

ESTTA Tracking number: **ESTTA34538**

Filing date: **06/01/2005**

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

<b>Proceeding.</b>	91158578
<b>Applicant</b>	Plaintiff NETSCOUT SYSTEMS, INC. NETSCOUT SYSTEMS, INC. 310 LITTLETON ROAD WESTFORD, MA 01886
<b>Other Party</b>	Defendant ForeScout Technologies, Inc. ForeScout Technologies, Inc. 2755 Campus Drive Suite 115 San Mateo, CA 94403

### **Motion for Suspension in View of Civil Proceeding With Consent**

The parties are engaged in a civil action which may have a bearing on this proceeding. Accordingly, NETSCOUT SYSTEMS, INC. hereby requests suspension of this proceeding pending a final determination of the civil action. Trademark Rule 2.117.

NETSCOUT SYSTEMS, INC. has secured the express consent of all other parties to this proceeding for the suspension requested herein.

NETSCOUT SYSTEMS, INC. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

### **Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,  
/Elizabeth A. Walker/  
Elizabeth A. Walker  
tmboston@klnq.com, ewalker@klnq.com  
dstein@coleman-firm.com  
06/01/2005

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

In the matter of Applications:  
Serial Nos.: 78/126,968 and 78/126,971  
Filed: May 7, 2002  
Applicant: ForeScout Technologies, Inc.  
Marks: ACTIVESCOUT and FORESCOUT  
Published in the Official Gazette of November 12, 2002

NetScout Systems, Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91158578
	)	
ForeScout Technologies, Inc.,	)	
	)	
Applicant.	)	
	)	

**CONSENTED TO MOTION TO SUSPEND OPPOSITION**

The Opposer, NetScout Systems, Inc., moves, pursuant to 37 CFR § 2.117 and Sections 510.02 and 510.03 of the Trademark Trial and Appeal Board (“Board”) Manual of Procedure (“TBMP”), for a suspension of the above-captioned proceeding (including all discovery and testimony deadlines) pending disposition of Civil Action No. 05-10929 PBS filed on May 5, 2005, by Opposer against Applicant, ForeScout Technologies, Inc., in the United States District Court for the District of Massachusetts (the “Civil Action”). Applicant consented to this Motion via a telephone conference between counsel for Applicant and counsel for Opposer on May 31, 2005. In further support of this Motion, Opposer states as follows:

Applicant has applied for federal registration of the marks ACTIVE SCOUT (Serial No. 78/126,968) and FORE SCOUT (Serial No. 78/126,971) (the "ForeScout Marks"). Opposer has filed a Notice of Opposition to the pending applications for the ForeScout Marks on the grounds that a likelihood of confusion exists between Opposer's trademarks and the ForeScout marks, and that Opposer will be damaged by such confusion.

Opposer has filed the Civil Action under the Lanham Act, 15 U.S.C. § 1051 et seq. and similar federal and state statutory and common law causes of action. Opposer seeks, among other relief, that the District Court adjudge that Opposer's trademarks have been infringed and diluted by the ForeScout Marks, and that Applicant be enjoined from using the ForeScout Marks. Opposer further requests that the District Court deny registration of the ForeScout Marks by the United States Patent and Trademark Office. A copy of Opposer's complaint in the Civil Action is attached hereto.

Because the pending Civil Action involves the same issues which are involved in this Opposition proceeding and will be dispositive of this Opposition proceeding, Opposer requests that all further proceedings be suspended pending disposition of the Civil Action pursuant to 37 CFR § 2.117(a) and TBMP Section 510.02.

In addition, Opposer and Applicant have been discussing settlement of this Opposition, and Opposer requests that all further proceedings be suspended while settlement negotiations are ongoing pursuant to 37 CFR § 2.117(c) and TBMP Section 510.03.

WHEREFORE, Opposer respectfully requests that the Board suspend this Opposition No. 91158578 (including all discovery and testimony deadlines) pending

disposition of the Civil Action and the completion of settlement discussions between the parties.

Date: June 1, 2005

Respectfully submitted,

NETSCOUT SYSTEMS, INC.

By its Attorneys



Deborah J. Peckham

Elizabeth A. Walker

Kirkpatrick & Lockhart Nicholson Graham LLP

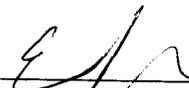
75 State Street

Boston, MA 02109-1808

Phone: (617) 261-3100

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Consented To Motion To Suspend Opposition is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to counsel for Applicant, Ronald D. Coleman and David Stein, Coleman Law Firm, 410 Park Avenue, 15<sup>th</sup> Floor, New York, NY 10022, this 1st day of June 2005.

  
Elizabeth A. Walker

867485-1

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

NETSCOUT SYSTEMS, INC.,

Plaintiff,

v.

FORESCOUT TECHNOLOGIES, INC.,

Defendant.

CIVIL ACTION NO.

**05 - 10929 PPS**

JURY TRIAL REQUESTED

**COMPLAINT**

Plaintiff NetScout Systems, Inc. ("NetScout"), for its Complaint against ForeScout Technologies, Inc. ("ForeScout") alleges as follows:

**NATURE OF THE ACTION**

1. In this action, Plaintiff seeks injunctive relief and damages for acts of trademark infringement, dilution, and unfair competition committed by Defendant in selling goods and services under the trademarks FORESCOUT and ACTIVESCOUT, which are confusingly similar to Plaintiff's NETSCOUT® trademark. Defendant's acts violate the laws of the United States, as well as the statutory and common laws of various states, including the Commonwealth of Massachusetts. In particular, this action arises under the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*, the statutory trademark, dilution, and unfair competition laws of Massachusetts, Mass. Gen. Laws ch. 110B, §§ 11 and 12, and ch. 93A, § 11, and the common law of Massachusetts.

