

This Opinion is Not a
Precedent of the TTAB

Mailed: September 24, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Frito-Lay North America, Inc.

v.

Real Foods Pty. Ltd.
—

Opposition No. 91212680

Opposition No. 91213587

ON REMAND
—

William G. Barber and Paul Madrid of Pirkey Barber PLLC, for Frito-Lay North America, Inc.

Bruce S. Londa, Jeanne M. Hamburg and Ami Bhatt of Norris McLaughlin & Marcus P.A., for Real Foods Pty. Ltd.

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Before Zervas, Kuhlke and Mermelstein,
Administrative Trademark Judges.¹

Opinion by Zervas, Administrative Trademark Judge:

Real Foods Pty. Ltd. (“Applicant”) filed the following two applications on the Principal Register for standard character marks:

¹ Judge Masiello who participated in our original decision in this consolidated opposition proceeding has retired from Federal service. Judge Kuhlke has been substituted for Judge Masiello.

- Application Serial No. 79111074² for CORN THINS filed on January 19, 2012, for “crispbread slices predominantly of corn” in International Class 30, based on a request for extension of protection filed under Section 66(a) of the Trademark Act of 1946, 15 U.S.C. § 1141f(a); and
- Application Serial No. 85820051³ for RICE THINS filed on January 10, 2013, for “crispbread slices primarily made of rice” in International Class 30, based on Section 1(a) of the Trademark Act, 15, U.S.C. § 1051(a), and claiming first use and first use in commerce in 2007.

The terms CORN and RICE have been disclaimed in the respective applications.

In the respective amended notices of opposition, Frito-Lay North America, Inc. (“Opposer”) alleges that RICE THINS and CORN THINS are (i) generic names for Applicant’s respective goods; (ii) so highly descriptive of Applicant’s goods as to be incapable of acquiring distinctiveness; and (iii) merely descriptive of thin slices of crispbread made of rice or corn, as the case may be, and Applicant has not provided proof that THINS has acquired distinctiveness.⁴

On February 21, 2017, the Board issued a decision (the “prior decision”) in which it inter alia granted Applicant’s pending motion to amend the identification of goods in the CORN THINS application from “crispbread slices predominantly of corn” to “crispbread slices predominantly of corn, namely popped corn cakes” and granted Applicant’s motion to amend the identification of goods in the RICE THINS application from “crispbread slices primarily made of rice” to “crispbread slices primarily made of rice, namely rice cakes.” Applicant explained, “after

² Application Serial No. 79111074 is the subject of Opposition No. 91213587.

³ Application Serial No. 85820051 is the subject of Opposition No. 91212680.

⁴ 6 TTABVUE.

commencement of this proceeding, Real Foods [Applicant] 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).”⁵ Applicant is an Australian company and the application for CORN THINS is based on an Australian registration. In granting the motion, the Board cited Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a), and referenced Opposer’s statement in its brief that “the evidence and admissions in the record indisputably show that popped corn and rice cakes are kinds of crispbread.” In addition, the Board dismissed Opposer’s claims of genericness and incapability of acquiring distinctiveness as a trademark, and sustained the oppositions on the ground that the proposed marks are merely descriptive and have not acquired distinctiveness.

On appeal, the Court of Appeals for the Federal Circuit affirmed the Board’s conclusions that (i) the marks are highly descriptive (“the TTAB properly considered the proposed marks in light of the record and adequately supported its finding that Real Foods’ marks are highly descriptive”), *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018), and (ii) Applicant has not demonstrated acquired distinctiveness (“the TTAB properly determined that Real Foods’ proposed marks have not acquired distinctiveness.”) *Id.* at 1379. The court, however, disagreed with the Board’s choice of genus in deciding Opposer’s genericness claim. The court stated:

While recognizing that the amendment narrowed the identification of goods, the TTAB failed to take into account in its determination of the genus under step one that the

⁵ 30 TTABVUE 10.

