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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD



Arrow Trading Co, Inc.,

Opposer,

v.

Victorinox, A.G. and Wenger, S.A.,

Applicants.

Opposition No. 103,3

09-16-2002

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APPLICANTS' TRIAL BRIEF
AND BRIEF IN SUPPORT OF MOTION TO STRIKE

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Applicants, Victorinox, A.G. and Wenger, S.A. respectfully submit their trial brief and brief in support of their motion to strike various exhibits submitted with Opposer's Notice of Reliance.

I. SUMMARY OF ARGUMENT

Applicants' trademark SWISS ARMY (not Wenger SWISS ARMY or Victorinox SWISS ARMY but simply SWISS ARMY) is easily the best known brand of pocketknife in this country if not the world. As ROLEX is to watches, ROLLS ROYCE to automobiles, or COCA COLA to soft drinks, SWISS ARMY knives have achieved such recognition and such a reputation for quality as to transcend the category of cutlery alone. The great good will represented by the mark, long used on and in connection with Applicants' knives (and *only* Applicants' knives), has spawned a similarly great demand for other authorized products, such as SWISS ARMY watches, SWISS ARMY fragrances and SWISS ARMY sunglasses. The popularity of Applicants' knives has also spawned copyists and imitators who, from time to time, have sought to pawn off cheap imitations on American consumers. Hence the need to protect the mark SWISS ARMY by registration.

Opposer, although no longer in existence, was simply one such opportunistic trade pirate. Although Opposer closed its doors nine years ago and was formally dissolved as a corporation in 2000 (thus disabling it as a matter of law from even maintaining this opposition proceeding), and although it never sold any of its counterfeit "Swiss Army" knives after 1993, when it was sanctioned for contempt in federal court (Dweck Ex. 22)¹, Opposer did fleetingly attempt to build

¹ References to the testimony of Jack Dweck and exhibits attached thereto are presented as "Dweck Tr." and "Dweck Ex.", and can be found in Applicants' Notice of Reliance at Exhibit L. (continued...)

a business poaching on Applicants' extraordinarily popular cutlery trademark. To lend some pretense of legitimacy to its own use of Applicants' well-known mark on poor quality, Chinese-made pocket-knives, Opposer first sought to register Applicants' mark, SWISS ARMY (together with a spurious simulation of a Swiss cross) -- the same mark it now says, disingenuously, is not a trademark. After it was enjoined from using the name SWISS ARMY alone for knives in the case, *Forschner Group, Inc. v. Arrow Trading Co., Inc.*, 92 Civ. 6953 (S.D.N.Y.) (a proceeding commenced by a U.S. distributor of authentic SWISS ARMY knives but to which Applicants were not parties), Opposer sought to call its inauthentic, decidedly "unclassic" knives "CLASSIC SWISS ARMY" knives. It was sanctioned for contempt for such conduct and soon thereafter ceased all operations, making no further use of Applicants' trademark after 1993 (Dweck Tr. 119-120, 127-9). There is no basis for the statement in Opposer's brief (Opp. Br. at 9) (unaccompanied by any record citation) that Opposer has continued sales to date.

There is, indeed, little support for most of Opposer's assertions because Opposer presented no testimony at trial and most of its exhibits are inadmissible hearsay or lack any foundation. They should, accordingly, be stricken.² Moreover, because Opposer no longer exists, as a matter of law, it lacks capacity to maintain this proceeding, and can suffer no harm if the mark is registered. Whatever unnamed individual or entity is now pursuing this proceeding, no proper grounds to deny registration have been shown, as Opposer has not sustained its burden of proving

¹ (...continued)

References to the Exhibits attached to the parties Notices of Reliance are referred to as Opp. Not. Rel. or App. Not. Rel.

² Attached as Appendix A to this brief is a summary of Applicants' evidentiary objections.

its two grounds for opposition: that Applicants are not proper joint applicants or that SWISS ARMY is generic.

Notwithstanding that the issue of joint ownership was fully briefed on the parties' earlier cross-motions for summary judgment, Opposer has not even set forth the standard for joint ownership of a trademark, much less shown that Applicants' mark should be denied protection. Indeed, what is perhaps most striking about the few legal precedents Opposer cites is how different they are from the facts here: in the cases cited, the litigants themselves disputed rights in the mark in issue and had no common interest in the marks they separately claimed. Victorinox and Wenger, by contrast, have never disputed their own shared (and exclusive) rights in the mark SWISS ARMY, and have consistently opposed third party use. For sixty years, Applicants (and only Applicants) have been the single (if anonymous) source of SWISS ARMY knives, all of which are produced under the same shared quality standards and all of which are known to consumers as having equal and unrivaled quality. Opposer has presented no evidence at all that consumers distinguish between SWISS ARMY knives manufactured by Wenger or Victorinox - or have any reason to do so. Indeed, perhaps the greatest irony of this case is that the SWISS ARMY knife not only represents a single standard of quality, but the SWISS ARMY knife (not the Victorinox SWISS ARMY knife or Wenger SWISS ARMY knife) has become a *metaphor* for quality, often invoked by other merchants as a single standard to which they aspire and against which their own products or services might be judged. It is not hyperbole to note that few, if any, marks have had such a unique hold on the public imagination.

Opposer questions the basis for the Applicants' shared quality controls, yet cites to none of the facts documented in the record showing Applicants' cooperative quality control efforts and

their collaboration in enforcing their trademark rights so as to preserve the consistent superb quality level of the only true SWISS ARMY knives and maintain the integrity of the SWISS ARMY brand. It is surely telling that Opposer presented no evidence (expert or otherwise) that there has *ever* been any *actual* material difference in the quality of the Applicants' products. Dismissing Applicants' remarkable 100-year record of consistent quality as mere happenstance, Opposer identifies various facts showing that Applicants are legally separate entities. But this is simply to state the obvious; indeed, it is precisely why Applicants are applying as *joint* applicants as provided under T.M.E.P. § 803.03(d) (which Opposer nowhere even mentions).

Rather than address undisputed commercial reality, Opposer's Trial Brief consists principally of obfuscating the relationship between Applicants (the *only* manufacturers of authentic SWISS ARMY knives) and their U.S. distributors. From Applicants' entire sixty-year use of the name SWISS ARMY, and the innumerable ads that have appeared, Opposer cites *one* lone ad produced by a U.S. distributor (not by either *Applicant*), the use of which is hardly clear and for which the distributor was duly chastened by Applicant, Wenger. Opposer consistently mis-attributes to *Applicants* out-of-court statements of Applicants' U.S. *distributors*, The Forschner Group, Inc. ("Forschner") and Precise Imports Co. ("Precise"), who, consistent with general legal principles, do not purport to own the mark. Virtually all of the cited evidence is hearsay and inadmissible; nothing Applicants' distributors may have said is an admission of Applicants nor would it establish that there are *in fact* any material quality differences much less that consumers perceive any such differences. Like Coca-Cola bottlers, Applicants' distributors do compete in various respects, yet cooperate in others, unlike typical competitors. And just as competition by Coca-Cola bottlers does not destroy the COCA-COLA trademark, competition

between U.S. distributors of SWISS ARMY knives does not destroy the SWISS ARMY trademark.

Just as Opposer has failed to address the actual standard of joint ownership, Opposer has not stated the test of genericness, much less proven that SWISS ARMY is generic for any genus of goods. Indeed, Opposer nowhere even attempts to define the class of goods supposedly designated by the name SWISS ARMY, which for sixty years has identified *only* Applicants' multi-function pocket-knives. Instead, conflating the tests for genericness and mere descriptiveness, it points to evidence that American servicemen who could not pronounce the Swiss name "Schweizer Offiziermesser" adopted the name SWISS ARMY to "describe" the knives. Whether or not this is proof the mark was at first descriptive (which is doubtful, since the term at most "described" certain *users* of the knives, not a quality or characteristic of the knives) it surely is *not* proof of genericness *ab initio*. And although Opposer criticizes Applicants' "Teflon" survey showing 81% recognition of SWISS ARMY as a trademark among knife purchasers, it offered no expert testimony and conducted no survey of its own to vet its hypothesis that a survey could have better measured consumer understanding of the claimed mark SWISS ARMY by using the phrase "Swiss Army knife" – even though that is not the mark Applicants have applied to register.

To deny registration would be to ignore the commercial reality that American consumers recognize and rely on the name SWISS ARMY as a long-standing symbol of consistent unmatched quality. To deny registration would aid and abet cheap imitators (such as Opposer once was) to pawn off spurious products on the market, thereby deceiving consumers and destroying one of the world's best-recognized trademarks. Denying registration would not even

benefit Opposer itself, which no longer exists. Under these circumstances registration should be allowed.

II. FACTUAL BACKGROUND

A. Applicants' Authentic SWISS ARMY Knives

Victorinox produced its first knife for the Swiss military in 1891 (Elsener Tr. 11). As a matter of Swiss defense procurement policy, it was then and is now required that the Swiss Armed Forces have an alternate source of supply for their equipment purchases (Id. 16-17). Thus, in 1901, Wenger, as designated second supplier, began producing identical knives for the Swiss military (Cachot Tr. 10-11). This arrangement, under which 50% of the knives made for the Swiss Armed Forces is produced by Victorinox and 50% is produced by Wenger, has continued to date (Elsener Tr. 19; Cachot Tr. 11; Opp. Ex. 2).

World War II introduced American servicemen to the Applicants' knives. GI's bought them in Switzerland and Germany where they had become popular PX items. Servicemen coined the name SWISS ARMY, which applicants adopted and used as a trademark for more than 50 years (Elsener Tr. 110; Cachot Tr. 84). Returning home, GI's brought with them the popular knives, whose reputation rapidly spread in the United States (Elsener Tr. 27; Cachot Tr. 85; App. Ex. 9 at inside front cover, summarizing history).

