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

Proceeding no.	91282241
Party	Defendant Pan, Cuiping
Correspondence address	ZHIRONG LIU 61-35 98TH STREET, APT 6L, REGO PARK, NY 11374 UNITED STATES Primary email: arzliullc2@gmail.com 517-802-7123
Submission	Motion for Relief from entry of Default Judgment
Filer's name	Shan Zhu
Filer's email	shan.zhulaw@gmail.com
Signature	/Shan Zhu/
Date	02/27/2023
Attachments	Full motion to go.pdf(426570 bytes )

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

Shenzhen Huangchao Apparel Co., Ltd.

Petitioner

vs.

Cuiping Pan.

Applicant

**OPPOSITION No: 91282241**

**Mark: ICE ROLLER**

**SERIAL No: 97218947**

**APPLICANT'S MOTION TO VACATE THE DEFAULT AND EXTENSION  
OF TIME TO FILE AN ANSWER OR OTHERWISE RESPONSE TO THE  
PLEADING**

Pursuant to TBMP § 312.02 and Fed. R. Civ. P. 55(c), Applicant Cuiping Pan (“Applicant”), through counsel, moves for an order to vacate the default and an extension of time to file an answer or otherwise response to the pleading for 20 days upon the broad grants Applicant’s motion to vacate the default.

/s/ Shan Zhu

Shan Zhu

Shan Zhu Law Group, P.C.

136-20 38th Ave., Suite 11G-2

Flushing, New York 11354

(347) 470-7008

*Attorneys for Applicant Cuiping Pan*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 27th day of February 2023, a true and correct copy of the foregoing and supporting documents were served via electronic mail upon the following:

Shengmao Mu, Esq. <smu@whitewoodlaw.com>

Dated:           Flushing, New York  
                  February 27, 2022

/s/ Shan Zhu  
Shan Zhu, Esq.  
136-20 38th Ave., Suite 11G-2  
Flushing, NY 11354  
Tel: (347) 470-7008  
Email: [shan.zhulaw@gmail.com](mailto:shan.zhulaw@gmail.com)  
*Attorney for Petitioner*

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Petitioner

vs.

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Applicant

**OPPOSITION No: 91282241**

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**AFFIRMATION OF SHAN ZHU IN SUPPORT OF MOTION TO VACATE THE  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(a)**

I, Shan Zhu, declare under penalty of perjury the following to be true:

1. I am the attorney of record of Applicant Cuiping Pan (“Applicant”) in this action. I submit this Affirmation in support of the Applicant’s motion to vacate the default and extension of time to file an answer or otherwise response to the pleading. I am familiar with this matter base on the documents maintained by this firm.
2. The Applicant retained this office to represent the above-captioned matter on or about February 8, 2023.
3. On February 8, 2023, I emailed the Opposer's attorney at [smu@whitewoodlaw.com](mailto:smu@whitewoodlaw.com) to seek consent from the Opposer for vacating the default.
4. Without receiving a response, I called Mr. Mu on or about February 9, 2023, to discuss the potential resolution of this matter.
5. During the phone call, Mr. Mu expressed his client's concern that the Applicant may use this application to complain about Opposer's e-commerce store. I have attached the email chain hereto as Exhibit A.

6. With such a concern in mind, I discussed it with the Applicant on February 9 in the evening. Given the concern, the Applicant agreed to resolve this matter and proposed an offer.
7. I communicated the offer to the Opposer's counsel on the same day. It is my understanding that such an offer proposed should resolve the Opposer's concern.
8. On February 13, I wrote to Mr. Mu to follow up. However, until today, I have received no communication. It appears the settlement negotiation is not successful at this point.

Dated:           Flushing, New York  
                    February 27, 2023

/s/ Shan Zhu  
Shan Zhu, Esq.  
3511-B Farrington Street #335  
Flushing, NY 11354  
Tel: (347) 470-7008  
Email: [shan.zhulaw@gmail.com](mailto:shan.zhulaw@gmail.com)  
*Attorney for Applicant*

# Exhibit A



shan zhu &lt;shan.zhulaw@gmail.com&gt;

**Re: Trademark application SN 97198561, 97218947**

1 message

shan zhu <shan.zhulaw@gmail.com>  
To: smu@whitewoodlaw.com

Mon, Feb 13, 2023 at 12:09 PM

Dear Mr. Mu,  
Writing to follow this up.  
Please advise.  
Thank you  
Shan Zhu

