

This Opinion is a
Precedent of the TTAB

Hearing: August 2, 2018

Mailed: June 8, 2021

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

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On Remand from the United States
Court of Appeals for the Federal Circuit

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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:

On August 17, 2018, the Board issued a final decision affirming the refusal to register Applicant's mark COOKINPELLETS.COM (in standard character form), for "[p]rocessed wood fuel in the nature of pellets for use in barbecue grills," in Class 4 on the grounds that COOKINPELLETS.COM is generic and, if it is not generic, that

it is merely descriptive and has not acquired distinctiveness. Sections 1, 2(e)(1), 2(f), and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052(e)(1), 1052(f), and 1127.¹

Applicant appealed the Board's August 17, 2018 decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).² Before the Federal Circuit heard the appeal, the U.S. Supreme Court decided *U. S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729 (2020), which addressed the legal question whether a generic term combined with the top level domain “.com” (a “generic.com” term) results in a combination that is necessarily generic. The Supreme Court rejected a *per se* rule that a “generic.com” term is always generic, but also rejected a rule that such a term is automatically non-generic. *Id.* at *7. Instead, the Court held that “[w]hether any given ‘generic.com’ term is generic . . . depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.” *Id.* In an order dated

¹ 22 TTABVUE. 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. The application also includes goods in Class 9 and the Board's August 17, 2018 decision also affirmed the refusal to register COOKINPELLETS.COM as to the Class 9 goods. The Board's decision affirming the refusal to register the mark for the Class 9 goods stands and is not subject to further review because Applicant did not appeal the Board's decision affirming the Class 9 refusals to the U.S. Court of Appeals for the Federal Circuit. *In re GJ & AM, LLC*, No. 19-1214, Brief for Appellant, Dkt 25 at 1 n.1. Accordingly, this decision on remand is limited to the refusals as to the goods in Class 4.

Citations to the examination record refer to the USPTO Trademark Status and Document Retrieval system (TSDR) by page number in the downloadable .pdf format. References to the Board's interim Orders and the parties' briefs on appeal refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if available and applicable.

² 25 TTABVUE.

July 21, 2020, the Federal Circuit remanded this appeal to the Board for further consideration in light of the Supreme Court's *Booking.com* decision, stating:

The impact of the Supreme Court's decision in *Booking.com* is best determined by the Board in the first instance.³

The issues before us on remand are: (i) whether the record establishes that COOKINPELLETS.COM is generic for "processed wood fuel in the nature of pellets for use in barbecue grills" and, if not; (ii) whether Applicant has shown that COOKINPELLETS.COM has acquired distinctiveness for "processed wood fuel in the nature of pellets for use in barbecue grills."⁴

I. Evidentiary Issue

As discussed below, numerous evidentiary exhibits are totally or partially illegible. It is the responsibility of the party making submissions to the Board and to the Trademark Examining Operation 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) ("[T]he onus is on the

³ 26 TTABVUE 2.

⁴ Although the *Booking.com* decision addressed only genericness, the Federal Circuit's Order further noted that "the Board's acquired distinctiveness holding was '[b]ased on the evidence ... in connection with the genericness refusal.'" 26 TTABVUE 2. As previously noted, only the refusals as to the Class 4 goods are before us on remand.

party making the submissions to ensure that, at a minimum, all materials are clearly readable by the adverse party and the Board”), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014); *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.”). Below, in discussing the evidence, we have noted where we have identified illegibility issues. We have given the partially legible evidence identified below varying degrees of probative value, depending on our assessment of how critical the illegible aspects of the evidence are to the asserted probative value of the evidence.

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

“A generic name—the name of a class of products or services—is ineligible for federal trademark registration.” *Booking.com*, 2020 USPQ2d 10729, at *1. A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Co. 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)). “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*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530).

The Federal Circuit 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, does the relevant public understand the term sought to be registered 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); *see also Booking.com*, 2020 USPQ2d 10729, at *6 (“whether a term is generic depends on its meaning to consumers”). 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)); *accord Booking.com*, 2020 USPQ2d 10729, at *7 n.6.

With respect to the first part of the *Marvin Ginn* inquiry, we define the genus 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 Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding the description of services properly defined the genus of the services); *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.”⁵

The second part of the *Marvin Ginn* test is does the relevant public understand the term sought to be registered primarily to refer to that genus of goods? The

⁵ Applicant's Brief, p. 6 (8 TTABVUE 7); Examining Attorney's Brief (15 TTABVUE 6).

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); *see also Booking.com*, 2020 USPQ2d 10729, at *5 (“whether ‘Booking.com’ is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services”). “Applicant agrees with the Examining Attorney’s determination that ‘the relevant public comprises consumers who purchase applicant’s goods....”⁶ In this case, the 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 the evidence bearing on how these people perceive the term COOKINPELLETS.COM in connection with “processed wood fuel in the nature of pellets for use in barbecue grills.”

A. The Meaning of the Component Terms

At the outset, we note that the meanings of the component terms comprising the mark are not in dispute, and in any event are supported by dictionary definitions in the record. Specifically, dictionaries define the word “Cooking,” *inter alia*, as “suitable for or used in cooking.”⁷ Dictionaries define the word “Pellet,” *inter alia*, as “a small,

⁶ Applicant’s Brief, p. 6 (8 TTABVUE 7). Applicant did not submit any testimony or evidence estimating the number of consumers in relevant consumer group. However, Applicant asserts that there are “tens of thousands of users having an interest in applicant’s recited pellet fuel products of [sic] or food preparation services utilizing” its products. Applicant’s Brief, p. 14 (8 TTABVUE 15). We discuss the lack of such testimony or evidence *infra* in the acquired distinctiveness analysis.