It is true that Applicants' SWISS ARMY knives most familiar to American consumers are not the same *models* as those currently produced by Applicants for the Swiss military - although the military models are also sold to consumers under the name SWISS ARMY (Elsener Tr. 24-5; Cachot Tr. 30; App. Ex. 9 at p. 17; App. Ex. 13 at 22-23). The consumer models have their own distinctive handles (often red, but increasingly since 1976 (Elsener Tr. 45) other colors as well

(App. Ex. 9 at 9; App. Ex. 13 at 7). Some have wooden handles (App. Ex. 10); some have handles contoured to fit one's hand (App. Ex. 9 at 19-20; App. Ex. 13 at 20-21); some have exposed rivets (App. Ex. 9 at 12, 13; Ex. 13 at 30-31); many have additional blades and tools. However, all carry over the same quality standards as Applicants' military products. Indeed, both Applicants' SWISS ARMY knives produced for consumers conform to the same standards of tensile strength, yield strength, tolerances and material (*i.e.*, metallurgical quality) as do their military counterparts (Elsener Tr. 71-3; Cachot Tr. 34-5). Standard quality control procedures are also employed in manufacturing all of the knives. The stainless steel in both Applicants' knives is identical. It meets identical Rockwell hardness criteria. Both Applicants purchase steel, aluminum and plastic from the same suppliers (Elsener Tr. 37; Cachot Tr. 92). Certain of the parts are made by one of the Applicants and supplied by it to the other: Victorinox supplies the aluminum handles and can opener to Wenger (Elsener Tr. 82-3; Cachot Tr. 20-1). And since at least as early as 1901, *each* knife had to be inspected for quality of materials and execution prior to delivery (*Id.* Ex. 6).

The 100% inspection requirement has never been changed and of course, is still followed today by both Applicants (Elsener Tr. 42, 172; Cachot Tr. 24-5, 28-30, 141). The technical specifications and testing and acceptance conditions currently promulgated by the Swiss Defense Procurement Agency ("GRD") demonstrate a stringent attention to detail. Thus, the surface processing, material specifications and mechanical strength properties for each individual element of the Soldier's Knife are set out on the detailed drawings that are part of the standard supply contract between applicants and the GRD (Elsener Tr. 58; App. Exs. 14, 15, 18;). Beyond this, there are production inspections for each and every part of the Soldier's Knife, namely, blade, awl,

can opener, screw driver, platen, liner and both handles. They are individually inspected and tested for shape, handle and hole position, handle depth, blank thickness and milling length (App. Ex. 16; Cachot Tr. 22-25).

The Applicants' quality standards are developed jointly among themselves and the Swiss military (Elsener Tr. 58; Cachot Tr. 17-18). Documents relating to the quality assurance and technical specifications established by the Swiss Confederation beginning in 1891 and continuing to the present are of record (*see, e.g.*, App. Exs. 14, 15, 16, 18). Such documents and the history of the development of the Swiss Army knife explain why the knives, regardless of whether they are assembled by Victorinox or Wenger, exhibit such consistently high quality, which is unmatched in the field of commercial knives.

Opposer offered no testimony or documents showing any *actual* differences in the quality of Applicants' knives, and its trial brief identifies no genuine differences between the products. Instead, from the entire 100 year history of the SWISS ARMY knife, Opposer identifies one ad (Opp. Exs. 25-27), produced not by either Applicant but the distributor, Precise, purporting to identify different features of the Applicants' knives. These small differences are unrelated to quality. Moreover, there is no testimony at all from the distributor regarding when, how widely, or even if the ad was used, and no evidence of any specific publications in which the ad may have appeared much less any circulation numbers for any such publication. Wenger's witness expressed some uncertainty as to the use of the ad (see Cachot Tr. 115-18). However, he was quite certain Wenger did not approve of such comparative ads which, until recently, had been illegal in Switzerland. Precise informed Wenger that they only intended to use the comparative ad once and that they did not intend to use it again after that. (Cachot Tr. 117). Opposer also cites

out-of-court statements by James Kennedy, a former President of the distributor, Forscher, that at one time he thought there were some differences between the Applicants' products (Opp. Not. Rel. Exs. 3, 20). Yet Opposer failed to take Mr. Kennedy's (or anyone else's) testimony or offer any other basis to establish a foundation for the admissibility of his earlier statements. There is no evidence to suggest that Applicants' shared quality control procedures have *in fact* ever allowed any material differences between their products.

Applicants' discipline and regimen is not confined to their government contract work. The unrelenting pursuit of excellence became an integral component of Applicants' entire work ethic and is naturally reflected in the world-recognized superior quality of their commercial SWISS ARMY multifunction pocketknives, which are made to the same exacting standards as are the military models (Elsener Tr. 71-72; Cachot Tr. 34-35). Indeed, there exists on the market no other comparably priced knife with similar quality (Elsener Tr. 79). Moreover, Applicants' consistent and shared quality levels are the result not only of their joint work together with the Swiss military to develop and improve quality standards (Elsener Tr. 58, 136-37), but their own cooperative efforts. The Applicants meet regularly - at least twice a year in person and frequently by phone (Elsener Tr. 85-86). They have agreed between themselves to maintain the quality levels of their product (Elsener Tr. 150-51). Although Opposer observes disparagingly that the agreement is not in writing, this is consistent with Victorinox's practice of preferring oral agreements to written contracts - even for basic commercial dealings (Elsener Tr. 219-20). As part of their cooperative relationship, the Applicants frequently have shared technology with one another (not simply parts such as the can opener and handles produced by Victorinox for Wenger). This has included Wenger's sharing with Victorinox its method of attaching the handles without visible rivets;

Victorinox's sharing with Wenger its patented technology for incorporating a lighting device into the handle of a knife, and its sharing with Wenger of its design patents for translucent handles (Elsener Tr. 83-84). Wenger also offered to share with Victorinox its patented scissor design, but Victorinox elected to continue using its own design (Elsener Tr. 85). Although the Applicants do compete in some respects, they cooperate to maintain the quality of their knives because of their recognition that it is this superiority that distinguishes authentic SWISS ARMY knives from all other knives (Elsener Tr. 74-5; Cachot Tr. 38). The Applicants also jointly police their trademark against infringers (Elsener Tr. 85-6, 89-90; App. Ex. 20).

Applicants' SWISS ARMY knives have been placed in the design collections of numerous prestigious museums and have received numerous awards for design excellence (Elsener Tr. 31-32; App. Ex. 5 at 141; Ex. 8). Applicants' SWISS ARMY knife has, indeed, been widely used as a metaphor for quality by other manufacturers who compare their own products to the gold standard set by the SWISS ARMY knife – not the Wenger SWISS ARMY knife or the Victorinox SWISS ARMY knife (Elsener Tr. 33-35; Dweck Ex. 15).³ A survey conducted by Applicants in connection with this proceeding revealed that among the relevant market of persons who purchase knives, 81% recognized SWISS ARMY as a trademark (Ostberg Tr. 15-16; App. Ex. 4). Opposer conducted no survey and retained no expert to rebut the conclusions of Applicants' expert.

³ The Second Circuit agreed:

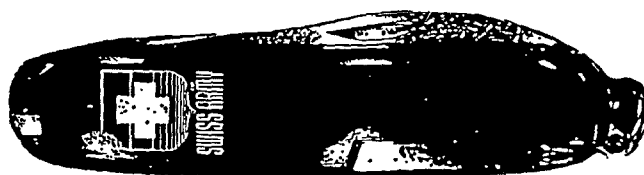
The multi-function pocketknives made by Victorinox and Wenger are renowned for their quality and durability, and are the object of a mystique. As the District Court stated, these knives "have taken on the qualities of legend, albeit less regal than Excalibur." *Forschner*, 833 F. Supp. at 390.

Forschner Group, Inc. v. Arrow Trading Co., Inc., 30 F. 3d 348, 350 (2d Cir. 1994).

Applicants' trademark SWISS ARMY is registered in their joint names in the United Kingdom, the one other country where they filed a joint application (Elsener Tr. 185-6; App. Ex. 25). The Swiss military itself has acknowledged that they are proper joint owners of the mark (App. Exs. 22, 23).⁴

B. Opposer's Spurious "Swiss Army" Knives

In 1992, Arrow began importing Chinese-made multi-function pocketknives having oblong-shaped red handles and on which appeared the words "Swiss Army" and a cross and shield emblem simulating the Swiss national symbol (Dweck Tr. 58; Dweck Ex. 4 at 5). A "TM" symbol appeared just above the words "Swiss Army" (*Id.* Dweck Ex. 8). The product appeared as follows:



Jack Dweck, Opposer's President, made the decision to use the name "Swiss Army" on the knives (*Id.*, Dweck Tr. 58, 62). Mr. Dweck admitted that he had been aware of Victorinox's SWISS ARMY knives since he had been a teenager (*Id.* at 88). At the time he and Opposer decided to use the name, he had understood the name SWISS ARMY represented a single source of knives

⁴ Although Opposer objected to these exhibits, it has not moved to strike them. Moreover, it is clear Mr. Elsener, who testified to their authenticity is familiar with them as business records of Victorinox and indeed as documents he has actively used in recent discussions with the Swiss military (Elsener Tr. 93, 102). Exhibit 23 appeared in a widely circulated Swiss publication (Elsener Tr. 100-101).

(Id. at 88-89). He could not identify with certainty any third-party use of the name (*Id.* at 91-95), and there is no record evidence of any such third-party use.

The box in which Opposer's product was sold prominently stated "SWISS ARMY" on the top, together with the statement "11 Function/Swiss Army Knife" (Dweck Ex. 7). The side of the box stated as follows: "The Swiss Army Logo Design⁵ is a trademark used under license by Arrow Trading Co., Inc., New York, New York." A "TM" symbol again appears just above the words "Swiss Army". The packaging thus appeared as follows:



Opposer's President, Mr. Dweck, admitted under oath that there was no written license agreement (Dweck Tr. 67-69). He stated that the alleged license was with Opposer's sister company, Colony, and was made before Opposer began importing the knives in early 1992. (*Id.*) Opposer has produced no tangible proof or contemporaneous evidence substantiating the existence of the purported license or explaining why a license would have been necessary to accomplish any valid business purpose.

⁵ As distinct from its unauthorized "Swiss Army" trademark, Opposer designates the emblem resembling the Swiss flag as the "Cross and Shield Logo" (Dweck Exs. 4 at 2, 10).

On April 8, 1991, Opposer itself applied to register the trademark SWISS ARMY and a Cross Design simulating the Swiss national emblem, Appln. Serial No. 74-154,714, for watches, luggage, pens and umbrellas (Dweck Ex. 9). The declaration accompanying the application, signed by Opposer's President, Mr. Dweck, states that "he believes said corporation to be the owner of the mark sought to be registered." In seeking to register the composite word and design mark, Opposer never disclaimed exclusive rights in the name "Swiss Army".

The respective quality levels of the parties' knives was assessed by the Second Circuit:

As to quality, the parties do not dispute that the Arrow knife is markedly inferior. Arrow itself describes its knife as "an attractive functional product.... It's not a Rolls Royce. It's a Honda Accord."

