

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Hearing: October 26, 2022

Mailed: October 27, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re C.E. Shepherd Company, L.P.*  
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Application Serial No. 88636382  
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Bryant S. Banes and Sarah P. Harris of Neel, Hooper & Banes, P.C.,  
for C.E. Shepherd Company, L.P.

Ashley Albano, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

—  
Before Bergsman, Pologeorgis, and Coggins,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

C.E. Shepherd Company, L.P. (“Applicant”) seeks registration on the Principal Register of the proposed mark MODULAR GABION SYSTEMS (in standard characters) for “gabions of steel wire,” in International Class 6.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88636382 was filed on September 30, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as 1980.

When we refer to the record, we cite to the Trademark Status and Document Retrieval system (TSDR) in the downloadable .pdf format. When we refer to the briefs, we cite to TTABVUE, the Board’s online docket system.

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

## **I. Preliminary Issues**

### **A. Submitting testimony and evidence multiple times**

At the outset, we are compelled to make an observation regarding Applicant's prosecution of this application. Applicant submitted affidavits multiple times. For example,

- Applicant submitted the Mark Toungate affidavit five times;<sup>2</sup>
- Applicant submitted the Joseph Harris affidavit five times;<sup>3</sup>
- Applicant submitted the Lesley Britton affidavit five times;<sup>4</sup>
- Applicant submitted the Ronald Langston affidavit five times;<sup>5</sup>
- Applicant submitted the Joseph Cibor affidavit five times;<sup>6</sup>

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<sup>2</sup> January 22, 2021 Request for Reconsideration (TSDR 23, 106, 173); August 6, 2021 Response to Office Action (TSDR 39 and 176).

<sup>3</sup> January 22, 2021 Request for Reconsideration (TSDR 25, 107, 174); August 6, 2021 Response to Office Action (TSDR 48 and 177).

<sup>4</sup> January 22, 2021 Request for Reconsideration (TSDR 27, 110, 177); August 6, 2021 Response to Office Action (TSDR 50 and 180).

<sup>5</sup> January 22, 2021 Request for Reconsideration (TSDR 29, 109, 176); August 6, 2021 Response to Office Action (TSDR 41 and 179).

<sup>6</sup> January 22, 2021 Request for Reconsideration (TSDR 31, 108, 175); August 6, 2021 Response to Office Action (TSDR 43 and 178).

- Applicant submitted the George Ragazzo affidavit five times;<sup>7</sup> and
- Applicant submitted the Maury Shepherd affidavit twice.<sup>8</sup>

Suffice it to say, the probative value of affidavit testimony and documentary evidence does not increase with repetition; it needlessly increases the size of the record, and makes review of the record more difficult. *See In re Six Continents Ltd.*, 2022 USPQ2d 135, at \*3 (TTAB 2022).

### **B. Attaching evidence to the briefs and citing to the record**

Because Applicant's original brief exceeded the 25-page limit set forth in Trademark Rule 2.142(b)(2), 37 C.F.R. § 2.142(b)(2), the Board gave Applicant time to file a substitute brief in compliance with Rule 2.142(b)(2).<sup>9</sup> Applicant attached evidence it submitted during the prosecution of the application as an appendix to its original brief and cited to the appendix rather than the record. In its revised appeal brief and during the hearing, Applicant continued to cite to the appendix.

First, the record should be complete prior to filing an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Exhibits or attachments to briefs are of little or no use in a Board proceeding. Evidence which was timely filed during the prosecution of the application need not and should not be resubmitted. Applicants occasionally seem to be under the impression that attaching previously-filed evidence to a brief (and citing to the attachments, rather than to the prosecution record) is a courtesy or a

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<sup>7</sup> January 22, 2021 Request for Reconsideration (TSDR 33, 111, 178); August 6, 2021 Response to Office Action (TSDR 45 and 181).

<sup>8</sup> January 22, 2021 Request for Reconsideration (TSDR 83 and 150).

<sup>9</sup> 11 TTABVUE.

convenience to the Board. It is neither. When considering a case for final disposition, the entire record is readily available to the panel. Because we must determine whether such unnecessary attachments are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during prosecution, requiring more time and effort than would have been necessary if citations were directly to the trial record. *Cf. LifeZone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 n.4 (TTAB 2008).

While exhibits to briefs are not explicitly prohibited by the Trademark Rules, the Board will usually ignore them, because they comprise either untimely evidence or unnecessary copies of timely evidence. As demonstrated by this appeal, they generally are a waste of time and other resources.

As noted above, in its revised brief and during the hearing Applicant continued to cite to its appendix. However, “[c]itation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record.” Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.143(b)(3).

We do not consider the evidence submitted as part of the appendix unless it was properly submitted during the prosecution of the application. Nor do we consider the citations to the appendix because we do not consider the evidence in the appendix.

## **II. Introduction**

To facilitate our analysis of whether Applicant’s proposed mark MODULAR GABION SYSTEMS is generic or merely descriptive, we define the words that

comprise the proposed mark and reproduce photographs and drawings illustrating their meanings.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2020) (ahdictionary.com) defines “Modular,” *inter alia*, as “[c]onstructed out of usually prefabricated units with standard dimensions, allowing for easy assembly and flexible arrangement: modular furniture; modular homes.”<sup>10</sup>

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “Gabion” as *inter alia*, “[a] metal cage filled with rocks used in constructing dams, embankments, and other structures.”<sup>11</sup> “Gabions are rectangular, interconnected, stone filled wire baskets formed from welded or woven mesh, used to form an aesthetic retaining wall.”<sup>12</sup> Gabions are commonly used as temporary or permanent retaining walls, channel linings, and free standing walls or for soil reinforcement, erosion control, and cladding systems.<sup>13</sup>

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<sup>10</sup> January 4, 2020 Office Action (TSDR 6).

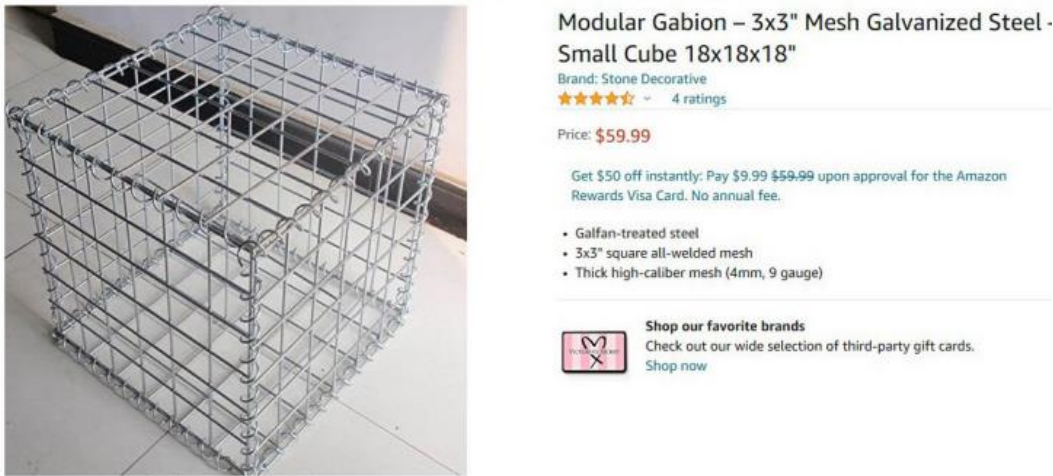
<sup>11</sup> February 12, 2021 Office Action (TSDR 10).

<sup>12</sup> Keller website (keller.na.com) attached to the September 9, 2021 Denial of the Request for Reconsideration (TSDR 6). *See also* Weinstein Construction Corp. website (weinsteinconstuction.com) *id.* at TSDR 9-10 (“Gabions are decorative galvanized wire containers that are filled with hard materials such as decorative rocks or glass chunks.”); Reed & Graham Geosynthetics website (rginc.com) *id.* at TSDR 14 (“Gabions, as used in modern engineering practice, are compartmented, rectangular containers made of galvanized or PVC coated steel hexagonal wire mesh, and filled with stone.”); Wikipedia.org *id.* at TSDR 22 (“A gabion ... is a gage, cylinder, or box filled with rocks, concrete, or sometimes sand and soil for use in civil engineering, road building, military applications and landscaping.”).

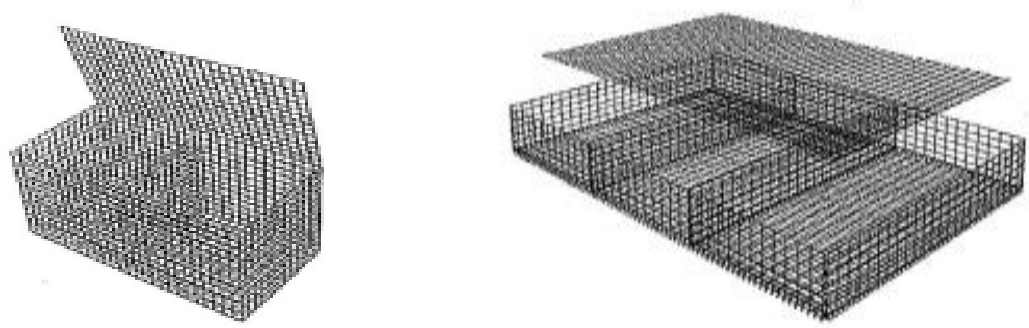
<sup>13</sup> Keller website (keller.na.com) attached to the September 9, 2021 Denial of the Request for Reconsideration (TSDR 6). *See also* MacCafferri website (maccaferri.com/us). *Id.* at TSDR 25.

