

ESTTA Tracking number: **ESTTA599054**

Filing date: **04/17/2014**

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

Proceeding	91213763
Party	Plaintiff Inhale, Inc.
Correspondence Address	LOUIS F TERAN SLC LAW GROUP 1055 E COLORADO BLVD, SUITE 500 PASADENA, CA 91106 UNITED STATES lteran@strategiclegalcounseling.com
Submission	Opposition/Response to Motion
Filer's Name	Louis F. Teran
Filer's e-mail	lteran@strategiclegalcounseling.com
Signature	/Louis F. Teran/
Date	04/17/2014
Attachments	Opposition to Motion for Default.pdf(598000 bytes )

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

**In the Matter of Application Serial No. 85/929,488**

**Mark: NEVER XHALE**

**Filed: May 12, 2013**

**Published: October 29, 2013**

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	)	
INHALE, INC.,	)	
	)	
Opposer,	)	
	)	<b>OPPOSITION NO: <u>91213763</u></b>
v.	)	
	)	
KSX ENTERPRISE, INC.,	)	
	)	
Applicant.	)	
	)	
	)	

**OPPOSITION TO MOTION FOR DEFAULT JUDGMENT**

**I. STATEMENT OF FACTS**

Opposer is the owner of U.S. Trademark Registration No. 4,063,774 (“Opposer’s Registration”) for the mark “EXHALE” (“Opposer’s Mark”) for “Hookah, hookah pipes, hookah bases, hookah tobacco, vaporizer, and water pipes,” in International Class 034 (“Opposer’s Goods”).

On May 12, 2013, Applicant filed U.S. Application Serial No. 85/929,488 for the mark “NEVER XHALE” (“Applicant’s Mark”) for “Cigarette cases not of precious metal; Cigarette lighters nor of precious metal; Electric cigarettes; Hookahs” in International Class 034 (“Applicant’s Goods”).

On November 29, 2013, Opposer filed a Notice of Opposition. On January 2, 2014, Applicant filed an Answer to the opposition. In the Answer, Applicant included a counterclaim to cancel Opposer’s Registration. Opposer received a copy of Applicant’s Answer on or around January 7, 2014. See *Teran Decl.*, ¶4.

On April 8, 2014, Applicant filed a Motion for Default Judgment for Failure to Answer based on Opposer’s failure to file an answer to Applicant’s Counterclaim.

However, the copy of Applicant’s Answer received by Opposer on or around January 7, 2014 has a total of five (5) pages. See *Teran Decl.*, ¶4. Furthermore, the pages of Applicant’s Answer received by Opposer were not numbered in any way. See *Teran Decl.*, ¶4. Thus, Opposer reasonably believed that the copy of Applicant’s Answer it had received was complete.

After receiving a copy of Applicant’s Motion for Default Judgment, Opposer compared Applicant’s Answer it had received on or around January 7, 2014 to the Answer that is posted on the Trademark Trial and Appeal Board Inquiry System (“TTABVUE”). See *Teran Decl.*, ¶8. Applicant’s Answer received by Opposer has a total of five (5) pages, whereas Applicant’s Answer posted on TTABVUE has a total of six (6) pages. See *Teran Decl.*, Ex. ¶8. None of the pages on either version of Applicant’s Answer have been numbered in any manner. See *Id.* Furthermore, nothing in either version of Applicant’s Answer indicates how many pages make up the document. See *Id.* In fact, the single page that is missing from Applicant’s Answer received by Opposer is what appears to be page no. 4 in Applicant’s Answer posted on TTABVUE. See *Id.*

Page no. 4 in Applicant’s Answer posted on TTABVUE includes a section entitled “Counterclaim to Cancel Registration”. This page with said counterclaim section is not

included in Applicant's Answer received by Opposer. See *Teran Decl.*, ¶4. Thus, Opposer reasonably believed that Applicant's Answer it had received was complete and did not include a counterclaim. In fact, the title of Applicant's Answer received by Opposer is "Answer to Notice of Opposition". See *Teran Decl.*, ¶4. Even the preamble to Applicant's Answer does not indicate that said document includes both an answer and a counterclaim. Without receiving a copy of the missing page no. 4, Opposer did not know or realize that Applicant's Answer included a counterclaim. Therefore, Opposer never filed an answer to Applicant's counterclaim.

