

This Opinion is Not a
Precedent of the TTAB

Mailed: June 24, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Fusion 360, Inc.
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Serial No. 88131491
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Bret E. Field of Bozicevic, Field & Francis LLP,
for Fusion 360, Inc.

Robert Clark, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

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Before Ritchie, Kuczma, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Fusion 360, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark BUD SET for goods identified as “Fertilizers; plant foods; chemicals for use in agricultural and industry, namely, microbial nutrient compositions, microbial compositions, bioremediation compositions, mineral fertilizing preparations, and plant nutrient compositions,” in International Class 1.¹

¹ Application Serial No. 88131491 was filed on September 25, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Examining Attorney has refused registration of the proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that BUD SET is merely descriptive of the goods. When the Examining Attorney made the refusal final, Applicant requested reconsideration, which was denied, and appealed to the Board. Applicant and the Examining Attorney have filed briefs.² We affirm the refusal to register.

I. Record on Appeal³

The record on appeal includes third-party Supplemental Register registrations of marks containing the term BUD,⁴ and webpages containing articles from scientific journals and other materials, including advertisements, in which the term “bud set” appears.⁵ We also grant the Examining Attorney’s request in his brief, 14 TTABVUE 5 n.1, that we take judicial notice of definitions of the words “bud” and “set” from the

² Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

³ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁴ October 11, 2018 Office Action at TSDR 2-21.

⁵ *Id.* at TSDR 22-63; April 12, 2019 Final Office Action at TSDR 2-23; October 30, 2019 Denial of Request for Reconsideration at TSDR 2-61. Applicant made no evidence of record during prosecution. Applicant’s brief refers to the contents of three websites and lists hyperlinks to them, 12 TTABVUE 8 n.3, but because Applicant did not make the websites of record, we have given no consideration to Applicant’s related argument that the fact that its competitors do not use the term BUD SET shows that the term “is not well-known or indicative of fertilizers, plant food and the like.” *Id.* at 8. See *In re ADCO Indus. — Techs., L.P.*, 2020 USPQ2d 53786, *2 (TTAB 2020) (“Web addresses or hyperlinks are not sufficient to make the underlying webpages of record.”).

MERRIAM-WEBSTER ONLINE DICTIONARY (merriam-webster.com). *Id.* at 14-28; 15 TTABVUE 2-11. *See, e.g., In re Omniome, Inc.*, 2020 USPQ2d 3222, *2 n.17 (TTAB 2019). Applicant’s brief cites definitions of the words “fertilizer” and “set” from the same dictionary, 12 TTABVUE 6 & nn.1-2, and although Applicant did not make those definitions of record, or request that we judicially notice them, to the extent that they are relevant to this decision, we take judicial notice of those definitions as well.

II. Mere Descriptiveness Refusal

A. Applicant’s Prior Application Serial No. 85582688

Applicant’s current application is virtually identical to Application Serial No. 85582688, an intent-to-use application which Applicant filed in March 2012 to register BUD SET in standard characters for “fertilizers; plant foods; chemicals for use in agricultural and industry, namely, microbial nutrient compositions, microbial compositions, bioremediation compositions, mineral fertilizing compositions, and plant nutrient compositions” (the “Previous Application”).⁶ *In re Fusion 360, Inc.*, 22 TTABVUE 1-2 (Serial No. 85582688) (TTAB Mar. 27, 2014) (the “2014 Decision”). The Examining Attorney assigned to the current application also examined the Previous Application, and, as here, refused registration on the ground that BUD SET was merely descriptive of the goods. Applicant appealed the final refusal through the same counsel who represents it on the current application and on this appeal. The

⁶ The only difference is that the goods identified in the current application as “mineral fertilizing preparations” were identified in the Previous Application as “mineral fertilizing compositions.”

Board affirmed the refusal, finding that “we have no doubt that a consumer would understand ‘bud set,’ used in connection with applicant’s goods, as directly conveying information about them.” *Id.* at *7. Applicant did not appeal the 2014 Decision, and the Previous Application was abandoned.

