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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	Motion for Sanctions
Filer's Name	Michael C. Olson
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Signature	/MCO/
Date	02/09/2009
Attachments	motion.dismiss.sanctions.pdf (17 pages)(509053 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.)	
)	MOTION TO DISMISS OR FOR
)	ALTERNATIVE RELIEF
Direct Access Technology, Inc.)	
)	
Applicant)	

APPLICANT’S MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

Pursuant to FRCP 37 and 37 C.F.R. §2.120 (g) (2), Applicant Direct Access Technology, Inc. hereby moves the Board to dismiss the Opposition filed by Opposer Galaxy Metal Gear, Inc., or, alternatively for such other relief as the Board determines just and appropriate. Applicant’s motion is based on the fact that Opposer has deliberately, and wilfully, failed to produce a witness to provide deposition testimony despite timely notice by Applicant under FRCP 30(b)(6) .

Opposition No. 91184213

I. UNDISPUTED FACTS

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 is a corporation owned, in part, by individuals who were prior employees of Applicant, Direct Access Technology, Inc. Opposer is owned by Antonio (Tony) Tan, Garry Ching and Geoffrey Ching, who are all officers in Applicant. At one time, Garry Ching and Geoffrey Ching were employees of Applicant. They opened Opposer to compete with Applicant, selling the same goods as Applicant sells under a confusingly similar mark as Applicant's mark. Previously, Opposer attempted to register the mark GALAXY METAL GEAR BOX. Applicant successfully opposed that registration, with Opposer agreeing to abandon its application and change its mark. (TTAB proceedings No. 91174214) (Declaration of Michael Olson, par. 2)

On December 19, 2008, Applicant served its notice of deposition under FRCP 30(b)(6) on Opposer. (Declaration of Michael Olson, par. 3) The deposition was scheduled for January 23, 2009. The deposition was to be of the person most knowledgeable at Opposer regarding the facts which support the Opposition proceedings. Specifically the notice designated a witness to testify regarding the following topics:

- “1. Any facts evidencing or tending to show that DAT was not the first to sell, in the United States, hard drive enclosures bearing the mark Metal Gear.
2. Any facts evidencing or tending to show that DAT is not the owner of the mark Metal Gear for hard drive enclosures.

3. Any facts evidencing or tending to show DAT made a material false statement in its application for registration of the mark Metal Gear.
4. Any facts evidencing or tending to show that Metal Gear is merely descriptive of DAT's product.
5. Any facts evidencing or tending to support OPPOSER's claim that DAT is not entitled to registration of the mark Metal Gear for hard drive enclosures." (Exhibit "A", Dec. Of Olson, Par.3)

On January 13, 2009, counsel for the Opposer emailed counsel for the Applicant advising that Opposer was short staffed and a continuance was needed. (Dec. Of Olson, Par. 4) Applicant advised Opposer that no continuance could be granted since the last date to conclude discovery was January 25, 2009. (Dec. Of Olson, Par. 4) On January 22, 2009 Opposer advised that the deposition was off and that the witness would be produced on February 6th or February 13th for deposition.(Dec. Of Olson, Par. 4) Opposer also advised that no continuance of the discovery cutoff date would be granted, but that there was no objection to taking this deposition after the cutoff date. The Opposer failed to produce a witness on the January 23rd, 2009 scheduled date. (Dec. Of Olson, Par. 4)

On January 30, 2009 Applicant emailed counsel for Opposer rescheduling the date of the deposition for February 6th. (Dec. Of Olson, Par. 5) On the same day, Opposer responded by cancelling the deposition because the witness "currently has a medical emergency (eye infection) and he may not be able to drive, by the time 2/6/2009 rolls around."(Dec. Of Olson, Par. 5)

On February 2nd, 2009 Applicant advised Opposer's counsel that a continuance was not acceptable and that either the Opposer produce a doctor's note that the witness could not attend a deposition or the deposition would proceed as scheduled. Applicant offered to move the deposition to a site convenient to the witness if the witness was unable to travel. (Dec. Of Olson, Par. 5) The same day, Opposer's counsel responded indicating he would check with his client regarding moving

the deposition to a more convenient site, but also wanted to confirm the deposition for February 13th, 2009. (Dec. Of Olson, Par. 5). On February 3, 2009 Applicant's counsel emailed Opposer's counsel that the deposition would not be continued unless a doctor advised that the witness was unable to submit to a deposition as Applicant intended to file a Motion for Summary Judgment and delay in the deposition would prejudice Applicant in that regard. (Dec. Of Olson, Par. 6)

On February 5th, 2009, Opposer's counsel emailed Applicant that the doctor would not provide a note for the witness stating that the "doctor balked at the request of doctor's note, when told that the reason is for legal proceeding." (Dec. Of Olson, Par.6). Opposer advised that the deposition would have to be postponed to February 13, 2009. Counsel did supply medical records regarding the witness. For privacy reasons, the records are not attached hereto. However, it appears the witness did see the doctor on January 28, 2009, January 30, 2009 and February 4, 2009 for the aforementioned eye infection. Significantly, the February 4, 2009 records show that the witness is to return for a followup in "1 year." (Dec. Of Olson, Par. 7)

On February 6th, 2009, the witness did not show for his deposition. (Dec. Of Olson, Par. 7) There is no legitimate basis for the failure of the witness to appear, and the failure to appear should be deemed wilful. The Opposition proceedings should be dismissed, or alternatively other relief, such as preclusion of testimony by Opposer should be ordered as a sanction for failure to appear.

