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

Proceeding	92047013
Party	Defendant Internet FX, Inc.
Correspondence Address	Susan E. Hollander, Laura M. Franco Manatt, Phelps & Phillips, LLP 1001 Page Mill Road, Bldg. 2 Palo Alto, CA 94304 UNITED STATES patrademarks@manatt.com
Submission	Motion to Reopen
Filer's Name	Britt L. Anderson
Filer's e-mail	patrademarks@manatt.com
Signature	/Britt L. Anderson/
Date	09/25/2008
Attachments	DOC000.PDF (27 pages)(846262 bytes)

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

In re Registration No. 3,064,820
Mark: NETTRAK
Registered: March 7, 2006

NeTrack, Inc., Petitioner, v. Internet FX, Inc., Registrant.	Cancellation No. 92047013 **MOTION TO REOPEN DISCOVERY PERIOD AND RESET TESTIMONY AND TRIAL PERIODS; SUPPORTING DECLARATION OF BRITT L. ANDERSON**

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Pursuant to Federal Rule of Civil Procedure ("FRCP") 6(b), 37 C.F.R. §§ 2.120(a) and 2.121(a)(1), and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 509.01 and 509.02, Registrant Internet FX, Inc. ("Registrant") hereby moves the Board for an order reopening the discovery period for ninety (90) days and resetting the testimony and trial periods accordingly ("Motion"). This Motion is made on the grounds that Registrant's failure to serve discovery prior to the most recent August 20, 2007 close of discovery was due to excusable neglect due to Registrant's good faith belief that it could conclude a written settlement with Petitioner NeTrack, Inc. ("Petitioner"), and that service of discovery on Petitioner was unnecessary and counterproductive, in light of the parties' exchange of settlement proposals. Registrant requested Petitioner's consent to this Motion, which was denied.

I. INTRODUCTION

As the Board's August 28, 2008 Order ("August 28, 2008 Order") provides, during this proceeding's initial discovery period, Petitioner was dilatory in responding to a draft settlement agreement that Registrant prepared and sent immediately after discussing terms for settlement

with Petitioner. Despite Registrant's counsel's repeated follow-up with Petitioner's counsel over a nearly four-month period, Petition did not respond to Registrant's written agreement. At the eleventh hour, without any suggestion that it was set to litigate rather than settle the case, Petitioner served discovery requests timed to arrive after the close of discovery. As the Board has been apprised by the parties' earlier motions in this cancellation proceeding, Petitioner denied Registrant's request in August 2007 that the parties stipulate to reopen the initial discovery period despite the foregoing circumstances. Now, Registrant has attempted once again, to obtain agreement from Petitioner to reopen discovery without success.

Registrant still lacks any discovery based upon its earlier good faith belief that the parties were very close to settling the matter, and that service of discovery was unnecessary. Based on the foregoing, Registrant's motion to reopen the discovery period and to reset the testimony and trial periods in this action should be granted. This Motion is supported by the accompanying brief, the Declaration of Britt L. Anderson, and such other papers as may be presented to the Board.

II. RELEVANT FACTS

A. 2007 Procedural Background

On February 1, 2007, Petitioner filed its Petition for Cancellation against United States Trademark Registration No. 3,064,820 for the mark NETTRAK based on a likelihood of confusion with its mark NETRACK. (Declaration of Britt L. Anderson in Support of Motion ("Anderson Decl."), ¶ 2.) Also on February 1, 2007, the Board set discovery to close on August 20, 2007. (*Id.* ¶ 3.) On March 13, 2007, Registrant filed a timely Answer in response, denying any likelihood of confusion. (*Id.* ¶ 4.) On or about April 10, 2007, counsel for Registrant and Petitioner had a telephone conference in which terms for potential settlement of this matter were discussed. (*Id.* ¶ 5.) Petitioner and Registrant agreed to exchange written proposals for settlement. (*Id.*) Accordingly, on April 25, 2007 Registrant's counsel forwarded a draft agreement to Petitioner's counsel for review. (Anderson Decl. ¶ 8.)

Between May 14, 2007 and August 3, 2007, Registrant's counsel, through its attorneys Laura Franco and Christine Klenk, attempted on six (6) occasions to contact Petitioner's counsel either by leaving phone messages at his office or by sending emails to obtain Petitioner's comments on the proposed terms. (*Id.* ¶ 6.) During the time that Registrant was waiting for Petitioner to comment on the draft co-existence agreement, it refrained from serving discovery under the belief that a resolution to this matter was imminent. (*Id.* ¶ 7.) On August 3, 2007, Petitioner finally responded to the draft settlement agreement but raised a new issue that had not been previously discussed. (*Id.* ¶ 8.) By letter to Petitioner's counsel dated August 13, 2007, Registrant responded substantively to this new issue. (*Id.* ¶ 9.)

