

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Hearing: April 20, 2011

Mailed: September 15, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Retail Brand Alliance, Inc.

Serial No. 77049126

Stephen L. Baker and John M. Rannells of Baker and Rannells
PA for Retail Brand Alliance, Inc.

David Taylor, Trademark Examining Attorney, Law Office 112
(Angela Wilson, Managing Attorney).

Before Cataldo, Taylor and Mermelstein,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Retail Brand Alliance, Inc. filed an application to
register on the Principal Register the mark BLACK FLEECE in
standard characters for the following goods, as amended:

belts; blouses; boots; bottoms; coats; dresses;
evening dresses; gloves; hats; hosiery; jackets;
men's suits, women's suits; mufflers; neckties;
pants; rainwear; scarves; shirts; shoes; shorts;
skirts; socks; suits; suspenders; sweaters; ties;
tops; trousers; and vests not made of fleece
fabric

in International Class 25.¹ The application is based upon an allegation of August 2007 as the date of first use of the mark anywhere and in commerce. During the course of examination of the application, applicant amended its application in the alternative to seek registration of its mark under Section 2(f) of the Trademark Act, based upon a declaration of substantially exclusive and continuous use of the mark in commerce since August 2007 and evidence attached thereto.

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is deceptively misdescriptive of its goods and that applicant's evidence is insufficient to show acquired distinctiveness of the mark under Section 2(f) of the Act.² When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issues under appeal, and applicant has filed a reply brief. In addition, applicant and the examining attorney presented arguments directed toward the issues on appeal in an oral hearing held on April 20, 2011.

¹ Application Serial No. 77049126 was filed on November 21, 2006.

² The examining attorney also raised but withdrew refusals to register based upon deceptiveness under Section 2(a) and mere descriptiveness under Section 2(e)(1).

With regard to the refusal to register under Section 2(e)(1), applicant acknowledges that because "the recitation of clothing goods in the application at issue states 'not made of fleece fabric,' the term 'black fleece' is facially misdescriptive of apparel that is not made of black fleece."³ However, applicant argues that "[t]he record, as well as common sense, dictates the conclusion that consumers are not likely to believe the facial misrepresentation."⁴ In the alternative, applicant argues that it has made a prima facie showing that its BLACK FLEECE mark has acquired distinctiveness under Section 2(f).

In support of its position, applicant has made of record the following evidence:

- advertisements, brochures, catalogs and invoices showing applicant's use since the mid-1800s of the marks BROOKS BROTHERS, GOLDEN FLEECE, and the "hanging lamb" design shown below, alone and in combination with each other and additional wording for a wide variety of clothing and clothing related goods;

³ Applicant's brief, p. 11.

⁴ *Id.*



- a hangtag for goods bearing its BLACK FLEECE mark; a brochure from September 2006 announcing the launch of the BLACK FLEECE line of clothing; a draft brochure introducing the BLACK FLEECE line of clothing from Fall 2007; and press clippings from Internet websites including brandish.tv, daveibsen.typad.com, brooksbrothers.com, coolhunting.com, men.style.com, washingtonpost.com, fashionweekdaily.com, gentrystyle.com, and fashionsite.wwd.com;
- the declaration of one of applicant's salespersons, Bella Raouf, attesting that: the BLACK FLEECE collection was launched in August 2007 in collaboration with the famous designer Thom Browne; such collaboration was the first time applicant hired a famous designer to create a line of clothing; the BLACK FLEECE line received a great deal of attention in trade journals, fashion magazines and Brooks Brothers stores; clothing items from the BLACK FLEECE collection are the most

expensive products offered by applicant; BLACK FLEECE products are displayed in a separate area or department within Brooks Brothers stores and by a separate link on the brooksbrothers.com website; and the BLACK FLEECE collection is part of the present trend for clothing companies to delineate fashion lines using color references. Declarant also attests that: applicant does not offer for sale any products made of fleece material; and that no consumers have expressed the belief that clothing items from the BLACK FLEECE collection are made of black fleece fabric;

