

ESTTA Tracking number: **ESTTA247288**

Filing date: **11/06/2008**

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 & Britt L. Anderson Manatt, Phelps & Phillips, LLP 1001 Page Mill Road, Bldg. 2 Palo Alto, CA 94304 UNITED STATES patrademarks@manatt.com
Submission	Motion to Strike
Filer's Name	Britt L. Anderson
Filer's e-mail	patrademarks@manatt.com
Signature	/Britt L. Anderson/
Date	11/06/2008
Attachments	MTS2.pdf (5 pages)(105776 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.,)	Cancellation No. 92047013
)	
Petitioner,)	
)	
v.)	REGISTRANT’S MOTION TO STRIKE
)	PETITIONER’S NOTICE OF RELIANCE
Internet FX, Inc.,)	ON DIJKER DECLARATION FILED
)	OCTOBER 16, 2008 (ESTTA NO. 243087)
Registrant.)	

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

INTRODUCTION

In accordance with Rule 2.123(b) of the Trademark Rules of Practice and the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) §§ 533 and 707.02, Registrant moves the Board to strike a Notice of Reliance submitted by Petitioner Netrack, Inc. Specifically, Registrant moves the Board to strike Petitioner’s Notice of Reliance filed October 16, 2008 (ESTTA 243087) (hereinafter, “Notice of Reliance”) to the extent it notices reliance on the Declaration of Barbara Dijker (“Dijker Deposition”). By the subject Notice of Reliance, Petitioner attempts to improperly make of record the following item that is not admissible: an affidavit of a witness, where the parties have not stipulated or agreed in writing to use of the affidavit during the trial phase of the case.

The Dijker Declaration Is Not Admissible

Petitioner has attempted to submit the Dijker Declaration while citing to Trademark TBMP § 704.02, which provides that “a party may make certain specified types of evidence of record by filing a notice of reliance thereon, accompanied by the evidence being offered.” TBMP § 704.02. However, the cited TBMP section provides no support for Petitioner’s attempt

to make the Dijker Deposition of record. In fact, the relevant section relating to the introduction of trial testimony in *inter partes* cases plainly excludes introduction of testimony submitted in affidavit form without an agreement. 37 C.F.R. § 2.123(b).

During the trial phase of a case before the Board, affidavits may be used only by written agreement of the parties. Trademark Rule 37 C.F.R. § 2.123(b). The relevant rule provides: “[b]y written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses.” *Id.* (emphasis added). With respect to meeting the requirements of Trademark Rule 2.123(b), Registrant has not received from Petitioner any request for agreement and Registrant has not provided any agreement to submission of the Dijker Declaration as evidence in this case. (*See* Declaration of Britt L. Anderson ¶ 2, filed herewith.) Accordingly, Petitioner’s Notice of Reliance along with the attached Dijker Declaration should be stricken and the Dijker Declaration should not be taken into evidence in this case.

Registrant Bears the Burden of Showing Admissibility

To the extent there is any doubt concerning the admissibility of the Dijker Declaration, Petitioner, as the offering party, bears the burden of showing that the documents are admissible. *Cf. Glamorene Prods. Corp. v. Earl Grissmer Co.*, 203 U.S.P.Q. 1090, 1092 n.5 (T.T.A.B. 1979)

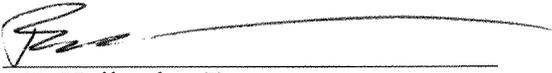
CONCLUSION

For the forgoing reasons, Registrant requests that the Board strike Petitioner's Notice of Reliance filed October 16, 2008 under ESTTA Tracking No. 243087.

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

Dated: November 6, 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 STRIKE NOTICE OF RELIANCE**

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"). I submit this declaration in support of Petitioner Netrack, Inc.'s ("Petitioner") Notice of Reliance filed October 16, 2008 (ESTTA 243087). 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. Registrant has not received from Petitioner any request for agreement and Registrant has not provided any agreement to submission of the Declaration of Barbara Dijker as evidence in this case.

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 6th day of November, 2008 at San Francisco, California.



Britt L. Anderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REGISTRANT'S MOTION TO STRIKE PETITIONER'S NOTICE OF RELIANCE ON DIJKER DECLARATION FILED OCTOBER 16, 2008 (ESTTA NO. 243087)** 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 6th day of November, 2008.



Linda Allen

CERTIFICATE OF SERVICE