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

Proceeding	91198483
Party	Defendant David Mahony, Ph.D., ABPP
Correspondence Address	DAVID MAHONY PHD ABPP PSYBARI 104 FUDORA CIRCLE SIMPSONVILLE, SC 29681 UNITED STATES drdavidmahony@gmail.com
Submission	Reply in Support of Motion
Filer's Name	David Mahony
Filer's e-mail	drdavidmahony@gmail.com
Signature	/david mahony/
Date	08/05/2012
Attachments	Reply in Support of MSJ.pdf (14 pages)(311646 bytes) Affidavit of Dr Mahony.pdf (5 pages)(178648 bytes) Affidavit of Service.pdf (1 page)(123016 bytes) Exhibits.pdf (16 pages)(2544759 bytes)

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

In the Matter of:

Application Serial no. 85095429

Published in the *Official Gazette*

January 11th, 2011

PSYBAR LLC)

Opposer)

Opposition No. 91198483

v.)

David Mahony, Ph.D., ABPP)

**REPLY BRIEF IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

Pursuant to T.B.M.P. § 528.08, 37 C.F.R. § 2.127E. and Fed. R. Civ. P. 56, Applicant, submits this brief in support of its Motion for Summary Judgment. Applicant filed its Motion for Summary Judgment on May 27th, 2012. Pursuant to T.B.M.P. § 528.01 Opposer has failed to establish any probative facts or genuine issue to any material facts with its affidavits and has offered no evidence for any of their evolving claims.

CONCLUSION

Based on the fact that the Opposer has continually changed the basis of their claim(s), lack of any evidence and the Opposer's own acknowledgement in their affidavits that, to date,

there has been no “deception,” “misdescription,” “dilution,” “confusion,” or benefit from good will, the Applicant respectfully requests that the Board find in favor of the Applicant’s Motion for Summary Judgment.

Respectfully submitted,

PsyBari

By: David Mahony Ph.D.

David Mahony, Ph.D., ABPP

PsyBari

30 Bayard St., Suite 1F

Brooklyn, NY, 11211

(718) 668-1919

Date: Aug 4th, 2012

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INTRODUCTION

The PsyBari test, an internationally recognized industry leader in bariatric psychology and bariatric medicine, has been in use since 2002, and is seeking trademark protection. The PsyBari test was created by Dr. David Mahony, a clinical psychologist, in order to evaluate obese patients that are seeking bariatric (weight loss) surgery. The test is used by a handful of bariatric psychologists around the world in clinical and research settings. The PsyBari test has become intimately connected to the name of its author, Dr. David Mahony, and a loss of the mark PsyBari, would cause irreparable damage to his career. The Opposer is a company that works in

the field of forensic psychology, a completely distinct and separate specialty within psychology that does not evaluate obese patients seeking bariatric surgery.

Since the inception of this case in August of 2010, the Opposer has repeatedly changed the nature of their claim(s) and has offered no probative proof of any of their claims including likelihood of confusion, dilution, misdescription, deception or benefit from good will. In fact, in the Opposer's own sworn affidavits, they acknowledge that in spite of the fact that both marks have been used over the past ten years, there are not known cases of confusion, misdescription, deception or dilution and no evidence that the Applicant has benefitted from the Opposer's good will. The reason for this is that the two organizations involved are in distinct subspecialties within the field of psychological evaluations. The PsyBari test is a test used exclusively by bariatric psychologists in clinical and research settings to evaluate obese patients seeking bariatric surgery. The Opposer conducts forensic evaluations where entities, such as insurance companies, are requesting that they confirm a claimant's psychological status. In effect, the PsyBari test is only used in settings with obese patients that are seeking bariatric surgery and is not appropriate for use in forensic settings while the Opposer evaluates claimants (individual that are making claims of a psychological disability) and as such does not conduct evaluations in clinical or research settings or evaluations for patients seeking bariatric surgery.

The use of the mark PsyBari is important to the Applicant as it is an industry recognized name and has become synonymous with David Mahony, Ph.D. A loss of the use of this mark would cause Dr. Mahony considerable financial hardship and damage to his name recognition.

