

ESTTA Tracking number: **ESTTA723766**

Filing date: **01/29/2016**

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

Proceeding	91212680
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Date	01/29/2016
Attachments	145845.PDF(203998 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In the Matter of Trademark Application
Serial No. 79111074 for CORN THINS and
Serial No. 85820051 for RICE THINS

FRITO-LAY NORTH AMERICA, INC.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91212680 (Parent)
	§	Opposition No. 91213587
REAL FOODS PTY LTD.,	§	
	§	
Applicant.	§	

OPPOSER'S SUPPLEMENTAL REPLY BRIEF

Cutting through Applicant's inflammatory rhetoric and aspersions, its supplemental brief primarily consists of the building up and the taking down of strawmen.

I. Rice cakes and popped corn cakes are kinds of crispbread slices and crackers

Opposer first addresses Applicant's arguments concerning the genus of the goods. Applicant first builds a strawman, erroneously asserting that Opposer took the position that Applicant's goods are not rice cakes and popped corn cakes, and then tries to distance itself from the identification of goods in its own applications by suggesting that its goods are not really "crispbreads." 73 TTABVUE 8. Contrary to Applicant's mischaracterizations, Opposer does not dispute that Applicant's goods are popped corn cakes and rice cakes. Further, no one disputes that the Board can rely on evidence to determine the genus and not just the goods descriptions in the applications. Instead, the dispute centers on whether popped corn cakes and rice cakes belong to the wider categories of crispbread slices and crackers.

Applicant conceded that “popped corn cakes” and “rice cakes” belong to the crispbread genus by its own motions to amend.¹ The use of a “namely” construction in the proposed amended goods necessarily indicates that “crispbread slices” is a larger genus being narrowed to the smaller genus of “popped corn cakes” and “rice cakes.” *See* TMEP § 1402.03(a) (noting that “namely” indicates a narrowing from a larger group to a smaller part within that group). Moreover, the evidence shows that crispbreads are crackers and that Applicant has continually called its products crispbreads and crackers, both on its packaging and its advertising to consumers that the goods are “popped corn cakes” and “rice cakes.” *See* discussion at 47 TTABVUE 7. Thus, the evidence and admissions in the record indisputably show that popped corn and rice cakes are kinds of crispbread and, thus, kinds of crackers. Applicant’s position, by contrast, ignores its prior statements, and tries to focus solely on the times it only said “popped corn cakes” and “rice cakes.”

Besides mischaracterizing the record, Applicant’s position also leads to factual and legal contradictions. The use of “crispbread” cannot be merely an artifact of the Madrid Protocol extension of protection as Applicant claims; otherwise, “popped corn cakes” and “rice cakes” would not be narrowing amendments but instead would broaden the description by transforming the applied-for genus into a new genus, in violation of 37 C.F.R. § 2.71(a). Further, if popped corn and rice cakes were not types of crispbread slices, the result would be that Applicant never used or intended to use its purported marks for the original goods identified in the applications, rendering them void *ab initio*. Given that Applicant is the proponent of the identifications of

¹ Applicant seeks to amend the identification of goods in Ser. No. 79111074 from “crispbread slices predominantly of corn” to “crispbread slices predominantly of corn, **namely popped corn cakes**,” and in Ser. No. 85820051 from “crispbread slices primarily made of rice” to “crispbread slices primarily made of rice, **namely rice cakes**.”

goods in both the motion to amend and the original applications themselves, the Board should not countenance its attempt to play fast and loose with the genus of its goods.

In addition to the legal inconsistency of Applicant's position, it is also refuted by the record and the evidence:

- Only one of the applications (CORN THIS) relies on the Madrid Protocol as the application basis; the other (RICE THIS) is based on domestic use in commerce and likewise unabashedly uses "crispbread" in the identification of goods.
- If "crispbread" was merely a Madrid Protocol artifact rather than a super-genus, then Applicant would not have advertised identified and its products as crispbread and crackers to U.S. consumers, and consumers would not have identified the products as crackers or as bread substitutes. *See* discussion at 47 TTABVUE 7.

For the sake of argument, let's ignore the original goods description and pretend that Applicant only applied to register these purported marks for "popped corn cakes" and "rice cakes" without any reference to crispbread. Even if those were the goods descriptions before the Board in this case (as Applicant misleadingly suggests), the Board should still find that those goods belong to the wider genus of crispbread slices and crackers given the evidence showing:

- Applicant's packaging called its goods crispbread:



(cited in discussion at 47 TTABVUE 7).

- Applicant advertised its goods as crispbread and crackers.
- Consumers recognize the goods as crackers and bread substitutes.

