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

Proceeding	91184213
Party	Defendant Direct Access Technology Inc
Correspondence Address	MICHAEL C. OLSON 1400 BRISTOL STREET N SUITE 270 NEWPORT BEACH, CA 92660 UNITED STATES molson@lawyer.com
Submission	Opposition/Response to Motion
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Signature	/MCO/
Date	03/27/2009
Attachments	opposition.56f.pdf (39 pages)(1986256 bytes)

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

**In the matter of Trademark Application Serial No. 78914975
For the mark, METAL GEAR**

Galaxy Metal Gear, Inc.)	
)	Opposition No. 91184213
Opposer)	
)	
v.)	
)	OPPOSITION OF APPLICANT TO
)	OPPOSER'S MOTION FOR
Direct Access Technology, Inc.)	REQUEST FOR DISCOVERY TO
)	RESPOND TO SUMMARY
Applicant)	JUDGMENT

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

Applicant Direct Access Technology, Inc. (hereinafter "Applicant") filed a motion pursuant to FRCP 56 and TBMP §528 for Summary Judgment in its favor and against Opposer Galaxy Metal Gear, Inc. (hereinafter "Opposer"). Applicant's motion is based on the fact that Opposer has no factual basis for bringing the Opposition, that there was no fraud by the Applicant in the prosecution of its application for registration of the mark METAL GEAR, that Applicant is the owner of the

Opposition No. 91184213

mark METAL GEAR, and that the mark is not merely descriptive of the goods being sold by Applicant.

On the eve of the deadline for the filing of the opposition to the Motion for Summary Judgment, Opposer brought the instant Motion for Request for Discovery to Respond to Applicant's Motion, requesting a continuance of 120 days. Opposer wants to take the deposition of Gary Chen, a nonparty witness who was disclosed to Opposer at the outset of these proceedings in Applicant's Initial Disclosure. Gary Chen wrote an email to Patrick Wang, an officer of Applicant DAT, dated July 9, 2004, which was produced to Opposer in time for Opposer to have deposed Gary Chen prior to the discovery cut-off date. That email states that Applicant had exclusivity for the mark Metal Gear in the United States. Because Opposer has failed to diligently pursue its discovery opportunities and cannot show how additional discovery would preclude summary judgment, Opposer's Request should be denied.

I. INTRODUCTION

Applicant seeks to register, on the Principal Register, the mark METAL GEAR in International Class 009. The goods on which the mark will be used are listed as ENCLOSURES FOR EXTERNAL COMPUTER HARD DRIVES. The application was filed on June 22, 2006, claiming the mark was first used in commerce as of May 14, 2003. Publication for opposition occurred on January 22, 2008.

Opposer has instituted these proceedings claiming two things. First, Opposer claims that Applicant committed fraud by claiming ownership of the mark METAL GEAR. Opposer claims that DataStor is the real owner of the mark by virtue of sales to CompUSA. Second, Opposer claims the mark METAL GEAR is merely descriptive of Applicant's product.

In the Initial Disclosure at the outset of these proceedings, Applicant identified the names of its witnesses, including nonparty witness Gary Chen. During discovery a July 9, 2004 email from Gary Chen of Data Stor to Patrick Wang of DAT (Applicant) was produced to Opposer. That email confirms Applicant's contention that it was promised and believed it had the exclusive right to use the mark METAL GEAR in the United States.

The only discovery Opposer conducted in this case, written or otherwise, is the deposition of Momo Chen, which occurred on November 13, 2008. Discovery is now closed.

On or about February 23, 2009, Applicant filed its Motion for Summary Judgment. Applicant argues in the motion that Opposer cannot prove fraud because first, Applicant is the true owner of the mark, and second because Applicant's belief it is the owner of the mark is reasonable. Applicant also argues that the mark is not merely descriptive of Applicant's goods.

Two days before its Opposition was due, Opposer filed its Motion for Request for Discovery to Respond to Summary Judgment. Opposer wants 120 days to depose Gary Chen, a nonparty witness about whom Opposer has known since the beginning of these proceedings.

As will be seen, the deposition of Gary Chen will not provide evidence to justify Opposer's Opposition to Applicant's Motion for Summary Judgment, and the instant Motion should be denied. The point on which Opposer wished to depose Gary Chen is irrelevant and will not change the outcome of the Applicant's motion.

II. ARGUMENT

A. RULE 56(f) STANDARD

Federal Rule of Civil Procedure 56(f) allows discovery after a summary judgment has been filed:

(f) When Affidavits Are Unavailable

Should it appear from the affidavits of a party opposing the motion [for summary judgment] 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.

