

ESTTA Tracking number: **ESTTA484071**

Filing date: **07/18/2012**

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

Proceeding	91198483
Party	Plaintiff PsyBar LLC
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Date	07/18/2012
Attachments	2012.07.16 OPPOSER'S REPLY & Memo of Law in Support of Summary Judgment.pdf (6 pages)(45414 bytes)

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

PsyBar, LLC,

Opposer,

Opposition No.: 91198483

v.

Serial No.: 85095429

David Mahony, PhD.,

Applicant.

**OPPOSER PSYBAR, LLC’S REPLY AND MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Opposer, PsyBar, LLC (“PsyBar”), a nationally recognized industry leader in the forensic and legal communities, has been using its famous mark PSYBAR since 1995 and the same has been registered since 1996. After agreeing to be a contract medical examiner for PsyBar in 2003 and taking PsyBar’s online educational seminar in 2005, Applicant began to formulate a patient based bariatric test that he later named “PsyBari.” Applicant’s unimaginative use of PsyBar’s famous mark, by simply adding an “i” at its end, is a usurpation of PsyBar’s name and protected mark! Applicant’s use of “PsyBari” and his attempted registration came about after Applicant knew of PsyBar’s mark. Once PsyBar learned of Applicant’s attempt to register in 2011 PsyBar objected, and this case resulted.

Although untimely, the Court accepted Applicant’s Response to PsyBar’s Motion for Summary Judgment. That Response was a joint Memorandum in Opposition to PsyBar’s Motion

for Summary Judgment as well as Applicant's Memorandum in support of his request for Summary Judgment. Because Applicant's Response is simply a compilation of unattested opinions made in an attempt to create questions of fact when in reality none exist, it is difficult to ascertain where one argument ends and the other begins.

To be sure, when a party seeks to establish or disprove fact it must do so with evidence (proof) that would otherwise be admissible at trial. Meer conjecture is not sufficient and should be ignored. At bar, Applicant's obligation was to properly notice, brief and serve his Motion and Memorandum. Any allegations made within his Memorandum are expected to be supported by case law and admissible evidence. *See Fed. R. Civ. Pro. 56(c)(1), (4)*. He failed to do so and PsyBar objects to Applicant's Memorandum in its entirety as lacking any evidentiary basis whatsoever. *See Fed. R. Civ. Pro. 56(c)(2)*.

Assuming, arguendo, that this Court may take favor upon Applicant, in his position as a pro-se litigant, Opposer replies as follows.

FACTS

PsyBar moved for Summary Judgment on April 4, 2012 arguing Likelihood of Confusion, False Suggestion of Connection, and Dilution.¹ Each of PsyBar's legal claims was fully briefed, support by relevant case law and further buttressed by facts attested to by Dr. David Fisher. Those legal claims, facts and case law remain unchallenged.

The entirety of Applicant's Response is unsupported. There is no supporting Affidavit or other sworn testimony such as a deposition or other means of discovery. Applicant simply

¹ In its June 18, 2012 Order addressing the timeliness of Applicant's Responsive Memorandum, the Court sua sponte indicated it would not consider PsyBar's claim of dilution. Because Applicant was well aware of this claim even prior to litigation, *See Applicant's Response Memorandum, pg 2 Ex A*; the fact Applicant asserts such notice was tantamount to a waiver *Id*; and the fact PsyBar's Pleadings provide more than adequate notice of the issues involved at Bar, PsyBar respectfully requests the Court to consider the same. Absent that, PsyBar asks that it be allowed to amend its Objection to include such claim so it can conform to the evidence. *See 37CFR §2.107*.

guesses at what PsyBar may or may not do. PsyBar respectfully submits that Applicant's responsive memorandum is simply Applicant's opinion. Accordingly, any assertion made within Applicant's Response is unverifiable and should not be considered. *See Fed. R. Civ. Pro. 56(c)(1), (2) and (4)*. Moreover, Applicant has no foundation or basis on which to guess at what PsyBar does or does not do, how PsyBar operates in its business or in what fashion it manages its business relationships. Even if the Court relies on such speculation, the undisputed facts of this case require summary judgment in Opposer's favor, to-wit:

1. PsyBar has continuously used the PSYBAR mark since its inception in 1995 to identify the professional services it offers. *See Affidavit of David C. Fisher. ¶¶ 2,3 and 5.*
2. The trademark PSYBAR was registered to PsyBar in 1996. *Id. at ¶ 4.*
3. PsyBar is the nation's leading and best known specialist provider of forensic psychological and psychiatric assessment litigation services. *Id. at ¶ 6.*
4. Based on PsyBar's prominent status in the industry, PSYBAR is considered to be a famous mark.
5. In 2003 Applicant signed on with PsyBar to be an independent medical examiner and then in 2005 enrolled in one of PsyBar's educational programs. *Id. at ¶ 24.*
6. PsyBar became aware of Applicant's use of PsyBar's mark in 2010 and immediately objected to Applicant's attempted registration of "PSYBARI". *Id. at ¶¶ 10-11.*
7. PsyBar is a nationally known psychological specialty provider of employee assistance programs, fitness for duty examinations and other examinations, evaluations and litigation strategy services, which routinely use psychological tests akin to Applicant's PsyBari test. *Id. at ¶ 12, See also Second Affidavit of David Fisher ¶¶ 2-*

