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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Farm Fleet Supplies, Inc.

v.

Blain Supply, Inc.

Opposition No. 91196469
to Application Serial Nos. 77894710, 77894766 and 77894812

Eric O. Haugen of Haugen Law Firm PLLP for Farm Fleet Supplies, Inc.

Nancy B. Johnson and George K. Steil, Jr. of Brennan Steil SC for Blain Supply, Inc.

Before Zervas, Wellington and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Blain Supply, Inc. ("Blain Supply" or "applicant") seeks registration of the mark FARM & FLEET, in standard character format and with FARM disclaimed, for

> On-line retail store services featuring animal supplies, farm supplies, agricultural products, automotive parts and supplies, hardware goods, home improvements,

> appliances, electronics, hand tools, power tools, housewares, lawn and garden supplies, outdoor power equipment, sporting goods, hunting equipment, camping equipment, toys, clothing, commercial cleaning supplies, food, furniture, and holiday decorations (the "Online Services");[1] and
>
> Retail store services featuring animal supplies, farm supplies, agricultural products, automotive parts and supplies, hardware goods, home improvements, appliances, electronics, hand tools, power tools, housewares, lawn and garden supplies, outdoor power equipment, sporting goods, hunting equipment, camping equipment, toys, clothing, commercial cleaning supplies, food, furniture, and holiday decorations (the "Retail Store Services").[2]

Applicant also seeks registration of BLAIN'S FARM & FLEET, in standard character format and with FARM disclaimed, for its Online Services.[3] In each of the three involved applications, applicant claims ownership of prior registrations, including BLAIN'S FARM & FLEET in typed form, with a claim of acquired distinctiveness under Section 2(f) as to FARM & FLEET, but no disclaimer,[4] and

[1] Application Serial No. 77894766, filed December 16, 2009, alleging first use dates of October 27, 2009.

[2] Application Serial No. 77894812, filed December 16, 2009, alleging first use dates of June 1, 1955.

[3] Application Serial No. 77894710, filed December 16, 2009, alleging first use dates of October 27, 2009.

[4] Registration No. 3009930, issued November 1, 2005 from an application filed January 28, 2003.

with a disclaimer of "'FARM' OR 'FLEET,'" but no claim of acquired distinctiveness,[5] both for, *inter alia*, applicant's Retail Store Services.

In its notices of opposition,[6] opposer Farm Fleet Supplies, Inc. ("opposer") alleges that since 1962 it has used FARM FLEET and NORBY'S FARM FLEET for retail store services identical to applicant's Retail Store Services, that it "has a real commercial interest in fully and fairly utilizing the term 'farm fleet', as well as the term[s] 'farm & fleet' and 'farm and fleet'" and that it will be damaged if FARM & FLEET is registered or if BLAIN'S FARM & FLEET is registered without a "full" disclaimer of FARM & FLEET. Notices of Opposition ¶¶ 2-3. As grounds for opposition, opposer alleges that FARM & FLEET is merely descriptive of and generic for applicant's services. In its answers, applicant "admits that FARM & FLEET is descriptive," Answers ¶ 3, but alleges that the term has acquired distinctiveness, and otherwise denies the salient allegations in the notices of opposition.

I. <u>The Record</u>

The evidence of record consists of the pleadings, the files of the opposed applications and the following:

- opposer's notices of reliance ("NOR") Nos. 1-3, filed March 26, 2012 (TTABVue Docket #'s 12-14) and 4, filed November 29, 2012 (TTABVue Docket # 30), which include: corporate filings, trademark registrations and

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[5] Registration No. 2852826, issued June 15, 2004 from an application filed January 28, 2003.

[6] Although opposer filed a consolidated opposition against the three involved applications, its filing consisted of three separate notices of opposition, and applicant in turn filed three separate answers.

filings, newspaper articles, press releases, blog and Internet postings, website printouts, business listings and SEC filings;

- applicant's NOR Nos. 1-4, filed October 15, 2012 (TTABVue Docket #'s 25-29), which include opposer's responses to certain of applicant's interrogatories ("Opposer's Int. Resp.") and requests for admission ("Opposer's RFA Resp."), portions of the discovery depositions of Paula Norby, Constance Norby, Gregory Norby and Eric Haugen and certain exhibits thereto, printouts from Office records relating to certain of applicant's uninvolved registrations, website printouts and newspaper articles;

- opposer's testimonial depositions (TTABVue Docket # 31,) of Constance Norby, one of opposer's founders and currently a buyer and consultant for opposer ("C. Norby Tr.") and Paula Norby, who has financial, human resources, computer and general management responsibilities for opposer ("P. Norby Tr."), and the exhibits thereto;

- applicant's testimonial depositions (TTABVue Docket #'s 32-43 and 45-54) of Philip Johnson, applicant's expert witness ("Johnson Tr."), Richard R. Zeckmeister, Vice President of North America Marketing and Planning for Briggs and Stratton Corporation ("Zeckmeister Tr."), Stewart C. Mills, Jr. of Mills Fleet Farm ("Mills Tr."), Brian Ziegler, applicant's Vice President of Management Information Systems ("Ziegler Tr."), Renee Tarnutzer, who handles aspects of applicant's marketing and website operations ("Tarnutzer Tr."), William C. Schendt, applicant's Chief Financial Officer and secretary-treasurer ("Schendt Tr."), Robert Blain, applicant's President ("Blain Tr."), Jane Blain Gilbertson, applicant's Executive Vice President ("Gilbertson Tr.") and David Scott Schansberg, applicant's Vice President of Marketing ("Schansberg Tr.") and the exhibits thereto.

II. The Parties

Opposer is an Iowa corporation which was formed in 1962. At that time opposer operated a retail store known as "Norbys – Farm Fleet Supplies" which sold automotive, electrical and farm supplies, hardware and plumbing. C. Norby Tr. at 3-7; P. Norby Tr. at 4 and Ex. 11. The store is now known as Norbys Farm Fleet. *Id.* Opposer and its affiliates (hereinafter "opposer") currently operate 10 retail stores, nine in Iowa and one in Kentucky, which offer the same types of products as the original store. C. Norby Tr. at 4, 19-21.

Like opposer, applicant and its affiliated corporations (hereinafter "applicant") also operate a family-owned chain of retail stores, and, like opposer, applicant also initially offered automotive and farm supplies, and still does. Blain Tr. at 7-9; Schendt Tr. Exs. 67-68. Applicant's first store opened in 1955 in Janesville, Wisconsin and at that time began using the mark FARM & FLEET. Applicant currently operates 35 FARM & FLEET stores, all of which are in Wisconsin, Illinois or Iowa. *Id.* at 7-11; Gilbertson Tr. at 6 and Ex. 57. Like "big box" stores such as Walmart and Target, applicant's stores now offer an exceedingly wide variety of products, including sporting goods, apparel, housewares, lawn and garden equipment, furniture, toys, pet supplies, plumbing, hardware and other products. Blain Tr. at 12-21; Gilbertson Tr. at 7-10. While applicant's original customers were primarily members of the "farm community," applicant's customer base is now much broader, as applicant has stores in urban and other areas which also serve general consumers, i.e. members of the general public. Gilbertson Tr. at

21-22; Blain Tr. at 20. Applicant began offering products for sale online in 2009 on a limited basis, and its online efforts were successful to the point that applicant now offers tens of thousands of products online, to customers throughout the country. Gilbertson Tr. at 33-34.

It is not coincidental that opposer and applicant both use marks including the word FLEET. Both are currently and have long been members of a buying cooperative known as Mid-States, which enables the parties to offer discounts to customers, something which was difficult at the time the parties went into business because of certain "fair trade" laws in place at the time. In order to offer discounts without violating these fair trade laws, opposer and applicant offered a similar program, under which owners of a "fleet" of vehicles, which could include automobiles, tractors or even lawnmowers or other tools with engines, were permitted to purchase at a discount if they had a "fleet card." As Mr. Blain testified:

> … In Wisconsin they had fair trade laws that prevented retailers from selling at a discount unless they had a stipulated reason to do so, and thereby my father and uncle instituted a card system where a customer would register to get a card and there were certain questions that they had to fill out, and if they were given the answers that would allow my father and uncle to sell them at a discount based on the fair trade laws, they were given a card for a discount.

Blain Tr. at 30. As Ms. Blain Gilbertson testified:

> … This was actually a card that allowed basically a membership card that allowed our customers at that time to shop at a discount. And if they could prove they had five engines, and it could be everything from a lawn

> mower to a composter to a tractor, they were allowed to receive this membership card and then shop at a discount. … It was a state law that didn't allow retailers to sell at a discount directly to a consumer. The workaround was if you had five engines, presumably, you were more of a business, so that allowed people to buy at a discount.

Gilbertson Tr. at 28-29; *see also*, Mills Tr. at 6-12. Opposer's Constance Norby gave similar testimony regarding opposer's program:

> We had a card and a customer would come in and they'd fill out this thing that said they had five engines so – and it could be a lawn mower included but I mean that would be – that would make – that would be fleet and so when they got that card, they could buy at a better price.

C. Norby Tr. at 21. *See also* Gilbertson Tr. at 22-23 and Ex. 61 (book entitled "Blain's Farm & Fleet® 50 Years of Keeping Family Values in a Family Business," produced in connection with applicant's 50th "anniversary").

