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

Proceeding	92064261
Party	Defendant John Groat dba Holly Shirt!
Correspondence Address	ROBERT E PURCELL THE LAW OFFICE OF ROBERT E PURCELL PLLC 211 WEST JEFFERSON STREET, SUITE 24 SYRACUSE, NY 13202 UNITED STATES rpurcell@repurcelllaw.com
Submission	Reply in Support of Motion
Filer's Name	Robert E. Purcell
Filer's e-mail	rpurcell@repurcelllaw.com
Signature	/Robert E. Purcell/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration Serial No. 4,099,565

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Michael Spitzbarth,

*Petitioner,*

Cancellation No.  
92064261

-vs-

JOHN GROAT  
D/B/A HOLY SHIRT!,

*Registrant.*

-----X  
**REGISTRANT’S BRIEF IN REPLY TO PETITIONER’S BRIEF IN  
OPPOSITION TO REGISTRANT’S MOTION FOR SUMMARY  
JUDGMENT**

Registrant, John Groat, (hereinafter “Groat”) submits this Reply Brief in connection with his Motion For Summary Judgment.

**Overview**

Petitioner’s opposition relies totally on the declaration of Petitioner as well as three accompanying exhibits. The relevant portions of the declaration were not revealed in any way in connection with Petitioner’s initial disclosures, in his responses to interrogatories, or in his document production. Moreover, the three accompanying documents were first produced to Groat on March 21, 2017 -- two days prior to the filing of Petitioner’s opposition brief.

In a surprising lack of candor with the Trademark Trial and Appeal Board, Petitioner fails to acknowledge or admit this belated revelation of germane testimony and this belated revelation and production of the three documents.

Groat urges the Board to apply an estoppel sanction prohibiting Petitioner's reliance on such testimony and documents in opposing Groat's motion for summary judgment. Without such illegitimate testimony and documents, Petitioner has proffered insufficient evidence to establish standing to petition to cancel Groat's registration as a matter of law.

#### **Factual Update**

Petitioner, Michael Spitzbarth, (hereinafter "Spitzbarth") does not dispute the relevant content of his initial disclosures as set forth in Groat's motion for summary judgment. Nor does Spitzbarth dispute Groat's portrayal of Spitzbarth's interrogatory responses and responses to document requests as set forth in Groat's motion for summary judgment. Nor does Spitzbarth dispute the portrayal of the documents Spitzbarth had produced prior to the filing of Groat's motion for summary judgment, in particular, that there were no documents produced pertaining to an intention to use the trademark "BLEED" in the United States other than the application to register itself.

Nor does Spitzbarth contest Groat's position that the information and documents revealed and provided as of the date of Groat's motion for summary

judgment were insufficient as a matter of law to evidence an intent to use the trademark "BLEED" in the United States. Nor does Spitzbarth contest that, without such sufficient evidence, he lacks standing to petition to cancel Groat's registration.

When compared against Spitzbarth's initial disclosures and responses to interrogatories and document requests, virtually the entire declaration of Michael Spitzbarth submitted with the opposition brief presents only newly disclosed information. Moreover, Mr. Spitzbarth's declaration identifies a new witness, Denis Basovic, his web designer, who allegedly has relevant knowledge regarding Spitzbarth's intention to use the trademark "BLEED" in the United States. However, Mr. Basovic has never been identified in connection with Spitzbarth's initial disclosures or responses to interrogatories or document requests.<sup>1</sup> Mr. Basovic's revelation constitutes yet another violation of Spitzbarth's obligations in connection with his initial disclosures.<sup>2</sup> Further, Spitzbarth failed to reveal the existence or import of Mr. Basovic in response to Groat's interrogatory no. 1<sup>3</sup>, which requested:

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<sup>1</sup> See the Declaration of Robert E. Purcell In Support Of Registrant's Brief In Reply To Petitioner's Brief In Opposition To Registrant's Motion For Summary Judgment.

<sup>2</sup> Fed. R. Civ. P. 26(a)(1)(A)(i) requires Spitzbarth to provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information -- along with a subject of that information -- that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment".