⁷ 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).

solid or densely packed ball or mass, as of food, wax, or medicine.”⁸ “.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.⁹

In addition, the record establishes and Applicant does not contest that “Cookin” is a misspelling of the word “Cooking” and means the same thing. The Examining Attorney submitted excerpts from websites using the term “Cookin” in lieu of “Cooking” that show the terms are equivalents and interchangeable.¹⁰ We add that the Board’s precedents and those of the Federal Circuit, our primary reviewing court, hold that slight misspellings generally do not turn a descriptive term into a distinctive one, or a generic term into one capable of indicating source. *See, e.g., Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 196 (Fed. Cir. 1997) (finding CUSH-N-GRIP the equivalent of “cushion grip” and generic); *In re Omaha Nat’l Corp.*, 819 F.2d 1117,

⁸ 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).

⁹ 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.”).

¹⁰ March 17, 2017 Office Action (TSDR 7-18); October 27, 2017 Denial of Request for Reconsideration (TSDR 23-30) (6 TTABVUE 23-30). Examples include the websites cookinwithjenny.net, bahamiancookin.com, kidsacookin.org, and stubbsbbq.com, which sells “Cookin sauces.”

1118 (Fed. Cir. 1987) (finding “FirsTier” the phonetic equivalent of “first tier,” and thus merely descriptive of banking services); *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 Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (holding MINERAL-LYX generic for mineral licks for feeding livestock).

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

To assess Applicant’s use, we look to Applicant’s own mobile application and its website, as well as other evidence in the record showing the ways in which Applicant promotes recognition of its goods among consumers. *See In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) (“Evidence of the context in which a mark is used . . . in advertising material directed to the goods is probative of the reaction of prospective purchasers to the mark.”). A screen-shot image of Applicant’s mobile application bearing the mark used in commerce (the specimen offered in an attempt to show use for the goods in Class 9) 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 ...

In an excerpt from its website, Applicant states:

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 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.¹¹

Applicant's social media presence shows use of the relevant terms as follows:

- 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."¹² Applicant asserts that 27,948 users "like" the Facebook page and 27,875 follow Applicant's Facebook page.¹³
- Applicant's Twitter page (twitter.com) refers to "Cookinpellets.com."¹⁴
- Applicant's Instagram account (Instagram.com) refers to "cookinpellets" and notes that Applicant has 975 followers.¹⁵

¹¹ April 14, 2016 Office Action (TSDR 5).

¹² February 19, 2017 Request for Reconsideration (TSDR 75) (4 TTABVUE 75).

¹³ *Id.*

¹⁴ February 19, 2017 Request for Reconsideration (TSDR 76) (4 TTABVUE 76). The information regarding the number of people receiving Applicant's "twitter feed" is illegible.

¹⁵ February 19, 2017 Request for Reconsideration (TSDR 77) (4 TTABVUE 77).

- Applicant's Pinterest Board (pinterest.com) refers to "cookinpellets.com" and notes that Applicant has 20 followers.¹⁶
- Applicant's YouTube channel (YouTube.com) refers to both "Cookinpellets.com" and "cookinpellets."¹⁷
- Applicant posted a video on the Twitch website (URL illegible) and the webpage refers to "Cookinpellets.com" and "Cookinpellets."¹⁸

In the Letstalkbbq.com Internet forum,¹⁹ the topic "Cookin Pellets Perfect Mix" is moderated by Chris Becker, Applicant's principal.²⁰ A partial screen shot starting the topic is reproduced below:²¹



¹⁶ February 19, 2017 Request for Reconsideration (TSDR 78) (4 TTABVUE 78).

¹⁷ February 19, 2017 Request for Reconsideration (TSDR 79) (4 TTABVUE 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.

¹⁸ February 19, 2017 Request for Reconsideration (TSDR 80) (4 TTABVUE 80). The information regarding the number of followers is illegible.

¹⁹ July 14, 2016 Response to Office Action (TSDR 28-33).

²⁰ Chris Becker Decl. ¶ 3 attached to July 14, 2016 Response to Office Action (TSDR 61); *see also* TSDR 30.

²¹ July 14, 2016 Response to Office Action (TSDR 28).

Chris Becker also appears in The Smoke Ring (thesmokingring.com) Internet forum as cbecker111.²²

The Smoke Ring Forum Index > Wood and Charcoal

Kudos for cookingpellets.com (sic)²³

Yukoff

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!²⁴

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 300.²⁵

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 ...

²² July 14, 2016 Response to Office Action (TSDR 38-40).

²³ *Id.* at TSDR 38.