III. Evidence on Genericness, Descriptiveness and Acquired Distinctiveness

A. Opposer

In support of its claims of genericness and descriptiveness, opposer relies upon corporate filings and Internet printouts revealing third party trade names, as well as statements incorporating "farm and fleet" or variations thereof in annual reports, news articles and promotional and other materials, as follows:

Business Name Revealed In Corporate Filing/Internet Printout	**Citation**
Highland Tire Farm & Fleet (Ohio)	Opposer's NOR Nos. 1, 3
Farm and Fleet Field Service, LLC (Missouri)	Opposer's NOR No. 1
Hilliard Auto Farm and Fleet, Inc. (Ohio)	Opposer's NOR Nos. 1, 3
Quality Farm & Fleet (Pennsylvania) (Michigan),	Opposer's NOR Nos. 1, 3

(Ohio), (Indiana), (Virginia) (New York)	
Dinsmore Farm and Fleet (Ohio)	Opposer's NOR Nos. 1, 3
Dave's Farm & Fleet Service (Michigan)	Opposer's NOR No. 3
Farm & Fleet (Indiana)	Opposer's NOR No. 3
Farm & Fleet Restoration (Indiana)	Opposer's NOR No. 3
Farm & Fleet Supply (Minnesota)	Opposer's NOR No. 3
G&A's Diesel, Farm & Fleet Services (Michigan)	Opposer's NOR No. 3
Mike's Farm & Fleet Repair (Ohio)	Opposer's NOR No. 3
Ok Farm and Fleet Store (North Dakota)	Opposer's NOR No. 3
Pete-Co Farm & Fleet (NY)	Opposer's NOR No. 3
Rossi's Tire & Auto Service, Farm & Fleet (California)	Opposer's NOR No. 3
Sedam Farm & Fleet Tire Service (New York)	Opposer's NOR No. 3
Steve's Farm & Fleet (Indiana)	Opposer's NOR No. 3
Wisner Farm Fleet, Inc. (Louisiana)	Opposer's NOR No. 3

There is no evidence in the record regarding whether or how extensively these corporate names are currently in use, or regarding the extent to which consumers have been exposed to these trade names. In fact, opposer's attorney, who conducted the searches that revealed these business names, did not verify that any of the companies were still in existence or that the listings were accurate. Applicant's NOR No. 3 (Haugen Tr. at 12-13). Furthermore, Quality Farm & Fleet is no longer in existence. Zeckmeister Tr. at 24; Mills Tr. at 32-33.

Opposer also relies on the following statements in Securities and Exchange Commission and corporate filings:

Source and Statement	**Citation**
Doane Pet Care Company Annual Report for fiscal year ended January 1, 2005 Part I, General: "Our private label customers primarily include mass merchandisers, grocery chains, farm and fleet companies and pet specialty stores. We refer to each of these customer types as a channel….A majority of our regional brand sales are to the grocery and farm and	Opposer's NOR No. 1

fleet channels." Part I, Customers: "Our store brand customers in the United States include mass merchandisers such as WalMart, Inc., pet specialty stores such as PETSMART, grocery chains such as Food Lion, Kroger, Royal Ahold and Safeway, and farm and fleet stores such as Tractor Supply, Mid-States and Land O' Lakes Purina Feeds."	
Thermadyne Holdings Corp. Annual Report for fiscal year ended December 31, 2003 "U.S. sales are organized based upon our two channels, the industrial channel … and the specialty markets channel, which includes mass merchandisers, automotive after-market, catalogs, farm and fleet, heating, ventilation and air conditioning, plumbing and medical home healthcare distributors."	Opposer's NOR No. 1
Mark IV Industries Inc. Annual Report for February 28, 1999 "Mark IV Automotive provides a vast array of automotive belts, hose and accessories to automotive warehouse distributors, oil companies, original equipment service centers, retail and auto parts chains, mass merchandisers, farm and fleet stores, and hardware distributors."	Opposer's NOR No. 1
Organic Sales & Marketing Inc. Quarterly Report for June 30, 2011 "On March 10, 2011 the Company entered into an NDA (Non-disclosure Agreement) with a large Farm and Fleet distributor to enter into a discussion concerning certain Company technologies …" Revenue Projections: "The 2011 projections have been made on a product category basis with 82% of projected revenues coming from a combination national distributors in the Federal government, military, laboratory, commercial and industrial sectors, grocery, farm & fleet, private label, hotel & hospitality, and the remaining from a combination of website and radio ad	Opposer's NOR Nos. 1, 4

sales …"	
Global Dynamics Corp. Form 8-K March 19, 2010 "The team was successful in placing products in many of the large retail outlets in the United States. These included, are not limited to, Big Box retailers, Warehouse Clubs, Hardware Chains, Farm and Fleet, and many others.	Opposer's NOR No. 1
Astec Sales Trade Name, Trademark Details recorded with Louisiana Secretary of State "Type of Business: Retail, Wholesale, Farm and Fleet, AG and Feed Coops, Hardware Sales	Opposer's NOR No. 1
Orchard Supply Hardware Stores Corp. Prospectus "The increase in Non-Dealer sales in 2011 is due to strong results in the sporting goods channel ($1.6 million) and the farm and fleet channel ($0.9 million) … The farm and fleet channel increase is attributable to …"	Opposer's NOR No. 4
TriMas Corp. Analyst Day printout from SEC website, May 13, 2010 "Focused on serving the retail market and the Do-It-Yourself consumer Retail channels served: Mass Merchants, Hardware/Home Centers, Farm/Fleet, Auto Retail …"	Opposer's NOR No. 4
Land O' Lakes, Inc. 2008 Annual Report, printout from SEC website, September 26, 2012 "Feed continued its focus on building brand strength in 2008, successfully launching the Purina brand integration in lifestyle feed and leveraging a creative distribution strategy to penetrate new or expanded market spaces, including 64 new Farm and Fleet stores."	Gilbertson Tr. Ex. 66
Printout from "harmanstoves.com" website, September 24, 2012 "They can be purchased at hardware stores, farm and fleet stores, and in big box outlet stores."	Gilbertson Tr. Ex. 66
Printout from "realviewdigital.com" website, September 27, 2012 "Market Directions recently concluded a comprehensive analysis for an agribusiness client to better understand	Gilbertson Tr. Ex. 66

how large property owners influence the Farm and Fleet channel …"	

Again, there is no evidence in the record regarding the extent to which the relevant public has been exposed to these statements.

Opposer further relies on the following statements in news articles and promotional materials:[7]

Source and Statement	**Citation**
John Caulfield, "Big farm & fleet dealers merge," Home Channel News, April 19, 1999 "Consolidation continues in farm and fleet retailing, as that sector's second-and-third largest dealers are merging to improve their position against a broad swatch of retail competitors nationwide. … Farm and fleet stores have spruced up appearances and product assortments to compete for what has become a customer base that has changed dramatically, as more city dwellers move farther into exurbs and rural areas, but expect the same products and services they got in more populated markets. …"	Opposer's NOR No. 2
Sean Sexton, "Farm & Fleet Stores Graze Home Improvement Pasture," Home Channel News, May 22, 2000 "Incursions by home centers into smaller markets put pressure on these mostly rural dealers.	Opposer's NOR No. 2

[7] While some of opposer's evidence is of a type not generally permitted to be introduced by notice of reliance, much of that evidence was printed from the Internet and meets the requirements set forth in *Safer Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010). It is therefore admissible and has been considered. However, a small number of articles and printouts opposer submitted fail to meet the requirements for submission by notice of reliance and are also not admissible under *Safer*, and have therefore been given no consideration. Certain duplicative evidence, such as materials indicating where Wrangler products may be purchased, which were apparently written by the same source, has only been listed once. One article describing an event in a foreign country has been given no consideration.

Even as larger home improvement dealers encroach on their rural markets, farm and fleet retailers continue to resist adding substantially to their assortments of hardlines and building products. However, subtle concessions are being made by these dealers to accommodate the product and service expectations of suburbanites and city dwellers who are migrating to the country."	
"Orgill carves a spot in farm and fleet distribution," Home Channel News, August 2, 2007 "The farm and ranch category by many accounts is a bright spot on the retailing landscape. On the recently published Home Channel News Top 500 Scoreboard, the farm and ranch segment – making its first appearance on the list as a stand-alone retail category – led all other segments in growth with a 10.2 percent jump over the previous year. … 'So if you look at the locations, they all kind of point inward to the heart of our nation,' said Brake. 'This is prime farm and ranch territory.'"	Opposer's NOR No. 2
Bob Vereen, "Analyzing the Diversified American Hardware/Home Center Marketplace," IMEX Exchange, December 1, 2009 "… One of the more interesting class of retailers in America these days is what is called 'Farm & Fleet' or farm/ranch stores – stores located either in suburbia or smaller towns and focusing on serving the needs of regular farmers or so-called 'gentlemen farmers,' who maintain small acreage for gardens and some crops. These retailers, headed by Tractor Supply, fared far better, on average, than most of the other kinds of retailers listed. They carry basic hardgoods, plus larger power equipment and other needs of the farm/ranch trade."	Opposer's NOR No. 2
"Western Leader Supports U.S. Veterans, Launches Wrangler® National Patriot™ Program," Wrangler Western Wear Press Release, December 12, 2009 "About Wrangler: Wrangler Western Wear apparel is available nationwide in specialty stores, including work apparel chains, farm & fleet, and western stores, as well as through on-line and catalog retailers."	Opposer's NOR No. 2
Iowa City Craigslist listing for boots, September 24, 2011	Opposer's NOR No. 2

