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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	Internet FX, Inc. 19202 Foxtree Lane Houston, TX 77094 UNITED STATES
Submission	Motion to Reopen
Filer's Name	Laura M. Franco, Esq.
Filer's e-mail	patrademarks@manatt.com
Signature	/Laura M. Franco/
Date	08/30/2007
Attachments	92047013 Motion to Reopen Discovery Period.pdf (39 pages)(1744700 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 DECLARATIONS OF LAURA M. FRANCO AND CHRISTINE KLENK**

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. This motion is made on the grounds that Registrant's failure to request discovery prior to the close of the discovery period was due to excusable neglect; to wit, reliance on Petitioner NeTrack, Inc.'s ("Petitioner") statements and actions regarding settlement. Registrant requested Petitioner's consent to this motion, which was denied.

This request to reopen discovery is necessary because Petitioner took advantage of Registrant's good faith belief that it and Petitioner had reached a resolution to this matter, and on that basis refrained from conducting discovery. Specifically, early in the discovery period, Petitioner's counsel advised Registrant's counsel that a resolution in the form of a co-existence agreement was appropriate based on the difference in the parties' services, channels of trade and

customers. After immediately preparing a draft agreement, Registrant was forced to wait nearly four months before Petitioner finally approved the language of the agreement.

However, despite the consent to the language of the draft agreement, Petitioner made a surprise, eleventh-hour demand that Registrant cease using its logo (which logo is not at issue in this proceeding). Registrant did not agree to Petitioner's new and unrelated demand based on the fact that Registrant found no evidence that Petitioner was actually using the claimed mark. However, rather than engage in a dialogue regarding this new issue, Petitioner purposefully hid his intention to serve discovery and continue to litigate this action, and served discovery clearly timed to arrive after the close of the discovery period and before Registrant could prepare its own discovery requests.

Further demonstrating its bad faith, after Registrant's counsel learned – a day after the close of the discovery period – that Petitioner had served discovery, Petitioner denied Registrant's request to consent to reopen the discovery period so that Registrant would have the opportunity to take discovery. Even more egregious, Petitioner's counsel threatened that should Registrant bring the instant motion, Petitioner would seek sanctions from the Board and that such a motion would "poison any hope of meaningful settlement discussion in the future."

Based on the actions of Petitioner and its counsel, 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 declarations of Laura M. Franco and Christine Klenk, and such other papers as may be presented to the Board.

RELEVANT FACTS

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. On March 13, 2007, Registrant filed a timely Answer in

response denying any likelihood of confusion. Declaration of Laura Franco in Support of Motion ("Franco Decl."), ¶ 3.

On or about April 10, 2007, counsel for Registrant and Petitioner had a telephone conference in which Registrant's counsel explained that Registrant's services are significantly different than those of the Petitioner, are targeted to a specific industry (the automobile industry) and to a specific type of customer (automobile dealerships). *Id.* ¶ 4. Based on this explanation, Petitioner's counsel, Carl Oppedahl, expressed his belief that a simple co-existence agreement between the parties would be sufficient to resolve this matter. *Id.* Accordingly, on April 25, 2007 Registrant's counsel, Laura Franco, forwarded a draft agreement to Mr. Oppedahl for his review. *Id.* ¶ 5, Ex. A.

Mr. Oppedahl did not respond until May 15, 2007, when he advised Ms. Franco that he sent the draft agreement on to Petitioner for its review. Franco Decl. ¶ 7. That same day, Ms. Franco sent an email to Mr. Oppedahl stating that "while [the discovery] period is not scheduled to close until mid-August, [Registrant] would like to conclude this matter as soon as possible so that both parties can focus on their respective businesses." *Id.* ¶ 7, Ex. B.

In the following months, Mr. Oppedahl did not respond to any of the numerous email and telephonic messages left for him by Registrant's counsel inquiring as to the status of the draft agreement. Franco Decl. ¶¶ 8-11; *see also* Declaration of Christine Klenk in Support of Motion ¶¶ 2-5. Yet despite Mr. Oppedahl's silence, Registrant continued to be under the impression that the parties would conclude a resolution to this matter, and on that basis refrained from serving discovery on Petitioner. Franco Decl. ¶10.

It was not until August 3, 2007 that Mr. Oppedahl responded to counsel's communications. On that day, Mr. Oppedahl sent to Ms. Franco an email acknowledging his failure to respond to the repeated attempts to reach him, and confirming that his "client is comfortable with the draft agreement." Franco Decl. ¶ 12, Ex. C. However, notwithstanding this consent to the terms of the draft agreement, Petitioner raised a new issue unrelated to the current cancellation proceeding –Registrant's abandonment of its logo. *Id.* Nowhere in Mr.

Oppedahl's email did he suggest that were Registrant to decline to cease use of its logo, that Petitioner was prepared to proceed with this action, or that such a response would upset the tentative resolution. *Id.* ¶.