II. ARGUMENT

There are a number of possible remedies the Board could order for failure of a witness to appear at a deposition. Federal Rule of Civil Procedure 37 provides as follows:

“(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(I) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition;

“(3) Types of Sanctions.

Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

37 C.F.R. §2.120 (g) (2) similarly provides as follows:

“(g) Sanctions. (1) If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board does not have authority to hold any person in contempt or to award any expenses to any party. The Board may impose against a party any of the sanctions provided by this subsection in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

(2) If a party, or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) of the Federal Rules of Civil Procedure to testify on behalf of a party, fails to attend the party's or person's discovery deposition, after being served with proper notice, or fails to provide any response to a set of interrogatories or to a set of requests for production of documents and things, and such party or the party's attorney or other authorized representative informs the party seeking discovery that no response will be made thereto, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section.”

Case law makes it clear that as to the failure of a party to attend a deposition, a adversary is not required to first obtain an order compelling compliance. Sanctions may be ordered immediately

for failure to appear. *Lindstedt v. City of Granby* 238 F.3d 933 (8th Cir., 2000). Further, 37 C.F.R. §2.120 (g) (1) authorizes a dismissal for violation of an order regulating discovery. If an order was always required before sanctions could be ordered for failure to appear at a deposition, there would be no need for 37 C.F.R. §2.120 (g) (2).

Failure to appear at a deposition is treated more harshly than other discovery violations. *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 165 n.6 (7th Cir. 1994) (holding that dismissal for failure to appear for deposition does not require a finding of willfulness). Under FRCP 37(d)(2) “A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).”

While the Board can order any remedy, a dismissal or an evidentiary sanction precluding the presentation of testimony from a witness is the only appropriate remedy. A mere order to appear at a third deposition would prejudice Applicant, given that discovery is cutoff, and Applicant would not have time to complete the deposition and still file a Motion for Summary Judgment. Here, Opposer’s witness has failed to appear for deposition on two occasions without any justifiable reason.

The only reason for the failure to appear at the depositions is delay these proceedings. Indeed, these entire proceedings are nothing more than an obvious attempt to delay registration of Applicant’s mark, given that Opposer is owned by former employees of Applicant, attempted to register a confusingly similar mark as the Applicant’s and after being forced to abandon its attempts to register the confusingly similar mark, filed these proceedings to prolong registration of

Applicant's mark. Dismissal with or without prejudice is the preferred remedy. Alternatively, an evidentiary sanction forbidding the offer of testimony from witnesses for Opposer is appropriate. While in some circumstances an order compelling appearance might be appropriate, this is not one of those cases.

February 9, 2009

Respectfully Submitted,



Michael C. Olson Reg. No. 45,728

LAW OFFICE OF MICHAEL C. OLSON, P.C.
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Attorneys for Applicant
Direct Access Technology, Inc.

Opposition No. 91184213

**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.)	
)	DECLARATION OF MICHAEL C.
)	OLSON IN SUPPORT OF
Direct Access Technology, Inc.)	MOTION TO DISMISS OR FOR
)	ALTERNATIVE RELIEF
Applicant)	

**DECLARATION OF MICHAEL C. OLSON IN SUPPORT OF MOTION FOR
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. I was counsel for Direct Access Technology, Inc. in TTAB proceedings No. 91174214. In those proceedings, Opposer tried to register the mark GALAXY METAL GEAR BOX for hard drive enclosures. Applicant successfully opposed that registration, with Opposer agreeing to abandon its application and change its mark.

3. On December 19, 2008, Applicant served its notice of deposition under FRCP 30(b)(6) on Opposer. A copy of the deposition notice is attached as Exhibit "A."

4. On January 13, 2009, counsel for the Opposer emailed me advising that Opposer was short staffed and a continuance was needed. I advised Opposer's counsel that no continuance could be granted since the last date to conclude discovery was January 25, 2009. On January 22, 2009 Opposer's counsel advised me that the deposition was off and that the witness would be produced on February 6th or February 13th for deposition. The Opposer failed to produce a witness on the January 23rd, 2009 scheduled date.

5. On January 30, 2009 I emailed counsel for Opposer rescheduling the date of the deposition for February 6th. On the same day, Opposer responded by cancelling the deposition because the witness "currently has a medical emergency (eye infection) and he may not be able to drive, by the time 2/6/2009 rolls around." On February 2nd, 2009 I advised Opposer's counsel that a continuance was not acceptable and that either the Opposer produce a doctor's note that the witness could not attend a deposition or the deposition would proceed as scheduled. I offered to move the deposition to a site convenient to the witness if the witness was unable to travel. The same day, Opposer's counsel responded indicating he would check with his client regarding moving the

deposition to a more convenient site, but also wanted to confirm the deposition for February 13th, 2009.

