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

Proceeding	91212680
Party	Defendant Real Foods Pty Ltd
Correspondence Address	BRUCE S LONDA NORRIS MCLAUGHLIN & MARCUS PA 875 3RD AVENUE, 8TH FLOOR NEW YORK, NY 10022-6225 UNITED STATES jhamburg@nmmlaw.com, bcmarin@nmmlaw.com, abhatt@nmmlaw.com
Submission	Reply in Support of Motion
Filer's Name	Ami Bhatt
Filer's e-mail	abhatt@nmmlaw.com,jhamburg@nmmlaw.com,bcmarin@nmmlaw.com
Signature	/ami bhatt/
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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

**APPLICANT'S REPLY ON ITS MOTION FOR SUMMARY JUDGMENT**

Despite Frito-Lay's assertions, this case is straightforward and disposing of it in Real Foods' favor on this motion will consequently *avoid*, not exacerbate, needless expenditure of the parties' and Board's resources. Contrary to Frito-Lay's contentions, this case does not turn on the registrations for *other* marks in which THINS is disclaimed (or even the more than two dozen registrations in which THINS is *not* disclaimed), the use of THINS by parties around the world in Australia, New Zealand or the United Kingdom, the use of THINS by the media, the use of THINS for products in other categories apart from popped corn and rice cakes, and most certainly not the use of the adjective "thin" in any of these contexts.

Rather, the sole issue presented is Real Foods' right to register CORN THINS and RICE THINS as U.S. trademarks for its products. Real Foods has demonstrated that there is no triable fact issue foreclosing entry of summary judgment in its favor. *As applied to Real Foods' goods*, the marks are suggestive. Moreover, Real Foods' millions of dollars in U.S. sales began over fourteen years ago and have established it as leader in its target markets. Simply because it does not have the sales of a snack food giant does not mean Real Foods' sales, the marks' longevity of use or Real Foods' resulting market share can be expunged by its larger adversary in this proceeding.

**I. FRITO-LAY HAS NOT ESTABLISHED ANY TRIABLE FACT ISSUE TO PRECLUDE THE BOARD FROM FINDING CORN THINS AND RICE THINS ARE SUGGESTIVE**

Contrary to Frito-Lay's assertions, Real Foods has established that the CORN THINS and RICE THINS marks are suggestive. Frito-Lay wrongly contends that because the marks connote something

about features of the goods, they are merely descriptive. However the hallmark of a suggestive mark is that it *does* convey something about the goods, which the consumer is required exercise some imagination to perceive. The names CORN THINS and RICE THINS do not *immediately* convey that the products themselves are slender; and certainly do not *only* convey that the products are slender. A corn kernel or rice kernel cannot be thinly sliced like a bagel can be, to use Frito-Lay's example of BAGEL THINS. There is no such thing as a "thin corn" or a "thin rice" but there can be a "thin bagel." Therefore comparisons to registered marks that pair ingredient names with the non-disclaimed term THINS (*e.g.* WHEAT THINS, NUT-THINS) are more analogous in their suggestive significance than the examples provided by Frito-Lay. Moreover, unlike Frito-Lay's and other parties' use of the adjective "thin" in connection with snack products (*see, e.g.* FL App. 3311-3343, 3347, discussing uses such as Rold Gold Thin Twists Pretzels, Stacy's Soy Thin Crisps, Thin Sliced Bagels), the designation "THINS" is used as a noun in Real Foods' marks, for which there is no dictionary definition. Accordingly, there can be no doubt the Real Foods' marks are suggestive.

Further, in view of the all-natural, healthful, low calorie, gluten free and dietetic benefits of the products, the marks have another, suggestive meaning—that consuming them is compatible with a light, diet-conscious and thinning diet. In view of the imagination required to explicate the marks' significance, there is no fact issue precluding entry of summary judgment by the Board that the marks are suggestive. This is the same conclusion reached by no fewer than three Examining Attorneys assigned to six applications of the marks in issue. Indeed, not a single of these Examining Attorneys required the applicant, including, on two occasions, Real Foods, to establish distinctiveness under Section 2(f).

## **II. FRITO-LAY HAS ESTABLISHED NO TRIABLE FACT ISSUE AS TO SECONDARY MEANING**

### **A. Real Foods Has Established Acquired Distinctiveness**

On its motion, Real Foods has introduced evidence of millions of dollars of sales over a 14 year period beginning in May 2000 with its first sales of CORN THINS in the U.S. These sales have resulted in Real Foods attaining a leading position in the aggregate popped corn cakes and rice cakes market in

the natural foods subset of mainstream supermarkets and drug stores in the U.S., in natural foods stores and in specialty gourmet stores. Incredibly, Frito-Lay falsely contends that these reports of Real Foods' market share should not be considered as they were not produced during discovery. FL Br. 3.

