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

Proceeding	91198483
Party	Plaintiff PsyBar LLC
Correspondence Address	ROBERT A GUST BERNICK LIFSON PA 5500 WAYZATA BLVD, SUITE 1200 MINNEAPOLIS, MN 55416 UNITED STATES bgust@bernicklifson.com
Submission	Testimony For Plaintiff
Filer's Name	Robert A. Gust
Filer's e-mail	bgust@bernicklifson.com, bdarkow@bernicklifson.com
Signature	/Robert A. Gust/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Opposition No: 91198483
Serial No: 85095429

PsyBar, LLC,

Opposer,

vs.

David Mahony, Ph.D.,

Applicant.

DEPOSITION OF
DAVID FISHER
November 28, 2012
10:00 a.m.

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DEPOSITION OF DAVID FISHER, taken by and on behalf of Opposer, at 5500 Wayzata Boulevard, Minneapolis, MN 55416 on November 28, 2012, commencing at 10:00 a.m., before Kristin Hoium, Notary Public, State of Minnesota, County of Hennepin.

* * * * *

APPEARANCES

BERNICK & LIFSON
BY: Robert Gust, Esq.
8500 Wayzata Boulevard
Suite 1200
Minneapolis, Minnesota 55416
Appeared for Opposer

DR. DAVID MAHONY
30 Byard Street
Suite 1F
New York, New York 11211
Appeared for Applicant via telephone

I N D E X

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*** READING AND SIGNING NOT WAIVED ***
*** ORIGINAL TRANSCRIPT IN POSSESSION OF ATTORNEY ROBERT GUST ***

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DAVID FISHER,

a witness in the above-entitled action, having
been duly sworn, deposes and says as follows:

EXAMINATION

BY MR. GUST:

Q. Dr. Fisher, could you state your full name for
the record?

A. It is David Charles Fisher, F I S H E R.

Q. Could you briefly describe your educational and
professional background?

A. Well, I have a Ph.D. in clinical psychology that
I received in 1986 and I have been practicing as
a clinical psychologist and/or a forensic
psychologist for most of the past 16, 17 years.

I have worked in a variety of different
facilities, a lot of medical facilities. I have
worked for example with Abbott Northwestern
Hospital here in Minneapolis, Sister Kenny
Institute in Minneapolis where I have worked
with, again, many different medical populations.

And most recently for the past 17 years
or so I have been either the president or
chairman of the board of PsyBar. We do forensic
consulting which involves assessment.

Q. So let me ask you when was PsyBar the entity

1 formed?

2 A. 1995.

3 Q. And is that when you first started using the name
4 PsyBar?

5 A. Yes.

6 Q. And at some point you also trademarked that name?

7 A. Yes. That's correct.

8 Q. That's a matter of record, but do you recall the
9 date of that?

10 A. I believe it was in 1995. Maybe June or so.

11 Q. So the services that are provided by PsyBar, have
12 they been more or less the same since 1995 until
13 now in terms of the types of things that it does?

14 A. Well, they have gone through some sort of -- they
15 have gone through somewhat of an evolution. You
16 know, we have always done consulting services
17 that have included many things, giving people
18 direct advice, they involve producing
19 psychological and psychiatric evaluations,
20 steering people towards the right psychological
21 tests, other assessment procedures as well. But,
22 you know, the groups that we have serviced have
23 changed over the years somewhat, yes.

24 Q. As of right now how would you describe the
25 business of PsyBar?

1 A. Well, primarily our consulting involves providing
2 evaluations. And we provide evaluations for many
3 different kinds of entities. We provide them for
4 employee assistance programs, for attorneys, for
5 insurers, for employers. Almost exclusively lay
6 clients are our clients as well. And
7 psychologists and psychiatrists to a much lesser
8 extent are our clients but occasionally clients
9 nevertheless.

10 Q. So when you say lay clients you mean they are
11 people who aren't in the psychology or
12 psychiatric business?

13 A. Yeah. They are not terribly sophisticated
14 consumers of psychological assessment services or
15 psychological testing.

16 Q. And so for my benefit and I guess more for the
17 benefit of the Trademark Appeal Board, what is
18 the type of testing? I mean, what types of
19 issues do people hire PsyBar in order to provide
20 these consulting services?

21 A. Well, for example, if we are contacted by an
22 insurance company, say it is a health insurance
23 company, the health insurance company may ask us
24 to determine things like whether treatment is
25 recommended. Whether it is really appropriate or

1 not. And we will either do an evaluation of
2 somebody or we will review the medical records
3 and the medical -- the testing that has been done
4 on that person to help give an opinion.

5 We do a large number of independent
6 medical exams for disability, workers'
7 compensation and other kinds of insurers where
8 they come to us to, again, examine the past
9 psychological, psychiatric and other medical work
10 that has been done with somebody and issue a
11 report to help adjudicate a medical/legal matter
12 of some sort.

13 Employers come to us to help determine
14 if somebody is fit for duty, if they have a
15 psychiatric or psychological problem or if they
16 need other psychological or medical care
17 sometimes. And, again, our consulting will help
18 our clients obtain the best psychological or
19 psychiatric services in that case often by
20 issuing a report that includes the results of an
21 evaluation and often a detailed summary of past
22 medical services that have been provided to that
23 person.

24 Q. So your company -- generally what you are being
25 asked to evaluate is some mental health issue of

1 some individual in some capacity?

2 A. Generally but not exclusively mental health
3 issues. There is -- it is not an absolutely
4 clear distinction and sometimes our doctors are
5 asked to evaluate physical problems as well with
6 people.

7 An example is our psychiatrists. They
8 may be in an appropriate position to make
9 judgments regarding some physical issues as well.
10 And just the whole topic of clearly separating
11 out physical versus psychological problems is
12 very dicey. There are some problems with that.

13 Q. Okay. So who are the people who -- how many
14 employees does PsyBar have, direct sort of on the
15 payroll employees?

16 A. We have got I think 15 -- 14 employees now. And
17 then I think in addition to that are the two
18 owners, Dr. Fenwick and myself.

19 Q. And then how about as I understand you have a
20 network of psychiatrists and psychologists, is
21 that correct?

22 A. Yes.

23 Q. How large is that?

24 A. It's about 1,700, something like that. It
25 changes every year. We get rid of some people

1 and we add some people.

2 Q. And of that network of 1,700 are they all doing
3 work or are they just sort of all available if
4 work is -- if there is work in their geographic
5 area?

6 A. They are available. We use them as we need to.
7 So if we have an evaluation that needs to be done
8 in Dallas or Miami or South Carolina or wherever
9 it is, we will often call the doctor that is in
10 that area. Sometimes if we do file reviews, for
11 example, where we simply review the medical
12 records and issue a report to another entity like
13 an insurance company, we may use a doctor in,
14 say, Minnesota and they will review records from
15 across the nation.

16 Q. So in performing their services these people in
17 this network, do they ever do sort of direct
18 clinical exams like in I think you used the term
19 independent medical evaluations?

20 A. Yeah. It is very common. Probably I believe in
21 the majority of the services that we provide that
22 direct face to face evaluation is performed. The
23 person will come in to the doctor's office. The
24 doctor will have read the previous medical
25 records and will do usually a lengthy interview

1 and objective psychological testing and then
2 issue a report.

3 Q. And they issue the report to whom?

4 A. Well, they issue the report to PsyBar and then
5 PsyBar issues the report, turns the report over
6 to our clients.

7 Q. Okay. And so the work that PsyBar is doing and
8 that people in your network are doing is not
9 designed to treat the individuals. It is
10 designed to report with respect to the
11 individuals?

12 A. Yeah. It is essentially to help other
13 individuals make medical/legal decisions or
14 employment decisions, administrative decisions.
15 So our doctors do not establish what you might
16 think of as a typical doctor/patient relationship
17 with anyone that they evaluate.

