

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Garden Artisans LLC*  
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Serial No. 88705122  
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Michael K. Fretwell of Laubscher & Laubscher, P.C. for Garden Artisans LLC.

Chrisie Brightmire King, Senior Trademark Examining Attorney,<sup>1</sup> Law Office 111,  
Chris Doninger, Managing Attorney.

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Before Lykos, Larkin, and Coggins,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Garden Artisans LLC (“Applicant”) seeks registration on the Principal Register of  
the proposed standard-character mark GARDEN ARTISANS for

Arbors of metal; Baskets of common metals; Door knockers  
of metal; Fitted liners for metal baskets; Metal bird baths  
being structures; Metal gazebos; Metal hooks; Metal plant

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<sup>1</sup> The involved application was examined by Trademark Examining Attorney Tracy Whittaker-Brown, who issued the final refusal to register from which Applicant appealed. The application was reassigned on appeal to Senior Trademark Examining Attorney Brightmire King, who filed the brief of the United States Patent and Trademark Office (“USPTO”). We will refer to Ms. Brightmire King and Ms. Whittaker-Brown as the “Senior Examining Attorney” and the “Examining Attorney,” respectively.

cages; Metal trellises; Pergolas primarily of metal; Statues of common metal, in International Class 6, and

Bird baths being bowls for birds to bathe in; Bird feeders; Ceramic figurines; Napkin rings; Natural and synthetic fiber coco liners fitted for plant boxes, plant pots, and plant baskets; Ornaments of glass; Plant baskets; Planters for flowers and plants; Watering cans; Works of art made of glass, in International Class 21.<sup>2</sup>

The Examining Attorney refused registration of Applicant's proposed mark in both classes on the ground that it is "merely descriptive" of the goods identified in the application within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). As discussed below, Applicant has made a claim, in the alternative, that its proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). The Senior Examining Attorney has accepted this alternative acquired distinctiveness claim, 8 TTABVUE 2 n.1, so the sole issue on appeal is whether the mark is merely descriptive.

When the Examining Attorney made the Section 2(e)(1) refusal final, Applicant appealed and requested reconsideration, which was denied. The case is fully briefed.<sup>3</sup> We affirm the refusal to register, but the application will proceed to publication for opposition following entry of Applicant's claim of acquired distinctiveness.

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<sup>2</sup> Application Serial No. 88705122 was filed on November 25, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claimed first use of the mark and first use of the mark in commerce at least as early as January 1999.

<sup>3</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. The TTABVUE page numbers do not correspond to the numbered pages in the briefs. Applicant's appeal brief appears at 6 TTABVUE and its reply brief appears at 9 TTABVUE. The Senior Examining Attorney's brief appears at 8 TTABVUE.

## I. **Prosecution History and Record on Appeal**<sup>4</sup>

In her brief, the Senior Examining Attorney candidly acknowledges “the lengthy and convoluted prosecution history” of this application, 8 TTABVUE 2, which we briefly summarize below because it provides useful background for our analysis of the mere descriptiveness refusal.

The Examining Attorney refused registration of Applicant’s proposed mark on the ground of mere descriptiveness in a first Office Action in which she made of record dictionary definitions of “artisan,”<sup>5</sup> and multiple pages from Applicant’s website at gardenartisans.com,<sup>6</sup> including a page whose masthead states “GARDEN DECOR FROM GARDEN ARTISANS.”<sup>7</sup> The Examining Attorney also suggested that Applicant amend its application to seek registration on the basis of acquired distinctiveness given Applicant’s claimed long use of the proposed mark.<sup>8</sup>

Applicant responded by disclaiming the exclusive right to use GARDEN even though such a disclaimer had not been requested, and arguing against the mere descriptiveness refusal.<sup>9</sup> Applicant made of record a portion of its website containing the tagline “...because the garden is your canvas:”

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<sup>4</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 USPTO’s Trademark Status & Document Retrieval (“TSDR”) database.

<sup>5</sup> February 28, 2020 Office Action at TSDR 2-6.

<sup>6</sup> *Id.* at TSDR 7-11.

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

<sup>8</sup> *Id.* at TSDR 1.

<sup>9</sup> June 11, 2020 Response to Office Action at TSDR 1.



Applicant did not address amendment of its application to seek registration under Section 2(f).

The Examining Attorney then issued two Office Actions about two weeks apart in which she made the descriptiveness refusal final and again suggested amendment to seek registration under Section 2(f).<sup>11</sup> The Examining Attorney made of record additional pages from Applicant's website,<sup>12</sup> and pages from the websites of etsy.com, novica.com, pinterest.com, and gentleearthphotography.com regarding the use of the word "artisan" to refer to the creators of some of the goods identified in the application.<sup>13</sup>

Applicant appealed and simultaneously requested reconsideration. The Board instituted and suspended the appeal, and remanded the application to the Examining Attorney for consideration of Applicant's Request for Reconsideration. 2 TTABVUE 2.