## JURISDICTION AND VENUE

2. This is an action under the Lanham Act, 15 U.S.C. § 1051 et seq. (“Lanham Act”), particularly 15 U.S.C. §§ 1114, 1119, and 1125, for trademark infringement, false designation of origin, false description or representation, and related unfair competition. Plaintiff also asserts claims for trademark infringement and unfair competition under the statutory and common law of states, including Massachusetts, Mass. Gen. Laws. ch. 110B, §§ 11 and 12 (2002), and for unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce under state law, including Mass. Gen. L. ch. 93A, § 11 (2002).

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1338(b). This Court also has jurisdiction pursuant to 15 U.S.C. § 1121(a) and 28 U.S.C. § 1367(a).

4. Defendant is subject to suit in Massachusetts because, among other reasons, it has or had a reasonable expectation that goods sold or transported under the FORESCOUT and ACTIVESCOUT trademarks are used or are to be used, are sold, or are to be sold in Massachusetts, its tortious conduct has taken place and continues to take place in Massachusetts, and/or it regularly solicits business in Massachusetts and its acts are causing tortious injury in Massachusetts.

5. Venue is proper under 28 U.S.C. §§ 1391(b), and (c) in that, upon information and belief, Defendant is subject to personal jurisdiction in the Commonwealth of Massachusetts and/or the wrongful acts committed by Defendant occurred in and are causing injury in the Commonwealth of Massachusetts.

## **THE PARTIES**

6. Plaintiff is a Delaware corporation with its headquarters at 310 Littleton Road, Westford, Massachusetts 01886.

7. Upon information and belief, Defendant is a Delaware corporation with a principal place of business of 10001 N. De Anza Blvd. Suite 220, Cupertino, CA 95014.

## **PLAINTIFF AND PLAINTIFF'S TRADEMARKS**

8. Founded in 1984, NetScout is one of the world's premier providers of integrated computer network performance management solutions. NetScout currently serves more than 3500 organizations in locations across North America, Europe, and Asia.

9. Since shipping its first product in 1992 – a standards-based Ethernet probe – NetScout has led the market with a continual stream of industry firsts that have evolved into industry standards, including the market's most comprehensive computer network performance management solution. The key features of NetScout's integrated software and hardware solution include computer network monitoring, capacity planning, troubleshooting, fault prevention, and service-level management, all of which maximize the integrity, reliability, availability, performance and efficiency of applications and content delivered over computer networks, supporting the mission critical operations of NetScout's customers.

10. NetScout markets and distributes its products through its own direct sales force and through channel partners that include original equipment manufacturers, distributors, resellers, service providers, and systems integrators. Customers represent a wide range of industries, including financial services, technology, healthcare, retail, manufacturing, and service providers, as well as many large agencies of the federal government.

11. NetScout advertises and sells its products throughout the United States, including in Massachusetts, and throughout the world by means of promotional materials, catalogs, magazines, and similar types of printed literature, as well as over the Internet through its own web site at <[www.netscout.com](http://www.netscout.com)>.

12. At least as early as 1991, and prior to the acts of Defendant complained of herein, Plaintiff adopted and began to use in commerce the inherently distinctive designation and trademark "NETSCOUT" (the "NETSCOUT<sup>®</sup> Trademark") for and in connection with computer network monitoring software, and related goods and services. Such use has been continuous since that time.

13. Plaintiff has registered the NETSCOUT<sup>®</sup> Trademark in the United States Patent and Trademark Office (PTO), as well as in Canada, the European Community, and Japan. In the United States, Plaintiff owns the following registrations related to the NETSCOUT<sup>®</sup> Trademark:

<u>Trademark</u>	<u>Registration Number</u>	<u>Registration Date</u>
NETSCOUT	1,764,154	April 13, 1993
NETSCOUT and Design	2,287,610	October 19, 1999

14. True and correct copies of the Certificates of Registration for Plaintiff's Reg. Nos. 1,764,154 and 2,287,610 are attached hereto as composite Exhibit A.

15. Plaintiff's Reg. No. 1,764,154 has become incontestable, pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065, and, accordingly, constitutes conclusive evidence of the validity of the registered mark, Plaintiff's ownership of the mark, and Plaintiff's exclusive right to use the NETSCOUT<sup>®</sup> Trademark in commerce in connection with the goods specified in the Certificate of Registration. A true and correct copy of the Notice of Acceptance of Section 8

Affidavit and Notice of Acknowledgement of Section 15 Affidavit for Plaintiff's Reg. No. 1,764,154 is attached hereto as Exhibit B.

16. Plaintiff's Reg. No. 2,287,610 has become incontestable, pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065, and, accordingly, constitutes conclusive evidence of the validity of the registered mark, Plaintiff's ownership of the mark, and Plaintiff's exclusive right to use the NETSCOUT and Design<sup>®</sup> Trademark in commerce in connection with the goods specified in the Certificate of Registration. A true and correct copy of the Notice of Acceptance of Section 8 Affidavit and Notice of Acknowledgement of Section 15 Affidavit for Plaintiff's Reg. No. 2,287,610 is attached hereto as Exhibit C.

17. Plaintiff has registered its NETSCOUT trademark in the Commonwealth of Massachusetts and has been issued a Certificate of Registration therefor, Massachusetts Reg. No. 65017. A true and correct copy of the Certificate of Registration for Plaintiff's Massachusetts Reg. No. 65017 is attached hereto as Exhibit D.

18. Since prior to the acts of Defendant complained of herein, Plaintiff has achieved wide-spread and substantial sales of its products designated by the NETSCOUT<sup>®</sup> Trademark throughout the United States, including Massachusetts, and worldwide.

19. The NETSCOUT<sup>®</sup> Trademark is and has been so commonly used by Plaintiff and others to identify Plaintiff's products that said products are now and, since prior to the acts of Defendant complained of herein, have been generally known among the trade and the public by the NETSCOUT<sup>®</sup> Trademark.

20. The NETSCOUT<sup>®</sup> Trademark appears on Plaintiff's computer software and hardware, packaging, user manuals, web site, and other promotional and advertising materials.