FACTS

The Opposer, Dr. David Fisher, contacted Dr. David Mahony, the Applicant, in June of 2010 by telephone to discuss the two marks. At that time, the Opposer had no concerns about dilution or confusion, or that the Applicant's psychological test, the PsyBari, was benefitting from the Opposer's good will (A). Then in July of 2010, Dr. Fisher, the Opposer, sent Dr. Mahony an email (B) stating vague concerns of dilution and that his real concern was "the extreme remote

chance that [Dr. David Mahony] gets sued for the [PsyBari] test and somebody tried to come after [the Opposer].” The Opposer went on to request, in that email, that the Applicant pay the Opposer a \$500 a year “licensing fee” to use the mark PsyBari. In effect, in June and July of 2010, the Opposer had vague concerns about dilution, no concerns about deception, misdescription, confusion, or benefit of good will, and made no request that the Applicant stop using the mark PsyBari. In fact, the Opposer acquiesced to the Applicant’s use of the mark PsyBari as long as the Applicant was willing the pay the Opposer \$500 a year. In addition, the Opposer refused to agree with the Applicant that the two entities would agree to not work in the other’s area of specialty (see attached affidavit). Since the Opposer had not legal rights to the mark PsyBari, the Applicant, Dr. David Mahony, filed for trademark status for the mark PsyBari, in August of 2010. The mark PsyBari is intimately connected with Dr. Mahony’s career as it has become synonymous with his name in the field of bariatric psychology (C).

In February of 2011, the Opposer, who originally had vague concerns about “dilution” and a “remote” concern that use of the mark PsyBari would lead to litigation, but still acquiesced to the Applicant’s use of the mark as long as the Applicant paid him a license fee, was now opposed to the use of the mark PsyBari although for entirely different reasons. The Opposer’s Notice of Opposition to the mark PsyBari was based on claims of “confusion, mistake or deception within the meaning of Section 2(d) of the Trademark Act.” In spite of these new claims, the Opposer offered no evidence of “confusion, mistake or deception” and in fact, did not present any evidence at all that the mark PsyBari, which had been in use by then for eight years, caused the Opposer any problems. Additionally, the Opposer’s own latest affidavits attest that there, in fact, has been no “deception,” “dilution,” “misdescription,” “confusion,” or benefit from good will.

In May of 2011, the Opposer then filed an Amended Notice of Opposition and again changed the basis for their opposition to the use of the mark PsyBari. This Amended Notice Of Opposition changed the allegation from “confusion, mistake or deception” to a “false suggestion

of a connection in violation of Section 2(a) of the Trademark Act,” but again offered no evidence. Section 2(a) of the Trademark Act clarifies that their needs to be “misdescription” and the Opposer offered no evidence that this occurred or any evidence that it even could occur given that the parties do not offer similar services and do not have the same clients. Again, the Opposer’s own latest affidavits attest that, to date, there has been no “deception,” “misdescription,” “confusion,” or benefit from good will.

In December of 2001, the Opposer responded to the Applicant’s discovery requests and provided no evidence of any of their claims of deception or misdescription. Additionally, they offered no evidence of any dilution, confusion or that the Applicant was somehow benefitting from the Opposer’s good will. In spite of the fact that the PsyBari test was by then in use for nine years, the Opposer had no evidence to support their claims.

In April of 2012, the Opposer filed a Motion for Summary Judgment. In this motion the Opposer changed the nature of their complaint for a third time. This time they made no mention of their amended complaint of “deception” and “misdescription” but reverted to “Likelihood of Confusion” and added on complaints of “False Suggestion of Connection” and “Dilution.” Again, they offered no proof of these claims, even though the PsyBari mark was in use for ten years by this time. Their only evidence was affidavits from the Owner and Chairman of the Board, Dr. David Fisher, an individual that is clearly biased in this matter. Additionally, in spite of the Opposer’s repeated claim in their affidavits that they are “nationally recognized” and the “leading and best known specialist provider of forensic psychological and psychiatric assessment litigation services,” apparently, none of their customers or contracted psychologists were willing to supply supportive affidavits. Furthermore, in Dr. Fisher’s own later affidavits, he confirms that there has been no “deception,” “misdescription,” “confusion,” “false suggestion of connection,” or benefit from good will.

In May of 2012, the Applicant responded and refuted the Opposer’s Motion of Summary Judgment by demonstrating the lack of evidence of the Opposer’s claims and refuting the

supporting affidavits. In May of 2012, the Applicant also filed a Motion for Summary Judgment since the discovery process found no proof of the Opposer's claims and because the Opposer continually changed their complaint.