- the declaration of applicant's chief merchandising officer, Lou Amendola, attesting that: applicant is the owner of the BROOKS BROTHERS trademarks; Brooks Brothers offers several clothing lines, including BROOKS BROTHERS, GOLDEN FLEECE and BLACK FLEECE; that from the time of its launch in August 2007 and the declaration date of December 15, 2008, applicant expended \$2 million promoting and advertising the BLACK FLEECE collection; the BLACK FLEECE link on the Brooks Brothers website has received nearly 141,000 visitors; the BLACK FLEECE line of clothing has received nationwide publicity in trade journals,

fashion magazines and applicant's stores; numerous celebrities have worn clothing from the BLACK FLEECE collection, in particular at the 2008 Emmy Awards ceremony; during 2008, BLACK FLEECE received over 167 million consumer impressions in printed publications; and applicant has realized sales of over \$3.6 million in the United States;

- the Amendola declaration also introduces the following exhibits: a press kit for the BLACK FLEECE launch; photographs of celebrities wearing BLACK FLEECE clothing; BLACK FLEECE media placement reports; and screenshots from brooksbrothers.com displaying photos and descriptions of the BLACK FLEECE products offered for sale;
- the declaration of John M. Rannells, one of applicant's attorneys, introducing the following exhibits: copies obtained from a search of the Lexis database of a sampling of news articles from March 2007 through July 2009 taken from third-party periodicals such as *The New York Times*, *Newsday*, *Chicago Tribune*, *Los Angeles Times*, *New York Magazine*, *The Washington Post*, *GQ*, *Glamour*, *Vanity Fair*, *Time*, *Esquire*, *Vogue*, *Forbes*, *Fortune* and *Harper's Bazaar*, containing unsolicited mention of

clothing items under applicant's BLACK FLEECE mark; declarations of three individual consumers attesting (1) to their recognition that BLACK FLEECE is the name for a collection of Brooks Brothers clothing, (2) that BLACK FLEECE is a trademark, and (3) that declarants do not consider BLACK FLEECE to describe the clothing within the collection; and the declaration of the senior editor of *WWD Men's*, Jean Palmieri, attesting to 25 years in the fashion industry, knowledge of the BLACK FLEECE line of clothing, recognition of BLACK FLEECE as an upscale and contemporary take-off and counterpart to applicant's GOLDEN FLEECE mark and collection, and that consumers will not consider BLACK FLEECE clothing to be made of black colored fleece material;

- the second declaration of Lou Amendola, essentially updating information as of July 2009 from his first declaration as follows: the BROOKS BROTHERS, GOLDEN FLEECE, and hanging lamb design marks have been in use since the mid-1800s and are very well-known in the clothing industry; applicant's customers have not experienced confusion or believed that applicant's GOLDEN FLEECE products are gold-colored

or made of fleece; similarly, applicant's customers do not believe that its BLACK FLEECE products are black-colored or made of fleece; BLACK FLEECE is intended to be perceived by customers as a variation of applicant's GOLDEN FLEECE mark; in February 2009 applicant opened its first free-standing BLACK FLEECE store in Manhattan featuring BLACK FLEECE clothing and related items; applicant has received nearly 300,000 visitors to the BLACK FLEECE link on its website; from January 2008 to the declaration date, BLACK FLEECE received over 242 million consumer impressions in printed publications; applicant has realized sales of over \$6.7 million in the United States; and the January 2009 cover of GQ magazine featuring the actress Jennifer Aniston wearing nothing but a BLACK FLEECE necktie generated 2.8 million consumer impressions and 15.5 million viewership impressions;

- the second Amendola declaration also introduces the following exhibits: a second press kit for the BLACK FLEECE launch; additional photographs of celebrities wearing BLACK FLEECE clothing; updated BLACK FLEECE media placement reports; and screenshots from brooksbrothers.com displaying

photos and descriptions of the BLACK FLEECE products offered for sale.

Furthermore, in its August 2, 2007 and May 15, 2008 responses to the examining attorney's Office actions, applicant listed a number of registered marks containing designer names and colors (e.g. SAMSONITE BLACK LABEL and NAUTICA BLUE) and marks consisting of the terms BLACK or FLEECE and other terms (e.g. SILVERFLEECE, TWEED FLEECE, BLACK SILK and BLACK COTTON). Because the examining attorney did not advise applicant that such listing is insufficient to make the registrations of record at a point when the applicant could have corrected the error, the examining attorney is deemed to have stipulated the list of registrations into the record. See TBMP §1208.02 (3d ed. 2011) and authorities cited therein. Nonetheless, we will only consider the information submitted by applicant. See *Id.* Inasmuch as the information submitted by applicant in this case only lists the marks and their registration numbers, this evidence possesses no probative value regarding the registrability of the applied-for BLACK FLEECE mark. Applicant further will note that the Board will not take judicial notice of third-party registrations. See TBMP § 1208.02 (3d ed. 2011) and authorities cited therein. *Cf. In re Chippendales USA, Inc.*, 622 F.3d 1346,

