

This Opinion is Not a
Precedent of the TTAB

Hearing: August 2, 2018

Mailed: August 17, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re GJ & AM, LLC
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Serial No. 86858003
—

David A Gottardo of David A. Gottardo, Attorney At Law,
for GJ & AM, LLC.

Charles H. Hiser, IV, Trademark Examining Attorney, Law Office 112,
Renee Servance, Managing Attorney.

—
Before Bergsman, Greenbaum and Goodman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

GJ & AM, LLC (“Applicant”) seeks registration on the Principal Register of the
mark COOKINPELLETS.COM (standard characters), for goods listed below:

Processed wood fuel in the nature of pellets for use in
barbecue grills, in Class 4; and

Downloadable mobile applications for advertising barbecue
grill fuels, in Class 9.¹

¹ Application Serial No. 86858003 was filed on December 27, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of its mark anywhere and in commerce on September 1, 2007 for the goods in Class 4 and first use of its mark anywhere and in commerce on March 1, 2012 for the goods in Class 9.

The Examining Attorney refused to register Applicant's mark for the goods in Class 4 on the grounds that the mark is generic and, if it is not generic, that it is merely descriptive and it has not acquired distinctiveness. Sections 1, 2(e)(1) and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052(e)(1), and 1127.

With respect to the goods in Class 9, the Trademark Examining Attorney refused registration on the grounds that it is merely descriptive pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and it has not acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and that the specimen of use does not show use of Applicant's mark in connection with the description of goods. Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§1051 and 1127; Trademark Rules 2.56 and 2.88(b)(2), 37 C.F.R. §§ 2.56 and 2.88(b)(2).

I. Preliminary Issue

As discussed below, numerous evidentiary exhibits are totally or partially illegible. It is the responsibility of the party making submissions to the Board via the electronic database to ensure that the evidence has, in fact, been properly made of record. Trademark Rule 2.126(a)(2), 37 C.F.R. § 2.126(a)(2) ("Exhibits pertaining to an electronic submission must be made electronically as an attachment to the submission and must be clear and legible."). See *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1350-51 (TTAB 2014); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 170, 1758 n.16 (TTAB 2013), *aff'd mem.*, 565 Fed. Appx. 900 (Fed. Cir. 2014) ("the onus is on the party making the submissions to ensure that, at a minimum, all materials are clearly

readable by the adverse party and the Board”); *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998) (“It is reasonable to assume that it is opposer’s responsibility to review the documents it submits as evidence to ensure that such submissions meet certain basic requirements, such as that they are legible and identified as to source and date.”). We have given illegible evidence probative value to the extent that we can read and understand what it says.

II. Whether COOKINPELLETS.COM is generic for “processed wood fuel in the nature of pellets for use in barbecue grills”?

A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Cola v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by clear and convincing evidence. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term to be protected to refer to the genus of goods or services in question.” *Royal Crown Cola*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530).

Our primary reviewing court has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? *Marvin Ginn*, 228 USPQ at 530. The relevant public’s perception is the chief consideration in

determining whether a term is generic. *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015). Evidence of the public's understanding of a term may be obtained from "any competent source, such as consumer surveys, dictionaries, newspapers and other publications." *Id.* at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)).

With respect to the first part of the *Marvin Ginn* inquiry, the genus may be defined by the goods identified in the application: "processed wood fuel in the nature of pellets for use in barbecue grills." *See In re Reed Elsevier Prods. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration). Applicant and the Examining Attorney agree that the proper genus is "processed wood fuel in the nature of pellets for use in barbecue grills."²

The second part of the *Marvin Ginn* test is whether the term sought to be registered is understood by the relevant public primarily to refer to that genus of goods. The relevant public is the purchasing public for the identified goods. *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). "Applicant agrees with the Examining Attorney's determination that 'the relevant public comprises consumers who purchase applicant's goods....'"³ In this case, the

² Applicant's Brief, p. 6 (8 TTABVUE 7); Examining Attorney's Brief (15 TTABVUE 6).

³ Applicant's Brief, p. 6 (8 TTABVUE 7). Applicant, did not submit any testimony or evidence estimating the size of the relevant consumers. However, Applicant asserts that there are

consumers who purchase “processed wood fuel in the nature of pellets for use in barbecue grills” are people who grill, smoke or otherwise cook food using wood pellets.

We now turn to how people who grill, smoke or otherwise cook food using wood pellets perceive the term COOKINPELLETS.COM when it is used in connection with “processed wood fuel in the nature of pellets for use in barbecue grills.” At the outset, we note that the misspelling of the word “Cooking” as “Cookin” in the proposed mark does not affect our analysis because a slight misspelling of a word does not turn a descriptive or generic word into a non-descriptive term. *See In re Calphalon Corp.*, 122 USPQ2d 1153, 1164 (TTAB 2017) (holding SHARPIN, the phonetic equivalent of “sharpen,” merely descriptive of knife blocks with built-in sharpeners); *In re ING Direct Bancorp*, 100 USPQ2d 1681, 1690 (TTAB 2011) (holding PERSON2PERSON PAYMENT generic for direct electronic funds transfers including electronic payment services between individuals); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (holding URBANHOUSING, in standard character form, would be perceived by consumers as the equivalent of the descriptive term URBAN HOUSING, rather than as including the separate word ZING); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (“The generic meaning of ‘togs’ not overcome by the misspelling of the term as TOGGS. . .”); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (holding MINERAL-LYX generic for mineral licks for feeding livestock); *C-Thru Ruler*

“tens of thousands of users having an interest in applicant’s recited pellet fuel products of or food preparation services utilizing” its products. Applicant’s Brief, p. 14 (8 TTABVUE 15). The lack of such testimony or evidence is discussed *infra* in the acquired distinctiveness analysis.

Co. v. Needleman, 190 USPQ 93 (E.D. Pa. 1976) (holding C-THRU to be the equivalent of “see-through” and, therefore, merely descriptive of transparent rulers and drafting aids). Further, the Examining Attorney submitted excerpts from websites using the term “Cookin” in lieu of “Cooking” to show that those terms are equivalents.⁴

A. Applicant’s use of COOKINPELLETS.COM or COOKINPELLETS.

Applicant’s specimen of use for the goods in Class 9 (“Screen-shot image of mobile application bearing the mark used in commerce”) reads as follows:

Cookinpellets.com

Cookinpellets.com is dedicated to teaching everyone about pellet grills and how easy and versatile they are! We also manufacture premium wood pellets for the smoking & cooking pellet grill industry and strive to be ...

In an excerpt from its website, Applicant states the following:

WHY DO WE ONLY OFFER 2 TYPES OF PELLETS???

Our Cooking Pellets are 100% Hardwood with NO fillers.
...

* * *

Cooking Pellets Vs Heating Pellets

The difference between Cooking (smoking or bbq pellets) and Heating pellets is *most* heating pellets are made of scrap (bark) and soft woods, like pine or fir with some hardwoods mixed in. They don’t burn as clean and will leave a nasty taste to the food and could harm you if you use them for cooking. It is true that some heating pellets are made with all hardwoods like live oak but, the heating pellets may not have consistency [sic] of all hardwoods due

⁴ March 17, 2017 Office Action (TSDR 7-18); October 27, 2017 Denial of the Request for Reconsideration (TSDR 23-30).

Citations to the USPTO TSDR database are to the downloadable .pdf format.

to them being able to use any type of wood that they can get to fill their needs. Here at Cookinpellets.com we ONLY use the top hardwoods. Since we ONLY offer pellets for pellet grills we are very careful to keep to our TOP Hardwoods ONLY ingredients.

Cookinpellets.com is for cooking ONLY. We do not sell heating pellets for your home.⁵

Applicant's Facebook page (facebook.com) refers to COOKINPELLETS.COM once and Cookinpellets three times, including the following instruction: "See more of Cookinpellets by logging into Facebook."⁶ Applicant asserts that 27,948 "like" the Facebook page and 27,875 follow Applicant's Facebook page.⁷

Applicant's Twitter page (twitter.com) refers to "Cookinpellets.com."⁸

Applicant's Instagram account refers to "cookinpellets" and notes that Applicant has 975 followers.⁹

The Pinterest.com website refers to "cookinpellets.com" and notes that Applicant has 20 followers.¹⁰

Applicant's YouTube.com posting refers to both "Cookinpellets.com" and "cookinpellets."¹¹

⁵ April 14, 2016 Office Action (TSDR 5).

⁶ February 19, 2017 Request for Reconsideration (TSDR 75).

⁷ *Id.*

⁸ February 19, 2017 Request for Reconsideration (TSDR 76). The information regarding the number of people receiving Applicant's "twitter feed" is illegible.

⁹ February 19, 2017 Request for Reconsideration (TSDR 77).

¹⁰ February 19, 2017 Request for Reconsideration (TSDR 78).

¹¹ February 19, 2017 Request for Reconsideration (TSDR 79). The information regarding the number of subscribers and views for Applicant's YouTube video is illegible. As best we can tell, there appears to be 113 subscribers and 18,000+ views.

