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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
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Date	04/07/2009
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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.	)	
	)	
	)	**SUPPLEMENTAL OPPOSITION**
	)	**OF APPLICANT TO OPPOSER'S**
Direct Access Technology, Inc.	)	**MOTION FOR REQUEST FOR**
	)	**DISCOVERY TO RESPOND TO**
Applicant	)	**SUMMARY JUDGMENT**

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

I. INTRODUCTION

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").

On the eve of the deadline for the filing of the opposition to the Motion for Summary Judgment, Opposer brought a Rule 56(f) Motion for Request for Discovery to Respond to

Applicant's Motion, requesting a continuance of 120 days to take the deposition of Gary Chen, about whom Opposer has known since the outset of these proceedings. Opposer failed to diligently pursue its discovery opportunities during this litigation and did not meet its burden of showing how additional discovery would preclude summary judgment in its 56(f) motion, as set forth in the Opposition of Applicant to Opposer's Motion for Request for Discovery to Respond to Summary Judgment.

A couple of days after Applicant responded to Opposer's Rule 56(f) Motion, however, Opposer actually filed an Opposition to Applicant's Motion for Summary Judgment. Opposer filed the Opposition to Applicant's Motion for Summary Judgment, despite having claimed that it was unable to do so without reopening discovery, forcing it to bring a Rule 56(f) Motion, and asking for a 120-day continuance to conduct a fishing expedition: "We have no factual basis for opposing summary judgment, but, if you stay proceedings, we *might* find *something*." *Keebler Co. v. Murray Bakery Products* (Fed. Cir. 1989) 866 F.2d 1386, 9 USPQ2d 1736, 1738 (emphasis in original). Opposer's Rule 56(f) Motion should be denied.

II. ALLOWING THE DEPOSITION OF GARY CHEN WOULD CERTAINLY BE A WASTE OF TIME: OPPOSER HAS FILED AN OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT WITHOUT HAVING TAKEN IT

Opposer's Rule 56(f) Motion has no merit, because it can present facts essential to oppose summary judgment. Federal Rule of Civil Procedure 56(f) explicitly states:

(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.

Opposer had the opportunity to depose Gary Chen, but chose otherwise. While this deposition may or may not facilitate Opposer's response to the Motion for Summary Judgment, the failure to conduct this deposition did not preclude Opposer from filing a response.

"A Rule 56(f) motion should only be filed when a party's inability to respond to its adversary's summary judgment motion is so constrained, because of an inability to take needed discovery, that the Rule 56(f) movant cannot present, by affidavit, facts essential to justify the party's opposition to its adversary's motion for summary judgment." *Dyneer Corp. v. Automotive Products, PLC*, 37 USPQ2d 1251, 1253 (TTAB 1995).

Obviously, this is not the case. Opposer was not so constrained, as evidenced by its Opposition to Summary Judgment.

III. THE FILING OF THE INSTANT RULE 56(f) MOTION IS SANCTIONABLE CONDUCT UNDER RULE 11

Opposer's Motion for Request for Discovery to Respond to Summary Judgment is a frivolous pleading subjecting Opposer to Rule 11 sanctions, as Opposer was clearly able to, and did, oppose Applicant's Motion for Summary Judgment. Rule 11 provides as follows:

(a) Signature. Every pleading, written motion, and other paper shall be signed by at

least one attorney or record in the attorney's individual name . . . .

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . .

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Opposer cannot have it both ways: it can argue that it either has insufficient evidence to oppose Applicant's Motion for Summary Judgment and must take the Deposition of Gary Chen to effectively oppose it, or it has sufficient evidence to oppose, and therefore files an Opposition to Applicant's Motion for Summary Judgment. One of the two pleadings, either the Rule 56(f) Motion, or the Opposition to the Motion for Summary Judgment, lack evidentiary support and therefore lack

merit and are therefore violate of Rule 11.

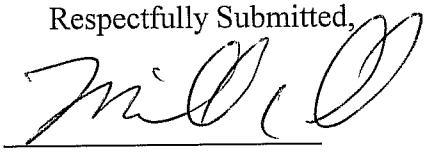
Therefore, sanctions under Rule 11 should be imposed for Opposer's bringing of its frivolous Rule 56(f) Motion.

IV. CONCLUSION

The fact that Opposer filed an Opposition to Applicant's Motion for Summary Judgment in and of itself indicates the lack of merit of Opposer's Rule 56(f) Motion. In addition to this salient fact, Opposer delayed over two and a half years to conduct the most rudimentary discovery in this case and then filed a motion on the eve of Summary Judgment for another four months to conduct a fishing expedition deposition of a witness of whom not only has Opposer been aware since the outset of this litigation but also about whose testimony Opposer has failed to establish any foundation of personal knowledge of any admissible facts. Opposer does not need 120 days to take the Deposition of Gary Chen to allow Opposer time to gather evidence to justify its opposition to Applicant's Motion for Summary Judgment under Federal Rule 56(f), because it already filed n Opposition. Accordingly, Opposer's request should be denied. Sanctions should be imposed under Rule 11, as the instant Motion under Rule 56(f) is a frivolous motion.

Dated: April 7, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **APPLICANT'S SUPPLEMENTAL OPPOSITION TO OPPOSER'S MOTION FOR REQUEST FOR DISCOVERY TO RESPOND TO SUMMARY JUDGMENT** was served on Jen-Feng Lee, counsel for applicant on this 7th day of April, 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
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