18 Q. So can you give me some idea of the size or the
19 scope of PsyBar in terms of the number of
20 customers it has? You have already told me the
21 size of its network, but the number of customers
22 it has or quantity of something else that will
23 give us some scope.

24 A. Well, you know, we have been in business for
25 17 years. And so just during the course of

1 17 years of spending many hours in booths at
2 conferences and talking with thousands of people
3 on the phone we have made a lot of contacts. We
4 have worked probably with hundreds of Fortune 500
5 companies. You know, if you Google the name
6 PsyBar you will see many hits.

7 We spend a lot of money to become very
8 well known. Our marketing budget has increased
9 considerably this year. I think it is about a
10 quarter of a million dollars right now that we
11 use to reach people. That doesn't include some
12 salary which would be appropriately considered to
13 be marketing. That's probably more than doubled
14 since 2011 or so.

15 You know, in 2011 I'm sure we did over
16 30 presentations and seminars for corporations
17 and for conferences. Sometimes hundreds of
18 people were at those presentations.

19 Q. So who are the -- in terms of the -- by category
20 the type of people who would be familiar with
21 your name, with the name PsyBar? And maybe you
22 have touched on this a little bit before, but
23 obviously psychologists and psychiatrists who are
24 in your network would be, is that correct?

25 A. Yeah.

1 Q. And those psychologists and psychiatrists, they
2 are in your network but they are also practicing
3 psychologists and psychiatrists with their own
4 client base, is that right?

5 A. Yes. We are typically a very small portion of
6 the referrals that any of our individual doctors
7 get.

8 Q. And I'm curious, and we are going to jump ahead a
9 little bit, but Dr. Mahony has referred to
10 bariatric psychologists I believe was the term.
11 Is it your understanding -- I guess I will ask
12 this of Dr. Mahony later on -- that people who do
13 bariatric psychology is that all they do or is
14 that just sort of part of their practice, if you
15 know?

16 A. You know, I don't really know that I can speak to
17 that because I don't know any bariatric
18 psychologists.

19 Q. So to kind of get back to my point, so
20 psychiatrists and psychologists would be familiar
21 with the PsyBar name. Who else kind of by
22 category?

23 A. Well, certainly insurance companies. These would
24 include health insurance companies, they would
25 include disability, they would include liability

1 companies for example that insure people that
2 have been in car accidents and so forth. They
3 would include employee assistance programs. We
4 are probably the -- well, I would be very
5 surprised if we were not -- if somebody made a
6 case that we were not the best known company in
7 the nation that does this kind of assessment,
8 fitness for duty exams with employee assistance
9 programs.

10 We in fact pioneered a model. It is
11 called a fitness for duty evaluation facilitator
12 model that really has been adopted in many
13 respects both in the United States and in some
14 foreign areas. Ireland in particular I believe
15 is starting to use it. So we are very well known
16 in that group.

17 Attorneys to a lesser extent.
18 Certainly plaintiff and defense attorneys are
19 familiar with our work. Again, we have done
20 many, many thousands of evaluations over the
21 years.

22 Employers as well because employers
23 come to us either directly or through their EAPs
24 to help evaluate their employees in fitness for
25 duty evaluations.

1 Q. Maybe you could just expand a little bit. On the
2 fitness for duty evaluation, is that -- you have
3 used the term model. What does that mean? Is it
4 like a test? Is it like some other sort of
5 paradigm or what is that?

6 A. What has happened over the years or historically
7 is that employers and employee assistance
8 programs have gone directly to psychologists and
9 psychiatrists to perform evaluations on their
10 employees. PsyBar was very vocal about this
11 issue and made it known that we believed that
12 that was a bad model for them to follow. It
13 causes all kinds of problems.

14 For example, when they do that they are
15 often unable to correctly identify the best
16 psychologist or psychiatrist to perform an
17 evaluation. So part of our consulting service
18 with them is to teach them how to bring the right
19 doctor on board. What kind of credentials to
20 look for and so on and so forth. They are also
21 not typically in a good position to review the
22 reports to be sure they are done at the highest
23 quality.

24 So, again, our consulting services that
25 PsyBar provides includes that kind of report

1 review and educating our customers on how to be
2 good consumers of mental health evaluations.

3 And then also part of our consulting
4 services with those employers involves helping
5 them to interpret the results of the
6 psychological evaluations and psychiatric
7 evaluations that we provide.

8 Q. There has been in the documents some reference to
9 forensic versus clinical. Can you for the record
10 give us your understanding or offer an
11 explanation of what you think the differences
12 are?

13 A. Forensic and clinical psychology and psychiatry,
14 you know, the concept that you are talking to
15 generally has to do with a couple of things.
16 Number one is the type of assessment that is
17 performed. And in clinical assessment, you know,
18 in a general practice it is far more common for
19 the psychologist or psychiatrist to base their
20 conclusions on perhaps an informal records review
21 and their clinical judgment in talking with what
22 is usually their patient. That, you know, is
23 okay many times.

24 Forensic evaluations include those same
25 things. So of course there is a lot of overlap.

1 But forensic evaluations are somewhat more likely
2 to include objective psychological testing.
3 Things that will stand up in court, stand up
4 under scrutiny. Tests for example like the MMPI
5 which was originally developed of course for the
6 clinical population but then is adopted in
7 forensics. IQ tests as well are objective
8 psychological tests. The PsyBari is an objective
9 psychological test as well.

10 So that is one thing that somewhat
11 distinguishes the two fields but, again, there is
12 a lot of overlap. It certainly isn't clear cut.

13 DR. MAHONY: This is David Mahony. I
14 want to object to his reference to the PsyBari
15 when he has never seen the actual test.

16 MR. GUST: You object to his referring
17 to the PsyBari as objective because you feel he
18 has never seen your test, is that what you said?

19 DR. MAHONY: Yes. That's correct. My
20 objection is that Dr. Fisher is not in a position
21 to comment about the PsyBari since he has never
22 seen or used it.

23 MR. GUST: Okay. Maybe I should
24 clarify.

25 BY MR. GUST:

1 Q. Dr. Fisher, have you ever seen the PsyBari test?

2 A. Yeah. I have got a copy of it here and I have
3 read the articles.

4 Q. So you have some familiarity with it?

5 A. Yeah. I have never used it but I have read the
6 development articles and so forth that he
7 provided. And I believe I have a full copy of
8 the test with all of the questions that Dr.
9 Mahony provided.

10 Q. So as long as we are on this train of thought,
11 are there -- is this similar to other tests that
12 you -- that PsyBar uses in its work?

13 A. It is -- clearly it is a niche test. It is I
14 believe a well designed niche test. But the
15 basic procedures and in constructing the PsyBari
16 that I read about actually in an article last
17 night that Dr. Mahony wrote are similar, the same
18 to procedures that are used in conducting --
19 developing other objective psychological tests.

20 Let me say I want to add though that
21 I'm not -- I don't consider myself an expert in
22 test construction but I'm generally familiar with
23 the procedures that are used. And it is my
24 belief that this is considered to be objective
25 because of the data that are used, how it is

1 validated. It is not like a test where you ask
2 somebody to draw a house, a tree and a person and
3 then the psychologist comes up with some kind of
4 explanation about what that might mean.

5 Q. So in the work that PsyBar does through its
6 network of mental health professionals, do they
7 use other types -- tests of this type? I mean,
8 not necessarily on this particular issue but of
9 this objective type of test.

10 A. PsyBar uses -- PsyBar doctors use many, many
11 different objective tests. And that is very much
12 the preference.

13 Q. And do you -- to your knowledge have any of them
14 of ever used the PsyBari test?

15 A. No. Not to my knowledge. I don't know of any
16 that have actually used the test.

17 Q. Is it possible or likely or something else that
18 in the future that could happen?

19 A. Well, according to the materials that I read, and
20 this is information from Dr. Mahony, not that I
21 got, but at least according to that information
22 there are about a quarter of a million potential
23 candidates for bariatric surgery in the United
24 States in any one year. So assuming that the
25 test was appropriately used for those people just

1 once, that seems to be about a quarter million
2 chances of overlap each year.

