

ESTTA Tracking number: **ESTTA422327**

Filing date: **07/28/2011**

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

Proceeding	92054121
Party	Plaintiff Jacques Moret, Inc.
Correspondence Address	HOWARD F MANDELBAUM LEVINE AND MANDELBAUM 222 BLOOMINGDALE ROAD, SUITE 203 WHITE PLAINS, NY 10605 UNITED STATES mail@levman.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Howard F Mandelbaum
Filer's e-mail	mail@levman.com
Signature	/Howard F. Mandelbaum/
Date	07/28/2011
Attachments	JACQ1381US Response.pdf ( 5 pages )(14078 bytes ) JACQ1381US Declaration.pdf ( 26 pages )(7734077 bytes )



Immediately upon learning of the error, Petitioner's attorney served a copy of the Petition to Cancel on the Director with a new certificate of service. Petitioner now requests that the new certificate of service be entered as an amended certificate and that the cancellation filing date be reset to the date of service on the Director.

The pertinent facts are set forth in the accompanying declaration of Petitioner's attorney, Howard F. Mandelbaum.

### **ARGUMENT**

Instead of dismissing the proceeding as Respondent has requested, Petitioner asks that the filing date of the Petition to Cancel be reset to July 27, 2011, the date of service on the Director, following the decision of the Board in The Equine Touch Foundation, Inc., v. Equinology, Inc., 91 U.S.P.Q 2d 1943 (T.T.A.B. 2009).

The facts in Equine are similar to those here. In Equine just as here, an attorney served a Petition to Cancel on the wrong person. In entering an amended certificate of service on the proper recipient and resetting the filing date of the cancellation proceeding, the Board observed in view of the participation of the Respondent's counsel, "it is clear that respondent will be represented by counsel in this proceeding".

Similarly, in the instant proceeding, it is clear that respondent will be represented by counsel, if not which of Respondent's three law firms will be the one who will actually represents Respondent, i.e., Brian R. McGinley, the attorney of record, and his firm Sonnenschein Nath & Rosenthal LLP, Brad D. Rose, the attorney who wrote to Petitioner claiming to be respondent's "new counsel", and his firm, Pryor Cashman, or J. Allison Strickland, who brought this motion on behalf of Respondent, and her firm, Fross Zelnick Lehrman and Zissu P.C.

As the Equine Board observed:

"a petition to cancel a registration issued on the Principal Register . . . may be filed at any time within five years from the date of the registration of the mark."<sup>1</sup>

Respondent's registration was issued on October 7, 2008. Accordingly, Petitioner would have until October 7, 2013 to seek cancellation of the registration.

The Equine Board further noted:

"Inasmuch as petitioner acted promptly to cure its acknowledged failure of service, and given the fact that this petition would not be time-barred as of the date of actual compliance with the service requirement, petitioner cured the defective filing by its amendment of the proof of service. Therefore, the Board will not dismiss this petition as a nullity but instead will accord the petitioner a new filing date of

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<sup>1</sup> In Equine descriptiveness was urged as a basis for cancellation unlike the present case where likelihood of confusion is asserted.

October 17, 2008, which is the date of such amendment."

**CONCLUSION**

Petitioner respectfully submits that its attorney acted in good faith and promptly sought to cure its acknowledged failure of service. As in Equine, this petition would not be time-barred as of the date of actual compliance with the service requirement. There is a distinction between a complete lack of actual service and defective but curable service. Chocoladefabriken Lindt & Sprungli AG v. Sprungli AG v. Karlo Flores, 91 U.S.P.Q.2d 1698 (T.T.A.B. 2009).

For the foregoing reasons, Petitioner respectfully requests that Respondent's Motion to Dismiss be denied and that Petitioner's Cross Motion to Accept Belated Service on the Director and Reset the Cancellation Filing Date be granted.

