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

Proceeding	91190169
Party	Plaintiff SUSINO UMBRELLA CO., LTD.
Correspondence Address	Wang Anbang, President Susino Umbrella Co., Ltd. Jin' ou Industrial Park, DongshiTown Jinjiang, 362271 CHINA meihuaumbrella@yahoo.com.cn
Submission	Motion to Reopen
Filer's Name	Brian J. Hurh
Filer's e-mail	brianhurh@dwt.com
Signature	/brian j. hurh/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of App. Ser. No. 77/355,544)	
)	
Susino Umbrella Co., Ltd.,)	
)	
Opposer,)	
v.)	Opposition No. 91190169
)	
Susino USA LLC,)	
)	
Applicant.)	

**MOTION FOR RELIEF
FROM JUDGMENT**

Pursuant to TBMP § 544 and Fed. R. Civ. P. Rule 60(b) of the Federal Rules of Civil Procedure, Opposer Susino Umbrella Co., Ltd. (“Opposer”) moves the Trademark Trial and Appeal Board for an order setting aside the summary judgment entered in the captioned opposition proceeding (“Opposition”). In support of this motion, Opposer incorporates the attached Brief In Support Of Motion From Judgment and accompanying exhibits (“Brief”), the Declaration of Mr. Anbang Wang (“Wang Declaration”), and all of the pleadings, papers and other records on file in this Opposition, and states as grounds for this motion:

1. As set forth in the Brief and Wang Declaration, Applicant Susino USA LLC (“Applicant”) failed to properly serve Opposer with its discovery requests, including its interrogatories, documents requests, and request for admissions. In consequence, Opposer never received Applicant’s discovery requests and, thus, did not have any opportunity to respond.
2. As set forth in the Brief and Wang Declaration, Applicant failed to properly serve Opposer with its motion for summary judgment. In consequence, Opposer never

received the motion for summary judgment and, thus, did not have any opportunity to respond.

3. Because service of the motion for summary judgment was not proper, the Board should not have considered the motion for summary judgment pursuant to Trademark Rule § 2.119(a) and TBMP § 113.02. Therefore, the Board's order granting summary judgment as conceded deprived Opposer of due process since it never received the motion for summary judgment or any notice thereof, and never had a chance to defend its rights against Applicant's application for the SUSINO mark.
4. Accordingly, pursuant to Fed. R. Civ. P. 60(b)(4), the summary judgment is void, and the Opposition must be reopened in order for the Board to consider the merits of this case.
5. Because Applicant's failure to properly serve either its discovery requests or the motion for summary judgment resulted in Opposer not receiving the discovery requests or the motion for summary judgment, Opposer's inability to respond to the motion for summary judgment was thus due to "excusable neglect" and "surprise." Accordingly, the Board should set aside the summary judgment and reopen the Opposition pursuant to Fed. R. Civ. P. 60(b)(1).
6. As set forth in detail throughout the Brief and Wang Declaration, the circumstances of this case are exceptional.
7. Opposer manufactures and exports umbrellas in its own factory in China to various countries throughout the world, including the United States. From 2002 through 2007, Applicant was merely the U.S. sales agent for Opposer with the limited role

of soliciting wholesale customers in the United States for Opposer's umbrellas, which Opposer manufactured and shipped directly to the wholesale customers.

8. Opposer has common law rights in the SUSINO mark due to its prior use of the mark in the United States and elsewhere, has used the SUSINO name and mark continuously since 1995, and owns three international registrations for the SUSINO mark dating back to March 2004.
9. Applicant knowingly and fraudulently relied on Opposer's own use of the SUSINO mark in the United States to support its application and subsequent registration for the SUSINO mark, specifically submitting copies of Opposer's goods depicting the SUSINO mark as Applicant's specimens of use.
10. Applicant has at least twice acknowledged that the SUSINO mark belongs to Opposer, first by attempting to extort approximately \$1 million from Opposer and offering to sell the SUSINO mark "back" to Opposer, and again by later claiming that Opposer authorized Applicant to file its application for the SUSINO mark.
11. Registration of the SUSINO mark by Applicant is likely to cause confusion, mistake or deception, resulting in damages and injury to Opposer, as well as harm to Opposer's goodwill and reputation associated with the SUSINO mark.
12. Registration of the SUSINO mark has resulted in the wrongful appropriation of Opposer's goodwill and reputation associated with the SUSINO mark, as well as harm to Opposer's commercial interests in the United States.
13. Opposer has good and valid defenses to Applicant's motion for summary judgment, namely, that it never had an opportunity to respond to Applicant's request for admissions (the sole basis for Applicant's summary judgment motion), and in any

event, there are genuine issues of material fact rendering summary judgment inappropriate.

14. Opposer has good and valid claims against Applicant's Application, namely, that Opposer is the rightful owner of the SUSINO mark; that Applicant relied on Opposer's own use of the mark in the United States to support its application; that Opposer never assigned or transferred any rights in the SUSINO mark to Applicant; and that Opposer has priority of use over Applicant due to Opposer's actual earlier and continuous use of the SUSINO mark in interstate commerce.
15. Accordingly, for these and all of other reasons set forth in the Brief and Wang Declaration, the Board should, in its sound discretion, and as a matter of law and consistent with the principles of equity and justice, set aside the summary judgment and reopen the Opposition pursuant to Fed. R. Civ. P. 60(b)(6).
16. There was no undue delay in bringing this motion, as it has been filed less than six weeks from the Board's summary judgment order, and Applicant will not be unduly prejudiced if the Board decides to set aside the summary judgment in this matter and allow Opposer to defend its rights to the SUSINO mark. All of the witnesses and evidence are still available, and Applicant has not obtained an incontestable mark.
17. Applicant is currently using its recently-issued Registration to threaten Opposer's commercial interests in the United States and interfere with Opposer's business relationships based on a misappropriated trademark, causing significant harm and prejudice to Opposer's rights and goodwill in the SUSINO mark. The Board should expeditiously consider the instant Motion for Relief to prevent Applicant from

further benefiting from its deceptive and misleading behavior thus far, to mitigate the commercial and economic harm to Opposer, and to restore the SUSINO mark to its rightful owner, Opposer.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP
David Silverman
Brian J. Hurh

/brian j. hurh/

1919 Pennsylvania Ave NW
Suite 800
Washington, DC 20006
Telephone (202) 973-4279
Fax (202) 973-4499
davidsilverman@dwt.com
brianhurh@dwt.com

ATTORNEYS FOR
SUSINO UMBRELLA CO., LTD.

