

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 5, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Bison Designs LLC*

*v.*

*Tough Gear, Inc.*  
—

Opposition No. 91201036  
—

Margaret Polson of Polson & Associates PC  
for Bison Designs LLC.

Kenneth L. Wilton and Julia K. Sutherland of Seyfarth Shaw LLP  
for Tough Gear, Inc.

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Before Kuhlke, Wellington and Kuczma,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Tough Gear, Inc. (“Applicant”) filed an application to register the mark  
**SURVIVAL BRACELET** in standard character form for bracelets in International  
Class 5.<sup>1</sup> The term BRACELET is disclaimed.

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<sup>1</sup> Application Serial No. 85233383 was filed on February 3, 2011 based on an allegation of first use anywhere and in commerce on June 30, 2006, pursuant to Section 1(a) of the Trademark Act.

Bison Designs LLC (“Opposer”) has opposed registration of Applicant’s mark on the ground that the mark is generic under Trademark Act Section 23, 15 U.S.C. § 1091; and on the ground that the mark is merely descriptive of the identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). Notice of Opposition ¶¶ 24-36.<sup>2</sup> Opposer alleges that the proposed mark “SURVIVAL BRACELET” merely identifies the function or purpose of the bracelet and that there are sellers offering survival bracelets for sale.

Applicant, in its answer, admitted that its mark is “used in connection with bracelets” and that its bracelets “may be unraveled to deploy the bracelet’s paracord for use,” but otherwise denied the salient allegations of the Notice of Opposition. Answer ¶¶ 26-27, and 31.<sup>3</sup> Specifically, Applicant denied that its mark is descriptive or generic.

The Parties have filed briefs, including a reply brief from Opposer.

***Opposer’s Motion to Strike Applicant’s Brief***

As an initial matter, we address Opposer’s motion to strike Applicant’s trial brief because it was filed after its due date and is improperly formatted. As to the latter basis, Opposer also takes issue with Applicant’s failure to list all cited cases in its

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<sup>2</sup> 1 TTABVUE 6-7 refers to the Board’s publicly available online docket sheet. For the citations to the record in TTABVUE throughout the decision, the number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the TTABVUE page number(s) of that particular docket entry.

We also note that Opposer attached a number of exhibits with its Notice of Opposition. Unless otherwise properly introduced at trial, these materials are not of record. Trademark Rule 2.122(c).

<sup>3</sup> 4 TTABVUE 7.

Table of Authorities and asserts that “approximately 46% of cases cited by Applicant do not appear in Applicant’s ‘Table of Authorities.’”<sup>4</sup>

Trademark Rule 2.128 requires, in part, that each trial brief “shall contain an alphabetical index of cases cited.” Upon review of Applicant’s brief, it is readily apparent that it did list, in alphabetical order in a “Table of Authorities” section, citations to all of the 13 cases mentioned in the main body of its brief; however, Applicant did not list the 11 case citations mentioned in its Appendix (list of objections). An appendix (or a list of objections) is, at least for page limit purposes, not considered part of the brief itself. *See* TBMP § 801.03 (“Exhibits or appendices to a brief, not being part of the brief itself, are not included within the page limit.”). Indeed, an appendix or list of objections is not even required. The rules do not provide that an index of cases be provided for the appendix.

In any event, the fact that Applicant failed to provide a separate Table of Authorities for its Appendix does not warrant striking Applicant’s brief or the appendix.<sup>5</sup> We further note the following contention made by Opposer in its motion to strike:<sup>6</sup>

Applicant’s Brief contained an alleged evidentiary objection appendix with a mix of both evidentiary objections and substantive argument as to the exhibits, that alone should be sufficient reason to strike if it was used as a subterfuge to circumvent the page limits.

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<sup>4</sup> 36 TTABVUE 5.

<sup>5</sup> The Board may allow a party to refile its brief so that it is in compliance. However, in this case and under these circumstances, we see no benefit and it would be pointless to now require Applicant to refile a complete index of cases to include those mentioned in the appendix.

<sup>6</sup> 36 TTABVUE 4.