²⁴ *Id.*

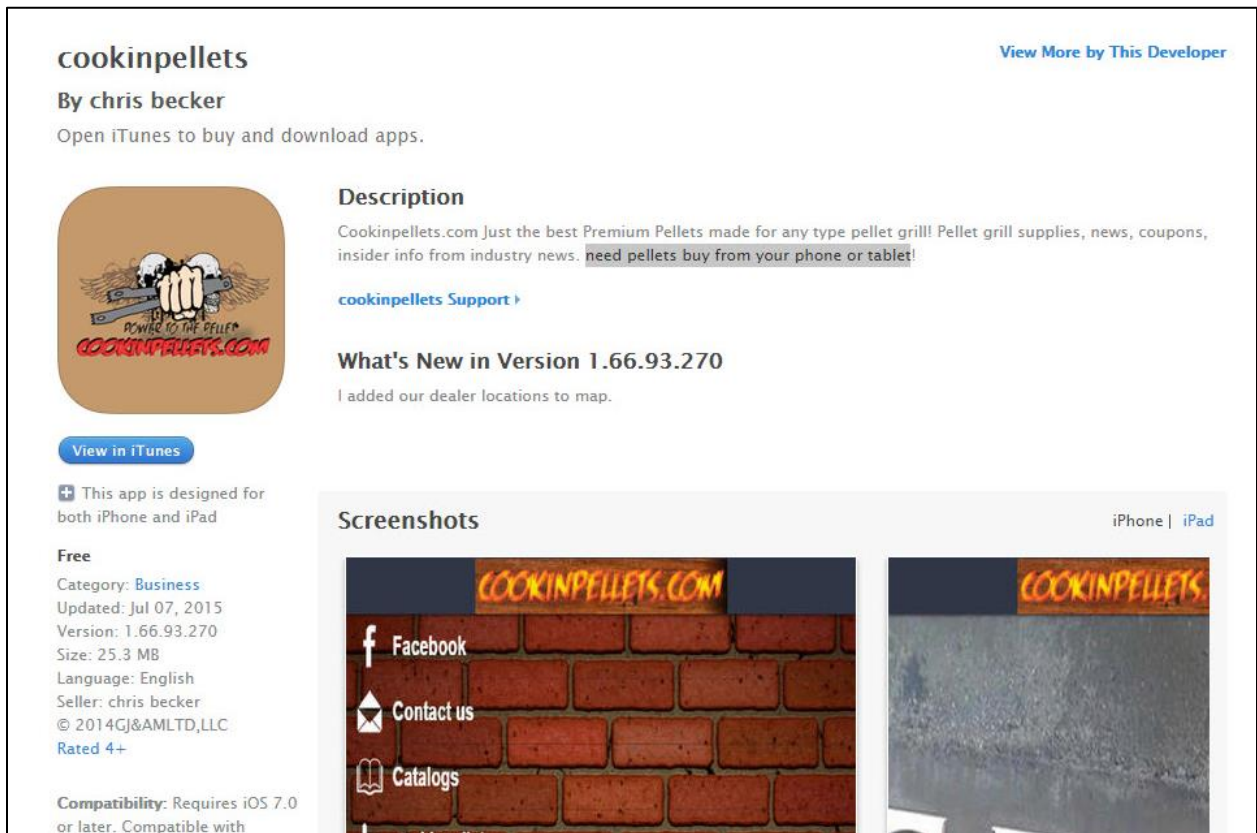
²⁵ *Id.* at TSDR 39.

Chris²⁶

graybeard

Near as I can find, the contact number for Cooking Pellets is a cell # in the Racine area.²⁷

Applicant's advertisement for its "Cookinpellets" app posted on the iTunes website (itunes.apple.com) is reproduced below:²⁸



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

(bbqcentralshow.com).²⁹ The sponsorship statement reads:

²⁶ *Id.* This appears to be Chris Becker, Applicant's principal.

²⁷ *Id.* at TSDR 40.

²⁸ August 19, 2016 Office Action (TSDR 35).

²⁹ February 19, 2017 Request for Reconsideration (TSDR 23) (4 TTABVUE 23); *see also* (TSDR 32) (4 TTABVUE 32).

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.

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

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

C. Third-party commercial use of cooking pellets and cookinpellets.

Next, we consider uses by parties other than Applicant that involve “cooking pellets,” “Cookin Pellets,” and Applicant’s applied for mark “Cookinpellets.com.”

- An excerpt from Facebook page for Wandoo Rise Gourmet Cooking Pellets (facebook.com/WandooRiseGourmetCookingPellets/timeline) is reproduced below:³⁰



³⁰ May 31, 2016 Office Action (TSDR 5).

- 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!"³¹
- Smokin Wood Pellets (smokinwoodpellets.com):³²

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)³³

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)³⁴

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.

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

³² May 31, 2016 Office Action (TSDR 8); *see also* February 19, 2017 Request for Reconsideration (TSDR 25) (4 TTABVUE 25).

³³ May 31, 2016 Office Action (TSDR 9).

³⁴ May 31, 2016 Office Action (TSDR 10).

- Allied Charcoal & Wood (nevadahotwood.com)³⁵

Home>Wood Pellets>Cooking Pellets

Cooking Pellets

- Earth Sense Energy Systems, Inc. (pellethead.com)³⁶

COOKING WOOD PELLETS2 HARDWOOD COOKING PELLETS

- HomComfort (homcomfort.com)³⁷ 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)³⁸

Hickory Cooking Pellets 20# bg

- Kring’s Hearth & Home (kringsonline.com)³⁹

Wood Pellets for Cooking OR Heating

³⁵ May 31, 2016 Office Action (TSDR 12).

³⁶ May 31, 2016 Office Action (TSDR 14).

³⁷ May 31, 2016 Office Action (TSDR 15).

³⁸ May 31, 2016 Office Action (TSDR 16).

³⁹ May 31, 2016 Office Action (TSDR 17).

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)⁴⁰

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)⁴¹

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."⁴² The advertisement refers to both "Cookinpellets.com" and "CookinPellets."
- The Water Shed (denver.craigslist.org)⁴³

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

⁴⁰ May 31, 2016 Office Action (TSDR 19).

⁴¹ May 31, 2016 Office Action (TSDR 23).

⁴² October 27, 2017 Denial of the Request for Reconsideration (TSDR 8-9) (6 TTABVUE 8-9); *see also* May 31, 2016 Office Action (TSDR 24).

⁴³ July 14, 2016 Response to Office Action (TSDR 60).

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

- Batey, Ltd. (bateyltd.com)⁴⁴

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)⁴⁵

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)⁴⁶

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.

- Hubbard's Farm (hubbardsfarm.com)⁴⁷

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

⁴⁴ August 19, 2016 Office Action (TSDR 11).

⁴⁵ *Id.* at TSDR 13.

⁴⁶ *Id.* at TSDR 14.

⁴⁷ *Id.* at TSDR 20.

pellets in 20 lb. bags, in a variety of flavors to suit your tastes.

- Memphis Wood Fire Grills (memphisgrills.com)⁴⁸

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)⁴⁹

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.⁵⁰

- Pellet Grills of Minnesota (pelletgrillsofmin.com)⁵¹

Green Mountain – Hardwood Cooking Pellets

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

- PelletGrillsBBQ (pelletgrillsbbq.com).⁵² This website identifies “cooking pellets” as a category of products as shown below:

⁴⁸ *Id.* at TSDR 21.

⁴⁹ *Id.* at TSDR 23.

⁵⁰ *Id.* at TSDR 24.

⁵¹ *Id.* at TSDR 25.