Applications show that popped corn cakes and rice cakes are types of crispbread slices, which, in turn, the record defines as types of crackers. *See Frito-Lay*, 2017 TTAB LEXIS 82, 2017 WL 914086, at *3 (relying on Frito-Lay’s concession that “the record indisputably show[s] that popped corn and rice cakes are kinds of crispbreads” to grant the Motion to Amend (emphasis added) (internal quotation marks and footnote omitted)); *see also* J.A. 94 (defining “crispbreads” as “plain dry unsweetened cracker[s] made from crushed grain”), 169 (defining, in an online dictionary, “crispbread” as “[a] kind of flat, dry bread or cracker”); *cf. In re Hotels.com, L.P.*, 573 F.3d 1300, 1303-04, 1306 (Fed. Cir. 2009) (relying on dictionary definitions to define an individual term within a mark).

This was error. As set forth in Real Foods’ Applications and the Motion to Amend, *see* J.A. 279, corn cakes and rice cakes are the species, not the genus, *see Two Pesos*, 505 U.S. at 768. In its Opinion, the TTAB failed to provide any reasoning for its conclusion that the narrowed identification of goods alone was the appropriate genus to use in its genericness analysis. The TTAB’s error in identifying the proper genus at step one, thereby affected its analysis at step two.

Real Foods, 128 USPQ2d at 1380. The court advised that “[h]ad the TTAB identified a broader genus of goods, such a determination might bear on, inter alia, the ubiquity with which the term thins is used for that genus and whether the mark ‘refers to a key aspect of the genus.’” *Id.* at n. 9 (citing *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1047 (Fed. Cir. 2018)). The court vacated-in-part and remanded our decision for further proceedings. The court directed, among other things, that the Board “reconsider its selected genus and conduct its genericness analysis in light of that genus.” *Id.* at 1380. Our analysis and conclusion on remand follows.⁶

⁶ The parties have not requested additional briefing on the issues raised by the court.

I. Genericness

The court stated that “[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark. Here, the opposer, Frito-Lay, bears the burden of proving that the term is generic.” *Id.* at 1374 (citations omitted). Opposer must do so by a preponderance of the evidence. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (“In an opposition or cancellation proceeding, the opposer or petitioner bears the burden of proving genericness by a preponderance of the evidence.”) (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d, 1750, 1761 (TTAB 2013), *aff’d*, 565 Fed. Appx. 900 (Fed. Cir. 2014)).

As we stated in our prior decision, there is a two-part test used to determine whether a designation is generic: (1) what is the genus of goods or services at issue; and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services. *H. Marvin Ginn Corp. v. Int’l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). The relevant public’s perception is the primary consideration in determining whether a term is generic. Trademark Act Section 14(3), 15 U.S.C. § 1064(3); *Loglan Inst. Inc. v. Logical Language Grp. Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence of the public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Id.* at 1533; *Dan Robbins & Assocs, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979). In addition, indirect evidence, including evidence “of

‘competitive use, evidence that other companies use [a term] in combination with their own . . . marks, third-party registrations[,] and applications for such combined marks,’ may be relevant for genericness.” *Real Foods*, 128 USPQ2d at 1375 (citing *Royal Crown*, 127 USPQ2d at 1048).

Further, and particularly pertinent to this case, “[a]ny term that the relevant public uses or understands to refer to the genus of goods, or a key aspect or subcategory of the genus, is generic.” *In re Twenty-Two Desserts, LLC*, 2019 USPQ2d 292782 (TTAB 2019) (holding that MALAI, the Hindi word for high fat cream, is a reference to a key aspect or a type of goods including ice cream) (citing *Royal Crown*, 127 USPQ2d at 1047 (“The Board ... must consider whether ZERO is generic because it refers to a key aspect of at least a sub-group or type of the claimed beverage goods.”)). “[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016); (holding CHURRASCOS, meaning a type of grilled meat, to be generic for restaurant services because it referred to a key aspect of those services).

