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

Proceeding	92057455
Party	Defendant Old Grey Foundation, Inc.
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Attachments	SUM J COUNTER REPLY.pdf(372472 bytes) EXH 17.pdf(250285 bytes)

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

In the Matter of Registration No. 3649427 owned by Old Grey Foundation, Inc. for the Mark:
TXST: International Class 36; Registered on July 7, 2009

Board of Regents, The Texas State
University System

Plaintiff

v.

Old Grey Foundation, Inc.,

Respondent

Cancellation No. 92057455

**RESPONDENT'S REPLY BRIEF TO PETITIONER'S RESPONSE TO
RESPONDENT'S COUNTER-CLAIM FOR SUMMARY JUDGEMENT
AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF**

Old Grey Foundation, Inc. ("Respondent"), a 501(c)(3) non-profit, registered Texas Corporation for the exclusive benefit of Texas State University Renegade Rugby Football Club, a charitable organization having an address at 104 W. Mimosa Cir., San Marcos, Texas 78666 (*See* Respondent Exhibit 13), submits this Respondent's Reply Brief to Petitioner's Response to Respondent's Counter-Claim Motion for Summary Judgment and Memorandum of Authorities in Support in the above-referenced cancellation action.

I. INTRODUCTION - RESPONSE

A.

Petitioner suggests that Respondent's Affirmative Defenses are invalid. Such is not the case and the Affirmative Defenses are not only valid, but Petitioner has failed to present any evidence contrary to the pled Affirmative Defenses raised and supported by the evidence.

In support of Petitioner's contention(s), Petitioner simply repeatedly states:

“Respondent admitted to the USPO that the mark at issue (“TXST”) was intended to refer to Texas State University”. *See* pp. 2 ¶2, 4 ¶3, 6 ¶2, 7 ¶1, 9 ¶2, 10 ¶3, 12 ¶1, all of which simply ignore that the mark “TXST” was not intended to refer to Petitioner itself, but rather only as it relates directly to and in reference to Texas State University Renegade Rugby Football Club and not Petitioner as a whole. This continued misrepresentation of the evidence has been repeatedly corrected and demonstrated by the evidence.

B.

Petitioner fails to make any of the requisite, detailed objections to, nor contests or objects to the reliability or truthfulness of the Exhibits submitted in support of Respondent’s Counter-Claim for Summary Judgment and Memorandum of Authorities in Support Thereof, as is required.

Respondent Exhibit Nos. 1-2 & 9-16 are self-authenticating public records, relevant, further authenticated by the attached Authenticating Affidavit and can be further authenticated at trial by numerous sponsoring witnesses.

Respondent Exhibits 1-8 have either been provided by Respondent to Petitioner as either Exhibits to its Answer and/or Request for Production and/or during Deposition and are documents that are, or should be in the possession of Petitioner, but have not been produced in response to Respondent’s Request for Production.

Respondent presents an Authenticating Affidavit (*See* Respondent Exhibit No. 17) as an exhibit to this Reply Brief in accordance with Fed.R.Civ.P. 56(e) and in support of Respondent Exhibit Nos. 1-16. Respondent requests the Board allow submission for consideration in support of and as supplementation of Respondent’s Counter-Claim for Summary Judgment and Memorandum of Authorities in Support Thereof. This requested

supplementation is requested out of an abundance of caution and based upon Petitioner's concerns/objections referenced in Petitioner's Response to Respondent's Counter-Claim for Summary Judgment and Memorandum of Authorities in Support Thereof.