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “System” as, inter alia, “a regularly interacting or interdependent group of items forming a unified whole.”<sup>14</sup>

We reproduce below a photograph of a “Modular Gabion” advertised on Amazon.com.<sup>15</sup>



We reproduce below drawings of Applicant’s gabion and gabion mattress displayed in Applicant’s brochure.<sup>16</sup>



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<sup>14</sup> February 12, 2021 Office Action (TSDR 12).  
<sup>15</sup> February 12, 2021 Office Action (TSDR 29).  
<sup>16</sup> January 22, 2021 Request for Reconsideration (TSDR 133).

We quote below an explanation of “Gabion systems” from the record evidence:<sup>17</sup>

Gabions are rectangular, interconnected, stone[-]filled wire baskets formed from welded or woven mesh, used to form an aesthetic retaining wall. . . .

**Process**

The corrosion-resistant gabion baskets are placed on a competent formation, then connected to adjacent gabions using tie wire or clips. The gabions are then machine filled with stone and hand placed to reduce voids. The baskets are stacked on top of one another and are generally stepped back to construct a tiered or sloped wall. Tie back can also be applied to resist lateral loads.

We reproduce below a photograph of “Gabions and Gabion Baskets in Los Angeles, CA.”<sup>18</sup>



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<sup>17</sup> Keller website (keller.na.com) attached to the September 9, 2021 Denial of the Request for Reconsideration (TSDR 6-7). *See also* Reed & Graham Geosynthetics website (rginc.com) *id.* at TSDR 14; TerraAqua Inc. website (terraqua.com). *Id.* at TSDR 17.

<sup>18</sup> July 24, 2020 Office Action (TSDR 30).

### III. Whether MODULAR GABION SYSTEMS is generic

“A generic name—the name of a class of products or services—is ineligible for federal trademark registration.” *USPTO v. Booking.com B.V.*, 591 U.S. \_\_\_, 140 S. Ct. 2298, 2020 USPQ2d 10729, at \*2 (2020). 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 refer to the genus of goods or services in question.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530); *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015).

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 services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of services? *Marvin Ginn*, 228 USPQ at 530. The perception of the relevant public is the chief consideration in determining whether a term is generic. *See Princeton Vanguard, LLC*, 114 USPQ2d at 1833. *See also Booking.com*, 2020 USPQ2d at 10729, at \*6 (“[W]hether 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.” *Princeton Vanguard, LLC*, 114 USPQ2d at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)). See also *Booking.com*, 2020 USPQ2d at 10729, at \*7 n.6 (relevant evidence includes any “source of evidence bearing on how consumers perceive a term’s meaning.”). “In assessing the primary significance of Applicant’s proposed mark to the relevant public, we also may consider Applicant’s use thereof.” *In re Consumer Prot. Firm PLLC*, 2021 USPQ2d 238, at \*8 (TTAB 2021) (citing *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987)).

“[A] term can be generic for a genus of ... services if the relevant public ... understands the term to refer to a key aspect of that genus.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016)).

With respect to the first part of the *Marvin Ginn* inquiry, the genus may be defined by the goods identified in the application (i.e., “gabions of steel wire”). See *Cordua Rests.*, 118 USPQ2d at 1636 (“[A] proper genericness inquiry focuses on the description of [goods] set forth in the certificate of registration.”) (quoting *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)); *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007).

Applicant contends that “gabions of steel wire” is too broad to be the genus, asserting that the genus is “wire mesh products.”<sup>19</sup>

While [Applicant’s] Application identifies the goods as “Gabions of steel wire,” this classification is far too broad

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<sup>19</sup> Applicant’s Brief, p. 9 (12 TTABVUE 14).

to effectively define the goods associated with the brand MODULAR GABION SYSTEMS. As defined above, “gabion” has become colloquially associated with earth-retaining baskets. Gabion, Merriam-Webster (11th ed. 2003). However, the genus that is applicable to [Applicant’s] application is not simply baskets, or wire baskets, but integrated welded-wire units and monolithic apparatuses used for “earth retention and soil stabilization, erosion control, and architectural applications.” (Internal citation omitted). Thus, the descriptive term for [Applicant’s] goods is “wire mesh products,” “wire-faced walls,” or “wire mesh mattresses/baskets.”... [S]ince “Gabions of steel wire” does not specifically and adequately describe the genus of [Applicant’s] goods, “wire mesh products” should be the genus of goods the Board uses in determining if MODULAR GABION SYSTEMS, as a whole is a generic term.<sup>20</sup>

The problem with Applicant’s contention is that its identification of goods is “gabions of steel wire,” not “integrated welded-wire units and monolithic apparatuses used for ‘earth retention and soil stabilization, erosion control, and architectural applications.’” “The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” See *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (citing cases)).

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<sup>20</sup> *Id.* at 9-10 (12 TTABVUE 14-15).

Applicant submitted a December 2002 informational pamphlet and a June 1997 price quotation as its original specimens of use.<sup>21</sup> On page one of the pamphlet, Applicant displays photographs of a “pond bisected with a gabion wall” and “debris collected behind the gabion wall.”<sup>22</sup> On page two, Applicant provides a description of a project using its products. For example,

The Concho River project consists of two gabion structures constructed at a primary watershed. The secondary structure is a gabion wall which bisects an existing retention pond in a downtown San Angelo Park.<sup>23</sup>

Applicant submitted as substitute specimens, inter alia, excerpts from its website displaying its products.<sup>24</sup> The excerpt features photographs of gabion structures and provides the following text:<sup>25</sup>

Modular Gabion Systems are engineered welded mesh products for earth retention and soil stabilization, erosion control and flood control, and landscape and architectural applications.<sup>26</sup>

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Construction costs are reduced; unskilled laborers can easily learn to erect Modular Gabion Systems, fill them and close them properly. Many gabion structures may be built without any mechanical equipment. ...

Upon completion, a gabion structure will take its full load immediately – without the waiting periods of up to one

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<sup>21</sup> Application (TSDR 2 and 4).

<sup>22</sup> Application specimen (TSDR 8).

<sup>23</sup> Application specimen (TSDR 9).

<sup>24</sup> July 2, 2020 Response to Office Action (TSDR 5).

<sup>25</sup> July 2, 2020 Response to Office Action (TSDR 11-15).

<sup>26</sup> July 2, 2020 Response to Office Action (TSDR 13).

month normally associated with concrete structures.  
Gabion structures are virtually maintenance free.<sup>27</sup>

According to Applicant's specimens, its "gabions of steel wire" are gabions. In any event, whether we identify the genus of Applicant's products as "gabions," "gabions of steel wire" as set forth in the description of goods, or "wire mesh products" as asserted by Applicant in its brief, our analysis is the same. *See Royal Crown*, 127 USPQ2d at 1047 (in a genericness determination, the Board must "consider whether the relevant consuming public would consider the term ... to be generic for a subcategory of the claimed genus of goods."); *Cordua Rests.*, 118 USPQ2d at 1638 ("[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole."); *In re Twenty-Two Desserts, LLC*, 2019 USPQ2d 292782, at \*2 (TTAB 2019) ("Any term that the relevant public uses or understands to refer to the genus of goods, or a key aspect or subcategory of the genus, is generic."). Put simply, "gabions of steel wire" are gabions which are a subclass of "wire mesh products."

Because doubt on the issue of whether a term is generic must be resolved in favor of the applicant, and to assuage Applicant, we analyze the genus of goods as "wire mesh products." *See In re GJ & AM*, 2021 USPQ2d 617, at \*33 (TTAB 2021) (citing *In re Waverly, Inc.*, 27 USPQ2d 1620, 1624 TTAB 1993)); *In re DNI Holdings Ltd.*,

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<sup>27</sup> July 2, 2020 Response to Office Action (TSDR 14).

77 USPQ2d 1435, 1437 (TTAB 2005). Of course, as noted above, “gabions of steel wire” are a subclass of “wire mesh products.”

The second part of the *Marvin Ginn* test is whether the term sought to be registered is understood by the relevant public primarily to refer to that genus of goods or services. “The relevant public for a genericness determination is the purchasing or consuming public for the identified goods.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1187 (TTAB 2017) (citing *Magic Wand*, 19 USPQ2d at 1553); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013).

In this case, the relevant purchasing public includes contractors, architects, engineers, the United States Department of Defense, United States Army Corps of Engineers, and various other United States government agencies.<sup>28</sup>

The Examining Attorney does not address the composition of the relevant public.

As noted above, gabions are commonly used as temporary or permanent retaining walls or free-standing walls for soil reinforcement, erosion control, and cladding systems.<sup>29</sup> And, Wikipedia.org provides that gabions are used in landscaping applications.<sup>30</sup> Accordingly, gabions may be used by landscapers as well.

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<sup>28</sup> Applicant’s Brief, p. 10 (12 TTABVUE 15). Applicant, in its Reply Brief, changes the relevant public to “a specialized or limited group of civil engineers who are familiar with earth-retention techniques in the United States.” Applicant’s Reply Brief, p. 4 (12 TTABVUE 5).

<sup>29</sup> Keller website (keller.na.com) attached to the September 9, 2021 Denial of the Request for Reconsideration (TSDR 6). *See also* Maccaferri website (maccaferri.com/us). *Id.* at TSDR 25.

<sup>30</sup> September 9, 2021 Denial of the Request for Reconsideration (TSDR 22).

We find the relevant public comprises contractors, architects, engineers, landscapers, the United States Department of Defense, United States Army Corps of Engineers, and various other United States government agencies in the fields of land preservation, retaining walls, channel linings, and freestanding walls or for soil reinforcement, erosion control, and cladding systems.

