Mailed: May 7, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Bell Rock Growers, Inc.

Serial No. 86747927

Michelle Hon Donovan of Duane Morris LLP,
for Bell Rock Growers, Inc.

Linda M. Estrada, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

Before Ritchie, Heasley and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Bell Rock Growers, Inc. ("Applicant") seeks registration on the Principal Register of the mark PET GRASS (in standard characters) under Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f), for the following goods and services:[1]

[1] Application Serial No. 86747927, filed on September 4, 2015, based on an allegation of (1) a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), for the following goods in Class 31: "processed cereal grasses for animal consumption; catnip; digestible chewing bones for animal consumption; edible small animal treats; food for animals," and (2) use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), for the remaining identified Class 31 goods, as well as all of the Class 35 services. Applicant claims November 1998 as both the date of first use and the date of first use in commerce for the Class 31 goods based on use in commerce. Applicant claims

> live wheat, oat, rye and barley grass; kits comprised of wheat, oat, rye and barley grass seeds and growing medium; processed cereal grasses for animal consumption; catnip; digestible chewing bones for animal consumption; edible small animal treats; food for animals, in International Class 31; and
>
> online retail store services featuring pet supplies, pet toys, and pet food, in International Class 35.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the goods and services identified in its application, and that the mark has not acquired distinctiveness under Section 2(f) of the Trademark Act.[2]

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. The appeal is fully briefed. We affirm the refusal to register.[3]

I. Preliminary Matter – Evidentiary Objections

We initially turn to certain evidentiary objections lodged by the Trademark Examining Attorney regarding evidence allegedly presented by Applicant for the first

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November 5, 2015 as both the date of first use and the date of first use in commerce for the Class 35 services.

[2] During the prosecution of Applicant's application, the Trademark Examining Attorney also issued refusals under Section 2(d) of the Trademark Act and on the ground that Applicant's mark is generic for the identified goods and services. These two refusals, however, were subsequently withdrawn.

[3] Unless otherwise specified, all TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations reference the docket and electronic file database for Application Serial No. 86747927. All citations to the TSDR database are to the downloadable PDF version of the documents.

time with its appeal brief. First, the Examining Attorney contends that Applicant improperly seeks to introduce new evidence in its appeal brief by referring to Registration No. 1881570 for the mark CAT GRASS PLUS, which was not made of record prior to the appeal. Second, the Trademark Examining Attorney objects to Applicant's attempt to introduce "new or replacement hyperlinks" for web pages, which were properly made of record by the Trademark Examining Attorney through Office Actions dates December 29, 2015 and August 3, 2016. Specifically, the Trademark Examining Attorney contends that Applicant refers to these "new or replacement hyperlinks" to demonstrate that these web pages are no longer in use or no longer contain references to the designation PET GRASS. The Trademark Examining Attorney argues that Applicant did not raise this issue or provide any evidence, such as corresponding or replacement screen captures for the web pages, prior to the appeal.

It is well-settled that the record in an ex parte proceeding must be complete prior to appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). With regard to the Trademark Examining Attorney's objection to the reference of Registration No. 1881570, we note that Applicant, in its reply brief, states that it did not intend to introduce this registration as new evidence on appeal and any reference to it should be disregarded.[4] In view of the foregoing, no consideration will be given to this

[4] Applicant' Reply Brief, p. 4, 10 TTABVUE 5. Applicant further stated that "[c]onsideration of the actual registration is unnecessary because the evidence of record clearly shows that the CAT GRASS PLUS mark is a registered trademark through use of the ® symbol." *Id*. The fact that the documentary evidence submitted during prosecution of Applicant's application displays the ® symbol next to the phrase CAT GRASS PLUS is not evidence that the mark

registration and the Trademark Examining Attorney's objection regarding the registration is deemed moot.

