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

Proceeding	92064261
Party	Plaintiff Michael Spitzbarth
Correspondence Address	NORMAN P SOLOWAY HAYES SOLOWAY PC 4640 E SKYLINE DRIVE TUCSON, AZ 85718 UNITED STATES jbarton@hayes-soloway.com, admin@hayes-soloway.com
Submission	Reply in Support of Motion
Filer's Name	Stephen B. Mosier
Filer's e-mail	smosier@hayes-soloway.com
Signature	/stephen b. mosier/
Date	04/19/2017
Attachments	Reply on MSJ.pdf(42737 bytes ) Dec of Mosier.pdf(169626 bytes )

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

In the matter of Trademark Registration No.: 4099565  
For the Mark: "IBLEED"  
Date of Registration: February 14, 2012  
Cancellation No.: 92064261

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Michael Spitzbarth,  
*Petitioner,*

v.

John Groat,  
*Registrant.*

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TRADEMARK TRIAL & APPEAL BOARD  
Commissioner of Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITIONER'S CROSS-MOTION  
FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO REGISTRANT'S MOTION  
FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING**

TO THE TRADEMARK TRIAL AND APPEAL BOARD:

Petitioner Michael Spitzbarth (hereinafter "Petitioner" or "Spitzbarth"), by its undersigned counsel, hereby submits this reply brief in support of Petitioner's Cross-Motion for Summary Judgment, and in opposition to Registrant's Motion for Summary Judgment on the issue of standing.

Registrant John Groat, in his response brief filed April 5, 2017, acknowledges *sub silentio* (by failing to address the merits of the underlying issue of "standing" in any way) that Petitioner's evidence establishes Petitioner's "standing", i.e., that Petitioner has been or will

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continue to be damaged by the existence of Registration No. 4009565. See, Registrant's Reply in Support of Motion for Summary Judgment, Doc. 13 (hereinafter "Registrant's Reply"). Thus, Registrant has now effectively conceded that Petitioner has indeed shown a bona fide intent to use the BLEED mark in commerce in the United States, for the goods recited in Class 25. See, Registrant's Reply. The sole and singular issue that Registrant has raised for the first time in Reply in opposition to Petitioner's cross-motion for summary judgment is whether Petitioner/Applicant should be precluded as a sanction (for supposed discovery abuse, *Id.*) from offering any evidence in support of Petitioner's standing.

Registrant's Reply demonstrates that Registrant never had any credible evidence to support the *ipse dixit* assertion of Registrant's own legal counsel that Petitioner lacked a *bona fide* intent to sell branded products into the United States. The Rules of Civil Procedure are clear that summary judgment is appropriate *only* when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Here, there is no genuine dispute, Petitioner unquestionably had a bona fide intent to use the BLEED mark in commerce in the United States for the goods recited in Class 25.

At the time Registrant moved for summary judgment on the issue of standing, discovery had not yet (or ever) closed in this case---indeed, not a single deposition has yet been taken by either side. The Registrant's motion papers accused Petitioner/Applicant Spitzbarth of discovery abuse, but tellingly, Registrant Groat himself has not yet produced a single piece of paper to Petitioner in this case. It bears repeating (because the irony is so palpable), Registrant Groat has not yet even produced the documents he identified in Registrant's own Initial

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Disclosures, even though Applicant has specifically and formally demanded their production.<sup>1</sup> Despite the irony that Petitioner Groat has defaulted on his own discovery obligations, Groat now seeks the most draconian of all possible sanctions to be imposed against Petitioner Spitzbarth, primarily for the (allegedly) tardy production of the five earliest U.S. invoices (reflecting Petitioner's earliest sales of branded products in the U.S.), concerning an issue wholly collateral to the real issues at play in this Cancellation Proceeding.<sup>2</sup>

It is unclear why Registrant Groat failed to mention Registrant's own wholesale disregard for his own discovery obligations in this case, or the fact that discovery remains open in this case and that no depositions have been taken, or that the issue about which Registrant complains has nothing to do with the actual basis asserted for cancelling Registrant's Registration. It is also unclear why Registrant elected not to apprise the Board that Registrant has not once made the slightest attempt to contact Petitioner regarding any alleged discovery abuse, or to follow up in any way respecting any of the issues which Registrant raised in his much-premature summary judgment motion. Instead, Registrant simply filed a motion for summary judgment long prior to the discovery deadline in this case, based solely on a supposed paucity of documentary evidence establishing such intent. Notably, Registrant was well aware the Mr. Spitzbarth had produced, along with Petitioner's Initial Disclosures, Petitioner's own sworn Declaration affirming Petitioner's intent to use the Mark in the U.S., and further listing

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<sup>1</sup> See Declaration of Stephen B. Mosier, attached hereto as Exhibit 1 (hereinafter "Mosier Decl.")

