

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 13-4428-A

LLOYDS BANK PLC, f/k/a Lloyds TSB Bank plc,
in its capacity as Facility Agent,

Plaintiff,

v.

SERVICE POINT USA, INC.,

Defendant, and

CITIZENS BANK OF MASSACHUSETTS,

Trustee Process Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
ENTRY OF DEFAULT JUDGMENT AND ASSESSMENT OF DAMAGES**

Plaintiff Lloyds Bank, plc, f/k/a Lloyds TSB Bank plc, in its capacity as Facility Agent for certain secured lenders (the "Agent") as creditors of defendant Service Point USA, Inc. ("SPU") pursuant to one or more guarantees of indebtedness given by SPU, and as a secured party holding a valid, perfected, first priority security interest (the "First Lien") in all, or substantially all of the assets of SPU, hereby submits this memorandum of law in support of its *Motion for Entry of Default Judgment and Assessment of Damages* (the "Motion") pursuant to which the Agent seeks a default judgment and assessment of damages against SPU under Mass. R. Civ. P. 55(b)(2).

As set forth more fully herein, and as supported by facts set forth in the *Affidavit of Michael J. Fencer, Esq.* (the "Fencer Aff.") and filed herewith, and the *Affidavit of Andrew*

Moore in Support of Certain Motions for Injunctive and Equitable Relief (the "Moore Aff. "),¹ the Agent is entitled to the entry of a default judgment and the assessment of damages against SPU.

I. Relevant Background and Procedural History

1. On December 18, 2013 the Agent filed a *Complaint* (the "Complaint") against SPU demanding a judgment for money damages for, *inter alia*, SPU's indebtedness to the Agent under a certain *Amendment and Restatement Agreement* (the "Restatement Agreement") and Existing Facility Agreement, which indebtedness is secured under a certain *Collateral Agreement* (the "Collateral Agreement"). (Fencer Aff. ¶ 3; Moore Aff. ¶¶ 3-4.)

2. On December 28, 2013 SPU was duly served by making service of process upon SPU's registered agent of record, Kevin Eyers, with, *inter alia*, a summons and a true and accurate copy of the Complaint. A true and accurate copy of the *Proof of Service of Process* is annexed hereto as Exhibit C. (Fencer Aff. ¶ 4; Ex. A.)

3. SPU has failed to plead or otherwise respond to the Complaint. (Fencer Aff. ¶ 5.) On January 22, 2013, I caused a *Request for Entry of Default* to be filed with the civil clerk and served upon all parties to this civil action. (Fencer Aff. ¶ 5.) Despite receiving the request, the civil clerk has not yet entered SPU's default in this civil action. (Fencer Aff. ¶ 5.)

4. As a Massachusetts business corporation, SPU is not in the military, nor is it an infant or an incompetent person, or an incapacitated person as defined in Mass. Gen. Laws ch. 190B. (Fencer Aff. ¶ 6.)

¹ The Moore Affidavit was previously filed in support of certain preliminary relief sought by the Agent.

II. Facts Established by the Default of SPU

5. SPU is a corporation formed under the laws of the Commonwealth of Massachusetts with a principal place of business located a 5 Commonwealth Avenue, Unit No. 5, Woburn, Massachusetts 01801. (Compl. ¶ 3; Moore Aff. ¶ 2.)

6. On March 17, 2011 SPU and its affiliates entered into the Collateral Agreement² with the Agent, as agent for, and for the benefit of the Lenders, pursuant to which SPU granted the Agent the First Lien in all, or substantially all of its assets, including without limitation, all Accounts, cash and currency, Deposit Accounts, Documents, Equipment, Fixtures, General Intangibles, Instruments, Inventory, Goods, and all Proceeds, products, and accessions thereof or thereto (the "Collateral"). (Compl. ¶ 5; Moore Aff. ¶ 3.)

7. On October 31, 2012 SPU and its affiliates entered into the Restatement Agreement³ with the Agent, as agent for, and for the benefit of the Lenders, pursuant to which SPU restated and reaffirmed to the Agent its guarantees of the indebtedness of its parent and affiliates originally granted pursuant to the facilities agreement dated 21 July 2006 and made between, among others, SPU and the Agent in various capacities (the "Existing Facility Agreement").⁴ (Compl. ¶ 6; Moore Aff. ¶ 4.)