The district court, having compared them closely, found that the Arrow knife was in fact more akin to a Yugo. [*Forschner Group, Inc. v. Arrow Trading Co., Inc.*, 833 F. Supp. 385] at 388 [(S.D.N.Y. 1993)].⁶

30 F.3d at 351. Opposer declined to present any samples of its knives or any other evidence disputing the district court's finding.

In its responses to interrogatories in this proceeding, and in the deposition of its owner, Jack Dweck, Opposer plainly admitted that the only knives it has sold bearing the name "Swiss Army" (8,000 units total) were sold in 1992 and 1993 (Dweck Tr. 119-120, 127, Dweck Tr. Ex. 4

⁶ The New York District Court's first reported decision is elsewhere referred to herein as *Forschner I*. A second decision, after remand from the Second Circuit, reported at 904 F. Supp 1409 (1995), is referred to as *Forschner II*.

at 5-7). Opposer evidently was dissolved soon thereafter and its assets divided up between two companies (Dweck Ex. 4 at 2-3; Dweck Tr. 10). Jack Dweck has testified that Opposer ceased doing business at the end of 1993 (Dweck Tr. 11, 119-120, 127), well before this Opposition was commenced in 1996. After 1993, it had no offices, no assets and made no sales (Dweck Tr. 10-12). There is no record evidence of what became of the assets it may have had or of any relationship Arrow Trading may have had with unidentified "successors" mysteriously referred to in Opposer's trial brief. The New York Secretary of State formally dissolved the corporation on December 27, 2000 (App. Not. Rel. Ex. J). Opposer thus no longer even exists. The statement in Opposer's Brief that Arrow has continued to sell "Swiss Army" knives (Opp. Br. at 9) is contradicted by the record and supported by no evidence whatsoever. Neither Arrow Trading Group nor Archer Worldwide are parties to this proceeding.

C. Opposer's Litigation With The Distributor, Forschner⁷

In 1992, Forschner filed suit against Opposer in the Southern District of New York. Applicants were never parties to the litigation. The U.S. distributor, Forschner, has never purported to be the owner of the trademark SWISS ARMY. When it commenced suit against Opposer, it did not sue for trademark infringement, but rather for false advertising and unfair competition under federal and state law. The District Court and the Second Circuit thus each noted the narrow legal basis of the action as being solely for false advertising.⁸

⁷ Although Applicants are mindful of the Board's prior ruling that the *Forschner* litigation does not collaterally estop the parties from proving the elements of their claims or defenses, the litigation nonetheless forms part of the relevant background of the case.

⁸ The Second Circuit stated: "Forschner conceded that Swiss Army knife is not a registered trademark and therefore Forschner did not (and cannot) assert exclusive use of that phrase. [Citation (continued...)]

The Court of Appeals further explained that its decision that the term "Swiss Army" is not geographically descriptive (and hence that it was not *literally* false for Arrow to use the term in connection with non-Swiss-made knives) was made "[w]ithout deciding the unpresented issue of whether or not the phrase Swiss Army knife could have been exclusively appropriated as a trademark for a multifunction pocketknife if such an application had been made. . . ." 30 F.3d at 355. The Second Circuit expressly qualified the scope of its holding by noting that "[w]hile Victorinox and Wenger may (or may not) be able to register the phrase [SWISS ARMY] for trademark protection, they cannot enjoy trademark rights without registration,⁹ or enforce such rights by means of a false advertising claim. 30 F.3d at 352.

Neither Applicant was a party before the court and the subject application had not yet been filed. Mr. Elsener testified that Victorinox had no involvement in any of the prior litigations and did not supervise the actions of its distributor in those suits (Elsener Tr. 103-110). Similarly, neither Wenger nor its U.S. distributor, Precise, was a party to the suit or supervised Forscher's conduct of the suit (Cachot Tr. 41-45). Opposer identifies no evidence indicating Forscher was acting as Victorinox's or Wenger's agent in fact in the litigation. The relevance of the litigation

⁸ (...continued)
omitted]. Instead, Forscher argued that Arrow's use of the phrase Swiss Army knife violates the false advertising provision of the Lanham Act." 30 F.3d at 352. The district court likewise stated: "In sum, I understand the Court of Appeal's opinion to say the following and no more: Arrow has not falsely advertised." *Forschner II*, 904 F. Supp. at 1414.

⁹ The court evidently did not consider Victorinox's or Wenger's *common law rights* in the name SWISS ARMY. Elsewhere as well (*see supra* note 8), the decision speaks in a manner suggesting the court may have misapprehended the fundamental tenet of U.S. trademark law that trademark protection arises from use, not registration. Neither of the Applicants were before the court to assert that such rights can be protected even in the absence of registration. Forscher evidently did not raise the issue.

was assessed by the Board in deciding the parties' cross-motions for summary judgment. The Board rejected Opposer's (and Applicants'¹⁰) contentions that any part of the case could be resolved by collateral estoppel:

We find the issues to be determined in this proceeding, specifically whether applicants are joint owners of the proposed mark for purposes of applying for registration as joint applicants and whether the term SWISS ARMY is generic as used in connection with multifunction pocketknives, were not "actually and necessarily determined" in the prior civil proceedings.

In addition, while there is much discussion in the courts' decisions regarding the manufacturing history of applicants and a characterization of them as a dual source,¹¹ the issue of joint ownership for purposes of registration was not before the court. (Mem. Dec. at 6.)

Indeed, in declining to make any findings or reach any conclusions as to what rights the non-party *Applicants* might be able to prove, the Second Circuit explained:

Since Victorinox and Wenger are the only manufacturers who sell pocketknives to the Swiss Army, there is reason to associate the phrase Swiss Army knife with those two companies. Accordingly, Arrow must take "every reasonable precaution" to distinguish its

¹⁰ Applicants had noted the District Court's finding that "identity of origin is not blurred by the dual manufacture of the Swiss-made 'Swiss Army knife.' Victorinox and Wenger are the only suppliers of knives to the Swiss Army." *Forschner II*, 904 F. Supp. at 1420. The district court, citing the "anonymous source rule", also concluded that "there is in the public mind a definite 'association between the knives, on the one hand, and Victorinox and Wenger and their distinctive histories and prominent reputations, on the other.'" 904 F. Supp. at 1420, (quoting *Forschner I*, 833 F. Supp. at 389). The court specifically found that the mark SWISS ARMY "has acquired secondary meaning. Over the 104-year history of the knife, consumers have come to associate this familiar and distinctive product with Victorinox and Wenger." 904 F. Supp. at 1419. The court also noted the complete absence of third party use of the term. *Id.*

¹¹ Second Circuit limited its conclusions about *Forschner's* rights in the name by expressly couching its decision in the hypothetical, by "assuming *arguendo*" there is no trademark. 30 F.3d at 359

Swiss Army knife from the Swiss Army knives produced by Victorinox and Wenger.

30 F.3d at 359-50. Shortly after the Second Circuit noted the open nature of the issue of registrability of the mark, Applicants filed the subject application.

**D. The Injunction and Contempt Citation
Against Opposer and Its Subsequent Dissolution**

Without adjudicating the issues of registrability or Applicants' common law rights,¹² the District Court, on remand, entered an injunction prohibiting Opposer from using the phrase SWISS ARMY alone as a trademark on knives. Acknowledging the "source-distinguishing ability of a mark", the court held that Opposer's use of the term SWISS ARMY was likely to cause confusion, *Forschner II*, 904 F. Supp. at 1420, 1424 and 1425, and concluded that Opposer "made a 'deliberate attempt to exploit purchaser familiarity with the name' and dress of the Forschner knife." *Id.* at 1428 (citation omitted). The District Court's April 24, 1996 Judgment and Order

¹² On remand, the District Court acknowledged that the existence or not of protectable trademark rights was not before it (or the Second Circuit). The court clarified that "[t]he issue was not presented, it was never reached, and the Court of Appeals left unanswered the question of whether the mark is registerable." *Forschner II*, 904 F. Supp. at 1414. The District Court explained that it was constrained by Forschner's own pleadings to recognize in Forschner no trademark rights. *Id.* at 1416. The Court also explained that, without deciding whether the mark SWISS ARMY is registrable or whether it should be classified as suggestive, descriptive or generic, it would, to ensure against unmerited protection for Forschner, assume for the purpose of the decision (and for this purpose only) that the trademark was generic. The Court explained its cautious approach:

If Forschner's use of the phrase 'Swiss Army Knife' merits some protection when it is assumed to be generic, it will receive no less if later - when properly before a court or the Patent and Trademark Office - it is determined to be otherwise.

Id. at 1415. The court expressly noted its awareness of the pendency of the subject application. *Id.* at 1414 n.7.

(Opp. Not. Rel. Ex. 9) enjoined Opposer "from advertising, promoting, selling or offering to sell any multifunction pocketknife represented as a Swiss Army knife, UNLESS:

(1) the phrase "Swiss Army knife" is immediately preceded by (as in "Arrow Swiss Army Knife"), or immediately followed by (as in "Swiss Army Knife by Arrow" or "Swiss Army Knife from Arrow Trading Co.") the name of the defendant in such a way as to clearly designate its origin, although in no case should the size or presentation of the type designating origin be smaller or less prominent than the type used in the phrase Swiss Army knife.

After entry of the injunction, Opposer adopted a new manner of presenting the trademark SWISS ARMY: by adding the adjective "classic", thus identifying its products as CLASSIC SWISS ARMY knives. The word "classic", of course, has a well-established meaning signifying "authentic", "authoritative", "traditional" or "of recognized value." *Webster's Ninth New Collegiate Dictionary* at 246 (1987). Although the adjective "classic" might well describe Applicants' authentic SWISS ARMY knives, the District Court concluded the phrase was not fit for Opposer's inauthentic knives and thus sanctioned Opposer for contempt (Dweck Ex. 22 at 6-10). More specifically, the District Court held that Opposer's proffered interpretation of the court's order under which Opposer claimed to be free to use the name SWISS ARMY alone or in combination with any other elements of its choosing) was unreasonable:

First with respect to whether or not defendant's interpretation of the order is a reasonable interpretation, I find that it is an unreasonable interpretation. First, the clear language of the April 24 Order, including the parentheticals, demonstrates that it is defendant's name, that is the name Arrow, that is required to be used either before or after Swiss Army Knife.

The court further held that in adopting the adjective "classic" to describe knives, Opposer was deliberately "fostering confusion" by "piggybacking" and "preying on" the goodwill in the SWISS ARMY mark (*Id.* at 7, 8, 10).