96 USPQ2d 1681 (Fed. Cir. 2010).⁵

The examining attorney, for his part, argues that the mark BLACK FLEECE misdescribes the goods, which as identified are "not made of fleece fabric." The examining attorney further argues that "the evidence of record supports the examiner's position that clothing goods of the type provided by Applicant are often offered in black fleece material."⁶ Specifically, the examining attorney argues that "the evidence of record demonstrates that the description conveyed by the mark is plausible because consumers regularly encounter goods that contain the features or characteristics of the mark, namely, 'black fleece.'"⁷ The examining attorney argues in addition that applicant's evidence is insufficient to establish that BLACK FLEECE has acquired distinctiveness.

In support of his position, the examining attorney has made of record screenshots from commercial Internet websites featuring clothing items made of black fleece material. The following examples are illustrative:

⁵ Further, any expired registrations and pending and abandoned applications are of no value. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"), and the applications show only that they have been filed. *See Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003).

⁶ Examining attorney's brief, unnumbered p. 4.

⁷ *Id.* at 4-5.

Jackets and gloves made of fleece material,
including black colored items;
(north-face.com)

Pullover sweaters in black fleece material;
(paddling.net)

Dresses, hats, gloves, capes, and coats made of
black fleece material;
(bestdressedchild.com)

Button trench over coat jacket made of black
fleece material;
(amiclubwear.com)

BT Couture ruffle jacket in black fleece
material;
(luvcharlie.com)

Women's pants made of black fleece material;
(ffbdesigns.com) and

Women's skirts made of black fleece material;
(cryoflesh.com).

Issues on Appeal

As noted above, applicant amended its application to seek registration under Section 2(f) of the Trademark Act in the alternative, reserving its contention that the BLACK FLEECE mark is not deceptively misdescriptive. *Cf. Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988); and, e.g., *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 88 USPQ2d 1501 (TTAB 2008). Applicant and the examining attorney have presented arguments and evidence on both issues. Thus, we must first determine whether BLACK FLEECE is

deceptively misdescriptive as applied to the identified goods under Section 2(e)(1). If so, we must then determine whether BLACK FLEECE has acquired distinctiveness as applied to such goods.

Deceptive Misdescriptiveness

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. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question

is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). If a term immediately conveys such an idea but the idea is false, although plausible, then the term is deceptively misdescriptive and is also unregistrable under Section 2(e)(1). See *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987) (CAMEO deceptively misdescriptive of jewelry); and *In re Ox-Yoke Originals, Inc.*, 222 USPQ 352 (TTAB 1983) (G.I. deceptively misdescriptive of gun cleaning patches, rods, brushes, solvents and oils).

In determining whether a mark is deceptively misdescriptive within the meaning of Section 2(e)(1), we apply a two-prong test: First, does the mark misdescribe the goods or service to which it applies? Second, if so, we consider whether consumers are likely to believe the misdescription. See *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). See also *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002); and *In re Shniberg*, 79 USPQ2d 1309, 1311 (TTAB 2006).

In this case, applicant amended its identification of goods to specify that the clothing items listed therein are "not made of fleece fabric." Because the goods as identified are not made of fleece fabric, we find that the mark BLACK FLEECE misdescribes such goods. Applicant also acknowledges that as a result of the amendment to its identification of goods "the term 'black fleece' is facially misdescriptive of apparel that is not made of black fleece."⁸ In short, BLACK FLEECE clearly describes a type of clothing, and applicant's identification of goods states that its clothing is not of that type. Therefore, the first prong of the test for misdescriptiveness is satisfied.

We turn then to the question of whether consumers are likely to believe the misdescription. As outlined above, the examining attorney has made of record evidence that clothing items of the type identified in the involved application are available from a number of retailers in black fleece fabric. These specifically include black fleece coats, dresses, gloves, jackets, pants, and skirts. Because the record supports a finding that consumers may encounter clothing items of the type identified in the involved application that are made of black fleece, we find

⁸ Applicant's brief, p. 11.

that customers are likely to believe that BLACK FLEECE misdescribes the identified goods.

