

THIS DISPOSITION IS
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OF THE TTAB

Hearing:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Arrow Trading Co., Inc.
v.
Victorinox A.G. and Wenger S.A.

Opposition No. 103,315
to application Serial No. 74/600,279
filed on November 17, 1994

Joseph H. Lessem and Mary L. Grieco of Gursky & Ederer,
LLP for opposer.

Jonathan E. Moskin of Pennie & Edmonds LLP and Susan
Progoff of Fish & Neave for applicants.

Before Cissel, Chapman, and Holtzman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Victorinox A.G. and Wenger S.A., (both Switzerland
corporations), as joint applicants, seek to register on
the Principal Register under Section 2(f) of the
Trademark Act,

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15 U.S.C. §1052(f)¹, the mark SWISS ARMY for "handtools, namely, multifunction pocketknives" in International Class 8. The application is based on applicants' claimed date of first use and first use in commerce with the United States of 1958.

The Pleadings

Arrow Trading Co., Inc. (a New York corporation) has opposed registration, alleging that "for many years and continuing through the present day, [opposer], itself and through its business successors Arrow Trading Group, Inc. and Archer Worldwide, Inc., has imported and sold handtools, including multifunction pocketknives" (paragraph 1); that since 1991, opposer has used the designation "Swiss Army knife" on these goods, and "continues to use, or has an intention to use, this designation through its business successors in connection with these products" (paragraph 2); that applicants' purported mark is a generic designation which is incapable of distinguishing the goods of applicants from

¹ During the ex parte prosecution of the application, the Examining Attorney had originally refused registration on the basis that the mark is merely descriptive/generic of the goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1). The Examining Attorney subsequently approved the application for publication based on applicants' claim of acquired distinctiveness under Section 2(f).

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those of others; that the designation "SWISS ARMY" has been "judicially declared to be generic in connection with multifunction pocketknives" (paragraph 13), citing several decisions from the case of The Forscher Group Inc.² v.

Arrow Trading Co. Inc., specifically (i) 833 F. Supp. 385, 30 USPQ2d 1258 (SDNY 1993), (ii) 30 F.3d 348, 31 USPQ2d 1614 (2nd Cir. 1994), and (iii) 904 F.Supp. 1409, __ USPQ2d __ (SDNY 1995) (paragraphs 4-6);³ that applicants' purported mark as applied to the involved goods, "does not identify a single product emanating from a single source," but rather the two applicant corporations "are unrelated parties with adverse interests and rights," and thus, "they are not joint owners of the mark"; and that "SWISS ARMY is not and cannot be a trademark for multifunction pocketknives because it does not identify a single source of origin of such products" (paragraphs 14-16).⁴

² For clarity, it is explained that The Forscher Group Inc. (Forschner) is Victorinox A.G.'s exclusive distributor for knives in the U.S.; and Forscher is now known as Swiss Army Brands, Inc. Wenger S.A.'s exclusive distributor for knives in the U.S. is Precise Imports, Inc.

³ See also, 124 F.3d 402, 43 USPQ2d 1942 (2nd Cir. 1997), which decision was issued the year after the notice of opposition was filed.

⁴ Opposer's pleading was organized by opposer setting forth three grounds--(i) the mark is generic, (ii) the mark fails to identify a single source, and (iii) applicants committed fraud

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In their answer, applicants claim that they are the exclusive manufacturers of SWISS ARMY multifunction pocketknives; and admit, inter alia, certain matters regarding the civil suit involving opposer and Forschner and

based on applicants' asserted misrepresentations to the Examining Attorney that they were joint owners of the mark.

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certain specific responses made by applicants during the ex-parte prosecution of their involved application.

Applicants otherwise deny the salient allegations of the notice of

opposition. In addition, applicants assert the

"affirmative defenses" that (i) opposer lacks standing to oppose; (ii)

opposer lacks capacity to oppose; (iii) opposer is guilty of unclean hands;⁵ and (iv) the opposition is barred under the principles of collateral estoppel.⁶

Opposer's Motion to Amend Its Pleading to Add Parties

Opposer filed on May 12, 2003 (about one month after the oral hearing was held in this case), a motion to amend the notice of opposition to add opposer's "sole shareholders, Mark Dweck and Jack Dweck, as additional Opposers" (brief, pp. 1 and 5) pursuant to Fed. R. Civ. P. 15(b) and 21. Opposer provided no information

⁵ Applicants did not raise the defense of unclean hands in their brief. Thus, they have waived that affirmative defense.

⁶ In deciding opposer's motion and applicants' cross-motion for summary judgment, the Board in its March 24, 2000 decision, inter alia, explained that both parties argued that collateral estoppel applied based on court decisions in the case of *The Forschner Group Inc. v. Arrow Trading Co. Inc.* (see citations listed above); held that "collateral estoppel is not applicable in this case" (p. 7); granted applicants' motion for summary judgment on the fraud claim; and otherwise denied the parties' respective motion and cross-motion for summary judgment.

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whatsoever as to why it did not take action to add party plaintiffs at any time earlier in this opposition proceeding. Aside from the extremely late nature of the motion, opposer neither

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provided evidence in support thereof accompanying its brief, nor pointed to any such evidence in the record. We are well aware opposer is asserting the joinder of additional parties under Fed. R. Civ. P. 15(b) to conform the pleadings to the evidence. However, in order to amend the pleadings to conform to the evidence, the record must establish what the party moving to amend seeks to add to the pleading. Here the evidence does not support opposer's motion, and in fact, if anything, the evidence shows that opposer was reorganized into two corporations, not that two individuals now stand in its shoes. Specifically, opposer's president, Jack Dweck, testified in his discovery deposition (submitted into the record as Exhibit L in applicants' notice of reliance)(p. 11) that there was "an arbitration agreement which distribute[d] [opposer's] assets to the two new corporations." He did not specify the two successor corporations, and he did not testify (nor is there any evidence of record) that opposer's assets were transferred to the individuals, Jack Dweck and Mark Dweck. There is only argument by opposer's counsel to that effect. Thus, the issue was not tried by the parties and amendment of the opposition under Fed. R. Civ. P. 15(b) is inappropriate.