Following entry of the injunction and contempt citation against Arrow Trading, Opposer never again sold any of its counterfeit "SWISS ARMY" knives. In 1993 the company's assets were divided between two companies (Dweck Tr. 10), the exact identity of which are not disclosed by the record. The record does not show that either company is a legal successor to any relevant rights or obligations of Opposer. Opposer offered no documents or testimony on these subjects.

In its entire existence, Opposer sold only 8,000 of its counterfeit SWISS ARMY knives (in 1992 and 1993), which it purchased for \$1.36 per unit. Mr. Dweck admitted at his December 6, 2000 deposition that Opposer had no income after its 1993 reorganization (Dweck Tr. 11). It had no office (*id.* at 12), no inventory or other assets (*id.* at 59, 10) and apparently paid no taxes after 1993 (*id.* at 12). Opposer was formally dissolved by the New York Secretary of State's office in 2000 (App. Not. Rel. Ex. J). When asked at his deposition how Opposer would be harmed by registration of the subject mark, Mr. Dweck, Arrow's designated witness on the subject, could identify no harm whatsoever (Dweck Tr. 134-38). Opposer presented no further testimony or evidence during its trial or rebuttal period to support a claim of injury or to show that any attempt had been made to restore its corporate existence. It's trial brief is silent as to how it will be harmed by registration or how a non-existent entity can be harmed or has capacity to maintain an opposition proceeding.

III. ARGUMENT

Opposer bears the burden of proving the two claims of the Notice of Opposition that remain after dismissal on summary judgment of its fraud claim: that SWISS ARMY is not a trademark and that SWISS ARMY is generic. *Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd.*, 691 F.2d 1019, 1022, 215 U.S.P.Q. 833, 834 (Fed. Cir. 1982). Opposer never sets forth the legal standard under which joint ownership of trademarks is permitted, much less attempts to show why Applicants' uniquely well-known mark falls short of accepted standards for joint ownership. Notwithstanding that the relevant legal questions were thoroughly briefed on the parties' cross-motions for summary judgment, Opposer addresses none of these issues, instead offering only desultory criticisms of Applicants' manufacturing arrangements – arrangements that have never impaired Applicants' ability to maintain the consistent and unmatched quality of their knives. Although this case does not require determination of all instances in which joint ownership should be allowed, the law expressly does permit ownership by separate legal entities, provided quality is sufficiently consistent that consumers will not be confused. There is no suggestion that a consumer buying a SWISS ARMY knife manufactured either by Wenger or Victorinox receives anything less than or other than expected with respect to the level of quality of the product or is in any way a victim of confusion or deception. Rather, it is Opposer that seeks to sow confusion by undermining the SWISS ARMY mark (and Applicants' ability to protect their mark) so as to allow anyone to place the trademark SWISS ARMY on any kind of knife.

Nor does Opposer attempt seriously to show the mark is generic. Without ever setting forth the standard of genericness, Opposer seizes on innocuous statements by Applicants' witness, Mr. Elsener, that American GI's initially used the term "Swiss Army" to "describe" the unique

officer's knives made by Applicants and referred to in German as "Schweizer Offiziermesser". Although Mr. Elsener (whose first language is German (Elsener Tr. 4)) used the word "describe," nothing in his testimony (or Opposer's brief) identifies what supposed qualities or characteristics of the knives were described by the term (nor would Mr. Elsener be able to testify to what exactly GI's might have said or meant in the 1940's). More important, even if the term were initially descriptive, it would hardly show the term was generic *ab initio*. Nowhere does Opposer attempt to define the supposed genus of goods at issue, much less show the term is understood by the relevant public primarily to refer to that genus of goods. Mr. Dweck was utterly unable to define the supposed generic elements of a Swiss Army knife. Moreover, Applicants' consumer survey confirms the primary significance of the term is as a trademark.

Wholly apart from the merits (or lack thereof) of Opposer's theory, the Opposition should be dismissed because Opposer is without legal capacity even to maintain this proceeding, much less claim any harm if the registration issues. As a matter of law, Opposer simply does not exist.

A. Applicants Have Properly Claimed Joint Ownership

T.M.E.P. § 803.03(d) expressly provides for applications by joint applicants. Such applications are proper where "the mark and the business in which it is used are in fact owned by separate parties jointly and cannot be identified correctly in any other way" In *In re Diamond Walnut Growers, Inc.*, 204 U.S.P.Q. 507 (T.T.A.B. 1979), the Board, citing *In re E.I. duPont deNemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973), explained that where two entities agree to own a mark jointly, their elected arrangement is *presumed* valid:

Considering therefore that each of the joint applicants herein is the owner of the registrations for the marks "DIAMOND" and "SUNSWEEP", respectively, cited by the Trademark Attorney; that

the joint applicants have a strong interest in protecting the validity and integrity of their marks and their registrations and *presumably* would not engage in any activity detrimental to the long established rights therein; that, confusion in trade would be inimical to their best interests; and that the agreement reflects a joint effort governing the use of their marks, including a viable effort to avoid confusion, in the marketing of the gift packs, as reflected in part by the marketing on the packs themselves and the packages therein, we can only conclude that confusion in trade is unlikely to occur and that the registration sought by the joint applicants is, in no way, contrary to the spirit and intent of Section 2(d).

204 U.S.P.Q. at 511 (emphasis added).

The cases where 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. Thus, in *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.* 932 F.2d 1113 (5th Cir. 1991), *aff'd*, 505 U.S. 763 (1992), the court recognized that the *trade dress* at issue could be owned jointly by two brothers owning *competing* restaurants because of the reality that their quality control standards were similar (even absent any formal right of either entity to control the quality of the other's services) and because there was no fraud or deception of the public:

Prior to this litigation, the Stehling brothers divided the Taco Cabana restaurants. Felix Stehling retained the name "Taco Cabana," and Michael Stehling adopted the name "TaCasita." The agreement allowed the two groups to use the same trade dress, which Two Pesos calls a "naked license." But Two Pesos faces a stringent standard because finding a "naked license" signals involuntary trademark abandonment and forfeits protection. *See American Foods, Inc. v. Golden Flake, Inc.*, 312 F.2d 619, 624-25 (5th Cir. 1963). While this cross-license arrangement is not governed closely by any precedent, we find no basis for an involuntary abandonment.

An owner may license its trademark or trade dress and retain proprietary rights if the owner maintains adequate control over the quality of goods and services that the licensee sells with the mark or dress. See *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977) (quality-control rationale is that public has right to expect consistent quality of goods or services associated with trademark or trade dress). Two Pesos argues that the cross-license creates two separate sources of good will and thus cannot indicate a single origin. This argument ignores the emergence of the "quality theory," which broadens the older source theory "to include not only manufacturing source but also the source of the standards of quality of goods bearing the mark" or dress. 1 J. McCarthy, *supra*, § 3:4 at 112. So long as customers entering a Taco Cabana or a TaCasita can expect a consistent level of quality, the trade dress retains its "utility as an informational device." *Kentucky Fried*, 549 F.2d at 387.

While the parties dispute the actual level of quality control, the jury's finding -- that Taco Cabana exercises adequate supervision and control over TaCasita to ensure that the quality of TaCasita's goods and services are not inferior to Taco Cabana's -- enjoys adequate record support. We also reject Two Pesos's argument that the district court erred in refusing to instruct the jury that TaCasita must also exercise quality control over Taco Cabana. Ignoring the record evidence of at least some bilateral quality monitoring, the law requires consistent quality, not equivalent policing. The jury found the requisite quality consistency; we need not demand rigorous bilateral regulation.

The purpose of the quality-control requirement is to prevent the public deception that would ensue from variant quality standards under the same mark or dress. Where the particular circumstances of the licensing arrangement persuade us that the public will not be deceived, we need not elevate form over substance and require the same policing rigor appropriate to more formal licensing and franchising transactions. Where the license parties have engaged in a close working relationship, and may justifiably rely on each parties' intimacy with standards and procedures to ensure consistent quality, and no actual decline in quality standards is demonstrated, we would depart from the purpose of the law to find an abandonment simply for want of all the inspection and control formalities. See *Embedded Moments, Inc. v. International Silver Co.*, 648 F. Supp. 187, 194 (E.D.N.Y. 1986) (license agreement

without explicit provision for supervisory control and absence of actual inspection nevertheless no basis for abandonment where prior working relationship established basis for reliance on licensee's integrity and history of manufacture was "trouble-free").

The history of the Stehling brother's relationship warrants this relaxation of formalities. Prior to the licensing agreement at issue, the Stehling brothers operated Taco Cabana together for approximately eight years. Taco Cabana and TaCasita do not use significantly different procedures or products, and the brothers may be expected to draw on their mutual experience to maintain the requisite quality consistency. They cannot protect their trade dress if they operate their separate restaurants in ignorance of each other's operations, but they need not maintain the careful policing appropriate to more formal license arrangements. Two Pesos adduces no evidence to indicate any decline in the level of quality at Taco Cabana or TaCasita, and we find nothing in the record to substantiate Two Pesos' claim that the licensing arrangement diminishes any proprietary rights in the trade dress.

932 F.2d at 1121. The "quality theory" that formed the basis of the decision in *Taco Cabana Int'l* is not new and is widely accepted. See *In re Polar Music Int'l AB*, 714 F.2d 1567, 221 U.S.P.Q. 315 (Fed. Cir. 1983). In *Polar Music*, recording artists were permitted to register their mark ABBA for sound recordings even though they were not literally the one direct source of the records, which were produced by a separate record company. In finding the performing artists owned the mark for records, the Federal Circuit explained that where the claimed mark "has been used numerous times on different records and has therefore come to represent an assurance of quality to the public, the name may be registered as a trademark since it functions as one." *Id.* at 1572, 221 U.S.P.Q. at 318. SWISS ARMY, no less than ABBA, has been used numerous times on different knives of both Applicants and has come to represent an assurance of quality to the public. Where, as here, the parties have a longstanding relationship, they also may rely on each

other to control quality. *Arner v. Sharper Image Corp.*, 39 U.S.P.Q.2d 1282, 1286 (C.D. Cal. 1995).

Likewise, in *Coca-Cola Bottling of Shreveport v. Coca-Cola Co.*, 696 F. Supp. 97 (D. Del. 1988), the court recognized that joint ownership of the mark COCA-COLA as between the Coca-Cola Company and its bottlers properly reflected consumer understanding that the term is a trademark:

Third, 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 minds of the public as to source, joint ownership better represents reality (footnote omitted). The bottlers and the Company share responsibility for the quality of the product (footnote omitted). Moreover, the bottlers own the bottling business, "a separate and distinct part of the business" [footnote omitted] of producing Coca-Cola.

Id. at 127-28.