Applicant argues that

Brooks Brothers' customers (i.e., the relevant consumer "who knows what the goods are") are not deceived into thinking, anticipating or expecting that their \$4,000 business suit or their expensive pin point cotton oxford shirt is made from fleece, black or otherwise. Simply put, none of Brooks Brothers' customers for its BLACK FLEECE line of clothing expect the products to be made from "black fleece" fabric.⁹

We agree that reasonably careful purchasers in applicant's stores who examine and purchase applicant's own goods may not be deceived into believing that they are made of fleece fabric. However, not all clothing items are purchased with such a degree of care. First, we are mindful that applicant's goods under its BLACK FLEECE mark are not only available to careful and discerning consumers, but may be purchased by ordinary purchasers with sufficient funds and interest in doing so in all trade channels common for goods of this type, regardless of their level of sophistication or familiarity with applicant and its goods and trademarks. That is to say, applicant's goods under the BLACK FLEECE mark are not only available to discerning consumers of Brooks Brothers stores, but to anyone. In addition,

⁹ *Id.* at 12.

applicant has indicated that its goods are available through catalogs and over the Internet. Catalog and Internet purchasers of applicant's goods do not enjoy firsthand examination thereof prior to purchase. Furthermore, catalogs and Internet postings do not necessarily describe or depict goods in such detail as to prevent consumers from believing that the goods are made of fleece. See, e.g., *In re Woodward & Lothrop, Inc.* at 1414 ("If applicant's CAMEO jewelry were sold under those conditions, and under other conditions where careful examination may not be possible, it is not inconceivable, and indeed quite likely, that a reasonable consumer would think that the goods contain some form of a cameo.") Also, a reasonable consumer, upon hearing a radio advertisement or word-of-mouth promotion of applicant's goods, might expect the clothing items to be made of fleece materials. *Id.*

Applicant further argues that "consumers are educated by industry custom and accustomed to the use of color references to delineate fashion lines"¹⁰ and that because "the Trademark Office has allowed numerous marks that include color in classes 24 and 25 ... [c]onsumers have been educated to understand color references such as BLACK

FLEECE and/or GOLDEN FLEECE to be trademarks that refer to particular lines or collections of products.”¹¹ However, and as discussed above, the evidence provided by applicant in support of these contentions, namely, a listing of trademarks and their registration numbers, possesses no probative value. Simply put, there is insufficient evidence of record to support applicant’s contentions that consumers have become accustomed to color references used as trademarks to distinguish designers’ particular fashion lines.

Applicant argues in addition that

As evidenced by the Examining Attorney’s own evidence, “fleece” products are primarily outerwear products (e.g., coats, capes, hats, gloves, outer jackets) made of a synthetic fiber, their look and feel being well-known by consumers. Reasonable prospective purchasers are not likely to believe that Applicant’s trademark use of the term BLACK FLEECE on its labels and hangtags actually describes Applicant’s expensive, luxury, non-fleece goods.¹²

In support of this contention and as discussed above, applicant has submitted the declaration of one of its salespersons, its chief merchandising officer, and the senior editor of a fashion magazine, all opining that consumers will not and do not consider applicant’s BLACK

¹⁰ *Id.* at 13.

¹¹ *Id.* at 13-14.

¹² *Id.* at 14.

FLEECE clothing to be made of fleece material. We note, however, that these declarations reflect the opinions and experience of clothing and fashion industry professionals, not consumers of applicant's goods. These industry professionals possess knowledge of the clothing industry in general and applicant's clothing items in particular that even sophisticated and fashion-conscious consumers may not. Thus, their declarations are of limited usefulness in determining the perceptions of consumers of applicant's clothing under its BLACK FLEECE mark. Applicant did submit the declarations of three individual consumers attesting that they recognize BLACK FLEECE as a trademark for a line of Brooks Brothers clothing and do not consider BLACK FLEECE to describe the clothing in that collection. These declarations are probative to the extent that they reflect the opinion of actual consumers of applicant's goods under the BLACK FLEECE mark. Three declarations, however, are hardly overwhelming evidence of customer perception. Given the number of visitors to applicant's Internet website and the number of consumers otherwise exposed to the BLACK FLEECE mark, we find that the declarations of three such consumers to be far from conclusive on the issue before us.