As the Board is aware, under Fed.R.Civ.P. 56(e), the Board may permit the parties to supplement their summary judgment affidavits or to submit additional affidavits. In light of the objections by Petitioner, Respondent moves the Board to exercise discretion under the rule in favor of considering the additional evidence offered with Respondent's Reply Brief. *See* Fed. R. Civ. P. 56(e), *See also, Shalom Children's Wear Inc. v. In Wear A/S*, 26 USPQ2d 1516 (TTAB 1993).¹

Respondent relies upon Rule 56 of the Federal Rules of Civil Procedure as authority, which governs the procedure by which the court must review objections to the admissibility of evidence presented in connection with a motion for summary judgment. As the Board is aware, Rule 56 was revised in 2010 and in most respects, "works a sea change in summary judgment procedure and introduces flexibility in place of the bright-line rules that are obtained previously." *See, ForeWord Magazine, Inc. v. OverDrive, Inc.* 2011 U.S. Dist. Lexis 125373, Case No. 1:10-cv-1144 (W.D. Michigan 2011). Former Rule 56(e) contained an unequivocal direction that documents presented in connection with a summary judgment motion must be authenticated, however a more inclusive view is now applicable under the present rule. The revised Rule contemplates that the proponent of evidence will have the ability to address the opponent's objections and allows the court to give the proponent "an opportunity to properly support or address the

¹ If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact.

fact,” if the court finds the objection meritorious. FED. R. CIV. P. 56(e)(1). *Id.*

Respondent Exhibit Nos. 1, 2, 4, 6 & 7 are copies of letters or agreements sent by and/or entered into by Petitioner’s attorney and/or agents with and to Respondent. Respondent Exhibit No. 14 (Courtney Affidavit) attests that these exhibits are true copies of letters sent and agreements entered on the date each bears. One of the nonexclusive methods of showing authenticity is by testimony of a witness with knowledge, attesting that a “matter is what it is claimed to be.” FED. R. EVID. 901(b)(1). Mr. Courtney’s testimony authenticating letters sent to him and/or agreements he signed is sufficient. *See Love v. Nat’l Med. Enterprises.*, 230 F.3d 765, 776 (5th Cir. 2000) (affidavit of person with knowledge sufficient to authenticate record).

Respondent Exhibit Nos. 3 & 5 purport to be documents that are business records kept in the normal course of business by Respondent and are originated by Petitioner.

Respondent Exhibit No. 8 is an Agency Agreement between Collegiate Licensing Company and Petitioner and is a Public Record obtained via Public Information Act from Petitioner.

Exhibits 9–16 are screen shots of Internet websites. All of which represent current content of websites. All of these exhibits, excepting No. 14, are government websites. Respondent Exhibit 17 identifies each of these as a true and accurate copies of the content found on the Internet sites identified in the affidavit. “The Federal Rules of Evidence, including Rule 901, apply to computer-based evidence in the same way as they do to other evidence.” 5 WEINSTEIN’S FEDERAL EVIDENCE § 900.05(1)(b) at 900-50 (2d. ed. 2004). The federal district courts have applied the concepts embodied in Rule 901 to questions involving authentication of screen shots from Internet websites.

Although records from government websites are generally considered to be self-authenticating, *see Williams v. Long*, 585 F. Supp. 2d 679, 686-89 (D. Md. 2008), exhibits reflecting information from commercial websites must be authenticated by one of the methods allowed by Rule 901, including testimony from a witness with personal knowledge, expert testimony, or reference to distinctive characteristics. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 556 (D. Md. 2007). The lower courts generally hold that an affidavit of a witness, when viewed in combination with circumstantial indicia of authenticity (such as the existence of the URL, date of printing, or other identifying information) would support a reasonable juror in the belief that the documents are what the proponent says they are. *See, e.g., United States v. Meienberg*, 263 F.3d 1177, 1181 (10th Cir. 2001), *Firehouse Restaurant Group, Inc. v. Scurmont LLC*, No. 4:09-cv-618, 2011 W.L. 3555704, at *4-5 (D. S.C. Aug. 11, 2011); *United States v. Standring*, No. 1:04cv730, 2006 WL 689116, at *3 (S.D. Ohio 2006); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002). Once this “minimal authentication requirement” is met, arguments concerning the accuracy of the printouts go only to weight, not admissibility. *Meienberg*, 263 F.3d at 1181. The Authenticating Affidavit (Respondent Exhibit No. 17), along with other indicia of reliability (such as the Internet domain address and the date[s] of printout) are sufficient to authenticate these exhibits under the foregoing authorities.” *See, ForeWord, Supra.*

II. ARGUMENT REPLY

A. LICENSEE ESTOPPEL

Petitioner would have the Board believe that Licensee Estoppel is dead. To the contrary it is alive and well, fully recognized and applicable to the present case at hand. Petitioner suggests that *WCVB-TV* contradicts Respondent’s position, however Petitioner

overlooks the case's true authority, as applied herein. The most important factor relating to "licensee estoppel" in *WCVB-TV* and applicable to the case at hand is the mere fact that the Court recognized its validity.