8. On November 2, 2012 the Agent, as agent for, and for the benefit of the Lenders, caused a duly executed and authenticated UCC-1 Financing Statement (the "Financing Statement")⁵ to be filed and recorded with the Secretary of the Commonwealth of Massachusetts perfecting the Agent's security interest in and to the Collateral. (Compl. ¶ 7; Moore Aff. ¶ 5.)

² A true and accurate copy of the Collateral Agreement is annexed to the Moore Affidavit as Exhibit B.

³ A true and accurate copy of the Restatement Agreement is annexed to the Moore Affidavit as Exhibit C.

⁴ A true and accurate copy of the Existing Facility Agreement is annexed to the Moore Affidavit as Exhibit D.

⁵ A true and accurate copy of the Financing Statement is annexed to the Moore Affidavit as Exhibit E.

At no time since the filing of the Financing Statement has the Agent or the Lenders executed, authenticated, or filed or recorded any release of the security interest in and to any of the Collateral. (Compl. ¶ 7; Moore Aff. ¶ 5.)

9. Prior to initiating this civil action, the Agent made demand on SPU under the guarantee in the Restatement Agreement for the full amount of SPU's indebtedness which amount was then and still is immediately due and payable as a result of one or more Events of Default as defined in and under the terms of the Restatement Agreement. (Compl. ¶ 10; Moore Aff. ¶ 8.)

10. As of the date hereof, SPU is indebted to the Agent and the Lenders in the aggregate amount of €71,926,281 Euro of principal demanded debt plus interest thereon and other amounts owed to the Lenders under the Restatement Agreement and the Finance Documents as defined therein, which amount, is immediately due and payable by SPU under the terms of the Existing Facility Agreement, the Restatement Agreement, and secured under the Collateral Agreement. (Compl. ¶ 8; Moore Aff. ¶ 6.)

11. In addition, pursuant to the Restatement Agreement, the Agent is entitled to recover from SPU all reasonable attorneys fees and other costs incurred by the Agent in connection with the enforcement of the Restatement Agreement. As a result, the Agent is entitled to recover from SPU \$68,285.00 in attorney's fees and \$3,223.04 in out of pocket costs, which represent the reasonable and necessary costs and expenses incurred by Jager Smith in prosecuting this civil action. (Fencer Aff. ¶¶ 10, 11.)

III. Discussion

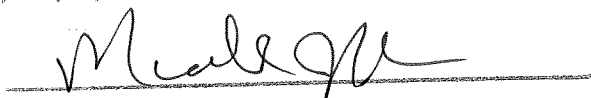
There is no dispute that SPU has failed to plead or otherwise answer the Complaint and that the Agent is entitled to entry of a default and default judgment in its favor. The only

remaining question is in what currency and amount should the Agent's judgment be denominated. In that regard, it is a settled principle of Anglo-American law that judgments for money damages must be rendered in the currency of the forum. *See In re Good Hope Chem. Corp.*, 747 F.2d 806, 809 (1st Cir. 1984). Where the obligation is governed by foreign law and payable in foreign currency, courts follow the "judgment rule" wherein the conversion from the foreign currency into dollars is made at the rate of exchange prevailing at judgment. *Id.* at 811. As a result, the Agent requests that the Court enter a judgment against SPU for the Agent's money damages in an amount equal to €71,926,281 multiplied by the Euro/Dollar exchange rate in effect on the day the judgment is entered. In addition, the judgment should include the reasonable attorneys fees and costs incurred by the Agent in prosecuting this civil action in the amounts of \$68,285.00 and \$3,223.04, respectively. *See Hannon v. Original Gunitite Aquatech Pools*, 385 Mass. 813, 827 (1982) (attorneys fees and expenses awardable by contract).

IV. Conclusion

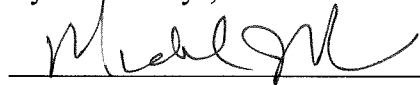
For the foregoing reasons, and those that may be stated at any hearing on the Motion, the Court should enter an order granting the Motion in its entirety.

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party by mail (by hand) on 3/19/14



LLOYDS BANK, PLC,
f/k/a Lloyds TSB Bank, plc,
in its capacity as Facility Agent,

By its attorneys,


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Dated: March 19, 2014