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Moreover, opposer's motion is otherwise untimely. Fed. R. Civ. P. 21 provides for the adding or dropping of parties "at any stage of the action and on such terms as are just." The grant or denial of a motion under Rule 21 is within the discretion of the trial judge. The timing of such a motion may influence the judge's determination of whether to grant said motion. Courts typically deny requests that come so late in the case that it will delay the case or prejudice any of the parties to the case. See Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, §§1688 and 1688.1. (2001).

In the circumstances of this opposition proceeding involving the registrability of a mark before this administrative tribunal, it would be clearly unjust and prejudicial to applicants to allow opposer to add two individual party plaintiffs at this juncture. Opposer waited from the filing of its notice of opposition in 1996, through briefing and decision on summary judgment motions which included arguments and issues related to opposer's standing (1997-2000), through trial (2001-2002), and even through briefs after trial (2002) and oral hearing (2003) before opposer took any action to join any party plaintiff.

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Moreover, as explained above, the evidence does not show that the individuals sought to be joined are the successors to opposer, and this would amount to allowing these individuals to file an untimely notice of opposition. See *SDT Inc. v. Patterson Dental Co.*, 30 USPQ2d 1707 (TTAB 1994).

We find opposer's proposed amendment to the pleadings, filed so late in the proceeding, is not supported by the evidence, and would be prejudicial to applicants. Accordingly, opposer's May 12, 2003 motion to amend the notice of opposition to add two individual opposers is denied. Cf. *Kalman v. The Berlyn Corp.*, 914 F.2d 1473, 16 USPQ2d 1093 (Fed. Cir. 1990)(involving a motion to amend under Fed. R. Civ. P. 21 and 15(a) -- not 15(b)).

The Record / Evidentiary Matters

The record consists of the pleadings; the file of the opposed application; opposer's notice of reliance on Exhibit Nos. 1-61 (filed September 29, 2001);⁷ opposer's supplemental notice of reliance on Exhibit Nos. 62-63

⁷ Applicants' motion to strike certain of opposer's exhibits in this notice of reliance will be determined later in this decision.

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(filed November 27, 2001);⁸ applicants' notice of reliance on Exhibits A-L (filed February 8, 2002); applicants' supplemental notice of reliance on Exhibit M (filed July 3, 2002);⁹ the testimony, each with exhibits, taken by applicants of (i) Charles Elsener, president of Victorinox, A.G.,¹⁰ (ii) Maurice Cachot, CEO of Wenger S.A. (through a French interpreter), and (iii) Dr. Henry D. Ostberg, chairman of The Admar Group (survey expert)¹¹; and a stipulation (filed on May 3, 2002, via certificate of mailing, the closing date of opposer's rebuttal testimony period) submitted in lieu of the testimony (by

⁸ The parties filed two stipulations on November 27, 2001: (1) indicating applicants' consent to opposer's filing of its supplemental notice of reliance after the close of opposer's initial testimony period; and (2) that opposer's Exhibit Nos. 1-63 in its two notices of reliance may be offered into evidence without objection as to authenticity of said materials, but without prejudice to applicants' right to raise objections to admissibility on any other grounds.

⁹ On July 3, 2002, the parties filed a stipulation that applicants were permitted to supplement their trial evidence with the material in their supplemental (footnote continued) notice of reliance.

The Board notes that neither of applicants' notices of reliance includes statements of the relevance of the material offered as required by Trademark Rule 2.122(e). However, opposer did not object thereto; thus any objection on that basis is waived.

¹⁰ Opposer's objections to applicants' Exhibit Nos. 22-23 introduced during the Charles Elsener deposition, and reiterated by opposer in its brief, will be determined later in this decision.

¹¹ During opposer's cross-examination, opposer objected to the testimony of Dr. Ostberg, but did not reiterate that objection in its brief. (In point of fact, opposer specifically listed the testimony of Henry D. Ostberg in its description of the

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subpoena) of Swiss Army Brands, Inc. (SABI) -- Victorinox A.G.'s exclusive distributor of knives in the United States, and Precise Imports, Inc. (Precise) -- Wenger S.A.'s exclusive distributor of knives in the United States. (Based thereon, the subpoenas were withdrawn by opposer.)

Portions of the testimony depositions were filed under seal as "confidential." Neither opposer's nor applicants' briefs after trial were marked "confidential." Nonetheless, the Board has exercised discretion in discussing evidence originally submitted as confidential.

Both parties filed briefs on the case.¹² An oral hearing was held before the Board on April 15, 2003.

We will now decide the evidentiary matters raised by the parties. Opposer objected to two exhibits offered during the testimony deposition of Charles Elsener, and reiterated the objections in its brief.¹³ Specifically, opposer objects to applicants' Exhibit No. 22 (portions of a document titled "Trademark Agreement" between the

record without reference to any objection.) Opposer has accordingly waived its objections thereto. See TBMP §718.04.

¹² Opposer's motion (filed July 5, 2002) to extend the time to file briefs is granted.

¹³ These are the only objections to any part of the record reiterated by opposer in its brief. Thus, all other objections

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Swiss Confederation and SABI), based on lack of authentication, redacted document, hearsay; and applicants' Exhibit No. 23 (consisting of three photocopied pages--a September 4, 1997 letter in English from the Swiss Military Department addressed to "To whom it may concern," the "enclosure" referenced in the letter consisting of one page from the February 27, 1997 Swiss "Handelszeitung" article (in German), and an English translation of the article) based on hearsay, no certified translation of the document, and where the witness purported to translate two phrases in the letter, that he is not a certified translator.

Regarding Exhibit No. 22, other than making the objections during the trial deposition and stating in its brief (p. 5) "[opposer] restate[s] that objection here," opposer has offered neither any specific argument nor any legal precedent in support of its request that this exhibit be excluded from the record. There is no indication from opposer why an exhibit should be stricken from the record solely because it is redacted, and here the document appears on its face to be admissible. Opposer's objection as to lack of proper authentication of the

made by opposer during depositions, including those previously

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document is not well taken as the witness's testimony relative thereto substantiates his familiarity with the "Trademark Agreement" sufficient to allow it into the record (e.g., Victorinox, A.G. has a copy of the document in its records, the witness had discussed the agreement with the parties thereto). (Elsener dep., pp. 93-97). Moreover, the Board does not generally strike properly taken and filed testimony or exhibits based on substantive objections such as hearsay. Rather, such objections are taken into consideration in determining the probative value of the evidence. See *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1326 (TTAB 1992). Opposer's objections to applicants' Exhibit No. 22 are overruled.

