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Mailed: June 20, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BAG Corp, LLC d/b/a BAGCORP

Serial No. 86438780

Daniel Chalker and Jesica R. Flores of Chalker Flores, LLP
for BAG Corp, LLC d/b/a BAGCORP.

Won T. Oh, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Zervas, Adlin and Hightower, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

BAG Corp, LLC d/b/a/ BAGCORP (“Applicant”) seeks a Principal Register registration for the proposed mark BAGCORP, in standard characters, for “flexible intermediate sacks or bags for storage and transportation of materials in bulk.”¹ In the application, Applicant identifies as a “related property” its registration for the

¹ Application Serial No. 86438780, filed October 29, 2014 based on an alleged intent to use the mark in commerce under Section 1(b) of the Trademark Act.

mark B.A.G. CORP. (in typed format, with “BAG CORP.” disclaimed, and a Section 2(f) claim as to the entire mark) for “bags for transporting goods in bulk.”²

The Examining Attorney originally refused registration on the ground that the term BAGCORP is merely descriptive of Applicant’s goods under Section 2(e)(1) of the Act, and rejected Applicant’s assertion that the mark has acquired distinctiveness under Section 2(f). After the descriptiveness refusal became final, Applicant appealed and filed its Appeal Brief. The Examining Attorney then requested and was granted a remand to issue a second refusal based on genericness. After the appeal resumed, Applicant filed a supplemental Appeal Brief addressing the genericness refusal; subsequently, the Examining Attorney filed his Appeal Brief and Applicant filed a Reply Brief, both of which address both refusals.

Genericness

“Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services.” *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2011) (citations omitted).

The ultimate test for determining whether a term is generic is its primary significance to the relevant public. *See* Section 14(3) of the Act. *See also, In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). The

² Registration No. 1994534, issued August 20, 1996; renewed.

examining attorney bears the burden of making a “strong” showing, with “clear evidence,” that Applicant’s mark is generic. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). *See In re K-T Zoe Furniture, Inc.*, 16 F.3d 390, 29 USPQ2d 1787, 1788 (Fed. Cir. 1994). “[D]oubt on the issue of genericness is resolved in favor of the applicant.” *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

We must make a two-step inquiry to determine whether BAGCORP is generic: First, what is the genus (category or class) of goods and 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? *H. Marvin Ginn Corp. v. International Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

As for the first question, in this case there is no dispute that the genus is as described in Applicant’s identification of goods. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016); *Magic Wand*, 19 USPQ2d at 1551; 9 TTABVue 10 (Applicant’s Supplemental Appeal Brief at 5) (identifying genus as “flexible intermediate sacks or bags for storage and transportation of materials in bulk”). In fact, the record establishes that Applicant offers a variety of bags, including “dewatering,” “specialty,” “bulk,” “utility,” “sand,” “silage” and “packaging peanut” bags. Exhibits to Applicant’s response of October 5, 2016.

With respect to the second part of the genericness inquiry, Applicant’s evidence establishes that the relevant purchasing public consists of a wide range of businesses in the agricultural, construction, waste, transportation, food, landscaping and other

industries in need of bags for storage and transportation. There is no evidence or argument to the contrary. Evidence of this relevant public's understanding of BAGCORP may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985). “[E]vidence of competitors’ use of particular words as the name of their goods or services is, of course, persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods and services.” *Continental Airlines, Inc. v. United Air Lines, Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999).

We must consider how the defined relevant public perceives the term BAGCORP in its entirety. In *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015), our primary reviewing court stated:

[E]ven in circumstances where the Board finds it useful to consider the public’s understanding of the individual words in a compound term as a first step in its analysis, the Board must then consider available record evidence of the public’s understanding of whether joining those individual words into one lends additional meaning to the mark as a whole.

114 USPQ2d at 1832-33. *See also 1800Mattress.com IP*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009) (explaining that the Board appropriately considered the separate meanings of “mattress” and “.com” in determining that the combination “mattress.com” is generic); *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1535 (Fed. Cir. 2009) (affirming the Board’s finding that “the composite term HOTELS.COM communicates no more than the common meanings of the individual components”).

