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

Certificate of Mailing:

I hereby certify that this correspondence, and all the papers referenced herein, is being deposited with the United States Postal Services as first class mail in an envelope addressed to: Commissioner for Trademarks, Box TTAB NO FEE, 2900 Crystal Drive, Arlington, VA 22202-3513, on this date May 8, 2003.

Mary Grieco — 5/8/03 Date

ARROW TRADING CO., INC.	:	
	:	Opposition No. 103,315
Opposer,	:	
v.	:	
	:	
VICTORINOX, A.G. and WENGER, S.A.,	:	
	:	
Applicants.	:	

MOTION TO AMEND THE NOTICE OF OPPOSITION
UNDER TBMP § 507.03 and FED. R. CIV. P. 15 and 21

In its trial brief, Applicants argued that Arrow Trading Co., Inc. ("Arrow") has no standing to maintain this Opposition since Arrow is a dissolved corporation. Although, as shown in its trial brief, Arrow does have standing, since a dissolved corporation may institute or defend legal actions as part of winding up its affairs, Arrow hereby respectfully requests the Board to allow an amendment to the Notice of Opposition adding Arrow's sole shareholders, Mark Dweck and Jack Dweck, as additional Opposers.

Pursuant to an arbitration in which, among other things, the assets of Arrow were divided between Mark and Jack Dweck, both Dwecks were given the right to sell Swiss Army knives. Applicants have known of this arrangement since before this Opposition was even filed. As set forth in detail in both parties' trial briefs, Applicants' respective exclusive U.S. distributors sued

Arrow in 1992 in federal court in New York over Arrow's sales of Swiss Army knives. The cessation of Arrow's operations and the transfer of its Swiss Army knife business to the Dweck brothers individually were fully explained to the district court and all parties during the course of that litigation.

Jack Dweck has continued to do business as Arrow Trading Group, Inc. ("ATG"), although, briefly, he incorporated Classic Knife Corporation, intending to use that entity as the vehicle for his Swiss Army knife business. Mark Dweck has continued to do business as Archer Worldwide, Ltd., ("Archer"), although he also incorporated a separate entity, International Branded Cutlery, Inc. ("IBC"), to handle his Swiss Army knife business.

Applicants' U.S. distributors continued to pursue Arrow's shareholders and successor corporations, bringing suit against IBC in federal court in New York and commencing a proceeding in the United States International Trade Commission against ATG and Archer. The relevant papers in those actions are all part of the trial record in this case.

Thus, by the time the present Opposition was filed in 1996, Applicants were already well aware of the status of Arrow and its shareholders. Nonetheless, seven years after this Opposition was filed, after motions, trial testimony, briefing, and oral argument, Applicants seek to dismiss the Opposition on the ground that Arrow has no standing to maintain the Opposition, in a transparent ploy to avoid having this matter decided on the merits.

If the Board is at all inclined to consider the standing issue, the appropriate exercise of discretion under the circumstances is to allow an amendment to the Notice of Opposition adding Mark and Jack Dweck as parties.

It is beyond dispute that the Board has the power to amend the pleading to add new parties or conform to evidence, and the law is clear that such amendments should be freely given. Fed. R. Civ. P. 21 and 15(b), TBMP § 507.03(a).

In *American Optical Corp. v. American Olean Tile Co., Inc.*, 168 U.S.P.Q . 471, 473 (T.T.A.B 1971), the Board stated:

> Amendments to pleadings should be allowed with great liberality at any stage of the proceeding where necessary to bring about a furtherance of justice, unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of opposing parties.

Rule 21 of the Federal Rules of Civil Procedure authorizes an amendment to pleadings to add new parties as Rule 21 clearly states: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

Such amendments may be made even after a full trial. In the leading case on point, *Mullaney v. Anderson*, 342 U.S. 415 (1952), the Supreme Court allowed the post-trial addition of two parties as plaintiffs in response to an allegation by the defendant that the current plaintiff had no standing to maintain the action. As the Court explained, "to dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." 342 U.S. at 417.