## DEFENDANTS ACTIVITIES

21. Subsequent to Plaintiff's adoption and use of the NETSCOUT® Trademark in commerce, Defendant filed applications to register the designations FORESCOUT and ACTIVESCOUT both for "computer software designed to provide computer network perimeter security; computer hardware," with the PTO. The applications have been assigned Serial Nos. 78/126,971 and 78/126,968, respectively (the "ForeScout Applications").

22. Subsequent to Plaintiff's adoption and use of the NETSCOUT® Trademark in commerce, Defendant commenced the manufacture, distribution, and/or sale in commerce of software and/or the rendering of services under the FORESCOUT and ACTIVESCOUT trademarks (the "Accused Trademarks") or bearing the Accused Trademarks. Copies of pages from Defendant's web site located at <www.forescout.com>, which display products and services offered under the Accused Trademarks, are attached hereto as composite Exhibit E.

23. Subsequent to Plaintiff's adoption and use of the NETSCOUT® Trademark in commerce, Defendant began promoting and offering for sale products and services bearing the Accused Trademarks via a web site at <www.forescout.com> (the "Domain Name"). See copy of domain name registration information, attached hereto as Exhibit F. This interactive web site is continuously available in Massachusetts, and visitors to the web site can, among other things order and/or view a live demonstration of the products bearing the Accused Trademarks.

24. Upon information and belief, Defendant has distributed, sold, or offered for sale products and services bearing or associated with the Accused Trademarks in the Commonwealth of Massachusetts and in other states.

25. Upon information and belief, Defendant has promoted products and services bearing or associated with the Accused Trademarks, among other things, through sponsorship

and/or participation in industry events in the Commonwealth of Massachusetts and in other states.

26. The Accused Trademarks are confusingly similar to Plaintiff's NETSCOUT® Trademark.

27. The goods provided by Defendant under the Accused Trademarks – computer software designed to provide computer network perimeter security; computer hardware – are highly similar or highly related to the goods provided by Plaintiff under its NETSCOUT® Trademark. In fact, Defendant's products perform network performance management functions such as “monitor[ing] internet traffic,” and “reporting and displaying information about attack attempts...” See Exhibit E.

28. Upon information and belief, Defendant is well aware and, since long prior to the acts of Defendant complained of herein, has been well aware of the goodwill represented and symbolized by the NETSCOUT® Trademark. Upon information and belief, Defendant has been well aware that the NETSCOUT® Trademark is recognized widely and relied upon by the public and the trade as identifying NetScout and its products and as distinguishing said products from the products of others.

29. Notwithstanding that knowledge, and indeed by reason of such knowledge, Defendant engaged in a deliberate and willful scheme to trade upon and to misappropriate for itself the goodwill represented and symbolized by the NETSCOUT® Trademark, by applying to register, adopting, or using in commerce the Accused Trademarks.

30. Defendant's use in commerce of the Accused Trademarks is designed, and is calculated, and is likely to cause confusion, to cause mistake, and to deceive customers and prospective customers as to the source, origin, or sponsorship of Defendant's products, and to

cause consumers mistakenly to believe that Defendant's products are the products of Plaintiff, or are sponsored, licensed, authorized, or approved by Plaintiff, all to the detriment of Plaintiff, the trade, and the public.

31. Defendant's use of the Accused Trademark is without the license, authorization, or consent of Plaintiff.

32. Plaintiff has objected to the use and/or registration of the Accused Trademarks by Defendant. Plaintiff has filed a consolidated opposition proceeding with the Trademark Trial and Appeal Board (TTAB) of the PTO against the ForeScout Applications, which is pending.

33. Defendant has refused to comply with Plaintiff's demands to cease and desist use of the Accused Trademarks or to abandon the ForeScout Applications.

#### **COUNT I – FEDERAL TRADEMARK INFRINGEMENT**

34. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 33 as if fully set forth herein.

35. With full knowledge and awareness of Plaintiff's ownership and prior use of the NETSCOUT® Trademark and for their own benefit, Defendant intentionally has used in commerce, and upon information and belief, will continue to use the Accused Trademarks, which use is likely to cause confusion, or to cause mistake, or to deceive.

36. Defendant's aforesaid acts constitute infringement of Plaintiff's federally-registered and incontestable trademarks, in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114.

37. Defendant's aforesaid acts have caused and will cause irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer irreparable injury.

38. Plaintiff has no adequate remedy at law.

39. Defendant's aforesaid acts have harmed Plaintiff's reputation and have caused damage to Plaintiff in an amount to be determined.

40. Defendant's aforesaid acts have unlawfully enriched and benefited Defendant in an amount to be determined.

**COUNT II – FALSE DESIGNATION, DESCRIPTION,  
AND REPRESENTATION UNDER THE LANHAM ACT**

41. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 40 as if fully set forth herein.

42. Defendant intentionally has used and, upon information and belief, will continue to use in commerce the Accused Trademarks, which use constitutes a false designation of origin, false or misleading description of fact, or a false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to affiliation, connection, or association with Plaintiff, or origin, sponsorship, or approval of Defendant's products by Plaintiff.

43. Defendant's aforesaid acts constitute unfair competition, false designation of origin, and/or false description or representation in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

44. Defendant's aforesaid acts have caused and will cause irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer irreparable injury.

45. Plaintiff has no adequate remedy at law.

46. Defendant's aforesaid acts have harmed Plaintiff's reputation and have caused damage to Plaintiff in an amount to be determined.

47. Defendant's aforesaid acts have unlawfully enriched and benefited Defendant in an amount to be determined.

### **COUNT III – COMMON LAW TRADEMARK INFRINGEMENT**

48. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 47 as if fully set forth herein.

49. Defendant's acts in promoting and selling products and services that are of substantially the same character as NETSCOUT<sup>®</sup> products in connection with a trademark that is confusingly similar to Plaintiff's NETSCOUT<sup>®</sup> Trademark constitutes common law trademark infringement, palming or passing off of Defendant's goods and services as those of Plaintiff, and unprivileged imitation, all of which create in the mind of the public the impression that Plaintiff is responsible for the quality and performance of Defendant's goods and services or is otherwise connected to or associated with Defendant.