See discussion at 47 TTABVUE 7. The fact that Applicant moved to amend the designations to add “namely popped corn cakes” and “namely rice cakes” simply reinforces this conclusion.

II. Rejecting Applicant’s survey for one, or all, of its flaws is not inconsistent with *Princeton Vanguard*

Applicant’s second strawman is its attempt to recast Opposer’s position on Applicant’s proffered “Teflon” survey. Contrary to Applicant’s assertion, Opposer’s position is not that the Board should overlook the survey proffered by Applicant; rather the Board should explicitly consider and reject it, stating in its decision the plethora of reasons provided in the record and by law for its rejection:

- It is poorly designed and poorly implemented, per Dr. David Stewart’s analysis.
- It does not test a coined term for genericide, which is the purpose of the Teflon format as recognized by numerous courts of appeal. See, e.g., *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1536 n.1 (Fed. Cir. 2009) (noting that the Teflon format tests whether a mark “had become a generic (common) name through usage” (citing *E.I. DuPont de Nemours & Co v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 525-27, 185 USPQ 597 (E.D.N.Y. 1975))); see also *Hunt Masters Inc. v. Landry’s Seafood Rest., Inc.*, 240 F3d 251, 57 USPQ2d 1884, 1886 (4th Cir. 2001) (noting that surveys are used “to determine whether the term has become generic through common use”).

The Federal Circuit’s decision in *Princeton Vanguard* does not stand for the proposition that surveys are infallible evidence, or that Teflon surveys must always be considered persuasive in testing the meaning of generic compound terms. See *Princeton Vanguard, LLC v. Frito-Lay N.*

Am., Inc., 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (noting that “surveys *may*,” not must, “be a preferred method of proving genericness” (emphasis added) (quoting *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570, 35 USPQ2d 1554 (Fed. Cir. 1995))). Rather, the Court simply vacated and remanded the Board’s decision and indicated that the Board should give the reasons for accepting or rejecting the applicant’s survey on remand rather than omitting the reasons. *Princeton Vanguard*, 114 USPQ2d at 1834. The Court did not dictate what weight (if any) the Board should give to the applicant’s purported Teflon-style survey in that case, or even address whether such surveys are appropriate in cases where the purported mark is a combination of two generic terms, as opposed to a coined mark. The Court’s decision was completely silent on that issue. Thus, contrary to Applicant’s argument, the Court in *Princeton Vanguard* in no way held that the Board must give significant (or even any) weight to a Teflon survey like the one Applicant here has submitted in these types of cases. Instead, when presented with a genericness survey, the Board is free to accept or reject it, provided that it articulates the reasons for doing so.

Furthermore, Applicant’s attempt to distinguish, in a half page footnote (73 TTABVUE 6), the persuasive cases from circuit courts showing the impropriety of genericness surveys in cases like the one at bar falls flat. Applicant’s argument that the specific survey format was not identified in the courts’ decisions would only make sense if the courts criticized the surveys for design flaws, but that is not what they did. Rather, the courts criticized the surveys for attempting to test the meaning of purported marks made of terms in common usage. *See, e.g., Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 203 USPQ 642, 647 (7th Cir. 1979). It does not matter whether the surveys were Teflon-style, Thermos-style, or some other unspecified experimental format; what matters is that in each of those cases the proponent presented a survey

ostensibly designed to test what the designation meant to consumers, and each court criticized the party for doing so given that the designations were not coined but made up of common words. Common usage includes familiar English words, *e.g.*, *Jos. Schlitz*, 203 USPQ at 647 (noting inapplicability of surveys to “lite,” a basic word in the English language), as well as words commonly used by others before the proponent. *See, e.g., Schwan’s IP LLC v. Kraft Pizza Co.*, 460 F.3d 971, 79 USPQ2d 1790, 1793-94 (noting that “brick oven” was in use by others prior to the proponent and that using a survey to prove meaning was unnecessary); *Hunt Masters*, 57 USPQ2d at 1885-86 (noting that “crab” and “house” had common meanings and that because “crab house” was not a coined term like “asprin,” “teflon,” or “thermos,” using a survey to prove meaning was wrongheaded). Those criticisms apply exactly to this situation: putting aside its failure to create a competent Teflon survey, Applicant is holding up the survey as some silver bullet despite the fact that it too tests designations made up of either basic words in the English language or words long in use before Applicant’s own use (“corn,” “rice,” and “thins”). Applicant’s remaining attempts to distinguish these cases (i.e. that they involved common law rights or disclaimed terms) in no way detract from the courts’ crucial criticism that the designations at issue were composed of common terms in use by others. The Board should reject Applicant’s misguided attempts to explain away these cases.

