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

Proceeding	92068068
Party	Defendant Insight Energy Ventures LLC DBA Powerley
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Filer's Name	DANIEL H. BLISS
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Signature	/DANIEL H. BLISS/
Date	05/30/2019
Attachments	Registrants Motion and Brief to Exclude Declaration of Eric J Ball in Support of Petitioner Pure Storage Incs Motion for Partial.pdf(156548 bytes ) Declaration of James Bumbaugh in Support of Registrants Motion and Brief to Exclude Declaration of Eric J Ball etc.pdf(88417 bytes ) Exhibit A.pdf(309700 bytes ) Exhibit B.pdf(179263 bytes )

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

**In re Trademark of:**

**Registrant:** Insight Energy Ventures LLC dba Powerley  
**Registration No.** 5,156,080  
**Registration Date:** March 7, 2017  
**Mark:** P (Stylized/Design)

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PURE STORAGE, INC.,

Plaintiff/Petitioner,

v.

Cancellation No. 92068068

INSIGHT ENERGY VENTURES LLC  
DBA POWERLEY,

Defendant/Registrant.

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**REGISTRANT’S MOTION AND BRIEF TO EXCLUDE DECLARATION OF  
ERIC J. BALL IN SUPPORT OF PETITIONER PURE STORAGE, INC.’S MOTION  
FOR PARTIAL SUMMARY JUDGEMENT UNDER RULE 37(C)**

Registrant, Insight Energy Ventures LLC dba Powerley (“Powerley”), moves for an order to exclude the Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.’s (“Pure Storage”) Motion for Partial Summary Judgement under Rule 37(c) of the Federal Rules of Civil Procedure and submits this Brief in support of this motion and the Declaration and Exhibits referenced therein.

Rule 37(c) enforces the disclosure requirements imparted by Rule 26. Rule 37(c) states, in relevant part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”

Fed. R. Civ. P. 37(c)(1); *see also Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (affirming district court's order excluding undisclosed damages evidence); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *Ortiz-Lopez v. Sociedad Española de Auxilio Mutuo*, 248 F.3d 29, 33 (1st Cir. 2001); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir.2001) (“[T]he party facing sanctions for belated disclosure” has the obligation “to show that its failure to comply with the Rule was either justified or harmless and therefore deserving of some lesser sanction.”).

Thus, the rule contemplates the exclusion of later-discovered evidence not disclosed in the supplemental discovery responses required by Rule 26(e), as well as the initial disclosures contemplated by Rule 26(a)(1). *See Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) (noting that prior to 1993 “adoption of Rule 37(c)(1), no rule specifically provided sanctions for the failure to supplement discovery”).

In addition to requiring payment of reasonable expenses, including attorney fees, caused by the failure to disclose, these sanctions may include an order that facts be taken to be established under Rule 37(b)(2)(A); an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party under Rule 37(b)(2)(C); or informing the jury of the failure to make the disclosure under Rule 37(c)(1). Dismissal is a severe sanction, and a court will impose it only in extreme circumstances. Dismissal may be “imposed only if the court concludes that a party’s failure to cooperate in discovery is due to willfulness, bad faith, or fault.” *Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153–54 (6th Cir. 1988).

As to Petitioner’s Initial Disclosures, Petitioner identified only Jason Nadeau as a fact witness who had information and an expert witness to be identified later. *See Declaration of*

James Bumbaugh in Support of Registrant's Motion and Brief to Exclude Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment under Rule 37(c) ("Bumbaugh Decl."), Ex. B. Eric J. Ball was never identified as a fact witness or an expert witness. *See* Bumbaugh Decl. Petitioner never supplemented Petitioner's Initial Disclosure to add Eric J. Ball as a fact witness or expert witness. *See* Bumbaugh Decl. Eric J. Ball is an attorney and the third set of counsel in this proceeding. He is not a fact witness and not allowed to supply evidence on Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment. The failure to name Eric J. Ball as a fact witness is not substantially justified and is not harmless. Petitioner could have supplied evidence through its fact witness Jason Nadeau. In addition, Petitioner did not produce any documents to Registrant and therefore cannot rely on any documents as evidence in the Declaration of Eric J. Ball. *See* Bumbaugh Decl.

