

ESTTA Tracking number: **ESTTA743187**

Filing date: **04/28/2016**

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

| | |
|------------------------|---|
| Proceeding | 92062104 |
| Party | Plaintiff Information Resources, Inc. |
| Correspondence Address | BART A LAZAR SEYFARTH SHAW LLP 131 S DEARBORN STREET , SUITE 2400 CHICAGO, IL 60603-5577 UNITED STATES chiipdocket@seyfarth.com, blazar@seyfarth.com, tshimada@seyfarth.com, lax-docket@seyfarth.com |
| Submission | Motion for Default Judgment |
| Filer's Name | Bart A. Lazar |
| Filer's e-mail | blazar@seyfarth.com |
| Signature | /Bart A. Lazar/ |
| Date | 04/28/2016 |
| Attachments | motion for sanctionsanddefault.pdf(1434959 bytes) |

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

In the Matter of Registration No. 4055582
Registration Date: November 15, 2011

Information Resources, Inc.,

Petitioner,

v.

Plug and Play Consulting

Registrant.

Cancellation No. 92062104

PETITIONER'S MOTION FOR SANCTIONS AND DEFAULT JUDGMENT

Petitioner Information Resources, Inc. ("Petitioner") moves for sanctions, including the entry of a default judgment against applicant Plug and Play Consulting ("Registrant"), pursuant to Rules 37 and 55 of the Federal Rules of Civil Procedure on the basis of Registrant's failure to withdraw as counsel as required by the Board's March 17, 2016 order, failure to respond to settlement communications and failure to conduct a discovery conference as required by the Board's February 1, 2016 order.

FACTUAL BACKGROUND

Registrant has failed to meet any deadline in this matter, as well as failing to respond to reasonable requests from Petitioner's counsel and recent requests from the Board. For example, Registrant failed to answer the Petition for Cancellation. On October 14, 2015, the Board entered a Notice of Default for Registrant's failure to file an answer or otherwise move to extend its time to answer. Dkt. 4. That same day, Respondent's attorney, Anthony Verna, filed his appearance as well as an answer, though the pleading failed to inform the Board why Registrant did not file a timely answer. Dkts. 5-7. As a result, Registrant remained in technical default and

was given thirty days to explain why it did not timely answer. Dkt. 7.

On or around October 29, 2015, Mr. Verna and Petitioner's attorney, Bart Lazar, first spoke regarding the proceeding. Declaration of Bart A. Lazar, ("Lazar Dec.") ¶2. A few days later on November 2, 2015, Mr. Lazar emailed Mr. Verna proposing potential terms of a settlement to the proceeding. Id. at Ex. A (a redacted copy of Mr. Lazar's email). Although Registrant's counsel indicated he would speak with his client about the settlement proposal and respond, Registrant never substantively responded to the November 2, 2015 email. Id. at ¶5, Ex. B. As a result, Mr. Lazar sent a follow-up email requesting information on the status of the discussions between Mr. Verna and his client and whether settlement was still a viable option. Id. at ¶6, Ex. C.

On February 1, 2016, the Board set aside the default and reset the discovery conference, disclosure, discovery and trial dates. Dkt. 9. The Order set a March 2, 2016 deadline for the parties to conduct a discovery conference. Id.

Mr. Lazar and Mr. Verna spoke via telephone prior to the March 2, 2016 deadline at which time Mr. Verna indicated he would be withdrawing as counsel for Respondent. Lazar Dec. ¶9. Mr. Verna still had not withdrawn as of the day after the discovery conference deadline. Accordingly, on March 3, 2016, Mr. Lazar formally requested he withdraw as counsel. Id. at ¶10, Ex. E. If in fact Mr. Verna still represented Registrant, Mr. Lazar requested his availability for a discovery conference and also sought a response to the outstanding settlement proposal. Id. At this point, Mr. Verna still had not responded to the settlement proposal sent over four months prior on October 29, 2015 and the parties had not conferenced on discovery issues. Id. at ¶10. On March 8, 2016, Mr. Lazar again requested Mr. Verna withdraw as counsel for Registrant or advise of his availability for the discovery conference. Id. at ¶11, Ex. F.

A week later on March 15, 2016, Mr. Verna filed his Motion to Withdraw, albeit a defective motion. See Dkts. 10, 11 and 12. Counsel was given another thirty-day window, expiring April 16, 2016, within in which to remedy the defective filing. Dkt. 11. As of the date of this motion, counsel has not filed a corrective motion to withdraw complying with the requirements of Trademark Rule 2.19(b) and Patent and Trademark Rule 11.116, as required, and the TTAB has resumed proceedings. Dkt. 13.