50. Defendant's use of a trademark confusingly similar to Plaintiff's NETSCOUT<sup>®</sup> Trademark constitutes a use of Plaintiff's trademark on and in connection with goods or services that Plaintiff cannot control. Such acts will materially damage the reputation of Plaintiff and that of its goods and services and damage the goodwill in Plaintiff's trademark that has been created by Plaintiff's substantial expenditure of money.

51. Defendant's aforesaid acts constitute trademark infringement and unfair competition, all in violation of Plaintiff's rights under the common law of the Commonwealth of Massachusetts and other states.

52. Defendant's aforesaid acts have caused and will cause irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer irreparable injury.

53. Plaintiff has no adequate remedy at law.

54. Defendant's aforesaid acts have harmed Plaintiff's reputation and have caused damage to Plaintiff in an amount to be determined.

55. Defendant's aforesaid acts have unlawfully enriched and benefited Defendant in an amount to be determined.

**COUNT IV – STATE TRADEMARK INFRINGEMENT: MASSACHUSETTS**

56. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 55 as if fully set forth herein.

57. Plaintiff is the owner of the Massachusetts Registration for NETSCOUT for computer software and hardware. See Exhibit D. The Certificate of Registration shown in Exhibit D serves as competent and sufficient proof of the registration of Plaintiff's NETSCOUT trademark in Massachusetts.

58. Upon information and belief, Defendant has used and will continue to use the Accused Trademarks in Massachusetts, which use is likely to cause confusion or to cause mistake or to deceive as to the source or origin of Defendant's goods or services, all in violation of Plaintiff's rights under Massachusetts law. Such use by Defendant is without Plaintiff's consent.

59. Defendant's aforesaid acts constitute infringement of Plaintiff's registered trademark, in violation of Mass. Gen. Laws ch. 110B, § 11 (2002).

60. Defendant's aforesaid acts have caused and will cause irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer irreparable injury.

61. Plaintiff has no adequate remedy at law.

62. Defendant's aforesaid acts have harmed Plaintiff's reputation and have caused damage to Plaintiff in an amount to be determined.

63. Defendant's aforesaid acts have unlawfully enriched and benefited Defendant in an amount to be determined.

**COUNT V – STATE TRADEMARK DILUTION: MASSACHUSETTS**

64. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 63 as if fully set forth herein.

65. The NETSCOUT<sup>®</sup> Trademark is distinctive and, through long and extensive use, advertising, marketing, and public awareness, possesses a high degree of distinctiveness, including in Massachusetts.

66. Upon information and belief, Defendant has used and will continue to use the Accused Trademarks in Massachusetts, which use has injured and will continue to injure Plaintiff's business reputation and/or has diluted and will continue to dilute the distinctive quality of Plaintiff's NETSCOUT<sup>®</sup> Trademark.

67. Defendant's aforesaid acts are likely to injure the business reputation of Plaintiff or likely to dilute the distinctive quality of Plaintiff's NETSCOUT<sup>®</sup> Trademark, in violation of Mass. Gen. Laws ch. 110B, § 12 (2002).

68. Defendant's aforesaid acts have caused and will continue to cause great and irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer great and irreparable injury.

**COUNT VI – UNFAIR TRADE PRACTICES: MASSACHUSETTS**

69. Plaintiff incorporates herein each and every allegation set forth in Paragraphs 1 through 68 as if fully set forth herein.

70. Defendant's acts and practices described above constitute unfair methods of competition and/or unfair or deceptive acts or practices declared unlawful by Mass. Gen. Laws ch. 93A, § 11 (2002), and were committed by Defendant primarily and substantially in the Commonwealth of Massachusetts and in knowing and willful violation thereof.

71. Defendant's aforesaid acts have harmed Plaintiff's business reputation, severely damaged Plaintiff's goodwill, and upon information and belief, have unjustly enriched Defendant.

72. Defendant's aforesaid acts have injured and will continue to injure Plaintiff's business reputation and have diluted and will continue to dilute the distinctive quality of Plaintiff's Trademarks.

73. Defendant's aforesaid acts have caused and will continue to cause great and irreparable injury to Plaintiff, and unless said acts are restrained by this Court, they will be continued and Plaintiff will continue to suffer great and irreparable injury.

74. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays:

A. That this Court adjudge that the NETSCOUT<sup>®</sup> Trademark has been infringed and diluted as a direct and proximate result of the acts of Defendant as set forth in this Complaint, in violation of Plaintiff's rights under the Lanham Act, 15 U.S.C. § 1051 et seq., and the statutory and common laws of Commonwealth of Massachusetts and other states.

B. That this Court adjudge that Defendant have competed unfairly with Plaintiff as set forth in this Complaint, in violation of Plaintiff's rights under the Lanham Act, the General Laws of Massachusetts, and the common laws of the Commonwealth of Massachusetts, and other states.

C. That this Court deny the registration of the ForeScout Applications by the United States Patent and Trademark Office.

D. That Defendant, and all officers, directors, agents, servants, employees, affiliates, attorneys, successors, and assigns, and all persons in active concert or participation therewith, be preliminarily and permanently enjoined and restrained:

1) From using the Accused Trademarks, or any designation or trademark similar thereto, in any way, including in the Domain Name or any other domain name or web address, in connection with computer software or hardware, or any other related goods or services; and

2) From doing any other act or thing likely to cause the public or the trade mistakenly to believe that there is any connection between Defendant and Plaintiff, or their respective products and/or services; and

3) From otherwise infringing or diluting any trademark owned by Plaintiff or engaging in unfair competition against Plaintiff.

E. That Defendant be required to deliver up for destruction all products, packaging, signs, prints, promotional materials, advertisements, and other written or printed materials that bear the Accused Trademarks, or any trademarks similar thereto.

F. That Plaintiff recover Defendant's profits and the damages of Plaintiff arising from Defendant's acts of trademark infringement, dilution, false designation of origin, false description or representation, and unfair competition.

G. That this Court treble such amounts awarded as allowed by § 35 of the Lanham Act, 35 U.S.C. § 1117, and multiple and/or punitive damages as allowed by federal and other state law.