Regarding Exhibit No. 23, subsequent to the deposition of Charles Elsener, applicants filed a notice of reliance, including as Exhibit K the identical three page document, but also including both (i) a letter from the Swiss Confederation confirming the signature and the authenticity of the September 4, 1997 letter, and (ii) a certification of the translation of the article. Opposer made no objection to applicants' Exhibit K. Thus, opposer's objections to Exhibit 23 are overruled as moot.

noted herein, are considered waived. See TBMP §718.04.

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We turn then to applicants' motion (included as part of its brief on the case) to strike opposer's Exhibit Nos. 1-8, 10-18, 20-23, 25-27, and 29-61.¹⁴ Applicants' objections are generally based on hearsay and/or relevance and/or lack of foundation. Applicants also objected to certain of the above-enumerated exhibits because leave was not granted by the Board to admit testimony from another proceeding under Trademark Rule 2.122(f), or because they are not "printed publications" under Trademark Rule 2.122(e), or because they are not self-authenticating and thus are not "printed publications" under Trademark Rule 2.122(e).

Upon careful review of the record, the objections, the arguments of the parties on applicants' motion to strike, and the applicable law, we overrule applicants' objections and we allow into the record all of opposer's exhibits. We particularly note that applicants stipulated to the authenticity of all materials submitted by opposer (Exhibit Nos. 1-63) in the stipulation filed with the Board on November 27, 2001. In addition, opposer's Exhibit No. 3

¹⁴ As noted above, opposer took no testimony, but offered 63 exhibits by way of one notice of reliance (Exhibit Nos. 1-61) and one supplemental notice of reliance (Exhibit Nos. 62-63).

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(objected to by applicants) is also applicant's Exhibit No. 33 introduced at the testimony deposition of Maurice Cachot, Wenger S.A.'s CEO (pp. 45-49). Opposer's Exhibit Nos. 34-52 are copies of miscellaneous published court decisions (in which the judge(s) used the term "Swiss Army knife") which the Board is free to consider for whatever probative value, if any, they may have. Also, opposer's Exhibit Nos. 53-61 are printouts of stories from printed publications and are therefore admissible under Trademark Rule 2.122(e).

Based on the discussion above, applicants' motion to strike certain of the exhibits from opposer's September 29, 2001 notice of reliance is denied.

The Parties

Applicants, Victorinox A.G. and Wenger S.A., are both corporations of Switzerland, and both are located in Switzerland. Victorinox A.G. (under a different name) was founded in 1884 by Karl Elsener; and he also founded the Association of Swiss Master Cutlers consisting of a few small enterprises in the knife manufacturing

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business,¹⁵ in order to obtain an order from the Swiss military for knives for each soldier. In 1891 the first order from the Swiss military for pocketknives with multiple utensils thereon was

¹⁵ Today, the Association of Swiss Master Cutlers has over fifty members, and both joint applicants herein are still members thereof.

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filled. The knife was and is called "the soldier's knife."

Victorinox A.G. first sold knives in the United States in 1936 or 1937, and in 1952 it first sold knives through its U.S. distributor, Forschner (now SABI). American GIs coined

the nickname "Swiss Army knife" for these multifunction pocketknives after World War II. It was in 1952 that Victorinox A.G. first used "SWISS ARMY" on and in connection with its pocketknives. Victorinox A.G.'s sales of pocketknives in the United States is in the millions of units per year.

Wenger S.A. was founded in 1893 under the name Coutellerie Suisse, and in 1907 was renamed Wenger. It first sold the soldier's knife to the Swiss military in 1901 (this may have occurred earlier, but, due to a fire, its records trace back only to 1901). Today, Wenger S.A. manufactures several types of knives, including various models of multifunction pocketknives (80% of Wenger's business) and professional cutlery (such as for chefs, gardeners). Wenger S.A. first sold multifunction pocketknives in the United States in 1949. Since then, Precise has been Wenger S.A.'s distributor of knives in

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the U.S. Wenger S.A.'s sales of pocketknives in the United States are also in the millions of units per year.

The Swiss military required two sources for the soldier's knife, and thus, it purchases half of its supply thereof from Wenger S.A. and half from Victorinox A.G.

Opposer has offered no testimony concerning its activities or background. In its brief ("Statement of Facts" Section, p. 9), opposer set forth two paragraphs of information regarding opposer's activities, mentioning several related companies. However, opposer did not refer to anything in the record to support these asserted facts.¹⁶

¹⁶ Opposer had the burden of introducing evidence in support of its claims. If opposer intended that the Board accept the findings of fact and conclusions of law from the various decisions and court orders in the case of *The Forscher Group, Inc. v. Arrow Trading Co., Inc.*, cited above, we decline to do so. The issues in that case were very narrow and were so explained by the courts, beginning with the first decision of September 29, 1993, in which the U.S. District Court for the Southern District of New York stated "This action involves only a small slice of the law of unfair competition. The existence of a trademark is not at issue." 833 F.Supp. at 388. The issue in that case was whether Arrow's representation of the Chinese knife as a Swiss Army knife misleads consumers as to the geographic origin and the quality of the Chinese knife. The Court noted that:

"Arrow, rather than focusing upon these issues, has directed its energies in an attempt to prove that 'Swiss Army knife' is a generic term denoting any multifunction pocketknife." ...
"...Arrow rivets itself to the notion that 'Swiss Army knife' cannot receive trademark protection if it is a generic term. (Citations

omitted.) However, Forschner does not seek trademark protection in this action, but attempts to stop Arrow from misrepresenting the Chinese knife...." 833 F.Supp. at 392.

"...Arrow still has failed to demonstrate that 'Swiss Army knife' is a generic term." 833 F.Supp. at 395.

