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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.
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Attachments	Reply in Support of Motion - NETTRAK.pdf ( 7 pages )(183394 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,	)	<b>BRIEF IN REPLY TO PETITIONER'S</b>
	)	<b>RESPONSE TO MOTION TO REOPEN</b>
v.	)	<b>DISCOVERY PERIOD AND RESET</b>
	)	<b>TESTIMONY AND TRIAL PERIODS</b>
Internet FX, Inc.,	)	
Registrant.	)	

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. §§ 2.127(a) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 502.02 and 509.01 Registrant Internet FX, Inc. ("Registrant") hereby submits a reply brief in further support of its Motion to Reopen Discovery Periods and Reset Testimony and Trial Periods.

**A. Petitioner Has Not Refuted Registrant's Showing of "Excusable Neglect"**

Contrary to Petitioner's contention, the *Pumpkin* case not only provides the operative law, it supports Registrant's showing of excusable neglect. *Pumpkin, Ltd. dba Pumpkin Masters v. The Seed Corps*, 43 U.S.P.Q.2D (BNA) 1582 (TTAB 1997). In *Pumpkin*, the Board established its current definition of excusable neglect, which requires an equitable determination of several factors, including prejudice to the non-movant and the length of delay. Petitioner points out that in *Pumpkin*, the Board denied the movant's request to reopen discovery. However, the movant in *Pumpkin* filed its motion three

months after its testimony period closed, based solely on its own internal docketing error, and after previously obtaining five months worth of extensions. Unlike the movant in *Pumpkin*, Registrant here made the request a mere two days after the close of the discovery period, there have never been any previous extension requests, and the delay was not due to any internal error, but due to Registrant's good faith reliance on Petitioner's statements implying that settlement was imminent. As required by *Pumpkin*, and as set forth below, taking account of all relevant circumstances surrounding the Registrant's omission, Registrant's conduct constitutes excusable neglect.

**1. There is no danger of prejudice to Petitioner**

Petitioner's presents no credible argument that its ability to bring its claims against Registrant will be prejudiced by extending the discovery period. Prejudice is demonstrated by showing witnesses or evidence have become unavailable due to delay in proceedings. *Pumpkin*, 43 U.S.P.Q.2D at 1587. See also *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997) (Prejudice not shown where nonmovant fails to demonstrate evidence will be unavailable due to delay). Petitioner has not even suggested that its witnesses or evidence will become unavailable as a result of the delay in the proceedings.

Petitioner's claim that reopening discovery will prejudice it because Registrant will be in a "less rushed situation" to prepare its own discovery is also without merit. By its own admission, Petitioner could have prepared discovery sooner and thus have avoided any "rushed situation." Further, reopening the discovery period can only help Petitioner by affording it the opportunity to prepare any additional discovery it may require. Petitioner's concerns that it will incur additional expenses "that may not have been necessary if Registrant had conducted discovery during the original specified time

period” are likewise without basis. Indeed, if the discovery period is not reopened due to Petitioner’s objections, Registrant will be forced to defend its case through costly testimony depositions of Petitioner’s representatives. In fact, Petitioner will also have to rely on costly testimony depositions to authenticate any evidence it would seek to submit as evidence in this case. Such deposition practice will likely cost Petitioner more than it would have spent in responding to discovery requests. Indeed, Petitioner has increased its own costs by forcing Registrant to bring this motion. Quite simply, Petitioner has shown no prejudice.

**2. Petitioner misinterprets how “delay” is calculated**

Petitioner claims that the length of the delay on judicial proceedings will be “at least three additional months,” and attempts to distinguish this matter from *Champagne Louis Roederer v. J. Garcia Carrion, S.A.*, 2004 TTAB LEXIS 235 (T.T.A.B. 2004), where a request to reopen the discovery period for only thirty-days was granted.

However, Petitioner is mistaken in how “delay” is calculated. As explained by the Board in *Pumpkin*, the calculation of the length of the delay in the proceedings is determined not by the length of the requested extension, but by the amount of time granted in prior extensions, the amount of time which elapsed between the closure of the period and the request to reopen, and the amount of time to consider the motion itself. *Pumpkin*, 43 U.S.P.Q.2D at 1588. Indeed, in *Champagne*, the Board noted that the movant acted “swiftly” by bringing a similar motion just one month after the discovery period closed. Here, Registrant filed its motion just days after the close.