In a response dated August 13, 2007, Ms. Franco explained that based on Registrant's investigation, including a review Internet archives, it appeared that Petitioner had abandoned its claimed logo on or about December 22, 2002, nearly five years ago. Franco Decl. ¶ 13, Ex. D. Ms. Franco further stated that based on this, Registrant would not cease using its own logo. Ms. Franco then requested Mr. Oppedahl's confirmation that the co-existence agreement would be signed by Petitioner. *Id.*

Rather than respond to Ms. Franco's request for confirmation of settlement, Petitioner simply served discovery on Registrant. Franco Decl. ¶ 14. Notably, while the cover letter accompanying the discovery requests was dated August 15, counsel did not receive the discovery requests until August 21, 2007 – the day after the discovery period closed. *Id.* [1]

Immediately upon receiving the discovery, Ms. Franco called Mr. Oppedahl, leaving him a voicemail message inquiring as to why he served the discovery given the parties' agreement in principle regarding the co-existence agreement. Ms. Franco also asked why Mr. Oppedahl had failed to notify her that Petitioner intended to proceed with the action so that she could advise Registrant to prepare its own discovery requests. Franco Decl. ¶ 15.

By email that same day, Mr. Oppedahl responded to Ms. Franco's message, stating that Petitioner had "no choice" but to pursue the cancellation based on Registrant's decision to continue using its logo. Franco Decl. ¶ 16, Ex. E.

The next day, August 22, Ms. Franco sent an additional email to Mr. Oppedahl requesting two things: first, that he provide Registrant with evidence that Petitioner is currently using the logo on which he based his August 3 letter, and second, that Petitioner agree to reopen the

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[1] Additionally, Petitioner served a copy of its discovery requests directly on Registrant itself, in violation of Professional Conduct rules prohibiting counsel from communicating directly with an opposing party represented by counsel. Franco Decl. ¶ 14.

discovery period for a period of ninety days so that Registrant would have an opportunity to conduct its own discovery. Specifically, Ms. Franco wrote:

> since you had led us to believe that we were in agreement on resolution, and that we did not receive your discovery until the close of the discovery period, that you will consent to our motion to re-open discovery for an additional 3 months so that our client will not be prejudiced.

Franco Decl. ¶ 17, Ex F.

However, rather than providing Registrant with support for its demand, and backtracking on his earlier representation that Petitioner "was comfortable" with the language of the co-existence agreement, Mr. Oppedahl caustically responded that there was no need to reopen discovery, that Registrant would not be prejudiced by an inability to take discovery, and that while he would request it of his client, he believed that Petitioner would deny such a request. Franco Decl. ¶ 18, Ex. F.

Concerned with preserving Registrant's rights to conduct discovery, Ms. Franco asked Mr. Oppedahl to confirm by the close of business on the next day, August 24, 2007, whether Petitioner would consent to reopening the discovery period for three months. Franco Decl. ¶ 19, Ex. G. Ms. Franco further advised that if Petitioner did not consent, Registrant would be forced to bring a motion to the Board to preserve its right to conduct discovery. *Id.*

In a rage, Mr. Oppedahl responded that as he was on vacation, that he could not provide a response to Registrant's request within the requested timeframe (despite the fact that he had been sending numerous emails over the last several days regarding this issue). Franco Decl. ¶ 20, Ex. H. Even more outrageous, Mr. Oppedahl claimed that should Registrant rely on any of its previous communications with Mr. Oppedahl to support a motion to reopen discovery, such reliance would "violate Rule 408 of the Federal Rules of Evidence" [2] and threatened to "seek an appropriate remedy from the Board for such conduct." *Id.*

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[2] Rule 408 (a) prohibits admission as evidence at trial of statements made in compromise negotiations regarding a claim only when such statements are "offered to prove liability for, invalidity of, or amount of a claim that was disputed" and Rule 408(b) expressly permits use of settlement communications for other purposes, including "negating a contention of undue delay." *See also Central Mfg. Co. v. Outdoor Innovations, L.L.C.*, 2003 TTAB LEXIS 189, *3-4 (T.T.A.B. 2003) (allowing evidence of settlement to support applicant's argument that opposer's actions were intended to obstruct the prosecution of applicant's trademarks).

In a final attempt to prevent Registrant from obtaining discovery in this proceeding, Mr. Oppedahl stated that filing such a motion would "poison any hope of meaningful settlement discussion in the future." *Id.*

Needless to say, Petitioner has not consented to Registrant's request to reopen the discovery period, and this motion was filed. Franco Decl. ¶ 21.