The purpose of Rule 56(f) is to prevent the opposing party from being "railroaded by a premature motion for summary judgment. *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 106 S.Ct. 2548, 2554. As will be shown, that is hardly the case here.

Whether to grant Opposer's Motion under Rule 56(f) is a matter within the Board's discretion. Under established law, such discretion should be exercised in favor of granting the motion only if the movant [here Opposer] diligently pursued its previous discovery opportunities and can show how additional discovery would preclude summary judgment. *Nidds v. Schindler Elevator Corp.* 113 F.3d 912, 921 (9th Cir 1996); *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994). In the instant case, Movant can show neither.

1. Opposer Has Not Diligently Pursued Discovery Remedies

As set forth in the Declaration of Michael C. Olson, Gary Chen was disclosed as a witness in Applicant's Initial Disclosure pursuant to the Boards order. Throughout these proceedings, Opposer has conducted no written discovery: no interrogatories, no requests for admissions and no requests for production of documents. The only deposition Opposer has taken is that of Momo Chen on November 13, 2008. Momo Chen was examined extensively by Applicant's counsel regarding Gary Chen and his email. Even if Opposer was not aware until November 13, 2008 that Gary Chen was an important witness, it still had time to set his deposition, because the discovery cut-off was not until January 25, 2009. Opposer ignored this opportunity, choosing rather to take the precarious gamble of foregoing this discovery. Opposer lost.

During Momo Chen's deposition on November 13, 2008, Mr. Olson questioned Momo Chen about Gary Chen's email and attached it to the deposition as Exhibit 3 (Depo. of Momo Chen, pp. 33-54, attached to transcript of Depo. of Momo Chen as Exhibit 3.). As Mr. Tanji implicitly

admitted in his Declaration, counsel for Opposer (and his client Geoffrey Ching)¹ were sitting right there in Momo Chen's deposition while Mr. Olson questioned her about Gary Chen's email, but Mr. Tanji, and/or his client, chose to forego the opportunity of taking Gary Chen's deposition. Mr. Tanji's Declaration is devoid of any facts to establish good cause explaining why he did not set Gary Chen's deposition between November 13, 2008 and the present, although he and his clients knew about Gary Chen since the Initial Disclosure.

If the party has already ample opportunity to conduct discovery, a request for continuance to conduct additional discovery may be denied. *Cornwell v. Electra Central Credit Union* (9th Cir. 2006) 439 F.3d 1018, 1027 (continuance properly denied where counsel made strategic decision not to conduct discovery before cut-off date).

Opposer continued to sit on its hands until the instant Motion for Summary Judgment was filed. On the eve of the deadline for the Opposition to Applicant's Summary Judgment Motion, after knowing that Gary Chen was a material witness for a substantial period of time, Opposer now seeks an additional delay of 120 days to take the deposition of Gary Chen. This is simply a delaying tactic on the part of Opposer to postpone the inevitable and should be denied.

2. Allowing the Deposition of Gary Chen Would Be a Waste of Time, As Opposer Has Not Shown that Taking the Deposition of Gary Chen Will Produce a Genuine Factual Dispute to Justify Opposer's Opposition and Therefore Preclude Summary Judgment

At issue in Opposer's purported Opposition to Applicant's Motion for Summary Judgment

¹See transcript of Deposition of Momo Chen, p. 6, attached to Olson Declaration as Exhibit 1.

is whether there was fraud in the Application as to Applicant's claim of ownership of the mark. In order to prove fraud, Opposer must prove both that the claim of ownership was false and the Applicant, at the time the Application was filed, had no reasonable basis to believe the truth of its claim of ownership. *Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon)*, 43 USPQ2d 1440 (TTAB 1997). Opposer has not established that Gary Chen can testify to any relevant facts that would establish both elements.

In its moving papers and the attached Declaration of Attorney Kenneth Tanji at paragraph 6, Opposer

“requests to take the deposition of Gary Chen to clear up the apparent inconsistency between the Memo Chen testimony and the 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 subjects² 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.”

Moving papers, p. 2; Declaration of Attorney Kenneth Tanji, paragraph 6.

First of all, Opposer's argument that it needs Gary Chen's deposition to “clear up the

²Obviously, Opposer is seeking to conduct a fishing expedition.

inconsistency between Momo Chen's deposition and Gary Chen's Declaration" is disingenuous. There is no inconsistency between Momo Chen's deposition and Gary Chen's Declaration. Momo Chen did not start working at Data Stor until March 2004. (Momo Chen Deposition, p. 14, lines 10-13.) Gary Chen, on the other hand, worked at Data Stor before Momo Chen and had the sales account for DAT at Data Stor before she did. (Depo. Of Momo Chen pp. 43, line 23- p. 44. line 1.) Momo Chen simply has no personal knowledge of relevant facts prior to the time she worked at Data Stor.