"All I know for sure is that if they fit you, you'll save almost $50 compared to buying a new pair in a farm and fleet store."	
Printout from "maplecrestfarmky.com" website, November 10, 2011 List of sponsors, including Purina Mills, the description of which states "Sold through an extensive network of independent dealers and farm and fleet retailers, there is a great chance that you are never far from a Purina Feed dealer."	Opposer's NOR No. 2
Printout of article from "homechannelnews.com" website, "Tractor Supply digs into expansion plans," June 11, 2008 "At an investors' conference Wednesday, Tractor Supply CEO Jim Wright described the company's growth plans and explained an expense management program designed to help the farm and fleet retailer succeed in tough times."	Opposer's NOR No. 2
Printout of article from "homechannelnews.com" website, "Same-store sales up 1.9 percent at Tractor Supply," October 31, 2007 "Farm and fleet retailer Tractor Supply saw third-quarter earnings of $17.5 million …."	Opposer's NOR No. 2
Printout of article from "homechannelnews.com" website, "Tractor Supply names new board member," August 10, 2007 "Nashville, Tenn.-based farm and fleet retailer Tractor Supply …."	Opposer's NOR No. 2
Ken Clark, "15 Points About the Top 500," Home Channel News, June 15, 2008 "Farm and fleet stores fared even better. Combined sales increased 13.1 percent for the 31 farm and fleet companies on the Top 500."	Opposer's NOR No. 2
Printout of "Environmental Lubricants Manufacturing, Inc. Company Overview" from "businessweek.com" website, January 26, 2012 "Environmental Lubricants Manufacturing, Inc. provides	Opposer's NOR No. 2

biobased lubricants, greases, and metalworking fluids. It offers retail greases for retail, farm and fleet, and hardware stores ….”	
Printout of “Sencret Chemical Co., Inc. Company Overview” from “businessweek.com” website, January 26, 2012 “Its products are distributed through hardware, home center, mass merchant, food and drug, farm and fleet, and independent garden center retailers in the United States.”	Opposer’s NOR No. 2
Printout of “Doane Pet Care Company Company Overview” from “businessweek.com” website, January 26, 2012 “Doane Pet Care serves mass merchandisers, retailers, grocery chains, farm and fleet companies, and pet specialty stores.”	Opposer’s NOR No. 2
Printout from “researchandmarkets.com” website entitled “US top 10 farm and fleet retailers by 1999 sales in dollars, with number of stores for 1999 and sales for 1998”	Opposer’s NOR No. 2
Printout of Prevue Pet Products, Inc. Company Profile from “petsglobal.com” website, January 26, 2012 “Customer base is thru wholesales Distributors (sic), major mass chains, pet specialty chains, Pet Catalogue and Internet Retailers and Farm and Fleet Retailers.”	Opposer’s NOR No. 2
Printout from “trimascorp.com” website concerning Cequent Consumer Products, January 26, 2012 “This market includes mass merchants, auto retailers, hardware stores and home centers, farm & fleet retailers, wholesale clubs, marine specialty and sporting goods retailers ….”	Opposer’s NOR No. 2
Printout from “centrummarketing.com” website, January 26, 2012 “Centrum marketing covers Indiana, Michigan,	Opposer’s NOR No. 2

Kentucky, Ohio, Western Pennsylvania, and West Virginia calling on the following types of distribution: Hardware Co-Op's & Distributors, Automotive distributors, Mass Retailers, Building Material Retailers, Paint Distributors, Farm & Fleet Retailers …."	
Printout from "pchassociates.com" website, January 26, 2012 "Special emphasis is given to large volume accounts, including: Mass Merchandisers/Retail Chains, Warehouse Distributors, Mail Order Marketers … Farm & Fleet Retailers."	Opposer's NOR No. 2
Printout from "globalinstore.com" website, January 26, 2012 "…and the solid relationships we have developed with other leading pet information providers, pet and farm & fleet retailers, the book trade, supermarket & specialty and product manufacturers"	Opposer's NOR No. 2
Printout of Gardner-Gibson Inc. Company Information from "roofingcontractor.com" website, January 26, 2012 "… while Gardner and Black Jack brands are available through leading building material and home improvement stores, hardware, lumber, and farm & fleet retailers"	Opposer's NOR No. 2
Printout from "clean-rite.com" website, January 26, 2012 "Aiken's products can be found at automotive, hardware, farm and fleet retail stores and commercial companies serving both professional and do-it-yourself customers."	Opposer's NOR No. 2
Printout from "clc.com" website regarding Dri-Duck Apparel, January 27, 2012 "These outerwear items are available in farm and fleet, sporting goods, western, outdoor, specialty, and department stores."	Opposer's NOR No. 2
Undated Sweeney's press release "Sweeney's New Solar Powered Sonic Spikes Drives Moles & Gophers Away" "Sweeney's Mole & Gopher Sonic Spikes are available at leading hardware, home center, mass merchant, farm and fleet and independent garden center retailers	Opposer's NOR No. 2

nationwide."	
Undated article "Antler Attakk," Clearwater-West Sherburne Tribune, printed December 3, 2011 "Antler Attakk products are available at some big box stores, sporting goods stores, farm and fleet stores and some hardware stores."	Opposer's NOR Nos. 2, 4
Mari Harries, "The Little City that Would," printout from "nm2020.org" website, March 17, 2011 "Windom has clothing spots, a hardware store, flower and fit shops, farm and fleet suppliers, a general store, and even a place to buy antiques."	Opposer's NOR No. 2
Becky Ebenkamp, "Toy Fair 2004: Niche Toys," printout from "allbusiness.com," December 7, 2011 "ERTL's Racking Champions have cornered hobby and 'farm and fleet' marketing, with John Deere one of its biggest licenses …."	Opposer's NOR No. 2
"RTA add at Depot: CrossRoads stores said to lay plans," printout from "thefreelibrary.com," December 7, 2011 "Taking a page from the old farm-and-fleet store concept, The Home Depot, the nation's largest home center chain, is testing mammoth superstores designed to sell rural America everything from lumber and lariats to tractors, tools and tires."	Opposer's NOR No. 2
Printout from "artzulu.com" website entitled "Licensing Opportunities," November 4, 2011 "Art Zulu helped Brand Sense Partners launch a rodeo inspired sportswear and workwear line for Dodge, to be sold in major farm and fleet stores and complete with brands such as Carhardt and Wrangler."	Opposer's NOR No. 2
Printout from "kjksales.com" website, entitled "Professional Sales Management," November 10, 2011 "KJK Sales specializes in sales management services to manufacturers of consumer packaged goods in the Sporting Goods, Hardware, Farm & Fleet, Automotive Aftermarket, C-Store and other retail chains in the U.S."	Opposer's NOR No. 2
Printout from "neagroup.com" website, October 26, 2011 "Perhaps the best feature is that every 'wear part' like	Opposer's NOR No. 2

brakes, bearings, hydraulics, etc., can be purchased over-the-counter at a farm & fleet or automotive parts store."	
Printout from "warrenunilube.com" website, January 26, 2012 "We are specialists in designing automotive programs for convenience store distributors, wholesale grocers, mass merchandisers, drugstore chains, hardware wholesalers, farm and fleet, and traditional aftermarket."	Opposer's NOR No. 2
Printout from "nationjob.com" website, December 7, 2011 "Introduced in the fall of 2004, primarily in 'Big Box' farm-and-fleet retailers, Carhartt is now sold in approximately 2000 stores."	Opposer's NOR No. 2
Printout from "2exhibitions.com" website, November 4, 2011 Listed visitors to National Lawn and Garden Show include "Retail Chains, Department Stores, Big Box Stores, Wholesale Distributors, Buying Groups/Coops, Catalog and Direct Mail … Farm & Fleet Stores …."	Opposer's NOR Nos. 2, 4
Printout from "shareholder.com," describing Liberty Safe November 10, 2011 "The company's products are the market share leader and are sold in various sporting goods, farm and fleet, and home improvement retailers."	Opposer's NOR No. 2
Printout from "everything2.com" website describing Cloquet, Minnesota, January 24, 2005 "Of particular note are L&M a farm and fleet supply store, and the Super Wal-Mart. L&M sells all manner of farm and fleet supplies, as well as hunting equipment, replacement parts for trucks, tractors, cars, and major appliances, and home improvement items."	Opposer's NOR No. 4
Printout from "googleusercontent.com," author identified as BobPalma, July 9, 2008 "We also have a small 'Farm & Fleet' type store called Thrifty Supply. They do an excellent business with more of agricultural angle than the other stores."	Opposer's NOR No. 4
Printout from "igcshow.com" website, September 24, 2012	Opposer's NOR No. 4

"Senoret Chemical Co., Inc. (Senoret) is a manufacturer and marketer of insecticides, rodenticides and repellents for the consumer markets … These products are sold primarily to Mass Merchandisers, Home Improvement Centers, Hardware Dealers, Grocery and Drug stores, Farm and Fleet centers and independent lawn and garden retailers."	
OurPet's Company Press Release, January 3, 2006 "Pet Zone products are sold through pet specialty distributors and retailers, mass retailers, grocery chains, farm and fleet stores, E-commerce and catalogs."	Opposer's NOR No. 4

Opposer also relies on its own use of FARM FLEET for over 50 years. C. Norby Tr. at 6-9 and Exs. 1-3. According to Constance Norby, opposer uses FARM FLEET because it describes the types of products opposer sells. C. Norby TR. at 17-18.

Finally, opposer points out that the identification of goods in cancelled Registration No. 1193481 for the mark F & F in typed form included ""sold in farm and fleet stores." Opposer's NOR No. 1.

B. Applicant

Applicant relies on its Registration No. 3009930, for the mark BLAIN'S FARM & FLEET for applicant's Retail Store Services, which includes a claim of acquired distinctiveness as to FARM & FLEET. Blain Tr. Ex. 25; Applicant's NOR No. 4. Applicant points out that its Online Services involve the retail sale of the same goods offered through applicant's Retail Store Services.

