

ESTTA Tracking number: **ESTTA1116030**

Filing date: **02/22/2021**

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

| | |
|---------------------------|---|
| Proceeding | 92076008 |
| Party | Plaintiff Essential Layer, Inc. |
| Correspondence Address | HEATHER G. SAPP SCHERER SMITH & KENNY LLP 140 GEARY STREET, 7TH FLOOR SAN FRANCISCO, CA 94108 UNITED STATES Primary Email: hgs@sfcounsel.com 415-433-1099 |
| Submission | Response to Board Order/Inquiry |
| Filer's Name | Heather G. Sapp |
| Filer's email | hgs@sfcounsel.com |
| Signature | /Heather G. Sapp/ |
| Date | 02/22/2021 |
| Attachments | Certificate of Service - signed.pdf(334857 bytes) |

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

Essential Layer, Inc.,)
)
) Petitioner)
)
) v.)
)
) Michael Krieger)
)
) Registrant)
)
)
)
)
)


Cancellation No. 92076008

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that the attached **MOTION FOR ENTRY OF DEFAULT JUDGMENT FOR FAILURE TO ANSWER PETITION FOR CANCELLATION** was served upon the Registrant by transmission by overnight courier (Federal Express), on February 10, 2021, addressed as follows:

MICHAEL KRIEGER
GARTENZEILE 4
NEUBURG A. D. DONAU GERMANY 86633



Rianna Rualo

Certificate of Service
Cancellation No: 92076008

ATTACHMENT
Motion

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

| | | |
|-----------------------|---|---------------------------|
| Essential Layer, Inc. |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| Michael Krieger |) | Cancellation No. 92076008 |
| |) | |
| Registrant |) | Registration No. 4774614 |
| |) | |
| |) | |

**MOTION FOR ENTRY OF DEFAULT JUDGMENT FOR FAILURE TO ANSWER
PETITION FOR CANCELLATION**

1. Essential Layer, Inc. (hereinafter “*Petitioner*”), a corporation duly organized and existing under the laws of the State of California and having a principal place of business of 1857 Lombard Street, Apt. 1, San Francisco, California 94123, respectfully submits this Motion for Entry of Default Judgment for the failure of Registrant, Michael Krieger, an individual (“*Respondent*”), to file and serve an Answer to Petitioner’s Petition for Cancellation of the registration for the mark, EARTHBACK, U.S. Registration No. 4774614 (the “*Registered Mark*”).

2. On December 17, 2020, Petitioner instituted a cancellation proceeding against the Registered Mark by filing a Petition for Cancellation of Registered Mark (the “*Proceeding*”).

3. On December 21, 2020, the Trademark Trial and Appeal Board (the “*Board*”) served a Notice of Institution of the Proceeding (“*Notice*”) on the Respondent, which Notice included a Scheduling Order providing the Registrant forty (40) days in which to answer the Petition for Cancellation.

4. The Time to Answer date as set forth in Notice was January 30, 2021.

5. As of today, February 4, 2021, the Respondent has not filed an answer or made an appearance.

6. Pursuant to TBMP Rule 312.01, citing 337 C.F.R. §2.114(a): “If no answer is filed within the time initially set...the petition may be decided as in case of default.”

7. Furthermore, under TBMP Rule 508:

“If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. If the defendant fails to file a response to the notice, or files a response that does not show good cause, default judgment may be entered against it. The issue of whether default judgment should be entered against a defendant when it fails to file a timely answer to the complaint may also be raised by means other than the Board’s issuance of a notice of default. For example, **the plaintiff, realizing that the defendant is in default, may file a motion for default judgment (in which case the motion may serve as a substitute for the Board’s issuance of a notice of default)...**” [bold added].

8. Finally, pursuant to 37 CFR § 2.114, “If the cancellation proceeding is based solely on abandonment or nonuse and default judgment is entered with no appearance by the defendant, and no filings are made other than the petition to cancel, \$200 per class of the petition to cancel fee may be refunded.”

9. In furtherance of the above, the time allowed by the Board for answering having expired as of January 20, 2021, Petitioner hereby moves for entry of default judgment against Respondent.

10. Petitioner also respectfully requests a refund of \$600 for the filing fees for the Proceeding against the Registered Mark (\$200 multiplied by 3 classes).

WHEREFORE, Petitioner respectfully requests the relief as set for above.

Date: February 4, 2021

Respectfully submitted,

SCHERER SMITH & KENNY LLP

By: /Heather G. Sapp/
Heather G. Sapp
140 Geary Street, 7th Floor
San Francisco, CA 94108
hgs@sfcounsel.com
www.sfcounsel.com
T: (415) 433-1099
F: (415) 433-9434
Attorney for Petitioner