Under the doctrine of claim preclusion, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *In re Bose Corp.*, 476 F.3d 1331, 81 USPQ2d 1748, 1752 (Fed. Cir. 2007) (quotation and quotation marks omitted). We have applied claim preclusion in an ex parte proceeding “where an applicant had already been refused registration for the same mark and goods in a prior ex parte proceeding, and applicant did not demonstrate a change of circumstances so as to justify not applying preclusion based on the prior judgment.” *In re Anderson*, 101 USPQ2d 1912, 1916 (TTAB 2012). The Federal Circuit has “warned that particular caution is warranted in the application of [claim] preclusion by the [USPTO], for the purposes of administrative trademark procedures include protecting both the consumer public and the purveyors,” *Bose*, 81 USPQ2d at 1752 (quoting *Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1314 (Fed. Cir. 2005)), and because the Examining Attorney did not assert claim preclusion based on the 2014 Decision as a ground for refusal of registration, we will not apply the doctrine on this appeal. Nevertheless, because the 2014 Decision dealt with the same mark for the same goods and, as discussed below, some of the same evidence as in this case, we will look to the 2014 Decision as persuasive authority in determining whether the Examining Attorney

has again shown that the proposed BUD SET mark is merely descriptive of the identified goods based on the record in this case.

B. Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).⁷ “A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

“A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “Moreover, a mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper if the mark is descriptive of any of the [goods] for which registration is

⁷ Like the Previous Application, the current application is based on intention to use the proposed mark rather than use in commerce, and Applicant does not claim that if BUD SET is found to be merely descriptive, it is registrable because it has acquired distinctiveness.

sought.” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use,’” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), and “not in the abstract or on the basis of guesswork.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of the words BUD and SET. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757),

but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the words in the proposed mark are individually descriptive of the identified goods, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). *See also Omniome*, 2020 USPQ2d 3222, at *5 (cataloging sources of evidence of descriptiveness).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing

Gyulay, 3 USPQ2d at 1010). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

C. Summary of Arguments

1. Applicant

Applicant argues that

the mark BUD SET is not merely descriptive of the goods for at least the following reasons:

- BUD SET is not merely descriptive because it does not describe a “significant function, attribute, or property” of the claimed goods;
- The Examining Attorney’s web search results, provided as evidence of the alleged connection between the mark BUD SET and fertilizer, plant food and the like, fail to demonstrate that BUD SET represents a significant function or purpose of fertilizer, plant food and the like but instead indicate that BUD SET does not represent a significant purpose of fertilizer, plant food and the like and therefor is not merely descriptive;
- BUD SET is at most suggestive – and therefore not merely descriptive – of the goods claimed because “imagination, thought, or perception” are required to connect the Applicant’s mark BUD SET with the goods claimed; and
- Where there is doubt as to whether a mark is descriptive, as there is with the instant mark BUD SET, such doubt should be resolved in the Applicant’s favor.

12 TTABVUE 4.

Applicant “submits that significant functions or purposes of fertilizers, plant foods, plant nutrients and the like include improving crop yield, increasing the rate

at which certain plants grow, promoting growth of certain plants over others, influencing the appearance of plants, correcting soil mineral deficiencies, improving long term soil viability, improving soil microbial health, and so forth,” *id.* at 6, but that these purposes “fail to contemplate or refer to a ‘bud set,’ explicitly or implicitly.” *Id.* Applicant acknowledges that the mark “BUD SET includes the constituent term ‘bud,’ which, in the context of plants, may refer to an intermediate stage in the development of plant structures” and “also includes the constituent term ‘set,’ which has many potential meanings but, in its noun form in the context of plants, may refer to ‘a young plant or rooted cutting ready for transplanting.” *Id.* Applicant argues, however, that “[w]hile each term ‘bud’ and ‘set’ may refer to a plant or a plant structure, they refer to just that, a static plant or a static plant structure, not plant growth, crop yield or the other significant purposes of fertilizer, plant food or plant nutrients described above.” *Id.* According to Applicant, “neither BUD SET, nor the constituent terms, ‘bud’ and ‘set,’ are indicative of plant growth, a salient feature of the significant purposes of the claimed goods,” because “plant growth is a rate or a change, whereas BUD SET, and its constituent terms, at most might only refer to a static structure of plant anatomy, not a rate or a change such as plant growth.” *Id.* According to Applicant, “[e]ven if bud set were taken to relate to a desirable intermediate stage of plant growth, it does not have the same meaning as an economically successful crop because ‘benefit [to] a bud set’ does not directly affect economic considerations.” *Id.* at 7.

