

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 8, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Dock Blocks of North America, LLC*

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Serial No. 88320379

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Todd M. Hess of Business and IP Law for Dock Blocks of North America, LLC.

April Roach, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Adlin, Larkin, and Hudis,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Dock Blocks of North America, LLC (“Applicant”) seeks registration on the Principal Register of the proposed standard-character mark DOCK BLOCKS for goods ultimately identified as “Modular floating non-metal docks; non-metal floating walkway systems comprised of non-metal floats and strengthening bars; portable

non-metal swimming platforms; drive-on lifts for watercraft, namely, floating nonmetal platforms for holding watercraft” in International Class 19.<sup>1</sup>

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

When the Examining Attorney made the refusals final, Applicant appealed and requested reconsideration, and after the request was denied, the appeal continued. The case is fully briefed.<sup>2</sup> We reverse the genericness refusal, but affirm the refusal based on mere descriptiveness and the absence of acquired distinctiveness.

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<sup>1</sup> Application Serial No. 88320379 was filed on February 28, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce at least as early as March 1, 2011.

<sup>2</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 7 TTABVUE and its reply brief appears at 11 TTABVUE. The Examining Attorney’s brief appears at 9 TTABVUE.

## **I. Prosecution History and Record on Appeal<sup>3</sup>**

We summarize below the prosecution history of the application because it provides useful background to our analysis of the issues on appeal.

Applicant's use-based application to register its proposed mark for goods originally identified as "Modular floating non-metal dock systems; floating walkway systems extending from shore over water; swimming platforms; drive-on lifts for watercraft" was accompanied by Applicant's specimen of use, which was identified as a digital photograph of the product.<sup>4</sup> Applicant also claimed ownership of Registration No. 4358644.

The Examining Attorney issued an Office Action refusing registration on the ground that Applicant's proposed mark was "merely descriptive" of the goods within the meaning of Section 2(e)(1) of the Trademark Act, and requiring Applicant to amend its identification of goods.<sup>5</sup> The Examining Attorney made of record dictionary definitions of "dock" and "block;"<sup>6</sup> pages from Applicant's website at dock-blocks.com;<sup>7</sup> pages from third-party websites showing various modular and floating docks;<sup>8</sup> and USPTO electronic records regarding Applicant's Registration No. 4358644 of DOCK

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<sup>3</sup> Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the electronic version of pages in the Trademark Status and Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>4</sup> February 28, 2019 Application at TSDR 3.

<sup>5</sup> May 9, 2019 Office Action at TSDR 1.

<sup>6</sup> *Id.* at TSDR 2-6.

<sup>7</sup> *Id.* at TSDR 7-8.

<sup>8</sup> *Id.* at TSDR 10-36.

BLOCKS BY PIER PLAS and design for “non-metal floating docks” and a “non-metal portable pier which extends from a shore line out over water,” in which Applicant had disclaimed the exclusive right to use “DOCK BLOCKS” apart from the mark as shown.<sup>9</sup>

Applicant responded by arguing against the descriptiveness refusal and amending its identification of goods.<sup>10</sup> Applicant made of record the declaration of Matthew West, its managing member, and Exhibits A-N thereto,<sup>11</sup> which consisted of additional pages from Applicant’s website at dock-blocks.com;<sup>12</sup> pages from amazon.com displaying and describing Applicant’s “DOCK BLOCKS” Floating Dock and containing customer reviews;<sup>13</sup> pages from the website at cabelas.com displaying and describing Applicant’s “Dock Blocks™ Personal-Watercraft Dock;”<sup>14</sup> Applicant’s Facebook page and YouTube channel;<sup>15</sup> various advertisements and promotional

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<sup>9</sup> *Id.* at TSDR 37-39.

<sup>10</sup> November 12, 2019 Response to Office Action at TSDR 2-4.

<sup>11</sup> *Id.* at TSDR 5-27. As discussed below, Applicant also submitted two supplemental West declarations executed on June 1, 2020 and December 30, 2020, respectively. The declarations are nearly identical in substance, and we will primarily cite the most recent updated version of the declaration, which was first filed with Applicant’s December 30, 2020 Request for Reconsideration, by paragraph and exhibit number (e.g., “Second West. Supp. Decl. ¶ 8; Ex. B”), as well as by TSDR pages.

<sup>12</sup> West. Decl. ¶¶ 7-9; Exs. A-C (November 12, 2019 Response to Office Action at TSDR 5-6, 9-13).

<sup>13</sup> West Decl. ¶ 11; Ex. D (November 12, 2019 Response to Office Action at TSDR 6, 14-16).

<sup>14</sup> West Decl. ¶ 11; Ex. E (November 12, 2019 Response to Office Action at TSDR 6, 17-18).

<sup>15</sup> West Decl. ¶¶ 12-13; Exs. F-G (November 12, 2019 Response to Office Action at TSDR 6, 19-20).

materials regarding Applicant's products;<sup>16</sup> a photograph of Applicant's display at a trade show and a picture of Applicant's brochure.<sup>17</sup>

The Examining Attorney then issued an Office Action in which she continued the prior mere descriptiveness and identification refusals and issued new refusals based on genericness and the insufficiency of Applicant's evidence of acquired distinctiveness.<sup>18</sup> She made of record third-party webpages regarding floating docks and modular dock systems.<sup>19</sup>

Applicant responded by amending its application to seek registration under Section 2(f),<sup>20</sup> and arguing against the genericness refusal.<sup>21</sup> In support of its Section 2(f) claim, Applicant submitted a supplemental West declaration with Exhibits A-N and Appendices 1-45 thereto.<sup>22</sup> The exhibits included most of the exhibits from Mr. West's original declaration as well as articles from third-party webpages displaying and discussing Applicant's products.<sup>23</sup> The Appendices consisted of third-party

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<sup>16</sup> West Decl. ¶ 16; Exs. H-L (November 12, 2019 Response to Office Action at TSDR 6-7, 21-25).

<sup>17</sup> West Decl. ¶ 17; Exs. M-N (November 12, 2019 Response to Office Action at TSDR 7, 26-27).

<sup>18</sup> November 18, 2019 Office Action at TSDR 1.

<sup>19</sup> *Id.* at TSDR 2-6.

<sup>20</sup> June 1, 2020 Response to Office Action at TSDR 3.

<sup>21</sup> *Id.* at TSDR 10-16. Applicant also amended its identification of goods to the current identification.

<sup>22</sup> *Id.* at TSDR 17-316.

<sup>23</sup> First Supp. West Decl. ¶ 17; Exs. H-J (June 1, 2020 Response to Office Action at TSDR 21, 51-59).

webpages of Applicant's competitors on which the proposed mark DOCK BLOCKS was not used.<sup>24</sup>

The Examining Attorney then issued an Office Action making final the genericness and mere descriptiveness refusals, and rejecting Applicant's showing of acquired distinctiveness.<sup>25</sup> She made of record additional third-party webpages in which components for floating docks were called "blocks."<sup>26</sup>

Applicant appealed and requested reconsideration of both refusals,<sup>27</sup> making of record a second supplemental West declaration and Exhibits A-P and Appendices 1-45 thereto.<sup>28</sup> Consideration of Applicant's Request for Reconsideration was sidetracked for many months due to a skirmish between Applicant and the Examining Attorney over the proper execution of the Request for Reconsideration and subsequent documents regarding a change of counsel. This resulted in the issuance of a notice of abandonment of the application and a petition to the USPTO Director

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<sup>24</sup> First Supp. West Decl. ¶ 23; Appendices 1-45 (June 1, 2020 Response to Office Action at TSDR 22, 65-316).

<sup>25</sup> June 30, 2020 Final Office Action at TSDR 1.

<sup>26</sup> *Id.* at TSDR 2-26.

<sup>27</sup> December 30, 2020 Request for Reconsideration at TSDR 2-27.

<sup>28</sup> *Id.* at TSDR 28-235. The exhibits were largely redundant of those in the previous declarations, but also included one of Applicant's brochures and its Twitter and Instagram pages. Second Supp. West Decl. ¶¶ 15-16, 19; Exs. N-P (December 30, 2020 Request for Reconsideration at TSDR 76-109). The Appendices were again webpages of Applicant's competitors in which the phrase "dock blocks" was not used.

to revive it.<sup>29</sup> The application was ultimately reinstated,<sup>30</sup> following which the Examining Attorney denied Applicant's Request for Reconsideration.<sup>31</sup>

## II. Evidentiary Matters

Before discussing the merits of the two refusals, we briefly address evidentiary objections asserted by the Examining Attorney in her brief, 9 TTABVUE 12-13, and discussed by Applicant in its reply brief, 11 TTABVUE 6-7.

The Examining Attorney objects to evidence that she argues was not made of record during prosecution,<sup>32</sup> specifically (1) what Applicant describes as a "Digital Ad Example,"<sup>33</sup> which the Examining Attorney argues was not accompanied by the URL or date of download, 9 TTABVUE 12; (2) Applicant's Facebook page,<sup>34</sup> which the Examining Attorney argues does not show a "voluminous number of unsolicited positive comments," *id.*, because the page shows only "one complete review . . . two partial reviews, a single complete post in honor of the Memorial Day holiday with

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<sup>29</sup> January 26, 2021 Notice of Incomplete Response at TSDR 1; February 8, 2021 Change Address or Representation Form at TSDR 1; February 9, 2021 Request for Reconsideration at TSDR 1-235; February 18, 2021 Notice of Incomplete Response at TSDR 1; March 1, 2021 Change Address or Representation Form at TSDR 1-2; March 2, 2021 Request for Reconsideration at TSDR 1-235; March 30, 2021 Notice of Abandonment at TSDR 1; April 27, 2021 Petition to Director at TSDR 1-4.

<sup>30</sup> January 7, 2022 Official USPTO Notice Trademark Application Reinstated at TSDR 1.

<sup>31</sup> January 7, 2022 Denial of Request for Reconsideration at TSDR 1.

<sup>32</sup> The Examining Attorney purports to object to statements made in the body of Applicant's December 30, 2020 Request for Reconsideration, on the ground that the referenced supporting evidence is not of record, 9 TTABVUE 12-13, but we have considered her objections to be directed to consideration of the evidence itself.

<sup>33</sup> Second Supp. West Decl. ¶ 17; Ex. L (December 30, 2020 Request for Reconsideration at TSDR 30, 61).

<sup>34</sup> Second Supp. West Decl. ¶ 13; Ex. F (December 30, 2020 Request for Reconsideration at TSDR 29, 47-48).

seven likes and no comments, and a second partial post . . . .,” *id.* at 12-13; (3) Mr. West’s testimony that “products bearing the DOCK BLOCKS mark are scheduled to [be] feature[d] in the upcoming editions of Pontoon and Deck Boat magazine accessible at pdbmagazine.com,”<sup>35</sup> which is accompanied by what appears to be a link to that website, on the ground that “[t]he referenced material was not provided” and “merely providing a hyperlink is not sufficient to introduce the underlying webpages into the record, *id.* at 13; and (4) Mr. West’s testimony that Applicant’s Twitter account has had “over 4,500 likes,”<sup>36</sup> on the ground that the Twitter pages in the record show that Applicant’s “account has 1,117 followers, and that the majority of applicant’s tweets receive no likes, retweets, or comments.” *Id.*

Applicant responds in its reply brief that (1) the “Digital Ad Example” may be considered because it is Applicant’s own Internet material, 11 TTABVUE 6; (2) Applicant’s Facebook page may be considered because “Applicant has supported the existence of such information through a Declaration,” *id.* at 7; (3) Mr. West’s testimony regarding the upcoming features on Applicant’s products may be considered because his declaration “provides the details of this website,” *id.*; and (4) Mr. West’s testimony regarding the number of “likes” on Applicant’s Twitter page may be considered because the attached Exhibit O “is merely exemplary and the

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<sup>35</sup> Second Supp. West Decl. ¶ 18 (December 30, 2020 Request for Reconsideration at TSDR 30).