August 20, 2010

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

In the Matter of App. Ser. No. 77/355,544)	
)	
Susino Umbrella Co., Ltd.,)	
)	
Opposer,)	
v.)	Opposition No. 91190169
)	
Susino USA LLC,)	
)	
Applicant.)	

**BRIEF IN SUPPORT OF
MOTION FOR RELIEF FROM JUDGMENT**

Pursuant to TBMP § 544 and Fed. R. Civ. P. Rule 60(b), Opposer Susino Umbrella Co., Ltd. (“Opposer”), a Chinese corporation, hereby provides its brief in support of its motion for relief (“Motion For Relief”) from the Trademark Trial and Appeal Board’s (“Board”) order granting Applicant Susino USA, LLC (“Applicant” or “Susino USA”) its motion for summary judgment in the captioned opposition proceeding (“Opposition”).

A. INTRODUCTION

At first glance, this case appears to be straightforward. On May 13, 2009, Opposer initiated the Opposition against Applicant’s application, Serial No. 77/355,544, for SUSINO (stylized), the mark at issue in this proceeding (“Application”). On December 23, 2009 and January 11, 2010, Applicant purportedly served discovery on Opposer, to which Opposer did not respond. Applicant filed a motion for summary judgment with the Board on March 12, 2010 (“Summary Judgment Motion”), and purportedly served the motion on Opposer, to which Opposer did not respond. The Board granted the Summary Judgment Motion as conceded in Applicant’s favor on June 8, 2010 (“Summary Judgment Order”).

The reality, however, is that Opposer never received Applicant's discovery requests, nor did it receive Applicant's Summary Judgment Motion, due to Applicant's failure to properly serve these papers on Opposer. Thus, upon the Board considering and ultimately ruling on the unopposed Summary Judgment Motion, Opposer was fundamentally deprived of its due process right to respond to Applicant's Summary Judgment Motion. Because service was improper, the Board should not have considered the Summary Judgment Motion pursuant to Trademark Rule § 2.119(a). Accordingly, the Board's Summary Judgment Order must be deemed void pursuant to Fed. R. Civ. P. 60(b)(4).

Additionally, the Board should set aside its Summary Judgment Order because Opposer's inability to respond to the Summary Judgment Motion or Applicant's discovery requests, including Applicant's request for admissions on which the Summary Judgment Motion exclusively relies, was a result of "excusable neglect" and "surprise" pursuant to Rule 60(b)(1).

Furthermore, the exceptional circumstances of this case justify relief from the Board's Summary Judgment Order pursuant to Fed. R. Civ. P. 60(b)(6). Opposer has a valid defense to Applicant's Summary Judgment Motion, namely, that there are genuine issues of material fact that must be considered by the Board, which would have been established from Opposer's responses to Applicant's request for admissions – had Applicant properly served its discovery requests on Opposer. Moreover, Opposer has valid claims in this case, specifically, that granting a registration to Applicant is improper here because:

1. Applicant was merely Opposer's U.S. sales agent with the limited role of soliciting wholesale customers for Opposer's goods manufactured by Opposer in China;

2. Opposer has common law rights in the SUSINO mark due to its prior and continuous use of the mark in the United States and elsewhere;
3. Applicant's claim of use was based on Opposer's use, as evidenced by the fact that both of Applicant's specimens of use in support of its Application belonged to Opposer. Thus, the registration was obtained on a false, if not fraudulent, claim of use;
4. Opposer did not assign or otherwise transfer any rights in the SUSINO mark to Applicant or any of its officers, directors, agents or employees;
5. Applicant twice acknowledged that the SUSINO mark rightly belongs to Opposer, having first attempted to extort approximately \$1 million (7.5 million Chinese yuan) from Opposer by offering to sell the SUSINO mark "back" to Opposer, and then more recently claiming that Applicant had filed its application with Opposer's authorization for the purpose of "insuring the right to the trademark were [sic] protected";
6. Registration of the SUSINO mark by Applicant is likely to cause confusion, mistake or deception, resulting in damages and injury to Opposer, as well as harm to Opposer's goodwill and reputation associated with the SUSINO mark; and
7. Registration of the SUSINO mark by Applicant has resulted in the wrongful appropriation of Opposer's goodwill and reputation associated with the SUSINO mark, as well as harm to Opposer's commercial interests in the United States.¹

The Board should, in its sound discretion, and as a matter of law and consistent with principles of equity and justice, grant Opposer's Motion For Relief pursuant to Fed. R. Civ. P.

¹ A Certificate of Registration based on the Application (Registration No. 3816103) issued on July 13, 2010.

Rule 60(b). Opposer respectfully requests expeditious consideration of the Motion For Relief, in light of the significant prejudice to Opposer as a result of Applicant's misappropriation of Opposer's SUSINO mark.

B. FACTUAL BACKGROUND

a. The Parties

1. Opposer

Opposer is a Chinese corporation having offices at Jin'ou Industrial Park Dongshi Town, Jinjiang, FJ 362271 CHINA. (Notice of Opp. ¶ 1; Declaration of Anbang Wang ("Wang Declaration") ¶ 6.) Opposer was formerly known as Jinjiang Hengshun Umbrella Company, Ltd. ("Hengshun Umbrella"). (Notice of Opp. ¶ 3; Wang Declaration ¶ 7.) Opposer has been in the business of manufacturing, marketing and selling umbrellas since 1995, when it was first known as Hengshun Umbrella. (Notice of Opp. ¶ 3; Wang Declaration ¶¶ 7- 8.) Since 1995, Opposer has manufactured and exported nearly 500 million umbrellas worldwide, including shipment of 20 million to the United States. (Wang Declaration ¶ 8.) Due to its global success, in 2007, Opposer became a publicly-traded company in the ShenZhen Stock Exchange Market. (Wang Declaration ¶ 8.)