On Thu, Feb 9, 2023 at 9:52 PM shan zhu <shan.zhulaw@gmail.com> wrote:

Dear Mr. Mu,  
I have discussed with my client about your client's concern.  
We can offer not to complaint links appointed by your client. To offer further safeguard to your client, we may also consent to certain jurisdiction(s) which is convenient to your client if any dispute arises out of the settlement agreement.  
The Client informed me that the registration is actually for protective use instead of an offensive use.  
Again, given we are already in default, I wish either we can reach a quick settlement or we can get a consent for an extension.  
Please let me know your client's position.  
Thank you  
Shan Zhu

On Wed, Feb 8, 2023 at 12:01 AM shan zhu <shan.zhulaw@gmail.com> wrote:

Dear Counsel,  
This firm represents the applicant in this matter. My client would like to see if parties may resolve those two cases amicably. Please let me know if your client may have a settlement demand.  
Meanwhile, I understand we are in default. I'd like to request a short extension to answer or otherwise respond to the pleading until February 17. if your client may consent to such a request.  
Please advise  
Thank you for your prompt attention to this matter and looking forward to hearing from you.  
Shan Zhu, Esq.  
Zebra Law Group, P.C.  
136-20 38th Ave.,  
Suite 11G-2  
Flushing, NY 11354  
Tel: (347)470-7008



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

Shenzhen Huangchao Apparel Co., Ltd.

Petitioner

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**OPPOSITION No: 91282241**

**Mark: ICE ROLLER**

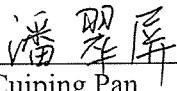
**SERIAL No: 97218947**

**DECLARATION OF CUIPING PAN IN SUPPORT OF MOTION TO VACATE THE  
DEFAULT PURSUANT TO FED. R. CIV. P. 55(a)**

I, Cuiping Pan, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am the owner of the ICE ROLLER trademarks with serial No. 97198561 and 97218947.
2. I first retained Mr. Zhirong Liu as a counsel for this matter.
3. I was notified on January 11, 2023 that my trademarks were opposed.
4. On or about January 11, 2023, I attempted to seek a counsel to represent myself before the TTAB.
5. In February 2023, I first discussed the case with Mr. Shan Zhu.
6. The delay in response to the notice of opposition is not intentional.

Dated:           Flushing, New York  
                  February 27, 2023

  
\_\_\_\_\_  
Cuiping Pan  
Owner



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

Shenzhen Huangchao Apparel Co., Ltd.

Petitioner

vs.

Cuiping Pan.

Applicant

**OPPOSITION No: 91282241**

**Mark: ICE ROLLER**

**SERIAL No: 97218947**

**MEMORANDUM OF LAW IN SUPPORT OF THE APPLICANT'S MOTION  
TO VACATE THE DEFAULT AND EXTENSION OF TIME TO FILE AN  
ANSWER OR OTHERWISE RESPONSE TO THE PLEADING**

Shan Zhu  
Shan Zhu Law Group, P.C.  
136-20 38th Ave., Suite 11G-2  
Flushing, New York 11354  
(347) 470-7008  
*Attorneys for Applicant Cuiping Pan*

## **I. Introduction**

On or about December 8, 2022, opposer, Shenzhen Huangchao Apparel Co., Ltd. (“Opposer”), filed an opposition to Applicant’s Mark ICE ROLLER (the “Applied-for Mark). The Applicant, Cuiping Pan's (the "Applicant") time to answer or otherwise respond to the pleading is due on January 17, 2023. The Applicant failed to timely file an answer or otherwise respond to the pleading. On January 28, the broad entered a default pursuant to Fed. R. Civ. P. 55(a). Dkt. No. 4. Meanwhile, the board suspended the proceeding and allows thirty days for the Applicant to show cause why a default judgment should not be entered. The Applicant hereby, through its attorney file the instant motion to vacate the default.

## **II. Argument**

The Broad should vacate the default entered and grant the Applicant 20 days from the order vacating the default to file an answer or otherwise response to the pleading because 1) the Applicant has recently changed counsel, 2) the Applicant has meritorious defenses and, 3) the short delay in response to the pleading does not prejudice the Opposer.