After remand from the 1994 decision of the Court of Appeals for the Second Circuit, the U.S. District Court reiterated:

"My underlying decision held that 'the existence of a trademark is not an issue.' (Citation omitted.) The Court of Appeals agreed. (Citation omitted.) The phrase 'Swiss Army knife' has never enjoyed trademark protection, as Forschner readily concedes in its complaint. (Footnote omitted.) Because the issue was not presented, it was never reached, and the Court of Appeals left unanswered the question of whether the mark is registrable." 904 F.Supp. at 1414.

Along this line, we emphasize that this was made clear in the March 24, 2000 Board order holding collateral estoppel not applicable to this opposition proceeding. (See Board order, pp. 3-7.) Thus, opposer has been (or should have been) fully aware of its burden to prove its case by means other than through the decisions in the Forschner (and other) cases. We note, in contrast to the issue before the Courts, the Board is an administrative tribunal with limited jurisdiction over only the question of registrability of the mark. We have no jurisdiction over issues of trademark infringement or unfair competition. See Sections 17 and 18 of the Trademark Act, 15 U.S.C. §§1067 and 1068. See also, TBMP §102.01.

In addition, opposer contends that the statements made by the joint applicants' respective U.S. distributors (Forschner, now SABI and Precise) in various court cases (both documents and testimony), and in letters signed by the distributors are admissions against interest as to the involved joint applicants. We decline to so hold. Of course, it is not surprising that the U.S. distributors would not be claiming ownership rights in the mark of the foreign manufacturers of the products they distribute. Moreover, the record shows that applicants' distributors did not consult with applicants prior to filing various lawsuits; that applicants did not pay any part of the expenses of any of these cases; that applicants did not receive papers from these cases, but, rather, they were sometimes informed of the results. (Elsener dep., pp. 102-107.) Victorinox A.G. and Forschner (SABI) have been in a contractual relationship since 1937, but they first sold knives to Forschner

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The Board gleaned information about opposer mainly from the excerpts of the discovery deposition of Jack Dweck, opposer's president, (submitted into the record by applicants). Also, Exhibit J from applicants' notice of reliance is a certificate of the State of New York Department of State showing the incorporation of Arrow Trading Co., Inc. on August 27, 1969 and its dissolution on December 27, 2000.

The excerpts of the discovery deposition of Jack Dweck indicate that opposer first used "Swiss Army" in connection with multifunction pocketknives on purchase orders and invoices in the late 1980s and first used it on opposer's packaging and on the knives around 1992; and that for the year 1992-1993 opposer sold about 8,000 units, and opposer sold none thereafter.

In 1991 opposer ordered, inter alia, about 20,100 multifunction pocketknives from a company located in Hong Kong. It was also in 1991 that opposer filed an application to register the mark shown below (with no disclaimer)



in 1952, and the first written contract was executed in 1980.

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for watches in International Class 14, pens in International Class 16, and luggage and umbrellas in International Class 18.¹⁷

The record is clear that opposer completely ceased business operations in 1993. It last had any income in 1993. Its lease terminated in 1993. There have been no directors' meetings since 1993. Employees were let go in 1993. No knives have been sold by opposer since 1993. (See, e.g., Dweck discovery dep., pp. 10-13, 59, 119-120, 127). Mr. Dweck testified (pp. 120-124) that after 1993, Arrow Trading Group, Inc. and Classic Knife Corporation sold imported pocketknives which did not display "Swiss Army" on the handles of the knives or on the packaging therefor; but that these goods were marketed using "Swiss Army knife." The only marketing material created was a video (Exhibit No. 18 to the Dweck testimony), which is the video for which opposer was held in contempt in 1996 in the U.S. District Court for the Southern District of New York (Exhibit No. 22 to the Dweck testimony). (See footnote 22, *infra*.)

(Elsener dep., pp. 110-111.)

Burden of Proof

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, it has standing to bring this opposition, and the asserted grounds for opposition -- that SWISS ARMY is generic for multifunction pocketknives, that the mark does not indicate a single source of origin, and that applicants are not proper joint applicants. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); and *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

Opposer's Standing

The standing question is an initial and basic inquiry made by the Board in every inter partes case. That is, standing is a threshold inquiry. Standing is an essential element of opposer's case which, if it is not proved at trial, defeats opposer's claims. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *No Nonsense Fashions, Inc. v. Consolidated Foods Corporation*, 226 USPQ 502 (TTAB 1985).

¹⁷ Application Serial No. 74/154,714, filed April 8, 1991, and held abandoned on June 15, 1992 for failure to respond to an Office action.

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In this case, applicants challenge opposer's standing on two separate bases.¹⁸ First, applicants challenge opposer's standing on the basis that opposer is a dissolved corporation. We cannot agree with applicants because opposer filed its notice of opposition in September 1996, but opposer was not dissolved as a corporation by the State of New York until December 2000. (Applicants' Exhibit J.) Simply put, because opposer was not a dissolved corporation at the time it filed the notice of opposition, we cannot find that opposer lacks standing based solely on the dissolution of opposer corporation four years later.

However, applicants also contend that opposer lacks standing because opposer ceased doing business years ago, does not currently exist, and thus, cannot be damaged by registration of the mark.

Section 13(a) of the Trademark Act, 15 U.S.C. §1063(a), allows for opposition to the registration of a mark by anyone "who believes that he would be damaged by the registration of a mark..." The party seeking to oppose the

¹⁸ "Lack of standing" is not an affirmative defense (as stated in applicants' answer to the notice of opposition). Rather, it is, as explained above, an essential element of the plaintiff's case. The defendant is, of course, free to assert that the plaintiff has failed to establish its standing.

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registration of the mark must prove two elements: (1) that it has standing and (2) that there is a valid ground to prevent the registration of the opposed mark.

As stated by our primary reviewing court, the Court of Appeals for the Federal Circuit, in *Cunningham v.*

Laser, supra, 55 USPQ2d at 1848:

Standing is the more liberal of the two elements and requires only that the party seeking cancellation believe that it is likely to be damaged by the registration. . . . A belief in likely damage can be shown by a direct commercial interest.