Further, the fact that Worldwide Marketing may have been supplying Metal Gear enclosures directly or indirectly to CompUSA is not a matter that is relevant to the dispute over ownership of the mark. Applicant alleges first use as of 2003. Gary Chen confirms the first sale to Worlwide Marketing was in 2004, after Applicant was already selling the product in the US. It makes no difference whether the first sale to Worldwide Marketing in 2004 was intended to be a sale to CompuUSA or not. Either way, the sale was almost one year after Applicant began using the mark. How will the proposed examination of Gary Chen challenge the ownership claim?

Opposer also wants to delve into Gary Chen's "understanding of the relationship of Worldwide Marketing and CompUSA." What is the relevance of Gary Chen's *understanding* to whether Applicant committed fraud in its Application. The important issue is Applicant's understanding and knowledge.

Opposer claims that it wants to depose Gary Chen on the issue of the "timing of the alleged exclusivity of 'Metal Gear' by Applicant." The statement of exclusivity is in a dated email. The email is the best evidence of the promised exclusivity. Further, the email and the promise of

exclusivity is not a new issue. Momo Chen was questioned extensively about the promise at her deposition. Opposer could have conducted the requested discovery months ago on this issue.

If Applicant has a reasonable belief that it was the owner of the “Metal Gear” mark, Opposer loses on its purported fraud argument. Taking Gary Chen’s deposition will not provide supporting evidence for Opposer’s Opposition. In addition, Patrick Wang’s belief that Applicant had exclusivity on the United States, reinforced by Gary Chen’s email of July 9, 2004, was reasonable, refuting Opposer’s claim that there was purported fraud in the Application for the registration of the mark “Metal Gear.” How will the proposed deposition change Applicant’s beliefs?

Any knowledge by Gary Chen “of United States resales of goods sold to Worldwide Marketing by CompUSA” (Moving papers, p. 3, paragraph 1, at (1)), is irrelevant to whether Applicant owns, or had a reasonable belief that it owned, the trademark. As seen previously, the sales to Worldwide were almost one year after Applicant began first using the mark.

The fact that others may have sold enclosures bearing the METAL GEAR mark does not mean that Applicant is not the owner of the METAL GEAR mark or that Applicant committed fraud. *McCarthy on Trademarks and Unfair Competition*, § 15:62 (4th ed. 2007) (“The mere fact that some other uses of the same mark existed does not mean that the declaration was fraudulent because applicant’s use was not “substantially exclusive.” If such uses were either inconsequential or were infringing, there was no fraud.”)

Finally, in order to meet its heavy burden, Opposer must produce evidence showing that not only is Applicant not the owner of the mark, but that there could be no reasonable and honest belief that the representation of ownership was true. Opposer cannot prove that element, and nothing set

forth in the moving papers shows that Gary Chen can provide evidence on this issue. Even if “Data Stor sold “Metal Gear” goods to Worldwide Marketing intending the goods be sold to CompUSA, evidence of this “fact” would not refute the reasonableness of Applicant’s belief that it had exclusivity for the Metal Gear mark.

The moving party must demonstrate how the additional information will raise a genuine issue of material fact. *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994); *see also Serdarevic v. Advanced Medical Optics*, (Fed. Cir. 2008) 532 F.3d 1352. The requested information sought to be solicited in Gary Chen’s deposition will not raise such an issue.

Under federal case law, an abuse of discretion to deny discovery under Rule 56(f) occurs “only if the movant *diligently pursued* its previous discovery opportunities **and** can show how allowing additional discovery would have precluded summary judgment.” *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 921, emphasis added. *See also, Cornwell v. Electra Central Credit Union* (9th Cir. 2006) 439 F.3d 1018, 1027. Here, Opposer has not met its burden.

Allowing Opposer to take Gary Chen’s deposition based on Opposer’s offer of proof as set forth in its moving papers is simply a delay tactic and will be a waste of time. Applicant respectfully requests that the Board deny Opposer’s request to take Gary Chen’s deposition and for a 120-day continuance and rule on the Motion for Summary Judgment.

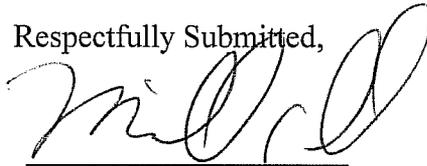
III. CONCLUSION

Opposer has delayed over two and a half years to conduct the most rudimentary discovery in this case. On the eve of Summary Judgment, Opposer suddenly wants another four months to

conduct a fishing expedition deposition of a witness that not only has Opposer been aware of since the outset of this litigation but also which Opposer has failed to establish any foundation of personal knowledge of any admissible facts. Allowing Opposer 120 days to take the Deposition of Gary Chen would not have the purportedly desired effect of allowing Opposer time to gather evidence to justify its opposition to Applicant's Motion for Summary Judgment under Federal Rule 56(f). Accordingly, Opposer's request should be denied.