Jacques Moret, Inc.,  
Petitioner

By: /Howard F. Mandelbaum/  
Howard F. Mandelbaum  
Attorney for Petitioner  
Levine & Mandelbaum  
222 Bloomingdale Road  
Suite 203  
White Plains, NY 10605  
(914) 421-0500

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE AND CROSS MOTION TO ACCEPT BELATED SERVICE ON THE DIRECTOR AND RESET THE CANCELLATION FILING DATE has been forwarded this 28<sup>th</sup> day of July, 2011, by first class mail to:

Craig S. Mende, Esq.  
J. Allison Strickland, Esq.  
Alexander L. Greenberg, Esq.  
Fross Zelnick Lehrman & Zissu, P.C.  
866 United Nations Plaza  
New York, New York 10017

/Howard F. Mandelbaum/  
Howard F. Mandelbaum



Petitioner for the mark SPEED DRI for wearing apparel, namely, leotards, leggings, tops and tights.

3. On October 7, 2008, unbeknownst to Petitioner, the Patent and Trademark Office issued U.S. Trademark Registration No. 3,513,161 for the mark SPEEDRY to the Respondent. There is no indication in the prosecution history of the SPEEDRY registration that the examiner was aware of or ever considered Petitioner's earlier '630 registration of SPEED DRI for the same and similar goods. Among the Class 25 items included in the SPEEDRY registration are leotards, leggings, and tops, three of the four items of apparel listed in Petitioner's original registration. The remaining items in the SPEEDRY registration are closely related items of apparel.

4. On November 11, 2010, Petitioner filed an application for renewal of its Registration No. 2,414,630. At the time the renewal was filed, Petitioner was not using its SPEED DRI mark on leotards and tights. Accordingly, the registration was renewed only for leggings and tops.

5. Because Petitioner intended to resume use of its SPEED DRI mark on leotards and tights, on November 11, 2010 it filed U.S. Trademark Application Serial No. 85/174,754 to register SPEED DRI for use on wearing apparel, namely, leotards and tights.

6. On December 27, 2010 the Examining Attorney issued an office action refusing registration of the mark SPEED DRI to Petitioner in view of Respondent's registration of SPEEDRY.

7. On April 28, 2011, Petitioner's attorney wrote to Brian R. McGinley, Esq. of the Chicago law firm of Sonnenschein Nath & Rosenthal LLP who was then, and still is, listed as the attorney of record in Respondent's registration. Petitioner asked that Respondent voluntarily cancel its registration and cease and desist from use of the registered trademark. Exhibit A.

8. Petitioner received a response to its April 28, 2011 letter from Respondent's "new counsel", Brad D. Rose, dated June 10, 2011. Exhibit B. In the response, Respondent's attorney said that Respondent was unwilling to comply with Petitioner's requests for voluntary cancellation of the registration and cessation of use of the SPEEDRY trademark.

9. On June 16, 2011 Petitioner's attorney filed, by ESTTA, a Petition to Cancel Respondent's registration with a certificate of service signed by Petitioner's attorney certifying service "upon all parties, at their address of record". Petitioner's attorney then served Respondent's

"new counsel", Brad D. Rose, in the erroneous belief that he was the proper person to serve.

10. On July 13, 2011 Petitioner's attorney received an email communication from J. Allison Strickland, Esq., representing that her firm, Fross Zelnick Lehrman and Zissu P.C., was representing respondent, reporting that Respondent had received notification from the Trademark Trial and Appeal Board that a cancellation petition had been instituted against its Registration No. 3,513,161 for the mark SPEEDRY, and asking for the address to which the cancellation petition was mailed. Exhibit C.

11. On the same date, July 13, 2011, Petitioner's attorney responded to Ms. Strickland that service had been made upon Brad D. Rose, Esq. of the firm of Pryor Cashman LLP who had represented that he was "new counsel" to Respondent. Exhibit D. At that time, Petitioner's attorney still did not realize the error in the party who should have been served.