3 Q. So all of the people who may have undergone the
4 PsyBari may be subject to some type of work that
5 PsyBar does at some other time?

6 A. Yeah. By that I don't necessarily mean that we
7 are going to be asked to evaluate them for the
8 appropriateness of bariatric surgery, although
9 that might occur, but that we would evaluate them
10 and that we would read the medical records and
11 have to report in detail on the results of prior
12 psychological testing as part of our evaluation.

13 Q. So before we had the objection we were talking
14 about forensic versus clinical. I just want to
15 make sure that I'm clear on this.

16 What PsyBar does is generally
17 considered forensic?

18 A. Yes. What we do is generally considered
19 forensic. I guess I would go a little bit
20 further than that to say that it is essentially
21 always considered to be forensic.

22 Q. And being forensic means you are not doing work
23 in order to provide patient guidance. You are
24 doing work to evaluate the various issues for
25 somebody else other than the patient.

1 A. Well, I want to rephrase what you said. We often
2 give treatment recommendations, but our doctors
3 only in extremely rare situations actually
4 provide any kind of treatment.

5 And for example, you know, this may
6 come up twice a year. If a patient comes in one
7 of our doctor's offices for a fitness for duty
8 evaluation for an employer and they are suicidal
9 and they present an imminent risk of harm to
10 themselves, then the doctor may have to intervene
11 sort of like a treating doctor and make sure that
12 that person is immediately hospitalized. That's
13 sort of a treatment relationship. But, again, it
14 is very, very rare that that will happen. And
15 occasionally they will give them feedback on
16 their results. But, again, that's --
17 99.9 percent of what we do there is really not a
18 typical doctor/patient relationship.

19 Q. And so in doing the forensic work that PsyBar
20 does do they just deal in mental health?

21 A. We -- you know, as I said before, there is not a
22 terribly clear distinction between the two, in
23 many cases between mental health and physical
24 issues. You know, for example like brain injury
25 and so forth. There is a lot of overlap.

1 For example, one of the things that we
2 do a lot of, I think a really good example of
3 where you are going, is we do many evaluations to
4 determine if people are appropriate candidates to
5 receive spinal stimulation therapy and
6 intrathecal pumps. These are chronic pain
7 patients that have usually back pain, leg pain
8 and so forth. And they are being -- their
9 insurance companies come to us and ask our
10 doctors to evaluate them to see if they are
11 appropriate candidates for one of these
12 implantable surgical devices for example from
13 Medtronic here in Minneapolis. Medtronic makes
14 both these implantable surgical back pain devices
15 and they also make, by the way, devices that are
16 used in bariatrics I believe.

17 And our doctors will assess those
18 people and, again, summarize the past
19 psychological testing that has been done in their
20 report that is issued by PsyBar, for example,
21 mentioning the MMPIs that have been given in the
22 past, the IQ tests that have been given in the
23 past, if they ran across the PsyBari that would
24 almost certainly be included in that report. And
25 then we issue a report to the insurance company

1 about whether that person is an appropriate
2 candidate for the spinal stimulation device or
3 the intrathecal pump.

4 Q. But is it the case that when PsyBar is involved
5 there is always at least a mental health issue
6 involved? In other words people don't come to
7 PsyBar to have you say review someone's knee
8 surgery as to whether or not the insurance
9 company did something right?

10 A. Not as of yet. Although we do have a contract
11 with one insurance company to do that we have not
12 yet done that. Essentially what we do are mental
13 health evaluations.

14 Q. Do you have other competitors that are strictly
15 sort of forensic mental health companies?

16 A. We do.

17 Q. And what do you think is sort of your market in
18 terms of relative size or whatnot compared to
19 people who just do what you do?

20 A. Well, you know, to my knowledge we are the
21 largest company like ours in the nation. That we
22 really in a practical sense only do the kinds of
23 evaluations that I have discussed so far. I know
24 there is another company called BMI that is here
25 in Minneapolis and overall they are a little bit

1 bigger than us, but a large percentage, I think
2 the majority of their work, is physical stuff
3 like neurology or gastroenterology or dental
4 evaluations and so forth. There are some smaller
5 companies that I believe to be smaller in the
6 nation. Of course I don't have -- I'm not privy
7 to their financial statements, but that's my
8 belief.

9 You know, we have got very strong
10 internet presence and I base my opinion on a lot
11 of that. You know, we also are on radio and TV
12 and we offer educational programs and so forth.

13 Q. So let me -- we moved ahead a little bit a while
14 ago to the PsyBari but let's kind of get to
15 logically where I wanted to go next.

16 First of all, does PsyBar have a prior
17 relationship with Dr. Mahony?

18 A. Yes. Limited.

19 Q. Why don't you -- just for the record what did
20 that consist of?

21 A. I believe our first contact with him was in about
22 July of 2003. And we got a letter I think from
23 Dr. Mahony when we were at one of our old suites
24 and he joined our panel at that time, signed our
25 contract. And then sometime after that I think a

1 few months later, maybe November in 2003, I think
2 he signed up but didn't take one of our online
3 courses. It may have been the one on fitness for
4 duty evaluations, but I'm not positive about
5 that.

6 Q. So did Dr. Mahony ever actually perform any
7 services for PsyBar?

8 A. No he didn't.

9 Q. But he had been qualified or something else that
10 would have allowed that to happen?

11 A. Yeah. You know, we have certain qualifications
12 for a network. They need to be licensed and they
13 have to have Ph.Ds or MDs or Psy.D. degrees.

14 He fulfilled those requirements. He
15 had a strong CV. We put him on our panel. But,
16 again, we didn't have anything in his geographic
17 area so we didn't use him.

18 Q. Your requirements for panel members, have they
19 been the same since 1995 until now or have they
20 evolved in some fashion?

21 A. They have been essentially the same since then.
22 Our contract is somewhat longer and more
23 detailed. We do have a specialty panel now that
24 is -- that has evolved somewhat and that is --
25 that's -- that will soon be on our website.

1 Those are people that we have certain contractual
2 agreements with price and we have a long history
3 of doing -- of them issuing high quality reports
4 for us.

5 Q. When did you first become aware of the PsyBari
6 test?

7 A. In June 2010.

8 Q. Do you recall how you became aware of it?

9 A. I think I did an internet search. I'm not sure.
10 I may have put in PsyBar and then -- occasionally
11 I will do that because I will want to check on
12 our internet presence. And then I will just go
13 through all of the Google hits and see if there
14 is anybody out there that is referring to us or
15 whatever.

16 I think that there is a bar in Nairobi
17 for example called the PsyBar. And things like
18 that pop up. And I believe, although I'm not a
19 hundred percent certain right now, that was a
20 while ago, that's how I ran across the PsyBari.
21 That Google confused us.

22 Q. So, again, I realize we touched on this a little
23 bit earlier, but what is your understanding of
24 the PsyBari test and the work that Dr. Mahony
25 does?

1 A. Well, Dr. Mahony's test is really involved in
2 doing psychological assessment. And most -- his
3 work I think most famously is psychological
4 assessment in bariatric surgery patients and
5 potential --

6 DR. MAHONY: I want to put in an
7 objection. He is not qualified to say what Dr.
8 Mahony does.

9 BY MR. GUST:

10 Q. Go ahead?

11 A. My understanding looking at his CV and reading
12 his articles is that's what he does. It may be
13 off but that's my understanding. And, you know,
14 that essentially the work that his test does and
15 that he does is to help insurance companies make
16 coverage and claim decisions. That the PsyBari
17 is a good, I believe, objective psychological
18 test and that insurance companies require that
19 before they pay for bariatric surgery.

20 So, again, the way that I conceptualize
21 his work is that it helps patients make the right
22 decisions about their health care and it helps
23 insurance companies make claim decisions
24 regarding their insureds.

