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

Proceeding	92068068
Party	Plaintiff Pure Storage, Inc.
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Date	06/19/2019
Attachments	2019 06 19 Pure Storage Opposition to Motion to Exclude Ball Declara- tion.pdf(179412 bytes) 2019 06 19 E. Ball Decl ISO Opp to Motion to Exclude.pdf(347213 bytes) 2019 06 19 Reply ISO Motion for Partial MSJ.pdf(161430 bytes)

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

In the matter of Trademark Registration

Reg. No.: 5,156,080
Registered: March 7, 2017
By: Insight Energy Ventures LLC d/b/a Powerley
For the Trademark: P (Stylized/Design)

Pure Storage, Inc.

Petitioner,

v.

Insight Energy Ventures LLC d/b/a Powerley,
Registrant.

Cancellation No. 92068068

**PURE STORAGE, INC.'S OPPOSITION TO MOTION TO EXCLUDE DECLARATION
OF ERIC J. BALL IN SUPPORT OF PURE STORAGE, INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pure Storage, Inc. (“Pure Storage”) opposes Registrant Insight Energy Ventures LLC d/b/a Powerley’s (“Powerley”) Motion to Exclude the Declaration of Eric J. Ball in Support of Pure Storage’s Motion for Partial Summary Judgment. Pure Storage respectfully requests that the Board deny Powerley’s Motion to Exclude.

I. INTRODUCTION

Powerley’s Motion to Exclude the Declaration of Eric J. Ball in Support of Pure Storage’s Motion for Partial Summary Judgment (“Ball Declaration”) puts improper arguments about the form of Pure Storage’s evidence over the substance of it. Rather than dispute the substance of any of the exhibits, Powerley argues that exclusion is warranted because, while Pure

Mark: P (Stylized/Design)
Cancellation No.: 92068068

Storage did disclose a witness to testify about the use of its mark and registrations, it did not specifically disclose Eric Ball, its attorney of record, in its Initial Disclosures. At the summary judgment stage, such an argument should be ignored. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (explaining that at the summary judgment stage, the substance of the evidence must be admissible, but the form of the evidence does not). The key question here is whether the exhibits are admissible. The answer is yes.

First, every exhibit attached to the Ball Declaration is admissible even without a declaration. *See* TBMP §528.05. *Second*, contrary to Powerley’s statement that Pure Storage failed to produce documents, Pure Storage properly gave Powerley notice that responsive documents to its discovery requests were available. Powerley failed to follow-up and cannot complain about its lack of documents now. *Third*, even if the Board were to conclude that, technically, Pure Storage did not supplement its initial disclosures to identify its attorney of record, Pure Storage’s actions were proper because they were substantially justified and harmless. Thus, the Board should deny Powerley’s Motion to Exclude.

II. FACTUAL BACKGROUND

On July 2, 2018, Pure Storage served its Initial Disclosures on Powerley. Declaration of James Bumbaugh (“Bumbaugh Decl.”), Exh. B. Pure Storage disclosed Jason Nadeau, Vice President of Marketing as an individual likely to have discoverable information relating to its mark and registrations. *Id.* Pure Storage also disclosed that it would rely on “documents relating to use, advertising, sales, and marketing of the trademarks by Petitioner” to support its claims. *Id.* Pure Storage introduced these documents into evidence through the Ball Declaration. The Ball Declaration is an attorney declaration for the purpose of identifying and authenticating evidence, as required by Federal Rule of Civil Procedure 56(e). It is a common practice for

attorneys to submit declarations in support of motions. The attached exhibits attached to the Ball Declaration are: Pure Storage's registrations, Powerley's registration, and printouts from Pure Storage's publicly available website showing use of its P logo registrations at issue in this action in connection with its products and services.

Pure Storage substituted Ball as counsel on March 15, 2019, two days before discovery closed. 13 TTABVUE 1. Powerley received notice of Ball's appearance, so Powerley knew that Ball was Pure Storage's counsel as of March 15, 2019. Thus, Powerley was not surprised by the Ball Declaration, nor does Powerley argue that is was.

III. POWERLEY'S MOTION TO EXCLUDE SHOULD BE DENIED BECAUSE THE EXHIBITS ARE ADMISSABLE, PURE STORAGE COMPLIED WITH ITS DISCOVERY OBLIGATIONS, AND ANY FAILURE TO SUPPLEMENT ITS DISCLOSURE IS HARMLESS AND JUSTIFIED.

The Board should deny Powerley's Motion to Exclude for the following three reasons: (1) every exhibit attached to the Ball Declaration is admissible even without a declaration; (2) Pure Storage gave Powerley notice that responsive documents to its discovery requests were available and Powerley did not file a motion to compel; and (3) Pure Storage's actions were substantially justified and harmless.

A. The Exhibits Attached to the Ball Declaration Are Admissible Even Without a Declaration.

1. Pure Storage's Registrations are Admissible Under TBMP § 528.05(d).

Under TBMP § 528.05(d), Pure Storage may make its registrations part of the record by "filing a status and title copy thereof, or a current printout of information from the USPTO electronic database records showing the status and title thereof, with its brief on the summary judgment motion." These documents would also be admissible at trial through a notice of reliance. *See* TBMP 704.03(b)(1)(A); *see also Research in Motion Ltd. v. NBOR Corp.*, 92

USPQ2d 1926,1928 (TTAB 2009) (printouts showing status and title of pleaded registrations may be introduced at trial under notice of reliance). Both Exhibits B and C to the Ball Declaration are printouts of Pure Storage's U.S. Trademark Registrations from the USPTO electronic database. Thus, Exhibits B and C are admissible under TBMP § 528.05(d) even without a declaration.

2. Powerley's Registration is Automatically Admissible Under TBMP § 528.05(a)(1).

The entire file of a subject registration, including any evidence made of record during prosecution of the underlying application, is part of the record in a cancellation proceeding without any action of the parties. *See* TBMP § 528.05(a)(1) (explaining that the evidentiary record upon summary judgment includes, without action by any party, the pleadings, and the file of any application or registration that is the subject of the proceeding). The same is true for trial. *See* TBMP § 704.03(a) (explaining that the registration that is the subject of the proceeding is automatically introduced as evidence at trial). Exhibit H, which is Powerley's registration at issue, is automatically admissible at both summary judgment and trial. Thus, Exhibit H should not be excluded from the record.

3. Pure Storage's Printouts of Internet Webpages Are Admissible Under § TBMP 528.05(e).

Information obtained from the Internet is admissible and self-authenticating if it contains the date it was accessed and the document's Uniform Resource Locator ("URL"). *See* TBMP 528.05(e); *see also Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) ("if a document obtained from the Internet identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with

Trademark Rule 2.122(e)"). Exhibits A, D, E, F, G, I, and J are printouts from Pure Storage's publicly available online website. The URL and the accessed date is listed in the bottom right-hand corner of every exhibit. Thus, Exhibits A, D, E, F, G, I, and J, the website printouts, are admissible and should not be excluded.

Every exhibit attached to the Ball Declaration is admissible under TBMP §528.05 and thus should not be excluded.

B. Pure Storage's Exhibits Were Available to Powerley During Discovery.

Contrary to Powerley's assertion that Pure Storage did not produce any documents, Pure Storage made its documents available to Powerley when it timely served its objections and responses on February 21, 2019. Declaration of in Eric J. Ball in Support of Pure Storage, Inc.'s Opposition to Motion to Exclude ("Ball Opposition Decl."), Exh. A at 4. In responding to Powerley's discovery requests, Pure Storage stated, "petitioner will produce non-privileged documents describing the products and services offered under Petitioner's Marks, if any, at a mutually agreed upon time and place." *Id.* Both Pure Storage and Powerley used similar language as quoted throughout their responses. Ball Opposition Decl., Exh. B at 7-8. Powerley had over three months to follow-up regarding Pure Storage's documents. Powerley failed to do so and should not be allowed to complain about it now. *See Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 103 USPQ2d 1435, 1438-39 (Fed. Cir. 2012) (Board did not abuse its discretion by refusing to exclude plaintiff's evidence where plaintiff objected to the requests and offered to produce documents at an agreeable time and place and defendant failed to follow-up or move to compel). Moreover, if Powerley needed additional documents to prepare its opposition, it should have filed a motion under Federal Rule of Civil Procedure 56(d) saying so. It did not.