Applicant also argues that BUD SET is suggestive, not merely descriptive, because “BUD SET is at best indirectly related to the goods claimed since a multi-step thought process is required to link the mark BUD SET with the claimed goods.” *Id.* at 11. Applicant contends that “the link between BUD SET or the constituent terms ‘bud’ and ‘set’ and fertilizer would not be a direct, immediate connection, since fertilizer is only one of many factors that might bring about the healthy conditions for a bud to form on a plant,” *id.*, and that “a multi-step thought process involving considering a host of potential causes and conditions to link BUD SET with fertilizer or plant food, one of the many potential causes for such development on a plant.” *Id.* at 11-12. Applicant further argues that BUD SET is suggestive “because the singular terms ‘bud’ and ‘set’ are not the typical or common way to refer to purposes of the goods claimed,” *id.* at 13, and that the “distinctiveness of the term BUD SET, as evidenced by its uncommon usage, should contribute to treating BUD SET not as merely descriptive but instead as at most suggestive.” *Id.*

Applicant concludes by arguing that

to the extent there continues to be any doubt as to whether the BUD SET mark is merely descriptive of the Applicant’s services [sic], as there is here, the course of action consistent with precedent is to pass the mark to publication with the knowledge that if a party does believe it will be damaged by the registration of Applicant’s mark, an opposition proceeding can be brought and a more complete record can be established.

Id. at 14.

2. The Examining Attorney

The Examining Attorney argues that BUD SET is merely descriptive because it “merely combines two descriptive elements to describe a characteristic, intended purpose and use of the goods.” 14 TTABVUE 5. He points to dictionary definitions of “bud” as “a small part that grows on a plant and develops into a flower, leaf, or new branch,” and “set” as “the condition of being set’ and ‘to cause (as fruit or seed) to develop,” *id.* (quoting MERRIAM-WEBSTER ONLINE DICTIONARY), and argues that

[t]aking these definitions together, it is clear that BUD SET, when used in connection with “fertilizers; plant foods; chemicals for use in agricultural and industry, namely, microbial nutrient compositions, microbial compositions, bioremediation compositions, mineral fertilizing preparations, and plant nutrient compositions”, refers to a stage in the growth of a plant when buds are formed. A significant purpose of applicant’s goods is to enhance this bud set.

Id. at 6.

The Examining Attorney cites the Internet materials in the record, *id.* at 6-7, which he argues “describe[] the impact of different factors including fertilizer, lengths of nights and genetics on bud set,” *id.* at 6, and “show use of the term ‘bud set’ to identify development of flower buds and the period when buds develop.” *Id.* at 7. According to the Examining Attorney, a “significant purpose of applicant’s goods is to enhance or promote this bud set,” such that the proposed mark BUD SET “must be considered merely descriptive of applicant’s goods.” *Id.*

The Examining Attorney also cites four third-party Supplemental Register registrations of the marks BIG BUD for plant growth nutrients, FAT BUD for fertilizers, BUD BLOOM for plant nutrients, and BUD ORGANIC for organic plant

nutrients, which he claims constitute “probative evidence on the issue of descriptiveness” *Id.* at 8.

In response to Applicant’s suggestiveness arguments, the Examining Attorney contends that “it is apparent that consumers would perceive ‘bud set,’ in relation to applicant’s identified goods, as describing a function or purpose of them,” and that “it requires no thought or mental gymnastics to understand that ‘bud set,’ when referring to applicant’s goods, describes a feature highlighting the growth stage at which applicant’s ‘fertilizers; plant foods’ or ‘chemicals’ may be applied, or perhaps the growth stage that may be achieved when this is properly done.” *Id.* at 11-12.

The Examining Attorney concludes that BUD SET

is merely descriptive of applicant’s fertilizers; plant foods; chemicals for use in agricultural and industry, namely, microbial nutrient compositions, microbial compositions, bioremediation compositions, mineral fertilizing preparations, and plant nutrient compositions because the mark identifies a significant use, purpose and characteristic of these goods, namely, [sic] encourages vigorous vegetative growth during bud set and leads to more abundant buds.

Id. at 12.

