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

Proceeding	92060593
Party	Defendant Tushar Madhu Goradia
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Date	05/30/2016
Attachments	MOTION FOR DISCOVERY UNDER FED. R. CIV. P. 56(D).pdf(81663 bytes ) Affidavit in support of Motion for Discovery.pdf(29145 bytes ) Exhibit A Petitioners Responses to First Set Of Interrogatories.pdf(983698 bytes ) Exhibit B Petitioners Responses to Second Set of Interrogatories.pdf(2254923 bytes ) Exhibit C Petitioners Responses to First set of Requests for Admissions.pdf(157227 bytes ) Exhibit D Petitioners Responses to Second Set of Admissions.pdf(1161131 bytes ) Exhibit E Petitioners Responses to Second Set of Requests for Production.pdf(1456103 bytes ) Exhibit F Internet information regarding FDA classification of Transcutaneous electrical nerve stimulator for pain relief.pdf(2138404 bytes )

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

Cancellation Proceeding 92060593

In the matter of Trademark Registration No. 3341418

For the mark: NERVANA

Registration Date: Nov. 20, 2007

Nervana, LLC v. Tushar Madhu Goradia

**MOTION FOR DISCOVERY UNDER FED. R. CIV. P. 56(D)**

Registrant Tushar Goradia in accordance with Rule 56(d) of the Federal Rules of Civil Procedure and TBMP 528.06, hereby moves to stay ruling on Petitioner's Motion for Summary Judgment and requests that the Board either (1) defer consideration of Petitioner's Motion for Summary Judgment and allow Registrant time to take additional discovery and follow up on previous discovery; (2) deny it; or (3) issue any other appropriate order.

Timely and properly filed Rule 56(d) motions for discovery are generally granted as a matter of course. "The summary judgment process presupposes the existence of an adequate record. . . . This is particularly so when there are discovery requests outstanding or relevant facts are under the control of the moving party." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007).

Courts generally require a Rule 56(d) movant to establish three things: (1) a description of the particular discovery the movant intends to seek; (2) an explanation showing how that

discovery would preclude the entry of summary judgment; and (3) a statement justifying why this discovery had not been or could not have been obtained earlier.

## 1. DESCRIPTION OF THE PARTICULAR DISCOVERY REGISTRANT IS SEEKING

To determine if Petitioner has standing to bring the Motion for Summary Judgment:

Registrant moves the Board for an order:

- ✓ Instructing Petitioner to provide complete responses without objection to Registrant's Interrogatory Nos 24-34 (46 TTABVUE 24-27);
- ✓ Permitting Registrant to depose Petitioner's CEO and others in Petitioner's organization about the facts of this matter generally, the topics regarding the validity of Petitioner's trademark application(s) and standing, the validity of Ami Brannon being listed as an inventor on the patent application, what goods are intended to be contained in the applications, the channels of trade used or intended to be used, the manufacturing of the goods and where that manufacturing has or will take place, whether or not the goods are medical devices or 'intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals', the target market for the goods, the sophistication of the consumers, and the sales process, Petitioner's marketing efforts; and,
- ✓ Permitting Registrant to depose Petitioner's CEO about her responses to specific interrogatories.

All of the above are regarding Petitioner's standing and Registrant's related affirmative defenses and potential affirmative defenses.

## 2. INFORMATION OBTAINED FROM DISCOVERY WILL PRECLUDE THE ENTRY OF SUMMARY JUDGMENT

### LACK OF INFORMATION TO DATE

Information from discovery will show that Petitioner doesn't have standing to bring the summary motion. The application(s) pleaded by Petitioner lack a bona fide intent to use in commerce and are indefinite.

Registrant seeks further discovery, including testimony, regarding facts that pertain directly to standing and to the validity of Petitioner's applications as a basis for standing. Petitioner's responses to discovery are more noteworthy for the total lack of knowledge or disclosure from Petitioner regarding what the goods from SN 86492131 and SN 86272051 are going to be and their intended uses indicating that Petitioner has no bona fide intent to use the goods in commerce and has no standing for this summary judgment motion.

Both of the applications that Petitioner is attempting to base its standing on have been refused for indefiniteness. Petitioner brought this proceeding before answering the examiner's requirements to cure these indefiniteness claims. Registrant is entitled to discovery regarding the intended use of the goods, just as the examiner made this requirements.

SN 86492131: "Applicant must further specify the goods by its common commercial name, such as *"massage apparatus"*, or *"electrical nerve and muscle stimulators for providing transcutaneous electrical nerve stimulation, infrared heat and compression for medical or therapeutic purposes"*.

SN 86272051: "The wording "medical devices" in the identification of goods is indefinite and must be clarified because it does not specify the nature of the devices. See TMEP §1402.01. Applicant must amend the identification to specify the common commercial name of the goods. If there is no common commercial name, applicant must describe the product and its intended uses."

Registrant has been so far unable to get Petitioner to clarify through interrogatories or document requests the intended use of any of the goods and unable to clarify if any of the goods, including those identified by the examiner as the overly broad “medical devices” have any intended uses. Examples of interrogatories that have already been propounded that require a further inquiry are:

Interrogatory No. 23:

Describe in detail and identify the intended uses of each of the goods in Petitioner's SN 86492131 and SN 86272051 that are not devices under the definition: "Device" means any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including its components, parts, or accessories, which is: (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, or any supplement thereof, (b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or (c) Intended to affect the structure or any function of the body of humans or other animals, and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

Answer:

NERVANA incorporates by reference its General Objections above as though set forth in response to this interrogatory. NERVANA objects to this interrogatory on the basis of relevance, the Scope Objection. This interrogatory is not relevant to any asserted claims or defenses of any party in this proceeding, not likely to lead to the discovery of admissible evidence in connection herewith, and is well outside the permissible scope of discovery under Fed. R.Civ.P. 26(b)(1). Vagueness Objection as to the words "intended uses" and "devices." Calls for Legal Conclusion. Objection as the interrogatory is a contention interrogatory in that the interrogatory requests that NERVANA to explain or articulate a legal reason for the contention. Privilege Objection and Harassment Objection. Compound Objection.

Interrogatory No. 24:

Describe in detail and identify the intended uses of each of the goods in Petitioner's SN 86492131 and SN 86272051 that are devices under the definition: "Device" means any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including its components, parts, or accessories, which is: (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, or any supplement thereof, (b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or (c) Intended to affect the structure or any function of the body of humans or other animals, and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or

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