Pure Storage also objected to producing documents that were equally available to Powerley. Ball Opposition Decl., Exh. A at 4. This objection is proper under TBMP § 402.02. All exhibits attached to the Ball Declaration are publicly available documents. Thus, they are subject to Pure Storage's objection. Powerley should have moved to compel if it disagreed with the objection. But Powerley never attempted to meet and confer with Pure Storage's counsel, nor did Powerley move to compel production. Again, Powerley cannot belatedly complain about the sufficiency of discovery. *See H.D. Lee Co v. Maidenform, Inc.*, 87 USPQ2d 1715, 1719 (TTAB 2008) (holding that a party that receives responses it believes to be inadequate, but fails to file a motion to compel may not later complain about its sufficiency); *see also Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002) (defendant cannot complain about the inadequacy of discovery responses where defendant failed to move to compel). For this same reason, Powerley is not entitled to sanctions. *See, e.g., Guthy-Renker Corp. v. Boyd*, Opposition No. 91182999, 2008 WL 4922487, at *3 (TTAB 2008) (motion for sanctions denied where moving party could have made additional efforts with adverse party to schedule conference, including requesting Board participation in the discovery conference, but failed to do so).

Pure Storage properly made its exhibits available to Powerley during discovery thus Powerley's motion to exclude them should be denied.

C. Pure Storage's Omission of Eric Ball in its Initial Disclosures is Justified and Harmless.

Even if the Board were to conclude that Pure Storage did not comply with Rule 26, Pure Storage's omission of Eric Ball in its Initial Disclosures is justified and harmless. Fed. R. Civ. P. 37(c)(1). The Board should therefore deny Powerley's Motion to Exclude. In instances where a party does not "unequivocally refuse" to provide information in response to discovery requests, the preclusion sanction under Fed. R. Civ. P. 37(c)(1) may not apply. *See Midwestern Pet*

Foods, 103 USPQ2d 1439 (refusing to exclude evidence where plaintiff objected to requests and offered to produce documents at an agreeable time and place); *see also British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1201 (TTAB 1993) (evidence introduced by applicant at trial was considered where applicant gave partial answers and otherwise objected to requests as cumulative or burdensome but opposer failed to file motion to compel), *aff'd*, 32 USPQ2d 1120 (Fed. Cir. 1994).

The Board also applies a five-factor test to determine whether a party's failure to supplement or correct its disclosure is substantially justified or harmless: "(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." *Great Seats, Inc. v. Great Seats, Ltd.*, 100 USPQ2d 1323, 1326-27 (TTAB 2011). Here, all factors weigh in favor of Pure storage.

1. There Was No Surprise to Powerley.

Powerley does not argue surprise or prejudice because of the Ball Declaration. That is because there is none. This is further shown by Powerley's failure to cite a single case allowing for the exclusion of an attorney declaration either generally, or specifically, due to failure to include an attorney of record in the initial disclosures. Instead, Powerley relies on a handful of distinguishable cases excluding expert witnesses or damages calculations at trial. These cases are distinguishable because unlike cases showing delay or surprise, Powerley knew Ball was Pure Storage's new counsel and knew about each of the exhibits attached to the Ball Declaration. Indeed, Federal Rule of Civil Procedure 26(e) only requires supplementing when the other side is not aware of the new information. And here, Powerley was on direct notice of Ball's appearance

in the proceedings. *See* 13 TTABVUE 1 (Pure Storage’s Substitution of Attorney). Powerley was also given notice that Pure Storage had the documents submitted as part of the Ball Declaration. Pure Storage informed Powerley in its Initial Disclosures and in its discovery responses that it had responsive registration documents and documents about its use of its mark. Bumbaugh Decl., Exh. B; Ball Decl., Exh. A. Pure Storage told Powerley it would produce these documents at a mutually agreed upon time and place. *Id.* Powerley never followed up about the documents.

Finally, Pure Storage disclosed Jason Nadeau as a potential witness to testify on the same subjects. Bumbaugh Decl., Exh. B. There is no surprise where someone testifies on the same subject matter previously disclosed. *See Kate Spade LLC v. Thatch, LLC*, 126 USPQ2d 1098, 1103-04 (TTAB 2018) (holding applicant’s failure to make pretrial disclosure of certain witnesses was substantially justified and harmless where witnesses with similar information were previously identified); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1551 (9th Cir. 1990) (denying plaintiff’s motion to exclude attorney declaration where another disclosed witness could have testified about the same information). Powerley concedes that Jason Nadeau, a previously disclosed witness, could have submitted the same exhibits in his declaration. *See* 17 TTABVUE 3. Again, rather than argue that something is wrong with the substance of the exhibits, Powerley elevates form over substance. The substance is what matters for summary judgment. *See Celotex Corp.*, 477 U.S. 317, 324 (explaining that the substance of the evidence is what matters, not the form).

2. Powerley Had Ample Time to Cure Any Surprise.

As to the second factor, Powerley had ample opportunity to cure any surprise. Powerley received notice of Pure Storage's Motion for Partial Summary Judgment on April 30, 2019. 14 TTABVUE 1-10. Powerley did not file its response to the motion until May 30, 2019. 18 TTABVUE 1-15. Rather than filing a motion under Federal Rule of Civil Procedure 56(d) and asserting that Powerley needed additional facts to justify its opposition, Powerley used its response window to prepare a motion to exclude the evidence. And Powerley neither sought to compel Pure Storage's discovery responses nor did Powerley seek to meet and confer on these issues. To the extent there was any "surprise" about Pure Storage's use of the parties' registration and public websites showing use of the mark, Powerley made no attempt to cure it. Thus, the second factor weighs heavily in favor of Pure Storage.

3. Allowing the Ball Declaration Will Not Disrupt the Trial.

Allowing the Ball Declaration will not negatively affect trial. Powerley does not argue, nor does it cite to any evidence of possible disruption at trial. For one, in Trademark Trial and Appeal Board actions there is no concern of jury prejudice. Second, the exhibits attached to the Ball Declaration would all be admissible through a Notice of Reliance at trial. *See* TBMP §528.05. Thus, this factor weighs in favor of Pure Storage.

4. The Ball Declaration is Important to Pure Storage's Case.

The Ball Declaration provides Pure Storage's evidence in support of its Motion for Partial Summary Judgment. Such attorney declarations are common. *See Hal Roach Studios*, 896 F.2d at 1551 (denying plaintiff's motion to exclude attorney declaration). The Ball Declaration identifies and authenticates Pure Storage's registration documents and documents

showing use of Pure Storage's P logo at issue in this proceeding. These publicly available documents are key to Pure Storage's motion and should not be excluded.

5. Pure Storage's Explanation for Not Disclosing Ball in its Initial Disclosures is Adequate and Justified.

Ball was substituted in as counsel for Pure Storage two days before the close of discovery and Powerley was on notice of Ball's appearance as counsel. 13 TTABVUE 1. The website information submitted as part of the Ball Declaration was also reviewed by Ball after the close of discovery. As evidenced by the exhibits' date stamps, Ball collected the exhibits shortly before filing the Motion for Partial Summary Judgment. Thus, Pure Storage's omission of Ball in its Initial Disclosures was substantially justified because it would have been unreasonable and burdensome for Pure Storage, through its new counsel, to update its Initial Disclosures while preparing the summary judgment motion. *See Intel Corp. v. Via Tech., Inc.*, 204 F.R.D. 450, 451 (N.D. Cal. 2001) ("as the deadline for summary judgment nears in any civil case, it is customary for counsel to solicit declarations. . . . In this process, it would be unreasonable and burdensome (and rarely, if ever, done in practice) to require all sides to augment any . . . disclosure lists each and every time they obtain a declaration for potential use on summary judgment.").