ARGUMENT

A DEFAULT JUDGMENT SHOULD BE ENTERED AGAINST REGISTRANT

When a registrant fails to answer a complaint *or otherwise defend* the matter, the registrant is in default and the petitioner may file a motion for the entry of a default judgment. See FRCP 55(a); TBMP §508; TBMP §312. Additionally, “[a]ll parties to a proceeding have a duty to cooperate and conduct the discovery conference in a timely fashion.” TBMP §408.01(a); The party seeking to schedule a discovery conference may file a motion for sanctions pursuant to 37 CFR §2.120(g), whereupon the Board may impose any sanctions provided for under FRCP 37(b)(2), including entry of judgment. *Id.*; 37 CFR §2.120(g)(1), (“If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure...”).

In accordance with the Board’s February 1, 2016 Order, the parties were to conduct a discovery conference by March 2, 2016. Prior to and even after the March 2, 2016 deadline, Petitioner repeatedly sought to schedule a discovery conference with counsel for Registrant. See Lazar Dec. ¶¶9-11, Exs. E and F. Registrant has yet to offer an available date to conference and has clearly not made any apparent effort to do so. Likewise, as early as October 2015, Petitioner

sought resolution of the proceeding and proposed a settlement which to date has not received a response. Id. at ¶2, Ex. A. As demonstrated above, Petitioner has made numerous good faith efforts to schedule the conference in order to discuss both discovery and settlement, yet Registrant unjustifiably remains uncooperative and non-compliant.

Additionally, in accordance with the TTAB Order of March 17, 2016, Registrant had thirty days, until April 16, 2016, to submit a motion to withdraw as counsel that complied with Trademark Rules 2.19(b) and Patent and Trademark Rule 11.116. Registrant has not done so. Registrant cannot show good cause for its failure to schedule a discovery conference or obey the Board's Order. Indeed, the present failure is indicative of Respondent's continued delays and failure to comply with Board ordered deadlines in this proceeding. Such failure puts into question Registrant's good faith in originally moving to vacate the default entered by the Board.

Registrant's continued delay of the present proceeding has and will continue to result in substantial prejudice to Petitioner. Since October 2015, Petitioner has been unable to move the proceeding forward in any meaningful fashion. Petitioner's settlement offer still has not received a response. Nor has Petitioner been able to engage Respondent or Respondent's counsel in a discovery conference. Compounding the issue, because Mr. Verna has not yet properly withdrawn from proceeding, Petitioner is without recourse to contact the Respondent directly.

CONCLUSION

For all of the foregoing reasons, the Board should enter a default judgment against Registrant and cancel Registration No. 4,153,562 after suspending proceedings pending the disposition of this motion and such other relief as is necessary and appropriate in this matter.

Respectfully submitted,

SEYFARTH SHAW LLP

Date: April 28, 2015

By: _____ /Bart A. Lazar/ 

Bart A. Lazar
Vincent Smolczynski
Attorneys for Petitioner
INFORMATION RESOURCES, INC.

131 S. Dearborn St., Suite 2400
Chicago, IL 60603-5577
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 2.111 of the Trademark Rules of Practice (27 CFR 2.111), a true copy of the foregoing MOTION FOR SANCTIONS AND DEFAULT JUDGMENT was served on Registrant on April 28, 2016, via first class mail to:

ANTHONY M VERNA III
VERNA LAW PC
445 HAMILTON AVE, SUITE 1102
WHITE PLAINS, NY 10601
UNITED STATES

/BART A. LAZAR/



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

In the Matter of Registration No. 4055582
Registration Date: November 15, 2011

Information Resources, Inc.,

Petitioner,

v.

Plug and Play Consulting

Registrant.

Cancellation No. 92062104

**DECLARATION OF BART A. LAZAR IN SUPPORT OF PETITIONER'S MOTION
FOR SANCTIONS AND DEFAULT JUDGMENT**

I, BART A. LAZAR, hereby declare and state and follows:

1. I am a partner at Seyfarth Shaw, LLP, counsel to Petitioner herein. I am a member of the bars of New York and Illinois and have practiced before the United States Patent and Trademark Office and Trademark Trial and Appeal Board for approximately 28 years.

2. On or about October 29, 2015, I first spoke with Mr. Verna, the attorney for Registrant regarding this proceeding. Our conversation was cordial and focused primarily on the possibility of exchanging information regarding our clients' respective businesses and marks and the possibility of settlement.

3. On November 2, 2015, I emailed Mr. Verna proposing potential terms of a settlement to the proceeding. A redacted copy of my email is attached hereto as Exhibit A.

4. On November 2, 2015, Mr. Verna responded, indicating he would speak with his client about the settlement proposal and get back to me. A copy of Mr. Verna's email is attached hereto as Exhibit B.