Registrant did not receive a response to its August 13, 2007 letter, and Petitioner provided no notice to Registrant that Petitioner's discovery requests were forthcoming, despite Registrant's settlement proposal having been in Petitioner's hands without response for nearly four months. (Anderson Decl. ¶ 10.) Instead, on August 21, 2007, one day after the close of discovery, Registrants' counsel received Petitioner's discovery requests. (*Id.* ¶ 10, Exh. A) The discovery requests did not have attached Certificates of Service. (*Id.*) On August 22, 23 and 24, 2007, Registrant's counsel contacted Petitioner in writing in an effort to reach agreement to reopen the discovery period for a period of ninety days so that Registrant would have an opportunity to conduct its own discovery. (*Id.* ¶ 11.) Petitioners' counsel did not respond to this request. (*Id.*)

Given the lack of response from Petitioner, as well as its need to conduct discovery, on August 30, 2007, Registrant filed a motion to reopen the discovery period and reset testimony and trial dates ("August 30, 2007 Motion to Reopen Discovery"), which Petitioner opposed. (*See* Board's August 28, 2008 Order ("August 28, 2008 Order") at 1.) On September 19, 2007, Petitioner filed a motion to strike portions of Registrant's August 30, 2007 Motion to Reopen Discovery ("September 19, 2007 Motion to Strike"). (*Id.*) On November 30, 2007, Registrant filed a Motion to Withdraw its August 30, 2007 Motion to Reopen Discovery ("November 30, 2007 Motion to Withdraw"). (*Id.*) Also on November 30, 2007, because Petitioner failed to

submit any testimony or offer any evidence prior to the earlier close of Plaintiff's testimony period, Registrant filed a Motion to Dismiss pursuant to Trademark Rule 2.132(a) ("November 30, 2007 Motion to Dismiss"). (*Id.*) On December 30, 2007, Petitioner filed a Motion to reopen testimony and reschedule trial dates ("December 30, 2007 Motion to Reopen Testimony"). (*Id.*)

On August 28, 2008, the Board issued its Order in regard to the foregoing motions. The Board granted Registrant's November 30, 2007 Motion to Withdraw, noting that the motion was for withdrawal was without prejudice and that Registrant had a right to submit a new motion to reopen discovery. (*See* August 28, 2008 Order at 3 n.1) Further, the Board granted Petitioner's December 30, 2007 Motion to Reopen Discovery, and reset the testimony periods, with the 30-day period for plaintiff's testimony to close on November 1, 2008. (*Id.* at 6.)

B. Parties' Communications Since the August 28, 2008 Order

Following the Board's August 28, 2008 Order, on September 10, 2008, Registrant's counsel, Britt Anderson, telephoned Petitioner's counsel, Carl Oppedahl, to discuss the potential for reinitiating settlement discussions as well. (Anderson Decl. ¶ 12.) Mr. Anderson requested Mr. Oppedahl to review Petitioner's settlement position in light of the draft settlement agreement that Registrant had sent to Petitioner in May 2007. (*Id.*) Mr. Anderson also specifically advised Mr. Oppedahl that if the litigation were to proceed, Registrant would require a stipulation to reopen the discovery period. (*Id.*) Mr. Anderson subsequently followed up with Mr. Oppedahl to ask that he provide a response to the earlier settlement draft, specifically by providing redlined changes. (*Id.* ¶ 13.) Mr. Oppedahl replied in a subsequent email that same day that it would be a "waste of time to try and make redline changes" and that there was "too big a gap." (Anderson Decl. ¶ 14.) Mr. Anderson wrote back to Mr. Oppedahl on September 12, 2008 to explain that Registrant required a written revision because multiple management personnel at Registrant needed to engage in any settlement, and stating that "we will await your further advice." (*Id.* ¶ 15) Absent any response at all from Petitioner, on September 22, 2008, Registrant's counsel requested Petitioner's stipulation to re-open discovery, which Petitioner refused. (*Id.* ¶ 16) This motion followed.

III. LEGAL ARGUMENT

A. Registrant Is Entitled to Have the Discovery Period Reopened

Once the discovery period has closed, it may be reopened pursuant to FRCP 6(b) upon a showing of excusable neglect. 37 C.F.R. § 2.116(a), § 2.120(a); TBMP §509. "Excusable neglect" is an "elastic" concept, "not limited strictly to omissions caused by circumstances beyond the control of the movant," and the existence of which is an equitable determination made by "taking account of all relevant circumstances surrounding the party's omission." *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1585-86 (T.T.A.B. 1997), quoting *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392 (1993). The factors to be considered in determining whether excusable neglect exists include "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. Here, each of the elements of the excusable neglect test favor Registrant.