Applicant posted a video on the Twitch website (URL illegible) and the webpage refers to “Cookinpellets.com” and “Cookinpellets.”¹²

In the Letstalkbbq.com Internet forum,¹³ the topic “Cookin Pellets Perfect Mix” is moderated by Chris Becker, Applicant’s principal.¹⁴ A partial screen shot starting the topic is reproduced below:¹⁵



Chris Becker also appears in The Smoke Ring (thesmokingring.com) Internet forum as cbecker111.¹⁶

The Smoke Ring Forum Index > Wood and Charcoal

Kudos for cookingpellets.com¹⁷

Yukoff

¹² February 19, 2017 Request for Reconsideration (TSDR 80). The information regarding the number of followers is illegible.

¹³ July 14, 2016 Response to Office Action (TSDR 28-33).

¹⁴ Chris Becker Decl. ¶ 3 attached to July 14, 2016 Response to Office Action (TSDR 61); *see also* TSDR 30.

¹⁵ July 14, 2016 Response to Office Action (TSDR 28).

¹⁶ July 14, 2016 Response to Office Action (TSDR 38-40).

¹⁷ *Id.* at TSDR 38.

yes, i've been buying from cookinpellets.com since sept? of last year, not only are prices great but they're 100% wood and ship quickly! Bout time they got cherry pellets!¹⁸

big_jake

lets say you want to cook a steak on the traeger so you crank the thermos up to 450. i hear the "cookinpellets" won't take it past 300.¹⁹

cbecker111

Ok guys here is the story...

Cookinpellets pellets will get your traeger up to grilling temps. Take a look at this link it will show you BTU wood values, how hot they get.

* * *

All the Cookinpellets woods are 100% and due to that fact some burn hotter than others ...

* * *

The Perfect Mix at Cookinpellets is a blend of Hickory Cherry Pecan & Apple and I find it works great to grill ...

Chris²⁰

graybeard

Near as I can find, the contact number for Cooking Pellets is a cell # in the Racine area.²¹

¹⁸ *Id.*

¹⁹ *Id.* at TSDR 39.

²⁰ *Id.* This appears to be Chris Becker, Applicant's principal.

²¹ *Id.* at TSDR 40.

Applicant's advertisement for its "Cookinpellets" app posted on the iTunes website (itunes.apple.com) is reproduced below:²²

cookinpellets

[View More by This Developer](#)

By **chris becker**

Open iTunes to buy and download apps.



Description

Cookinpellets.com Just the best Premium Pellets made for any type pellet grill! Pellet grill supplies, news, coupons, insider info from industry news. **need pellets buy from your phone or tablet!**

[cookinpellets Support](#)

What's New in Version 1.66.93.270

I added our dealer locations to map.

[View in iTunes](#)

+ This app is designed for both iPhone and iPad

Free

Category: **Business**
Updated: Jul 07, 2015
Version: 1.66.93.270
Size: 25.3 MB
Language: English
Seller: chris becker
© 2014GJ&AMLTD,LLC
Rated 4+

Compatibility: Requires iOS 7.0 or later. Compatible with

Screenshots

iPhone | iPad



Applicant is a sponsor for "The BBQ Central Radio Networks Get In The Smoke!"

(bbqcentralshow.com).²³ The sponsorship statement reads as follows:

CookinPellets: We use a pellet grill about 4-6 days per week and are serious about offering you something that we found missing in this industry ...

A 100% premium product at a fair price.

Cookinpellets.com was started because we got aggravated at the minimal flavor that was produced by all the pellets we tried.

²² August 19, 2016 Office Action (TSDR 35).

²³ February 19, 2017 Request for Reconsideration (4 TTABVUE 23); *see also* 4 TTABVUE 32.

So we found the best materials to make a premium pellet and started manufacturing 8 years ago. We have over 40 dealers and 5 distributors throughout the US and Canada.

Check out our online store at www.cookinpellets.com or via Amazon.com

Applicant uses “Cooking Pellets” as a generic term and COOKINPELLETS.COM, “Cookinpellets” and “Cookin Pellets” interchangeably to refer to its products.

B. Third-party use commercial use

Facebook page for Wandoo Rise Gourmet Cooking Pellets (facebook.com/WandooRiseGourmetCookingPellets/timeline). An excerpt from the Facebook page is reproduced below:²⁴



An excerpt from the Sears website (sears.com) advertising the sale of Applicant’s product states “Cookinpellets Perfect Mix Cooking Pellets 40 lb bags! Best Mix on the Market!”²⁵

²⁴ May 31, 2016 Office Action (TSDR 5).

²⁵ May 31, 2016 Office Action (TSDR 6).

Smokin Wood Pellets (smokinwoodpellets.com)²⁶

Welcome to Smokin' Wood Pellets Your premier provider for quality BBQ pellets and BBQ supplies. Our initial goal is to make quality cooking pellets available to New Jersey, Pennsylvania, Delaware, Maryland & New York pellet users.

* * *

We are happy to add, that we are distributors of both Cookinpellets & Lumber Jack pellets.

Tomahawk Stove Junction (pelletstovejunction.com)²⁷

GRILLING PELLETS AND MORE

UNCLE JED'S PREMIUM APPLE BBQ PELLETS

Uncle Jed's Brand Apple Hardwood BBQ pellets. An excellent blend consisting of 2/3 oak 1/3 apple wood. ... These premium quality cooking pellets are designed for use in all pellet grills and ...

Weekend Grilling LLC (weekendgrilling.com)²⁸

Lumber Jack Pellets

Lumber Jack Pellets are simply the best. Over the years I have tried numerous brands of BBQ cooking pellets for grilling and smoking and found that Lumber Jack were superior in both taste and leftover ash in the fire pit of my pellet grill.

²⁶ May 31, 2016 Office Action (TSDR 8); *see also* February 19, 2017 Request for Reconsideration (4 TTABVUE 25).

²⁷ May 31, 2016 Office Action (TSDR 9).

²⁸ May 31, 2016 Office Action (TSDR 10).

Allied Charcoal & Wood (nevadahotwood.com)²⁹

Home>Wood Pellets>Cooking Pellets

Cooking Pellets

Earth Sense Energy Systems, Inc. (pellethead.com)³⁰

COOKING WOOD PELLETS HARDWOOD COOKING PELLETS

HomComfort (homcomfort.com)³¹ website advertises the sale of Cherry Cooking Pellets and Hickory Cooking Pellets. A bag of the “Premium BBB Cooking Pellets” displayed on the website is reproduced below:



Cherry Cooking Pellets

AM FM ENERGY.com (amfmenergy.com)³²

Hickory Cooking Pellets 20# bg

²⁹ May 31, 2016 Office Action (TSDR 12).

³⁰ May 31, 2016 Office Action (TSDR 14).

³¹ May 31, 2016 Office Action (TSDR 15).

³² May 31, 2016 Office Action (TSDR 16).

Kring's Hearth & Home (kringsonline.com)³³

Wood Pellets for Cooking OR Heating

At Krings Hearth & Home, we sell both heating pellets and cooking pellets

The cooking pellets we sell include Apple, Hickory, and Mesquite flavored pellets for the serious grilling expert.

PelHeat (pelheat.com)³⁴

Watch How Traeger Wood Pellets Are Made

At PelHeat most of the enquiries we receive are for manufacturing fuel pellets for stoves and boilers. However there is another market for wood pellets and that is for pellet cookers in the form of BBQ's and smokers. ...

The thermostat adjusts the feed rate of the cooking pellets into the burn pot, therefore temperature can be accurately controlled.

TimberRidge (heatredefined.com)³⁵

Smoke-N-Sear Hickory Cooking Pellets

Pellets: PG-HPEL

Hickory Cooking Pellets, 20 lb. bag.

An excerpt from the Home Depot website (homedepot.com) is an advertisement for Competition Blend Premium BBQ Cooking Pellets, as well as, Applicant's "CookinPellets."³⁶ The advertisement refers to both "Cookinpellets.com" and "CookinPellets."

³³ May 31, 2016 Office Action (TSDR 17).

³⁴ May 31, 2016 Office Action (TSDR 19).

³⁵ May 31, 2016 Office Action (TSDR 23).

³⁶ October 27, 2017 Denial of the Request for Reconsideration (6 TTABVUE 8-9); *see also* May 31, 2016 Office Action (TSDR 24).

The Water Shed (denver.craigslist.org)³⁷

Cooking Pellets, Smoking Pellets, Cookin Pellets – Best Prices! - \$12

We stock several brands of smoking pellets with many flavors by Green Mountain, Pacific Gourmet, Lumber Jack, Pitmaster & Cookin Pellets.

Batey, Ltd. (bateyltd.com)³⁸

Grill Candy Gourmet Cooking Pellets

A product of Batey, Ltd. Sawmill, Grill Candy promotes Total Timber Utilization. ... These gourmet cooking pellets are 100% natural wood and represent that commitment.

Eco Que (ecoque.com)³⁹

Chip Strip

If you've ever tried using aluminum foil or metal boxes to add smoke to your grill then you understand what we were thinking when we invented Chip Strip™.

This solid cast iron design heats wood chips and Cooking pellets evenly and keeps the host so they can smolder, longer-delivering better smoke flavor.

Glyndon Gardens (glyndongardens.com)⁴⁰

MAY IS NATIONAL BBQ MONTH!

Come celebrate with us and enjoy great deals on Big Green Egg, Saber, and Traeger grills and smokers. We stock a full line of rubs, seasonings, sauces, charcoal, cooking pellets, and much more.

³⁷ July 14, 2016 Response to Office Action (TSDR 60).