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 will not prejudice Petitioner or otherwise "impair [its] ability to litigate the case." TBMP § 500. Indeed, Petitioner can only gain by reopening the discovery period. For instance, once Registrant responds to Petitioner's first set of discovery requests, Petitioner may have follow up discovery it wishes to conduct based on Registrant's responses. Petitioner will have that opportunity if the discovery period is reopened. Indeed, this request does not affect Registrant's obligation to respond to the outstanding discovery. 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, immediately upon learning that Petitioner served discovery requests on Registrant, Registrant's counsel tried to obtain Petitioner's consent to reopen the discovery period. Franco Decl. ¶ 15. Indeed, Registrant requested Petitioner's consent a mere two days after the close of discovery. *See id.* ¶ 14-15. Moreover, Registrant asks that the discovery period be reopened for only ninety (90) days, which is shorter by half than the complete discovery period. 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). *Id.* ¶ 22. 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. Based on this, Registrant prepared a co-existence agreement and sent it to Petitioner for review. Franco Decl ¶ 5, Ex. A. Though Petitioner did not timely respond to Registrant's draft agreement, neither did Petitioner notify Registrant that it had objections to the draft agreement. Indeed, on August 3, 2007, mere days before the close of discovery, Petitioner validated Registrant's decision to forego serving discovery when it advised that it was "comfortable" with the language of the draft agreement. *Id.* ¶ 12, Ex. C.

Thus, when Petitioner requested that Registrant cease use of its logo in the same paragraph that it concurred with the draft co-existence agreement, Registrant was misled into believing the parties had an understanding that would avoid the necessity of discovery. Accordingly, Registrant was not aware until it received the discovery, calculated by Petitioner to arrive after the last day of the discovery period, that Petitioner intended to proceed with this action. Had it known Petitioner's intent, indeed, had Petitioner or its counsel advised Registrant that Petitioner intended to serve discovery, Registrant would have prepared and served its own discovery requests.

Finally, failure to reopen the discovery period will result in prejudice to Registrant. 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 18, 2007, which is prior to Registrant's testimony period, Registrant will not have an opportunity to discovery facts that would support such a motion. *See* TBMP § 528.02; 37 C.F.R. 127(e) (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, 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).

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: August 30, 2007

By: _____

Susan E. Hollander, Esq.
Laura M. Franco, Esq.
Christine Klenk, Esq.
Manatt, Phelps & Phillips, LLP
1001 Page Mill Road, Bldg. 2
Palo Alto, CA 94304

Attorneys for Registrant
Internet FX, Inc.

DECLARATION OF LAURA M. FRANCO IN SUPPORT OF MOTION TO REOPEN DISCOVERY

I, Laura M. Franco, declare:

1. I am an attorney admitted to practice in the States of California and New York, and am a partner 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 that knowledge upon my personal participation in the matters described and upon my review of the file in preparation of this declaration.

2. On February 2, 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. On March 13, 2007, Registrant filed a timely Answer in response denying any likelihood of confusion.

4. On or about April 10, 2007, my partner Susan Hollander and I had a telephone conference with Carl Oppedahl, counsel for Petitioner. In that call, Ms. Hollander informed Mr. Oppedahl that this firm represented Registrant in this matter. She also explained that Registrant's services are significantly different that those of the Petitioner, are targeted to a specific industry (the automobile industry) and to a specific type of customer (automobile dealerships). Based on this explanation, Mr. Oppedahl expressed his belief that a simple co-existence agreement between the parties would be sufficient to resolve this matter.

5. Accordingly, I prepared a draft co-existence agreement and on April 25, 2007, forwarded that draft to Mr. Oppedahl for his review. In my cover letter to Mr. Oppedahl, I requested that he call me to discuss the draft once he had a chance to review it. A true and correct copy of my April 25, 2007 cover email (omitting the draft agreement) is attached hereto as Exhibit A.

6. On May 14, 2007, not having heard from Mr. Oppedahl regarding the draft agreement, I called him and left him a voicemail message asking him to call me back.

7. On May 15, 2007, I again tried to reach Mr. Oppedahl by telephone, and this time was able to speak with him. In that call, I asked Mr. Oppedahl whether he had any comments on the draft agreement. He advised that he sent the draft agreement on to his client for review. Following the call, I sent a follow up email to Mr. Oppedahl stating that "while [the discovery] period is not scheduled to close until mid-August, we would like to conclude this matter as soon as possible so that both parties can focus on their respective businesses." A true and correct copy of this email is attached hereto as Exhibit B.

8. Not having heard from Mr. Oppedahl since our May 15 conversation, I sent Mr. Oppedahl another email on May 22, 2007 inquiring as to the status of the draft agreement. He did not respond to this email, or to any of the subsequent voicemail messages that I left for him over the ensuing weeks.