Furthermore, Pure Storage's omission of Ball in its Initial Disclosures was also justified because Pure Storage did not surprise Powerley with any additional documents or testimonial subjects during summary judgment. Powerley was on notice that the registrations and documents showing use were available as early as July 2, 2018, the date Pure Storage served its Initial Disclosures. Bumbaugh Decl., Exh. B. Pure Storage even disclosed Jason Nadeau as a potential witness to testify on the same subjects covered by the Ball Declaration. *Id.* Pure Storage's explanation of its omission of Ball in its Initial Disclosures, as explained throughout

this opposition brief, is adequate, justified, and supported by case law. This final factor weighs in favor of Pure Storage.

IV. CONCLUSION

Powerley's Motion to Exclude should be denied because: (i) all the exhibits submitted with the Ball Declaration are admissible under TBMP § 528.05; (ii) Pure Storage's website exhibits were available to Powerley during discovery; and (iii) even if the Board were to conclude that, technically, Pure Storage did not comply with Rule 26, Pure Storage's actions were proper because they were substantially justified and harmless. Accordingly, Pure Storage respectfully requests that the Board deny Powerley's Motion to Exclude Declaration of Eric J. Ball.

Respectfully submitted,

Dated: June 19, 2019

/Eric J. Ball/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PURE STORAGE, INC.’S
OPPOSITION TO MOTION TO EXCLUDE DECLARATION OF ERIC J. BALL IN
SUPPORT OF PURE STORAGE, INC.’S MOTION FOR PARTIAL SUMMARY
JUDGMENT** was served this 19th day of June 2019 on counsel for Powerley at
ipdocket@h2law.com as required by the Trademark Trial and Appeal Board.

/Irene Lopez/

Irene Lopez

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

In the matter of Trademark Registration

Reg. No.: 5,156,080
Registered: March 7, 2017
By: Insight Energy Ventures LLC d/b/a Powerley
For the Trademark: P (Stylized/Design)

Pure Storage, Inc.

Petitioner,

v.

Insight Energy Ventures LLC d/b/a Powerley,

Registrant.

Cancellation No. 92068068

**DECLARATION OF ERIC J. BALL IN SUPPORT OF PETITIONER
PURE STORAGE, INC.'S OPPOSITION TO INSIGHT ENERGY VENTURES LLC'S
MOTION TO EXCLUDE DECLARATION OF ERIC J. BALL**

I, Eric Ball, hereby declare:

1. I am an attorney with the law firm of Fenwick & West LLP, counsel for the Petitioner, Pure Storage, Inc. (“Pure Storage”) in this Cancellation against Registrant’s, Insight Energy Ventures LLC d/b/a Powerley (“Registrant”) U.S. Trademark Registration No. 5,156,080. I submit this Declaration in Support of Petitioner Pure Storage’s Opposition to Insight Energy Ventures LLC’s Motion to Exclude Declaration of Eric J. Ball. 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. Attached as Exhibit A is a copy of Pure Storage’s responses and objections to Registrant’s Request for Production of Documents. Pure Storage timely served its responses and objections on Powerley on February 21, 2019.

3. Attached as Exhibit B is a copy of Powerley’s responses and objections to Pure Storage’s Request for Production of Documents. Powerley served its responses and objections on Pure Storage on August 1, 2018.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 19, 2019 in Mountain View, California.

/Eric J. Ball/
Eric J. Ball

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DECLARATION OF ERIC J. BALL IN SUPPORT OF PETITIONER PURE STORAGE, INC.’S OPPOSITION TO INSIGHT ENERGY VENTURES LLC’S MOTION TO EXCLUDE DECLARATION OF ERIC J. BALL** was served this 19th day of June 2019 on counsel for Powerley at: ipdocket@h2law.com as required by the Trademark Trial and Appeal Board.

/Irene Lopez/
Irene Lopez

EXHIBIT A

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

In the Matter of Registration

Reg. No. 5156080

Registered: March 07, 2017

By: Insight Energy Ventures LLC dba Powerley

Mark: P (Stylized/Design)

Pure Storage, Inc.

Petitioner,

v.

Insight Energy Ventures LLC dba
Powerley,

Registrant.

Cancellation No. 92068068

**PETITIONER’S RESPONSES TO REGISTRANT’S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

Petitioner, Pure Storage Inc., (“Petitioner”), by and through its undersigned attorneys, hereby objects and responds to Registrant, Insight Energy Ventures LLC dba Powerley’s, (“Registrant”) First Request for Production of Documents in accordance with the provisions of 37 CFR § 2.120 and Rules 26 and 34 of the Federal Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

Petitioner objects to each request on the grounds set forth below:

1. Petitioner objects to each request to the extent the request calls for production of documents or information protected by the attorney-client privilege, the work-product doctrine or the right of privacy. This information will not be produced in response to propounding party's requests. Any inadvertent production will not be deemed a waiver of any privilege with respect to the documents produced or their contents.

2. Petitioner objects to each request to the extent the request fails to specify a reasonably particular category of documents and is, accordingly, overbroad, unduly burdensome, and entails the production of documents that are neither relevant to any party's claim or defense nor proportional to the needs of this proceeding, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit..

3. Petitioner objects to each request to the extent it requires Petitioner to provide information that is equally or more readily available to propounding party or that can be obtained from other sources or in other manners by propounding party.

4. Petitioner objects to providing specific documents in response to this request for documents when those documents have previously been provided to propounding party.

5. Petitioner further objects that these requests for production of documents place an undue burden on Petitioner to the extent that they seek documents or electronically stored information that that are equally available to Opposer, are stored in sources not reasonably accessible without undue burden or expense, or otherwise unduly burdensome to demand of Petitioner.

6. Petitioner objects to providing documents to the extent they contain information regarded as confidential, proprietary, or trade secrets of Petitioner and/or third parties.

7. Petitioner objects to these requests for production of documents to the extent that they purport to impose obligations on Petitioner to obtain documents from

non-parties and/or persons not currently employed by Petitioner; or that are otherwise not in Petitioner's possession, custody, or control.

8. Petitioner further objects to those requests for production of documents to the extent that they are not limited to a specified reasonable time period. Requests not limited to a reasonable or relevant time period are overly broad, burdensome and oppressive.

9. While Petitioner has conducted a reasonable and diligent investigation regarding the subject matter of this proceeding and Opposer's requests, Petitioner's investigation is ongoing. Petitioner makes these responses based upon the information known to it at the time these responses are served. Petitioner reserves the right to change or supplement a response should it appear to be incomplete or incorrect, or if additional documents should become available.

10. By responding to these requests, Petitioner does not concede the relevancy or materiality of the documents sought in these requests or of the subject matter to which these requests refer. Petitioner's response to any request is made subject to, and without in any way waiving or intending to waive, any questions as to the competency, relevancy, materiality, authenticity, privilege or admissibility as evidence or for any other purpose, of any of the documents referred to or of the responses given herein, or of the subject matter thereof, in any proceeding.

11. All responses given herein are made subject to each and every general objection, and to the specific objections made in response to the requests.

12. The above-stated general objections shall be deemed continuous throughout the responses to the specific document requests, which follow, even if not specifically referred to therein.

OBJECTIONS AND RESPONSES TO FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

DOCUMENT REQUEST NO. 1:

Documents sufficient to identify and describe fully the products and services offered under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 1

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner also objects to this request to the extent that it seeks documents of public record and is, therefore, equally accessible to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents describing the products and services offered under Petitioner's Marks, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 2:

Documents sufficient to identify all past and present officers and directors of Petitioner from the time of Petitioner's first use of Petitioner's Marks to the present.

RESPONSE TO DOCUMENT REQUEST NO. 2

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents identifying past and present officers and directors at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 3:

Documents sufficient to identify the corporate standing of Petitioner at the time it filed the Petition to Cancel for Registrant's Mark.