12. There was no further communication from Attorney Strickland or any of Respondent's other attorneys until the afternoon of July 26, 2011 when Petitioner's attorney received a faxed copy of Respondent's present motion. Upon researching the allegations made in the motion,

Petitioner's attorney discovered he had erred in serving Attorney Rose instead of the Director.

13. On July 27, 2011, Petitioner served on the Director a copy of the Petition to Cancel with a new certificate of service and an explanatory letter by first class mail. Exhibit E.

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/her own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: July 28, 2011  
White Plains, NY

/Howard F. Mandelbaum/  
Howard F. Mandelbaum

## **EXHIBIT A**

LEVINE & MANDELBAUM  
INTELLECTUAL PROPERTY LAW  
222 BLOOMINGDALE ROAD  
SUITE 203  
WHITE PLAINS, N.Y. 10605

TELEPHONE: 914-421-0500  
212-588-9800

FAX: 914-840-1234

email: mail@levman.com

PATENTS

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INTERNET

April 28, 2011

Brian R. McGinley, Esq.  
SNR Denton US LLP  
P.O. BOX 06108  
Chicago, IL 60606-1080

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Re: Jacques Moret, Inc. vis-à-vis Speedo Holdings B.V.  
U.S. Trademark Registration No. 3,513,161  
SPEEDRY  
Our Ref.: JACQ1380US

Dear Mr. McGinley:

We are trademark counsel to Jacques Moret, Inc. the owner of U.S. Trademark Registration No. 2,414,630 for the trademark SPEED DRI which has been renewed for wearing apparel, namely leggings and tops.

Registration No. 3,513,161 for the mark SPEEDRY, issued to your client Speedo Holdings B.V., was called to our attention when the examiner of Jacques Moret's pending application to register SPEED DRI for use on leotards and tights asserted a likelihood of confusion between the marks.

We are, therefore, requesting that your client voluntarily cancel U.S. Trademark Registration No. 3,513,161 under Section 7 of the trademark law, cease and desist from use of the trademark SPEEDRY, and account for its sales and profits of goods sold under the trademark SPEEDRY.

Brian R. McGinley, Esq.  
Re: Jacques Moret, Inc. vis-à-vis Speedo Holdings B.V.  
April 28, 2011  
Page 2

Please let us know, no later than May 10, 2011, whether we may expect your client's cooperation. Should you wish to discuss the matter, please feel free to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard F. Mandelbaum". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Howard F. Mandelbaum

HFM:gmt

## **EXHIBIT B**



Brad D. Rose  
Partner

Direct Tel: 212-326-0875  
Direct Fax: 212-798-6369  
brose@pryorcashman.com

June 10, 2011

VIA E MAIL & REGULAR MAIL

Howard F. Mandelbaum, Esq.  
Levin & Mandelbaum  
222 Bloomingdale Road, Suite 203  
White Plains, New York 10605

*Confidential Settlement Communication  
Pursuant to Fed. R. Evid. 408*

Re: SPEEDRY / SPEED DRI Trademark Matter

Dear Mr. Mandelbaum:

We have recently been retained as new counsel to Speedo Holdings B.V. ("Speedo") and your correspondence dated April 28, 2011 concerning the foregoing matter has been forwarded to us for response.

We note that upon examination, the U.S. Patent and Trademark Office ("USPTO") has rejected Jacques Moret, Inc.'s ("Jacques Moret") application for SPEED DRI covering "wearing apparel, namely, leotards and tights" in cl. 25 based upon the existence of Speedo's registration for SPEEDRY® covering a wide assortment of apparel in cl. 25, and that further, your client had previously procured a registration for SPEED DRI® which initially covered "wearing apparel, namely, leotards, leggings, tops and tights" in cl. 25 but upon renewal in November 2010, "leotards and tights" were removed from its registration.

We further note that your client has requested that our client voluntarily surrender its registration and further cease and desist from such use accordingly.