ARGUMENT

The Opposer's Reply And Memorandum of Law In Support Of Its Motion for Summary Judgment, dated July, 18th of 2012, has multiple errors, including basic errors in logic. For example, in this document, the Opposer continues to argue that the Applicant was aware of the Opposer's use of the mark by implying that the Applicant worked for the Opposer since the Applicant signed one of the Opposer's "Independent Contractor Agreements." The Opposer leaves out the fact that this document was signed in 2003, a year after the Applicant was using the PsyBari mark. The Opposer then goes on to claim that the "Applicant has no foundation or basis on which to guess at what [the Opposer] does or does not do, how [the Opposer] operates in its business or in what fashion it manages its business relationships." It is simply illogical to argue that the Applicant was working for the Opposer and then claim that the Applicant has no knowledge of the Opposer's business. In fact, although the Applicant, in fact, has never done business with the Opposer, the Opposer's business model is clearly stated on their web page (www.psybar.com) and the Applicant has intimate knowledge of forensic psychology organizations, similar to the Opposer, as he has worked for many over the past 15 years (see affidavit). These types of contradictions of logic are rampant in the Opposer's reply and alone should lead to an approval of the Applicant's Motion for Summary Judgment.

The Opposer's reply goes onto make eight bullet points but again offers no evidence of confusion, dilution or that the Applicant somehow benefitted from the Opposer's good will. For example, in bullet point 3, the Opposer states that they are the "nation's leading and best known specialist provider of forensic psychological and psychiatric assessment litigation services." In

spite of this repeated claim, they offer no evidence to support this and the Opposer's name does not even come up in a Google search for "forensic psychology companies" (D).

In Bullet point 6, the Opposer reports that they "immediately objected to the Applicant's" application for the mark PsyBari. They fail to mention that the Applicant filed for the mark after the Opposer made dubious attempts to get "licensing fees" from the Applicant and that the basis for the Opposer's opposition was previously unknown to the Applicant and in contradiction to the Opposer's previous acquiescence.

In bullet point 7, the Opposer states that "[The Opposer...routinely use[s] psychological tests akin to the Applicant's PsyBari." This claim is false. As can be seen in the Opposer's "Independent Contractor Agreement," the Opposer does not conduct psychological evaluations themselves but contracts out to third party psychologists. In effect, the Opposer claims to use psychological tests when in fact they do not. They hire independent contractors that use them. Additionally, the Opposer offered no evidence that their contracted psychologists use psychological tests "akin" to the PsyBari. In fact, the PsyBari is a unique test and there are no similar tests on the market (see affidavit).

The Opposer repeatedly states that their contracted psychologists perform "forensic" evaluations. They offer no evidence that they have ever conducted even one evaluation on an obese patient seeking bariatric surgery. Their web page makes no mention of doing evaluations for bariatric surgery or conducting scientific research. In essence, the Opposer's claim that they use tests "akin" to the PsyBari are patently false since they do not evaluate bariatric surgery candidates, nor do they conduct research, the two uses for the PsyBari test.

Finally, in bullet point 8, the Opposer states that the "use of the PsyBari" is confusing, there is significant overlap in the consumer base and the use of the PsyBari dilutes the Opposer's "famous mark." In spite of these claims, the Opposer offers no evidence of confusion or overlap of consumer base or that their mark is in fact famous. In fact, while both the Opposer and the Applicant provide psychological evaluations, these evaluations are done for entirely different

reasons and are completely distinct. Additionally, the psychologists that the Opposer contracts to do their psychological evaluations are all Ph.D.'s. They are therefore educated and knowledgeable about the differences between forensic and bariatric psychological evaluations. In fact, the users of the PsyBari test have to register in advance to use the test and demonstrate that they in fact, work with bariatric surgeons. Additionally, customers of both services engage in long-term relationships and are not making impulsive decisions where these types of mistakes could be made.