a. The genus of the goods at issue

The genus of the goods is determined by focusing on the identification of goods in the subject applications. *Id.*; *Magic Wand*, 19 USPQ2d at 1552 (“[A] proper genericness inquiry focuses on the description of [goods] set forth in the certificate of registration.”); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1350 (TTAB 2013). We hence consider the genus in each application to be established by

the amended identifications of goods. Therefore, the specific genera in the two applications are, respectively, “crispbread slices predominantly of corn, namely popped corn cakes” and “crispbread slices primarily made of rice, namely rice cakes.” The court noted that the record describes a “crispbread slice” as a kind of cracker. *Real Foods*, 128 USPQ2d at 1377. We must therefore decide in the context of the broader genus of crispbread slices, which are a kind of cracker, whether:

- CORN THINS is a generic name for “crispbread slices predominantly of corn, namely popped corn cakes”; and
- RICE THINS is a generic name for “crispbread slices primarily made of rice, namely rice cakes.”⁷

b. The relevant public

The second part of the genericness test is whether the relevant public understands the designation primarily to refer to the genus. The relevant public for a genericness determination is the purchasing or consuming public for the identified goods. *Magic Wand*, 19 USPQ2d at 1553 (citing *In re Montrachet S.A.*, 878 F.2d 375, 11 USPQ2d 1393, 1394 (Fed. Cir. 1989); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *Marvin Ginn*, 228 USPQ at 530; *Dan Robbins & Assocs.*, 202 USPQ at 105). As we found in the prior decision,

⁷ Opposer states, “the evidence demonstrates that crispbreads are a sub-genus of crackers. ... Additionally, the evidence of record strongly indicates that THINS is used and understood as a generic term for a variety of crispbread and other cracker products.” 47 TTABVUE 16. Opposer considers “crispbread slices” to be a larger genus than “popped corn cakes” and “rice cakes,” and concludes that “the evidence and admissions in the record indisputably show that popped corn and rice cakes are kinds of crispbread and, thus, kinds of crackers. 72 TTABVUE 2.

the relevant public is the general consuming public who consume and eat the snack foods identified.⁸

c. Public perception

In our prior decision we first considered the individual terms in the proposed marks and then considered the proposed marks as a whole. *See Princeton Vanguard*, 114 USPQ2d at 1832-33 (“even in circumstances where the Board finds it useful to consider the public’s understanding of the individual words in a compound term as a first step in its analysis, the Board must then consider available record evidence of the public’s understanding of whether joining those individual words into one lends additional meaning to the mark as a whole.”); *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184 (TTAB 2017) (on remand) (“it may be appropriate ‘as a first step’ to analyze the constituent terms in the applied-for mark.” (citations omitted)). Because the court in *Real Foods* did not disapprove our analysis of the proposed marks, we follow the same approach.

The pertinent evidence as introduced by the parties into the record includes dictionary definitions of the components of the composite marks, uses of “thins,” “rice thins” and “corn thins” in websites and articles, Applicant’s promotional materials, third-party registrations and Internet search results. “Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Royal Crown*, 127 USPQ2d at 1046 (internal

⁸ The court did not comment on our identification of the relevant public.

quotation marks and citation omitted). We presume familiarity with the evidence of record, set forth in our prior decision.

In light of our redefined genus, however, we briefly revisit Applicant's online Teflon survey for genericness of the proposed CORN THINS mark. Applicant's survey expert, Sarah Butler, conducted a Teflon survey with a nationwide sample of adults aged 18 or older who were past or prospective purchasers of popped corn cakes. The survey was designed to evaluate the extent to which relevant consumers view CORN THINS as a brand name for a product. In our prior decision, we found that Applicant's Teflon survey was unnecessary for the disposition of Opposer's genericness claim and did not further consider it.

The Board's decision after remand in *Princeton Vanguard, supra*, issued after our prior decision in this case, addressed Teflon surveys in the context of a Board inter partes proceeding. The Board stated that "various courts have found that Teflon surveys are only appropriate to consider in a case where the question is whether a coined or arbitrary mark has become generic, and is not appropriate to prove recognition of an otherwise not inherently distinctive mark" and that "we agree with those circuit court decisions that Teflon surveys are not relevant when a term is not inherently distinctive." *Princeton Vanguard*, 124 USPQ2d at 1196. Because Applicant's marks are not inherently distinctive,⁹ the Teflon survey is not relevant, and we need not further consider Ms. Butler's survey.