Here, the Examining Attorney relies on dictionary definitions which reveal that “bag” means “a container of flexible material, such as paper, plastic, or leather, that is used for carrying or storing items,”³ and “corp.” is an abbreviation for “corporation,” which is “an entity such as a business, municipality, or organization, that involves more than one person but that has met the legal requirements to operate as a single person, so that it may enter into contracts and engage in transactions under its own identity.”⁴ Office Action of February 24, 2015. Obviously, the word “bag” is generic, at least by itself, because Applicant’s identification of goods includes the word.

Furthermore, Applicant prominently uses the term generically in selling its identified goods:

New Environmentally Friendly Use for Super Sack® Bags!



Last summer, one of B.A.G. Corp.’s customers, 8Rivers Safe Development, found an innovative and environmentally friendly use for our traditional Super Sacks.

³ <https://www.ahdictionary.com/word/search.html?q=bag>.

⁴ <https://www.ahdictionary.com/word/search.html?q=corp.>;
<https://www.ahdictionary.com/word/search.html?q=corporation>.

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Buying bulk bags has never been easier! Our credit card only online store allows users to purchase bulk bags online in quantities from one to 200 (best sellers can be bought in lots of 400), with most orders shipped out the next business day.



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The De-Watering Super Sack container facilitates filtration of a fluid mixture allowing the solid materials to be retained as the liquid drains.

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Reliable, strong and long-lasting, the WindMule™ Utility Bag is designed to carry or lift tools, products, parts, or materials to hard to reach worksites or locations.

Ventilated Super Sack® Containers
Ventilated Super Sack® Containers are extremely breathable and perfect for the storage of potatoes, onions and much more.

Sand Bags
Sandbags may be used during emergencies when rivers threaten to overflow, or a levee or dike is damaged.

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Great for job-site, construction, roadside, demolition, or general cleanup projects.

Archery Targets
Our Super Sack® Archery Targets are made of heavy-duty, cut-resistant woven polypropylene fabric and are printed on both sides.

Mattress Cover
Mattress covers are custom-fitted for Queen or King-sized mattresses and their low slip surface prevents stacked mattresses from sliding.

MuckyMat Utility Mat
The MuckyMat is a reusable, all-purpose barrier designed to protect the cargo area of a car or SUV when transporting messy items, and is ideal for spot clean-up jobs or as a painting tarp.

Packaging Peanuts Bag
An effective way to store and transport styrofoam packing peanuts. The Packaging Peanuts bag is also ideal for dispensing the peanuts into boxes and other shipping containers.

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Used in the farming industry, the Silage Bag has the ability to transport and store large amounts of grain and animal feed.

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As for “corp,” that term, or at least “corp.” (with a period), is commonly used as an abbreviation for “corporation,” as the dictionary evidence makes clear.

When the terms “bag” and “corp” are combined into the proposed mark BAGCORP, the relevant public will understand the term to refer to a company that offers bags. There is no evidence that BAGCORP has any alternative meaning, and Applicant does not suggest one.

We recognize that Applicant’s proposed mark does not include a period after “corp,” but this is insignificant under the circumstances. As explained in more detail below, Applicant vigorously contends that “[t]he mark B.A.G. CORP. [in Applicant’s Registration No. 1994534] and the [proposed, involved] mark BAGCORP are the same mark,” *i.e.* that “corp.” with a period is “the same” as “corp” without a period. 9 TTABVUE 16 (Applicant’s Supplemental Appeal Brief at 11). Furthermore, there is no evidence that “corp” without a period has a meaning different than “corp.” with a period. And it is settled that the word “corporation,” and thus the abbreviation “corp.” (or in this case “corp”) merely designates Applicant’s legal status rather than indicating the source of Applicant’s goods or services. *In re Wm. B. Coleman Co.*, 93 USPQ2d 2019, 2026 (TTAB 2010); *In re Patent & Trademark Services, Inc.*, 49 USPQ2d 1537, 1539-40 (TTAB 1988); TMEP § 1213.03 (2017).⁵ As the Supreme Court held in closely analogous circumstances:

⁵ Applicant’s reliance on 17 Principal Register registrations for marks containing an allegedly generic word combined with CORP or CORPS, such as ALUMNICORPS (Reg. No. 4035843) and CADCORP (Reg. No. 2833648) is misplaced. Office Action response of October 5, 2016. Applicant itself “acknowledges that USPTO findings in other applications are not dispositive of the issues in this proceeding, nor are they given any precedential weight by the Board or USPTO.” 9 TTABVUE 11-12 (Applicant’s Supplemental Appeal Brief at 6-7). *See also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”) and *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014) (“Although the United States Patent

The addition of the word ‘Company’ only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. Thus parties united to produce or sell wine, or to raise cotton or grain, might style themselves ‘Wine Company,’ ‘Cotton Company,’ or ‘Grain Company,’ but by such description they would in no respect impair the equal right of others engaged in similar business to use similar designations, for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world. Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name.

Goodyear’s Rubber Mfg. Co. v. Goodyear Rubber Co., 128 U.S. 598, 602-03 (1888).

While Applicant argues that there is no evidence of record “that the relevant public understands Applicant’s entire mark BAGCORP to primarily refer to the genus of flexible intermediate sacks or bags for storage and transportation of materials in bulk,” *Id.* at 10 (Applicant’s Supplemental Appeal Brief at 5), it is simply incorrect. The Examining Attorney has introduced ample evidence that companies which sell bags use “bag corp.” or variations thereof generically:

and Trademark Office strives for consistency, each application must be examined on its own merits. Neither the Examining Attorney nor the Board is bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.”). In any event, as the Examining Attorney points out, several of the cited registrations do not support a finding of non-genericness here, including those which include “corps” rather than “corp” and those that do not include a generic term such as “bag.” 11 TTABVUE 9-10 (Examining Attorney’s Appeal Brief at 8-9).

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⁶ This listing reveals generic use of BAG CORP without a period after “corp.”

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Space	AAA 00-01 / A-0
Phone	305-540-4310
Products	BAGS FROM \$5, QUALITY PRODUCT, GOOD PRICES

Merchandise P/L
Perfume
Pet Shop
Restaurants / Supermarkets
Scooters
Services
Shoes
Sportswear
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⁷ This listing and the one immediately above reveal use of BAG CORP without a period after “corp.”

Serial No. 86438780

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Rating

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Company name: AMERICAN LAUNDRY BAG CORP.

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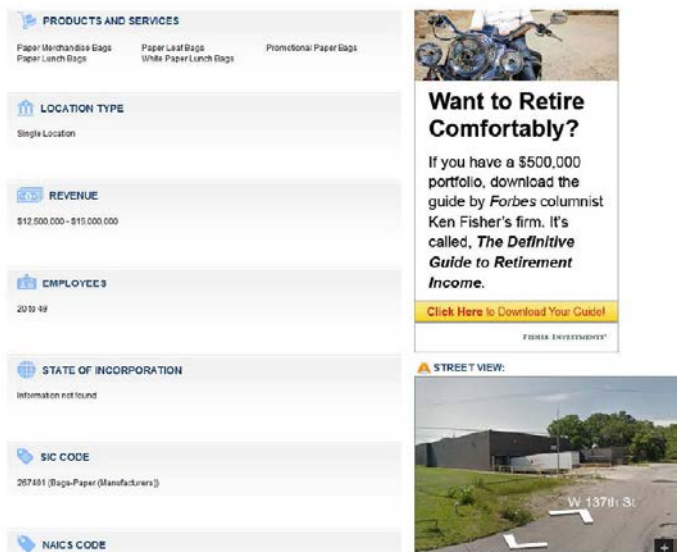
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Office Action of November 3, 2016.

In addition to these generic uses of BAG CORP and variations thereof in bag company trade names, the Examining Attorney has also introduced evidence that several newspapers refer to bag companies generically as “bag corporations”:

⁸ This listing also reveals use of BAG CORP without a period after “corp.”

3. The San Diego Union Tribune, October 27, 2016 Thursday, Final Edition, LOCAL; B; Pg. 9, 682 words, **Protect California's bag ban from out-of-state interests**, ROGER KUBE

... days of the ink drying on the new law, **plastic bag corporations** from Texas and South Carolina - backed by \$7 ...