<sup>3</sup> See the Declaration of Robert E. Purcell In Support Of Registrant's Motion For Summary Judgment, ¶ 12, Exhibit I.

Identify every person having any knowledge of any intentions or plans by any person or entity to use the trademark “BLEED” in the United States in connection with any goods within GOODS, and describe in detail each such person’s knowledge.

Mr. Basovic’s identification as a person having knowledge of any relevant information and his role in connection with any intended use of the trademark “BLEED” in the United States was never revealed or disclosed to Groat until receiving Mr. Spitzbarth’s declaration.<sup>4</sup> Are there other individuals whom Spitzbarth should have also identified and whose knowledge should have been set forth as well?

Each of the documents comprising Exhibits A, B, and C to Spitzbarth’s declaration was first revealed and produced to Groat on March 21, 2017 -- two days before Spitzbarth filed his opposition brief.<sup>5</sup> None of the three documents was revealed or produced in connection with Spitzbarth’s initial disclosures.<sup>6</sup> Nor were any of the documents revealed or produced in connection with Spitzbarth’s discovery responses.<sup>7</sup> In particular, they were not revealed or produced in response to Groat’s document requests no. 1,<sup>8</sup> which states as follows:

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<sup>4</sup> See the Declaration of Robert E. Purcell In Support Of Registrant’s Brief In Reply To Petitioner’s Brief In Opposition To Registrant’s Motion For Summary Judgment.

<sup>5</sup> *Id.*

<sup>6</sup> Fed. R. Civ. P. 26(a)(1)(A)(ii) requires Spitzbarth to provide “a copy -- or a description by category and location -- of all documents, electronically stored information, and tangible things that the disclosing party has in supports of its possession, custody, or control and may use to support its claims and defenses, unless the use would be for solely impeachment”.

<sup>7</sup> *Id.*

<sup>8</sup> See the Declaration of Robert E. Purcell In Support Of Registrant’s Motion For Summary Judgment, ¶ 13, Exhibit J.

All documents reflecting, addressing, or evidencing any intentions or plans, or lack of any intention or plan, by any person or entity to use the trademark "BLEED" in the United States in connection with any goods within GOODS.

Although Spitzbarth has now revealed and produced three documents that were squarely and clearly requested by the foregoing request for production of documents, the question naturally arises as to whether Spitzbarth has been hiding, and continues to hide, additional e-mails and other documents relevant to the foregoing request.

In summary, Spitzbarth has repeatedly defied his disclosure and discovery obligations, and still cannot be trusted to have completely fulfilled his disclosure and discovery obligations. Rather, it appears that Spitzbarth has "cherry picked" what information and documents he chooses to reveal and provide, albeit only to the extent that such information and documents might be helpful, and not harmful, to Spitzbarth's position.

This is not a situation where the witness(es) or their testimony were unknown to Spitzbarth until just before filing his opposition brief. This is not a situation where the newly revealed and provided information and documents relate to some ancillary aspects of the cancellation proceeding, since the existence of standing is essential to Spitzbarth's petition, and standing must not only be sufficiently pleaded, but also must be affirmatively proved at trial (or on summary judgment).

This is also not a situation where Spitzbarth made at least a facially legitimate or arguably sufficient objection in not providing the clearly requested information and documents, such that Groat would have first needed to move to compel discovery. Instead, Spitzbarth's discovery responses appear to be complete, and there would have been no reason for Groat to have moved to compel anything. Indeed, Groat would have had difficulty explaining how the responses were insufficient and *what* he was moving to compel.

Rather than fess up to this last-minute revelation and provision of relevant information and documents, Spitzbarth feigns compliance with his disclosure and discovery obligations. In fact, to date, Petitioner has not provided any supplement disclosures, supplemental interrogatory responses, or supplemental production of documents other than the three documents accompanying Mr. Spitzbarth's declaration.<sup>9</sup>

Spitzbarth has been cheating.