Opposer's President, Mr. Anbang Wang ("Mr. Wang"), the authorized representative for Opposer in this proceeding, cannot read or understand English, and must rely on third parties for the translation and interpretation of all English communications, including those related to business and legal matters. (Wang Declaration ¶¶ 1, 3.) Mr. Wang is not a lawyer, and is not familiar with the Board's legal procedures. (Wang Declaration ¶ 4.)

2. Applicant

On information and belief, Applicant is a Florida-based limited liability company that first registered with the Florida Secretary of State, Division of Corporations on December 19, 2007 – the same day that the Application was filed with the Board, and *after* Applicant’s claimed dates of first use and first use in commerce. As of the date of this filing, Applicant’s status with the Florida Secretary of State is “inactive.” (Exhibit 1.) According to the Florida Secretary of State, Todd Nadrich (“Nadrich”) is Applicant’s “manager,” although more recent correspondence identifies Nadrich as the “President” of Susino USA. (Exhibit 2.) Nadrich is also the named correspondent for Applicant in the Application and this proceeding. Nadrich is or was also the managing director of a company called SSM International, with offices in Weston, Florida and Taipei, Taiwan. (Exhibit 3.)

On information and belief, Nadrich’s business partner, Shu-Lian Shyu a/k/a Stephanie Shyu (“Shyu”), also works for Applicant as a “Director.” (Exhibit 4.) Shyu is or was associated with at least four other companies: TiFu Enterprises, Inc., TiFu Umbrella Co., Sourcing Strategies Inc., and SSM Asia Ltd. (Exhibits 3 and 5.) SSM Asia Ltd. has the same U.S. and Taiwan office addresses as Nadrich’s company, SSM International, and the e-mail addresses that Nadrich and Shyu used to communicate with Opposer between 2002 and 2007 utilize the same domain name, “@stsource.com.” (Exhibits 3 and 6.) Nadrich and Shyu continue to use the same “@stsource.com” domain as officers of Applicant Susino USA. (Exhibits 2, 4, and 7.)

On information and belief, Applicant is merely a corporate veil for Nadrich and Shyu, and thus for purposes of this Motion for Relief, references to Applicant shall include Nadrich and/or Shyu.

b. Applicant's Relationship with Opposer

Applicant's relationship with Opposer began in 2002 when Nadrich and Shyu contacted Opposer proposing an arrangement in which Nadrich and Shyu would solicit wholesale customers in the United States for Opposer's umbrellas. Opposer, as an Original Equipment Manufacturer ("OEM"), would manufacture the umbrellas branded with the wholesale customer's logo or other markings and ship them directly to the wholesale customer. (Wang Declaration ¶ 11; Exhibit 6.)

Pursuant to this arrangement, from 2002 through 2007, Applicant would prepare purchase orders that identified Opposer (by its former name) as the vendor, *i.e.*, the manufacturer of the umbrellas. Applicant would submit these purchase orders to Opposer's sales manager, Jianzhang "Jorzon" Wang ("Jorzon"), or Jorzon's co-worker, Carter Guan, via e-mail using Applicant's corporate email address "@stsource.com" and in many cases copying each other (Nadrich and Shyu) on these emails. (Wang Declaration ¶ 13; Exhibit 6.)

At no time during this arrangement did Nadrich or Shyu indicate that they were working for, or had any association with, an entity called "Susino USA." (Wang Declaration ¶ 12.) At all times relevant to this proceeding, Nadrich and Shyu operated under or on behalf of TiFu Umbrella, SSM International, Sourcing Strategies, among others – but not Susino USA. (Exhibit 6.)² Indeed, Nadrich and Shyu's role with respect to Opposer was strictly limited to soliciting wholesale customers for Opposer's umbrellas. (Wang Declaration ¶ 14.)

In June 2007, Shyu decided to formalize her relationship with Opposer "as it's [sic] sales representative" and provided Opposer with a proposed agreement under which she would "obtain

² Further demonstrating Applicant's attempts to mislead not only Opposer but also its customers, in 2003, Applicant misrepresented to one of Opposer's wholesale customers during a visit to Opposer's factory that Applicant was a shareholder of the company, implying an association with Opposer and the SUSINO brand. This was, of course, not true, and Opposer immediately instructed Applicant not to misrepresent itself in that manner again. (Wang Declaration ¶ 15.)

customers for the manufacturing contract of producing umbrellas with Susino companies.” (Exhibit 5; Wang Declaration ¶ 16.) Jorzon executed the agreement on behalf of Opposer shortly thereafter. This agreement was limited in scope to Shyu acting only as a U.S. sales agent for Opposer with the limited task of obtaining customers for Susino Umbrella. The agreement did not provide for the assignment or transfer of any rights in Opposer’s SUSINO mark. (Exhibit 8 (executed agreement); Wang Declaration ¶ 16.)

In her correspondence with Opposer, Shyu also indicated that Nadrach planned to discuss a similar agency agreement with Mr. Wang at an upcoming trade show in Las Vegas featuring exhibits by a variety of merchandisers, a gift expo and a jewelry show. (Wang Declaration ¶ 17; Exhibit 9.) However, Mr. Wang did not attend the event, and Jorzon, who did attend as Opposer’s representative, did not discuss such an agreement with Nadrach, who visited Opposer’s booth and thus had access to Opposer’s goods and marketing materials. (Wang Declaration ¶¶ 17-18.) In fact, Opposer did not discuss such an agreement with Nadrach during or after the trade show, and certainly did not enter into any agreement for the assignment or transfer of any rights in the SUSINO mark to Nadrach, Shyu, or anyone else associated with Susino USA. (Wang Declaration ¶ 19.)

By December 2007, Opposer’s business relationship with Applicant had deteriorated. In a December 15, 2007 correspondence to Jorzon, Applicant claimed that it “lost financially because we no longer have AS orders, Dyno orders, and now problems with Toppers orders.” (Exhibit 10; Wang Declaration ¶ 20.) The email further claimed that Opposer’s SUSINO trademark “expired in 2002/3,” and that “[t]his was not our doing, whoever handle this for Mr. Wang failed him, not us.” Presumably in retaliation for its purported financial and business losses, Applicant then demanded “\$7.5m yuan” (approximately \$1 million) from Opposer to

“purchase the [SUSINO] trademark back” for use in the United States, asserting that, “[s]o only left to discuss is whether [Mr. Wang] wishes to purchase trademark back or not. It is useless to attempt to litigate this issue, as the cost in legal fees far out weigh the cost to purchase the trademark back. Susino is on stock market is worth over 1.5 billion yuan, is this correct? To ask for \$7.5m yuan is small price to pay for the trademark back to Susino public company.” (Exhibit 10; Wang Declaration ¶ 20.)

