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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pure Storage, Inc.

Serial No. 86895203

Sally M. Abel of Fenwick & West LLP[1]
for Pure Storage, Inc.

Wendy B. Goodman, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Mermelstein, Lykos, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Pure Storage, Inc. ("Applicant") seeks registration on the Principal Register of the mark FLASHBLADE in standard characters for:

[1] Applicant's prior counsel withdrew after briefing was completed in this case, and Ms. Abel and Fenwick & West LLP were appointed on December 17, 2018.

> Computer hardware and downloadable software for use in the field of enterprise data storage; Data storage apparatus and equipment, namely, data processing apparatus and apparatus for storing, transmission and reproduction of data in International Class 9.[2]

Applicant initially based the application on an allegation of its bona fide intent to use the mark in commerce. After the notice of allowance issued, Applicant filed a statement of use with a specimen that Applicant described as "pages from applicant's website showing the product and how to order it."[3] The Examining Attorney refused registration under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that the specimen is mere advertising, as the webpages do "not include a means for ordering the goods."[4] After the application was abandoned for failure to respond to the Office Action, Applicant successfully petitioned to revive it, and at the same time responded to the refusal by submitting a substitute specimen described as "pages from applicant's website showing the mark being used to identify the goods and includes the contact request through which the purchasing process is initiated."[5]

The Examining Attorney then made the refusal final, providing the following rationale:

> In this case, the specimen does not include a way of ordering the goods; information and links are provided to contact Applicant to receive a "demo" or an "evaluation" but

[2] Application Serial No. 86895203 was filed February 2, 2016, based on alleged use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

[3] TSDR October 13, 2016 Statement of Use at 1.

[4] TSDR December 1, 2016 Office Action at 1.

[5] TSDR September 11, 2017 Petition to Revive at 1-10.

> a demo or evaluation is not the means for ordering goods, pricing information, etc. The specimen does not state how to receive pricing or ordering information; it simply states how to get a "demo." A free demo or evaluation is not ordering the goods. *See In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1122-24 (Fed. Cir. 2009); *In re Azteca Sys., Inc.*, 102 USPQ2d 1955, 1957 (TTAB 2012); TMEP §§ 904.03(i), *et seq*. Without this feature, the specimen is mere advertising material, which is generally not acceptable as a specimen for showing use in commerce for goods. *See In re Kohr Bros.*, 121 USPQ2d 1793, 1794 (TTAB 2017) (quoting *In re Quantum Foods, Inc.*, 94 USPQ2d 1375, 1379 (TTAB 2010)); *In re Genitope Corp.*, 78 USPQ2d 1819, 1822 (TTAB 2006); TMEP § 904.04(b).[6]

Applicant requested reconsideration, and provided attorney argument – but no declaration or other evidence – regarding the nature of the goods and the purchasing process.[7] Applicant's outside counsel argued that the goods are customized and highly technical, requiring "a significant amount of customer input and information in connection with the purchase."[8] Applicant's counsel further stated that customers would have "established purchasing accounts prior to making purchases," and the "Request a Demo" button[9] "provides exactly that information on how/where to buy," because Applicant and its customer would then "identify and customize the product," with pricing information only becoming available after that.[10]

The Examining Attorney denied the request for reconsideration, noting that the "Request a Demo" button is not a way to order the goods, and instead "invit[es]

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[6] TSDR November 1, 2017 Office Action at 1 (citations revised).

[7] 4 TTABVUE 1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

potential customers to ask for more information about the goods, rather than purchase them."[11] Applicant appealed, and the appeal is fully briefed.

As explained below, we affirm the refusal to register.

II. Whether the Specimen Qualifies as a Display Associated with the Goods

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a trademark is used in commerce when "it is placed in any manner on the goods or their containers or the displays associated therewith ...." *See also* Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(1). The crux of the issue in this case is whether Applicant's webpage specimens contain sufficient ordering means and information to qualify as a display associated with the goods. "Factually, we need to ask whether the purported point-of-sale display provides the potential purchaser with the information normally associated with ordering products of that kind. This has long been an important factor to the Board and its reviewing Courts." *In re Anpath Grp. Inc.*, 95 USPQ2d 1377, 1381 (TTAB 2010) (citing *In re Marriott Corp.,* 173 USPQ 799, 800 (CCPA 1972); *Lands' End Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314, 1316 (E.D. Va. 1992); and *In re Shipley Co.*, 230 USPQ 691, 693-94 (TTAB 1986)). Applicant relies on the "Request a Demo" button as equivalent to providing a mechanism for ordering the goods, arguing that the invitation to request a demo makes the webpage point-of-sale material.

[11] 5 TTABVUE 2-3.