In fact on October 1, 2014, Real Foods produced to Frito-Lay the same market share reports that were authenticated through the declaration of Michael Movitz on Real Foods' summary judgment motion. RF App. 2-3. Moreover, Real Foods only learned of Mr. Movitz's existence during the course of preparing that motion (after the close of discovery) when it decided to rely on these reports and contacted their producer, SPINS, to identify someone who could authenticate them; SPINS identified Mr. Movitz.<sup>1</sup> *Id.* at 3. Further as the SPINS reports themselves were produced to Frito-Lay during discovery, Real Foods was not under an obligation to supplement its disclosures to identify SPINS or Mr. Movitz. *Byer California v. Clothing for Modern Times Ltd.*, 95 USPQ2d 1175, 1178 (TTAB 2010). Nor is Mr. Movitz an "expert" witness required to be identified in Real Foods' expert disclosures; he was called upon solely to authenticate reports previously produced to Frito-Lay. RF App. 3. Finally, contrary to Real Foods' contention, the sole interrogatory Frito-Lay served in this proceeding (seeking market share for "crispbread slices," "popped corn cakes," "rice cakes") did not seek the information contained in the SPINS reports which contained shares relating to *aggregated* corn and rice cake market *segments*.<sup>2</sup>

Frito-Lay's contention that it would "derail" this proceeding to take discovery now about the SPINS market share data is disingenuous. Frito-Lay did not take a single discovery deposition, serving only written discovery requests during the discovery period and waiting until the very last day of

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<sup>1</sup> Frito-Lay contends that Real Foods should have identified Mr. Movitz in its initial disclosures and failure to do so should result in his declaration being inadmissible. Under this logic, two of Frito-Lay's own declarations and exhibits thereto (FL App. 2-1649; 3173-3495) should be excluded. Jeannette Zimmer was not identified by Frito-Lay in its initial disclosures or even in its pre-trial disclosures. Diana Rausa was not identified in Frito-Lay's initial disclosures. RF App. 129-37.

<sup>2</sup> Further, Frito-Lay had sufficient opportunity to review the SPINS reports given that they were produced during discovery. If, thereafter, Frito-Lay felt that Real Foods' interrogatory response was deficient, it could have moved to compel further disclosure but failed to do so. Frito-Lay cannot be permitted now to complain about any deficient discovery response. TBMP § 523.04 ("If a party that served a request for discovery receives a response thereto which it believes to be inadequate, but fails to file a motion to test the sufficiency of the response, it may not thereafter be heard to complain about the sufficiency thereof").

discovery to serve its second set of demands, which included the interrogatory in question. It might have deposed Real Foods or SPINS about the market share information disclosed in these reports well before the close of discovery, but it chose not to. Moreover, the TBMP specifically allows for the taking of further discovery if a party believes it necessary to oppose a motion for summary judgment—but this too is an option Frito-Lay has chosen not to exercise. *See* TBMP § 528.06. Frito-Lay’s request that the Board not consider the SPINS reports or Mr. Movitz’s authenticating declaration should be denied.

**B. Frito-Lay’s Reliance on Dated Market Analysis Does Not Raise a Triable Fact Issue**

Ignoring the market share data presented in the SPINS reports, Frito-Lay instead cites an outdated, *decade-old* marketing presentation delivered by The Leading Edge to Real Foods (an Australian company) to help Real Foods’ redesign its marketing strategy at the time it was a relatively new entrant to the U.S. market. FL App. 3147. Real Foods cannot attest to the accuracy of the data presented by The Leading Edge, or to the methodology deployed in deriving that data, and it is so dated as to provide little value in the case at hand. For example, Real Foods sales have nearly doubled from those it had at the time the Leading Edge report was generated. Pels Supp. Dec 1. Even if it is credited with any value, according to the presentation, Quaker Oats was the only brand in the “primary tier,” dominating the aggregate rice/popped corn cake market. Real Foods’ brand recognition, at the time the presentation was created, was comparable to that of *all the rest of the* competition (including Quaker Oats-owned Mother’s brand) in the “second tier” of the combined rice/corn cake mass market. *Id.* at 2832. The ten year old presentation does not raise a triable fact issue.