Further, the same Court stated in *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999):

Section 13 of the Lanham Act establishes a broad class of persons who are proper opposers; by its terms the statute only requires that a person have a belief that he would suffer some kind of damage if the mark is registered. However, in addition to meeting the broad requirements of §13, an opposer must meet two judicially-created requirements in order to have standing--the opposer must have a "real interest" in the proceedings and must have a "reasonable" basis for his belief in damage.

. . . and at 1027 the Court stated:

However, our precedents suggest something more - that the "belief of damage" required by Section 13 of the Lanham Act is more than a subjective belief. See *Universal Oil*, 463 F.2d at 1124, 174 USPQ at 459-460. The

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belief must have a "reasonable basis
in fact."

In this case, the record clearly and unequivocally establishes that opposer ceased business operations in 1993, three years before it filed the notice of opposition. Opposer does not dispute and in fact concedes that it "is no longer doing business as a separate entity" (reply brief, p. 8), but it argues that this opposition comes within the category of "winding up its business affairs" under the New York dissolution statute and that it now represents the interests of both former shareholders/officers, Jack Dweck and Mark Dweck, whom it has attempted to join as parties to this opposition. (For the reasons stated, the joinder of parties plaintiff was denied earlier herein.) To be very clear, the Board is not finding a lack of standing based on the dissolution of the opposer corporation in 2000 under New York law. Rather, we hold that opposer lacks standing because the entity which filed this opposition in 1996, having ceased business operations in 1993,¹⁹ has failed to show a "real interest" in the opposition, and certainly has failed to demonstrate a "reasonable" basis for its belief in damage.

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Having found that opposer lacks standing, we necessarily find that the opposition must be dismissed. However, for the sake of thoroughness of the decision on registrability, in the event it should be determined on appeal that opposer has standing, we will rule on opposer's claims and applicants' affirmative defenses.

Estoppel Defense²⁰

In support of this affirmative defense, applicants argue that opposer applied to register the mark shown below



for watches in International Class 14, pens in International

¹⁹ We note that opposer corporation was formally dissolved by the State of New York prior to opposer filing any evidence in this case.

²⁰ Applicants' affirmative defense of estoppel is distinguished from the collateral estoppel explained previously herein, involving the March 24, 2000 Board order and discussion of and holding on the question of collateral estoppel in the context of the civil action between one of the joint applicants' U.S. distributors and opposer (Forschner v Arrow). The Board, in denying summary judgment, held that the issues of whether applicants are proper joint applicants and whether the term SWISS ARMY is generic for multifunction pocketknives were not determined in the prior civil action; and that "collateral estoppel is not applicable in this case."

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Class 16, and luggage and umbrellas in International
Class 18,²¹ without disclaiming the words "SWISS ARMY";
that

²¹ Serial No. 74/154,714, filed April 8, 1991, and abandoned for failure to respond to an Office action on June 15, 1992.

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opposer later adopted the word 'classic' to modify the mark

SWISS ARMY, thereby exploiting the standard English meaning of 'classic' and thus, affirmatively recognizing the trademark significance of the words SWISS ARMY; that on the packaging for its Chinese made pocketknives, opposer used a "TM" symbol and stated on the packaging that "the Swiss Army logo design" is a trademark used by opposer under license. (Applicants' Exhibit No. 7 to the Dweck dep.)²² From this, applicants conclude that opposer's "use as a trademark and attempted registration of the term SWISS ARMY should estop [opposer] from contending that the mark is anything other than a trademark." (Brief, p. 42.)

Opposer contends that it removed the words SWISS ARMY before obtaining a registration for the design portion of the mark; that "an affiliate" of opposer, Colony Corporation, obtained the registration for the design portion²³; and that because opposer has been

²² Applicants also point out that opposer's use of the word 'classic' with the words SWISS ARMY was held by the United States District Court for the Southern District of New York (order dated June 26, 1996--applicants' Exhibit No. 22) to be in contempt of a previous injunction order, specifically finding that Arrow Trading Co., Inc. was attempting to "piggyback" on the plaintiff's goodwill and that Arrow acted in bad faith.

²³ Mr. Dweck's discovery deposition includes his acknowledgment that approximately one year after he signed an application based

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litigating for years over the right to use "Swiss Army knife" for multifunction pocketknives and has consistently taken the position the term is generic for said goods, there is no estoppel against opposer herein.

Opposer's application Serial No. 74/154,714, included the words SWISS ARMY as part of the mark, but it did not include multifunction pocketknives in the identification of goods. Thus, it cannot be said that opposer is now taking a position from which it should be estopped by asserting SWISS ARMY is generic for multifunction pocketknives. With regard to opposer's past use of the words "Swiss Army logo design" in a sentence referring to an anonymous license on its pocketknives and/or the packaging therefor, we simply do not find sufficient evidence on this issue to find for applicants.

on an assertion of a bona fide intention to use the mark in the name of Arrow Trading Co., Inc. (Serial No. 74/154,714), he signed an application in the name of Colony Corporation (Serial No. 74/285,495 now issued as Reg. No. 2,089,486) for the design portion of the mark (without the words SWISS ARMY) for goods in International Classes 6, 8, 9, 11, 14, 16, 18, 21, 25 and 34, also based on that applicant's assertion of a bona fide intention to use the mark in commerce. (Applicants' Exhibit Nos. 9 and 10, Dweck dep.) While Mr. Dweck testified that opposer licensed the design mark (as shown on its label -- Exhibit 7) from Colony Corporation, when questioned regarding the license, it was clear that there was no written license agreement, and opposer never paid any license fees to Colony Corporation.

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Accordingly, we hold that this affirmative defense must fail. Opposer is not estopped from making its claims in this case.

Opposer's Capacity to Sue Defense

Applicants contend that opposer lacks the capacity to sue under the laws of the state of New York because opposer is a dissolved New York corporation. Opposer contends that a dissolved corporation may maintain a legal action or proceeding under NY Bus. Corp. Law §1006.²⁴

First, the notice of opposition was filed by opposer in 1996, four years before opposer was dissolved as a corporation. Second, even assuming, arguendo, that dissolution applies herein, the relevant portion of "NY Bus. Corp. Law §1006 Corporate action and survival of remedies after dissolution" reads as follows:

- (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by

²⁴ Both sides have cited cases from the courts of the state of New York regarding this issue.

court order. In particular, and without limiting the generality of the foregoing:

...