First, while Registrant will be greatly prejudiced by the inability to take discovery, reopening the discovery period for a short 90-day period will not prejudice Petitioner or otherwise "impair [its] ability to litigate the case." TBMP § 509.01(b)(1). Here, Petitioner can only gain by reopening the discovery period. For instance, while Registrant responded on September 19, 2007 to Petitioner's first set of discovery requests, Petitioner may have additional discovery it wishes to conduct based on Registrant's responses. Petitioner will have that opportunity if the discovery period is reopened. If the discovery period is reopened, Petitioner also will have the opportunity to take discovery depositions. Moreover, Petitioner has no outstanding motions or other requests such that reopening the discovery period will delay an expected decision. In any event, the "prejudice to the nonmovant contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action, and more than the nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission." *Id.*

Second, Registrant has filed this Motion promptly upon receiving the Board's August 28,

2008 Order, after a brief period in which it took steps to reinitiate settlement discussions with Petitioner and attempted to obtain a stipulated agreement to re-open the discovery period. (Anderson Decl. ¶¶ 12-16.)[1] The requested delay is not significant considering that Registrant asks that the discovery period be reopened for only ninety (90) days, which is shorter by half than the complete discovery period.[2] This request is the first such request made of the Board in this action, and does not impact any of the proceedings herein (i.e., there are no outstanding motions or other procedural matters that would be affected by reopening the discovery period). Indeed, the Board liberally grants requests to extend discovery periods, and because this request is promptly made, it is similar to a request to extend the discovery period. *See Champagne Louis Roederer v. J. Garcia Carrion, S.A.*, 2004 TTAB LEXIS 235 (T.T.A.B. 2004)(granting request to reopen discovery period, in part, because, by bringing the motion just one month after the discovery period closed, movant acted "swiftly").

Third, Registrant's failure to request discovery during the discovery period, as detailed above, was the result of Registrant's good faith belief that it had reached a resolution of this matter with Petitioner in April 2007. As the parties agreed, Registrant prepared a co-existence agreement and sent it to Petitioner for review on April 25, 2007. (Anderson Decl ¶ 5.) During the ensuing nearly four month period, Petitioner did not respond to Registrant's draft agreement, or notify Registrant that it had objections to the draft agreement. (*Id.* ¶¶ 6-7.) Indeed, on August 3, 2007, when Petitioner's counsel finally responded to Registrant's draft settlement proposal after a delay of nearly four months, Petitioner's counsel did not suggest in any way that the parties would not be able to settle or that his client's service of discovery was imminent. (*Id.* ¶ 8.) Further, after Registrant responded substantively on August 13, 2007 to the issue raised for the first time on August 3, 2007, Petitioner gave no indication that the issue was a "dealbreaker" or would derail settlement. Instead, Petitioner's counsel silently served discovery, apparently

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[1] Registrant similarly attempted to obtain a stipulated agreement to re-open the discovery period and upon failing to reach agreement with Petitioner thereto filed its August 30, 2007 Motion to Reopen Discovery approximately ten (10) days after the discovery period ended.

[2] Under the testimony and trial deadlines are set in the Board's August 28, 2008 Order, plaintiff's Reply Brief is due on May 30, 2009. If this Motion is granted, plaintiff's Reply brief would be due on approximately August 29, 2009.

carefully timing it to arrive after the close of discovery. (*Id.* ¶ 10, Exh. A) Given this complete lack of notice from Petitioner that it apparently planned to pursue litigation, Registrant reasonably maintained a good faith belief that settlement was very close. Furthermore, the apparent high likelihood of settling the matter (to Registrant) also made it reasonable that Registrant would view service of discovery as counterproductive and threatening to concluding negotiations.

Finally, failure to reopen the discovery period will result in considerable prejudice to Registrant because it has not been able to gather evidence needed to respond to Petitioner's claims. Based on Registrant's good faith belief that a resolution was imminent, it did not engage in discovery. Because a motion for summary judgment must be filed by October 1, 2007, which is prior to Registrant's testimony period, Registrant has not had an opportunity to discover facts that will allow it to prepare its case. *See* TBMP § 528.02; 37 C.F.R. 127(e)(1) (summary judgment motion should be filed prior to commencement of the first testimony period). Moreover, because the testimony period is limited to the taking of testimony, if the discovery period is not reopened, Registrant will not have the opportunity to seek documentary evidence from Petitioner to support its defense. *See* TBMP § 703.

Based on the foregoing, Registrant's failure to serve discovery prior to the close of the discovery period was the result of excusable neglect, and the discovery period should be reopened for ninety days.

B. <u>Registrant Is Entitled to Have the Testimony and Trial Periods Reset</u>

Testimony and trial dates may be reset or extended pursuant to FRCP 6(b) upon good cause shown. 37 C.F.R. § 2.121(a); TBMP §509. The Board is liberal in resetting the testimony periods and in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See Amer. Vitamin Prods., Inc., v. DowBrands, Inc.*, 22 U.S.P.Q.2d 1313, 1315 (T.T.A.B. 1992).

Because Registrant has shown that it is entitled to have the discovery period reopened, it

is also entitled to have the testimony and trial periods reset. This is the first request to reset or to extend the testimony and trial periods in this action. In short, good cause exists for resetting the testimony and trial periods. *Consolidated Foods Corp. v. Ferro Corp.*, 189 U.S.P.Q. 582, 584 (T.T.A.B. 1976); *Ortho Pharmaceutical Corp. v. Schattner*, 184 U.S.P.Q. 556, 558 (T.T.A.B. 1975).

