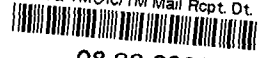


August 30, 2002

BY U.S. EXPRESS MAIL

U.S. Patent & TMO/c/TM Mail Rcpt. Dt. #57



08-30-2002

United States Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513
Attention: Legal Assistant, TTAB

TRADEMARK TRIAL AND
APPEAL BOARD
02 SEP 10 AM 12:23

Re: Cancellation No.: 32,282
Mark: TBC HERRINGTON'S TEDDY BEAR CLUB & Design
Registration No.: 2,382,866
Registration Date: September 5, 2000
Registrant: Herrington & Company, Inc.
Our Ref.: 40362.10

Dear Sir or Madam:

Enclosed herewith is Registrant's Objections and Response to Petitioner's Reply Brief for the above referenced matter. So that we may have a timely record of receipt of the enclosed, please date-stamp the enclosed, stamped, self-addressed post card, and deposit it into the U.S. mail.

Please direct all correspondence regarding this matter to my attention.

Very truly yours,

Elizabeth Moreno McArthur
Attorney at Law

EMM/sl

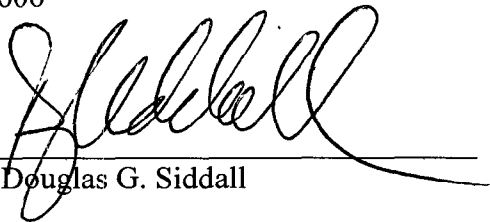
Enclosure
Copy: P. Craig Cardon

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2002, I served a copy of the foregoing REGISTRANT'S OBJECTIONS AND RESPONSE TO PETITIONER'S REPLY BRIEF upon petitioner Boyds Collection, Ltd.'s counsel of record, Michael J. Cherskov, Esq., by mailing a true and correct copy thereof by postage prepaid First Class United States Mail to the following address:

Michael J. Cherskov
CHERSKOV & FLAYNIK
The Civic Opera Building, Suite 1447
20 N. Wacker Drive
Chicago, IL 60606

DATED: August 30, 2002

By: 
Name: Douglas G. Siddall

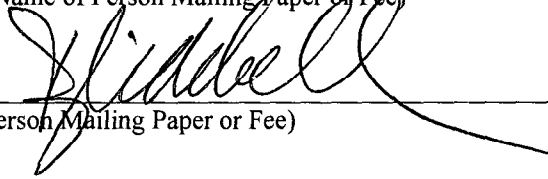
Express Mail mailing label No. **EL 952565435 US**

Date of Deposit **August 30, 2002**

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Commissioner for Trademark, 2900 Crystal Dr., Arlington, VA 22202-3513.

Douglas G. Siddall

(Type or Print Name of Person Mailing Paper or Fee)



(Signature of Person Mailing Paper or Fee)

Elizabeth McArthur, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza
Suite 300
San Francisco, CA 94111
(415) 954-0200

Attorneys for Applicant



08-30-2002

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD**

IN THE MATTER OF TRADEMARK REGISTRATION NO. 2,382,866
Registered September 5, 2000

BOYDS COLLECTION, LTD.,)
 Petitioner,)
)
v.)
)
HERRINGTON & COMPANY, INC.,)
 Registrant.)

Cancellation No. 32,282

**Mark: TBC HERRINGTON'S TEDDY
BEAR CLUB & Design**
Registration No.: 2,382,866
Registration Date: September 5, 2000

REGISTRANT'S OBJECTIONS AND RESPONSE TO PETITIONER'S REPLY BRIEF

Registrant HERRINGTON & COMPANY, INC. (hereinafter "Registrant") hereby objects and responds to the reply brief filed by petitioner BOYDS COLLECTION, LTD. (hereinafter "Petitioner"), served and filed on August 15, 2002, in the above referenced cancellation action (the "Reply"). The Reply purports to respond to Registrant's Opposition to Petitioner's Motion to Compel served and filed on July 26, 2002 (the "Opposition Brief").