5. Mr. Verna has never responded to the settlement proposal contained in my November 2, 2015 communication.

6. After not hearing from Mr. Verna, on November 24, 2015, I sent a follow-up email requesting information on the status of the discussions between Mr. Verna and his client and whether settlement was still a viable option. A copy of my email is attached hereto as Exhibit C.

7. On December 3, 2015, Mr. Verna sent me an email indicating that he had not heard back from his client. A copy of Mr. Verna's email is attached hereto as Exhibit D.

8. On February 1, 2016, the Board set aside the default and reset the discovery conference, disclosure, discovery and trial dates. The Order set a March 2, 2016 deadline for the parties to conduct a discovery conference.

9. On several occasions prior to the March 2, 2016 deadline I telephoned Mr. Verna to determine the status of settlement, if any, and to schedule a date to conduct a discovery conference. I did not receive a return phone call until a short time prior to the March 2, 2016 deadline, at which time Mr. Verna indicated he would be withdrawing as counsel for Respondent.

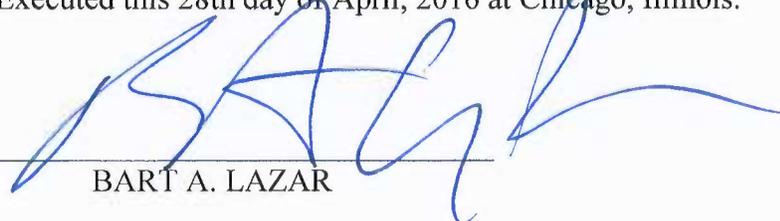
10. As of the March 2, 2016 deadline, Mr. Verna still had not withdrawn. On March 3, 2016, I formally requested that Mr. Verna withdraw as counsel or conduct the discovery conference. A copy of my email is attached hereto as Exhibit E.

11. On March 8, 2016, I again requested Mr. Verna withdraw as counsel for Registrant or conduct a discovery conference. A copy of my email is attached hereto as Exhibit F.

12. Other than receiving Mr. Verna's defective Motion to Withdraw, I have not received any further communications from Mr. Verna.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of April, 2016 at Chicago, Illinois.



A handwritten signature in blue ink, appearing to read 'BART A. LAZAR', is written over a horizontal line. The signature is stylized and cursive.

BART A. LAZAR

Exhibit A

Smolczynski, Vincent

Subject: FW: Information Resources vs. Plug and Play Consulting, TTAB #92062104--
CONFIDENTIAL

From: Lazar, Bart
Sent: Monday, November 02, 2015 11:30 AM
To: 'Anthony M. Verna III'
Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104--CONFIDENTIAL

Without Prejudice--for settlement purposes only.

Anthony: Following our conversation last week, I spoke to my client and we are willing to [REDACTED]

Toward that end, I think it would make sense for us to share information on an informal basis so that we can properly develop an agreement.

- [REDACTED]

In addition, we may need to include [REDACTED]

Our clients' respective identifications of services are as follows:

Plug and Play: providing temporary use of on-line non-downloadable computer software for data management.

IRI: Market analysis; Market assessment services; Market research; Market research and business analyses; Market research and market intelligence services; Market research by means of a computer database; Market research consultation; Market research services.

I will seek similar information from my client so we can make a reasoned comparison.

In the meantime, you can represent to the TTAB that IRI consents to vacating the default as well as a suspension, if necessary.

I could take a first crack at a co-existence agreement as well.

Please let me know if this is an acceptable approach from your and your client's perspective. -Bart.

From: Anthony M. Verna III [<mailto:anthony@vernalaw.com>]
Sent: Wednesday, October 28, 2015 9:54 AM
To: Lazar, Bart
Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104

Bart,

How is 11 Eastern/10 Central tomorrow?

Anthony M. Verna III, Esq.
Verna Law, P.C.
445 Hamilton Ave Ste 1102
White Plains, NY 10601

Phone: 914-358-6401
anthony@vernalaw.com

<http://vernalaw.com>
<http://facebook.com/anthonyvernalaw>
<http://twitter.com/avernalaw>
<https://www.linkedin.com/in/anthonyverna>

From: Lazar, Bart [<mailto:BLazar@seyfarth.com>]
Sent: Tuesday, October 27, 2015 4:27 PM
To: 'Anthony M. Verna III' <anthony@vernalaw.com>
Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104

Sure. I am generally available Thursday. Friday available except 1-230 your time.

Bart A. Lazar | Seyfarth Shaw LLP
131 S. Dearborn Street | Suite 2400 | Chicago, Illinois 60603-5577
Direct: +1-312-460-5986
blazar@seyfarth.com | www.seyfarth.com

SEYFARTH
SHAW

The information contained in this transmission is attorney privileged and/or confidential information intended for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited.