IV. CONCLUSION

For the foregoing reasons, Registrant requests that the Board grant its motion to reopen the discovery period for ninety days and reset the testimony and trial periods in this proceeding.

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

Dated: September 25, 2008

By: _____

Susan E. Hollander, Esq.
Britt L. Anderson, Esq.
Manatt, Phelps & Phillips, LLP
1001 Page Mill Road, Bldg. 2
Palo Alto, CA 94304

Attorneys for Registrant
Internet FX, Inc.

DECLARATION OF BRITT L. ANDERSON IN SUPPORT OF MOTION TO REOPEN DISCOVERY

I, Britt L. Anderson, declare:

1. I am an attorney admitted to practice in the state of California and am an associate in the law firm of Manatt, Phelps & Phillips, LLP, attorneys for Registrant Internet FX, Inc. ("Registrant"). if called upon to testify to the matters stated herein, I would and could do so based upon my personal knowledge except where otherwise indicated. I base my knowledge upon my familiarity with this firm's relevant files in regard to Cancellation No. 92047013 as well as my personal participation in the events described.

2. On February 1, 2007, Petitioner filed its Petition of Cancellation against United States Trademark Registration No. 3,064,820 for the mark NETTRAK based on a likelihood of confusion with its mark NETRACK.

3. Also on February 1, 2007, the Board set discovery to close on August 20, 2007.

4. On March 13, 2007, Registrant filed a timely answer in response denying any likelihood of confusion.

5. On April 25, 2007, after discussions regarding potential settlement of the cancellation on April 10, 2007, Registrant's counsel, as agreed with Petitioner, forwarded a draft settlement to Petitioner's counsel for his review.

6. Between May 14, 2007 and August 3, 2007, Registrant's counsel, attempted on six (6) occasions by telephone and email to contact Petitioner's counsel to obtain Petitioner's comments on the proposed terms.

7. During the time that Registrant was waiting for Petitioner to comment on the draft co-existence agreement, it refrained from serving discovery under the belief that a resolution to this matter was imminent.

8. On August 3, 2007, Petitioner finally responded to the draft settlement agreement raising a new issue that had not been previously discussed, but omitting any mention of any plans to pursue the litigation or discovery if the new issue were not addressed.

9. By letter to Petitioner dated August 13, 2007, Registrant responded substantively to this new issue.

10. Registrant did not receive a response to its August 13, 2007 letter. Rather, on August 21, 2007, my firm received Petitioner's discovery requests. Notably, although the enclosure letter was dated August 15, 2007, my firm did not receive it until August 21, 2007, which was one (1) day after the close of discovery. The enclosed discovery requests did not contain certificates of service. attached hereto at Exhibits A is a true and correct copy of the discovery requests served by Petitioner.

11. On August 22, 23 and 24, 2007, Registrant's counsel contacted Petitioner in writing in an effort to reach agreement to reopen the discovery period for a period of ninety days so that Registrant would have an opportunity to conduct its own discovery. Petitioners' counsel did not respond to this request.

12. Following the August 28, 2008 order, on September 10, 2008, I telephoned Petitioner's counsel, Carl Oppedahl, on September 10, 2008 in an attempt to re-initiate settlement discussions based on the earlier exchange of the draft agreement. In light of the fact that Registrant had never been permitted to take discovery in the case, I also advised Mr. Oppedahl that Registrant would need to have either a stipulation or motion to reopen discovery were the litigation to proceed.

13. On September 11, 2008, I followed up in writing with Mr. Oppedahl to request that he provide a response to the earlier settlement draft, specifically by providing proposed redlined changes.

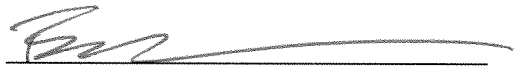
14. Mr. Oppedahl replied in a subsequent email the same day that it would be a waste of time to try and make redline changes, and that there was "too big a gap."

15. I wrote back to Mr. Oppedahl on September 12, 2008 to explain Registrant required a written revision because multiple individuals employed by Registrant needed to engage in any settlement, and stating "we will await your further advice."

16. Absent any response to my September 12, 2008 email, I requested Petitioner's agreement to reopen discovery which was refused.

I declare under penalty of perjury under the laws of the United States and of the State of California that the foregoing is true and correct.

Executed this 25th day of September, 2008 at Palo Alto, California.



Britt L. Anderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO REOPEN DISCOVERY PERIOD AND RESET TESTIMONY AND TRIAL PERIODS with SUPPORTING DECLARATION OF BRITT L. ANDERSON has been served upon the Petitioner by depositing it with the United States Postal Service as first class mail, postage prepaid, in a sealed envelope addressed to:

Carl Oppedahl, Esq.
Oppedahl Patent Law Firm, LLC
P. O. Box 4850
Frisco, CO 80443-4850

on this 25th day of September, 2008.