<sup>36</sup> Second Supp. West Decl. ¶ 15; Ex. O (December 30, 2020 Request for Reconsideration at TSDR 29, 89-104).

statement in the Declaration provides information that Applicant respectfully suggests may be considered by the Board.” *Id.*

We overrule each of the Examining Attorney’s objections. Exhibit L to the second supplemental West declaration does not bear a URL or date of download, both of which would be required for **self**-authentication of the involved Internet page, *see Icon Health & Fitness, Inc. v. Eifit LLC*, 2022 USPQ2d 315, at \*13 (TTAB 2022), but as the Board recently held in the inter partes context, “when Internet documents are submitted by witness testimony, the witness may identify and authenticate such documents” and the “absence of URL or date alone, therefore, is not a valid basis to strike the testimony exhibits from the record, if authentication is otherwise established.” *Id.*, at \*14. We hold that this principle applies to declaration testimony in the ex parte context. Mr. West adequately authenticated Exhibit L as an “Digital Ad Example” in his testimony,<sup>37</sup> and we have considered it for whatever probative value it may have.

Applicant’s Facebook page was properly made of record and the Examining Attorney’s objection to it goes to the evidentiary weight to be accorded the page as evidence of acquired distinctiveness of Applicant’s proposed mark. We have considered Applicant’s Facebook page for whatever probative value it may have.

Mr. West’s testimony that Applicant’s products were scheduled to be featured in upcoming editions of Pontoon and Deck Boat magazines is sufficient to establish the

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<sup>37</sup> Second Supp. West Decl. ¶ 17 (December 30, 2020 Request for Reconsideration at TSDR 30).

prospective appearance of the products in those publications. We have considered his testimony for whatever probative value it may have.

Finally, Applicant's objection to Mr. West's testimony regarding the number of "likes" enjoyed by Applicant's Twitter account again goes to the evidentiary weight to be accorded his testimony, and we have considered it for whatever probative value it may have.

### **III. Genericness Refusal**

"A generic name—the name of a class of products or services—is ineligible for federal trademark registration." *In re GJ & AM, LLC*, 2021 USPQ2d 617, at \*4 (TTAB 2021) (quoting *U.S. Pat. & Trademark Off. v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, at \*1 (2020)). "A generic term 'is the common descriptive name of a class of goods or services.'" *Id.* (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term to be protected to refer to the genus of goods or services in question." *Id.* (quoting *Royal Crown*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530)).

"The Federal Circuit has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, does the relevant public understand the term sought to be registered primarily to refer to that genus of goods or services?" *Id.*, at \*4-5 (citing *Marvin Ginn*,

228 USPQ at 530). “The relevant public’s perception is the chief consideration in determining whether a term is generic.” *Id.*, at \*5 (citing *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015); see also *Booking.com*, 2020 USPQ2d 10729, at \*6 (“whether a term is generic depends on its meaning to consumers”).

“Evidence of the public’s understanding of a term may be obtained from ‘any competent source, such as consumer surveys, dictionaries, newspapers and other publications.’” *Id.*, at \*5 (quoting *Princeton Vanguard*, 114 USPQ2d at 1830) (internal quotation omitted); see also *Booking.com*, 2020 USPQ2d 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)).

Any doubt regarding whether Applicant’s proposed mark is a generic name must be resolved in Applicant’s favor. *GJ & AM*, 2021 USPQ2d 617, at \*33 (citing *In re Waverly, Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993)).

**A. What is the Genus (Category or Class) of Goods at Issue?**

The first part of the *Marvin Ginn* test seeks to identify the genus of goods at issue. The Examining Attorney argues that the “genus of goods is defined by the applicant’s identification of goods,” 9 TTABVUE 4, and that “the relevant public comprises ordinary consumers.” *Id.* at 5 n.2. Applicant “agrees that the genus of the goods are

[sic] defined by Applicant’s identification of goods and the relevant public are the ordinary consumers who purchase Applicant’s goods . . . .” 7 TTABVUE 4. Applicant and the Examining Attorney thus are in accord that we should “define the genus by the goods identified in the application.” *GJ & AM*, 2021 USPQ2d 617, at \*5. We find that the genus of goods is modular floating non-metal docks.<sup>38</sup>

**B. Does the Relevant Public Understand DOCK BLOCKS Primarily to Refer to Modular Floating Non-Metal Docks?**

The second part of the *Marvin Ginn* test asks whether the relevant public understands the term sought to be registered primarily to refer to the relevant genus of goods. *Id.* “The relevant public is the purchasing public for the identified goods,” *id.*, at \*6, which Applicant and the Examining Attorney agree includes ordinary consumers of modular floating non-metal docks.

**1. Summary of Arguments**

Applicant’s argument on the second part of the *Marvin Ginn* test is encapsulated in the following statement in its appeal brief:

[T]he Examining Attorney’s approach entirely ignores the direction the Supreme Court has provided in *Booking.com* where the inquiry requires the [USPTO] to look at the combination of the terms meaning as a whole and not just

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<sup>38</sup> The Examining Attorney need not show that DOCK BLOCKS is the generic name for all of the goods identified in the application because in “the *ex parte* context, [a] registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1956 (TTAB 2018) (quoting *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016) (internal quotation omitted)). The Examining Attorney argues that “the genus of the goods is docks assembled from modular blocks.” 9 TTABVUE 5. We disagree to the extent that the Examining Attorney claims that the genus includes **all** forms of “docks assembled from modular blocks” because Applicant’s identification of goods is limited to “modular **floating non-metal** docks” (emphasis added). Applicant properly defines the genus as “modular floating non-metal docks.” 7 TTABVUE 15.

a single word as the Examining Attorney has done in support of her rejection. None of the fifteen websites entered into evidence by the Examining Attorney uses the combination “dock blocks” in describing their respective goods.

7 TTABVUE 10-11.

Applicant cites *Booking.com* for the proposition that the “Supreme Court has provided clarification on deviations from the direction the [USPTO] can take with respect to compound terms” such as DOCK BLOCKS, specifically that for “a compound term, the distinctiveness inquiry trains on the term[']s meaning as a whole, not its parts in isolation.” 7 TTABVUE 6-7 (quoting *Booking.com*, 2020 USPQ2d 10279, at \*5). In its appeal brief, Applicant argues that the “Examining Attorney has not provided any examples where the combination mark having the constituent terms ‘dock blocks’ is used by any third party in association with their products,” *id.* at 14, and that “[n]one of the fifteen websites entered into evidence by the Examining Attorney uses the combination ‘dock blocks’ in describing their respective goods.” *Id.* at 10-11. In its reply brief, Applicant argues that the “Examining Attorney has not cited any third-party descriptions of goods whereby ‘dock blocks’ is used in combination to describe such products” and “lacking such support, the Examining Attorney fails to present any evidence that the combination of the constituent words ‘dock’ in conjunction with ‘blocks’ yields any meaning to consumers to distinguish such goods.” 11 TTABVUE 4.

Applicant also argues that it has “entered into evidence forty-five third parties having products similar to those provided by Applicant” and that “many of these third parties do not use of the words ‘block’ or ‘blocks’ at all in describing their products on

their associated websites.” 7 TTABVUE 11. Applicant’s appeal brief contains a table regarding these uses, which includes a column containing what Applicant’s describes as each company’s generic name for its products. *Id.* at 11-14.

Applicant further argues that the “use of the word ‘block’ directly in association with ‘dock’ is not common in the industry and cannot be deemed generic” and that “[e]ven more important, none of these third parties use the combination of the constituent words ‘dock blocks’ in describing their products.” *Id.* at 14. According to Applicant, “[c]onsideration of use of the mark as a whole within the industry demonstrates that the combination of terms ‘dock’ and ‘blocks’ used together does not exist in the industry and cannot be said to be a common name of a product or class of products in the industry” and the “combined term ‘dock blocks’ . . . shows Applicant is the source of products branded with the DOCK BLOCKS mark.” *Id.*

Applicant concludes as follows:

The Examining Attorney has failed to present any evidence that the combination of the constituent words “dock blocks” is used by any third party. Rather, the Examining Attorney’s evidence appears to only support the conclusion that “blocks” itself is generic, but not that “dock blocks” without the use of intervening connective words is generic. Furthermore, “dock blocks” in its entirety does add meaning to an otherwise generic mark. . . . The Examining Attorney has not provided any examples where the combination mark having the constituent terms “dock blocks” is used by any third party in association with their products. While the Examining Attorney provides articles and advertisements where a minority of potential competitors use the word blocks by itself in the description of their floatation-type products, there has been no evidence presented by the Examining Attorney that the term “dock blocks” has been used in a constituent combination when describing their products. Thus, it is

doubtful the relevant public will immediately understand the proposed mark DOCK BLOCKS in connection with a product refers to the genus or subcategory of modular floating non-metal docks.

*Id.* at 14-15.

The Examining Attorney acknowledges that “[a]n inquiry into the public’s understanding of a mark requires consideration of the mark as a whole,” 9 TTABVUE 5 (quoting *In re 1800Mattress.com IP, LLC*, 583 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009)), but argues that “[w]hen each constituent term in a compound mark is generic, and the combination does not add any meaning, the entire mark is generic.” *Id.* at 5-6 (citing *Princeton Vanguard*, 114 USPQ2d at 1831).<sup>39</sup> She argues that “Applicant has not offered any alternative meaning for ‘dock,’ ‘block,’ or the combination of ‘dock blocks,’ and has not offered any evidence that the terms, either alone, or in combination, would have any non-generic significance to the purchasing public.” *Id.* at 6.

In support of her position, the Examining Attorney cites dictionary definitions of the words “dock” and “blocks” in the proposed mark, pages from Applicant’s website, and pages from third-party websites using the word “block” in connection with floating docks. *Id.* at 6-10. She concludes that “Applicant’s own use, and third party descriptions of applicant’s goods, shows that the individual words ‘dock’ and ‘blocks’

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<sup>39</sup> The Examining Attorney cites *Booking.com* only in passing, 9 TTABVUE 4, but the Supreme Court held in that case that a “compound of generic elements is generic if the combination yields no additional meaning to consumers capable of distinguishing the goods or services.” *Booking.com*, 2020 USPQ2d 10729, at \*7 (emphasis in original). We read this portion of the Supreme Court’s decision to be consistent with the principles set forth in the Federal Circuit cases cited by the Examining Attorney.

retain their original meaning and no additional meaning is created by their combination,” *id.* at 8, and that “[t]his evidence shows that the public understanding of the combination of ‘DOCK BLOCKS’ as a whole is as the generic designation for goods that are docks comprised of blocks.” *Id.* at 10. She rejects Applicant’s arguments based on its claim that there is no third-party use of DOCK BLOCKS as a whole because “[t]his is not the test,” as “it is not necessary to show that the relevant public uses the term to refer to the genus,” and “[t]he fact that there is no evidence of third-party use of the precise compound term or phrase is not, by itself, necessarily fatal to a finding of genericness.” *Id.*

## 2. Analysis

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. Thus, we will begin by determining the understood meaning of the words DOCK and BLOCKS in the context of modular floating non-metal docks. *GJ & AM*, 2021 USPQ2d 617, at \*6-7.<sup>40</sup>

The dictionary definitions in the record are probative on that issue. *Id.*; *see also Gould*, 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,

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<sup>40</sup> We “may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions,” *In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at \*9 (TTAB 2021), and we take judicial notice that the word “modular” in the identification and genus of goods means “constructed with standardized units or dimensions for flexibility and variety in use.” MERRIAM-WEBSTER DICTIONARY ([merriam-webster.com](https://www.merriam-webster.com), last accessed on September 7, 2022).