³⁸ August 19, 2016 Office Action (TSDR 11).

³⁹ *Id.* at TSDR 13.

⁴⁰ *Id.* at TSDR 14.

Hubbard's Farm (hubbardsfarm.com)⁴¹

Cooking Pellets

If you own a pellet grill, you're in for a treat. Our cooking pellets will enhance your grilling experience! We carry BBQ Delight, Green Mountain Grills, and Lumber Jack pellets in 20 lb. bags, in a variety of flavors to suit your tastes.

Memphis Wood Fire Grills (memphisgrills.com)⁴²

THE LIFE OF A GRILL WOOD PELLETT

It's What's on the Inside That Matters

Pellets today have changed a lot from what they were like when first produced, not in appearance, but in makeup. Unlike wood pellets used for heating stoves, cooking pellets use a blend of high-quality hardwoods that are safe for cooking.

Minnewaska Meats & Catering (minnewaskameats.com)⁴³

Pellets – Made from 100% pure hardwood sawdust Traeger wood pellets are the source of both fuel and flavor in your Traeger Barbecue. Traeger cooking pellets are manufactured using heat and pressure (10,000 psi) and provide more than 8,500 BTU's of heat per pound. Traeger hardwood cooking pellets contain no added substances-just pure hardwood goodness.⁴⁴

Pellet Grills of Minnesota (pelletgrillsofmn.com)⁴⁵

Green Mountain – Hardwood Cooking Pellets

Our bag of hardwood cooking pellets contains 28-lb. of pellets instead of the normal 20-lb.

⁴¹ *Id.* at TSDR 20.

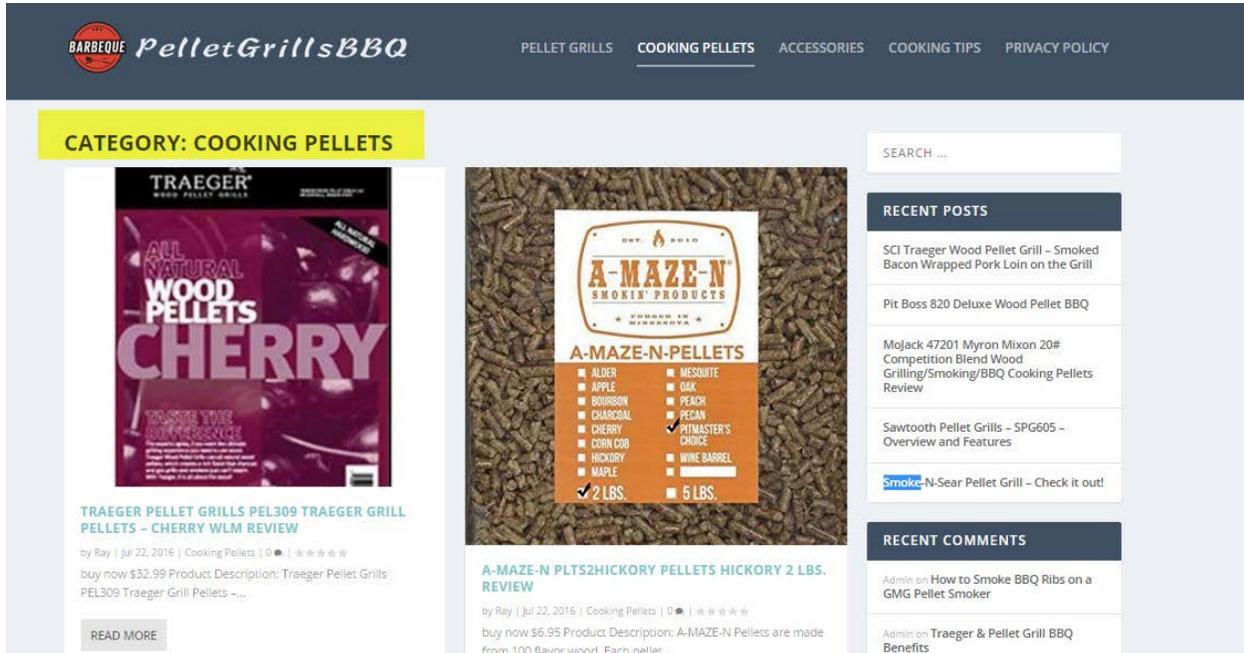
⁴² *Id.* at TSDR 21.

⁴³ *Id.* at TSDR 23.

⁴⁴ *Id.* at TSDR 24.

⁴⁵ *Id.* at TSDR 25.

PelletGrillsBBQ (pelletgrillsbbq.com).⁴⁶ This website identifies “cooking pellets” as a category of products as shown below:



VMG (verna-mae.com)⁴⁷ advertises the sale of Backyard Cooking Pellets. An excerpt from the website is reproduced below:⁴⁸



⁴⁶ *Id.* at TSDR 26.

⁴⁷ *Id.* at TSDR 31.

⁴⁸ *Id.* at TSDR 32.

BBQ Pellets Online.com (bbqpelletsonline.com),⁴⁹ Rec Tec Grills (rectecgrills.com),⁵⁰ and The Water Shed (thewatershed.com)⁵¹ list “Cookin Pellets” or “Cookin’ Pellets” as a brand of pellets.

The Taylor Made Smoke website (taylormadesmoke.com) states that its pellets come from Cookinpellets.com.⁵²

The BBQ Pit Bros. website (thebbqpitbros.com) advertises the sales of CookinPellets Perfect Mix.⁵³

Smokin’ Pete’s BBQ (smokinpetesbbq.com) advertises the sale of CookinPellets Hickory Smoking Pellets.⁵⁴ The website advertisement also displays a photograph of Applicant’s bag with the mark COOKINPELLETS.COM.

Modern Tire Pros website (URL illegible) advertises the sale of “CookinPellets.”⁵⁵

Outdoor Grilling Now (outdoorgrillingnow.com) advertises the sale of “CookinPellets.”⁵⁶

Walmart website (walmart.com) search for “cooking pellets” retrieved advertisements for multiple wood pellets,⁵⁷ including Applicant’s “Cookinpellets

⁴⁹ February 19, 2017 Request for Reconsideration (4 TTABVUE 21).

⁵⁰ *Id.*

⁵¹ *Id.* at 4 TTABVUE 24.

⁵² *Id.* at 4 TTABVUE 26.

⁵³ *Id.* at 4 TTABVUE 30.

⁵⁴ *Id.* at 4 TTABVUE 31.

⁵⁵ *Id.* at 4 TTABVUE 32.

⁵⁶ *Id.* at 4 TTABVUE 33.

⁵⁷ October 27, 2017 Denial of the Request for Reconsideration (6 TTABVUE 10-12).

CPAM40lb Apple Mash Cooking Pellet,” featuring a photograph of Applicant’s bag displaying “Cookinpellets.com.”⁵⁸

Third parties use the term “Cooking Pellets” as a generic term. They also use “Cookin Pellets” or “Cookingpellets.com” as a brand name. Some third parties use the generic term “Cooking Pellets” and the brand names “Cookin Pellets” or “Cookinpellets.com” in the same posting.

C. Third-party use in online forums⁵⁹

Smoking MeatForums.com (smokingmeatforums.com)⁶⁰

Pellet Smokers Group

There is a growing number of Pellet Smoker Owners at SMF. This is a group where we can share ideas and tips, and learn from other pellet pit owners what works best in all kinds of rigs.

Affordable Cooking Pellets

THREAD STARTER

SeenRed

Hey Guys! Do you notice a significant difference in the quality and performance of different brands of cooking pellets?

⁵⁸ October 27, 2017 Denial of the Request for Reconsideration (6 TTABVUE 11).

⁵⁹ The presentation of the forums is annotated for clarity, relevance, and to avoid cumulative evidence.

⁶⁰ April 14, 2016 Office Action (TSDR 3).

Smoking MeatForums.com (smokingmeatforums.com).⁶¹ In this forum, the users refer to “CookinPellets” as a brand name, with the exception of one use of “Cookinpellets.com” noted below. The following examples are illustrative:

CookinPellets vs. Lumberjack?

THREAD STARTER

Frog1369

I've got a Rec-Tec and have only burnt CookinPellets in it. I'm located about midway between CookinPellets and Lumberjack.⁶²

SeenRed

I am currently burning some CookinPellets 100% hickory with very good results.⁶³

Phrett

I've used many varieties of pellets and the CookinPellets.com have been the best. I went through about 8 bags of Lumberjack, the 100% hickory and cherry. They were not as good as Cookinpellets, although the cherry did produce a little bit of color to the meat. I can tell the better flavor of the Cookinpellets 100% hickory over any other pellet, most of which don't change the flavor at all from one to another.⁶⁴

BBQ-Brethren.com forum⁶⁵

BBQSAMYesIam

⁶¹ July 14, 2016 Response to Office Action (TSDR 18-22).

⁶² *Id.* at TSDR 18.

⁶³ *Id.* at TSDR 18-19. SeenRed was quoted in the previous Internet forum using the generic term “cooking pellets.”

⁶⁴ *Id.* at TSDR 20.

⁶⁵ May 31, 2016 Office Action (TSDR 7).