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<sup>10</sup> *Id.* at TSDR 2.

<sup>11</sup> July 2, 2020 Final Office Action at TSDR 1; July 13, 2020 Final Office Action at TSDR 1. The second final Office Action was issued following a telephone conversation between the Examining Attorney and Applicant's counsel on the date of the issuance of the first final Office Action. *Id.*

<sup>12</sup> *Id.* at TSDR 2-9.

<sup>13</sup> *Id.* at TSDR 10-43.

In its Request for Reconsideration, Applicant withdrew the disclaimer of GARDEN, argued against the mere descriptiveness refusal, and asserted, in the alternative, a claim of acquired distinctiveness under Section 2(f) based on at least five years of substantially exclusive and continuous use of GARDEN ARTISANS.<sup>14</sup> Applicant made of record pages from its website,<sup>15</sup> and copies of numerous certificates of registration of third-party marks containing the word ARTISAN or ARTISANS.<sup>16</sup>

The Examining Attorney denied Applicant's Request for Reconsideration in a non-final Office Action in which she rejected Applicant's withdrawal of the disclaimer of GARDEN, rejected Applicant's alternative Section 2(f) claim based on use of the mark on the ground that the proposed mark was highly descriptive, and continued and maintained the mere descriptiveness refusal.<sup>17</sup> She made of record dictionary definitions of "garden;"<sup>18</sup> third-party registrations of marks for some of the involved goods containing a disclaimer of the word "garden" or a variant, alone or with other matter;<sup>19</sup> pages from third-party websites in which the word "garden" was used in connection with the involved goods;<sup>20</sup> articles from the LexisNexis database containing the term "garden artisans;"<sup>21</sup> a copy of the Board's decision in *In re*

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<sup>14</sup> January 13, 2021 Request for Reconsideration at TSDR 1.

<sup>15</sup> *Id.* at TSDR 2-4.

<sup>16</sup> *Id.* at TSDR 5-57.

<sup>17</sup> April 1, 2021 Office Action at TSDR 1.

<sup>18</sup> *Id.* at TSDR 2-4.

<sup>19</sup> *Id.* at TSDR 5-137.

<sup>20</sup> *Id.* at TSDR 138-269.

<sup>21</sup> *Id.* at TSDR 270-86.

*RiseSmart Inc.*, 104 USPQ2d 1931 (TTAB 2012), from the LexisNexis database;<sup>22</sup> and pages from the third-party website at gardenartisansllc.com.<sup>23</sup>

Applicant responded to this Office Action by noting its willingness to re-enter a disclaimer of GARDEN if the mark as a whole was found to be suggestive,<sup>24</sup> and by making of record webpages reviewing Applicant's goods,<sup>25</sup> and copies of the certificates of registration of third-party GARDEN-formative marks for some of the involved goods in which a showing of acquired distinctiveness was not required.<sup>26</sup> Applicant also argued that its alternative claim of acquired distinctiveness based on use was sufficient.<sup>27</sup>

The Examining Attorney then issued another Office Action in which she maintained and made final the mere descriptiveness refusal, the rejection of Applicant's alternative Section 2(f) claim on the ground that more evidence was necessary due to the claimed highly descriptive nature of the mark,<sup>28</sup> and the requirement of a disclaimer of GARDEN.<sup>29</sup> She made of record third-party webpages

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<sup>22</sup> *Id.* at TSDR 287-93. It was unnecessary for the Examining Attorney to make a copy of this precedential decision of record.

<sup>23</sup> *Id.* at TSDR 294-98. The owner of the website is a design and landscape architecture company that states on its website that it "help[s] homeowners and businesses create beautiful outdoor living environments." *Id.* at TSDR 295. It does not appear to sell the goods identified in the application.

<sup>24</sup> October 1, 2021 Response to Office Action at TSDR 1.

<sup>25</sup> *Id.* at TSDR 2-24.

<sup>26</sup> *Id.* at TSDR 25-37.

<sup>27</sup> *Id.* at TSDR 1.

<sup>28</sup> *Id.*

<sup>29</sup> April 13, 2022 Final Office Action at TSDR 1.

in which the word “artisan” is used in combination with a generic term for goods.<sup>30</sup>  
The appeal was then resumed. 5 TTABVUE.