1550 (TTAB 2017) (discussing dictionary definitions of the words COFFEE and FLOUR in the proposed mark COFFEE FLOUR).

A “dock” is defined as a “platform extending from a shore over water, used to secure, protect, and provide access to a boat or ship; a pier” and a “floating platform attached to a mooring and used as a rest or play area when swimming.”<sup>41</sup> The “word [‘dock’] appears in Applicant’s identification of goods,” and Applicant does not dispute “that it is a generic word as used in Applicant’s mark” for modular floating non-metal docks. *Id.*

A “block” is defined as, among other things, a “solid piece of a hard substance, such as wood, having one or more flat sides; such a piece used as a construction member or as a support.”<sup>42</sup> Applicant does not appear to dispute that “blocks,” like “dock,” is generic for modular floating non-metal docks, as Applicant argues in its appeal brief that “the Examining Attorney’s evidence appears to only support the conclusion that ‘blocks’ is itself generic, but not that ‘dock blocks’ without the use of [an] intervening connective word is generic,” 7 TTABVUE 14, but we will review the record evidence on that issue.

Applicant made of record a page from its website on which it uses “blocks” in a manner consistent with its meaning as a “solid piece of a hard substance . . . having one or more flat sides” that is “used as a construction member or as a support.”<sup>43</sup> The

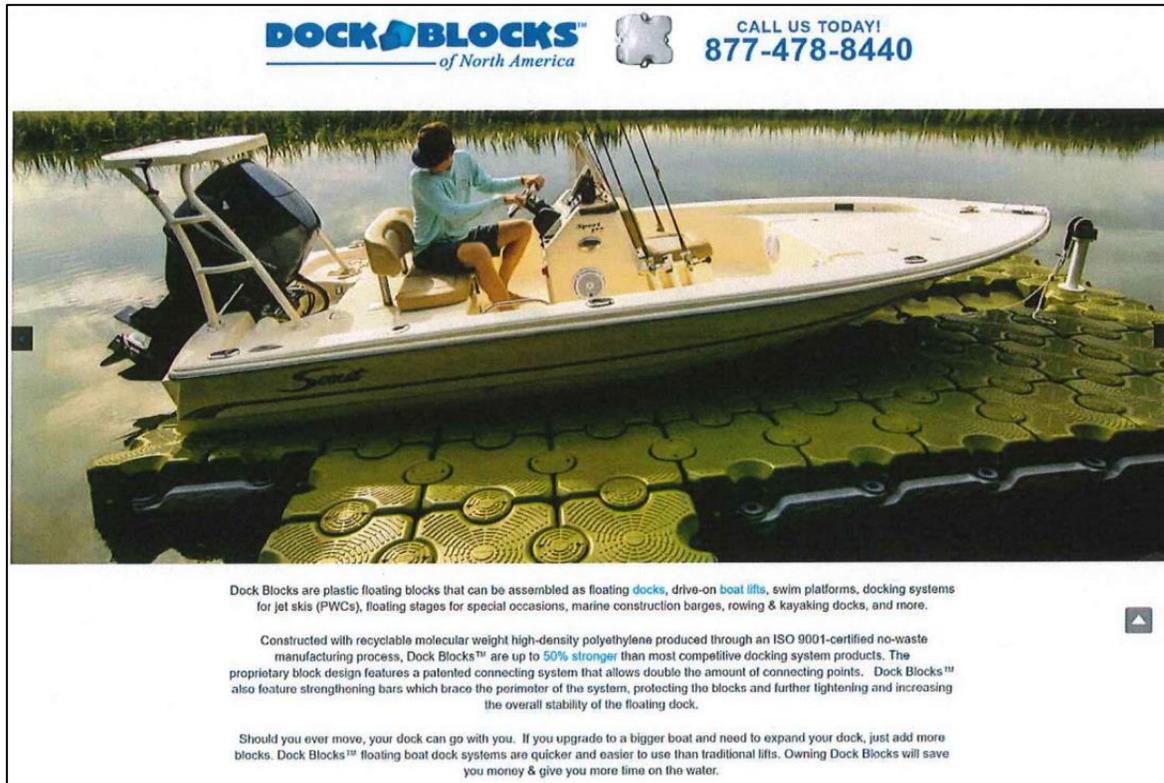
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<sup>41</sup> May 9, 2019 Office Action at TSDR 2 (THE AMERICAN HERITAGE DICTIONARY).

<sup>42</sup> *Id.* at TSDR 4 (THE AMERICAN HERITAGE DICTIONARY).

<sup>43</sup> The page was from Applicant’s website as it appeared in November 2019.

webpage displayed below states that “**Dock Blocks are plastic floating blocks** that can be assembled as floating docks, drive-on boat lifts, swim platforms, docking systems for jet skis (PWCs), floating stages for special occasions, marine construction barges, rowing & kayaking docks, and more”:



**DOCK BLOCKS™**  
of North America

CALL US TODAY!  
**877-478-8440**

Dock Blocks are plastic floating blocks that can be assembled as floating docks, drive-on boat lifts, swim platforms, docking systems for jet skis (PWCs), floating stages for special occasions, marine construction barges, rowing & kayaking docks, and more.

Constructed with recyclable molecular weight high-density polyethylene produced through an ISO 9001-certified no-waste manufacturing process, Dock Blocks™ are up to 50% stronger than most competitive docking system products. The proprietary block design features a patented connecting system that allows double the amount of connecting points. Dock Blocks™ also feature strengthening bars which brace the perimeter of the system, protecting the blocks and further tightening and increasing the overall stability of the floating dock.

Should you ever move, your dock can go with you. If you upgrade to a bigger boat and need to expand your dock, just add more blocks. Dock Blocks™ floating boat dock systems are quicker and easier to use than traditional lifts. Owning Dock Blocks will save you money & give you more time on the water.

44

Applicant’s website has also contained the following statements that use “blocks” in the same manner:<sup>45</sup>

<sup>44</sup> West Decl. ¶ 7; Ex. A (November 12, 2019 Response to Office Action at TSDR 9) (emphasis added).

<sup>45</sup> An earlier May 2019 version of Applicant’s website also contained these statements. May 9, 2019 Office Action at TSDR 8. Because the top of the page is cut off in the copy made of record in the Office Action, it is not clear whether the page also contained the statement that “Dock Blocks are plastic floating blocks that can be assembled as floating docks, drive-on boat lifts, swim platforms, docking systems for jet skis (PWCs), floating stages for special occasions, marine construction barges, rowing & kayaking docks, and more.”

- “Constructed with recyclable molecular weight high-density polyethylene produced through an ISO 9001-certified no-waste manufacturing process, **Dock Blocks™ are up to 50% stronger than most competitive docking system products;**”<sup>46</sup>
- Applicant’s “**proprietary block design** features a patented connecting system that allows double the amount of connection points;”<sup>47</sup>
- “**Dock Blocks** also feature strengthening bars which brace the perimeter of the system, **protecting the blocks** and further tightening and increasing the overall stability of the floating dock;”<sup>48</sup>
- “Should you ever move, your dock can go with you. If you upgrade to a bigger boat and need to expand your dock, **just add more blocks;**”<sup>49</sup> and
- “Owning **Dock Blocks** will save you money & give you more time on the water.”<sup>50</sup>

Applicant’s Facebook page contains a posting that uses “blocks” similarly:



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<sup>46</sup> West Decl. ¶ 7; Ex. A (November 12, 2019 Response to Office Action at TSDR 9) (emphasis added).

<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> Second Supp. West Decl. Ex. F (December 30, 2020 Request for Reconsideration at TSDR 47).

and Applicant's example of one of its digital ads does so as well:



Applicant's Sales Agreement identifies Applicant as the "licensed manufacturer and authorized distributor of the "Dock Blocks by Pier Plas product line,"<sup>53</sup> and uses "blocks" to identify a "solid piece of a hard substance . . . having one or more flat sides" and "used as a construction member or as a support":

DBNA is not responsible for inaccuracies in measurements of docking system or boat specifications, all of which are provided by the purchaser and relied on by DBNA in fulfilling order(s). Blocks may conform to the shape of heavier boats in places where additional weight is added.

One of Applicant's brochures states that the "modular design of **Dock Blocks** allows you to customize the best float dock system for your specific application," that "**Dock Blocks are over 50% stronger than leading competitive products** due to our patented connecting system and durable construction process," and that "[m]ade of high-density polyethylene (HDPE), a thick and durable plastic, **Dock Blocks are ready to help you enjoy the water** no matter what your pleasure."<sup>55</sup>

<sup>52</sup> Second Supp. West Decl. ¶ 17; Ex. L (December 30, 2020 Request for Reconsideration at TSDR 61).

<sup>53</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 38).

<sup>54</sup> *Id.*

<sup>55</sup> Second Supp. West Decl. ¶ 19; Ex. N (December 30, 2020 Request for Reconsideration at TSDR 77) (emphasis added).

The brochure also touts Applicant’s proprietary technology, which “provid[es] up to 220 support for **each block**” and “**pulls the blocks closer together** as weight is added **thus getting the most support out of the blocks**,”<sup>56</sup> and states that the floating dock is “Extra Stable with **Only Two Blocks per Pin**,”<sup>57</sup> that the height of a floating dock “can be lowered or raised by **filling blocks with water**,”<sup>58</sup> that “[b]locks can be reassembled and used for different jobs,”<sup>59</sup> and that Applicant’s standard colors are gray and green, and that additional custom colors “require a **minimum order of 500 blocks**.”<sup>60</sup> Two customer comments included in the brochure state that Applicant’s “**blocks arrived at the time arranged**” and the customer was able to assemble the “**24 block dock**” in about an hour and a half, and that a customer’s “**dock blocks**” made it through Hurricane Arthur.<sup>61</sup>

Uses in third-party materials also refer to “blocks” as the standardized construction units of Applicant’s modular floating non-metal docks. A display of Applicant’s product on amazon.com is accompanied by the statement that “[e]ach

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<sup>56</sup> Second Supp. West Decl. ¶ 19; Ex. N (December 30, 2020 Request for Reconsideration at TSDR 78) (emphasis added).

<sup>57</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 79) (emphasis added).

<sup>58</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 83) (emphasis added).