With regard to the "new or replacement" hyperlinks, the Board agrees with the Trademark Examining Attorney that these hyperlinks should be given no consideration. If Applicant believed that the hyperlinks provided by the Trademark Examining Attorney in the December 29, 2015 and August 3, 2016 Office Actions were no longer in use or no longer contained references to the designation PET GRASS, Applicant should have responded to those Office Actions in a timely manner during the course of prosecution or filed a written request with the Board to suspend the appeal and remand the application so that Applicant could submit evidence that the hyperlinks were no longer operative or no longer displayed the designation PET GRASS pursuant to Trademark Rule 2.142(d). Applicant did not do so. Accordingly, we cannot consider the evidence submitted for the first time with the appeal brief as evidence in our analysis. In view thereof, the Examining Attorney's evidentiary objection with regard to the "new or replacement" hyperlinks is sustained.

II. Degree of Descriptiveness

Although the Examining Attorney has refused registration of Applicant's applied-for mark on the ground that the mark is merely descriptive of the identified goods and services, Applicant, as noted above, filed its application seeking registration

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is a federally registered trademark. Parties occasionally display the ® symbol with their trademarks, when in fact, the trademark is not federally registered. If Applicant wanted to make this registration of record, it should have done so prior to appeal by submitting a status and title copy of the same.

under Section 2(f) of the Trademark Act. As such, Applicant has effectively conceded that its PET GRASS mark is merely descriptive. *See The 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."). Therefore, the only issue before us is whether Applicant's evidence of acquired distinctiveness for the mark PET GRASS is sufficient. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

The initial question before us in our analysis of whether PET GRASS has acquired distinctiveness is the degree of descriptiveness of that phrase as used in connection with Applicant's goods and services. As noted below, the higher the degree of descriptiveness of the designation in question, the higher the burden Applicant faces in proving acquired distinctiveness. *See Nazon v. Ghiorse*, 119 USPQ2d 1178, 1186 (TTAB 2016).

A designation is merely descriptive under Section 2(e)(1) if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). The wording need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the terminology describes one

significant attribute or function of the goods or services. *See In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

The term "pet" means "any domesticated or tamed animal that is kept as a companion and cared for affectionately." (dictionary.infoplease.com/pet).[5] The term "grass" is defined as "1. any plant of the family Gramineae, having jointed stems, sheathing leaves, and seedlike grains. Cf. grass family. 2. such plants collectively, as when cultivated in lawns or used as pasture for grazing animals or cut and dried as hay." (dictionary.infoplease.com/grass).[6] Each of the words comprising Applicant's proposed mark, "pet" and "grass," is highly descriptive of the types of goods and services offered by Applicant. Furthermore, when combined, the composite terminology PET GRASS is, at the very least, highly descriptive of Applicant's products that include various types of grass that may be consumed by pets and the online retail services offered by Applicant that presumably also feature such grass products for pets. *See, e.g.*, *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1759 (Fed. Cir. 2012) (finding SNAP SIMPLY SAFER merely descriptive for cannulae, needles, and syringes); *Remington Prods. Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990) ("travel care" is merely descriptive in light of, among other evidence, advertisements using the term descriptively); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (holding SUPERJAWS merely descriptive for tools). No imagination is required to

[5] December 29, 2015 Office Action, TSDR p. 57.

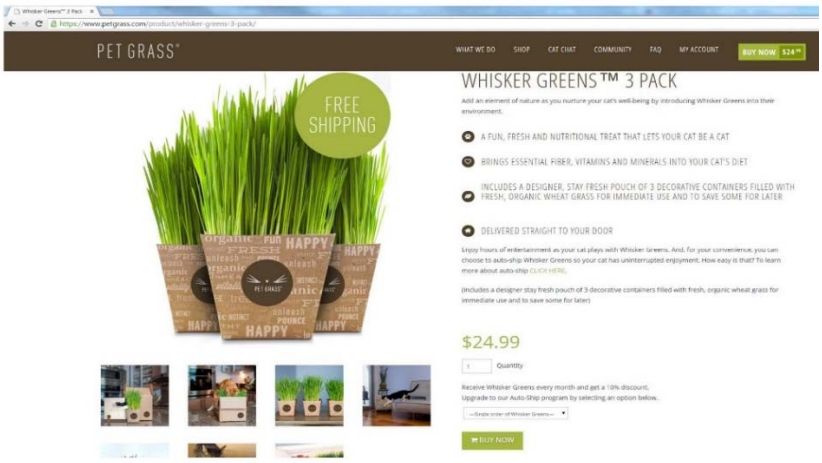
[6] *Id.*, TSDR p. 59.

