial support in PTO practice and precedent to support her conclusion, contrary to Frank's, that the term THINS can carry a mark.

That Frank reaches the wrong conclusion about PTO practice is not surprising in view of his background. Specifically, as Ms. Roberts explains, Frank does not have the requisite legal background to adequately interpret the results of his search. One of the most (but by no means only) telling signs of Frank's dearth of apposite experience is his conclusion that THINS is, in his words "generic/weak", and his definition and use of the term "generic". *Id.* at ¶ 13(a). As Ms. Roberts

notes, even if THINS were weak it would not mean it was generic and not registrable, making Frank's conclusion that the mark is one or the other beside the point. *Id.* Further, Frank appears to have invented his own definition of what "generic" means while simultaneously explaining that his definition is (in Frank's words) "not intended to imply a legal determination of genericness," leaving anyone who reads his report with the nagging question of why he uses the term at all. *Id.* at ¶ 13(b). Ms. Roberts also points out that in the conceded absence of any dictionary definition for THINS, Frank's invented definition of the term "generic", which is not based in any factual support or legal precedent, should not have any bearing in this proceeding. *Id.* at ¶ 13(c).

Perhaps nowhere is Frank's lack of expertise more on display than in his treatment of the WHEAT THINS mark. Specifically, as Ms. Roberts points out, "Frank devotes an entire highlighted section of his Report, which is boxed for emphasis, on his exclusion of numerous references to the designation 'Wheat Thins' from his search. (Frank Report at p. 21, 'A Word About Wheat Thins')." *Id.* at 14. Later in her report, she concludes this omission was critical in leading Frank to reach the wrong conclusions about the CORN THINS and RICE THINS marks; as she states:

Frank also fails to discuss the seminal "THINS" registration – WHEAT THINS (Reg. No. 1022799). Undoubtedly, he must have seen this registration in his review. WHEAT THINS with "wheat" disclaimed has been a registered mark since 1975 and is still a live registration. Given the predominant number of marks that include the word "THINS" with the term preceding "THINS" disclaimed, it appears that the WHEAT THINS registration is the one that established this practice in the USPTO and should continue to be followed.

Id. at 35.

Finally, as Ms. Roberts' points out, though Real Foods and others have combined THINS with other terms to produce trademarks (including, but not limited to the WHEAT THINS brand), which Frank concedes, Frank also paradoxically insists that THINS cannot be combined with another term to function as a source indicator. *Id.* at ¶ 36. Thus he argues, on the one hand, the designation THINS, when combined with other terms, can function as part of a trademark/source identifier, and on the other, that it cannot.

The foregoing is just a short summary of some of Ms. Roberts' conclusions about Frank's deeply flawed report, which are amply detailed in her accompanying declaration. Further, in thoroughly searching in the PTO's records for marks including the term THINS covering goods in both Classes 29 and 30 (Frank fails to search both classes and fails to search expired or abandoned marks), Ms. Roberts discovers that the USPTO has consistently *not* required a disclaimer of THINS when an ingredient name is paired with the term, but, rather has only required disclaimer of the ingredient name (as, for example, in the case of WHEAT THINS). Thus, she concludes, PTO precedent clearly establishes that THINS may "carry" the marks. *Id.* at ¶¶ 35, 44. Moreover, as noted above, the PTO has repeatedly (*six* times) found both marks to be suggestive, not descriptive, in cases assigned to *three different* Examining Attorneys, with none of them requiring a showing of acquired distinctiveness nor a disclaimer of the term THINS. *Pels Dec.* at ¶ 19.

Finally, not a single competitor of Real Foods has found any need to use RICE THINS or CORN THINS to refer to its products. Because the primary purpose behind the policy of not permitting registration of generic terms is to "prevent competitive harm," and given the abundance of other available names, there is no basis to deny registration of the CORN THINS or RICE THINS marks. *In re Trek 2000 Int'l Ltd.*, 97 U.S.P.Q.2d 1106, 1108 (TTAB 2010); *In re Minnetonka Inc.*, 3 U.S.P.Q.2d 1711, 1713 (TTAB 1987) ("the issue of genericism is based in the basic tenet of trademark law that competitors must not be hampered from the free use of generic terms to name their goods").