(4) The corporation may sue or be sued in all courts and participate in proceedings, whether judicial, administrative, arbitratative or otherwise, in its corporate name, and process may be served by or upon it.

(b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided

in

sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

We find that opposer has, or at least at the time of filing of the notice of opposition had, the capacity to sue. Applicants' affirmative defense that opposer lacks capacity to oppose therefore must fail.

Joint Applicants

Opposer contends that these applicants are not proper joint applicants because they are not cooperatively producing and marketing a single product as

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a single source of origin; that applicants are competitors and have been for about 100 years; and that there is no joint venture or license agreement between them.²⁵

Applicants contend that joint applicants are specifically recognized by the USPTO; that when two entities agree to own a mark jointly, their elected arrangement is presumed valid because the joint applicants have a strong interest in protecting the validity of their mark as explained in *In re Diamond Walnut Growers, Inc. and Sunsweet Growers Inc.*, 204 USPQ 507, 511 (TTAB 1979); that here the

²⁵ We reiterate at this juncture that opposer's fraud claim (based on applicants misrepresenting themselves as joint applicants) was dismissed by way of Board order dated March 24, 2000, granting applicants' motion for summary judgment thereon.

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two applicants have achieved "100 years of unmatched consistent quality"; that there is no requirement that the parties enter a written agreement or that there be a formal partnership or joint venture; that there is no requirement that only jointly produced products merit or qualify for joint trademark ownership; that "where the rights of joint owners have been recognized generally have been instances where common sense acceptance of how a mark is used in the marketplace required such an acknowledgment to reflect actual consumer understanding" (brief, p. 23); that protecting the mark SWISS ARMY for knives in the name of the only producers of authentic SWISS ARMY knives furthers the basic premises of trademark law of preventing consumer confusion and protecting the owner's rights.

Section 1 of the Trademark Act, 15 U.S.C. §1051, provides that "[t]he owner of a trademark used in commerce may request registration...." See also, Section 45 of the Trademark Act, 15 U.S.C. §1127 for a definition of "Person, juristic person." TMEP §803.03(d) (Third Edition 2002) explains that "[a]n application may be filed in the name of joint applicants or joint owners. ... Joint applicants are not the same as a joint venture.

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A joint venture is a single applicant, in the same way that a partnership is a single applicant."

In order to prevail on this issue, opposer must show that the individual applicants are not both owners of the mark SWISS ARMY for multifunction pocketknives. Opposer has failed to do so. In fact, the evidence is to the contrary that both applicant entities have ownership rights in the mark and they share ownership of the mark for these involved goods. The fact that there is no written agreement between the two joint applicant corporations is not fatal to their joint ownership, as the record clearly establishes that these two entities have an agreement regarding quality of the goods and the use of the mark SWISS ARMY. Moreover, the Swiss government placed Victorinox A.G. and Wenger S.A. into a cooperative relationship by requiring each to share the franchise of making knives for the Swiss military about 100 years ago; and applicants have never disagreed about the rights of each other in the mark SWISS ARMY for knives.

We find that applicants Victorinox A.G. and Wenger S.A. are proper joint applicants.²⁶ See In re Polar Music

²⁶ Informationally, we note of interest two documents made of record in this case: (1) applicants' Exhibit No. 25 introduced in the Charles Elsener deposition, which is a copy of United

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International AB, 714 F.2d 1567, 221 USPQ 315, 318 (Fed. Cir. 1983); Taco Cabana International, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 19 USPQ2d 1253, 1259 (5th Cir. 1991), aff'd 505 U.S. 763 (1992); In re Diamond Walnut Growers, supra; and Ex parte Pacific Intermountain Express Co., 111 USPQ 187 (Comm. 1956). See also, 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §16:41 and "Author's Comment" in §16:45 (4th ed. 2001).

Single Source of Origin

Opposer argues that a term cannot serve as a trademark if it does not indicate a single source of origin of the goods; that the term SWISS ARMY is not a trademark for multifunction pocketknives because it does not indicate a single commercial source of origin; that Victorinox A.G. and Wenger S.A. do not manufacture a single product, but rather they are competitors who separately manufacture their goods and offer them to the purchasing public.

Kingdom Registration No. 2043590 issued November 6, 1995 to Victorinox A.G. and Wenger S.A. for the mark SWISS ARMY for "multifunctional pocketknives; all being made in Switzerland," and (2) applicants' Exhibit K, which includes a letter from the Swiss Military Department acknowledging the "joint exclusive rights" of Victorinox A.G. and Wenger S.A. in the mark SWISS ARMY for multifunction pocketknives.

In response, applicants argue as follows:

[H]ere, the Swiss government placed Victorinox and Wenger into a cooperative relationship by requiring each to share the franchise of making folding knives for the Swiss military. In like cases, where governing authorities have decreed the conditions for use or non-use of a mark, courts consistently have applied the principle that the law abhors a forfeiture by refusing to find a loss of rights. (Citations and footnote omitted.) The forfeiture Opposer seeks here would be particularly inappropriate since the government-decreed sharing of the Swiss Army knife franchise entailed neither a cessation of sales nor an impairment of quality control standards, but rather required both manufacturers to satisfy the very highest standards possible, led the two companies into a cooperative relationship, and hence helped establish the brand's singular reputation for consistent quality. (Emphasis in original.)

We acknowledge that this case presents a situation with unusual, unique circumstances. It is true that Victorinox A.G. and Wenger S.A. are competitors in the sense that, for example, they compete for sales of their multifunction pocketknives; they use different distributors in the United States²⁷; they do not inspect

²⁷ The stipulation of the parties (filed May 5, 2002) regarding Swiss Army Brands, Inc. and Precise Imports, Inc. makes clear that these two entities are the exclusive U.S. distributors of Victorinox A.G. and Wenger S.A., respectively; that the U.S. distributors do not have a written agreement between themselves regarding their distribution of SWISS ARMY pocketknives; that they do not claim to own the trademark SWISS ARMY for knives;

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each other's facilities; and they do not share patents or technology information. However, it is also true that, for example, these two corporations for over 100 years have never disputed their shared rights in the mark SWISS ARMY; that for over 50 years they have been the only sources of SWISS ARMY brand pocketknives in the United States; that they both use the same suppliers of the materials (e.g., steel, aluminum) needed to make SWISS ARMY multifunction pocketknives; that they make the soldier's knife to identical specifications (as required by the Swiss military) and, by agreement between the companies, they make all SWISS ARMY brand pocketknives to the same specifications. In addition, Victorinox A.G. and Wenger S.A. cooperate not only on the specifications for manufacturing SWISS ARMY brand pocketknives, but also on the quality control of the pocketknives they produce; and they cooperate in enforcing their trademark rights as against third parties.