March 27, 2009

Respectfully Submitted,



Michael C. Olson Reg. No. 45,728

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Attorneys for Applicant
Direct Access Technology, Inc.

Opposition No. 91184213

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **OPPOSITION OF APPLICANT TO OPPOSER'S REQUEST FOR DISCOVERY TO RESPOND TO MOTION FOR SUMMARY JUDGMENT; DECLARATION OF MICHAEL C. OLSON** was served on Jen-Feng Lee, counsel for applicant on this 27th day of March, 2009 by depositing a copy of the same in the United States mail, first class postage prepaid, addressed to:

Jen-Feng Lee, Esq.
World Esquire Law Firm, LLP
80 South Lake Avenue, Ste 708
Pasadena, CA 91101
Telephone: (626) 795-5555
Facsimile: (626) 795-5533

A handwritten signature in black ink, appearing to read "Michael C. Olson", written over a horizontal line.

Michael C. Olson

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

**In the matter of Trademark Application Serial No. 78914975
For the mark, METAL GEAR**

Galaxy Metal Gear, Inc.)	
)	Opposition No. 91184213
Opposer)	
)	
vs.)	
)	
)	
Direct Access Technology, Inc.)	
)	
Applicant)	

**DECLARATION OF MICHAEL C. OLSON IN SUPPORT OF APPLICANT'S
OPPOSITION TO OPPOSER'S MOTION FOR REQUEST FOR DISCOVERY TO
RESPOND TO SUMMARY JUDGMENT**

I, Michael C. Olson, declare as follows:

1. I am an attorney duly licensed to practice law in the States of Michigan and California. I am counsel for Applicant, Direct Access Technology, Inc. in this matter. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would

Opposition No. 91184213

truthfully and competently testify to the following.

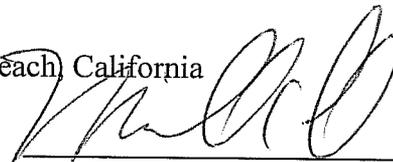
2 In the Initial Disclosure at the outset of these proceedings, Applicant produced the names of witnesses, including nonparty witness Gary Chen. Applicant also produced during discovery, the July 9, 2004 email from Gary Chen of Data Stor to Patrick Wang of DAT (Applicant) indicating that, at least up through July 9, 2004, Applicant has exclusivity for the mark "Metal Gear" in the United States.

3. The only discovery Opposer conducted in this case, written or otherwise, is the deposition of Momo Chen, which occurred on November 13, 2008. I attended the deposition of Momo Chen on November 13, 2008. Copies of the pages of her deposition transcript cited in this Opposition, including my complete examination of Momo Chen, are attached hereto.

4. Even if Opposer was not aware until November 13, 2008 that Gary Chen was an important witness, it still had time to set his deposition, because the discovery cut-off was not until January 25, 2009.

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 27, 2009 at Newport Beach, California



Michael C. Olson

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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
Thursday, November 13, 2008
Pasadena, California

REPORTED BY: Jamie B. Snyder, CSR No. 5159



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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.



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(Continued)

APPEARANCES OF COUNSEL

Also Present:

PATRICK WANG

LUCY YEE

GEOFFREY CHING



1 MR. TANJI: All right. I don't have any
2 further questions at this time, but I would like a
3 couple-minute break.

4 MR. OLSON: Sure.

5 (A ten-minute recess was taken.)

6 MR. TANJI: I'll just finish up that you're
7 entitled, by state law, to a witness fee, it's \$35 plus
8 .20 a mile, and so it's a check for \$45.80.

9 THE WITNESS: Okay (in English).

10 MR. TANJI: I pass on the questioning.

11 MR. OLSON: Okay.

12

13 EXAMINATION +

14 BY MR. OLSON:

15 Q. Ms. Chen, my name is Mike Olson. I'm going to
16 ask you a couple of questions.

17 A. Okay.

18 MR. TANJI: Excuse me. Just so we're clear,
19 can you identify your party?

20 MR. OLSON: Yeah. I represent DAT in the
21 trademark proceedings.

22 Q. Now, you said before you were served with a
23 subpoena in Mr. Lee's office; is that correct?

24 A. Correct.

25 Q. And Mr. Lee, he's the attorney for Galaxy,

1 correct?