Here is a link that has a lengthy debate about “heating” pellets versus “cooking” pellets
<http://pelletheads.com/index.php?act...ge;topic=409.0>

BBQ-Brethren.com forum⁶⁶

Best Pellets for that Smoky Flavor [starter thread]

jmoney7269

As far as the best smokey flavor, it’s dang hard to beat cookinpellets 100% hickory.⁶⁷

RAYSOR [in response to jmoney7269]

I agree on the cookinpellets. Aztec Rental Services on west 34th st in Houston just became a supplier for them ...⁶⁸

Big Green Egg (eggheadforum.com)⁶⁹

wood cooking pellets in BGE [thread starter]

Pelletheads.com⁷⁰

Cooking and Heating Pellets [thread starter]

Toddler

... You’ll also see one side argue that food-grade lubricants for the machinery are mandated for cooking pellets, the other side says the amount of lubricant isn’t worth worrying about. ... Since they aren’t, bulk ordering cooking pellets isn’t much more expensive and I know the results I get with them.

Dough75boy

⁶⁶ July 14, 2016 Response to Office Action (TSDR 23-27).

⁶⁷ *Id.* at TSDR 25.

⁶⁸ *Id.* at TSDR 26.

⁶⁹ May 31, 2016 Office Action (TSDR 11).

⁷⁰ May 31, 2016 Office Action (TSDR 22).

... I know i will get over myself and go back to some cooking pellets to see if we can really taste the difference of these heating pellets i found and some good cooking pellets.

Pelletheads.com⁷¹

BEWARE of Cookinpellets.com

ChowHound

I've gotta burn through a quarter tank of Hickory and I'm going to give your "Perfect Mix" a try next.⁷²

Ron_L

I ordered two jugs of the Perfect Blend and used for my first FE cook.⁷³

Fast Freddie

There's a lot more ash with cookinpellets, but they have a lot more flavor.⁷⁴

JamieB

Jake, order your next Cooking Pellets in bulk bags and reuse the jugs. Saves you some \$\$ on shipping.⁷⁵

MNrribsmoker

Just did a turkey last night with apple pellets from CookinPellets.⁷⁶

⁷¹ July 14, 2016 Response to Office Action (TSDR 41-58).

⁷² *Id.* at TSDR 41.

⁷³ *Id.* at TSDR 43.

⁷⁴ *Id.* at TSDR 43.

⁷⁵ *Id.* at TSDR 43.

⁷⁶ *Id.* at TSDR 46.

Amazon.com product reviews for Applicant's "CookinPellets 40H Hickory Smoking Pellets."⁷⁷ The reviewers referred to Applicant's product as "CookinPellets."

The following excerpts are illustrative:

- After trying nearly every brand out there, I've now settled on CookinPellets for all my needs;⁷⁸
- I went through these CookinPellets, at least twice as fast as the LG pellets. That shouldn't be possible seeing as how the CookinPellets are 100% hickory.⁷⁹
- I highly recommend to anyone looking for alternative pellet to give CookinPellets Hickory Smoking Pellets a try.⁸⁰

Yoder Smokers (community.yodersmokers.com)⁸¹

New Pellets

Has anyone had any experience with "CookinPellets" brand of pellets?⁸²

... I have been equally happy with BBQr's Delight and CookinPellets Perfect Mix. I find they burn at about the same rate for me.⁸³

In the Cookshack Internet forum (cookshack.com) topic "Cookin Pellets???", the participants discussed their experience with Applicant's "Cookin Pellets" product.⁸⁴

⁷⁷ July 14, 2016 Response to Office Action (TSDR 12-17); *see also* February 19, 2017 Request for Reconsideration (TSDR 72).

⁷⁸ July 14, 2016 Response to Office Action (TSDR 12).

⁷⁹ *Id.*

⁸⁰ *Id.* at TSDR 13.

⁸¹ July 14, 2016 Response to Office Action (TSDR 34-37).

⁸² *Id.* at TSDR 34.

⁸³ *Id.* at TSDR 36.

⁸⁴ February 19, 2017 Request for Reconsideration (4 TTABVUE 22).

In the PelletSmoking.com Internet forum topic “Who’s pellets do you use and why?”, Big_Jake recommended “Cookinpellets.”⁸⁵ In the PelletSmoking Internet form topic “Pellets for a Traeger,”⁸⁶ Sallywag wrote that he “switched from Traeger to cookinpellets.com,”⁸⁷ and Cliffk wrote that he buys “from “cookinpellets.com.”⁸⁸

The BBQ Brethren (bbq-brethren.com) Internet topic was “Cookin Pellets – Any good?”⁸⁹ CtTradArcher, LordlyMantis, and Ron_L referred to “cookinpellets.com.”

The Cookshack Barbecue & Smoke-Cooking Center (forum.cookshack.com) Internet forum topic was “Anyone tried Cabela’s pellets?”⁹⁰

AndyJ

Forgot about cookinpellets, heard good things about them.⁹¹

Joe M

You’ll like the BBQ’ers & CookinPellets. The one downside to the CookinPellets is limited choices.⁹²

⁸⁵ *Id.* at 4 TTABVUE 34.

⁸⁶ *Id.* at 4 TTABVUE 58-61.

⁸⁷ *Id.* at 4 TTABVUE 58.

⁸⁸ *Id.* at 4 TTABVUE 61.

⁸⁹ *Id.* at 4 TTABVUE 35-39.

⁹⁰ *Id.* at 4 TTABVUE 40-43.

⁹¹ *Id.* at 4 TTABVUE 41.

⁹² *Id.* at 4 TTABVUE 43.

Yelp website (yelp.com) reviewed “California Pellet Grills,” a retailer.⁹³ Nick E. wrote that “California Pellet Grills carries both BBQ’s Delight and CookinPellets, which happen to be the two I was most interested in.”⁹⁴

Reddit website (reddit.com/r/pelletgrills/comments/) reviewed pellets (“Let’s talk pellets”).⁹⁵ Jamesandginger wrote that “Cookin’ Pellets Perfect Mix. Best bang for the buck for sure.”⁹⁶

TexasBBQRub Forum (texasbbqrub.com) topic “To all traeger owners,”⁹⁷ Jmoney7269 wrote “Alot [sic] to do with traegers not having good smoke flavor is due to not using a premium pellet such as bbqr’s delight or Cookinpellets 100% or perfect mislx [sic] which is hickory, maple, apple and cherry.”⁹⁸

Consumers and users of wood pellets who visit Internet forums use “Cooking Pellet” as a generic term and “Cookin Pellets” or “Cookinpellets.com” as a brand name.

D. News articles⁹⁹

Not Your Father’s BBQ! (oldsorb.wordpress.com)¹⁰⁰

⁹³ *Id.* at 4 TTABVUE 44-52.

⁹⁴ *Id.* at 4 TTABVUE 47.

⁹⁵ *Id.* at 4 TTABVUE 53-57.

⁹⁶ *Id.* at 4 TTABVUE 53.

⁹⁷ *Id.* at 4 TTABVUE 62-71.

⁹⁸ *Id.* at 4 TTABVUE 64. JMoney7269 also participated in the BBQ-Brethren.com forum noted above.

⁹⁹ The “Best Wood Pellet Products of 2017” posted on the myhomeproduct.com website (4 TTABVUE 24) and the blog at 4 TTABVUE 30 are illegible.

¹⁰⁰ May 31, 2016 Office Action (TSDR 18).

WOOD FIRED CONVECTION GRILLING

At the Heart of the Pellet Grill

Deep at the heart of the wood fired pellet grill lies the combustion chamber. ...

The modern cooking pellet is a healthier and cleaner burning fuel for grilling and they are also more economic and earth friendly than charcoal.

Cooking pellets are manufactured specifically for cooking on pellet grills and they contain no added fillers or binders. ...

The Roanoke Times, (June 17, 2012)¹⁰¹

Social Smokers

Twenty-five years ago, there was no such thing as pellets except for wood stoves. Now there are flavored cooking pellets, as well.

Times-Picayune (March 29, 2012)¹⁰²

It's time to put those grill skills to the test

The entry fee for the Backyard competition is \$100. Backyard teams will compete by barbecuing ribs and chicken - - Note: you must provide your own meat and only can cook on charcoal, wood or cooking pellets.

St. Tammany News (April 8, 2012)¹⁰³

Olde Towne gets a little wood, fire and chargrilling

Bo the backyard and pro competition only allowed cooks to use charcoal, wood or cooking pellets.

¹⁰¹ August 19, 2016 Office Action (TSDR 6).

¹⁰² *Id.* at TSDR 7.

¹⁰³ *Id.*

How to BBQ right.com (howtobbqright.com)¹⁰⁴

BBQr's Delight

Wood cooking pellets have been around for many years, and I see more and more teams using pellet smokers now days. There are several companies manufacturing cooking pellets, but the absolute best pellet on the market is made by a company called BBQr's Delight.

The DailyMotion website (dailymotion.com) presented a video product review for "CookinPellets 40PM Perfect Mix Smoking Pellets."¹⁰⁵

The Sites Done Right Blog (sitesdoneright.com) features an article regarding the use of pellet smokers.¹⁰⁶ The author states that he is using "CookinPellets Perfect Mix in his smoker."

The following websites reviewed Applicant's products and identified it as "CookinPellets":

- Online Shopping Guide (URL illegible);¹⁰⁷
- Fires Review website (firesreview.com);¹⁰⁸ and
- The BBQ Beat website (bbqbeat.com).¹⁰⁹

News articles in newspapers and posted on websites use "Cooking Pellets" as a generic term and "CookinPellets" as a brand name.