In the Argument section of the Opposer's reply they go on to refute the Applicant's arguments for Summary Judgment without offering any evidence to support their claims. In point 3, the Opposer states that the Applicant is simply adding the letter "i" on. They ignore the Applicant's previous explanation that the mark PsyBari uses the generic prefix "psy" to indicate psychological services and the generic "bari" to indicate bariatric surgery. As submitted in previous briefs, "psy" is a widely used generic term that indicates psychology, "bari" is a widely recognized generic term that indicates bariatrics, and "bar" is a generic term that is widely recognized in to indicate legal or forensic services (E). All three generic terms have been incorporated in multiple names that have received trademark status.

The Opposer goes on to state that their "customers can and do seek out bariatric tests" yet offer no evidence of this. They then claim that the use of the mark PsyBari will "damage" the Opposer but again they offer no evidence of any "damage" during the past ten years that both marks have been used. In fact, the Opposer later attests in the affidavit that, in fact, there has been no "deception," "misdescription," "confusion," or benefit from good will. The Opposer further states that the "damage" has not yet occurred since the "PsyBari test remains in the validation stage and has not yet received wide acceptance." In this statement, the Opposer is insinuating that the PsyBari test will receive wider adoption in the future, after it is validated. This statement is misleading, erroneous and particularly egregious. The PsyBari test has a very specific market (i.e., bariatric psychologists conducting evaluations or research with patients seeking bariatric

surgery). It is already widely adopted within this specialty. The Opposer's claims that the test is not yet validated are particularly egregious since the Opposer was sent the validation studies as part of the discovery process. As a clinical psychologist, the Opposer is fully aware of the meaning of these studies. This is one of many attempts by the Opposer to mislead readers that are not savvy about terms and concepts used in psychological evaluations.

The Opposer goes on to state that "the unmistakable truth that [the Opposer] conducts many forensic evaluation on medical patients who are candidates for, or more commonly, have completed, medical procedures including bariatric surgery." Again, the Opposer attempts to mislead the reader that is not savvy about psychological evaluations by presenting the possibility that a person that is seeking bariatric surgery or had bariatric surgery could be evaluated by the Opposer. What the Opposer leaves out is that persons that are seeking bariatric surgery have to be evaluated by a bariatric psychologist that is affiliated with a bariatric surgery program. These evaluations are not performed by forensic psychologists. So while the Opposer may see persons that are seeking bariatric surgery they are evaluating them for another reason. Additionally, if the Opposer evaluates persons that have already had bariatric surgery, they would have no use for the PsyBari test as it is only a test for persons seeking bariatric surgery.

The Opposer attached two separate affidavits from Dr. David Fisher, the Owner and Chairman of the Board of PsyBar. Most of these "sworn statements" are refuted above and many are refuted in the attached affidavit. It is curious that the "nationally recognized leader in forensic psychology" was unable to get any supporting statements from individuals other than their owner and Chairman of the Board, an individual that is clearly biased in this matter. This is also the same individual that two years ago had no concerns about the mark PsyBari as long as he received yearly "licensing fees." Now he is asserting that his "nationally recognized" firm will be damaged by a test that is used by a handful of psychologists in a specialty that has no connection to his. Of course, he offers no evidence and surprisingly, his own affidavits attests that there has been no "deception," "misdescription," "confusion," or benefit from good will.

In his initial affidavit, Dr. Fisher, the Opposer, attempts to portray the PsyBari test as something that is still “in development.” As mentioned previously, this is particularly egregious since Dr. Fisher was sent a copy of the validation studies as part of the discovery process. As a clinical psychologist, Dr. Fisher is well aware of the meaning of these studies (i.e., that the PsyBari test has already been validated). The Opposer then goes on to insinuate that since the Applicant spends no money on advertising and has few visitors to the web site, this is further proof that the PsyBari test has not been validated. In reality, the PsyBari test is introduced to bariatric psychologists at bariatric surgery conferences, not from the web page.

Dr. Fisher goes on to brag about receiving a citation from the American Psychological Association. This was a citation for “forensic assessment...for the benefit of the businesses, insurance companies, occupational health professionals, and unions across the United States.” It is curious that this is included as it seem irrelevant to his claims and provides evidence for the Applicant that, in fact, there is no overlap in the customers of the respective products, since the PsyBari test is not used by these organizations. The PsyBari test is only used by bariatric psychologist in clinical and research settings.