**C. Frito Lay’s Secondary Meaning Survey Is Inadmissible**

Frito-Lay’s secondary meaning survey presented respondents—none of whom were screened for their purchase of popped corn cakes—with a very large photograph of the (unlabeled) product. In failing to screen for popped corn cakes purchasers, Cunningham neglected to include all segments of the relevant universe, *e.g.*, those consumers of CORN THINS-brand products who cannot or will not eat traditional crispbreads made with ingredients containing gluten. Accordingly, the universe of the Cunningham Survey was overbroad, rendering the survey of no value in assessing secondary meaning.

Even if it had included the right universe, Cunningham’s survey design was patently misleading and designed to produce the outcome desired by Frito-Lay. By presenting a photograph, and then asking the question “With respect to this **type of product shown above**, do you associate CORN THINS with one company, more than one company or don’t you know,” (emphasis added) the Cunningham survey question **directs** consumers to the **product type depicted** in the photograph, leaving consumers open to believing the question was asking with whom they associated the **product type** (rather than the **name**). One need only look at the *verbatim* answers of respondents, which repeatedly (and predictably) referred to whether the **types of product** shown in the photograph came from more than one company rather than whether the **name** CORN THINS did, to appreciate how flawed the survey design is. These responses included: “because some may taste better than the other;” “[m]any companies make these;” “I have seen the product under different types of brands;” “I have purchased several brands;” “[b]ecause I buy them and there are several brands.” Poret Dec. 9-10. Every one of these, and numerous other, *verbatim* answers indicate many respondents interpreted the question to ask whether they associate the product type depicted in the photo with one company or more than one company.<sup>3</sup> In attempting to justify this flawed design, Frito-Lay relies upon a hypothetical credited to Vincent Palladino which is so nonsensical it can have no application to *any* secondary meaning survey design. FL Br. 24. In that hypothetical, respondents are shown baking powder and asked if they associate the term ROYAL with one or more than one company. The term ROYAL as applied to baking powder is arbitrary, which begs the question as to why secondary meaning would need to be assessed. Only when there is an issue as to whether a designation is descriptive as applied to the goods is it relevant to assess secondary meaning and whether the designation functions as a source identifier. Cunningham’s survey is so flawed as to be inadmissible.

### **III. FRITO-LAY HAS ESTABLISHED NO TRIABLE ISSUE OF FACT WITH RESPECT TO GENERICNESS**

Frito-Lay wrongly insists that the genus of Applicant's goods is “crackers.” FL Br. 6. As set forth in Applicant’s amended identification, the subject of its September 2, 2014 motion, the goods in

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<sup>3</sup> Cunningham’s survey also suffers from numerous other flaws as set forth more fully in the Declaration of Hal Poret submitted with Real Foods’ motion, and the survey therefore should be accorded no weight.

question are crispbreads, *namely popped corn cakes and rice cakes*. TTABVUE No. 14. Nowhere in this identification does the term “crackers” appear. Real Foods’ products are, unlike crackers, not flat and not comprised of ground ingredients; they are composed of whole popped/puffed grains and are much thicker than crackers, different in composition and texture, and packaged differently. Pels Dec. 3. Real Foods itself advertises its products as “not quite like anything you've tried before.” FL App. 2892. It also states: “It’s easier to explain what to do with it, than explain what it is.” *Id.* Thus, Real Foods states its products may be used in a similar way or as an alternative to other categories of goods—*e.g.* tortilla chips, bread, or crackers. FL App. 2888-89. This is because its gluten-free customers cannot or will not eat any of those other products which are traditionally made with ingredients containing gluten. That, however, does not make Applicant’s products the same as or in the same genus as these goods, which clearly span more than one product category. Moreover, Frito-Lay’s assertion that consumers take away that the products are crackers is unsupported by the “evidence” it cites. *See e.g.*, FL App. 3045 (consumer uses “cracker” in quotation marks), 2984, RF App. 40 (Chinese website refers to corn crackers) *and compare with* FL App. 2913 (CORN THIN products are like “rice cakes”), 3053 (eat CORN THINS cakes “*instead of bread or crackers*”). Despite Frito-Lay’s insistence on ignoring the plain facts, the proper genus is not crackers, bread, tortilla chips or any other product for which CORN THINS and RICE THINS cakes have been marketed as an alternative. The genus is popped corn cakes and rice cakes.