Contrary to Petitioner's position that licensee estoppel is inapplicable, *WCVB-TV* does not contradict Respondent's stated affirmative defense. The *WCVB-TV* decision actually reveals Petitioner's failings in this regard. As required under *WCVB-TV*, Petitioner presents absolutely no "post-license facts, after the license has expired" to either support their claims, nor rebut the affirmative defenses presented.

As detailed above and authenticated by Respondent's Exhibit No. 17, Respondent's Exhibit No. 1 is a true and correct copy of the Trademark Licensing Agreement entered into between Petitioner and Respondent on April 13, 2010, signed by myself on behalf of Respondent as General Counsel, Secretary and it's Registered Agent and William Nance, Vice-President of Finance of Petitioner and Counsel for Petitioner, Mr. William Fly and authenticated by Scot Courtney in interrogatory and admitted by Petitioner. This is also a public document obtained via Public Information Act request and produced by Petitioner in compliance with Texas Attorney General PIA ID#501765 on August 13, 2013.

Petitioner further suggests that Respondent has "provided no authority or proof whatsoever that indicates that Petitioner knew of Respondent's representation to the USPTO that the TXST mark was intended to refer to Petitioner." Respondent's U.S. Registration No. 3,649,427 of the mark "TXST" was a part of the Licensing Agreement as Schedule A (*See* Respondent's Exhibit No. 1) and Petitioner is painfully aware that the exhibits and testimony reflected in the sole interrogatory repeatedly demonstrate that the

mark “TXST” was intended to refer specifically to the Texas State University Renegade Rugby Football Club. Such a statement is not only misrepresenting the facts, but disingenuous to the Board. Petitioner has been aware that Respondent was a registered non-profit corporation since at least 2009, when it entered into the Licensing Agreement (*See* Respondent Exhibit No. 1). Additionally, Petitioner was aware of Respondent’s registration of “TXST”, as it is specifically referenced in the Licensing Agreement and as reflected in the records of the United States Patent and Trademark Office, Respondent’s use of reference of the mark “TXST” is plainly set forth in that application and petition to revive which specifically states:

“TXST’ does stand for TEXAS STATE as it specifically relates to the usage of TXST by Old Grey Foundation, Inc. in its efforts to promote itself in association with Texas State University Rugby Football Club, as well as usage by Texas State University Rugby Football Club at the suggestion of and with permission of Old Grey Foundation, Inc. as is consistent with its stated purpose and mission.”

(*See* Petition for Cancellation Exhibit No. 6, pg 2. ¶7)

Petitioner would suggest that Respondent must inure upon Petitioner some knowledge of usage and intended references, whatever they may be, to assert this Affirmative Defense. Petitioner has presented no evidence in rebuttal to this Affirmative Defense, nor authority in support of their contention relating to Respondent’s stated usage and reference.

While rigid application of the Licensee Estoppel Doctrine may not be mandated, the facts in this matter are clear. Petitioner entered into a valid licensing agreement with Respondent, who holds an enforceable intellectual property right in the mark “TXST”, just as they have when licensing their own trademarks, using the same legal counsel (William “Bill” Fly-University Attorney) and representatives (William Nance-Vice-

President of Finance) for over twelve (12) years. Petitioner recognized the mark, was informed of the U.S. Registration, was familiar with Respondent, Respondent's uses, stated corporate mission, as well as its beneficiaries, even settling with Respondent over a breach in the License Agreement during its term. Once the Licensing Agreement terminated, Petitioner now seeks to strip the lawful and rightful owner of its property, for its own enrichment. Absolutely no post-license facts have been pled or proven by Petitioner to justify the non-application of licensee estoppel. Petitioner simply likes the idea of and sees a potential in its use of the mark for itself and does not wish to be constrained by the laws that protect property the rights of others.