H. That this Court award Plaintiff multiple damages as allowed by Mass. Gen. Laws ch. 93A, and other federal and state law.

I. That Plaintiff recover both pre-judgment and post-judgment interest on each and every award.

J. That Plaintiff recover its reasonable attorneys' fees incurred in this action, as provided for under federal and state law.

K. That Plaintiff has and recover its taxable costs and disbursements incurred in this action.

L. That Plaintiff has other and such further relief as the Court may deem just and proper.

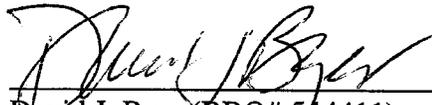
**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all issues so triable.

Date: May 5, 2005

NETSCOUT SYSTEMS, INC.

By its attorneys,



David J. Byer (BBO# 544411)

Deborah J. Peckham (BBO# 564865)

Kirkpatrick & Lockhart Nicholson Graham LLP

75 State Street

Boston, MA 02109-1808

Telephone: (617) 261-3100

Facsimile: (617) 261-3175

BOS-818682-1

# EXHIBIT A

Int. Cl.: 9

Prior U.S. Cl.: 38

**United States Patent and Trademark Office**

Reg. No. 1,764,154  
Registered Apr. 13, 1993

**TRADEMARK  
PRINCIPAL REGISTER**

**NETSCOUT**

FRONTIER SOFTWARE DEVELOPMENT, INC.  
(MASSACHUSETTS CORPORATION)  
1501 MAIN STREET, SUITE 39-40  
TEWKSBURY, MA 01876

FOR: SOFTWARE FOR USE ON LOCAL  
AREA NETWORKS AND WIDE AREA NET-  
WORKS TO ANALYZE NETWORK INFORMA-  
TION TRAFFIC FOR THE PURPOSE OF MEAS-  
URING NETWORK PERFORMANCE AND ISO-

IATING AND DIAGNOSING ERRORS,  
DELAYS AND FAULTS, IN CLASS 9 (U.S. CL.  
38).

FIRST USE 10-7-1991; IN COMMERCE  
10-7-1991.

SER. NO. 74-220,917, FILED 11-8-1991.

DOMINIC J. FERRAIUOLO, EXAMINING AT-  
TORNEY

ESD-601

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36 and 38

**United States Patent and Trademark Office**

Reg. No. 2,287,610

Registered Oct. 19, 1999

**TRADEMARK  
PRINCIPAL REGISTER**



NETSCOUT SYSTEMS, INC. (DELAWARE  
CORPORATION)  
4 TECHNOLOGY PARK DRIVE  
WESTFORD, MA 01886

FIRST USE 3-31-1997; IN COMMERCE  
3-31-1997.

OWNER OF U.S. REG. NO. 1,764,154.

SER. NO. 75-516,167, FILED 7-9-1998.

FOR: COMPUTER PROGRAMS FOR MONI-  
TORING AND MANAGING COMPUTER NET-  
WORK TRAFFIC AND COMPUTER NETWORK  
DIAGNOSTIC SOFTWARE, IN CLASS 9 (U.S.  
CLS. 21, 23, 26, 36 AND 38).

DAVID M. MERMELSTEIN, EXAMINING AT-  
TORNEY

# EXHIBIT B



UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trade Office  
ASSISTANT COMMISSIONER FOR TRADEMARKS  
2900 Crystal Drive  
Arlington, VA 22202-3513

REGISTRATION NO. 1764154 SERIAL NO. 74/220917

PAPER NO.

MAILING DATE: Aug 30, 1999

MARK: NETSCOUT

REGISTRANT: NETSCOUT SYSTEMS, INC.

CORRESPONDENCE ADDRESS:

JOSEPH G HADZIMA JR  
TESTA HURWITZ & THIBEAULT  
TRADEMARK ADMINISTRATOR  
125 HIGH ST  
BOSTON MA 02110

TMPRU

Please furnish the following  
in all correspondence:

1. Your phone number and ZIP Code.
2. Mailing date of this action.
3. Affidavit-Renewal Examiner's name.
4. Mark all correspondence to the attention of "PRU" using the above address.
5. Registration No.

RECEIPT IS ACKNOWLEDGED OF THE SUBMITTED REQUEST UNDER:

SECTION 8 OF THE TRADEMARK STATUTE AND 37 CFR SECS. 2.161-2.166.

SECTION 15 OF THE TRADEMARK STATUTE AND 37 CFR SECS. 2.167-2.168.

YOUR REQUEST FULFILLS THE STATUTORY REQUIREMENTS AND HAS BEEN ACCEPTED.

*A. J. Gore*

---

A. J. GORE  
AFFIDAVIT-RENEWAL EXAMINER  
TRADEMARK EXAMINING OPERATION  
(703) 308-9500 EXT. 129

# EXHIBIT C



Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451  
[www.uspto.gov](http://www.uspto.gov)

REGISTRATION NO: 2287610 SERIAL NO: 75/516167 MAILING DATE: 12/16/2004

REGISTRATION DATE: 10/19/1999

MARK: NETSCOUT AND DESIGN

REGISTRATION OWNER: Netscout Systems, Inc.

**CORRESPONDENCE ADDRESS:**

Jennifer K. Lawson  
TESTA HURWITZ & THIBEAULT LLP  
ATTN: Trademark Administrator  
125 HIGH ST  
BOSTON MA 02110

**NOTICE OF ACCEPTANCE**

15 U.S.C. Sec. 1058(a)(1)

THE COMBINED AFFIDAVIT FILED FOR THE ABOVE-IDENTIFIED REGISTRATION MEETS THE REQUIREMENTS OF SECTION 8 OF THE TRADEMARK ACT, 15 U.S.C. Sec. 1058.

ACCORDINGLY, THE SECTION 8 AFFIDAVIT IS ACCEPTED.