Moreover, we note that applicant's goods, as identified, also include outerwear products such as coats,

gloves, hats, jackets, mufflers and rainwear, that is, the same types of clothing items that applicant argues comprise the majority of fleece clothing. Further, the examining attorney's evidence shows that certain of the black fleece clothing items included in applicant's identification are intended to be not merely utilitarian, but stylish and fashionable. In other words, there is no evidence that fleece clothing items per se cannot be marketed as fashion clothing.

The mark BLACK FLEECE immediately conveys the idea that applicant's clothing items identified thereby are made of black fleece material. As identified, applicant's goods are not made of fleece material and, as such, the idea conveyed by the mark is false. While the goods offered by applicant under the BLACK FLEECE mark are not made of fleece material, the evidence submitted by the examining attorney shows that certain of the clothing items in applicant's identification of goods that are offered for sale by third parties are indeed made of black fleece material. Therefore, we find that the term BLACK FLEECE is deceptively misdescriptive as applied to the identified goods and is unregistrable under Section 2(e)(1).¹³

¹³ In coming to this result, we observe that the Board is not so sartorially challenged as to be unaware of the nature of the

Acquired Distinctiveness

We turn then to our determination of whether applicant has carried its burden of establishing, by a preponderance of the evidence, a prima facie case that its deceptively misdescriptive mark, BLACK FLEECE, has acquired distinctiveness under Section 2(f) of the Trademark Act. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988); *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"); and *In re Rogers*, 53 USPQ2d 1741 (TTAB 1999).

We consider the evidence submitted by applicant and outlined above in support of its claim of acquired distinctiveness. The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case. See *Roux Laboratories, Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34 (CCPA 1970). Evidence of acquired distinctiveness can include the length of use of the mark, advertising expenditures, sales, survey

goods provided by applicant, particularly under its BROOKS BROTHERS mark. Nonetheless, as discussed *infra* we find that the facts and record of this case support the examining attorney's refusal to register under Section 2(e)(1).

evidence, and affidavits asserting source-indicating recognition. See Trademark Rule 2.41. However, a successful advertising campaign is not in itself necessarily enough to prove secondary meaning. See also *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (claim based on annual sales under the mark of approximately eighty-five million dollars, and annual advertising expenditures in excess of ten million dollars, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of mark).

In this case, applicant has used its mark since August 2007. Obviously, four years of use is insufficient in itself to create a prima facie case of acquired distinctiveness. Furthermore, it is settled that a claim that applicant has been using the subject matter for a long period of substantially exclusive use may not be sufficient to demonstrate that the mark has acquired distinctiveness. See *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001) (66 years of use).

Applicant argues and has introduced evidence that it is the owner of the BROOKS BROTHERS, GOLDEN FLEECE and "hanging lamb" design marks, which have been in use since the mid-1800s. With regard to applicant's prior marks and

registrations, Trademark Rule 2.41(b) provides that ownership of a registration of "the same mark" on the Principal Register may be accepted as prima facie evidence of acquired distinctiveness. In relying on this rule, an applicant is essentially seeking to "tack" the use of the registered mark to its use of the present mark for purposes of transferring distinctiveness to the new mark. See *In re Flex-O-Glass, Inc.*, 194 USPQ 203 (TTAB 1977). However, to state the obvious, BLACK FLEECE is not the legal equivalent of GOLDEN FLEECE, let alone BROOKS BROTHERS or the "hanging lamb" design mark. See, e.g., *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866 (Fed. Cir. 1991). See also *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001). Because the marks are not the same, Trademark Rule 2.41(b) cannot be used to establish that BLACK FLEECE has acquired distinctiveness as a mark for any goods, let alone the goods for which registration is now sought.

We do not disregard applicant's prior marks and registrations, but consider them for such probative value as they may have in the context of the rest of applicant's evidence of acquired distinctiveness. However, there is little evidence that consumers of applicant's goods will recognize BLACK FLEECE as a complement to or take-off on

applicant's more established GOLDEN FLEECE mark. In this regard, we note that the evidence of record, in particular, the second Amendola declaration, the Palmieri declaration, and observations in articles contained in certain third-party publications, indicates that applicant intended to create both an association with and distinction between its BLACK FLEECE clothing line and other named clothing lines. However, the record falls far short of establishing that the notoriety associated with applicant's other marks that have been in use for over a century is somehow transferred to the BLACK FLEECE mark.

