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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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**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.)	Cancellation No. 92047013
)	
Internet FX, Inc., Registrant)	

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

**PETITIONER’S OPPOSITION TO REGISTRANT’S MOTION TO STRIKE
PETITIONER’S NOTICE OF RELIANCE FILED OCTOBER 14, 2008
AND EXHIBITS THERETO (ESTTA NO. 242652 [TTAB PAPER 27])**

The Petitioner, NeTrack, Inc. (hereafter referred to as “Petitioner”) respectfully requests that the Board DENY the Registrant, Internet FX, Inc.’s¹ (hereafter referred to as “Registrant”) “Motion to Strike Petitioner’s Notice of Reliance Filed October 14, 2008 and Exhibits Thereto (ESTTA NO. 242652 [TTAB Paper 27])”, TTAB Paper 36, (hereafter “Registrant’s Motion to Strike”). In TTAB Paper 27, the Registrant seeks to strike many exhibits from the Petitioner’s TTAB Paper 27. In the present TTAB Paper, the Petitioner opposes the Registrant’s Motion to Strike, and asserts that any doubts regarding the Petitioner’s proffered evidence should go to the weight of said evidence, not to its alleged inadmissibility on technical issues. As grounds, the Petitioner states as follows:

¹ The listed Registrant for the mark NETTRAK has changed since the institution of this cancellation proceeding. Two assignments have been recorded to attempt to assign registration in the mark NETTRAK from Internet FX, Inc. to NetTrak Lead Manager Solutions, Ltd., which may be a subsidiary of Internet FX, Inc. For the purposes of this Motion, all references to the Registrant are intended to refer to whoever actually owns U.S. Trademark Registration No. 3,064,820.

A. The Registrant's Internet Printouts Submitted to the Petitioner By the Registrant In Response to Petitioner's Interrogatories Should Be Admissible Because They Have Been Authenticated By the Registrant's Answer to an Interrogatory Pursuant to FRCP 33(d), and Because They Have Probative Value.

It is appropriate to rely on a document provided by the opposing party when the document serves as part of the response to a Request for Admission or Interrogatory. See e.g., Promark Brands Inc. v. Schwan's IP LLP, Opposition 91159653 at 8 (TTAB 2007) (noting in Footnote 11 that “. . . opposer has objected to search reports that applicant submitted under its notice of reliance, as constituting hearsay and not having been properly authenticated. However, they were authenticated by opposer's response to Applicant's Request for Admission No. 48. Thus, the search reports are properly of record for whatever probative value they may have.”)

Even though Internet printouts are often inadmissible as evidence because of concerns regarding the ability of opposing parties to authenticate or corroborate this evidence by opposing parties, there are exceptions to this rule. *Generally*, Internet printouts are inadmissible because the element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. See Raccioppi v. Apogee Inc., 47 USPQ2d 1368, 1370 (TTAB 1998); see also In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). Internet postings are considered transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." See Weyerhaeuser v. Katz, 24 USPQ2d 1230, 1232 (TTAB 1992) (citing *Glamorene Products Corporation v. Earl Grissmer Company, Inc.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979)). Importantly, the Petitioner asserts that the key concern from these rules is that the opposing party is not prejudiced by evidence that the opposing party cannot corroborate or refute the authenticity of.

When the Board does admit Internet printout evidence, it nevertheless analyzes the probative weight and value of the evidence, which is where any doubts raised regarding the evidence should be directed. See Sports Authority Michigan Inc. v. PC Authority Inc., 63 USPQ2d 1782, 1798 (TTAB 2001) (not evidence of use but may have some probative value to show the meaning of a mark in the same way as third-party registrations) and *Raccioppi v.*

Apogee Inc., 47 USPQ2d 1368, 1371 (TTAB 1998) (the reliability of the information becomes a matter of weight or probative value to be given the Internet evidence); see also *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002) (involving Internet articles from sources outside the United States).

In the present case, the Petitioner properly served a set of Interrogatories to the Registrant. Among the Interrogatories, Interrogatory 9 requested that the Registrant “[i]dentify all documents consulted, referred to or relied on by the Registrant in responding to the forgoing interrogatories.” In response to Interrogatory 9, the Registrant chose not to simply provide a mere list of the names/identities of documents that the Registrant used to answer the other Interrogatories; rather, the Registrant submitted to the Petitioner an unorganized, 310-page package which largely contained Internet search reports, copies of Registrant’s webpages, and other online-based reports and disclosures. Specifically, the Registrant chose not to indicate which of its submitted 310 pages applied to which previous Interrogatory, and the Registrant’s textual answer accompanying the 310-page part of its answer was as follows:

The Registrant objects to this Interrogatory to the extent that it seeks information protected by the attorney-client privilege, attorney work-product or that is otherwise protected from disclosure, and/or that is confidential and proprietary business information. Subject to this objection and the General Objections, and pursuant to FRCP 33(d) Registrant, refers Petitioner to Document Nos. NET 00001 through NET 00310, and other documents which will be produced subject to entry of an appropriate Protective Order.

Notably, the Registrant submitted all 310 pages of documentation in its answer to Interrogatory 9 as *business records*, pursuant to FRCP 33(d). By the Registrant’s own admission, the Registrant considers each of the 310-pages of documentation as a *business record*. FRCP 33(d) states:

Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party’s business records (*including electronically stored information*), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

- (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding

- party could; and
- (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.
- (Emphasis added.)