While our client can appreciate your client's request given the issues it currently faces with the USPTO, our client is unwilling to comply with either of its demands, especially given the fact that your client's rights in and to SPEED DRI are fairly limited in scope and that the USPTO itself earlier determined that our client was entitled to registration.

Howard F. Mandelbaum, Esq.  
June 10, 2011  
Page 2

Notwithstanding the foregoing, and in the interest of amicable resolution of this matter, our client is willing to make a compromise and co-exist along the following general terms and conditions: Our client will provide your client with its written consent to use and register SPEED DRI as applied to "leotards and tights" in exchange for your client's promise never to object and/or otherwise challenge our client's use of SPEEDRY® and registration for such mark (as set forth under U.S. Reg. No. 3,513,161).

Please let us know your client's position once you have had an opportunity to discuss this proposal with them.

The foregoing is without prejudice to our client's rights herein and nothing contained herein or omitted herefrom shall be deemed to be a waiver of any of our client's rights at law or in equity, all such rights being expressly reserved.

Very truly yours,

  
Brad D. Rose

cc: Speedo Holdings B.V.

## **EXHIBIT C**

**mail**

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**From:** Allison Strickland [astrickland@fzlj.com]  
**Sent:** Wednesday, July 13, 2011 1:52 PM  
**To:** 'mail@levman.com'  
**Subject:** Jacques Moret, Inc. v. Speedo Holdings B.V., Canc. No 92-054,121 (Our Ref: PDBH USA TC-11/05963)

Attn: Howard F. Mandelbaum, Esq.

Dear Mr. Mandelbaum:

We represent Speedo Holdings, B.V. Our client received a notification from the Trademark Trial and Appeal Board regarding a cancellation petition that was instituted against its registration No. 3,513,161 for the mark SPEEDRY.

The document includes a Certificate of Service indicating that service was made upon all parties. Can you kindly advise to what address the service copy of the cancellation petition was mailed to Speedo Holdings, B.V.?

Thank you.

Very truly yours,



J. Allison Strickland  
Fross Zelnick  
866 United Nations Plaza  
New York, NY 10017  
212-813-5967 (direct)

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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The information contained in this email message may be privileged, confidential, and protected from disclosure. Any unauthorized use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this email message in error, please reply to the sender.

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7/28/2011

## **EXHIBIT D**

mail

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**From:** Howard F Mandelbaum [howard.mandelbaum@levman.com]  
**Sent:** Wednesday, July 13, 2011 2:22 PM  
**To:** 'Allison Strickland'; 'mail@levman.com'  
**Subject:** RE: Jacques Moret, Inc. v. Speedo Holdings B.V., Canc. No 92-054,121 (Our Ref: PDBH USA TC-11/05963)

Dear Ms. Strickland,

Service was made on Brad D. Rose, Esq., who represented to us that his firm, Pryor Cashman LLP, has been retained as new counsel to Speedo Holdings B.V.

Sincerely,

Howard F. Mandelbaum  
Levine & Mandelbaum  
222 Bloomingdale Road, Suite 203  
White Plains, NY 10605  
Tel: (914) 421-0500  
(212) 588-9800  
Fax: (914) 840-1234  
howard.mandelbaum@levman.com

---

**From:** Allison Strickland [mailto:astrickland@fziz.com]  
**Sent:** Wednesday, July 13, 2011 1:52 PM  
**To:** 'mail@levman.com'  
**Subject:** Jacques Moret, Inc. v. Speedo Holdings B.V., Canc. No 92-054,121 (Our Ref: PDBH USA TC-11/05963)

Attn: Howard F. Mandelbaum, Esq.

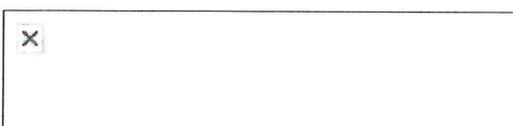
Dear Mr. Mandelbaum:

We represent Speedo Holdings, B.V. Our client received a notification from the Trademark Trial and Appeal Board regarding a cancellation petition that was instituted against its registration No. 3,513,161 for the mark SPEEDRY.