In fact, it is Petitioner that is delaying these proceedings. Rather than consent to a simple request to reopen discovery for 90 days, it forced Registrant to file this motion and

take up valuable Board time. Indeed, the Board routinely grants ninety day extensions in similar cases. See *Kellogg Company v. Pacific Grain Products, Inc.*, 1996 TTAB LEXIS 478 (TTAB 1996) (Discovery period extended ninety days). See also *Creo Products Inc. v. Martin-Williams, Inc.*, 2002 TTAB LEXIS 560 (TTAB 2002) (Discovery period extended ninety days), and *International Race of Champions, Inc. v. Horne*, 2001 TTAB LEXIS 799 (TTAB 2001) (Discovery period extended ninety days). Indeed, if Petitioner was concerned about the length of “delay” it could have suggested that the discovery period be reopened for a shorter amount of time. Accordingly, this factor favors Registrant.

**3. Petitioner concedes that Registrant acted in good faith**

Petitioner concedes that Registrant has not demonstrated bad faith, thus this factor clearly favors Registrant.

**4. Delay was not within the reasonable control of Registrant**

Trying to downplay its actions in settlement discussions, Petitioner cites to *Atlanta-Fulton County Zoo, Inc. v. De Palma*, 45 USPQ25 1858 (TTAB 1998), which states that “mere existence of settlement negotiations did not justify party’s inaction or delay”. In that case, without any prior negotiation or movement toward settlement, applicant served an unsolicited settlement proposal on opposer four days prior to the close of the testimony period. Opposer did not confirm or respond to the proposal. Thirty-seven days later, applicant sought to reopen the testimony period on the basis of “settlement discussions”. *Atlanta-Fulton* is not analogous to this matter. Here, Registrant relied in good faith on Petitioner’s consistent indications over a nearly four month period that settlement was imminent, making discovery unnecessary. Further,

three weeks prior to 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. Petitioner failed to notify Registrant that settlement discussions were ended and timed its service of discovery so that Registrant would not receive it with time to serve discovery of its own. Any delay in this matter was caused by and was in the control of the Petitioner. However, even if the delay was arguably within Registrant's control, where, as here, the remaining three factors weigh in Registrant's favor, excusable neglect will be found. *See Champagne*, 2004 TTAB LEXIS 235, \*10-11 (Board found excusable neglect even though delay was due to movant's failure to request an extension of time to serve discovery prior to the expiration of the time therefore).

**B. The Balance of Factors Weighs In Favor of Reopening the Discovery Period**

It is clear that on balance, the *Pumpkin* factors weigh in favor of a finding of excusable neglect. Here, Registrant has demonstrated an absence of prejudice to Petitioner, which Petitioner cannot rebut. *Pumpkin*, *supra* at 1587. Petitioner's two-day turn-around in filing its motion, particularly in light of no previous requests for extension, show that the minimal delay has minimal judicial impact. *Champagne*, *supra* at \*11. Petitioner has admitted that Registrant's actions were not in bad faith. Finally, Petitioner has demonstrated that the delay was out of its reasonable control. Accordingly, Registrant has demonstrated excusable neglect, and its motion to reopen discovery should be granted.

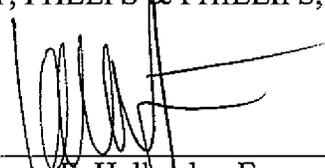
**CONCLUSION**

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: October 9, 2007

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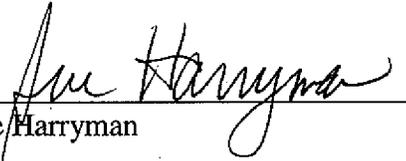
*Internet FX, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN REPLY TO PETITIONER'S RESPONSE TO MOTION TO REOPEN DISCOVERY PERIOD AND RESET TESTIMONY AND TRIAL PERIODS 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.  
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on this 9<sup>th</sup> day of October, 2007.

  
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Sue Harryman