B. ABANDONMENT

Petitioner has presented no evidence of any steps Petitioner has taken, at any time to enforce or protect the mark "TXST", much less the mark "Texas State". Conversely, Respondent has presented evidence of Petitioner's affirmative actions denouncing and discouraging use of the mark "TXST", in favor of other marks they see fit best represent Texas State. These policies and directives are comprised of public statements and Petitioner's own adopted and published policies (*See* Respondent Exhibits 15 & 16).

Petitioner not only suggests that other entities' usage of the term "TEXAS STATE" in some way diminishes Respondent's affirmative defense of abandonment, but also that others who use the term to directly associate themselves with Petitioner in some way increases the significance of the mark "TEXAS STATE". Petitioner continually advances the argument that Respondent has in its registration of the mark "TXST" created a false connection with Petitioner that may cause confusion. Petitioner not only disregards the use by other entities unassociated with Petitioner, but also simply

overlooks and turns a blind eye to those entities' that explicitly use the term "TEXAS STATE" to do so.

Petitioner's argument more significantly emphasizes Petitioner's complete failure to not only take any measures to protect any interests in the mark "TEXAS STATE", but also suggests a tacit consent and encouragement to use the mark "TEXAS STATE" by entities that are independent organizations/corporations separate from Petitioner. Most poignant is Texas State Alumni Association, a non-profit Texas Corporation, not a subdivision or department of Petitioner and holds a valid State of Texas trademark in the mark "TEXAS STATE ALUMNI ASSOCIATION", among many others in a similar situation, including Respondent. The main difference is that Petitioner has taken no steps to protect the mark "TEXAS STATE" being used by any of these entities.

Apparently, Petitioner simply has chosen Respondent to single out and claim some false connection, but disregards the scores of others who not only do so, but do so by actually using Petitioner's claimed mark "TEXAS STATE", whereas Respondent uses the mark "TXST" to identify, promote and exclusively benefit the Rugby Club at Texas State University and not Petitioner itself.

Abandonment and Petitioner's claimed false association are two distinct issues and should not be confused, however Petitioner suggests that Respondent is attempting to falsely associate its goods and services with those of Petitioner. Petitioner's statement, "the alleged use of the 'Texas State' mark by the Texas State Alumni Foundation, which is comprised of alumni of Texas State University" evidences that many other entities actually use Petitioner's claimed mark "TEXAS STATE". Respondent is in an analogous position: it is comprised of Alumni of Texas State University, as well as Alumni of the

Rugby Club at Texas State University; it is a non-profit Texas corporation; it is a 501(c) exempt corporation; and, it operates for the exclusive benefit of Texas State University students.

The difference between Respondent and these other entities is that Respondent has taken the extra step in distancing itself from a direct association with Petitioner itself, by creating and using the distinguishable mark “TXST” to identify and market itself and the Rugby Club at Texas State University. Furthermore, to do so, Respondent has registered, protected, promoted, marketed and publicized an otherwise unassociated, worthless mark, with no inherent meaning, that has been and continues to be denounced and disavowed by Petitioner in describing itself². Respondent created an association of the mark “TXST” with the Rugby Club at Texas State University, all while directly benefitting those students attending Texas State University and took steps to protect that enforceable, proprietary right in the mark “TXST”.

Additionally, Petitioner argues competing interests: SIGNIFICANCE V. FALSE ASSOCIATION. In one breath Petitioner argues that Respondent’s use of the mark “TXST” as it references the Rugby Club at Texas State University creates a false association with Petitioner and confusion with the mark “TEXAS STATE”, but with it’s next breath suggests that the usage by other entities of the mark “TEXAS STATE” in some way increases its significance as protectable interest in that mark for Petitioner. Petitioner simply cannot have it both ways and acknowledges the mark “TEXAS STATE” is freely used by many other entities.