Linda Allen
LINDA ALLEN

EXHIBIT A

OPPEDAHL PATENT LAW FIRM LLC
FRISCO, COLORADO

CARL OPPEDAHL
JESSICA L. OLSON
INNA S. SHESTUL

TEL: + 1 970 468-8600
FAX: + 1 970 468-5432
WWW.OPPEDAHL.COM

August 15, 2007

RECEIVED
AUG 21 2007
MANATT, PHELPS & PHILLIPS LLP

Susan E. Hollander, Esq.
Manatt, Phelps & Phillips, LLP
1001 Page Mill Road, Building 2
Palo Alto, CA 94304

Chris Garver, President
Internet FX, Inc.
19202 Foxtree Lane
Houston, TX 77094

Re: Cancellation proceeding No. 92/047013

Dear Conferes:

Enclosed please find three discovery requests in the pending cancellation proceeding.

Our review of the TTAB files did not yield any indication of the registrant being represented by counsel. Thus out of an abundance of caution we are addressing our service of these requests not only to the Manatt, Phelps & Phillips, LLP firm but also to the registrant directly. We welcome your guidance as to whether future service should likewise be addressed to both addresses.

Sincerely,

Carl Oppedahl

Carl Oppedahl

POSTAL ADDRESS: P.O. BOX 4850, FRISCO, COLORADO 80443-4850

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.	)	

RECEIVED
AUG 2 1 2007
MANATT, PHELPS & PHILLIPS LLP

PETITIONERS' FIRST SET OF INTERROGATORIES TO REGISTRANT

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 33 of the Federal Rules of Civil Procedure, NeTrack, Inc. ("Petitioner") hereby requests that Internet FX, Inc. ("Registrant"), serve upon Petitioner sworn Answers to the following Interrogatories within thirty (30) days after the service hereof. The Interrogatories are intended to be continuing in nature and any information which may be discovered subsequent to the service and filing of the Answers should be brought to the attention of Petitioner through Supplemental Answers, within a reasonable time following such discovery, pursuant to Rule 26 of the Federal Rules of Civil Procedure.

INSTRUCTIONS

1. In each instance where an Interrogatory is answered on information and belief, it is requested that Registrant set forth the basis for such information and belief.

2. In each instance where Registrant denies knowledge or information sufficient to answer the Interrogatory, it is requested that Registrant set forth the name and address of each person, if any, known to have such knowledge.

3. In each instance where the existence of a document is disclosed, Registrant is requested to attach a copy of such document to its Answer. If such document is not in Registrant's possession, custody or control, it is requested that Registrant state the name and address of each person known to Registrant to have such possession, custody or control, and identify which documents are in such person's possession, custody or control.

4. In any instance in which an Interrogatory is objected to for any reason, including privilege, it is requested that all of the grounds for such objection be stated in detail and that the following information be provided:

(a) for documents, state: (i) the type of document; (ii) general subject matter of the document; (iii) the date of the document; (iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other; and

(b) for oral communications; state (i) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (ii) the date and place of communications; (iii) the general subject matter of the communications.

DEFINITIONS

1. The terms "you" and "your" when used herein refer to Registrant, its present and former parents, subsidiaries, affiliates, divisions, subdivisions, general and limited partners, licensees and/or agents, if any, its predecessors or successors, if any, and any entity which controls or is controlled by Registrant and its and their present and former general or limited partners, officers, directors, employees, agents and representatives and attorneys, to the fullest extent the context permits.

2. As used herein, "person" means an individual, firm, partnership, corporation, proprietorship, association or any other organization or entity.

3. When used herein, the term "identify" shall mean:

(a) in connection with natural persons, to state their full names, titles and job descriptions, if applicable, and their present or last known business and home address;

(b) in connection with firms, partnerships, corporations, proprietorships, associations or other entities, to state their name, and each of their present or last known addresses;

(c) in connection with documents, to describe the documents, setting forth their dates, titles, authors, addressees, parties thereto and the substance thereof, with such reasonable particularity as would be sufficient to permit them to be sought by subpoenas duces tecum or under the provisions of Rule 34 of the Federal Rules of Civil Procedure. Documents to be identified shall include both documents in your possession, custody and control and all other documents of which you have knowledge; and

(d) in connection with oral statements and communications, to (i) state when and where they were made; (ii) identify each of the makers and recipients thereof, in addition to all

others present; (iii) indicate the medium of communication; and (iv) state their substance.

4. The term "documents" is used herein in its customary broad sense and includes all original writings of any nature whatsoever and all non-identical copies thereof, in your possession, custody or control regardless of where located, and includes, but is not limited to, memoranda, stenographic or handwritten notes, contracts, agreements, records, tape recordings, correspondence, communications, reports, studies, summaries, surveys, statistical compilations, minutes, charts, manuals, brochures, schedules, price lists, telegrams, teletypes, software (whether in disk form or any other form or manner in which software programs are embodied, including source code or object code) and any other data compilation from which information can be obtained or translated through detection devices into reasonably usable form when translation is practicably necessary including each and every copy of such writing or record where the original is not in the possession, custody, or control of Registrant and every copy of every such writing or record where such copy is not an identical copy of an original or wheresoever that does not appear on the original by stating the date, author, sender, recipient, type of writing or record or some other means of identification, and any other documents as defined in Rule 34 of the Federal Rules of Civil Procedure. In all cases where originals and/or non-identical copies are not available, "documents" also means identical copies of original documents and copies of non-identical copies.