I. INTRODUCTION

Petitioner's Motion to Compel was both substantively and procedurally deficient. Now, in the Reply, Petitioner again fails to provide the proper foundation for its documentary evidence and engages in a discussion citing new facts and authority never before presented to the Board in support of its Motion to Compel or in Registrant's Opposition Brief and bringing in allegations that are wholly foreign to the issues involved in the Motion to Compel. Therefore, this response of Registrant serves only to (1) object to the evidentiary deficiencies in Petitioner's Reply and (2) respond and correct the record with regard to the new material raised by Petitioner in Subsection C of Section II of the Reply.

II. EVIDENTIARY OBJECTIONS

A. Evidence in Support of Reply Lacks Proper Foundation

It is well known that motions in both federal and state court as well as motions with the TTAB must be based upon affidavits and declarations, documentary evidence provided that a

proper foundation is laid in supporting declarations or other admissible evidence. See 2 William Swarzer, *et al.*, CALIFORNIA PRACTICE GUIDE FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 12:14 and Fed. R. Evid. 901. Petitioner's evidence in support of its Reply is contained in Exhibits 1 through 19 attached to the Reply. Exhibits 1 through 17 and 19 contain documentary evidence such as the briefs and letters between counsel (collectively "Petitioner's Documentary Evidence"). Exhibit 18 contains the declaration of Petitioner's counsel Michael Cherskov (the "Cherskov Declaration"). None of Petitioner's Documentary Evidence, that is all of the Exhibits attached to the Reply except Exhibit 18 (i.e., the Cherskov Declaration), are authenticated, judicially noticed, or incorporated by reference into the Cherskov Declaration. In fact, Mr. Cherskov does not reference, verify or authenticate nor does he attach any documents to his declaration. Furthermore, Paragraph 2 of the Cherskov Declaration is inadmissible hearsay under Fed. R. Evid. 802.

Accordingly, Registrant hereby objects to Petitioner's Documentary Evidence as Petitioner was required to provide a proper evidentiary foundation in its Reply—not hearsay allegations and exhibits lacking authentication. All of the Petitioner's Documentary Evidence is simply inadmissible and accordingly may not be considered in connection with determining whether Petitioner has any right to compel discovery in this matter.

B. Subsection C of Section II Presents Facts Outside Scope for Reply Briefs

Reply briefs, when appropriate, are limited in scope. Reply papers are limited to matters raised in the opposition papers. In fact, it is improper for the moving party to shift gears and introduce new facts or different legal arguments in the reply brief than presented in the moving papers. See Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Subsection C of Section II of the Reply introduces material and allegations that are irrelevant to the issues in the Petitioner's Motion to Compel. Petitioner provides a discussion on the Notice of Default that was rescinded by the Board on July 29, 2002 in this action, but which it made no reference to in its Motion to Compel and which was not discussed or even referred to in Registrant's Opposition Brief. Contrary to the suggestions in Subsection C of Section II of the Reply, the discussion of the default judgment and the new material contained therein is not an equitable claim and is not a claim relating to the Motion to Compel. Further, this discussion is

wholly foreign to the issues involved in the Motion to Compel and the subject matter of the cancellation action and, therefore, should not be considered in determining the discovery matters at issue in the Motion to Compel.

Accordingly, Registrant objects to Subsection C of Section II of the Reply, and requests that the Board not consider any of the new authority or new arguments contained therein.

III. RESPONSE TO NEW MATERIAL PRESENTED IN REPLY

Although, as the discussed above, Subsection C of Section II of the Reply raises new material and is wholly irrelevant to the Motion to Compel and unresponsive to the Opposition Brief, if the Board permits the introduction of said new material, Registrant requests the opportunity to respond and clarify the erroneous and misleading record.

As expected, rather than focus on the law and the facts of the discovery issue, Petitioner has chosen to sling mud at Registrant.¹ However, Petitioner's burden here is not to discredit Registrant, but to articulate and make an adequate showing in support of its own claims related to the alleged "excusable neglect" in Petitioner's failure to file the Motion to Compel within the time frame mandated by 37 C.F.R. § 2.120(e).

