

ESTTA Tracking number: **ESTTA1322611**Filing date: **11/16/2023**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91272143
Party	Plaintiff Hangzhou Mengku Technology Co., Ltd and Fuzhou Mengku Technology Co., Ltd
Correspondence address	JIGANG JIN JIN LAW FIRM PO BOX 1937 UNION CITY, CA 94587 UNITED STATES Primary email: jigang.jin@jfuslaw.com Secondary email(s): qianan.li@bigcool.com 408-220-4350
Submission	Motion to Strike Testimony
Filer's name	Jigang Jin
Filer's email	jigang.jin@jfuslaw.com
Signature	/Jigang Jin/
Date	11/16/2023
Attachments	mts.pdf(202605 bytes) Jin decl.pdf(57688 bytes) exhibits.pdf(393967 bytes)

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

HANGZHOU MENGKU TECHNOLOGY
CO., LTD. and FUZHOU MENGKU
TECHNOLOGY CO., LTD.

Opposers,

v.

SHANGHAI ZHENGLANG
TECHNOLOGY CO., LTD.,

Applicant.

Opposition No. 91272143

Application Ser. No. 90371133

**OPPOSERS' MOTION TO STRIKE PART OF RUIHUA JI'S TESTIMONY AND
EXHIBITS**

Opposers Hangzhou Mengku Technology Co., Ltd. and Fuzhou Mengku Technology Co., Ltd. ("Opposers") hereby respectfully submit their motion to strike part of Ruihua Ji's testimony declaration ("JI Declaration") and exhibits 2, 4, 6 and 8-46 thereof.

I. Introduction

On September 6, 2023, Applicant submitted JI Declaration and its exhibits 1-46. But the JI Declaration and its exhibits contain inadmissible evidence and testimony. Particularly, Exhibits 2, 4, and 6 are inadmissible hearsay evidence. Paragraphs 8, 10, and 14 of JI Declaration pertaining to the inadmissible hearsay evidence are also inadmissible. Furthermore, paragraphs 9, 25-26 and Exhibits 15-46 to JI Declaration are out of the scope of Applicant's pretrial disclosure. Exhibits 15-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, and 45 and paragraphs 25, 26, 26.a-26.o, 26.a.i-26.o.i of JI Declaration are also irrelevant to this proceeding. As such, these exhibits and testimony should be stricken.

II. Argument

A. Paragraphs 8, 10, 14 and Exhibits 2, 4, and 6 to JI Declaration should be stricken for lack of foundation and being offered as hearsay.

F.R.E. 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

F.R.E. 802 provides that "[h]earsay is not admissible"

1. Exhibit 2 and Paragraph 8 of JI Declaration.

Exhibit 2 is a third-party report published on the Internet. It constitutes hearsay under F.R.E. 801(c). In paragraph 8 of JI Declaration, JI used Exhibit 2 to prove the truth of the matters contained in Exhibit 2, namely, the number of apps in the Google Play Store as of June 2023. In addition, JI was not the author and had not established any personal knowledge on the

content of Exhibit 2. As such, Exhibit 2 should be stricken. Because paragraph 8 of JI Declaration relies on Exhibit 2, it should also be stricken.

2. Exhibit 4 and Paragraph 10 of JI Declaration.

Exhibit 4 is a third-party report published on the Internet. It constitutes hearsay under F.R.E. 801(c). In paragraph 10 of JI Declaration, JI used Exhibit 4 to prove the truth of the matters contained in Exhibit 4, namely, "uniqueness was a strong predictor of icon successfulness, defined as users' willingness to click, download, and/or buy an app after viewing the icon." In addition, JI was not the author and had not established any personal knowledge on the content of Exhibit 2. As such, Exhibit 4 should be stricken. Because paragraph 10 of JI Declaration relies on Exhibit 4, it should also be stricken.

3. Exhibit 6 and Paragraph 14 of JI Declaration.

Exhibit 6 is a third-party report published on the Internet. It constitutes hearsay under F.R.E. 801(c). In paragraph 14 of JI Declaration, JI used Exhibit 6 to prove the truth of the matters contained in Exhibit 6, namely, the number of Google apps that have reached 1 million, 1,000, or 100,000 downloads, respectively. In addition, JI was not the author and had not established any personal knowledge on the content of Exhibit 2. As such, Exhibit 6 should be stricken. Because paragraph 14 of JI Declaration relies on Exhibit 6, it should also be stricken.

B. Paragraphs 9, 25-26 and Exhibits 15-46 to JI Declaration should be stricken because of inadequate and late pretrial disclosure.