25 Q. So based on your understanding of the PsyBari who

1 are the people sort of by category who you think
2 are likely to come in contact with the PsyBari
3 other than I guess the patients obviously? They
4 have to take the test. Who are the other people
5 who may come upon that in the course of what they
6 do professionally?

7 A. Well, psychologists of course. And it is, again,
8 a well designed test for psychologists to use in
9 this venue. I think psychiatrists will come
10 across it, although they aren't, I believe,
11 trained to be able to use it and interpret the
12 tests, but they certainly will read about it in
13 the medical reports.

14 The rest of the members of the medical
15 team that work with bariatric patients certainly
16 will read about the PsyBari results. Other
17 entities as well that read -- you know, that read
18 medical records. EAPs read medical records.
19 Attorneys read medical records. Insurance
20 companies of course of all types read medical
21 records and rely on medical records to make
22 coverage decisions. And, again, employers even
23 read medical records if they are self-insured
24 employers. There are occupational health
25 departments and HR departments who are employers

1 also would read about this test and certainly
2 other medical procedures.

3 Q. So at the beginning of this process I had asked
4 you about the types of entities that come in
5 contact with PsyBar and you gave me a list which
6 seemed similar to the list you just gave me. Is
7 there anybody that you can think of that PsyBar
8 regularly interacts with that doesn't have the
9 potential to also run into the PsyBari? Is that
10 question clear enough?

11 A. Yeah. You know, on one hand everybody, all of
12 our clients have the potential to run across it
13 either when they are researching PsyBar's name or
14 when they are reading our reports where we
15 summarize the past medical and physical treatment
16 that has been done with the people that we have
17 evaluated. You know, some certainly are not that
18 likely to run across it and some are very likely
19 to run across it. It just depends on what their
20 niche is.

21 So by that I don't mean to imply that
22 it is going to be under everybody's nose. With a
23 lot of our clients it will be a very rare
24 occurrence I'm sure and with other clients of
25 ours it will be much more common.

1 Q. And, I'm sorry, you said with insurers it would
2 be much more common?

3 A. I believe so, yeah. Insurers are demanding
4 apparently, again, from the materials that I have
5 read that have been provided to me this test.

6 Q. So how about --

7 A. Or this kind of evaluation prior to approving
8 surgery.

9 Q. How about -- so if an employer is self-insured
10 does that fall into the same category?

11 A. Yes. A self-insured employer, they pay the
12 benefits themselves and they typically hire a
13 third-party administrator to oversee the process.

14 Q. And in those situations that's the type of work
15 that PsyBar sometimes does as well is to give an
16 evaluation based on all of the underlying testing
17 that has been done?

18 A. Yes. The assessments that we provide in our
19 consultation business almost without exception
20 for insurance related matters contain a detailed
21 synopsis of past medical treatment. For example,
22 past IQ tests or past tests for brain injury,
23 past personality tests. Even school grades and
24 so on and so forth. Things that are reasonably
25 related to the current psychological issue should

1 be covered.

2 Q. So do you believe that there is a likelihood of
3 confusion in the future between the PsyBari and
4 PsyBar?

5 A. Yes, I do. Again, it varies depending on the
6 kind of client. Sometime it will be not much and
7 sometimes I think a lot.

8 Q. And do you think that there will be a false
9 suggestion that there is a connection between
10 PsyBar, that PsyBar is perhaps the author of the
11 PsyBari or vice versa?

12 A. Yes.

13 Q. Just to be clear, at this point you are not aware
14 of that having happened, is that correct?

15 A. That's correct.

16 Q. And what is your understanding of how widespread
17 the PsyBari is currently being used?
18 Understanding that your knowledge is limited
19 somewhat to what has been provided in this case.
20 But based on that what's your understanding?

21 A. There are two statements in the documents that I
22 have been given. I think one it was stated that
23 I think, quote, a few psychologists give it and
24 another had said a handful. So something like a
25 few and then something like a handful.

1 And then there was also a statement I
2 think in an early document, perhaps an affidavit,
3 that the test is given by psychologists in
4 exchange for data collection.

5 So, you know, again, I don't know what
6 a few and what a handful of psychologists means
7 exactly. I'm assuming five or 10 psychologists
8 give it regularly. Maybe they have given more
9 than a hundred a piece. I just don't know. But
10 given that there are a quarter of a million
11 potential uses of it every year, it seems to me
12 that the dissemination has been pretty minimal so
13 far. Although I might be wrong about that.

14 MR. GUST: Dr. Mahony, I have one
15 document I was going to mark as an exhibit. Are
16 you somewhere where I can scan it and email it or
17 fax it to you?

18 DR. MAHONY: Can you email it to me?

19 MR. GUST: I can probably email it to
20 you. It would take two minutes. I can go scan
21 it and email it to you. I mean it is not
22 revolutionary. It is just a Google search that
23 shows that if you type in PsyBari, Google asks do
24 you mean PsyBar.

25 Before I offer that it is probably

1 appropriate, unless you don't care, that I send
2 you a copy so that you can look at it.

3 DR. MAHONY: No. You can send me a
4 copy.

5 MR. GUST: So it is 10:42. Why don't
6 we take five minutes because it will take me that
7 much time. So maybe I will get something to
8 drink and then we will come back. So if you need
9 to step out of the room, just when we come back
10 we will all say, okay, we are back now. Does
11 that sound fair?

12 DR. MAHONY: Okay.

13 (At this time a recess was had.)

14 (Exhibit No. 1 was marked for
15 identification.)

16 MR. GUST: For the record, Dr. Mahony,
17 I have just marked as Exhibit 1 the same document
18 that I just sent to you. And obviously you will
19 be able to confirm this once this is online. So
20 I'm going to hand it to the witness and ask him
21 to identify it for the record.

22 THE WITNESS: It is a Google search of
23 the name PsyBari.

24 BY MR. GUST:

25 Q. So at the top in the little Google box what is

1 the word that is there?

2 A. PsyBari.

3 Q. And then what is the message that appears under
4 that?

5 A. Under that it says do you mean PsyBar.

6 Q. Now, have you at different previous times
7 conducted similar searches?

8 A. Yes.

9 Q. And why don't you -- did you have any what I call
10 paid responses show up to typing in either PsyBar
11 or PsyBari?

12 A. I have.

13 Q. For the record why don't you say what it was that
14 happened.

15 A. It doesn't happen every time but yesterday when I
16 put in PsyBari for the first time what happened
17 is a paid response, an advertisement came up for
18 one of our competitors, Medical Consulting.

19 DR. MAHONY: Are you referring to the
20 document we are looking at?

21 MR. GUST: No. I put in this document.
22 Now I have asked him about other times when he
23 has searched it.

24 THE WITNESS: One of our competitors
25 came up.

1 DR. MAHONY: I have to file an
2 objection. If there is no evidence in front of
3 us, I don't know what he is referring to.

4 MR. GUST: Noted.

5 BY MR. GUST:

6 Q. Go ahead.

7 A. I certainly didn't print it out, but I put in
8 PsyBari and then the Medical Consulting Network's
9 name came up. They are one of our competitors.
10 They have apparently used -- put PsyBar in as a
11 meditag (phonetic) for their marketing program.

12 Q. And for the record, what's your understanding of
13 what a meditag is?

14 A. Meditag is something that PsyBar used to do. I
15 don't think that we do it anymore. But we used
16 to have a Google marketing program. I don't
17 remember what that technical word is. But
18 essentially what you do is you tell the search
19 engine things that you want to -- when people put
20 those names or terms in, that you want them to be
21 directed to your page or you perhaps want an
22 advertisement that comes up on I think it was on
23 the right side of the page.

24 So for example what PsyBar did years
25 ago was we selected some of the names of our

1 major competitors and told I believe it was
2 Google that when somebody Googles the name of one
3 of our competitors that we wanted our ad to come
4 up. Then they click on our ad when it comes up
5 and we paid a small fee for each click I think
6 four or five cents, sometimes it was more, and
7 then they would be directed to our page.