Thus, the evidence irrefutably establishes that neither CORN THINS nor RICE THINS is generic because both marks are used in the relevant market and for the relevant goods to refer exclusively to Real Foods' popped corn and rice cakes.

III. Assuming Real Foods' Marks Are Not Suggestive, the CORN THINS and RICE THINS Marks Are Descriptive and Have Acquired Secondary Meaning Through Long Usage and Substantial Sales

Even if the Board finds CORN THINS and RICE THINS are descriptive, not suggestive, there is no genuine issue of disputed fact as to whether each mark has acquired distinctiveness. It is once again Frito-Lay's burden to prove no distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1578-79 (Fed. Cir. 1988); McCarthy § 15:32. Secondary meaning can be shown via a variety of sources, including "the length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits asserting source-indicating recognition." *In re Kyjen Co.*, Serial No. 77571488, 2012 WL 1424429, *6 (TTAB, Apr. 12, 2012). Frito-Lay has not met its burden to demonstrate no distinctiveness whereas Real Foods has ample evidence that CORN THINS and RICE THINS have each obtained secondary meaning; there can be no genuine dispute about these facts.

Courts have repeatedly held that a trademark owner may prove secondary meaning through indirect evidence such as the duration of sales and their volume, as well as market share. *See* McCarthy § 15:30, *citing Echo Travel, Inc. v. Travel Assoc., Inc.* 870 F.2d 1264, 1268 (7th Cir. 1989); *see also Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 231 U.S.P.Q. 926, 934 (TTAB 1986); *Kraft General Foods Inc. v. Allied Old English Inc.*, 831 F.Supp. 123, 129 (S.D.N.Y. 1993); *see also Ctr. for Documentary Arts v. Documentary Arts, Inc.*, Opposition No. 91154077, 2007 WL 117525, at *7 (TTAB, Jan. 11, 2007).

Here, Real Foods' years of use and sales under its CORN THINS and RICE THINS marks have, despite a relatively low marketing budget, resulted in Real Foods' achieving the second largest share of the combined popped corn and rice cakes market in natural food stores in the U.S., comprised of stores selling food and snack products made from all natural (not artificial or genetically modified) ingredients. Movitz Dec. at 14. Likewise, 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. *Id.* 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. *Id.* Real Foods has made millions of dollars in sales of the products sold under these brands. These sales cannot just be swept under the rug because they are not on the same scale as Frito-Lay’s. Even small companies with proportionately fewer sales than their giant competitors are entitled to own trademarks.

Furthermore, the vast majority of probative references on a Google search of CORN THINS is to the Real Foods brand. Roberts Dec. at ¶ 15. Additionally, as noted, no other competitor in the rice and popped corn cakes market uses the terms RICE THINS and CORN THINS, respectively. Real Foods’ website promoting its CORN THINS and RICE THINS brands enjoys good site traffic with thousands of visitors each year, it has received thousands of communications from satisfied consumers, it has over 16,000 Facebook “likes” and its products have been featured on several popular blogs. Pels Dec. at ¶ 25.

Against this backdrop, Frito-Lay offers only the survey of its expert, Isabella Cunningham (“Cunningham”) which purports to be probative of the issue of secondary meaning of CORN THINS (*not* RICE THINS). However that survey is so seriously flawed as to be rendered inadmissible, as attested by Real Foods’ rebuttal survey expert, Hal Poret. *See* Declaration of Hal Poret in Support of Real Foods’ Motion for Summary Judgment, dated January 16, 2015, (“Poret Dec.”) at ¶ 16. As Mr. Poret sets forth in his report, Cunningham surveyed the wrong universe of consumers. *Id.* at ¶ 16(a). The applications in issue in this proceeding identify the goods as “crispbread slices”. Real Foods made a motion early in this proceeding and long before expert disclosures were due, to amend its goods for the CORN THINS brand to include “popped corn cakes” as part of the crispbread category, given that crispbread is not a term used commonly in the U.S. Moreover, the industry

usage of “popped corn cakes” is widespread as a Google search indicates. Pels Dec. at ¶ 26. As noted, Quaker Oats-owned Mother’s brand identifies the products in question as popped corn cakes. *Id.*, Ex. D. Accordingly, consumers have come to expect to see the goods marketed, and identify them, as “popped corn cakes” and, accordingly, the appropriate universe should be comprised of consumers of these products.

