

ESTTA Tracking number: **ESTTA568470**

Filing date: **11/01/2013**

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

Proceeding	91212680
Party	Plaintiff Frito-Lay North America, Inc.
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Date	11/01/2013
Attachments	Amended Notice of Opposition (FRIT030).pdf(411258 bytes)

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

In the Matter of Trademark Application
Serial No. 85/820,051
Mark: RICE THINS

FRITO-LAY NORTH AMERICA, INC.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91212680
	§	
REAL FOODS PTY LTD,	§	
	§	
Applicant.	§	

AMENDED NOTICE OF OPPOSITION

Frito-Lay North America, Inc., a Delaware corporation, having a place of business at 7701 Legacy Drive, Plano, TX 75024, hereby opposes the application of Real Foods Pty Ltd (hereinafter "Applicant"), an Australian proprietary limited company, pursuant to 37 CFR § 2.104(a), for an application to register RICE THINS ("the Application"), U.S. Application Serial No. 85820051, in Class 30.

As grounds for opposition, Opposer states:

1. Frito-Lay North America, Inc., through its predecessors in interest and title, and through its related companies, divisions and/or licensees (hereinafter individually and/or collectively referred to as "Opposer"), has been engaged in the manufacture and sale of snack foods for over fifty years and is now one of the largest manufacturers of snack foods in the United States.

2. Opposer's snack foods, including a variety of crackers and crisp breads, are marketed and sold in tremendous quantities on a nationwide basis, supported by many millions of dollars of advertising and promotion each year. Opposer's snack foods

are sold in almost every supermarket in the United States as well as in numerous convenience stores, vending machines, mass merchandise stores, schools and other outlets.

3. Opposer has manufactured snack foods for well over 50 years. Opposer has expanded its product lines to identify other snack food styles, flavors and shapes, manufactured and sold exclusively by Opposer.

4. Applicant's RICE THINS mark was published for "crispbread slices primarily made of rice" in International Class 30.

COUNT I: GENERICNESS

5. The word RICE is a generic term for the primary ingredient in Applicant's goods.

6. Applicant disclaimed the generic and descriptive wording RICE from the Application.

7. The word THINS is a generic term for crispbread slices, crackers, and related goods.

8. The word THINS is a very common word used by the public and other food manufacturers to describe thinly sliced or thin-shaped food products.

9. On information and belief, the word THINS is frequently disclaimed on the Principal Register from applications and registrations of marks that include the word THINS for food products. Applicant did not disclaim THINS in the application.

10. Applicant's alleged mark RICE THINS, created by joining the individually generic words RICE and THINS, immediately and unequivocally describes the purpose, function, and nature of Applicant's goods. The compound term RICE THINS merely combines the primary ingredient of Applicant's goods with their shape.

11. Joining the individual generic words RICE and THINS into one compound term lends no additional meaning to the term RICE THINS. Instead, the separate generic

words RICE and THINS retain their generic significance when joined to form a compound term that has a meaning identical to the meaning common usage would ascribe to those words as a compound.

12. Applicant's alleged mark RICE THINS is a generic name for Applicant's goods, and thus is not registrable on the Principal Register or the Supplemental Register. See *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ 2d 1110 (Fed. Cir. 1987).

COUNT II: TRADEMARK INCAPABILITY

13. Alternatively, even if Applicant's alleged mark were not generic, the term RICE THINS is so highly descriptive of Applicant's goods as to be incapable of acquiring distinctiveness as a trademark. Thus, Applicant's alleged mark is not registrable on the Principal Register or the Supplemental Register. See *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ 2d 1056 (Fed. Cir. 1999); *In re Wm. B. Coleman Co.*, 93 USPQ 2d 2019 (TTAB 2010).

COUNT III: MERE DESCRIPTIVENESS

14. Alternatively, registration of the Application is barred by Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), because Applicant seeks to register a mark that is merely descriptive of the goods inasmuch as it describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

15. The entirety of Applicant's mark describes a characteristic and appearance of the goods, in that RICE THINS describes thin slices of crispbread made of rice.

16. Applicant's alleged mark consists of a combination of two descriptive words that does not evoke a new and unique commercial impression. The component words, RICE and THINS, each retain their descriptive significance in relation to the goods, so the combination results in a composite that is itself descriptive. See *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004)

17. Applicant has not provided proof that the mark has acquired distinctiveness as applied to THINS used on Applicant's goods in commerce and therefore is not registrable on the Principal Register under §2(f) of the Trademark Act, 15 U.S.C. §1052(f).

18. Registration of the Application would provide color of *prima facie* exclusive rights to Applicant to use the mark and phrase. Therefore, allowing registration of Applicant's mark is a source of damage and injury to Opposer inasmuch as it would preclude Opposer from using the same or similar descriptive wording or phrasing in its advertising for snack food products. See *In re Abcor Development Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978) (descriptive marks should not be registered in order to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products).

19. Registration of the Application should be refused in order to maintain freedom of the public and Opposer to use the generic and descriptive language included in the Application that is necessary to advertise and properly describe Opposer's own products. See *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 543-44 (1920).

WHEREFORE, for the reasons set forth above, Opposer prays that the Application be rejected, and that registration of the Application be denied and refused.

Respectfully submitted,

Date: November 1, 2013

By: /WGB/

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ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing AMENDED NOTICE OF OPPOSITION was served on counsel for Applicant on November 1, 2013, by sending same via First Class mail, postage prepaid, to the counsel of record:

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