## II. Analysis of Mere Descriptiveness Refusal

### A. Applicable Law

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), 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).<sup>31</sup>

“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 Zuma Array Ltd.*, 2022 USPQ2d 736, at \*5 (TTAB 2022) (quoting *In re Fallon*, 2020 USPQ2d 11249, at \*7 (TTAB 2020)). “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.” *Id.* (quoting *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016)).

Applicant’s application contains numerous goods in Classes 6 and 21, but the GARDEN ARTISANS mark “need not be merely descriptive of all recited goods . . .

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<sup>30</sup> *Id.* at TSDR 2-66.

<sup>31</sup> As discussed above, the Senior Examining Attorney has agreed that Applicant’s proposed mark has acquired distinctiveness in the event that the Board finds that the mark is merely descriptive. She also appears to have agreed to withdrawal of the requirement of a disclaimer of GARDEN in the event that the Section 2(f) claim is entered. 8 TTABVUE 2 n.2.

in [the] application” for us to affirm the refusal to register as to either or both classes in their entireties because a “descriptiveness refusal is proper ‘if the mark is descriptive of any of the [goods] for which registration is sought.’” *Id.* (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

“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,’ *id.*, at \*6 (internal quotations and quotation marks omitted), and “not in the abstract or on the basis of guesswork.” *Id.* (internal quotation and quotation marks omitted). “We ask whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Id.* (internal quotations and quotation marks omitted).

Applicant’s proposed mark combines the words GARDEN and ARTISANS. We must consider the commercial impression of the proposed GARDEN ARTISANS mark as a whole, *id.*, and we “may not dissect the mark into isolated elements, without consider[ing] . . . the entire mark,” *id.* (internal quotations and quotation marks omitted), “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.* (internal quotation and quotation marks omitted). “Indeed, we are required to examine the meaning of each component individually, and then



determine whether the mark as a whole is merely descriptive.” *Id.* (internal quotations and quotation marks omitted).

“Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase.” *In re Omniome, Inc.*, 2020 USPQ 3222, at \*4 (TTAB 2019). “If the words in the proposed mark are individually descriptive of the identified goods, we must determine whether their combination ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *Fallon*, 2020 USPQ2d 11249, at \*7 (quoting *Fat Boys*, 118 USPQ2d at 1515-16). “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.* (quoting *Fat Boys*, 118 USPQ2d at 1516) (internal quotation omitted)).

“Whether a mark is merely descriptive or not is determined from the viewpoint of the relevant purchasing public.” *Zuma Array*, 2022 USPQ2d 736, at \*7 (quoting *Omniome*, 2020 USPQ2d 3222, at \*5 (internal quotation omitted)). Applicant argues that the customers of the involved goods “purchase and use the goods to design their garden,” 6 TTABVUE 7, and thus “the class of purchasers would include members of the general public, such as homeowners.” *Zuma Array*, 2022 USPQ2d 736, at \*8.

“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.” *Id.* (internal

quotations and quotation marks omitted). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods.” *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at \*7-8) (internal quotation omitted)). The USPTO “commonly looks to an applicant’s website when it is made of record for possible evidence of descriptive use of a proposed mark.” *In re Berkeley Lights, Inc.*, 2022 USPQ2d 1000, at \*9 (TTAB 2022).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Zuma Array*, 2022 USPQ2d 736, at \*8 (internal quotations and quotation marks omitted). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (internal quotations and quotation marks omitted). “The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (internal quotations and quotation marks omitted).

## **B. Summary of Arguments**

### **1. Applicant**

Applicant argues that when the proposed GARDEN ARTISANS “mark is considered as a whole, it creates a different commercial impression tha[n] the words considered on their own, resulting in a suggestive mark,” 6 TTABVUE 5, because “the GARDEN ARTISANS mark conjures the idea that a person’s garden is like a canvas and the person is like an artist painting on that canvas,” *id.* at 2, and “consumers of the goods sold under the mark are to purchase Applicant’s goods so that they can create their own canvas (i.e. garden).” *Id.* at 2-3.

“In Applicant’s opinion, the meaning of GARDEN ARTISANS for the range of goods identified in the application is similar to those cases in which a mark suggests a desired result of the goods, and not the goods themselves, and therefore the mark is not descriptive of the goods.” *Id.* at 6 (citations omitted). Applicant argues that the GARDEN ARTISANS mark “suggests what will result from purchasing the goods. That is, that customers become something similar to an artisan of their own garden when they purchase and use the goods to design their garden.” *Id.* at 6-7.

