ESTTA Tracking number: **ESTTA183311**

Filing date: **12/26/2007**

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

Proceeding	91160397
Party	Defendant D'ASCOLI, EDMONT P., Trustee of the Edmont P. D' Ascoli Revocable Living Trust dated May 24, 1996
Correspondence Address	MARTIN E. HSIA CADES SCHUTTE LLP PO BOX 939 HONOLULU, HI 96808-0939 UNITED STATES
Submission	Opposition/Response to Motion
Filer's Name	Martin E. Hsia, Esq. Reg. No. 32,471
Filer's e-mail	mhsia@cades.com, vdamge@cades.com
Signature	/Martin E. Hsia/
Date	12/26/2007
Attachments	Memo in Opp - Declaration of Counsel, Ex A-B.PDF (18 pages)(630661 bytes)

IN THE UNITED STATES PATENT & TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EXEL OYJ, Opposer, v. EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996, Applicant.	)	Opposition No. 91160397 Serial No. 76/272,356

APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION TO REOPEN THE DISCOVERY PERIOD

I. INTRODUCTION.

Applicant EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996 ("Applicant"), submits the following for his Memorandum In Opposition to the Motion to Reopen the Discovery Period filed by Opposer EXEL OYJ ("Opposer") on December 6, 2007 (the "Motion to Reopen"). The Motion to Reopen was received in the mail on December 17, 2007.

As set forth more fully herein, Applicant respectfully submits that Opposer's Motion to Reopen is unjustified and must be denied because the requested discovery pertains to an event that occurred more than six months after the discovery and testimony periods closed in this matter. Opposer now claims that Applicant is not using the mark. But the Application at issue is an intent-to-use ("ITU") application. The requested discovery is therefore irrelevant.

II. BACKGROUND.

Opposer Exel Oyj ("Opposer"), filed a Notice of Opposition on May 5, 2004, and an Amended Notice of Opposition on or about May 21, 2004, opposing Applicant's ITU

application Serial No. 76/272,356 to register the mark "XCEL" for "duffel bags, beach bags, and backpacks" in International Class 18, and for "diving bags" in International Class 28. In support of its position, Opposer pled ownership of Registration No. 2,394,384 for the mark "EXEL" for "ski poles, ski pole straps, ski pole handles, ski pole grips, and ski pole tips" (the "Ski Pole Registration"), among other things. At the time the opposition proceeding was instituted, the ITU Application was in the blackout period. No statement of use has been filed by Applicant.

Applicant filed an Answer to the Amended Notice of Opposition on or about July 29, 2004.

Pursuant to the Board's order mailed September 7, 2005, Applicant asserted a Counterclaim (the "Counterclaim"), claiming among other things, that the Ski Pole Registration pled by Opposer was void or invalid, and thus should be cancelled. The Counterclaim pled Applicant's ownership of the following Registrations: Nos. 1,965,081; 1,292,982; 1,622,623; 2,217,115; and 2,825,694 (collectively, the "Registrations"). Opposer filed an Answer to the Counterclaim on or about October 7, 2005.

Discovery was to close on November 1, 2005, pursuant to the Board's September 7, 2005 order. Pursuant to Opposer's motion to extend testimony, the testimonial periods closed on October 3, 2006. Briefs for Plaintiff in the Opposition (Opposer), for Defendant in the Opposition (Applicant), for Plaintiff in the Counterclaim (Applicant as Counterclaimant), and for Defendant in the Counterclaim (Opposer as Counterclaim Defendant) were filed during the time period December 2, 2006 – February 15, 2007, per the briefing schedule set forth in the Board's Order Granting Opposer's Motion to Extend Opposer's Testimony Period filed on or about March 14, 2006. Thus, trial and briefing were completed on February 15, 2007. No decision has yet been entered by the Board.

Subsequently, and more than six months after the discovery and testimony periods had closed in this matter, Applicant assigned the Registrations pled in the Counterclaim to

Assignee SEAL TRADEMARKS PTY LTD as of September 5, 2007, and recorded the assignment with the U.S. Patent and Trademark Office on October 11, 2007. A true and correct copy of the Assignment of Trademarks is attached hereto as Exhibit "A". A true and correct copy of the Notice of Recordation of Assignment Document is attached hereto as Exhibit "B".