Protection of the trademark SWISS ARMY in the joint names of the only producers of authentic SWISS ARMY knives furthers the basic premise of trademark law of preventing consumer confusion. "The trademark laws exist not to 'protect' trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner's right to a non-confused public." *James Burroughs, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 276, 192 U.S.P.Q. 555, 563 (7th Cir. 1976) (Markey, J. sitting by designation). Given the plainly piratical interests of the Opposer, the concern with preventing confusion that lay at the heart of the Board's seminal decision in *In re Diamond Walnut Growers, Inc.* is, in this case, readily resolved in favor of protecting Applicants' - and consumers' - shared interests in preventing confusion and

deception of trusting purchasers. Indeed, even withholding judgment whether the SWISS ARMY mark could be registered, and even assuming *arguendo* that the mark was generic, the New York District Court found that Opposer's use of the term was likely to cause confusion. *Forschner II*, 904 F. Supp. at 1425. Protection of consumers as well as Applicants' enormous investment in their uniquely respected mark thus counsels in favor of passing the mark SWISS ARMY to registration.

There is no requirement that the parties' agreement jointly to maintain the SWISS ARMY trademark be reduced to writing or that there be a formal partnership or joint venture relationship. *National Lampoon v. American Broadcasting Cos. Inc.*, 376 F.Supp. 733, 737 (S.D.N.Y. 1974); *Stockpot, Inc. v. Stock Pot Restaurant*, 220 U.S.P.Q. 52-60 (T.T.A.B. 1983). Certainly T.M.E.P. Rule 803.03(d) contains no such requirement as Opposer demands but, rather, explicitly acknowledges that a joint application is proper where the applicants are *separate* entities. Victorinox, which does not generally retain lawyers (Elsener Tr. 213-14), has a decided preference for gentlemen's agreements, even in commercial dealings (Id. 219-20). What Opposer sarcastically derides as a "myth" has had the curiously realistic result of 100 years of unmatched consistent quality. That reality justifies registration. Indeed, as set forth in *Charles of the Ritz Group, Ltd. v. Marcon, Ltd.*, 635 F. Supp. 158, 159 (S.D.N.Y. 1986), cited by Opposer, a trademark "must be used in a manner that is clearly calculated *to project to consumers* that the trademarked goods originate from a single source (emphasis added)." That "source" obviously need not be known to consumers. Opposer does not dispute that the mark SWISS ARMY is used by Applicants to project to *consumers* a single source and consistent quality. Jack Dweck himself

admitted that until he embarked on his piratical scheme, he too recognized the SWISS ARMY mark as designating a single source of knives (Dweck Tr. 88-89).

In *Mishawaka Rubber and Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942), a case in which the mark in issue was simply a red dot on a shoe heel, Justice Frankfurter explained the legal basis for protecting trademarks:

The protection of trademarks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising shortcut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same -- to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.

Id. at 205.

In the market for pocketknives and other goods (such as watches and sunglasses) for which the SWISS ARMY name has now been licensed, the subject mark is a powerful symbol. It is so powerful that, as Opposer concedes, the SWISS ARMY knife has become a metaphor for excellence ("A symbol of success and taste" (Dweck Ex. 15; Elsener Tr. 33-35)) – akin to ROLLS ROYCE or TIFFANY. Opposer's aim is simply to poach on this commercial magnetism, or in the words of the New York District Court, to "piggyback" or "prey on" Applicants' goodwill. Opposer's goal to disenfranchise Applicants of the trademark SWISS ARMY does not reflect the failure of the term to serve as a trademark. Just the opposite: Opposer seeks freedom to trade on

the enormously powerful "merchandising shortcut" (or "symbol of success and taste") that Applicants have labored for generations to develop, and in so doing mislead unsuspecting consumers who would buy Opposer's imitation "Swiss Army" knives with the false expectation of receiving the same quality product they have long-associated with the SWISS ARMY brand. The enormous value of Applicants' mark to *Opposer* (if it ever were to reenter the pocket knife market) no less than Applicants is simple proof that the mark does serve as a trademark and should be preserved in the hands of Applicants.

Opposer is simply incorrect in arguing (Opp. Br. at 25) that there must be a single jointly produced product or service for a joint application to be allowed. Although joint production of a single product may justify joint registration by separate entities, as in *Pacific Intermountain Express Co.*, 111 U.S.P.Q. 187 (Comm'r 1956) (where the Commissioner acknowledged the "unusual nature of the facts [led] to an unusual conclusion"), there is no requirement that only jointly produced products merit joint trademark ownership.

In *Illinois High School Ass'n. v. GTS Vantage, Inc.*, 99 F.3d 244 (7th Cir. 1996), *cert denied*, 117 S. Ct. 1083 (1997), the case principally relied upon by Opposer, plaintiff claimed to own the mark MARCH MADNESS (probably best associated with the NCAA annual college basketball tournament) and, based on a claim of priority of use, sued the NCAA's licensee to enjoin its use. Plaintiff and the NCAA did not purport to own the mark jointly, and the suit itself revealed their disagreement as to what rights each had in the term. Unlike the two Swiss Applicants, the Illinois High School Association and the NCAA were utter strangers, without any history of cooperation. The closest parallel here would be a suit between Applicants to declare one the exclusive owner, yet unlike the parties in *Illinois High School Ass'n.*, Applicants have

never disagreed about the rights of each in the SWISS ARMY name; and have *never* disagreed that they are the *only* entities that should be permitted to use the name. Whatever competition there has been between the Applicants, it has never undermined their mutual interest in protecting the name SWISS ARMY; has never threatened their shared recognition of the need to maintain the highest possible quality standards, and has never caused them to lose sight of the need to prevent third parties such as Opposer from poaching on their joint trademark. Likewise in *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911 (S.D.N.Y. 1983), *aff'd*, 746 F.2d 112 (2d Cir. 1984), also relied on by opposer, the parties had competing interests in the name “Kong” (as part of the movie King Kong and the Donkey Kong computer game). There had been no effort by the legitimate but disparate owners of King Kong to manage their interests together or establish joint ownership. Moreover, although Opposer cites the district court decision, the Second Circuit declined to decide whether divided ownership of the movie rights threatened possible trademark rights. 746 F.2d at 115.

By contrast, here, 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. *Cuban Cigar Brands N.V. v. Upmann Int'l*, 457 F. Supp. 1090, 1101, 199 U.S.P.Q. 193, 202 *aff'd*, 607 F.2d 995 (2d Cir. 1979) (confiscation of cigar company and its trademarks by Castro government and resulting 15-year interruption of sales by original trademark owner not an abandonment); *Vaudable v. Montmartre*, 193 N.Y.S. 332, 335, 123 U.S.P.Q. 357, 358 (N.Y. Sup. Ct. 1959) (forced wartime withdrawal of business from U.S. not an

abandonment); *Pennsylvania Co. for Ins. v. Patterson & Coane, Inc.*, 38 U.S.P.Q. 276, 280 (D.N.J. 1938) (interruption of sales during prohibition not an abandonment).¹³ 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.

**B. Incorrect Statements Made By Applicants' Distributors
 Are Not Evidence SWISS ARMY Is Not A Trademark**

Although there have been statements by Applicants' United States *distributors* admitting neither owned the trademark SWISS ARMY¹⁴ and even that SWISS ARMY is not a mark, there have been no such statement *by Applicants*, and Opposer admits it can identify none (Dweck Tr. 110; Dweck Ex. 16 at 6-8). The statements by the distributors are inadmissible since Opposer has presented no evidence either distributor had authority to make any such statements. Moreover, all of the statements referred to are hearsay and should be stricken. (See Appendix A.) Simply

¹³ The circumstances here also bear some resemblance to cases where joint use was permitted upon dissolution of a business. *See, e.g., Menendez v. Holt*, 128 U.S. 514, 522 (1888); *In re Marriage of Shelton*, 118 Cal. App. 3d 811, 173 Cal. Rptr. 629 (3d Dist. 1981). However, notwithstanding (and in part because of) the Swiss military's requirement that there be two manufacturers, the two Applicants have always cooperated with one another to produce the best quality knives possible.

¹⁴ Most of the statements by the distributors do not refer at all to *Applicants'* trademark rights, but simply acknowledge accurately that neither *distributor* owns or purports to own *Applicants'* SWISS ARMY trademark. This is consistent with the presumption that, as between a U.S. distributor and a foreign manufacturer, all trademark rights belong to the foreign manufacturer. *Global Maschinen GmbH v. Global Banking Systems, Inc.*, 227 U.S.P.Q. 862, 866 (T.T.A.B. 1985). Statements by the distributors acknowledging this legal truism are irrelevant.

because Forscher and Precise distribute Applicants' SWISS ARMY knives, it hardly follows that their statements are admissible against Applicants.

No broad agency relationship arises between a trademark owner and its distributors merely because the distributors sell the trademark owner's products. In *Oberlin v. Marlin American Corp.*, 596 F.2d 1322 (7th Cir. 1979), the court explained that the Lanham Act does not, "create a federal law of agency." *Id.* at 1326-27. "The duty [of quality control] does not give a licensor control over the day-to-day operations of a licensee beyond that necessary to ensure uniform quality of the product or service in question. It does not automatically saddle the licensor with the responsibilities under state law of a principal for his agent." *Id.* at 1327. Opposer presented no evidence that Mr. Kennedy was authorized by either Applicant to make a statement concerning Applicants' trademark rights or that any statements by either distributor was made by them within the scope of their agency. Opposer did not take the testimony of either distributor and Applicants denied the existence of any such authority (Elsener Tr. 103-110). Other statements, such as Mr. Kennedy's statement about a supposed lack of quality control at Wenger (Opp. Not. Rel. Ex. 3), have no foundation and are simply inaccurate (Cachot Tr. 45-49). Nor did Opposer establish that a purported ad by the distributor Precise was in general circulation. *See Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q. 2d 1705, 1722, n.56 (T.T.A.B. 1999) ("[A]s a general rule, catalog advertising or product information [is not admissible by notice of reliance as a printed publications]"); *Hard Rock Café Licensing Corp. v. Elsea*, 1998 WL 391120, at *3 (T.T.A.B. 1998) (rejecting excerpts from newspapers and periodicals that failed to indicate the names and/or dates of the publications in which the excerpts appeared); *Raccioppi v. Apogee, Inc.*, 1998 WL 425473, at *2 n.2 (T.T.A.B. 1998) ("[A notice of reliance containing a printed publication] shall specify the printed

publication (including information sufficient to identify the source and date of the publication) . . .").