Applicant also relies on its extensive promotion of its mark and sales by its "brick and mortar" stores in Wisconsin, Iowa and Illinois. While the specific figures

are confidential and will only be discussed generally here, suffice it to say that in 1989 applicant's gross advertising expenses were quite significant, and have increased substantially since that time. Similarly, applicant's sales have grown significantly from their already high level in 1977 to a much higher level today. Schendt Tr. Ex. 69. By any measure, applicant's gross sales and gross advertising expenses are extremely impressive, fast-growing and at the absolute highest end of the range seen in Board cases. All of applicant's 35 stores have always and continuously used FARM & FLEET. Blain Tr. at 27-28.

Mr. Zeckmeister of Briggs & Stratton, who is familiar with the parties' industry, testified that FARM & FLEET is not a generic term, and that it currently "means" applicant. He is aware that Quality Stores also used the mark at one time, but ceased to exist "10, 15 years ago." Zeckmeister Tr. at 19-25; Blain Tr. at 43-44. Mr. Schansberg testified that in front of the Clinton, Iowa Home Depot store was a sign stating: "We will beat Farm & Fleet by 10% on same or comparable portable power tools," referring to applicant. Schansberg Tr. at 40 and Ex. 89. Applicant's stores are also used as reference points, for example by other businesses which identify themselves to customers by saying "across the street from Farm & Fleet" or "next to farm and fleet," for example, in reference to applicant. Gilbertson Tr. at 43. Applicant offers a wide variety of "private label" products under the BLAIN'S FARM & FLEET mark, including candy, nuts, automotive products, batteries, Christmas lights, clothing, pet food, etc. *Id.* at 17-20 and Ex. 60.

Applicant commissioned a "jingle" or "theme song" in 1991 which prominently features applicant's mark ("It's everything that you need … the hardest working people in America Find Value at Farm & Fleet. … So many choices … and we believe … the hardest working people in America Find Value at Farm & Fleet."). Gilbertson Tr. at 35-37 and Ex. 62. The jingle has been used "constantly" in applicant's radio and television commercials ever since. *Id.* In fact, applicant uses the jingle in approximately 300-350 radio commercials and 150 television commercials per year, and attempts to reach each person in its market areas twice with each commercial. Schansberg Tr. at 42-44. Applicant advertises on almost 90 different radio stations and in over 70 different newspapers. *Id.* at 31 and Ex. 100. It advertises during telecasts of college and professional sporting events, including games featuring the Milwaukee Bucks and Brewers, Green Bay Packers, Marquette basketball, and the Chicago Bears, Blackhawks and Cubs. *Id.* at 83. Applicant's print advertising campaign is similarly extensive and substantial; for example, applicant distributed 39 "mass inserts" in 2012, delivered to over three million homes in all 35 markets where applicant has brick and mortar stores. *Id.* at 54-61, 66-69. Applicant promotes itself through celebrity endorsers, including NASCAR driver Matt Kenseth, whose racing suit bears applicant's FARM & FLEET logo and domain name, "farmandfleet.com;" Mr. Kenseth's racing car also bears the FARM & FLEET mark and "farmandfleet.com" domain name. Schansberg Tr. at 11-13; Gilbertson Tr. at 16-17 and Ex. 59. Applicant employs over 20 people in its

marketing and advertising department. Schansberg Tr. at 13-14. Some of applicant's advertisements are distributed nationally. Schansberg Tr. at 56-57.

Applicant also relies on its fast-growing Internet presence and sales, which have extended use and recognition of the FARM & FLEET mark beyond the three states where applicant operates brick and mortar stores. When applicant started selling products online in October 2009, it offered tens of thousands of items, and now offers several times that many. *Id.* at 34, 38; Tarnutzer Tr. at 10. Within two months of beginning to sell products online, applicant had sold products to customers in all 50 states and continues to do so. Gilbertson Tr. at 38-39. Applicant's Internet sales have grown substantially, continuously and rapidly since 2009, but remain significantly less than sales by applicant's brick and mortar stores. Schendt Tr. Ex. 69. Applicant's "Internet market penetration" is particularly significant not only in the states where it has brick and mortar stores, but also in California, New York, Texas, Florida, Pennsylvania, Ohio, Minnesota and Michigan. Ziegler Tr. at 17-18. The domain name for applicant's website is "farmandfleet.com." Blain Tr. at 60.

Like opposer, applicant also relies on news articles and other materials, but applicant does so in support of its claim of acquired distinctiveness. Applicant relies on the following:

Source and Statement	**Citation**
Gary Van Sickle, "Golf news, instruction, equipment, travel, courses, scores and more," printout from "golf.com," July 17, 2012	Applicant's NOR No. 4

referencing a billboard for the John Deere Classic golf tournament: "The billboard's location – along the busy four-lane road that passes John Deere Co. headquarters and leads to TPC Deere Run – was perfect. Stricker's visage stands between two Midwestern icons – a towering market for Blain's Farm & Fleet store and a sprawling new Menards home center.	
Jo Anne Killeen, "Highway 16 Turn Lane Extension Planned for '12," Courier Life News, November 11, 2011 Subtitled "Project will cut off access to Farm & Fleet" in reference to applicant "the city has not complied with terms of a grant to modify the westbound Highway 16 lanes in front of Farm and Fleet," referencing applicant "According to the letter, the city will have to close the median opening providing access to Farm and Fleet because of deteriorating traffic conditions …"	Applicant's NOR No. 4
Matt Liparota, "Rockton's Farm & Fleet Opens Doors for Business," Beloit Daily News, April 12, 2012 "The store employs 133 people, [Jane Blain] Gilbertson said, most of whom are area residents. Job fairs near the beginning of the year brought in close to 2,000 applicants, she said." "Gilbertson said the company chose to move into the Rockton market because many customers in their Rockford, Loves Park and Belvidere locations were coming in from the Rockton-Roscoe area."	Applicant's NOR No. 4
Cynthia Beaudette, "Wearing Their Hearts on Their Sleeve," The Muscataine Journal, November 1, 2011 "Pam bought her son the two Wrangler western-style shirts – including the blue one he was wearing when he died – at Farm and Fleet in Muscataine, for Christmas in 2009." "Pam returned several times to Farm and Fleet to purchase another shirt like the ones Derek had liked so well … After learning why the shirt meant so much to Pam, the employee called Wrangler's national	Tarnutzer Tr. Ex. 79

headquarters to see if the shirt was available elsewhere … A few weeks later a package of custom-made, red and blue shirts arrived at Farm and Fleet for the Dallege family."	
Barry Adams, "East Side Farm & Fleet to expand," printout from "Madison.com," September 29, 2010 "The Farm & Fleet store on Madison's East Side is getting more room for snowblowers, bird seed, Toyland and tires. …The move comes two years after the company opened its second Dane County location, in Verona, and will increase the size of the Madison store at 2202 S. Stoughton Road to 108,000 feet. 'It's a testament of the high volume of sales it earns compared to its relative small size,' said Renee Tarnutzer, a spokeswoman for the company. … Farm & Fleet has 34 stores in Wisconsin, Illinois and Iowa."	Tarnutzer Tr. Ex. 79
Kevin Murphy, "Blain's Farm & Fleet retains name rights," The Janesville Gazette, December 12, 2011 "Blain's Farm & Fleet retained exclusive rights to use its trade name in settling a legal dispute with a Minnesota retailer, which also uses the Farm and Fleet name for its stores." "… Runnings Supply, the Marshall, Minn.,-based retailer agreed to: -- Drop any 'Farm & Fleet' reference on its website -- Restrict the use of the Runnings Farm & Fleet name to Minnesota, North Dakota, South Dakota, Montana, Colorado, Wyoming and Nebraska." --Not use 'Farm & Fleet' without it being preceded by 'Runnings' in those seven states. Blain's spokesperson Renee Tarnutzer said the Janesville-based corporation was pleased with the terms. 'We get to use the trademark nationwide. Runnings is restricted to using it in the seven states (they currently operated in),' she said." "Runnings' conceding the use of 'Farm & Fleet' on its website might be increasingly important in the future. Both companies used basically the same name for years as retailers in adjoining states, but Blain's filed suit in December 2009 as both chains turned to the Internet to gain sales. When the suit was filed, Blain's attorney	Tarnutzer Tr. Ex. 79

George Steil confirmed that Internet sales were among the key reasons for the suit. 'It causes confusion among customers and conflicts when two companies using the same name start selling the same merchandise over the Internet,' Steil said. In 1955, Blain's began using 'Farm & Fleet' on its retail stores, which have since grown to number 34. In the 1980s, Claude and Bert Blain changed the name to Blain's Farm & Fleet to avoid confusion with Mills Fleet Farm, another Wisconsin retailer. In 1996, Runnings began using the name Runnings Fleet & Farm but changed in early 2002, when Runnings' new name was challenged by Mills Fleet Farm. That resulted in Runnings switching the last two words in its trade name to Runnings Farm & Fleet."	
Jane Burns, "Addition Planned for Farm & Fleet's Stoughton Road store," printout from "Madison.com," February 3, 2011	Tarnutzer Tr. Ex. 79
Seth Jovaag, "Verona native building new Farm and Fleet store," The Verona Press, May 18, 2008 "This will be the 34th Farm and Fleet location and the fourth built by Design Structures. The new store will be the company's most architecturally advanced, as Verona's Plan Commission put heavy demands on Blain's Supply when president Robert Blain brought the project for approval last spring. Many on the commission and the Common Council considered the development the 'gateway' to the city and therefore had higher visual standards for the 114,525-square-foot building – the biggest retail project Verona has had by far – than are normally seen at Farm and Fleet stores. In the end, Blain's decided to have an architect design the façade, the first time it has done so with a retail store." 'You have to give credit to Farm and Fleet,' Zingg said. 'They were willing to work (with city officials), and this is the result.'" "'I think it really looks nice,' he said. 'It's going to be an asset to the city.'" "Anderson tipped his hat to Farm and Fleet, noting how the company spent extra money during construction to 'build green.' Those efforts included transplanting trees off site and recycling tons of materials from the foundation of the former Hometown Village assisted-living complex.	Tarnutzer Tr. Ex. 79