8 Q. I think before the break we were sort of going
9 down this topic area of reasons why you think
10 PsyBari has the potential for causing confusion.
11 I'm not sure that we had finished that topic.

12 Are there other things about the name
13 or how it is used that you think create a
14 likelihood of confusion or a possibility of a
15 false suggestion of a connection?

16 A. Well, there are a few things. I think first of
17 all is its appearance. And I was looking at the
18 government document that was filed. I don't
19 recall what it is called but it is with the US
20 Patent and Trademark Office. And the
21 capitalization is the same. Capital P, capital
22 B. I'm not an expert in fonts but it appears to
23 me to be exactly the same font. So the physical
24 appearance to me is strikingly similar.

25 But also, you know, you asked me before

1 about the articles that I read.

2 Q. Let me interrupt.

3 MR. GUST: I forgot one thing, Dr.
4 Mahony. I'm sorry. This procedure is a little
5 different then what happens in court. So I am
6 going to offer into evidence Exhibit 1, the
7 document that I sent to you. And so if you have
8 an objection to that document being admitted into
9 evidence, this is your time to say you have one
10 and what the objection is.

11 DR. MAHONY: I have no objection. Are
12 you going to refer to it?

13 MR. GUST: Actually, I'm done with it
14 at this point. I was just putting it into
15 evidence as an example of what happens when you
16 go to Google. You type in PsyBari and it thinks
17 that you must have meant PsyBar. That's the
18 extent of it and he has already testified to that
19 part.

20 I understand you made an objection to
21 him referring to another time and that objection
22 is of record. So the only question is whether or
23 not you have an objection to the document I sent
24 you.

25 DR. MAHONY: No objection.

1 MR. GUST: Thank you.

2 BY MR. GUST:

3 Q. So, Dr. Fisher, you had started to reference
4 having read articles by Dr. Mahony in order to
5 get some understanding of it.

6 I guess for the record first of all
7 what are the articles if you -- not necessarily
8 by title if you don't know them. Were they
9 things that you independently researched or were
10 they things produced in litigation or something
11 else?

12 A. Yeah. The articles that were produced in the
13 litigation.

14 Q. They were produced by Dr. Mahony?

15 A. Yes.

16 Q. So you say you have read or reviewed those.

17 A. Yeah. I have reviewed them.

18 Q. So based on your review of those does that affect
19 your opinion of the likelihood of confusion?

20 A. Yes.

21 Q. What is it about those articles that has affected
22 your opinion of that?

23 A. First, you know, they seem to be very reputable
24 journals and it appears to be -- although they
25 are not journals that I read, Obesity Surgery and

1 Bariatric Times and Journal of Child Sexual
2 Abuse, these appear to be good peer reviewed
3 journals, although I haven't investigated that.

4 Q. Let me interrupt.

5 MR. GUST: Just for the record Dr.
6 Fisher has those articles in front of him so he
7 was looking at the documents in order to sort of
8 provide the title to those.

9 DR. MAHONY: Okay.

10 THE WITNESS: Also, it appears to me to
11 be a well done test. They are good size norm
12 groups that have been used for this. Hundreds --
13 it has been -- there have been studies validating
14 it with hundreds of people. And, you know, that
15 is very good. It doesn't seem to be a fly by
16 night kind of instrument.

17 So if it is something that is well done
18 it would seem to me that there is a lot of
19 potential for it to be used in the quarter
20 million or so surgical candidates that I
21 understand there are for this procedure each year
22 in the United States.

23 It is my impression, I have looked at
24 many catalogs from test publishers that publish
25 niche tests like this, and I don't -- there has

1 been no credible competition to this test, at
2 least that has -- that really has come to my
3 attention. I think in his articles he sometimes
4 talks about the sorry state of -- maybe I'm going
5 a little too far with that phrase but I will use
6 it again, the sorry state of some aspects of
7 assessment in this population and how his very
8 good test fills some of that gap.

9 But the other thing that really caught
10 my eye in reading the articles is that it does
11 have a validity scale measuring denial. It is
12 obvious of course that in forensics one of the
13 big issues is validity. Is somebody telling the
14 truth, are they not telling the truth or do they
15 seem to be in denial of problems that are
16 happening to them.

17 And so, again, I think that although
18 this certainly is not designed as a forensic
19 instrument, number one, that there is certainly
20 potential for it to be used in forensic venues.
21 And even if it is not administered directly in a
22 forensic evaluation, when a forensic psychologist
23 reviews the medical records and summarizes those
24 medical records in a report that is issued by
25 PsyBar, they are very likely to pay considerable

1 attention to the score on that test, the subtest
2 of the PsyBari that has to do with denial.

3 BY MR. GUST:

4 Q. So we have covered a fair number of things. This
5 is just kind of open ended.

6 Are there other things we haven't
7 talked about that occurred to you that indicate a
8 likelihood of confusion? We may have covered the
9 map already.

10 A. I think essentially we have covered everything,
11 yeah.

12 Q. Just give me a couple minutes to go through my
13 notes here. I might actually be done.

14 (At this time a recess was had.)

15 BY MR. GUST:

16 Q. Let me ask a couple summary questions which I
17 think we have covered but just to make sure.

18 Dr. Fisher, you are not contending that
19 your network is actually going to be offering the
20 PsyBari exam, are you or are you?

21 A. I am not contending that we are actually going to
22 be offering the exam because I don't know how it
23 is going to be rolled out. It may be that we are
24 asked to offer it just like we are asked to
25 evaluate patients about the suitability for other

1 surgical procedures, but I can't say clearly
2 whether that is going to occur.

3 I can say that we are virtually always
4 asked to summarize medical records. And if you
5 consider that being offered, offering a summary
6 of the test or even an interpretation of the test
7 scores if it was given by somebody else, that is
8 probably more likely to occur, but it is a little
9 bit -- I can't say exactly.

10 Q. So your expectation is that PsyBar's network will
11 encounter or is likely to encounter the PsyBari
12 test in connection with just what it normally
13 does because it will review sort of all medical
14 records of the people when it is conducting its
15 forensic work.

16 A. Yes. Absolutely.

17 Q. I don't think I have anything else.

18 MR. GUST: Dr. Mahony, are you still
19 there?

20 DR. MAHONY: Yes.

21 MR. GUST: Do you have anything?

22 DR. MAHONY: Sure.

23 EXAMINATION

24 BY DR. MAHONY:

25 Q. This is David Mahony. Dr. Fisher, you and I did

1 speak once on the phone previously.

2 To start with, for this deposition were
3 you at all prepared by your attorney?

4 A. We certainly have discussed the deposition and
5 topics that would come up in it.

6 Q. How much time would you say you spent on the
7 preparation with your attorney?

8 A. In the same room on or the phone? We probably
9 have talked for two hours about. I think we had
10 an hour and 20 minute meeting I think it was
11 yesterday maybe and we have talked a couple other
12 times briefly.

13 Q. And I wanted to go over your background just to
14 review.

15 A. Sure.

16 Q. You have a Ph.D. in clinical psychology?

17 A. Yes.

18 Q. You also mentioned previously that you had
19 received an award from the APA?

20 A. Yes.

21 Q. Can I ask who nominated you for that award?

22 A. That is one where you -- I believe it is one
23 where you dominate yourself. So I think I sent
24 in an application.

25 Q. Have you ever been arrested?

1 A. No. I have never been arrested. I have had one
2 speeding ticket in my life if that is relevant.

3 Q. Have you ever had your license revoked or denied
4 in any state?

5 MR. GUST: You are talking about his
6 professional license?

7 DR. MAHONY: I'm sorry.

8 BY DR. MAHONY:

9 Q. Do you have a license to practice?

10 A. I do.

11 Q. And how long have you had it?

12 A. I think -- again, this is getting to be a bit of
13 ancient history, but I graduated -- I believe I
14 got my Ph.D. in 1986. And I think that I
15 probably had to practice a couple of years under
16 supervision in Minnesota. And so actually I
17 think I was probably awarded the license itself
18 in 1988. I believe. You know, those years might
19 be off a little bit, but that's the best of my
20 recollection. I'm sure it is available with the
21 state.