¹⁰⁴ *Id.* at TSDR 15.

¹⁰⁵ February 19, 2017 Request for Reconsideration (4 TTABVUE 22).

¹⁰⁶ *Id.* at 4 TTABVUE 25.

¹⁰⁷ February 19, 2017 Request for Reconsideration (4 TTABVUE 26-27).

¹⁰⁸ *Id.* at 4 TTABVUE 27-28.

¹⁰⁹ *Id.* at 28-29.

E. Miscellaneous evidence

The search results from a search for the term “cooking pellets review” provided the following results reproduced below:¹¹⁰



F. Analysis

As noted above, COOKINPELLETS.COM is generic if the people who grill, smoke or otherwise cook food using wood pellets perceive the term COOKINPELLETS.COM as a class of goods when it is used in connection with “processed wood fuel in the nature of pellets for use in barbecue grills.”

“An inquiry into the public's understanding of a mark requires consideration of the mark as a whole. Even 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 Steelbuilding.com*, 415 F.3d 1293, 1297 [75 USPQ2d 1420, 1421] (Fed. Cir. 2005); *see In re Am. Fertility Soc’y*, 188 F.3d 1341, 1347 [51 USPQ2d 1832, 1837] (Fed. Cir. 1999) (“[I]f the compound word would plainly have no different meaning from its constituent words, and dictionaries, or other evidentiary sources, establish the meaning of those words to be generic, then the compound word too has been proved generic. No

¹¹⁰ April 14, 2016 Office Action (TSDR 4).

additional proof of the genericness of the compound word is required.”).

In re 1800Mattress.com IP LLC, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009).

The term “Cooking Pellets” is indisputably generic. The word “Cooking” is defined, inter alia, as “suitable for or used in cooking.”¹¹¹ The word “Pellet” is defined, inter alia, as “a small, solid or densely packed ball or mass, as of food, wax, or medicine.”¹¹² The combination does not result in a term that will be understood by relevant purchasers as anything other than a cooking fuel. Applicant does not contest that “Cooking Pellets” is generic; rather, Applicant argues that it has submitted evidence showing that COOKINPELLETS.COM and “Cookinpellets” are recognized as its brand name.¹¹³ Applicant also asserts that the addition of “.COM” to “Cookinpellets” “conveys to consumers the impression of a commercial entity on the internet” and, therefore, consumers will perceive COOKINPELLETS.COM as referring to an online service rather than “processed wood fuel in the nature of pellets for use in barbecue grills.”¹¹⁴

¹¹¹ OXFORD DICTIONARIES (North American English) (oxforddictionaries.com) attached to the March 17, 2017 Office Action (TSDR 35); *see also* MERRIAM-WEBSTER (merriam-webster.com) attached to the March 17, 2017 Office Action (TSDR 36).

¹¹² AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2017) attached to the March 17, 2017 Office Action (TSDR 31); *see also* OXFORD DICTIONARIES (North American English) (oxforddictionaries.com) attached to the March 17, 2017 Office Action (TSDR 32); MERRIAM-WEBSTER (merriam-webster.com) attached to the March 17, 2017 Office Action (TSDR 33).

¹¹³ Applicant’s Brief, pp. 7-8 (8 TTABVUE 8-9).

¹¹⁴ Applicant’s Brief, p. 8 (8 TTABVUE 9).

“.COM” is defined as follows:

A top-level Internet domain used mainly by businesses; however, it is not restricted and a .com domain can be registered for any purpose. Because the “dot-com” address is used by major companies throughout the world, it is the most coveted top-level domain.¹¹⁵

“Only in rare instances will the addition of a TLD indicator to a descriptive term operate to create a distinctive mark.” *Steelbuildings.com*, 75 USPQ2d at 1422 (citing *Oppedahl*, 373 F.3d 1171, 71 USPQ2d 1370, 1374 (Fed. Cir. 2004) (“When examining domain name marks, the PTO must evaluate the commercial impression of the mark as a whole, including the TLD indicator. The addition of a TLD such as ‘.com’ or ‘.org’ to an otherwise unregistrable mark will typically not add any source-identifying significance, similar to the analysis of ‘Corp.’ and ‘Inc.’”).

The *Oppedahl* court provided the following hypothetical to illustrate circumstances under which a TLD might affect the descriptiveness or registrability of a proposed mark:

Under the hypothetical, a company seeks to register the mark tennis.net for a store that sells tennis nets. The applicant openly states that it does no business on the Internet and has no intention to ever use the Internet. This hypothetical applicant's mark consists of a descriptive term—“tennis”—and a TLD—“.net.” The “net” portion alone has no source-identifying significance. The hypothetical mark as a whole, as is immediately apparent, produces a witty double entendre relating to tennis nets, the hypothetical applicant's product. Arguably, the

¹¹⁵ THE FREE DICTIONARY (thefreedictionary.com) attached to the March 17, 2017 Office Action (TSDR 19); *see also* *Wikipedia* attached to the March 17, 2017 Office Action (TSDR 20) (“The domain name com is a top-level domain (TLD) in the Domain Name System of the Internet. Its name is derived from the word commercial indicating its original intended purpose for domains registered by commercial organizations. Later, the domain opened for general purposes.”).

attachment of the TLD to the other descriptive portion of the mark could enhance the prospects of registrability for the mark as a whole. This hypothetical example illustrates that, although TLDs will most often not add any significant source-identifying function to a mark, a bright-line rule might foreclose registration to a mark with a TLD component that can demonstrate distinctiveness.

71 USPQ2d at 1373.¹¹⁶

Likewise, the addition of “.com” to “CookinPellets” is no more than a designation of a commercial entity, like the word “Company,” because it does not expand the meaning of “Cookinpellets” beyond “processed wood fuel in the nature of pellets for use in barbecue grills.” The Board has previously held that a term which describes the provider of goods or services is without source-identifying capability. *See In re Wm. B. Coleman Co.*, 93 USPQ2d 2019, 2025 (TTAB 2010) (with respect to ELECTRIC CANDLE COMPANY, “Electric Candle” is a unitary generic term and “Company” is simply a designation for a type of entity without source-identifying capability.); *In re Cell Therapeutics Inc.*, 67 USPQ2d 1795 (TTAB 2003) (applicant “never argued that the addition of INC. would cause its mark in its entirety (CELL THERAPEUTICS, INC.) to be not generic assuming it were proven that CELL THERAPEUTICS was generic.”); *In re Energy Prods. of Idaho*, 13 USPQ2d 2049 (TTAB 1989) (the word “Company” in the mark THE WASTE-TO-ENERGY COMPANY “would be viewed in [its] ordinary sense: a company that is in the water-

¹¹⁶ The court rejected applicant’s hypothetical that the addition of “.com” to “Amazon” adds source-identifying significance finding that “the addition of ‘.com’ adds no source-identifying significance, which is likely to be the case in all but the most exceptional case.” *Oppedahl*, 71 USPQ2d at 1373. “Accordingly, substantial evidence supports the Board’s conclusion that ‘.com’ indicates a commercial entity.” *Id.* at 1374.

to-energy field.”); *In re The Paint Prods. Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (“purchasers encountering the words ‘PAINT PRODUCTS CO.’ on the goods for which registration is sought would view those words not as a trademark, but in their ordinary dictionary sense: a company that sells paint products.”); *In re Phone Co., Inc.*, 218 USPQ 1027, 1028 (TTAB 1983) (“The term ‘THE PHONE COMPANY’ seems to us to inform purchasers directly and immediately that the items of telephone equipment bearing those words emanate from a company specializing in such equipment” and “would ... equally describe [telephone] equipment emanating from one of applicant’s competitors.”). In other words, consumers encountering the mark COOKINPELLETS.COM will perceive it as meaning a company that sells cooking pellets. Accordingly, we disagree with Applicant’s argument that the addition of the top-level domain name changes the meaning or commercial impression engendered by the mark in its entirety to that of a company providing an “online service.”¹¹⁷ The cases upon which Applicant relies for that proposition are whether the term at issue is generic for Internet related services, and as discussed, that is not the only meaning that can be attributed to “.com.” Rather, “.com” also indicates a commercial entity.

It is clear from the evidence that the term COOKINPELLETS.COM is a compressed version of the words “Cookin” and “Pellets,” and the top-level domain “.Com.” This is readily apparent to any purchaser or prospective purchaser of “processed wood fuel in the nature of pellets for use in barbecue grills.” The individual words and the top-level domain retain their generic meaning because the compression

¹¹⁷ Applicant’s Brief, pp. 8-11 (8 TTABVUE 9-12).

of the terms does not create an incongruous term, nor does it evoke a unique commercial impression. *See Paint Products Co.*, 8 USPQ2d at 1866 (“PAINT PRODUCTS CO’ is no more registrable for goods emanating from a company that sells paint products than it would be as a service mark for the retail paint store services offered by such a company.”).