Petitioner states in the Reply that the Notice of Default should have been made final.² However, as Petitioner is well aware, Registrant timely filed its Answer in this action on August 31, 2001 and timely served the Answer on Petitioner on the same day, as required by TBMP §§ 113 and 316. Declaration of Elizabeth McArthur attached at Tab 1 ("McArthur Decl.") at ¶ 2 & Exhibit A. As confirmed in paragraph 4 of the Cherskov Declaration, the Notice of Default appears to be the result of a clerical error in the TTAB's docketing of the answer **due to a transposed number in the Cancellation Number on the cover letter** enclosing the

¹ While Petitioner appears to be alleging that the Notice of Default is somehow related to the equity of the issues in this matter, it does not and has never claimed that or explained how the Notice of Default has in any way affected or was related to the alleged "excusable neglect" in Petitioner's failure to file the Motion to Compel in a timely fashion.

² It is curious why Petitioner claims that the case should have gone into default, notwithstanding the facts that it received Registrant's timely filed Answer on August 31, 2001 and was proceeding in the action and filed its discovery requests on March 5, 2002. McArthur Decl. at ¶ 9. It is even more curious why Petitioner was not willing to clarify this clerical mistake with the TTAB even upon the TTAB's request that a copy of the Answer be sent to it by facsimile. Cherskov Decl at ¶¶ 3 and 6.

Registrant's Answer to the Notice of Cancellation.³ McArthur Decl. at ¶¶ 3 and 4 & Exhibit B. The Answer contained the correct cancellation proceeding number. McArthur Decl. at ¶ 3.

Neither Registrant nor Registrant's counsel ever received the Board's Notice of Default in this case. McArthur Decl. at ¶ 5. In fact, Registrant was responding to Petitioner's discovery requests and corresponding with Petitioner in this action, and it was never made aware by Petitioner or given any indication by Petitioner or the Board that a Notice of Default had been issued. McArthur Decl. at ¶ 9. Thus, Registrant having no notice and no reason to believe that a Notice of Default had been issued, did not file a response showing cause. McArthur Decl. at ¶ 6. If it had been aware, Registrant would have timely responded and corrected the TTAB's docketing error in this matter. McArthur Decl. at ¶ 7.

The first time Registrant became aware that a notice of default had been issued was on June 11, 2002, when Registrant's counsel Ms. Elizabeth McArthur spoke with the TTAB Legal Assistant Ms. Veronica White. McArthur Decl at ¶ 8. Ms. White called Registrant's counsel to inquire about the Notice of Default and whether an answer had been filed in this case. Upon such notice, Ms. McArthur immediately forwarded to Ms. Veronica White the Registrant's Answer as filed on August 31, 2001, together with copies of the certificate of mailing, certificate of service and the TTAB's stamped postcard confirming timely receipt thereof. McArthur Decl at ¶ 8 & Exhibit B.

Lastly, Registrant notes that equity does not favor a plaintiff that fails to read to rules and follow the Board's procedures. Section 101.01 of the TBMP states that all proceedings before the Board are governed by, among others, the rules of practice in trademark cases which may be found in part 2 of Title 37 of the Code of Federal Regulations. Registrant wishes merely to note that Section 2.120(e) of title 37 of the Code of Federal Regulations clearly states for all that "motions to compel must be filed *prior* to expiration of testimony period." (italics added) Assuming that Petitioner did adequately review TBMP § 523, even these rules expressly state that in any event, a motion to compel must be filed within a reasonable time after service of the response that is believed to be inadequate. In this case, Registrant's discovery responses were served on Petitioner on April 9, 2002. The Petitioner's Motion to Compel was not filed until

³ The cover letter enclosing the Answer contained an error wherein one of the numbers in the Cancellation

June 3, 2002. Registrant submits that 56 days is not a reasonable time under TBMP § 523.03.⁴

Accordingly in this case, equity does not dictate that the Motion to Compel, which contravenes the express rules, be granted. To the contrary, it dictates that, in light of Petitioner's inaction and failure to follow the rules and requirements of TTAB procedure, the Motion to Compel be denied.

IV. CONCLUSION

Based on the foregoing discussion, Registrant respectfully objects to Petitioner's Documentary Evidence and requests that the Board not countenance Petitioner's unauthorized and improper attempt at "one last bite", and that the Petitioner's Documentary Evidence and allegedly equitable claim in Subsection C of Section II of the Reply not be considered in support of the Reply. The only inequity here would be to allow Petitioner to recover on this legally and evidentiary deficient claim.