We now turn to how the relevant public uses and understands the term MODULAR GABION SYSTEMS. We “may consider the understood meanings of portions of Applicant’s [proposed mark] as a step in the process towards our ultimate finding of whether the proposed mark, as a whole, is generic for Applicant’s [goods].” *Consumer Prot. Firm*, 2021 USPQ2d 238, at \*17. The dictionary definitions are probative of the meaning of Applicant’s proposed mark. *See GJ & AM*, 2021 USPQ2d 617, at \*6-7. *See also Gould Paper Corp.*, 5 USPQ2d at 1111-12 (discussing a dictionary definition of the word “wipe” in the proposed mark SCREENWIPE); *In re Empire Tech. Dev. LLC*, 120 USPQ2d 1544, 1550 (TTAB 2017) (discussing dictionary definitions of the words COFFEE and FLOUR in the proposed mark COFFEE FLOUR). *See also Princeton Vanguard, LLC*, 114 USPQ2d at 1832-33 (“Accordingly, even in circumstances where the Board finds it useful to consider the public’s understanding of the individual words in a compound term as a first step in its analysis, the Board must then consider available record evidence of the public’s understanding of whether joining those individual words into one lends additional meaning to the mark as a whole.”).

As discussed above in the “Introduction,” the words comprising Applicant’s mark have the following definitions:

- “Modular” is defined as “[c]onstructed out of usually prefabricated units with standard dimensions, allowing for easy assembly and flexible arrangement.”;
- A “Gabion” is “[a] metal cage filled with rocks used in constructing dams, embankments, and other structures.”; and
- A “System” is “a regularly interacting or interdependent group of items forming a unified whole.”

Based on the dictionary definitions of the words comprising Applicant’s proposed mark, the meaning of MODURAL GABION SYSTEMS is a group of standard, premade metal cages filled with rocks for use in civil engineering, road building, military applications and landscaping. Accordingly, the words “Modular,” “Gabion,” and “Systems” are individually generic for wire mesh products, specifically gabions of steel wire.

However, the individual meanings of the component terms are not dispositive because Applicant is seeking to register a phrase and not a single or compound word. “[T]he Board cannot simply cite [dictionary] definitions and generic uses of the constituent terms of the mark ... in lieu of conducting an inquiry as to meaning of the disputed phrase as a whole to hold a mark, or a phrase within the mark, generic.” *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). Therefore, as required by *American Fertility*, our analysis by no means stops with the dictionary definitions of the individual terms “Modular,” “Gabion,” and “Systems.”

We must consider the meaning of the term MODULAR GABION SYSTEMS as a whole: that is, whether the joining of those individual words into the proposed mark lends additional meaning to the proposed mark as a whole. *Princeton Vanguard*, 114 USPQ2d at 1832-33.

“[A] compound of generic elements is [also] generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services.” *Consumer Prot. Firm*, 2021 USPQ2d 238, at \*16 (quoting *Booking.com* 2020 USPQ2d 10729, at \*7). As the Federal Circuit has explained, “where the [proposed] mark in its entirety has exactly the same meaning as the individual words . . . the [US]PTO has satisfied its evidentiary burden if . . . it produces evidence including dictionary definitions that the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound [or phrase].” *Consumer Prot. Firm*, 2021 USPQ2d 238, at \*17 (quoting *Princeton Vanguard*, 114 USPQ2d at 1831) (internal quotation and citation omitted)).

In this regard, we find that Applicant’s use “Modular Gabion Systems,” in its entirety, is consistent with the dictionary definitions of the individual terms and the proposed mark, as a whole, identifies a thing (i.e., wire mesh products or more specifically gabions), not the source of the products. In this regard, Applicant does not use MODULAR GABION SYSTEMS to modify a product name (e.g., MODULAR GABION SYSTEMS brand gabions). We reproduce below representative samples of Applicant’s generic use of MODULAR GABION SYSTEMS:



- Applicant's website (ceshepherd.com) reproduced, in relevant part, below:

## Modular Gabion Systems

Modular Gabion Systems are engineered welded wire mesh products for earth retention and soil stabilization, erosion control and flood control, and landscape and architectural applications.<sup>31</sup>

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## Modular Gabion Systems

This is another innovative use of our industrial welded wire mesh products. These modular welded wire mesh baskets filled with stones or other matter are highly effective in erosion and flood control thanks to their resilience to the elements and overall permeability. Our Modular Gabion Systems are utilized by landscape professionals, architects, land preservation professionals and more. For more information and details on our modular gabion systems – click here!<sup>32</sup>

- GOOGLE search result summary reproduced below:<sup>33</sup>

ceshepherd.com › texas-modular-gabion-erosion-contr... ▼  
**Modular Gabion Systems & Erosion Control Solutions in Texas**  
Modular Gabion Systems & Erosion Control Solutions. Protect your property or facility from erosion or flooding with the help of ...

- Applicant's brochure submitted as an exhibit.

**Modular Gabion Systems** are supplied in three configurations for suitability on a wide range of projects. Fully assembled units are supplied with all exterior panels and diaphragms attached to the base. There units are complete stand alone gabions. Modular Gabion Systems are also supplied as separate panels which can be used to

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<sup>31</sup> July 2, 2020 Response to Office Action (TSDR 13).

<sup>32</sup> July 2, 2020 Response to Office Action (TSDR 22).

<sup>33</sup> July 2, 2020 Response to Office Action (TSDR 32).

assemble the required structure with significant reduction in material costs by elimination of common panels where gabions come together.

**Modular Gabion Systems** incorporate two important features. First, diaphragms are used to divide the gabions into one meter or one yard long cells and are designed to eliminate movement of the rock fill while reinforcing the structure. Second, the wire is class III zinc galvanized or GALMAX coated.<sup>34</sup>

- Applicant’s advertisement in November/December 1998 issue of Land and Water, Applicant uses “Modular Gabion Systems” consistent with the dictionary definition saying that “Modular Gabion Systems require less material with less waste.”<sup>35</sup>

- Applicant’s advertisement in the May/June 1997 issue of Land and Water, Applicant states “Modular Gabion Systems can be installed 2-3 times faster than gabions requiring hand lacing” and “Modular Gabion Systems meet the ATSM Specification A974-97 for Welded Wire Mesh Gabions.”<sup>36</sup>

- We reproduce below page one of Applicant’s assembly guide:<sup>37</sup>

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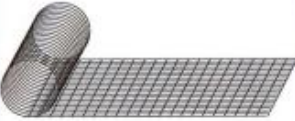
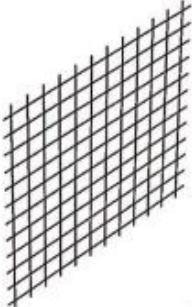
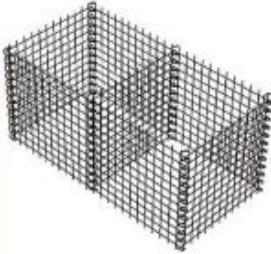
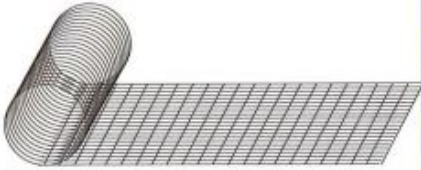
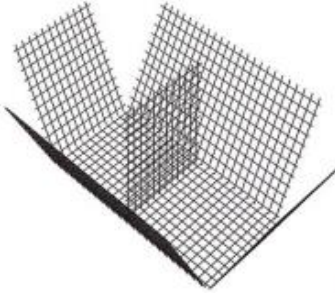
<sup>34</sup> July 2, 2020 Response to Office Action (TSDR 37). In the brochure, Applicant highlights “Modular Gabion Systems” the same way it highlights “Gabions,” “Retaining Walls,” “Weirs,” “Revetments,” “Flexible Aprons,” “Coastal and Beach Protection,” and “Mechanically Stabilized Earth Walls.” *Id.*

<sup>35</sup> July 2, 2020 Response to Office Action (TSDR 42).

<sup>36</sup> August 6, 2021 Response to Office Action (TSDR 83).

<sup>37</sup> July 2, 2020 Response to Office Action (TSDR 49).

# Modular Gabion Systems

<p>Modular Gabions Systems may be supplied in (A) roll form,</p>  <p>When using roll stock, begin the assembly process at Step 1.</p>	<p>(B) pre-cut panels or</p>  <p>When using pre-cut panels, proceed to Step 2.</p>	<p>(C) partially assembled gabions or mattresses.</p>  <p>When using pre-assembled gabions, proceed to Step 3.</p>
<p>Panels may be cut to appropriate sizes in the field. When using roll stock, bottoms, lids, fronts and backs may be rolled out in lengths up to 300'.</p>  <p>1</p>		<p>Ends, diaphragms, front and back panels are placed upright on the bottom section of wire mesh.</p>  <p>2</p>

**MODULAR GABION SYSTEMS**  
2221 Canada Dry Street, Houston, Texas 77021 US  
800.324.8282 • 713.924.4371 • 713.924.4381 fax  
www.gabions.net • wire@gabions.net