D. Analysis of Refusal

Both words in the proposed mark have descriptive significance in the context of the fertilizers and plant foods identified in the application. As discussed above, the MERRIAM-WEBSTER ONLINE DICTIONARY defines a “bud” as “a small part that grows on a plant and develops into a flower, leaf, or new branch,” and “set” as “to cause (as fruit or seed) to develop,” and Applicant acknowledges that “bud,” “in the context of

plants, may refer to an intermediate stage in the development of plant structures,” 12 TTABVUE 6, while “set,” “in its noun form in the context of plants, may refer to ‘a young plant or rooted cutting ready for transplanting.’” *Id.* n.2.⁸ Applicant further acknowledges that the combination of BUD and SET into the proposed mark BUD SET may “refer to an intermediate stage in the development of plant structures.” *Id.* at 7.

The combination of the words BUD and SET in the proposed mark does not yield “any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quotation omitted). In the 2014 Decision, the Board noted that “the examining attorney submitted evidence showing third-party use of the term ‘bud set’ to describe a specific growth stage of plants.” *Fusion 360*, 22 TTABVUE 3 (Serial No. 85582688). The same is true here based on some of the same evidence in the record as in the Previous Application as well as additional probative evidence.

In the 2014 Decision, the Board noted that “several of the excerpts submitted by the examining attorney, including the first three set forth above, specifically reference plant food or fertilizer when discussing ‘bud set.’” *Id.* at 6. One of the three excerpts, an article by Arthur S. Myhre and W.P. Mortensen entitled *The Effect of Phosphorous on Rhododendron Flower-Bud Formation*, JOURNAL AMERICAN

⁸ In the 2014 Decision, the Board noted that Applicant similarly “admit[ted] that the term ‘bud set’ may refer to a growth stage of plants, at least as one possible meaning of the term.” *Fusion 360*, 22 TTABVUE 5 (Serial No. 85582688).

RHODODENDRON SOCIETY (1964), *id.* at 4, is of record here,⁹ and, as the Board noted in the 2014 Decision, *id.* at 3, it states, among other things, that the use of nitrogen “increased bud set.”¹⁰ A second article listed and summarized by the Board in the 2014 Decision, Antje Rohde, *et al.*, *Bud set in poplar-genetic dissection of a complex trait in natural and hybrid populations*, NEW PHYTOLOGIST (2010), *id.* at 5, is also of record here,¹¹ and it refers to “bud set” as one of the “[m]any events in the annual growth cycle” of plants.¹² The record also contains an abstract of an article entitled *Sumagic (Uniconazole) Promotes Flower Bud Set on Camellia Japonica* on the website of the JOURNAL OF ENVIRONMENTAL HORTICULTURE, which states that container-grown plants sprayed with a water control and other treatments “provided no increase in flower bud sets but Sumagic treatments increased bud set for ‘Grace Albritten’ by up to 370% and ‘Paulette Goddard’ by 200%,”¹³ and an article in SCIENTIA HORTICULTURAE entitled *Cranberry Growth and yield response to fertilizer and paclobutrazol*, which states that in a cranberry field study certain sprays of paclobutrazol “increased bud set and flower-bud set on uprights.”¹⁴

⁹ October 30, 2019 Denial of Request for Reconsideration at TSDR 29-33.

¹⁰ *Id.* at TSDR 30.

¹¹ October 11, 2018 Office Action at TSDR 26-48.

¹² *Id.* at TSDR 27.

¹³ October 30, 2019 Denial of Request for Reconsideration at TSDR 60-61.

¹⁴ October 11, 2018 Office Action at TSDR 62-63. Applicant dismisses this article as “demonstra[ting] that fertilizer may have several functions, purposes or effects on a plant and its environment,” rather than that “a significant purpose of fertilizer is to promote bud set.” 12 TTABVUE 10. This argument is unavailing. As discussed above, a “mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *Fat Boys*, 118 USPQ2d at 1513. The fact that fertilizers may have

As in the Previous Application, the record here also contains webpages “showing third-party use of the term ‘bud set’ to describe a specific growth stage of plants,” *Fusion 360*, 22 TTABVUE 3 (Serial No. 85582688), and “specifically referenc[ing] plant food or fertilizer when discussing ‘bud set.’” *Id.* at *6. These include a page promoting FoxFarm Tiger Bloom fertilizer, which states that the product “helps promotes [sic] abundant fruit, flower and bud set;”¹⁵ a page promoting FoxFarm’s family of fertilizers, which recommends that “[o]nce bud set begins feed with Beastie Bloom® for a two week period;”¹⁶ a page promoting Tappin Roots Solid Bloom fertilizer, which states that the product’s “all natural recipe supplies nutrients specifically tailored to develop heavy bud set, dense flowering and prosperous fruit yields, while boosting overall plant quality and hardiness;”¹⁷ and a page promoting *Jack’s* fertilizer, which urges use of the product “during periods of bud set to increase number and size of blossoms.”¹⁸

multiple functions or purposes in addition to “increas[ing] bud set,” October 11, 2018 Office Action at TSDR 63, does not mean that BUD SET does not describe “one significant attribute, function or property of the goods.” *Fat Boys*, 118 USPQ2d at 1513.