⁹ See *Real Foods*, 128 USPQ2d at 1374 ("Substantial evidence supports the TTAB's finding that the proposed marks are highly descriptive.").

i. The Terms “Rice” and “Corn”

We stated in our prior decision that “corn” is defined as a “grain,” and “rice” is defined as “small white or brown grains that come from a Southeast Asian plant and that are used for food”; that the terms appear in the respective identifications of goods and identify the key or primary ingredients of the goods; and that the terms RICE and CORN are generic names of the respective key ingredients of the respective goods. 76 TTABVUE 28. The court in *Real Foods* did not disagree with these findings, and we see no reason to revisit them.

ii. The Term “Thins”

Turning to the public’s understanding of the term “thins,” *Real Foods* states “that had the Board identified a broader genus of goods, such a determination might bear on, inter alia, the ubiquity with which the term thins is used for that genus and whether the mark ‘refers to a key aspect of the genus.’”¹⁰ *Real Foods*, 128 USPQ2d 1380 n.9. In light of this instruction, we now consider “the ubiquity with which the term thins is used for” “crispbread slices predominantly of corn, namely popped corn cakes” and “crispbread slices primarily made of rice, namely rice cakes,” considering “crispbread” as a kind of cracker, and whether thins refers to a key aspect or subcategory of crispbread slices which are defined as a kind of cracker. We first

¹⁰ Our consideration of the evidence in our prior decision was not limited to the use of “thins” in connection with popped corn cakes and rice cakes, but included consideration of the use of “thins” on other goods such as cookies and crackers, as advocated by Opposer in its initial brief. *See, e.g.*, 47 TTABVUE 8. For example, we stated in the genericness section of the prior opinion, “[w]ith regard to the public’s understanding of the term ‘thins,’ we find that there is evidence of the term ‘thins’ used by consumers of Applicant’s goods to identify cracker products, and other food products which have a thin cross-section.” 76 TTABVUE 29.

consider the uses by competitors and third parties because *Real Food* specifically mentions those uses.

1. Competitor and third-party uses

Real Foods notes that “thins” has been used in marks for other similar snack food products, and that competitive use and use of a term by other companies in combination with their own marks may be relevant for genericness.¹¹ *Real Foods*, 128 USPQ2d at 1375. Indeed, “the cases have recognized that competitor use is evidence of genericness,” *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1558 (Fed. Cir. 1995), and that “evidence of competitors’ use of particular words as the name of their goods or services, is ... persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods or services.” *Phillip Morris Inc. v. Williamson Tobacco Corp.*, 230 USPQ 172, 176 (TTAB 1986). *See also Royal Crown*, 127 USPQ2d at 1048 (“evidence of competitive use” cited as supportive of genericness finding); *In re Nordic Naturals, Inc.*, 755 F.3d 1340, 1344, 111 USPQ2d 1495, 1498 (Fed. Cir. 2014) (evidence of third-party competing products described as “Children’s DHA” supported finding that the term was generic). However, evidence of third party use in the manner of a **trademark** is **not** necessarily probative of consumer recognition as possessing meaning which is

¹¹ Opposer’s expert, Dr. Robert M. Frank, included a chart summarizing 119 uses of “thins” with his expert report. 47 TTABVUE 348-350. Dr. Frank characterizes such uses obtained from magazines, newspapers, registered trademarks and the Internet as including (i) competitors marketing THINS products made with rice or corn; (ii) competitors marketing THINS products made with ingredients other than rice or corn; (iii) individuals who bake “thins” products (such as Lemon Thins or Chocolate Thins); and (iv) generic use of “thins” where the writer is simply describing a thin, crisp bakery product. 49 TTABVUE 347. The court referred to these uses in its decision.

generic. *Nobelle.com LLC v. Qwest Comm. Int. Inc.*, 66 USPQ2d 1300, 1306 (TTAB 2003) (“We see no legal or logical basis for finding that trademark or service mark use of a designation by competitors is probative evidence, under the second part of the *Ginn* test, that the relevant public regards the designation as being generic.”). Thus, we consider competitor and third-party uses of the term “thins” in their trademarks not as evidence of non-generic use of “thins” but as favoring neither party. But where such use is corroborated by non-trademark generic use by the same competitor or third party, we regard it as evidence of genericness. Of course, the competitive and third-party uses must be for goods which fall within the identified genus, namely, crispbread slices which are a kind of cracker and which, of course, excludes uses for breads, cookies and similar goods.