2 A. Yes.

3 Q. Had you agreed to come to the United States
4 and testify in this deposition before you were served
5 with a subpoena?

6 A. Yes.

7 Q. Had Galaxy agreed to pay your salary, five-day
8 salary, before you came to the United States?

9 A. Yes.

10 Q. Did you discuss that you were going to be paid
11 five-day salary with Mr. Lee?

12 A. The five-day salary, I discussed it with
13 Galaxy.

14 Q. Did you talk with Mr. Lee in his office before
15 you were served with a subpoena?

16 A. Yes.

17 Q. And did you talk with him after you were
18 served with the subpoena?

19 A. After I received the subpoena?

20 Q. Yes.

21 A. Are you talking about the same day, when I
22 received the subpoena, or the next day after that?

23 Q. Any other time after you got served, have you
24 talked with Mr. Lee?

25 A. At the time when I received the subpoena, we

1 talked about it for a little while.

2 Q. Okay. At any time, did you tell Mr. Lee that
3 you were going to receive five-days' salary from Galaxy
4 for your testimony?

5 A. Yes.

6 Q. Okay. And how about Mr. Tanji, did you tell
7 him?

8 A. Yes.

9 Q. Okay. When was it that you told Mr. Tanji
10 about your getting paid five-days' salary?

11 A. The same day when I received the subpoena.

12 Q. Had you received the five-day salary before
13 you received the subpoena?

14 A. No.

15 Q. Have you received the five-day salary as of
16 today?

17 A. No.

18 Q. So that they promised to pay you the salary,
19 but they haven't paid it yet; is that correct?

20 A. Yes.

21 Q. Is Galaxy still a customer of yours?

22 A. For my current company, yes.

23 Q. What kind of products are they buying from
24 your current company?

25 A. HDMI cable and HDMI switch, it's different,

1 it's not external enclosure.

2 Q. Are those sold under the name of Galaxy Metal
3 Gear?

4 A. No Metal Gear, just Galaxy.

5 Q. Is it your understanding that Galaxy was owned
6 by Data Store?

7 MR. TANJI: Objection; calls for speculation.

8 THE WITNESS: What do you mean by "owned by"?

9 BY MR. OLSON:

10 Q. That Galaxy was the only one that had the
11 right to use that trademark -- well, strike that.

12 That Data Store was the only one who had the
13 right to use Galaxy?

14 MR. TANJI: Objection; calls for speculation.

15 THE WITNESS: For that part, I'm not sure.

16 BY MR. OLSON:

17 Q. Did you contact anyone at Data Store and ask
18 them if it was okay to put Galaxy on HDMI cables that
19 your new company is selling?

20 A. No.

21 Q. By the way, when you were at Data Store, did
22 you receive extra salary if you had more sales?

23 A. Are you talking about Data Store?

24 Q. Yeah, at Data Store.

25 A. Not extra salary, but bonus.

1 Q. So if you had more sales, you get a bigger
2 bonus while you were at Data Store?

3 A. Yes, they have a system for bonus.

4 Q. Why did you leave Data Store?

5 A. Because Data Store had their own problems, it
6 was a family company. They had internal fights between
7 brothers, so I didn't want to get involved into it.

8 Q. Were you asked to leave Data Store?

9 THE INTERPRETER: Sorry, Counsel?

10 BY MR. OLSON:

11 Q. Were you asked by Data Store to find a new
12 job?

13 A. No. I did it on my own.

14 Q. Exhibit 2 is the front page of your passport
15 or the face page, correct?

16 A. Correct.

17 Q. Okay. And what year were you born?

18 A. 1968.

19 Q. And what year did you graduate college?

20 A. It's quite some time ago. Let me count.

21 Around the year 1989 or 1990.

22 Q. After you graduated, did you start working in
23 sales?

24 A. No. I started from an assistant.

25 Q. A sales assistant?



1 A. Everything, just the assistant for sales, for
2 administration, everything.

3 Q. Okay. And how many companies did you work for
4 after you graduated and before you start working at Data
5 Store?

6 A. I don't quite remember, but at least about
7 five companies.

8 Q. Were you involved in selling electronic parts
9 before Data Store?

10 A. Yes.

11 Q. And did you work at Data Store -- well, strike
12 that.

13 When you were first hired at Data Store, were
14 you hired as an assistant in the sales department?

15 A. No. I hired as a salesperson.

16 Q. Were you hired as a sales manager?

17 A. There's a difference to the outside. It is
18 referred as sales manager, but for internal business, it
19 is deputy manager for sales.