9. In addition to my attempts to reach Mr. Oppedahl regarding the status of the draft agreement, I instructed an associate, Christine Klenk, to try to reach Mr. Oppedahl as well. Accordingly, on June 29, July 6, and July 27, 2007, Ms. Klenk left voicemail messages for Mr. Oppedahl requesting that he call back regarding the status of the draft agreement. In her final message, Ms. Klenk stressed that the discovery period was scheduled to close on August 20th and expressed a desire to work out any issues with the draft agreement before then. (*See* the accompanying declaration of Christine Klenk.)

10. 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.

11. On August 1, 2007, again pursuant to my instructions, Ms. Klenk left another message with Mr. Oppedahl, this time speaking directly with his assistant. Specifically, Ms. Klenk stressed the need to finalize the agreement in advance of the close of discovery period

and requested a return phone call. Mr. Oppedahl's assistant assured Ms. Klenk that Mr. Oppedahl would call back shortly. *Id.*

12. Mr. Oppedahl did not respond to any of these messages until August 3, 2007, when I received an email from him acknowledging his failure to respond to our numerous attempts to reach him. Mr. Oppedahl also confirmed that his "client is comfortable with the draft agreement." However, notwithstanding this agreement to the terms of the draft agreement, Mr. Oppedahl raised a new issue unrelated to the current cancellation proceeding – the use of Registrant's logo. Mr. Oppedahl proceeded to compare Registrant's current logo to one purportedly used by Petitioner. Based on the alleged similarities between the two, Petitioner requested that Registrant cease using its current logo. Nowhere in Mr. Oppedahl's email did he suggest that the issue of the logos would be a "deal-breaker" of the tentative resolution. A true and correct copy of Mr. Oppedahl's August 3 email is attached hereto as Exhibit C.

13. In a response dated August 13, 2007, I explained that based on our investigation, including a review of the "Way Back Machine," a web crawler which memorializes and allows one to track changes made to websites over time (*www.archive.org*), it appeared that Petitioner had not used its claimed logo since December 22, 2002, almost five years ago. Accordingly, Registrant declined to cease using its own logo. I then requested Mr. Oppedahl's confirmation of when we could expect a signed agreement. A true and correct copy of my August 13, 2007 letter is attached hereto as Exhibit D.

14. I did not receive a response to my August 13, 2007 letter. Rather, on August 21, 2007, my firm received Petitioner's discovery requests which Petitioner had also served directly on Registrant itself (despite having been advised by Ms. Hollander as far back as April that this firm was representing Registrant in this matter). Notably, although the enclosure letter was dated August 15, 2007, my firm did not receive it until August 21, 2007 and the enclosed discovery requests did not contain a Certificates of Service.

15. Immediately upon learning of this discovery, I called Mr. Oppedahl and left a voicemail message inquiring as to why he served the discovery given the parties'

agreement in principle regarding the co-existence agreement, and why he had failed to advise me that Petitioner intended to proceed with the action in time to allow Registrant to serve its own discovery.

16. By email that same day, Mr. Oppedahl responded to my message, claiming that Petitioner had "no choice" but to pursue the cancellation based on Registrant's decision to continue using its logo. A true and correct copy of Mr. Oppedahl's August 21, 2007 email is attached hereto as Exhibit E. Mr. Oppedahl and I exchanged further email messages on August 21 relating to this matter.

17. The next day, August 22, 2007, I emailed Mr. Oppedahl. In that email, I requested that Mr. Oppedahl provide me with evidence that his client is currently using the logo on which he based his August 3 letter to me. I also requested that because Registrant had been led to believe that the parties were in agreement on resolution (particularly after Mr. Oppedahl's representation that Petitioner "was comfortable with the draft agreement"), and because Mr. Oppedahl never indicated that his client intended to abandon settlement efforts, Petitioner agree to reopen the discovery period for a period of ninety days so that Registrant would have an opportunity to conduct its own discovery.

18. Rather than work together to try to salvage a resolution, Mr. Oppedahl caustically responded that there was no need to reopen discovery, that Registrant would not be prejudiced by an inability to take discovery, and that while he would request it of his client, he believed that Petitioner would deny such a request. True and correct copies of these August 22nd emails are attached hereto collectively as Exhibit F.

19. Concerned with preserving Registrant's rights to conduct discovery, I asked Mr. Oppedahl to confirm by the close of business on the next day, August 24, 2007, whether his client would consent to reopening the discovery period for three months. I advised Mr. Oppedahl that if Petitioner did not consent, Registrant would be forced to bring a motion to the Board to preserve its right to conduct discovery. A true and correct copy of this August 23 email is attached hereto as Exhibit G.

20. Abandoning any attempt at civility, Mr. Oppedahl responded in a rage, claiming that as he was on vacation, that he could not provide me with a response to our request by the requested time (despite the fact that he had sent me numerous emails over the last several days regarding this issue). Even more outrageous, Mr. Oppedahl claimed that reliance on any of our previous communications in support of a motion to reopen discovery, would "violate Rule 408 of the Federal Rules of Evidence" and that such a motion would "poison any hope of meaningful settlement discussion in the future." He further threatened that were I to bring a motion to reopen, he "would seek an appropriate remedy from the Board for such conduct on [my] part." A true and correct copy of Mr. Oppedahl's August 23, 2007 email is attached hereto as Exhibit H.