The competitor and third-party uses of “thins” for crispbread slices and crackers favoring Opposer are:

- www.backtonaturefoods.com¹² listing “Multi-Seed Gluten Free Rice Thins” as a category of crackers along with “Sunflower Basil” and “Classic Round”;
- Pepperidge Farm, listing “Chips, Crisps & Thins” as product options;¹³
- Nature Valley Granola Thins as a product category along with “Protein,” “Sweet & Salty Nut” and “Greek Yogurt Protein”;¹⁴ and
- www.gratifyfoods.com listing “Sea Salt Thins” as a product category along with “Sea Salt Sticks and Sea Salt

¹² 47 TTABVUE 42.

¹³ *Id.* at 244, 245.

¹⁴ *Id.* at 279.

Twists” and placing “SEA SALT THINS” in same location and lettering as “GLUTEN FREE PRETZELS.”¹⁵

2. Other uses

With regard to other uses of “thins” in connection with crispbread slices and crackers, in addition to the evidence in the record noted in our prior decision, we note the following:

- yummys.com webpages submitted with Mr. Frank’s report having a section devoted to “Baked Thins Recipes” as a heading. The identified recipes are for Spiced Thins, Almond Thins, Homemade Wheat Thins, Cheese Thins and Pistachio Thins.¹⁶
- uses of “thins” as a noun in many articles in connection with thin food products, and by many third-party producers of food items:

“Guiding a neighborhood’s appetite” - The New York Times (May 18, 2011):

Then she ate one of the baked potato **thins** she invented years ago, which are not a store favorite. “I don’t like frying,” she said. “I never did.”¹⁷

“Seder Invaders – Grandma Wouldn’t Recognize These 21st Century Passover Plates” - New York Post (Mar. 31, 2004):

The golden, super-crisp **thins** garnered an enthusiastic thumbs up from our office tasters, one of whom even gave the ultimate rave, “This doesn’t taste anything like matzo!”¹⁸

¹⁵ *Id.* at 364.

¹⁶ 49 TTABVUE 348 – 52.

¹⁷ *Id.* at 393.

¹⁸ *Id.* at 424.

“If You Need Some Crunch; Crispy Homemade Crackers Add a Little Snap to Dishes” - The Record (Bergen County, NJ):

Herbed sourdough **thins**

1 (15-inch) sourdough baguette (about ½ pound)

3 tablespoons each butter and olive oil[.]¹⁹

- uses of “thins” in trade magazines:

“Nonni’s Foods LLC has purchased Glendale, AR-based Villa Veneto Corporation, baker of La DolceVita brand of products” – The Food Institute Report (Jan. 14, 2013).

Nonni’s, the maker of biscotti and almond **thins**, is a portfolio company of Chicago-based WIND POINT PARTNERS.²⁰

“Nature Valley granola thins” – Candy Institute (Feb. 2012).

The **thins** are 100% natural, made with delicate, crispy toasted granola and dark chocolate.²¹

3. Conclusion regarding the term “thins”

We find that this third-party use evidence shows use of the term “thins” to refer to a product category. In addition, there is the evidence discussed in our prior decision regarding (i) Applicant’s own use of the term “thins” (including those identified in *Real Foods* as being used generically), (ii) the uses of “thins” in articles, magazines and on the Internet, and (iii) consumer uses of “thins.” All of this bears on the ubiquity of use of the term “thins” as a subcategory of crackers or crispbread slices and suggest

¹⁹ *Id.* at 432.