Trademark Rule 2.128(b) provides that a main brief on the case shall not exceed fifty-five pages in length in its entirety. As previously noted, the appendix does count towards this limit. Nevertheless, the overall length of Applicant's entire main brief, even when combined with its Appendix, falls significantly short of the page limitation. Therefore, any argument that Applicant is using the Appendix as a "subterfuge" to circumvent the brief page limit is without merit. Likewise, to the extent that Applicant's Appendix contains a "mix of both evidentiary objections and substantive argument" is of no consequence, and Opposer has not demonstrated any prejudice in this regard.

As to the timeliness of Applicant's brief, Opposer's brief was due on October 12, 2014, and pursuant to Rule 2.128, Applicant's brief was therefore due thirty (30) days later, on November 11, 2014.<sup>7</sup> Applicant's brief was filed on November 13, 2014, and thus is untimely. If a brief on the case is not timely filed, according to Trademark Rule 2.128(b), it may be stricken, or given no consideration, by the

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<sup>7</sup> See Board order dated March 31, 2014 (28 TTABVUE 22) setting forth the parties' testimony periods. Rule 2.128 sets forth the due dates for trial briefs in conjunction with the last day of trial. Specifically, the last testimony period ended on August 13, 2014, and Opposer's trial brief was due on October 12, 2014, pursuant to Rule 2.128(a)(1). Although Opposer did not file its brief until October 14, 2014, it is considered timely because October 12, 2014 was a Sunday, and October 13, 2014 was the Columbus Day federal holiday. See Rule 2.196.

This set of circumstances did not change the due date for Applicant's brief. That is, pursuant Rule 2.128, Applicant's brief was due 30 days from the due date of Opposer's brief, on November 11, 2014. In other words, Applicant's due date remains inextricably linked to Opposer's due date. While a paper may be considered timely filed on a date later than the due date, as is the case with Opposer's brief, it is erroneous to view the "due date" as having been changed. Simply put, neither party's "due date" changed.

We further note that whereas November 11, 2014 was the Veterans' Day federal holiday, under Rule 2.196, Applicant had until November 12, 2014 to submit its brief which, at that point, would have been considered timely filed. Applicant, however, did not file its brief until November 13, 2014.

Board. See *Ariola-Eurodisc Gesellschaft v. Eurotone International Ltd.*, 175 USPQ 250, 250 (TTAB 1972) (brief filed three weeks late stricken); TBMP § 801.02(b).

Because Applicant did not timely file its brief on the case, Applicant must establish that its untimeliness was the result of excusable neglect. *Pioneer Investment Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997); Fed. R. Civ. P. 6(b)(1). In *Pioneer*, as adopted by the Board in *Pumpkin*, the Supreme Court clarified the meaning and scope of “excusable neglect,” as used in the Federal Rules of Civil Procedure and elsewhere. *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, at 395. The Court held that the determination of whether a party’s neglect is excusable is:

...at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include. . . [1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

The introduction of the list of factors in this manner clearly suggests that all other factors bearing on the party's omission may be considered; and broader equitable considerations should not be overlooked.

With regard to the first *Pioneer* factor, although it might be an inconvenience to Opposer, Applicant’s filing of its brief amounts to a one-day delay (see footnote 7 explaining that Applicant actually had until November 12, 2014 to timely file its brief). Opposer argues, however, that “[b]y filing its Response Brief two days late,”

Applicant's delay "usurped 13.33% of Opposer's total time to reply to Applicant's Main Trial Brief."<sup>8</sup> We disagree. It has not been shown how the single day has resulted in any measurable prejudice to Opposer, especially in view of Opposer's timely filing of its reply brief.<sup>9</sup> Prejudice to the nonmovant must be more than mere inconvenience or delay, it is prejudice to the nonmovant's ability to litigate the case. *See Pumpkin Ltd. v. The Seed Corps*, at 1587 (citing *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); TBMP § 509.01(b)(1).

Accordingly, the factor weighs in favor of finding excusable neglect.

As to the second *Pioneer* factor, Applicant filed its brief one-day later than allowed for it to have been considered timely-filed. The impact of the delay upon this proceeding is insignificant and weighs in favor of finding excusable neglect.

