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October 6, 2004

VIA E-FILING AND HAND DELIVERY

The Honorable Fern M. Smith
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Friskit, Inc. v. RealNetworks, Inc. et al.*, Case No. CV 03-5085-FMS;
**Motion to Compel Continuation of Rule 30(b)(6) Deposition
of Plaintiff Friskit, Inc.**

Dear Judge Smith:

I write on behalf of Defendants RealNetworks and Listen.com (“RealNetworks”).

On July 19, 2004, RealNetworks noticed the Rule 30(b)(6) deposition of Plaintiff. The notice sought a corporate representative to testify concerning the facts underlying Plaintiff’s L.R. 3-1 Preliminary Infringement Contentions. Plaintiff did not object to proceeding with the deposition. On September 15, 2004, RealNetworks commenced the noticed deposition. Because of the breadth of Plaintiff’s allegations, RealNetworks was unable to complete the deposition in a single day, and the witness was unavailable to proceed the following day. Accordingly, RealNetworks requested an additional session with the witness at a later date. Friskit did not object to providing a witness to testify for an additional day. Friskit refused, however, to produce the witness again until after RealNetworks provided Friskit with discovery regarding the accused products in this case. By this letter brief, RealNetworks requests the Court to order Friskit to produce its Rule 30(b)(6) witness without further delay.

Plaintiff may argue that Defendants should not need another day for this deposition. RealNetworks has proceeded through the deposition as quickly as possible. Friskit accuses over 20 RealNetworks products of infringement, however, and Plaintiff asserts these products infringe 58 claims in five separate patents. While Defendants have repeatedly asked Plaintiff to reduce its asserted claims, Plaintiff has refused. Furthermore, Friskit’s contentions fail to adequately identify the features of the accused products Friskit contends infringe the asserted patent claims. This made obtaining the facts underlying Friskit’s infringement contentions as to the many asserted claims necessarily a much more lengthy process. In any event, counsel for Friskit has represented on the record that Friskit does not object to providing its Rule 30(b)(6) designee for deposition for a second day. (30(b)(6) Deposition Transcript p. 361 line 4 – p. 364 line 8).

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There is also no justification for Plaintiff's conditioning the timing of the continuation of the Rule 30(b)(6) deposition on unspecified unrelated discovery. Federal Rule of Civil Procedure 26(d) specifically provides that "methods of discovery may be used in any sequence, and *the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.*" (emphasis added). Moreover, RealNetworks is not seeking Plaintiff's future contentions. RealNetworks is seeking the facts underlying Plaintiff's existing preliminary infringement contentions. These contentions have not changed. In fact, nothing has occurred since the original notice of deposition, to which Plaintiff did not object, that would now require discovery before it can be completed.

Plaintiff may also argue that RealNetworks has sought to "delay" discovery as to its products. This is untrue. Any delay in exchange of confidential information is attributed to Plaintiff's failure to respond to RealNetworks' efforts to negotiate a protective order. RealNetworks included a draft protective order with its discovery requests to Plaintiff, which requests were served on April 7, 2004. Plaintiff, however, delayed responding to RealNetworks' efforts to negotiate for months at a time, even though RealNetworks has proposed a protective order in the form previously approved for use in patent litigation in this District. Notably, Plaintiff has not raised any issue regarding RealNetworks' discovery other than, as here, by way of a reaction to unrelated requests by RealNetworks for Plaintiff to do something.

RealNetworks therefore requests that the Court order Friskit to produce its Rule 30(b)(6) witness for the completion of the deposition without further delay.

Respectfully submitted,

/s/ David A. Perlson

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