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Filing date: **03/20/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184213
Party	Plaintiff Galaxy Metal Gear, Inc.
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Submission	Motion to Extend
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Signature	/Kenneth Tanji, Jr./
Date	03/20/2009
Attachments	mot req discovery.pdf (18 pages)(18897391 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 78914975
Filed: 6/22/2006
Mark: METAL GEAR

GALAXY METAL GEAR, INC., Opposer, vs. DIRECT ACCESS TECHNOLOGY, INC. Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

**OPPOSER'S MOTION FOR REQUEST
FOR DISCOVERY TO RESPOND TO
SUMMARY JUDGMENT**

OPPOSER'S MOTION FOR REQUEST FOR DISCOVERY

TO RESPOND TO SUMMARY JUDGMENT

Pursuant to FRCP 56(f) and 37 CFR §2.127(e)(1), Opposer Galaxy Metal Gear, Inc., hereby moves the Board to order a continuance of the date for Opposer to file a response to the Motion for Summary Judgment of Applicant Direct Access Technology, Inc. to permit the deposition of Gary Chen to take place. Opposer requests a continuance of 120 days.

Opposer's motion is based on the fact that in support of its Motion for Summary Judgment, Applicant submitted a declaration of Gary Chen, a nonparty witness. A key issue in this opposition proceeding is whether Applicant is the owner of the mark "Metal Gear." Opposer contends a nonparty entity, Datastor Technology Company, Ltd. ("Datastor") owns the mark "Metal Gear."

Opposer took the deposition of a Ms. Momo Chen, who testified that as an employee of Datastor from March 2004 to June 2007, she sold enclosures under the brand name "Metal Gear" to Comp USA via its Taiwanese branch office, Worldwide Marketing (see deposition of Momo Chen, Exhibit A). By this sale, that indicates Datastor sold "Metal Gear" enclosures in the United States, indicating that Datastor is the owner of "Metal Gear" and not Applicant.

Applicant's declaration of Gary Chen acknowledged Datastor sold "Metal Gear" enclosures to Worldwide Marketing (§4 of Gary Chen declaration). Gary Chen was in fact the Worldwide Marketing account rep at Datastor before Momo Chen and presumably set up the account. Gary Chen, however, states that Gary Chen understood that Applicant had the exclusive right to sell "Metal Gear" enclosures in the United States (§3 of Gary Chen declaration).

As stated in the attached Declaration of Kenneth Tanji, Jr., Opposer requests to take the deposition of Gary Chen to clear up the apparent inconsistency between the Momo Chen testimony and Gary Chen declaration. The inconsistency is that Datastor is selling "Metal Gear" enclosures to Worldwide Marketing, but Momo Chen stated that meant direct sales of "Metal Gear" enclosures to CompUSA for resale in the United States while Gary Chen is claiming Applicant had the exclusive right to sell "Metal Gear" in the United States. Opposer requests to depose Gary Chen on, among other subjects, his understanding of the relationship of Worldwide Marketing and CompUSA, the timing of such relationship, the reselling of enclosures by Worldwide Marketing, and the timing of the alleged exclusivity of "Metal Gear" by Applicant.

Without taking the deposition of Gary Chen, Opposer will be unable to effectively oppose this Motion for Summary Judgment because it will otherwise be unable to present by affidavit facts within Gary Chen's knowledge. Should Gary Chen indicate any of the following, that would substantially support Opposer's opposition: (1) that Gary Chen had knowledge of United States resales of goods sold to Worldwide Marketing by CompUSA; (2) that Datastor sold "Metal Gear" goods to Worldwide Marketing before Applicant's only documented proof of the ownership of "Metal Gear": the July 9, 2004, e-mail from Gary Chen; and (3) that Datastor did not grant exclusivity of "Metal Gear" to Applicant until a date later than that purported by Applicant.

"Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." FRCP 56(f). "A motion under Rule 56(f) of the Federal rules of civil Procedure, if filed in response to a motion for summary judgment, shall be filed within 30 days from the date of service of the summary judgment motion."

37 CFR §2.127(e)(1). In lieu of an affidavit, a party may submit a declaration. *Cf.*

Taylor Brothers, Inc. v. Pinkerton Tobacco Co., 231 USPQ 412, 415 n.3 (TTAB 1986).

Based on the above authority and argument, Opposer Galaxy Metal Gear, Inc., respectfully requests the Board to order a continuance of 120 days of the date for Opposer to file a response to the Motion for Summary Judgment of Applicant Direct Access Technology, Inc. to permit the deposition of Gary Chen to take place. 120 days is requested because Gary Chen evidently resides in Taiwan, based on his declaration.