\*\*\*\*\*  
**NOTICE OF ACKNOWLEDGEMENT**

15 U.S.C. Sec. 1065

THE AFFIDAVIT FILED FOR THE ABOVE-IDENTIFIED REGISTRATION MEETS THE REQUIREMENTS OF SECTION 15 OF THE TRADEMARK ACT, 15 U.S.C. Sec. 1065.

ACCORDINGLY, THE SECTION 15 AFFIDAVIT IS ACKNOWLEDGED.

\*\*\*\*\*  
THE REGISTRATION WILL REMAIN IN FORCE FOR CLASS(ES):  
009.

ROBERSON, FAITH  
PARALEGAL SPECIALIST  
POST-REGISTRATION DIVISION

(703)308-9500

**PLEASE SEE THE REVERSE SIDE OF THIS NOTICE FOR INFORMATION  
CONCERNING REQUIREMENTS FOR MAINTAINING THIS REGISTRATION  
ORIGINAL**

---

**REQUIREMENTS FOR MAINTAINING A FEDERAL TRADEMARK REGISTRATION**

**I) SECTION 8: AFFIDAVIT OF CONTINUED USE**

The registration shall remain in force for 10 years, except that the registration shall be canceled for failure to file an Affidavit of Continued Use under Section 8 of the Trademark Act, 15 U.S.C. Sec. 1058, at the end of each successive 10-year period following the date of registration.

**Failure to file the Section 8 Affidavit will result in the cancellation of the registration.**

**II) SECTION 9: APPLICATION FOR RENEWAL**

The registration shall remain in force for 10 years, subject to the provisions of Section 8, except that the registration shall expire for failure to file an Application for Renewal under Section 9 of the Trademark Act, 15 U.S.C. Sec. 1059, at the end of each successive 10-year period following the date of registration.

**Failure to file the Application for Renewal will result in the expiration of the registration.**

**NO FURTHER NOTICE OR REMINDER OF THESE REQUIREMENTS WILL BE SENT TO THE REGISTRANT BY THE PATENT AND TRADEMARK OFFICE. IT IS RECOMMENDED THAT THE REGISTRANT CONTACT THE PATENT AND TRADEMARK OFFICE APPROXIMATELY ONE YEAR BEFORE THE EXPIRATION OF THE TIME PERIODS SHOWN ABOVE TO DETERMINE APPROPRIATE REQUIREMENTS AND FEES.**

# EXHIBIT D



**The Commonwealth of Massachusetts**  
William Francis Galvin, Secretary of the Commonwealth  
Corporations Division

#: 65017  
Mark: NETPCOUT

Dear Registrant:

Enclosed please find an approved copy of your Trademark or Servicemark application. This certificate of registration will be effective for a period of ten (10) years from the date stamped on the back. The registration number, which appears in the top right corner of the front of the form, should be used when requesting information, copies, or notifying this office of an address change.

Within six (6) months of the expiration of your term of registration a notification will be sent to the last address of record. Notices will not be sent to the law firm which may have filed the original application.

The appropriate symbol to indicate state registration is "TM" or "SM". The symbol used for a federal registration is an "R" within a circle. This symbol may not be used unless you mark is registered with the Patent and Trademark Office in Washington, DC. For federal information and forms, call (703) 308-4357.

This office is not permitted to give legal advice regarding infringement of your Trademark or Servicemark. If you need information on name disputes or Trademark or Servicemark infringement, please consult an attorney.

Office of the Secretary of the Commonwealth  
One Ashburton Place  
Trademark Division  
Boston, MA 02108

# The Commonwealth of Massachusetts

William Francis Galvin  
Secretary of the Commonwealth  
One Ashburton Place, Boston, Massachusetts 02108-1512

## APPLICATION FOR REGISTRATION OF A TRADEMARK (General Laws, Chapter 110B, Section 2)

1. Name of applicant: NetScout Systems, Inc.
2. (a) Principal business address: 310 Littleton Road, Westford, MA 01886  
(b) \*Business address in Massachusetts, if any:
3. State whether applicant is an individual, partnership, corporation, union or association: corporation
4. If a corporation, the state of incorporation is: Delaware
5. Describe mark:  
The mark is: NETSCOUT
6. Describe the specific goods in connection with which the mark is used:  
Computer software and computer hardware
7. Class No.: 9
8. The mark is used by displaying it:
  - directly to the goods
  - to tags or labels affixed to the containers for the goods
  - directly to the containers for the goods
  - to tags or labels affixed directly to the goods
  - by displaying it in physical association with the goods in the sale or distribution thereof
  - in other fashions (explain):
9. Date of first use of mark by applicant or predecessor. If first use of mark was in Massachusetts, use the same date in both (a) and (b).  
(a) Anywhere: 10/07/91  
(b) In Massachusetts: 10/07/91
10. If either of the above first uses was by a predecessor of the applicant, state which use or uses were by a predecessor and identify that predecessor: The first uses anywhere and in Massachusetts on 10/07/91 were by a predecessor of the applicant, Frontier Software Development, Inc.

State of: Massachusetts  
County of: Middlesex

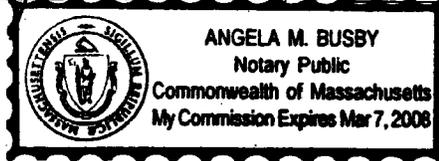
Name of applicant: (signatory) Todd E. Johnson  
Signature of applicant: [Signature]  
Title: Director of Legal Services

Note: This document must be notarized - see reverse side.  
\*Fill in only if principal business address is not in Massachusetts

Todd E Johnson, being duly sworn, deposes and says that he is the Dir. of Legal Serv  
of the above named applicant, that the statements contained in the foregoing statement are true and that he verily believes  
that said applicant is the owner of the mark sought to be registered and that no other person has the right in the Common-  
wealth of Massachusetts to use such mark either in the identical form thereof, or in such near resemblance thereto, as to be  
likely, when applied to the goods or services of such person, to cause confusion or to cause mistake or to deceive.

SUBSCRIBED and sworn to before me this 10 day of November, 2004.