RESPONSE TO DOCUMENT REQUEST NO. 3

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner also objects to the phrase "corporate standing" as vague, ambiguous, overbroad, and/or undefined in the context of this request.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, propriety, and relevance of this request.

DOCUMENT REQUEST NO. 4:

All documents evidencing Petitioner's first use of Petitioner's Marks in the United States on or in connection with each product and service identified in response to Interrogatory No. 2, served concurrently herewith.

RESPONSE TO DOCUMENT REQUEST NO. 4

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner objects that this request is overbroad and seeks documents that are not relevant

to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show its first use of Petitioner's Marks in the United States at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 5:

Representative samples of advertisements for products and services offered under or in connection with Petitioner's Marks

RESPONSE TO DOCUMENT REQUEST NO. 5

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner also objects to this request to the extent that it seeks documents that are not within Petitioner's possession, custody, or control, and/or are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce representative samples of advertising relating to products and services currently offered in connection with Petitioner's Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 6:

Representative samples of promotional materials for products and services offered under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 6

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner objects to this request to the extent that it seeks documents that are not within Petitioner's possession, custody, or control, and/or are equally available to Registrant. Petitioner also objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herein.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce representative samples of promotional materials relating to

products and services currently offered in connection with Petitioner's Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 7:

Documents sufficient to show the price of products and services offered under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 7

Petitioner objects to this document request as vague, ambiguous, overbroad, burdensome and oppressive. Petitioner further objects to this document request as not reasonably calculated to lead to the discovery of admissible evidence, and seeking information not relevant to any party's claim or defense.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show prices of the products and services offered in connection with Petitioner's Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 8:

Documents sufficient to identify persons who have offered or sold products or services under or in association with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 8

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to identify persons who have offered or sold products or services under Petitioner's Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 9:

Documents sufficient to identify actual and/or projected expenditures for the advertising and promotion of products or services offered under or in association with Petitioner's Marks from the date of first use to the present, including all summaries of said advertising expenditures.

RESPONSE TO DOCUMENT REQUEST NO. 9

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner further objects to this document request as not reasonably calculated to lead to the discovery of admissible evidence, and seeking information not relevant to any party's claim or defense.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show the advertising expenses for the goods and services bearing Petitioner's Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 10:

All business plans concerning products or services offered under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 10

Petitioner objects to the terms “business plan” as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner objects that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for “all business plans”. Petitioner also objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner’s confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner’s and/or third parties’ confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show the intended use of Petitioner’s Marks at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 11:

All documents concerning Petitioner’s decision to register and/or use Petitioner’s Marks.

RESPONSE TO DOCUMENT REQUEST NO. 11

Petitioner objects to this document request on the grounds that this request is not proportional to the needs of this proceeding, and that the burden and expense of

responding to this request outweighs its likely benefit to this proceeding as it calls for “all documents”. Petitioner further objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner’s confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights. Petitioner also objects to the term “decision” as vague, ambiguous, overbroad, and/or undefined in the context of this request.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show its conception of Petitioner’s Marks, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 12:

All documents concerning the derivation and creation of Petitioner’s Marks.

RESPONSE TO DOCUMENT REQUEST NO. 12

Petitioner objects to this document request on the grounds that this request is not proportional to the needs of this proceeding, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for “all documents”. Petitioner objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner’s confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights. Petitioner objects to the terms “derivation” and “creation” as vague, ambiguous, overbroad, and/or undefined in the context of this

request. Petitioner further objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herein.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show its conception of Petitioner's Marks, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 13:

All documents concerning each mark considered for use by Petitioner as an alternative to Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 13

Petitioner objects to this document request on the grounds that this request is not proportional to the needs of this proceeding, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner further objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show its conception of Petitioner's Marks, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 14:

All documents concerning Registrant.

RESPONSE TO DOCUMENT REQUEST NO. 14

Petitioner objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herein.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, propriety, and relevance of this request.

DOCUMENT REQUEST NO. 15:

All documents concerning the circumstances under which Petitioner first became aware of Registrant's use or ownership of Registrant's Mark.

RESPONSE TO DOCUMENT REQUEST NO. 15

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show when it first became aware of Registrant's Mark, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 16:

All documents concerning the availability of Petitioner's Marks for use and/or registration, including all trademark searches and opinions concerning same.

RESPONSE TO DOCUMENT REQUEST NO. 16

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this request to the extent that it seeks documents that constitute Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner further objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all documents".

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce all non-privileged search reports, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 17:

All publications wherein Petitioner's Marks have been referenced.

RESPONSE TO DOCUMENT REQUEST NO. 17

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner objects that this request seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all publications". Petitioner further objects to this request to the extent that it seeks documents that are not within Petitioner's possession, custody, or control, and/or are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged responsive documents, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 18:

Documents sufficient to identify the trade channels through which products or services are offered under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 18

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case". Petitioner also objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows:

Petitioner will produce non-privileged responsive documents, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 19:

Documents sufficient to identify the class of purchasers to whom Petitioner offers products or services under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 19

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner also objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce documents sufficient to identify the class of purchasers of the products and services offered in connection with Petitioner's Marks, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 20:

All documents concerning the methods of sale and/or marketing for Petitioner's products or services under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 20

Petitioner objects that this request seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the

burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for “all documents”. Petitioner objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner objects to this request to the extent that it seeks documents that contain Petitioner’s and/or third parties’ confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner also objects to this request to the extent that it seeks documents that are not within Petitioner’s possession, custody, or control, and/or are equally available to Registrant. Petitioner further objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herein

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged relevant responsive documents, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 21:

All agreements concerning use of Petitioner’s Marks or any component thereof.

RESPONSE TO DOCUMENT REQUEST NO. 21

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this request to the extent that it seeks documents that constitute Petitioner’s and/or third parties’ confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner further objects that this request is overbroad and seeks documents that are not

relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all agreements".

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, propriety, and relevance of this request.

DOCUMENT REQUEST NO. 22:

All documents concerning Petitioner's discontinuance of Petitioner's Marks for any period of time.

RESPONSE TO DOCUMENT REQUEST NO. 22

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all documents".

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 23:

All documents concerning every objection received by Petitioner to the use or registration of Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 23

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to the phrase "objection" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner objects that this request seeks documents that are not

relevant to any party's claim or defense and/or are not proportional to the needs of the case as it calls for "all documents".

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 24:

Documents sufficient to identify gross revenues from the sale of products and services offered under or in association with Petitioner's Marks from the date of first use to the present.

RESPONSE TO DOCUMENT REQUEST NO. 24

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations. Petitioner also objects to this request to the extent that it seeks documents that are not within Petitioner's possession, custody, or control, and/or are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged responsive documents sufficient to identify the gross revenues from the sale of products and services offered under Petitioner's Marks, if any, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 25:

Documents sufficient to identify the geographic areas in which products or services have been offered under or in association with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 25

Petitioner objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that constitute Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information, which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce non-privileged documents sufficient to show the geographic areas in which products and services have been and are currently offered in connection with Petitioner's Marks in the United States, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 26:

The file history and correspondence related thereto for all trademark applications and registrations for Petitioner's Marks and variants thereof.

RESPONSE TO DOCUMENT REQUEST NO. 26

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner further objects to this request to the extent that it seeks documents that are public record and thus that are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce responsive, non-privileged documents, at a mutually agreed upon time and place.

DOCUMENT REQUEST NO. 27:

All documents of transfer to which Petitioner is a party concerning Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 27

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this document request on the grounds that this request is not proportional to the needs of this proceeding, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents".

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 28:

All documents which any expert retained in connection with the instant proceeding has seen in the course of arriving at any opinions in this proceeding.

RESPONSE TO DOCUMENT REQUEST NO. 28

Petitioner objects to this request to the extent that it seeks documents protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects to this document request on the grounds that this request is not proportional to the needs

of this proceeding, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for “all documents”. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner’s and/or third parties’ confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 29:

All documents concerning confusion between any of Petitioner’s Marks and the Registrant’s Mark.