Applicant's pretrial disclosure was due on June 23, 2023. On June 26, 2023, Applicant served its pretrial disclosure. Declaration of Jigang Jin, ¶ 2, Exhibit 1. However, on September 6, 2023, the last day of Applicant's testimony period, Applicant served an amended pretrial disclosure. *Id.* at ¶ 3, Exhibit 2. In the amended pretrial disclosure, Applicant added the following testimony topic and documents that were not disclosed in the initial pretrial disclosure:

"The purpose and effect of design marks, like Applicant's Design Mark, that are used as icons for downloadable game apps" (hereinafter, the "Late Disclosed Topic"); and "third-party trademark registrations relevant to the issues in this opposition" (hereinafter, the "Late Disclosed Documents").

Applicant's amended disclosure was untimely.

Paragraph 9 to JI Declaration states:

When a user enters an app store or searches for a new mobile application, the app icon is almost always the first thing a user sees and relies upon to determine whether an app is of interest. Good app icons have both a marketing aspect and an informational aspect. To help consumers make decisions, an app icon often serves both to indicate source and to suggest to potential users some of the functions, features, characters, content, or themes of the app.

Thus, paragraph 9 clearly relates to the purpose and effect of design marks. As such, paragraph 9 should be stricken.

Exhibits 15-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, and 45 to JI Declaration are third-party trademark registrations and paragraphs 25, 26, 26.a-26.o, 26.a.i-26.o.i of JI Declaration pertains to those third-party registrations. As such, they should be stricken as well.

Exhibits 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46 and paragraphs 26.a.ii-26.o.ii pertain to third-party games, which are not disclosed as a topic or documents in Applicant's pretrial disclosures. Thus, these exhibits and testimony should be stricken.

As such, paragraphs 9, 25-26 and Exhibits 15-46 to JI Declaration should be stricken completely because of inadequate and late pretrial disclosure.

C. **Portions of Paragraphs 25-26 and Exhibits 15-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, and 45 should be stricken for being irrelevant.**

JI used these third-party registrations to support his allegation that the Opposed Mark was free of descriptiveness issue. But the Board and the Federal Circuit had held that third-party registrations were irrelevant to the registrability of an opposed mark. *See In re Mayweather*

Promotions, LLC, 86753084 (T.T.A.B. Oct. 29, 2020) ("third-party registrations are irrelevant" and "prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the [Board]"); *see also, In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (noting we "must assess each mark on the record of public perception submitted with the application" and finding "little persuasive value" in third-party registration evidence of alleged inconsistency); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) ("Each application for registration must be considered on its own merits"). As such, Exhibits 15-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, and 45 and paragraphs 25, 26, 26.a-26.o, 26.a.i-26.o.i of JI Declaration are irrelevant to this proceeding and should be stricken.

III. Conclusion

At least for the foregoing reasons, Opposers' motion to strike should be granted.

November 16, 2023

Respectfully submitted,

/Jigang Jin/
Jigang Jin
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Union City, CA 94010-1455
(tel.) 408-220-4350
jigang.jin@jfuslaw.com

Attorney for Opposers

CERTIFICATE OF SERVICE

I, Jigang Jin, hereby certify that on November 16, 2023 the foregoing document and referenced declaration and exhibits were served by email to Applicant's counsel of record.

Date: 11/16/2023

By: Jigang Jin
Jigang Jin

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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TECHNOLOGY CO., LTD.

Opposers,

v.

SHANGHAI ZHENGLANG
TECHNOLOGY CO., LTD.,

Applicant.

Opposition No. 91272143

Application Ser. No. 90371133

**DECLARATION OF JIGANG JIN IN SUPPORT OF OPPOSERS' MOTION TO
STRIKE PART OF RUIHUA JI'S TESTIMONY AND EXHIBITS**

I, Jigang Jin, hereby declare under penalty of perjury:

1. I am attorney for Opposers Hangzhou Mengku Technology Co., Ltd. and Fuzhou Mengku Technology Co., Ltd. (together, "Opposers") in this proceeding. I submit this declaration in support of Opposers' Motion to Strike Part of Ruihua Ji's Testimony and Exhibits. I make this declaration based on my personal knowledge of the facts and circumstances set forth herein and on the records of the Trademark Trial and Appeal Board ("TTAB").
2. On June 26, 2023, Applicant Shanghai Zhenglang Technology Co., Ltd. ("Applicant") served its pretrial disclosure. Attached as Exhibit 1 is a true and correct copy of the pretrial disclosure.

3. On September 6, 2023, the last day of Applicant's testimony period, Applicant served an amended pretrial disclosure. Attached as Exhibit 2 is a true and correct copy of the amended pretrial disclosure.
4. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 16th day of November 2023.



Jigang Jin

Exhibit 1

to Jigang Jin Declaration

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

HANGZHOU MENGKU TECHNOLOGY
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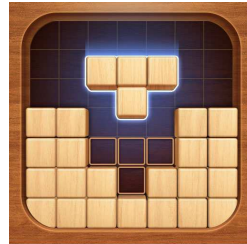
v.

SHANGHAI ZHENGLANG
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Applicant.