Respectfully submitted,

Dated: March 20, 2009

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 78914975
Filed: 6/22/2006
Mark: METAL GEAR

GALAXY METAL GEAR, INC., Opposer, vs. DIRECT ACCESS TECHNOLOGY, INC. Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

DECLARATION OF KENNETH TANJI, JR.
RE: OPPOSER'S MOTION FOR REQUEST
FOR DISCOVERY TO RESPOND TO
SUMMARY JUDGMENT

DECLARATION OF KENNETH TANJI, JR.

I, Kenneth Tanji, Jr. , declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. I am co-counsel for Opposer, Galaxy Metal Gear, Inc., in this matter. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would truthfully and competently testify as to the following.

2. I attended the discovery deposition of Momo Chen. A copy of excerpts of her deposition is attached hereto as Exhibit A.

3. Opposer is hereby moving the Board to order a continuance of the date for Opposer to file a response to the Motion for Summary Judgment of Applicant Direct Access Technology, Inc. to permit the deposition of Gary Chen to take place. Opposer requests a continuance of 120 days as Gary Chen appears to be a resident of Taiwan.

4. Opposer needs the deposition testimony of Gary Chen for its opposition to Applicant's Motion for Summary Judgment as follows. Applicant submitted a declaration of Gary Chen, a nonparty witness. A key issue in this opposition proceeding is whether Applicant is the owner of the mark "Metal Gear." Opposer contends a nonparty entity, Datastor Technology Company, Ltd. ("Datastor") owns the mark "Metal Gear." Opposer took the deposition of a Ms. Momo Chen, who testified that as an employee of Datastor from March 2004 to June 2007, she sold enclosures under the brand name "Metal Gear" to Comp USA via its Taiwanese branch office, Worldwide Marketing (see deposition of Momo Chen, Exhibit A). By this sale, that indicates Datastor sold "Metal Gear" enclosures in the United States, indicating that Datastor is the owner of "Metal Gear" and not Applicant.

5. Applicant's declaration of Gary Chen acknowledged Datastor sold "Metal Gear" enclosures to Worldwide Marketing (§4 of Gary Chen declaration). Gary Chen was in fact the Worldwide Marketing account rep at Datastor before Momo Chen and presumably set up the account. Gary Chen, however, states that Gary Chen understood that Applicant had the exclusive right to sell "Metal Gear" enclosures in the United States (§3 of Gary Chen declaration).

6. Opposer requests to take the deposition of Gary Chen to clear up the apparent inconsistency between the Momo Chen testimony and Gary Chen declaration. The inconsistency is that Datastor is selling "Metal Gear" enclosures to Worldwide Marketing, but Momo Chen stated that meant direct sales of "Metal Gear" enclosures to CompUSA for resale in the United States while Gary Chen is claiming Applicant had the exclusive right to sell "Metal Gear" in the United States. Opposer requests to depose

Gary Chen on, among other subjects, his understanding of the relationship of Worldwide Marketing and CompUSA, the timing of such relationship, the reselling of enclosures by Worldwide Marketing, and the timing of the alleged exclusivity of "Metal Gear" by Applicant.

7. Without taking the deposition of Gary Chen, Opposer will be unable to effectively oppose this Motion for Summary Judgment because it will otherwise be unable to present by affidavit facts within Gary Chen's knowledge. Should Gary Chen indicate any of the following, that would substantially support Opposer's opposition: (1) that Gary Chen had knowledge of United States resales of goods sold to Worldwide Marketing by CompUSA; (2) that Datastor sold "Metal Gear" goods to Worldwide Marketing before Applicant's only documented proof of the ownership of "Metal Gear": the July 9, 2004, e-mail from Gary Chen; and (3) that Datastor did not grant exclusivity of "Metal Gear" to Applicant until a date later than that purported by Applicant.

8. For these reasons, Opposer seeks the above continuance.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 20, 2009, at Pasadena, California.



Kenneth Tanji, Jr.

EXHIBIT A

DEPOSITION OF MOMO CHEN

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GALAXY METAL GEAR, INC.,)
)
 Opposer,)
)
 vs.) No. 91184213
)
 DIRECT ACCESS TECHNOLOGY, INC.,)
)
 Applicant.)
)

Deposition of MOMO CHEN, a Witness, taken on
behalf of the Opposer, at 80 South Lake Avenue,
Suite 708, Pasadena, California 91101, commencing
at the hour of 10:10 a.m., Thursday, November 13,
2008, before Jamie B. Snyder, CSR No. 5159,
pursuant to Notice of Taking Deposition and
Subpoena.