Applicant argues that “[t]he only evidence submitted by the examining attorney in this protracted application that is relevant to the entirety of GARDEN ARTISANS includes less than 10 instances of ‘garden artisans’ being used as a descriptor in articles to describe a certain type of person;” that there is “no evidence that third-party businesses use ‘garden artisans’ to identify or describe goods that they sell;” that there is “no evidence that the relevant consuming public would recognize ‘garden artisans’ as having a descriptive meaning for the goods identified;” and that “[n]early all of the examining attorney’s evidence to support the descriptiveness of the GARDEN ARTISANS mark relates to descriptive uses of ‘garden’ and ‘artisan(s)’ separately.” *Id.* at 8.

Applicant claims that GARDEN ARTISANS “was coined by Applicant as a way to suggest or conjure up the idea to consumers that their garden is a canvas (which, in the literal sense, it is not) and the goods sold can be used to creatively add to that canvas.” *Id.* at 8-9.

Applicant also argues that “[e]ven if there is a meaning of GARDEN ARTISANS that is considered descriptive, the suggestive meaning of the term is still relevant” because “[t]his suggestive meaning in combination with a second, descriptive meaning results in the mark creating a double entendre.” *Id.* at 9. Applicant claims that the double entendre would be readily apparent on the face of the GARDEN ARTISANS mark itself because the goods identified in the application “are often used by consumers in the marketplace to decorate their garden” and “[c]onsumers interested in these goods who spend time decorating their garden would recognize that. From there, these consumers would understand that the goods may be bought and used with their garden to, in a sense, make the customers the artisans of their own garden.” *Id.* Applicant calls this “a straightforward suggestive meaning that customers interested in the underlying goods would understand” on the basis of Applicant’s website, which Applicant calls “evidence of this meaning,” but which Applicant claims is not required for the meaning to be “readily apparent.” *Id.*

Applicant concludes that

[t]he goods sold by Applicant under its GARDEN ARTISANS mark can be used in the design of a garden, thus the person who purchases the goods in a sense becomes like the “garden artisans” of the business cited by the examining attorney. Applicant’s GARDEN ARTISANS mark suggests to customers that they can use Applicant’s goods to become their own designer.

*Id.* at 10.

In its reply brief, Applicant “does not deny the descriptiveness of ‘artisans’, nor does Applicant deny that ‘garden’ when used in association with the identified goods may inform customers of aspects of the goods,” 9 TTABVUE 2-3, but claims that this

“does not lead to the entire mark *as a whole* being merely descriptive.” *Id.* at 3 (emphasis supplied by Applicant). Applicant argues that if “the GARDEN ARTISANS mark is considered merely descriptive . . . it also has a suggestive meaning . . . and thus the mark creates a double entendre.” *Id.* Applicant claims that its website tagline “...because the garden is your canvas” is not needed for an understanding of the double entendre of its mark because of what consumers may think when seeing the mark alone. *Id.* at 4. According to Applicant, “an appreciable number of consumers will wonder who GARDEN ARTISANS products are meant for, and from there, determine that GARDEN ARTISANS suggests the intended purchaser. *Id.* at 5.

## **2. The Senior Examining Attorney**

The Senior Examining Attorney begins by defining the words GARDEN and ARTISAN in the proposed mark: “Garden is defined as ‘[g]rounds laid out with flowers, trees, and ornamental shrubs and used for recreation or display; public gardens; a botanical garden’ and simply as ‘[a] yard or lawn,’” while “[a]rtisan is defined as ‘[a] person skilled in making a product by hand’ and ‘[m]ade by hand or by traditional means and using high-quality ingredients; artisanal . . . .” 8 TTABVue 4 (citations omitted).

The Senior Examining Attorney then argues that Internet webpages in the record demonstrate “that ‘garden artisans’ directly and aptly describes goods that are created by artisans for use in a garden,” *id.*; that “GARDEN ARTISANS immediately conveys that applicant’s own ‘garden artisans’ create its goods,” *id.* at 5; that “purchasers will understand the mark ‘GARDEN ARTISANS’ as conveying that

applicant's goods are hand-made by someone skilled and that the goods are for use in a garden, rather than denoting applicant as the source of such goods," *id.* at 5-6; and that "[c]onsumers will immediately understand that these are artisanal products with unique artistic features to decorate one's yard or lawn." *Id.* at 6.

The Senior Examining Attorney also points to Applicant's specimen, which she claims "further evidences the descriptiveness of 'artisans' in relation to the goods where the specimen provides a way to shop by Artist under 'Ways to shop . . . Artist,'" and states that consumers "can also find 'hand-crafted' goods, supporting the fact that the 'GARDEN ARTISANS' is merely descriptive." *Id.* She argues that "Applicant's goods feature various pieces of garden art created by a person skilled at making a product by hand or by traditional means," *id.* at 7, citing excerpts of articles that she claims show that "ARTISAN describes various types of art made by artisans . . ." *Id.* at 6-7.