'A lot of big-box developers would just come in and trash the place and leave it that way,' Anderson said. They went out of their way to do a lot of environmentally sensitive things.'"	
Seth Jovaag, "Farm and Fleet brings big names to Verona for grand opening," The Verona Press, September 22, 2008 "Five weeks after Blain's Farm and Fleet opened on Verona's east side, the store is hosting a three-day party that will feature some big names and big crowds. The three-day grand opening from September 25-27 will include appearances by NASCAR driver and Cambridge native Matt Kennseth, University of Wisconsin athletic director Barry Alvarez, UW-Madison basketball coach Bo Ryan and former Green Bay Packers president Bob Harlan. The company is also giving away $25,000 in gift cards and shopping sprees, and entertainment will range from a 'horse whisperer' who will tame area stallions to a performance by 'Lenox Hackman' (yes, that's a stage name) who will cut a car in half for the audience's enjoyment, said company spokesperson Renee Tarnutzer. Blain's Supply always holds a grand opening party for new stores, though Verona's 114,525-square-foot store is the company's first new location since 2000. Tarnutzer expects the event to draw about 10,000 customers a day." "Keri Hall, general manager of the nearby Super 8 Hotel, said all 40 of her rooms are booked throughout the week because of the grand opening. For celebrity appearances, large crowds could prompt the company to issue tickets to visitors on a first-come, first-served basis to determine an order of who gets to meet and greet the famous guests, she said."	Tarnutzer Tr. Ex. 79
Neil Johnson, "Chest Pains? Don't Drive. Call 911," The Janesvile Gazette, December 1, 2011 Caption: "Janesville paramedics treat 'patient' Eugene Martin for a possible heart attack in the furniture section of the Farm and Fleet store. The event was an exercise put on by Mercy with the city and the heart association to encourage the use of 911 in cardiac emergencies."	Tarnutzer Tr. Ex. 79
"Kitties Dylan and Ebony are looking for love!," December 5, 2011	Tarnutzer Tr. Ex. 79

"You can meet them both at Farm and Fleet in Woodstock on Saturday December 10th and Sunday December 11th; we will have some of our adoptable kittens & cats near the Pet Department both days."	
Brian D. Bridgeford, "Riverfront plan ready: Public input to be sought at meeting," News Republic September 8, 2011 "The analysis has generated new information about three areas from which Baraboo draws consumers – the nearby convenience trade area, the middle-distance destination trade area of people bound for Wal-Mart and Farm and Fleet, and tourists who can come to Baraboo from a very wide area, he said."	Tarnutzer Tr. Ex. 79
Sarah Millard, "Attorney General Announces Crime Alert Network Program and Waukesha Store," Menomonee Falls Patch, December 6, 2011 "A new program will allow community members, businesses and other organizations to receive up to date notifications about crime trends in the area and suspect descriptions in an effort to increase citizen participation with local law enforcement in solving crimes, Attorney General J.B. Van Hollen announced during a news conference Tuesday morning at Farm and Fleet in Waukesha."	Tarnutzer Tr. Ex. 79
Jenn Smith, "Farm & Fleet Toyland Opening," printout from "973rivercountry.com" website, October 17, 2011 "Todd Bryand got up early to broadcast from the opening of Toyland at Farm & Fleet in Morton!"	Tarnutzer Tr. Ex. 80
Printout from "asap-usa.org" website "ASAP will continue doing adoption events at the Woodstock, Illinois Farm and Fleet on Saturdays and Sundays between from 10am to 2pm."	Tarnutzer Tr. Ex. 80
Jay Furst, "Furst Draft," Post Bulletin, October 24, 2005 "Both Mills Fleet Farm and Blain's Farm & Fleet are celebrating their 50th anniversaries this year. In both stores, the layout is virtually the same, as is the merchandise. Are they owned by the same company? – Peter	Tarnutzer Tr. Ex. 80

"Though it's often rumored in farm country that the Mills and Blain's chains are the result of a family feud, they're not, says Blain's spokeswoman Renee Tarnutzer. 'In fact, we chuckle every time we hear the rumor that there was some sort of family dispute between two brothers,' she says. The Mills Cos. opened a farm merchandise store called Fleet Wholesale Supply in Marshfield, Wis. in 1955, and that piece of the Mills family empire morphed into Mills Fleet Farm in 1960. It has 30 stores in Minnesota, Wisconsin, North Dakota and Iowa. Blain's Farm & Fleet also dates from 1955 and was founded by brothers W.C. Blain and N.B. Blain. The chain has 33 stores in Wisconsin, Illinois and Iowa; the closest to Rochester is in LaCrosse, Wis. Unlike Fleet Farm, Blain's has a company song, recorded in Nashville by members of Eddie Rabbitt's band, with lyrics such as, 'We're making it easy to save you time … we're bringing you quality … the top of the line."	
"Farm and Fleet, Fleet Farm," Printout from "tommcmahon.net" website, June 30, 2005 "Completely separate companies running two competing chains of real he-man guy stores in Wisconsin … I've been told they at one time they were a single company run by two brothers who got into a fight but I haven't found anything to support that bit of Local Wisconsin Folklore. … If you are training to be a spy and your cover story is that you are from Wisconsin, this is a little bit of Wisconsin Culture you need to know."	Tarnutzer Tr. Ex. 80
Michelle K. Mellor, "Planting the Seeds of Prairie Renewal," Chicago Tribune, March 21, 2000 "With multi-lane traffic converging at U.S. Highway 14 and Lake Street in Woodstock, the vacant lot across from the Farm and Fleet store may seem an unlikely location for a prairie restoration project."	Tarnutzer Tr. Ex. 80

Ms. Tarnutzer testified that she knows these references are to applicant's stores because "[t]hey are mentioning the Farm & Fleet in locations where we have our stores or they are specifically stating a store." Tarnutzer Tr. at 20-25.

Applicant further relies on its trademark enforcement efforts, which include sending "cease and desist" letters to those it becomes aware are using FARM & FLEET without authorization, and if necessary filing lawsuits for trademark infringement. Schendt Tr. at 20-21; Tarnutzer Tr. at 37; Blain Tr. at 49-51 and 69-73 and Exs. 37-40; Gilbertson Tr. at 60-61. This includes publications which use FARM & FLEET incorrectly, such as Home Channel News, and according to Messrs. Schendt and Blain, Home Channel News stopped using "farm and fleet" generically after applicant requested that it do so. Schendt Tr. at 20-21; Blain Tr. at 70-72.[8] In fact, the Home Channel News articles upon which opposer relies all predate applicant's cease and desist letter.

Applicant filed a trademark infringement lawsuit against Running Supply of Minnesota over Running's use of FARM & FLEET, which was terminated when the parties entered into a Settlement Agreement. Blain Tr. at 62-67 and Ex. 36. Pursuant to the Settlement Agreement:[9]

> • Runnings will "permanently remove from its website all references to 'Farm and/& Fleet' and will permanently refrain from search engine optimization regarding said website …;"
>
> • Runnings is permitted to use the name "Runnings Farm & Fleet" for its retail stores and advertising consistent with its current market practices, but only in certain states in which applicant does not have any retail stores;

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[8] Mr. Schendt mistakenly referred to the recipient of the request as "Home Shopping News."

[9] While the Settlement Agreement itself is designated as "confidential," Mr. Blain's testimony concerning the Agreement is not.

> • Runnings acknowledged applicant's exclusive ownership rights in its federally registered trademark "Blain's Farm & Fleet;" and
>
> • Runnings "will withdraw all opposition to currently pending Blain trademark applications with the United States Patent and Trademark Office."

Blain Tr. at 62-67 and Ex. 36 ¶¶ 1-4.

While applicant concedes that there is an "obvious similarity" between FARM & FLEET and FLEET FARM, which is used by Mills Fleet Farm, Mr. Blain testified that Mills uses FLEET FARM pursuant to a "verbal agreement" allowing it to use FLEET FARM with applicant's permission. Blain Tr. at 73-74. The agreement between applicant and Mills is not surprising given their history, in that applicant and Mills together helped to form Mid-States and the concept of selling to farmers and others at a discount provided they had a "fleet card." Mills Tr. at 6-12. In fact, Mills Fleet Farm and the Mills family features prominently in the book written to celebrate applicant's 50th "anniversary":

> The Mills family had the same sense about the potential success of this concept and had spoken to the Blains at some length about the opportunity. Again, to avoid competing with their established dealerships in Minnesota, they opened up their first store operation, Valley Wholesale in Appleton, Wisconsin. The government however, felt it was misleading to call their consumer discount "wholesale" so they demanded the Mill's Valley Wholesale organization change their name. As the Blains had already taken the name Farm & Fleet, Stew Mills contacted the Blain brothers and asked if it would be a problem to use the name Fleet Farm. As the four had now become friends, it was eventually agreed that the name choice would be OK. Claude and Bert Blain remained close friends of the Mills family throughout the remainder of their lives.

Gilbertson Tr. Ex. 61.