In this case, the compression or combination of the terms into a unitary term is irrelevant. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (“the combination of “SCREEN” and “WIPE” does not render Gould’s mark unique or incongruous, the common descriptive aspect of applicant’s mark is not lost in the combined form.”); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOM-BLENDED for gasoline held generic because the category of gasoline was blended personally for the motorist); *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1631 (TTAB 1998) (the fact that MASSFLO is a telescoped, slightly misspelled version of “mass flow” does not transform a generic term into a trademark); *see also In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ2d 215, 219 (CCPA 1978) (Judge Rich, concurring) (“GASBADGE” generic for a gas monitoring badge). The terms “Cookin,” “Pellets,” and “.COM” are as generic in the compound as they are individually, and the compound thus created, COOKINPELLETS.COM, is itself generic.

While the record does not show the compressed terms COOKINPELLETS.COM, or “CookinPellets,” in common usage, it is a compound word that names the goods “cooking pellets.” This case is distinguishable from *Steelbuilding*, 75 USPQ2d at 1423 on its facts. Here, the compressed generic compound is used in connection with the

actual goods it names rather than the subject matter of the services. *See In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010) (there was no evidence that NANDRIVE had any other meaning or would be perceived as anything other than a reference to a NAND drive); *In re 3Com Corp.*, 56 USPQ2d 1050, 1062 (TTAB 2000) (because there is nothing in the record to show that ATMLINK as one word has a different meaning than ATM LINK, the deletion of a space between the terms ATM and LINK does not transform the otherwise generic term into a trademark or change the commonly understood meaning of the term).

With respect to the trademark use of COOKINPELLETS.COM and “Cookinpellets” by consumers and retailers, Applicant may have acquired a de facto secondary meaning or distinctiveness in the sense that some or even many people associate COOKINPELLETS.COM with Applicant; but this does not establish a proprietary or de jure right necessary to support registration. *See Interstate Folding Box*, 167 USPQ 241, 245 (TTAB 1970) (“It may well be that applicant, by reason of its long and continuous use, has acquired a de facto secondary meaning in the term “INNER-LINED” in the sense that some or even many people have come to associate “INNER-LINED” with applicant; but this falls far short of establishing a propriety or a legal or de jure right therein necessary to support registration.”); *see also In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156, 158 (CCPA 1973) (“[b]ecause of long use, large sales and advertising, it may be assumed that some persons might recognize a mark as designating origin, but that alone is not enough.”); *cf. In re Recorded Books Inc.*, 42 USPQ2d 1275, 1282 (TTAB 1997) (recognizing that even a generic term may

be recognized as a trademark by a subset or applicant's customers); *Continental Airlines, Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, (TTAB 1999) ("Even if one has achieved de facto acquired distinctiveness in a generic term through promotion and advertising, the generic term is still not entitled to protection because to allow protection would 'deprive competing manufacturers of the product of the right to call an article by its name.'). As the Federal Circuit has held:

While it is always distressing to contemplate a situation in which money has been invested in a promotion in the mistaken belief that trademark rights of value are being created, merchants act at their peril in attempting, by advertising, to convert common descriptive names, which belong to the public, to their own exclusive use. Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect.

In re Pennington Seed Inc., 466 F.2d 1053, 80 USPQ2d 1758, 1762 (Fed. Cir. 2006) (quoting *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 414 (CCPA 1961)).

In view of the foregoing, we find that the term COOKINPELLETS.COM is generic for "processed wood fuel in the nature of pellets for use in barbecue grills."

For purposes of completeness, we analyze whether the term COOKINPELLETS.COM for "processed wood fuel in the nature of pellets for use in barbecue grills" is merely descriptive and, if so, whether it has acquired distinctiveness.

III. Whether COOKINPELLETS.COM is merely descriptive for “processed wood fuel in the nature of pellets for use in barbecue grills”?

At the outset of our analysis of whether COOKINPELLETS.COM is merely descriptive, we note that in its April 16, 2016 Response to an Office Action, Applicant claimed that its mark had acquired distinctiveness by virtue of Applicant’s substantially and exclusive use of COOKINPELLETS.COM in connection with the identified goods for at least five years.¹¹⁸ Thus, Applicant conceded that COOKINPELLETS.COM is merely descriptive.

For procedural purposes, a claim of distinctiveness under §2(f), whether made in the application as filed or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“Where an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”). For the purposes of establishing that the subject matter is not inherently distinctive, the examining attorney may rely on this concession alone. Once an applicant has claimed that matter has acquired distinctiveness under §2(f), the issue to be determined is not whether the matter is inherently distinctive but, rather, whether it has acquired distinctiveness.

See, e.g., Yamaha Int’l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 1577, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988); *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1849 (TTAB 2017); *In re Cabot Corp.*, 15 USPQ2d 1224, 1229 (TTAB 1990); *In re Prof’l Learning Ctrs., Inc.*, 230 USPQ 70, 71 (TTAB 1986); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984).

¹¹⁸ TSDR 1, 2.

TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1212.02(b) (October 2017).

Despite Applicant’s concession that COOKINPELLETS.COM is merely descriptive, we must determine its degree of descriptiveness for purposes of determining whether it has acquired distinctiveness. “[A]pplicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *Steelbuilding.com*, 75 USPQ2d at 1424.

IV. Whether COOKINPELLETS.COM for “processed wood fuel in the nature of pellets for use in barbecue grills” has acquired distinctiveness?

Pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it “has become distinctive of the applicant’s goods in commerce.” Thus, the mark may be registered on the Principal Register if the applicant proves that the merely descriptive matter has acquired distinctiveness (also known as “secondary meaning”) as used on the applicant’s goods in commerce. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728-30 (Fed. Cir. 2012); *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d at 1848. Acquired distinctiveness is generally understood to mean an acquired “mental association in buyers’ minds between the alleged mark and a single source of the product.” *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848 (quoting 2 McCarthy on Trademarks and Unfair Competition § 15:5 (4th ed., June 2017

Update)). In this regard, in analyzing above whether COOKINPELLETS.COM is a generic term, we considered all of the evidence touching on the public perception of that term.

An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness. *See Yamaha Int'l Corp.*, 6 USPQ2d at 1005. Applicant's burden is to prove acquired distinctiveness by a preponderance of the evidence. *Id.* at 1006 "Finally, the applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning." *Steelbuilding.com*, 75 USPQ2d at 1424. As the Board has explained:

[T]he greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. The sufficiency of the evidence offered to prove acquired distinctiveness should be evaluated in light of the nature of the designation. Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of acquired distinctiveness thus will ordinarily be required to establish that such terms truly function as source-indicators

In re Greenliant Sys. Ltd., 97 USPQ2d at 1085 (internal citations omitted); *see also In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (Board has discretion not to accept an applicant's allegation of five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness when the proposed mark is "highly descriptive"); *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) ("[C]onsidering the

highly descriptive nature of the proposed mark, [Applicant] has not met its burden to show that the proposed mark has acquired secondary meaning.”).

A. Degree of Descriptiveness

The initial question before us in our analysis of whether COOKINPELLETS.COM has acquired distinctiveness is the degree of descriptiveness of that term as used in connection with Applicant’s goods. *See Nazon v. Ghiorse*, 119 USPQ2d 1178, 1187 (TTAB 2016). As noted above, the higher the degree of descriptiveness of the designation in question, the higher the burden Applicant faces in proving acquired distinctiveness.

Based on the evidence discussed above in connection with the genericness refusal, we find that each of the terms comprising Applicant’s mark, “Cookin,” “Pellets,” and “.Com,” is highly descriptive of “processed wood fuel in the nature of pellets for use in barbecue grills.” Moreover, when combined, the composite mark COOKINPELLETS.COM is, at the very least, highly descriptive. *See, e.g., DuoProSS Meditech Corp., v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1759 (Fed. Cir. 2012) (finding SNAP SIMPLY SAFER merely descriptive for cannulae, needles, and syringes); *Remington Prods. Inc. v. North Am. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990) (“travel care” is merely descriptive in light of, among other evidence, advertisements using the term descriptively); *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1851 (MEDICAL EXTRUSION TECHNOLOGIES is highly descriptive of “polyurethanes in the form of sheets, films, pellets, granules, and tubes for use in the manufacture of medical devices, medical

diagnostic devices, artificial vascular grafts, stents, pacemaker leads, artificial heart pump diaphragms, catheters, drug delivery devices, orthopedic and spinal implants, blood glucose monitors, and blood gas analyzers”); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (holding SUPERJAWS merely descriptive for tools). Clearly, no thought or imagination is required to immediately understand that wood pellets sold under the mark COOKINPELLETS.COM are just that, wood cooking pellets.

Accordingly, Applicant’s mark COOKINPELLETS.COM is highly descriptive of Applicant’s goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

B. Acquired Distinctiveness

As noted above, Applicant bears the ultimate burden of proving acquired distinctiveness by a preponderance of the evidence, and the amount of proof required to carry that burden increases when the wording sought to be placed on the Principal Register under Section 2(f) is highly descriptive. Because we have found that the term COOKINPELLETS.COM is highly descriptive of Applicant’s goods, Applicant’s burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Greenliant Sys. Ltd.*, 97 USPQ2d at 1085.

“To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or

service itself.” *Steelbuilding.com*, 75 USPQ2d at 1422; *see also Coach Servs.*, 101 USPQ2d at 1729. Our ultimate Section 2(f) analysis and determination in this case is based on all of the evidence considered as a whole. In determining whether Applicant has demonstrated acquired distinctiveness of the proposed mark COOKINPELLETS.COM for its goods, the Board examines the evidence of record, including any evidence of advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source). *Steelbuilding.com*, 75 USPQ2d at 1424; *Cicena Ltd. v. Columbia Telecomms. Grp.*, 900 F.2d 1546, 14 USPQ2d 1401, 1406 (Fed. Cir. 1990). On this list, no single fact is determinative. *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009); *see also In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1283 (TTAB 2000) (“Direct evidence [of acquired distinctiveness] includes actual testimony, declarations or surveys of consumers as their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”).

