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

Proceeding	92047013
Party	Plaintiff NeTrack, Inc.
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Date	10/29/2007
Attachments	reply.pdf (5 pages)(71702 bytes)

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration Number: 3,064,820

Mark: NETTRAK

Registered: March 7, 2006

NeTrack, Inc.)
)
v.)
)
Internet FX, Inc.)
_____)

Cancellation No. 92047013

Commissioner for Trademarks
PO Box 1451
Alexandria, Virginia 22313-1451

**REPLY TO REGISTRANT’S “BRIEF IN OPPOSITION TO
PETITIONER’S MOTION TO STRIKE”**

Petitioner understands that the TTAB discourages the filing of Reply Briefs. For this reason, Petitioner has not repeated arguments made in its initial brief. Petitioner does, however, question some of the characterizations made in Registrant’s “Brief in Opposition to Petitioner’s Motion to Strike”. Therefore, Petitioner respectfully requests that the TTAB consider the following brief remarks.

Registrant Fails to Provide a Legitimate “Permissible Purpose” to Introduce Settlement Information under Federal Rule of Evidence 408.

Registrant cannot claim that it introduced confidential settlement information for Rule 408's legitimate permissible purpose of “negat[ing] a contention of undue delay”. In order to negate

such a contention, the contention would first need to have been made.

The fact that Rule 408 uses the word “negate” suggests that, while evidence of a settlement may be relevant to rebut evidence that a party engaged in undue delay, this evidence cannot be admitted unless the door is first opened by a party raising the issue of undue delay. See Charles Alan Wright and Kenneth W. Graham, Jr., 23 Fed. Prac. & Proc. § 5312 (supp. 2006) (“[T]he offeror cannot himself raise the issue of delay as a justification for the admission of the evidence.”).

Stockman v. Oakcrest Dental Ctr., P.C., 480 F.3d 791, 808 (6th Cir. 2007).

At no time prior to Registrant providing the TTAB with the confidential settlement information did Petitioner contend to the TTAB that Registrant was causing “undue delay”. Registrant’s purpose for presenting the confidential settlement information in its “Motion to Reopen Discovery Period and Reset Testimony and Trial Periods” was to “explain the reasons it did not serve discovery prior to the close of the discovery period.” (See page 3 of Registrant’s “Brief in Opposition to Petitioner’s Motion to Strike”).

Registrant Was Aware at the Time of Filing its “Motion to Reopen Discovery Period and Reset Testimony and Trial Periods” that Petitioner Considered the Email Exchange Disclosed by Registrant to the TTAB to Contain Confidential Settlement Information.

Registrant states: “Had Petitioner been so concerned about the disclosure of confidential settlement material, it should have indicated on the face of the communications its expectation of confidentiality.” (See page 3 of Registrant’s “Brief in Opposition to Petitioner’s Motion to Strike”). Petitioner notes that Federal Rule of Evidence 408 does not require that confidential settlement information be marked as such to avoid disclosure.

It is disingenuous for Registrant to imply that it might not have known Petitioner considered the communications confidential prior to disclosing them to the TTAB. Petitioner's attorney expressly counseled Registrant's attorney not to introduce the settlement communications into evidence prior to Registrant doing so. (See Exhibit A, Declaration of Carl Oppedahl).

Conclusion

For the reasons provided in Petitioner's Motion to strike, further supported by the comments above, Petitioner again respectfully requests that the Board grant its motion to strike the portions of Registrant's "Motion to Reopen Discovery Period and Reset Testimony and Trial Periods; Supporting Declarations of Laura M. France and Christine Klenk" as indicated in the Motion to Strike's Appendix A.

Respectfully submitted,

Oppedahl Patent Law Firm, LLC

Date: October 29, 2007

By: _____/s/_____

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Declaration of Carl Oppedahl

1. My name is Carl Oppedahl and I make the following statement under penalty of perjury.
2. On Thursday August 23, 2007 I communicated the following in an email to Ms. Laura Franco:

I counsel you in the strongest terms not to violate Rule 408 of the Federal Rules of Evidence. I can tell you that such an action on your part would poison any hope of meaningful settlement discussion in future...

If you were to attempt to introduce into evidence the settlement communications between our respective clients, I advise you that we would seek an appropriate remedy from the Board for such conduct on your part.

Dated 10/29/2007

_____/s/_____
Carl Oppedahl

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Reply to Registrant's Brief in Opposition to Petitioner's Motion to Strike was served this 29th day of October, 2007 by first class mail, upon the attorneys for Registrant:

Susan E. Hollander, Esq.
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_____/s/_____
Carl Oppedahl