- The cover of Applicant’s brochure reproduced below uses the term “Modular Gabion Systems” consistent with dictionary definitions of the component words to

identify a modular gabion system, not the source of the product:<sup>38</sup>

## ***Modular Gabion Systems***



*Houston, Texas USA*

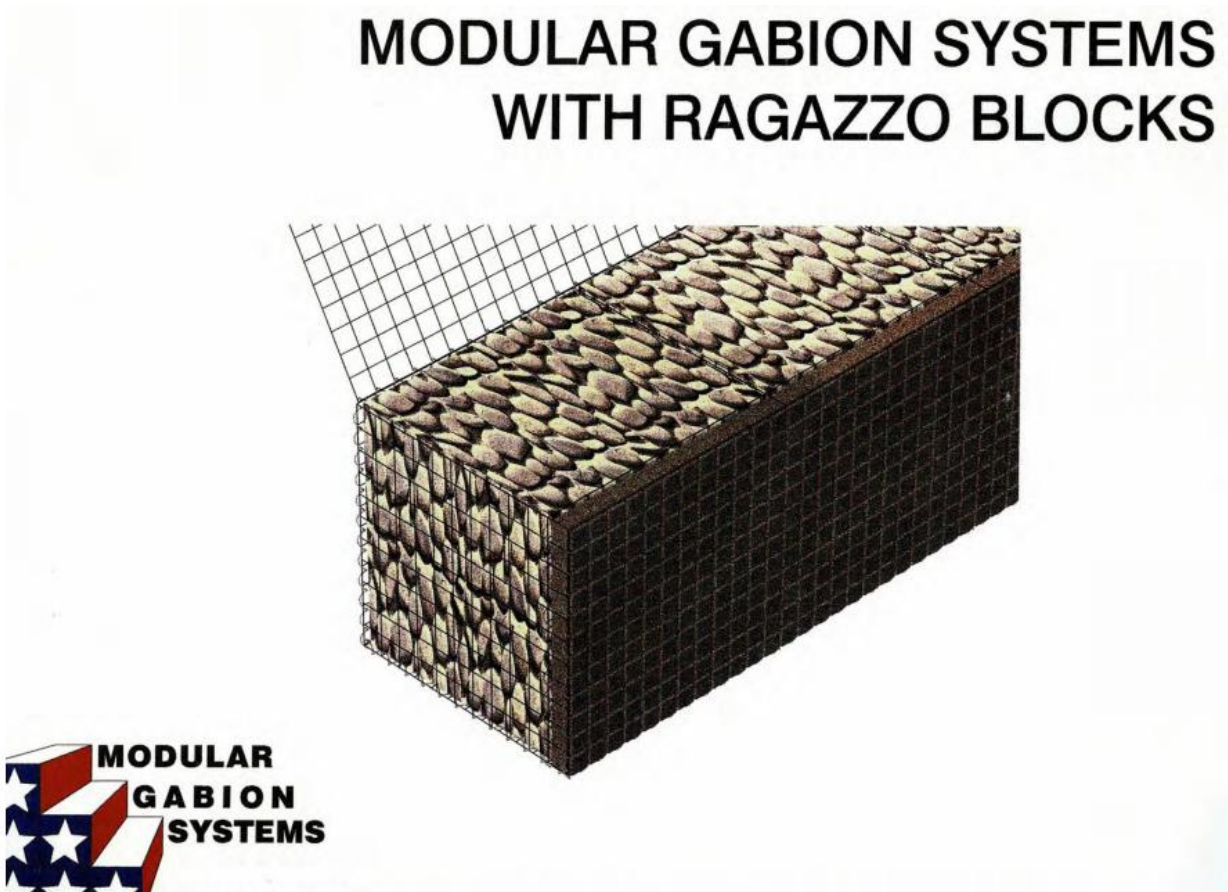
***Solutions to Stabilize  
Soil, Restore Vegetation  
& Control Erosion***



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<sup>38</sup> January 22, 2021 Request for Reconsideration (TSDR 99).

- Inside the brochure, Applicant provides the information reproduced below:<sup>39</sup>



- Applicant states in the brochure that “Modular Gabion Systems may be supplied in roll stock form, pre-cut par[cut off] or partially assembled gabions or mattresses.”<sup>40</sup>

- Applicant uses the term “Modular Gabion” consistent with the dictionary definitions to describe a “wire mesh product” in the brochure it submitted as its specimen with its application. We reproduce below the relevant excerpt from the specimen:<sup>41</sup>

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<sup>39</sup> January 22, 2021 Request for Reconsideration (TSDR 100).

<sup>40</sup> January 22, 2021 Request for Reconsideration (TSDR 101).

<sup>41</sup> Application at TSDR 11.

Modular Gabion & Gabion Mattresses conform to ASTM A974-97 and are ideal for:

- Bank & Channel Protection
- Retaining Walls
- Culvert Outlets
- Weirs & Drop Structures
- Groins & Jetties
- Shore Defense

Modular Gabion & Gabion Mattresses approved by these agencies:

- US Army Corps of Engineers
- USDA Natural Resources Conservation Commission
- US DOT Federal Highway Administration
- Federal Aviation Administration
- US Department of the Interior

As shown above, Applicant uses “Modular Gabion Systems” as the name of standard, premade metal cages designed to interact as a group when filled with rocks for use in civil engineering, road building, military applications and landscaping. It uses “Modular Gabion Systems” as a compound noun, without an accompanying product name. Such uses of the proposed mark condition consumers to understand that “Modular Gabion Systems” are things, not a source-identifier for those things. *See, e.g., Empire Tech.*, 123 USPQ2d at 1558-60 (use of proposed mark COFFEE FLOUR “in lower case lettering as a compound noun, without an accompanying generic term,” found to be “a classic example of the use of a putative mark as a generic term”).

We now turn to the evidence the Examining Attorney submitted, including the websites listed below that refer to “Modular Gabion Systems” as a generic term:

- Chunky River Supply website ([chunkyriversupply.com](http://chunkyriversupply.com))<sup>42</sup>

### Modular Gabion Systems

IF YOU NEED GABIONS FOR RETAINING WALLS, CHANNEL LINING, OR SLOPE STABILIZATION - WE HAVE WHAT YOU NEED.



- Mingshu Gabion Baskets Factory website ([gabionbaskets.org](http://gabionbaskets.org))

#### Modular Gabion System

We supply modular gabion system to form a quick solution for retaining walls, earth retention and other uses. In such system [sic], gabions as wire fabric containers, uniformly partitioned of variable size, are interconnected with other similar containers and filled with stones at the site of use, to form flexible and permeable structures such as retaining walls, sea walls, channel linings, revetments and weirs for earth retention.<sup>43</sup>

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<sup>42</sup> January 4, 2020 Office Action (TSDR 10). Applicant asserts that Chunky River Supply uses photos of Applicant's projects without Applicant's consent to advertise Chunky River Supply products. July 2, 2020 Response to Office Action (TSDR 71). In its Reply Brief, Applicant contends that Applicant has made Chunky River Supply aware that it was misappropriating photographs of Applicant's products to advertise and market its own products and that Chunky River Supply has since stopped using the marketing photographs and Applicant's "brand." Applicant's Reply Brief, p. 5 (12 TTABVUE 6).

<sup>43</sup> January 4, 2020 Office Action (TSDR 12). Applicant contends that the Mingshu Gabion Baskets website is another example of infringing use. July 2, 2020 Response to Office Action (TSDR 71-72). However, Applicant did not repeat that accusation in its main brief or reply

- The Acrazo Development Next Material website (nextmaterial.com)<sup>44</sup>



**Modular Gabion Systems (MGS)**

**10 GA | 1 x 1**

L: 6.250 in  
W: 6.250 in  
H:  
D:

Location: Row 10  
Barcode: 10-313600-001  
Class: 1 Week  
Status: Available

- Frank Roberts & Sons Inc. website (frankrobertsandsons.com) advertises gabion baskets and refers to them as “modular gabions” and “modular gabion systems.”

Modular gabions are made of 3”X3” welded steel wire mesh in various lengths, widths, & heights.

Gabions are available with a galvanized or PVC coating. Modular gabion systems feature a preformed steel wire spiral binder used to assemble & interconnect empty gabions.<sup>45</sup>

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brief. Applicant also points out that Mingshu Gabion Baskets is a website originating from a company located in China. *Id.* at TSDR 72.

<sup>44</sup> January 4, 2020 Office Action (TSDR 14). Applicant contends that this webpage is identical to the University of Texas School of Architecture Material Lab’s website, *see* August 6, 2021 Response to Office Action TSDR 126, “the only exception being that it omits [Applicant’s] link.” According to Applicant, “a reasonable viewer can conclude that Next Material is a third-party website advertising and selling [Applicant’s] brand MODULAR GABION SYSTEMS but failing to include [Applicant’s] link.” Applicant’s Reply Brief, p. 3 (12 TTABVUE 4). Without more evidence, we decline to draw that inference because the NextMaterial.com website displays generic use of MODULAR GABION SYSTEMS without any nexus to Applicant or the University of Texas School of Architecture Material Lab.

<sup>45</sup> July 24, 2020 Office Action (TSDR 20).



- In a story posted on the Cape May website (capemay.com) (August 1, 2006) about the Cape May Canal, the author reports the following:

In 1996 sections of the canal bank were refurbished and a modular Gabion system, composed of rocks encased in wire mesh, were installed to help prevent erosion.<sup>46</sup>

- A posting on the HowToArchitect.tumblr.com website provides the following reference to a modular gabion system:<sup>47</sup>

## erosion control architecture

Who would have thought you could make a building out of an stone erosion control modular gabion system? Image by [Sarah\\_Ackerman](#) @ flickr.



Never miss a post!



howtoarchitect  
how to architect

Never miss a post!



howtoarchitect  
how to architect

Posted at 3:11 PM 16 notes [Permalink](#) ∞

Tagged: [erosion](#) [gabion](#) [stone](#) [architecture](#) [architects](#) [herzog](#)  
[and de meuron](#)

<sup>46</sup> July 24, 2020 Office Action (TSDR 57).

<sup>47</sup> July 24, 2020 Office Action (TSDR 54).

- The term “modular gabion system” is used in New Zealand patent NL2001034C2 for a “Groyne for protecting bank of tidal river, comprises sloping bank with spaced apart gabions on top of its crown.”<sup>48</sup>

The superstructure consists of a modular gabion system that can be attached to the substructure by means of a pin-hole connection. The prefabricated gabions can be easily placed and/or removed by means of a crane.