During all times relevant to this proceeding, Applicant was merely Opposer’s U.S. sales agent for the limited role of soliciting wholesale customers for Opposer’s umbrellas. Applicant did not have any independent rights to the SUSINO mark. (Wang Declaration ¶¶ 11-19; Notice of Opp. ¶ 6.) Opposer never entered into any agreement with Applicant for the assignment, license or grant of any rights in the SUSINO mark. (Wang Declaration ¶ 19.) By Applicant’s own admission, Opposer explicitly rejected plans to form a partnership to “launch” the Susino brand in the U.S., further indicating that Opposer specifically declined to convey any rights in the SUSINO mark to Applicant. (Exhibits 6³ and 10 (acknowledging rejection of potential business venture to “bring Susino brand to USA as partnership.”))

c. Applicant Files the Application; Opposer Hires Jinxiang to Initiate Opposition Against Application

On December 19, 2007, only a few days after Applicant sent the December 15 email to Opposer, Applicant filed the subject Application for the SUSINO mark. The USPTO published the Application for opposition on January 13, 2009. This was not the first time that Applicant attempted to misappropriate the SUSINO mark from Opposer. In June 2007, a “Robert Nadrich,” having the same Loxahatchee, Florida address as Applicant and Todd Nadrich, filed an

³ See, e.g., e-mail chain between Jorzon, Nadrich and Shyu (July 17, 2002 and Aug. 1, 2002) (discussing potential business venture to manufacture SUSINO umbrellas in U.S.).

application in his own name for the same SUSINO mark plus design (depicting a plum blossom) and Chinese characters that Opposer's predecessor Hengshun Umbrella had filed for on March 26, 2004 (Serial No. 79/001855), and which Opposer had already secured through its international registration issued on March 26, 2004 (Int'l Registration No. 822244).⁴ (Wang Declaration ¶¶ 10, 21; Exhibits 11, 12 and 16.) In October 2007, "Robert Nadrich" attempted to replace the original mark and design with the SUSINO word mark that is now at issue. On December 15, 2007, Todd Nadrich filed a preliminary amendment attempting to substitute himself as the named applicant. By office action dated December 18, 2007, the examining attorney rejected the amendment of the mark as a material alteration and the inappropriate applicant substitution.

The very next day, on December 19, 2008, Todd Nadrich, on behalf of Applicant Susino USA, filed the subject Application for the SUSINO word mark – the same mark that forms the word portion and dominant part of the trademark claimed in Opposer's March 2004 application, and which is registered through its international application that issued on March 26, 2004. (Wang Declaration ¶¶ 9-10, 21; Exhibits 11 and 12.)

In early 2008, Opposer learned about Applicant's Application for the first time when Nadrich called Jorzon to tell him about it. At that time, Nadrich did not mention that the Application was filed by a company called "Susino USA." Only after preparations were under way to oppose the Application did Opposer learn of Susino USA's existence. (Wang Declaration ¶¶ 22-23.) Opposer did not authorize Nadrich to use the name "Susino" for any purpose. (Wang Declaration ¶ 22.)

⁴ Opposer has two other international registrations, one for the same SUSINO word mark and design as Int'l Registration No. 822244 (Int'l Registration No. 925010) and one for the same SUSINO word mark at issue in this proceeding (Int'l Registration No. 1002627). (Exhibit 12.)

Having no knowledge of Board procedures or U.S. trademark law, and not being able to read or understand the English language, Opposer hired Xiamenshi Huliqun Jinxiang Lianhe Trademark Agency Co. (“Jinxiang”), a trademark agency (although not a law firm) located in Fujian, China, to handle the Opposition. (Wang Declaration ¶¶ 3-4, 25.) Jinxiang assured Opposer that it could handle the Opposition and Opposer had no reason to believe otherwise. (Wang Declaration ¶ 25.) However, without Opposer’s knowledge or authorization, Jinxiang assigned the matter to Voson Intellectual Property Co., Ltd. (“Voson”), an intellectual property law firm located in Beijing, China. Opposer was not aware of Voson’s involvement in this case until after the Board’s Summary Judgment Order, when Jinxiang informed Opposer of the Summary Judgment Order and Voson’s involvement. (Wang Declaration ¶¶ 26, 42.)

Voson, in turn, solicited the assistance of a U.S. law firm, Vidas, Arrett & Steinkraus P.A. (“Vidas”), also without Opposer’s knowledge or authorization. (Wang Declaration ¶ 27.) Although filings made with the Board on behalf of Opposer indicated that Vidas represented Opposer from May 13, 2009 (Opposition file date) to October 27, 2009 (Vidas withdrawal), Opposer had no knowledge of Vidas’ involvement in this proceeding until Jinxiang informed Opposer that Vidas had been handling the case, and that it was withdrawing from the case. (Wang Declaration ¶ 27.) Although Vidas claimed that it had an executed client agreement with Opposer (*see* Request to Withdraw as Attorney, Attachment, filed Oct. 27, 2009), upon closer inspection, Opposer’s “signature” was not made by Mr. Wang or any other employee of Opposer, but by an alleged “Legal Representative” of Opposer who apparently signed on Opposer’s behalf. (Wang Declaration ¶ 28.) On information and belief, it appears that Opposer’s “signature” may have been made by Voson. In any event, Opposer did not have any knowledge of a client agreement with Vidas, did not authorize Voson or anyone else to sign the

Vidas client agreement on its behalf, and did not know about Vidas' involvement until after Vidas withdrew from the case in October 2009.

d. Opposer Initiates Opposition Against Application

The Opposition was timely filed on May 13, 2009. Although Opposer did not know Vidas was involved at the time, it had authorized Jinxiang to initiate this proceeding, and presumably Jinxiang, through Voson, authorized Vidas to file the Opposition. (Notice of Opp. ¶¶ 1-2; Wang Declaration ¶¶ 25, 29) On June 5, 2009, Nadrich, on behalf of Applicant, filed Applicant's Answer, including affirmative defenses.