¹⁵ October 30, 2019 Denial of Request for Reconsideration at TSDR 59 (planetnatural.com). One of the advertisements referenced in the 2014 Decision was a FoxFarm advertisement for Grow Big liquid plant food, which stated that the product “encourages vigorous vegetative growth from the first week through bud set.” *Fusion 360*, 22 TTABVUE 4 (Serial No. 85582688).

¹⁶ April 12, 2019 Final Office Action at TSDR 2 (foxfarmfertilizer.com).

¹⁷ *Id.* at TSDR 7 (homedepot.com). Applicant argues that this page “refers to developing bud set as only one of a litany of effects of applying Solid Bloom,” 12 TTABVUE 9, but that “it does so at most as a secondary benefit of the ultimate ‘significant purpose’ of improving ‘flowering potential.’” *Id.* For the reasons noted above, this argument is unavailing because “develop[ing] heavy bud set,” April 12, 2019 Final Office Action at TSDR 7, need not be the only purpose or function of fertilizers or plant food to be “one significant attribute, function or property of the goods.” *Fat Boys*, 118 USPQ2d at 1513.

¹⁸ April 12, 2019 Final Office Action at TSDR 20-21 (greenhousemegastore.com).

As discussed above, like the record in the Previous Application, the record here shows that increasing bud set is a significant function or purpose of the use of fertilizer, even if it is not the only or primary one. We are not persuaded by Applicant's arguments that its proposed mark is suggestive "since a multi-step thought process is required to link the mark BUD SET with the claimed goods," 12 TTABVUE 11, that BUD SET is "not the usual or normal manner in which the purpose of the goods claimed is described, *id.* at 13, and that the "distinctiveness of the term BUD SET, as evidenced by its uncommon usage, should contribute to treating BUD SET not as merely descriptive but instead as at most suggestive," *id.*, that the result in this case should be different from the one in the 2014 Decision.

Applicant's first argument regarding "a multi-step thought process" addresses a non-issue. "[T]he question is not whether someone presented only with the mark could guess the goods and services listed in the identification. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *Mecca Grade Growers*, 125 USPQ2d at 1953 (citing *DuoProSS*, 103 USPQ2d at 1757). The latter two arguments regarding the alleged "uncommon usage" of the proposed mark are unavailing because "there is no requirement that the Examining Attorney prove that others have used the mark at issue or that they need to use it, although such proof would be highly relevant to an analysis under Section 2(e)(1)," *Fat Boys*, 118 USPQ2d at 1514, and "[t]he fact that Applicant may be the first or only user of a term does not render that term distinctive,

if it otherwise meets the standard [for descriptiveness] set forth in *In re Gyulay*, *In re Chamber of Commerce* and *DuoProSS*.” *Id.*

We find, on the basis of the record as a whole, that the Examining Attorney established a prima facie case “that consumers would perceive ‘bud set,’ in relation to applicant’s identified goods, as describing a function or purpose of them,” *Fusion 360*, 22 TTABVUE 6 (Serial No. 85582688), and that “it requires no thought or mental gymnastics to understand that ‘bud set,’ when referring to applicant’s goods, describes a feature highlighting the growth stage at which applicant’s ‘fertilizers; plant foods’ or chemicals’ may be applied, or perhaps the growth stage that may be achieved when this is properly done.” *Id.* at 6-7 (citing *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780-81 (Fed. Cir. 2003)). Applicant made of record no evidence, and advanced no persuasive arguments, to rebut that prima facie case. Accordingly, as the Board concluded in the 2014 Decision, “we have no doubt that a consumer would understand ‘bud set,’ used in connection with applicant’s goods, as directly conveying information about them.” *Id.* at 7.

Decision: The refusal to register is affirmed.