²⁰ *Id.* at 491.

²¹ *Id.* at 498.

that “thins” identifies a subcategory of crackers and crispbread slices. Thus, in consideration of the broader genus of goods in each application, *i.e.*, “crispbread slices predominantly of corn, namely popped corn cakes” and “crispbread slices primarily made of rice, namely rice cakes” (with “crispbread” defined as a kind of cracker), and their bearing “on, inter alia, the ubiquity with which the term thins is used for” each genus, *Real Foods*, 128 USPQ2d at 1380 n.9, we find that “thins” is a generic term for a subcategory of crispbread slices.

iii. “Corn Thins” and “Rice Thins” as Combined Terms

Having found that the individual components of the proposed marks are generic, we turn next to the proposed marks as a whole, *see Princeton Vanguard*, 114 USPQ2d at 1833-33,²² and consider “whether the mark ‘refers to a key aspect of the genus.’” *Real Foods*, 187 USPQ2d 1380 n.9.

Real Foods states as follows regarding the evidence concerning the combined terms “corn thins” and “rice thins”:

Not only does the record reveal that Real Foods has deployed the proposed marks as **generic** descriptors, *see, e.g.*, J.A. 5309 (referring, in Real Foods’ advertising material, to the product as “Delicious Golden Corn Thins With Real Flavoring,” with the term “Corn Thins” stylized the same as the rest of the phrase), 5319 (same), but purchasers of Real Foods’ products have also used these terms to describe Real Foods’ products, rather than as source identifiers for the products, which amounts to direct evidence of the “commercial impression” of the mark as a whole, *DuoProSS*, 695 F.3d at 1252; *see, e.g.*, J.A. 5288 (referring, by a potential customer, to “[Real Foods] corn

²² The redefined genus does not capture additional evidence; we did not exclude evidence in our prior decision on the basis that it did not concern the earlier, disapproved genera of “popped corn cakes” or “rice cakes.” If evidence was excluded in the prior decision, it was excluded for other reasons.

thins product”), 5318 (similar by an online distributor of Real Foods’ product).

Real Foods, 128 USPQ2d at 1376-77 (emphasis added).

The court has also stated that an applicant’s own advertising materials may be probative, and even “the most damaging evidence,” in indicating how the relevant public perceives a term — as an indicator of source or as generic. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1118-19 (Fed. Cir. 1987) (“Gould’s own submissions provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good’s source.”); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1958 (TTAB 2018) (finding Applicant’s website “admits that ‘floor-malted’ refers to a type of malt ... for brewing and distilling and that ‘floor-malting’ is a process performed by others”); *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544 (TTAB 2017) (Board considered applicant’s own website and promotional video in finding COFFEE FLOUR generic).

In our prior decision, we were not persuaded that the evidence pertaining to the combined terms reflected a genus of goods. We stated, “[m]uch of the evidence comes from Applicant rather than from actual purchasers of Applicant’s goods”; “many of the instances where Applicant’s consumers refer to ‘corn thins’ and ‘rice thins’ without initial capitalization are made in the context of a discussion of Applicant’s goods, so the lower case lettering does not indicate the authors are unaware of a single source for the goods”; “[o]ther instances reflect mixed upper-case and lower-case uses”; “[t]he reference in Applicant’s advertising to ‘1 Rice Thin’ is not strongly

indicative of genericness”; and “[t]he uses by wholesalers who are actual or prospective purchasers are more indicative of genericness, but still equivocal.”²³

Nevertheless, in view of the court’s comments on the evidence and our finding above that “thins” refers to a subcategory of crackers or crispbread slices, we reconsider the evidence.