Dated: August 30, 2002

Respectfully submitted,

HERRINGTON & COMPANY, INC.

By: 

Elizabeth Moreno McArthur, Esq.

P. Craig Cardon, Esq.

SQUIRE SANDERS & DEMPSEY L.L.P.

1 Maritime Plaza, Suite 300

San Francisco, CA 94111

Tel: (415) 954-0200

Attorneys for Registrant

Number was transposed and listed as 32,382, rather than 32,282. McArthur Decl. at ¶ 3.

⁴ Petitioner's citation to the Johnson & Johnson v. Diamond Medical, Inc. case fails to show why the reading of the TBMP rules and the court's allowance of such motions to be filed after the close of the *discovery period* constitutes excusable neglect when the motion is filed on the closing day of the *testimony period*. Perhaps this is another case of misreading by Petitioner; mistaking "*close of discovery period*" for "*close of testimony period*"—two distinct dates in this case separated by over 90 days.

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

IN THE MATTER OF TRADEMARK REGISTRATION NO. 2,382,866
Registered September 5, 2000

BOYDS COLLECTION, LTD.,)	Cancellation No. 32,282
Petitioner,)	
)	
v.)	<u>Mark:</u> TBC HERRINGTON'S TEDDY
)	BEAR CLUB & Design
HERRINGTON & COMPANY, INC.,)	<u>Registration No.:</u> 2,382,866
Registrant.)	<u>Registration Date:</u> September 5, 2000
)	

**DECLARATION OF ELIZABETH MORENO MCARTHUR IN SUPPORT OF
REGISTRANT'S OBJECTIONS AND RESPONSE TO PETITIONER'S REPLY TO
REGISTRANT'S OPPOSITION TO MOTION TO COMPEL**

I, Elizabeth Moreno McArthur, declare as follows:

1. I am an attorney at law licensed to practice in the state of California, and am counsel of record for Registrant HERRINGTON & COMPANY, INC. in the above-captioned cancellation action. I make the following statements of my own personal knowledge, except where so indicated, and, if required, could competently testify thereto at trial.

2. I filed registrant Herrington & Company, Inc. ("Registrant")'s Answer to petitioner Boyds Collection, Ltd. ("Petitioner")'s Notice of Cancellation on August 31, 2001 and served the Answer on Petitioner on the same day. A true and correct copy of the Answer as filed on August 31, 2002 with the certificate of mailing, certificate of service on Petitioner and post card for confirmation of receipt is attached hereto as Exhibit A.

3. The cover letter to the TTAB enclosing the Answer contained an error wherein one of the numbers in the Cancellation Number was transposed and listed as 32,382, rather than 32,282. The actual Answer contained the correct Cancellation Number 32,282.

4. The Notice of Default appears to be the result of a clerical error in the TTAB's docketing of the answer due to the incorrect number on the cover letter enclosing the Registrant's Answer to the Notice of Cancellation.

5. I never received the Board's Notice of Default in this case. I telephoned Christopher Herrington, President of the Registrant, and inquired whether the Registrant ever received the Notice of Default. He informed me that he did not.


6. Because I had no notice and no reason to believe that a Notice of Default had been issued, I did not file a response showing cause.

7. If I had been aware of the Notice of Default, I would have timely responded and corrected the TTAB's docketing or mailing error.

8. The first time I became aware that a notice of default had been issued was when I spoke with the TTAB Legal Assistant Ms. Veronica White on June 11, 2002. Ms. White called me to inquire about the Notice of Default and whether an answer had been filed in this case. Upon such notice, I immediately forwarded to Ms. White the Registrant's Answer as filed on August 31, 2001, together with copies of the certificate of mailing, certificate of service and the TTAB's stamped postcard confirming timely receipt thereof. A true and correct copy of the my facsimile transmission to Ms. White is attached hereto as Exhibit B.

9. After the Answer was filed and served on Petitioner, Petitioner served its first set of discovery requests on Registrant on March 5, 2002. Up until me conversation with the Veronica White, I had been responding to Petitioner's discovery requests and corresponding with Petitioner in connection with the Motion to Compel in this case, and I was never made aware by Petitioner or given any indication by Petitioner or the Board that a Notice of Default had been issued.