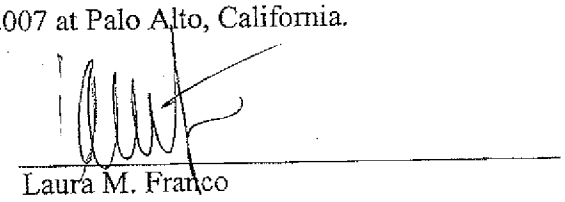
21. Needless to say, Mr. Oppedahl did not respond to my request to reopen the discovery period, and I prepared this motion.

22. There are no outstanding motions or other procedural matters that would be affected by reopening the discovery period in this proceeding.

23. This is the first request for an extension of time in this action.

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 30th day of August, 2007 at Palo Alto, California.



Laura M. Franco

EXHIBIT A

From: Franco, Laura
Sent: Wednesday, April 25, 2007 6:46 PM
To: 'carl2@oppedahl.com'
Subject: Draft Co-Existence Agreement (NETTRAK) (MPP 25908-072)
Attachments: Agreement (NETTRAK).DOC

Dear Carl-

As we discussed last week, attached is a draft Co-Existence agreement between NeTrack and Internet FX relating to the NETRACK/NETTRAK marks. As you will see, Internet FX recently assigned its interest in the NETTRAK mark/registration to a related entity. Accordingly, I have included both of those parties to this agreement.

Pleaes take a look and give me a call to discuss.

We look forward to resolving this matter without further litigation.

Thank you,

Laura Franco

Laura M. Franco
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EXHIBIT B

From: Franco, Laura
Sent: Tuesday, May 15, 2007 11:21 AM
To: 'carl2@oppedahl.com'
Subject: NETTRAK cancellation action (MPP 25908-072)

Dear Carl-

As we discussed on the phone this morning, on April 25, I forwarded to you a draft Co-Existence Agreement to resolve this matter. I understand that you have forwarded the draft agreement to your client and are awaiting its comments.

As you know, we are in the discovery period in this matter, and while that period is not scheduled to close until mid-August, we would like to conclude this matter as soon as possible so that both parties can focus on their respective businesses. Accordingly, please let us know as soon as you have heard from your client.

I look forward to your response and to amicably concluding this matter.

Laura

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http://www.manatt.com/uploadedFiles/Areas_of_Expertise/Tax_Employee_Benefits_and_Global_Compensation/C

EXHIBIT C

From: Carl Oppedahl [carl2@oppedahl.com]
Sent: Friday, August 03, 2007 11:10 AM
To: Franco, Laura
Subject: Re: Draft Co-Existence Agreement (NETTRAK) (MPP 25908-072)

Franco, Laura wrote on 4/25/2007 7:46 PM:

> As we discussed last week, attached is a draft Co-Existence agreement between NeTrack and Internet FX relating to the NETRACK/NETTRAK marks. As you will see, Internet FX recently assigned its interest in the NETTRAK mark/registration to a related entity. Accordingly, I have included both of those parties to this agreement.

Thank you for your several gracious reminders that I owe you a response to the draft coexistence agreement which you sent.

Our client is comfortable with the draft agreement, the one outstanding area being your client's logo. Your client's logo, and our client's long-standing logo, are quoted below. As you will see, your client's logo copies the exact font, the italics, the capitalization of the T and the line along the bottom.

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What we ask is that your client change the appearance of its logo so that it is substantially different than that of our client, by changing at least those features they currently copy. Specifically, we suggest that they use a font from a different font family (not a sanserif font such as Helvetica, Ariel, etc.), not capitalize the T, and remove the line along the bottom. Since italics can only be on or off, having italicized type will be acceptable if everything else is changed enough so that the italics alone do not cause the logo to look substantially similar to ours.

I look forward to hearing back from you about this.

EXHIBIT D

manatt
manatt | phelps | phillips

Laura M. Franco
Manatt, Phelps & Phillips, LLP
Direct Dial: (650) 812-1326
E-mail: lfranco@manatt.com

Client-Matter: 25908-072

August 13, 2007

VIA EMAIL (carl2@oppedahl.com)
ORIGINAL BY FIRST-CLASS MAIL

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

Re: NeTrack, Inc. v. Internet FX, Inc. – NETTRAK, U.S. Reg. No. 3,064,820

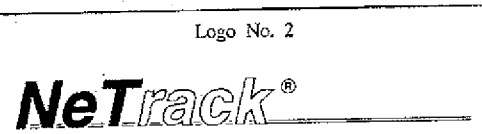
Dear Carl:

Thank you for your email, dated August 3, 2007, regarding the coexistence agreement draft and related trademark logos for the above referenced matter above.