Since Petitioner failed to provide the documents in response to the requests for production of documents or identify Eric J. Ball as a witness as required by Rule 26(a) or (e), Rule 37(c) automatically excludes the Declaration of Eric J. Ball and Petitioner is not allowed to use that information or Eric J. Ball as a witness to supply factual information or evidence on Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment. Therefore, Registrant requests an order striking the Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment and not allowing the information or as witness to supply evidence on Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment, dismissing the cancellation proceeding, or rendering a judgment by default against the disobedient Petitioner under Rule 37(b)(2)(C) for willfully failing to cooperate in discovery.

Wherefore, Registrant respectfully requests that its motion be granted.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS  
PLLC

Dated: May 30, 2019

By: /Daniel H. Bliss/

Daniel H. Bliss (P40129)  
450 West Fourth Street  
Royal Oak, Michigan 48067-2557  
Phone: (248) 645-1483 | Fax: (248) 723-1568  
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***Attorneys for Insight Energy Ventures, LLC  
dba Powerley***

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true, correct, and complete copy of the foregoing REGISTRANT'S MOTION AND BRIEF TO EXCLUDE DECLARATION OF ERIC J. BALL IN SUPPORT OF PETITIONER PURE STORAGE, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER RULE 37(C) has been served upon all parties, via electronic mail at their email address of record on this date.

Date: May 30, 2019

By: /Daniel H. Bliss/  
Daniel H. Bliss

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

In re Trademark of:

**Registrant:** Insight Energy Ventures LLC dba Powerley  
**Registration No.** 5,156,080  
**Registration Date:** March 7, 2017  
**Mark:** P (Stylized/Design)

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PURE STORAGE, INC.,

Plaintiff/Petitioner,

v.

Cancellation No. 92068068

INSIGHT ENERGY VENTURES LLC  
DBA POWERLEY,

Defendant/Registrant.

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**DECLARATION OF JAMES BUMBAUGH IN SUPPORT OF REGISTRANT'S  
MOTION AND BRIEF TO EXCLUDE DECLARATION OF ERIC J. BALL IN SUPPORT  
OF PETITIONER PURE STORAGE, INC.'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT UNDER RULE 37(C)**

I, James Bumbaugh, hereby declare:

1. I am an employee and general counsel of the Registrant, Insight Energy Ventures LLC dba Powerley ("Powerley"), in this Cancellation against Registrant's U.S. Trademark Registration No. 5,156,080. I submit this Declaration in support of Registrant's Brief in Opposition to Petitioner Pure Storage, Inc.'s ("Pure Storage") Motion for Partial Summary Judgement. Unless otherwise noted, I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the facts set forth herein.

2. I am listed as a fact witness in Defendant/Registrant's Initial Disclosure, attached as Exhibit A dated July 2, 2018 that was served on Petitioner.

3. Attached as Exhibit B is a copy of Petitioner's Initial Disclosures dated July 2, 2018 that was served on Registrant.

4. Eric J. Ball was never identified as a fact witness or expert witness in Petitioner's Initial Disclosures.

5. Petitioner never supplemented Petitioner's Initial Disclosures to add Eric J. Ball as a fact witness or expert witness.

6. Petitioner did not produce any documents to Registrant.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May30, 2019 in Royal Oak, Michigan.



---

By: James Bumbaugh



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true, correct, and complete copy of the foregoing DECLARATION OF JAMES BUMBAUGH IN SUPPORT OF REGISTRANT'S MOTION AND BRIEF TO EXCLUDE DECLARATION OF ERIC J. BALL IN SUPPORT OF PETITIONER PURE STORAGE, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER RULE 37(C) has been served upon all parties, via electronic mail at their email address of record on this date.

Date: May 30, 2019

By: /Daniel H. Bliss/  
Daniel H. Bliss

# Exhibit A

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

**In re Trademark of:**

**Registrant:** Insight Energy Ventures LLC dba Powerley  
**Registration No.** 5,156,080  
**Registration Date:** March 7, 2017  
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PURE STORAGE, INC.,

Plaintiff/Petitioner,

v.

Cancellation No. 92068068

INSIGHT ENERGY VENTURES LLC  
DBA POWERLEY,

Defendant/Registrant.