First, we point out that there is little evidence of competitor or third-party use of “corn thins” and “rice thins” as combined terms.²⁴ The absence of competitor or third-party use, however, does not require a finding of non-genericness. If an applicant is the first to use a term, it may still be found to be generic. *See In re Mecca Growers*, 125 USPQ2d at 1959 (“Applicant may be the first to use the precise phrase ‘mechanically floor-malted’ to designate ‘[m]alt for brewing and distilling’ in International Class 31 and ‘[p]rocessing of agricultural grain.’ Applicant might even be the creator of a new mechanized process for producing floor malt. But whether this is true or not, this does not affect the generic nature of Applicant’s proposed mark. The record shows that the relevant public in this market will perceive the designation ‘mechanically floor-malted’ as the generic designation for such goods and services.”); *Sheetz of Del.*, 108 USPQ2d at 1362 (“Even if applicant was the first and/or sole user of a generic term or phrase, as it claims, that does not entitle applicant to register such a term or phrase as a mark.”); *see also In re Nordic Naturals*, 111 USPQ2d at 1498 (“[W]hile Nordic may have been the first to use the phrase ‘children’s DHA’ in

²³ 76 TTABVUE 30-31.

²⁴ *Real Foods* mentions competitor use of the term “thins” on other similar snack foods. *Real Foods*, 128 USPQ2d at 1375.

this market, the question remains, in light of Nordic's use and all other relevant uses, what does 'children's DHA' primarily mean to the relevant public? The evidence relied upon by the Board, and recited herein, constitutes sufficiently clear evidence that the relevant public uses 'children's DHA' primarily to refer to the category of DHA products for children.”).

Second, we point out that “[e]ven if each of the constituent words in a combination mark is generic, the combination is not generic unless the entire formulation does not add any meaning to the otherwise generic mark.” *In re Mecca Growers*, 125 USPQ2d at 1956 (quoting *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009)); *see also Cummins Engine Co. v. Cont. Motors Corp.*, 359 F.2d 892, 149 USPQ 559 (CCPA 1966) (“TURBODIESEL” generic for engines having exhaust driven turbine superchargers). The terms CORN, RICE and THINS retain their generic meaning when combined in both of the proposed marks.

Third, and most importantly, we find that consumer and wholesaler uses, and uses by Applicant, of “corn thins” and “rice thins” which are (i) “stylized the same as the rest of [other words in a] phrase,” (ii) discuss ingredients or flavoring of the goods, and (iii) include the article “the” before each term, are references to a subcategory of corn or rice crackers or crispbread slices and are not trademark uses. *See, e.g.*, “Flavored Corn Thins [in same font and size],” “your delicious corn thins,” “your sample corn thins,” “The Flavors they offer are Original[,] ... Multigrain[,] Sesame[,] Rice Thins”; “I had a multigrain corn thin with some peanut butter and banana slices”; “I couldn't wait to try out this corn thin because I love food with sesame seeds in them whether it's a bagel, crackers or corn thins!"; “original and flavored corn

thins,” “it’s fun to experiment with toppings on a whole corn thin,” “[i]f you are wondering what a corn thin is, think rice cake but thinner,” “your corn thins product,” “[w]e order corn thins from Azure foods,” “I’m interested in purchasing the corn thins for my store,” “the sesame corn thins,” “organic rice thins,” “BBQ or Cheese flavored corn thins,” “[o]riginal corn thins flax and soy corn thins multigrain corn thins sesame corn thins whole grain rice thins,” “flavors of corn thins,” “we found the rice thins a good sub for bread,” and “I will look for the rice thins.”²⁵

iv. Final Conclusion on Genericness

In view of the foregoing, we find that the combination of CORN THINS and rice THINS as a whole imparts no new meaning and that the relevant public will understand CORN THINS and RICE THINS to refer to a subcategory or key aspect of crackers, or “crispbread slices predominantly of corn, namely popped corn cakes” and “crispbread slices primarily made of rice, namely rice cakes,” respectively. CORN THINS and RICE THINS are, therefore, generic terms and are incapable of identifying the source of such products; purchasers will understand and will use such terms to refer to as a subcategory of crackers.

Decision on remand: Opposer’s claim of genericness is sustained in both applications.

²⁵ 49 TTABVUE 1366, 1367 and 1369; 50 TTABVUE 15, 16, 19, 25, 30, 99, 102, 109, 111, 113, 115, 119, 121, 131, 172 and 174.