22 Q. Was your license ever denied or revoked?

23 A. No.

24 Q. Are there any complaints filed against your
25 license?

1 A. Not to my knowledge.

2 Q. Are you a member of the America Psychological
3 Association?

4 A. Yes.

5 Q. Were there ever any complaints filed against you
6 there?

7 A. No. Not to my knowledge.

8 Q. Have you been denied clinical privileges in a
9 hospital or any mental health setting?

10 A. No.

11 Q. You had mentioned that the first time you became
12 aware of the PsyBari test was in June of 2010?

13 A. Yeah. I believe so.

14 Q. And you said that you became aware of it when you
15 did a Google search?

16 A. You know, I believe that is the case. Yeah, I
17 believe that's the case that I did it. I
18 discovered it. I don't know any other way that I
19 would have discovered it. I'm really sorry.
20 Again, I can't say that with a hundred percent
21 certainty but that's the best of my recollection.

22 Q. How often would you do this type of search?

23 A. Oh, you know, I probably do a Google search like
24 that once a year or so on our name. It is kind
25 of an informal process. Every once in awhile I

1 will just want to check to be sure there -- be
2 sure what people are saying about it and if there
3 are any problems. So I will Google search
4 PsyBar's name and then I will look through the
5 first page or two or sometimes go through more
6 pages of search results with our name in it.

7 Q. And the first time you put in PsyBar?

8 A. Yes. That's, again, to the best of my
9 recollection. Again, that's the way that I
10 believe that it happened. Certainly nobody came
11 to me with the name of your test.

12 Q. Previous to 2010 the PsyBari test was not -- did
13 not come up in those searches?

14 A. It is not something that I remember having come
15 up in the searches. Again, you know, maybe I
16 will just do it quickly. I will look at the
17 first page of results. You know, I just don't
18 know.

19 Q. When you did the searches were there other things
20 that came up that were concerning to you?

21 A. You know, again, this was a couple of years ago
22 so I just don't remember what else may have come
23 up. I think I was a little bit concerned about
24 the Psybar bar. Again, I think it is in Nairobi.
25 But I decided that that wasn't going to be a

1 problem.

2 Q. In 2010 when you contacted me, David Mahony, via
3 email, your attorney had brought the name PsyBari
4 to your attention?

5 A. No. That's not correct. I realized that that
6 was stated in one of the documents that we have
7 here, but I brought it to his attention. If you
8 direct me to that document now maybe I can shed
9 some light on it. But I do realize that that
10 misstatement was someplace in the records that we
11 have.

12 Q. Okay. I don't have it in front of me.

13 A. Okay.

14 Q. And so when the name PsyBari came up on a search
15 why was that concerning to you back in 2010?

16 A. Well, I was concerned about name confusion.

17 Q. Just to be clear I know that -- I think you have
18 addressed this before, but to be clear up until
19 2010 and even after, even up until today's date
20 there have been no incidences of your customers
21 or providers in your network confusing your
22 company with the PsyBari test.

23 A. Yes. That is absolutely correct. None that I'm
24 aware of.

25 Q. And if I understand it correctly when you're

1 talking about confusion, what you are saying is
2 that the PsyBari test may be cited in a
3 psychological report that is reviewed by some of
4 your providers?

5 A. Both that is reviewed by our providers and
6 potentially administered by our providers.

7 Q. So have any of your providers ever administered
8 the PsyBari test?

9 A. I have never asked. It may be that there are
10 because there are apparently only a handful of
11 people in the country that give it, but I can't
12 say that.

13 MR. GUST: Just to clarify, Dr. Mahony,
14 are you asking him whether they have -- the
15 providers have ever done it in connection with
16 PsyBar work or if they have ever done it at all
17 in their own independent practice? I'm assuming
18 the former because I don't know how this witness
19 would know otherwise, but I just want to clarify
20 that. Which was your question?

21 DR. MAHONY: Either. Have they ever
22 done it as a part of PsyBar work or to his
23 knowledge at all.

24 THE WITNESS: If they would have done
25 it as a part of PsyBar I probably would have

1 known it. And I do not believe that anybody has
2 ever given that test under PsyBar's name. I
3 would be astounded and I don't even think that
4 you make it available to people right now that
5 are outside of bariatric surgery centers.

6 Whether they have given it outside of
7 our company, again, I just don't know. My
8 assumption is from what I have read that either a
9 handful or a few people give it. The handful or
10 few people to me meaning five or 10
11 psychologists. They might not be in our network
12 so perhaps they have never given it. I could
13 answer that question if I had a list of the
14 psychologists that had given it and then I could
15 cross check that with our provider list.

16 BY DR. MAHONY:

17 Q. You mentioned that you have roughly 1,700
18 providers on your list?

19 A. Yes.

20 Q. Are those all mental health providers?

21 A. Yes.

22 Q. And roughly how many mental health evaluations
23 will your people conduct a year?

24 A. Do we do a year? I don't have a number. I know
25 we do about \$5 million in gross revenue a year.

1 And an average evaluation -- the prices for the
2 evaluations vary tremendously. A low priced
3 service maybe six, \$700. A high priced service
4 may be five, \$6,000.

5 Q. Would you say you do more than a thousand -- I'm
6 sorry. Would you say you do at least a thousand
7 evaluations a year?

8 A. Talk in terms of -- you know, in a week we --
9 right now we are probably providing services, and
10 this includes file reviews -- you know, I don't
11 know exactly how many. I would prefer -- and
12 that's rather confidential company information.
13 But I do feel comfortable in saying we do about
14 \$5 million. We are projected to break \$5 million
15 this year.

16 Q. And you consider yourself as known as a medical
17 examining company for mental health in the United
18 States?

19 A. Yes.

20 Q. Would you say you are the largest?

21 A. You know, again, I have not seen the financial
22 statements from all of our competitors. I know
23 that there are huge competitors that we have that
24 maybe do hundreds of millions of dollars that do
25 mental health evaluations along with many other

1 kinds of evaluations.

2 Q. I see.

3 A. We are certainly not bigger than them. And the
4 impression that I have, again, I can't say this
5 for sure and you may be able to produce a list of
6 10 strictly mental health private companies like
7 ours that are bigger than us and then I will be
8 shown wrong, but at least it has not been called
9 to my attention that there is another company
10 like ours that does essentially just mental
11 health assessment and services forensically that
12 is bigger than ours. But of course I may be
13 wrong but I haven't seen anyone's financial
14 statements.

15 Q. Would you know how many independent medical
16 examination companies are in the United States?

17 A. No. There are probably quite a few. I know that
18 many of them are being bought up these days by a
19 big company called ExamWorks so they are probably
20 -- there maybe fewer and fewer as time goes on.
21 There are a lot of mom and pop organizations.
22 And, again, I don't -- I just don't know how big
23 all of those are.

24 Q. For your organization you listed the types of
25 entities that purchase your services. Have

1 bariatric surgery centers ever purchased your
2 services?

3 A. I'm sorry, I couldn't quite hear your entire
4 sentence.

5 Q. In the beginning you listed organizations such as
6 the EAPs, attorneys, insurance companies,
7 employers who have purchased the services from
8 your company.

9 A. Yes.

10 Q. My question is have any bariatric surgery centers
11 ever purchased services from your company?

12 A. No. We don't provide clinical services, just
13 forensics. So we have never been approached by a
14 bariatric surgery center.

15 Q. Has your company ever done any evaluations for
16 patients seeking bariatric surgery in order to
17 get clearance for bariatric surgery?