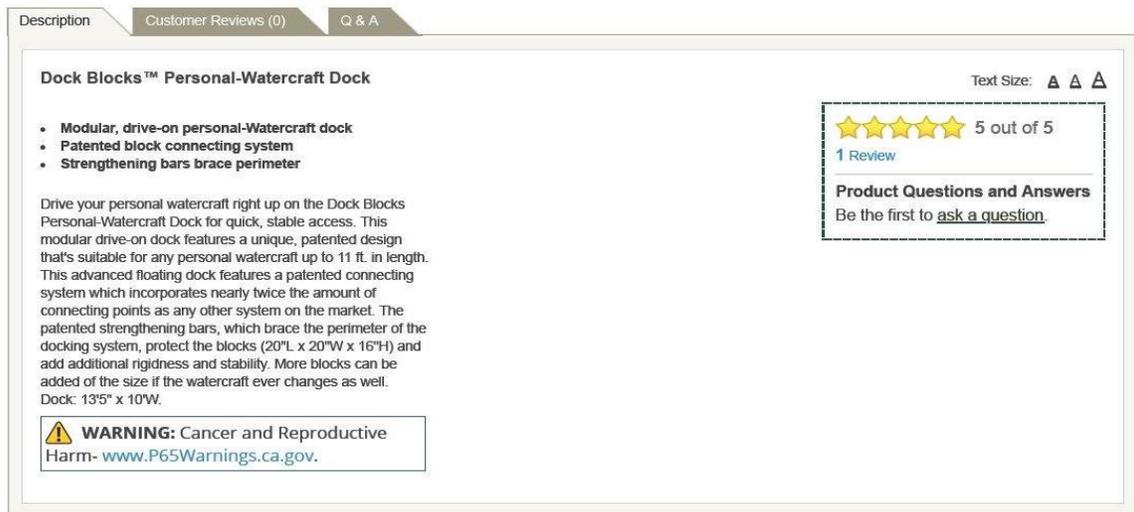
<sup>59</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 85) (emphasis added).

<sup>60</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 86) (emphasis added).

<sup>61</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 87) (emphasis added).

**individual block** is 2.58 sq/ft, weighs 15lbs, & can support 200lbs,”<sup>62</sup> and an accompanying “Product description” states that “**Dock Blocks are plastic floating cubes** that can be assembled easily to create the floating dock you want,” that the “**modular block system** offers more flexibility to design the exact docking system to meet your waterfront needs,” that “if you upgrade and/or need to expand your dock, **you can always add more blocks,**” and that “[s]hipment includes **all necessary blocks, pins, plugs, nuts, bolts and bars.**”<sup>63</sup>

The website at cabelas.com refers to Applicant’s “patented **block connecting system,**” and states that the patented strengthening bars “protect the **blocks**” and that “[m]ore blocks can be added”:



<sup>62</sup> Second Supp. West Decl. ¶ 12; Ex. D (December 30, 2020 Request for Reconsideration at TSDR 42) (emphasis added). In a comment about the product captioned “Exceptional Floating Dock,” a consumer stated that the “**blocks are super thick** so I don’t see myself ever replacing it.” *Id.* at TSDR 44 (emphasis added).

<sup>63</sup> Second Supp. West Decl. ¶ 8; Ex. B (December 30, 2020 Request for Reconsideration at TSDR 43) (emphasis added).

<sup>64</sup> Second Supp. West Decl. ¶ 12; Ex. E (December 30, 2020 Request for Reconsideration at TSDR 46) (emphasis added).

An article in THE ENSIGN, the official magazine of America’s Boating Club, recounts a boater’s experience installing and using one of Applicant’s floating boat lifts. The article concludes with text and pictures that use “block” and “blocks” to refer to the standardized construction units of Applicant’s products:

Now after a day out on the water, I come in, unload the boat and drive it up on my floating lift. I left three blocks off in the center end of the lift to accommodate my lower unit and depth sounder transducer. I tilt the engine up, wash the boat with fresh water and rest assured that the little marine critters will have to find a new home. Maybe they'll settle on the bottom of my floating lift. I'll have to get back to you on that.



1. UNLOADING AND PREPARING BLOCKS. EACH BLOCK MUST HAVE A THREADED HOLE PLUGGED WITH A NYLON PLUG TO RENDER IT WATER TIGHT.

2. THE CENTER OF THE DOCK MUST BE ASSEMBLED ON A LEVEL, FLAT SURFACE. HALF BLOCKS IN THE CENTER ACCOMMODATE THE KEEL THE OUTER FULL BLOCK ROWS ARE CONNECTED TO THE CENTER WITH PLASTIC BOLTS AND NUTS.

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5. THE PINS THAT HOLD THE BLOCKS TOGETHER MUST BE TIGHTENED A QUARTER TURN TO LOCK THEM TOGETHER.

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<sup>65</sup> Second Supp. West Decl. ¶ 17; Ex. H (December 30, 2020 Request for Reconsideration at TSDR 52).

<sup>66</sup> *Id.* at TSDR 46.

An article on the website of SOUTHERN BOATING magazine displayed below:

## Dock Blocks Modular Docking Systems

by ERIN B



Dock Blocks Modular Docking Systems by Pier Plas are used to build docks, bridges, swimming platforms, fishing cages, and more. Size and shape are unlimited. Conquer your project with as many blocks as you need. Each Dock Block is made of durable, high-density polyethylene and molded with a grooved, slip-free surface. The proprietary connection system provides strength and stability for an even, gapless walking platform. Light colors keep bare feet cool in hot sun with no splinters! Do-it-yourself construction and maintenance is quick and easy, and Dock Blocks can also be easily removed in the event of a heavy storm. Lifetime warranty. MSRP varies; [dock-blocks.com](http://dock-blocks.com)

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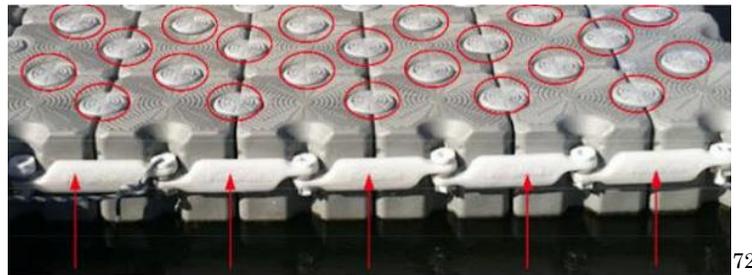
discusses Applicant's modular docking systems and states that consumers can "[c]onquer your project with **as many blocks as you need**," that "[e]ach **Dock Block is made of durable, high-density polyethylene** and molded with a grooved, slip-free surface," and that "**Dock Blocks can also be easily removed** in the event of a heavy storm."<sup>68</sup>

<sup>67</sup> Second Supp. West Decl. Ex. J (December 30, 2020 Request for Reconsideration at TSDR 58-59).

<sup>68</sup> *Id.* at TSDR 58 (emphasis added).

The Examining Attorney made of record webpages of sellers of competing products, and persons providing advice on floating docks, on which “blocks” are identified as standardized construction units of those goods. The website at jetfloat.com, which boasts that it sells “the best modular floating dock system on the market today,”<sup>69</sup> states that its products are made of “large light-weight inter-locking **building blocks . . .**”<sup>70</sup> The website urges consumers to “[t]hink of them as **Lego building blocks on water**” and to “[u]se your imagination to build configurations that best meet your needs.”<sup>71</sup>

The website at matraxinc.com offers a “Modular Floating Dock System” shown below:



and states that its system “consists of high molecular weight **HDPE blocks** capable of holding over 200 lbs. each,”<sup>73</sup> and that its “**modular blocks**” are “[m]ade of high-density polyethylene” and are “almost 50% stronger than competitor systems and are

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<sup>69</sup> May 9, 2019 Office Action at TSDR 14.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> June 30, 2020 Final Office Action at TSDR 9.

<sup>72</sup> May 9, 2019 Office Action at TSDR 18.

<sup>73</sup> *Id.* at TSDR 17-18 (emphasis added).

capable of handling large scale events and industrial projects.”<sup>74</sup> The website makes multiple other uses of the word “blocks” and the term “modular blocks” to identify the construction members of its modular floating dock systems.<sup>75</sup>

The website at greatnortherndocks.com offers “Modular Plastic Docks” that are “[a]vailable in 10” Tall and 18” Tall Float **Blocks**,”<sup>76</sup> and that “meet an ever-increasing demand for affordable, low maintenance, and stable floating docks.”<sup>77</sup> According to the website, modular plastic docks or MPDs “use a rotational molding technique to make hand portable sized ‘**building blocks**’ that lock together on the water” and that are “incredibly sturdy, yet each **block** is light enough for parcel shipping to your door. Most assemblies can be done with basic hand tools and are easily rearranged as your configuration needs change.”<sup>78</sup> The website also states that “MPD **2’x2’ blocks** are the smallest and easiest to assemble” and shows a young child with some blocks:



Kid Friendly

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<sup>74</sup> *Id.* at TSDR 17 (emphasis added).

<sup>75</sup> *Id.* at TSDR 18-20.

<sup>76</sup> *Id.* at TSDR 22 (emphasis added). Applicant also made of record pages from this website. June 1, 2020 Response to Office Action at TSDR 164-67.

<sup>77</sup> June 30, 2020 Final Office Action at TSDR 6.

<sup>78</sup> *Id.* (emphasis added).

<sup>79</sup> *Id.* at TSDR 7 (emphasis added).

The website at candock.com offers a modular plastic floating dock system,<sup>80</sup> and states that the system “is simple: **floating blocks** closely and firmly held together by special mounting screws. All pieces are light and easy to handle.”<sup>81</sup>

The website at connectadock.com offers floating docks, touts the benefits of “Modular design,” and states that “[u]sing this unique **building block design**, you can assemble docks, party barges, boat slips and just about any style of dock.”<sup>82</sup> The website at gulffishing.com offers “Tips on Buying a Floating Dock” and states that “[o]ne option is a modular dock. It is sold in sections and assembled like **building blocks** using connectors. Sections can be added as budget permits, or arranged into a new configuration to accommodate an owners’ growing inventory of watercraft.”<sup>83</sup>

The website at ezdockinnovations.net offers floating docks and states that its “modular design concept is similar to the famous Lego toy system” and that “[u]sing a wide variety of shapes and sizes as **building blocks**, EZ Docks can be configured into any size and shape.”<sup>84</sup>

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<sup>80</sup> May 9, 2019 Office Action at TSDR 28.

<sup>81</sup> *Id.* at TSDR 29 (emphasis added). In June 2020, the website stated that the “Candock system is simple: **blocks** closely and firmly held together by special mounting screws. All pieces are light and easy to handle. It is so easy you can assemble it yourself!” June 30, 2020 Final Office Action at TSDR 21 (emphasis added). Applicant also made of record pages from this version of the website that refer to blocks closely held together. June 1, 2020 Response to Office Action at TSDR 87.

<sup>82</sup> November 18, 2019 Office Action at TSDR 2 (emphasis added). Applicant also made of record a page from this website that states that “[u]sing this unique **building block design** you can assemble decks, party barges . . . boat slips . . . and just about any style of dock . . . Your imagination is your only limitation”). June 1, 2020 Response to Office Action at TSDR 105 (emphasis added).

<sup>83</sup> *Id.* at TSDR 5 (emphasis added).

<sup>84</sup> *Id.* at TSDR 6 (emphasis added).