Opposer made no effort to prove at trial any independent *factual* bases to support the inferences it wishes the Board to draw against Applicants. *Plymouth Rock Found. v. Christian Heritage Tours, Inc.*, 2001 TTAB LEXIS 494, at *8 (T.T.A.B. 2001) (correspondence submitted in notice of reliance did not constitute printed publication or official record and thus was not admissible); *Cadence Indus. Corp. v. Kerr*, 1985 TTAB LEXIS 120, at *3 (T.T.A.B. 1985).

“In the absence of a stipulation, the Board . . . requires that a party move for leave to use testimony from another proceeding.” *Carganza, Inc. v. Scholfield Auto Plaza, LLC*, 1999 TTAB LEXIS 376, at *2 n.2 (T.T.A.B. 1999). Opposer has not moved for such leave in this action, and the time in which to do so has expired. *See Trademark Trial and Appeal Board Manual of Procedure* § 531. “[T]estimony in the form of a[] . . . declaration may be submitted, but only pursuant to a written agreement of the parties.” *Pacific Solar Company, Inc. v. Pacific Solar Pty., Ltd.*, 2002 TTAB LEXIS 307, at *2 n.4 (T.T.A.B. 2002); *see also Blue Cross and Blue Shield Assoc. v. American Medical Assoc.*, 2000 TTAB LEXIS 132, at *4 (T.T.A.B. 2000); 37 C.F.R. § 2.123(b). There is no such agreement here. Accordingly, Exhibits 3-5 and 15 are inadmissible.

Even if admissible in this proceeding, statements by distributors are not *admissions* of Applicants, but at most inconclusive -- or plainly foundationless -- *evidence*, which must be weighed against all of the other evidence presented to determine their materiality. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151, 153-54 (C.C.P.A. 1978) (fact finder “may not . . . consider as ‘admitted’ a fact shown to be non-existent by [the] other [party’s] evidence of record; nor may he consider a party’s opinion relating to the ultimate conclusion on

'admission'''). That the distributors may have made incorrect statements of fact or law does not require the Board to repeat their errors. Incorrect *legal* conclusions on the ultimate issue the Board must decide of whether the designation SWISS ARMY is a trademark, are not *evidence* at all. *Harjo*, 50 U.S.P.Q. 2d at 1716 ("The Board must reach its own conclusions on the legal issues before it, based on the record in each case. The Board will not simply adopt the opinions of particular witnesses . . ."); *Saab-Scania AB v. Sparkomatic Corp.*, 1993 WL 186178, at *5 n.5 (T.T.A.B. 1993) (according no determinative weight to the legal conclusions of a witness). *See also*, *YKK Corp. v. Jungwoo Zipper Co., Ltd.*, 2002 U.S. Dist. LEXIS 14665, at *21-22 (C.D. Cal. April 25, 2002) (refusing to consider non-lawyer's testimony regarding likelihood of confusion); *Maynard v. Ferno-Washington, Inc.*, 22 F. Supp. 2d 1171, 1179 (E.D. Wash. 1998) (excising conclusions of law from expert's affidavit); *E.E.O.C. v. Clayton Residential Home, Inc.*, 874 F. Supp. 212, 216 (N.D. Ill. 1995) (inappropriate to consider party's possibly untutored *legal* conclusion).

C. The Trademark SWISS ARMY Is Not Generic

It is Opposer's burden to prove genericness by a preponderance of the evidence. *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 641-42, 19 U.S.P.Q.2d 1551, 1554 (Fed. Cir. 1991). More specifically, Opposer must show that the "primary significance" of SWISS ARMY "to the relevant consuming public" is to designate pocketknives or multifunction pocketknives generally, rather than multifunction pocketknives made by Applicants. *Id.* The Trademark Clarification Act of 1984 confirmed that the test of genericness is the test articulated by Judge Learned Hand in *Bayer Co. v. United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921), namely: "What do the buyers

understand by the word for whose use the parties are contending." *Accord H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986).

H. Marvin Ginn explained that analysis of genericness requires two steps: "First, what is the genus of goods or services at issue? Second, is the term sought to be registered . . . understood by the relevant public primarily to refer to that genus of goods or services." 782 F.2d at 990, 228 U.S.P.Q. at 530. Opposer satisfies neither element. To the contrary, Opposer's designated witness, Mr. Dweck, was unable to identify any genus of goods supposedly denoted by the term "SWISS ARMY" and the few elements he did identify were wrong. He first defined the "generic" SWISS ARMY knife as being multi-functional and having red handles (Dweck Tr. 97). In fact, Applicants' SWISS ARMY knives are available in a rainbow of colors (App. Ex. 9 at 9; App. Ex. 13 at 7; App. Ex. 26 at 1.2.4), and even Mr. Dweck agreed that not all SWISS ARMY knives are red (Dweck Tr. 101). Mr. Dweck next added to his definition that SWISS ARMY knives do not have rivets (Dweck Tr. 104). But yet, sometimes they do (App. Ex. 9 at 12, 13; App. Ex. 13 at 30-31; App. Ex. 26 at 1.6.2). Mr. Dweck then redefined the term to add that SWISS ARMY knives are symmetrical: *i.e.*, they do not have contoured bodies (Id. at 105). In fact, they do (App. Ex. 9 at 19-20; App. Ex. 13 at 20-21; App. Ex. 26 at 1.7.1-2). Mr. Dweck's final limitation was that SWISS ARMY knives do not have grainy or wooden handles (Dweck Tr. 106). Applicants Exhibit 10, however, is a wood-handled SWISS ARMY knife, and Applicants sell numerous other SWISS ARMY knives with handles of wood, horn, mother of pearl and the like (Elsener Tr. 45; App. Ex. 5 at final 2 pages; App. Ex. 13 at 25-29). The only remaining characteristic of the genus "SWISS ARMY" is that knives belonging to the class are multi-functional. But Mr. Dweck himself agreed that Boy Scout knives - which unquestionably are multi-functional - are not

SWISS ARMY knives (Dweck Tr. 103). All multi-function pocket knives plainly are not SWISS ARMY knives. The only workable definition of SWISS ARMY knives is that they are all made by Applicants - which of course is because SWISS ARMY is a trademark, not a generic term for some genus of knives.

To describe the “genus” of Applicants' products, the lexicon has no lack of generic terms: folding knife, pocketknife, multifunction pocketknife, pen knife, jack knife, multi-blade. The joint application itself describes the class of goods as "handtools, namely multifunction pocketknives." Opposer's Notice of Opposition uses the generic terms "handtools" and "multifunction pocketknives" or simply "pocketknives" to refer to its own imitation "Swiss Army" knife or Applicants' genuine products. There is no evidence the name SWISS ARMY is used or understood by the purchasing public in a manner akin to such truly generic terms or that it has any meaning as applied to folding knives, pocketknives, jack knives, etc., other than as a designation of origin with Applicants.

That American GI's coined the term, as Mr. Elsener testified, because they could not pronounce Schweizer Offiziermesser or Sportmesser is hardly proof of genericness - or even of descriptiveness. Indeed, a merely descriptive term denotes a quality or characteristic of the product. *See Trademark Manual of Examining Procedure* §1209.01(b) (3d ed. 2002). Even assuming Mr. Elsener (whose first language is not English) was purporting to identify some state of mind of servicemen he never met, the GI's use of SWISS ARMY to “describe” the purchasers or users of his company's knives as a matter of law is not a description of a quality or characteristic of a knife.

Opposer does not disagree that the 81% recognition rate of SWISS ARMY as a trademark (Ostberg Tr. 15-16; App. Ex. 4) more than satisfies the primary significance test. Opposer's disagreement with Dr. Ostberg's survey results is that it would have preferred had he probed consumer reactions to the words "Swiss Army knife" rather than "Swiss Army" alone. Of course, the mark applied for is SWISS ARMY, not Swiss Army knife, and Opposer's criticism is supported by no authority - legal or otherwise. It is hardly clear this would have yielded relevant results. Opposer cites no legal authority that Dr. Ostberg's test format was in any way flawed. To the contrary, Dr. Ostberg used the *Teflon* Methodology which has been approved by numerous courts and by the Board. *E.I. DuPont De Nemours and Co. v. Yoshida Int'l, Inc.*, 393 F. Supp. 502 (E.D.N.Y. 1975); *In re Callaway Golf Co.*, 2001 TTAB LEXIS 599 at *8 (T.T.A.B. 2001).¹⁵ Furthermore, Opposer, which has known of the survey results since 1997, never retained its own expert to critique the survey (or if it did, it elected not to have him or her testify) and never conducted its own consumer research to test its hypothesis a different survey design would have yielded better results.

Opposer has cited no meaningful evidence of genericness.¹⁶ Opposer cites to three internet dictionaries. Yet the unreliability of such evidence renders it inadmissible. *See Guinness United*

¹⁵ Applicants acknowledge that *Calloway* is not designated to be cited as precedent.

¹⁶ The only ground specified in the Notice of Opposition is Opposer's allegation that the Second Circuit or the New York District Court held the mark to be generic (Notice of Opp. ¶¶ 5-7). The Board has already rejected that contention since the federal courts merely *assumed arguendo* (for specified reasons) the mark is generic. The District Court also expressly noted that the SWISS ARMY mark possesses secondary meaning and identifies Wenger and Victorinox as source, which would be inconsistent with a finding of genericness. 904 F. Supp. at 1419. *See H. Marvin Ginn*, 782 F.2d at 989, 228 U.S.P.Q. at 530 (a generic term "is incapable of acquiring de jure distinctiveness under § 2(f)"); *In re Montrachet*, 878 F.2d 375, 376, 11 U.S.P.Q. 2d 1393, 1394 (Fed. Cir. 1989) ("generic names are incapable of indicating source").

Distillers & Vintners v. Lowe, 2001 TTAB LEXIS 788, at *3 n.5 (T.T.A.B. 2001); *Blue Cross*, 2000 TTAB LEXIS 132, at *4-5. This case well exemplifies why such transitory evidence should be disregarded, as Applicants have shown more recent editions of two of the three dictionaries that do not give the term SWISS ARMY any generic meaning, (App. Not. Rel. Ex. I; App. Supp. Not. Rel. Ex. M); the third (Opp. Ex. 32) is a British dictionary with no known U.S. circulation. Opposer has cited no authoritative dictionaries defining SWISS ARMY generically.