understand immediately that edible grass for pets sold under the designation PET GRASS is just that, namely, an edible treat for pets that consists of grass. Similarly, no imagination is required to understand that an online pet supplies and pet food retail service provided under the designation PET GRASS provides edible goods for pets in the nature of grass. *See In re Sterotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089-90 (Fed. Cir. 2005) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) ("The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.")).

Applicant's specimens of record for both its Class 31 goods and Class 35 services, as displayed below, also support the finding that Applicant's PET GRASS mark, when viewed in relation to the goods and services for which registration is sought, is merely descriptive of those identified goods and services. The specimens plainly depict grass for consumption by pets, as well as retail store services featuring grass for consumption by pets.

Class 31 Specimen of Use[7]

Class 35 Specimen of Use[8]

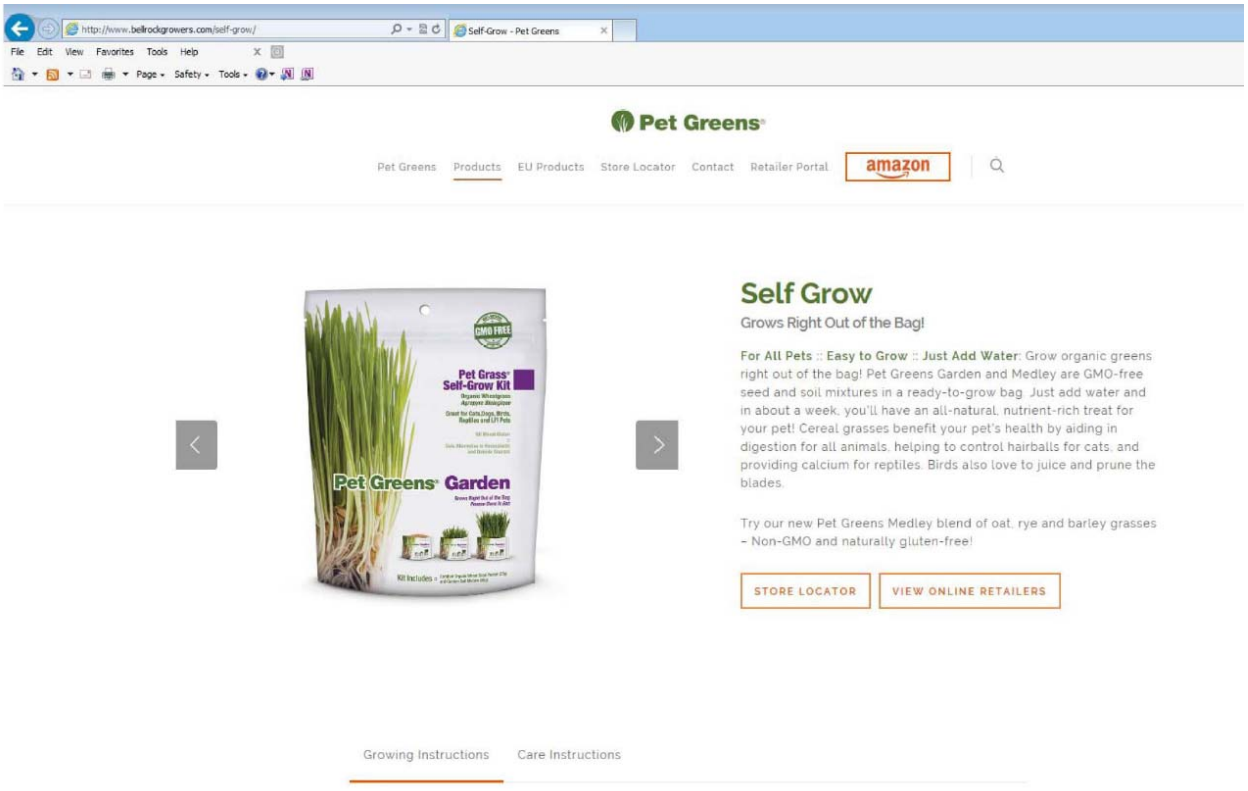


Similarly, Applicant's own advertisements of record support the finding that Applicant's PET GRASS mark is highly descriptive of Applicant's identified goods and services. As an example:[9]

[7] Application, TSDR p. 7.

[8] Amendment to Allege Use, TSDR p. 5.

[9] June 29, 2016 Response to Office Action, TSDR pp. 103 and 116.