On August 27, 2009, Applicant filed a motion to dismiss the notice of opposition for failure to state a claim. On December 10, 2009, the Board issued an order denying the motion to dismiss ("Motion To Dismiss Order") on the ground that Opposer had properly alleged that it had common law rights in the SUSINO mark; that Applicant's claim of use of the SUSINO mark is based on sales of SUSINO-branded umbrellas manufactured by Opposer; and that Applicant was "merely a middleman that received opposer's product." (Motion To Dismiss Order at 5.)

The Motion to Dismiss Order also reminded the parties that the Trademark Rules "require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board." (Motion To Dismiss Order at 7.)

e. Opposer's U.S. Counsel Withdraws; Unauthorized Filing Purports to State that Opposer Will Represent Itself in the Opposition

On October 27, 2009, Opposer's attorney of record at that time, Vidas, filed a request to withdraw from the proceeding ("Request for Withdrawal"). The Board granted Vidas' request on October 30, 2009. It was at this time that Jinxiang told Opposer that a U.S. law firm had been

handling the Opposition, that the U.S. firm was withdrawing from the case, but that Jinxiang would continue handling the case. (Wang Declaration ¶ 27, 30.) However, Opposer still was not informed of Voson's involvement in the case.

Following Vidas' withdrawal, a document titled "Statement of Opposer Chooses to Represent Itself" was filed with the Board on November 29, 2009 ("Statement"). The Statement indicated that "[w]e, opposer, state that choose to present itself on the proceeding of this case," and bore the alleged electronic signature of Mr. Wang, with the obsolete e-mail address "meihuaumbrella@yahoo.com.cn." (Wang Declaration ¶ 32.) Opposer had no knowledge of, and did not authorize, the filing of this Statement. Nor did Mr. Wang authorize anyone to place his electronic signature on the Statement. (Wang Declaration ¶ 32.) Upon information and belief, it appears that Voson filed the Statement without Opposer's knowledge or authorization, just as it appears that it signed the client agreement with Vidas on Opposer's behalf, without Opposer's knowledge or authorization.

On that same date (November 29, 2009), a Change of Correspondence Address was filed with the Board indicating that Opposer's new representative was Tony Tune of Houston, Texas, again bearing an electronic signature alleged to be that of Mr. Wang. It is not entirely clear who Tony Tune is and what his role was in this proceeding. In any event, several days later, a second Change of Correspondence Address was filed with the Board on December 2, 2009, indicating that Opposer's new correspondence address was:

Wang Anbang
President
Jin' ou Industrial Park,DongshiTown,
Jinjiang, FJ 362271
CHINA
meihuaumbrella@yahoo.com.cn

This address, including the postal code 362271, is, in fact, Opposer's correct mailing address (although the same obsolete e-mail address was used). (Wang Declaration ¶ 33.) However, this change of address was filed without Opposer's knowledge or authorization, and Mr. Wang did not authorize his electronic signature to be used on this filing. (Wang Declaration ¶ 33.) On information and belief, Voson made these Change of Correspondence Address filings without Opposer's authorization.

f. Applicant Serves Discovery Requests on Opposer But Fails to Use Opposer's Correct Address; Opposer Does Not Receive Applicant's Discovery Requests

On December 23, 2009, Applicant purportedly served interrogatories and document requests on Opposer. (Summary Judgment Motion, Exhibits B (Interrogatories) and C (Document Requests).) However, as clearly indicated on the certificates of service, Applicant used the wrong mailing address, using postal code **352771**, instead of **362271**. Regardless of whether Applicant used the wrong address or whether Applicant even mailed the requests at all, Opposer never received Applicant's interrogatories or document requests. (Wang Declaration ¶ 34.)

Likewise, on January 11, 2010, Applicant purportedly served a request for admissions on Opposer. (Summary Judgment Motion, Exhibit A (Request for Admissions).) Again, as clearly indicated on the certificate of service, Applicant used the wrong mailing address, using postal code **352771**, instead of **362271**. Regardless of whether Applicant used the wrong address or whether Applicant even mailed the request at all, Opposer never received Applicant's request for admissions. (Wang Declaration ¶ 35.) While the certificate of service also claims that Applicant emailed the request for admissions to Opposer's email address of record, that email address has been obsolete for nearly four years, the parties never mutually agreed to service by electronic transmissions as required by the Trademark Rules and, in any event, Opposer did not receive this

email. (Wang Declaration ¶ 36.) Applicant’s claim that Opposer requested that the parties communicate by email is false, *see* Summary Judgment Motion at 2 n.1, as Opposer’s Statement does not make such a request.⁵

g. Applicant Files its Summary Judgment Motion with the Board, but Again Fails to Use Opposer’s Correct Mailing Address; Opposer Does Not Receive Applicant’s Summary Judgment Motion

On March 12, 2010, Applicant filed its Summary Judgment Motion with the Board. According to Applicant’s certificate of service, however, the certificate clearly shows the wrong address – Applicant again used postal code **352771**, not **362271**. Regardless of whether Applicant used the wrong address or whether Applicant even mailed the motion at all, Opposer never received Applicant’s Summary Judgment Motion. (Wang Declaration ¶ 37.) While the certificate of service also claims that Applicant emailed the Summary Judgment Motion to Opposer’s email address of record, as noted above, that email address has been obsolete for nearly four years, the parties never mutually agreed to service by electronic transmissions as required by the Trademark Rules, Applicant’s claim that Opposer requested that the parties communicate by email is false and, in any event, Opposer never received any such email.⁶ (Wang Declaration ¶ 38.)