Displays associated with the goods, including online displays, must be at the point of sale, where the customer sees the mark on the display contemporaneously with the ability to purchase the goods. *Lands' End,* 24 USPQ2d at 1316 ("A crucial factor in the analysis is if the use of an alleged mark is at a point of sale location."); *see also In re Sones*, 93 USPQ2d at 1122 (quoting *In re Ostberg*, 83 USPQ2d 1220, 1222-23 (TTAB 2007) ("'In [*Lands' End*], the determinative factor was that the mark was used at the point of sale.'")). "A point of sale location provides a customer with the opportunity to look to the displayed mark as a means of identifying and distinguishing the source of goods." *Lands' End*, 24 USPQ2d at 1316. The Board has held:

> [T]o be more than mere advertising, a point-of-sale display associated with the goods must do more than simply promote the goods and induce a person to buy them; that is the purpose of advertising in general. The specimen must be "calculated **to consummate a sale**."

In re U.S. Tsubaki, Inc., 109 USPQ2d 2002, 2009 (TTAB 2014) (quoting *In re Bright of Am., Inc.*, 205 USPQ 63, 71 (TTAB 1979) (emphasis added)); *see also Avakoff v. S. Pac. Co.,* 764 F.2d 1097, 226 USPQ 435, 436 (Fed. Cir. 1985) (solicitation letters sent to retailers deemed mere advertisements in which use of the mark apart from the goods did not qualify as trademark use for the goods). To be calculated to consummate a sale, the specimen must contain sufficient practical information about the goods and a way to order the goods, so as to put the prospective customer at the point of purchase. A way to order the goods can include a catalog order form, a telephone number through which the consumer is invited to call in a purchase, *Lands End*, 24 USPQ2d at 1316, or in the case of webpage specimens, a way to "plac[e] orders for the

goods via the Internet," *Anpath Grp.*, 95 USPQ2d at 1381, such as selecting goods and adding them to a virtual shopping cart for check-out.

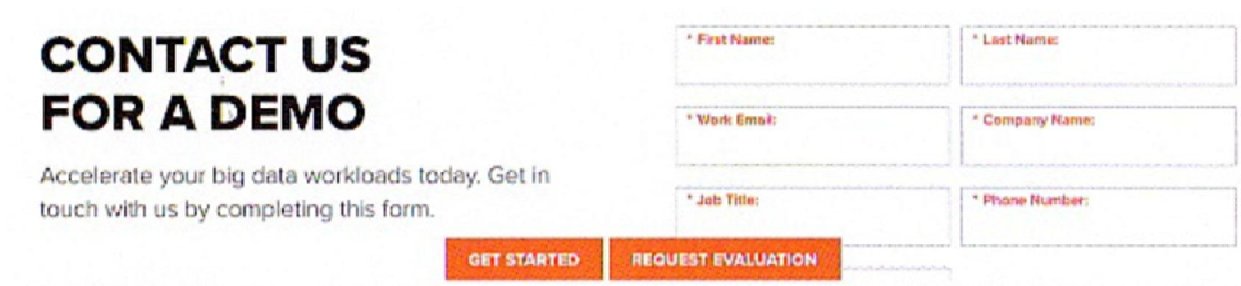
On the other hand, a specimen fails to qualify as a point-of-sale display if it contains more limited information, and would require a prospective customer to "contact applicant to obtain preliminary information necessary to order the goods" before the prospective customer could actually place an order. *Id.*; *see also U.S. Tsubaki*, 109 USPQ2d at 2005. The U.S. Court of Appeals for the Federal Circuit recently affirmed the rejection of a webpage specimen because it was not a point-of-sale display. The Federal Circuit held that substantial evidence supported the Board decision:

> [The Board] noted the absence of information it considered essential to a purchasing decision, such as a price or range of prices for the goods, the minimum quantities one may order, accepted methods of payment, or how the goods would be shipped. J.A. 8. The Board also considered the "For sales information:" text and phone number contact. It assumed that the phone number would connect a prospective customer to sales personnel, but it found that "if virtually all important aspects of the transaction must be determined from information extraneous to the web page, then the web page is not a point of sale." J.A. 9; see J.A. 6 ("A simple invitation to call applicant to get information—even to get quotes for placing orders—does not provide a means of ordering the product." (quoting *In re U.S. Tsubaki, Inc.*, 109 U.S.P.Q.2d 2002, 2005 (T.T.A.B. 2014))). The Board further noted the absence of any evidence (as opposed to attorney argument) of how sales are actually made—e.g., documentation or verified statements from knowledgeable personnel as to what happens and how. J.A. 9.

In re Siny Corp., 920 F.3d 1331, 1336, 2019 USPQ2d —, — (Fed. Cir. 2019).

We note that Applicant and the Examining Attorney focus their arguments on the substitute specimen,[12] which consists of nine pages of screenshots from Applicant's website.[13] While the webpages provide information about the goods, "the industry's first all-flash storage purpose-built for modern analytics,"[14] we find that they do not have a means of ordering the goods and enough information to put a potential consumer in a position to order them.