4. Sacramento Bee (California), October 8, 2016 Saturday, capitol alert, 1244 words, Environmental nuisance or grocery-store necessity? **California voters to decide fate of plastic bags**, Taryn Luna; The Sacramento Bee

... California consumers." **Since October 2014, out-of-state bag corporations** Advance Polybag Inc., Fomosa Plastics Corp., Superbag ...

28. Hood River News (Oregon), June 14, 2016, OPINION, 1048 words, **Wy'east students continue plea for plastic ban**

... **bags may be quite helpful in the future, plastic bag corporations** would say otherwise. Companies such as Helix or Hippo produce millions of ...

*Id.*⁹

While third-party or media use of terms such as COSMETIC BAG CORP or “plastic bag corporation” are not identical to BAGCORP alone, generic modifiers such as COSMETIC or “plastic” do not detract from the probative value of this genericness evidence. *See, e.g., Hotels.com*, 91 USPQ2d 1532 (evidence of use of domain names such as “all-hotels.com” and “my-discount-hotels.com” supported finding that “hotels.com” is generic); *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007) (domain names such as “medialawyer.com” and “Massachusetts-lawyers.com” supported finding that “lawyers.com” is generic). Furthermore, the “telescoping” of the terms “bag” and “corp” into BAGCORP without a space is “immaterial to the issue before us.” *In re Greenliant Systems Ltd.*, 97

⁹ While these are merely search results rather than entire articles, it is clear from the excerpts provided and the context that United States publications are referring to bag companies as bag corporations. This evidence is probative, even without the rest of the articles. *Cf. In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833-34 (Fed. Cir. 2007) (finding Google search result summaries of “lesser” and “little” probative value where there was “very little context of the use of ASPIRINA on the webpages linked to the search report”). Here, the excerpts reproduced above do not reveal use of Applicant’s proposed mark, as in *Bayer*, but instead reveal that newspapers refer to companies in the same business as Applicant as “bag corporations,” which is, essentially, a form of Applicant’s proposed mark.

USPQ2d 1078, 1083 (TTAB 2010); *In re 3Com Corp.*, 56 USPQ2d 1060, 1062 (TTAB 2000). *See also In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987).

The record as a whole leaves no doubt that BAGCORP considered in its entirety is generic for bags, including “flexible intermediate sacks or bags for storage and transportation of materials in bulk,” especially because “the determination of whether a proposed mark is capable of achieving significance as a source identifier must be made in relation to the goods and services for which registration is sought, not in the abstract.” *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1587 (TTAB 2014). In short, businesses in need of storage and transportation bags, and aware that Applicant offers storage and transportation bags, would understand the term BAGCORP primarily to refer to those goods and the source that offers them.

Indeed, this case is similar to *In re Wm. B. Coleman Co.*, in which we found ELECTRIC CANDLE COMPANY generic for light bulbs, lighting fixtures and related goods. We held that “the addition of the company designation” had “no significance,” and that “even if the proposed mark as a whole is not the literal name of the goods, it is nonetheless incapable, and, therefore, unregistrable on the Supplemental Register,” *i.e.*, generic. 93 USPQ2d at 2025.¹⁰ We so held notwithstanding that there was no evidence that others used the entire phrase ELECTRIC CANDLE COMPANY.

¹⁰ Here, by contrast, there are several examples of third-party bag companies using “Bag Corp” and “Bag Corp.,” and of the media referring to bag companies as “bag corporations.”

While this record does not contain an example of another electric candle company referring to itself or its candles as “electric candle company” in offering its electric candles for sale, the need to use “electric candle company” is demonstrated by the evidence establishing that “electric candle” is used by others as the generic name of the goods, and an entity designation must be free for all to use in combination with the generic name of the products sold by the entity. Therefore, we hold that the designation “company” cannot transform the name of the goods for which registration is sought into a trademark.