⁵² *Id.* at TSDR 26.

- VMG (verna-mae.com)⁵³ advertises the sale of Backyard Cooking Pellets. An excerpt from the website is reproduced below:⁵⁴

⁵³ *Id.* at TSDR 31.

⁵⁴ *Id.* at TSDR 32.

- BBQ Pellets Online.com (bbqpelletsonline.com),⁵⁵ Rec Tec Grills (rectecgrills.com),⁵⁶ and The Water Shed (thewatershed.com)⁵⁷ 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.⁵⁸
- The BBQ Pit Bros. website (thebbqpitbros.com) advertises the sale of CookinPellets Perfect Mix.⁵⁹
- Smokin’ Pete’s BBQ (smokinpetesbbq.com) advertises the sale of CookinPellets Hickory Smoking Pellets.⁶⁰ 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.”⁶¹
- Outdoor Grilling Now (outdoorgrillingnow.com) advertises the sale of “CookinPellets.”⁶²
- Walmart website (walmart.com) search for “cooking pellets” retrieved advertisements for multiple wood pellets,⁶³ including Applicant’s “Cookinpellets CPAM40lb Apple Mash Cooking Pellet,” featuring a photograph of Applicant’s bag displaying “Cookinpellets.com.”⁶⁴

The preceding evidence shows third parties use the term “Cooking Pellets” as a generic term. They also use “Cookin Pellets” or “Cookingpellets.com” as a brand

⁵⁵ February 19, 2017 Request for Reconsideration (TSDR 21) (4 TTABVUE 21).

⁵⁶ *Id.*

⁵⁷ *Id.* at 4 TTABVUE 24.

⁵⁸ *Id.* at 4 TTABVUE 26.

⁵⁹ *Id.* at 4 TTABVUE 30.

⁶⁰ *Id.* at 4 TTABVUE 31.

⁶¹ *Id.* at 4 TTABVUE 32.

⁶² *Id.* at 4 TTABVUE 33.

⁶³ October 27, 2017 Denial of the Request for Reconsideration (TSDR 10-12) (6 TTABVUE 10-12).

⁶⁴ October 27, 2017 Denial of the Request for Reconsideration (TSDR 11) (6 TTABVUE 11).

name. Some third parties use the generic term “Cooking Pellets” and the brand names “Cookin Pellets” or “Cookinpellets.com” in the same posting.

D. Third-party use in online forums⁶⁵

We also consider uses by parties other than Applicant that involve discussion of pellets for cooking, but which may not be in the context of commercial sales.

- Smoking MeatForums.com (smokingmeatforums.com)⁶⁶ hosts a Pellet Smokers Group and the “thread starter” uses cooking pellets as a generic term:

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?

- In another excerpt from Smoking MeatForums.com (smokingmeatforums.com),⁶⁷ the users refer to “CookinPellets” as a brand name, with the exception of one use of “Cookinpellets.com” noted below; and other forums show similar usage. The following examples are illustrative:

CookinPellets vs. Lumberjack?

THREAD STARTER

⁶⁵ The presentation of the forums is annotated for clarity, relevance, and to avoid cumulative evidence.

⁶⁶ April 14, 2016 Office Action (TSDR 3).

⁶⁷ July 14, 2016 Response to Office Action (TSDR 18-22).

Frog1369

I've got a Rec-Tec and have only burnt CookinPellets in it. I'm located about midway between CookinPellets and Lumberjack.⁶⁸

SeenRed

I am currently burning some CookinPellets 100% hickory with very good results.⁶⁹

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.⁷⁰

- BBQ-Brethren.com forum⁷¹

BBQSAMYesIam

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 forum⁷²

Best Pellets for that Smoky Flavor [starter thread]

jmoney7269

⁶⁸ *Id.* at TSDR 18.

⁶⁹ *Id.* at TSDR 18-19. SeenRed was quoted in the previous Internet forum using the generic term "cooking pellets."

⁷⁰ *Id.* at TSDR 20.

⁷¹ May 31, 2016 Office Action (TSDR 7).

⁷² July 14, 2016 Response to Office Action (TSDR 23-27).

As far as the best smokey flavor, it's dang hard to beat cookinpellets 100% hickory.⁷³

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 ...⁷⁴

- Big Green Egg (eggheadforum.com)⁷⁵

wood cooking pellets in BGE [thread starter]

- Pelleheads.com⁷⁶

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

... 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.

- Pelleheads.com⁷⁷

BEWARE of Cookinpellets.com

ChowHound

⁷³ *Id.* at TSDR 25.

⁷⁴ *Id.* at TSDR 26.

⁷⁵ May 31, 2016 Office Action (TSDR 11).

⁷⁶ May 31, 2016 Office Action (TSDR 22).

⁷⁷ July 14, 2016 Response to Office Action (TSDR 41-58).

I've gotta burn through a quarter tank of Hickory and I'm going to give your "Perfect Mix" a try next.⁷⁸

Ron_L

I ordered two jugs of the Perfect Blend and used for my first FE cook.⁷⁹

Fast Freddie

There's a lot more ash with cookinpellets, but they have a lot more flavor.⁸⁰

JamieB

Jake, order your next Cooking Pellets in bulk bags and re-use the jugs. Saves you some \$\$ on shipping.⁸¹

MNrribsmoker

Just did a turkey last night with apple pellets from CookinPellets.⁸²

- Amazon.com includes product reviews for Applicant's "CookinPellets 40H Hickory Smoking Pellets."⁸³ 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;⁸⁴
 - 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.⁸⁵

⁷⁸ *Id.* at TSDR 41.

⁷⁹ *Id.* at TSDR 43.

⁸⁰ *Id.* at TSDR 43.

⁸¹ *Id.* at TSDR 43.

⁸² *Id.* at TSDR 46.

⁸³ July 14, 2016 Response to Office Action (TSDR 12-17); *see also* February 19, 2017 Request for Reconsideration (TSDR 72) (4 TTABVUE 72).

