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

Proceeding	92068068
Party	Defendant Insight Energy Ventures LLC DBA Powerley
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Attachments	Registrants_Opposition_Petitioner_Motion_Strike.pdf(30864 bytes )

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

**In re Trademark of:**

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

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PURE STORAGE, INC.,

Plaintiff/Petitioner,

v.

Cancellation No. 92068068

INSIGHT ENERGY VENTURES LLC  
DBA POWERLEY,

Defendant/Registrant.

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**REGISTRANT’S OPPOSITION TO PETITIONER PURE STORAGE, INC.’S  
MOTION TO STRIKE REGISTRANT’S REPLY IN SUPPORT OF MOTION TO  
EXCLUDE DECLARATION OF ERIC J. BALL**

Registrant, Insight Energy Ventures LLC dba Powerley (“Powerley”), submits this Brief in opposition to the motion of Petitioner, Pure Storage, Inc. (“Pure Storage”), to strike Registrant’s Reply in Support of Registrant’s Motion to Exclude Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.’s Motion for Partial Summary Judgement under Rule 37(c).

By way of background, Petitioner Pure Storage, Inc. filed a Motion for Partial Summary Judgement on April 30, 2019 along with a Declaration of Eric J. Ball in support of Petitioner Pure Storage, Inc.’s Motion for Partial Summary Judgement (14 TTABVUE). Prior to this filing, Petitioner failed to disclose attorney Eric J. Ball as a fact witness to introduce documents in support of its dispositive Motion for Partial Summary Judgment. Petitioner never supplemented its initial disclosures to add attorney Eric J. Ball as a fact witness. FRCP Rule

26(a) and (e) required the identification of witnesses and documents that may be used to support the disclosing parties' claims and applies to motions for summary judgement. Although FRCP Rule 37(c) automatically excludes undisclosed information or documents for failure to timely disclose materials in discovery, on May 30, 2019, Registrant filed Registrant's Motion and Brief to Exclude Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgement under Rule 37(c). (17 TTABVUE).

On June 19, 2019, Petitioner filed Pure Storage, Inc.'s Opposition to Exclude Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment under Rule 37(c). (19 TTABVUE).

On July 12, 2019, Registrant filed Registrant's Reply in Support of Its Motion to Exclude Declaration of Eric J. Ball in Support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment under Rule 37(c). (22 TTABVUE). Registrant's Reply was twelve pages long. In Registrant's Reply, Registrant argued that it was both surprised and prejudiced by attorney Eric J. Ball as both legal advocate and fact witness to introduce facts and documents in support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgment, that the failure to identify or supplement by Petitioner were not substantially justified nor harmless, and that the Declaration of Eric J. Ball and documents in support of its dispositive Motion for Partial Summary Judgement are automatically excluded under FRCP Rule 37(c).

As to filing Registrant's Reply three days late, Registrant has investigated this issue and has determined that Registrant's Reply was improperly calendared for twenty-three days, which included a three-day mailing rule. As to Registrant's Reply being two pages longer than ten pages, Registrant accidentally exceeded the ten page length because Registrant was responding to the points that (1) attorney Eric J. Ball was not identified as a fact or expert witness in

Petitioner's initial disclosures or in any supplemental disclosures; (2) FRCP Rule 37 (c) automatically excludes both witnesses not disclosed and the documents in support of Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgement; and (3) Petitioner's failure to use Jason Nadeau as a fact witness who had information and to use the Declaration of Eric J. Ball as a fact witness to support Petitioner Pure Storage, Inc.'s Motion for Partial Summary Judgement was not substantially justified nor harmless.

Petitioner apologizes for the improper calendaring of the due date and respectfully requests that the Board consider Registrant's Reply. Petitioner also apologizes for exceeding the ten page limit for Registrant's Reply and respectfully requests the Board to allow Registrant time to submit a substitute Registrant's Reply brief or consider Registrant's Reply, but stop reading after page 10 of Registrant's Reply.

For all the foregoing reasons, the Board should deny Petitioner Pure Storage's Motion to Strike Registrant's Reply in Support of its Motion to Exclude the Declaration of Eric J. Ball.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS  
PLLC

Dated: August 2, 2019

By: /Daniel H. Bliss/

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dba Powerley***

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true, correct, and complete copy of the foregoing REGISTRANT'S OPPOSITION TO PETITIONER PURE STORAGE, INC.'S MOTION TO STRIKE REGISTRANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE DECLARATION OF ERIC J. BALL has been served upon all parties, via electronic mail at their email address of record on this date.

Date: August 2, 2019 By: /Daniel H. Bliss/  
Daniel H. Bliss