### **A. Standard of Review**

If a defendant who has failed to file a timely answer to the complaint responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it, the Board will set aside the notice of default. TBMP § 312.02.

The determination of whether a default judgment should be entered against a party lies within the sound discretion of the Board. *Id.* (Internal citation omitted). In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer and tends to resolve any doubt on the matter in favor of the defendant. *Id.*

TTAB has further routinely vacated Rule 55(a) default for such a short delay. See e.g. *DrDisabilityQuotes.com, LLC v. Krugh*, 2021 USPQ2d 262, at \*2 (TTAB 2021) (setting aside notice of default; one-day delay in filing motion to dismiss); *DeLorme Publishing Co v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (willful conduct shown where although applicant may not have intended that proceedings be resolved by default, applicant admittedly intended not to answer for six months); *Paolo's Associates L.P. v. Bodo*, 21 USPQ2d 1899, 1903-04 (Comm'r 1990) (no evidence that failure was willful; costs incurred in preparing and filing motion not sufficient to support finding of prejudice); *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991) (failure to answer due to inadvertence on part of applicant's counsel; answer had been prepared and reviewed by applicant but counsel inadvertently failed to file it; nine-day delay would cause minimal prejudice; by submission of answer which was not frivolous meritorious defense was shown). *Cf.* regarding a motion to set aside judgment under Fed. R. Civ. P. 60(b), *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (the two other factors having been shown, applicant was allowed time to show meritorious defense by submission of answer).

Under Rule 55(c), a court may set aside an entry of default "for good cause." Fed. R. Civ. P. 55(c). "[A]ffording a defendant an opportunity to move to vacate [an entry of default] pursuant to Rule 55(c) is the preferable course because it avoids the need to prepare for and pursue a damage hearing in those instances where the Rule 55(c) motion is granted." *Meehan v. Snow*, 652 F.2d 274, 276 n. 5 (2d Cir. 1981).

"In deciding a motion to vacate a default judgment, the district court is to be guided principally by three factors: (1) whether the default was willful, (2) whether the defendant demonstrates the existence of a meritorious defense, and (3) whether, and to what extent, vacating the default will cause the nondefaulting party prejudice." *S.E.C. v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998) (citations omitted). The Court may also consider "relevant equitable factors, including

whether failure to appear was 'a mistake made in good-faith and whether the entry of default would bring about a harsh or unfair result.'" *Raheim v. New York City Health and Hospitals Corp.*, No. 96-CV-1045 (JFB)(CPP), 2007 U.S. Dist. LEXIS 59573, 2007 WL 2363010, at \*3 (E.D.N.Y. Aug. 14, 2007) (quoting *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)). In general, courts disfavor default judgments, preferring to adjudicate cases on their merits. See *Percasky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001). See also *Enron Oil Corp.*, 10 F.3d at 98 ("[Be]cause defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party.").

#### **B. Good Cause to Vacate the Default.**

The Applicant first retained the undersigned counsel on or about February 7, 2023, which is after the broad entered the default under Rule 55. After being retained, I have tried to contact the Opposer's attorney to seek consent to vacate the default and a settlement demand. Zhu Decl. ¶¶ 2-8. However, I received no consent nor reached a settlement with Opposer.

Here, no evidence suggests the default was willful. Pan Decl. ¶¶ 4-6.

#### **C. Meritorious Defense**

##### **1. The Opposer Failed to State a Standing**

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020), cert. denied, 142 U.S. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Meenaxi Enter., Inc. v. CocaCola*

*Co.*, 2022 USPQ2d 602, at \*2 (Fed. Cir. 2022) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014)); *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020).

Here, the Opposition will not survive a motion to dismiss because the Opposer failed to allege it is within the zone of interests. Opposer alleges that it is in the business of the fashion and beauty industry since 2012. Dkt. No. 1 ¶¶ 1. However, the Applied-for Mark is for a different industry. Dkt. No. 1 ¶¶ 3. As such, the Opposer and the Applicant are not competitors.