I declare under penalty of perjury that the foregoing statements are true and correct.
Executed this 28th day of August, 2002 in San Francisco, California.


Elizabeth Moreno McArthur

**SQUIRE
SANDERS**

LEGAL
COUNSEL
WORLDWIDE

FILE
CLIENT <u>Herrington</u>
FILE NO. <u>40362.6</u>
CORRESPONDENCE <u>✓</u>
DOCUMENTS _____
INITIALS <u>egz</u>

SQUIRE, SANDERS & DEMPSEY L.L.P.

801 South Figueroa, 14th Floor
Los Angeles, California 90017-5554

Office: +1.213.624.2500

Fax: +1.213.630.4444

Direct Dial:

+1.213.689.5127

emoreno@ssd.com

August 31, 2001

BY EXPRESS MAIL

United States Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

**Attention: Dwayne Bowling
Legal Assistant, TTAB**

Re: Cancellation No. 32,382 (Mailed 08/17/01)
Mark: TCB HERRINGTON'S TEDDY BEAR CLUB & Design
Reg. No.: 2,382,866
Reg. Date: September 5, 2000
Registrant: Herrington & Company, Inc.
Our Ref.: 40362.6

Dear Mr. Bowling:

Enclosed herewith is Registrant's Answer to the Petition for Cancellation filed by Petitioner, Boyds Collection, Ltd. So that we may have a timely record of receipt of the enclosed, please date-stamp the enclosed, stamped, self-addressed post card, and deposit it into the U.S. mail. Please direct all correspondence regarding this application to my attention.

Sincerely yours,



Elizabeth C. Moreno
Attorney at Law

Enclosure

LosAngeles/55607.2

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

IN THE MATTER OF TRADEMARK REGISTRATION NO. 2,382,866
Registered September 5, 2000

BOYDS COLLECTION, LTD.,

Petitioner,

vs.

HERRINGTON & COMPANY, INC.

Registrant

Cancellation No. 32,282

Mark: TBC HERRINGTON'S TEDDY BEAR CLUB
& Design

Registration No.: 2,382,866

Registration Date: September 5, 2000

REGISTRANT'S ANSWER TO THE PETITION FOR CANCELLATION

HERRINGTON & COMPANY, INC. ("Registrant"), the owner of the registration identified above, in response to the Notice dated August 17, 2001, instituting this cancellation proceeding, hereby responds to the Petition for Cancellation in this matter filed by BOYDS COLLECTION, LTD., ("Petitioner") on or about June 26, 2001, as follows:¹

1. Registrant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first paragraph on page 1 of the Petition for Cancellation.

2. Except to admit that Registrant owns U.S. Trademark Registration No. 2,382,866 registered on September 5, 2000, for the mark TBC HERRINGTON'S TEDDY BEAR CLUB & Design for "toys, namely, plush toys, stuffed toys, stuffed animals, and play figures" and to specifically deny that Registration No. 2,382,866 covers "sporting goods," Registrant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the second paragraph on page 1 of the Petition for Cancellation.

3. Registrant denies the allegations contained in the first paragraph on page 2 of the Petition for Cancellation.

¹ Because Petitioner did not draft its Petition for Cancellation using numbered paragraphs, Registrant is unable to answer the claims in correspondence with the numbered paragraphs of the Petition for Cancellation, as set forth in Section 318.02(a) of the TBMP. As such, Registrant responds to each paragraph by referencing its placement on the page of the Petition for Cancellation.

4. Registrant denies the allegations contained in the second paragraph on page 2 of the Petition for Cancellation.

5. Registrant denies the allegations contained in the third paragraph on page 2 of the Petition for Cancellation.

6. Registrant denies the allegations contained in the fourth paragraph on page 2 of the Petition for Cancellation.

7. Registrant denies the allegations contained in the fifth paragraph on page 2 of the Petition for Cancellation.

AFFIRMATIVE DEFENSES

In further answer to the Petition for Cancellation, the Registrant asserts that:

8. The Petition for Cancellation fails to state a claim upon which relief can be granted to Petitioner.

9. The Petition for Cancellation is barred by laches.

10. The Petition for Cancellation is barred by waiver.


11. The Petition for Cancellation is barred by illegality, namely that Petitioner has engaged in unfair competition with Registrant.