We certainly do not disagree with the general propositions that a trademark is used by a manufacturer

that these distributors compete with regard to the distribution and marketing of the pocketknives; that the distributors do not possess any documents concerning the license between the two joint applicant corporations; and that the distributors have no

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or merchant to distinguish its goods from those manufactured or sold by others, and that a trademark must be used in a manner calculated to project to consumers that the goods originate from a single source. However, as argued by applicants, where two entities have a long-standing relationship and rely on each other for quality control, it may be found, in appropriate circumstances, that the parties, as joint owners, do represent a single source. See *In re Polar Music International AB*, supra; *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 192 USPQ 555, 563 (7th Cir. 1976) ("The trademark laws exist not to 'protect' trademarks, but, as indicated above, to protect the consuming public from confusion, concomitantly protecting the trademark owner's right to a non-confused public"); and *Coca-Cola Bottling of Shreveport v. Coca-Cola Co.*, 696 F.Supp. 97 (D.C. Del. 1988) ("...the defendant's contention that joint ownership is frowned upon in trademark law is of no moment....The defendant goes too far in contending that joint ownership of the 'Coca-Cola' mark 'is unworkable and fundamentally inconsistent with basic principles of trademark law.' In the Court's view, in the case of Coke products, rather than creating a likelihood of confusion in the minds of

direct knowledge of the terms of the oral agreement between the

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the public as to source, joint ownership better represents reality. ... The bottlers and the Company share responsibility for the quality of the product.").

In the circumstances of this very unusual case now before us, we find that SWISS ARMY is a trademark essentially indicating a single source in these joint applicants.

Genericness

The critical issue in determining genericness is whether members of the relevant public primarily use or understand the designation sought to be registered to refer to the genus or category of goods or services in question. See *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). In making our determination, we follow the two-step inquiry set forth in that case and reaffirmed in *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999), namely:

- (1) What is the genus or category of goods at issue?, and
- (2) Is the designation sought to be registered understood by the relevant public primarily to refer to that genus or category of goods?

joint applicants Victorinox A.G. and Wenger S.A.

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"The correct legal test for genericness, as set forth in *Marvin Ginn*, requires evidence of 'the genus of goods or services at issue' and the understanding by the general public that the mark refers primarily to 'that genus of goods or services.'" *American Fertility Society*, 51 USPQ2d at 1836. That is, do the members of the relevant public understand or use the term sought to be registered to refer to the genus of the goods and/or services in question?

The genus or category of goods involved in this case is "multifunction pocketknives," as the goods are identified in applicants' application. During the discovery testimony of Jack Dweck, he had difficulty defining precisely what "SWISS ARMY" was generic for. For example, he identified "Swiss Army knives" as "having red handles," but later he acknowledged that he knew they were not all red, but most consumers believe they are all red (dep., pp. 97 and 101). The record shows that applicants have sold SWISS ARMY knives in other colors (e.g., black, white, blue, silver, green) for many years (some of those colors since 1976). He also identified the generic characteristics of "Swiss Army knives" as being "smooth" and not having rivets on the sides (dep., p. 104). However, the record shows that applicants sell

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multifunction pocketknives with wooden handles and grainy handles and some have rivets on the sides. Applicant offers that the generic names to describe the "genus" of its involved goods include "multifunction pocketknife," "jack-knife," "pocketknife," "penknife," and "folding knife."

In considering the understanding of the relevant public, we must first determine who comprises the public for the identified goods. See *Stocker v. General Conference Corp. of Seventh-day Adventists*, 39 USPQ2d 1385, at 1394 (TTAB 1996). In this case, we find the relevant public is ordinary consumers in the United States.

As previously stated, it is opposer's burden to establish, by a preponderance of evidence, that the applied-for mark is generic. During its testimony in chief, opposer submitted 63 exhibits to prove its case. These exhibits include various papers (e.g., complaint, pre-trial order, pages from transcripts of testimony, final court decisions, a settlement agreement) from various court cases (e.g., *Forschner v. Arrow*, *Forschner v. International Branded Cutlery, Inc.*, *Forschner v. Precise*, and a case before the International Trade Commission); a few letters from *Forschner* to *Victorinox*

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A.G.; a page from a book The Knife and Its History²⁸; three otherwise unidentified advertisements but listed in opposer's notice of reliance as advertisements for Wenger S.A.; a page from Wenger S.A.'s catalog; a few Internet web site pages and a few entries from encyclopedias and dictionaries; nineteen reported court decisions in miscellaneous cases in which the judge referred to "Swiss Army knife/knives" therein; nine articles from various newspapers; a 1979 letter from Victorinox A.G. regarding an article in the "San Francisco Chronicle," and a 1975 "Overall Business Study" Report for Forschner and Victorinox.

Applicant submitted evidence including the testimony of Victorinox A.G.'s president, of Wenger S.A.'s CEO and of Dr. Henry Ostberg (a survey expert), as well as notices of reliance on, inter alia, excerpted sections from various books, encyclopedias, dictionaries and Internet web sites and the excerpts from the discovery deposition of Jack Dweck, opposer's president.

Opposer's evidence that SWISS ARMY is generic for multifunction pocketknives is weak and/or ambiguous.

²⁸ The entire book, published in 1984 on the 100th anniversary of Victorinox A.G., was introduced at the deposition of Charles Elsener, as Exhibit No. 5.