**A. Frito-Lay’s Reliance on Third Party Usage Is Not Probative of Genericness**

Frito-Lay presents the Board with a veritable mountain of irrelevant third party usage. Not one of these references is to the use of CORN THINS on *any* food product being sold in the United States, including popped corn cakes, and none are references to use of RICE THINS in the U.S. for rice cakes. This is, quite simply, because Real Foods is the exclusive user of CORN THINS and RICE THINS for popped corn and rice cakes, respectively. Pels Dec. 1-2, 10. The remaining uses fall within four broad categories: (i) registrations and prosecution records showing disclaimer of the term “thins” in various marks (FL App. 359-1649); (ii) use of CORN THINS or RICE THINS outside the U.S. (*Id.* 30-32; 34-36;

38-41; 47-50; 52-54) (iii) the use of THINS on food products that are not popped corn or rice cakes (*Id.* 15-28; 55-358) and (iv) the use of “thin” on products by Frito-Lay and third parties in the overwhelming majority of cases as an adjective to describe the goods and always in connection with unrelated goods including some “obsolete” Frito-Lay packaging (*see, e.g., id.* 3312-53, 3354-3457).

Frito-Lay has not established a triable issue of fact arising from the first category—a subset of prosecution records for marks including the designation THINS. Though many of the registrations cited by Frito-Lay disclaim the term THINS, several cited registrations are ones where THINS is not disclaimed. *See* FL Br. 7 (citing VEGETABLE THINS, BARKTHINS, WHEAT THINS, STONED WHEAT THINS, NUT-THINS). Further, Frito-Lay’s selection of these records excludes numerous valid and subsisting registrations that do *not* disclaim the term THINS. RF App. 3-4, 44-72. Accordingly, when considered in their entirety, the records demonstrate that the PTO properly considers the distinctiveness of the term THINS on a case by case basis in the context of the designation in which it is used. For example, many of the registration and prosecution records relied upon by Frito-Lay relate to baked goods that were sliced to produce the resultant product and *not* to an ingredient name (*e.g.* Muffin Thins, Cupcake Thins, Brownie Thins, Cake Thins, Cookie Thins, Bagel Thins). The remainder (*see* FL Br. 9) combine arbitrary or fanciful terms with the term THINS. In the end, examination of PTO records demonstrates only that, consistent with the Board’s 2012 pronouncement on the subject, in numerous instances THINS can carry a mark and that the Board should consider this case on its own merits. *See In re Grupo Bimbo, S.A.B. de CV*, Serial No. 77798364, Slip Op. at pp. 12-13 (TTAB, Aug. 10, 2012).

Likewise, the second category upon which Frito-Lay relies does not establish a triable fact issue. This category includes uses of CORN THINS outside the U.S. by Rude Health (located in the UK) and CORN CAKE THINS by Pure Harvest (located in Australia). RF App. 33-38. Since this proceeding relates to U.S. rights in the marks CORN THINS and RICE THINS, the Board should not consider this third party use. The third category upon which Frito-Lay relies relates to the use of THINS in connection with goods that are *not* rice cakes and popped corn cakes, and is for this reason obviously not probative here. FL App. 16-27, 56-358, 3175, 3475-95. Finally, with respect to the fourth category, Real Foods

does not take issue with, nor is this case about, whether third-parties can use the adjective “thin” to describe its goods; such usage is irrelevant to the issues at hand.

**B. Frito-Lay’s Genericness “Research Expert” Report Has No Probative Value**

As he concedes in his most recent submission, Frito-Lay expert Robert Frank was instructed to “conduct research of THINS by itself” and *not* CORN THINS or RICE THINS. FL App. 1713. Therefore his report (and the plethora of documents he has submitted with it) utterly fail to address whether CORN THINS and RICE THINS function as source identifiers. Indeed, the only references to CORN THINS Frank finds are to Real Foods’ products. FL App. 1762, 1780. Moreover, he makes numerous confusing legal conclusions and opinions about the results of his “research” that demonstrate that he is patently unqualified, as Jessie Roberts sets forth in her rebuttal report. Roberts Dec. 3.<sup>4</sup>