The website at [ecoetech.com](http://ecoetech.com) offers floating docks and states that “TDock floating dock platforms are recycled environmentally friendly **plastic floating blocks** that can be assembled as floating docks, drive-on boat lifts, swim platforms, docking systems for jet skis (PWCs), floating stages for special occasions, marine construction barges, rowing & kayaking docks, and more.”<sup>85</sup>

The website at [matbridge.com](http://matbridge.com) offers “Modular Floating Docks” and states that “High-Density **Polyethylene Blocks** Require no Sealing or Maintenance” because “these **modular blocks** are almost 50% stronger than competitor systems and are capable of handling large scale events and industrial projects.”<sup>86</sup>

The record, highlighted by Applicant’s own multiple generic uses of “blocks,” amply supports what Applicant describes as a finding that “‘blocks’ is itself generic,” 7 TTABVUE 14, for modular floating non-metal docks because the word “blocks” has been used widely to refer to the standardized construction units providing flexibility and variety in use from which modular floating non-metal docks are assembled.

Based on our review of the evidentiary record, we find that the words DOCK and BLOCKS are each individually generic for modular floating non-metal docks, and we turn now to the question of whether the Examining Attorney has shown that the whole of Applicant’s proposed mark DOCK BLOCKS is no greater than the sum of its generic parts.

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<sup>85</sup> June 30, 2020 Final Office Action at TSDR 15 (emphasis added).

<sup>86</sup> *Id.* at TSDR 26 (emphasis added).

“[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].” *Id.*, at \* 17 (quoting *Princeton Vanguard*, 114 USPQ2d at 1831) (internal citation omitted).

On this issue, Applicant “does not challenge the accuracy of the definitions and uses” of the words DOCK and BLOCKS discussed above. *Id.* “Applicant’s principal argument is that the references made of record by the Examining Attorney do not show usage of the proposed mark [DOCK BLOCKS] as a whole.” *Id.* For example, in addressing the uses of “block” in connection with modular floating non-metal docks, Applicant argues repeatedly that there is no use of the words DOCK and BLOCK in combination, 7 TTABVUE 7-10, and Applicant attempts to prove that negative through its submission of the websites of 45 “third parties having products similar to those provided by Applicant,” *id.* at 11, none of which “use the combination of the constituent words ‘dock blocks’ in describing their products.” *Id.* at 14.

Applicant’s argument that its proposed mark cannot be found to be generic in the absence of generic uses of it by third parties is unavailing. “The fact that there is no

evidence of third-party use of the precise term [DOCK BLOCKS] is not, by itself, necessarily fatal to a finding of genericness.” *Mecca Grade Growers*, 125 USPQ2d at 1957. *See also Gould*, 5 USPQ2d at 1111-12 (affirming the Board’s finding that SCREENWIPE was generic for “pre-moistened, antistatic cloth for cleaning computer and television screens” based on dictionary definitions of the words, third-party registrations, and the applicant’s own generic use of the claimed mark on its specimen, even though there was no evidence of third-party use of the proposed mark); *Empire Tech.*, 123 USPQ2d at 1564 (rejecting the applicant’s argument that the fact that none of its competitors “use the term [COFFEE FLOUR] at issue” raised “doubt as to whether the term actually primarily refers to a genus of goods or services and whether competitors can effectively identify their goods or services without using that particular phrase,” in view of the “well-settled principle that being the first and only user of a generic term even if the public associates it with the first user does not make an otherwise generic term non-generic.”); *In re Greenliant Sys., Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010) (“the fact that an applicant may be the first or only user of a generic designation . . . does not justify registration if the only significance conveyed by the term is that of the category of goods.”); *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.”).

In *Mecca Grade Growers*, the Board found that the proposed mark MECHANICALLY FLOOR-MALTED was generic for both malt for brewing and

distilling in Class 31, and the processing of agricultural grain in Class 40, even though there was no record evidence of third-party use of the exact term. The applicant there made essentially the same arguments that Applicant makes here:

Applicant maintains that the paucity of third-party uses means that the relevant class of purchasers does not perceive “mechanically floor-malted” as the genus for Applicant’s goods and services. Applicant criticizes the Examining Attorney’s genericness refusal as being based solely on evidence regarding the meaning of the mark’s individual components. Applicant also asserts that the Examining Attorney’s reliance on third-party use and Applicant’s own website is misplaced noting that while the terms “mechanical conveyors,” “mechanical devices” and “mechanical shovels” do appear, there is no mention of the proposed mark “mechanically floor-malted.” With respect to Applicant’s use on its website of “Mechanical Floor-Malting” to designate its “proprietary” malting process, Applicant submits that the initial capitalization is indicative of trademark, not generic, use.

*Mecca Grade Growers*, 125 USPQ2d at 1957.

In rejecting those arguments, and finding that MECHANICALLY FLOOR-MALTED was generic even in the absence of its use by third parties or the public, the Board noted that in *Princeton Vanguard*, the Federal Circuit “was explicit in not overruling *In re Gould*, an ex parte appeal where dictionary definitions and Applicant’s explanatory text in its specimen sufficed to establish genericness” of the proposed mark SCREENWIPE for “pre-moistened, antistatic cloth for cleaning computer and television screens.” *Id.* The Board quoted the Federal Circuit’s discussion in *Princeton Vanguard* of the court’s earlier analysis in *Gould*:

The applicant in *Gould* sought to register the mark SCREENWIPE for goods identified as “pre-moistened, antistatic cloth for cleaning computer and television screens.” . . . While the Board looked to the individual

definitions of “screen” and “wipe,” we found that “Gould's own submissions provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good's source.” . . . Indeed, Gould described its own product as “a . . . wipe . . . for . . . screens.” . . . Given this admission, we noted that the “compound immediately and unequivocally describes the purpose, function and nature of the goods as Gould itself tells us.” . . . (“Gould has simply joined the two most pertinent and individually generic terms applicable to its product, and then attempts to appropriate the ordinary compound thus created as its trademark.”). In that context, **where the mark in its entirety has exactly the same meaning as the individual words, we stated that “the 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 (internal citations omitted) (emphasis added). The Board in *Mecca Grade Growers* concluded that *Princeton Vanguard* “simply underscores that all evidence bearing on public perception must be given appropriate consideration,” *Mecca Grade Growers*, 125 USPQ2d at 1958, and that a proposed mark can be found to be generic under the *Marvin Ginn* test even if it is used only by the applicant for registration.

In *Mecca Grade Growers*, *Empire Tech.*, and *Gould*, the Board looked to the applicant's own use of the proposed marks in finding that they were generic names for the involved goods, noting in *Mecca Grade Growers* that “an applicant's own website or marketing materials may be probative, or even, as in *Gould*, ‘the most damaging evidence,’ in indicating how the relevant public perceives a term.” *Mecca*

*Grade Growers*, 125 USPQ2d at 1958. “To assess Applicant’s use [of DOCK BLOCKS], we look to Applicant’s . . . website, as well as other evidence in the record showing the ways in which Applicant promotes recognition of its goods among consumers.” *GJ & AM*, 2021 USPQ2d 617, at \*8.

As shown and discussed above and below, Applicant has used “Dock Blocks” both as a compound noun, and as an adjective modifying “floating dock systems” and like terms, in public-facing materials.<sup>87</sup> Applicant’s website has stated that “**Dock Blocks are plastic floating blocks that can be assembled as floating docks;**”<sup>88</sup> that “**Dock Blocks™**” are “[c]onstructed with recyclable molecular weight high-density polyethylene produced through an ISO 9001-certified no-waste manufacturing process,”<sup>89</sup> and “are up to 50% stronger than most competitive docking system products;”<sup>90</sup> that “**Dock Blocks** also feature strengthening bars which brace the perimeter of the system, protecting the blocks and further tightening and

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<sup>87</sup> Applicant almost always displays its proposed mark as “**Dock Blocks.**” This means of display does not necessarily impact whether Applicant’s proposed mark would be understood to be a source identifier. *See Mecca Grade Growers*, 125 USPQ2d at 1960 (“Applicant’s attempt to appropriate this term for itself with the use of initial capitalization on its website is futile. As the Federal Circuit has emphasized: ‘The test is not only whether the relevant public would itself *use* the term to describe the genus, but also whether the relevant public would *understand* the term to be generic.’”) (quoting *1800Mattress.com*, 92 USPQ2d at 1685 (emphasis in original)).

<sup>88</sup> November 12, 2019 Response to Office Action at TSDR 9 (emphasis added).

<sup>89</sup> *Id.* (emphasis added). Applicant makes frequent use of the ™ symbol in its materials, but such use alone does not establish that “Dock Blocks” is a source identifier because “[u]se of the letters ‘TM’ on a product does not make unregistrable matter into a trademark.” *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987). *See also Empire Tech.*, 123 USPQ2d at 1559-60 (“The compressed manner of depiction of the compound noun ‘coffee flour,’ and the use of trademark symbols with it on Applicant’s website, do not convert it into a trademark.”).

<sup>90</sup> *Id.*

increasing the overall stability of the floating dock;” and that “Owning **Dock Blocks** will save you money & give you more time on the water.”<sup>91</sup> The “Find A Dealer” page on Applicant’s website states that “**Dock Blocks**™ can be installed anywhere across North America and the Caribbean.”<sup>92</sup> Applicant’s website has also stated that “**Dock Blocks**™ floating block systems are quicker and easier to use than traditional lifts.”<sup>93</sup>

Applicant’s Facebook page shows one of Applicant’s floating modular docks and states that “Dock blocks” come in a variety of cool colors”:



In one of its brochures, Applicant states that “**Dock Blocks**™ is an innovative modular docking system built to last;” that the “modular design of **Dock Blocks** allows you to customize the best float dock system for your specific application;” that “**Dock Blocks are over 50% stronger than leading competitive products** due

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<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> *Id.* at TSDR 13 (emphasis added).

<sup>93</sup> May 9, 2019 Office Action at TSDR 8; November 12, 2019 Response to Office Action at TSDR 9 (emphasis added).

<sup>94</sup> June 1, 2020 Response to Office Action at TSDR 38.

to our patented connecting system and durable construction process;” that “[m]ade of high-density polyethylene (HDPE), a thick and durable plastic, **Dock Blocks are ready to help you enjoy the water** no matter what your pleasure,”<sup>95</sup> and that “[w]hether you want to enhance your lifestyle or need to be on the water for a specific function, **Dock Blocks** provide the ideal solution built to last without the regular maintenance of traditional docking materials. They are effortless to assemble too.”<sup>96</sup>

Applicant’s Twitter page begins as follows: “**Dock Blocks**™ floating dock systems and drive-on boat lifts: a new way to put your boat on a pedestal.”<sup>97</sup> The tweets listed on the page include the ones shown below:



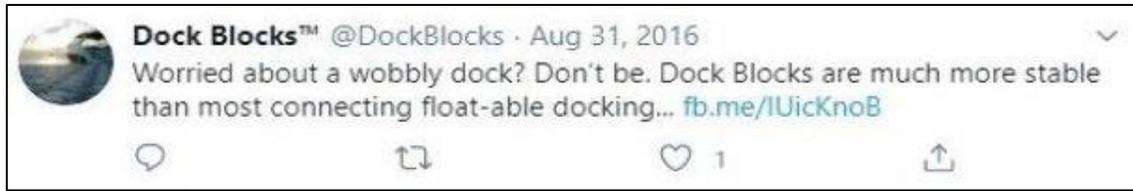
98

<sup>95</sup> December 30, 2020 Request for Reconsideration at TSDR 77 (emphasis added).