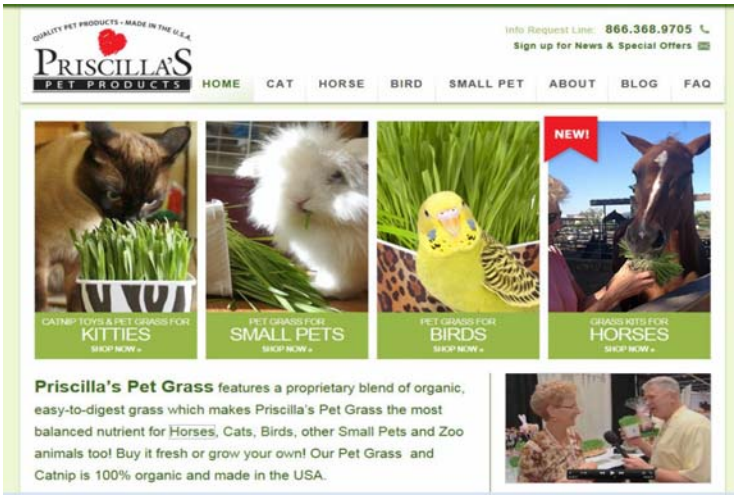
Additionally, the record includes numerous examples from various websites that demonstrate third-party uses of the wording "pet grass" in connection with the goods and services identified in Applicant's application, as emphasized in the following:

- bonnieplants.com/growing/growing-pet-grass/:[10]

"Both cats and dogs need a little grass in their diets, especially if they do not spend a lot of time outdoors. So if you have a pet, growing **pet grass** is a great idea.

"Growing **pet grass** is easy. Like other grasses, **pet grass** prefers full sun and well-drained soil. However, for best growth, keep the potting mix evenly moist. Use care when fertilizing. If grass yellows or growth declines, water with Bonnie Herb & Vegetable Plant Food. It is made from soybean oilseed extract and should not be off putting to a pet, nor will it have a fishy or animal smell as do some organic formulas."

- www.priscillaspetproducts.com:[11]



[10] December 29, 2015 Office Action, TSDR p. 62.

[11] *Id.*, TSDR p. 70.

- www.localharvest.org/cat-pet-grass-organic-seed-free-catnip-C1497:[12]

Advertising "Cat & **Pet Grass** Organic seed & Free Catnip!" This evidence includes a list of pet grass mixes.

Cat & Pet Grass ORGANIC seed & FREE CATNIP!

Store Pet Needs Cat & Pet Grass ORGANIC seed & FREE CATNIP!

(1 review) Like 6

Easy, fast-growing HEALTHY organic pet & cat grass oats, barley & rye, 1 oz .99 !!