Pursuant to TBMP § 512.01, Applicant on October 22, 2007 filed a Motion to Substitute Assignee SEAL TRADEMARKS PTY LTD as the Counterclaimant in this proceeding (the "Motion to Substitute"). Opposer has not filed any opposition to the Motion to Substitute, and the Board has not yet ruled on that motion.

III. ARGUMENT.

As set forth in the Trademark Manual of Procedure (2d Ed., Rev. Mar. 2004) ("TBMP"), the assignor of a pleaded mark may file a motion to substitute the assignee in its place under certain circumstances specified in the rule:

> If a mark pleaded by plaintiff is assigned and a copy of the assignment is filed with the Board, the assignee ordinarily will be substituted for the originally named party if the assignment occurred prior to the commencement of the proceeding, if the discovery and testimony periods have closed, if the assignor is no longer in existence, or if the defendant raises no objection to substitution. Otherwise, the assignee will be joined, rather than substituted, to facilitate the taking of discovery and the introduction of evidence. The assignment does not have to be recorded with respect to a plaintiff's pleaded application or registration before substitution or joinder (whichever is appropriate) is made. However, recordation in the Assignment Services Division of the USPTO is advisable because it will aid the assignee in its effort to prove ownership of the application or registration at trial.

TBMP § 512.01 at 500-59 (emphasis added).

Pursuant to TBMP § 512.01, Applicant's Motion to Substitute requested that Assignee be substituted in place of Applicant as Counterclaimant in this proceeding (in the position of Plaintiff on the Counterclaim) in view of the fact that "a mark pleaded by plaintiff [Applicant as Counterclaimant]" had been assigned and because "the discovery and testimony periods have closed". Because the application opposed by Opposer – Application Serial No.

76/272,356 – was not assigned to Assignee (see Exhibit "A" attached hereto), Applicant should remain a party (in the position of Defendant in the opposition).

Opposer seeks to reopen discovery, ostensibly to question whether Applicant retains any valid rights to pursue the Application, even though the Application was not assigned. In this case, however, further discovery in this proceeding is inappropriate. Not only does the validity of Applicant's ownership rights in view of the assignment constitute an unpleaded matter, the language of TBMP § 512.01 clearly contemplates the substitution of the assignee for Applicant in the Counterclaim in the event "the discovery and testimony periods have closed" -- viz. the rule does not allow for further or reopened discovery in such event. Where the discovery and testimony periods have not closed (which is not the case here), the rule allows for joinder of the assignee "to facilitate the taking of discovery". But not where the assignee is to be substituted, as here, where Applicant's Motion to Substitute was unopposed.

Moreover, the discovery purportedly sought by Opposer relates to an event that occurred more than six months after the trial in this matter had concluded and cannot affect the outcome of the trial. Opposer claims that Applicant is not using the XCEL mark because, after the trial concluded, he assigned various XCEL registrations to assignee SEAL. But Applicant is not required to demonstrate use of (or intent to use) the mark at this point in time, because his Application was filed on an intent-to-use basis, no further statements of intent to use are presently required, and he has not yet had the opportunity to file a Statement of Use. Thus, the subject matter of the requested discovery is irrelevant to the matters that have already been presented to the Board for trial, or that are properly before the Board.

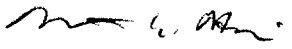
If Opposer genuinely wishes to challenge Applicant's rights, it may later petition to cancel the registration, assuming the Opposition is dismissed, the registration is allowed, and that Opposer has standing to cancel. Therefore, Opposer will not be prejudiced if its Motion to Reopen is denied. For that reason, and because the assignment occurred well after the trial in

this matter concluded, further discovery regarding the assignment and the extent to which Applicant may still be using the mark in affiliation with the assignee is irrelevant and unjustified. Opposer's Motion to Reopen must be denied.

IV. CONCLUSION.

For the reasons set forth above, and in view of the prejudice to Applicant that would result if Opposer's Motion to Reopen were to be granted and Applicant's Application were to be further delayed, Applicant requests that Opposer's Motion be denied.

DATED: Honolulu, Hawaii, December 26, 2007.