### **The Estoppel Sanction Is Warranted**

This Board has not hesitated to apply the sanction of estoppel in connection with the belated presentation of evidence, which sanction is warranted to preserve the integrity of the litigation process. Here, Spitzbarth was repeatedly, clearly called upon to provide the information and documents that he now first reveals and

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<sup>9</sup> See the Declaration of Robert E. Purcell In Support Of Registrant's Brief In Reply To Petitioner's Brief In Opposition To Registrant's Motion For Summary Judgment.

provides in connection with his opposition brief. Further, we are still left in the dark about whether Spitzbarth has *completely* fulfilled his disclosure and discovery obligations -- not only as to the intention-to-use issue, but all other issues as well. We do not have even a simple statement from Spitzbarth to the effect that, after reconsidering his disclosures and discovery responses, he has supplemented those disclosures and responses completely and has produced all documents responsive to Groat's discovery requests. Indeed, Spitzbarth has tried to sweep his misbehavior under the rug and has falsely pretended to this Board that the information in Mr. Spitzbarth's declaration and the accompanying documents were somehow all provided prior to the filing of Groat's motion of summary judgment. Spitzbarth's misbehavior constitutes an affront to the integrity of the litigation process, and also an affront to the Board itself.

The Board articulated the standard for applying an estoppel sanction in *Great Seats, Inc. v. Great Seats, Ltd.*, Opposition No. 91189540 (TTAB Sept. 21, 2011) as follows:

Under the estoppel sanction, a party that fails to provide information may, upon motion or objection by its adversary, be precluded from using that information or witness at trial, "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). See also TBMP Section 527.01(e) (3d ed. 2011).

In determining whether opposer's failure to disclose Mr. Kelly or the other twenty-six new potential witnesses in a supplemental response to interrogatory no. 1 is substantially justified or harmless, the Board is guided by the following five-factor test: "1) the surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the



surprise; 3) the extent to which allowing the testimony would disrupt the trial; 4) importance of the evidence; and 5) the nondisclosing party's explanation for its failure to disclose the evidence." [citing cases]

(footnotes omitted.)

With respect to factor 1), the germane information and documents are a complete surprise to Groat. Spitzbarth has not suggested otherwise.

With regard to factor 2), Spitzbarth cannot cure the surprise. Groat has spent significant energies and monies in moving for summary judgment, and the Board is powerless to award to attorneys' fees as a sanction. Groat was entitled to rely upon Groat's disclosures and discovery responses in connection with the issue of standing, as to which Spitzbarth bore the burden of proof and persuasion. Further, Spitzbarth still has not provided any supplemental disclosures or discovery responses, and there exists a serious question as to whether Spitzbarth has provided all of the information and documents required to be disclosed and requested in discovery.

With regard to factor 3), discovery was scheduled to close on April 26, 2017. The discovery period would need to be re-opened and extended so as to permit Groat to seek more detailed discovery including taking the depositions of Mr. Spitzbarth and Mr. Basovic, both of whom are apparently located in Germany. As such, the depositions would proceed under TTAB rules requiring such depositions of foreign witnesses to be taken by written questions -- an extremely

disfavored way of trying to discover relevant information. The Board has held that the re-opening of the discovery period to allow a discovery deposition on written questions would significantly disrupt an *inter partes* proceeding. See, *Spier Wines (PTY), Ltd. v. Ofer Z. Shepher*, 105 USPQ 2d 1239 (TTAB 2012)

With regard to factor 4), the evidence that Spitzbarth belatedly seeks to proffer relates to an issue that is essential to his standing to pursue the opposition proceeding. The Court of Appeals For The Federal Circuit has held that “the exclusion of evidence of damages due to its belated revelation does not tip the scale in favor of the proponent of the damages, particularly where the proponent alone is to blame for creating this situation.” *Micro Strategy Inc. v. Business Objects, S.A.*, 429 F.3d 1344, (Fed. Cir. 2005). See, also, *Spier Wines, supra*. Thus, where the belatedly revealed evidence is essential to obtaining relief, the sanction of estoppel will still apply, especially if the proponent of such evidence is to blame. Here Spitzbarth is clearly to blame for his concealment of germane information and documents that were indisputably within his possession and control at all relevant times in this proceeding.