The third *Pioneer* factor is the reason for Applicant's delay. Applicant argues that it believed the rules allowed Applicant thirty days from the "effective due date of Opposer's brief." As previously explained, such an interpretation is incorrect (*See* footnote 7). Alternatively, Applicant argues that even if its brief is untimely, "[its] counsel's interpretation of the interplay between Rules 2.128 and 2.196 is reasonable and logical, and does not seem to have been previously addressed by the Board and is not discussed in the TBMP." Applicant also argues that it:

respectfully suggests that a balancing of equities favors acceptance and consideration of Applicant's Brief. *See, e.g., Promark Brands Inc. and H.J. Heinz Company v.*

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<sup>8</sup> 39 TTABVUE 6.

<sup>9</sup> We would be remiss if we did not point out the irony that, while Opposer's brief was timely filed, it too was filed two days after its actual "due date" (*see* footnote 7), and this cut into Applicant's time to respond to Opposer's brief.

*GFA Brands, Inc.*, Opp. No. 91194974 (Apr. 11, 2014 TTAB) (reversing interlocutory attorney's decision to strike applicant's brief filed six days late due to applicant's counsel's mistaken belief that Rule 2.119(c) applied to extend filing deadlines for trial briefs).<sup>10</sup>

Applicant's interpretation of the rules, albeit incorrect, was not wholly illogical. It was certainly plausible that confusion would ensue, given the interplay between the rules and the fact that the due dates for both parties' briefs coincided with weekend days and holidays.

As to the fourth *Pioneer* factor, bad faith, Opposer's allegations in this regard are made in a conclusory fashion. The evidence does not support a conclusion that Applicant was acting in bad faith. As such, this factor remains neutral for purposes of finding excusable neglect.

Upon weighing the aforementioned factors and for the reasons discussed above, and taking into account all relevant circumstances in this case, the Board finds there is excusable neglect in Applicant's failure to timely file its brief.

Accordingly, Opposer's motion to strike Applicant's brief is denied. We have considered all trial briefs filed.

### ***The Record***

The record in this case includes the pleadings and, by rule, the file of the involved application. Trademark Rule 2.122(b)(1).

During its trial period, Opposer submitted a Notice of Reliance on the following materials:

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<sup>10</sup> 38 TTABVUE 4.

1. Screenshots of webpages, marked as Exhibits “A” through “Z” and five additional screenshots of webpages, marked as Exhibits “AA” through “EE.” Opposer, in the Notice of Reliance, indicated that the relevance of these materials was to demonstrate that the terms in the mark were either descriptive or generic.<sup>11</sup>
2. Declaration of Abigail Smith averring that she “accessed and printed” certain webpage screenshots and conducted the searches using the Google Search engine and Amazon.com, which comprise several of the exhibits filed under this notice of reliance.<sup>12</sup>
3. Declaration of Margaret Polson, Counsel for Opposer, as to discovery of an item, entitled “Survivor Bracelet,” for sale in a gift shop of the Denver Art Museum.<sup>13</sup>

Applicant, during its trial period, filed a Notice of Reliance on its First Set of Requests for Admissions Nos. 1 through 10 which it asserted were deemed admitted under Fed. R. Civ. P. 36(a)(3) in view of Opposer’s failure to respond to them.<sup>14</sup>

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<sup>11</sup> 6 TTABVUE 1-89.

<sup>12</sup> 6 TTABVUE 90-91. We note that Ms. Smith does not describe her position or relationship to this proceeding. We furthermore note that the Notice of Reliance does not list her declaration or otherwise provide this information. Absent a stipulation, testimony may not be submitted under affidavit or declaration. *See Tri-Star Marketing LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007) (declaration cannot be submitted in lieu of testimony deposition absent a stipulation of the parties); *see also* Trademark Rule 2.123(a); TBMP § 703.01(b).

<sup>13</sup> 6 TTABVUE 92.

<sup>14</sup> A copy of the Requests for Admissions was attached to Applicant’s Notice of Reliance as Exhibit 1. (21 TTABVUE 2-3 and 4-10).