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**DEFENDANT/REGISTRANT'S INITIAL DISCLOSURES**

Pursuant to the Trademark Trial & Appeal Board's Scheduling Order and Rule 26(a) of the Federal Rules of Civil Procedure and Rule 2.120(a), Defendant, Insight Energy Ventures LLC dba Powerley ("Registrant"), submits the following Initial Disclosures in the above-captioned action. Registrant's investigation is ongoing and these initial disclosures are based upon the information reasonably available to it at this time. By making these disclosures, Registrant does not represent that it is identifying every document or witness that supports its claims or defenses. Pursuant to Fed. R. Civ. P. 26(e), Registrant reserves the right to modify or supplement the information provided in these Initial Disclosures based upon continuing investigation and discovery in this action.

Registrant makes the following disclosures without in any way waiving: (1) the right to object to the use of any such information on evidentiary grounds in any subsequent proceeding in this or any other action; and (2) the right to object on any and all grounds at any time to any

other discovery request or proceeding involving or relating to the subject matter of these disclosures.

**I. WITNESSES REGISTRANT MAY USE TO SUPPORT ITS CLAIMS**

A. The following individual(s) are believed to have knowledge of the facts in regards to the instant cancellation proceeding and may be called by Registrant to provide testimony during the relevant testimony periods. Registrant reserves the right to identify additional potential witnesses as discovery progresses. Unless otherwise stated, the following individuals are employees or agents of Registrant and may only be contacted through Registrant's counsel, Howard & Howard Attorneys PLLC:

1. \_\_\_\_\_  
Member  
Insight Energy Ventures LLC dba Powerley  
333 W. 7th Street, #200  
Royal Oak, MI 48067
2. Kevin Foreman  
\_\_\_\_\_  
Vectorform, LLC  
123 W 5th Street  
Royal Oak, MI 48067
3. Trevor \_\_\_\_\_  
Designer  
Vectorform, LLC  
123 W 5th Street  
Royal Oak, MI 48067
4. Lindsey Rosenburg  
Interactive Designer & Administrator  
Vectorform, LLC  
123 W 5th Street  
Royal Oak, MI 48067
5. James Bumbaugh  
Insight Energy Ventures LLC dba Powerley  
General Counsel  
333 W. 7th Street, #200

Royal Oak, MI 48067

Among other things, Mr. \_\_\_\_\_ has knowledge of, and may testify about the following:

all issues in the cancellation, including the allegations asserted in Registrant's Answer, the adoption, use and ownership of Registrant's mark identified in Registrant's registration, the marketing, advertising and promotion of goods/services under Registrant's mark, the nature of goods/services provided in connection with Registrant's mark, the channels of trade and classes of customers for goods/services provided in connection with Registrant's mark, the Petition to Cancel, and use of Petitioner's marks.

Among other things, Mr. Foreman has knowledge of, and may testify about the following:

all issues in the cancellation, including the creation and adoption of Registrant's mark.

Among other things, Mr. Trevor \_\_\_\_\_ has knowledge of, and may testify about the following:

all issues in the cancellation, including the creation and adoption of Registrant's mark.

Among other things, Ms. Rosenberg has knowledge of, and may testify about the following:

all issues in the cancellation, including the creation and adoption of Registrant's mark.

Among other things, Mr. Bumbaugh has knowledge of, and may testify about the following:

all issues in the cancellation, including the preparation and filing of the trademark application for Registrant's mark, the description of the goods/services provided in connection

with Registrant's mark, the channels of trade and classes of customers for goods/services provided in connection with Registrant's mark.

3. Expert witnesses as Registrant deems necessary or appropriate.
4. Rebuttal witnesses identified during the course of this action.

II. **DOCUMENTS AND TANGIBLE THINGS REGISTRANT MAY USE TO SUPPORT ITS CLAIMS OR DEFENSES**

- A. The non-privileged information, documents and things pertaining to Registrant's adoption, use and ownership of Registrant's mark.
- B. The non-privileged information, documents and things pertaining to marketing, advertising, and promotion of goods/services under Registrant's mark.
- C. The non-privileged information, documents and things pertaining to the channels of trade and classes of customers for goods/services provided in connection with Registrant's mark.
- D. The non-privileged information, documents and things pertaining to the nature of goods/services provided in connection with Registrant's mark.
- E. The non-privileged information, documents and things pertaining to Registrant's application and Registrant's use of the mark covered thereby.
- F. The non-privileged information, documents and things pertaining to the filing and prosecution of Petitioner's trademark registration for "P" identified in U.S. Trademark Registration No. 4,165,143 (the '143 Registration).
- G. The non-privileged information, documents and things currently within Petitioner's possession pertaining to Petitioner's marketing, advertising,

and promotion of goods recited in the '143 Registration.