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P.O. Box 939
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Tel: (808) 521-9200
Attorneys for Applicant/Assignor
EDMONT P. D'ASCOLI, Trustee of the
EDMONT P. D'ASCOLI REVOCABLE
LIVING TRUST DATED MAY 24, 1996

IN THE UNITED STATES PATENT & TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EXEL OYJ, Opposer, v. EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996, Applicant.	)	Opposition No. 91160397 Serial No. 76/272,356

DECLARATION OF COUNSEL; EXHIBITS "A" – "B"

I, MARTIN E. HSIA, hereby declare as follows:

1. I am a partner of Cades Schutte A Limited Liability Law Partnership LLP, counsel of record for Trustee of the Edmont P. D'Ascoli Revocable Living Trust Dated May 24, 1996 ("Applicant"), and am duly authorized to make this declaration, which is based upon my personal knowledge and information.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Assignment of Trademarks in favor of Seal Trademarks Pty Ltd, executed as of September 5, 2007, and filed with the Untied States Patent and Trademark Office on October 11, 2007.

3. Attached hereto as Exhibit "B" is a true and correct copy of the United States Patent and Trademark Office Notice of Recordation and Assignment Document faxed on October 12, 2007.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false

statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Signed at Honolulu, Hawaii this 26th day of December 2007.

MARTIN E. HSIA 32,471

EXHIBIT "A"

ASSIGNMENT OF TRADEMARKS

WHEREAS, **EDMONT P. D'ASCOLI, an individual, and EDMONT P. D'ASCOLI, Trustee of the EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996** (hereinafter collectively referred to as "Assignor"), having a principal place of business at 66-590 Kamehameha Highway, Haleiwa, Hawaii 96712, has adopted, used, is using and is to the best of its knowledge and belief, the owner of, the trademarks identified in the attached Schedule A (the "Marks"), registered or unregistered.

WHEREAS, **SEAL TRADEMARKS PTY LTD, an Australian corporation** (the "Assignee"), having a principal place of business at 1 Billabong Place, Burleigh Heads, Queensland, 4220, Australia, is desirous of acquiring the entire right, title and interest in and to the Marks and the registrations thereof;

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Assignor hereby assigns to Assignee, all right, title and interest in and to said Marks, together with the goodwill of the business symbolized by and associated with said Marks and registrations thereof, and the right to sue for past infringement, if any there may be.

The Assignor hereby authorizes and requests that such officials as are duly authorized by the laws of United States to register trademarks, to issue any and all certificates of registration of the Marks to the Assignee as the owner of the entire interest, for the sole use of the said Assignee, its permitted successors, assigns and legal representatives.

Assignor, by such execution of this Assignment, irrevocably constitutes and appoints the Assignee as Assignor's true and lawful attorney and agent, with full power and authority in Assignor's name, place and stead only to execute, acknowledge and deliver and to file or record in any appropriate public office any certificate or other instrument which may be necessary, desirable or appropriate to record the assignment of all or any part of the Marks to Assignee in accordance with the provisions of this Assignment. Notwithstanding the existence of this power of attorney, Assignor agrees to join in the execution, acknowledgment and delivery of the instruments referred to above if requested to do so by the Assignee. This power of attorney granted to the Assignee is a limited power of attorney that does not authorize the Assignee to act on behalf of Assignor except to execute the documents described in this paragraph.

IN WITNESS WHEREOF, the undersigned Assignor has executed this Assignment as of September 5, 2007, nunc pro tunc.

EDMONT P. D'ASCOLI, Trustee of the EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996

EDMONT P. D'ASCOLI

EXHIBIT A

SCHDULE A

Mark	Registration No.	Registration Date	Mark Type	Goods/Services	Class
EXCEL LITE (stylized)	2,957,141	05/31/2005	Trademark	Low calorie pre-sweetened powdered mix used in the preparation of soft drinks	32
XCEL PRO	2,975,385	07/26/2005	Service Mark	Arranging and conducting athletic competitions	41
XCEL	2,977,752	07/26/2005	Trademark	Life jackets	09
Three arrows forming a triangle	2,836,886	04/27/2004	Trademark	Wetsuits, swimwear, T-shirts, sweat shirts, sweat pants, jerseys, jackets, shirts, shorts, headwear, footwear, namely surf bootees and dive bootees, and gloves	25
XCEL	2,825,694	03/23/2004	Trademark	Canoe bags and canoe paddle bags	12
XCEL	2,948,566	05/10/2005	Trademark	Surfboard bags and bodyboard bags	28
EXCELWEAR	2,345,952	04/25/2000	Trademark	Outdoor clothing, namely, shirts, shorts	25
XCEL	2,217,115	01/12/1999	Service mark	Retail stores featuring wetsuits, swimsuits and watersport related goods	35
XCEL	1,965,081	04/02/1996	Trademark	Wetsuits, swimwear, T-shirts, sweat shirts, sweat pants, jerseys, jackets, shirts, shorts, headwear, footwear, namely surf bootees and dive bootees	25
XCEL (stylized)	1,622,623	11/13/1990	Trademark	Bathing suits and bicycling apparel, namely, shirts, tights, jackets, jerseys, shorts, hats	25
XCEL (stylized)	1,292,982	09/04/1984	Trademark	Wetsuits	25