WHEREFORE, Registrant Herrington & Company, Inc. prays for judgment dismissing Petition for Cancellation No. 32,282 forthwith, and for such other and further relief as is deemed just and proper.

Dated: August 31, 2001

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY L.L.P.

By: 

Elizabeth C. Moreno
801 South Figueroa Street
14th Floor
Los Angeles, CA 90017-5554
Telephone: (213) 689-5127
Attorneys for Registrant
Herrington & Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2001, I served a copy of the foregoing REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION upon petitioner Boyds Collection, Ltd's counsel of record, Michael J. Cherskov, Esq., by mailing a true and correct copy thereof by postage prepaid First Class United States Mail to the following address:

Michael J. Cherskov
CHERSKOV & FLAYNIK
The Civic Opera Building, Suite 1447
20 N. Wacker Drive
Chicago, IL 60606

DATED: August 31, 2001

By: Esther Rodriguez
Name: Esther Rodriguez

*** TX REPORT ***



TRANSMISSION OK

TX/RX NO 4453
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SQUIRE, SANDERS & DEMPSEY L.L.P.

One Maritime Plaza, Suite 300
San Francisco, California 94111-3492

**SQUIRE
SANDERS**

LEGAL
COUNSEL
WORLDWIDE

Office: +1.415.954.0200
Fax: +1.415.393.9887
Preferred Fax: +1.415.393.9887
If Problems: +1.415.954.0303

June 11, 2002

PLEASE DELIVER THESE PAGES IMMEDIATELY

06/11/02 09:23

No. of Pages (including cover): 7

To: Veronica White

Facsimile No: 703.308.9333

Company: Trademark Trial and Appeal Board

Confirmation No: 703.308.9300 x162

From: Elizabeth Moreno McArthur

Direct Dial No: +1.415.954.0287

E-mail: emcarthur@ssd.com

Re: Mark: TBC HERRINGTON'S TEDDY BEAR CLUB & Design
Cancellation No. 32,282
Our File: 40362.10

Message:

Dear Veronica:

Pursuant to our telephone discussion of this morning, attached hereto is a copy of Respondent's Answer, together with copies of our cover letter to the TTAB, express mail label and the returned post card stamped by the TTAB upon receipt on 8/31/01, in the above referenced Cancellation No. 32,282.

If you have any questions, or require additional information, please call me.

Thank you for your continued assistance with this matter.

Very truly yours,

**SQUIRE
SANDERS**

LEGAL
COUNSEL
WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.

One Maritime Plaza, Suite 300
San Francisco, California 94111-3492

Office: +1.415.954.0200
Fax: +1.415.393.9887
Preferred Fax: +1.415.393.9887
If Problems: +1.415.954.0303

June 11, 2002

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From: Elizabeth Moreno McArthur

Direct Dial No: +1.415.954.0287

E-mail: emcarthur@ssd.com

Re: Mark: TBC HERRINGTON'S TEDDY BEAR CLUB & Design
Cancellation No. 32,282
Our File: 40362.10

Message:

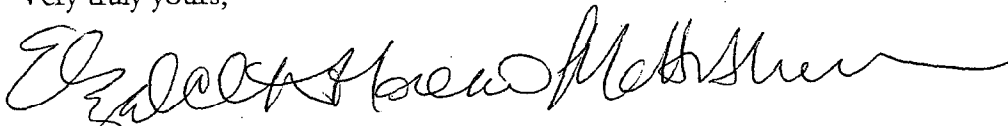
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If you have any questions, or require additional information, please call me.

Thank you for your continued assistance with this matter.

Very truly yours,



Elizabeth Moreno McArthur

CONFIDENTIALITY NOTICE:

The attached information is LEGALLY PRIVILEGED AND CONFIDENTIAL and is intended only for the use of the addressee named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, please be aware that any dissemination, distribution or duplication of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the address above via the postal service. Thank you.