Opposer moved to set aside the deemed admissions and filed responses to the admission requests. On March 31, 2014, the Board set aside the deemed admissions, and Opposer's responses denying the admission requests were substituted.<sup>15</sup> Without any deemed admissions, there is no substance to Applicant's Notice of Reliance. Consequently, Opposer's second Notice of Reliance<sup>16</sup>, filed during its rebuttal testimony period, is rendered moot and would now constitute improper rebuttal inasmuch as there is no longer evidence from Applicant for Opposer to rebut. As a result, the materials submitted with Opposer's second notice of reliance have not been considered.<sup>17</sup>

Finally, we note that Applicant raised various objections to the materials submitted by Opposer under its first and second Notices of Reliance.<sup>18</sup> However, for

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<sup>15</sup> 28 TTABVUE 21.

<sup>16</sup> 23 TTABVUE.

<sup>17</sup> Applicant also raised this issue by the following objection:

Opposer's second Notice of Reliance ... contained Opposer's responses to requests for admissions and interrogatories ... to "contradict[] the supposed admissions" contained in Applicant's Notice. Because the Board concluded that the admissions were responded to by Opposer, the responses contained in the second Notice of Reliance are no longer relevant, and should be stricken. As a consequence, only the first Notice of Reliance is of record.

See 34 TTABVUE 11. This objection is sustained. See *Carefirst of Maryland Inc. v. FirstHealth of the Carolina Inc.*, 77 USPQ2d 1492, 1498 (TTAB 2005) (a plaintiff's rebuttal testimony period is reserved for introduction of evidence that denies, explains or discredits evidence submitted by the defendant in its testimony period); See also TBMP § 707.02(c).

<sup>18</sup> In particular, Applicant objects to many of the materials because, *inter alia*, they assertedly constitute inadmissible hearsay; website exhibits that lacked full URLs; irrelevant exhibits; exhibits presented as search summaries without any supporting testimonial evidence; and exhibits that lacked probative value. For example, Applicant objected to Opposer's Exhibit B on the ground that "evidence from www.archive.org, also referred to as 'The Wayback Machine,' is generally unacceptable as not being self-

purposes of this decision, we need not reach these objections because, whether we sustain or overrule the stated objections we would reach the same ultimate decision in this proceeding, as further discussed below.

### ***Standing***

Standing is a threshold issue that must be alleged and proven in every *inter partes* case. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 USPQ 185, 189 (CCPA 1982).

As noted by Professor McCarthy:

... all that is required is that a plaintiff allege facts sufficient to show a “real interest” in the proceeding, and a “reasonable basis” for its belief that it would suffer some kind of damage if the mark is registered. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). See also *Herbko International Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1377 (Fed. Cir. 2002); To plead a “real interest,” plaintiff must allege a “direct and personal stake” in the outcome of the proceeding.

The allegations in support of plaintiff’s belief of damage must have a reasonable basis “in fact.” *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999) (stating that the belief of damage alleged by plaintiff must be more than a subjective belief) (*citing Universal Oil Products v. Rexall Drug & Chemical Co.*, 463 F.2d 1122, 174 USPQ 458, 459-60 (CCPA 1972)).

McCarthy on Trademarks and Unfair Competition, Fourth Edition, § 20:11 and §§ 20:52 *et. seq.* (2014).

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authenticating.” See 34 TTABVue 25. Applicant also objects to Exhibit B because “it does not include a full URL – it ends with an ellipsis – and therefore is inadmissible by notice of reliance.” *Id.*

In addition to pleading its standing, an opposer must also prove its standing allegations and show that it has a “real interest,” i.e., a “personal stake,” in this proceeding beyond that of a mere intermeddler. *Ritchie v. Simpson*, 50 USPQ2d at 1025-26; *Lipton Industries*, 213 USPQ at 189.

In matters involving the ground of mere descriptiveness of the involved mark, such as this proceeding, the plaintiff’s standing is presumed if it has a sufficient interest in using the descriptive term in its business. *De Walt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 129 USPQ 275 (CCPA 1961) (“This court, since the earliest days of its jurisdiction over Patent Office appeals, has adhered to the then already established principle that damage to an opposer or injury to a petitioner for cancellation . . . will be presumed or inferred when the mark sought to be registered is descriptive of the goods and the opposer or petitioner is one who has a sufficient interest in using the descriptive term in its business.”). The same standard applies with regard to asserting a genericness ground; the plaintiff must prove only a need to use the alleged generic term. *J. Kohnstam, Ltd. v. Louis Mark & Co.*, 280 F.2d 437, 126 USPQ 362 (CCPA 1960). See discussion in *Astra Pharmaceutical Products, Inc. v. Pharmaton, S. A.*, 345 F.2d 189, 145 USPQ 461 (CCPA 1965). One who shows a need to use a generic term has standing to raise the genericness of a term in an opposition proceeding, rather than be forced to wait for registration. See also, McCarthy on Trademarks and Unfair Competition, Fourth Edition, §§ 12:1 *et. seq.* (2014).