20 Q. Were you a deputy manager for sales?

21 A. Yes. In the company, yes.

22 Q. When you were hired, you were hired as deputy
23 manager of sales?

24 A. Yes.

25 Q. And you worked at Data Store for two years?

1 A. I would say three years.

2 Q. What product were you selling when you first
3 started at Data Store?

4 A. Same products, external enclosure.

5 Q. Were you -- when you first started at Data
6 Store, was DAT already a customer?

7 A. Yes.

8 Q. And when you first started at Data Store,
9 whose account was -- was DAT?

10 A. As far as I know, at that time, it was Gary,
11 and also my boss would also contact him.

12 Q. And who was your boss?

13 A. Anderson.

14 Q. Okay.

15 A. Actually, Anderson had known him for a long
16 time.

17 Q. By the way, you said you worked at Tagan
18 Company in City of Industry?

19 A. Mm-hmm. Yes.

20 Q. Do you know the address?

21 A. I don't quite remember. I tried to remember
22 the street number.

23 Q. Do you know what street it was on?

24 A. Aside Gale (in English).

25 THE INTERPRETER: "Aside Gale."

1 THE WITNESS: Beside Gale. The zip code is
2 Ca 91745, but I don't quite remember the street number,
3 14-something.

4 Q. Who is the owner?

5 A. The boss of Tagan?

6 Q. Yeah. Do you recall his name?

7 A. I contact my supervisor, the manager above me,
8 but who do you want to know, my direct boss or the
9 owner?

10 Q. If you know the owner's name, I'd like to know
11 that.

12 A. No, I don't know.

13 Q. Okay. Who is your immediate supervisor,
14 what's his name?

15 A. Naninni, N-a-n-i-n-n-i (in English).

16 THE INTERPRETER: "N-a-n-i-n-n-i."

17 THE WITNESS: Mr.

18 BY MR. OLSON:

19 Q. Do you have a green card?

20 A. No.

21 Q. Do you have -- did you have work authorization
22 from the United States to work in the United States?

23 A. At that time, I was applying for it, and I was
24 only doing a part-time job to help them out, but later
25 on, it didn't get approved, and I didn't want to stay

1 longer, so I went back.

2 Q. So were you here on a U.S. -- strike that.
3 Were you here on a visitor's visa?

4 A. Yes.

5 Q. And you were working while you had a visitor's
6 visa?

7 A. I was just helping them, I wouldn't consider
8 it as work. I stayed at my friend's house, and I was
9 only working part time. I don't think that was work.

10 Q. Were you being paid for the work you did
11 there?

12 A. This company, no.

13 Q. You didn't receive any money at all from
14 this -- from this company?

15 A. This -- money from this company, no.

16 Q. Did you receive money from any company in the
17 U.S. for the work you did for Tagan?

18 A. No, because originally I wanted to have a
19 long-time stay in the United States, but it didn't work
20 out, so I went back Taiwan.

21 Q. What's the name of the friend you're staying
22 with?

23 A. Miss Lee, Mr. Lee, Mrs. Lee.

24 Q. When you were working for Tagan Company, you
25 were staying with Mrs. -- Mr. and Mrs. Lee?

1 A. I was staying at their house, but the work
2 with Tagan, it was just the work as an assistant. I was
3 just assisting them.

4 Q. What's Mr. and Mrs. Lee -- or Mrs. Lee's first
5 name?

6 A. I don't quite remember their first name
7 because, for instance, when somebody calls me, they may
8 not know my last name, we just go by the name.

9 Q. How do you spell Lee?

10 A. L-e-e (in English).

11 THE INTERPRETER: "L-e-e."

12 BY MR. OLSON:

13 Q. And where do they live?

14 A. At Walnut.

15 Q. What street name?

16 A. I don't know.

17 Q. How long did you live with them?

18 A. During that time.

19 Q. Yeah. How many months?

20 A. About two months. May I ask what is the
21 relationship between them and this matter?

22 Q. Unfortunately, you're not allowed to ask any
23 questions in deposition unless you don't understand a
24 question, then let me know, I'll rephrase it.

25 Do you recall what street name they -- what's

1 the name of the street they lived on?

2 A. I don't remember.

3 Q. How long had you known Mr. and Mrs. Lee?

4 A. Two, three years.

5 Q. And how did you meet them?

6 A. That's my -- they're my parents' friends,
7 that's how we got to know each other.

8 Q. So you've known them for only two or three
9 years?

10 A. Myself, yes.

11 Q. And you lived in their house last year,
12 correct?

13 A. Correct.

14 Q. And from what months?

15 A. I don't quite remember. Sometimes for a short
16 while. I don't remember.

17 Q. Did you work for Gary Chen when you were --
18 worked -- first started at Data Store?

19 MR. TANJI: Objection -- hold it. Objection;
20 vague as to "work for."

21 THE WITNESS: Who is Gary Chen?

22 BY MR. OLSON:

23 Q. Okay. Gary had the sales account for
24 Direct Access Technology before you at Data Store,
25 correct?

1 A. Yes.

2 Q. His last name was Chen, right?

3 A. I don't quite remember.

4 Q. Okay. Did he -- was he the one who hired you
5 when you first were hired at Data Store?

6 A. Of course not. The boss was Anderson. It was
7 Anderson.

8 Q. Did you work for Gary before he left?

9 A. Of course not.

10 Q. Did he give you any instruction or information
11 regarding Direct Access Technology before you took over
12 the account?