1 A. Because I wanted to go back Taiwan.
2 Q. What work did you do for Tagan?
3 A. Same, sales.
4 Q. What kind of products?
5 A. Same thing, computer peripherals.
6 Q. Before Tagan, where did you work?
7 A. Data Store.
8 Q. Where are they located?
9 A. In Taiwan.
10 Q. When did you start working for Data Store?
11 A. In March 2004.
12 Q. When did you stop working for Data Store?
13 A. Until the year 2007.
14 Q. All right. I'll talk to you more about Data
15 Store in a minute.
16 Where did you work before Data Store?
17 A. I don't quite remember.
18 Q. All right. Do you remember what kind of
19 company?
20 A. Similar companies, selling products of
21 electronics.
22 Q. And where is this company located?
23 A. In Taiwan.
24 Q. Do you remember any of your other jobs before
25 Data Store?

1 Q. Now, you mentioned this name of Metal Gear, so
2 is that a name that a client wanted?

3 A. That was a name that Data Store originally had
4 it, and the customer liked it, so used it.

5 MR. OLSON: Well, I'll object for speculation.

6 MR. GURITZKY: Join.

7 BY MR. TANJI:

8 Q. How do you know that Data Store had the name?

9 A. They had their existing products for this
10 name, and those were sold to many other customers.

11 MR. OLSON: I'll object as hearsay.

12 MR. GURITZKY: Join.

13 BY MR. TANJI:

14 Q. What customers were those?

15 A. We sold it to DAT, Galaxy, CompUSA.

16 Q. Any others that you know about?

17 A. Others --

18 THE INTERPRETER: Counsel, may I clarify?

19 (The interpreter and the witness speak in
20 Mandarin.)

21 THE WITNESS: Others, if not handled by
22 myself, I wouldn't know.

23 BY MR. TANJI:

24 Q. So are you saying that for DAT, Galaxy and
25 CompUSA, you worked on those accounts?

1 MR. OLSON: I'll object; speculation, it calls
2 for -- also hearsay.

3 MR. TANJI: All right. Well, let's talk about
4 CompUSA.

5 Q. So tell me how CompUSA came to order products
6 from Data Store.

7 MR. GURITZKY: That calls for a narrative.

8 MR. OLSON: I'll join.

9 THE WITNESS: May I answer?

10 MR. TANJI: Yes.

11 THE WITNESS: Those companies, CompUSA, DAT
12 and Galaxy, those I took over the business, the accounts
13 from a previous sales. When I started in Data Store,
14 soon after, that person left, so I took over the work
15 for CompUSA, including delivery of products, and, also,
16 same thing for DAT and Galaxy.

17 BY MR. TANJI:

18 Q. Who is the person you took over the CompUSA
19 account from?

20 A. I think the interpreter is not translating the
21 same as what you said.

22 Q. The last question or your answer?

23 A. Are you asking the counter window of CompUSA?

24 Q. Ma'am, my last question was you said you took
25 over the CompUSA account from somebody else. Who was

1 that person?

2 A. That's the person, the salesperson before me.

3 Q. Yeah. Do you remember that person's name?

4 A. Yes.

5 Q. Who was that?

6 A. Gary.

7 Q. Last name?

8 A. I don't remember.

9 Q. Was that the Gary who now works at Galaxy?

10 A. Of course not.

11 Q. What products was Data Store selling at
12 CompUSA when you worked on that account?

13 A. Same thing, external enclosures.

14 Q. Did the enclosures have a name?

15 A. Yes.

16 Q. What was that?

17 A. Metal Gear.

18 Q. Was the words "Metal Gear" on the enclosures
19 that were sold by Data Store to CompUSA?

20 A. Yes.

21 Q. As far as you know, did Data Store need any
22 license to sell an enclosure to CompUSA with Metal Gear
23 written on it?

24 MR. OLSON: Calls for speculation.

25 MR. GURITZKY: Join. Lacks foundation.

1 MR. OLSON: And, also, object it calls for a
2 legal conclusion.

3 MR. GURITZKY: Join.

4 THE WITNESS: Can you repeat the question?

5 MR. TANJI: I'll have the court reporter read
6 it.

7 (The record was read by the reporter as
8 follows:

9 "Q. As far as you know, did Data Store
10 need any license to sell an enclosure to
11 CompUSA with Metal Gear written on it?"

12 MR. GURITZKY: Same objections.

13 THE WITNESS: No.

14 BY MR. TANJI:

15 Q. As far as you know, did Data Store have any
16 licensing agreement with anyone regarding the sale of
17 the enclosures of Metal Gear that was sold by Data Store
18 to CompUSA?

19 A. No. As a salesperson, the more products we
20 could sell, the better, as far as I understand.

21 MR. TANJI: All right. I'll have the court
22 reporter repeat that question.

23 (The record was read by the reporter as
24 follows:

25 "Q. As far as you know, did Data Store

1 have any licensing agreement with anyone
2 regarding the sale of the enclosures of Metal
3 Gear that was sold by Data Store to CompUSA?")