RESPONSE TO DOCUMENT REQUEST NO. 29

Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner’s and/or third parties’ confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations. Petitioner further objects to this request to the extent that it seeks documents that are not within Petitioner’s possession, custody, or control, and/or are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce responsive non-privileged documents, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 30:

All documents concerning consumer complaints about the products or services offered by Petitioner under or in connection with Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 30

Petitioner objects to this document request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to the phrase "consumer complaints about the products or services offered by Petitioner under or in connection with Petitioner's Marks" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner responds as follows, Petitioner is willing to meet and confer with Registrant regarding the scope, relevance, and propriety of this request.

DOCUMENT REQUEST NO. 31:

Documents sufficient to identify Petitioner's policies or practices of handling consumer communications.

RESPONSE TO DOCUMENT REQUEST NO. 31

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to the phrase "Petitioner's policies or practices of handling consumer communications" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, relevance, and propriety of this request.

DOCUMENT REQUEST NO. 32:

All documents concerning the strength of Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 32

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and

overbroad. Petitioner also objects to the phrase “strength” as vague, ambiguous, overbroad, calling for a legal conclusion and/or undefined in the context of this request.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 33:

All documents concerning the strength of Registrant’s Mark, including all documents concerning third-party use of marks which Petitioner deems to be a copy or colorable imitation of Registrant’s Mark.

RESPONSE TO DOCUMENT REQUEST NO. 33

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party’s claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for “all documents”. Petitioner objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner also objects to the phrases “strength” and “colorable imitation” as vague, ambiguous, overbroad, calling for a legal conclusion and/or undefined in the context of this request. Petitioner further objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herewith.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is not aware of any responsive, non-privileged documents.

DOCUMENT REQUEST NO. 34:

Petitioner's document retention policy.

RESPONSE TO DOCUMENT REQUEST NO. 34

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case. Petitioner further objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce Petitioner's document retention policy, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 35:

All correspondence between Petitioner and Registrant.

RESPONSE TO DOCUMENT REQUEST NO. 35

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all correspondence". Petitioner also objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner further objects to this request to the extent that it seeks documents

that are not within Petitioner's possession, custody, or control, and/or are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, relevance, and propriety of this request.

DOCUMENT REQUEST NO. 36:

All documents as to the relatedness of the products and services between Petitioner and Registrant.

RESPONSE TO DOCUMENT REQUEST NO. 36

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner also objects that this request is not limited to a relevant timeframe nor geographic scope, rendering it vague, ambiguous, and overbroad. Petitioner further objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce responsive non-privileged documents, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 37:

All documents as to the likely degree of purchaser of the products and services of Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 37

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner also objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations. Petitioner objects to the phrase "likely degree of purchaser" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner further objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herewith.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, relevancy, and relevance of this request, including Registrant's intended meaning of "likely degree of purchaser."

DOCUMENT REQUEST NO. 38:

All documents as to the likely degree of purchaser of the products and services of Registrant's Mark.

RESPONSE TO DOCUMENT REQUEST NO. 38

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner also objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and overbroad. Petitioner objects to the phrase "likely degree of purchaser" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner further objects to this request to the extent that it seeks documents that are not within Petitioner's possession, custody, or control, and are equally available to Registrant.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner is willing to meet and confer with Registrant regarding the scope, relevancy, and relevance of this request, including Registrant's intended meaning of "likely degree of purchaser."

DOCUMENT REQUEST NO. 39:

All documents as to the likelihood of expansion of the products and services of Petitioner under Petitioner's Marks.

RESPONSE TO DOCUMENT REQUEST NO. 39

Petitioner objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner objects that this request is not limited to a relevant timeframe, rendering it vague, ambiguous, and

overbroad. Petitioner objects to this request to the extent that it seeks documents that contain Petitioner's and/or third parties' confidential commercial information, trade secrets, and/or other information which is protected by confidentiality rights and/or obligations. Petitioner also objects to the phrase "likelihood of expansion of the products and services of Petitioner under Petitioner's Marks" as vague, ambiguous, overbroad, and/or undefined in the context of this request. Petitioner further objects that this request is duplicative and cumulative because it requests the same category of documents as other requests propounded herewith.

Subject to the foregoing general and specific objections, and based on the reasonable and diligent search conducted to date, Petitioner responds as follows: Petitioner will produce responsive non-privileged documents, if any, at a mutually agreed upon place and time.

DOCUMENT REQUEST NO. 40:

All documents concerning Petitioner's answers to the Interrogatories served by Registrant concurrently herewith.

RESPONSE TO DOCUMENT REQUEST NO. 40

Petitioner objects to this request to the extent that it seeks documents that are protected by the attorney-client privilege and/or attorney work-product doctrine. Petitioner also objects that this request is overbroad and seeks documents that are not relevant to any party's claim or defense and/or are not proportional to the needs of the case and that the burden and expense of responding to this request outweighs its likely benefit to this proceeding as it calls for "all documents". Petitioner objects that "documents concerning Petitioner's answers to the Interrogatories" is unintelligible.

Subject to the foregoing general and specific objections, and based on the

reasonable and diligent search conducted to date, Petitioner responds as follows:

Petitioner will produce responsive non-privileged documents identified in its responses to Registrant's First Set of Interrogatories, if any, at a mutually agreed upon place and time.

Respectfully Submitted,

COBALT LLP

Date: February 21, 2018

By: /s/ Travis Manfredi
Travis Manfredi, Esq.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of February, 2019, a true and correct copy of the foregoing **PETITIONER'S RESPONSES TO REGISTRANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** was served upon Registrant by electronic transmission, addressed as follows:

Daniel H. Bliss
HOWARD & HOWARD
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450 West Fourth Street
Royal Oak, MI 48067-2557
DBliss@HowardandHoward.com

/s/ Travis Manfredi
Travis Manfredi

EXHIBIT B

**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)

PURE STORAGE, INC.,

Plaintiff/Petitioner,

v.

Cancellation No. 92068068

INSIGHT ENERGY VENTURES LLC
DBA POWERLEY,

Defendant/Registrant.

**DEFENDANT/REGISTRANT'S RESPONSES TO
PLAINTIFF/PETITIONER'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS AND THINGS**

Defendant, Insight Energy Ventures LLC dba Powerley ("Registrant"), through its attorneys, Howard & Howard Attorneys PLLC, responds to Plaintiff Pure Storage, Inc.'s ("Petitioner") First Set of Requests for Production of Documents and Things as follows:

**RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS
GENERAL OBJECTIONS**

Registrant makes the following General Objections to the Requests. These General Objections are incorporated by reference into Registrant's response to each individual Request, to the extent applicable, whether or not stated in any individual response.

1. Registrant objects to the Requests to the extent that they seek to broaden the scope of discovery beyond that permitted by, or to impose obligations more extensive, burdensome or expansive than those required by, the Federal Rules of Civil Procedure and TTAB Rules of Practice.

2. Registrant objects to the Requests to the extent that the language of a specific Request is vague and ambiguous in the context used with respect to the subject matter of that Request.

3. Registrant objects to the Requests to the extent that the language of a specific Request is vague and ambiguous in the context used with respect to the subject matter of that Request.

4. Registrant objects to the Requests to the extent that the Requests are unduly repetitive and redundant, either of one another or of other discovery already taken in this action.

5. Registrant objects to the Requests to the extent that they seek information concerning matters, or documents protected from disclosure by the attorney-client privilege, by the attorney work-product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and TTAB Rules of Practice, or prior rulings, or by any other privilege or protection from discovery afforded by applicable law.

6. Registrant objects to the Requests to the extent that they are not proportional to the needs of this case, and that the burden and expense of responding to these Requests outweighs its likely benefit to this Cancellation.