Although Opposer did receive the Board’s March 26, 2010 order suspending the proceeding pending disposition of the Summary Judgment Motion (“Suspension Order”), which

⁵ Although a certificate of service may indicate that service was additionally made “by e-mail,” this does not satisfy the requirement for proper service of papers, and Opposer in fact never received the email. First, service by “electronic transmission” is only proper when “mutually agreed upon by the parties.” *See* Trademark Rules § 2.199(b)(6). There was no agreement between the parties that service may be made by e-mail or other “electronic transmission.” (Wang Declaration ¶ 36.) Applicant’s contention that Opposer requested that the parties communicate by e-mail, *see* Summary Judgment Motion at 2 fn. 1, is unpersuasive, as Opposer’s Statement, to which Applicant refers, does not indicate any such request by Opposer, much less a mutual agreement to serve papers via e-mail. (Opposer’s Statement, attached to Summary Judgment Motion.) Even if service by e-mail was appropriate in this proceeding, which it is not, the e-mail address for Opposer and presumably used by Applicant is outdated, has not been in use for at least four years, and was submitted to the Board without Opposer’s knowledge or authorization. (Wang Declaration ¶¶ 36.)

⁶ *Id.*

was sent to Opposer's correct mailing address by the Board, Opposer was unable to understand the Board's order, as it was written in English and Opposer could not read or understand English. (Wang Declaration ¶¶ 3, 40.) Opposer diligently requested a translation of the order from Jinxiang, who provided Opposer with a Chinese translation of the Board's order, which, in English, read to mean:

The written Response will not be acceptable any more, and now it is entered into the judgment stage.

(Wang Declaration ¶ 40.) Based on this translation, Opposer was led to believe that there was nothing for Opposer to do, and was not made aware that the Summary Judgment Motion had been filed or that any response from Opposer was necessary. (Wang Declaration ¶¶ 40-41.) Thus, despite Opposer's diligence, and due to Applicant's failure to properly serve Opposer with any of its discovery requests or the Summary Judgment Motion, Opposer did not have any knowledge or notice, or reason to believe, that the Summary Judgment Motion had been filed in the case or that a response was required.

Presuming that Opposer received and understood the Summary Judgment Motion and, having received no response from Opposer, the Board granted the motion as conceded in favor of Applicant on June 8, 2010. Opposer did not learn about the Board's Summary Judgment Order until Shyu notified Opposer's sales manager Jorzon via email dated July 1, 2010 (Exhibit 13; Wang Declaration ¶¶ 39, 42). It was only then that Jinxiang told Opposer about Voson's involvement, and that Opposer had in fact lost the case. (Wang Declaration ¶ 42.) Opposer immediately discharged Jinxiang as its agent, and upon hiring new legal counsel in both China and the United States, promptly filed this Motion for Relief. (Wang Declaration ¶ 43.)

On July 13, 2010, a Certificate of Registration was issued for SUSINO in Applicant's name, Registration No. 3816103 ("Registration"). Notably, Applicant's specimen of use on which the Registration is based is actually Opposer's own catalog.⁷ (Exhibit 14; Wang Declaration ¶ 24.) Soon after obtaining the Registration, Applicant sent a cease-and-desist letter to Opposer regarding the production and import of Opposer's goods in the United States, in addition to accusing at least one of Opposer's OEM customers in the U.S. of violating Applicant's purported rights to the SUSINO mark and allegedly requesting U.S. Customs and Border Protection to search and seize all goods shipped to that customer, without providing any notice to the customer. (Exhibits 2 and 4.)

In a more recent exchange of emails with Opposer's undersigned counsel, Nadrich asked, "[i]s [Opposer's President] Wang denying he gave authorization to go forward with insuring the right to the trademark were [sic] protected?" (Exhibit 7.) Then, in an email dated August 18, 2010, Nadrich advised the undersigned counsel that he has recorded Applicant's wrongfully obtained Registration with the U.S. Customs and Border Protection, Intellectual Property Branch. (Exhibit 15.) Accordingly, the urgency of the Board's consideration of this Motion for Relief in order to prevent the wrongful seizure of Opposer's genuine SUSINO-branded umbrellas could not be more clear.

C. LEGAL ARGUMENT

a. The Motion for Relief From the Board's Summary Judgment Order Should Be Granted

Motions for relief from a final judgment, order or other proceeding are governed by Federal Rules of Civil Procedure Rule 60(b), as made applicable by 37 C.F.R. § 2.116(a). *See*

⁷ The catalog was actually a substitute specimen requested by the PTO. The original specimen was a photograph of a SUSINO label on an umbrella, which also was Opposer's product bearing Opposer's SUSINO name. (Wang Declaration ¶ 24.)

also TBMP § 544. The determination of whether a motion under Rule 60(b) should be granted is a matter that lies within the sound discretion of the Board. TBMP § 544.

b. Opposer's Motion for Relief is Timely

As this Motion For Relief is being filed well less than a year from the Board's Summary Judgment Order of June 8, 2010, any one of the six enumerated grounds for relief under Rule 60(b) may be applicable. *See* Fed. R. Civ. P. Rule 60(b)(c). Opposer's Motion For Relief is timely. TBMP § 544.

c. The Summary Judgment Order Should Be Considered Void Pursuant to Rule 60(b)(4) Because the Board Should Not Have Considered the Motion

Rule 60(b)(4) authorizes relief from void judgments. An order must be void, not merely erroneous, to be set aside. A judgment is void for lack of jurisdiction of the subject matter, or of the parties, or for action in a manner inconsistent with due process of law. *CareerXchange, Inc. v. Corpnet Infohub, Ltd.*, 80 U.S.P.Q.2d 1046, 2005 WL 5998064 (TTAB June 10, 2005) (citing Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2862 (2002)).

The Trademark Rules and the TBMP explicitly provide that for every paper filed in an inter partes case, *proof of service must be made before the paper will be considered by the USPTO*. Trademark Rule § 2.119(a); TBMP § 113.02 (“When a party to an inter partes proceeding before the Board files a document required by 37 CFR § 2.119(a), to be served upon every other party to the proceeding, proof that the required service has been made ordinarily must be submitted before the filing will be considered by the Board.”).

A statement, such as a certificate of service, signed by the attorney or other authorized representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service was made, will be accepted as *prima facie* proof of service.

Trademark Rule § 2.119(a). However, the Board has held that “[a]lthough it is well settled that

the proper mailing of a letter through the United States Postal Service creates a rebuttable presumption that the letter reached its destination and was actually received by the person to whom it was addressed,” the circumstances of the case may combine to rebut the presumption. *CareerXchange*, 80 U.S.P.Q.2d 1046, 2005 WL 5998064 at *7.