Id. at 2026-27. The Supreme Court made essentially the same point almost 130 years ago in *Goodyear’s Rubber*, 128 U.S. at 602-03 (“nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name”). Here, while Applicant is correct that its goods are not referred to as BAGCORP, “the relevant public would nonetheless understand [BAGCORP] to refer to a company that offers [bags], and public understanding is critical ... it is a term a purchaser would understand and could use to refer to the type of company that sells [bags], and must be left available for use by other such companies selling [bags].” *In re Wm. B. Coleman*, 93 USPQ2d at 2027.

Finally, Applicant’s argument to the contrary notwithstanding, its disclaimer of “bag corp” in Registration No. 1994534 is further evidence of genericness, not the lack thereof. Indeed, that registration issued under Section 2(f), and therefore Applicant’s disclaimer of “bag corp” in that registration “constitutes a tacit admission that this individual term is generic for the identified” goods. *Alcatraz Media Inc. v. Chesapeake*

Marine Tours Inc., 107 USPQ2d 1750, 1762 (TTAB 2013), *aff'd*, 565 Fed. Appx. 900 (Fed. Cir. 2014).¹¹

There is no doubt based on a review of all evidence of record that BAGCORP will be understood by the relevant public to refer to bags and the corporate entity that supplies them. Moreover, as shown by the evidence, others have a competitive need to use the term and variations thereof. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999). Therefore, BAGCORP is generic and incapable of functioning as a mark, and the Examining Attorney's genericness refusal is accordingly affirmed.

Acquired Distinctiveness

For the sake of completeness, we address the Examining Attorney's finding that Applicant's mark has not acquired distinctiveness.

Our finding that "bagcorp" is generic subsumes a finding that the term is merely descriptive, because "[t]he generic name of a thing is in fact the ultimate in descriptiveness." *H. Marvin Ginn*, 228 USPQ at 530. Applicant bears the burden of establishing acquired distinctiveness. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006-07 (Fed. Cir. 1988). Furthermore, it is

¹¹ Applicant's Contingent Request for Remand, filed March 27, 2017, is moot. We have assumed for purposes of this decision that Applicant disclaimed B.A.G. CORP. in Registration No. 1994534 "based on a descriptiveness rejection under 15 U.S.C. § 1052(e)(1)," and that Applicant did not intend to thereby admit that B.A.G. CORP. is generic. *Alcatraz Media* does not distinguish disclaimers in Section 2(f) registrations made in response to descriptiveness refusals from disclaimers made in response to other types of refusals. Nor does it hold that an Applicant's intent in agreeing to such a disclaimer is relevant to whether it constitutes a "tacit admission."

settled that “the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *In re Steelbuilding*, 75 USPQ2d at 1424 (citing *In re Bongrain Intern. (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990)). Here, as explained in finding Applicant’s proposed mark generic, we find that the term “bagcorp” is highly descriptive, and therefore Applicant’s burden is “concomitantly high.” *Id.* In determining whether Applicant has met its burden, we “may examine copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source),” though “no single factor is determinative.” *Id.*

Applicant has not met its high burden. Applicant relies in large part on its President Jodi Simons’s declaration, in which she states that Applicant has made “substantially exclusive and continuous use in commerce” of its registered B.A.G. CORP. mark “for at least 45 years.” Office Action response of October 7, 2015 (Simons Dec. ¶ 3). Furthermore, from 2010-2015 Applicant spent \$678,371 “to build awareness of the registered mark B.A.G. CORP.,” spending over \$200,000 in 2011 alone. *Id.* at ¶¶ 6-7.¹² “Applicant’s total gross sales since 2009 under the registered mark B.A.G. CORP. are \$227,086,900,” including more than \$30 million in every year from 2009-2014.¹³ Ms. Simons also testifies that Applicant and its customers and

¹² Ms. Simons indicates that Applicant “provides its goods and services in numerous countries throughout the world,” Simons Dec. ¶ 5, and it is not clear how much of its advertising expenses were directed to the United States market.

¹³ Again, there is no indication what percentage of these sales were in the United States.

vendors use B.A.G. CORP. and BAGCORP “interchangeably.” *Id.* ¶¶ 13-14. Finally, and as indicated, Applicant argues that its proposed mark BAGCORP and the registered mark B.A.G. CORP. -- which has been in use since 1969 and is registered under Section 2(f) -- are the “same mark,” pointing out that “[i]n appropriate cases, ownership of one or more prior registrations on the Principal Register ... of the same mark may be accepted as prima facie evidence of distinctiveness.” Trademark Rule 2.41(a)(1).