We were surprised to receive your request that Internet FX change its NetTrak logo (see Logo No. 1, at right), to be less similar to NeTrack's logo (Logo No. 2), given that use of the red and white NeTrack logo appears to have ceased nearly five years ago.

Logo No. 1

Logo No. 2



Logo No. 3

Logo No. 4

Indeed, according to Internet Archive (see http://www.archive.org/index.php) the red and white NeTrack logo was last used in December 2002. For approximately ten months thereafter, NeTrack appears to have used a similar all red version of the logo (Logo No. 3).

However, beginning in October 2003, and continuing through today, NeTrack appears to have consistently used a blue and white logo with capitalized letters (Logo No. 4). We have enclosed printouts of NeTrack's October 2003 webpages in addition to its current webpages for your reference; both pages feature the blue and white logo. Clearly, our client's logo (No. 1) is not in any way similar to the current NeTrack current logo (No. 4).

manatt
manatt | phelps | phillips

In any event, the cancellation action in this matter is related to two word marks, NETTRAK and NETRACK. Neither mark is registered with a design element and the coexistence agreement was drafted solely in connection with the word marks. Therefore, we do not feel that it is appropriate to require Internet FX to limit the design elements used in connection with its word mark.

Based on the foregoing, Internet FX declines to change the design of its logo. We trust that we have addressed the issues raised in your email, and unless we hear otherwise from you, we will consider the coexistence agreement draft to be finalized. Please let us know when we can expect a signed copy.

Sincerely,

Laura M. Franco

LMF.ck
Enclosures

cc: Internet FX, Inc.
Susan E. Hollander, Esq.

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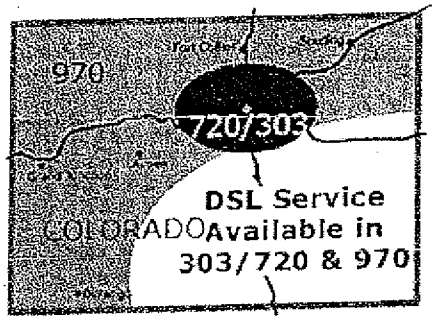

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Contact Policy

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EXHIBIT E

From: Carl Oppedahl [carl2@oppedahl.com]
Sent: Tuesday, August 21, 2007 4:13 PM
To: Franco, Laura
Subject: (NETTRAK) (MPP 25908-072)

I am traveling just now, out of the country. I received your voice mail message. You had received our discovery requests and you wanted to know why those were needed given our previous communications about coexistence agreements.

The reason for the discovery requests was your letter of August 13, 2007. In that letter you said your client will not change the presentation of its mark. Thus, we feel we have no choice but to pursue the cancelation proceeding.

If your client chooses at some point to reconsider the position it took in your letter of August 13, I trust you will let me know.

EXHIBIT F

From: Franco, Laura
Sent: Wednesday, August 22, 2007 9:43 AM
To: 'Carl Oppedahl'
Subject: RE: (NETTRAK) (MPP 25908-072)

Carl-

Please provide us with better documentation of the logo you claim your client is currently using. We have looked at your client's website, and do not find the logo anywhere.

I also assume that since you had led us to believe that we were in agreement on resolution, and that we did not receive your discovery until the close of the discovery period, that you will consent to our motion to re-open discovery for an additional 3 months so that our client will not be prejudiced. Please advise as soon as possible so that we can prepare the necessary papers.

Laura

-----Original Message-----
From: Carl Oppedahl [mailto:carl2@oppedahl.com]
Sent: Tuesday, August 21, 2007 10:12 PM
To: Franco, Laura
Subject: Re: (NETTRAK) (MPP 25908-072)

Franco, Laura wrote on 8/21/2007 5:20 PM:
> Dear Carl-
>
> You fail to acknowledge that the reason our client has determined not to change its logo is that the NETRACK logo identified in your request does not appear to have been used for a number of years. Given that your client has apparently abandoned the claimed logo, we see no basis for your demand.
>
You are mistaken in your assumptions about the use of that logo. The logo is in current use and I am not aware of any reason why anyone should think it is not. For example, the images I included in my email message to you about this were taken from current and active web pages of our client.
> Incidentally, we were quite surprised to see you serve discovery
> requests directly on our client. Regardless of whether Manatt has been identified as counsel of record in connection with the cancellation proceeding, you are well aware that we were representing Internet FX in connection with this matter. I would think that at the least, you would have sought confirmation from us as to whether we were representing Internet FX in the cancellation proceeding before communicating directly with them.
You ought not to be surprised at all. You have not appeared in the cancelation proceeding, your name appears nowhere in the Answer that was filed, and you have never said to us (prior to today) that you are accepting service of papers in that proceeding.