⁸⁴ July 14, 2016 Response to Office Action (TSDR 12).

⁸⁵ *Id.*

- I highly recommend to anyone looking for alternative pellet to give CookinPellets Hickory Smoking Pellets a try.⁸⁶
- Yoder Smokers (community.yodersmokers.com)⁸⁷

New Pellets

Has anyone had any experience with “CookinPellets” brand of pellets?⁸⁸

... I have been equally happy with BBQr’s Delight and CookinPellets Perfect Mix. I find they burn at about the same rate for me.⁸⁹
- In the Cookshack Internet forum (cookshack.com) topic “Cookin Pellets???”, the participants discussed their experience with Applicant’s “Cookin Pellets” product.⁹⁰
- In the PelletSmoking.com Internet forum topic “Who’s pellets do you use and why?”, Big_Jake recommended “Cookinpellets.”⁹¹
- In the PelletSmoking Internet form topic “Pellets for a Traeger,”⁹² Scallywag wrote that he “switched from Traeger to cookinpellets.com,”⁹³ and Cliffk wrote that he buys “from “cookinpellets.com.”⁹⁴
- The BBQ Brethren (bbq-brethren.com) Internet topic was “Cookin Pellets – Any good?”⁹⁵ CtTradArcher, LordlyMantis, and Ron_L referred to “cookinpellets.com.”

⁸⁶ *Id.* at TSDR 13.

⁸⁷ July 14, 2016 Response to Office Action (TSDR 34-37).

⁸⁸ *Id.* at TSDR 34.

⁸⁹ *Id.* at TSDR 36.

⁹⁰ February 19, 2017 Request for Reconsideration (TSDR 22) (4 TTABVUE 22).

⁹¹ *Id.* at 4 TTABVUE 34.

⁹² *Id.* at 4 TTABVUE 58-61.

⁹³ *Id.* at 4 TTABVUE 58.

⁹⁴ *Id.* at 4 TTABVUE 61.

⁹⁵ *Id.* at 4 TTABVUE 35-39.

- The Cookshack Barbecue & Smoke-Cooking Center (forum.cookshack.com) Internet forum topic was “Anyone tried Cabela’s pellets?”⁹⁶

AndyJ

Forgot about cookinpellets, heard good things about them.⁹⁷

Joe M

You’ll like the BBQ’ers & CookinPellets. The one downside to the CookinPellets is limited choices.⁹⁸

- Yelp website (yelp.com) reviewed “California Pellet Grills,” a retailer.⁹⁹ Nick E. wrote that “California Pellet Grills carries both BBQ’ers Delight and CookinPellets, which happen to be the two I was most interested in.”¹⁰⁰
- Reddit website (reddit.com/r/pelletgrills/comments/) reviewed pellets (“Let’s talk pellets”).¹⁰¹ Jamesandginger wrote that “Cookin’ Pellets Perfect Mix. Best bang for the buck for sure.”¹⁰²
- TexasBBQRub Forum (texasbbqrub.com) topic “To all traeger owners,”¹⁰³ 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.”¹⁰⁴

⁹⁶ *Id.* at 4 TTABVUE 40-43.

⁹⁷ *Id.* at 4 TTABVUE 41.

⁹⁸ *Id.* at 4 TTABVUE 43.

⁹⁹ *Id.* at 4 TTABVUE 44-52.

¹⁰⁰ *Id.* at 4 TTABVUE 47.

¹⁰¹ *Id.* at 4 TTABVUE 53-57.

¹⁰² *Id.* at 4 TTABVUE 53.

¹⁰³ *Id.* at 4 TTABVUE 62-71.

¹⁰⁴ *Id.* at 4 TTABVUE 64. JMoney7269 also participated in the BBQ-Brethren.com forum noted above.

Consumers and users of wood pellets who visit Internet forums use “Cooking Pellet” as a generic term and “Cookin Pellets” (with or without a space between the words) or “Cookinpellets.com” as a brand name.

E. News articles¹⁰⁵

Next, we turn to media referrals of the involved cooking pellet product.

- Not Your Father’s BBQ! (oldsorb.wordpress.com)¹⁰⁶

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)¹⁰⁷

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)¹⁰⁸

¹⁰⁵ 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.

¹⁰⁶ May 31, 2016 Office Action (TSDR 18).

¹⁰⁷ August 19, 2016 Office Action (TSDR 6).

¹⁰⁸ *Id.* at TSDR 7.

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)¹⁰⁹

Olde Towne gets a little wood, fire and chargrilling

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

- How to BBQ right.com (howtobbqright.com)¹¹⁰

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."¹¹¹
- The Sites Done Right Blog (sitesdoneright.com) features an article regarding the use of pellet smokers.¹¹² 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);¹¹³

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at TSDR 15.

¹¹¹ February 19, 2017 Request for Reconsideration (TSDR 22) (4 TTABVUE 22).

¹¹² *Id.* at 4 TTABVUE 25.

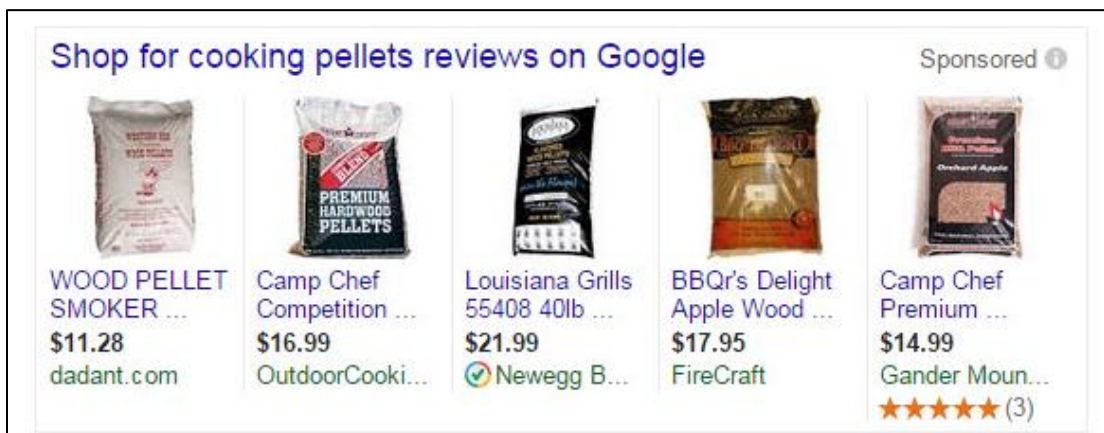
¹¹³ February 19, 2017 Request for Reconsideration (TSDR 26-27) (4 TTABVUE 26-27).