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Much of opposer's evidence is not evidence of the perception of the term by the general public. Many of these materials would not ordinarily be seen by consumers, e.g., papers

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filed in the different "Forschner" court cases and before the ITC (and of course, those papers filed therein by opposer are likely to express opposer's view regarding the term SWISS ARMY for knives),²⁹ letters from one businessman to another, miscellaneous published court decisions, an "Overall Business Study" report to a corporation.

While opposer submitted dictionary and encyclopedia excerpts which include references to "Swiss Army knife," it is not even clear that all the uses in opposer's own references are evidence of generic use of the term. Moreover, applicants submitted dictionary and encyclopedia entries which do not include references to "Swiss Army" or "Swiss Army knife." This amounts to conflicting credible evidence going to the public perception of the term.

Most of opposer's newspaper evidence of use of the term "Swiss Army knife" is generally ambiguous in that the term appears in a list of items (e.g., things not allowed at airports, things to take as camping equipment), or it appears in the article in such a manner that one cannot ascertain whether the term is being used

²⁹ As explained previously herein, the questions of genericness and registrability of "SWISS ARMY" for multifunction pocketknives were not issues in the "Forschner" cases.

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generically or whether it indicates a trademark. That is, the uses in these publications are ambiguous insofar as they use "Swiss Army knife" in a manner which could be interpreted as

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generic use or as use referring to the source of applicants' products. These several indeterminate or ambiguous uses of the term "Swiss Army knife" (which is not the mark applicants have applied to register--rather the mark is SWISS ARMY) are certainly not persuasive of the public perception of the term as the generic name of the goods. "Swiss Army knife" with a capital "S" and a capital "A" could be either.

There are perhaps two exceptions -- opposer's Exhibit No. 59, "News & Record (Greensboro, NC)," June 16, 1996, which refers to the "Swiss Army knife" as "...the familiar red knife - with versions made by Victorinox, Wenger, Imperial Schrade and Buck..."; and Exhibit No. 58, "The State Journal-Register (Springfield, IL)," June 13, 1995, which refers to "...A good quality Swiss Army knife-Victorinox and Wenger are the top brands-can provide a small but versatile toolbox in a convenient package...." These two exceptions are not sufficient to establish that the public understands the words SWISS ARMY as a generic name for multifunction pocketknives. We cannot find based on such a minuscule number of journalistic uses (or misuses) of "Swiss Army knife" that the mark SWISS ARMY is generic. Use of

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"Swiss Army knife" with the "S" and "A" capitalized is not inconsistent with the use of the term as a trademark.

Opposer's submission of several uses of "Swiss Army" or "Swiss Army knife" by judges in their decisions (Exhibit Nos. 34-52) are also ambiguous, as it is not clear whether such uses are evidence of generic use or of trademark use. Moreover, such uses are not persuasive of how the general public perceives SWISS ARMY for knives because it is highly unlikely that the general public reads such reported court decisions.

Applicants, however, have submitted convincing evidence that SWISS ARMY is their trademark for multifunction pocketknives. This evidence includes the testimony of Dr. Henry D. Ostberg, chairman of The Admar Group³⁰, and the results of the telephone survey his company conducted in 1997 to determine whether the term "Swiss Army" was perceived as a generic name or as a brand designation. The findings from the survey were: (1) of a cross-section of potential purchasers, 81% considered "Swiss Army" to be a brand name, not a common name; and (2) most consumers (92%) associated "Swiss Army" with knives or pocketknives, although 16% believed

³⁰ Opposer stipulated that Dr. Ostberg is qualified in the area of consumer surveys. (Ostberg dep., p. 4.)

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there was some association between the "Swiss Army" name and watches.

This survey utilized the generally approved "Teflon Methodology." It involved men and women, ages 18 and older, who indicated an intention to purchase a pocketknife in the next six months; and it was conducted between November 5 and 18, 1997. Consumers were asked a series of questions, including whether they thought "Margarine," "Aspirin," "Cellophane," "Easy Spirit," "Swiss Army," "M & M," and "Sony" were common names or brand names. The findings were based on 215 respondent interviews which were completed and tabulated.

Opposer thoroughly cross-examined applicant's survey expert witness regarding the type of survey, the interviewing, the analysis, etc. However, it is noteworthy that opposer did not retain a survey expert to critique applicants' survey, and did not conduct its own survey (or elected not to submit such testimony or survey results). Rather, opposer argued in its brief that applicants' survey "is fatally flawed because the survey failed to test the term at issue in this case - Swiss Army knife. Instead, consumers were asked whether they believed SWISS ARMY was a brand name or a generic term." (Brief, p. 40.) Opposer further explains in that, for

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example, "polo" is not generic, but "polo shirt" is generic.

We have carefully considered the entire testimony of Dr. Ostberg, and we find no reason to discount his survey. The survey showing an 81% public recognition rate of SWISS ARMY (the mark applied for herein) as a brand designation is probative evidence that the term is not a generic name for pocketknives.

In addition, Jack Dweck, opposer's president, was asked in his discovery deposition, whether he was aware of importers or manufacturers of multifunction pocketknives, other than applicants, who used the name SWISS ARMY on knives, or the packaging or the promotional materials for knives. He answered "yes," and then explained there were two companies (Azad and DME) he knew of because of proceedings against them by Forschner. Other than those two, he was aware of no others. (Dep., pp. 91-93). When questioned further on this matter, i.e., asked specifically if he had seen any knife made by Azad or DME bearing the mark SWISS ARMY, he answered that he saw an advertisement in the late 1980s or early 1990s that may have been DME's ad and it may have appeared in "Parade Magazine," but he could not be sure, nor could he

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recall whether the words SWISS ARMY were used on the knife or somewhere in the ad copy. (Dep., pp. 93-95.)

Opposer's assertion in its reply brief that applicants' own evidence establishes that the term SWISS ARMY is generic is simply neither accurate nor persuasive in this case.

While we have no doubt that opposer strongly believes the term SWISS ARMY is generic for multifunction pocketknives, we likewise have no doubt that opposer has utterly failed to prove that claim.

In sum, we find that opposer lacks standing to bring this opposition; and that opposer has failed to prove any of the claims asserted in the notice of opposition. (We also find that applicants did not establish a factual basis for their affirmative defenses of estoppel and lack of capacity to oppose.)

Decision: The opposition is dismissed.