EXHIBIT "B"

UNITED STATES PATENT AND TRADEMARK OFFICE

Facsimile Transmission

To:	**Name:**	MARTIN E. HSIA 32,471
	Company:	1000 BISHOP STREET, SUITE 1200
	Fax Number:	18085405049
	Voice Phone:	
From:	**Name:**	ASSIGNMENT SERVICES BRANCH
	Voice Phone:	571-272-3350

37 C.F.R. 1.6 sets forth the types of correspondence that can be communicated to the Patent and Trademark Office via facsimile transmissions. Applicants are advised to use the certificate of facsimile transmission procedures when submitting a reply to a non-final or final Office action by facsimile (37 CFR 1.8(a)).

Fax Notes:

Pg#	Description
1	Cover Page
2	268.TXT
5	Document 1, Batch 1060586

USPTO ASSIGNMENT SYSTEM PROCESSING

Date and time of transmission: Friday, October 12, 2007 9:16:18 AM
Number of pages including this cover sheet: 06

EXHIBIT B

UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

OCTOBER 12, 2007

PTAS

900089167A

MARTIN E. HSIA 32,471
1000 BISHOP STREET, SUITE 1200
HONOLULU, HI 96813

UNITED STATES PATENT AND TRADEMARK OFFICE
NOTICE OF RECORDATION OF ASSIGNMENT DOCUMENT

THE ENCLOSED DOCUMENT HAS BEEN RECORDED BY THE ASSIGNMENT DIVISION OF THE U.S. PATENT AND TRADEMARK OFFICE. A COMPLETE MICROFILM COPY IS AVAILABLE AT THE ASSIGNMENT SEARCH ROOM ON THE REEL AND FRAME NUMBER REFERENCED BELOW.

PLEASE REVIEW ALL INFORMATION CONTAINED ON THIS NOTICE. THE INFORMATION CONTAINED ON THIS RECORDATION NOTICE REFLECTS THE DATA PRESENT IN THE PATENT AND TRADEMARK ASSIGNMENT SYSTEM. IF YOU SHOULD FIND ANY ERRORS OR HAVE QUESTIONS CONCERNING THIS NOTICE, YOU MAY CONTACT THE EMPLOYEE WHOSE NAME APPEARS ON THIS NOTICE AT 571-272-3350. PLEASE SEND REQUEST FOR CORRECTION TO: U.S. PATENT AND TRADEMARK OFFICE, MAIL STOP: ASSIGNMENT SERVICES BRANCH, P.O. BOX 1450, ALEXANDRIA, VA 22313.