- Fires Review website (firesreview.com);¹¹⁴ and
- The BBQ Beat website (bbqbeat.com).¹¹⁵

As shown above, news articles in newspapers and posted on websites use “Cooking Pellets” as a generic term and “CookinPellets” as a brand name.

F. Miscellaneous evidence

The search for the term “cooking pellets review” included the following results:¹¹⁶



G. 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 whole as signifying the class of goods “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

¹¹⁴ *Id.* at TSDR 27-28 and 4 TTABVUE 27-28.

¹¹⁵ *Id.* at 28-29.

¹¹⁶ April 14, 2016 Office Action (TSDR 4).

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 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); *see also Booking.com*, 2020 USPQ2d 10729, at *2 (“A term styled ‘generic.com’ is a generic name for a class of goods or services only if the term has that meaning to consumers.”).

The term “Cooking Pellets” is indisputably generic. As established by the foregoing evidence, the combination of “cooking” and “pellet” does not result in a term that purchasers of the identified goods will understand as anything other than a cooking fuel.

It is readily apparent to any purchaser or prospective purchaser of “processed wood fuel in the nature of pellets for use in barbecue grills” that the term COOKINPELLETS.COM is a compressed version of the words “Cookin” and “Pellets,” and the top-level domain “.Com.” The individual words “Cookin” or “Cooking” and “Pellets” retain their generic meaning because the compression of the terms does not create an incongruous term, nor does it evoke a unique commercial impression. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (“[T]he 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); *In re ING Direct Bancorp*, 100 USPQ2d at 1690 (“Applicant’s deletion of spaces or hyphens within the designation ‘Person2Person’ cannot transform clearly generic terms such as ‘Person 2 Person Payment’ or ‘Person-2-Person Payment’ into something that is capable of functioning as a source identifier.”); *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.*, 200 USPQ2d at 219 (Judge Rich, concurring) (“GASBADGE” generic for a gas monitoring badge). The terms “Cookin” and “Pellets” are as generic in the compound COOKINPELLETS as they are individually, and the compound term itself is generic.

Whether COOKINPELLETS.COM is generic turns on how the addition of the term “.COM” affects our analysis. Applicant does not contest that “Cooking Pellets” is generic; rather, Applicant argues that it has submitted evidence showing that the relevant public recognizes COOKINPELLETS.COM and “Cookinpellets” as its brand name.¹¹⁷ 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

¹¹⁷ Applicant’s Brief, pp. 7-8 (8 TTABVUE 8-9).

service rather than “processed wood fuel in the nature of pellets for use in barbecue grills.”¹¹⁸

We begin by noting that the Supreme Court in *Booking.com* left undisturbed the circuit court’s finding that “.com does not itself have source-identifying significance when added to [a second-level domain] like booking.” *Booking.com B.V. v. USPTO*, 915 F.3d 171, 185 (4th Cir. 2019), *aff’d*, *USPTO v. Booking.com B.V.*, 2020 USPQ2d 10729, at *2. We find on the record before us that consumers will perceive .COM when added to COOKINPELLETS as signifying that Applicant is a commercial entity with an online presence and does not have source identifying significance in relation to the goods.

Although the record establishes that COOKINPELLETS.COM is a compound of generic terms, “a compound of generic elements is generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services.” *Booking.com*, 2020 USPQ2d 10729, at *7 (emphasis omitted). Here, the evidence shows some consumers, publishers, and other third parties use or understand COOKINPELLETS (with or without a separating space) and COOKINPELLETS.COM as capable of serving as a source indicator rather than as naming the class of goods. For example:

- Applicant uses “Cooking Pellets” as a generic term and uses COOKINPELLETS.COM, “Cookinpellets” and “Cookin Pellets” interchangeably to refer to itself and its products;
- Third parties use “Cookin Pellets” or “Cookingpellets.com” as a brand name. Some third parties use “Cooking Pellets” as a generic term and “Cookin

¹¹⁸ Applicant’s Brief, p. 8 (8 TTABVUE 9).

Pellets” or “Cookinpellets.com” to refer to Applicant’s product in the same posting;

- Consumers and users of wood pellets who visit Internet forums use “Cooking Pellet” as a generic term and “Cookin Pellets” or “Cookinpellets.com” as referring to Applicant’s product; and
- News articles in newspapers and posted on websites use “Cooking Pellets” as a generic term and “CookinPellets” as a brand name.

Although this evidence of consumer perception is limited, on the specific facts and record before us, we find it is sufficient to create doubt about whether consumers would perceive COOKINPELLETS.COM as a whole as generic, or rather as capable of indicating source and thus eligible for registration on the Supplemental Register or on the Principal Register under Section 2(f) if Applicant can show it has acquired distinctiveness. We are constrained to resolve that doubt in favor of Applicant. *See, e.g., In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993) (in genericness case, Board said: “Although the record herein presents a close case, any doubt on the matter should be resolved in applicant’s favor and the mark should be published for purposes of opposition.”) (citations omitted).

We reverse the refusal to register COOKINPELLETS.COM on the ground that it is a generic term for “processed wood fuel in the nature of pellets for use in barbecue grills.”

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 exclusive use of COOKINPELLETS.COM in connection with the identified goods for at least five years.¹¹⁹ Thus, Applicant conceded that COOKINPELLETS.COM is not inherently distinctive.