Despite this, Cunningham bafflingly chose to survey those who purchase *crackers OR* crispbread/crispbread slices. Undoubtedly because the term “crispbread” is not in widespread use in the U.S., the vast majority of those surveyed—as Mr. Poret states, nearly *80 percent*—were cracker purchasers. Poret Dec. at ¶ 18. Because crackers are a product category different from rice and popped corn cakes, the opinions of cracker consumers are irrelevant to the proceeding at hand. Crackers are, as noted, made of ground ingredients and sold in boxes or bags; popped corn cakes are made of puffed corn grains alone or in combination with other puffed grains, and sold by Real Foods and others in cylindrically shaped packages. Pels Dec. at ¶ 7. Thus, there is utterly no way to determine if a purchaser of crackers has ever purchased or will ever purchase popped corn cakes, much less consume these corn cake products. Selection of the appropriate universe is critical to a trademark survey’s design and therefore its probative value; a survey which is not directed to the appropriate consumers should not be accorded any weight. *In Re Spirits Int’l N.V.*, 86 U.S.P.Q.2d 1078, 1088 (TTAB 2008), *rev’d on other grounds*, 90 U.S.P.Q.2d 1489 (Fed. Cir. 2009). For the sole reason that Cunningham failed to survey the right universe of crispbread, namely popped corn cake, consumers, her survey should be entirely disregarded.

The Cunningham Survey’s shortcomings do not end there, however. Respondents in the Cunningham Survey were *not* asked questions about whether the *name* CORN THINS was a brand or common name, which is of course the relevant question. Instead, they were shown an *image* of a single slice of the Real Foods’ corn cake product *not even the product packaging bearing the name*

CORN THINS and asked whether CORN THINS was a brand/common name “With respect to the type of product shown above....” Poret Dec. at ¶ 21. Cunningham could just as easily have asked the critical survey question “with respect to popped corn cakes”, but chose instead to show the product image. Moreover, that product image took up an enormous part of the screen on which the survey question was asked, consuming far more visual space than the actual question. The effect of showing the product image in this way, instead of the product name, was to confuse consumers and undoubtedly to result in the desired outcome for Frito-Lay. Moreover, as Mr. Poret points out, the image of the Real Foods’ product was shown immediately following the display of a bicycle and a question as to what product was shown (the respondents were presented with three other product categories in addition to the correct category). *Id.* at ¶ 23. This further misdirected consumers to a consideration of the product category rather than product name.

Cunningham’s survey respondents’ verbatim answers to the survey question compellingly demonstrate they were thinking about sources for the *types* of product shown, rather than whether the *name* CORN THINS functioned as a source identifier. As Mr. Poret sets forth in his report, these survey responses included ones such as: “[m]any companies make these”; “I have seen the product under different types of brands”; “I have purchased several brands” and numerous others of the same ilk. *Id.* at ¶ 25.

From these comments, it is obvious that a huge number of consumers surveyed—Mr. Poret estimates *43 percent of the total surveyed—were not responding to the key question* of whether they perceive CORN THINS as a brand name or common name but instead their understanding of whether the product *type* of popped corn cakes comes from more than one company. *Id.* at ¶ 26. Consumer understanding of whether the popped corn cakes products come from more than one source is of course irrelevant to this proceeding. For this reason, too, the Cunningham survey should be disregarded.