7. The inadvertent production of any privileged, immune or objectionable information shall not be deemed a waiver of such privilege, immunity or objection.

8. Registrant objects to the Requests to the extent that they seek documents that are not within its possession, custody or control.

9. Registrant does not hereby admit, adopt, or acquiesce to any factual or legal contention, assertion, or characterization that is contained in the Requests.

10. Registrant responses herein are made without waiver, and with full preservation, of: (a) all questions as to competency, relevancy, materiality, privilege and admissibility of these Responses, the information provided or the documents produced hereunder and the subject matter

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thereof, as evidence for any purpose in any proceeding or action (including the trial of this action); (b) the right to object to the uses of the Responses, the information provided or the documents produced hereunder, or the subject matter thereof, on any ground in any proceeding or action (including the trial of this action); (c) the right to object on any ground at any time to any other demand or request for the identification or production of documents, or for answers to Requests, or any other discovery proceedings, or requests involving or relating to the subject matter hereof; (d) the right at any time to revise, amend, correct, add to, supplement or clarify any of the responses contained herein, without acknowledging any obligation to do so except as required by law; (e) the right to use at trial in this action, information or documents later discovered in this action without regard to whether that information has been provided or those documents have been identified and produced by Registrant in response to the Requests; and (f) the right to use at trial in this action information and/or documents that Registrant may later determine to have been responsive to the Requests.

11. By agreeing to produce documents responsive to a particular Request, Registrant is not representing that such documents actually exist, or that such documents are in its possession, custody or control.

12. Registrant objects to the Requests to the extent they purport to impose a continuing demand and/or purport to impose any obligation of amendment or supplementation beyond that contained in The Federal Rules of Civil Procedure and TTAB Rules of Practice.

13. Registrant will answer the Requests based on the best of its present knowledge, information, and belief. The answers are, at all times, subject to such additional or different information that discovery or future investigation may disclose, and such additional knowledge or facts as may result from either discovery or investigation. Registrant reserves the right to

supplement or amend its answers upon, among other things, discovery of additional facts and materials and other developments in this proceeding.

14. Registrant objects to the Requests to the extent they are temporally overbroad.

15. Registrant objects to the definition of "Registrant" as overly broad and unduly burdensome because the definition of "Registrant" includes both (i) all corporate entities affiliated with Insight Energy Ventures, LLC regardless of the fact that Insight Energy Ventures, LLC is the only defendant in this action and (ii) Registrant's attorneys.

Without waiving any of the foregoing objections, Registrant responds as follows:

DOCUMENT REQUEST NO. 1:

All documents that relate to the formation and organization, including articles of incorporation, operating agreement(s), minute books, bylaws, stock or membership interest ledgers, partnership agreements, resolutions, minutes, and other documents, of any business entity through which Registrant has or intends to market, advertise, sell, or offer for sale any goods or services under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 2:

All documents that relate to your consideration, development, selection, creation, adoption, first use or intended first use of Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 3:

All documents that evidence your first use and first use in commerce of Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

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DOCUMENT REQUEST NO. 4:

All Documents (including, but not limited to, comments on online user forums) that refer or relate to any instance in which a person has expressed a belief, view, idea, reflection, opinion, observation or understanding that there is any connection, association, affiliation, endorsement or sponsorship relationship between the Registrant and Petitioner.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”. Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 5:

Please provide a sample of each product or service bearing Registrant’s Mark for each of the years from the claimed first use date through the present.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “each of the years”.

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Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request since the term “sample” is not defined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 6:

Please provide a sample, or a copy if no sample is available, of all advertising and/or promotional materials (including advertisements, press releases, product packaging, labels, brochures, photographs, products, price lists, point of sale displays, catalogues, signs, letterhead, journals, newspaper and magazine print or online advertisements, directory listings and advertisements, and any other such documents) used or distributed in connection with your use of Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request since the term “sample” is not defined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 7:

All documents relating to any investigation, research, survey, or empirical study relating to consumer, trade, or industry perception or understanding in the United States of your use of Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 8:

All documents constituting, or relating to, any trademark surveys and/or similar empirical studies (and/or relating to any results to any such survey or empirical study) by or on your behalf in connection with your use of Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 9:

All documents related to, arising from, or evidencing your claimed continuous use in the United States of Registrant's Mark from your claimed date of first use to the present.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 10:

All documents relating to or referencing any searches or investigations performed by you or on your behalf in connection with your decision to use the letter P and/or the color orange in conjunction with your goods or services.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”. Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 11:

All documents, including without limitation, for example, any business plan(s), sample product(s), or pitches, relating to, arising from, or evidencing your use or intended use of Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request since the term "business plan(s)" is not defined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 12:

All documents relating to, arising from, referring to, or evidencing any investigations or research you conducted or intend to conduct regarding and/or evidencing Petitioner's use and/or registration of Petitioner's Marks.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint

defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 13:

Documents sufficient to identify your annual sales (including the number of units of each product sold) for goods sold under Registrant's Mark in interstate commerce from your claimed date of first use to the present.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 14:

Documents that reveal the geographical areas in the United States in which you market, have marketed, have plans to market, offer to sell, have offered to sell, and have plans to sell any goods or services under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the

needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 15:

Documents that reveal the channels of trade through which you promote, advertise, or plan to promote or advertise, any goods or services under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 16:

Representative documents summarizing or sufficient to establish the amount, by year, expended by Registrant for marketing expenses (including without limitation advertising, business development, promotion, etc.) for all products or services bearing Registrant's Mark from the year of first use to the present.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request as the term “representative documents” is not defined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 17:

All documents related to, arising from, or evidencing agreements Registrant has with any third parties related to the creation and production of any goods you have offered for sale or intended to offer to sell under Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

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DOCUMENT REQUEST NO. 18:

All documents relating to Registrant's intentions and/or plans, if any, to expand the use of Registrant's Mark beyond the goods and services identified in U.S. Trademark Registration No. 5,156,080.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 19:

All documents, including invoices, purchase orders, ledgers, receipts, or summaries thereof, relating to your sales of goods or services under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

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Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 20:

All documents that refer or relate to Registrant's discovery of, knowledge of, or familiarity with Petitioner's use of the letter P and/or its logo identified in the drawings of Petitioner's Marks.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 21:

All documents relating to the use of the letter P by third parties in connection with any goods or services you deem or have deemed to be confusingly similar or otherwise related.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its

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likely benefit to this Cancellation as it calls for “all documents”. Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 22:

All documents evidencing agreements you have entered into with any third party relating to your or their use of the letter P as a trademark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 23:

All documents related to, arising from, or evidencing measures you have taken to enforce your rights in Registrant’s Mark with respect to any third party uses.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the

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needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”. Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 24:

Each document referred to, reviewed, or otherwise used in connection with the preparation of your responses to the First Set of Interrogatories served contemporaneously herewith.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation. Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 25:

All Documents reflecting versions of all Internet websites that you or anyone affiliated with you owns, operates, controls, or maintains, or formerly owned, operated, controlled, or maintained,

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that, as of service of these Requests, makes available, describes, or references the goods or services offered under Registrant's Mark, including without limitation, the actual URL address (rather than merely the Home Page).

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 26:

All documents identified in your Initial Disclosures.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

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DOCUMENT REQUEST NO. 27:

All Documents that refer to, describe, reference, analyze, or otherwise relate to your target consumers for all goods or services you offer under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request as the term "target consumers" is undefined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 28:

All agreements you have or have ever had with any third parties for the sale, creation, marketing, development, or distribution of any goods or services sold or to be sold under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all agreements".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

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DOCUMENT REQUEST NO. 29:

All documents referencing, arising from, or evidencing Registrant's plans to grow sales and marketing of any goods or services offered under Registrant's Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents".

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 30:

All documents that support any allegation you make that Registrant has prior rights to Petitioner over a mark including the letter P.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for "all documents". Registrant further objects to this request on the ground that this request calls for the production of documents protected from disclosure by the attorney-client privilege, by the attorney-work product doctrine, by the joint defense/litigation privilege, by the limitations and restrictions on discovery provided by the Federal

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Rules of Civil Procedure and the TTAB Rules of Practice, or prior rulings, or by any other privilege or protection discovery afforded by applicable law.

