

## EMC, Pure Storage Prodded To Narrow Dispute Before Trial

By **Brian Amaral**

*Law360, Boston (September 19, 2016, 7:43 PM EDT)* -- An exasperated federal magistrate judge on Monday urged Dell EMC and Pure Storage Inc. to simplify and narrow the issues in their hotly contested courtroom feud that involves contracts, patents and allegedly purloined trade secrets before it goes to a Massachusetts jury in just over a month.

U.S. Magistrate Judge Judith Dein said during arguments for partial summary judgment that she was feeling “angst” about the scattershot nature of arguments as an Oct. 24 trial date nears. Her Massachusetts courtroom is one venue for a battle between upstart Pure Storage and established player, and newly merged, Dell EMC.

“This court is not going to make rulings on endless random thoughts,” Judge Dein said. “I’m really worried about this.”

The arguments Monday were about just part of Pure Storage’s cross-claims against Dell EMC, but even that narrow tranche seemed as complex, layered and at times inscrutable as the massive computer data storage arrays that the two companies are warring over. In a separate case, Dell EMC’s \$14 million patent win has been vacated and is headed for a new trial.

A “shielded purchase” of one such data storage device was at the center of Monday’s arguments for Dell EMC’s motion for partial summary judgment. Dell EMC is seeking to knock out some trade secrets-related counterclaims that Pure Storage brought. Dell EMC sued first, alleging an exodus of talent, and customer lists, to the startup.

In the counterclaims at issue Monday, Pure Storage alleges that EMC posed as another company and went through a straw purchaser to buy a Pure Storage data array, knowing that Pure Storage would never would have sold it directly to a competitor.

When EMC tested the Pure Storage device, and disclosed information about the data storage box’s performance, it disclosed its competitor’s trade secrets, Pure Storage says. That’s in part because Pure Storage argues that EMC was bound by the end-user license agreement in the case, strengthening and broadening its protections, Pure Storage says.

In addition to trade secrets claims, Pure Storage is suing EMC for conversion over the shielded purchase.

EMC, naturally, sees things differently: For one thing, it argues that it was not a party to a contract when

it purchased the Pure Storage data device through a third party. Also, Dell EMC said, the performance data it obtained in the shielded purchase is not a trade secret as a matter of law, attorney Paul Popeo of Choate Hall & Stewart said. In fact, it's the "most nonsecret information one can imagine," Popeo said.

"It would be the same as Ford claiming as a trade secret how the car behaves when you drive it around," Popeo said.

Pure Storage, however, contends that EMC was bound by an agreement not to disclose the performance data without its permission when it conducted a shielded purchase of the data storage unit.

In Popeo's analogies, Pure Storage attorney Adam S. Gershenson of Cooley LLP said, the customers who were disclosing information about the performance of the Ford wouldn't have signed a nondisclosure agreement.

For her part, Judge Dein said she struggled to connect the disclosure of contractually confidential performance data to a trade secret — even if EMC was bound by the end-user agreement.

"The issue I have is whether that's a breach of contract issue or a trade secret issue," Judge Dein said.

From there, other tributaries of arguments flowed, touching on several different areas of contract law: whether the fact that the agreement and all of its alleged obligations were in the box with the shipment was good enough to bind it, for example, or whether Pure Storage could try to enforce the agreement at all when EMC also alleges that Pure Storage violated the agreement.

In a previous summary judgment ruling, the court trimmed a state-based unfair competition claim from EMC's original suit, but let the trade secrets claim proceed — despite Pure Storage's arguments that EMC had disclosed those trade secrets in the patent suit.

The court had also denied Pure Storage's arguments that EMC was estopped from defending its statements that Pure Storage's method of "deduplicating" — uncluttering, basically — was not as good as EMC's, when it had argued in the patent trial that they were one and the same.

On Monday, Pure Storage and EMC also argued over Pure Storage's conversion claim. Pure Storage says that it demanded EMC return the data unit when it found out that EMC was the real buyer, and when it got it back, it was no longer fit for resale.

That claim would depend in part on Pure Storage's contention that a conversion claim can stand even when the good was bought and paid for with real money. EMC says that it can't.

"EMC didn't convert this," Popeo said. "They bought it."

Pure Storage, on the other hand, says that the case law is on its side.

"Purchased by fraud is widely recognized to be conversion," Pure Storage attorney Michael Sheetz of Cooley LLP said.

Finally, the two sides argued over "open source" code, and its effect on trade secrets. Open source code is computer code that is open to the public for collaborative input and improvement.

EMC argues that the very trade secrets that Pure Storage asserts are open source, meaning that they're not trade secrets. It found that out during discovery, Popeo said.

"Pure Storage's compression algorithm is not proprietary," Popeo said. "It's open source."

Because of that, Popeo said, Pure Storage is in violation of its own end-user agreement, in which it says it will disclose whatever open source code it uses, and can't enforce the agreement.

But, Pure Storage says, this tardy argument keeps changing — first it was about compression, then something else, and now back to compression — and is not true.

"It's dizzying," Pure Storage attorney Gershenson said. "It's hard to know what code they're even talking about."

EMC is represented by Paul D. Popeo, Michael H. Bunis, G. Mark Edgerton, Margaret E. Ives and Kevin C. Quigley of Choate Hall & Stewart LLP.

Pure Storage is represented by Michael Sheetz, Brendan J. Murphy, Adam S. Gershenson and others at Cooley LLP.

The case is EMC Corp. v. Pure Storage Inc., case number 1:13-cv-12789 before the U.S. District Court for the District of Massachusetts.

--Editing by Bruce Goldman.