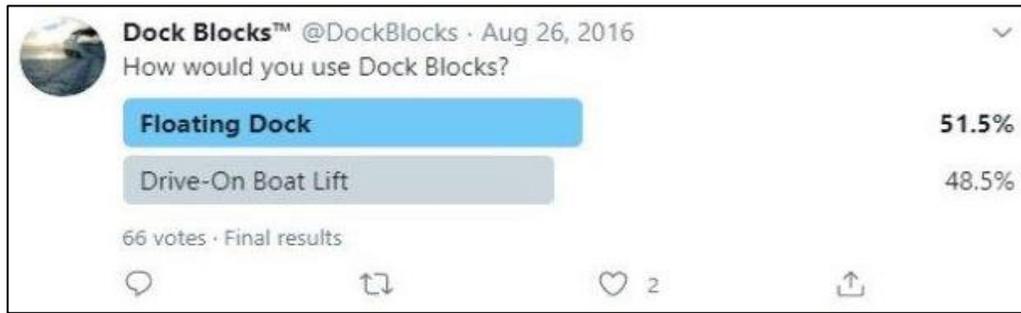
<sup>96</sup> *Id.* at TSDR 82 (emphasis added).

<sup>97</sup> Second Supp. West Decl. ¶ Ex. O (December 30, 2020 Request for Reconsideration at TSDR 89) (emphasis added).

<sup>98</sup> *Id.* at TSDR 91.



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Applicant's Instagram page begins as follows:



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<sup>99</sup> *Id.* at TSDR 97.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Second Supp. West Decl. Ex. P (December 30, 2020 Request for Reconsideration at TSDR 105).

Mr. West testified that “[p]eople buy **Dock Blocks** as camouflaged hunting platforms for duck blinds and for fishing” and that “[t]hey are also used as launching platforms for paddle boarders and kayakers.”<sup>103</sup>

Applicant’s uses of “Dock Blocks” as a compound noun, without an accompanying product name, use the proposed mark generically because they condition consumers to understand that “Dock Blocks” are things, not a source-identifier for things. *Cf. 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”). By contrast, Applicant’s uses of “Dock Blocks” to modify the terms “modular docking systems,” “floating block systems,” and “floating docks” do not use the proposed mark generically because they condition consumers to understand that the term “Dock Blocks” identifies the source of those things, not the things themselves.

Applicant’s own uses of “Dock Blocks,” which are by far the strongest evidence of the possible genericness of the proposed mark,<sup>104</sup> are in the nature of what the Federal Circuit and the Board have called “mixed use” of the proposed mark as both a generic name of the goods and a putative source-indicator for them. *See, e.g., In re*

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<sup>103</sup> Second Supp. West Decl. ¶ 6 (December 30, 2020 Request for Reconsideration at TSDR 28) (emphasis added).

<sup>104</sup> The record contains little other evidence of genericness of the proposed mark as a whole. In addition to the SOUTHERN BOATING article discussed above, which used “Dock Blocks” both as an adjective modifying “Modular Docking Systems” and as a generic term, the webpage of the 2020 NauticExpo at nauticexpo.com used “Dock Blocks” ambiguously in a portion designated “Products > Dock Blocks” that displays Applicant’s trade name and products. Second Supp. West Decl. Ex. M (December 30, 2020 Request for Reconsideration at TSDR 65).

*Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1765 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). “Mixed” use of this sort is incompatible with a finding that the **primary** significance of the proposed mark is as the generic name for the involved genus of goods. *See id.*; *cf. Empire Techs.*, 123 USPQ2d at 1565 (noting that the record was not “mixed on the question of genericness” because it showed “use of ‘coffee flour’ almost exclusively to refer to a genus of flour made from coffee cherry skins, pulp, and pectin.”).

As evidence of genericness, Applicant’s own uses of its proposed mark are not comparable in quantity or quality to the applicants’ generic uses of their sui generis proposed marks in *Mecca Grade Growers*, *Empire Tech.*, and *Gould*. Although the dictionary definitions of “dock” and “block,” the third-party uses of the word “block(s)” to refer to the construction units of modular floating non-metal docks, and Applicant’s own generic uses of DOCK BLOCKS strongly suggest that Applicant’s proposed mark is an apt generic name for those goods, “[a]ptness is insufficient to prove genericness.” *Empire Tech.*, 123 USPQ2d at 1551 (quoting *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999)). The limited record evidence of genericness of the proposed mark as a whole is “sufficient to create doubt about whether consumers would perceive [DOCK BLOCKS] as a whole as generic, or rather as capable of indicating source and thus eligible for registration on the Supplemental Register or on the Principal Register under Section 2(f) if Applicant can show it has acquired distinctiveness.” *GJ & AM*, 2021 USPQ2d 617, at \*30, 33 (finding that the

proposed mark COOKINPELLETS.COM was not generic even though the term “Cooking Pellets” was “indisputably generic”). “We are constrained to resolve that doubt in favor of Applicant,” *id.*, and we reverse the refusal to register DOCK BLOCKS on the Principal Register on the ground that it is a generic name for modular floating non-metal docks.

#### **IV. Mere Descriptiveness Refusal**

We turn now to the Examining Attorney’s alternative refusal to register DOCK BLOCKS on the Principal Register on the ground that if DOCK BLOCKS is not generic, it is merely descriptive of the goods and has not acquired distinctiveness under Section 2(f) of the Trademark Act. Applicant “does not challenge the Examining Attorney’s allegations that the constituent combination of words ‘dock blocks’ is merely descriptive of Applicant’s description of goods found in the application,” 7 TTABVue 15, and acknowledges that where, as here, “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.” *Id.* (quoting *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009)). There is thus no dispute that DOCK BLOCKS is merely descriptive of the goods identified in the application, *GJ & AM*, 2021 USPQ2d 617, at \*34, and the only issue is whether Applicant has carried its burden of showing that DOCK BLOCKS has acquired distinctiveness.

**A. Degree of Descriptiveness of the Proposed Mark DOCK BLOCKS**

“Despite Applicant’s concession that [DOCK BLOCKS] is not inherently distinctive and our finding that [DOCK BLOCKS] is merely descriptive, we must determine its degree of descriptiveness for purposes of determining whether it has acquired distinctiveness,” *id.*, at \*35, because “the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *In re Sausser Summers, PC*, 2021 USPQ2d 618, at \*7 (TTAB 2021) (quoting *Royal Crown*, 127 USPQ2d at 1048).<sup>105</sup> “We must make ‘an express finding regarding the degree of the mark’s descriptiveness on the scale ranging from generic to merely descriptive, and [we] must explain how [our] assessment of the evidentiary record reflects that finding.” *Id.* (quoting *Royal Crown*, 127 USPQ2d at 1048).

“The evidence discussed above in connection with the genericness refusal is equally probative on the question of the level of descriptiveness of Applicant’s asserted mark, because the two inquiries are so closely related.” *GJ & AM*, 2021 USPQ2d 617, at \*35 (citing *Marvin Ginn*, 228 USPQ at 530 (“The generic name of a thing is in fact the ultimate in descriptiveness.”)). “We reiterate our finding above

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<sup>105</sup> Applicant acknowledges in its appeal brief that “[a]n assessment of the degree of distinctiveness of Applicant’s mark bears on the sufficiency of the evidence required to prove acquired distinctiveness, 7 TTABVUE 16, but repeats its argument that the “Examining Attorney has not shown any use of the contiguous combination of the words ‘dock’ and ‘block in association with the class of goods identified by Applicant,” and claims rather awkwardly that, as a result, “the degree of descriptiveness of the constituent combination of the words ‘dock blocks’ does not even have a high degree of descriptiveness.” *Id.* Applicant argues alternatively that its evidence of acquired distinctiveness is sufficient to carry even an elevated burden of proof if its proposed mark is found to be highly descriptive. *Id.*

that each of the terms comprising Applicant's mark, [DOCK and BLOCKS,] is generic" for "modular floating non-metal docks." *Id.*<sup>106</sup> The word DOCK is obviously generic for the subcategory of docks consisting of modular floating non-metal docks, and in the context of its use as a noun in Applicant's proposed mark for those goods, the word BLOCKS indisputably refers to the standardized construction members that are used to provide flexibility and variety in the assembly and modification of modular floating non-metal docks. "When combined, the composite mark [DOCK BLOCKS] is, at the very least, highly descriptive." *Id.* Indeed, we have found above that the record strongly suggests that DOCK BLOCKS is an apt generic name for modular floating non-metal docks. Applicant's proposed mark is thus far closer to the generic end of the "scale ranging from generic to merely descriptive," *Royal Crown*, 127 USPQ2d at 1048, than it is to the merely descriptive end.

**B. The Sufficiency of Applicant's Evidence of Acquired Distinctiveness**

Applicant "bears the ultimate burden by a preponderance of the evidence of establishing acquired distinctiveness." *GJ & AM*, 2021 USPQ2d 617, at \*37 (citing *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005-06 (Fed. Cir. 1988)). "Because we have found that the term [DOCK BLOCKS] is highly descriptive of Applicant's goods, Applicant's burden of establishing

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<sup>106</sup> As in the case of the genericness refusal, the Examining Attorney need not show that Applicant's proposed mark is merely descriptive of all of the goods identified in the application, see *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at \*5-6 (TTAB 2022), although Applicant appears to concede that that is the case. 7 TTABVUE 15.

acquired distinctiveness under Section 2(f) is commensurately high.” *Id.*, at \*37-38 (citations omitted). As the Board has explained:

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

*Id.*, at \*38 (quoting *Greenliant Sys.*, 97 USPQ2d at 1085). See also *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015).

Applicant may show acquired distinctiveness by direct or circumstantial evidence. *GJ & AM*, 2021 USPQ2d 617, at \*38 (citing *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1743 (Fed. Cir. 2018)). “Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind,” while “[c]ircumstantial evidence . . . is evidence from which we may infer a consumer association, such as years of use, prior registrations, extensive amount of sales and advertising, unsolicited media coverage, and any similar evidence showing wide exposure of the mark to consumers.” *Id.*, at \*38-39 (citations omitted). “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.

*Id.*, at \*39 (quoting *Converse, Inc. v. ITC*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)). “On this list, no single fact is determinative[.] ‘[A]ll six factors are to be weighed together in determining the existence of secondary meaning.’” *Id.* (quoting *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at \*3 (TTAB 2020) (internal quotation omitted)).

As discussed below, Applicant relies on circumstantial evidence of acquired distinctiveness. Applicant argues in its appeal brief that

[t]he evidence of record shows that Applicant has established, over the course of over ten years, which is more than the requisite five years, a substantial business where Applicant has promoted its goods under the mark DOCK BLOCKS in such a way to have created among a large base of customers an association between its mark and its goods. In support of its claim of distinctiveness, Applicant has submitted actual evidence that the mark has acquired distinctiveness pursuant Section 2(f) that includes (1) Applicant has a substantial length, degree, and exclusivity of use of the DOCK BLOCKS mark in association with the goods identified in the Application; (2) Applicant has invested a significant amount in promoting and advertising the goods bearing the DOCK BLOCKS mark and the manner of such advertising is aligned with that typically used by other manufacturers of similar products that are sold to the purchasing public; (3) actual purchaser’s [sic] associate the DOCK BLOCKS mark with Applicant as the source of modular floating docks, walkway systems, swimming platforms and platforms for holding watercraft; (4) Applicant has established an extensive customer base and has experienced growth in annual sales that exceeds \$2.5 million since the products began bearing the DOCK BLOCKS mark; (5) Applicant exclusively uses the DOCK BLOCKS mark in association with the identified goods and none of Applicant’s competitors have

adopted or used a mark that is the same as or similar to DOCK BLOCKS; and (6) unsolicited media coverage of Applicant's goods bearing with the DOCK BLOCKS mark.

