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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.
Correspondence Address	Carl Oppedahl Oppedahl Patent Law Firm LLC P.O. Box 4850 Frisco, CO 80443-4850 UNITED STATES
Submission	Opposition/Response to Motion
Filer's Name	Carl Oppedahl
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Date	12/20/2007
Attachments	20071220-carl-opposition.pdf (7 pages)(124867 bytes)

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

NeTrack, Inc.	)	
	)	**Cancellation No. 92/047013**
	)	**Registration No. 3,064,820**
Petitioner,	)	**Mark: NETTRAK**
	)	
v.	)	
	)	
Internet FX, Inc.	)	
	)	
Registrant.	)	
	)	
	)	

OPPOSITION TO MOTION TO DISMISS

By this paper, Petitioner opposes Registrant's motion to dismiss (paper number 14). Petitioner requests that the motion be denied and that testimony periods be reset.

Summary of opposition. Simply put, the reason the motion should be denied is that the predicate (petitioner not having presented testimony during the testimony period) is due to Registrant's purported withdrawal of a motion for resetting of testimony periods.

It may be convenient to look at the attached time line. As may be seen in this time line, Plaintiff conducted discovery (in August of 2007) and then discovery closed (August 20, 2007). Registrant thereafter realized it had failed to conduct any discovery, and on August 30, 2007 filed a motion to reopen discovery and to reset the testimony periods (paper number 6). That motion stood fully briefed (Opposition, paper number 7, and Reply, paper number 9) as of October 29, 2007.

Relying upon such cases as *D.K. Jain v. Ramparts, Inc.* 49 USPQ2d 1429 (Opposition no. 98,307, 1998) and *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 5 USPQ2d 1067

(TTAB 1987), Plaintiff did not present testimony during the scheduled testimony period that ended November 18, 2007.

Registrant waited until the Plaintiff's scheduled testimony period had closed, and shortly thereafter unilaterally purported to withdraw its motion to reopen discovery and to reset the testimony periods (paper number 13). Plaintiff does not, of course, know Registrant's motivation for filing its motion before the start of Plaintiff's scheduled testimony period, and then unilaterally purporting to withdraw its motion immediately after the end of Plaintiff's scheduled testimony period, with a same-day filing of a Motion to Dismiss. But regardless of the motivation, the practical effect is clear, as will now be discussed.

It would have been prejudicial to Plaintiff had Plaintiff been forced to present all of its testimony at a time when Petitioner did not yet know the disposition of Registrant's motion.

At the time of the scheduled plaintiff testimony period, Plaintiff did not yet know the disposition of Registrant's motion. Thus, Plaintiff should not be held to task for failing to present its testimony during that period. "We believe it would be unfair to enter judgment against petitioner for failure to offer evidence in support of its case during a time when there was pending before the Board a motion to amend the answer, the decision on which might affect the nature of the evidence petitioner wished to offer in its behalf. Put more simply, petitioner had a right to know the issues before the Board before proceeding to trial." *Midwest Plastic* at *7. "The pendency of opposer's motions to compel discovery, which expressly included opposer's requests (now granted by the Board) for suspension of proceedings and for a resetting of testimony periods after decision of the motions to compel, constitutes good cause for opposer's failure to present testimony or file a brief in this case." *D. K. Jain* at *2-3.

Had Petitioner presented its testimony during the scheduled testimony period, and had Registrant's motion later been granted, then the practical result would have been an extremely lopsided opportunity for Registrant to carry out all of its discovery after having seen Petitioner's entire case and legal strategy.

Excusable neglect. (TTAB Manual §534.02). The "good and sufficient cause" standard, in context of

this rule, is equivalent to "excusable neglect" standard that would have to be met by any motion under Fed. R. Civ. P. 6(b) to reopen the plaintiff's testimony period.

The factors for determining whether "excusable neglect" was shown by the Petitioner are set forth by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ 2d 1582 (TTAB 1997). The excusable-neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including:

1. the danger of prejudice to the nonmovant;
2. the length of the delay and its potential impact on judicial proceedings;
3. the reason for the delay, including whether it was within the reasonable control of the movant; and
4. whether the movant acted in good faith.

These factors will be discussed in turn.

No danger of prejudice to the nonmovant. This factor focuses on the danger of prejudice to the Registrant if the testimony periods are reset as the Plaintiff requests, and thus if the motion to dismiss is denied.

The relief presently being requested by plaintiff is resetting of the schedule for testimony periods. A grant of such relief cannot possibly be prejudicial to the nonmovant (here, the Registrant) because the Registrant has also asked for precisely this relief. (The nonmovant asked for this very relief in its motion to reopen discovery and to reset the schedule for testimony periods dated August 30, 2007, paper number 6.)

This factor, then, urges in the direction of granting the relief presently requested (that the testimony periods be reset and that the motion to dismiss be denied).

The length of the delay and its potential impact on judicial proceedings. To the extent that the

relief presently requested by Plaintiff gives rise to any delay, such delay is not long. Had the Registrant not attempted unilaterally to withdraw its motion to reset the schedule of testimony periods, that very motion to reset the schedule would presumably still be pending at the present time. At such time as the TTAB were to rule upon that motion, that is when the proceedings would again move forward.
The present request for relief (the request that the motion to dismiss be denied, which is part and parcel of the request for resetting the testimony periods) will not, it seems, make any difference as to when the proceedings will again move forward. Stated differently, proceedings would not have been able to move forward regardless of whether the not-yet-decided motion was that of Registrant or that of Plaintiff.

This factor, then, urges in the direction of granting the relief presently requested (that the testimony periods be reset and that the motion to dismiss be denied).

The reason for the delay, including whether it was within the reasonable control of the movant.
As mentioned above, it has been held that the third Pioneer factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the Pioneer factors in a particular case.