**(a). *Opposer Has Not Properly Plead Standing***

In the preamble of its Notice of Opposition, Opposer makes the following statement:<sup>19</sup>

The above-identified Opposer believes that it will be damaged by the above-identified application if it were to proceed to registration, and hereby petitions to refuse the same.

Applicant argues that the aforementioned allegation is insufficient by itself and that Opposer failed to otherwise properly plead its standing:<sup>20</sup>

The remainder of the Notice is silent on what Opposer does, what it manufactures or sells (if anything), or any reason why it has a real interest in the proceeding. In fact, the term “Opposer” is not found anywhere between the introductory paragraph and the prayer. (Id.) As a result, Opposer has failed to provide any alleged facts from which the Board could conclude its “belief” of damage is reasonable.

Applicant is correct that Opposer’s statement “it will be damaged” is the only reference to Opposer in the entire Notice of Opposition. Suffice it to say, this statement is the closest that Opposer comes to alleging that it has an interest in opposing the registration of Applicant’s mark. As it is, however, it is merely a blanket assertion by Opposer that it will be damaged without alleging/pleading any particular reason as to why or how this is so. The Board finds the complaint fails to allege, for example, that Opposer is engaged in the sale of the same or related products and that the Opposer has an interest in using the term SURVIVAL BRACELET descriptively or generically in its business. Opposer has not pleaded,

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<sup>19</sup> 1 TTABVUE 3.

<sup>20</sup> 34 TTABVUE 17.

for example, that it is a competitor or otherwise has a need to use this term. *See Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2024 (Fed. Cir. 1987), on remand, 5 USPQ2d 1622 (TTAB 1987), *rev'd*, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988).

As a result, Opposer failed to plead a “real interest” or otherwise that it has standing to bring this proceeding.

**(b). Opposer Has Not Established (Proven) Standing**

Even if we were to find that Opposer adequately pleaded its standing in this matter, and we do not make such a finding, it has failed to introduce any evidence establishing its standing. In this regard, Applicant correctly points out that “Opposer’s Notice of Reliance does not identify any exhibit relevant to standing.” Applicant’s Brief, p.15. Applicant states, “[a]t trial, where it was required to *prove* that it has standing to assert the claims herein, Opposer failed to introduce *any* evidence to support this critical element.” *Id.* Applicant further points out, “[a]t no time did Opposer assert that *any* of its exhibits were introduced to prove standing,” *Id.* at 17, and “...Opposer’s failure to assert that any of its exhibits were introduced for purposes of proving standing is *not* a defect that can be cured.”<sup>21</sup> Finally, Applicant asserts that “it is only by inferring conclusions that cannot be drawn from the evidence that Opposer concludes it has demonstrated standing.” *Id.* at 18.

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<sup>21</sup> *Id.* at 19.

In response, Opposer claims in its reply brief that it sells goods called “survival bracelets”<sup>22</sup> and relies specifically on two of the exhibits that were submitted under Notice of Reliance, namely, Exhibit I and Exhibit AA. Opposer, referencing the former exhibit, argues that:

[e]ven if, as Applicant suggests, the Google search does not show that Opposer sells survival bracelets, it shows on its face that Opposer sells a paracord survival item using the term survival in the generic sense. Opposer must only show that it is in a position to properly use the term descriptively at some future point.<sup>23</sup>

We have reviewed all evidence of record in connection with Opposer’s burden of establishing its standing. In particular, we have given careful consideration to the two exhibits specifically identified by Opposer which it believes shows it has an interest in bringing this opposition.