<sup>2</sup> The central issue in this Cancellation Proceeding is whether Registrant's use of a questionably distinct, modified form of the Registered Mark does, or does not, constitute a use of the Mark. While Petitioner acknowledges that "standing" may indeed be an issue in any cancellation proceeding, it is only if, and to the extent, affirmatively raised in the pleadings as an affirmative defense, which Groat failed to raise in this proceeding. See Answer, Doc. 4. See also Footnote 7, *infra*.

Applicant Spitzbarth as a trial witness on the issue of Mr. Spitzbarth's bona fide intent to use the BLEED mark in commerce in the United States for the goods recited in Class 25.

Even more importantly, as of the date Registrant Groat filed his motion for summary judgment on February 21, 2017, two months and five days remained prior to the close of discovery in this proceeding. Registrant never made any attempt to depose Mr. Spitzbarth or anyone else regarding Petitioner's intent to use the BLEED mark in commerce in the United States for the goods recited in Class 25. Moreover, Registrant's website and the ICANN WHOIS record of ownership of Registrant's website are publicly available and easily accessed online. Registrant's bona fide intent to use the mark is well established by Mr. Spitzbarth's timely-filed Declaration, his timely-filed listing of himself as a person expected to offer testimony on that subject, and the publicly available supporting documents alone. Registrant's motion for summary judgment was entirely frivolous when filed, and the position Registrant asserts in Registrant's Reply is equally if not even more frivolous.

It is uncontroverted that Petitioner has sold environmentally friendly organic clothing and accessories in Europe and through the [www.bleed-clothing.com](http://www.bleed-clothing.com) website since 2008. Declaration of Michael Spitzbarth, ¶1. It is undisputed that Petitioner's BLEED products include clothing products made from cork (or paper, cardboard and goods from these materials), printed matter, photographs, clothing, footwear, headgear, games, playthings, and sporting goods. (Declaration of Michael Spitzbarth, ¶2. It is undisputed that Petitioner had a bona fide intent to begin selling Petitioner's BLEED products in the U.S. when Petitioner filed U.S. application no. 79/181,001 (Petitioner's "001 Application") on October 23, 2015, (Declaration of Michael Spitzbarth, ¶3) and that Petitioner first sold BLEED branded clothing products in the United States in February, 2016 (just a little over three months after the filing

date of Petitioner's U.S. application), and further that Petitioner continues to this day to market and sell BLEED-branded clothing and other products in the United States. (Declaration of Michael Spitzbarth, ¶5). Mr. Spitzbarth's publicly available English language website marketing and selling BLEED-branded clothing fully supports his testimony regarding his own intent. Registrant has not (and cannot) dispute any of these facts. Thus, there can be no genuine dispute that Petitioner had a bona fide intent, at all times relevant, to use the BLEED mark in commerce in the United States for the Class 25 goods recited.

As has repeatedly been noted by the TTAB, the only time it is permissible to find a lack of a *bona fide* intention to use the mark is when there is a complete and total absence of *any* documented evidence or *any* facts which adequately explain or outweigh applicant's failure to provide any documentary evidence of such intent. See, *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1506 - 1507 (TTAB 1993) (holding that "whether the absence of any documents evidencing the applicant's claimed intention to use its mark may be sufficient to constitute objective proof of a lack of a *bona fide* intention to use" was a "close question"). Petitioner Spitzbarth proffers his own uncontroverted testimony, together the timely-produced Declaration of intent and various other publicly available English language marketing materials, and select, properly authenticated representative invoices reflecting direct sales of branded products sold in the United States in close proximity to the date of Petitioner's U.S. application. (Declaration of Michael Spitzbarth ¶¶5, 8 and at Exhibit C). Those are, and certainly should be, dispositive of this issue, as a matter of law.<sup>3</sup>

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<sup>3</sup> The several pages of invoices themselves are the frosting on the cake, but there are layers upon layers of cake, even without the frosting.