18 A. Well, we have done evaluations on thousands of
19 obese patients, of obese people, who, you know,
20 with my understanding of it certainly maybe
21 potential candidates for it, but we have not been
22 asked -- we certainly don't have any kind of
23 expertise in doing evaluations on bariatric
24 surgery. I certainly wouldn't consider myself
25 competent to perform or oversee those kinds of

1 evaluations, at this point at least.

2 Q. In your evaluations -- scratch that.

3 You mentioned that the health insurance
4 companies are -- the word used was demanding
5 psychological clearance in order to receive
6 bariatric surgery.

7 A. Yeah. I got that not from my firsthand knowledge
8 but the materials that were presented to me in
9 this matter. I believe your affidavit perhaps
10 and maybe some other materials, an article or two
11 that you wrote mentioned that.

12 Q. Do you know any health insurance companies that
13 are requiring a psychological evaluation in order
14 for a bariatric surgery clearance?

15 A. Are you asking me do I know their names?

16 Q. Yes.

17 A. No. I don't know which ones are. The statement
18 I believe in maybe your article or your affidavit
19 was that it is pretty widespread. So my
20 assumption, although I don't know this to be
21 true, is that it would certainly be the larger
22 ones.

23 Q. Are you familiar with any of the governing
24 organizations that write the rules, regulations,
25 requirements for treatment in bariatric surgery?

1 A. If you name them I will tell you yes or no.

2 Q. American Society for Metabolic and Bariatric
3 Surgery.

4 A. No.

5 Q. Obesity Society.

6 A. No.

7 Q. Surgical Review Corporation.

8 A. No.

9 Q. Do you have an understanding of who requires --
10 who else other than insurance companies require
11 psychological evaluations for bariatric surgery
12 patients?

13 A. I know insurance companies because I got that
14 from you. I would assume also that their
15 surgical teams do. That kind of thing is pretty
16 standard in our field. But, again, this is not
17 an area that I specialize in like you do.

18 Q. Do you know any of the questions involved when a
19 patient is being reviewed for surgery for
20 psychological clearance for bariatric surgery?

21 A. Well, again, I haven't done those evaluations
22 myself, but I have looked at some of the issues
23 that you have cited in your reports. And I
24 believe that when you selected many of the items
25 for your test for the PsyBari that you initially

1 generated those items at least, you know, in
2 large part upon your experience assessing these
3 people clinically.

4 So my belief is that when you are
5 asking me what kind of specialized questions
6 should be asked that the hundred and some items
7 in the test would be many of those. I'm looking
8 at those now.

9 But, again, you know, very admittedly
10 bariatric surgery assessment on these patients is
11 not an area of specialty of mine like it is with
12 you.

13 Q. You mentioned that your customers may include
14 health insurance companies and the PsyBari test
15 results maybe sent to a health insurance company
16 for the process for clearance for bariatric
17 surgery.

18 A. I'm sorry, I didn't quite catch that whole
19 sentence.

20 Q. You mentioned that some of your customers are
21 health insurance companies.

22 A. Yes.

23 Q. Also you mentioned that the PsyBari test results
24 maybe forwarded to these companies as part of
25 bariatric surgery presurgical requirements.

1 A. Yes.

2 Q. Do you know any health insurance companies that
3 require to see the psychological test results
4 before they give approval for bariatric surgery?

5 A. No. Again, this is not an area that we have
6 offered services in before.

7 Q. Are you aware that it is the NIH recommendations
8 from 1991 that requires psychological evaluations
9 or that suggested that patients should receive
10 psychological evaluations for clearance for
11 bariatric surgery?

12 A. I believe I read something to that effect that
13 you wrote. If that's exactly what it said though
14 I can't say for sure. I do remember you
15 referenced an NIH recommendation.

16 Q. Are you aware that it is a requirement of most
17 bariatric surgery centers in order to fulfill the
18 guidelines of the American Association of
19 Metabolic and Bariatric Surgery Review
20 Corporation that the bariatric surgery candidates
21 receive psychological clearance previous to
22 surgery?

23 A. That's my understanding from you.

24 Q. The issue here is who do you think is requiring
25 the evaluations, the insurance companies or the

1 organizations that oversee the bariatric surgery
2 centers?

3 A. It is my understanding, again, this might be
4 wrong, that it is both. But, I mean, the bottom
5 line is that it is required. And it would seem
6 to me that a bariatric surgery center would want
7 to be in compliance with the national guidelines
8 and best practice standards, so that in a sense
9 that they would probably require it themselves if
10 they are any good. That they would follow those
11 national standards that have been set down. But,
12 again, that's your area of expertise.

13 Q. Also you mentioned that Medtronic -- are they a
14 client of yours?

15 A. They are not a client of ours. We have had a
16 number of discussions over the years regarding
17 their services and our services, however I can't
18 really discuss the matter anymore by virtue of an
19 agreement that we have.

20 Q. You mentioned that Medtronic makes devices for
21 bariatric surgery?

22 A. Well, I know that they make devices for chronic
23 pain patients. I saw a reference to Medtronic in
24 some materials and I believe that they have some
25 association with this as well. Maybe something

1 that you provided. Although exactly what they do
2 or if it is in the research stage or whatever,
3 you know, again, I don't know. Again, I might be
4 wrong on this because my specialty is not
5 assessment of bariatric patients.

6 Q. Do you know who users of the PsyBari test are?

7 A. Well, yes. I think that you have two general
8 types of users. You have first of all the
9 psychologists that administer the test. Now, a
10 handful or a few. But the secondary users of
11 your test are the people that purchase
12 evaluations. For example, insurance companies,
13 EAPs, TPAs working for employers, you know,
14 bariatric surgery centers. They are really the
15 secondary users for your test. All of those
16 entities that I talked about before as being
17 PsyBar clients.

18 Q. You are aware that only psychologists can
19 administer psychological tests such the PsyBari
20 test?

21 A. That's what you tell me and I believe that you
22 are -- that you are being accurate in saying
23 that. That they are the only ones that can
24 administer the test.

25 Q. I'm asking in a general sense about all

1 psychological testing. That only psychologists
2 are supposed to use psychological tests.

3 A. This is a very interesting issue to me in that as
4 psychologists you and I just want us to be able
5 to use these kinds of tests and of course there
6 are standards for education and training that
7 reputable test companies require purchasers of
8 these tests to fulfill. So in a very general
9 sense there are many tests, apparently including
10 the PsyBari, that only psychologists themselves
11 can purchase and administer.

12 However there are other professions
13 that are knocking at our door and administer
14 tests that we might consider -- we might think we
15 are the only ones that are capable of
16 appropriately administering and interpreting
17 these tests, nurses and occupational therapists
18 and so forth. So, again, there isn't a very
19 clear line but what you are saying about the
20 PsyBari I certainly do not -- I don't dispute
21 that.

22 Q. Okay. So if somebody -- a professional who is in
23 your network of providers who is a mental health
24 professional, they are some of the people who
25 will confuse the two names?

1 A. Well, again, that's an interesting topic. I
2 think certainly that the professionals in our
3 network are less likely to confuse the names than
4 are insurance companies, attorneys, employee
5 assistance programs and so forth.

6 Because you and I as psychologists for
7 example if we get a test booklet, a catalog of
8 tests, we -- when your test -- if it is
9 eventually commercially available and more widely
10 disseminated, we would be able to call the test
11 publisher up very easily and say, hey, is the
12 PsyBari test written by PsyBar. Is there a
13 connection between the two. Or a psychologist
14 maybe able to go to the internet and go to the
15 APA website and do an article search and see if
16 you as the author of the test is likely
17 associated with PsyBar.

18 Whether psychologists are going to be
19 that aggressive in checking it out, I just don't
20 know. Psychologists can jump to conclusions just
21 like anybody else. But I do agree that
22 psychologists are less likely than other groups
23 to experience confusion.

24 Q. So if a psychologist were to be confused about
25 the two names, how would that be a problem for

1 your organization?

2 A. I'm sorry, could you say that -- if a
3 psychologist were to be confused about the two
4 names?

5 Q. Right. If any of your providers became confused
6 about the two names, how would that be a problem
7 for your organization?