With respect to Applicant's suggestiveness arguments, the Senior Examining Attorney argues that consumers would not readily understand that, as Applicant claims, "garden artisans refers to the purchasers of applicant's goods so that they can become artisans of their own garden," *id.* at 7, but that "the immediate meaning impressed upon the public is, as applicant's specimens state: 'GARDEN DECOR BY GARDEN ARTISANS.'" *Id.* at 7-8. According to the Senior Examining Attorney, "consumers would not view *themselves* as 'garden artisans' but would instead presume that the wording described the craft people who created the items." *Id.* at 8 (emphasis supplied by the Senior Examining Attorney).

The Senior Examining Attorney also rejects Applicant's double entendre argument, arguing that a double entendre "is an expression that has a double connotation or significance as applied to the goods and/or services," and that "[g]arden artisans, in context of the goods, only has one recognized meaning, namely, one who creates various types of art for gardens." *Id.* She further argues that "the multiple meanings that make an expression a 'double entendre' must be well-recognized by the public and readily apparent from the mark itself in the context of the applied-for goods and/or services," *id.* at 8-9, and that "[i]f the alleged second meaning of the mark is only apparent to purchasers 'after they view the mark in the context of the applicant's trade dress, advertising materials or other matter separate from the mark itself,' the mark is not a double entendre." *Id.* at 9 (quoting *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at \*7 (TTAB 2019) (internal quotation omitted)). She claims that "the alleged second meaning of the mark is only apparent to purchasers after seeing applicant's tag line on its landing page and having this [second] meaning explained to them, and is, therefore, not a double entendre." *Id.*

Finally, the Senior Examining Attorney disavows the Examining Attorney's claim during prosecution that "artisans" is a laudatory term, *id.* at 9, and argues that the mark as a whole instead "describes a feature and characteristic of the applicant's goods, namely, that the goods are created by artisans for use in a garden." *Id.* at 10.

### **C. Analysis**

Applicant posits, 6 TTABVUE 6, and the Senior Examining Attorney agrees, 8 TTABVUE 7, that the appropriate question in this case is "what or who is a GARDEN

ARTISAN and how does that apply to the goods identified in the mark?” Applicant states in its appeal brief that it “does not deny the fact that the term ‘garden’ when used in relation to goods made for a garden would be descriptive of those goods, nor does Applicant deny that ‘artisans’ would be descriptive of goods that are made by artisans.” 6 TTABVUE 7. Applicant further admits that “artisans” “refers to individuals who are experts in a craft such that they create art.” *Id.* at 9. Applicant similarly states in its reply brief that it “does not deny the descriptiveness of ‘artisans’, nor does Applicant deny that ‘garden’ when used in association with the identified goods may inform customers of aspects of the goods.” 9 TTABVUE 2-3.

Applicant’s admissions of the descriptiveness of the individual words “garden” and “artisans” in its proposed mark GARDEN ARTISANS are consistent with the meaning of those words. “Garden” in its noun form is “an area of land next to or near a house that is used for growing flowers or vegetables,”<sup>32</sup> while an “artisan” is a “person skilled in making a product by hand,”<sup>33</sup> and a “worker in a skilled trade, especially one that involves making things by hand.”<sup>34</sup>

In the proposed mark, the word GARDEN is an adjective that modifies the plural noun ARTISANS and that means “of, relating to, used in, or frequenting a garden.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on January 24,

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<sup>32</sup> April 1, 2021 Office Action at TSDR 2 (MACMILLAN DICTIONARY).

<sup>33</sup> February 28, 2020 Office Action at TSDR 2 (THE AMERICAN HERITAGE DICTIONARY).

<sup>34</sup> *Id.* at TSDR 4 (LEXICO).



2023).<sup>35</sup> The goods identified in the application include “arbors of metal,” “baskets of common metals,” “metal bird baths being structures,” “metal gazebos,” “metal plant cages,” “metal trellises,” and “statues of common metal” in Class 6, and “bird baths being bowls for birds to bathe in,” “bird feeders,” “ceramic figurines,” “natural and synthetic fiber coco liners fitted for plant boxes, plant pots, and plant baskets,” “ornaments of glass,” “plant baskets,” “planters for flowers and plants,” “watering cans,” and “works of art made of glass” in Class 21. All of these goods relate to or are used in a garden, and many are necessarily made by hand or at least could be made by hand. These characteristics of the goods are corroborated by the statement on Applicant’s website touting the “distinctive and high-quality handcrafted products offered by our company,”<sup>36</sup> and the nature of the products displayed on Applicant’s website, many of which appear to be unique or custom-made.<sup>37</sup> Examples of these goods are displayed below:

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<sup>35</sup> The Board “may take judicial notice of dictionary definitions, including online dictionaries, definitions in technical dictionaries and translation dictionaries that exist in printed form.” *Zuma Array*, 2022 USPQ2d 736, at \*12 (quoting *Omniome*, 2020 USPQ2d 3222, at \*2 n.17).