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16. A method according to any one of the preceding claims 13-15, wherein the flow resistance bodies comprise a modular gabion system and wherein gabions are moved or added or removed, for example by lifting the gabion.<sup>49</sup>

In its Request for Reconsideration, Applicant submitted a copy of “Channel Design Provides Protection of Outflow Following Earthquake” published in the January/February 2009 issue of Land and Water magazine noting that “Modular Gabion Systems, manufactured by [Applicant], were chosen for the project.”<sup>50</sup> Land

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<sup>48</sup> January 4, 2020 Office Action (TSDR 16). THE COLLINS ENGLISH DICTIONARY (2021) posted at Dictionary.com (accessed October 13, 2022) defines “Groyne” as “a wall or jetty built out from a riverbank or seashore to control erosion: Also called: spur, breakwater.”

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>49</sup> January 4, 2020 Office Action (TSDR 17).

<sup>50</sup> January 22, 2021 Request for Reconsideration (TSDR 161). The article also refers to Modular Gabion Systems as Applicant’s trade name. *Id.* (“The entire project was executed with PVC coated gabions and mattresses utilizing ‘roll-stock’ gabion construction method advocated by Modular Gabion Systems.”). Trade name use is not trademark use. *See, e.g., In re Walker Process Equip. Inc.*, 233 F.2d 329, 110 USPQ 41, 43 (CCPA 1956) (finding that term is a trade name and not a trademark); *In re Letica Corp.*, 226 USPQ 276, 277-78 (TTAB 1985) (“trade names qua trade names do not qualify for registration”; specimens showing “Letica Corp.” on the bottom of applicant’s goods is trade name use and not trademark use).

and Water magazine referred to Modular Gabion Systems as a thing manufactured by Applicant, not Applicant's branded product.

Applicant's customer PennaGroup, LLC uses the term "Modular Gabion System" as the name of a thing, not the source of the gabion product.<sup>51</sup>

**Twisted Wire vs. Welded Wire Gabion Baskets.** Used successfully by many U.S. Army Corps. of Engineer Districts, the Modular Gabion System (TM) have several distinct advantages over twisted wire gabion baskets including (1) installation cost savings; and (2) lifecycle cost savings. ...

**Installation Cost Savings.** While the cost of Modular Gabion System (TM) is slightly higher than twisted wire gabion baskets, the project labor installation costs are significant. In most cases, the Modular Gabion System (TM) can be installed in half the time. ...

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**Experienced Installers.** It should be noted that the prime contractor in this 1966 study, Trevcon Construction Company, Inc., was a first time installer of the Modular Gabion System (TM). ...

**Life Cycle Costs Savings.** In addition to the significant reduction in installation time, the Modular Gabion System (TM) will not suffer complete failure when even slight changes occur in their foundations. ...

**Modular Advantage.** Unlike the twisted wire system, a failure within the Modular Gabion System (TM) will be as the name suggests, "modular" in nature. In other words, when a twist wire system fails, often the customer will need to replace the entire section – but with Modular Gabion System (TM), only the specifically failed modules will need replacement.

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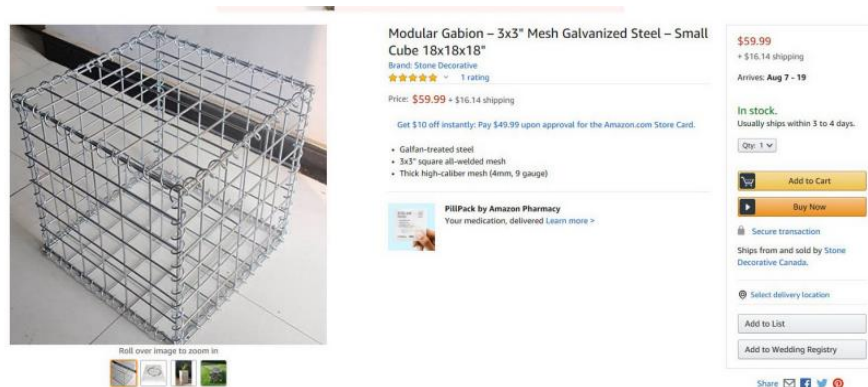
<sup>51</sup> Michael Evangelista-Ysasaga Aff. ¶ 4 and Exhibit 1 attached to the August 6, 2021 Response to Office Action (TSDR 107 and 110).

**PennaGroup Selection.** Based on these established advantages, in addition to being far more aesthetically pleasing, PennaGroup selected Modular Gabion System (TM) for its design-build bank stabilization projects.<sup>52</sup>

The PennaGroup advertisement specifically points out the modular nature of the product.

The Examining Attorney submitted the evidence listed below that refers to “Modular Gabions”:

- Amazon.com<sup>53</sup>



<sup>52</sup> *Id.* at TSDR 110. The advertisement notes that Applicant is the manufacturer of all Modular Gabion System (TM) products. *Id.* at TSDR 111.

The use of the TM symbol does not transform a generic term into a trademark. The “mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.” *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1864 (TTAB 2006) (quoting *In re Manco Inc.*, 24 USPQ2d 1938, 1942 n.11 (TTAB 1992) (the use of the TM symbol does not mark unregistrable matter a trademark)). *See also In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1461 (TTAB 1998) (DRIVE SAFELY - “[U]se of the notice indicating that DRIVE SAFELY is a trademark of applicant does not transform this unregistrable phrase into a trademark indicating source or origin.”); *In re Remington Prods, Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987) (“Mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.”).

<sup>53</sup> July 24, 2020 Office Action (TSDR 6). *See also* August 6, 2021 Response to Office Action (TSDR 137) (Amazon.com posting for “Modular Gabion 3 X 3 mesh 4mm Wire”); (TSDR 143) (Amazon.com posting for “Modular Gabion – 3 X 3 Mesh Galvanized Steel – Small Cube).

- Stone Decorative website (stonedecorative.com) advertises gabions saying, inter alia, “Our architectural and modular gabion cage are definitely the best alternative to cement or brick walls.”<sup>54</sup> The website provides the following:

#### Gabions

Garden Hip. The design trend in architectural landscaping, the Galfan-coated cages from Stone Decorative offer a durable, modular, and economical solution to retaining and separating walls, borders and fencing, and other decorative accent for any residential, commercial or industrial projects.<sup>55</sup>

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All of Stone Decorative’s cages are made of high-gauge, welded, and Galfan-coated galvanized steel.<sup>56</sup>

- Maccafferri website (maccafferri.com) advertises gabions that it refers to as modular units.<sup>57</sup> It also advertises “Modular gabion DEFENCELL MAC” for protection against ordinance, explosive and vehicle attack.<sup>58</sup> Lane Enterprises

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<sup>54</sup> July 24, 2020 Office Action (TSDR 13). Stone Decorative is a Canadian company but it provides a toll free number for customers located in the U.S. January 22, 2021 Request for Reconsideration (TSDR 36). *See also* August 6, 2021 Response to Office Action (TSDR 149) (advertising gabions as “Decorative & Modular”).

<sup>55</sup> July 24, 2020 Office Action (TSDR 12).

<sup>56</sup> July 24, 2020 Office Action (TSDR 13).

<sup>57</sup> July 24, 2020 Office Action (TSDR 14 and 16). The Maccafferri website states that the company is the “undisputed global leader in the manufacture, design and supply of gabion baskets.” *Id.* at 14. In addition, George Ragazzo, Applicant’s General Manager of the Modular Gabion Systems division, attested to the fact that he worked for Maccafferri as a Regional Manager. Ragazzo Aff. ¶ 4 attached to the January 22, 2021 Request for Reconsideration (TSDR 33).

<sup>58</sup> February 12, 2021 Denial of Request for Reconsideration (TSDR 27).

website (lane-enterprises.com),<sup>59</sup> Gabion Supply (gabionsupply.com),<sup>60</sup> and Northwest Linings & Geotextile Products, Inc. (northwestlinings.com)<sup>61</sup> also describe their gabion products as modular.

- ArchiExpo website (architexpo.com) advertises the sale of modular gabions by companies such Maccafferri, Phi Group, and CPM.<sup>62</sup>

- Mr. Steel website (mrsteel.com) advertises “modular gabion baskets.”<sup>63</sup>

- Ocean Caraibes website (oceancariabes.com) advertises “Green Gabions” that are “modular gabion units used for stream-bank stabilization, restoration and erosion protection solutions.”<sup>64</sup>

- Northwest Linings & Geotextile Products, Inc. website (northwestlistings.com) advertises its gabions as “modular wire baskets.”<sup>65</sup>

The Examining Attorney submitted the evidence listed below that refers to “Gabion Systems”:

- Weinstein Construction Corporation (retrofittingcalifornia.com) advertises “Gabion Systems.”

#### Gabion Systems

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<sup>59</sup> September 9, 2021 Office Action (TSDR 34).

<sup>60</sup> September 9, 2021 Office Action (TSDR 37).

<sup>61</sup> September 9, 2021 Office Action (TSDR 41).

<sup>62</sup> July 24, 2020 Office Action (TSDR 17). ArchiExpo advertises that it is a “marketplace for manufacturers and distributors to showcase their products for buyers all around the world.” August 6, 2021 Response to Office Action (TSDR 205).

<sup>63</sup> July 24, 2020 Office Action (TSDR 22).

<sup>64</sup> July 24, 2020 Office Action (TSDR 24). Ocean Caraibes is located in Dominica but does business internationally. January 22, 2021 Request for Reconsideration (TSDR 46).

<sup>65</sup> September 9, 2021 Denial of Request for Reconsideration (TSDR 41).