4 THE WITNESS: As far as I know, no.

5 BY MR. TANJI:

6 Q. As far as you know, for the enclosures with
7 Metal Gear that Data Store sold to CompUSA, did Data
8 Store have to share any of the revenues or profits with
9 anyone?

10 MR. OLSON: I'm going to object; speculation.

11 MR. GURITZKY: Join.

12 THE WITNESS: No. No, because we're only
13 making the sales.

14 BY MR. TANJI:

15 Q. How many units of enclosures with Metal Gear
16 did Data Store sell to CompUSA while you worked at Data
17 Store?

18 A. I cannot remember the exact figure, but about
19 over 1,000.

20 Q. Do you remember who you dealt with at CompUSA?

21 THE INTERPRETER: Counsel, would you --

22 BY MR. TANJI:

23 Q. Do you remember which person at CompUSA you
24 had contact with?

25 A. I don't quite remember.

1 Q. Had you ever talked with Mr. Wang before
2 2000 -- March 2004?

3 A. No.

4 Q. Now, you said that you sold some Metal Gear
5 enclosures to -- to Data Store, Galaxy Metal Gear and
6 DAT, correct?

7 MR. TANJI: Objection; it's misstating your
8 testimony. I think you said she sold to Data Store.

9 MR. OLSON: I thought I made that mistake, but
10 I'm glad you corrected me.

11 Q. While you were employed at Data Store, you
12 sold Metal Gear enclosures to CompUSA, Direct Access
13 Technology and Galaxy Metal Gear, correct?

14 A. Correct.

15 Q. Okay. Now, the buyer for CompUSA was Alex,
16 right?

17 A. I don't quite remember.

18 Q. Did you sell directly to CompUSA or did you
19 sell to Worldwide Marketing?

20 A. At that time, to Worldwide Marketing.

21 Q. And Worldwide Marketing is located in
22 Hong Kong and Taiwan, correct?

23 A. At that time, yes, but now maybe they have
24 changes.

25 Q. You don't know if they changed or not, right?

1 A. I don't know any details.

2 Q. Okay. Is it your understanding that Worldwide
3 Marketing sold the Metal Gear enclosures to CompUSA?

4 A. No, it's not like that. As far as I know, it
5 is not Worldwide Marketing selling to CompUSA, Worldwide
6 Marketing is a branch office of CompUSA in Taiwan, so
7 selling to Worldwide Marketing is the same as selling to
8 CompUSA, so we're selling directly to CompUSA through an
9 office in Taiwan.

10 Q. Were the invoices issued to Worldwide
11 Marketing?

12 A. I don't quite remember (in English).

13 THE INTERPRETER: "I don't quite remember."

14 BY MR. OLSON:

15 Q. You've never been employed by Worldwide
16 Marketing, have you?

17 A. No.

18 Q. Have you ever been employed by CompUSA?

19 A. No.

20 Q. Would it be fair to say the only thing you
21 know about the relationship between CompUSA and
22 Worldwide Marketing is what other people have told you?

23 A. No, I was told by the person I dealt with in
24 Worldwide company -- Worldwide Marketing.

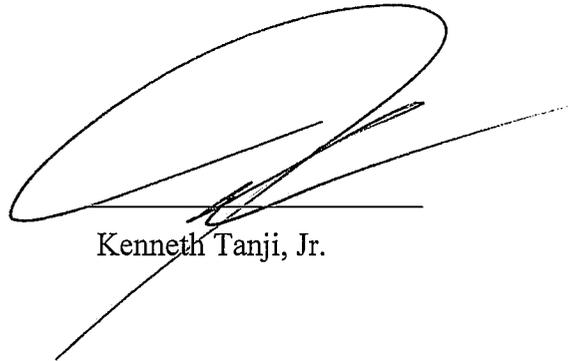
25 Q. Right. You don't have any personal knowledge

CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true copy of the foregoing
OPPOSER'S MOTION FOR REQUEST FOR DISCOVERY TO RESPOND TO
SUMMARY JUDGMENT; DECLARATION OF KENNETH TANJI, JR. RE:
OPPOSER'S MOTION FOR REQUEST FOR DISCOVERY TO RESPOND TO
SUMMARY JUDGMENT was served by depositing a copy of same in the United States
mail, first class postage prepaid, to the following address on

MARCH 20, 2009

Michael Olson, Esq.
Law Office of Michael C. Olson
1400 Bristol St. N.
Suite 270
Newport Beach, CA 92660



Kenneth Tanji, Jr.