Here, ample evidence supports Petitioner's *bona fide* intent to use Petitioner's BLEED mark with the identified goods in the United States at the time Petitioner filed Petitioner's '001 Application. Petitioner used the mark with the identified goods in Germany and through the www.bleed-clothing.com website prior to filing Petitioner's '001 Application. (Declaration of Michael Spitzbarth, ¶4). Petitioner Spitzbarth began selling branded goods in the United States in February, 2016, barely more than three (3) months after Petitioner filed the '001 Application. (Declaration of Michael Spitzbarth, ¶5) The very next month after commencing sales in the U.S. market, Petitioner established an English language version of the website, in approximately March, 2016. (Declaration of Michael Spitzbarth, ¶4) All of this evidence is consistent with Petitioner's declaration of his intent to sell branded goods in the United States, and there is no documentary or other credible evidence to the contrary.<sup>4</sup>

Registrant has not cited, and Petitioner has been unable to identify, any case in which a court or the Board has dismissed a case as a discovery sanction *before the close of discovery*, without even so much as the moving party having filed a discovery motion, or obtaining an Order finding a willful violation of a prior discovery Order. The case cited by Registrant, *Great Seats, Inc. v. Great Seats, Ltd.*, Opposition No. 91189540 (TTAB Sept. 21, 2011) concerned testimony of witnesses disclosed for the first time in pretrial disclosures more than 7 months after the close of discovery in that case and in violation of the Case Management Order. *Great Seats*, at p. 10. The other case cited by Registrant, *Spier Wines (PTY), Ltd. V. Ofer Z. Shepher*, 105 USPQ 2d 1239 (TTAB 2012) concerned a witness again first identified belatedly in pretrial

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<sup>4</sup> Indeed, the mere fact that Petitioner filed the instant Cancellation Proceeding, after an Examiner had cited Registrant's Registration as a §2d bar to Applicant's registration, alone evidences Petitioner's requisite intent to use the Mark in the U.S. Why else would Petitioner have filed this Cancellation proceeding?

disclosures “on the eve of trial and more than a year after the discovery period had closed.”

Indeed, as noted by the TTAB in *Spier Wines*, “[i]n identifying individuals through initial disclosures, a party need not identify all those that may be called at trial as potential “trial witnesses,” and instead must identify any trial witnesses through pretrial disclosures.”

Registrant Groat could not be more wrong in asserting that Spitzbarth committed discovery abuse by failing to name Basovic as a trial witness in Petitioner's Initial Disclosures. Basovic was merely mentioned in passing, in Petitioner Spitzbarth's Declaration, as the person who created Petitioner's website. Spitzbarth Declaration at ¶4, Doc. 12. That does not make Basovic a trial witness; in point of fact, Basovic is not now, nor was he ever going to be, a trial witness. (See Mosier Decl., ¶4) Basovic's knowledge is far too peripheral to the real issues to waste the Board's time (and Applicant's resources) on securing his trial testimony on a matter not even expected to be contested at trial. Basovic created Spitzbarth's web domain, and presumably knows that it contains an English-language translation, but Basovic's testimony at best would be merely cumulative of other evidence overwhelmingly establishing the same point. Anyone accessing Petitioner's website today can confirm most of this same information for themselves, and can use the Way Back Machine to obtain the rest. Thus, Spitzbarth did not engage in discovery abuse by failing to list Basovic as a trial witness, when in point of fact Basovic was never going to be one. Registrant's argument to the contrary was fabricated out of whole cloth. Mosier Decl., ¶¶3-8.

Even assuming (contrary to fact) that Basovic were a person who might conceivably be called as a trial witness by someone, that still would not support the draconian sanction proposed by Registrant. In determining whether any failure to disclose was justified or

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harmless, the five factors identified by the Board weigh heavily in favor in petitioner.<sup>5</sup>

Petitioner clearly identified Michael Spitzbarth as having knowledge relating to Mr.

Spitzbarth's registration of the BLEED Mark, and BLEED-branded products were publicly marketed in English on Mr. Spitzbarth's publically-available website. This is not some new theory that is being sprung on Registrant on the eve of trial. Registrant cannot be surprised by Mr. Spitzbarth's relevance to Spitzbarth's own intent. Any surprise to the Registrant is eliminated or vastly mitigated by the fact that Petitioner's opposition to Registrant's motion for summary judgment (and Petitioner's cross-motion for summary judgment) were each filed sixty-five (65) days before the close of discovery in this case. (Discovery has now been stayed, of course.) Moreover, Spitzbarth's Declaration of intent to use his own Mark in the U.S. was in fact already disclosed and produced to Groat timely by Applicant, along with Spitzbarth's Initial Disclosures---a point Registrant does not dispute. Registrant Groat's assertion of any surprise whatsoever is wholly contrived, but even if it were arguably true, any such surprise could readily have been cured by supplemental discovery or notice of deposition after the date Petitioner filed its opposition to Registrant's motion for summary judgment---still at a time which was (and still is) well before the close of discovery in this case.