In the case at hand, any presumption that the Summary Judgment Motion, or any of Applicant’s discover requests, was properly served is rebutted by the facts that Applicant failed to use Opposer’s correct mailing address, that Applicant purportedly emailed its papers to an obsolete email account absent an agreement to accept electronic service of process, and that Opposer simply did not receive the motion in either paper or electronic form. There is no excuse for Applicant’s oversight – it obviously knew of Opposer’s new correspondence address, as evidenced by the fact that Applicant attempted to serve its discovery requests and the Summary Judgment Motion on Opposer’s corporate address after having served previous papers on Opposer’s U.S. counsel prior to that counsel’s withdrawal. Moreover, having received no responses to any of its discovery requests, Applicant could have easily contacted Opposer for a response or an explanation, or asked the Board to compel Opposer to respond. It did not. *See CareerXchange*, 80 U.S.P.Q.2d 1046, 2005 WL 5998064 at *15 (noting that it would have taken very little time for petitioner to email or telephone respondent).

Because service was not proper, thus depriving Opposer an opportunity to respond, the Board should not have considered the motion. Consequently, the Board’s order granting the Summary Judgment Motion in Applicant’s favor was inconsistent with due process, and should be deemed void.

Orders granting unopposed summary judgment motions have been treated as the “functional equivalent of a default judgment.” *See Feeney v. AT&E, Inc.*, 472 F.3d 560, 562 (8th

Cir. 2006) (considering summary judgment grant to be equivalent to default judgment because court granted judgment without discussing merits of the claim based solely on party's failure to respond). The Board has held that such judgments "are not favored by the law" because they do not address the merits of the case; thus, Rule 60(b)(4) motions are "generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments." TBMP § 544. The Board has identified three factors to be considered in deciding a Rule 60(b) motion in this context: "(1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action." *Id.*

Grant of the Motion For Relief will not prejudice Applicant because, upon information and belief, Applicant does not manufacture or otherwise sell SUSINO-branded umbrellas, and given the prompt and expedient filing of the Motion for Relief, any expenses or efforts expended by Applicant to actually sell goods bearing the SUSINO mark since obtaining registration of the SUSINO mark (as of July 13, 2010) would likely not be significant.

Nor was Opposer's inability to respond to the Summary Judgment Motion willful. In fact, as evidenced by the exceptional facts in this case, Opposer's inability to respond to Applicant's discovery or the Summary Judgment Motion was due to *Applicant's* failure to properly serve the Summary Judgment Motion on Opposer, which misled Opposer into believing that there was nothing to act on in the proceeding.

Finally, Opposer has a meritorious defense to the Summary Judgment Motion. Applicant's motion was based solely on the allegation that Opposer did not respond to Applicant's request for admissions. However, as Opposer never received the request for admissions, it never had the opportunity to deny or admit any of Applicant's purported "facts." Consequently, these "facts" should not be deemed admitted under the circumstances. Had

Opposer been afforded the opportunity to respond to Applicant's request for admissions, the Board would find that genuine issues of material fact exist, as evidenced by Opposer's allegations herein (including Opposer's Declaration).⁸ *Cf. Burrell v. Henderson*, 434 F.3d 826, 834 (6th Cir. 2006) ("A defense is meritorious if there is *some possibility* that the outcome of the suit after a full trial will be contrary to the result achieved by the default.") (internal quotations omitted). Accordingly, grant of the Summary Judgment Motion was inappropriate and, thus, should be deemed void pursuant to Rule 60(b)(4) in order that the Board may fully address the merits of the case.

d. The Summary Judgment Order Should Be Vacated Pursuant to Rule 60(b)(1) Due To Excusable Neglect and Surprise

Rule 60(b)(1) authorizes the Board to set aside the Summary Judgment Order for "mistake, inadvertence, surprise, or excusable neglect." In determining whether there was "excusable neglect," the Board follows the factors and analysis outlined by the U.S. Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. P'ship et al.*, 507 U.S. 380 (1993), discussed in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). In *Pioneer*, the Supreme Court stated that the excusable neglect determination 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." *Pioneer*, 507 U.S. at 395. Of the various factors, the second and third factors are considered the

⁸ To the extent that the Board requires Opposer to move to withdraw or amend admissions, *see* TBMP § 525, Opposer respectfully requests leave of the Board to file such motion in order to demonstrate that its failure to timely respond to Applicant's request for admissions was due to excusable neglect. As discussed herein, Applicant failed to properly serve Opposer with its request for admissions, and as a result, Opposer never received the request for admissions. Consequently, Opposer never had an opportunity to respond to the request for admissions.

dominant factors. *See Pumpkin*, 43 USPQ2d at 1588; *Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 USPQ2d 1369 (TTAB 2000).

Opposer has promptly filed this Motion For Relief less than six weeks after Applicant received its registration (issued July 13, 2010) to avoid any undue delay. Opposer's prompt filing will result in little, if any, prejudice to Applicant if the Motion For Relief is granted, as Applicant does not appear to manufacture or sell its own goods, including umbrellas. Applicant was merely the U.S. sales agent for Opposer, with the limited role of soliciting wholesale customers for Opposer's umbrellas.

Nor will grant of Opposer's Motion For Relief have a significant impact on judicial proceedings, as there are currently no other judicial proceedings involving Applicant or Opposer that the Motion For Relief would impact.

Additionally, all the events in this proceeding that culminated in the Board granting the Summary Judgment Motion as conceded were outside of Opposer's control. Correspondingly, Opposer has done everything in its control to litigate this case diligently and in good faith. In particular, upon receiving the Board's March 26 suspension order, Opposer was led to believe that no action was necessary despite diligently seeking a translation of the Board's order. *See Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154, 1155 (TTAB 1991) (considering respondent's "limited command of the English language" in granting motion for relief under Rule 60(b)(1)); TBMP § 544, note 535 (explaining that, in *Regatta*, the Board granted a motion for relief under rule (1) because "respondent's employees had limited knowledge of English and were unaware cancellation and opposition were separate proceedings"). Upon learning that the Board had granted the Summary Judgment Motion, Opposer acted promptly to file this Motion For Relief in order to minimize any delay, prejudice or burden on Applicant or the Board. As

indicated above, Opposer's inability to respond to the Summary Judgment Motion was not willful; it has a meritorious defense to the Summary Judgment Motion, namely, that it was not served with Applicant's request for admissions and genuine issues of material fact remain, rendering summary judgment inappropriate; and Opposer has valid claims against Applicant's Application. The Board should grant the Motion For Relief due to Opposer's "excusable neglect." *See generally Regatta Sport* (granting motion for relief based on Rule 60(b)(1)). *Compare Pumpkin*, 43 USPQ2d at 1586-87 (finding against movant because failure to present evidence "was caused by circumstances wholly within opposer's reasonable control").