7 TTABVUE 17.

The Examining Attorney responds that Applicant's evidence of use of its proposed mark since 2011 "is insufficient to show acquired distinctiveness as the applied-for mark is highly descriptive of applicant's goods," 9 TTABVUE 12; that Applicant's Internet and other evidence displaying products bearing its proposed mark "does not, in itself, establish that applicant is using or promoting the wording as a source indicator for the goods," *id.* at 13-14; that Applicant's advertising evidence does "not show promotion of the applied-for mark as a source indicator," *id.* at 14; and that Applicant's "three third-party blog posts or articles that refer to applicant's goods . . . do not show that applicant has achieved widespread exposure or recognition of the applied-for mark as a source indicator for the goods." *Id.*

In its reply brief, Applicant argues that "[c]ontrary to the Examining Attorney's allegations . . . Applicant, through the extent of its submissions of evidence has established that Applicant has been successful in associating the DOCK BLOCKS mark and the Applicant as the source of Applicant's goods," 11 TTABVUE 8; that "feedback" on social media demonstrates that actual purchasers associate the proposed mark with Applicant, *id.* at 9-10; and that Applicant's advertising and promotional efforts, and sales success, are sufficient in context to show that the proposed mark has acquired distinctiveness. *Id.* at 10-11.

We discuss immediately below the record evidence regarding each of the relevant *Converse* factors.<sup>107</sup> We do so against the backdrop of Mr. West’s testimony that in “the United States, the floating dock system manufacturer and supply industry is quite fragmented” and that “Applicant has identified forty-five manufacturers/suppliers . . . that could be considered to have products that compete with Applicant’s products bearing the DOCK BLOCKS mark.”<sup>108</sup> His testimony establishes that Applicant has numerous competitors, but, as discussed below, even though “[o]ur precedents have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that we might otherwise accord advertising and sales numbers in the acquired distinctiveness inquiry,” *GJ & AM*, 2021 USPQ2d 617, at \*43 (citations omitted), Applicant provides no information regarding its market share or other metrics that could put its sales and advertising in context vis-à-vis the rest of the floating dock industry.

**1. Association of DOCK BLOCKS With a Particular Source by Actual Consumers**

As discussed above, association of a trademark with a particular source by actual purchasers is “typically measured by customer surveys,” *id.*, at \*39, and “Applicant did not submit a survey for our consideration.” *Id.*, at \*40. Applicant claims nevertheless that “actual purchaser’s [sic] associate the DOCK BLOCKS mark with

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<sup>107</sup> There is no evidence of intentional copying of Applicant’s proposed mark. Thus, we have not discussed this *Converse* factor. It is neutral in our analysis of acquired distinctiveness.

<sup>108</sup> Second Supp. West Decl. ¶ 23 (December 30, 2020 Request for Reconsideration at TSDR 31).

Applicant as the source of modular floating docks, walkway systems, swimming platforms and platforms for holding watercraft,” 7 TTABVUE 17, based on evidence of “feedback” on social media. 11 TTABVUE 9-10. The “record does contain evidence consisting of articles and product reviews, and comments thereto made by consumers,” and we will “address this evidence below in the discussion of unsolicited media attention.” *In re Larian*, 2022 USPQ2d 290, at \*39 (TTAB 2022).

## **2. Length, Degree, and Exclusivity of Use of DOCK BLOCKS**

Mr. West testified in his second supplemental declaration executed on December 30, 2020 that “products identified in the Application under the DOCK BLOCKS mark have been offered in commerce, without interruption, by Applicant since March of 2011,”<sup>109</sup> a period of nearly 10 years, and the record shows that Applicant’s use of DOCK BLOCKS has been exclusive. We know almost nothing about the degree of that use for the period before 2015, however, because Mr. West does not provide advertising or sales figures for the years 2011 through 2014, and as to that period, he testified only that Applicant’s website came online at some point in 2013.<sup>110</sup> We thus have useful information about the degree of Applicant’s use of its proposed mark only for the period between 2015 and 2020.

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<sup>109</sup> Second Supp. West Decl. ¶ 5 (December 30, 2020 Request for Reconsideration at TSDR 28). As noted above, Applicant argues that this period of use “is more than the requisite five years.” 7 TTABVUE 17. There is neither a requirement that a mark must be used for five years to acquire distinctiveness, nor a guarantee that use for five years (or more) will suffice to prove acquired distinctiveness. “Although Section 2(f) of the Lanham Act . . . provides that the PTO may accept five years of ‘substantially exclusive and continuous’ use as prima facie evidence of acquired distinctiveness, the statute does not require the [US]PTO to do so.” *La. Fish Fry Prods.*, 116 USPQ2d at 1265.

<sup>110</sup> Second Supp. West Decl. ¶ 11 (December 30, 2020 Request for Reconsideration at TSDR 29).

But even if we assume that “Applicant has been using the term [DOCK BLOCKS] for [about] 10 years to identify [modular floating non-metal docks], even longer use of a term does not necessarily establish that the term has acquired distinctiveness as a mark.” *GJ & AM*, 2021 USPQ2d 617, at \*41-42 (citing *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs. Inc.*, 123 USPQ2d 1844, 1855 (TTAB 2017) (25+ years not sufficient to prove acquired distinctiveness); *Alcatraz Media*, 107 USPQ2d at 1766 (19 years use insufficient to prove acquired distinctiveness); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (16 years “is a substantial period but not necessarily conclusive or persuasive” on acquired distinctiveness); *In re Interstate Folding Box Co.*, 167 USPQ 241, 245 (TTAB 1970) (30 years of use insufficient to prove 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,” *id.*, at \*42, and, as discussed immediately below in connection with Applicant’s advertising, in the context of Applicant’s position in the market for its goods.

### **3. Amount and Manner of Advertising**

Mr. West testified that Applicant expended a total of \$524,000 between 2015 and 2019 “for advertising and marketing and selling its DOCK BLOCK products,” broken down annually as follows:

2019	2018	2017	2016	2015
\$66,000	\$131,000	\$57,000	\$203,000	\$67,000

As noted above, he provides no information regarding any advertising expenditures for the four years before 2015.

By any measure, these “number[s] appear[ ] to be quite modest.” *Id.*, at \*42. Applicant all but as concedes as much when it argues in its reply brief that its “advertising and promotional efforts for the products marketed under the DOCK BLOCKS brand contribute to establishing acquired distinctiveness,” 11 TTABVue 10, citing as support for its argument *In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396, 399 (CCPA 1972), which Applicant describes as “holding promotional expenditures of only \$30,000 probative of secondary meaning,” *id.*, and *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 382-83 (CCPA 1960), which Applicant describes as “holding only \$112,000 over ten years probative of secondary meaning.” *Id.* These cases do not support Applicant. It is axiomatic that “[e]ach case must be decided on its own facts,” *Consumer Prot. Firm*, 2021 USPQ2d 238, at \*22, but Applicant’s reliance on these cases also requires us to compare expenditures in 1960 and 1972 dollars to expenditures in 2015-2019 dollars, which obviously cannot be an apples-to-apples comparison.

We also have almost no useful information regarding how these expenditures resulted in the exposure of Applicant’s claimed mark to consumers. Mr. West testified

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<sup>111</sup> Second Supp. West Decl. ¶ 20 (December 30, 2020 Request for Reconsideration at TSDR 30).

that Applicant “invests heavily in digital marketing across numerous platforms, and has invested in email software that includes logo, photography and storage of product imagery with the DOCK BLOCKS mark on-product, and has pursued numerous other advertising and marketing efforts,” citing Exhibits H-L to his second supplemental declaration.<sup>112</sup> Exhibits H-J are three magazine articles, not advertisements. Exhibit K is an advertisement, but it merely touts Applicant’s appearance at Booth 117/119 at the 2019 International Marina and Boatyard Conference in Fort Lauderdale, Florida. Exhibit L is the digital ad example shown and discussed above.<sup>113</sup> Mr. West does not testify about the extent of the exposure to consumers of any of the advertising and promotional materials specifically identified in his declaration, and he does not identify, much less provide such information about, Applicant’s claimed “numerous other advertising and marketing efforts.”

#### **4. Amount of Sales and Number of Customers**

Mr. West testified that “Applicant has established an extensive customer base and has experienced growth in annual sales that ranges from \$2.5 to \$3.0 million since the products began bearing the DOCK BLOCKS mark.”<sup>114</sup> He did not elaborate about

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<sup>112</sup> Second Supp. West Decl. ¶ 17; Exs. H-L (December 30, 2020 Request for Reconsideration at TSDR 30, 51-61).

<sup>113</sup> Mr. West attached as Exhibits H and I to his original declaration an example of the email software and some “Media Ads.” West Decl. ¶ 16; Exs. H-I (November 12, 2019 Response to Office Action at TSDR 5-6, 21-22). These exhibits are very difficult to read, and “it was Applicant’s duty to ensure that the evidence it submitted is legible.” *Sausser Summers*, 2021 USPQ2d 618, at \*24 n.59. “[W]e have considered this evidence to the extent it is legible and we are able to read the entire context of the evidence.” *Alcatraz Media*, 107 USPQ2d at 1758.

<sup>114</sup> Second Supp. West Decl. ¶ 22 (December 30, 2020 Request for Reconsideration at TSDR 31).

the number, identity, or geographic location of the members of Applicant's claimed "extensive customer base,"<sup>115</sup> and his testimony about Applicant's annual sales is vague because unlike with Applicant's annual advertising expenditures, he does not provide an aggregate figure or break out Applicant's annual sales. We thus do not know whether Applicant has had annual sales "rang[ing] from \$2.5 to \$3.0 million" in each year "since the products began bearing the DOCK BLOCKS mark" in 2011, or whether that range reflects only a more recent claimed "growth in annual sales." The latter appears to be far more likely given that there is no evidence of any advertising by Applicant before 2015, but even if we assume annual sales ranging from \$2.5 to \$3.0 million in each year between 2011 and 2019, in a market with dozens of competitors, "Applicant's sales and advertising figures, without any context in the trade, are not so impressive as to support a finding that Applicant's highly descriptive [DOCK BLOCKS mark] has acquired distinctiveness." *GJ & AM*, 2021 USPQ2d 617, at \*43. "[W]e cannot accurately gauge Applicant's level of success without additional evidence as to Applicant's market share or how [DOCK BLOCKS docks] rank[ ] in terms of sales in the trade." *Id.*, at \*42-43.

## 5. Unsolicited Media Coverage of Applicant's Products

Applicant has had an Internet website at dock-blocks.com since 2013,<sup>116</sup> and has a presence on social media through its Facebook page, YouTube channel, which Mr.