Chris Becker, Applicant’s principal, attested to the following:¹¹⁹

- COOKINPELLETS.COM has been in continuous and substantially exclusive use since at least September 1, 2007;
- Since September 1, 2007, Applicant has sold over 250,000 units of COOKINPELLETS.COM generating approximately \$3,000,000 in revenues;
- Since September 1, 2007, Applicant has spent \$25,000 advertising and promoting COOKINPELLETS.COM;

¹¹⁹ Chris Becker Declaration attached to the July 14, 2016 Office Action (TSDR 61-62).

- Applicant advertises and promotes COOKINPELLETS.COM through Facebook, Twitter, Instagram, Pinterest, YouTube and its own website; and
- From 2013 through 2015, COOKINPELLETS.COM has been the number one best-selling and highest rated pellet on Amazon.com.

Although Applicant has been using the term COOKINPELLETS.COM for over 10 years to identify “processed wood fuel in the nature of pellets for use in barbecue grills,” long use of a term does not necessarily establish that the term has acquired distinctiveness as a mark. *See Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1855 (25+ years not sufficient to prove acquired distinctiveness); *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d at 1766 (19 years use insufficient to prove acquired distinctiveness); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (16 years “is a substantial period but not necessarily conclusive or persuasive”); *In re The Interstate Folding Box Co.*, 167 USPQ at 245 (30 years of use insufficient to prove acquired distinctiveness). However, as indicated above, the length of Applicant’s use must be considered in connection with the other evidence of how consumers perceive Applicant’s mark.

Turning to Applicant’s advertising expenditures, \$25,000 on advertising and promotion since September 2007, or over ten years, is an average of \$2,500 per year. This number appears to be quite low. Likewise Applicant’s sales of 250,000 units generating \$3,000,000 in revenues since September 2007, or over ten years, is an average of 25,000 units per year generating an annual average revenue of \$300,000 appear low. Applicant’s assertion that there are “tens of thousands of users having an interest in applicant’s recited pellet fuel products of or food preparation services

utilizing” its products corroborates our finding that Applicant’s sales and revenues are low.¹²⁰ *Cf., e.g., In re Country Music Ass’n Inc.*, 100 USPQ2d 1824, 1834 (TTAB 2011) (acquired distinctiveness found where, *inter alia*, “from 2000-2007, applicant engaged in targeted advertising campaigns, spending approximately \$1-3 million annually on print and television ads, trade shows, promotional events, and email campaigns During that same time period, applicant earned over \$92.8 million in revenues.”). Moreover, in the absence of additional information such as Applicant’s market share or how COOKINPELLETS.COM ranks in terms of sales in the trade, we cannot accurately gauge Applicant’s level of success. *See Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007). Thus, the sales and advertising figures, without any context in the trade, are not so impressive as to support a finding that Applicant’s highly descriptive COOKINPELLETS.COM has acquired distinctiveness.

On the other hand, Applicant asserts that it has 27,948 “likes” and 27,875 followers on its Facebook page,¹²¹ that it has 975 Instagram followers,¹²² and that it has 20 Pinterest followers.¹²³ The information regarding the number of subscribers and views for Applicant’s YouTube video is illegible. As best we can tell, there appear to be 113 subscribers and 18,000+ views.¹²⁴ The information regarding the number of

¹²⁰ Applicant’s Brief, p. 14 (8 TTABVUE 15).

¹²¹ February 19, 2017 Request for Reconsideration (TSDR 75).

¹²² February 19, 2017 Request for Reconsideration (TSDR 77).

¹²³ February 19, 2017 Request for Reconsideration (TSDR 78).

¹²⁴ February 19, 2017 Request for Reconsideration (TSDR 79).

people receiving Applicant's "twitter feed" is illegible.¹²⁵ Nevertheless, Applicant contends that these exhibits show that "applicant has 32,339 followers across these various social media websites."¹²⁶ However, as noted above, in footnote 3, because Applicant has not provided any testimony or evidence estimating the number of relevant consumers, there is no context by which we can assess the extent or effectiveness of Applicant's social media reach. *Cf. In re Country Music Ass'n Inc.*, 100 USPQ2d at 1834 (applicant's website promoting applicant's services had over 15 million hits in 2007).

As further evidence of acquired distinctiveness, Applicant points to over 1,000 unsolicited positive reviews on Amazon.com.¹²⁷ Applicant submitted two screen shots of the reviews:

CookinPellets 40PM Perfect Mix Smoking Pellets
By CookinPellets

and

CookinPellets 40H Hickory Smoking Pellets
By CookinPellets

There were two reviews for each product. Only two of the reviews used "CookinPellets" as trademark. Nevertheless, this evidence is probative that there were at least 1,000 purchasers of Applicant's products who wrote reviews for the

¹²⁵ February 19, 2017 Request for Reconsideration (TSDR 76).

¹²⁶ Applicant's Brief, p. 14 (8 TTABVUE 15).

¹²⁷ Applicant's Brief, p. 15 (8 TTABVUE 16) (citing Applicant's February 19, 2017 Response to Office Action, TSDR 72).

product on the Amazon.com website. It also corroborates that Applicant's product is popular and successful on Amazon.com.

In this regard, Applicant has been the number one best-selling and highest rated pellet on Amazon.com and some third-party retailers and some consumers associate COOKINPELLETS.COM with Applicant. It may be that by reason of Applicant's use and social media presence, some or even many people have come to associate COOKINPELLETS.COM with Applicant. Because we do not know the size of the market, Applicant's evidence regarding its renown through third-party retailers and the Internet forums may be only a fraction of the market. *Cf. Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002) (in the context of fame, the court said that "some context in which to place raw statistics is reasonable."). The evidence, thus, falls short of establishing acquired distinctiveness.

In view of the foregoing, Applicant has failed to meet its burden of showing that the highly descriptive term COOKINPELLETS.COM has acquired distinctiveness.

V. Whether COOKINPELLETS.COM for "downloadable mobile applications for advertising barbecue grill fuels" is merely descriptive?

We turn now to whether COOKINPELLETS.COM is merely descriptive of "downloadable mobile applications for advertising barbecue grill fuels."¹²⁸ Section 2(e) of the Trademark Act prohibits registration on the Principal Register of "a mark

¹²⁸ In Applicant's February 19, 2017 Request for Reconsideration, Applicant amended the Class 9 description of goods to "downloadable mobile applications for advertising barbecue grill fuels" from "downloadable mobile applications for advertising and selling barbecue grill fuels, barbecue grill accessories and cooking ingredients." However, Applicant referred to the old description of goods in its brief, rather than to the operable description of goods. Applicant's Brief, p. 12 (8 TTABVUE 13).

which, (1) when used on or in connection with the goods of the applicant is merely descriptive ... of them.” 15 U.S.C. § 1052(e)(1). A term is “merely descriptive” within the meaning of Section 2(e)(1) if it “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Whether a mark is descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork, and we must consider “the context in which [the mark] is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp.* 103 USPQ2d at 1757; *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the combined mark is also merely descriptive turns on whether the combination of terms evokes a non-descriptive commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 71 USPQ2d at 1372 (quoting *Estate of P.D. Beckwith, Inc. v. Commr.*, 252 U.S. 538, 543 (1920)); *see also In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs).

On the other hand, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363, 365 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

As discussed above, the word “Cooking” is defined, inter alia, as “suitable for or used in cooking”;¹²⁹ “Pellet” is defined, inter alia, as “a small, solid or densely packed ball or mass, as of food, wax, or medicine”;¹³⁰ and “.COM” is defined as a top level domain for commercial organizations.¹³¹ Moreover, we have already found that, in this case, the addition of “.com” to “CookinPellets” is no more than a designation of a commercial entity, like the word “Company,” with respect to the goods in Class 4 and for the same reasons it does not expand the meaning of the mark beyond “downloadable mobile applications for advertising barbecue grill fuels.”

Based on the evidence discussed above in the analysis of whether COOKINPELLETS.COM is generic, the components of COOKINPELLETS.COM, “Cookin,” “Pellets,” and “.Com,” retain their descriptive significance when used in connection with “downloadable mobile applications for advertising barbecue grill fuels.”

¹²⁹ OXFORD DICTIONARIES (North American English) (oxforddictionaries.com) attached to the March 17, 2017 Office Action (TSDR 35); *see also* MERRIAM-WEBSTER (merriam-webster.com) attached to the March 17, 2017 Office Action (TSDR 36).

¹³⁰ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2017) attached to the March 17, 2017 Office Action (TSDR 31); *see also* OXFORD DICTIONARIES (North American English) (oxforddictionaries.com) attached to the March 17, 2017 Office Action (TSDR 32); MERRIAM-WEBSTER (merriam-webster.com) attached to the March 17, 2017 Office Action (TSDR 33).