² See Respondent Exhibit Nos. 15-16

Regardless of the false association and confusion argument advanced by Petitioner in this section, Respondent's affirmative defense of abandonment is properly evidenced. Petitioner has not presented any evidence in rebuttal and the evidence supports Respondent's requested summary judgment.

The evidence presented by Respondent regarding the usage of the term "TEXAS STATE" by the many entities evidences that Petitioner has even failed to take steps to protect the mark "TEXAS STATE", much less the mark "TXST".

C. COMMERCIAL USE

Petitioner cites *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F.2d 490, 493 (Fed Cir. 1987) suggesting that this decision stands to defeat Respondent's affirmative defense that Petitioner has no enforceable rights in the mark "TXST" as Petitioner has never used such for any commercial purpose. A close reading of *JVC* and its subsequent decision, *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888 (Fed Cir. 1988) reveals that both decisions simply state:

...that a trade association, having a real interest in the outcome of the proceedings, may maintain an opposition without proprietary rights in a mark or without asserting that it has a right or has an interest in using the alleged mark sought to be registered by an applicant. *See Tanners' Council [of America v. Gary Ind.]*, 440 F.2d 1404, 169 USPQ 608 (CCPA 1971); *The Scotch Whiskey Ass'n*, 204 USPQ 57 (TTAB 1979).
See Id.

More importantly to the case at hand, is that both decisions also recognize that such standing is based upon the satisfaction all of the requisites for enforcement of a proprietary right³ and the protection of that right. Petitioner suggests that the existence and establishment of a proprietary right is immaterial, however such is contrary to the

³ 1) Prior association of mark before claimed date of first use; 2) name was famous; 3) name was known at the time of registrant's first use; continuous use since before registrant's first use; 4) mark falsely suggests a connection; and 5) is likely to cause confusion or deception of the trade and public. *See JVC, supra.*

caselaw cited. *JVC* was successful, because it established that its member (DeBeers), for whom it was acting, did in fact have an enforceable, proprietary right in the mark in question.

Petitioner has not demonstrated and/or presented any of the requisite evidence supporting its claimed right to the mark “TXST”, nor has Petitioner evidenced any commercial use of the mark to raise a claim.

D. ENFORCEABLE RIGHT TO “TEXAS STATE”

Petitioner presents no argument relating to the heading “Petitioner has an Enforceable Right in “Texas State”” contained in its Response, however does advance arguments relating to association and confusion, rather than support for an enforceable proprietary right in the mark “Texas State”.

Additionally, Petitioner again espouses the refrain that Respondent has “admitted to the USPO that TXST refers to Petitioner”. This mantra of the Petitioner has been continually corrected, rebutted and contradicted, yet Petitioner continues to state such. Nonetheless, this has again been addressed and hopefully finally laid to rest in Respondent’s Introduction Response A. (*above* at pp. 1-2).

The lack of support and argument are indicative of Petitioner’s rights in the mark “Texas State”, which is wholly lacking from the evidence and supports Respondent’s requested summary judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have emailed mailed via a true and correct copy of this Reply Brief upon the below-listed counsel on this, the 17th day of September, 2014.



Scot Courtney

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

In the Matter of Registration No. 3649427 owned by Old Grey Foundation, Inc. for the Mark:
TXST: International Class 36; Registered on July 7, 2009

Board of Regents, The Texas State
University System

Plaintiff

Cancellation No. 92057455

v.

Old Grey Foundation, Inc.,

Respondent

DECLARATION OF SCOT COURTNEY

Scot Courtney hereby declares as follows:

1. I am the Secretary and Registered Agent for Old Grey Foundation, Inc.
2. I am competent in all respects to make this declaration.
3. I make this declaration in support of Respondent's Counter-Claim for Summary Judgment and Memorandum of Authorities in Support Thereof.
4. I make this Declaration on the basis of my personal knowledge of the facts recited below and in relation to the corresponding Respondent Exhibit No.:

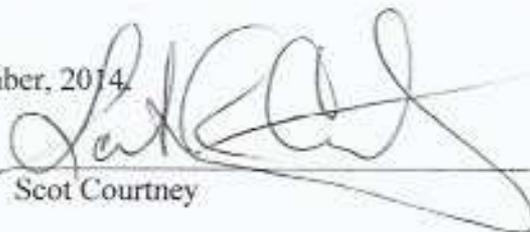
Respondent's Exhibit

- 1 – A true and correct copy of the Trademark Licensing Agreement entered into between Petitioner and Respondent on April 13, 2010, signed by myself on behalf of Respondent as General Counsel, Secretary and it's Registered Agent and William Nance, Vice-President of Finance of Petitioner and Counsel for petitioner, Mr. William Fly and authenticated by Scot Courtney in interrogatory and admitted by Petitioner. Also obtained via Public Information Act request and produced by Petitioner in compliance with Texas Attorney General PIA ID#501765 on August 13, 2013.
- 2 – A true and correct copy of a letter dated October 22, 2009 from Petitioner, by and through Mr. William Fly, Attorney for Petitioner via USPS sent to and received by myself on behalf of Respondent as General Counsel, Secretary and it's Registered Agent. This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.
- 3 – A true and correct copy of a Vendor Maintenance Form of Petitioner, signed by myself that is and will be at trial, authenticated by numerous witnesses, including myself, Mr. William Nance (Vice-President of Finance & Support Services for Petitioner) and/or Mr. William Fly (Former University Attorney of Petitioner). This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.

- 4 - A true and correct copy of a letter dated May 4, 2010 from Petitioner, by and through Mr. William "Bill" Fly, Attorney for Petitioner via USPS sent to, and received by myself on behalf of Respondent as General Counsel, Secretary and it's Registered Agent. This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.
- 5 - A true and correct copy of a document evidencing payment by Petitioner to Respondent on May 3, 2010 in the amount of \$500.00. This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.
- 6 - A true and correct copy of Settlement Agreement and Release entered into on November 15, 2010 for violation of Trademark licensing Agreement and/or trademark infringement between Petitioner and Respondent, signed by Petitioner's Assistant Athletic Director, Mr. Don Coryell and myself on behalf of Respondent as General Counsel, Secretary and Registered Agent. This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.
- 7 - A true and correct copy of a letter dated December 10, 2010 from Agent of Petitioner (Collegiate Licensing Company) on behalf of Petitioner via USPS to myself on behalf of Respondent as General Counsel, Secretary and Registered Agent. This record was kept in the course of a regularly conducted activity of Respondent and I am the Custodian of those Records.
- 8 - A true and correct copy of an Agency Agreement - Signed by Mr. William Nance, Vice-President of Finance & Support Services for Petitioner, obtained by Respondent via via Public Information Act and is a public record held by Petitioner, obtained by Respondent.
- 9 - A true and accurate copy of the content found in the United States Patent and Trademark Office Trademark Electronic Search System (TESS).
- 10 - A true and accurate copy of the content found in the United States Patent and Trademark Office Trademark Electronic Search System (TESS) on 7/21/14.
- 11 - A true and accurate copy of the content found in the United States Patent and Trademark Office Trademark Electronic Search System (TESS) on 7/21/14.
- 12 - A true and accurate copy of the content found on the Texas Secretary of State website electronically accessed records via SOSDirect (<http://www.sos.state.tx.us/corp/sosda/>) on 7/18/14.
- 13 - A true and accurate copy of the content found on the Texas Secretary of State website electronically accessed records via SOSDirect (<http://www.sos.state.tx.us/corp/sosda/>).
- 14 - A true and accurate copy of the content found on the Internet site published by an Agent of Petitioner (Collegiate Licensing Company) and found at: <http://www.clc.com/Clients/Client-Detail.aspx?id=264&t=1>.
- 15 - A true and accurate copy of the content found on the Internet site published by Petitioner and found at: <http://www.umktg.txstate.edu/resources/guides/editorial-styleguide.html>
- 16 - A true and accurate copy of the content found on the Internet site published by Petitioner and found at: http://www.txstatebobcats.com/documents/2012/2/3/Texas_State_Athletics_Identity_Branding_Guide.pdf?id=1607

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNED this the 17th day of September, 2014.


Scot Courtney