With regard to factor 5), Spitzbarth has offered no explanation whatsoever for his failure to disclose the germane information and documents. Indeed, he conceals from the Board the fact of its belatedness and takes the position that no

explanation is warranted and that his obligations under the rules of litigation may be disregarded with impunity -- a display of arrogance.

**Conclusion**

Groat asks that the Board issue an estoppel sanction denying Spitzbarth's reliance on the declaration of Mr. Spitzbarth and the accompanying documents. Applying such a sanction, Spitzbarth has no evidence whatsoever of his intent to use the trademark "BLEED" in the United States other than the filing of the intent-to-use application itself. As explained in Groat's motion for summary judgment, this Board has consistently held that such limited evidence is insufficient as a matter of law to establish any intent-to-use the trademark in the United States. Accordingly, Groat's registration-at-issue cannot harm Spitzbarth, since Spitzbarth's intent-to-use application is void *ab initio*. Spitzbarth lacks standing to petition to cancel Groat's registration.

Dated: 4/5, 2017

By: 

Robert E. Purcell  
THE LAW OFFICE OF ROBERT E. PURCELL,  
PLLC

211 West Jefferson Street, Suite 24

Syracuse, New York 13202

Telephone: (315) 671-0710

Facsimile: (315) 671-0711

email: [rpurcell@repurcelllaw.com](mailto:rpurcell@repurcelllaw.com)

*Attorneys for the Registrant, John Groat*

**CERTIFICATE OF SERVICE**

I certify that on the 5 day of April, 2017 a copy of the foregoing REGISTRANT'S BRIEF IN REPLY TO PETITIONER'S BRIEF IN OPPOSITION TO REGISTRANT'S MOTION FOR SUMMARY JUDGMENT was sent via E-Mail and First Class U.S. Mail, postage pre-paid, to the following:

Norman P Soloway  
Hayes Soloway PC  
4640 E Skyline Drive  
Tucson, AZ 85718  
United States  
Jbarton@Hayes-Soloway.com, Admin@Hayes-Soloway.com  
Phone: 520-882-7623

/s/Allison Haines

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Allison Haines

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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In the Matter of Registration Serial No. 4,099,565

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Michael Spitzbarth,

*Petitioner,*

Cancellation No.  
92064261

-vs-

JOHN GROAT  
D/B/A HOLY SHIRT!,

*Registrant.*  
-----X

**DECLARATION OF ROBERT E. PURCELL IN SUPPORT OF  
REGISTRANT'S BRIEF IN REPLY TO PETITIONER'S BRIEF IN  
OPPOSITION TO REGISTRANT'S MOTION FOR SUMMARY  
JUDGMENT**

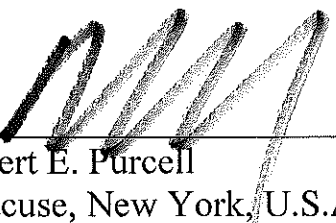
I, Robert E. Purcell hereby state, swear, and affirm as follows:

1. I have been and am the counsel of record for the Registrant, John Groat, in the instant cancellation proceeding.
2. None of Exhibits A, B, and C to the Declaration of Michael Spitzbarth in Opposition to Registrant's Motion For Summary Judgment were revealed or produced in response to Registrant's document requests.
3. Exhibits A, B, and C to the Declaration of Michael Spitzbarth in Opposition to Registrant's Motion For Summary Judgment were first revealed to and produced to Registrant on March 21, 2017.

4. Mr. Basovic has never been identified in connection with Spitzbarth's initial disclosures or responses to interrogatories or document requests.
5. Mr. Basovic's identification as a person having knowledge of any relevant information and his role in connection with any intended use of the trademark "BLEED" in the United States was never revealed or disclosed to Groat until receiving Mr. Spitzbarth's Declaration.
6. To date, Petitioner has not provided any supplement disclosures, supplemental interrogatory responses, or supplemental production of documents other than the three documents accompanying Mr. Spitzbarth's declaration

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

Executed on April 5, 2017

By:   
Robert E. Purcell  
At: Syracuse, New York, U.S.A.