6. On February 3, 2009 I emailed Opposer's counsel that the deposition would not be continued unless a doctor advised that the witness was unable to submit to a deposition as Applicant intended to file a Motion for Summary Judgment and delay in the deposition would prejudice Applicant in that regard. On February 5th, 2009, Opposer's counsel emailed me that the doctor would not provide a note for the witness stating that the "doctor balked at the request of doctor's note, when told that the reason is for legal proceeding."

7. Opposer advised me that the deposition would still have to be postponed to February 13, 2009. Counsel did supply me with medical records regarding the witness. For privacy reasons, the records are not attached hereto. However, it appears the witness did see the doctor on January 28, 2009, January 30, 2009 and February 4, 2009 for the aforementioned eye infection. Significantly, the February 4, 2009 records show that the witness is to return for a followup in "1 year." On February 6th, 2009, the witness did not show for his deposition.

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

Executed on February ~~8~~⁹, 2009 at Newport Beach, California



Michael C. Olson

Exhibit A

**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.

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Opposition No. 91184213

Opposer

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v.

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**Notice of Deposition of Person Most
Knowledgeable at Galaxy Metal
Gear, Inc.**

)

Direct Access Technology, Inc.

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)

Applicant

)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, Applicant, DIRECT ACCESS TECHNOLOGY, INC. (hereinafter "DAT") will take the deposition of the Person Most Knowledgeable at GALAXY METAL GEAR, INC., (hereinafter "OPPOSER") regarding the matters set forth in Exhibit "A", on January 23, 2008 at 10:00 a.m. at Law Office of Michael C. Olson, P.C., located at 1400 Bristol Street N., Suite 270, Newport Beach, CA 92660.

Opposition No. 91184213

Said deposition will take place before any notary public or any other such person authorized to administer oaths, and shall continue until completed, day to day, Saturdays, Sundays and holidays excluded.

A list of all parties or attorneys for parties on whom this Notice is being served is shown on the accompanying Proof of Service.

Demand is made on the OPPOSER to produce the person at the deposition.

Demand is hereby made on deponent to produce the documents in the attached exhibit "B".

Dated: December 19, 2008

Respectfully Submitted,



Michael C. Olson Reg. No. 45,728

LAW OFFICE OF MICHAEL C. OLSON, P.C.
1400 Bristol Street N., Ste 270
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Attorneys for Opposer Direct Access Technology, Inc.

Opposition No. 91184213

EXHIBIT "A"

1. Any facts evidencing or tending to show that DAT was not the first to sell, in the United States, hard drive enclosures bearing the mark Metal Gear.
2. Any facts evidencing or tending to show that DAT is not the owner of the mark Metal Gear for hard drive enclosures.
3. Any facts evidencing or tending to show DAT made a material false statement in its application for registration of the mark Metal Gear.
4. Any facts evidencing or tending to show that Metal Gear is merely descriptive of DAT's product.
5. Any facts evidencing or tending to support OPPOSER's claim that DAT is not entitled to registration of the mark Metal Gear for hard drive enclosures.

EXHIBIT "B"

1. Any and all documents that evidence or relate to the claim of OPPOSER that DAT's application for registration should be refused on the basis of fraud.
2. Any and all documents that evidence or relate to the claim set forth in paragraph 5 of OPPOSER's Notice of Opposition that DAT made a material false statement in its application for registration of the mark Metal Gear.
3. Any and all documents that evidence or relate to the claim of OPPOSER that Metal Gear is merely descriptive of DAT's product.
4. Any and all documents that evidence or relate to the claim set forth in paragraph 9 of OPPOSER's Notice of Opposition that Metal Gear is merely descriptive of DAT's product.
5. Any documents evidencing or tending to support OPPOSER's claim that DAT is not entitled to registration of the mark Metal Gear for hard drive enclosures.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **NOTICE OF DEPOSITION OF PERSON MOST KNOWLEDGEABLE AT GALAXY METAL GEAR, INC.** was served on Jen-Feng Lee, counsel for applicant on this 19th day of December, 2008 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

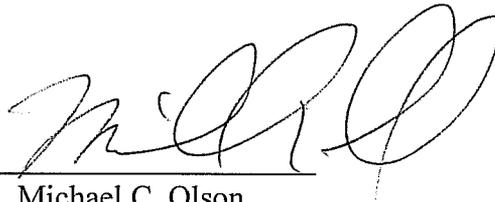


Michael C. Olson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **MOTION FOR DISMISSAL OR FOR ALTERNATIVE RELIEF**, was served on Jen-Feng Lee, counsel for applicant on this ~~8th~~^{9th} day of February, 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



Michael C. Olson