## 2. Opposer Failed to State a Claim for a Likelihood of Confusion

The Petitioner alleges that the Applied-for-Mark will likely cause confusion with the later-filed "BAIMEI ICE ROLLER" with registration number 6797964. Despite the fact that the BAIMEI ICE ROLLER is later filed and the Applied-for Mark was not cited by examiner, BAIMEI ICE ROLLER is registered for “Massage apparatus and instruments; Massage apparatus for eyes; Massage apparatus for neck and shoulders; Massaging apparatus for personal use; Electric massage appliances, namely, electric vibrating massager; Electric massage rollers; Electric foot spa massagers; Foam massage rollers; Foot massage apparatus”. While the Applied-for Mark is for “Opaque plastic film for blocking sunlight; Padding materials of rubber or plastic; Padding materials of rubber or plastics; Plastic and foam sign blanks; Plastic films for electrical insulation; Plastic foam used for arts and crafts; Plastic padding for impact protection; Plastic substances, semi-processed; Self-adhesive plastic sheets for use in manufacturing; Semi-processed foams of plastic in the nature of filtering materials in architecture; Semi-processed plastic in sheet form; Semi-processed plastics; Semiprocessed thermoplastics in pellet form; Synthetic plastic as semi-finished products in form of foils, plates, rods, profiles, hoses, tubes, blocks.” Dkt. No. 1 ¶¶ 3. The likelihood of confusion is non-existent because the goods are so different. Additionally, the pleading only used conclusive statements concerning the alleged likelihood of confusion. E.g. Dkt. No. 1 ¶¶

11-12.

As such, the Applicant believes that the Opposition for the likelihood of confusion cannot survive a motion to dismiss nor in a later stage.

### 3. Opposer Failed to State a Dilution Claim

Opposer alleges that the registration of the Applied for Mark will cause dilution by blurring to the Registered Mark. However, this claim cannot survive a motion to dismiss as well. The opposer failed to allege any specific fact concerning that the Registered Mark is a famous mark other than a conclusive statement. Dkt. No. 1 ¶¶ 13. Further the fact alleged by the Opposer does not support its status as a famous mark. Specifically, the Opposer alleges “Opposer has used the mark baimei ice roller in . . . since at least as early as March 9, 2019. . . . [C]onsumers in the United States have come to associate the baimei ice roller mark, as used in connection with these goods, with Opposer and Opposer's goods.” Dkt. No. 1 ¶¶ 2. This factual allegation does not support the fact that the Registered Mark is a famous mark.

As such, the opposition will not survive a motion to dismiss.

### 4. The Opposer failed to allege Fraud and Non-Use Claim

The Opposer alleges the fraud committed is that “the challenged mark was first in use on December 14, 2021”, while the order was placed on the same day. Dkt. No. 1 ¶¶ 4. This verified statement is “at least as early as 12/14/2021”. As such, the Opposer cannot state a claim for fraud.

The Opposer further failed to state a claim for non-use because it failed to allege any specific fact other than a conclusive statement. Dkt. No.1 ¶¶ 9.

For the reason stated above, not only Applicant has meritorious defenses but also the Opposing cannot survive a motion to dismiss.

### **D. The Opposer Will Not be Prejudiced by Vacating the Default**

Here, as the record noted, the deadline for the Applicant to file an answer is January 17,

2023. The broad entered default on January 28 and suspended the proceeding for thirty days. Here, it is less than 10 days from the time of default to the time the proceeding was suspended. And the Applicant filed the instant motion within the allowed thirty days' time. The Broad has ruled nine-day delay would cause minimal prejudice. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). As such, given the length of the delay, the Opposer will not be prejudiced.

### **III. Conclusion**

For the foregoing reasons, Applicant respectfully requests the default to be vacated and orders the Applicant to file an answer or otherwise respond to the pleading within 20 days from the order vacating the default.

Dated: Flushing, New York  
February 27, 2023

/s/ Shan Zhu  
Shan Zhu, Esq.  
3511-B Farrington Street #335  
Flushing, NY 11354  
Tel: (347) 470-7008  
Email: [shan.zhulaw@gmail.com](mailto:shan.zhulaw@gmail.com)  
*Attorney for Applicant*



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 27th day of February 2023, a true and correct copy of the foregoing was served via electronic mail upon the following:

Shengmao Mu, Esq. <[smu@whitewoodlaw.com](mailto:smu@whitewoodlaw.com)>

Dated:           Flushing, New York  
                  February 27, 2022

*/s/ Shan Zhu* \_\_\_\_\_  
Shan Zhu, Esq.  
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*Attorney for Petitioner*