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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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Attachments	Galaxy - Opposer's reply to opposition to evidence in momo chen depo.pdf (5 pages)(151969 bytes) Galaxy - Decleration of Jen Feng Lee.pdf (2 pages)(79622 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 REPLY TO OPPOSITION TO MOTION TO OFFER IN EVIDENCE DISCOVERY DEPOSITION OF MOMO CHEN

OPPOSER'S REPLY TO OPPOSITION TO MOTION TO OFFER IN EVIDENCE DISCOVERY DEPOSITION OF MOMO CHEN

Opposer Galaxy Metal Gear, Inc., hereby replies to the opposition to its motion moves to offer into evidence the discovery deposition of nonparty witness Momo Chen into evidence at the trial of this proceeding.

APPLICANT WAS NOT PREJUDICED BY USE OF THE DISCOVERY DEPOSITION: Applicant makes it seem like Momo Chen was a surprise witness that Applicant would have no idea upon what she would testify. Actually, a reading of the Momo Chen discovery deposition transcript shows Applicant was well prepared to question Momo Chen.

Momo Chen was not some unknown person out of nowhere but a sales rep who worked at Datastor who has had direct contact with Patrick Wang, the primary representative of Applicant (page 27, line 9, to page 28, line 4 of transcript of Momo Chen deposition). Momo Chen also had contact with Patrick Wang's wife. Both Patrick Wang and Patrick Wang's wife (Lucy Yee) attended Momo Chen's deposition (page 6 of transcript).

Applicant's counsel was prepared enough for Momo Chen's deposition that he brought to the deposition an e-mail from Momo Chen's co-worker that Applicant thought relevant (page 50, line 12 of transcript). The e-mail was from Gary Chen, a former co-worker of Momo Chen at Datastor, to Patrick Wang talking about selling enclosures and a purported understanding there was some exclusivity in Applicant selling enclosures in the United States. The potential relevance evidently relates to Momo Chen's testimony that Datastor sold Metal Gear enclosures to Applicant, Opposer, and Comp USA. Clearly Applicant knew enough about the subject matter what Momo Chen would say to bring this e-mail.

A review of Applicant's counsel's questions (pages 33-53 of transcript) indicates Applicant was fully prepared to examine Momo Chen and for Applicant now to say they were prejudiced is not persuasive.

GOOD CAUSE EXISTS TO USE THE DISCOVERY DEPOSITION AT TRIAL

Despite what Applicant contends, Opposer has very little control over Momo Chen. Momo Chen specifically stated in her declaration that she did not want to return to the United States for trial. That was not Opposer's idea, obviously Opposer would

benefit from being able to take the testimony deposition and not having to file this motion to enter her testimony into evidence. As Momo Chen is a citizen of Taiwan, Opposer has no power to compel her to testify. As stated in the Declaration of Jen-Feng Lee, It was only after much negotiation that Opposer was able to convince Momo Chen to appear for deposition. Opposer was not successful in convincing Momo Chen to appear for trial, and that is why her declaration states she did not agree to appear for trial. Momo Chen even specifically testified at deposition that her arrangements to appear in the United States to testify was for deposition only and not for trial (page 32, lines 23-25).

Applicant suggests a written deposition should have been taken. TBMP §703.02(f) states securing the attendance of an unwilling witness who is out of the country is the same procedure as securing it for an oral testimony deposition as per TBMP §703.01. As noted in the motion, Opposer cannot compel Momo Chen to appear at trial as she is not in the United States during the trial period.

Furthermore, as noted above, Momo Chen had only agreed to appear in the United States for deposition. Momo Chen gave her address to Applicant at her deposition (page 11, lines 5-6) and Applicant had over 6 months to make arrangements for Momo Chen's trial testimony.

It is evident the real reason for this motion is simply that Momo Chen's testimony is favorable to Opposer and not favorable to Applicant.

In summary, Momo Chen's discovery deposition was a fair examination by both Applicant and Opposer. Momo Chen was credible as to what she knew (who she sold products to) and to what she did not know (arrangements made before she took over the Metal Gear account). Ample good cause exists to enter Momo Chen's discovery deposition into evidence.

Respectfully submitted,

Dated: July 28, 2009

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CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true copy of the foregoing OPPOSER'S REPLY TO OPPOSITION TO MOTION TO OFFER IN EVIDENCE DISCOVERY DEPOSITION OF MOMO CHEN; DECLARATION OF JEN-FENG LEE RE: REPLY TO OPPOSITION TO MOTION TO OFFER IN EVIDENCE DISCOVERY DEPOSITION OF MOMO CHEN was served by depositing a copy of same in the United States mail, first class postage prepaid, to the following address on

JULY 28, 2009.

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

Kenneth Tanji, Jr.

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 JEN-FENG LEE RE: REPLY TO OPPOSITION TO MOTION TO OFFER IN EVIDENCE DISCOVERY DEPOSIITON OF MOMO CHEN

DECLARATION OF JEN-FENG LEE

I, Jen-Feng Lee, 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. At the time Opposer served its Initial Disclosures on August 28, 2008, Opposer did not know that Momo Chen would be a potential witness for this matter. In October 2008, I began investigation on former Datastor employees who knew relevant information and in the course of that investigation I made contact with Momo Chen.

3. By mid October 2008 I determined Momo Chen knew relevant information on Datastor's actions in selling Metal Gear enclosures to companies other than Opposer and Applicant. In seeking Momo Chen's testimony, however, Momo Chen was very reluctant to get involved. I had a choice to either wait and try to take Momo

Chen's testimony at trial or take her discovery deposition and see if she would be willing to testify again at trial. I decided that it was very risky to wait to see if I could get Momo Chen to testify at trial. Trial would be months later and I might lose contact with her and she might be less willing to testify later. Therefore, I decided to go for a discovery deposition and after much negotiation, Momo Chen agreed to travel to the United States, paid for by Opposer, for a discovery deposition. A notice of deposition of Momo Chen was served. I forgot to amend the initial disclosures.

4. Once Momo Chen arrived in the United States, she made clear to me that the discovery deposition would be her only involvement in this matter and she would not be willing to come back to the United States or doing anything further in this matter, including participating at trial. As Momo Chen is in Taiwan, we have no power to compel her to do anything. Even in seeking Momo Chen's declaration for this motion, it was extremely difficult to get her to agree to sign a declaration simply stating she was not in the United States. Momo Chen once again made clear to me that she will not have any further involvement in this case.

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

Executed on July 28, 2009, at Pasadena, California.

Jen-Feng Lee