

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

WINTER

Mailed: October 24, 2016

Cancellation No. 92060593

*Nervana, LLC*

*v.*

*Tushar Madhu Goradia*

**BY THE TRADEMARK TRIAL AND APPEAL BOARD:**

This case now comes up for consideration of Petitioner's motion (filed February 2, 2016) for discovery sanctions and Respondent's cross-motion (filed February 8, 2016) to modify the parties' standard protective agreement; Petitioner's motion (filed February 16, 2016) to strike Respondent's affirmative defenses; Petitioner's motion (filed March 4, 2016) for summary judgment; Respondent's motion (filed March 18, 2016) to strike; Respondent's motion (filed May 26, 2016) to withdraw deemed admissions; and Respondent's motion (filed May 30, 2016) for discovery under Rule 56(d).<sup>1</sup>

**Motion for Sanctions and Cross-Motion for Protective Order**

By way of background, on January 1, 2016, the Board issued an order compelling Respondent to respond without objection to certain interrogatories and requests for

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<sup>1</sup> Respondent's motion to suspend (filed March 22, 2016) was addressed in the Board's order mailed on May 17, 2016 (43 TTABVUE).

production of documents propounded by Petitioner. In particular, the Board overruled Respondent's objection that certain documents are confidential, stating that the Board's standard protective order for the protection of confidential information is automatically in effect for this proceeding and, therefore, Respondent must (i) serve sufficient responsive materials on Petitioner and (ii) provide a privilege log for any information and materials being withheld on the basis of privilege (25 TTABVue 12, 14).

Pursuant to Trademark Rule 2.120(g)(1), Petitioner requests that the Board issue a sanction against Respondent for failing to serve responsive documents to requests for production of document nos. 6, 8, 14, and 23,<sup>2</sup> which are being withheld by Respondent on the basis that the documents are "commercially sensitive." Specifically, Petitioner requests the sanction of prohibiting Respondent from relying on said documents in this matter or an order requiring Petitioner to produce the responsive documents, as well as the previously ordered privilege log.

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<sup>2</sup> The four requests for production at issue are as follows:

6. All documents concerning the use of Defendant's Mark by you, Goradia Medical Corporation, 4003 LLC or by any third party.

8. All documents concerning your plans or preparation to distribute or sell products or offer services under Defendant's Mark.

14. All marketing plans, forecasts, projections, and documents concerning your marketing and sales plans for products and/or services sold, to be sold, advertised, or to be advertised, bearing Defendant's Mark.

23. All documents concerning the dollar volume of sales of any product and/or services associated with Defendant's Mark by you or any third party or licensee authorized to use Defendant's Mark.

In response, Respondent requests that the Board modify the parties' protective order so that Petitioner, including Gregory Maybeck of Maybeck & Hoffman PA (Petitioner's counsel), a co-founder of Petitioner, is excluded from receiving Respondent's assertedly commercially sensitive information. In particular, Respondent wants the Board to modify the parties' protective agreement in the manner in which Respondent proposed to Petitioner (see 28 TTABVUE 41). Specifically, Respondent (i) seeks modification of the protective order to ensure that *outside* counsel, as well as in-house counsel, do not have access to "trade secret/commercially sensitive" information, (ii) seeks to modify the definition of "attorneys for parties" to exclude in-house counsel, and (iii) wants to delete the statement that "Parties and their attorneys shall have access to information designated as confidential or highly confidential, subject to any agreed exceptions" (28 TTABVUE 39). As grounds therefor, Respondent asserts that Mr. Mayback is a co-founder of Petitioner (29 TTABVUE 15-16); that Mr. Mayback is one of the inventors on Petitioner's patent application (29 TTABVUE 23) and on two of Petitioner's provisional patent applications (29 TTABVUE 23; 30 TTABVUE 3); that Mr. Mayback is identified as having the power of attorney for two provisional patent applications of Petitioner's founders (31 TTABVUE 3, 4); the Mr. Mayback is also a trademark attorney (29 TTABVUE 3); and that the office of Petitioner's counsel, "Mayback & Hoffman, P.A.," has been advertised as the place of contact for Petitioner (see 31 TTABVUE 71, 74). Respondent also contends, *inter alia*, that it was bad faith for Petitioner to not identify Mr. Maybeck's role with Petitioner in its initial

disclosures, and points out that Mr. Maybeck's email address was not removed from Petitioner's email address until January 28, 2016 (27 TTABVUE 1). Respondent also argues that it has produced all available "necessary" documents except its commercially sensitive documents, which are not needed insofar as the documents that have been produced show that Respondent used the mark NERVANA during all the relevant times.

In reply, Petitioner contends that Respondent's arguments are an attempt to deflect from its failure to respond to the Board's compel order. Petitioner also emphasizes that Mr. Mayback is not involved with this matter, does not have access to emails addressed to "trademarks@mayback.com," and that the only persons that receive such emails are Catherine Hoffman and Julie Dahlgard (Petitioner's counsel) and Julie D'Abruzzo (Ms. Hoffman's assistant).

- ***Decision***

- A. Petitioner's Motion for Sanctions***

As regards Petitioner's motion for sanctions, said motion is essentially a motion in limine requesting that the Board preclude Respondent from presenting certain evidence on summary judgment or at trial. It is not the Board's practice to prospectively exclude any evidence which might be presented by a party at trial (or, presumably, in connection with a summary judgment motion or response), to the extent that such evidence is inconsistent with the non-movant's discovery responses, or consists of material that said party refused to provide during discovery due to relevancy or other objections, or consists of material that said party failed to produce

in discovery on the ground that it was non-existent or unavailable. *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 (TTAB 1995).<sup>3</sup> In view of the foregoing, Petitioner's motion to prospectively exclude evidence for failing to produce documents responsive to request numbers 6, 8, 14, and 23 is **denied** as premature.

Nonetheless, the failure of Respondent, who is represented by counsel, to respond to Petitioner's discovery and to the Board's order requiring Respondent's responses thereto is wholly unacceptable. Therefore, another sanction for Respondent's failure to obey the Board's order is appropriate. When a party fails to comply with an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2), including entry of judgment against the disobedient party. *See, e.g., MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000); *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984); *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 USPQ 99 (TTAB 1976); and TBMP § 527.01 (2016). Sanctions may also include striking all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; or prohibiting the disobedient party from introducing designated matters in evidence. Further, while it is true that the

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<sup>3</sup> The better practice is to file a motion to strike or otherwise object to such evidence after it is introduced, identifying the specific evidence objected to and the asserted basis for exclusion thereof. If the objection is one that cannot be cured promptly, the adverse party may wait and raise the objection in or with its main brief on the case. TBMP § 527.01(f) (2016).

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