Registrant, however, made no effort whatsoever to depose Mr. Spitzbarth before or after Petitioner filed his opposition to Registrant's motion for summary judgment, and has made no attempt whatever to depose anyone or to seek more information concerning non-trial witness Mr. Basovic. Mosier Decl., ¶8 Allowing the testimony of Spitzbarth (a timely disclosed witness in any event) would not disrupt the trial in the slightest, but would instead allow the trial to

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<sup>5</sup> "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 non-disclosing party's explanation for its failure to disclose the evidence."

proceed and to be decided on its merits, as it should be. The several invoices of Petitioner's earliest U.S. customers, produced in response to Registrant's summary judgment motion papers, indeed do constitute "relevant" evidence responsive to the standing issue, which in hindsight could have been, and perhaps should have been, produced sooner,<sup>6</sup> but that is so only because (and to the extent) that Registrant elected to assert by motion, without first having raised in Registrant's Answer<sup>7</sup> (and indeed without any evidence whatsoever), the affirmative defense that the case must be dismissed for a lack of standing. Registrant fails even to acknowledge that he failed to raise the affirmative defense of "standing" in his Answer, and fails to comprehend that he has waived that affirmative defense by failing to raise it in his Answer.

All of the documents submitted in opposition to Registrant's Cross-Motion for Summary Judgment and in support of Petitioner's Cross-Motion for Summary Judgment have all been properly authenticated by sworn Declaration during the discovery period, unlike any of the cases cited and relied upon in Registrant's motion papers. The clear evidence in this record shows that Petitioner intended to use the BLEED mark in connection with the identified goods in the United States at the time Petitioner filed Petitioner's '001 Application. And, Petitioner in

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<sup>6</sup> But see Footnote 7, *infra*

<sup>7</sup> The entire premise underlying Registrant Groat's estoppel argument, that Petitioner committed discovery abuse by failing timely to disclose some (but not all) documentary evidence of Petitioner's "standing" to seek cancellation of Registrant's Registration, is fallaciously contrived. The issue of standing is, as a matter of law, an affirmative defense which must be raised affirmatively in a Defendant's Answer, and if not so raised by pleading, is deemed waived. *Garbinicius v. Boston Edison Co.*, 621 F.2d 1171, 1174 (1<sup>st</sup> Cir. 1980) (defendants waived any defect to plaintiff's standing by filing a general denial, instead of making more specific negative averments [in their Answer] as required by Fed. R. Civ. P 9(a); *In re Transcon Lines*, 89 F.3d 559 (9<sup>th</sup> Cir. 1996); *Society of Lloyds v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006). Defendant seemingly has overlooked the basic rule of civil procedure that the issues to be tried are limited to those framed by the parties' pleadings, and that issues waived by the Defendant (as here) do not continue to exist as issues remaining for purposes of discovery or trial. In any event, Defendant's assumption that discovery abuse of any kind occurred in this case is wholly unfounded, specious and contrived. See also Mosier Decl., ¶¶3-8.

fact began selling branded products in the U.S., long prior to the initiation of the proceedings at bar. Petitioner already sold all of the identified goods in Germany, and Petitioner evidenced an intent to sell those same goods in the United States by, *inter alia*, creating an English-language version of Petitioner's website roughly contemporaneously with the filing of Petitioner's '001 Application. The English-language website was created in March, 2016, and Petitioner's '001 Application was filed on October 23, 2015. In fact, Petitioner commenced commercial sales of BLEED-branded clothing products in the United States in February, 2016 very shortly after filing his U.S. Petition. All of these activities occurred in close proximity, and each corroborates and further supports the other evidence, all pointing in confirmation of Petitioner's Declaration of *bona fide* intent to sell branded product in the United States (which Declaration was included in Spitzbarth Application, timely included within Petitioner's Initial Disclosures).

The fact that Spitzbarth's Declaration of Intent was itself unquestionably timely served on Registrant Groat along with Spitzbarth's timely-served Initial Disclosures is by itself dispositive of the estoppel issue raised by Registrant for the first time in Registrant's Reply.

### CONCLUSION

Registrant has not even attempted to produce any credible evidence to the contrary of any of the foregoing. The uncontradicted facts and circumstances thus establish Petitioner's *bona fide* intent to use the BLEED mark in connection with the identified goods at the time Petitioner filed Petitioner's '001 Application.