Opposer's remaining "evidence" of genericness is likewise inadmissible. Statements by Applicants' distributors are not admissions of Applicants. (*See supra* pages 30-31.) Opposer did not obtain testimony from the distributors (or anyone else), nor have Applicants cross-examined any such hypothetical witnesses. Their prior statements are hence inadmissible hearsay, and Opposer's Exhibits 3, 4, 5 and 15 should be stricken. Review of the actual statements show why they are unreliable (and inadmissible) as evidence of genericness. For instance, Mr. Kennedy's use of SWISS ARMY as a "generic" term was simply to refer to Swiss-made knives produced by either Applicant for sale to the Swiss military (Dweck Ex. 16, Answer to Interrogatory No. 23) – hardly proof of genericness. The cited references to SWISS ARMY knives in court decisions (Opp. Not. Rel. Exs. 34-52) books (Opp. Not. Rel. Ex. 29, 33) and newsclippings (Opp. Not. Rel. Exs. 53-61) are all ambiguous at best. In each it is likely or at least plausible the judge or author was referring to Applicants' knives.

One court's mis-interpretation of the decision in *Forschner I* (Opp. Not. Rel. Ex. 34) (contrary to this Board's ruling in denying summary judgment recognizing the court never decided the issue of genericness) is simply erroneous and is at any rate inadmissible hearsay. *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 147 F.3d 1374, 1380-81 (Fed. Cir. 1998) (administrative

law judge's finding as to extent of similarity between two patents inadmissible); *Barnes Found. v. Township of Lower Merion*, 982 F. Supp. 970, 1009 (E.D. Pa. 1997) ("Civil judgments are inadmissible hearsay."). Use of SWISS ARMY as a metaphor for a standard of excellence (typically in respect of *other* products, Dweck Ex. 15), does not make it generic for knives. Just as the marks ROLLS ROYCE or TIFFANY are used in a laudatory and metaphorical way for all sorts of products (*e.g.*, "the Rolls Royce of timepieces") without casting the mark into the public domain, rights in the mark SWISS ARMY should not be forfeited because of Applicants' great marketing success and reputation for unsurpassed quality and ingenuity. Occasional metaphorical uses of the term SWISS ARMY by the press alone, unsupported by any other evidence, are also of dubious probative value because statements by journalists do not necessarily reflect "what the buyers understand." *Bayer, supra*. See *In re Montrachet*, 878 F.2d at 376, 11 U.S.P.Q.2d at 1394 (press usage insufficient to prove genericness); *In re Merrill Lynch, Pierce, Fenner, and Smith*, 828 F.2d 1567, 1569, 4 U.S.P.Q.2d 1141, 1142 (Fed. Cir. 1987) (same); *In re Bel Paese Sales Co.*, 1 U.S.P.Q.2d 1233, 1235 (T.T.A.B. 1986) (same). In the Notice of Opposition and its responses to discovery, Opposer offered no direct evidence of purchaser understanding of the term SWISS ARMY, such as testimony of consumers or consumer surveys. See *Magic Wand, Inc.*, 940 F.2d at 641, 19 U.S.P.Q.2d at 1553.

Opposer's genericness argument may simply be an application of the now-repudiated definition of genericness put forward in *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 216 U.S.P.Q. 588 (9th Cir. 1982), where "Monopoly" was deemed the generic name for a unique product. That definition was rejected by the 1984 Trademark Clarification Act, which amended the Lanham Act to provide that a mark "shall not be deemed to be the generic

name of goods or services solely because such mark is also used to identify a unique product or service." 15 U.S.C. § 1064(3). Applicants' pocketknives are undoubtedly unique, and have an unsurpassed reputation for ingenuity and quality. However, Opposer's argument confuses genericness with fame and does so precisely because Opposer once had hopes to exploit the great goodwill symbolized by Applicants' mark if this Board were to cast the mark into the public domain. Opposer has not sustained its burden of proving SWISS ARMY is generic for knives or some definable category of knives.

D. Opposer Lacks Capacity or Standing To Challenge Registration

New York law (and the law of most if not all jurisdictions) is well-settled that a corporation dissolved for failure to pay state franchise taxes is without capacity to sue or engage in any business other than the winding up of its affairs. *Brady v. State Tax Commn.*, 176 Misc. 1053, 1055, 29 N.Y.S.2d 88, 91 (Sup. Ct. NY County 1941) ("A corporation dissolved under Section 203-a is legally dead and can no longer sue or be sued, except in the limited respects specifically permitted by the statute. Its existence has been terminated and it is not even a de facto corporation."), *aff'd*, 263 App. Div. 955, 33 N.Y.S.2d 384, *aff'd*, 289 N.Y. 585, 43 N.E. 719 (N.Y. 1942).¹⁷ See also *Metered Appliances, Inc. v. 75 Owners Corp.*, 638 N.Y.S.2d 631, 631-32 (N.Y. App. Div. 1st Dept. 1996); *Application of S. M. & J. Eisenstadt, Inc.*, 10 N.Y.S. 868 (N.Y. App. Div. 1st Dept. 1939); *DeGeorge v. Yusko*, 169 A.D.2d 865, 866-67, 564 N.Y.S. 597, 598 (N.Y. App. Div. 3rd Dept. 1991)

¹⁷ Conduct exemplary of the winding up of a corporation's affairs includes collection of debts and payment of claims against the corporation. *Application of S. M. & J. Eisenstadt, Inc.*, 10 N.Y.S.2d at 872. Years before it even commenced this proceeding, Opposer wound up its affairs in 1993, when it disposed of its assets and closed its doors for business.

Opposer, which was formed and had once existed under New York law, was dissolved in 2000. As a matter of law, this opposition must be dismissed because Opposer lacks capacity to pursue the matter - and indeed had no basis even to have submitted evidence or a trial brief. Because Opposer no longer exists in any legal sense, it likewise cannot be damaged by registration of the subject mark. 15 U.S.C. § 1063. Indeed, Opposer has not sold a single knife in nine years, and (well prior to its formal dissolution) terminated all operations, disposed of all of its assets, and ceased to exist in any real sense in 1993, years before it even commenced this suit. Opposer has not identified (much less joined in this proceeding) any legal successor to any possible interest it may have had (nine years ago) in the name SWISS ARMY.

Thus, Opposer has no interest at stake, *Te-Ta-Ma Truth Found. Family of Uri, Inc. v. World Church of the Creator*, 297 F.3d 662, 667 (7th Cir. 2002), and registration of the subject mark cannot possibly cause injury to Opposer. *See Coup v. Vornado, Inc.*, 9 U.S.P.Q.2d 1824, 1825-26 (T.T.A.B. 1988) (petitioner unable to identify any relevant use of the mark in its own name and hence could not claim injury or establish standing to challenge registration). When directly - and repeatedly - asked at his deposition what harm Opposer might suffer from registration of the subject mark, Opposer's former owner and designated witness became argumentative but could identify no harm whatsoever (Dweck Tr. 134-38). Opposer failed to present at trial (in its case in chief or on rebuttal) any additional evidence to suggest how registration might affect a non-existent entity. Its trial brief says nothing.

Opposer has also been enjoined from using the name "SWISS ARMY" alone or in combination with other elements of its choosing. Putting aside the issue (which is not presented here) whether *Applicants* might be entitled to broader injunctive relief than that obtained by

Forschner, which admitted it did not own the mark, the simple fact that Opposer is not permitted to use the name SWISS ARMY alone means it cannot be damaged by registration of the mark alone. *Cf. Ultracashmere House, Ltd. v. Spring Mills, Inc.*, 828 F.2d 1580, 4 U.S.P.Q.2d 1252 (Fed. Cir. 1987) (party that had been enjoined from using the name ULTRACASHMERE unless accompanied by a disclaimer was thereby precluded from claiming rights in the mark, with or without the accompanying court-ordered disclaimer). Again, Opposer's trial brief says nothing on the subject.

**E. Opposer Is Estopped From Disputing
The Trademark Status of the Mark SWISS ARMY**

In 1991, Opposer sought to register the mark SWISS ARMY and a design simulating the Swiss national emblem, Appln. Serial No. 74/154,714. Opposer did not disclaim exclusive rights in the mark SWISS ARMY (Dweck Ex. 9). Likewise, by later adopting the adjective "classic" to modify the trademark SWISS ARMY, Opposer deliberately sought to exploit the established meaning of the word as "authentic," "authoritative," "traditional," and "of recognized value", *Webster's Ninth New Collegiate Dictionary*, at 246, and in so doing affirmatively recognized the trademark significance of the name SWISS ARMY. In finding Opposer in contempt, the District Court for the Southern District of New York thus held that Opposer was deliberately "piggybacking" and "preying on" the goodwill of the subject mark, and, in finding bad faith, concluded that "I do not credit Mr. Dweck's testimony that he believed from the language of the April 24 [1996] Order that the use of Classic modifying Swiss Army knife would be in compliance with the April 24 Order." (Dweck Ex. 22 at 6-7).

Accordingly, Opposer's use as a trademark and attempted registration of the term SWISS ARMY should estop it from contending that the mark is anything other than a trademark.

SquirtCo. v. Tomy Corp., 697 F.2d 1038, 1043, 216 U.S.P.Q. 937, 940 (Fed. Cir. 1983) ("Tomy cannot, on the one hand, assert that SQUIRT SQUAD is not descriptive of its goods . . . to entitle it to registration on the Principal Register, and when opposed, assert that the opposer is interfering with ordinary language usage"); *Gale Group, Inc. v. Diane Corp.*, 20 U.S.P.Q.2d 1550, 1551 (M.D. Fla. 1991) ("where, as here, the Defendants have used the term 'gazebo' as a trademark, they are thereafter estopped from urging that the term is merely descriptive"); *Polymer Dynamics, Inc. v. Cabot Corp.*, 13 U.S.P.Q.2d 1220, 1223 (D. Del. 1989) (plaintiff's attempt to register its VISCOLAS trademark precluded it from arguing the term was a fair use); *Plus Prods. v. Natural Organics, Inc.*, 223 U.S.P.Q. 27, 29 (N.D.N.Y. 1984) (defendant precluded from arguing it was using the term PLUS in a descriptive sense since it had sought to register the term NATURE'S PLUS as a trademark).

Equally damning to Opposer's contention that the name SWISS ARMY is not a trademark is the original packaging Opposer used to sell its knock-off knives, on which Opposer identified the mark with a "TM" symbol and misleadingly stated the trademark "Swiss Army" (not simply what it calls the "Cross and Shield Logo") was used "under license" from an unnamed licensor. Since the license evidently was a fiction – there being no evidence it ever existed (Dweck Tr. at 67-73); since the putative licensor was no more than a shell affiliated with Opposer; since the putative licensor had no recognized trade identity of its own, and since the packaging did not attempt to identify the supposed licensor, the transparent reality is that Opposer was seeking to exploit the value of Applicants' trademark by fostering the impression among consumers that it was Applicants' licensee. Opposer's contention now that SWISS ARMY is not a recognized

trademark is entitled to no more credence than Mr. Dweck's excuse for Opposer's contempt in selecting the adjective "classic" for its counterfeit knives.