Furthermore, Opposer's answer to counterclaim was apparently due on February 28, 2014. Applicant filed its Motion for Default Judgment on April 8, 2014. Applicant did not once contact Opposer after February 28, 2014 and prior to filing its Motion for Default Judgment with an inquiry about Opposer's failure to file an answer to the counterclaim. See *Teran Decl.*, ¶9. In fact, since Applicant filed its Answer, it never once contacted Opposer for any reason at all whatsoever. See *Teran Decl.*, ¶9. Even more astonishing, Opposer's counsel never received a copy of Applicant's Motion for Default Judgment filed on April 8, 2014. See *Teran Decl.*, ¶7. Opposer's counsel only became aware of Applicant's Motion for Default Judgment after he was informed by Opposer that it had received a fax copy of Applicant's Motion on April 16, 2014. See *Teran Decl.*, ¶7. Opposer's counsel never received any correspondence related to Applicant's Motion for Default Judgment from Applicant's counsel or from Applicant. See *Teran Decl.*, ¶7. Upon receiving a copy of Applicant's Motion for Default Judgment from Opposer, Opposer's counsel immediately commenced preparing this opposition, an answer to Applicant's counterclaim, and a motion for Opposer's late filed answer to be accepted.

In fact, pursuant the schedule set by TTAB, the parties were required to hold the Discovery Conference on or before March 30, 2014. In anticipation of said Discovery Conference, Opposer sent Applicant a letter dated March 17, 2014 requesting a time for said requisite conference. See *Teran Decl.*, ¶5. Applicant never responded to said letter

and the requisite Discovery Conference was never held. See *Teran Decl.*, ¶5. On April 1, 2014, Opposer sent Applicant a second letter regarding its failure to participate in the requisite Discovery Conference. See *Teran Decl.*, ¶6. Applicant never responded. See *Id.* Said letters were sent to Applicant's counsel to the following address listed as Applicant's Attorney/Correspondence Information:

Fei Pang  
LAW OFFICES OF FEI PANG  
11 W. Del Mar Blvd., Suite #200  
Pasadena, CA 91105

Upon reviewing TTABVUE, Opposer discovered that Applicant's Attorney/Correspondence address changed to the following:

Fei Pang  
LAW OFFICES OF FEI PANG  
630 W. Duarte Rd. Suite #302  
Arcadia, CA 91007

Notification of address change was never received by Opposer or Opposer's counsel. See *Teran Decl.*, ¶10. In fact, Applicant's counsel failed to identify any contact information in any of Applicant's pleadings and motions.

## **II. ARGUMENT**

The standard for determining whether default judgment should be entered for failure to file a timely answer to a counterclaim is the Fed. R. Civ. P. 55(c) standard, which requires a showing of good cause why default judgment should not be entered. See *TBMP* §312. In the present case, Opposer failed to file a timely answer to Applicant's counterclaim. Based on the foregoing, Opposer failed to file its answer because it did receive a copy of Applicant's counterclaim. The copy of Applicant's Answer received by Opposer is missing page no. 4 which includes Applicant's counterclaim. There is no way for Opposer to have known that any pages were missing because the pages in Applicant's Answer are not numbered and nothing in Applicant's Answer indicates the total number of

pages. Furthermore, the title of Applicant's Answer fails to indicate that said document includes a counterclaim. Even further, Applicant never once contacted Opposer with an inquiry or an attempt to meet and confer as to Opposer's failure to file an answer to counterclaim prior to filing its Motion for Default Judgment. Even further, Applicant never served a copy of its Motion for Default Judgment on Opposer's counsel. Applicant merely faxed a copy of its motion directly to Opposer on April 16, 2014, more than a week after it filed its motion with TTAB.

### **III. CONCLUSION**

Accordingly, Opposer respectfully requests the Board to deny Applicant's Motion for Default Judgment based on Opposer's showing of good cause for failing to file an answer to Applicant's counterclaim.

Dated: April 16, 2014

Respectfully submitted,



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Louis F. Teran  
Attorney for Opposer  
Inhale, Inc.