## Gabions and Gabion Baskets in Los Angeles, CA

Weinstein Retrofitting offers gabions, gabion baskets and gabion systems to help against tough mudslide applications.<sup>66</sup>

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### Advantages of Gabion Systems

Handling and Construction ...

Endurance ...

Application ...

Drainage ...

The advantages and limitations of gabion systems depend mostly on site condition as Weinstein Retrofitting has the manpower, resources, and equipment to create your most desirable custom gabion system perfect for your home or property.<sup>67</sup>

- “Gabion system. Earth retention technique,” YouTube.com provides that “Gabion systems is an earth retention technique in which gravity retaining walls are formed using rectangular, interconnected, stone-filled wire baskets.”<sup>68</sup>

- The Keller website (keller-na.com) advertises “Gabion systems.”<sup>69</sup>

- The TerraAqua Inc. website (terraaqua.com) states that the TerraAqua website “is provided as a guide to assist Professional Engineers, Government Agencies, Land

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<sup>66</sup> July 24, 2020 Office Action (TSDR 30). *See also* September 9, 2021 Office Action (TSDR 9).

<sup>67</sup> July 24, 2020 Office Action (TSDR 32).

<sup>68</sup> February 12, 2021 Denial of Request for Reconsideration (TSDR 23).

<sup>69</sup> September 9, 2021 Office Action (TSDR 6).

Developers, and General Contractors in the proper design, specification and construction of Terra Aqua's gabion systems and solutions."<sup>70</sup>

- The Huesker North America Facebook page provides the following:

Fortrac Gabion Systems// The Fortrac Gabion system consists of reinforced earth body and a facing of steel grid elements. There are a wide range of design options for HUESKER'S Fortrac Gabion system that all include rapid installation and easy repair.<sup>71</sup>

- The State of New Jersey, Department of Environmental Protection, Division of Land Use Regulation, General Permit for the construction of gabions at a single family home or duplex lot provides "[i]f the steepness and height of the slope of the non-storm shoreline profile precludes construction of a sloped gabion system, then the watershed slope of the step faced gabion system, as measured along a line connection the gabions, must be no steeper than one vertical to one horizontal."<sup>72</sup>

- "Stabilizing a Slope in Western Pennsylvania," Land and Water magazine (March/April 2009) reported the following:

The gabion system reinforced fill slope took only one month to complete. "The project went very smoothly and I was impressed with the ease of installation and the flexibility the gabion system provided reducing the impact on this environmentally sensitive area of the project," noted Charlie Singer, President of Singer Construction.<sup>73</sup>

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<sup>70</sup> September 9, 2021 Office Action (TSDR 17).

<sup>71</sup> September 9, 2021 Office Action (TSDR 19).

<sup>72</sup> July 24, 2020 Office Action (TSDR 49).

<sup>73</sup> July 24, 2020 Office Action (TSDR 51).



- “The stability of gabion walls for earth retaining structures,” ScienceDirect

(sciencedirect.com) (December 2013) provides the following:

Comparison of average deflections between both walls suggest that the hexagonal-configured wall deforms under more controlled outcomes compared to its more rectangular counterpart. This invariably suggests that lateral deformation exhibited by an interlocked gabion system is more stable than a conventional stacked-and-paired system.<sup>74</sup>

Based on the evidence discussed above, we find third parties use the terms MODULAR GABION SYSTEMS, MODULAR GABIONS, and GABION SYSTEMS as the name of a thing (i.e., gabions, including gabions of steel wire). Thus, third parties understand the whole of Applicant’s proposed mark MODULAR GABION SYSTEMS as no greater than the sum of its parts and, therefore, it is a generic term.

As the Federal Circuit noted in *Princeton Vanguard*,

[W]here the mark in its entirety has exactly the same meaning as the individual words, we stated that “the [US]PTO has satisfied its evidentiary burden if, as it did in this case, it produces evidence . . . that the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound.” . . . Because “the terms remain as generic in the compound as individually,” we concluded that the compound itself was generic.

*Princeton Vanguard*, 114 USPQ2d at 1831 (quoting *Gould Paper Corp.*, 5 USPQ2d at 1111-12).

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<sup>74</sup> July 24, 2020 Office Action (TSDR 46).

Applicant contends that “the descriptive term for [Applicant’s] goods is ‘wire mesh products,’ ‘wire-faced walls,’ or ‘wire mesh mattresses/baskets.’”<sup>75</sup> However, there can be more than one generic term for a particular genus of goods. “Any term that the relevant public uses or understands to refer to the genus of goods, or a key aspect or subcategory of the genus, is generic.” *In re Twenty-Two Desserts, LLC*, 2019 USPQ2d 292782, at \*2 (citing *Royal Crown Co. v. Coca Cola Co.*, 127 USPQ2d at 1046-47). See also *In re Cordua Rests., Inc.*, 118 USPQ2d at 1638; *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009).

Applicant argues to the contrary citing its customers’ affidavits attesting that MODULAR GABION SYSTEMS is a trade name unique to Applicant and that it does not describe a product.<sup>76</sup> Applicant submitted affidavits from eight customers. While we consider the affidavits, we find that they are not very probative. First, all the affidavits are from Applicant’s customers who have been working with Applicant for years. Accordingly, the affiants are familiar with Applicant’s long and purportedly substantially exclusive use of MODULAR GABION SYSTEMS.

In that regard, the fact that Applicant may be the first and only user of a generic designation does not justify registration when the only significance conveyed by the term is generic. *Empire Tech*, 123 USPQ2d at 1549 (citing *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010)). See also *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (quoting *CES*

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<sup>75</sup> Applicant’s Brief, p. 9 (12 TTABVUE 14).

<sup>76</sup> Applicant’s Brief, p. 10 (12 TTABVUE 15).

*Publ'g Corp. v. St. Regis Publ'ns, Inc.*, 531 F.2d 11, 188 USPQ 612, 615 (2d Cir. 1975)) (“To allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.”); *In re Preformed Prods. Co.*, 323 F.2d 1007, 139 USPQ 271, 273 (CCPA 1963) (quoting *J. Kohnstam, Ltd. v. Louis Marx & Co.*, 280 F.2d 437, 440 (CCPA 1960))(exclusive use, even when coupled with “large sales volume of such goods and its substantial advertising expenditure . . . cannot take the common descriptive name of an article out of the public domain and give the temporarily exclusive user of it exclusive rights to it, no matter how much money or effort it pours into promoting the sale of the merchandise.”). *Cf. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (discussing “the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first.”).

Finally, the affiants do not explain the basis for their knowledge for analyzing whether a term is generic, merely descriptive, or a trademark. Based on the dictionary definitions of the component words of Applicant’s proposed mark and third-party use evidence discussed above, the statements that MODULAR GAGION SYSTEMS does not describe a product simply lack credulity.

Applicant further contends:

*MODULAR GABION SYSTEMS* is not used when procuring a product because it represents a line of engineered welded wire mesh products, rather than being the product itself. (Internal citations omitted). For

example, when searching MODULAR GABION SYSTEMS on Amazon, both with and without quotation marks around the term, no wire mesh baskets/mattresses or anything of the like are returned as results. This is because MODULAR GABION SYSTEMS is not a generic name for [Applicant's] products or other manufacturers' products or services in the same genus, but instead, is a brand known by average consumers of earth retention wire-mesh baskets to be associated with [Applicant].<sup>77</sup>

However, as noted above, Amazon.com advertises "Modular GABION" mesh galvanized steel cubes, and Applicant, as well as other third parties, use the term "modular GABION" to refer to premade, wire mesh baskets and mattresses. The word "systems" does not add any trademark significance when used with "Modular GABION" to form MODULAR GABION SYSTEMS because "systems" merely signifies a group of premade wire mesh products. Nevertheless, many third parties refer to gabions and GABION SYSTEMS. While not dispositive, the uses of "Modular Gabion" and "Gabion Systems" are probative in our analysis of MODULAR GABION SYSTEMS because they show that "modular gabion" and "gabion systems" are generic.

"[Applicant] objected to the evidence presented by the Examining Attorney, asserting that because the sites presented as 'evidence' were foreign sites, they could not properly be considered."<sup>78</sup> However, as noted above, many foreign gabion manufacturers export their products into the United States. *See e.g.*, Stone

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<sup>77</sup> Applicant's Brief, p. 10 (12 TTABVUE 15).

<sup>78</sup> Applicant's Brief, p. 13 (12 TTABVUE 18).

Decorative website (stonedecorative.com),<sup>79</sup> Maccafferi website (maccefferi.com),<sup>80</sup> and Ocean Caraibes website (oceancariabes.com).<sup>81</sup> “Various factors may inform the probative value of a foreign website in any given case, such as whether the website is in English (or has an optional English language version), and whether the nature of the goods or services makes it more or less likely that U.S. consumers will encounter foreign websites in the field in question.” *In re Odd Sox LLC*, 2019 USPQ2d 370879, \*5-6 (TTAB 2019) (quoting *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1782 n.10 (TTAB 2017)). U.S. consumers researching sources for gabions are likely to consider foreign manufacturers and, therefore, the foreign websites are relevant.<sup>82</sup>

Applicant asserts that any use of MODULAR GABION SYSTEMS that is not expressly authorized by Applicant “is an attempt to cause confusion for consumers and profit off [Applicant’s] good name in the market which has been established over the last sixty (60) years.”<sup>83</sup> However, the third-party uses of “Modular Gabion Systems” noted above are competitors using a generic term. *See BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1558 (Fed. Cir. 1995) (“The cases have recognized that competitor use is evidence of genericness.”) (citing

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<sup>79</sup> January 22, 2021 Request for Reconsideration (TSDR 36) (directing consumers to call using a toll-free phone number “in the US”).