With regard to the sales and advertising figures recited by applicant, we first observe that applicant has provided no context for the industry by which we may determine applicant's share of this segment of the clothing market - which applicant describes as the very expensive, luxury, high-fashion clothing market - or where such sales and advertising expenditures place applicant among others in the same and related fields. In other words these figures, without context, tell us very little about whether consumers of applicant's clothing have come to recognize BLACK FLEECE as a source indicator. Therefore this evidence has very limited probative value. Even in the absence of such context, we observe that applicant's sales

and advertising figures are not overwhelming on their face and may not, without more, be sufficient to support a finding of acquired distinctiveness. See *In re Boston Beer Co. L.P.*, *supra*.

Similarly, although applicant has stated that the BLACK FLEECE link on its website was viewed by 300,000 people, there is no indication that applicant's website was viewed by 300,000 discrete visitors as opposed to repeated views by the same individuals. As such, we cannot quantify consumer exposure to applicant's mark by means of its website. In any event, this number lacks context for marks applied to comparable goods in the clothing and fashion industry. With regard to applicant's evidence that BLACK FLEECE received 242 million consumer impressions over an 18 month period, there is no indication of the extent to which consumers who have been exposed to applicant's marketing of its BLACK FLEECE line of clothing have come to recognize BLACK FLEECE as a mark therefor. For instance, applicant points to 2.8 million consumer impressions and 15.5 million viewership impressions of the January 2009 cover of *GQ* magazine featuring a photograph of the actress Jennifer Aniston naked except for a BLACK FLEECE necktie. However, the record does not reveal whether viewers of the image of an otherwise unclothed Ms. Aniston paid particular

attention to her necktie and, if so, whether the BLACK FLEECE mark was visible on it or they recognized it as belonging to the BLACK FLEECE collection. Likewise, it is not clear that viewers of photographs of celebrities at the 2008 Emmy Awards were aware of which of them were wearing BLACK FLEECE clothing. This particularly is the case inasmuch as the evidence of record does not show that BLACK FLEECE clothing items are prominently emblazoned with the mark. Viewers could obtain such information from photo credits or articles discussing the images, but there is no evidence of how many actually did so, or whether they came to recognize BLACK FLEECE as a mark for such clothing as a result.

In a similar fashion, the copies of news articles submitted by applicant suggest that applicant's launch of its BLACK FLEECE collection of clothing generated attention in the fashion industry and reflected applicant's attempt to appeal to a younger and more fashion-conscious demographic. Applicant indicates that it launched the BLACK FLEECE collection with the largest advertising campaign in its company's history, and many of the articles made of record focus on that launch and applicant's intentions for its line of BLACK FLEECE clothing. However, the articles do not establish that the consuming public has

come to recognize applicant's BLACK FLEECE mark as a source indicator for applicant's clothing items.

Finally, applicant submitted the declarations of three individual customers attesting to, inter alia, their recognition that BLACK FLEECE is a trademark for a line of Brooks Brothers clothing. As noted, such declarations provide direct evidence of source-indicating recognition by consumers. However, while these declarations have probative value with regard to the issue before us, the very small number submitted by applicant renders them far from conclusive.

In short, the evidence submitted by applicant suggests that it has enjoyed some commercial success in marketing its clothing line under its BLACK FLEECE mark. However, viewed as a whole the evidence falls rather short of demonstrating that BLACK FLEECE, as used on and in connection with such goods, has acquired distinctiveness under Section 2(f). There is neither context for the sales and advertising figures, marketing materials, and Internet website impressions nor sufficient direct evidence in the form of, for instance, surveys or affidavits asserting source-indicating recognition by which we may determine that the deceptively misdescriptive term BLACK FLEECE has

come to indicate source in applicant during the relatively brief time the mark has been in use.¹⁴

Decision: The refusals to register under Trademark Act Section 2(e)(1) and Trademark Act Section 2(f) are affirmed.

¹⁴ We observe nonetheless that acquired distinctiveness under Section 2(f) is not a static target. On such record as applicant may produce at a later date, we may come to a different result on this issue. In so observing, we are mindful that the probative value of a record on the issue of acquired distinctiveness is far less dependent on the size of the submission than the nature and quality thereof. *See, for example, In re Lorillard Licensing Co.*, 99 USPQ2d 1312 (TTAB 2011).