DOCUMENT REQUEST NO. 31:

All documents that refer to, describe, reference, analyze, or otherwise relate to your target market for all goods or services you offer under Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request as the term “target market” is undefined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 32:

All documents that refer to, describe, reference, analyze, or otherwise relate to your target consumers for all goods or services you offer under Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request as the term “target consumers” is undefined, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 33:

All licenses that allow you to sell, create, store, or distribute any goods or services under Registrant’s Mark, including any applications and related supporting documents.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all licenses”.

Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

DOCUMENT REQUEST NO. 34:

All documents referencing, arising from, or evidencing all costs and expenses, including without limitation labor, materials, time, third party consultants or vendors, or rental fees, related to the creation of any goods or services offered under Registrant’s Mark.

RESPONSE:

Registrant incorporates its foregoing General Objections as though fully set forth herein, and additionally objects to this request on the grounds that this request is not proportional to the needs of this case, and that the burden and expense of responding to this request outweighs its likely benefit to this Cancellation as it calls for “all documents”.

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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Subject to and without waiver of the foregoing objections, and to the extent Registrant understands this request, Registrant will produce responsive, non-privileged documents at a mutually agreed time and place.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS PLLC

Dated: August 1, 2018

By: /Daniel H. Bliss/
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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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing **DEFENDANT/REGISTRANT'S RESPONSES TO PLAINTIFF/PETITIONER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** has been served upon all parties, via electronic mail at their email address of record on this date.

Date: August 1, 2018

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

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

In the matter of Trademark Registration

Reg. No.: 5,156,080
Registered: March 7, 2017
By: Insight Energy Ventures LLC d/b/a Powerley
For the Trademark: P (Stylized/Design)

Pure Storage, Inc.

Petitioner,

v.

Insight Energy Ventures LLC d/b/a Powerley,

Registrant.

Cancellation No. 92068068

**PETITIONER PURE STORAGE, INC.'S REPLY IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Registrant Insight Energy Ventures LLC's d/b/a Powerley ("Powerley") arguments in its opposition to Petitioner Pure Storage, Inc.'s, ("Pure Storage") Motion for Partial Summary Judgment raise no genuine dispute as to any material fact. The Board should therefore grant Pure Storage summary judgment on the issues of: (i) standing; (ii) priority; (iii) the similarity of the parties' goods; and (iv) the direct overlap in the channels of trade and classes of purchasers of the parties' goods.

Mark: P (Stylized/Design)
Cancellation No.: 92068068

I. INTRODUCTION

Powerley's opposition failed to rebut the undisputed evidence that shows Pure Storage is entitled to summary judgment on standing, priority, the similarity in the parties' goods, and the overlap in the parties' channels of trade and classes of purchasers of the parties' goods.¹ *First*, instead of providing facts that raise a genuine dispute as to Pure Storage's standing and priority shown in its properly submitted registrations, Powerley focused on inaccurate and baseless procedural arguments. *Second*, Powerley relied on mere denials and conclusory statements to assert that the parties' goods are not similar; failing to meet its burden to show the existence of a genuine issue of material fact. *Third*, given that the parties' goods and services overlap and are related, Powerley failed to offer facts, evidence, or legal authority rebutting the presumption that there is an overlap in the parties' channels of trade and classes of purchasers in the absence of limitations in the registrations. Because Powerley failed to show the existence of specific, genuinely-disputed facts, the Board should grant Pure Storage's motion for partial summary judgment.

II. SUMMARY JUDGMENT STANDARD

When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact and that it is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific, genuinely-disputed facts that must be resolved at trial. *Hachette Filipacchi Presse v. Elle Belle LLC*, 85 USPQ2d 1090, 1093 (TTAB 2007). The nonmoving party may not rest on mere denials or conclusory assertions but must instead provide specific portions of the record or produce evidence showing the existence of a genuine issue of material fact for trial. *Id.* at 1093. "A dispute as to a material fact is genuine

¹ Pure Storage reserves its rights to address the similarity of the parties' marks at trial, but notes that the parties' marks are both geometrically shaped like the letter "P."

only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party.” *Id.* at 1092-1093. As highlighted below, Powerley’s opposition failed to put forth evidence showing a genuine dispute as to any material fact about Pure Storage’s standing and priority, the similarity in the parties goods and services, and the overlap in the channels of trade and classes of purchasers of the parties’ goods. Accordingly, the Board should grant partial summary judgment for Pure Storage.

A. Powerley Has No Facts Disputing Pure Storage’s Standing and Priority.

Powerley only argues that Pure Storage lacks standing because it has not introduced evidence that it owns the pleaded registrations. This is incorrect. By submitting current printouts of information from the electronic database records of the USPTO showing the current status and title of its registrations in its summary judgment motion, Pure Storage has properly made its pleaded registrations of record. *See* TBMP § 528.05(d) (“Alternatively, a plaintiff may make its pleaded registration of record, for purposes of summary judgment only, by filing a status and title copy thereof, or a current printout of information from the USPTO electronic database records showing the status and title copy thereof, with its brief on the summary judgment motion.”). This record shows that the registrations are valid, subsisting, and owned by Pure Storage. *See* 15 U.S.C. § 1115(a) (“a mark registered on the principal register . . . shall be prima facie evidence of . . . the registrant’s ownership of the mark”). Even more, Pure Storage’s Registration No. 4,165,143 is incontestable, which further conclusively establishes ownership. Powerley alleges no facts that rebut Pure Storage’s ownership of the pleaded registrations. Indeed, Powerley agrees that Pure Storage alleges that it owns the pleaded registrations. 18 TTABVUE 11.

Powerley also has not established a genuine issue as to any material fact about Pure Storage’s priority. Powerley admitted in its Answer that Pure Storage’s registrations “were

registered on June 26, 2012 and November 19, 2013.” 5 TTABVUE 2, ¶4. June 26, 2012 and November 19, 2013 both precede Powerley’s filing date and any claimed or conceivable first-use date. Powerley therefore admitted in its Answer that there is not an issue as to priority. Priority also is not at issue where the movant has introduced into evidence its registrations showing its priority dates—as Pure Storage has done with its motion. *See Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)) (priority not at issue where opposer introduces registration into evidence); *see also* U.S. Trademark Registration Nos. 4,165,143 and 4,436,830. Pure Storage is thus entitled to summary judgment on the issues of standing and priority because Powerley has not put forth facts establishing a genuine dispute as to any material fact on these issues.

B. Both Parties’ Goods and Services Relate to Computer Hardware and Computer Hardware Related Goods and Services.

Powerley argues that the parties’ goods are dissimilar, but offers only conclusory statements in support of its assertions. The facts are simple. Pure Storage has a registration for computer hardware, namely flash memory array, while Powerley’s registration similarly covers “computer hardware and peripheral devices.” *Compare* U.S. Trademark Registration No. 4,165,143 (Declaration of Eric Ball In Support of Petitioner Pure Storage, Inc.’s Motion for Partial Summary Judgment (“Ball Decl.”), Ex. C), *with* U.S. Registration No. 5,156,080 (*id.*, Ex. H). There is no claimed limitation in the type of computer hardware and peripherals that Powerley’s registration covers. And Powerley does not deny that both parties’ registrations cover computer hardware. Thus, at least these goods are legally identical.