The Summary Judgment Order should also be vacated because Opposer was certainly "surprised" when learned that the Board had decided in the case in Applicant's favor by summary judgment. As discussed above, Applicant failed to properly serve Opposer with its discovery requests or the Summary Judgment Motion. As a result, Opposer never received these papers and thus never had an opportunity to respond. In fact, Opposer did not even know about the discovery requests or the Summary Judgment Motion until after the Board issued its Summary Judgment Order. *Cf. Thompson v. American Home Assur. Co.*, 95 F.3d 429, 433 (6th Cir. 1996) (granting Rule 60(b)(1) motion because movant "clearly established surprise" because it was unaware that a lawsuit had been filed until after the default judgment had been entered; lack of actual notice was sufficient reason to set aside judgment). For these and the foregoing reasons, the Board should grant the Motion For Relief under Rule 60(b)(1) for "surprise."

e. The Summary Judgment Order Should Be Vacated Pursuant to Rule 60(b)(6) Due to Exceptional Circumstances

Rule 60(b) permits the Board to set aside the Summary Judgment Order for "any other reason justifying relief." Relief under Rule 60(b)(6) is an "extraordinary remedy to be granted only in exceptional circumstances." TBMP § 544. Rule 60(b)(6) "vests power in courts

adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Klapprott v. United States*, 335 U.S. 601, 615 (1949).

Opposer’s circumstances in this case are indeed exceptional. Applicant’s Application and subsequent Registration are founded entirely on Applicant’s deceptive, misleading and false, if not fraudulent, statements before the Board. It is Applicant’s second attempt at misappropriating Opposer’s intellectual property, having failed the first time it applied for registration of the very same SUSINO mark and design that Opposer had filed for in 2004, and for which Opposer already had two international registrations. Applicant knew that the specimens of use that Applicant submitted in support of its Application were actually Opposer’s own goods. Susino USA did not even exist when it claimed first use of the SUSINO mark in June 2007. Indeed, Shyu’s allegation in her December 2007 email – just days prior to filing the Application – that Opposer lost its trademark when “the trademark it [sic] expired in 2002/3,” and Applicant’s attempt to extort \$1 million from Opposer to “purchase trademark back,” constitute an implicit admission that the SUSINO mark belongs to Opposer. Similarly, Nadrich’s recent claim on August 7 that Opposer “gave authorization to go forward with insuring the right to the trademark” provides further evidence of Applicant’s knowledge that the SUSINO mark belongs to Opposer.

When Opposer did not respond to Applicant’s request for admissions, Applicant easily could have contacted Opposer for a response or an explanation, but instead immediately filed a summary judgment motion. Having not properly served even the Summary Judgment Motion on Opposer, Applicant, by mere default, acquired rights to valuable intellectual property to which it is not entitled as a matter of law.

In this Motion For Relief, Opposer has rebutted the presumption of both proper and actual receipt of the Summary Judgment Motion, as well as both proper and actual receipt of any discovery papers from Applicant. Opposer filed its Motion For Relief promptly and within a reasonable time period. Opposer has claimed, in good faith, that it has a meritorious defense to the Summary Judgment Motion, and valid claims against Applicant in this Opposition proceeding. *See CareerXchange*, 80 U.S.P.Q.2d 1046, 2005 WL 5998064 at *7-8 (granting relief under Rule 60(b)(6), despite denying relief claimed under (b)(4) or (b)(5)). For these and all of the other foregoing reasons, the Board should find, in its sound discretion, that the exceptional circumstances of this case are sufficient to warrant relief from the Board's Summary Judgment Order under Rule 60(b)(6).

D. Request for Expedient Consideration of the Motion

As evidenced by Applicant's recent use of its recently-issued Registration to threaten Opposer's commercial interests in the United States and interfere with Opposer's business relationships based on a misappropriated trademark, the Board's default Summary Judgment Order has led to significant harm and prejudice to Opposer's rights and goodwill in the SUSINO mark. Opposer respectfully requests that the Board expeditiously consider the instant Motion for Relief to prevent Applicant from further benefiting from its deceptive and misleading behavior thus far, to mitigate the commercial and economic harm to Opposer, and to restore the SUSINO mark to its rightful owner, Opposer.

E. Conclusion

For all of the foregoing reasons, and good cause appearing, Opposer respectfully requests that the Board expeditiously consider the instant Motion For Relief and (1) set aside the Summary Judgment Order against Opposer; (2) cancel Applicant's Registration No. 3816103;

(3) reopen the Opposition proceeding; (4) permit Opposer an opportunity to respond to Applicant's discovery requests and its Summary Judgment Motion following proper service; and (5) any other relief that the Board may deem appropriate.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP
David Silverman
Brian J. Hurh

/brian j. hurh/

1919 Pennsylvania Ave NW
Suite 800
Washington, DC 20006
Telephone (202) 973-4279
Fax (202) 973-4499
davidsilverman@dwt.com
brianhurh@dwt.com

ATTORNEYS FOR
SUSINO UMBRELLA CO., LTD.

August 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that a complete and true copy of the foregoing MOTION FOR RELIEF FROM JUDGMENT, along with its accompanying BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT and exhibits, was sent via first-class mail on August 20, 2010 to the following:

Todd Nadrich
Susino USA LLC
PO Box 1013
Loxahatchee, FL 33470-1013

Todd Nadrich
11985 Southern Blvd.
Royal Palm Beach, FL 33411

Incorp Services, Inc.
Registered Agent
17888 67th Court North
Loxahatchee, FL 33470

Erex Chen, Esq.
V&T Law Firm
11F Tongsheng Tower
458 Fushan Rd.
Shanghai 200042
CHINA

/brian j. hurh/

Brian J. Hurh