III. “Corn thins” and “rice thins” as a whole are generic

Another strawman argument presented by Applicant is that Opposer focuses in this case only on evidence of the generic meaning of the terms “corn,” “rice,” and “thins” individually, improperly dismissing evidence regarding the public perception of the designations “corn thins” and “rice thins” as a whole. That is not true. In addition to the overwhelming evidence showing the generic use and meaning of these individual terms, *see* discussion at 47 TTABVue 7-9,

Opposer has also introduced significant evidence showing the generic use and meaning of “corn thins” and “rice thins” as a whole. For example:

- Applicant has used the compound terms generically in its advertising.
- Applicant used the compound terms generically when discussing serving size and nutrition.
- Applicant’s customers use the compound terms generically.
- Competitors use the compound terms generically.

See discussion at 47 TTABVUE 10-12. Thus, the evidence shows both the meaning of the terms individually and the meaning of the terms as a whole, contrary to Applicant’s mischaracterizations.

In an attempt to salvage its Google search evidence, Applicant tries to distinguish *In re Greenliant Systems*, 97 USPQ2d 1078 (TTAB 2010), by arguing that RICE THINS and CORN THINS somehow have a more unique impression than combining NAND and DRIVE into NANDRIVE. 73 TTABVUE 8. This distinction is not only meritless² but also a red herring that does not address the Board’s treatment of the Internet searches, in which it focused not on the grammatical construction of the purported mark but rather the fact that “applicant may be the only user of the compound term NANDRIVE,” thus holding that the search was “heavily skewed” with articles referencing the applicant and/or its product. *Greenliant*, 97 USPQ2d at 1083-84. Similarly here, Applicant claims it “is the only party to use these designations in connection with sales in the U.S. of popped corn and rice cakes,” 73 TTABVUE 6 n.2, and thus its Internet evidence is just as skewed and unpersuasive as the Internet evidence in *Greenliant*.

² If anything, the use of CORN, RICE, and THINS in their ordinary senses with just a space between them is less distinctive than combining terms with a shared letter together.

IV. The term “thins” is generic (and thus properly refused or disclaimed in registrations covering crackers and cracker-type products)

Applicant appears to believe that the term THINS is generic or descriptive and thus properly refused or disclaimed only where the other word in the mark is a product capable of being sliced thinly. Thus, according to Applicant, it was proper for the USPTO to refuse registration or require a disclaimer for the marks BAGEL THINS, CUPCAKE THINS, BROWNIE THINS, and CAKE THINS because bagels, cupcakes, brownies and cakes can be sliced thinly, but THINS should not be disclaimed in marks like COFFEE THINS, CINNAMON THINS, and WHEAT THINS because coffee, cinnamon, and wheat cannot be sliced thinly. 73 TTABVUE 10. But Applicant misses the point. The evidence in this case overwhelmingly shows that “thins” is used and understood to be a generic term for crackers and cracker-like products such as Applicant’s crispbread slices, regardless of whether or not rice and corn can be sliced thinly. Thus, the term “thins” is generic and completely incapable of creating or adding any distinctiveness within Applicant’s purported marks.³

V. Applicant fails to distinguish the applicable precedents regarding trademark incapability

In Opposer’s Supplemental Brief, we argued in the alternative that the terms “corn thins” and “rice thins,” even if not found to be generic, are so highly descriptive of Applicant’s goods that they are incapable of acquiring distinctiveness as a mark, citing *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (denying registration of the highly laudatory phrase “The Best Beer in America”) and *In re Wm. B. Coleman Co.*, 93 USPQ2d 2019 (TTAB 2010) (denying registration of “Electric Candle Company”). Applicant’s only attempt to distinguish these cases is its meritless argument that RICE THINS and CORN THINS are

³ Applicant has already disclaimed the generic terms CORN and RICE in its applications.

suggestive as applied to rice cakes and popped corn cakes. 73 TTABVUE 12. Thus, Applicant has effectively conceded this issue if the Board finds that these terms are not suggestive. Because the evidence overwhelmingly shows that these terms are not suggestive of Applicant's goods as Applicant argues, the Board should hold that they are legally incapable of distinguishing Applicant's goods pursuant to these controlling precedents that Applicant fails to distinguish on any other basis.

VI. Conclusion

Applicant's desperate attempts to sway the Board with rhetoric, aspersions, and strawmen arguments cannot withstand scrutiny and should be rejected. The evidence shows that the terms Applicant seeks to register, "corn thins" and "rice thins," are generic or so highly descriptive of its goods that they cannot be registered and in any event have not acquired a secondary meaning in the marketplace. The applications should be refused.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that today, January 29, 2016, I served a copy of the foregoing OPPOSER'S SUPPLEMENTAL REPLY BRIEF by sending it via First Class Mail, postage prepaid, to counsel for Applicant at the address below:

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