Applicant contends that the "REQUEST A DEMO" button constitutes the means of ordering the goods. *See In re Dell Inc.*, 71 USPQ2d 1725, 1727 (TTAB 2004) (holding that a website can be a display associated with the goods when it "provides a means of ordering the product"). The button appears on six of the nine screenshots, five of which also include buttons to "GET STARTED" and "REQUEST EVALUATION."[15] The last screenshot also includes the following at the bottom of the page:[16]



[12] Applicant's original specimen does not include the "Request a Demo" button and refers to "FLASHBLADE SPECIFICATIONS – BETA" and indicates, "FINAL SPECIFICATIONS TO BE RELEASED UPON GA [general availability]," with a further message that "[a]ll features and specifications are preliminary and may change before GA." TSDR October 13, 2016 Specimen at 4. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 904.03(e) (Oct. 2018). We agree that this specimen was not acceptable.

[13] TSDR September 11, 2017 Specimen at 1-9.

[14] *Id.* at 1.

[15] *Id.* at 5-9.

[16] *Id.* at 9.

However, on its face, an invitation to contact Applicant for a product demonstration does "not indicate to consumers that they can place orders for the identified goods via the provided contact information." *U.S. Tsubaki,* 109 USPQ2d at 2006. According to its ordinary definition, a "demo" would provide a prospective customer the opportunity to see how a product works. Moreover, the screenshot excerpt above suggests that to request a demo, the prospective customer provides contact information for the purpose of scheduling the demo at some time in the future, further undermining the notion that the use of the mark on the website could be at the point of sale.

In addition, we lack persuasive evidence specific to Applicant's business and purchasing process to prove that the specimen constitutes point-of-sale material, by clarifying that something other than the ordinary meaning of "demo" applies in this context. While we have taken into consideration Applicant's description of the specimen as having a "contact request through which the purchasing process is initiated," this very general and conclusory unverified characterization does not convince us that the offer to request a demo equates to a means of ordering these goods, so as to put the customer at the point of sale. *See In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1420 (TTAB 2018) ("consideration must be given not only to the information provided by the specimen itself, but also to any explanations offered by Applicant clarifying the nature, content, or context of use of the specimen that are **consistent with what the specimen itself shows**.") (emphasis added). We also

note the attorney argument concerning the purchasing process,[17] but remain mindful that "[a]ttorney argument is no substitute for evidence." *Enzo Biochem v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). As the Board noted in *U.S. Tsubaki,* 109 USPQ2d at 2006, "there is no actual proof to support these statements in the record. We have only applicant's counsel's statements as to how applicant" sells the goods. In this case, just as in *U.S. Tsubaki*, "we have here no foundational information about counsel's investigation of, or understanding of, applicant's business, that would put him in a position to make statements regarding the marketing of the products at issue…." *Id.* (citing case law rejecting unsubstantiated arguments). The specimen on its face does not show it is point-of-sale material, and Applicant has not provided evidence to establish that the webpages are truly point-of-sale displays.

In addition, Applicant's specimen lacks other information that would help make a prospective customer ready to consummate a sale. For example, there is no pricing or payment information, and Applicant concedes in its Brief that "[p]ricing is necessarily

[17] 4 TTABVUE 1. In addition to the lack of a supporting declaration, this case has other important differences from *In re Valenite*, 84 USPQ2d 1346 (TTAB 2007), in which a specimen with a "Customer Service" toll-free telephone number was deemed to have sufficient ordering information given the testimony regarding the specialized industrial nature of the goods, and the actual consumer purchases through the customer service line. In particular, the *Valenite* specimen included detailed product information and an "online calculator" so that "applicant's website provides the prospective purchaser with sufficient information that the customer can select a product and call customer service to confirm the correctness of the selection and place an order." *Id.* at 1349-50. By contrast, in this case, the same level of information is lacking, and a prospective customer would not be in a position to merely "confirm the correctness of the selection and place an order." Rather, a product demonstration apparently would be required, along with at least the exchange of other information for customization, and the formulation of pricing information to consider prior to a customer being ready to make a selection and purchase.

only available after [product customization] information is provided."[18] Also, as Applicant has acknowledged in its Brief,[19] and as the specimen reflects, its goods require customization in consultation with the customer. One webpage contains a table of "specifications" options, depending on whether the 8-, 17-, or 52-TB Blade is selected, and whether "7 Blades" or "15 Blades" is selected.[20] These omissions also weigh against considering the webpages point-of-sale displays. *See U.S. Tsubaki*, 109 USPQ2d at 2005 (rejecting specimen without sales form or clear ordering information with "no information about minimum quantities one must order, how much the goods cost, or how the orders are shipped. Such advertising is not acceptable to show trademark use on goods"); *Anpath Grp.*, 95 USPQ2d at 1381 (rejecting specimen without clear ordering information where "the potential purchaser has no actual information about the minimum quantities of applicant's goods one may order, how much the goods cost, how one might pay for the products, how the large containers of liquid would be shipped, etc.").

III. Conclusion

Decision: We deem Applicant's specimen unacceptable as mere advertising and therefore affirm the refusal to register Applicant's mark.

[18] 7 TTABVUE 5 (Applicant's Brief).

[19] *Id.*

[20] TSDR September 11, 2017 Specimen at 2.