1/2_lb.Org.PottingMix	$3.97	On Vacation until 08/27/16
3 oz. Pet Grass Rye	$2.97	On Vacation until 08/27/16
1 oz. Pet Grass Oats	$0.99	On Vacation until 08/27/16
1 oz. Pet Grass Rye	$0.99	On Vacation until 08/27/16
1 oz. Pet Grass Wheat	$0.99	On Vacation until 08/27/16
3 oz. Pet Grass Barley	$2.97	On Vacation until 08/27/16
3 oz. Pet Grass Mix	$2.97	On Vacation until 08/27/16
3 oz. Pet Grass Oats	$2.97	On Vacation until 08/27/16
3 oz. Pet Grass Wheat	$2.97	On Vacation until 08/27/16
1 oz. Pet Grass Mix	$0.99	On Vacation until 08/27/16

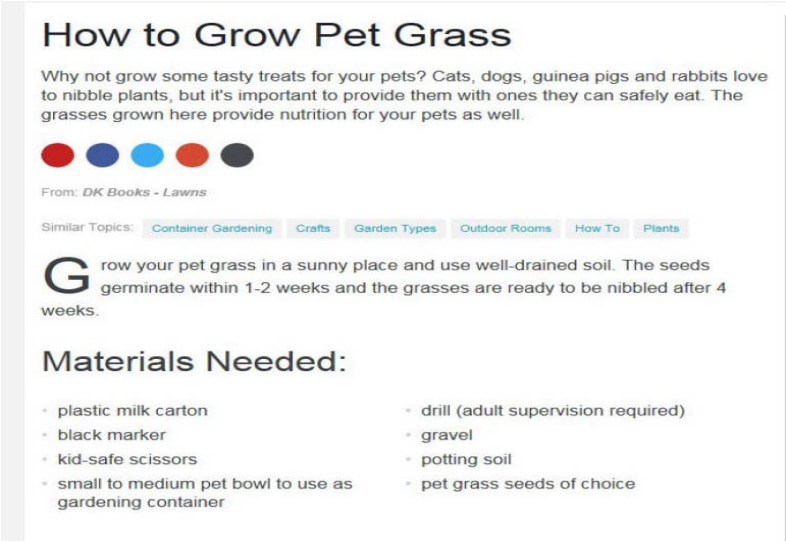
from: Catnip Farm

We have lots of repeat customers who love our grass & grow it regularly as a fresh healthy treat & digestive aid for their dogs, cats, bunnies, small mammals, reptiles and birds ~ many also grow it for juicing.

For free shipping click "Browse our Store" to see our other pet grass listings.

THANK YOU for your support!!!

- www.hgtv.com/design/outdoor-design/landscaping-and-hardscaping/how-to-grow-pet-grass:[13]



How to Grow Pet Grass

Why not grow some tasty treats for your pets? Cats, dogs, guinea pigs and rabbits love to nibble plants, but it's important to provide them with ones they can safely eat. The grasses grown here provide nutrition for your pets as well.

From: *DK Books - Lawns*

Similar Topics: Container Gardening | Crafts | Garden Types | Outdoor Rooms | How To | Plants

Grow your pet grass in a sunny place and use well-drained soil. The seeds germinate within 1-2 weeks and the grasses are ready to be nibbled after 4 weeks.

Materials Needed:

- plastic milk carton
- black marker
- kid-safe scissors
- small to medium pet bowl to use as gardening container
- drill (adult supervision required)
- gravel
- potting soil
- pet grass seeds of choice

[12] August 19, 2016 Office Action, TSDR pp. 32-33.

[13] December 29, 2015 Office Action, TSDR p. 76.

- homeguides.sfgate.com/grow-own-pet-grass-68844:[14]

- rockymountainwheatgrass.com:[15]

Welcome to a better you! Welcome also to Rocky Mountain Wheatgrass.com!

We are growers and sellers of fresh wheatgrass, as well as cut wheatgrass, and kits to grow your own wheatgrass products. Soon we will also be offering frozen wheatgrass juice, as well as pet grass for your four legged friends!

We can ship our products anywhere in the continental United States! We utilize specially insulated packaging

- www.wheatgrasskits.com/petgrass.html:[16]

[14] *Id.*, TSDR p. 84.

[15] *Id.*, p. 88.

[16] August 19, 2016 Office Action, TSDR p. 23.