<sup>80</sup> July 24, 2020 Office Action (TSDR 14) (the company is the “undisputed global leader in the manufacture, design and supply of gabion baskets.”).

<sup>81</sup> January 22, 2021 Request for Reconsideration (TSDR 46) (Ocean Caraibes is located in Dominica but “is a worldwide firm” which does business internationally, and includes USAID as a client.).

<sup>82</sup> Likewise, the New Zealand patent NL2001034C2 noted above is relevant because it is prior art for any gabion innovations sought to be protected by a patent.

<sup>83</sup> Applicant’s Brief, p. 14-15 (12 TTABVUE 19-20).

*Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1446 (Fed. Cir. 1990)); *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at \*9 (TTAB 2019) (“We find probative the generic uses of the [applied for mark] by competitors.”) (citing *Royal Crown Co. v. Coca-Cola Co.*, 127 USPQ2d at 1048).

Finally, Applicant argues that we should not consider the Living Roofs website ([livingroofs.org.nz](http://livingroofs.org.nz)),<sup>84</sup> the Innova Fences website ([innovafences.com](http://innovafences.com)),<sup>85</sup> or the Bharat Wire Mesh Pvt. Ltd. website ([bharabwire.com](http://bharabwire.com))<sup>86</sup> because Applicant could not access those websites. We have not included or considered those websites in our compilation of evidence.

Following full consideration of all the evidence and arguments, we find that consumers and competitors use and understand the term MODULAR GABION SYSTEMS used in connection with “gabions of steel wire” or “wire mesh products” as the common descriptive name for the class of goods. Therefore, we affirm the refusal to register MODULAR GABION SYSTEMS under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-1052 and 1127.

#### **IV. Acquired Distinctiveness**

For completeness, we now address the alternative ground for refusing to register MODULAR GABION SYSTEMS — that is, if MODULAR GABION SYSTEMS is not generic, it nonetheless is merely descriptive and has not acquired distinctiveness.

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<sup>84</sup> January 4, 2020 Office Action (TSDR 15).

<sup>85</sup> July 24, 2020 Office Action (TSDR 48).

<sup>86</sup> February 12, 2021 Denial of Request for Reconsideration (TSDR 20).

Although we have found MODULAR GABION SYSTEMS to be generic for “gabions of steel wire” or “wire mesh products,” we analyze this alternative ground in the event a reviewing court finds on appeal that MODULAR GABION SYSTEMS is not generic. For this analysis, we therefore treat MODULAR GABION SYSTEMS as being merely descriptive rather than generic. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d at 1204 (citing *Sheetz*, 108 USPQ2d at 1367).

Implicit in our holding above that the evidence before us establishes that MODULAR GABION SYSTEMS is generic for “gabions of steel wire” is a finding that MODULAR GABION SYSTEMS is not only merely descriptive of Applicant’s identified goods, but is highly descriptive of the goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 2(e)(1). “The generic name of a thing is in fact the ultimate in descriptiveness.” *Bellsouth Corp. v. DataNational Corp.*, 35 USPQ2d at 1557 (quoting *Marvin Ginn*, 228 USPQ at 530); *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 413 (CCPA 1961) (“The name of a thing is the ultimate in descriptiveness. ... It is immaterial that the name is in a foreign language.”). *See also In re Automated Mktg. Sys., Inc.*, 873 F.2d 1451, 11 USPQ2d 1319, 1320 (Fed. Cir. 1989) (after finding SALES FOLLOW-UP for soliciting repeat and referral business for automobile dealership services generic, “the highly descriptive nature of ‘SALES FOLLOW-UP’ outweighed [applicant’s] evidence of acquired distinctiveness.”); *In re Noon Hour Food Prods., Inc.*, 88 USPQ2d 1172 (TTAB 2008) (finding, despite applicant’s claim of use in commerce for almost one hundred years, as well as an “inadvertently cancelled” seventy-year-old registration

for the mark BOND-OST for cheese, current evidence clearly showed the mark was generic for the goods, and assuming arguendo that BOND-OST is not generic, that applicant had failed to establish acquired distinctiveness of the highly descriptive mark); *In re Waverly Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993) (finding MEDICINE not generic, but a highly descriptive term that had acquired distinctiveness, for medical journals).

Pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), matter that is 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, assuming that MODULAR GABION SYSTEMS is not generic, Applicant may register its mark on the Principal Register if Applicant proves that MODULAR GABION SYSTEMS has acquired distinctiveness (also known as “secondary meaning”) as used in connection with Applicant’s goods in commerce. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728-30 (Fed. Cir. 2012); *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Tech., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017).

Acquired distinctiveness requires a “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 the genericness and descriptiveness of MODULAR GABION SYSTEMS, we considered all of the evidence of record touching on the public perception of that term as discussed above and below.



An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness. *See In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005-06 (Fed. Cir. 1988). Applicant's burden increases with the level of descriptiveness. *Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). *See also 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 MODULAR GABION SYSTEMS is highly descriptive of Applicant's goods, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *Greenliant Sys.*, 97 USPQ2d at 1085.

To establish acquired distinctiveness, Applicant must demonstrate that relevant consumers perceive MODULAR GABION SYSTEMS as identifying the producer or source of the goods (i.e., Applicant). *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (acquired distinctiveness exists “when, in the minds of the public, the primary significance of a [proposed 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. *Schlafly 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.”); *In re Ennco Display Sys.*, 56 USPQ2d 1279, 1283 (TTAB 2000). Direct evidence includes 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 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 factor is determinative and “[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)).

**A. Association of the proposed trademark with a particular source by actual purchasers (typically measured by customer surveys).**

Applicant did not submit any survey evidence regarding whether purchasers associate the term MODULAR GABION SYSTEMS with Applicant, but as discussed above, it submitted eight customer affidavits. The affiants attested to the fact that MODULAR GABION SYSTEMS is “a unique trade name” associated with Applicant.

We find the affidavits have little probative value because the affiants are Applicant’s long time customers who have purchased Applicant’s gabions of steel wire and, therefore, not necessarily reflective of the market as a whole. *See In re Paint Prods. Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (affidavits collected by applicant from longstanding customers are not persuasive on the issue of how the average customer perceives the term at issue).

In addition, the determination that MODULAR GABION SYSTEMS has acquired distinctiveness requires more than the existence of a relatively small number of people who associate a mark with Applicant. *Id.* (affidavits from ten customers insufficient); *In re E.I. Kane, Inc.*, 221 USPQ 1203, 1206 (TTAB 1984) (in light of the

highly descriptive nature of OFFICE MOVERS, INC., nine affidavits by individuals to the effect that the term functions as a mark was not persuasive). *See also Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding sixteen declarations of little persuasive value, as they were nearly identical in wording and only one of the declarants was described as an end consumer). *Compare In re Bose Corp.*, 216 USPQ 1001, 1005 (TTAB 1983), *aff'd*, 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985) (deeming retailer's statement that he has been in contact with many purchasers of loudspeaker systems of whom a substantial number would recognize the depicted design as originating with applicant competent evidence of secondary meaning).

George Ragazzo's testimony that ASTM International, an international standards organization that publishes voluntary censuses for technical standard for various materials and products, recognizes MODULAR GABION SYSTEMS as an independent company that is part of Applicant is hearsay.<sup>87</sup> Applicant should have submitted an affidavit from a representative of ASTM International.

This factor is neutral.

**B. Length, degree, and exclusivity of use.**

Applicant has been continuously using MODULAR GABION SYSTEMS since 1992.<sup>88</sup> According to Applicant,

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<sup>87</sup> Ragazzo Aff. ¶ 3 attached to the January 22, 2021 Request for Reconsideration (TSDR 33).

<sup>88</sup> Shepherd Aff. ¶ 6 attached to the January 22, 2021 Request for Reconsideration (TSDR 84) (“[Applicant] has continuously used *MODULAR GABION SYSTEMS* since its inception in 1992.”). Nevertheless, we note that Applicant claimed 1980 as its dates of first use of its purported mark anywhere and in commerce.

Until very recently, no other company has tried to use *MODULAR GABION SYSTEMS* because using it would not gain more business for any competitor but would instead gain more attention to [Applicant] because of how widely known we are. Any use of *MODULAR GABION SYSTEMS* by companies other than [Applicant] within the United States is sparse [sic], that is, [Applicant] has maintained substantially exclusive use of *MODULAR GABION SYSTEMS* since 1992.<sup>89</sup>

Applicant's 30 years of use of MODULAR GABION SYSTEMS is substantial but not necessarily conclusive or persuasive considering the highly descriptive nature of the mark. *See GJ & AM*, 2021 USPQ2d 617, at \*41-42 (citing *Apollo Med. Extrusion*, 123 USPQ2d at 1855 (TTAB 2017) (25+ years not sufficient to prove acquired distinctiveness); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013) (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" on acquired distinctiveness). We must "consider the length of Applicant's use in connection with the other evidence of how consumers perceive Applicant's [proposed] mark." *GJ & AM*, 2021 USPQ2d 617 at \*42.

In addition, as discussed above, we find that third parties are using the term MODULAR GABION SYSTEMS and MODULAR GABION as the name of their products.

We find this factor to be neutral.

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<sup>89</sup> *Id.*

**C. Amount and manner of advertising.**

With respect to Applicant's advertising and marketing efforts, Maury Shepherd testified as follows:

Over the years, [Applicant has] spent approximately (at the very least) \$250,000.00 advertising *MODULAR GABION SYSTEMS*. [Applicant] participated in at least two trade shows per year, in which *MODULAR GABION SYSTEMS* advertised, which ranged from \$5,000.00 per year to \$10,000.00 per year depending on the trade show, ran magazine advertisements, which ranged from \$3,000.00 per run to \$7,000.00 per run (and also depended on size of the advertisement), in addition to creating and maintaining promotional websites, creating instructional videos, designing and printing brochures, hosting promotional courses for various companies, and designing and purchasing branded apparel, amount various other products. (Enclosure A). [Applicant] has invested at the very least \$8,300.00 per year since 1992 advertising *MODULAR GABION SYSTEMS*.<sup>90</sup>

Applicant's total advertising expenditures of approximately \$250,000 over 30 years and of at least \$8,300 per year since 1992 are not significant on their face. *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.").