Louis F. Teran  
SLC LAW GROUP  
1055 East Colorado Blvd., Suite #500  
Pasadena, CA 91106  
Telephone: (818) 484-3217 x200  
Facsimile: (866) 665-8877  
[lteran@strategiclegalcounseling.com](mailto:lteran@strategiclegalcounseling.com)

**DECLARATION OF LOUIS F. TERAN**

I, Louis F. Teran, declare:

1. I am an attorney at law duly licensed to practice before all courts in the state of California and a registered patent attorney with the United States Patent and Trademark Office (“USPTO”).

2. I am counsel of record for Opposer Inhale, Inc. (“Opposer”) in the above-captioned case. In such capacity, I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently thereto.

3. On November 29, 2013, I filed a Notice of Opposition on behalf of Opposer against Applicant’s U.S. Application Serial No. 85/929,488.

4. On or around January 7, 2014, I received a copy of Applicant’s Answer to Opposer’s Notice of Opposition via U.S. Postal Service (“USPS”). Applicant’s Answer that I received consisted of five (5) pages. None of the pages were numbered. Nothing in Applicant’s Answer indicated the total number of pages of the document. The title of Applicant’s Answer is “Answer to Notice of Opposition”. Said title does not make any indication that Applicant’s Answer includes a counterclaim. None of the five (5) pages that I received as Applicant’s Answer include any section entitled “Counterclaim”. Attached hereto as **Exhibit A** is a true and correct copy of Applicant’s Answer that I received.

5. On March 17, 2014, I sent Applicant’s counsel a letter requesting a time to hold the requisite Discovery Conference on or before March 30, 2014, as required by TTAB’s trial schedule. I never received any response from Applicant nor Applicant’s counsel to my letter. Attached hereto as **Exhibit B** is a true and correct copy of the letter I sent to Applicant’s counsel on March 17, 2014 via USPS.

6. On April 1, 2014, I sent Applicant’s counsel a letter requesting an explanation as to why he failed to participate in the requisite Discovery Conference and requesting a date on which to hold said conference. I never received any response from

Applicant nor Applicant's counsel to my letter. Attached hereto as **Exhibit C** is a true and correct copy of the letter I sent to Applicant's counsel on April 1, 2014 via USPS.

7. On April 16, 2014, I was contacted by Opposer, my client, with notification that it had received a fax copy of Applicant's Motion for Default Judgment for Failure to Answer. Opposer forwarded me the copy of Applicant's Motion immediately. I never received a copy of Applicant's Motion from Applicant nor Applicant's counsel. The first time I became aware of Applicant's Motion was April 16, 2014 when I received a copy from Opposer, my client.

8. On April 16, 2014, after receiving a copy of Applicant's Motion, I downloaded Applicant's Answer from TTABVUE and compared it to the copy of Applicant's Answer that I received on or around January 7, 2014. I discovered that Applicant's Answer posted on TTABVUE contains six (6) pages as opposed to the five (5) pages in the copy Applicant's Answer that I received. I discovered that page no. 4 is missing from the copy of Applicant's Answer that I received. Attached hereto as **Exhibit D** is a true and correct copy of Applicant's Answer as posted on TTABVUE.

9. Since, at least, January 7, 2014, I never received any communication or correspondence from Applicant or Applicant's counsel at all whatsoever.

10. On April 16, 2014, while reviewing the filings in TTABVUE, I discovered that Applicant's counsel had changed his address. I never received any notification from Applicant's counsel regarding about his change of address.

I declare under penalty of perjury of the laws of the state of California and the United States of America that the foregoing is true and correct and was executed on April 16, 2014 at Pasadena, California.



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Louis F. Teran

**CERTIFICATION OF SERVICE**

I certify that a copy of this OPPOSITION TO MOTION FOR DEFAULT JUDGMENT is being served via USPS on this the 17<sup>th</sup> day of April, 2014, to the following:

**Applicant's Attorney/Representative:**

Fei Pang  
LAW OFFICES OF FEI PANG  
11 W. Del Mar, Blvd., Suite #200  
Pasadena, CA 91105

The above document is also being emailed to [fp@panglawyer.com](mailto:fp@panglawyer.com) on the same day.