Under the circumstances, and given Applicant’s high burden to prove acquired distinctiveness, we find this evidence insufficient. Despite the obvious similarities, the mark in the prior registration is not the “same mark” as BAGCORP. Most significantly, the mark in the prior registration includes periods after the “B,” “A” and “G,” and therefore B.A.G. is an obvious acronym. In fact, Applicant submitted amendments to its Articles of Incorporation and Assumed Name Certificate which indicate that Applicant was formerly known as both Better Agricultural Goals Corporation and B.A.G. Corp. before adopting BAG CORP and BAGCORP. Office Action response of March 18, 2015. Consumers presented with B.A.G. would perceive it as an acronym for something, even if they were unaware of what the letters stand for specifically, rather than the word “bag.” Therefore, B.A.G. CORP. has a different commercial impression than, and is not the “same mark” as, BAGCORP.¹⁴ Applicant’s

¹⁴ Applicant’s arguments to the contrary notwithstanding, it is not relevant that Applicant’s prior registration is more than 5 years old or that it is incontestable. *In re Cordua Rests.*, 116 USPQ2d at 1634-35. Furthermore, “[t]he presumption of validity of 15 U.S.C. § 1057(b) does not carry over from registration of the older mark to a new application for registration of another mark that happens to be similar (or even nearly identical).” *Id.* at 1635.

evidence of the distinctiveness of B.A.G. CORP. has little probative value in establishing whether BAGCORP has acquired distinctiveness.

Furthermore, even if we assume that Applicant's evidence regarding B.A.G. CORP. is relevant to the acquired distinctiveness of BAGCORP, and that all of Applicant's advertising expenses were incurred and all of its sales were made in the United States, the amounts are not sufficient to establish acquired distinctiveness because Applicant's mark is so highly descriptive. Significantly higher advertising expenditures and sales have been found insufficient to establish acquired distinctiveness in analogous circumstances. *See, e.g., In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (\$85 million in annual sales revenue and \$2 million in annual advertising expenditures insufficient); *Goodyear Tire & Rubber Co. v. Interco Tire Corp.*, 49 USPQ2d 1705 (TTAB 1998) (\$56,000,000 in sales revenue and 740,000 tires sold insufficient). Of course, we have also considered that the involved application is based on an intent to use, and it is apparent that much of Applicant's evidence of acquired distinctiveness relates to Applicant's use of B.A.G. CORP. rather than BAGCORP, which is not the same. *See In re Louisiana Fish Fry Products, Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015). Even if B.A.G. CORP. and BAGCORP were the same, Applicant's use of B.A.G. CORP. since 1969 is also insufficient under the circumstances. *See In re Ennco Display Systems, Inc.*, 56 USPQ2d 1279, 1286 (TTAB 2000) (while Board may consider evidence of continuous use for more than five years, "the language of the statute is permissive,

and the weight to be accorded this kind of evidence depends on the facts and circumstances of the particular case”).

Perhaps more importantly, the evidence of widespread use of “bag corp.,” “bag corp” and variations thereof by numerous third parties, and “bag corporation” by the media establishes that Applicant’s mark has not acquired distinctiveness. To the contrary, this evidence establishes that applicant’s use of “bagcorp” is anything but “substantially exclusive.” *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *see also, Racine Industries Inc. v. Bane-Clene Corp.*, 35 USPQ2d 1832, 1840 (TTAB 1994).

For all of these reasons, even if BAGCORP is ultimately found to be not generic, Applicant’s evidence of acquired distinctiveness falls far short of meeting Applicant’s high burden of proof under Section 2(f).

Conclusion

The record leaves no doubt that Applicant’s mark is generic in connection with and incapable of distinguishing the identified goods, or their source. If the mark is ultimately found to be not generic, Applicant has failed to establish that it has acquired distinctiveness.

Decision: The refusals to register are affirmed.