In bullet point two of the second affidavit, Dr. Fisher states that “an insurance company, attorney, employee assistance program or employer sends claimants to [the Opposer]...to determine whether somebody is an appropriate candidate for a medical procedure.” Again, Dr. Fisher is including information that is consistent with the Applicant’s claims that there is no overlap in the customer base. The organizations that Dr. Fisher listed are not the organizations that refer bariatric surgery candidates for evaluations. Bariatric surgery candidates are referred to bariatric psychologists by bariatric surgeons.

In the affidavits, Dr. Fisher offers no supporting evidence of lack of dilution, confusion, misdescription, deception or benefit of good will and then begins to speculate that it is possible that confusion could occur in the future if an unlikely series of events occurred. For example, Dr. Fisher states that “We anticipate [confusion] will be a common occurrence once the PsyBari test

emerges from its current research stage and becomes widely adopted by hundreds of psychologists nationwide.” This is one more attempt by Dr. Fisher to misdirect a lay audience. As discussed previously, the PsyBari test has been fully adopted and while its use may increase it will never be used by “hundreds of psychologists nationwide” since there are probably only a hundred bariatric psychologists in the United States.

In bullet point three of the Opposer’s second affidavit, he again demonstrates the weakness in his argument for confusion. He states “If the PsyBari test had been given by anyone, even a previous psychologist, it would almost certainly confuse the [Opposer’s] lay clients.” By saying “if,” Dr. Fisher is in fact verifying the Applicant’s claims that the PsyBari test has never been used by anyone related to his organization and as such no cases of confusion have occurred. He reiterates this in bullet point 4 where he states “**To our knowledge, the PsyBari test has likely not been administered, to date, in a forensic evaluation.**” He then goes on to erroneously state that this is because the PsyBari test is a “research instrument” (again trying to mislead the lay audience) when in fact he is aware that the PsyBari has been validated and is currently used in clinical settings.

Dr. Fisher then continues to state that the PsyBari test will be used in forensic settings in the future. This is another example of an egregious statement since as a clinical psychologist Dr. Fisher is well aware that this would be an inappropriate use of the PsyBari test and in violation of ethical standards. Dr. Fisher then goes in a strange direction and states that “In this venue, presurgical bariatric evaluations are forensic evaluations.” This statement is absurd and disturbing to hear from a clinical psychologist that has been working in the field of forensic psychology for at least 16 years. Forensic evaluations are required by various entities to verify psychological problems. Bariatric evaluations are voluntarily done by obese individuals that are seeking bariatric surgery. Therefore by saying “bariatric evaluations are forensic evaluations”, what Dr. Fisher is suggesting is that in the future health insurance companies will *require* their clients to undergo bariatric surgery the way that they can currently require a person to have a forensic

evaluation. Although healthcare is constantly evolving, there is no indication that insurance companies will be able to require bariatric surgery.

In Bullet point 6, Dr. Fisher is attempting to address a previous claim regarding his firm's possible use of the PsyBari test in the future. In previous affidavits, Dr. Fisher reported that since the PsyBari has been validated to assess sexual abuse/attack and his firm conducts evaluations on individuals that have been victims of sexual abuse/attack, he may in fact use the PsyBari in the future. Again, Dr. Fisher leaves out key information including the fact that the PsyBari is validated to assess sexual abuse/attack in bariatric surgery patients only. This means it cannot be used to assess sexual abuse/attack in forensic setting and doing so would violate the ethics of psychological testing. Again, as a clinical psychologist Dr. Fisher is well aware of this and these attempts to mislead the lay readers are disturbing and desperate. In the affidavit, Dr. Fisher goes further and states that there are "public presentations" about their work with sexual abuse/attack victims on their website. Surprisingly he provided none of this research in the discovery process and no research is available on his web site (www.psybar.com) or in Google Scholar (F).

In bullet point 7, Dr. Fisher again states that his customers will be customers of the PsyBari test in the "future." He is again validating that his customers do not currently use the PsyBari test and as stated previously in this document, the Opposer's customers will have no use for the PsyBari test now or in the future.