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Louis F. Teran

# **EXHIBIT A**

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

In the Matter of Application Serial No. 85/929,488

Mark: NEVER XHALE

Filed: MAY 12, 2013

Published: October 29, 2013

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INHALE, INC., )

Opposer. )

v. )

OPPOSITION NO: 91213763

KSX ENTERPRISE, INC., )

Applicant. )

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**ANSWER TO NOTICE OF OPPOSITION**

Applicant, KSX ENTERPRISE, INC ("KSX"), for its answer to the Notice of Opposition filed by Inhale, Inc. ("Inhale") against application for registration of KSX's

trademark NEVER XHALE, Serial No. 85/929488 filed May 12, 2013, and published in the Official Gazette of October 29, 2013(the "Mark"), pleads and avers as follows:

1. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 1.
2. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 2.
3. Application admits the allegation of ¶ 3.
4. Application admits the allegation of ¶ 4.
5. Application admits the allegation of ¶ 5.
6. Application admits the allegation of ¶ 6.
7. Application denies each and every allegation contained in ¶ 7.
8. Application admits the allegation of ¶ 8.
9. Application denies each and every allegation contained in ¶ 9.
10. Application denies each and every allegation contained in ¶ 10.
11. Application denies each and every allegation contained in ¶ 11.
12. Application admits the allegation of ¶ 12.
13. Application denies each and every allegation contained in ¶ 13.
14. Application denies knowledge and information sufficient to admit or deny the

allegation of ¶ 14.

15. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 15.

16. Application denies each and every allegation contained in ¶ 16.

17. Application denies each and every allegation contained in ¶ 17.

18. Application denies each and every allegation contained in ¶ 18.

## **AFFIRMATIVE DEFENSES**

### **First Affirmative Defense**

Oppose fails to state a claim upon which relief can be granted.

### **Second Affirmative Defense**

As a result of Applicant's continuous use of the Mark since the time of Applicant's adoption thereof, the Mark has developed significant goodwill among the consuming public and consumer acceptance of the services offered by Applicant in conjunction with the Mark. Such goodwill and widespread usage has caused the Mark to acquire distinctiveness with respect to Applicant, and caused the Mark to become a valuable asset of Applicant.

### **Third Affirmative Defense**

There is no likelihood of confusion, mistake or deception because, inter alia, the Mark and the alleged trademark of Opposer are not confusingly similar.

term "EXHALE" is a generic term to denote the body movement of breathing out or expelling air.

4. Opposer's alleged EXHALE trademark is thus not distinctive.
5. Opposer's alleged EXHALE trademark has not acquired distinctiveness.
6. Consequently, Opposer's alleged EXHALE trademark has no secondary meaning and cannot function as a trademark.

Application is filing by credit card the statutory filing fee of \$300.00 for its counterclaim for cancellation.

WHEREFORE, Application prays as follows:

- (a) this opposition be dismissed;
- (b) that Registration No. 4063774 be cancelled; and
- (c) a registration for the term NEVER XHALE be issued to the Application.

Date: January 3, 2014

Respectfully Submitted,

KSX ENTERPRISE, INC

By:



Fei Pang

Attorney for Applicant

**CERTIFICATION OF SERVICE**

I certify that a copy of this NOTICE OF OPPOSITION is being served via USPS on this the 3rd day of January, 2014, to the following:

**Opposer's Attorney/Representative:**

Louis F. Teran

SLC Law Group

1055 E. Colorado Blvd., Suite 500

Pasadena, CA 91106

UNITED STATES

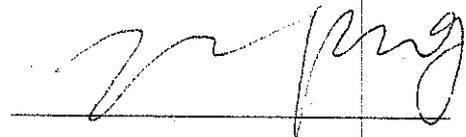
**Opposer**

Inhale, INC.