8 A. Well, a couple ways. Number one, if they didn't
9 like your test, and I have no -- it seems to be a
10 good test, but if they didn't like it they could
11 say that or they could say in their reports that
12 the PsyBari missed the mark on something and that
13 report could be disseminated to other health care
14 professionals that we have contact with or it
15 could be disseminated to some of our clients who
16 are the secondary users of your test. I think
17 also, you know, if -- you are asking me if it
18 confused psychologists, is that correct?

19 Q. I did, but my question was going to be in a
20 general sense in terms of your customers, the
21 insurance companies, attorneys, employers.

22 A. Let me say one more thing in response to your
23 first question about confusing psychologists.

24 You know, it certainly could be in
25 forensics that one of our psychologists, say a

1 PsyBar doctor, reviews the test in one of their
2 reports that PsyBar produces and then another
3 forensic person like a psychiatrist or
4 psychologist reviews it, reviews their report and
5 attacks my company PsyBar saying that our doctor
6 was biased in how they administered the PsyBari
7 test or how they interpreted the PsyBari test
8 because obviously there is a connection between
9 PsyBar and PsyBari.

10 There maybe other ways as well, but
11 those are the first two that come to mind. And
12 that response was really just limited to the
13 problems, the grief that it would cause us with
14 psychologists and psychiatrists.

15 Q. Does your organization do any research,
16 scientific research?

17 A. No. In the materials that we sent -- give me
18 just one second, please.

19 In the materials I have sent I have
20 said very clearly that our doctors and PsyBar's
21 principal psychologists do scientific research.
22 Nowhere have I stated that our company as an
23 organization does scientific research and
24 presents papers.

25 Q. Do any of your employees or professionals in your

1 network do research for your organization?

2 A. What would you define as research?

3 Q. Scientific research that is done in order to
4 improve the field that you are in or any other
5 field, conferences, maybe published in journals.

6 A. Our doctors do not perform research for our
7 company I believe in the manner in which you are
8 suggesting. Our doctors do give us many
9 recommendations about best practices to follow.
10 Our doctors will research -- they will do some
11 research in order to prepare for their
12 presentations for our company, but what you're
13 talking about when you use the word research I
14 believe is going out and designing a study and
15 collecting data and then potentially publishing
16 that in a scientific journal. No, we do not do
17 that and I have never represented ourselves as
18 doing that.

19 MR. GUST: Dr. Mahony, I have to
20 interrupt for a second. I just had a contact
21 lens pop out. Give me one minute so I can get
22 the case to put it in so it doesn't dry out.

23 DR. MAHONY: Take your time.

24 (At this time a recess was had.)

25 MR. GUST: Go ahead.

1 BY DR. MAHONY:

2 Q. In I believe you referred to it as Exhibit 1
3 which was a Google search for the word PsyBari,
4 the first thing that Google does is ask the user
5 if they meant PsyBar. How is that a problem for
6 your organization?

7 A. Well, you know, imagine somebody were -- I
8 think -- I don't know if people have a really
9 good understanding about why Google would confuse
10 them, but, again, I guess for me in general it
11 means that people see the two names together
12 spelled the same with identical fonts, just more
13 opportunity for that general confusion.

14 Q. Back in 2010 you contacted me, Dr. Mahony. You
15 offered a license to me, Dr. Mahony, with the
16 name PsyBari, is that correct?

17 A. I essentially said we could discuss that, yeah.

18 Q. Were you legally entitled to license that name?

19 MR. GUST: I object as calling for a
20 legal conclusion. You can answer if you know.

21 THE WITNESS: Yeah. I don't know. It
22 is a legal conclusion.

23 BY MR. MAHONY:

24 Q. How would a license for the name PsyBari have
25 helped diminish the problems such as confusion

1 that you are referring to?

2 A. Good question. And, you know, when I initially
3 contacted you about that it was really the first
4 time that this issue came to my attention. I had
5 not been confused about similar issues in the
6 past. So I was kind of struggling with a way to
7 allow you to use the word PsyBari and yet be sure
8 that it didn't have any impact on my business.

9 And for example one of the things that
10 was going along in my head was maybe on your
11 materials for the PsyBari or the publication for
12 the PsyBari you could say part of the licensing
13 agreement would be that you would say not related
14 to PsyBar. Maybe part of it would be that -- you
15 know, that you would protect us if there ever was
16 a lawsuit against the PsyBari and that was
17 confused with PsyBar.

18 I was kind of searching. And my hope
19 was that we could have come up with something
20 cordial along those lines and that those things
21 would really have protected me about it.

22 I talked more and more with my
23 attorneys about the issue after that and they
24 brought other legal issues to my attention.

25 MR. GUST: Let me interrupt you for a

1 minute. To the extent you had specific
2 discussions with your attorneys they are
3 considered privileged and if you disclose them
4 you will waive the privilege. Just so you are
5 aware of that if you decide you want to waive the
6 privilege. I don't recommend it. I just want to
7 caution you.

8 THE WITNESS: They certainly had other
9 material to bring to my attention that
10 discouraged me from continuing in that direction.

11 They essentially in a very general
12 sense told me that the remedies that I had in
13 mind to allow us to work this out cordially would
14 not achieve the goal that I had hoped.

15 BY DR. MAHONY:

16 Q. So your understanding -- I, Dr. David Mahony,
17 have offered to settle this matter in various
18 ways such as agreeing never to go into the field
19 of forensic psychology. Is it your understanding
20 agreements such as that, that that will not
21 protect you sufficiently?

22 A. Yes.

23 Q. Okay. I do not have any other questions.

24 MR. GUST: I believe that the witness
25 has the right to read and sign the transcript.

1 That's ordinarily the right in a deposition. I
2 will be honest, Dr. Mahony, I will have to
3 confirm that with the trademark people. But I
4 will ask Dr. Fisher would you like the
5 opportunity to read and review the transcript or
6 do you want to just submit it, assume it is taken
7 down correctly?

8 THE WITNESS: I would like to read and
9 review it. No offense to you.

10 MR. GUST: I figured that with it being
11 on the telephone.

12 As I said, I could be wrong. It may be
13 that right doesn't exist. I guess we will go
14 ahead and do it and if the trademark people say
15 we are not going to look at the revisions, that's
16 their prerogative. We can go off the record.

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Kristin Hoium
VERBATIM REPORTING
8906 ASHLEY TERRACE, SUITE 100
Minneapolis, MN 55443
Telephone 763-493-4535
Fax 763-493-4532

December 17, 2012

Robert Gust
5500 Wayzata Boulevard, Suite 1200
Mpls., MN 55416

Re: PsyBar vs. Mahony

Dear Mr. Gust:

With regard to the above-entitled matter, enclosed please find the Reading and Signing Certificate and transcript for the deposition of Dr. David Fisher.

Please have him complete the Certificate and retain a copy for your transcript.

Thank you for your cooperation. Feel free to call me if you have any questions.

Sincerely,

Kristin Hoium

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DEPOSITION CORRECTION PAGE

TITLE: PsyBar vs. Mahony

WITNESS: Dr. David Fisher

PAGE LINE DESIRED CHANGE/REASON FOR CHANGE

PAGE	LINE	DESIRED CHANGE/REASON FOR CHANGE
32	18	"MEDICAL CONSULTING" SHOULD BE "MEDICAL CONSULTANTS' NETWORK."
33	11, 13, 14	"MEDITALG" SHOULD BE "METH TAG."
63	5	"CONFUSED" SHOULD BE "CONFRONTED."
20	13-16	MEDTRONIC PLANNED TO ACQUIRE TRANSNEURONIX TO TREAT OBESITY. IT ALSO ADVERTISES SURGICAL INSTRUMENTS FOR BARIATRIC SURGERY.

Signature of Witness
Subscribed and sworn to before:

Notary Public Hennepin County of
Minnesota, December 18 2012