***Opposer’s Exhibit “I”***

Opposer’s Exhibit “I” consists of printouts from a Google internet search for the term “survival bracelet.” In the Notice of Reliance, Opposer describes the relevance of this exhibit as follows:

Exhibit I demonstrates that “survival bracelet” is a generic term, utilized by the relevant public to refer to the type of bracelets sold by Applicant.<sup>24</sup>

One of the Exhibit I pages contains, in part, the following image:<sup>25</sup>

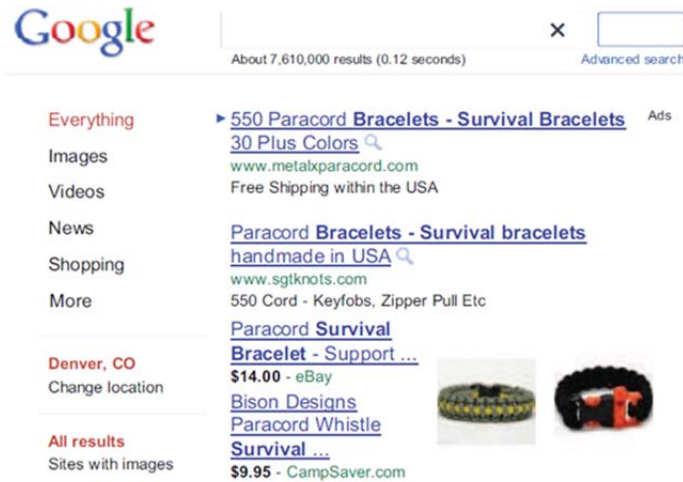
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<sup>22</sup> 37 TTABVUE 16.

<sup>23</sup> *Id.* at 17.

<sup>24</sup> 6 TTABVUE 3.

<sup>25</sup> *Id.* at 25.



In its brief, Applicant points out that “[i]n its Notice of Reliance, Opposer used identical language to describe the ‘Relevance of the Material Being Offered.’”<sup>26</sup> As to Exhibit I in particular, Applicant argues that “there is no explanation regarding what the phrase [“Bison Designs Paracord Whistle Survival...”] actually refers to, and no evidence that it even is referencing Opposer.” Applicant’s Brief, p. 19.<sup>27</sup> Applicant adds that “the ellipsis reflects a missing word, that word could be virtually any word in the English language” and that “it would have been simple for Opposer to have clicked on the link (assuming it is a link) and presented clear evidence that it actually uses the mark at issue in describing goods it sells. It chose not to do so.” *Id.* at 19-20.

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<sup>26</sup> 34 TTABVUE 18.

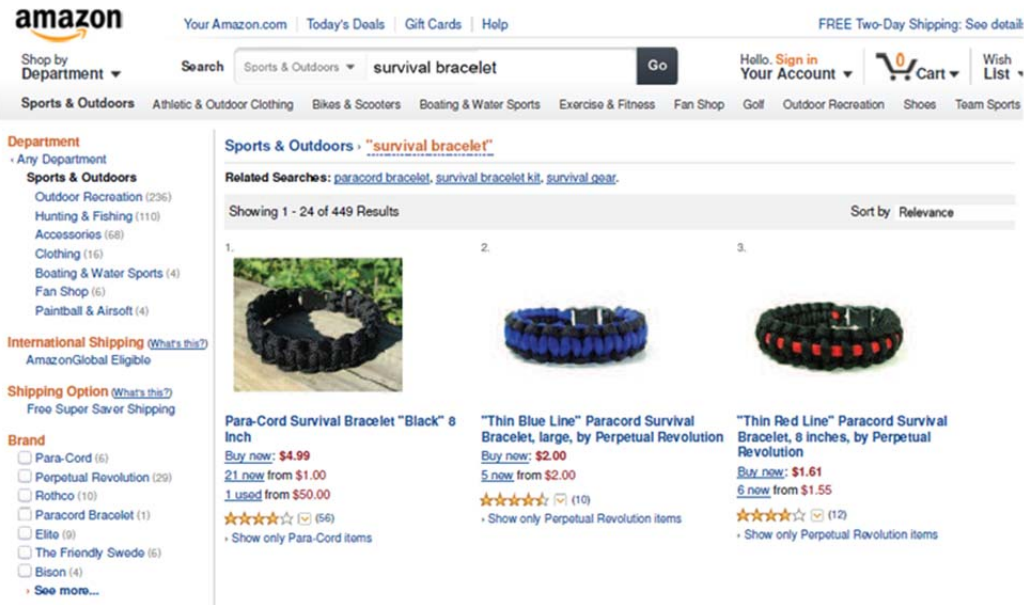
<sup>27</sup> As previously mentioned, Applicant raised several objections to Opposer’s evidence; with regard to this particular exhibit, Applicant objected to its admissibility because, *inter alia*, it is purported to be archived evidence from archive.org. *See Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856 (TTAB 2007) for discussion of archive.org materials. Applicant also argues that the exhibit, at least in part, is inadmissible on its face due to an incomplete URL.

