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

Proceeding	91166574
Party	Defendant AgaMatrix, Inc. AgaMatrix, Inc. 411 Massachusetts Avenue, Lower Level Cambridge, MA 02139
Correspondence Address	Marina T. Larson, Ph.D. Marina Larson & Associates, LLC P O Box 4928 Dillon, CO 80435-4928 UNITED STATES mlarson@himtnpatents.com
Submission	Reply in Support of Motion
Filer's Name	Marina T Larson
Filer's e-mail	mlarson@himtnpatents.com
Signature	/marina/
Date	09/29/2006
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for Opposer says that the reference to questions about the authenticity of the documents falls far short of the standard for needing more discovery. If Opposer would like greater specificity, it can be said that the newly submitted evidence includes a document that is allegedly created before the date of first use alleged in the Notice of Opposition, that it is undated, that it was not previously produced, and that its distribution is uncorroborated by anyone but the interested party. Moreover, there is no extrinsic evidence (such as a registration of a dba or a fictitious name statement) that the alleged entity Salt Creek Laboratories ever existed, nor is there evidence of the transfer of rights from this alleged entity to Wavesense LLC. In short, outside of the context of raising an issue for opposing a motion for summary judgment, this document and the testimony supporting is inherently not credible and has all the earmarks of a forgery. Surely the authenticity of the documents and the veracity of the witness are real issues. If Applicant's counsel has a fault here, it is in exercising too much discretion and civility in the face of Opposer's ambush tactics.

Opposer also argues that because the date of use alleged in Applicant's motion is February 2003 that investigation into occurrences some 5 years prior cannot create a triable issue of fact. (Brief, Page3). Opposer submitted these documents, presumably with the intention of relying on them, and thus they must have thought they were of some relevance. Surely in this circumstance, Applicant cannot be denied the opportunity to inquire into whether the events really occurred, and whether they are cognizable under the trademark laws. For example, the Executive Summary is said to have been distributed to "prospective investors and/or business associates from approximately August of 1998 to October of 1999." (Ex. A and ¶ 9, Feistel Declaration) Were any of these people potential purchaser, such that this is actually a trademark-type of use? The Feistel Declaration does not say. Furthermore, there may well be issues of abandonment since the

products of Salt Creek Laboratories may not be the same the products of Wavesense LLC, or have the same customers.

It should also be noted that while the Salt Creek Laboratories documents were not specifically requested (since there is no hint in the Notice of Opposition that Wavesense LLC acquired rights from a third party) some of the belated document are Wavesense LLC documents, which had not been previously produced. Opposer's makes much of the idea that the motion for summary judgment was premature, and that Applicant's counsel somehow failed to meet and confer. In reality, Applicants counsel asked on several occasions both by telephone and in writing for any evidence of use of the mark in the time frame specified and the evidence that was produced was listed in its entirety in Applicant's motion. Perhaps it is the practice of Opposer's counsel to drag matters out to maximize attorney fees,[1] but that it not the practice of the undersigned. The evidence as produced and known to Applicant's supported Applicant's motion and the expenditure of additional money could not reasonably be justified.

Finally, Applicant's request that if the motion for additional discovery is denied and the motions for summary judgment is not also simply denied, that they be afforded the opportunity to

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[1] In fact, Opposer's counsel chose to pursue a deposition in this case prior to the entry of a protective order, which opposer's counsel prepared but still has not signed, with the result that a great many questions could not be answered.

address the insufficiency of Opposer's evidence to establish a basis for summary judgment in favor of opposer.

Respectfully submitted,

Marina T. Larson Ph.D.
Marina Larson & Associates, LLC
PO Box 4928
256 Dillon Ridge Road
Dillon, CO 80435-4928
(970) 262-1800

Attorneys for Applicant

Certificate of Service

I certify that this paper, Reply Memorandum in Support of Applicant's Motion for Further Discovery is being served upon the Opposer this September 29, 2006 by service, via first class mail, upon Opposer's counsel:

STETINA BRUNDA GARRED & BRUCKER
Stephen Z. Vegh
75 Enterprise, Suite 259
Aliso Viejo, CA 92656

Marina T. Larson, Ph.D.

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

WAVESENSE, LLC, Opposer, vs. AGAMATRIX, INC. Applicant	Opposition No. 91166574

REPLY MEMORANDUM IN SUPPORT OF APPLICANT'S
MOTION FOR FURTHER DISCOVERY

This reply is filed in support of Applicant's motion for further discovery and in response to Opposer's Brief mailed on September 15, 2006. As Applicants see it, there are two options available in this case: (1) the Board may grant Applicants motion for further discovery on the priority issue, and hold the motions for summary judgment in abeyance until such summary judgment is complete, or (2) the Board may deny the motion for summary judgment in which case discovery as to all issues will resume. Applicants submit, however, that on the present record the Board should not grant summary judgment on the priority issue in favor of either party because the evidence newly presented by Opposer to which Applicant cannot meaningfully respond without further discovery could give rise to a finding of priority, but it is not sufficient to support a grant of summary judgment.

Opposer's Brief argument that the motion should go forward (and therefore presumably that they should win on priority) is full of vitriol, but not much substance. For example, counsel