- H. The non-privileged information, documents and things currently within Petitioner's possession pertaining to adoption, use and ownership of the mark in the '143 Registration.
- I. The non-privileged information, documents and things currently within Petitioner's possession pertaining to the channels of trade and classes of customers for goods provided in connection with the mark in the '143 Registration.
- J. The non-privileged information, documents and things currently within Petitioner's possession pertaining to the nature of the goods provided in connection with the mark in the '143 Registration.
- K. The non-privileged information, documents and things currently within Petitioner's possession, custody and control relating to enforcement of the mark in the '143 Registration.
- L. The non-privileged information, documents and things currently located within computer records that are maintained on the premises of Petitioner related to the '143 Registration, to the extent that such information, documents and things exist.
- M. The non-privileged information, documents and things pertaining to the filing and prosecution of Petitioner's trademark registration for "P" identified in U.S. Trademark Registration No. 4,436,830 (the '830 Registration).
- N. The non-privileged information, documents and things currently within

Petitioner's possession pertaining to Petitioner's marketing, advertising, and promotion of services recited in the '830 Registration.

- O. The non-privileged information, documents and things currently within Petitioner's possession pertaining to adoption, use and ownership of the mark in the '830 Registration.
- P. The non-privileged information, documents and things currently within Petitioner's possession pertaining to the channels of trade and classes of customers for services provided in connection with the mark in the '830 Registration.
- Q. The non-privileged information, documents and things currently within Petitioner's possession pertaining to the nature of the services provided in connection with the mark in the '830 Registration.
- R. The non-privileged information, documents and things currently within Petitioner's possession, custody and control relating to enforcement of the mark in the '830 Registration.
- S. The non-privileged information, documents and things currently located within computer records that are maintained on the premises of Petitioner related to the '830 Registration, to the extent that such information, documents and things exist.
- T. The non-privileged information, documents and things currently within Petitioner's possession pertaining to the variants of the mark in the '143 Registration and the '830 Registration (Petitioner's Mark) listed in the Petition to Cancel including the following: adoption, use and ownership;



marketing, advertising, and promotion of goods, channels of trade and classes of customers for services; nature of the services; and enforcement.

- U. The non-privileged information, documents and things currently within Petitioner's possession pertaining to Petitioner's business and marketing plans in connection with Petitioner's Marks.
- V. The non-privileged information, documents and things identified through Registrant's continuing investigation of relevant facts, evidence and witnesses.
- W. The non-privileged information, documents and things relied upon by any expert in this case.
- X. Rebuttal documents as Registrant deems necessary or appropriate.
- Y. Registrant anticipates that certain documents received from Petitioner through discovery will be used to support its claims and defenses.

The documents identified by items A-E above are in possession of Registrant and/or its counsel. Petitioner is expected to have in its possession documents identified by items F-U. It is premature to provide the location of documents identified by items V-Y.

**III. COMPUTATION OF ANY DAMAGES CLAIMED BY REGISTRANT**

- A. Not applicable.

**IV. APPLICABLE INSURANCE POLICIES THAT MAY COVER PART OF ANY JUDGMENT RENDERED AGAINST REGISTRANT**

- A. Not applicable.

V. CONCLUSION

Registrant reserves the right to supplement these disclosures as additional information becomes known to them throughout the discovery phase of this Proceeding.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS PLLC

Dated: July 2, 2018

By: /Daniel H. Bliss/  
Daniel H. Bliss (P40129)  
450 West Fourth Street  
Royal Oak, Michigan 48067-2557  
Phone: (248) 645-1483 | Fax: (248) 723-1568  
Email: [DBliss@HowardandHoward.com](mailto:DBliss@HowardandHoward.com)

*Attorneys for Insight Energy Ventures LLC  
dba Powerley*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of July 2018, a true and correct copy of the foregoing REGISTRANT'S INITIAL DISCLOSURES was served on to be served by email upon the following attorney of record for Petitioner:

Nate Colbert at [trademarks@cobaltlaw.com](mailto:trademarks@cobaltlaw.com)

Dated: July 2, 2018

By: /Daniel H. Bliss/

# Exhibit B



claim of privilege, work product protection, or other basis for nondisclosure, and reserving the right to object to discovery into any listed subject matter.