Finally, applicant relies on a secondary meaning survey, report and testimony by its expert witness Philip Johnson, Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a market research firm which conducts surveys for use in trademark litigation. Johnson Tr. Ex. 3 ¶ 1. Mr. Johnson, a graduate of Loyola University who received an M.B.A. from the University of Chicago Business School, has designed and supervised hundreds of consumer surveys in his over 40 year career, a number of which relate to secondary meaning. *Id.* ¶ 2; Johnson Tr. at 9. His surveys have always been accepted into evidence and he has always been admitted as an expert in the cases for which he has conducted surveys. Johnson Tr. at 10.

The purpose of the survey was to determine "whether FARM & FLEET has acquired secondary meaning within the geographic area where [applicant] operates its Farm & Fleet stores, such that the primary significance of the term FARM & FLEET is to identify a store that comes from a single, even if unknown, source." Johnson Tr. Ex. 3 ¶ 3. The survey was originally conducted in connection with another dispute, but Mr. Johnson believes its results "are applicable to the tri-state area (including Iowa), and would therefore, be useful in this dispute." *Id.* ¶ 4.

The survey was conducted between July 16-26, 2010 by telephone. In total, 404 consumers above the age of 18 "who are responsible for all or some of the shopping needs of the household" were interviewed. *Id.* ¶ 5. Interviewees were randomly selected from a sampling of both listed and unlisted numbers, "based on

having a high probability of being within a 12 mile wide circle around one of 33 Farm & Fleet store locations that has been operating prior to 2003, the year when [applicant] applied for registration of the 'Blain's Farm Fleet' mark" with the Office. *Id.*

One half of the interviews (201) were in the "test cell," and were asked about the term FARM & FLEET, while the other half (203) were in the "control cell" and were asked about the term RANCH & MACHINERY, which has a "parallel construction" to FARM & FLEET but "is not believed to currently function as a name of an actual retailer." *Id.* ¶ 6. Each participant was first asked whether they had heard of the term used for their cell. If they had not, the interview terminated. *Id.* ¶ 9. If they had, they were asked "Who or what/what or who is FARM & FLEET [RANCH & MACHINERY]?" *Id.* ¶ 10.[10]

Participants were next asked whether the term is owned or operated by one company or more than one company, and "What makes you say that?" *Id.* ¶ 11. Those who responded that the term is owned by one company were also asked where that store or company is located. *Id.* Interviews were "double-blind" and validated, and other standard survey techniques were used. *Id.* ¶¶ 9, 12, 14-16.

The survey revealed that "[v]irtually all of the test cell respondents (98%) are familiar with FARM & FLEET. By contrast, only 4% of control cell respondents report awareness of RANCH & MACHINERY." *Id.* ¶ 17. A majority of those asked how they would describe FARM & FLEET provided "a specific description that is

[10] "The order in which 'who or what' or 'what or who' was asked was rotated between respondents in both the test and control cells to eliminate any potential order bias." *Id.* ¶ 9.

consistent with [applicant's] stores (50% cite general store, 39% farm implement store) or describe goods and services found in these stores (45% cite clothing, 29% hardware, and 27% automotive goods). In contrast, control cell respondents do not describe a specific retailer, but give very general responses that are descriptive of the words 'ranch' and 'machinery.'" *Id.* ¶ 18. Furthermore, "a substantial majority of test cell respondents (59%) believe that FARM & FLEET is owned or operated by one company compared to just one control cell respondent (0.5%) who believes that RANCH & MACHINERY is owned or operated by one company." *Id.* ¶ 19. When asked why they believe that FARM & FLEET is owned by one company, those respondents state "that they are familiar with it (16%), it is a family company (15%), they specifically name Blain (11%), or say it is owned by one company (11%)," and 55% "correctly identify one of [applicant's] locations." *Id.* ¶¶ 20-21. Overall, "a majority of test cell respondents believe FARM & FLEET is operated by a single company (56%) and either spontaneously name Blain as the owner (12%) or identify a Blain Supply Farm & Fleet store location (55%) when describing FARM & FLEET." *Id.* ¶ 22. Mr. Johnson's conclusions include the following:

> • "FARM & FLEET is known to virtually all of the population (98%) who reside in" Illinois, Wisconsin and Iowa in regions where applicant has operated its FARM & FLEET stores prior to 2003;
>
> • "a majority of consumers believe FARM & FLEET is owned or operated by a single source (59%), which indicates that this name has acquired secondary meaning in its market area;" and

- "the primary significance of the term FARM & FLEET is to identify a store that comes from a single source."

Id. ¶¶ 23, 25, 27. In addition, based on the survey results, Mr. Johnson testified that "farm and fleet is not generic. It describes a specific source, not a general kind of source." Johnson Tr. at 32. However, he conceded that this "observation is based on the tri-state area where I conducted the survey." *Id.*

IV. Analysis

Applicant concedes, and the evidence establishes, that FARM & FLEET is merely descriptive. *See, e.g.* Answer ¶ 3; Applicant's NOR No. 4 (Registration No. 3009930, in which applicant claimed that FARM & FLEET has acquired distinctiveness) and *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."); Gilbertson Tr. at 51-52; Schansberg Tr. at 86-88. We are therefore left to determine, assuming that opposer has established its standing, first whether FARM & FLEET is generic, and, if it is not, whether it has acquired distinctiveness.

A. Standing

Opposer has established that it is engaged in the retail sale of goods such as those that applicant sells, including automotive, electrical and farm supplies, and hardware. C. Norby Tr. at 3-7, 19-21. This establishes opposer's standing to oppose the involved applications on the grounds of genericness and mere descriptiveness

without acquired distinctiveness. *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987); *Kistner Concrete Products, Inc. v. Contech Arch Technologies, Inc.*, 97 USPQ2d 1912, 1918 (TTAB 2011); *Stuart Spector Designs, Ltd. V. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1553 (TTAB 2009); *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1428 (TTAB 2007); *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 (TTAB 1999). Furthermore, opposer has introduced evidence, which applicant has not specifically contradicted, that it uses and desires to use FARM FLEET in connection with its retail stores. This also establishes opposer's standing. *See*, *Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676, 1679 (TTAB 2007); *Nature's Way Products Inc. v. Nature's Herbs Inc.*, 9 USPQ2d 2077, 2080 (TTAB 1989) (standing established where petitioner "is in a position to use the designation sought to be cancelled in a descriptive manner").

B. Genericness

"Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2011) (citations omitted). The ultimate test for determining whether a term is generic is the primary significance of the term to the relevant public. *See* Section 14(3) of the Act. *See also*, *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB, Inc.*, 940 F.2d 638, 19

USPQ2d 1551 (Fed. Cir. 1991). Opposer bears the burden of proving, by a preponderance of the evidence, that applicant's mark is generic. *Magic Wand*, 940 F.2d 638, 19 USPQ2d at 1554; *Tea Board of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1887 (TTAB 2006).

We must make a two-step inquiry to determine whether FARM & FLEET is generic: First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

Here, we find that the appropriate genus is adequately defined by applicant's identifications of services. *See*, *Magic Wand*, 940 F.2d at 638, 19 USPQ2d at 1552. In fact, the evidence establishes that applicant (and for that matter opposer) operates retail stores which sell the goods listed in the involved identifications of services; applicant's Online Services are effectively a subset of applicant's Retail Store Services, in that applicant sells the same goods online as it does in its brick and mortar stores. Blain Tr. at 12-21; Gilbertson Tr. at 7-10, 34. Opposer argues that "[t]he relevant genus of services is farm and fleet stores," Opposer's Trial Brief at 17, which is self-serving and begs the question, but nevertheless is effectively an admission that the relevant genus is adequately defined by applicant's Retail Store Services and Online Services.

Turning to how FARM & FLEET is understood by the "relevant public," we find that the "relevant public" is, as applicant proposes, the "general consumer." Applicant's Trial Brief at 42. Indeed, it cannot reasonably be argued that the relevant public is any more specific than that, given the exceedingly wide range of goods included in applicant's Retail Store Services and Online Services, and given that applicant (and opposer) now target not just the "farm community" but urban, suburban and rural communities comprising all types of consumers. Gilbertson Tr. at 21-22 ("So we really have to appeal to everybody truly"); Blain Tr. at 20 ("it's really opened up essentially to the general consuming public"). Opposer's customer base is similarly broad and "general." C. Norby Tr. at 12; P. Norby Tr. at 6-8.

Evidence of this relevant public's understanding of the term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985). Furthermore, "evidence of competitors' use of particular words as the name of their goods or services is, of course, persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods and services." *Continental Airlines, Inc. v. United Air Lines, Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999). Applicant's alleged mark is a phrase, and accordingly, we recognize that we may not "simply cite definitions and generic uses of the constituent terms" of the alleged mark "in lieu of conducting an inquiry into the meaning of the disputed phrase as a whole." *In re American Fertility*, 188 F.3d at 1341, 51 USPQ2d at 1836.

Opposer's evidence of genericness is certainly voluminous, but on close inspection, it becomes clear that there is less there than meets the eye. Indeed, while opposer relies on Internet printouts which appear to reveal that 12 entities used FARM & FLEET in their trade names, and 5 additional entities used FARM AND FLEET (which is not the exact term in question), there is no testimony or other evidence regarding these entities, their names, when or how those names were used, what goods or services, if any, are offered under the names, general consumers' perception of those names or anything else. As applicant points out, the materials upon which opposer relies, which are merely printouts from Internet websites, including the websites of various secretaries of state, "have little probative value. They are admissible only to show what has been printed, not the truth of what has been printed." *Safer*, 94 USPQ2d at 1040; TBMP § 704.08(b) (3d ed. rev. 2012) ("The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face; however, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed."). More specifically and importantly, the mere existence of corporate filings or Internet listings of companies which apparently used FARM & FLEET in their names does not establish that FARM & FLEET is currently in use in commerce or that general consumers have been exposed to any such uses, let alone that general consumers perceive the term FARM & FLEET as referring to the Retail Store Services or the Online Services. *See e.g.*, *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En* 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1693-94 (Fed.