In addition, we have no context in which to place these figures inasmuch as Applicant did not provide any information regarding the advertising expenditures of

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<sup>90</sup> Shepherd Aff. ¶ 7 attached to the January 22, 2021 Request for Reconsideration (TSDR 84). "Enclosure A" comprises samples of Applicant's marketing efforts and advertisements. *Id.* at 86-104.

its competitors. Moreover, we have no information as to the extent that Applicant's advertising has reached the universe of potential customers. For example, Applicant failed to provide any information as to the attendance at the trade shows in which it participates.

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 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 advertising figures, without any context in the trade, are not so impressive as to support a finding that Applicant's highly descriptive MODULAR GABION SYSTEMS has acquired distinctiveness. *See also In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 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.").

Where, as here, Applicant's mark is highly descriptive, Applicant's modest advertising expenditures are not sufficient to prove that its use of MODULAR

GABION SYSTEMS has acquired distinctiveness. *See e.g., In re Bos. Beer Co.*, 53 USPQ2d 1056, 1058 (annual advertising expenditures in excess of ten million dollars — two million of which were spent on promotions and promotional items which included the phrase THE BEST BEER IN AMERICA — found insufficient to establish distinctiveness, in view of the highly descriptive nature of the proposed mark); *In re E.I. Kane, Inc.*, 221 USPQ 1203, 1206 (TTAB 1984) (refusal to register OFFICE MOVERS, INC., for moving services, affirmed notwithstanding §2(f) claim based on, inter alia, evidence of substantial advertising expenditures. “There is no evidence that any of the advertising activity was directed to creating secondary meaning in applicant's highly descriptive trade name.”); *In re Kwik Lok Corp.*, 217 USPQ 1245 (TTAB 1983) (evidence held insufficient to establish acquired distinctiveness for configuration of bag closures made of plastic, notwithstanding applicant's statement that advertising of the closures involved several hundred thousands of dollars, where there was no evidence that the advertising had any impact on purchasers in perceiving the configuration as a mark).

Applicant’s advertising is a neutral factor.

**D. Amount of sales and number of customers**

Through Applicant’s efforts to have ASTM International accept its engineering specification for welded wire fabric gabions and gabion mattress<sup>91</sup> and Applicant’s marketing and networking efforts, “*MODULAR GABION SYSTEMS* became known

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<sup>91</sup> Shepherd Aff. ¶ 4 attached to the January 22, 2021 Request for Reconsideration (TSDR 83).



to innumerable engineers, contractors, and government agencies” and “contributed to [Applicant’s] exponential sales growth.”<sup>92</sup> The only evidence Applicant submitted to corroborate this vague testimony (i.e., MODULAR GABION SYTESM is known to “innumerable engineers, contractors, and government agencies” and Applicant has experienced “exponential sales growth”) is a summary of the number of invoices by state per year from 2001 through 2021.<sup>93</sup> However, Applicant did not total the number of invoices. It is incumbent on Applicant to explain the significance of its evidence not just make a reference to it. *Cf. Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 85 USPQ2d 1654, 1659 n.22 (Fed. Cir. 2008) (“A skeletal ‘argument’, really nothing more than an assertion, does not preserve a claim.”); *Clintec Nutrition Co. v. Baxa Corp.*, 44 USPQ2d 1719, 1723 n.16 (N.D. Ill. 1997) (where a party points the court to multi-page exhibits without citing a specific portion or page, the court will not pour over the documents to extract the relevant information, citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (judges do not hunt for truffles buried in briefs)). It is not our function to examine Applicant’s evidence in greater detail than as submitted by Applicant or to craft Applicant’s argument. Applicant’s evidence is at best an invitation to the Board to scour the record to extract the relevance of Applicant’s evidence. We decline the invitation.

Even if Applicant had totaled the number of invoices which presumably would have provided an estimate of the number of Applicant’s customers, because Applicant

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<sup>92</sup> Shepherd Aff. ¶ 5 attached to the January 22, 2021 Request for Reconsideration (TSDR 84).

<sup>93</sup> August 6, 2021 Response to Office Action (TSDR 73-75).

did not provide any testimony or evidence estimating the size of the relevant customer base, there is no context by which we can assess Applicant's market share.

Nevertheless, Applicant's summary of invoices shows that Applicant sells its products throughout the United States.

Applicant's evidence regarding its sales and number of customers is too vague to be probative.

**E. Intentional copying.**

Despite Applicant's claim that third parties are infringing Applicant's proposed MODULAR GABION SYSTEMS mark, there is no evidence of intentional copying. For instance, third parties could be using MODULAR GABION SYSTEMS for multiple reasons, including their understanding that MODULAR GABION SYSTEMS is a common descriptive term their consumers readily understand. Further, Applicant provided no evidence of misleading labelling or advertising (with the exception of Chunky River Supply)<sup>94</sup> from which we could infer that the third parties intended to deceive consumers or capitalize on Applicant's reputation.

We find this factor to be neutral.

**F. Unsolicited media coverage of the gabions referring to "Modular Gabion Systems."**

The City of Mobile, Alabama identified Applicant in the November 2002 specifications for a drainage system project.

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<sup>94</sup> July 2, 2020 Response to Office Action (TSDR 71). Applicant asserts that Chunky River Supply uses photos of Applicant's projects without Applicant's consent to advertise Chunky River Supply products. *See also* Applicant's Brief, p. 15 (12 TTABVUE 20) (accusing Chunky River Supply of "egregious misappropriation of [Applicant's] project photographs and products.>").

Section 246

GABIONS AND REVET (RENO) MATTRESSES

246.01 Description:

The work under this Section shall consist of furnishing, assembling, tying and filling with approved stones, open mesh wire baskets, constructed in accordance with these specifications, manufactured by Maccafferi Gabions, Inc., Modular Gabion Systems, or equal, approved by the Engineer.<sup>95</sup>

The specification did not refer to MODULAR GABION SYSTEMS brand gabions of steel wire. It identified Applicant by its trade name Modular Gabion Systems noting that is one of two manufacturers whose products meet the required specifications.

The May/June 1997 issue of Land and Water magazine article “Bringing Old Technology into the 21st Century” noted that “[a]ll gabion mattress material was supplied by Modular Gabion Systems of Houston, Texas.”<sup>96</sup>

The March/April 2003 issue of Land and Water magazine article “Prestigious Award for Hobbling Spring Creek” noted that the general contractor “selected Modular Gabion Systems (MSG) to supply gabions after a presentation by George Ragazzo. ... MSG is a member of [Applicant].”<sup>97</sup> The article reports that the general

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<sup>95</sup> January 22, 2021 Request for Reconsideration (TSDR 116). *See also* the Specifications for Gabion Retaining Walls for the Kilroy-Oyster Point project identifying Modular Gabion Systems as the acceptable manufacturer of the products. David Chan Aff., ¶ 3 and Exhibit 1 attached to the August 6, 2021 Response to Office Action (TSDR 91 and 96). The specification also refers to Modular Gabion Systems as a type of wire. *Id.* at TSDR 97 (“\* Type 2: Modular Gabion Systems “C” Unit System (Modified) is used at wood deck retaining wall WD-1A, 1B, and 1C.”).

<sup>96</sup> August 6, 2021 Response to Office Action (TSDR 83).

<sup>97</sup> August 6, 2021 Response to Office Action (TSDR 77).

contractor “selected the ‘roll stock’ option manufactured by Modular Gabion Systems.”<sup>98</sup>

The January/February 2009 issue of Land and Water magazine article “Channel Design Provides Protection of Outflow Following Earthquake” noted that “Modular Gabion Systems, manufactured by [Applicant], were chosen for the project.”<sup>99</sup>

Land and Water magazine articles in 1997 and 2003 refer to MODULAR GABION SYSTEMS as Applicant’s trade name, not as the source of MODULAR GABION SYSTEMS brand gabions. Likewise, the 2009 article referred to MODULAR GABION systems as a trade name and it also referred to it as a thing (“Modular Gabion Systems, manufactured by [Applicant].”).

In any event, the articles referred to MODULAR GABION SYSTEMS in passing. They did not discuss or refer to the renown or place of Applicant’s products in the industry.

We find that the unsolicited media coverage of MODULAR GABION SYSTEMS is a neutral factor.

## **G. Conclusion**

After considering all of the factors for which there is evidence in determining whether MODULAR GABION SYSTEMS has acquired distinctiveness, we find that Applicant has not met its burden of proving MODULAR GABION SYSTEMS has acquired distinctiveness. Specifically, there little advertising of record, sales

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<sup>98</sup> *Id.* at TSDR 79.

<sup>99</sup> January 22, 2021 Request for Reconsideration (TSDR 161).

information is vague, there is no evidence of intentional copying, and there is little media attention. Analyzing the evidence in its entirety, Applicant has failed to show that consumers associate the highly descriptive, proposed mark MODULAR GABION SYSTEMS as the source of Applicant's "gabions of steel wire."

We affirm the refusal to registration on the ground that MODULAR GABION SYSTEMS is merely descriptive under Section 2(e)(1) of the Trademark Act and it has not acquired distinctiveness.

**Decision:** We affirm both refusals to register Applicant's proposed mark MODULAR GABION SYSTEMS.