A similar amendment was allowed in *Persaud v. Exxon Corp.*, 867 F. Supp. 128 (E.D.N.Y 1994). In *Persaud*, an individual plaintiff sued Exxon seeking to rescind the mutual franchise termination and release. Exxon argued that the individual had no standing to maintain the action since the franchise agreement was signed by the corporate entity. In response, the plaintiff sought to amend the pleading to substitute the corporation for himself. The court

allowed the amendment, finding that there would be no prejudice to the defendant. *Id.* at 135-36. *See also, Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979).

In this action, there is simply no reason why an amendment to add Mark Dweck and Jack Dweck as Opposers should not be granted. There would be no prejudice to the Applicants, since the addition of these parties would not raise any new issues or theories. The only issues presented in the Opposition are (1) whether Applicants are proper "joint owners" of the claimed mark and (2) whether the claimed mark is generic. Neither issue would change as a result of the addition or Mark and Jack Dweck as parties.

In addition, Applicants took the depositions of both Mark and Jack Dweck, who were the sole owners of Arrow before Arrow was dissolved. Clearly, there is no line of questioning and there are no issues that would have been different had the individual shareholders of Arrow been parties to the proceeding from the beginning.

On the other hand, requiring Mark and Jack Dweck to bring a cancellation action after the trademark was registered – which the Board, at the trial hearing, acknowledged they could do – would be a tremendous waste of judicial resources and would be greatly prejudicial to the parties and to the Board. This Opposition has been pending since 1996. Both parties have engaged in extensive discovery and trial testimony, including the depositions of persons living in Switzerland. A summary judgment motion was filed and heard. Extensive trial and reply briefs were prepared and filed, and the matter was fully argued before the Board. Requiring a repetition of all of these actions makes no sense and would needlessly consume the time and money of the Board and the parties.

Furthermore, the public would be injured if a trademark was allowed to register which otherwise should not be so allowed. If the Opposition is dismissed on a technicality such as

standing, the real issues presented – whether "Swiss Army" functions as a trademark for multifunction pocketknives and whether Applicants, who are bitter rivals, are proper "joint owners" of the claimed mark – would not be resolved. There is nothing to be gained by an otherwise unregisterable trademark attaining registration.

Accordingly, Opposer requests that the Board grant its request to amend the Notice of Opposition to add Mark Dweck and Jack Dweck as additional Opposers.

Dated: New York, NY
May 8, 2003

Respectfully submitted,

GURSKY & EDERER, LLP

By: _____
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Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 8, 2003, a true and correct copy of the foregoing document, entitled

MOTION TO AMEND THE NOTICE OF OPPOSITION UNDER TBMP § 507.03 and FED. R. CIV. P. 15 and 21

was served upon Applicants' counsel by prepaid, first class U.S. mail, addressed as follows:

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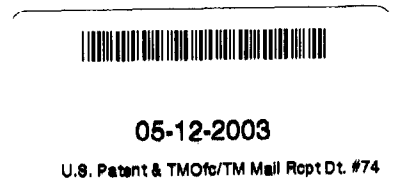

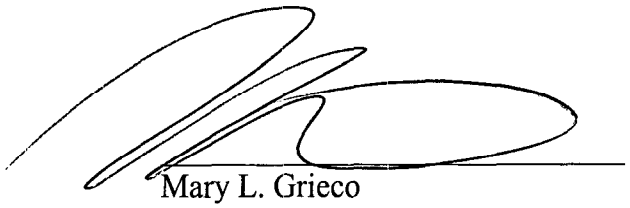

Mary L. Grieco

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May 8, 2003

05-12-2003
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Re:	**Applicant**	:	**Victorinox, A.G. and Wenger, S.A.**
	Opposer	:	**Arrow Trading Co., Inc.**
	Mark	:	**SWISS ARMY**
	Opposition No.	:	**103,315**
	Attorney Docket	:	**AT USA OP1**

Dear Sir:

We are enclosing herewith the following documents in connection with the above-identified Opposition.

(X) A Motion to Amend the Notice of Opposition;
(X) Certificate of Mailing; and
(X) An Acknowledgment Postcard.

It is requested that this Motion to Amend the Notice of Opposition be granted. Please acknowledge receipt by date stamping and returning the enclosed postcard.

Respectfully yours,

Mary L. Grieco

MLG:yio
Encls.