In bullet point 8, Dr. Fisher reports that "[The Opposer's] panel members, as well as [the Opposer's] principal psychologists, have collectively published many thousands of scientific papers. Under the [Opposer's name] psychologists have presented scientific information..." This again, is an attempt to say that the Opposer may use the PsyBari in the future as a research instrument. As stated previously, this will not occur as it is in inappropriate and unethical use of the PsyBari test. Additionally, in spite of the claim of publishing "thousands" of scientific papers, the Opposer again offered no evidence that they engage in scientific research and a Google Scholar search resulted in no hits (F). If the Opposer's organization had in fact published

“thousands” of scholarly papers, this would be a hard fact to hide. Google Scholar would find them instantly and this would have been mentioned in his presidential citation.

CONCLUSION

Given the Opposer’s initial acquiescence the Applicant’s use of the mark PsyBar, the continual changes to their claims, the lack of any evidence to support their claims, and the Opposer’s own affidavit stating that no “confusion,” “deception”, “misdescription,” “dilution” or benefit from good will has occurred, the Applicant respectfully requested that the Motion for Summary Judgment be granted for the applicant. The PsyBari test has become intimately connected to the name of its author, Dr. David Mahony, and a loss of the mark PsyBari, would cause irreparable damage to his career (G).

Respectfully submitted,

PsyBari

By: David Mahony Ph.D.

David Mahony, Ph.D., ABPP

PsyBari

30 Bayard St., Suite 1F

Brooklyn, NY, 11211

(718) 668-1919

Date: Aug 4th, 2012

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v.)

David Mahony, Ph.D., ABPP)

AFFIDAVIT OF DAVID MAHONY

STATE OF NEW YORK)

)

COUNTY OF KINGS)

I, David Mahony, having been duly sworn upon oath, deposes and says:

1. I am the owner and author of the PsyBari test, the Applicant in the above captioned matter and have personal knowledge of all matters contained in my Affidavit and all briefs filed in this matter.
2. I am the author of all of the Applicant's briefs in this matter and attest to the information being written in as truthful a manner as possible.
3. I initially developed the PsyBari test in 2002.

4. The PsyBari test has become intimately connected with the career of D. David Mahony and the loss of the mark PsyBari would cause significant irreparable financial and name recognition damage.
5. The PsyBari Test has continually used the mark PsyBari since 2002. The mark incorporates the generic term for psychology, “psy,” with the generic term for bariatrics, “bari.” These terms are used by hundreds of trademarked names.
6. The mark PsyBari has been discoverable on Google since 2002 and dozens of bariatric psychologists have contacted me in this manner.
7. The PsyBari web page, www.psybari.com, is registered to David Mahony and has been in use since 2005.
8. Since its inception in 2002, no one has ever confused the PsyBari test for the Opposer’s company.
9. Scientific research on the PsyBari has been published and presented in national bariatric surgery and obesity conferences since 2008.
10. The PsyBari test is well known in the bariatric surgery community and the name is used synonymously with its author, David Mahony.
11. The PsyBari mark has been used on multiple government and privately sponsored funding applications and receives funding.
12. Dr. David Fisher contacted me in June of 2010 and attempted to negotiate a “licensing agreement.” He acknowledged that his business had no complications due to the PsyBari test and that he did not even know of its existence until he was informed about it by his attorney, who found it on-line. Dr. Fisher demanded \$500 a year in “licensing fees” to use the PsyBari mark in spite of the fact that he had no demonstrated right to the mark.
13. In the two years since the trademark proceeding has commenced, the Opposer has provided no evidence of any of his constantly changing claims including deception, misdescription, dilution, confusion or Applicant’s benefit from his good will.

14. I have never benefitted from the good will of the Opposer.
15. I am fully knowledgeable about forensic evaluations performed by the Opposer as I have conducted them for other firms for the past 15 years.
16. Although I signed an agreement with the Opposer in 2003 I never worked for the Opposer.
17. The PsyBari is a validated psychological test, used by psychologists in research and clinical settings around the world. It is in full use at this time and is not “in development.”
18. The Opposer claims to engage in scientific research yet he has provided no evidence of conducting research and a Google Scholar search for the Opposer finds no hits.
19. The PsyBari is not designed or validated for forensic evaluations and use in these settings would constitute misuse of the test and a violation of the ethical use of a psychological test.
20. The PsyBari will only be used by bariatric psychologists.
21. Bariatric psychologists that use the PsyBari have to register in advance and demonstrate that they are working with a bariatric surgeon. The use of the PsyBari is not impulsive and done by individuals with Ph.D.'s. i.e., confusing the PsyBari test with the Opposer's company is not possible.
22. The PsyBari will not be used for other purposes in the future.
23. The PsyBari's customer base, bariatric psychologists, is not the customer base of the Opposer.
24. The Opposer's customer base of “attorneys, insurance companies, occupational health companies, and unions” is not, nor will they ever be, customers of the PsyBari.
25. The PsyBari will never be used in forensic psychology setting for research purposes.
26. The Opposer, or their customers, will not use the PsyBari now or in the future as it is an inappropriate use of a psychological test and a violation of psychological testing ethics.