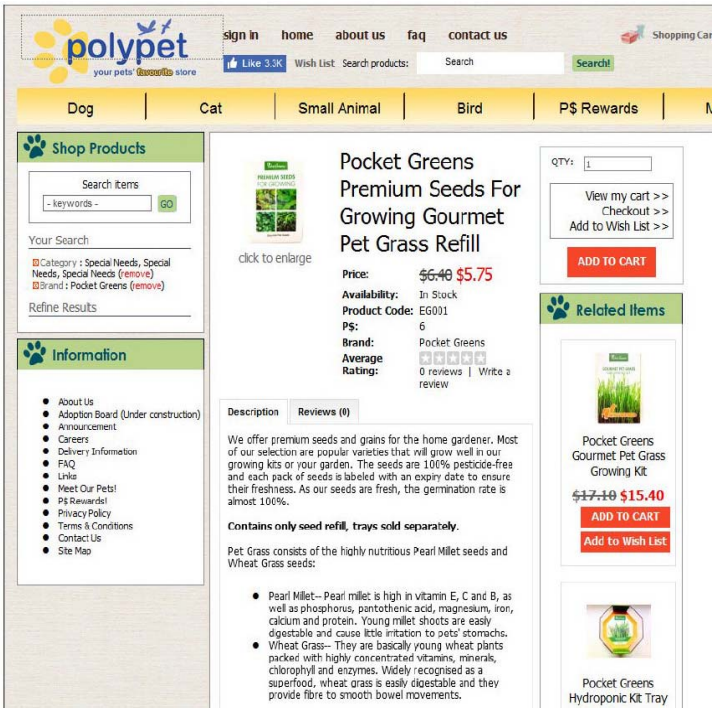
- www.araorganics.com/pets.php:[17]

- www.minnesotamicrogreens.com/products/pet-products:[18]

[17] *Id.*, TSDR p. 29.

[18] *Id.*, TSDR p. 37.

- www.polypet.com.sg:[19]



In view of the foregoing, we conclude that Applicant's proposed mark is highly descriptive of Applicant's goods and services under Section 2(e)(1).

III. Acquired Distinctiveness

Applicant bears the ultimate burden of proving acquired distinctiveness by a preponderance of the evidence. *See Yamaha v. Hoshino Gakki*, 6 USPQ2d at 1005. The amount of proof required to carry that burden increases when the wording sought to be placed on the Principal Register under Section 2(f) is highly descriptive. *See In re Steelbuilding.com,* 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *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 1078, 1085 (TTAB 2010). Because we have

[19] *Id.*, TSDR p. 39.

found that the wording PET GRASS is highly descriptive of Applicant's goods and services, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See In re Steelbuilding.com,* 75 USPQ2d at 1424.

Acquired distinctiveness is generally understood to mean an acquired "mental association in buyers' minds between the alleged mark and a single source of the product." J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (5th ed. March 2018 update). *See also In re Steelbuilding.com,* 75 USPQ2d at 1422 ("To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.") quoted in *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017). Evidence of acquired distinctiveness can include the length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits asserting source-indicating recognition. *In re Steelbuilding.com,* 75 USPQ2d at 1424.

We determine whether Applicant's mark has acquired distinctiveness based on the entire record, again keeping in mind that Applicant has the "ultimate burden of persuasion" as to acquired distinctiveness. *See Yamaha v. Hoshino Gakki*, 6 USPQ2d at 1004.

In support of its claim of acquired distinctiveness, Applicant submitted the declaration of Caleb Barber, Applicant's marketing director (the "Barber

Declaration"), stating, in substantive part, that:[20]

> Bell Rock coined the term PET GRASS and began using it in connection with wheat grass products as early as November 1998;
>
> The PET GRASS brand products have been sold in every major city in all 50 states, in over 4,500 retail stores across the United States;
>
> The PET GRASS products are available at every Petco and PetSmart store in the U.S. as well as Pet Valu, Pet Supplies Plus and other pet product specialty stores throughout the United States;
>
> PET GRASS brand products have also been sold through a variety of online retailers, which include retailers such as Petco, PetSmart, Amazon, Pet 360 and Chewy.com;
>
> Although product price points are low for goods of this nature, Bell Rock has enjoyed considerable sales due to the large volume of goods sold;
>
> Wholesale sales in the United States of products sold in association with the PET GRASS mark have exceeded $21.2 million over the past six years, broken out as follows:

Year	US Sales $
2015	3,681,240
2014	3,516,550
2013	3,198,000
2012	2,905,700
2011	2,470,250
2010	2,739,418

> Estimated retail sales are at almost $53 million dollars in the past six years.
>
> Total advertising sums expended to drive awareness of PET GRASS branded products in the United States exceeded $354,000 over the past five years;
>
> The majority of Bell Rock's advertising has occurred on the internet, in print advertisements, tradeshows, and in store retailer promotions;
>
> The PET GRASS products have also been advertised in a number of pet

[20] June 29, 2016 Response to Office Action, TSDR pp. 88-92.

> and cat magazines with national circulation in the United States, including "Pet Age Magazine," "Pet Business Magazine," "Pet Product New Internationally," and "Modern Cat Magazine";
>
> The PET GRASS mark is displayed on the bellrockgrowers.com website, and has been displayed on this website since at least 2002;
>
> The PET GRASS mark is also displayed on the petgrass.com website which was launched in November 2015;
>
> Bell Rock advertises its PET GRASS branded products on its Bell Rock Facebook page since April 2011, and now has 6,707 "likes";
>
> Bell Rock recently launched a separate Pet Grass Facebook page on September 28, 2015 to exclusively feature its Pet Grass products and already has 3,806 "likes";
>
> Bell Rock advertises its PET GRASS branded products under its PetGreens Twitter account since March 2011 and has also started a separate Twitter account exclusively for the Pet Grass products under the name PetGrassLove;
>
> The PET GRASS House Blend won the 2013 Pet Business Industry Recognition Award. Each year, Pet Business honors the ground-breaking products that are driving the growth in the pet care market;
>
> A picture of the PET GRASS product was also featured in the BuzzFeed 100 Most Important Cat Picture of All Times as the very first image in the article; and
>
> The PET GRASS product was also included in a New York Times article on providing wheatgrass to pets.

Applicant attached various exhibits to the Barber Declaration in support of Mr. Barber's statements.

Having carefully reviewed the totality of the evidence of record, we find that Applicant has failed to establish acquired distinctiveness of its proposed mark within the meaning of Section 2(f). Applicant contends that it coined the term PET GRASS and has used its PET GRASS mark since November 1998 in connection with its wheat

grass products. To the extent that Applicant is arguing that, because it allegedly coined the phrase PET GRASS, such action supports a finding that the phrase has acquired distinctiveness, we find such argument unpersuasive. Even if Applicant were indeed the first or only user of the term PET GRASS used in connection with "pet food," the PET GRASS designation nonetheless "projects a merely descriptive connotation" that Applicant's pet food product consists of grass. *See In re Interco Inc.*, 29 USPQ2d 2037, 2039 (TTAB 1993). Moreover, a word need not be in common use in an industry to be descriptive, and the mere fact that an applicant is the first to use a descriptive term in connection with its goods or services, does not imbue the term with source-identifying significance. *In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) (the fact that the applicant may be the first to use a merely descriptive designation does not "justify registration if the term projects only merely descriptive significance").

Furthermore, it is well settled that an applicant's use of wording for a long time does not necessarily establish that the wording has acquired distinctiveness as a mark. *See In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001) (66 years of use); *see also Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013) (21 years); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (16 years); *In re The Interstate Folding Box Co.*, 167 USPQ 241, 245 (TTAB 1970) (32 years). In the present case, Applicant's use since 1998 is outweighed by the other evidence showing that the phrase "PET GRASS" is highly descriptive of Applicant's goods and services.