<sup>36</sup> January 13, 2021 Request for Reconsideration at TSDR 2.

<sup>37</sup> February 28, 2020 Office Action at TSDR 7-9; July 13, 2020 Final Office Action at TSDR 2-9.



Mandarin Shelter Feeder  
**\$59.99** ~~\$72.99~~

38



Red Birdbath with Ivy Design  
**\$84.00**

39



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<sup>38</sup> February 28, 2020 Office Action at TSDR 8.

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

<sup>40</sup> January 13, 2021 Request for Reconsideration at TSDR 3.

In the context of the goods identified in the application, the phrase “garden artisans” refers on its face to persons, such as Applicant or its vendors, who are skilled in making products by hand that relate to or are used in a garden.

The record reflects the public’s understanding of the phrase in this manner. The Examining Attorney made of record a number of articles from publications around the United States that refer to producers and sellers of the involved goods as “garden artisans.”<sup>41</sup> Excerpts are set forth below (all emphasis supplied by the Examining Attorney):

“Garden Expo is a wonderful place to see the range of talent of our region’s **garden artisans**. This year’s Expo will have metal, wood, glass and stone **artisans** offering birdhouses, furniture, sculptures, garden antiques, planters, pottery and more.”<sup>42</sup>

“**Garden artisans** fill growing niche . . . **Garden art** has become a popular part of the landscape, and Folsome resident Ann Laird is just one of the **artists** contributing to this phenomenon. As gardening continues to be a growing trend, people look for more beautiful, interesting and elaborate ways to fill their homes, indoors and out... Laird’s passion for **metal sculpting** . . . . Although Laird brought in only one piece for display, Henderson said, she could have sold several pieces on the spot.”<sup>43</sup>

“**Art in the Garden:**’ Painters, photographers and **garden artisans** demonstrate and display their **art** 9:30 a.m. – 3:30 p.m. Aug. 27-28 at Weidner’s Gardens in Encinitas.”<sup>44</sup>

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<sup>41</sup> April 1, 2021 Office Action at TSDR 270-86. Applicant states that this evidence reflects the use of “garden artisans” as “a descriptor in articles to describe a certain type of person.” 6 TTABVUE 8.

<sup>42</sup> *Id.* at TSDR 272 (SPOKESMAN REVIEW (Spokane, Washington) May 3, 2008).

<sup>43</sup> *Id.* at TSDR 274 (TIMES-PICAYUNE (New Orleans, Louisiana) April 15, 2001).

<sup>44</sup> *Id.* at TSDR 276-77 (SAN DIEGO UNION-TRIBUNE August 25, 2011).

“**Garden artisans** will offer interesting wares along Mill Race Village streets. At garden number four on the walk, there will be a ‘Mystery Flower’ contest . . . .”<sup>45</sup>

“Stacey Kiser of Eugene, who has **bought art** from Beard in the past, was back looking at his work and those of other **garden artisans** on Friday. We love **garden art** here, and I’ve gotten lots of compliments on the stuff I’ve gotten . . . There are some great **pieces from local artists** . . . .”<sup>46</sup>

“Garden centers, **garden artisans**, beautiful landscape displays, seminars and demonstrations, good friends and delicious food makes this 3-day event a great way to kick off summer in New England . . . Crafters and **artisans** round out the show, **creating unique accessories for your home and garden, craft baskets**, handmade jewelry, dried floral wreaths and more.”<sup>47</sup>

“The following local nurseries, floral artists, landscape experts and **garden artisans** will have **their wares displayed** at the village gardens: Hen House Pottery, Sara’s Herb’s and everlastings, Stones & Stuff, Lougaberger Baskets . . . Garden tour tickets can be purchased . . . .”<sup>48</sup>

As noted above, Applicant belittles this evidence, 6 TTABVUE 8, but we find that against the backdrop of Applicant’s admission that “the terms ‘garden’ and ‘artisans’ on their own could be used to describe the underlying goods,” *id.* at 6, and the use of the phrase “GARDEN DECOR FROM GARDEN ARTISANS” on Applicant’s website,<sup>49</sup> the articles are sufficient to establish, *prima facie*, that GARDEN

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<sup>45</sup> *Id.* at TSDR 280 (ASSOCIATED NEWSPAPERS OF MICHIGAN July 5, 2018).