Cir. 2005); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009). In fact, as indicated, opposer concedes that it did not verify that any of the companies listed are still in existence or that the listings are accurate. Applicant's NOR No. 3 (Haugen Tr. at 12-13). And the record makes clear that Quality Farm & Fleet, the only entity opposer relies upon which apparently had multiple locations, has been out of business for some time. Zeckmeister Tr. at 24; Mills Tr. at 32-33.

The SEC and other corporate filings upon which opposer relies are similarly unpersuasive standing alone, as they do. While the evidence reveals that eight companies have referred to "farm and fleet" (which, again, is not the term in question) or "farm & fleet" as a type of "retail channel" or "store," the statements were made only in SEC or other filings, and there is no evidence that consumers review such filings in general, much less that they reviewed the particular filings upon which opposer relies, nor is there any evidence regarding the size of these companies. In fact, it appears that these materials are directed not to general consumers, but instead primarily to investors, and there is no evidence whether or to what extent investors in these particular companies shop at retail stores or websites such as applicant's. This evidence also appears to be rather obscure, rather than an indication of how general consumers (as opposed to investors, lawyers or regulators) perceive the term FARM & FLEET. Indeed, while some of this evidence suggests that some have used "farm & fleet" to refer to a type of retail

channel, none of it suggests that general consumers perceive the term as referring to the Retail Store Services or the Online Services.

The printouts of news articles and promotional materials, while voluminous, fare no better. At least seven of the articles are from Home Channel News, to which applicant sent a "cease and desist" letter on June 26, 2008, informing Home Channel News that BLAIN'S FARM & FLEET is a registered trademark. Blain Tr. Ex. 38. All seven of the articles predate the letter, and Home Channel News has apparently not used FARM & FLEET in a generic manner since receiving the letter. Opposer's NOR No. 2; Schendt Tr. at 20-21; Blain Tr. at 70-72. Of the remaining articles, most use "farm and fleet" or "farm-and-fleet," which are not the term in question, and at least two may be referring in part to applicant based on their use of capitalization, such as "what is called 'Farm & Fleet' or farm/ranch stores," and "a small 'Farm & Fleet' type store called Thrifty Supply." Most importantly, as with the other evidence upon which opposer relies, there is no indication whatsoever whether anyone, let alone a substantial number of general consumers, has seen these materials, or whether general consumers perceive the term FARM & FLEET the way the authors of some of these materials apparently do. *See, In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 & n. 1 (Fed. Cir. 1987) (finding CASH MANAGEMENT ACCOUNT not generic for stock brokerage and related services, pointing out that "[t]he issue … is how the consuming public views the mark," and stating that like the Internet, "[i]t is indeed remarkable to see the thoroughness with which NEXIS can regurgitate a [term]

casually mentioned in the news"); *Baroness Small Estates, Inc. v. American Wine Trade, Inc.*, 104 USPQ2d 1224, 1228 (TTAB 2012) ("The mere fact that one can do a search on the Internet and find, for example, a photograph on the flickr website, does not mean that consumers will be aware of this photograph."). In short, while these articles may have been persuasive if accompanied by additional evidence showing that they are indicative of how general consumers perceive FARM & FLEET, they are unpersuasive standing alone, especially because they also appear to be from obscure or easily-manipulated Internet sources, and/or do not pertain to retail or online services targeted to general consumers. *See*, *In re Country Music Association Inc.*, 100 USPQ2d 1824, 1830 (TTAB 2011) (reversing finding that COUNTRY MUSIC ASSOCIATION is generic for "association services, namely, promoting country music, and promoting the interests of country music entertainers and the country music recording industry," based in part on finding "merit in applicant's argument that the examining attorney's Internet evidence of third-party usages are relatively obscure"); *see also, Carl Karcher Enterprises, Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995) ("applicant has not furnished any evidence regarding the extent of use of the marks by these third parties. The geographic locations of these restaurants, in many instances, are relatively obscure. Moreover, the pictures of these restaurants tend to indicate that the operations are small and local in nature.").

To the extent that opposer uses FARM FLEET, that use may support our finding (and applicant's admission) that FARM & FLEET is merely descriptive, but

it is not particularly relevant to opposer's claim of genericness. *American Fertility*, 188 F.3d at 1341, 51 USPQ2d at 1836 ("the Board erred in finding that the proven genericness of the words, 'society,' and 'reproductive medicine,' without more, rendered generic the phrase SOCIETY FOR REPRODUCTIVE MEDICINE"). Moreover, opposer's evidence of its own use of FARM FLEET is sparse at best, and provides no information which suggests, let alone establishes, how general consumers perceive FARM & FLEET. Similarly, while Mills Fleet Farm uses FLEET FARM, that is not the term in question, and in any event Mills uses this term pursuant to an oral license from applicant.

As for applicant, its fairly extensive efforts to protect and enforce FARM & FLEET weigh against a finding of genericness. *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1640 (TTAB 1999) (applicant's "assertions of trademark rights in the term 'plyboo,' as evidenced for instance by its attempting to register such mark in the United States and its obtaining a correction notice with respect to an article in the *San Francisco Examiner* which used the mark generically, are relevant with respect to the issue of mere descriptiveness"). Applicant's prior Registration No. 3009330 for the mark BLAIN'S FARM & FLEET, which includes a claim of acquired distinctiveness as to FARM & FLEET, further suggests that FARM & FLEET is not generic. Perhaps more importantly, applicant's wide-ranging, pervasive and extended promotional efforts, which have met with considerable and increasing success given applicant's extraordinary level of sales, support a finding that FARM & FLEET identifies applicant, not applicant's Retail

Store Services or Online Services. *See e.g.* Zeckmeister Tr. at 19-25; Schansberg Tr. at 42-44 and Ex. 89; Gilbertson Tr. at 43; Applicant's NOR No. 4; Tarnutzer Tr. at 20-25 and Exs. 79, 80. Applicant's successful and fast-growing Internet presence and extensive Internet sales throughout the country similarly weigh against a finding of genericness, and while there is no evidence of whether or to what extent general consumers have been exposed to opposer's Internet evidence, the record makes clear that general consumers have had a great deal of exposure to applicant's website. Mr. Johnson's survey and testimony, while focused on the issue of secondary meaning, also tend to support the conclusion that FARM & FLEET identifies applicant rather than the Retail Store Services or the Online Services. *See* 2 *McCarthy on Trademarks and Unfair Competition* § 12.46 (4th ed. 2013) (secondary meaning survey may support finding that mark is not generic); *see also*, *Trump v. Caesars World, Inc.*, 645 F.Supp. 1015, 230 USPQ 594, 599 (D.N.J. 1986), *aff'd*, 819 F.2d 1135, 2 USPQ2d 1806 (3d Cir. 1987) (where survey to determine the meaning of the word "palace" found that 45.8% of respondents mentioned Caesars and 11.4% cited Trump's casino, "[t]his survey tends to negate Trump's contention that 'palace' is a generic term for accommodation and tends to support the contention that in the context of gambling activity in general palace is indicative of a source of such services.").

In short, while opposer has presented some evidence of genericness, it is of limited value because of its nature, because it is unexplained and unsupported by testimony or other evidence which would reveal how general consumers perceive

FARM & FLEET, and because it is obscure. That evidence must be balanced against applicant's impressive showing that FARM & FLEET is heavily promoted, enforced when necessary and well-recognized as identifying applicant. The "mixed" evidence in this case is simply insufficient to meet opposer's burden of establishing that FARM & FLEET is generic. *See e.g.*, *In re Merrill Lynch*, 828 F.2d at 1567, 4 USPQ2d at 1143; *In re America Online Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006). Accordingly, opposer's claim of genericness is dismissed with prejudice.

C. Acquired Distinctiveness

While the involved applications were each published for opposition without claims that the marks have acquired distinctiveness under Section 2(f), applicant asserts acquired distinctiveness as an affirmative defense to opposer's claims of mere descriptiveness. Answers ¶¶ 3, 4, 6-8. Applicant bears the burden of establishing the defense of acquired distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004-06 (Fed. Cir. 1988); *see also*, *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). In order to meet this burden, applicant "must show that, in the minds of the public, the primary significance of [FARM & FLEET] is to identify the source of the [service] rather than the [service] itself." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.11 (1982). In determining whether applicant has met its burden, we "may examine copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the

name to a source)," though "no single factor is determinative." *Steelbuilding.com*, 415 F.3d at 1293, 75 USPQ2d at 1424.

It is settled that "the applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning." *Id.* (citing *In re Bongrain Intern. (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990)). Here, the evidence establishes that applicant's mark is descriptive enough that applicant's burden of proving acquired distinctiveness is "concomitantly high." *Id.* Indeed, applicant has consistently disclaimed the term "farm" in its applications and registrations, with one exception, and has disclaimed "'FARM' OR 'FLEET'" in its Registration No. 2852826. During prosecution of the application which issued as Registration No. 3009930, applicant conceded in an Office action response that "'FARM may be used to refer to farm supplies and equipment which Applicant sells in its retail stores," and that "the term 'FLEET' may broadly related (sic) to vehicle repair, maintenance and installation services, which Applicant also offers through its retail stores." Opposer's NOR No. 1. Applicant's witnesses and the book it published in connection with its 50th anniversary also make clear that both "farm" and "fleet" are, at least individually, quite descriptive of applicant's Retail Store Services and Online Services. Mills Tr. at 11; Tarnutzer Tr. at 28; Gilbertson Tr. at 28-29, 52 and Ex. 61; Schansberg Tr. at 86-88.