RECORDATION DATE: 10/11/2007

REEL/FRAME: 003638/0362
NUMBER OF PAGES: 7

BRIEF: ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL

ASSIGNOR:
EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996

DOC DATE: 09/05/2007
CITIZENSHIP: HAWAII
ENTITY: TRUST

ASSIGNEE:
SEAL TRADEMARKS PTY LTD
1 BILLABONG PLACE
BURLEIGH HEADS, QUEENSLAND

AUSTRALIA
4220

CITIZENSHIP: AUSTRALIA
ENTITY: CORPORATION

APPLICATION NUMBER: 78362783
REGISTRATION NUMBER: 2957141

FILING DATE: 02/04/2004
ISSUE DATE: 05/31/2005

TO:MARTIN E. HSIA 32,471 COMPANY:1000 BISHOP STREET, SUITE 1200

MARK: EXCEL LITE
DRAWING TYPE: STYLIZED WORDS, LETTERS, OR NUMBERS

APPLICATION NUMBER: 76569433 FILING DATE: 01/02/2004
REGISTRATION NUMBER: 2975385 ISSUE DATE: 07/26/2005

MARK: XCEL PRO
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN BLOCK FORM

APPLICATION NUMBER: 76552538 FILING DATE: 09/29/2003
REGISTRATION NUMBER: 2977752 ISSUE DATE: 07/26/2005

MARK: XCEL
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

APPLICATION NUMBER: 76279217 FILING DATE: 06/26/2001
REGISTRATION NUMBER: 2836886 ISSUE DATE: 04/27/2004

MARK:
DRAWING TYPE: MISCELLANEOUS DESIGN

APPLICATION NUMBER: 76272360 FILING DATE: 06/13/2001
REGISTRATION NUMBER: 2825694 ISSUE DATE: 03/23/2004

MARK: XCEL
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

APPLICATION NUMBER: 76272357 FILING DATE: 06/13/2001
REGISTRATION NUMBER: 2948566 ISSUE DATE: 05/10/2005

MARK: XCEL
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

APPLICATION NUMBER: 75363656 FILING DATE: 09/26/1997
REGISTRATION NUMBER: 2345952 ISSUE DATE: 04/25/2000

MARK: EXCELWEAR
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

APPLICATION NUMBER: 75346723 FILING DATE: 08/25/1997
REGISTRATION NUMBER: 2217115 ISSUE DATE: 01/12/1999

MARK: XCEL
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

APPLICATION NUMBER: 74565558 FILING DATE: 08/25/1994
REGISTRATION NUMBER: 1965081 ISSUE DATE: 04/02/1996

MARK: XCEL
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

TO:MARTIN E. HSIA 32,471 COMPANY:1000 BISHOP STREET, SUITE 1200

APPLICATION NUMBER: 73815551
REGISTRATION NUMBER: 1622623

FILING DATE: 07/25/1989
ISSUE DATE: 11/13/1990

MARK: XCEL
DRAWING TYPE: STYLIZED WORDS, LETTERS, OR NUMBERS

003638/0362 PAGE 3

APPLICATION NUMBER: 73405981
REGISTRATION NUMBER: 1292982

FILING DATE: 12/13/1982
ISSUE DATE: 09/04/1984

MARK: XCEL
DRAWING TYPE: STYLIZED WORDS, LETTERS, OR NUMBERS

ASSIGNMENT SERVICES BRANCH
PUBLIC RECORDS DIVISION

TRADEMARK ASSIGNMENT

Electronic Version v1.1
Stylesheet Version v1.1

10/11/2007
900089167

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
Edmont P. D'Ascoli, Trustee of the Edmont P. D'Ascoli Revocable Living Trust Dated May 24, 1996		09/05/2007	TRUST: HAWAII

RECEIVING PARTY DATA

Name:	Seal Trademarks Pty Ltd
Street Address:	1 Billabong Place
City:	Burleigh Heads, Queensland
State/Country:	AUSTRALIA
Postal Code:	4220
Entity Type:	CORPORATION: AUSTRALIA

PROPERTY NUMBERS Total: 11

Property Type	Number	Word Mark
Registration Number:	2957141	EXCEL LITE
Registration Number:	2975385	XCEL PRO
Registration Number:	2977752	XCEL
Registration Number:	2836686	
Registration Number:	2825694	XCEL
Registration Number:	2948566	XCEL
Registration Number:	2345952	EXCELWEAR
Registration Number:	2217115	XCEL
Registration Number:	1965081	XCEL
Registration Number:	1622623	XCEL
Registration Number:	1292982	XCEL

OP $330.00 2957141

CORRESPONDENCE DATA

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Correspondent Name:	Martin E. Hsia 32,471
Address Line 1:	1000 Bishop Street, Suite 1200
Address Line 4:	Honolulu, HAWAII 96813

DOMESTIC REPRESENTATIVE

Name:	Martin E. Hsia 32,471
Address Line 1:	1000 Bishop Street, Suite 1200
Address Line 4:	Honolulu, HAWAII 96813

NAME OF SUBMITTER:	Martin E. Hsia 32,471
Signature:	/Martin E. Hsia/
Date:	10/11/2007

Total Attachments: 5
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EXEL OYJ, Opposer, v. EDMONT P. D'ASCOLI, TRUSTEE OF THE EDMONT P. D'ASCOLI REVOCABLE LIVING TRUST DATED MAY 24, 1996, Applicant.	)	Opposition No. 91160397 Serial No. 76/272,356

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing was sent by U.S. first class mail, postage prepaid, on December 26, 2007, to Norbert F. Kugele, Esq., Warner Norcross Judd LLP, 900 Fifth Third Center, 111 Lyon Street, N.W., Grand Rapids, MI 49503-2487.

DATED: Honolulu, Hawaii, December 26, 2007.

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P.O. Box 939
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EDMONT P. D'ASCOLI REVOCABLE
LIVING TRUST DATED MAY 24, 1996