The very thing you say we ought to have done (seeking clarification from you as to whether you were representing Internet FX in the cancellation proceeding) is what we did do, in the cover letter that was attached to the discovery requests.
> Please be advised that any further communication with Internet FX will should be directed to me.
>
I understand you to mean that you are indeed representing Internet FX in the cancellation proceeding, despite not having appeared in that proceeding. I understand you to mean that you are accepting service of papers on behalf of Internet FX in the cancellation proceeding. We will rely upon this and will henceforth serve papers in the cancellation proceeding upon you and not upon Internet FX directly. Thank you for this clarification.

From: Carl Oppedahl [carl2@oppedahl.com]
Sent: Wednesday, August 22, 2007 10:11 PM
To: Franco, Laura
Subject: Re: (NETTRAK) (MPP 25908-072)

Franco, Laura wrote on 8/22/2007 10:43 AM:
> Please provide us with better documentation of the logo you claim your client is currently using. We have looked at your client's website, and do not find the logo anywhere.
>
Before there was an Internet, clients used marks. Just because you have looked on the Internet and haven't seen what you are looking for does not mean there is no use.

The discovery period has ended. I have personally seen this logo in use by our client for many, many years. As an accommodation to you, I will make inquiry to client about this, and we may shortly get back to you with some more history about this logo.
> I also assume that since you had led us to believe that we were in
> agreement on resolution,
What you say is the opposite of what I said. I told you our client could agree to the coexistence agreement only if your client were to change its logo. I have never told you otherwise. This was on August 3, 2007.

If you believe that some other communication from me to you committed to an agreement, I invite you to let me know the date and form of that communication so that I may review it with our client.
> and that we did not receive your discovery until the close of the
> discovery period,
Our discovery requests were prompted by your letter of August 13, 2007.
Thus of necessity you did not receive the discovery requests until after August 13, 2007. This was in full compliance with the discovery schedule which has been in place since February.
> that you will consent to our motion to re-open discovery for an additional 3 months so that our client will not be prejudiced.
Your client was not prejudiced. Your client faced the same discovery schedule that our client faced. I think it is unlikely that our client will consent to a re-opening of discovery, but I will make inquiry.
> Please advise as soon as possible so that we can prepare the necessary
> papers
I am traveling out of the country for the next few weeks and so it will not be easy for me to do things on a short time frame. For now, so far as I am aware, the next scheduled date before the TTAB is that on November 18, 2007 the 30-day testimony period for party in position of plaintiff will close. Before that, of course, is the due date for your client to respond to our discovery requests.

I am not aware of very many facts in dispute in this case anyway beyond what is in our discovery requests, so it is not clear to me why more or extended discovery would be needed. Our client is the senior user of an incontestable mark. Your client is the junior user of a phonetically identical mark.

I do repeat my suggestion that if your client were to reconsider its refusal to change its logo, this might permit an easy resolution of things.

EXHIBIT G

From: Franco, Laura
Sent: Thursday, August 23, 2007 9:49 AM
To: 'Carl Oppedahl'
Subject: RE: (NETTRAK) (MPP 25908-072)

Carl-

Your position that my client has not been prejudiced by your actions is, to say the least, outrageous, and I am sure the Board would view it in the same way. I repeat, given your earlier representations in April of this year that a co-existence would be agreeable to your client, your several month delay in responding to our draft agreement, and your demand mere days before the close of the discovery period that our client cease use of its logo, which logo is not an issue in the cancellation proceeding, any refusal to reopen the discovery period to allow our client to take discovery is simply bad faith.

I repeat our request to your client's consent to re-open discovery for another 3 months. If we do not receive such consent by the close of business tomorrow, Friday, then we will file a motion with the Board seeking such relief, and will be forced to apprise the Board of your bad faith tactics.

Laura

-----Original Message-----
From: Carl Oppedahl [mailto:carl2@oppedahl.com]
Sent: Wednesday, August 22, 2007 10:11 PM
To: Franco, Laura
Subject: Re: (NETTRAK) (MPP 25908-072)

Franco, Laura wrote on 8/22/2007 10:43 AM:
> Please provide us with better documentation of the logo you claim your client is currently using. We have looked at your client's website, and do not find the logo anywhere.
>
Before there was an Internet, clients used marks. Just because you have looked on the Internet and haven't seen what you are looking for does not mean there is no use.

The discovery period has ended. I have personally seen this logo in use by our client for many, many years. As an accommodation to you, I will make inquiry to client about this, and we may shortly get back to you with some more history about this logo.
> I also assume that since you had led us to believe that we were in
> agreement on resolution,
What you say is the opposite of what I said. I told you our client could agree to the coexistence agreement only if your client were to change its logo. I have never told you otherwise. This was on August 3, 2007.