IV. CONCLUSION

For the reasons stated above and summarized in the attached Appendix A, Applicants' motion to strike Opposer's Exhibits 1-8, 10-18, 20-23 and 25-61 should be granted and the subject exhibits be held inadmissible. On the merits, judgment should be entered dismissing the Notice of Opposition and passing the subject mark to registration. Indeed, for almost sixty years, consumers have been able to rely with confidence on the name SWISS ARMY as an assurance of the very highest quality in multi-function pocketknives. There is no reason now to disturb that consumer trust to assist a counterfeiter such as Opposer in diluting, if not destroying, the SWISS ARMY name by passing off inferior quality knock-off knives on an unsuspecting public.

Dated: September 13, 2002

Respectfully submitted,

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Applicants' Objections to Opposer's Exhibits

Exhibit No.	Description	Objection
1	September 22, 1992 Complaint in <i>The Forschner Group, Inc. v. Arrow Trading Co.</i> , 92 Civ. 6953 (S.D.N.Y.)	Hearsay, FRE 802; statements of distributor in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin v. Marlin American Corp.</i> , 596 F.2d 1322 (7th Cir. 1979); no independent foundation of accuracy or relevance of such statements.
2	April 22, 1993 Joint Pretrial Order in <i>Forschner v. Arrow Trading</i>	Hearsay, FRE 802; statements of distributor in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements.
3-5	Testimony taken in other proceedings	Hearsay, FRE 802; statements of individuals in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding; no independent foundation of accuracy or relevance of such statements; leave not granted to admit testimony from another proceeding, TM Rule 2.122(f) and TBMP 715; <i>Carganza, Inc. v. Scholfield Auto Plaza, LLC</i> , 1999 TTAB LEXIS 376 *2 n.2 (T.T.A.B. 1999).

6	September 29, 1993 decision in <i>The Forschner Group v. Arrow Trading Co.</i> , 833 F.Supp 385 (S.D.N.Y. 1993)	Statements and findings of court in separate proceeding to which applicants were not parties not involving applicants are hearsay, <i>Applied Med. Res. Corp. v. U.S. Surgical Corp.</i> , 147 F.3d 1374, 1380-81 (Fed. Cir. 1998); <i>Barnes Found. v. Township of Lower Merion</i> , 982 F. Supp. 970, 1009 (E.D. Pa. 1997), and lack independent foundation of accuracy or relevance in this proceeding.
7	July 22, 1994 decision in <i>The Forschner Group v. Arrow Trading Co.</i> , 30 F.3d 348 (2d Cir. 1994)	Statements and findings of court in separate proceeding not involving applicants are hearsay, <i>Applied Med. Res. Corp.</i> , <i>supra</i> ; <i>Barnes Found. v. Township of Lower Merion</i> , <i>supra</i> , and lack independent foundation of accuracy or relevance in this proceeding.
8	October 24, 1995 decision in <i>The Forschner Group v. Arrow Trading Co.</i> , 904 F.Supp 1409 (S.D.N.Y. 1995)	Statements and findings of court in separate proceeding not involving applicants are hearsay, <i>Applied Med. Res. Corp.</i> , <i>supra</i> ; <i>Barnes Found. v. Township of Lower Merion</i> , <i>supra</i> , and lack independent foundation of accuracy or relevance in this proceeding.
10	September 4, 1997 decision in <i>The Forschner Group v. Arrow Trading Co.</i> , 124 F.3d 402 (2d Cir. 1997)	Statements and findings of court in separate proceeding not involving applicants are hearsay, <i>Applied Med. Res. Corp.</i> , <i>supra</i> ; <i>Barnes Found. v. Township of Lower Merion</i> , <i>supra</i> , and lack independent foundation of accuracy or relevance in this proceeding.
11	May 18, 1995 Complaint in <i>The Forschner Group, Inc. v. Int'l Branded Cutlery, Inc.</i> , 95 Civ. 3620 (S.D.N.Y.)	Hearsay, FRE 802; statements of distributor in separate proceeding not admissions of Applicants in this proceeding, <i>Oberlin</i> , <i>supra</i> ; no independent foundation of accuracy or relevance of such statements.

12	August 21, 1996 Memorandum and Order <i>Forschner Group, Inc. v. Int'l Branded Cutlery, Inc</i>	Statements and findings of court in separate proceeding not involving applicants are hearsay, <i>Applied Med. Res. Corp. , supra</i> ; <i>Barnes Found. v. Township of Lower Merion, supra</i> , and lack independent foundation of accuracy or relevance in this proceeding.
13	Statement of Investigative Attorney in <i>In re Certain Multiple Implement, Multi-Function Pocket Knives and Related Packaging and Promotional Materials</i> , Investigation No. 337-TA-398	Hearsay, FRE 802; statements and opinions on legal issues by attorney in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding; no independent foundation of accuracy or relevance of such statements.
14	January 7, 1992 Answer in <i>The Forschner Group, Inc. v. Precise Imports Corp.</i> , 91 Civ. 8466 (S.D.N.Y.)	Hearsay, FRE 802; statements of distributor in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements.
15	Unsigned December 17, 1991 Declaration of James Kennedy in <i>The Forschner Group, Inc. v. Precise Imports Corp.</i> , 91 Civ. 8466 (S.D.N.Y.)	Hearsay, FRE 802; unsworn statements of individual not employed by either applicant in separate proceeding not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements; submission of declarations not permitted without written agreement of parties; <i>Pacific Solar Company, Inc. v. Pacific Solar Pty., Ltd.</i> , 2002 TTAB LEXIS 307 *2 n.4 (T.T.A.B. 2002); <i>Blue Cross and Blue Shield Assoc. v. American Medical Assoc.</i> , 2000 TTAB LEXIS 132 (T.T.A.B. 2000).

16	December 17, 1991 Memorandum of Law in <i>The Forschner Group, Inc. v. Precise Imports Corp.</i> , 91 Civ. 8466 (S.D.N.Y.)	Hearsay, FRE 802; unsworn statements and opinions of attorney for distributor in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements.
17	December 27, 1991 Memorandum of Law in <i>The Forschner Group, Inc. v. Precise Imports Corp.</i> , 91 Civ. 8466 (S.D.N.Y.)	Hearsay, FRE 802; unsworn statements and opinions of attorney for distributor in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements.
18	June 30, 1992 Settlement Agreement in <i>The Forschner Group, Inc. v. Precise Imports Corp.</i> , 91 Civ. 8466 (S.D.N.Y.)	Hearsay, FRE 802; unsworn statements of distributors in separate proceeding to which applicants were not parties not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements.
20-22	Letters of James Kennedy	Hearsay, FRE 802; unsworn statements of individual not employed by either applicant not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements; letters are not "printed publications" as per TM Rule 2.122(e); <i>Plymouth Rock Foundation v. Christian Heritage Tours, Inc.</i> , 2001 TTAB LEXIS 494 *8 (T.T.A.B. 2001); <i>Cadence Industries Corp. v. Kerr</i> , 1985 TTAB LEXIS 120 *3 (T.T.A.B. 1985).

23	Excerpt from www.swissarmybrands.com	Hearsay, FRE 802; unsworn statement of distributor not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements; Internet printouts are not self-authenticating and as such are not "printed publications" as per Trademark Rule 2.122(e4); <i>Blue Cross</i> , 2000 TTAB LEXIS 132 at * __, <i>Guinness United Distillers & Vintners v. Lowe</i> , 2001 TTAB LEXIS 778 (TTAB 2001).
25-27	Undated advertisement of Precise Imports	Hearsay, FRE 802; unsworn statements of distributor not admissions of Applicants in this proceeding, <i>Oberlin, supra</i> ; no independent foundation of accuracy or relevance of such statements; advertisements are not "printed publications" as per TM Rule 2.122(e); <i>Food-Tek, Inc. v. Rhodia, Inc.</i> , 1999 TTAB LEXIS 614 *8 (T.T.A.B. 1999); no evidence of actual circulation, <i>Hard Rock Café Licensing Corp. v. Elsea</i> , 1998 WL 391120 *3 (T.T.A.B.1998); <i>Raccioppi v. Apogee, Inc.</i> , 1998 WL 425473 *2 n.2 (T.T.A.B. 1998).
29	Excerpt from unknown source	Hearsay, FRE 802; relevance (exhibit does not show use of SWISS ARMY as a generic term); no foundation.

30-32	Excerpts from Internet websites	Hearsay, FRE 802; relevance; foundation (compare App. Not. Rel. Ex. I; App. Supp. Not. Rel. Ex M; Internet printouts are not self-authenticating and as such are not "printed publications" as per TM Rule 2.122(e); <i>Blue Cross</i> , 2000 TTAB LEXIS 132 at * 4-5; <i>Guinness United Distillers & Vintners v. Lowe</i> , 2001 TTAB LEXIS 788 (TTAB 2001); Ex. 32 not a U.S. dictionary.
33	Excerpt from Strung, <i>An Encyclopedia of Knives</i>	Relevance (exhibit does not show use of SWISS ARMY as a generic term); no foundation.
34-52	Decisions in miscellaneous cases	Statements and findings of courts in separate proceedings not involving applicants (or opposer) are hearsay, <i>Applied Med. Res. Corp.</i> , <i>supra</i> ; <i>Barnes Found. v. Township of Lower Merion</i> , <i>supra</i> , and lack independent foundation of accuracy or relevance in this proceeding; exhibits do not show use of SWISS ARMY as a generic term.
53-61	Reprints of miscellaneous newspaper articles	Unsworn statements of newspaper reporters are hearsay, <i>Applied Med. Res. Corp.</i> , <i>supra</i> ; <i>Barnes Found. v. Township of Lower Merion</i> , <i>supra</i> , and lack independent foundation of accuracy or relevance in this proceeding; exhibits do not show use of SWISS ARMY as a generic term.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **APPLICANTS' TRIAL BRIEF AND BRIEF IN SUPPORT OF MOTION TO STRIKE** has been served by hand upon Joseph Lessem, Esq., an attorney for Opposer, at Gursky & Ederer, 1350 Broadway, 11th Floor, New York, New York 10017, this 13th day of September, 2002.

Dated: September 13, 2002



Jonathan E. Moskin