13 A. Yes, because we had e-mail exchange, and also
14 I would have a c.c., a copy of it, and we would meet
15 each other in the meeting, also.

16 Q. Could you have started in 2005 at Data Store?

17 A. No, the year 2004.

18 Q. How long was Gary working at Data Store after
19 you started?

20 A. Gary?

21 I don't quite remember, but I would say about
22 one year.

23 Q. And after you started, how long did Gary keep
24 working before he left?

25 A. Also, I don't quite remember, but about one

1 month.

2 Q. So your recollection is Gary left around 2004?

3 A. 2004, yes.

4 Q. Now, at the time that you started, Data Store
5 was already manufacturing enclosures under the name
6 Metal Gear, correct?

7 A. Correct.

8 Q. And they were manufacturing in China, Mainland
9 China?

10 A. Correct.

11 Q. And do they own the factory in Mainland China,
12 or do they have a contract with someone else?

13 A. I would think it was based on contract, but I
14 was not the boss, and I didn't know the details.

15 Q. Had you ever been to the factory in Mainland
16 China?

17 A. Yes.

18 Q. Did they manufacture the product for other
19 companies than Data Store at that factory?

20 A. Yes.

21 Q. And would it be fair to say that you do not
22 know who owned that factory?

23 A. Correct.

24 Q. Now, Data Store also had a factory in Taiwan,
25 correct?

1 A. No.

2 Q. Did they ever manufacture any product in
3 Taiwan?

4 A. I don't remember.

5 Q. Do you know whether the Metal Gear enclosures
6 were manufactured in Taiwan before you started?

7 A. As far as I know, when I was there, the
8 product was not manufactured in Taiwan, it was in
9 Mainland China.

10 Q. Did anyone tell you that at one time, the
11 enclosures were manufactured in Taiwan?

12 A. I don't remember.

13 Q. When did you first meet Mr. Anderson?

14 A. In the year 2004, when I was interviewed at
15 his company.

16 Q. Were you present at any meetings Mr. Anderson
17 had in 2003 with Mr. Wang?

18 A. No.

19 Q. When did you first meet Benson?

20 A. Also at the first interview.

21 Q. Okay. And when did you first meet Mr. Wang?

22 A. Which Mr. Wang?

23 Q. Patrick Wang.

24 A. I don't remember how many years ago, but it
25 was at his office.

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

1 of the contract between Worldwide Marketing and CompUSA,
2 do you?

3 A. Yes.

4 Q. You only know about the relationship between
5 Worldwide Marketing and CompUSA based on the
6 conversations you had with people at Worldwide
7 Marketing, right?

8 A. Yes.

9 Q. Now, you weren't working at Data Store when a
10 decision was made to use Metal Gear on enclosures,
11 correct?

12 A. Would you say it again?

13 Q. Okay. You started at Data Store in 2004,
14 correct?

15 A. Correct.

16 Q. Okay. And when you started, Data Store was
17 already selling Metal Gear enclosures, correct?

18 A. Yes.

19 Q. Well, is it true, then, that you were not at
20 any meeting where it was first decided to use Metal Gear
21 on enclosures?

22 A. Correct, because I was not there yet.

23 Q. Was Gary, in your dealings with him, did he
24 seem to you to be an honest person?

25 MR. TANJI: Objection; vague as to which Gary.

1 MR. OLSON: Okay. Let me clarify the
2 question.

3 Q. At one time when you were working at Data
4 Store, the Direct Access Technology account was handled
5 by Gary, correct?

6 A. Yes.

7 Q. Okay. You had dealings with Gary before he
8 left the company, right?

9 A. Correct.

10 Q. Did Gary impress you as an honest person?

11 A. Yes.

12 MR. OLSON: Let me show you what I'm going to
13 mark -- what is it, No. 3? Let the "court reporter"
14 read it to -- not the court reporter, the translator.

15 (The aforementioned document was marked by
16 the reporter as Applicant's Exhibit+ 3, for
17 identification; attached hereto.)