<sup>46</sup> *Id.* at TSDR 282-83 (THE REGISTER-GUARD (Eugene, Oregon) July 4, 2009).

<sup>47</sup> *Id.* at TSDR 284 (CARRIAGE TOWNE NEWS (Kingston, New Hampshire) May 8, 2014).

<sup>48</sup> *Id.* at TSDR 285 (THE TIMES REPORTER (New Philadelphia, Ohio) May 9, 2008).

<sup>49</sup> November 25, 2019 Specimen at TSDR 1. Applicant argues that in this phrase, the term GARDEN ARTISANS “does not describe artists that have made the goods, but rather identifies the business that is selling the goods: GARDEN ARTISANS” because “[p]urchasers

ARTISANS would likely be understood by the relevant consumers to describe producers of the involved goods, such as Applicant and its vendors,<sup>50</sup> and to shift the burden to Applicant to rebut the Examining Attorney's prima facie case. *Zuma Array*, 2022 USPQ2d 736, at \*8.

Applicant offers multiple arguments against the Examining Attorney's prima facie case. First, Applicant argues that "the meaning of GARDEN ARTISANS for the range of goods identified in the application is similar to those cases in which a mark suggests a desired result of the goods." 6 TTABVUE 6 (citing *In re Noble Co.*, 225 USPQ 749 (TTAB 1985) (NOBURST for nontoxic liquid antifreeze and rust inhibitor for use in hot water heating systems); *In re C.J. Webb Inc.*, 182 USPQ 63 (TTAB 1974) (BRAKLEEN for a chemical composition for cleaning and degreasing automotive brake parts); *In re Realistic Co.*, 440 F.2d 1393, 169 USPQ 610 (CCPA 1971) (CURV for permanent wave curling solutions); *In re Pennwalt Corp.*, 173 USPQ 317 (TTAB 1972) (DRI-FOOT for an anti-perspirant deodorant for feet)). We must consider the descriptiveness of GARDEN ARTISANS in the context of the involved goods and the evidence of record in this case, but the cited cases are readily distinguishable because each involved a mark that on its face suggested, but did not describe, the benefits of using the involved goods or, as Applicant puts it, a "desired result of the goods." 6

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are buying decor from the business called Garden Artisans." 8 TTABVUE 3. Consistent with the use of "garden artisans" in the articles, however, the phrase on Applicant's website indicates that "garden decor," the goods identified in the application, may be the work of "garden artisans."

<sup>50</sup> In that regard, the Examining Attorney and Senior Examining Attorney have not claimed that "garden artisans" is a generic name for any of the involved goods.

TTABVUE 6. Here, there is nothing on the face of the mark or, as discussed below, in the record, to show that consumers who purchase the goods would understand the mark to suggest that the “desired result” of purchasing the goods is to transform themselves into “person[s] skilled in making a product by hand,”<sup>51</sup> and “worker[s] in a skilled trade, especially one that involves making things by hand.”<sup>52</sup>

Second, Applicant argues that it “submitted numerous registrations that include either ‘garden’, and one or more terms, or ‘artisan’, and one or more terms, that are registered on the Principal register, and which do not include a claim of acquired distinctiveness under Section 2(f).” *Id.* at 7 (record citations omitted). Applicant “contends that GARDEN ARTISANS, when viewed in its entirety, is like those marks noted in the cases above and the registrations previously submitted, and thus it should also be considered inherently distinctive and available for registration without a claim of acquired distinctiveness.” *Id.* None of the third-party registrations involve marks containing both of the words comprising Applicant’s proposed mark,<sup>53</sup> and only a few cover the sorts of goods identified in the application.<sup>54</sup> They tell us nothing about whether GARDEN ARTISANS is descriptive of those goods.

Third, Applicant claims that the use of “garden artisans” to “describe the purchase of the identified goods” was “coined by Applicant as a way to suggest or conjure up

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<sup>51</sup> February 28, 2020 Office Action at TSDR 2 (THE AMERICAN HERITAGE DICTIONARY).

<sup>52</sup> *Id.* at TSDR 4 (LEXICO).

<sup>53</sup> January 13, 2021 Request for Reconsideration at TSDR 6-57; October 1, 2021 Response to Office Action at TSDR 25-37.