¹³¹ THE FREE DICTIONARY (thefreedictionary.com) attached to the March 17, 2017 Office Action (TSDR 19); *see also* *Wikipedia* attached to the March 17, 2017 Office Action (TSDR 20) (“The domain name com is a top-level domain (TLD) in the Domain Name System of the Internet. Its name is derived from the word commercial indicating its original intended purpose for domains registered by commercial organizations. Later, the domain opened for general purposes.”).

The term COOKINPELLETS.COM describes a feature or the subject matter of the mobile application (i.e., barbecue grill fuels). *In re Cox Enters. Inc.*, 82 UPSQ2d 1040, 1045 (TTAB 2007) (finding “THE ATL, a recognized nickname for Atlanta, and that the mark is merely descriptive of the subject matter of applicant’s publications that feature news and information of interest to residents of and tourists and visitors to Atlanta.”); *In re Viventia Biotech Inc.*, 80 USPQ2d 1376, 1379 (TTAB 2006) (“A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1) of the Trademark Act, if, as applied to the goods or services in question, it describes ... [the] subject matter of such goods or services.”); *In re Ethnic Home Lifestyles Corp.*, 70 USPQ2d 1156., 1158 (TTAB 2003) (“The term sought to be registered is merely descriptive in connection with these services because ‘ETHNIC ACCENTS’ indicates that ethnic accents are significant features or the subject matters of such programs.”). Consumers and prospective consumers of wood pellets, confronted with COOKINPELLETS.COM used in connection with a mobile application advertising barbecue grill fuels would, without the need of thought, imagination or perception, be immediately apprised of the subject matter of Applicant’s mobile application (i.e., wood pellets used for smoking, grilling, or cooking food).

In view of the foregoing, COOKINPELLETS.COM for “downloadable mobile applications for advertising barbecue grill fuels” is merely descriptive.¹³²

¹³² Applicant withdrew its claim of acquired distinctiveness for the Class 9 goods. February 19, 2017 Request for Reconsideration (4 TTABVUE 6, 10, and 16). Applicant explained that it did not address whether Applicant’s mark COOKINPELLETS.COM for “downloadable mobile applications for advertising barbecue grill fuels” “[b]ecause Applicant’s class 9 goods

VI. Whether the specimen for the Class 9 “downloadable mobile applications for advertising barbecue grill fuels” is acceptable?

During the prosecution of the application, Applicant, in the alternative, requested registration on the Supplemental Register for the goods in Class 9.

In the alternative, if despite the foregoing arguments, the Examining Attorney again refuses registration of the mark under class 9 on the Principal Register, applicant seeks registration under class 9 on the Supplemental Register.¹³³

The Examining Attorney agreed to amend the application to the Supplemental Register if Applicant submitted an acceptable specimen.¹³⁴ We now turn to whether the specimen of use shows the mark COOKINPELLETS.COM used for “downloadable mobile applications for advertising barbecue grill fuels.”

Applicant submitted a screen shot of its mobile application as the specimen showing use of its mark.¹³⁵ The specimen is reproduced below:¹³⁶

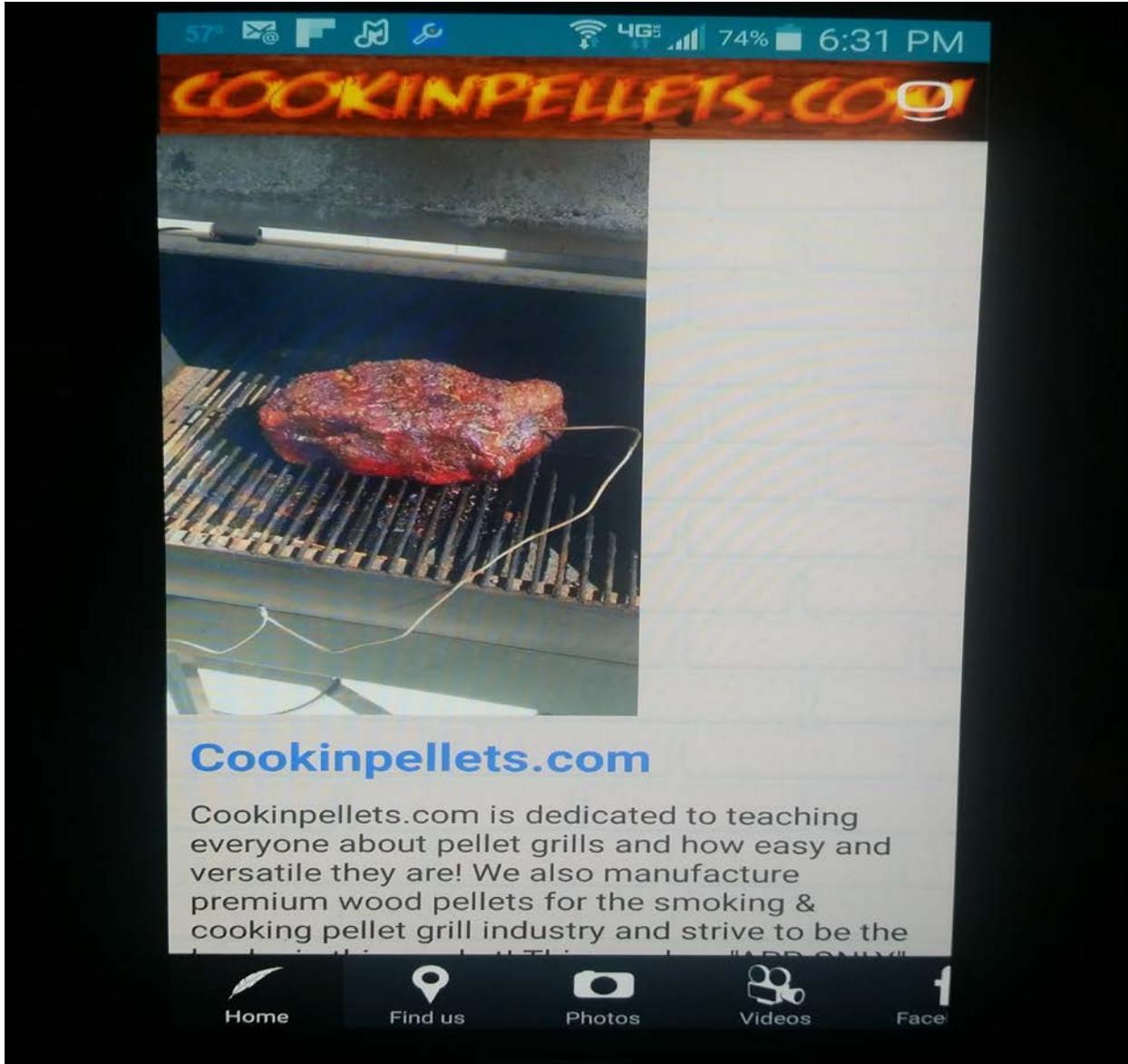
are ineligible for an acquired distinctiveness status for not satisfying the five year threshold.” Applicant’s Brief, p. 13 n.4 (8 TTABVUE 14).

¹³³ February 19, 2017 Request for Reconsideration (4 TTABVUE 7 and 17).

¹³⁴ March 17, 2017 Office Action (TSDR 5).

¹³⁵ Applicant’s application (TSDR 2) and Applicant’s September 18, 2017 Response to Office Action (TSDR 3).

¹³⁶ Applicant’s application (TSDR 37) and Applicant’s September 18, 2017 Response to Office Action (TSDR 9). The specimens are the same.



The Examining Attorney refused registration on the ground that the specimen does not show use of the mark COOKINPELLETS.COM in connection with “downloadable mobile applications for advertising barbecue grill fuels.” Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, and Trademark Rules 2.34(a)(1)(iv) and 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv) and 2.56(a). The text in the application displayed in the specimen states that COOKINPELLETS.COM is about “teaching everyone about pellet grills” and that Applicant manufactures wood pellets.

The Examining Attorney points out that nothing in the mobile application displayed in the specimen has anything to do with advertising barbecue grill fuels and, therefore, the specimen is not acceptable.

Section 1(a)(1) of the Trademark Act provides that an application must include a specimen or facsimile of the mark as used. Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a), provides that an application must include a specimen “showing the mark as used on or in connection with the goods or services.” For a downloadable application, “an applicant may submit a specimen that shows use of the mark on an Internet website.” TMEP § 904.03(e). The mark as used on the specimen must create an association between the mark and the software. *See In re Azteca Sys., Inc.*, 102 USPQ2d 1955, 1957 (TTAB 2012) (citing *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009)).

The specimen shows the mark used in connection with a downloadable mobile application for teaching people about pellet grills; the specimen fails to show the mark used in connection with a downloadable mobile application for advertising barbecue grill fuels. In view thereof, the refusal to register the mark for failure to provide an acceptable specimen is affirmed and, thus, Applicant’s amendment to the Supplemental Register is refused.

Decision: The refusal to register Applicant’s mark COOKINPELLETS.COM on the ground that it is generic for the goods in Class 4 is affirmed.

The refusal to register Applicant's mark COOKINPELLETS.COM on the ground that it is merely descriptive and has not acquired distinctiveness for the goods in Class 4 is affirmed.

The refusal to register Applicant's mark COOKINPELLETS.COM on the ground that it is merely descriptive for the goods in Class 9 is affirmed.

The refusal to register Applicant's mark COOKINPELLETS.COM on the ground that Applicant failed to provide an acceptable specimen of use is affirmed.