27. The PsyBari has never been sold or licensed to the Opposer and will not be sold or licensed to the Opposer in the future as this is an inappropriate use of a psychological test and a violation of psychological testing ethics.
28. The Opposer offered no evidence in discovery or on their web page that they conduct pre-surgical psychological evaluations or that they ever intend to conduct such evaluations.
29. I will never use the PsyBari in forensic settings.
30. In 2010, Dr. David Fisher refused to agree that both parties resolve this dispute by agreeing to remain in their respective specialties (i.e., I would not develop tests for forensic evaluations and the Opposer would not conduct pre-surgical psychological evaluations).
31. The Opposer never responded to a request in 2011 to resolve the dispute by both parties agreeing to remain in their respective specialties (i.e., I would not develop tests for forensic evaluations and the Opposer would not conduct pre-surgical psychological evaluations).
32. The Opposer's claims that the PsyBari is not validated are erroneous. The Opposer was sent copies of the validation studies in the discovery process and as a clinical psychologist he is aware of the significance of these studies (i.e., that the PsyBari is fully validated).
33. The Opposer included multiple statements in their Reply and Memorandum of Law In Support Of Its Motion for Summary Judgment that were erroneous. These statements appeared to be designed to mislead individuals that are not savvy about the principles and concepts involved in psychological testing. This includes statements that the PsyBari is not currently validated and that the PsyBari will be used in forensic settings in the future.

34. There are currently no psychological tests similar to the PsyBari on the market. Although there are tests that are marketed for this purpose, the PsyBari is the only known test designed for bariatric surgery candidates.
35. There are no known or expected conflicts between the two marks in this matter.

Respectfully submitted,

PsyBari

By: David Mahony Ph.D.

David Mahony, Ph.D., ABPP

PsyBari

30 Bayard St., Suite 1F

Brooklyn, NY, 11211

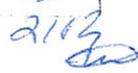
(718) 668-1919

Subscribed and sworn to before me

This 4th day of August, 2012



MICHELLE VAN TASSEL
Notary Public, State of New York
No. 01VA5039150
Qualified in Richmond County
Commission Expires February 13, 2007

2/13/12


AFFIDAVIT OF SERVICE

David Mahony, Ph.D. vs. PsyBar ,LLC

Opposition no: 91198483; Serial No: 85095429

STATE OF NEW YORK)
)ss.
COUNTY OF KINGS)

David Mahony, Ph.D., being first duly sworn, states that on Aug 4th, 2012, he served the following:

Applicant David Mahony, Ph.D./PsyBari's Reply Brief in Support of Motion for Summary Judgment

on:

James J. Kretsch, Jr.
5151 Edina Industrial Blvd, Suite 650
Minneapolis, MN 55439

by depositing in the U.S. mail, postage paid, copier thereof to said person.

David Mahony, Ph.D.

David Mahony, Ph.D.

Subscribed and sworn to before me

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Date	6-04-2010	Time	9:28AM	9:28AM	Duration	0.00 (hours)	Code	Follow-Up							
Desc	Phone with him about Psybari						Staff	David C Fisher							
Client	Mahony, David			MatRef			MatNo								
Alerts		(days before)	Follow	N	Done	N	Notify	N	Hide	N	Trigger	N	Private	N	Status
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Notes

::
He said he has had his website for 5 years and has 3 publications on the test. I asked h:
the name of his test and discussed our trademark. We will continue out talk next week.