**C. Frito-Lay’s Cited “Comments” Are Not Probative of Genericness**

Frito-Lay relies upon “comments” on Real Foods’ products in informal communications media (*e.g.* emails, blogs) for its incorrect assertion that Real Foods, consumers, other food companies and retailers and distributors, “have used the terms [CORN THINS] generically.” A close examination of the “evidence” upon which Frito-Lay relies discloses that Frito-Lay is grossly mischaracterizing these “comments.” Out of the hundreds of emails between Real Foods’ employees and consumers, Frito-Lay singles out *three* and blatantly exaggerates their significance.<sup>5</sup> Moreover, the consumer/retailer/distributor “comments” relied upon by Frito-Lay are only small subset of the thousands

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<sup>4</sup> Frito-Lay seeks to exclude Jessie Roberts’ report on the grounds it is comprised of legal opinions. However, Frito-Lay’s characterization of Ms. Roberts, and her role in rebutting Frank’s report, is misleading and false. Ms. Roberts is Managing Partner of a consulting firm—not a law firm—and has the requisite technical background to evaluate Frank’s conclusions about PTO practice. Among other things, she was a high level PTO administrator specializing in identification; assigned to examine applications covering the classes in issue; and the editor for two decades of the Acceptable Identification of Goods and Services Manual. She is uniquely qualified to render an expert rebuttal of the Frank report.

<sup>5</sup> For example, in one instance, a *single* employee of Real Foods merely attempted to convey, to a *single* consumer, the caloric content of a slice, explaining that a slice meant one of the Corn Thins products. Frito-Lay multiplies this single email exchange to refer to “employees” and “customers.” FL Br. 10. In another example, Frito-Lay repeatedly cites the words “Golden Corn Thins With Real Flavoring” on a *single, discontinued Real Foods package*, neglecting to note that CORN THINS appears prominently on the package, and the category name “popped corn cakes” *appears immediately above* the cited words. FL App. 2799, 3012, 3022.

of pages of emails that Real Foods produced. Further, use of the marks CORN THINS and RICE THINS in the emails on which Frito-Lay relies is not probative of the marks' genericness. *See, e.g.*, FL App. 2903, 2914, 2988, 3055 (using "corn thins" *and* "Corn Thins"); 2998 (retailer refers to "real foods" in lower case letters); 2994, 3000 (using all lower case letters or improper capitalization); 2903, 2909, 3017, 3021, 3053, 3084, 3087 (product category correctly distinguished from brand). Moreover, in as many if not more instances as those selected by Frito-Lay, Real Foods, consumers, retailers and distributors *do* correctly refer to Real Foods' brand names and distinguish the brands from the product category. *See id.*; RF App. 73-103 ("your Corn Thins product;" "range of Corn Thins;" "received your Corn Thins product;" "your Corn Thins Samples;" "sample packet of your product, Corn Thins;" "[t]hese corn cakes are the best;" "found your corn cakes;" "samples of Corn Thins;" and "Corn Thins products.>").

In fact, Real Foods' and consumers' use of the brands CORN THINS and RICE THINS are no different from that of other snack food brand owners and their customers on informal electronic communications platforms which could be construed to refer to their products as things to eat rather than brands, using the brand names in the singular rather than plural or *vice versa*, using lower case letters for brand names or deploying erratic capitalization and spelling of brand names. RF App. 5-6, 105-28. In the end, it is impossible to reach a conclusion that a handful of such "comments" raise any fact issue about the primary significance of CORN THINS or RICE THINS as brands or common names. Indeed, the inconclusiveness of this sort of evidence is precisely why surveys on genericness are conducted—to directly test for whether consumers primarily regard terms such as CORN THINS and RICE THINS as brand names or category names.

**D. Real Foods' Survey Establishes that CORN THINS is Not Generic**

In support of its summary judgment motion, Real Foods submitted a survey conducted by Sarah Butler. That survey (the "NERA Survey") found that 52 percent of past or prospective purchasers of popped corn cakes, and 62 percent of those with an opinion, identified CORN THINS as a brand name, not a common name. RF App. 139. Frito-Lay did not submit any survey on genericness. Thus, Ms. Butler's survey has not been rebutted with any empirical evidence of consumer perception on the issue of



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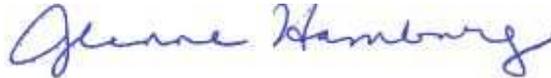
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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015 a copy of the foregoing APPLICANT'S REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT/OPPOSITION TO CROSS-MOTION ON INHERENT DISTINCTIVENESS and its attached evidentiary appendix was served via overnight courier in an envelope addressed to the attorneys for Opposer as follows:

William G. Barber  
Pirkey Barber PLLC  
600 Congress Avenue, Suite 2120  
Austin, TX 78701



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Jeanne Hamburg