For each of the reasons cited above, Registrant's Motion For Summary Judgment on the issue of standing must be denied, and Petitioner's Cross-Motion for Summary Judgment on the Issue of Standing is well taken, and must be granted.

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Reply Brief in Opposition to Registrant's Motion for Summary Judgment

Respectfully submitted,

/s/ Stephen B. Mosier

Stephen B. Mosier  
Attorney for Petitioner Michael Spitzbarth

**CERTIFICATE OF SERVICE**

I, Stephen B. Mosier, counsel for Petitioner, hereby certify that a copy of the foregoing Petitioner's Brief in Opposition to Registrant's Motion For Summary Judgment was served upon counsel of record for the Registrant, via email on April 19, 2017, at the following address:

Robert E. Purcell, Esq.  
The Law Office of Robert E. Purcell, PLLC  
211 W. Jefferson St.  
Syracuse, NY 13202  
[rpurcell@repurcelllaw.com](mailto:rpurcell@repurcelllaw.com)

/s/ Stephen B. Mosier

Stephen B. Mosier

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# **EXHIBIT 1**

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

In the matter of Trademark Registration No.: 4,099,565  
For the Mark: "IBLEED"  
Date of Registration: February 14, 2012  
Cancellation No.: 92064261

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Michael Spitzbarth,  
*Petitioner,*

v.

John Groat,  
*Registrant.*

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TRADEMARK TRIAL & APPEAL BOARD  
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**DECLARATION OF STEPHEN B. MOSIER IN OPPOSITION TO REGISTRANT'S  
MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PETITIONER'S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

I, Stephen B. Mosier, hereby state, swear, and affirm under penalty of perjury, as follows:

1. This Declaration is of my own personal knowledge. I am an adult individual residing in Tucson, Arizona. I am not under any disability, and I am competent to make this Declaration.
2. I am currently the Managing Partner of the Tucson Office of the law firm Hayes Soloway P.C., and trademark and litigation counsel for Petitioner Michael Spitzbarth (hereinafter "Petitioner Spitzbarth").

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3. Attached hereto as Attachment A is a true copy of the Initial Disclosures which I prepared and served on behalf of Petitioner Spitzbarth in this matter. These Initial Disclosures were served timely on counsel for Registrant John Groat, and were true, accurate and complete, both when served and now.
4. All persons known or believed by me to be trial witnesses expected to be called to testify on behalf of Petitioner Spitzbarth were so listed in Petitioner Spitzbarth's Initial Disclosures. Petitioner Spitzbarth's Initial Disclosures did not list as a person expected to testify on behalf of Petitioner an individual by the name of Denis Basovic. The reason Mr. Basovic was not listed as a person expected to testify on behalf of Petitioner Spitzbarth is because I did not then, and do not now, expect or intend Mr. Basovic to be a trial witness on behalf of Petitioner. Although Mr. Basovic was a person whose name was mentioned in a subsequent Declaration filed by Petitioner Spitzbarth (Mr. Basovic was identified in ¶4 of Mr. Spitzbarth's Declaration as the creator of Petitioner's website), Mr. Basovic was never expected to be a trial witness in this matter.
5. Registrant John Groat has not produced so much as a single piece of paper in discovery in this matter, and in particular, has not yet delivered into my possession, or otherwise made available for inspection or copying, even the documents which were identified by category in Registrant Groat's Initial Disclosures. I have requested that Registrant deliver those documents to me, but still await their receipt.
6. To the best of my knowledge and belief, no documents have been intentionally, wrongfully withheld by or on behalf of Petitioner Spitzbarth from production to Registrant in connection with this matter. Certainly, to the best of my knowledge

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and belief, no documents have been wrongfully withheld by or on behalf of Petitioner Spitzbarth from production to Registrant for any strategic or other improper purpose; the suggestion to the contrary made by Registrant's legal counsel, Robert Purcell, in his Declaration is entirely baseless.