<sup>54</sup> October 1, 2021 Response to Office Action at TSDR 25, 26, 27, 29, 30, 33, 35,

the idea to consumers that their garden is a canvas (which, in the literal sense, it is not) and goods sold can be used to creatively add to that canvas.” *Id.* at 8-9. Applicant claims first use of the proposed mark GARDEN ARTISANS in 1999, which pre-dates all of the articles discussed above, but even if Applicant indeed coined the term “garden artisans,” and was the first to use it in this or any other sense, those facts “do[ ] not render the term distinctive if, as here, it has been shown to be merely descriptive of the goods identified in the application.” *Zuma Array*, 2022 USPQ2d 736, at \*16 (citing *Fallon*, 2020 USPQ2d 11249, at \*11). Nor does the fact that there is “no evidence that third-party businesses use ‘garden artisans’ to identify or describe goods that they sell.” 6 TTABVUE 8. “[T]here 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).” *Zuma Array*, 2022 USPQ2d 736, at \*16 (quoting *Fallon*, 2020 USPQ2d 11249, at \*11 (internal quotation omitted)).

Finally, as discussed above, Applicant argues that its proposed mark is a double entendre, such that any descriptive meaning of the mark as a whole is overcome by its second, suggestive meaning that consumers of the goods, rather than their producers, are “garden artisans.” Applicant’s double entendre argument “is unsupported by the record. Not only must ‘both meanings . . . be readily apparent,’ but the second meaning must also be ‘apparent upon seeing the mark in connection with the [goods].’” *Yarnell Ice Cream*, 2019 USPQ2d 265039, at \*7 (quoting *In re Ethnic Home Lifestyles Corp.*, 70 USPQ2d 1156, 1159 (TTAB 2003)). “The multiple

interpretations that mark an expression a ‘double entendre’ must be associations that the public would make fairly readily, and *must be readily apparent from the mark itself.*” *In re Calphalon Corp.*, 122 USPQ 1153, 1163 (TTAB 2017) (citations omitted and emphasis in original). “[T]he meaning of the mark, in creating a double entendre, must be self-evident from the face of the mark.” *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at \*8 (TTAB 2019), *cancellation order vacated on default judgment*, No. 0:19-cv-61614-DPG (S.D. Fla. Dec. 17, 2019). “If the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant’s trade dress, advertising materials or other matter separate from the mark itself, the mark is not a double entendre.” *Yarnell Ice Cream*, 2019 USPQ2d 265039, at \*7 (quoting *In re The Place, Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005)).

As discussed above, Applicant argues that

The applied-for goods are often used by consumers in the marketplace to decorate their garden. Consumers interested in these goods who spend time decorating their garden would recognize that. From there, these consumers would understand that the goods may be bought and used with their garden to, in a sense, make the customers the artisans of their own garden. This is a straightforward suggestive meaning that customers interested in the underlying goods would understand. Previously presented is a copy of Applicant’s website as evidence of this meaning. The meaning, however, does not require the website to be readily apparent.

6 TTABVUE 10.

We agree with Applicant that the record shows that the goods identified in the application “are often used by consumers in the marketplace to decorate their garden”



and that “[c]onsumers interested in these goods who spend time decorating their garden would recognize that.” *Id.* But Applicant’s assertions that “[f]rom there, these consumers would understand that the goods may be bought and used with their garden to, in a sense, make the customers the artisans of their own garden,” and that “[t]his is a straightforward suggestive meaning that customers interested in the underlying goods would understand” are “unsupported by sworn statements or other evidence, and [a]ttorney argument is no substitute for evidence.”<sup>55</sup> *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at \*15 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)). Applicant’s website, which displays the tagline “...because the garden is your canvas,” does not aid Applicant because GARDEN ARTISANS “is not a double entendre even if a second meaning might be attributed to it in the context of extrinsic evidence of its use.” *Yarnell Ice Cream*, 2019 USPQ2d 265039, at \*7 n.57.

For the reasons discussed above, we find that Applicant did not rebut the Examining Attorney’s prima facie case that GARDEN ARTISANS is merely descriptive of one or more goods in each class in the application.

**Decision:** The refusal to register on the ground that the proposed mark is merely descriptive is affirmed as to both classes, but because Applicant has asserted in the

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<sup>55</sup> Applicant made of record multiple reviews of its products by consumers, who presumably were exposed to Applicant’s website. October 1, 2021 Response to Office Action at TSDR 3-24. Applicant received many favorable reviews of its goods and services, but only one review contains a comment that even remotely hints that the customer might consider himself to be what Applicant calls a “garden artisan”: “I applied to this garden store in order to decorate my lawn which I care [about] a lot.” *Id.* at TSDR 13. The gist of this review, like that of all the other favorable ones, is that “[c]lient support here is very responsive” and “[p]rices are good, hence this garden store has an advantage over other ones.” *Id.*

alternative that its proposed mark has acquired distinctiveness, and the Senior Examining Attorney has found Applicant's evidence of acquired distinctiveness to be sufficient, the application will be amended to reflect Applicant's Section 2(f) claim as to both classes and will proceed to publication for opposition following the entry of that amendment.