### INITIAL DISCLOSURES

#### A. Individuals Likely To Have Discoverable Information.

Pursuant to Rule 26(a)(1)(A)(i), Petitioner hereby discloses the following potential witnesses known to it at this time who are likely to either have discoverable information relevant to Petitioner's defense in this case, or who would be used solely for impeachment, along with the possible subjects of their testimony. Petitioner reserves the right to supplement or amend this disclosure and/or to call at trial or subpoena for deposition additional individuals, including calling at trial as its own witnesses any witnesses disclosed by Insight Energy Ventures LLC, d/b/a Powerly ("Registrant"), or introducing portions of these individuals' deposition testimony at trial. Petitioner's employee witnesses identified below may be contacted in this action only through Petitioner's counsel. Petitioner also reserves the right to call expert witnesses as described below to be identified at a later date.

#### Witness Identification

#### Subject Matter

Jason Nadeau VP, Product Marketing Pure Storage, Inc.  Please contact through counsel.	Selection and first and continued use of Petitioner's marks including its stylized P logo; advertising related to the marks; press coverage related to the marks; press releases related to the marks; goods and services offered under the marks; sales records of goods and services offered under the marks; history of formation and ownership of Petitioner; Petitioner's target consumers and trade channels.
Expert witnesses(es), to be identified at a later date	Knowledge of trademark law; Registrant's and/or Petitioner's respective fields of goods, sales, use of

	their respective marks; survey evidence regarding the respective marks at issue
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**B. Documents.**

Pursuant to Rule 26(a)(1)(A)(ii), Petitioner identifies the following general categories of “documents, electronically stored information, and tangible things” within Petitioner’s “possession, custody, or control” that Petitioner may use to support its claims (“Documents”). The potential location(s) of each category is indicated in parentheses. Petitioner preserves its objections to production of specific documents and categories of documents until requested. In addition, a protective order sufficient to protect Petitioner’s confidential information will need to be entered prior to production of any confidential documents. These categories include, but are not limited to, the following:

1. Documents evidencing Petitioner’s services offered under its trademarks.
2. Documents relating to use, advertising, sales, and marketing of the trademarks by Petitioner.
3. Documents relating to press coverage, accolades, recognition, and awards related to Petitioner’s use of the trademarks.

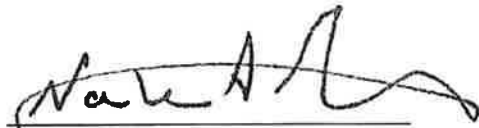
Petitioner will permit Registrant or its counsel, as may be appropriate, to inspect and copy documents at the law offices of Cobalt LLP, 1912 Bonita Avenue, Berkeley, California, 94704, including, but not limited to, the Documents described or identified above, which may be relevant to the disputed facts alleged with particularity in the pleadings or that are now reasonably available and that tend to support the positions that Petitioner has taken or is reasonably likely to take, pursuant to a protective order to be entered in this action.

Petitioner reserves all rights to object to the competency, relevancy, materiality, and admissibility of the information disclosed to Registrant. In addition, Rules 26(a)(i)(A)(iii) and 26(a)(1)(A)(iv) are not applicable in the instant proceedings.

Petitioner reserves the right to amend or supplement this disclosure if additional Documents are identified as pertinent to disputed facts. Petitioner further reserves the right to supplement or modify this disclosure to the extent that Registrant may further particularize its claims or contentions. Petitioner is not providing documents or information not reasonably available at this time.

Date: July 2, 2018

By:



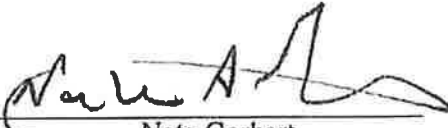
Nate A. Garhart  
COBALT LLP  
1912 BONITA AVENUE  
BERKELEY, CALIFORNIA 94704  
TEL: 510.841.9800  
FAX: 510.295.2401



**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of July, 2018, a true and correct copy of the foregoing **PETITIONER'S INITIAL DISCLOSURES** was sent by email, pursuant to the agreement by counsel for the parties, to Petitioner's counsel addressed as follows:

DANIEL H BLISS  
HOWARD & HOWARD ATTORNEYS PLLC  
dhb@h2law.com

  
Nate Garhart