7. Registrant's legal counsel neglected to raise, in Registrant's Answer filed in this proceeding, the affirmative defense of Petitioner's [alleged] lack of "standing" to bring this cancellation proceeding. At no time has Registrant or his legal counsel sought to amend his Answer to plead the "standing" affirmative defense.
8. Registrant's legal counsel never contacted me, either before or after filing his Motion for Summary Judgment on behalf of Registrant, to raise or discuss or inquire about any issue or concern he might have respecting Petitioner Spitzbarth's documentary production or Initial Disclosures served in this proceeding. To this date, I have received no oral or written communication from Registrant's legal counsel (apart from the summary judgment motion papers filed with the Board) raising any issue or concern on the part of Registrant about Petitioner Spitzbarth's:  
(1) documentary production; (2) objections to Registrant's documentary production requests; (3) interrogatory responses; (4) objections to Registrant's interrogatories; or (5) Petitioner's Initial Disclosures.

Further Declarant saith naught.

Executed on April 19, 2017  
at Tucson, Arizona

By: Stephen B. Mosier

Stephen B. Mosier

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# **ATTACHMENT A**

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

In the matter of Trademark Registration No.: 4099565  
For the Mark: "IBLEED"  
Date of Registration: February 14, 2012  
Cancellation No.: 92064261

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Michael Spitzbarth,  
*Petitioner,*

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John Groat,  
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**PETITIONER'S INITIAL DISCLOSURES**

TO THE TRADEMARK TRIAL AND APPEAL BOARD:

Petitioner Michael Spitzbarth (hereinafter "Petitioner" or "Spitzbarth"), by its undersigned counsel, hereby submit the following initial disclosures pursuant to 37 CFR §2.120 and Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure:

A. Petitioner's Rule 26(a)(1)(A)(i) initial disclosures concerning individuals with discoverable information.

The following individuals are likely to have discoverable information that Petitioner may use to support its claims or defenses. All listed individuals can be contacted through the undersigned counsel of record for Petitioner.

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(1) Michael Spitzbarth  
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Mr. Spitzbarth has knowledge relating to: (a) his application for registration of his Mark; (b) the goods and services to which the Mark of Registrant John Groat d/b/a Holy Shirt! (hereinafter "Registrant or Groat") has been applied; and (c) Registrant's uses of his Mark and variations thereof in association with Registrant's goods and services.

(2) any licensee, agent or employee of Registrant, including Dyke Marler (identity and contact information is not currently known by Petitioner, and has not been disclosed by Registrant to Petitioner); and

(3) John Groat (c/o Robert Purcell, his legal counsel): Mr. Groat has knowledge relating to the goods and services to which the Mark of Registrant has been applied, and Registrant's uses of his Mark and variations thereof in association with Registrant's goods and services.

B. Petitioner's Rule 26(a)(1)(A)(ii) initial disclosures of documents and/or tangible items that Petitioner may use to support its claims and/or defenses.

Petitioner discloses the following categories of documents which Petitioner may use to support its claims or defenses. These documents will, upon request, be made available for inspection or copying at the offices of Petitioner's undersigned counsel, at a mutually convenient date and time consistent with the applicable rules of the Board.

(1) Representative marketing information and materials regarding the uses of Registrant's Mark and the goods on which Registrant's Mark and variations thereof have been applied, and the respective dates of application as aforesaid of Registrant's respective Marks on those goods.

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- (2) Representative advertising information materials regarding Registrant's Mark.
- (3) Representative customer information on the types of customers who use or purchase the goods or services sold in connection with Registrant's Mark.
- (4) Documents, records and tangible things subsequently produced by Petitioner or Registrant, or both, or by Registrant's licensees, during discovery.
- (5) Prosecution history for U.S. Trademark Reg. No. 4,099,565.
- (6) Registration and ownership information regarding the web domain (if any) of Registrant and any licensee of Registrant.
- (7) Representative information and materials regarding third-party uses of Registrant's Mark and/or formulations thereof.
- (8) Documents referred to within the Petition for Cancellation in this proceeding, or in discovery responses, documentary productions or depositions. All documents disclosed herein, are in the custody of Petitioner's counsel, and all documents identified or disclosed in Petitioner's and/or Registrant's discovery responses hereafter, are or will be in the custody of Petitioner's counsel.

**AMENDMENTS**

These initial disclosures are made based on the information reasonably available to Petitioner at this time, and Petitioner reserves the right to amend and/or supplement any of the above initial disclosures in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Stephen B. Mosier

Stephen B. Mosier  
Attorney for Petitioner

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**CERTIFICATE OF SERVICE**

I, Stephen B. Mosier, counsel for Petitioner, hereby certify that a copy of the foregoing Petitioner's Initial Disclosure Statements was served upon counsel of record for the Registrant, via first class mail, postage prepaid, and email on November 28, 2016, at the following address:

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/s/ Stephen B. Mosier  
Stephen B. Mosier

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