But that is not all that is wrong with the Cunningham survey design. Cunningham focused her survey respondents inappropriately on answers that were too narrowly worded, asking whether they associated the name CORN THINS with one source. Instead of giving consumers the option of associating the name with one, more than one, or no brand *or* company, she gave them the option of choosing only “one company”, “more than one company”, “no company” or “don’t know”. Thus consumers who might not know the name of the company who produces CORN THINS might be impelled to answer that they do not associate CORN THINS with any *company*. As Mr. Poret notes, had consumers been able to choose “one brand” or “more than one brand” they might have answered differently if they were not sure of the precise company who produced that brand. *Id.* at ¶ 30. Alternatively, as Mr. Poret points out, Cunningham’s survey also could have clarified in the instructions that respondents did not need to know the name of the company when providing their response. *Id.* For this reason also, the Cunningham survey is not probative of the issue of secondary meaning. *Id.* Finally, three of the four key survey question answers favored Frito-Lay; this, too, biases the survey. *Id.* at ¶ 33. Cunningham easily could have drafted the answers so that there were an equal number of responses that would favor each party.

Accordingly, because Frito-Lay has introduced no admissible evidence that CORN THINS has no secondary meaning when used in connection with the sale of popped corn cakes in the U.S. and that RICE THINS lacks secondary meaning in connection with the U.S. sale of rice cakes, summary judgment should be granted in favor of Real Foods.

IV. Request to Suspend Proceeding Pending Resolution of Real Foods’ Motion for Summary Judgment

Pursuant to TBMP § 510.03 and 37 CFR § 2.127(d), Real Foods respectfully requests that this consolidated proceeding be suspended with respect to all matters not germane to this motion, pending a decision by the Board on Real Foods’ motion for summary judgment.

CONCLUSION

As discussed in detail above, Real Foods has established that its CORN THINS and RICE THINS marks are not generic, but rather are suggestive. A corn or a rice grain cannot be thinly sliced and served as a food product. Further there is no such thing as a “THINS.” Accordingly, Real Foods’ marks require consumers to use their imagination to determine the nature of Real Foods’ products. In addition, the marks at issue have two meanings—one that may suggest something about the profile of the product and a second that conveys the light and healthful benefits of the product. Marks with double entendre are consistently found to be suggestive and protectable without any showing of secondary meaning.

Real Foods has also established that its mark is not generic. In support of its position, Real Foods has submitted the results of a genericness survey conducted by Sarah Butler, in which Ms. Butler found that 52 percent of consumers considered CORN THINS to be a brand name; and among those surveyed who had an opinion, 62 percent of respondents considered CORN THINS to be a brand name. Real Foods also submitted a declaration from a former Examining Attorney and high level administrator of the PTO, Jessie Roberts, in which Ms. Roberts highlights numerous examples in which the PTO has registered numerous marks combining the term THINS with other terms, most notably ingredient names, to produce a trademark, including but not limited to the WHEAT THINS brand. Based on her extensive review of PTO records, Ms. Roberts concludes that the designation THINS should carry the marks in this case to registration without disclaimer of THINS, a determination that has been confirmed by three different Examining Attorneys assigned applications for RICE THINS and CORN THINS on three separate occasions.

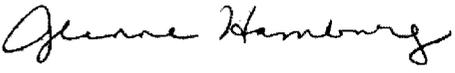
Finally, to the extent the CORN THINS and RICE THINS marks may be considered descriptive, Real Foods has submitted ample evidence to establish secondary meaning. This includes evidence of Real Foods’ long-standing use and years of growing sales under the marks at

issue, as well as strong evidence of consumer recognition of its brands—as demonstrated through instances of social media posts, website visitors, and consumer communications. Frito-Lay has failed to introduce sufficient admissible evidence necessary to sustain its burden to prove genericness, mere descriptiveness or a lack of secondary meaning.

For the foregoing reasons, the Board should grant Real Foods’ motion for summary judgment, this consolidated proceeding should be dismissed in its entirety, and the pending applications for CORN THINS and RICE THINS should be granted registration on the Principal Register. Additionally, the Board should a grant Real Foods’ request for a suspension of this matter pending the Board’s decision on Real Foods’ motion for summary judgment.

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NORRIS, McLAUGHLIN & MARCUS, P.A.

By: 

Bruce Londa
Jeanne M. Hamburg
Ami Bhatt
875 Third Avenue, 8th Floor
New York, New York 10022
Telephone (212) 808-0700
Facsimile (212) 808-0844
Attorneys for Real Foods Pty Ltd.