Moreover, Pure Storage’s U.S. Trademark Registration No. 4,436,830 covers hardware services: “[i]nstallation, maintenance and repair of *computer hardware*; technical support

services, namely, troubleshooting in the nature of the repair of *computer hardware*.” See Ball Decl., Ex. B (emphasis added). Pure Storage’s hardware services, covered by this registration, can be used to install or repair Powerley’s broadly identified computer hardware *and* its home and commercial energy management hardware referenced in the goods and services in Powerley’s registration. Thus, not only are some of the parties’ goods legally identical, but all of the parties’ goods and services are substantially related because Pure Storage’s hardware repair services can be used with or are complimentary to Powerley’s software and hardware goods and services. See *Hewlett-Packard Dev. Co., L.P. v. Vudu, Inc.*, 92 USPQ2d 1630, 1633 (TTAB 2009) (granting partial summary judgment on likelihood of confusion and finding that, “by their descriptions, applicant’s particular type of software for computers and opposer’s personal and gaming computers are complementary goods”); *Primesense Ltd. v. Primesensor Tech. Inc.*, Opposition No. 91198297, 2012 WL 6654127, at *9 (TTAB Dec. 13, 2012) (granting summary judgment on the similarity of goods because both parties’ goods included “integrated circuits” and opposer’s system on chip (SoC) goods worked in tandem with a type of semiconductor which applicant’s goods covered, so one of the parties’ goods was identical and at least one of applicant’s goods was complimentary to opposer’s goods); *Tinderbox Entm’t, LLC v. Flint & Tinder Studios, LLC*, Opposition No. 91227247, 2018 WL 3689329, at *4 (TTAB Aug. 1, 2018) (sustaining an opposition based on a likelihood of confusion and finding that applicant’s arcade game machines are related and complimentary to opposer’s game software).

Powerley did not put forth sufficient facts, offered no legal authority to support its conclusory assertions, and did not distinguish Pure Storage’s cases. Instead, Powerley admits it offers hardware. 18 TTABVUE 13. Powerley also focuses exclusively on Pure Storage’s registration for flash memory array and fails to address Pure Storage’s registration for hardware

services in U.S. Trademark Registration No. 4,436,830. By failing to address Pure Storage's registration for computer hardware services, Powerley has conceded that Pure Storage's computer hardware services are related to Powerley's computer hardware goods and services in their respective registrations.

Trying to salvage its position, Powerley points to Pure Storage's responses to Powerley's Requests for Admission Nos. 13 and 14 where Pure Storage says that its marks have not been used on the certain home and commercial energy related goods and services. *See* 18 TTABVue 3-4 (citing Declaration of James Bumbaugh in Support of Registrant's Brief in Opposition to Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment, Exhibit C). Although this may have been true at the time, this argument carries little weight. The computer hardware and hardware services in Pure Storage's registrations are not limited. So Pure Storage's registrations cover the commercial and home energy management space. Indeed, Pure Storage's flash memory array is a hardware product that helps conserve energy.

Powerley also left out the "[c]omputer hardware and peripheral devices" goods from its registration in its Requests for Admission Nos. 13 and 14. *Id.* Powerley did so because it knows that its computer hardware and peripheral devices are legally identical and substantially related to the goods and services in Pure Storage's registrations. But even excluding these goods, the Board has consistently held "that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner." *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). And here, the goods and services *are* related as the parties' registrations both cover computer hardware and computer hardware related goods and services. Even Powerley grouped "[c]omputer hardware and peripheral devices" with its home energy goods, which reflects

Powerley's thought that its computer hardware goods are related to its computer home energy hardware goods and services.

Finally, Powerley argues that Pure Storage conceded in paragraph nine of its Notice of Opposition that the parties' services are not identical or closely related in the registration. 18 TTABVUE 13. Not true. In making this assertion, Powerley ignores other parts of the allegation. Pure Storage alleged in paragraph nine that Powerley's mark "is confusingly similar to Petitioner's Marks when applied to the goods and/or services of the parties, namely, among others, 'computer hardware and peripheral devices.'" 1 TTABVUE 3, ¶ 9. This was a standard allegation that the parties' marks, as applied with the goods and services, are confusingly similar, referencing the *DuPont* likelihood of confusion legal standard. *See In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (outlining the factors that must be considered in testing the likelihood of confusion). The second clause of the allegation then highlights the most problematic goods because it directly overlaps with Pure Storage's goods. This allegation in no way reflects that Pure Storage was excluding either the identical nature of the parties' other goods or the similarity of the parties' other goods and services.

Because Powerley relied on mere denials and conclusory assertions, and failed to put forth facts that show the existence of a genuine dispute of a material fact, the Board should grant summary judgment on the similarity of the parties' goods and services.

C. Powerley Fails to Put Forth Facts Rebutting the Presumption that the Parties Have Overlapping Channels of Trade and Classes of Purchasers Absent Limitations in the Registrations.

Powerley argues that it "primarily" markets its software and computer hardware and peripheral devices to utility companies and energy providers and that its class of purchasers are sophisticated. 18 TTABVUE 14. But nothing in Powerley's registration or discovery responses suggests that its class of purchasers are sophisticated or that their channels of trade are limited.

And Powerley has offered no facts, evidence, or legal authority supporting an existence of a genuine issue of material fact as to these issues. Instead, Powerley points to a conclusory declaration with no factual or legal support. Powerley does not even attempt to distinguish Pure Storage's cited case law explaining that the Board has consistently held that in absence of limitations in the registrations, the Board presumes that the parties have overlapping channels of trade. *See CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983) (finding that "in the absence of specific limitations in the application and registration," the Board must presume the listed goods to travel in all "normal and usual channels of trade and methods of distribution."); *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (holding that "absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers."). Here, because the parties' goods and services are identical and related, the presumption that the parties' goods and services travel in the same channels of trade and are sold to the same class of purchasers applies.

Powerley also ignores that Pure Storage's registration for computer hardware and computer hardware related services is not limited, so Pure Storage's computer hardware and hardware services offered under its P logo, could be in the home energy management space as well. Pure Storage's hardware repair services, for example, can be used with Powerley's home and commercial energy management hardware related goods. Here again, the parties' goods and services are presumed to be sold to the same class of purchasers.

Accordingly, Pure Storage is entitled to summary judgment on the direct overlap in the channels of trade and classes of purchasers because Powerley has put forth no facts, evidence, or legal authority supporting a genuine dispute as to any material fact.

D. Powerley Failed to Meet and Confer on Any Discovery Issues.

Powerley argues that Pure Storage cannot rely on information or exhibits from the attorney declaration in support of Pure Storage's summary judgment motion because Pure Storage did not produce documents relating to its channels of trade, class of purchasers, and the relatedness of the parties' goods and services. 18 TTABVUE 4. However, Powerley did not file a motion under Federal Rule of Civil Procedure 56(d) asserting that it cannot present facts essential to justify its opposition. Powerley is not then claiming that it needs more evidence. All the evidence is here to decide the issue and was publicly available to Powerley. Moreover, Pure Storage sufficiently met its discovery obligations. Pure Storage gave Powerley notice of its objections and that responsive documents to its discovery requests were available. Powerley failed to follow up, so it cannot now complain about any absence of documents because of its own failure to meet and confer or pursue discovery. *See Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002) (defendant cannot complain about the inadequacy of discovery responses where defendant failed to move to compel); *see also* TBMP § 402.02 ("Even if the discovery sought by a party is relevant, it will be limited, or not permitted, where, inter alia, it is . . . obtainable from some other source that is more convenient").²

III. CONCLUSION

Powerley failed to put forth facts that rebut Pure Storage's undisputed evidence of (i) standing; (ii) priority; (iii) the similarity of the parties' goods; and (iv) the direct overlap in the channels of trade and classes of purchasers of the parties' goods. Because Powerley failed to

² *See also* Pure Storage, Inc.'s Opposition to Insight Energy Ventures LLC's Motion to Exclude Declaration of Eric J. Ball in Support of Pure Storage, Inc.'s Motion for Partial Summary Judgment.

show the existence of any genuine issue of a material fact, Pure Storage requests that the Board grant summary judgment on these issues.

Respectfully submitted,

Dated: June 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **PETITIONER PURE STORAGE, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was served this 19th day of June 2019 on counsel for the Registrant at ipdocket@h2law.com and dbliss@howardandhoward.com as required by the Trademark Trial and Appeal Board.

/Irene Lopez/

Irene Lopez