The movant for purposes of this factor (that is, the party now asking that the testimony periods be reset and that the motion to dismiss be denied) is the plaintiff. The reason for the relief requested (that is, the reason for what now may be construed as delay) is the purported withdrawal by the Registrant of its motion to reset the schedule of testimony periods. That purported withdrawal by the Registrant (paper number 13) was not within the control of the Plaintiff, but was solely within the control of the nonmovant (the Registrant).

Registrant chose to file the motion to reopen discovery and reset the testimony and trial periods. Had this motion not been pending during the plaintiff's scheduled testimony period, of course Plaintiff would have duly filed its testimony. The fact of Registrant having filed its motion to reset the testimony periods was not within control of the Plaintiff and was solely within the control of the Registrant.

This factor, then, urges in the direction of granting the relief presently requested (that the testimony periods be reset and that the motion to dismiss be denied).

Conclusion

For the forgoing reasons, Plaintiff's delay was excusable. It is requested that the motion to dismiss be denied, and that the testimony periods be reset, just as the Registrant requested in its Motion of paper number 6.

Respectfully submitted,

OPPEDAHL PATENT LAW FIRM LLC
Attorneys for Petitioner

Dated: December 20, 2007
Frisco, Colorado

By:_____/s/_____
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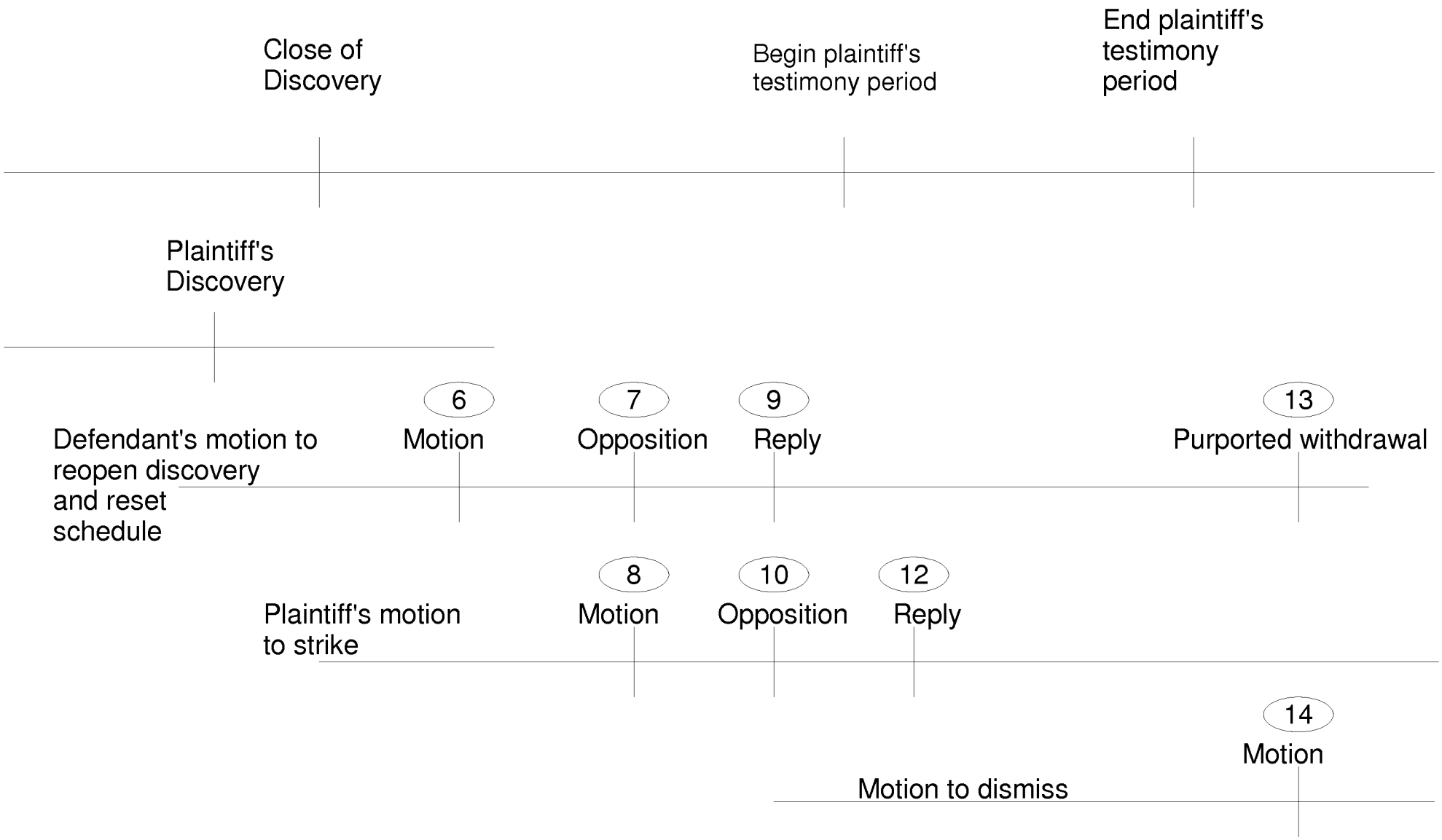
Close of Discovery
Begin plaintiff's testimony period
End plaintiff's testimony period
Plaintiff's Discovery
Defendant's motion to reopen discovery and reset schedule
6
Motion
7
Opposition
9
Reply
13
Purported withdrawal
Plaintiff's motion to strike
8
Motion
10
Opposition
12
Reply
Motion to dismiss
14
Motion

Certificate of service

I certify that this paper is being served upon the Registrant, by its counsel:

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by first-class mail this 20th day of December, 2007.

/s/
Carl Oppedahl
PTO Reg. No. 32746