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<sup>115</sup> Mr. West testified that "Applicant also has dealers authorized to sell the products bearing the DOCK BLOCKS mark," Second Supp. West Decl. ¶ 9 (December 30, 2020 Request for Reconsideration at TSDR 29), but he similarly provided no information regarding Applicant's dealer base.

<sup>116</sup> Second Supp. West Decl. ¶¶ 7-8, 10-11; Exs. A-C (December 30, 2020 Request for Reconsideration at TSDR 28-29, 35-41). Mr. West testified that Applicant's website "was

West testified has featured over 40 videos, many of which have had several thousand or more views, Twitter account (@DockBlocks) with over 1,100 followers, which Mr. West testified has received 4,500 “likes,” and Instagram account (@dockblocks84).<sup>117</sup> Applicant also made of record three articles discussing its products, as well as comments about its products on Applicant’s social media pages and on third-party websites.

We begin with the articles. Applicant made of record the August 2020 article on the website of THE ENSIGN that is referenced above in our discussion of the meaning of the word “block” in Applicant’s proposed mark. The author stated that barnacles and other wildlife fastened themselves to his boat, which he keeps in a canal in his backyard in Florida, but that the location of his property and local zoning laws prevented him from installing a boatlift where he wanted.<sup>118</sup> He “discussed this dilemma with [his] son, who suggested a drive-on floating boatlift like those he’d seen in South Carolina.”<sup>119</sup> “After doing some research,” he “found a company called Dock Blocks of North America, Inc. in Charleston, South Carolina,” which works closely with a boat company near the author’s house.<sup>120</sup> He stated that he viewed “videos and

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developed ad placed online in 2013 at a cost of about \$5,000” and that an updated website recently launched at a cost of approximately \$5,000. Second Supp. West Decl. ¶ 11 (December 30, 2020 Request for Reconsideration at TSDR 29).

<sup>117</sup> Second Supp. West Decl. ¶¶ 13-16; Exs. F-G, O-P (December 30, 2020 Request for Reconsideration at TSDR 29-30, 47-50, 89-109).

<sup>118</sup> Second Supp. West Decl. Ex. H (December 30, 2020 Request for Reconsideration at TSDR 51).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

photos online.”<sup>121</sup> The remainder of the article illustrates the assembly of the “blocks” into a finished floating lift. It makes no mention of Applicant’s proposed mark DOCK BLOCKS.<sup>122</sup>

Applicant made of record an August 2020 article on the website of BetterBoat captioned “How to Choose and Use a Floating Dock with Your Boat.”<sup>123</sup> The article explains what floating docks are, and their benefits and available types. In the middle of the article, a short paragraph states that “[i]f you take the 100% DIY approach to building your floating dock, using something like the modular **Dock Blocks Floating Dock kit (check price on Amazon here)**, you can save yourself some money.”<sup>124</sup> Farther down in the article there is a discussion of plastic floating docks, with one example being docks “**offered by EZ Dock**,” a competitor referenced above in our discussion of the meaning of the word “block” in Applicant’s proposed mark, and a second example being the “**Dock Blocks Floating Dock kit** mentioned above,” which is touted as “another cool plastic option that’s convenient to buy and ship **(check price on Amazon here)**.”<sup>125</sup> The remainder of the article discusses aluminum, wood, and inflatable floating docks and identifies a number of sellers of those goods and appears to provide hyperlinks to their websites and to

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at TSDR 52.

<sup>123</sup> Second Supp. West Decl. Ex. I (December 30, 2020 Request for Reconsideration at TSDR 54-57.

<sup>124</sup> *Id.* at TSDR 55 (emphasis added). The bolded portion appears to be a hyperlink to amazon.com.

<sup>125</sup> *Id.* (emphasis added). The bolded portions again appear to be hyperlinks.

amazon.com.<sup>126</sup> The article does not focus on Applicant or otherwise promote recognition of its proposed DOCK BLOCKS mark.

Finally, Applicant made of record the September 2014 article on the website of SOUTHERN BOATING shown above in our discussion of the possible genericness of Applicant's proposed mark.<sup>127</sup> This is the only article in the record that is solely devoted to Applicant and its products.<sup>128</sup> As noted above, this article makes both trademark use and generic use of "Dock Blocks," and identifies the source of the goods in its first sentence as "Pier Plas."

Applicant also made of record pages from the website at amazon.com, which contained three reviews of Applicant's products.<sup>129</sup> One of the reviews, captioned "Best Block Docks on Medina Lake," stated that the customers "bought Block Docks from Amazon," that "Doug and Russ at Block Docks were very helpful," and that "[w]e highly recommend Block Docks."<sup>130</sup> The repeated references to "Block Docks" in this review belies Applicant's claim that consumer commentary shows that "Dock Blocks" identifies Applicant as the source of the goods sold under that proposed mark.

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<sup>126</sup> *Id.* at TSDR 56.

<sup>127</sup> Second Supp. West Decl. Ex. J (December 30, 2020 Request for Reconsideration at TSDR 58-59).

<sup>128</sup> As discussed above, Mr. West testified that Applicant's products were to be "feature[d] in upcoming edition[s] of Pontoon and Deck Boat magazine[s]," Second Supp. West Decl. ¶ 18 (December 30, 2020 Request for Reconsideration at TSDR 30), but his testimony has no probative value as evidence of acquired distinctiveness in the absence of the articles themselves or circulation figures, which were not made of record.

<sup>129</sup> Second Supp. West Decl. Ex. D (December 30, 2020 Request for Reconsideration at TSDR 44).

<sup>130</sup> Second Supp. West Decl. Ex. D (December 30, 2020 Request for Reconsideration at TSDR 44).

Moreover, the three reviews on amazon.com pale in comparison to the “over 1,000 unsolicited positive reviews on Amazon.com” referenced by the applicant in *GJ & AM*, which reviews the Board found to be only “somewhat probative” of acquired distinctiveness because the fact that “there were at least 1,000 purported purchasers of Applicant's products who wrote reviews for the product on the Amazon.com website” provided “some evidence that Applicant’s product is popular and successful on Amazon.com.” *GJ & AM*, 2021 USPQ2d 617, at \*45.

With respect to Applicant’s social media presence, Applicant argues that its Facebook page “includes a voluminous number of unsolicited positive comments” about its products, 7 TTABVUE 22, which Applicant argues show that “these satisfied customers recognize and associate the DOCK BLOCKS mark” with the goods identified in the application. *Id.* at 22-23. Applicant argues that its other social media accounts similarly show an association of the proposed mark with Applicant, and that Applicant’s social media presence “clearly demonstrates that actual purchasers associate the DOCK BLOCKS mark with modular floating non-metal docks, walkway systems, swimming platforms and platforms for holding watercraft” and is “highly supportive of Applicant’s position that the DOCK BLOCKS mark has acquired distinctiveness over its well over five years of continuous use of the mark in association with the goods identified in the Application . . . .” *Id.* at 23-24.

What Mr. West described as the “image” of Applicant’s Facebook page in the record contains three favorable reviews of Applicant’s products.<sup>131</sup> Applicant’s Twitter

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<sup>131</sup> Second Supp. West Decl. ¶ 13; Ex. F (December 30, 2020 Request for Reconsideration at TSDR 29, 47). Applicant also made of record pages from what appears to be the Facebook

account contains links to third-party Facebook pages and YouTube accounts referring to Applicant's selection to expand the Charleston, South Carolina marina, a link to a YouTube video comparing various products, a link to the website display of the article in *ENSIGN* magazine discussed above, links to decking tutorial and floating platform dock assembly tutorial videos on YouTube, and a link to a YouTube video providing what the page describes as "Dock Blocks customer feedback,"<sup>132</sup> but does not contain the text of any customer reviews of the products. Applicant's Instagram account unsurprisingly displays numerous pictures, many of which display Applicant's products in use,<sup>133</sup> but does not contain any customer reviews of the products and displays only a few uses of the proposed mark **DOCK BLOCKS**,<sup>134</sup> the most relevant of which are shown below:

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page of the Francis Marion and Sumter National Forests operated by the U.S. Forest Service in South Carolina. Second Supp. West Decl. ¶ 19; Ex. M (December 30, 2020 Request for Reconsideration at TSDR 67-75). One of these pages appears to show one of Applicant's floating docks, *id.* at TSDR 71, but it does not refer to Applicant or display the proposed **DOCK BLOCKS** mark.

<sup>132</sup> Second West Supp. Decl. Ex. O (December 30, 2020 Request for Reconsideration at TSDR 92-96).

<sup>133</sup> Second Supp. West Decl. Ex. P (December 30, 2020 Request for Reconsideration at TSDR 105-09).

<sup>134</sup> *Id.* at TSDR 105, 107-08.



The picture on the left focuses on the choice of colors in which “DOCK BLOCKS” are available and the picture on the right appears to state that buying “Dock Blocks” can lead to happiness. They do not support a finding that DOCK BLOCKS has acquired distinctiveness.

Even if we credit Mr. West’s testimony that Applicant has 1,100 Twitter followers,<sup>136</sup> and that its YouTube videos have had “up to several thousand or even more views,”<sup>137</sup> these numbers are quite modest, and the evidence discussed immediately above does not reflect consumer recognition of DOCK BLOCKS as Applicant’s mark. In addition, because, as discussed above, “Applicant has not provided any testimony or evidence estimating the size of the relevant consumer base, there is no context by which we can assess the extent or effectiveness of Applicant’s social media reach.” *GJ & AM*, 2021 USPQ2d 617, at \*44 (citations omitted).

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<sup>135</sup> *Id.* at TSDR 107.

<sup>136</sup> Second Supp. West Decl. ¶ 15 (December 30, 2020 Request for Reconsideration at TSDR 29).

<sup>137</sup> Second Supp. West Decl. ¶ 14 (December 30, 2020 Request for Reconsideration at TSDR 29).

## 6. Conclusion

The Board's conclusion in *GJ & AM* that the stronger record in that case did not support that the proposed mark COOKINPELLETS.COM had acquired distinctiveness applies with even greater force here to the proposed mark DOCK BLOCKS: "After considering all of the [*Converse*] factors for which there is evidence in determining whether Applicant's mark [DOCK BLOCKS] has acquired distinctiveness, we find that Applicant has failed to meet its burden of showing that the highly descriptive term [DOCK BLOCKS] has acquired distinctiveness." *GJ & AM*, 2021 USPQ2d 617, at \*46-47. The record here shows that Applicant has numerous competitors in the floating dock market, but, as in *GJ & AM*, Applicant provided no "context as to how the raw numbers Applicant provided compare in the marketplace," and we thus have been forced to "analyze the evidence regarding consumer recognition, Applicant's modest advertising expenditures, and modest sales in a vacuum." *Id.* Based on the record as a whole, we find that Applicant falls far short of carrying its heavy burden of showing that its highly descriptive proposed mark DOCK BLOCKS has acquired distinctiveness, and we affirm the refusal to register DOCK BLOCKS on the Principal Register on the ground that it is merely descriptive of the goods identified in the application and has not acquired distinctiveness.

**Decision:** The refusal to register on the ground that Applicant's proposed mark is the generic name of goods identified in the application is reversed. The refusal to register on the ground that Applicant's proposed mark is merely descriptive of goods identified in the application and has not acquired distinctiveness is affirmed.