Accordingly, many of the discrete documents contained within the Registrant's 310-page answer to Interrogatory 9 were diligently electronically scanned and made into Exhibits H and J through Y by the Petitioner's legal counsel. Significantly, the Registrant has not challenged the validity or accuracy of any of the scanned documents from its 310-page answer to Interrogatory 9, said documents which comprise Exhibits H and J through Y. All documents within the subject exhibits appear exactly as they were produced by the Registrant. Therefore, the Registrant cannot be unfairly prejudiced by documents it itself has produced and thus authenticated. The Petitioner was and is willing to believe that the Registrant answered Interrogatory 9 in good faith and therefore has submitted true and accurate documents to the Petitioner in furtherance thereof.

B. Each of the Petitioner's Exhibits Listed in Its Notice of Reliance Is Properly Associated With a Specific Interrogatory, the General Relevance for Each Exhibit is Indicated, and the Nature of Each Exhibit is Identified With Appropriate Particularity.

As is clear by the Petitioner's Notice of Reliance, the Petitioner is primarily relying on the Registrant's answer to Interrogatory 9, provided *supra*, which by the very nature of the question in Interrogatory 9, implicates all of the other Interrogatories. In addition, it should be noted that for each listed exhibit in the Petitioner's Notice of Reliance, a brief description/explanation as to the nature and relevance of each exhibit is provided. Furthermore, each exhibit, which has been submitted in its raw form as received from the Registrant, contains an indication as to the date that the document was retrieved by the Registrant, with the exception of Exhibit W. Furthermore, most, if not all, of the information disclosed in Exhibits H and J through Y is uncontroversial — and much of it is reflected in the USPTO's own official records; therefore, the chance of the Registrant being unfairly prejudiced is highly unlikely.

The Petitioner's Notice of Reliance meets the requirements of 37 CFR §§ 2.120(j)(3)(i), which states:

A discovery deposition, an answer to an interrogatory, an admission to a request for admission, or a written disclosure (but not a disclosed document), which may be offered in evidence under the provisions of paragraph (j) of this section, may be made of record in the case by filing the deposition or any part thereof with any exhibit to the part that is filed, or a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto), or a copy of the written disclosure, together with a notice of reliance. The notice of reliance and the material submitted thereunder should be filed during the testimony period of the party that files the notice of reliance. An objection made at a discovery deposition by a party answering a question subject to the objection will be considered at final hearing.

The Petitioner disputes the Registrant's contention that the Petitioner failed to specify and make of record a copy of "particular" interrogatories to which "each" document was provided in lieu of an interrogatory answer. In fact, the "particularity" requirement that the Registrant asserts does not exist in 37 CFR §§ 2.120(j)(3)(i). Interrogatory 9 was very specific: The Registrant was asked to indicate what documents it relied on to answer to the previous eight interrogatories. To assert that the Registrant did not have any idea as to the scope of the question defies credibility. Here, it appears that the Registrant seeks to be absolved from its poor tactical decision to not answer Interrogatory 9 with care and particularity and instead submit to the Petitioner, in lieu of an answer, a disorganized, 310-page pile of papers that the Registrant compiled itself. To grant the Registrant's Motion to Strike would reward the Registrant for its "gamesmanship" in responding to the Petitioner's proper Discovery requests.

C. The Registrant's Objections Are Merely Procedural and Go to Admissibility Technicalities, While the Registrant's Objections Do Not Attack the Weight of the Proffered Evidence.

Any doubts regarding the Petitioner's proffered evidence should be directed to weight, and not to hyper-technical admissibility objections. The Petitioner respectfully suggests that the Board's paramount concern should be with ensuring a fair and complete record of evidence on which to base a final ruling in this Cancellation proceeding, rather than procedural technicalities on admissibility. For the sake of discussion only, to the extent that the Registrant's objections

would have any merit, the objections are based merely on procedural issues and *not* substantive issues. However, if the Board were to decide that any procedural technicalities need to be cured, then the Petitioner moves for a reasonable time to cure such procedural technicalities, which is well within the authority and discretion of the Board. See e.g., *Weyerhaeuser v. Katz*, 24 USPQ2d 1230, 1233 (TTAB 1992) (allowed 20 days to submit substitute notice of reliance remedying defects including submission of proper official record); *M-Tek Inc. v. CVP Systems Inc.*, 17 USPQ2d 1070, 1073 (TTAB 1990) (allowed time to clarify that the documents submitted by notice of reliance were in fact produced in response to interrogatories rather than in response to document requests).

D. Conclusion

Any doubts regarding the Petitioner's proffered evidence should go to the weight of said evidence, not to supposed admissibility issues. The Petitioner respectfully points out that in no way can the Registrant credibly claim that it can be unfairly prejudiced by the Petitioner's submitted Exhibits H and J through Y because each of said exhibits has been supplied, corroborated, and authenticated by the Registrant. Therefore, the protections afforded to opposing parties that form the basis of the TTAB rules cited by the Registrant are not compromised. The Petitioner reminds the Board that the Registrant put the Petitioner in the position of having to rely on the Registrant's answer to Interrogatory 9 by not providing a thoughtful and concise, written answer. Therefore, and in the interest of justice, the Board should consider the weight and probative value of the evidence contained in Exhibits H and J through Y, and apply it in this case accordingly. In the interest of judicial efficiency, the Petitioner strongly urges the Board to simply admit Exhibits H and J through Y into evidence.

WHEREFORE, for all of the reasons discussed herein, the Petitioner respectfully requests that the Board DENY the Registrant's "Motion to Strike Petitioner's Notice of Reliance Filed October 14, 2008 and Exhibits Thereto (ESTTA NO. 242652 [TTAB Paper 27])", and ADMIT Exhibits H and J through Y into evidence. Alternatively, if the Board finds that there are mere procedural deficiencies with the Petitioner's Notice of Reliance that nonetheless require curing, then the Petitioner respectfully requests that the Board grant a reasonable amount of time to cure any such deficiencies.