While Applicant expended approximately $354,000 over the past five years on sales and marketing and generated approximately $21 million in wholesale revenue and $53 million in retail sales over the last six years, Applicant provided no context for how these figures compare to the volume of sales and revenue by other pet supply companies. We similarly cannot ascertain the reach of Applicant's advertising. But even if those figures prove to be substantial, it is not in itself necessarily enough to prove secondary meaning, particularly when the mark sought to be registered is highly descriptive of identified goods and services, as is the case here. *In re Bos. Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (claim based on annual sales of approximately 85 million dollars, and annual advertising expenditures in excess of ten million dollars, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of mark). In any event, the ultimate test in determining whether a designation has acquired distinctiveness is applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source. *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 422 (Fed. Cir. 1985); *In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1208 (TTAB 2016); *In re Pennzoil Prods. Co.*, 20 USPQ2d 1753, 1760-61 (TTAB 1991). The record is devoid of information regarding the number of visitors to Applicant's booths at trade shows, the volume of unique visitors to Applicant's websites, the extent of national circulation of the trade magazines in which Applicant's advertisements have appeared and the amount of Applicant's advertising in such printed publications.

With regard to Applicant's Bell Rock and Pet Grass Facebook pages, Applicant

contends that these pages have received 6,707 and 3,806 "likes", respectively. Applicant, however, has not provided any context for these figures, so we cannot measure against it how many Facebook "likes" its competitors may have received via their own Facebook accounts. Similarly, with regard to Applicant's PetGreens and PetGrassLove Twitter accounts, Applicant has failed to indicate how many persons follow the accounts or how many consumers have been exposed to the Twitter accounts. Simply put, we are without enough information to determine the degree to which Applicant's Facebook "likes" and Twitter followers are significant.

In considering Applicant's unsolicited media coverage of record, namely, two newspaper articles and an allegedly prestigious product award, we find that this media coverage and accolade are insufficient in volume to support Applicant's claim of acquired distinctiveness.

Furthermore, the nature and number of third-party descriptive uses in the record indicate that use by Applicant has not been "substantially exclusive" as is required for a showing of acquired distinctiveness under Section 2(f). Non-exclusive use presents a serious problem for Applicant in obtaining trademark rights in a designation that is not inherently distinctive, because it interferes with the relevant public's perception of the designation as an indicator of a single source. *See, e.g., 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."); *Ayoub Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1404 (TTAB 2016) (finding that, because of widespread third-party uses of the surname Ayoub in connection with rug, carpet and flooring businesses, applicant's use of the applied-for mark AYOUB was not "substantially exclusive" and thus the mark had not acquired distinctiveness in connection with applicant's identified carpet and rug services); *Miller v. Miller*, 105 USPQ2d 1615, 1625 (TTAB 2013) ("[I]t is clear from the record that applicant has not established that her use of MILLER is substantially exclusive as required by Section 2(f).").

In view of the foregoing, we find that Applicant has failed to submit evidence that demonstrates that consumers perceive the term PET GRASS as pointing uniquely to Applicant as the source of its identified goods and services, and thus Applicant has failed to submit sufficient evidence to establish that the designation has acquired distinctiveness under Section 2(f) of the Trademark Act.[21]

Decision: The refusal to register Applicant's PET GRASS mark on the ground that the designation is merely descriptive of the identified goods and services and has not acquired distinctiveness under Section 2(f) of the Trademark Act is affirmed.

[21] With regard to the Class 31 goods on which Applicant has claimed a bona fide intent to use its mark, i.e., "processed cereal grasses for animal consumption; catnip; digestible chewing bones for animal consumption; edible small animal treats; food for animals," Applicant argues that since its mark has acquired distinctiveness in connection with the goods and services that are currently offered in commerce, this acquired distinctiveness "will transfer to its intent to use goods." Applicant's Appeal Brief p. 8, 7 TTABVUE 9. Applicant's argument is not persuasive since we have found that the proposed mark is highly descriptive in the context of all of the identified good and services and Applicant has not met its burden to establish that the proposed mark has acquired distinctiveness in connection with any of the goods and services identified in its application.