If you believe that some other communication from me to you committed to an agreement, I invite you to let me know the date and form of that communication so that I may review it with our client.
> and that we did not receive your discovery until the close of the
> discovery period,
Our discovery requests were prompted by your letter of August 13, 2007.
Thus of necessity you did not receive the discovery requests until after August 13, 2007. This was in full compliance with the discovery schedule which has been in place since February.
> that you will consent to our motion to re-open discovery for an additional 3 months so that our client will not be prejudiced.
Your client was not prejudiced. Your client faced the same discovery schedule that our client faced. I think it is unlikely that our client will consent to a re-opening of discovery, but I will make inquiry.
> Please advise as soon as possible so that we can prepare the necessary
> papers
I am traveling out of the country for the next few weeks and so it will not be easy for me

to do things on a short time frame. For now, so far as I am aware, the next scheduled date before the TTAB is that on November 18, 2007 the 30-day testimony period for party in position of plaintiff will close. Before that, of course, is the due date for your client to respond to our discovery requests.

I am not aware of very many facts in dispute in this case anyway beyond what is in our discovery requests, so it is not clear to me why more or extended discovery would be needed. Our client is the senior user of an incontestable mark. Your client is the junior user of a phonetically identical mark.

I do repeat my suggestion that if your client were to reconsider its refusal to change its logo, this might permit an easy resolution of things.

EXHIBIT H

From: Carl Oppedahl [carl2@oppedahl.com]
Sent: Thursday, August 23, 2007 1:09 PM
To: Franco, Laura
Subject: Re: (NETTRAK) (MPP 25908-072)

Franco, Laura wrote on 8/23/2007 10:48 AM:
> Carl-
>
> Your position that my client has not been prejudiced by your actions
> is, to say the least, outrageous, and I am sure the Board would view
> it in the same way. I repeat, given your earlier representations in
> April of this year that a co-existence would be agreeable to your
> client,
What representations are these? On what dates did these supposed representations happen? Was this by email or some other means?
> your several month delay in responding to our draft agreement, and
> your demand mere days before the close of the discovery period that
> our client cease use of its logo,
By your draft agreement you made an offer in negotiation toward settlement. We made a counter-offer in negotiation toward settlement.
You rejected it on August 13, a mere week before the close of discovery. Of course your client was not obligated to accept the counter-offer. In which case the cancelation proceeding continues.
That there was only one week left at that point before the close of discovery is simply the way it is.
> which logo is not an issue in the cancellation proceeding, any refusal to reopen the discovery period to allow our client to take discovery is simply bad faith.
>
You have had some six months during which you could carry out any discovery you might wish to carry out. You made a strategic decision not to carry out any discovery. That strategic decision is at your feet, not ours.
> I repeat our request to your client's consent to re-open discovery for another 3 months. If we do not receive such consent by the close of business tomorrow, Friday, then we will file a motion with the Board seeking such relief, and will be forced to apprise the Board of your bad faith tactics.
>
I consider your demand that I jump and do something by tomorrow, while I am on vacation in Europe, to be unreasonable. The time zones make such a thing very difficult, and the fact that I have vacation activities also gets in the way.

In any event, it seems to me that the time and energy that you contemplate spending on this ill-advised motion would be better spent working on a suitable settlement agreement.

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. I believe most tribunals are offended whenever any lawyer tries to introduce into evidence the settlement communications from another lawyer.

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.

DECLARATION OF CHRISTINE KLENK IN SUPPORT OF MOTION TO REOPEN DISCOVERY

I, Christine Klenk, declare:

1. I am an attorney admitted to practice in the States of California and New York, and am an associate with 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 that knowledge upon my personal participation in the matters described and upon my review of the file in preparation of this declaration.

2. I contacted Mr. Oppedahl on June 29, 2007 and again on July 6, 2007 and left voicemail messages with him requesting that he call back regarding the status of the co-existence agreement that my firm sent him on April 25, 2007.

3. On July 27, 2007, I called Mr. Oppedahl again and left another message and request for a call back regarding the co-existence agreement. I stressed that the discovery period was scheduled to close on August 20th and I expressed my firm's desire to work out any issues with the draft co-existence agreement before then.

4. On August 1, 2007, I left another message with Mr. Oppedahl, this time speaking directly with his assistant, stressing the need to finalize the agreement in advance of the close of discovery period and requesting a return phone call. Mr. Oppedahl's assistant assured me that Mr. Oppedahl was in the office and that he would call back "within five minutes".

5. Mr. Oppedahl did not return any of my telephone calls.

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 30th day of August, 2007 at Palo Alto, California.

Christine Klenk

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO REOPEN DISCOVERY PERIOD AND RESET TESTIMONY AND TRIAL PERIODS with SUPPORTING DECLARATIONS OF LAURA M. FRANCO and CHRISTINE KLENK 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 30th day of August, 2007.

Sonya Holloway

Sonya Holloway