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).

TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.02(b) (2018). In view thereof, we find COOKINPELLETS.COM is merely descriptive of "processed wood fuel in the nature of pellets for use in barbecue grills."

¹¹⁹ TSDR 1, 2.

Despite Applicant's concession that COOKINPELLETS.COM is not inherently distinctive and our finding 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." *Royal Crown*, 127 USPQ2d at 1047 (quoting *Steelbuilding.com*, 75 USPQ2d at 1424); *see also Nazon v. Ghiorse*, 119 USPQ2d 1178, 1187 (TTAB 2016).

The evidence discussed above in connection with the genericness refusal is equally probative on the question of the level of descriptiveness of Applicant's asserted mark, because the two inquiries are so closely related. *Cf. H. Marvin Ginn Corp.*, 228 USPQ at 530 ("The generic name of a thing is in fact the ultimate in descriptiveness.") (citations omitted). We reiterate our finding above that each of the terms comprising Applicant's mark, "Cookin," "Pellets," and ".Com," is generic of "processed wood fuel in the nature of pellets for use in barbecue grills." When combined, the composite mark COOKINPELLETS.COM is, at the very least, highly descriptive. *See, e.g., Steelbuilding.com*, 75 USPQ2d at 1424 (STEELBUILDING.COM for "computerized on-line retail services in the field of pre-engineered metal buildings and roofing systems" is highly descriptive); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (holding SUPERJAWS merely descriptive for tools); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1900 (TTAB 2001) (RUSSIANART, if not generic, is "very highly descriptive" of "dealership services in the field of fine art, antiques,

furniture and jewelry”). No thought or imagination is required for consumers immediately to understand that wood pellets sold under the mark COOKINPELLETS.COM are just that, wood cooking pellets sold online. Thus, within the merely descriptive category of marks on the spectrum of distinctiveness, the term is closer to the generic than suggestive line.

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).

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, Applicant may register its mark on the Principal Register if Applicant proves that the merely descriptive matter has acquired distinctiveness (also known as “secondary meaning”) as used on 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.*, 123 USPQ2d at 1848. We generally understand acquired distinctiveness 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 analyzing above whether the record shows COOKINPELLETS.COM is generic or merely descriptive with a high

degree of descriptiveness, we considered all of the evidence of record touching on the public perception of that term discussed more fully below.

An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden by a preponderance of the evidence of establishing acquired distinctiveness. *See Yamaha Int'l Corp.*, 6 USPQ2d at 1005-6. Applicant's burden increases with the level of descriptiveness. *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 1078, 1085 (TTAB 2010) (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 Bos. 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.").

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 (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Greenliant Sys. Ltd.*, 97 USPQ2d at 1085.

To establish acquired distinctiveness, an applicant must demonstrate that relevant consumers perceive the subject matter sought to be registered as identifying the producer or source of the product. *See Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (acquired distinctiveness exists “when, in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself”) (citation and internal quotation marks omitted); *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009) (“An applicant must show that the primary significance of the product configuration in the minds of consumers is not the product but the source of that product in order to establish acquired distinctiveness.”).

Applicants may show acquired distinctiveness by direct or circumstantial evidence. *Schlaflly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1743 (Fed. Cir. 2018) (“The Board and courts have recognized that both direct and circumstantial evidence may show secondary meaning.”) (citation omitted); *In re Ennco Display Sys.*, 56 USPQ2d 1279, 1283 (TTAB 2000). Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. *Ennco Display Sys.*, 56 USPQ2d at 1283. Circumstantial evidence, on the other hand, is evidence from which we may infer a consumer association, such as years of use, prior registrations, extensive amount of sales and advertising, unsolicited media

coverage, and any similar evidence showing wide exposure of the mark to consumers. *Id.*; see also *Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321 (Fed. Cir. 1994) (listing, as examples of circumstantial evidence, advertising, sales figures, and intentional copying by competitors).

In particular, the Federal Circuit set out factors to consider in assessing whether a mark has acquired distinctiveness, stating as follows:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

Converse, Inc. v. Int'l Trade Comm'n, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). See also *In re SnoWizard, Inc.*, 129 USPQ2d 1001, 1004-05 (TTAB 2018).

On this list, no single fact is determinative “[a]ll six factors are to be weighed together in determining the existence of secondary meaning.” *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *3 (TTAB 2020) (quoting *Converse*, 128 USPQ2d at 1546); *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009); see also *In re Ennco Display Sys. Inc.*, 56 USPQ2d at 1283 (“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:¹²⁰

- 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 (presumably bags) of COOKINPELLETS.COM generating approximately \$3,000,000 in revenue;
- Since September 1, 2007, Applicant has spent \$25,000 advertising and promoting COOKINPELLETS.COM;
- 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.

A. Association of COOKINPELLETS.COM with a particular source by actual purchasers.

Applicant did not submit a consumer survey for our consideration. However, as discussed above, some of the evidence submitted by Applicant and the Examining Attorney and considered in the analysis of whether COOKINPELLETS.COM is generic and its degree of descriptiveness is circumstantial evidence on the issue of acquired distinctiveness.

- Some third parties use "Cookin Pellets" or "Cookingpellets.com" as a brand name;
- Some 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; and
- News articles in newspapers and posted on websites use "CookinPellets" as a brand name.

¹²⁰ Chris Becker Declaration attached to the July 14, 2016 Response to Office Action (TSDR 61-62).

However, as noted above and discussed below, Applicant did not submit any testimony or evidence defining the size of the market. Therefore, we do not know whether the third parties that recognize COOKINPELLETS.COM as a brand name are a significant or de minimis portion of the market for cooking pellets or the extent to which they represent consumer recognition.