Notary Public: Angela M Busby My commission expires: March 7 2008



\*Please print the name and address in the space provided below of the person to whom you wish this application to be sent.

Three 4th of November, 20 04  
CR # 237717

General Laws, Chapter 110B, Section 4  
**NOV 04 2004**  
Filed with  
William Francis Galvin,  
Secretary of the Commonwealth  
and Secretary's Certificate of Record issued on:

**CERTIFICATE OF REGISTRATION  
OF A TRADEMARK**

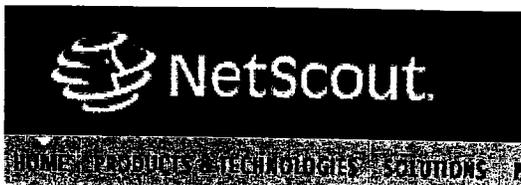
*Angela M Busby*

**FEE PAID**  
**NOV 04 2004**  
CASHIERS  
SECRETARY'S OFFICE



William Francis Galvin  
Secretary of the Commonwealth  
Trademark Section  
One Ashburton Place, Rm. 1712  
Boston, MA 02108

NetScout Systems: Unified Network and



Jennifer K. Lawson, Esq.

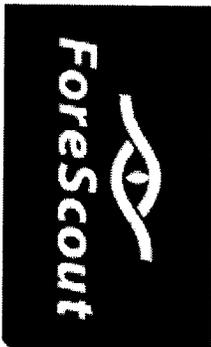
Testa, Hurwitz & Thibault, LLP

125 High Street, High Street Tower

Boston, MA 02110

# EXHIBIT E

- Company
- Products
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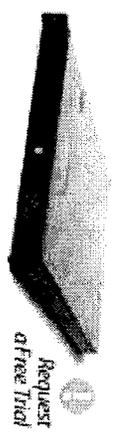
Intelligent Intrusion Prevention™



# Stop Hacker & Automated Attacks from Disrupting Your Business.

**Automatic**  
 100% Automatic Blocking.  
 No Signatures. No Prior Knowledge of the Attack.  
 Zero Latency. Zero Point-of-Failure.

## Defense in Depth Suite



- **CounterACT**  
Instantly identify and block/contain threats emanating from inside your network — espionage, self-propagating threats.
- **ActiveScout**  
Instantly stop threats from breaching your perimeter by identifying malicious sources with proven intent and automatically blocking them at the source.

## What's New

→ ForeScout Technologies chosen as a premier vendor to present at an exclusive Emerging Security Technology Forum sponsored by the Department of Homeland Security.



→ ForeScout and Apani Networks Forge Alliance To Provide Innovative Enterprise Security Solution

→ SIRVA Chooses ForeScout to Ensure Network Continuity During Worm Outbreaks

→ ForeScout Launches Free Service That Monitors Network Threats and Alerts Subscribers With Accurate, Actionable

## Customer Validated Solutions



→ **ACTNet System**

Accurate Containment of Threats Network is a global network of security sensors ensuring a reliable computing environment by stopping threats **BEFORE** they get to you network.

Data

→ *Find out why 100% of our customers have their ForeScout appliances set to automatic blocking mode.*



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## ActiveScout

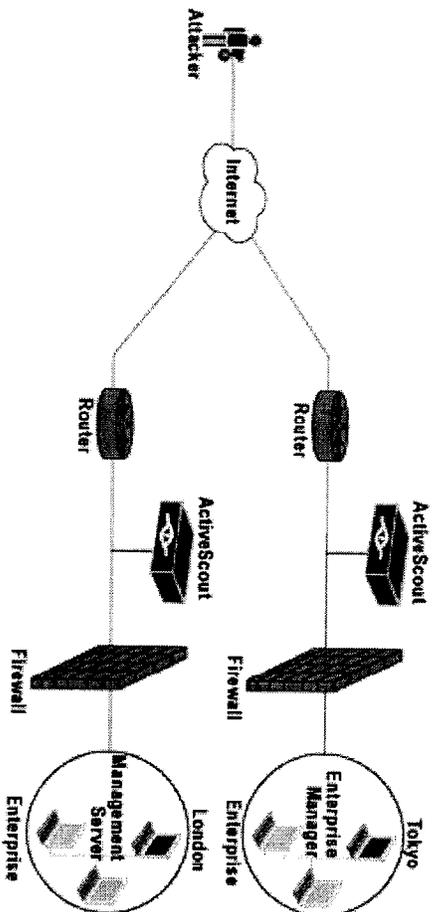
- CounterACT
- ActiveScout
  - 3 Phase Approach
  - Features
  - Requirements
  - Proven Intent
  - Demo Center
  - Case Studies
- FAQ's
- Resource Library



ActiveScout actively protects networks from external threats. Accurate identification of an attacker's proven intent allows ActiveScout to stop attacks before they reach your network. ActiveScout is truly a set-it and forget-it solution that you can trust to stop known and unknown threats.

### ActiveScout Components

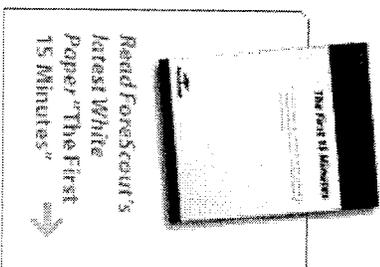
The ActiveScout Enterprise consists of three components:



[Download Datasheet](#)

#### Key Benefits

- Absolute Accuracy
- Prevention of Known & Unknown Threats
- Instantaneous Protection
- Minimal Cost of Prevention



### Scouts

The Scouts are positioned outside firewalls and actively monitor internet traffic for signs of pre-attack activity. The Scout is responsible for accurately identifying

attackers, 'marking' them as potential threats and automatically blocking any attempt they make to return. Multiple Scouts are deployed in the Enterprise solution to protect the network's distributed access points.

**Management Server**

The Management Server controls the activity and policy of Scouts distributed across the enterprise, reporting and displaying information about attack attempts, identification, and prevention measures that occur at each location.