5. The singular form of a word (e.g., "document" or "person") shall also refer to the plural, and words used in the masculine, feminine, or neuter gender refer to and include all genders.

6. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to bring within the Interrogatory all information which might otherwise be construed as outside its scope.

7. The term "Registrant's Mark" shall mean and refer to Registrant's claimed trademark as set forth in Registration No. 3,064,820.

8. The term "Petitioner's Mark" shall mean and refer to Petitioner's trademark NeTrack covered by Petitioner's Registration No. 2,139,229.

INTERROGATORIES

INTERROGATORY NO. 1

State the basis for Registrant's claim that it first used its mark on or before January 10, 2000.

INTERROGATORY NO. 2

State the basis for Registrant's claim that it used its mark in commerce on or before February 1, 2000.

INTERROGATORY NO. 3

State whether any searches or investigations were conducted by Registrant or any person on its behalf (including its attorneys) to determine whether the Registrant's Mark was available as a trademark or trade name and, if so, identify each such search or investigation.

INTERROGATORY NO. 4

State whether Registrant, or any individual(s) or other company(ies) or organization(s) acting on your behalf, have conducted or authorized any other individual or company to conduct a survey, investigation, study, or market test (hereinafter "Survey") relating either to Registrant's Mark, Petitioner's Mark or the products presently offered or to be offered under Registrant's Mark, including, but not limited to, surveys relating to public recognition, consumer acceptance, secondary meaning or confusion and, if so, identify:

(a) each individual or entity who was or is in charge of conducting each Survey;

(b) each report or summary of the results thereof, whether written or oral and, if oral, state the contents thereof and identify the persons making and receiving such report or summary and each person having knowledge thereof; and

(c) each document relating to, reflecting, supporting or generated in the consideration, planning, conducting or reporting of any such survey, and the results or substance thereof.

INTERROGATORY NO. 5

Identify each expert witness whose testimony Registrant may or will reply upon in connection with the instant proceeding involving any of the issues in this case including, but not limited to, Petitioner's Mark, and with respect to each such witness:

(a) state the subject matter on which he or she is expected to testify; and

(b) state the substance of the facts and opinions on which the expert is expected to testify, and summarize the grounds for each opinion.

INTERROGATORY NO. 6

State whether Registrant or any person acting for or on behalf of Registrrant has received any communication, oral or in writing, from any person which suggests, implies, or infers that Registrant may be connected or associated with either Petitioner or any other person, or which comprises any inquiry as to whether there is or may be or which evidences any such

connection or association.

INTERROGATORY NO. 7

If you, or any of your agents, representatives or customers have received a written or verbal order, inquiry or communication which was intended for Petitioner or inquired whether Petitioner or any product sold or intended for sale by Registrant are connected, affiliated, associated, or sponsored by Petitioner identify:

(a) by whom it was communicated;

(b) the date and place thereof;

(c) the nature and substance thereof;

(d) the manner in which the incident came to Registrant's attention including, but without limitation, the method of communication; and

(e) any and all document embodying, relating to, arising out of or connected with it.

INTERROGATORY NO. 8

Identify each person who participated in the preparation of Registrant's responses to the foregoing Interrogatories or furnished any information in response thereto, and for each specify the Interrogatory Response for which each such person provided information or participated in the preparation of the Response.

INTERROGATORY NO. 9

Identify all documents consulted, referred to or relied on by Registrant in responding to the foregoing interrogatories.

OPPEDAHL PATENT LAW FIRM LLC
Attorneys for Petitioner

Dated: August 15, 2007
Frisco, Colorado

By: Carl Oppedahl
Carl Oppedahl

PO Box 4850
Frisco, Colorado 80443
(970) 486-8600

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.	)	
	)	
	)	

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MANATT, PHELPS & PHILLIPS LLP

PETITIONER'S FIRST SET OF REQUESTS
FOR THE PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 34 of the Federal Rules of Civil Procedure, NeTrack, Inc. ("Petitioner") hereby requests that Internet FX, Inc. ("Registrant"), produce for the purpose of inspection and copying, at the offices of Oppedahl Patent Law Firm LLC, P.O. Box 4850, Frisco, CO 80443-4850 within thirty (30) days after the service hereof, or at such other time and place as may be agreed to by the parties in writing, the documents and/or things described below. The following Requests should be responded to in accordance with the following Definitions and Instructions:

DEFINITIONS AND INSTRUCTIONS

A. As used herein, the terms "you," "your," and/or "Registrant" shall mean and refer to Registrant and all persons and entities acting or purporting to act with or on its behalf, including general or limited partners, licensees, employees, agents, servants and attorneys, if any, its predecessors and successors, if any, and any entity which controls or is controlled by Registrant.