18 THE WITNESS: I understand it. Thank you.

19 BY MR. OLSON:

20 Q. You see at the bottom, there's a signature for
21 Data Store Technology Company, Limited?

22 A. Yes.

23 Q. Okay. Is that -- it lists a website. Is that
24 Data Store's website?

25 A. Yes, at that time, but now it's changed.

1 Q. Okay. And at that time -- do you see there's
2 a phone number for Data Store?

3 A. Yes.

4 Q. And was that the phone number of Data Store
5 back in July 19- -- or 2004?

6 A. Yes.

7 Q. And you see there's a fax number?

8 A. Yes.

9 Q. Okay. Was that the fax number for Data Store
10 in July 2004?

11 A. Yes.

12 Q. Have you ever seen this e-mail before today?

13 A. No.

14 Q. Does this refresh your recollection that the
15 Gary that had the Direct Access Technology account was
16 Gary Chen?

17 A. Yes. They contact him.

18 MR. TANJI: Well, objection, that's not
19 responsive to your question.

20 BY MR. OLSON:

21 Q. Does it -- after -- after reading the e-mail,
22 does that refresh your recollection that Gary's last
23 name was Chen?

24 A. It seems to me, yes, but I'm not sure.

25 Q. If you refer up to the top, it has a date of

le,
ncing
13,

1 Friday, July 9th, 2004; do you see that?

2 A. Yes, I see it.

3 Q. Does that refresh your recollection that Gary
4 Chen was working there in -- at Data Store in July 2004?

5 A. Yes.

6 Q. Do you have any reason to believe this e-mail
7 is not -- well, strike that.

8 Do you have any reason to believe that this
9 Exhibit 3 is not an accurate copy of the e-mail sent by
10 Gary Chen to Patrick at DAT?

11 MR. TANJI: Objection; calls for speculation,
12 lack of foundation.

13 THE WITNESS: I cannot identify anything in
14 this letter because I had never seen it, and I didn't
15 involve in it.

16 BY MR. OLSON:

17 Q. By the way, Gary was not related to you, was
18 he?

19 A. No.

20 Q. Could you take a look at the fourth paragraph
21 that begins with, "Frankly speaking"?

22 A. (Witness complies.)

23 Q. Do you have any reason to believe that Gary
24 was lying when he said, "Frankly speaking the order
25 quantity from April until today is very few. We could

1 understand the sales season is kind of weak during this
2 period of time in the world, but it shouldn't be that
3 small, especially you are exclusive in the U.S. market."

4 A. During the time when I was working for Data
5 Store, I didn't know his communication or correspondence
6 between him and DAT. As far as I know, I was only told
7 I could sell the products to anyone, no restrictions. I
8 didn't know about any exclusive rights or if he had any
9 communication with a third party. As a salesperson, all
10 I know is I need to sell more.

11 Q. Would it be accurate that if Data Store made a
12 promise to Direct Access Technology of exclusivity in
13 the U.S. market before 2004, you would not be aware of
14 that promise?

15 A. Yes, that is correct, because I was not with
16 Data Store.

17 Q. Do you recall when you first contacted NewEgg
18 about trying to sell them product?

19 A. I don't remember.

20 Q. Do you recall when you first contacted Frye's
21 to try and sell them product?

22 A. Also, I don't remember.

23 Q. Would it have been after 2005 when you first
24 contacted Frye's?

25 A. No. I don't remember.

DAT Inc.

From: "garychen" <garychen@datastor.com.tw>
To: "Patrick (DAT)" <pwdat65@verizon.net>
Sent: Friday, July 09, 2004 11:51 AM
Subject: About the order for 3.5" & 5.25" order

Hi, Patrick
Thank you for your attention.

I tried to call you, but it forward to the voice mail box.

How I can help you on the issue of 3.5" & 5.25" enclosure? Please let me know, otherwise, Anderson keep asking me about the order these days.

Frankly speaking, the order quantity from April until today is very few, we could understand the sales season is kind of weak during this period of time in the world, but it shouldn't be that small especially you are exclusive in the US market.

Patrick, let me help, tell me how to do, I can talk to Anderson, but I need to know how you are going to operate.

Awaiting your answer, email me or phone me +886-952-00-11-55.

White enclosure sample will deliver to you next week, please kindly note.

*Best regards,
Gary Chen*

Datastor Technology Co., Ltd.
IC website: www.datastor.com.tw
External enclosure: www.datastortech.com
Tel: +886-2-8976-9100 Ext. 241
Fax: +886-2-8976-9108

App's EXHIBIT 3
FOR IDENTIFICATION
JAMIE B. SNYDER, CSR 5159
Nov. 13, 20 08
WITNESS M. Chen

DIRECT - 00710