

ESTTA Tracking number: **ESTTA1101513**

Filing date: **12/14/2020**

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

Proceeding	92074689
Party	Plaintiff Afterpay Australia Pty Ltd.
Correspondence Address	LISA W ROSAYA BAKER & MCKENZIE LLP 452 FIFTH AVENUE NEW YORK, NY 10018 UNITED STATES Primary Email: nyc-trademarks@bakermckenzie.com Secondary Email(s): Lisa.Rosaya@bakermckenzie.com , lindsey.ustrata@bakermckenzie.com 212-626-4557
Submission	Opposition/Response to Motion
Filer's Name	Lindsey E. Utrata
Filer's email	lindsey.ustrata@bakermckenzie.com , Lisa.Rosaya@bakermckenzie.com , nyc-trademarks@bakermckenzie.com
Signature	/LEU/
Date	12/14/2020
Attachments	Petitioner_Response_Motion_Cancellation_No. 92074689.pdf(221219 bytes)

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

Afterpay Australia Pty Ltd,)	
)	
Petitioner,)	
)	Cancellation No.: <u>92074689</u>
v.)	Mark: FOREX TRADING ALGORITHM &
)	Design
IVP Finance (Cyprus) Ltd,)	Registration No.: 5093963
)	Registered: December 6, 2016
Registrant.)	International Class: 9
)	
)	

**PETITIONER'S RESPONSE MOTION TO REGISTRANT'S REQUEST FOR RELIEF FROM
ENTRY OF DEFAULT JUDGEMENT**

Pursuant to 37 C.F.R. § 2.127 and Trademark Board Manual of Procedure ("TBMP") 502, Petitioner hereby submits this Response Motion and respectfully moves for the Trademark Trial and Appeal Board (the "Board") to deny Registrant's Motion for Relief from Entry of Default Judgment.

As grounds in support of this Motion, Petitioner asserts as follows:

1. Petitioner filed its Petition for Cancellation in this proceeding on July 13, 2020 and the Board instituted the proceeding on July 13, 2020.
2. Pursuant to the Board's July 13, 2020 scheduling order, Registrant's deadline to file an answer in this proceeding was August 22, 2020.
3. Applicant filed its answer in this proceeding on August 12, 2020.
4. On August 17, 2020, the Board issued an order notifying Registrant of the requirement, pursuant to 37 C.F.R. § 2.11(a), for parties domiciled outside of the United States or its territories to be represented by an attorney who is an active member and currently in good standing of the bar of the highest court of a state of the United States, including any commonwealth, territory, or the District of Colombia.

5. The Board's August 17, 2020 order clearly stated that the deadline for Registrant to obtain qualified U.S. counsel and establish representation in the captioned proceeding was thirty days from the date of the order, or by September 16, 2020.

6. By September 16, 2020, Registrant failed to establish representation in the captioned proceeding by an attorney who is an active member and currently in good standing of the bar of the highest court of a state of the United States, including any commonwealth, territory, or the District of Columbia.

7. On October 26, 2020, the Board issued another notice to Registrant regarding its failure to comply with the requirement to appoint qualified U.S. counsel to represent it in the captioned proceeding, and set a further thirty-day timeline, or until November 25, 2020, for Registrant to obtain U.S. counsel, provide the Board with proper bar admittance information for said counsel, and to show cause to the Board why default judgment should not be entered against Registrant for its failure to actively participate in the captioned proceeding in accordance with the relevant rules procedures.

8. On November 24, 2020, Registrant filed with the Board a so-called Motion for Relief from Entry of Default Judgment ("Registrant's November 24, 2020 Motion") in which Registrant erroneously asserts that the deadline for establishing representation by qualified U.S. counsel is six months, not thirty days, from the Board's notice of said deficiency.

9. Specifically, in Registrant's November 24, 2020 Motion, Registrant incorrectly cited to 37 C.F.R. § 2.65(a) as the governing procedure for determining a deadline for responding to an order by the Board. However, 37 C.F.R. § 2.65(a) governs response deadlines regarding Office actions issued by the United States Patent and Trademark Office ("USPTO"), and notices by an applicant to the Board of an appeal of a USPTO Examiner's refusal to register an application. Administrative proceedings in the nature of petitions to cancel are not governed by 37 C.F.R. § 2.65(a) as Registrant erroneously asserts.

10. Petitioner hereby asserts that 37 C.F.R. § 2.127(b) is controlling here, in particular, "[a]ny request for reconsideration or modification of an order or decision...must be filed within one month from the date thereof."

11. Furthermore, Petitioner asserts that Registrant's November 24, 2020 Motion failed to include a Certificate of Service, as required under TMEP § 113.02. Moreover, TMEP § 113.02 states that "*proof that the required service has been made ordinarily must be submitted before the filing will be considered by the Board.*"

12. Despite the Certificate of Service being omitted from Registrant's November 24, 2020 Motion, Petitioner is hereby filing the instant Response Motion to alert the Board to Petitioner's objections to Registrant's November 24, 2020 Motion, and to request that the Board deny Registrant's November 24, 2020 Motion in light of the inaccuracies included therein as well as the deficiencies thereof.

13. Petitioner asserts that 37 C.F.R. § 2.127(b), allocates twenty days from the "date of service" of a request for reconsideration or modification of a Board order as the time for filing a brief in response to said motion.

14. While no Certificate of Service was included in Registrant's November 24, 2020 Motion, twenty days counted from the date the motion was filed with the Board, according to TTABVUE, the Trademark Trial and Appeal Board Inquiry System, is December 14, 2020. Accordingly, today's Response Motion is timely filed.

15. Petitioner hereby asserts that, as of today's date, Registrant has already been afforded nearly four months to obtain qualified U.S. counsel and establish representation in the captioned matter before the Board in compliance with the Board's August 17, 2020 order, well in excess of the thirty days allocated under 37 C.F.R. § 2.127(b). Registrant's failure to obtain qualified U.S. counsel in the captioned proceeding has led to Registrant's misunderstanding of the rules governing such proceedings and has thereby delayed prosecution of the captioned proceeding.

16. Moreover, Petitioner hereby objects to Registrant's allegations of use of the mark which is the subject of the instant cancellation proceeding, including as to paragraphs 3 through 8 of Registrant's November 24, 2020 Motion, as well as Registrant's characterization of Petitioner's Petition for Cancellation as containing "large scale misrepresentations." Petitioner hereby asserts that Registrant's November 24, 2020 Motion is not only an improper format for making these allegations, but Registrant failed to provide any evidence in the form of exhibits attached to Registrant's November 24, 2020 Motion to support these claims. Further, such allegations are properly considered during the discovery phase of proceedings of this nature. As such, Petitioner hereby asserts any factual claims asserted in Registrant's November 24, 2020 Motion should be disregarded by the Board.

WHEREFORE, Petitioner prays that this Motion be granted and Registrant's Motion for Relief from Entry of Default Judgment be denied.

Respectfully submitted,

By: *Lindsey E. Utrata*

Lisa W. Rosaya
Lindsey E. Utrata
Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
Tel: (212) 626-4557
Fax: (212) 310-1659

Date: December 14, 2020

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **PETITIONER'S RESPONSE MOTION TO REGISTRANT'S REQUEST FOR RELIEF FROM ENTRY OF DEFAULT JUDGEMENT** was served via email, upon counsel for Registrant, IVP Finance (Cyprus) Ltd., at the email address of record, office@ivpfinance.com, on this 14th day of December, 2020.

Lindsey E. Utrata

Lindsey E. Utrata