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

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|---|---|
| Proceeding | 92068068 |
| Party | Plaintiff<br>Pure Storage, Inc. |
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| Signature | /Eric J. Ball/ |
| Date | 06/19/2019 |
| Attachments | 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

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| 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.<br><br>Petitioner,<br><br>v.<br><br>Insight Energy Ventures LLC d/b/a Powerley,<br><br>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.

## 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

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