8616 Cuyamaca St.

Santee, CA 92071

UNITED STATES



*Fei Pang*

# **EXHIBIT B**

*SLC* LAW GROUP  
STRATEGIC LEGAL COUNSELING  
INTELLECTUAL PROPERTY, BUSINESS, & CIVIL LITIGATION ATTORNEYS

1055 East Colorado Blvd, Suite #500  
Pasadena, CA 91106  
Telephone: (800) 752-8470  
Facsimile: (866) 665-8877  
[www.slclg.com](http://www.slclg.com)

Louis F. Teran  
Direct Dial: (818) 484-3217 x200  
Email: lteran@slclg.com

March 17, 2014

**VIA USPS**

Fei Pang  
LAW OFFICES OF FEI PANG  
11 W. Del Mar Blvd., Suite #200  
Pasadena, CA 91105

**RE: TTAB Opposition No. 91213763**  
**Mark: Never-Xhale**

Dear Mr. Pang:

As you know, the TTAB trial schedule requires us to participate in a Discovery Conference on or before March 30, 2014. I can be available any day of the week of March 24, 2014. Please let me know which day and time works best for you. I also suggest that we conduct an in-person conference if possible.

Please feel free to contact me anytime with any comments or questions.

Respectfully submitted,



Louis F. Teran

# **EXHIBIT C**

*SLC* LAW GROUP  
STRATEGIC LEGAL COUNSELING  
INTELLECTUAL PROPERTY, BUSINESS, & CIVIL LITIGATION ATTORNEYS

1055 East Colorado Blvd, Suite #500  
Pasadena, CA 91106  
Telephone: (800) 752-8470  
Facsimile: (866) 665-8877  
[www.slclg.com](http://www.slclg.com)

Louis F. Teran  
Direct Dial: (818) 484-3217 x200  
Email: lteran@slclg.com

April 1, 2014

**VIA USPS**

Fei Pang  
LAW OFFICES OF FEI PANG  
11 W. Del Mar Blvd., Suite #200  
Pasadena, CA 91105

**RE: TTAB Opposition No. 91213763**  
**Mark: Never-Xhale**

Dear Mr. Pang:

As you know, the TTAB trial schedule required us to participate in a Discovery Conference on or before March 30, 2014. I have not heard from you about this matter. Please contact me as soon as possible so that we may schedule an appropriate time for this conference. It is important that we hold this conference so that we may proceed with Discovery.

Please note that if I do not hear from you on or before April 11, 2013, I may have to advise TTAB of your unwillingness to participate in the required Discovery Conference. I would like to avoid getting TTAB involved as I am certain we can resolve this matter. I look forward to hearing from you.

Please feel free to contact me anytime with any comments or questions.

Respectfully submitted,



Louis F. Teran

# **EXHIBIT D**

ESTTA Tracking number: **ESTTA579841**

Filing date: **01/02/2014**

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

Proceeding	91213763
Party	Defendant KSX ENTERPRISE, INC.
Correspondence Address	FEI PANG LAW OFFICES OF FEI PANG 11 W DEL MAR BLVD STE 200 PASADENA, CA 91105-2505  fp@panglawyer.com;pangfei74@hotmail.com
Submission	Answer and Counterclaim
Filer's Name	Fei Pang
Filer's e-mail	fp@panglawyer.com, pangfei74@hotmail.com
Signature	/Fei Pang/
Date	01/02/2014
Attachments	Answer and counterclaim_01032014.pdf(424512 bytes )

Registration Subject to the filing

Registration No	4063774	Registration date	11/29/2011
Registrant	Inhale, Inc. 8616 Cuyamaca St. Santee, CA 92071 CANADA		

Goods/Services Subject to the filing

Class 034. First Use: 2007/06/01 First Use In Commerce: 2011/02/01

All goods and services in the class are requested, namely: Hookah, hookah pipes, hookah bases, hookah tobacco, vaporizer, and water pipes

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

**In the Matter of Application Serial No. 85/929,488**

**Mark: NEVER XHALE**

**Filed: MAY 12, 2013**

**Published: October 29, 2013**

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INHALE, INC., )

Opposer, )

v. ) **OPPOSITION NO: 91213763**

KSX ENTERPRISE, INC., )

Applicant. )

---

**ANSWER TO NOTICE OF OPPOSITION**

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1. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 1.
2. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 2.
3. Application admits the allegation of ¶ 3.
4. Application admits the allegation of ¶ 4.
5. Application admits the allegation of ¶ 5.
6. Application admits the allegation of ¶ 6.
7. Application denies each and every allegation contained in ¶ 7.
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11. Application denies each and every allegation contained in ¶ 11.
12. Application admits the allegation of ¶ 12.
13. Application denies each and every allegation contained in ¶ 13.
14. Application denies knowledge and information sufficient to admit or deny the

allegation of ¶ 14.