B. As used herein, the term "Petitioner" shall mean and refer to Petitioner, his agents, employees, representatives or any other person or entity purporting to act on their behalf.

C. As used herein, the term "document" is defined to be synonymous in meaning and

equal in scope to the usage of that term in Rule 34(a) of the Federal Rules of Civil Procedure. A draft or non-identical copy is a separate document within the meaning of that term. Document includes the original and all copies which are different from the original (whether by interlineation, receipt, stamp, notation, indication of copy sent or received or otherwise), regardless of location, including all handwritten, typed, printed, photographed, recorded, transcribed, punched, taped, filmed or graphic matter, including any means or recording upon any tangible thing, any form of communication or representation, including without limitation: communications, including intra-agency communications; correspondence; directives; memoranda (including pencil jottings, diary entries, desk calendar entries, reported recollections and any other written form of notation of events or intentions); transcripts and recordings of conversations and telephone calls; books and records; reports; work sheets and work papers and all other documentary materials of any nature whatsoever, together with any attachments thereto or enclosures therewith, now in the possession, custody or control of Applicant or any attorney, employee, agent or any representative of Applicant.

D. As used herein, the terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

E. As used herein, the term "referring" shall mean concerning, relating to, pertaining to, describing, reflecting, constituting and/or evidencing, whether directly or indirectly.

F. The use of the singular form of any word includes the plural, and the use of the plural includes the singular.

G. For each document requested herein which is sought to be withheld under a claim of privilege, or other objection, provide the following information:

(a) identify the nature of the privilege, e.g., work product, which is being claimed;

(b) the place, approximate date, and manner of recordation or preparation of the document;

(c) the name and title of the sender, and the name and title of each recipient of the document;

(d) the name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document;

(e) the name and corporate position of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading or substantial summarization;

(f) a statement of the basis upon which the claim of privilege is asserted and whether or

not the subject matter of the contents of the document is limited to legal advice or information provided for the purpose of securing legal advice;

(g) the number of the Request herein to which the document is responsive;

(h) the identity and corporate position of the person or persons supplying the Registrant's attorney with the information in subsections (b) through (f) above; and

(i) a brief description of the subject matter of the contents of the document.

H. If any document requested herein was formerly in Registrant's possession, custody, or control and has been lost or destroyed, or otherwise disposed of, Registrant is requested to submit, in lieu of any such document, a written statement:

(a) describing in detail the nature of the document and its contents;

(b) identifying the person(s) who prepared or authored the document and, if applicable, the person(s) to whom the document was sent, whether indicated thereon or by blind copies;

(c) specifying the date on which the document was prepared and transmitted; and

(d) specifying, if possible, the date on which the document was lost or destroyed and, if destroyed, the conditions of and reasons for such destruction and the persons requesting and performing the destruction.

I. If any document relates in any manner to a meeting or to any other conversation, all participants in the meeting or conversation are to be identified.

J. This request is a continuing one and any document obtained subsequent to production which would have been produced had it been available or its existence been known at the time of production specified herein is to be supplied forthwith.

K. Registrant shall produce such documents either as they are kept in the usual course of business or shall organize and label them to correspond with the numbered Document Requests.

L. The term "Registrant's Mark" shall mean and refer to Registrant's claimed trademark as set forth in Registration No. 3,064,820.

M. The term "Petitioner's Mark" shall mean and refer to Petitioner's trademarks NeTrack covered by Petitioner's Registration No. 2,139,229.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

DOCUMENT REQUEST NO. 1

All documents that refer or relate to Petitioner's Mark including, without limitation, notes, correspondence, internal memoranda, searches and surveys.

DOCUMENT REQUEST NO. 2

All documents that refer or relate to the basis for Registrant's claim of first use of its mark on or before January 10, 2000.

DOCUMENT REQUEST NO. 3

All document referring or relating to the basis for Registrant's claim of first use of its mark in commerce on or before February 1, 2000.

DOCUMENT REQUEST NO. 4

All documents referring to how, when and where Registrant acquired knowledge of Petitioner's Mark and all documents surrounding the acquisition of such knowledge.

DOCUMENT REQUEST NO. 5

All documents including, without limitation, any searches, investigations or any other inquiries, whether formal or informal, conducted by or on behalf of Registrant referring or relating to the use of Petitioner's Mark and the application thereof.

DOCUMENT REQUEST NO. 6

All federal and state trademark applications and registrations and the file histories thereof and all correspondence related thereto referring or relating to Registrant's Mark and any variations thereof.

DOCUMENT REQUEST NO. 7

All documents relating or referring to formal or informal objection(s) made by Registrant to the use, application to register and/or registration by any third party of any trademark or trade name which Registrant believes to be confusingly similar to Registrant's Mark.