The document includes a Certificate of Service indicating that service was made upon all parties. Can you kindly advise to what address the service copy of the cancellation petition was mailed to Speedo Holdings, B.V.?

Thank you.

Very truly yours,

A rectangular box with a thin black border, containing a small 'x' icon in the top-left corner, indicating a redacted signature.

J. Allison Strickland

7/28/2011

Fross Zelnick  
866 United Nations Plaza  
New York, NY 10017  
212-813-5967 (direct)

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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7/28/2011

## **EXHIBIT E**

LEVINE & MANDELBAUM

INTELLECTUAL PROPERTY LAW  
222 BLOOMINGDALE ROAD  
SUITE 203  
WHITE PLAINS, N.Y. 10605

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TELEPHONE: 914-421-0500  
212-588-9800  
FAX: 914-840-1234  
email: mail@levman.com

July 27, 2011

Director of the United States Patent and Trademark Office  
P. O. Box 1450  
Alexandria VA 22313-1450

Re: Jacques Moret, Inc. v. Speedo Holdings B.V.  
Cancellation No. 92054121  
Trademark SPEEDRY  
Reg. No. 3513161  
Our Ref: JACQ1381US

Sir:

Belatedly submitted herewith is a service copy of a Petition to Cancel filed by ESTTA on June 16, 2011. Included is a new Certificate of Service.

The registrant, a foreign corporation, has not appointed a domestic representative. Service was erroneously made on the registrant's "new attorney" when it should have been made on the Director. 37 CFR § 2.24. The error was discovered on July 26, 2011 when the registrant's motion to dismiss for improper service was received. Petitioner will be filing a response to the motion to dismiss before the Trademark Trial and Appeal Board.

Respectfully submitted,



Howard F. Mandelbaum  
Registrant's Attorney

HFM/tct

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ESTTA Tracking number: **ESTTA414808**Filing date: **06/16/2011**

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

**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

<b>Name</b>	Jacques Moret, Inc.		
<b>Entity</b>	Corporation	<b>Citizenship</b>	New York
<b>Address</b>	1411 Broadway New York, NY 10018 UNITED STATES		

<b>Correspondence information</b>	Howard F Mandelbaum Attorney Levine & Mandelbaum 222 Bloomingdale Road Suite 203 White Plains, NY 10605 UNITED STATES mail@levman.com Phone:(914) 421-0500
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**Registration Subject to Cancellation**

<b>Registration No</b>	3513161	<b>Registration date</b>	10/07/2008
<b>Registrant</b>	Speedo Holdings B.V. Claude Debussylaan 24 1082 MD Amsterdam, NETHERLANDS		

**Goods/Services Subject to Cancellation**

Class 025. First Use: 2008/03/31 First Use In Commerce: 2008/03/31  
All goods and services in the class are cancelled, namely: Clothing, namely, shirts, blouses, singlets, bathing caps, vests, skirts, dresses, tracksuits, sweaters, wetsuits for water skiing, underwear, t-shirts, running shorts, water shorts, crop tops, bra tops, unitards, leotards, biking shorts, athletic shorts, leggings, warm-up jackets, warm-up pants, sweatshirts, sweatpants; footwear; headgear, namely, hats and caps; swimwear

**Grounds for Cancellation**

The registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used.	Trademark Act section 14
Priority and likelihood of confusion	Trademark Act section 2(d)

**Mark Cited by Petitioner as Basis for Cancellation**

<b>U.S. Registration No.</b>	2414630	<b>Application Date</b>	02/22/1999
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<b>Registration Date</b>	12/19/2000	<b>Foreign Priority Date</b>	NONE
<b>Word Mark</b>	SPEED DRI		
<b>Design Mark</b>	75644655#TMSN.gif		
<b>Description of Mark</b>	NONE		
<b>Goods/Services</b>	Class 025. First use: First Use: 1999/02/00 First Use In Commerce: 1999/02/00 Wearing Apparel, Namely Leotards, Leggings, Tops and Tights		