- 6.
8. The use of PsyBari is confusing, there is significant overlap in the consumer base and the use of PsyBari dilutes the famous mark PSYBAR. *Id.*

ARGUMENT

Over the course of 21 pages, Applicant offers no proof that the facts presented by PsyBar are anything but undisputed facts. Rather Applicant asserts, in various forms, three repetitive arguments to suggest the facts as presented by PsyBar do not support PsyBar's application of the law. Those arguments were:

1. PsyBar and Applicant do not share the same consumers. *See Responsive Memorandum, Pages 4, 14, and 15.*
2. PsyBar does not evaluate obese patients and Applicant's test is not used in forensic evaluations. *See Responsive Brief, Pages 2, 3,4,13, 15 and 18.*
3. Applicant's inclusion of a single letter at the end of PsyBar's previously protected mark is meant to avoid confusion. *See Responsive Brief, Page 4 and 18.*

Even if true, which they are not, none of the aforementioned arguments defeat Opposer's Motion for Summary Judgment.

First, with respect to Applicant's opinion that PsyBar and Applicant do not share the same customers, Applicant creates an artificially narrow definition of customer to include only those psychologists who work in a sub-field relating to bariatrics. We know from practical application that is not true. *See Second Affidavit of David Fisher §§ 2, 4, 5 and 7.* PsyBar's customers include insurers, attorneys, employee assistance programs, employers, occupational health professionals, safety experts and unions. *Id* at §§ 5 and 7, *See also Applicant's Responsive Memorandum, generally.* As such, PsyBar's customers can and do seek out bariatric tests. *Id.* at

¶¶ 2-7. Thus they are test consumers. It is obvious that there will not only be confusion with consumers but there will also be dilution of PsyBar's mark and that Applicant is endeavoring to improperly and illegally capitalize on PsyBar's successful mark. *Id.* The damage to PsyBar will continue to grow as Applicant's test evolves from the construction and validation stage to one of broader use and acceptance. *See Affidavit of David Fisher ¶¶ 4 and 7.* Although actual confusion is not a required showing, Applicant spends some time in his Response on this. Any lack of actual confusion is in large part because the PsyBari test remains in the validation stage and has not yet received wide acceptance. *See Affidavit of James Kretsch ¶¶ 2 and 3.* The state of PsyBari does not diminish the import of this action. It is axiomatic that the more accepted PsyBari becomes within the industry the greater harm will befall PsyBar.

Second, Applicant suggests, without support, that PsyBar does not evaluate obese patients and Applicant's test is not used forensic evaluations.

To that end, what Applicant ignores is the unmistakable truth that PsyBar conducts many forensic evaluations on medical patients who are candidates for, or more commonly have completed, medical procedures including bariatric surgery. *See Second Affidavit of David Fisher ¶ 2, 3, 4 and 9.* In that role, PsyBar can be tasked with overseeing psychological assessments to determine whether or not someone is an appropriate candidate for medical procedures such as bariatric surgery or implantation of spinal pain control devices. *Id.* There are all kinds of overlap between what PsyBar does and the use of Applicant's test, that overlap will cause harm to PsyBar's famous mark, confusion and dilution. *Id.*

Third, Applicant argues that Applicant's inclusion of a single letter at the end of PsyBar's previously protected mark is meant to avoid confusion. An interesting argument to cover-up the unimaginative process Applicant went through to parlay PsyBar's good will into

something Applicant can benefit from. Applicant suggest that the use of the prefix “Psy” or “Bari” in other context gives him carte-blanch authority to improperly infringe on PsyBar’s mark. *See Applicant’s Responsive Memorandum page 4, 10-12.* What Applicant fails to acknowledge is that he is attempting to usurp PsyBar’s entire mark, using the exact same text, the exact same spelling, with the exact same capitalization; with one minor exception and that is the addition of the letter “i” at the end. What Applicant also fails to acknowledge is that no other person has been so bold as to even attempt to hijack “PsyBar” within any other protected mark.

CONCLUSION

For the foregoing reasons, and those set forth in PsyBar’s original Motion in Support of Summary Judgment, Opposer PsyBar, LLC. respectfully requests the Board to grant its motion in full.

KRETSCH & GUST, PLLC

Dated: July 18, 2012

s/ James J. Kretsch, Jr.

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