DOCUMENT REQUEST NO. 8

All documents referring or relating to, or comprising any communication or notice to Applicant concerning the possibility that Petitioner use of Petitioner's Mark, or any portion or variation thereof, might or might not result in confusion or mistake in any industry or among the public, particularly in view of Registrant's use of Registrant's Mark or vice-versa.

DOCUMENT REQUEST NO. 9

All documents regarding the types and classes of consumers to whom, and the markets and channels of trade in the United States through which, Registrant markets or sells products bearing Registrant's Mark including, without limitation, all documents indicating the channels of commerce through which Registrant offers and sells products under Registrant's Mark to consumers including, without limitation, all documents indicating the manner in which goods are offered for sale,

marketed or sold under Registrant's Mark or by any division, subsidiary, related company or licensee of Registrant.

DOCUMENT REQUEST NO. 10

All documents and things referring or relating to, or comprising statements, inquiries, comments, or other communications by or from Registrant's potential customers, customers, distributors, suppliers, or others, relating to the similarity of Petitioner's Mark to Registrant's Mark or evidencing any confusion, suspicion, belief, or doubt on the part of said third parties as to the relationship between the Petitioner and Registrant or their products sold under Petitioner's Mark or Registrant's Mark, respectively, including any misdirected complaints or inquiries.

DOCUMENT REQUEST NO. 11

All documents referring or relating to or comprising any communication, whether oral or written, received by Registrant from any person which suggests, implies, or infers any connection or association with Petitioner or which inquires as to whether there is or may be such a connection or association.

DOCUMENT REQUEST NO. 12

Produce each and every document the identity of which is requested in Petitioner's First Set of Interrogatories.

DOCUMENT REQUEST NO. 13

Produce each and every document relied on, referred to or consulted in responding to Petitioners First Set of Interrogatories.

Dated: August 15, 2007
Frisco, Colorado

OPPEDAHL PATENT LAW FIRM LLC
Attorneys for Petitioner

By: Carl Oppedahl
Carl Oppedahl

P.O. Box 4850
Frisco, Colorado 80443
(970) 486-8600

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

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

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PETITIONERS' FIRST SET OF
REQUESTS FOR ADMISSIONS

Petitioner NeTrack, Inc. ("NeTrack) , pursuant to the Trademark Rules of Practice and Rule 36 of the Federal Rules of Civil Procedure, requests Registrant, Internet FX, Inc. within thirty (30) days after service of this First Set of Requests for Admissions, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial, admit the truth of the following facts. The Definitions and Instructions set forth in Petitioner's First Set of Interrogatories and First Set of Requests for Production of Documents are incorporated by reference herein where applicable.

Request No. 1

Petitioner filed its trademark application for NETRACK on May 6, 1997.

Request No. 2

Petitioner's trademark NETRACK was registered February 24, 1998.

Request No. 3

Petitioner registered the Internet domain name NETRACK.COM at least as early as February 25, 1996.

Request No. 4

Petitioner's NETRACK trademark registration became incontestable no later than July 10, 2003.

Request No. 5

Registrant's first use of its mark was at least as early as January 10, 2000.

Request No. 6

Registrant's first use of its mark in commerce was at least as early as February 1, 2000.

Request No. 7

Registrant filed its trademark application no earlier than August 23, 2004.

Request No. 8

Registrant's Registration No. 3,064,820 was registered no earlier than March 7, 2006.

Request No. 9

Registrant registered the domain name NETTRAKLM.COM no earlier than March 28, 2005.

Request No. 10

Registrant selected the domain name NETTRAKLM.COM only after finding that NETRACK.COM had already been registered.

Request No. 11

No application for trademark NETTRAK has been filed by Registrant with the USPTO other than the application that registered as Registration No. 3,064,820.

Request No. 12

No application for trademark NETTRAK has been filed by Registrant with any state of the United States.

Request No. 13

Registrant uses its mark NETTRAK with a capital N and a capital T.

Request No. 14

The mark NETTRAK is phonetically identical to the mark NETRACK.

Request No. 15

The mark NETTRAK has the same number of syllables as the mark NETRACK.

Request No. 16

The mark NETTRAK and the mark NETRACK both start with the letter N and end with the letter K.

Request No. 17

In the mark NETTRAK and the mark NETRACK the letter E immediately follows the letter N.

Request No. 18

In the mark NETTRAK and the mark NETRACK the letter T immediately follows the letter E.

Request No. 19

In the mark NETTRAK and the mark NETRACK the letter R follows the letter T.

Request No. 20

In the mark NETTRAK and the mark NETRACK the letter A immediately follows the letter R.

Request No. 21

The mark NETTRAK is descriptive of the goods set forth in Registration No. 3,064,820. The goods are used to "track" sales leads received on the "net".

Dated: August 15, 2007
Frisco, Colorado

OPPEDAHL PATENT LAW FIRM LLC
Attorneys for Petitioner

By: _____
Carl Oppedahl

P.O. Box 4850
Frisco, Colorado 80443
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