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40362.00010

Sadie Lum/SF

Job No: 71138.01

Account No.

Return to Office

SQUIRE SANDERS | LEGAL
COUNSEL
WORLDWIDE

FILE
CLIENT <u>Herrington</u>
FILE NO. <u>40362.6</u>
CORRESPONDENCE <u>✓</u>
DOCUMENTS _____
INITIALS <u>eg</u>

SQUIRE, SANDERS & DEMPSEY L.L.P.

801 South Figueroa, 14th Floor
Los Angeles, California 90017-5554

Office: +1.213.624.2500
Fax: +1.213.630.4444

Direct Dial:
+1.213.689.5127
emoreno@ssd.com

August 31, 2001

BY EXPRESS MAIL

United States Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Attention: **Dwayne Bowling**
Legal Assistant, TTAB

should be: 32,282

Re: **Cancellation No. 32,382** (Mailed 08/17/01)
Mark: **TCB HERRINGTON'S TEDDY BEAR CLUB & Design**
Reg. No.: **2,382,866**
Reg. Date: **September 5, 2000**
Registrant: **Herrington & Company, Inc.**
Our Ref.: **40362.6**

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Sincerely yours,



Elizabeth C. Moreno
Attorney at Law

Enclosure

LosAngeles/55607.2

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Registered September 5, 2000

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HERRINGTON & COMPANY, INC.

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Cancellation No. 32,282

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Registration No.: 2,382,866

Registration Date: September 5, 2000

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1. Registrant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first paragraph on page 1 of the Petition for Cancellation.
2. Except to admit that Registrant owns U.S. Trademark Registration No. 2,382,866 registered on September 5, 2000, for the mark TBC HERRINGTON'S TEDDY BEAR CLUB & Design for "toys, namely, plush toys, stuffed toys, stuffed animals, and play figures" and to specifically deny that Registration No. 2,382,866 covers "sporting goods," Registrant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the second paragraph on page 1 of the Petition for Cancellation.
3. Registrant denies the allegations contained in the first paragraph on page 2 of the Petition for Cancellation.

¹ Because Petitioner did not draft its Petition for Cancellation using numbered paragraphs, Registrant is unable to answer the claims in correspondence with the numbered paragraphs of the Petition for Cancellation, as set forth in Section 318.02(a) of the TBMP. As such, Registrant responds to each paragraph by referencing its placement on the page of the Petition for Cancellation.

4. Registrant denies the allegations contained in the second paragraph on page 2 of the Petition for Cancellation.

5. Registrant denies the allegations contained in the third paragraph on page 2 of the Petition for Cancellation.

6. Registrant denies the allegations contained in the fourth paragraph on page 2 of the Petition for Cancellation.

7. Registrant denies the allegations contained in the fifth paragraph on page 2 of the Petition for Cancellation.

AFFIRMATIVE DEFENSES

In further answer to the Petition for Cancellation, the Registrant asserts that:

8. The Petition for Cancellation fails to state a claim upon which relief can be granted to Petitioner.

9. The Petition for Cancellation is barred by laches.

10. The Petition for Cancellation is barred by waiver.


11. The Petition for Cancellation is barred by illegality, namely that Petitioner has engaged in unfair competition with Registrant.

WHEREFORE, Registrant Herrington & Company, Inc. prays for judgment dismissing Petition for Cancellation No. 32,282 forthwith, and for such other and further relief as is deemed just and proper.

Dated: August 31, 2001

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY L.L.P.

By: 

Elizabeth C. Moreno
801 South Figueroa Street
14th Floor
Los Angeles, CA 90017-5554
Telephone: (213) 689-5127
Attorneys for Registrant
Herrington & Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2001, I served a copy of the foregoing REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION upon petitioner Boyds Collection, Ltd's counsel of record, Michael J. Cherskov, Esq., by mailing a true and correct copy thereof by postage prepaid First Class United States Mail to the following address:

Michael J. Cherskov
CHERSKOV & FLAYNIK
The Civic Opera Building, Suite 1447
20 N. Wacker Drive
Chicago, IL 60606

DATED: August 31, 2001

By: Esther Rodriguez
Name: Esther Rodriguez