Because Exhibit I was introduced via a notice of reliance, without any accompanying testimony, it is restricted to what it shows on its face. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (Internet evidence, similar to printed publications, is only admissible for what it shows on its face.); *see also 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007). With this in mind, we cannot make the inference that Opposer is a manufacturer, retailer or otherwise involved with the “survival bracelets” mentioned in the printout. In spite of a listed “Bison Designs” item, there is insufficient information or any corroborating evidence for us to conclude that this is Opposer or an entity associated with Opposer. Furthermore, there is nothing showing that the website that immediately follows (“CampSaver.com”) is associated with Opposer. Simply put, Opposer did not state its relevance or characterize this evidence in its Notice of Reliance as involving Opposer’s own use of the term “survival bracelet.” Opposer cannot state in its brief for the first time that this evidence involves Opposer, and proceed to rely on the evidence for the same reason. Applicant was not put on notice and thus did not have the opportunity to verify such an assertion and, if it were to contest the assertion, submit rebuttal evidence, *e.g.*, showing that the reference involves an unrelated third party with a similar name.



***Opposer’s Exhibit “AA”***

Opposer identified Exhibit “AA” in the notice of reliance as an “Amazon.com search for survival bracelet.” It appears, in part, as follows:<sup>28</sup>



Again, Opposer stated the relevance for this exhibit was that it “demonstrates that ‘survival bracelet’ is a generic term, utilized by the relevant public to refer to the type of bracelets sold by Applicant.”<sup>29</sup>

This exhibit, with its reference to “Bison” on the left side under a vertical list heading, “Brand,” strikes an even more tenuous relationship to Opposer than does Exhibit I. Without any corroborating testimony or additional evidence, we again cannot make the factual determination that Opposer asserts, namely, that Opposer is one of several manufacturers or is a brand of “survival bracelets.” For the same

<sup>28</sup> 6 TTABVUE at 72.

<sup>29</sup> *Id.* at 5.

reasons that Exhibit I fails to show Opposer's interest in this proceeding, so does Exhibit AA fail in this regard.

In sum, with regard to Exhibits I and AA, Opposer not only failed to state their relevance in the Notice of Reliance to include showing Opposer's own use, but Opposer also did not produce materials which we can conclude, on their face, show such use in a manner that points uniquely to Opposer. Thus, we are constrained to agree with Applicant to the extent that these exhibits, as well as the remainder of the materials submitted under the Notice of Reliance, do not suffice for purposes of establishing a personal interest in this proceeding by Opposer. To make the factual determination that these materials, on their face, show that Opposer is a user of the term "survival bracelet," or has the need to be, would be improper, especially so given that Opposer does not state this to be the case in its submission of the materials. Moreover, we reiterate Applicant's objections to making any such factual determinations; we cannot therefore construe the record or the parties' arguments as somehow tantamount to there being consent, implicit or otherwise, in this regard. Rather, Applicant has raised timely and genuine arguments as to the limitations of the probative value of Opposer's evidence for purposes of showing its standing.

Accordingly, we find that Opposer has not proven its standing to bring this opposition.

### ***Conclusion***

We find that Opposer has failed to adequately plead and prove its standing in this opposition proceeding. The Board, therefore, dismisses the opposition without

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reaching the merits of the grounds, namely, whether Applicant's mark is merely descriptive or generic.

***Decision:*** The opposition is dismissed.