<b>Attachments</b>	75644655#TMSN.gif ( 1 page )( bytes ) JACQ1381US1USPetitiontoCancel.pdf ( 3 pages )(10135 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

<b>Signature</b>	/Howard F. Mandelbaum/
<b>Name</b>	Howard F Mandelbaum
<b>Date</b>	06/16/2011

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3. Plaintiff is the owner of U.S. Trademark Registration No. 2,414,630 for the trademark SPEED DRI for use on leggings and tops which it has produced and marketed for approximately 12 years and currently produces and markets.

4. On November 11, 2010, Plaintiff filed U.S. Trademark Application Serial No. 85/174,754 in the Patent and Trademark Office based on intent to use the mark SPEED DRI on "wearing apparel, namely, leotards and tights".

5. On December 27, 2010 the Examiner refused registration of SPEED DRI in Plaintiff's Application Serial No. 85/174,754 due to likelihood of confusion with the mark SPEEDRY in Defendant's Reg. No. 3,513,161.

6. The marks SPEED DRI and SPEEDRY are similar in appearance and spelling.

7. The marks SPEED DRI and SPEEDRY are identical in pronunciation.

8. Defendant's Reg. No. 3,513,161 for the mark SPEEDRY covers

Clothing, namely, shirts, blouses, singlets, bathing caps, vests, skirts, dresses, tracksuits, sweaters, wetsuits for water skiing, underwear, t-shirts, running shorts, water shorts, crop tops, bra tops, unitards, leotards, biking shorts, athletic shorts, leggings, warm-up jackets, warm-up pants, sweatshirts, sweatpants; footwear; headgear, namely, hats and caps; swimwear.

9. Both Plaintiff's Registration No. 2,414,630 and Defendant's later issued Registration No. 3,513,161 recite "leggings" in their respective identifications of goods.

10. "Tops" recited in the identification of goods in Plaintiff's Registration No. 2,414,630 encompasses "crop tops" and "bra tops" recited in the identification of goods in Defendant's later issued Registration No. 3,513,161.

11. Upon information and belief, Defendant's clothing is so closely related to Plaintiff's wearing apparel, that use of similar marks on the respective goods of the parties is likely to cause confusion or mistake, or to deceive purchasers as to the origin or sponsorship of the goods.

12. Plaintiff is damaged by the continued existence of the Defendant's registration, since that registration constitutes an impediment to registration of Plaintiff's trademark SPEED DRI.

13. Upon information and belief, the registration by Defendant of SPEEDRY for goods identical and closely related to Plaintiff's goods will impair Plaintiff's free use and registration of its trademark, and has resulted and will continue to result in injury to the good will Plaintiff has acquired with respect to its trademark, and its ability to register and protect its trademark, all to Plaintiff's damage.

WHEREFORE, Plaintiff prays that this petition be sustained and that Registration No. 3,513,161 be cancelled.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing  
Petition to Cancel has been forwarded this 27<sup>th</sup> day of July,  
2011, by first class mail, postage prepaid to:

Director of the United States Patent and  
Trademark Office  
P. O. Box 1450  
Alexandria VA 22313-1450



Howard F. Mandelbaum

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Declaration of Howard F. Mandelbaum in Support Of Petitioner's Response to Respondent's Motion to Dismiss for Insufficient Service and Cross Motion to Accept Belated Service on the Director and Reset the Cancellation Filing Date has been Forwarded, this July 28, 2011 by first class mail to:

Craig S. Mende, Esq.  
J. Allison Strickland, Esq.  
Alexander L. Greenberg, Esq.  
Fross Zelnick Lehrman & Zissu, P.C.  
866 United Nations Plaza  
New York, New York 10017

/Howard F. Mandelbaum/  
Howard F. Mandelbaum