B. Length, degree, and exclusivity of use.

Because only one entity may use a URL, Applicant's use of COOKINPELLETS.COM as a URL has been exclusive. The Examining Attorney did not submit any evidence showing that any entity other than Applicant uses or has used the domain names "cookingpellets.com" or "cookinpellets.com." Neither did the Examining Attorney submit any evidence of any third parties using "cookingpellets" or "Cookinpellets" as part of a domain name (e.g., BBQCOOKINGPELLETS.COM, HICKORYCOOKINGPELLETS.COM, etc.).

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," even longer 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). As indicated above, we must consider the length of Applicant's use in connection with the other evidence of how consumers perceive Applicant's mark.

C. Amount and manner of sales and advertising.

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 modest. Likewise Applicant's sales of 250,000 units generating \$3,000,000 in revenue since September 2007, or over ten years, is an average of 25,000 units per year generating an annual average revenue of \$300,000 also appears modest. 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 small.¹²¹ *Compare., 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, we cannot accurately gauge Applicant's level of success without additional evidence as to Applicant's market share or how COOKINPELLETS.COM

¹²¹ Applicant's Brief, p. 14 (8 TTABVUE 15).

ranks in terms of sales in the trade. Our precedents have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that we might otherwise accord advertising and sales numbers in the acquired distinctiveness inquiry. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016); *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1838 (TTAB 2013); *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007); *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001). Thus, Applicant's 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. *See also Bongrain Int'l*, 13 USPQ2d at 1729 (sales figures by themselves are insufficiently probative because they may indicate popularity of the product or other marks used along with the mark at issue); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ2d 345, 347 (CCPA 1975) ("The advertisements of record do not support an inference of distinctiveness inasmuch as the evidence fails to disclose information from which the number of people exposed to the [mark] could be estimated—such as circulation of the publications in which the advertisements appear, advertising expenditures, number of advertisements published, volume of sales of the soccer balls, and the like"); *see also* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (5th ed., June 2021 Update) ("Raw sales figures need to be put into context to have any meaning. That is, if a company says that its sales of goods or services under the mark are \$x, that number cannot be said to be 'impressive' or 'persuasive'").

evidence of secondary meaning without knowing how \$x compares with the norms of that industry.”).

D. Amount of customers

Applicant asserts that it has 27,948 “likes” and 27,875 followers on its Facebook page,¹²² that it has 975 Instagram followers,¹²³ and that it has 20 Pinterest followers.¹²⁴ 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.¹²⁵ The information regarding the number of people receiving Applicant’s “twitter feed” is illegible.¹²⁶ Nevertheless, Applicant contends that these exhibits show that “applicant has 32,339 followers across these various social media websites.”¹²⁷ In sum, Applicant contends its social media sites “have been ‘followed’ by tens of thousands of users having an interest in applicant’s recited pellet fuel products of [sic] or food preparation services utilizing [Applicant’s] products.”¹²⁸ However, because Applicant has not provided any testimony or evidence estimating the size of the relevant consumer base, there is no context by which we can assess the extent or effectiveness of Applicant’s social media reach. *Cf. Omaha*

¹²² February 19, 2017 Request for Reconsideration (TSDR 75) (4 TTABVUE 75).

¹²³ February 19, 2017 Request for Reconsideration (TSDR 77) (4 TTABVUE 77).

¹²⁴ February 19, 2017 Request for Reconsideration (TSDR 78) (4 TTABVUE 78).

¹²⁵ February 19, 2017 Request for Reconsideration (TSDR 79) (4 TTABVUE 79).

¹²⁶ February 19, 2017 Request for Reconsideration (TSDR 76) (4 TTABVUE 76).

¹²⁷ Applicant’s Brief, p. 14 (8 TTABVUE 15).

¹²⁸ *Id.*

Steaks Int'l v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018) (extensive evidence regarding social media following, millions of customers targeted through direct mail advertising, nationwide retail locations, as well as national print, radio and TV ads, unsolicited movie and TV publicity); *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.¹²⁹ Applicant submitted two screen shots of the reviews providing the following information:

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 a trademark. Nevertheless, this evidence is somewhat probative that there were at least 1,000 purported purchasers of Applicant's products who wrote reviews for the product on the Amazon.com website. This provides some evidence that Applicant's product is popular and successful on Amazon.com.

¹²⁹ Applicant's Brief, p. 15 (8 TTABVUE 16) (citing Applicant's February 19, 2017 Response to Office Action, TSDR 72).

In this regard, Applicant asserts that COOKINPELLETS.COM has been the number one best-selling and highest rated cooking pellet on Amazon.com¹³⁰ and some third-party retailers and some consumers associate COOKINPELLETS.COM with Applicant. By reason of Applicant's use and social media presence some people have come to associate COOKINPELLETS.COM with Applicant. Because we do not know the size of the market, Applicant's evidence regarding its recognition by third-party retailers and on Internet forums may show only a small fraction of consumers recognize Applicant's mark. *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.").

E. Intentional copying.

There is no evidence of intentional copying.

F. Unsolicited media coverage of the product embodying the mark.

As discussed in the "News Article" section of our analysis of whether COOKINPELLETS.COM is generic, five websites reviewed Applicant's product referring to it as CookinPellets, not COOKINPELLETS.COM.

G. Conclusion

After considering all of the factors for which there is evidence in determining whether Applicant's mark COOKINPELLETS.COM has acquired distinctiveness, we find that Applicant has failed to meet its burden of showing that the highly

¹³⁰ Becker Decl. ¶11 attached to the July 14, 2016 Office Action (TSDR 62).

descriptive term COOKINPELLETS.COM has acquired distinctiveness. Specifically, because Applicant did not submit any testimony or evidence defining the size of the market or otherwise providing context as to how the raw numbers Applicant provided compare in the marketplace, we analyze the evidence regarding consumer recognition, Applicant's modest advertising expenditures, and modest sales in a vacuum.

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

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 International 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 International Class 9 was not before us on remand and remains affirmed.

The refusal to register Applicant's mark COOKINPELLETS.COM on the ground that Applicant failed to provide an acceptable specimen of use for the goods in International Class 9 was not before us on remand and remains affirmed.