**Enterprise Manager**

The Enterprise Manager is a Java-based application that provides comprehensive management of all Scouts. Residing on any point of the network, it presents a visual overview of threat prevention activity - including a geographical representation of potential attackers and the preventive steps that were taken against them.

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## ActiveScout

CounterACT

ActiveScout

3 Phase Approach

Features

Requirements

Proven Intent

Demo Center

Case Studies

FAQ's

Resource Library

### Demo Center

Welcome to the ActiveScout Demo Center. This is the place where you can do more than read about our solutions and technology. You can learn about our intrusion prevention process and watch how it works.

### Demo Support

If you have any questions about the demo, please contact us at [demo@fore Scout.com](mailto:demo@fore Scout.com)

#### → ForeScout Technology Flash Tutorial



Learn how ActiveScout's unique 3 phased intrusion prevention process accurately and automatically blocks attacks. [View>](#)

#### → ActiveScout Product Demonstration



Experience a live network being protected real-time and see accurate identification of attackers from around the world. [View>](#)

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Thank you for your interest in viewing the ForeScout demo.

Please provide the information below. You will be receiving an email with a link that will allow you to access the demo.

(\*Required Fields)

First Name*:	<input type="text"/>	Last Name*:	<input type="text"/>
Company*:	<input type="text"/>	Title:	<input type="text"/>
State/Province*: (If US/Mexico/Canada):	<input type="text"/>	Country*:	<input type="text"/>
Zip/Postal Code* (If US/Canada):	<input type="text"/>	E-mail*:	<input type="text"/>
Phone Number*:	<input type="text"/>	Industry: --None--	<input type="text"/>
Company Size?	<input type="text"/>	Timeframe?	<input type="text"/>

Please keep me informed about ForeScout news and events.

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# EXHIBIT F

Thousands of domains expire every day.

WHOIS SEARCH RESULTS

WHOIS RECORD FOR

forescout.com



[Certified Offer Service - Make an offer on this domain](#)  
[Backorder - Try to get this name when it becomes available](#)

[Private Registration - Make personal information for this domain private](#)

[Similar Names - See suggested alternatives for this domain](#)

**Registrant:**

SHIKMONI, DORON \*\*

[Make this info private](#)

ForeScout Technologies, Habarzel 32  
 Tel-Aviv, 69710  
 IL  
 Phone: +972 3 6449987  
 Fax: 123 123 1234

**Domain Name:** FORESCOUT.COM

**Administrative Contact , Technical Contact :**

SHIKMONI, DORON \*\*  
 hostmaster@forescout.com  
 ForeScout Technologies, Habarzel 32  
 Tel-Aviv, 69710  
 IL  
 Phone: +972 3 6449987  
 Fax: 123 123 1234

**Record expires on** 29-Mar-2007  
**Record created on** 29-Mar-2000  
**Database last updated on** 29-Jun-2004

**Domain servers in listed order:**

[Manage DNS](#)

NS1.FORESCOUT.COM	194.90.25.83
NS2.FORESCOUT.COM	212.179.35.136

[Show underlying registry data for this record](#)

**Current Registrar:** NETWORK SOLUTIONS, LLC.  
**IP Address:** 212.179.35.136 (ARIN & RIPE IP search)  
**IP Location:** IL(ISRAEL)-TEL AVIV-TEL AVIV  
**Record Type:** Domain Name  
**Server Type:** Apache 1

BUY THE AVAILABLE EXT FOR THIS DOMAIN NAME

- forescout

SEARCH AGAIN

Enter a search term:

e.g. networksolutions.c

Search by:

- Domain Name
- NIC Handle
- IP Address

SEARCH

RELATED CATEGORIES

- [help](#)
- [financial help](#)
- [sales forecasting](#)
- [personal development](#)
- [bargains](#)

<b>Lock Status:</b>	REGISTRAR-LOCK
<b>Web Site Status:</b>	Active
<b>DMOZ</b>	no listings
<b>Y! Directory:</b>	<a href="#">see listings</a>
<b>Secure:</b>	No
<b>E-commerce:</b>	No
<b>Traffic Ranking:</b>	Not available
<b>Data as of:</b>	21-Jun-2004

- [financial assistance](#)
- [self help](#)
- [fortune telling](#)
- [low prices](#)
- [humanitarian aid](#)

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- Travel**
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- [Hotels](#)
- [Airline](#)

- Financial Planning**
- [Debt](#)
- [Credit Cards](#)
- [Loans](#)

- Business and Finance**
- [Affiliate Program](#)
- [Student Loans](#)
- [Stocks](#)

**Is the name you want here**

[VIEW](#)

**Keyword Alert Service**

A **FREE** service to find the domain you want e

When you register a domain name, current policies require that the contact information for your domain name registration be included in a public database known as WHOIS. To learn about actions you can take to protect your WHOIS information visit [www.internetprivacyadvocate.org](http://www.internetprivacyadvocate.org).

**NOTICE AND TERMS OF USE:** You are not authorized to access or query our WHOIS database through the use of high-volume, automated, electronic processes or for the purpose or purposes of using the data in any manner that violates these terms. The Data in Network Solutions' WHOIS database is provided by Network Solutions for information purposes only, and to persons in obtaining information about or related to a domain name registration record. Network Solutions does not guarantee accuracy. By submitting a WHOIS query, you agree to abide by the following terms of use: You agree that you may use this Data only for lawful purposes and that under no circumstances will you use this Data to: (1) allow, enable, or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via direct mail, e-mail, telephone, or facsimile; (2) enable high volume, automated, electronic processes that apply to Network Solutions (or its computer systems). The copying, repackaging, dissemination or other use of this Data is expressly prohibited without the prior written consent of Network Solutions. You agree not to use high-volume, automated, electronic processes to access or query the WHOIS database. Network Solutions reserves all rights and remedies it now has or may have in the future, including, but not limited to, the right to terminate access to the WHOIS database in its sole discretion, for any violations by you of these terms of use, including without limitation excessive querying of the WHOIS database or for failure to otherwise abide by these terms of use. Network Solutions reserves the right to modify these terms at any time.



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