Exhibit A
(1 of 1)



David Mahony <drdavidmahony@gmail.com>

FW: Psybari

1 message

David Fisher <fisher@psybar.com>

Wed, Jul 28, 2010 at 4:38 PM

To: "drdavidmahony@gmail.com" <drdavidmahony@gmail.com>, David Fisher <fisher@psybar.com>

Cc: James Kretsch <jkretsch@kretschgust.com>

Dr. Mahoney: Have you reached a decision on this? -David Fisher

From: dcfisher1@aol.com [mailto:dcfisher1@aol.com]

Sent: Wednesday, June 16, 2010 2:05 PM

To: David Fisher

Subject: Fwd: Psybari

Exhibit B
(1 of 2)

Dr. Mahony:

I spoke with our law firm about this matter yesterday. They confirmed that if I let this go, it would "dilute" the protection we have for our company name. The easiest solution, which would allow you to keep the name "Psybari" for your test, would be for both of us to sign a licensing agreement. Here's how it might work: For \$1 per year you could use the name for a time period we would specify. There would be a protect/indemnification clause, in the extremely remote chance you got sued for the test and somebody tried to come after PsyBar. The only significant fee, of at most \$500 (your expense), would be for our attorneys to draft the agreement.

As I said, I'm very sorry about this and am trying to work it out in the way that causes you the least expense and headache.

-Dave Fisher

David C. Fisher, Ph.D., LP, ABPP

President, PsyBar LLC

5151 Edina Industrial Boulevard

#675

Minneapolis MN 55439

Phone: 952-285-9000 x 11

Fax: 952-848-1798

www.psybar.com

From: dcfisher1@aol.com [mailto:dcfisher1@aol.com]

Sent: Thursday, June 03, 2010 11:48 PM

To: drdavidmahony@gmail.com

Subject: Psybari

Dr. Mahoney: I wonder if you could call me to discuss PsyBari. Thanks very much. -David Fisher
952.285.9000 x 11

Exhibit B (2 of 2)

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PsyBari

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Exhibit C
(10A2)

[Psychological assessments of bariatric surgery patients - NCBI](#)

www.ncbi.nlm.nih.gov/pubmed/20306154

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Development, reliability, and exploratory factor analysis of the **PsyBari**. Mahony D. Department of Psychiatry, Lutheran Medical Center, Brooklyn, NY 11220, ... You've visited this page 2 times. Last visit: 2/5/12

[Psychological Assessments of Bariatric Surgery Patients ...](#)

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[PsyBari - YouTube](#)

<https://www.youtube.com/user/PsyBari>

GoPro hand held & headcam video AND photos skiing "Canyons Resort", "Brighton Resort" and indoor surfing / Flowrider in Utah. DATES: Wednesday Marc.

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[PsyBari | LinkedIn](#)

www.linkedin.com/groups/PsyBari-4271255

Jan 26, 2012 - This is a forum to discuss the **PsyBari**, a psychological test for bariatric surgery patients.

[Standardizing Presurgical Psychological Evaluations with the PsyBari](#)

bariatrictimes.com/.../standardizing-presurgical-psychological-...

by D Mahony - Related articles

Sep 21, 2010 - by David Mahony, PhD, ABPP Dr. Mahony is a clinical psychologist from Lutheran Medical Center, Brooklyn, New York Funding: There was no ...

[David Mahony \(@PsyBari\) on Twitter](#)

twitter.com/PsyBari

Sign up for Twitter to follow David Mahony (@PsyBari).

[Psybari : Psych Evals for Bariatric Surgery Pt's](#)

health.groups.yahoo.com/group/Psybari/

New Questions. Description. This group is for mental health professionals who evaluate or otherwise work with bariatric surgery patients. Most Recent Messages ...

[Doc David Mahony, Ph](#)

www.connect2be.net/...users/.../PsyBari%20Instrument.doc

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PsyBari 2.1. PRE-BARIATRIC SURGERY ... 2011 David Mahony, Ph.D. To score this test goto WWW.PSYBARI.COM. **PSYBARI** 2.1. Abilify. Ambien ... You've visited this page 2 times. Last visit: 6/22/12

[PSYBARI - Reviews & Brand Information - David Mahony, Ph.D ...](#)

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[David Mahony | ResearchGate](#)

www.researchgate.net/profile/David_Mahony/

ABSTRACT: This study assessed sexual abuse/attack histories in 573 [corrected] bariatric surgery patients using the **PsyBari**. The prevalence rates found were ...

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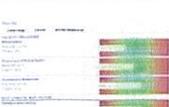
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