From: Anthony M. Verna III [<mailto:anthony@vernalaw.com>]
Sent: Tuesday, October 27, 2015 3:21 PM
To: Lazar, Bart
Subject: Information Resources vs. Plug and Play Consulting, TTAB #92062104

Mr. Lazar,

I'm Anthony Verna, and my practice represents Plug and Play Consulting in the above-referenced proceeding.

Do you have time to discuss the proceeding on Thursday or Friday?

Thank you.

Anthony M. Verna III, Esq.
Verna Law, P.C.

445 Hamilton Ave Ste 1102
White Plains, NY 10601

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Exhibit B

Smolczynski, Vincent

Subject: FW: Information Resources vs. Plug and Play Consulting, TTAB #92062104--
CONFIDENTIAL

From: Anthony M. Verna III [<mailto:anthony@vernalaw.com>]
Sent: Monday, November 02, 2015 12:06 PM
To: Lazar, Bart
Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104--CONFIDENTIAL

Bart,

Thank you. I will discuss with my client.

-Anthony

Anthony M. Verna III, Esq.
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Exhibit C

Smolczynski, Vincent

Subject: FW: Information Resources vs. Plug and Play Consulting, TTAB #92062104--
CONFIDENTIAL

From: Lazar, Bart
Sent: Tuesday, November 24, 2015 2:15 PM
To: 'Anthony M. Verna III'
Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104--CONFIDENTIAL

Hi Anthony: It has been a few weeks, and wanted to check to see if you have had the chance to discuss with your client. I realize it is Thanksgiving week so I would appreciate hearing back from you by the end of next week. Thanks. -Bart

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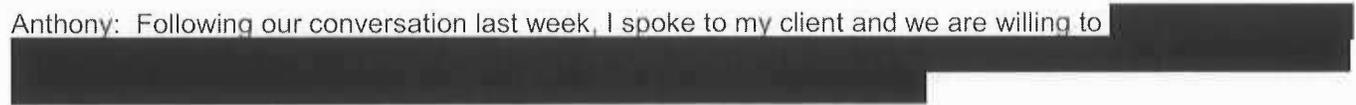
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<https://www.linkedin.com/in/anthonyverna>

Exhibit D

Fuson, Janet L.

Subject: Information Resources vs. Plug and Play Consulting, TTAB #92062104--CONFIDENTIAL

From: Anthony M. Verna III [mailto:anthony@vernalaw.com]

Sent: Thursday, December 03, 2015 1:32 PM

To: Lazar, Bart

Subject: RE: Information Resources vs. Plug and Play Consulting, TTAB #92062104--CONFIDENTIAL

Bart,

I just got your voicemail.

I haven't gotten a decision from my client.

Should we extend for 30 days?

-A

Anthony M. Verna III, Esq.

Verna Law, P.C.

445 Hamilton Ave Ste 1102

White Plains, NY 10601

Phone: 914-358-6401

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<https://www.linkedin.com/in/anthonyverna>

From: Lazar, Bart [mailto:BLazar@seyfarth.com]

Sent: Tuesday, November 24, 2015 3:15 PM

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SEYFARTH
SHAW

Exhibit E

Smolczynski, Vincent

Subject: FW: IRI--Plug and Play--Liquid Data

From: Lazar, Bart
Sent: Thursday, March 03, 2016 12:42 PM
To: Anthony M. Verna III (anthony@vernalaw.com)
Subject: IRI--Plug and Play--Liquid Data

Dear Anthony:

The last time we spoke about this matter, you indicated that you would be withdrawing as counsel. I have not seen any evidence that you have filed a withdrawal.

As you may know, the deadline for having a discovery conference was March 2, 2016.

Please advise me in writing as soon as possible as to whether you are still counsel for Plug & Play, or if I am free to communicate directly with Plug and Play Consulting.

If you still represent Plug and Play please let me know when you are available for a discovery conference next week and also respond to my settlement proposal.

Thank you very much. -Bart.

Exhibit F

Smolczynski, Vincent

Subject: FW: Plug N' Play Liquid Data

From: Lazar, Bart
Sent: Tuesday, March 08, 2016 2:10 PM
To: Anthony M. Verna III (anthony@vernalaw.com)
Subject: Plug N' Play Liquid Data

Dear Anthony:

This is the second time I am emailing you to ask you to confirm whether or not you are withdrawing as counsel as you indicated to me in December you would be doing.

Please either, a) respond to me to either set a date for discovery conference before March 15 or b) formally file your motion to withdraw by March 15. .

Thank you. -Bart.