15. Application denies knowledge and information sufficient to admit or deny the allegation of ¶ 15.

16. Application denies each and every allegation contained in ¶ 16.

17. Application denies each and every allegation contained in ¶ 17.

18. Application denies each and every allegation contained in ¶ 18.

## **AFFIRMATIVE DEFENSES**

### **First Affirmative Defense**

Oppose fails to state a claim upon which relief can be granted.

### **Second Affirmative Defense**

As a result of Applicant's continuous use of the Mark since the time of Applicant's adoption thereof, the Mark has developed significant goodwill among the consuming public and consumer acceptance of the services offered by Applicant in conjunction with the Mark. Such goodwill and widespread usage has caused the Mark to acquire distinctiveness with respect to Applicant, and caused the Mark to become a valuable asset of Applicant.

### **Third Affirmative Defense**

There is no likelihood of confusion, mistake or deception because, inter alia, the Mark and the alleged trademark of Opposer are not confusingly similar.

#### **Fourth Affirmative Defense**

Alternatively, any similarity between the Mark and Opposer's alleged trademarks is restricted to that portion of the Mark consisting of the word "xhale", which pronounced like "exhale", which is not distinctive. As a result, under the anti-dissection rule any secondary meaning Opposer may have in its alleged EXHALE trademark is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature of the trademark beyond the word "exhale."

#### **Fifth Affirmative Defense**

Opposer's rights in and to the portion of its alleged EXHALE trademark are generic or, in the alternative, merely descriptive of the goods or services offered under the mark. Opposer's alleged mark is therefore inherently unprotectable absent acquired distinctiveness, which the alleged EXHALE mark lacks.

#### **COUNTERCLAIM TO CANCEL REGISTRATION**

1. Application repeats and realleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.
2. Applicant hereby seeks cancellation of Opposer's Registration (Registration No. 4063774) issued November 29, 2011 for the mark EXHALE in International Class 034 for the application filed May 15, 2009.
3. The term "EXHALE" is not a newly created word coined by Opposer. Rather the

term "EXHALE" is a generic term to denote the body movement of breathing out or expelling air.

4. Opposer's alleged EXHALE trademark is thus not distinctive.

5. Opposer's alleged EXHALE trademark has not acquired distinctiveness.

6. Consequently, Opposer's alleged EXHALE trademark has no secondary meaning and cannot function as a trademark.

Application is filing by credit card the statutory filing fee of \$300.00 for its counterclaim for cancellation.

WHEREFORE, Application prays as follows:

(a) this opposition be dismissed;

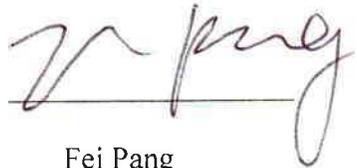
(b) that Registration No. 4063774 be cancelled; and

(c) a registration for the term NEVER XHALE be issued to the Application.

Date: January 3, 2014

Respectfully Submitted,

KSX ENTERPRISE, INC

By: 

Fei Pang

Attorney for Applicant

**CERTIFICATION OF SERVICE**

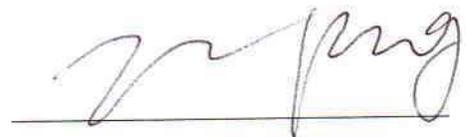
I certify that a copy of this NOTICE OF OPPOSITION is being served via USPS on this the 3rd day of January, 2014, to the following:

**Opposer's Attorney/Representative:**

Louis F. Teran  
SLC Law Group  
1055 E. Colorado Blvd., Suite 500  
Pasadena, CA 91106  
UNITED STATES

**Opposer**

Inhale, INC.  
8616 Cuyanaca St.  
Santee, CA 92071  
UNITED STATES

A handwritten signature in black ink, appearing to read 'Fei Pang', is written over a horizontal line.

*Fei Pang*