In other words, applicant must clear a high hurdle to prove acquired distinctiveness. We find that it has done so.

"In appropriate cases, ownership of one or more prior registrations on the Principal Register … of the same mark may be accepted as prima facie evidence of distinctiveness." Trademark Rule 2.41(b). Here, applicant owns Principal Register Registration No. 3009930 for the mark BLAIN'S FARM & FLEET, in typed form, for applicant's Retail Store Services, with a claim of acquired distinctiveness as to FARM & FLEET. This is obviously the same mark as BLAIN'S FARM & FLEET, in standard characters, the mark in involved application Serial No. 77894710, because there is no substantive difference between "standard character" marks and marks in "typed" form. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol … we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks"). We also have no difficulty finding that the mark in the prior registration is the "same mark" as FARM & FLEET, the mark in the remaining two involved application Serial Nos. 77894766 and 77894812. In fact, the only difference between the mark in the prior registration and FARM & FLEET is the surname BLAIN'S, which is not inherently distinctive. *See generally, Dial-A-Mattress*, 240 F.3d at 1341, 57 USPQ2d at 1813 ("As the 'same mark' or the 'legal equivalent' of '(212) M-A-T-T-R-E-S,' the '1-888-M-A-T-R-E-S-S' mark is entitled to rely on the former as prima facie evidence of acquired distinctiveness."); *Am. Sec. Bank v. Am. Sec. Bank & Trust Co.*, 571 F.2d 564, 197 USPQ 65, 67 (CCPA 1978) (AMERICAN SECURITY is legally equivalent

to AMERICAN SECURITY BANK). As for the services, they are identical with respect to involved application Serial No. 77894812, and with respect to involved application Serial Nos. 77894710 and 77894766, which are for applicant's Online Services, the difference is not meaningful, because as we have stated, applicant's Online Services are essentially a subset of applicant's Retail Store Services. *See Kellogg Co. v. General Mills, Inc.*, 82 USPQ2d 1766, (TTAB 2007) (CINNAMON TOAST CRUNCH for "cereal derived ready-to-eat food bar" legally equivalent to same mark for "breakfast cereal"). Accordingly, we find that applicant's prior registration of BLAIN'S FARM & FLEET, which includes a claim of acquired distinctiveness as to FARM & FLEET, is *prima facie* evidence that FARM & FLEET has acquired distinctiveness.

Applicant's advertising expenses and gross sales, which are substantial to say the least, and have been growing quickly and steadily for many years, further support applicant's claim of acquired distinctiveness. Applicant's mark FARM & FLEET is so well-known that it is used as a reference point in giving driving directions, and is the key lyric in applicant's advertising jingle, which is played on hundreds of radio and television commercials each year, and which is heard by millions of people. Applicant's stores sell approximately 150,000 different items and are physically quite large – applicant's brick and mortar stores range from 65,000 to 155,000 square feet and average 115,000 square feet. Blain Tr. at 14-16. While applicant came to be widely-known as FARM & FLEET in Wisconsin, Iowa and Illinois many years ago through its traditional retail stores, it has recently become

more well-known nationally as a result of its "farmandfleet.com" website, through which applicant now makes significant sales to customers in California, New York, Texas, Florida, Pennsylvania and other states beyond applicant's origins in Wisconsin, Iowa and Illinois.

Applicant has received substantial unsolicited media attention. Applicant's NOR No. 4; Tarnutzer Tr. Ex. 79. Many of the articles which reference applicant and its FARM & FLEET mark refer to how well-known applicant is, one refers to it as a "Midwestern icon," some reference applicant's trademark enforcement efforts, one praises applicant's environmental sensitivity, others reference public-service events which take place in applicant's stores, some mention applicant's celebrity endorsers and several discuss the FARM & FLEET name itself. In short, these articles make clear that FARM & FLEET primarily means applicant, its chain of stores and its website.

Mr. Johnson's survey, to which opposer does not specifically object, further supports a finding of acquired distinctiveness. Mr. Johnson has extensive experience in conducting consumer surveys, and several of his surveys have been admitted into evidence in court and Board proceedings. Johnson Tr. Ex. 3; *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425 (TTAB 2007). The survey randomly selected general consumers who have a high probability of living within 12 miles of one of applicant's stores, divided the respondents into "test" and "control" cells, and determined the ratio of respondents who associated FARM & FLEET with one source, even if anonymous. In short, the survey was consistent with accepted

survey procedures, and its results are probative. *See e.g.*, *Tone Bros. Inc. v. Sysco Corp.,* 28 F.3d 1192, 31 USPQ2d 1321, 1328-30 (Fed. Cir. 1994); *Monsieur Henri Wines, Ltd. et al. v. Duran*, 204 USPQ 601 (TTAB 1979); *In re Raytheon Co.*, 202 USPQ 317 (TTAB 1979). Furthermore, while the survey was conducted by telephone, this does not significantly detract from its reliability, especially because the survey concerned only the words FARM & FLEET, rather than a color, design or other mark for which a visual inspection would be expected to increase the reliability of the survey's results. *See generally, Saint-Gobain*, 90 USPQ2d at 1438-40 (involving one of Mr. Johnson's surveys).

We do have one concern with the survey, however, which is that its attempt to select consumers living within 12 miles of one of applicant's stores may have skewed the results. Mr. Ziegler testified that applicant considers consumers living in a zip code within 25 miles of the home zip code of one of applicant's stores to be "in market." Ziegler Tr. at 16. Mr. Johnson's selection of a subset of applicant's "in market" consumers, those living within 12 miles of one of applicant's stores, may have increased the likelihood of respondents associating FARM & FLEET with a single source because consumers living closer to a BLAIN'S FARM & FLEET store will be more likely to be aware of the mark given the large size of applicant's stores and their prominence in their communities. Indeed, as indicated, the evidence reveals that applicant's stores are sometimes used as a reference point or gathering place. Nevertheless, considering the survey in its entirety, and Mr. Johnson's

testimony, we find that the survey tends to support a finding that FARM & FLEET has acquired distinctiveness.

Finally, we find that applicant's long-term, continuous and substantially exclusive use of FARM & FLEET weighs in favor of finding that the mark has acquired distinctiveness. Applicant has now been using FARM & FLEET for 58 years, a significant amount of time by any measure. Perhaps more importantly, applicant's use of the mark has grown tremendously, from a single store in Janesville, Wisconsin to 35 highly successful brick and mortar stores and a fast-growing and increasingly national website accessible at "farmandfleet.com." While opposer has introduced a great deal of evidence that applicant's use of FARM & FLEET has not been exclusive, we find that evidence unpersuasive for the reasons stated in connection with our finding on genericness. Moreover, it is settled that opposer's reliance on "*any* use by others" and *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939 (Fed. Cir. 1984) is misplaced under the facts of this case.

> Section 2(f) declares that prima facie evidence of distinctiveness includes "proof of *substantially* exclusive and continuous use" of a mark for five years. 15 U.S.C.A. Section 1052(f) (West Supp. 1999) (emphasis added). As the Trademark Manual of Examining Procedure, Section 1212.05(b), recognizes: "The five years of use does not have to be exclusive, but may be 'substantially' exclusive. This makes allowance for use by others which may be inconsequential or infringing and which therefore does not necessarily invalidate the applicant's claim." *See generally In re International Flavors & Fragrances, Inc.*, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999) ("Although the Manual does not have the force of law, it 'sets forth the guidelines and procedures followed by the examining

> attorneys at the PTO.' " (quoting *West Fla. Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 1127 n.8, 31 USPQ2d 1660, 1664 n.8 (Fed. Cir. 1994))). The district court, therefore, erred in suggesting that *any* use by others is sufficient to preclude an applicant's declaration of "substantially exclusive" use. *Cf. Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1583, 6 USPQ2d 1001, 1010 (Fed. Cir. 1988) (affirming board's rejection of section 2(f) opposition, in spite of evidence that four other companies made similar products prior to registration).

L.D. Kichler Co. v. Davoil, Inc., 192 F.3d 1349, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999). In short, even if opposer's evidence establishes some generic use by others of FARM & FLEET, or use by others in connection with the Retail Store Services, Online Services or related services, when opposer's unsupported and mostly obscure evidence is weighed against applicant's extensive and impressive array, we find that applicant's use of FARM & FLEET has been extensive, continuous and substantially exclusive for 58 years.

Weighing all evidence of record, we find that applicant's prior registration, survey, and widespread, extensive, longstanding and fast-growing use of FARM & FLEET outweighs opposer's flawed and largely obscure evidence and establishes that FARM & FLEET has acquired distinctiveness. Accordingly, opposer's claim of mere descriptiveness is dismissed with prejudice.

V. <u>Conclusion</u>

Opposer has failed to meet its burden of proving that FARM & FLEET is generic. While FARM & FLEET is merely descriptive, applicant has established its defense that the mark has acquired distinctiveness. Accordingly applicant's

involved applications are hereby deemed amended to each include a claim of acquired distinctiveness under Section 2(f) with respect to FARM & FLEET.

Decision: The consolidated opposition is dismissed with prejudice, and applicant's involved applications are amended to include claims of acquired distinctiveness under Section 2(f) as to FARM & FLEET.

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