Opposition No. 91272143

Mark: App. Ser. No. 90/371,133



**APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.’S
PRETRIAL DISCLOSURES**

Pursuant to Rule 2.121(e) of the Trademark Rules of Practice and Federal Rule of Civil Procedure 26(a)(3), Applicant Shanghai Zhenglang Technology Co. Ltd. (“Applicant”) makes the following pretrial disclosures to opposers Hangzhou Mengku Technology Co., Ltd. and Fuzhou Mengku Technology Co., Ltd. (“Opposers”) regarding evidence that Applicant may present during its testimony period, other than solely for impeachment. In addition to the witnesses, documents, and things identified below, Applicant identifies and incorporates by reference any other witness, document, or thing identified by Opposers in their pretrial disclosures.

Rule 26(a)(3)(A)(i)

Pursuant to Federal Rule of Civil Procedure 26(a)(3)(A)(i) and Rule 2.121(e) of the Trademark Rules of Practice, Applicant identifies the following witnesses from whom it may take testimony:

Name	Title and Contact Information	Subjects on Which Witness Is Expected to Testify
Mr. Ruihua Ji	President of Applicant Mr. Ji may be contacted through Applicant's undersigned attorneys of record.	<ul style="list-style-type: none"> • Creation and selection of Applicant's Design Mark (as used herein, "Applicant's Design Mark" refers to the mark contained in U.S. Ser. No. 90/371,133); • Design elements of Applicant's Design Mark; • The goods offered under Applicant's Design Mark; • The offering for sale, sale, and distribution of goods under Applicant's Design Mark; • Content of Applicant's mobile games offered under Applicant's Design Mark; • Distinctiveness of Applicant's Design Mark; • Secondary meaning acquired by Applicant's Design Mark; and • Consumer perception of Applicant's Design Mark as a source indicator for Applicant's mobile games.

Rule 26(a)(3)(A)(iii)

Pursuant to Federal Rule of Civil Procedure 26(a)(3)(A)(iii) and Rule 2.121(e) of the Trademark Rules of Practice, Applicant identifies the following documents and things that may be used during Applicant's testimony period:

- Documents and things concerning goods offered for sale, sold, and distributed under Applicant's Design Mark;
- Documents and things concerning the offering for sale, sale, and distribution of goods under Applicant's Design Mark;
- Mobile games sold and distributed under Applicant's Design Mark;

- All pleadings and other filings in this opposition;
- Written discovery requests and responses served by the parties in this opposition;
- Documents produced by the parties in this opposition during discovery;
- Any documents produced by the parties during this opposition through motions practice, including, without limitation, declarations and exhibits;
- Any documents identified in Opposers' Pretrial Disclosures served on February 21, 2023;
- Any documents identified in Opposers' Notice of Reliance filed on June 5, 2023, including, without limitation, Exhibits 1-24 that were submitted with the Notice of Reliance on January 5, 2023 and January 6, 2023; and
- All documents necessary for impeachment purposes.

Applicant reserves the right to amend and/or supplement these disclosures as necessary.

Dated: June 26, 2023

KILPATRICK TOWNSEND & STOCKTON LLP

A handwritten signature in blue ink, appearing to read 'Rita Weeks', is written above a horizontal line.

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*Attorneys for Applicant Shanghai Zhenglang
Technology Co., Ltd.*

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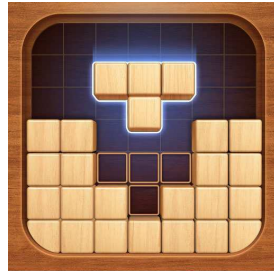
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Opposition No. 91272143

Mark: App. Ser. No. 90/371,133



CERTIFICATE OF SERVICE

I certify that on June 26, 2023, I served the foregoing **APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.'S PRETRIAL DISCLOSURES** on Opposers' counsel by email service as follows:

jigang.jin@jfuslaw.com

qianan.li@bigcool.com

Rita Weeks
Attorney for Applicant

Exhibit 2

to Jigang Jin Declaration

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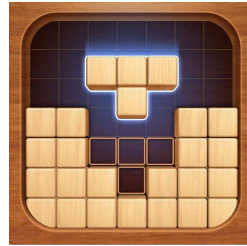
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**APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.’S
AMENDED PRETRIAL DISCLOSURES**

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Applicant reserves the right to amend and/or supplement these disclosures as necessary.

Dated: September 6, 2023

Respectfully submitted,



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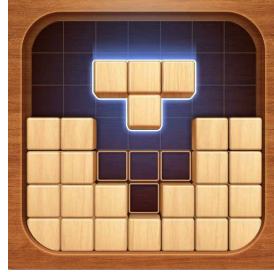
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CERTIFICATE OF SERVICE

I certify that on September 6, 2023, I served the foregoing **APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.’S AMENDED PRETRIAL DISCLOSURES** on Opposers’ counsel by email service as follows:

jigang.jin@jfuslaw.com

qianan.li@bigcool.com

/Kris Teilhaber/

Kris Teilhaber

Kilpatrick Townsend & Stockton LLP