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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 Summary Judgment
Filer's Name	Michael C. Olson
Filer's e-mail	molson@lawyer.com
Signature	/MCO/
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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.)	
)	MOTION FOR SUMMARY
)	JUDGMENT
Direct Access Technology, Inc.)	
)	
Applicant)	

APPLICANT’S MOTION FOR SUMMARY JUDGMENT

Pursuant to FRCP 56 and TBMP §528, Applicant Direct Access Technology, Inc. hereby moves the Board for Summary Judgment in its favor and against Opposer Galaxy Metal Gear, Inc. 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 mark METAL GEAR, and that the mark is not merely descriptive of the goods being sold by Applicant.

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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. (Dec. of Patrick Wang, Par. 4; Dep. TR of Antonio Tan (the designated representative of Opposer) page 6, lines 2-13) At one time, Garry Ching and Geoffrey Ching were employees of Applicant. (Dec. Of Wang, Par. 4; Dep. TR of Tan, page 6, lines 14-16) 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 tried 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. 3)

Applicant is the owner of the trademark METAL GEAR, which Applicant has used in commerce on enclosures for external computer hard drives since at least May 14, 2003. (Dec. Of Wang, Par.2) (Dep. TR of Tan, page 19, lines 13-20) External hard drive enclosures are containers into which a hard drive is installed. (Exhibit "D"; Dec. Of Wang, Par. 2) The enclosure is then attached to a computer via a USB or other connection.(Dec. Of Wang, Par. 2) Computer files can

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then be stored on the hard drive in the enclosure. (Dec. Of Wang, Par. 2) The enclosure has no gears or any moving parts. (Dec. Of Wang, Par. 2) Inside the container is merely a PC board which allows for communication between the hard drive and the computer, after the hard drive is installed into the enclosure. (Dec. Of Wang, Par. 2)

Even though Applicant's goods were at one time manufactured for Applicant by another, (DataStor), Applicant is the originator of the METAL GEAR mark. (Dec. Of Wang, Par. 3) Prior to entering into a business relationship with DataStor in 2003, Applicant was buying enclosures from a different supplier. (Dec. Of Wang, Par. 3) In 2003, DataStor was looking for new OEM business and Applicant introduced DataStor to the enclosure products that Applicant was already selling. (Dec. Of Wang, Par.3) Applicant has not bought product from DataStor since 2006 and since that date has manufactured METAL GEAR enclosures at Applicant's own factory. (Dec. Of Wang, Par.3) Further, when Applicant first consulted with DataStor about DataStor manufacturing enclosures for Applicant, an agreement was reached that DataStor would not sell to any other company in the US under the METAL GEAR mark and that Applicant would have "exclusivity" on the product. (Exhibit "A"; Dec. Of Wang, Par.3)

Opposer has filed this opposition proceedings solely on the basis that Applicant committed fraud in its application because the "real" owner of the mark is a foreign manufacturer (DataStor) and that the mark METAL GEAR is merely descriptive of the Applicant's product.¹ During these proceedings, Opposer failed to identify any expert witnesses in this matter. (Dec. Of Olson, Par.3)

¹It should be noted that the alleged "real" owner has not opposed Applicant's registration. It is questionable whether Opposer even has standing to oppose, given its agreement to abandon its application and to change its mark.

Opposer has produced documents during the proceedings which it claims support a finding that METAL GEAR is merely descriptive. (Exhibit "B") However, those documents are limited to trademark registrations related to other goods in which the examiner required a disclaimer of "Metal" or "Gear" as part of the examination process.

As will be seen, there is no evidence of fraud and the mark is not merely descriptive of Applicant's product. Accordingly, summary judgment on the Opposition is appropriate.

II. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is judicial economy, that is, to save the time and expense of a useless trial where no genuine issues of material fact remain and more evidence than is already available in connection with the motion for summary judgment could not reasonably be expected to change the result. See, e.g., *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 739 F.2d 624,626 (Fed. Cir. 1984). The summary judgment procedure is regarded as "a salutary method of disposition," and the Board does not hesitate to dispose of cases on summary judgment when appropriate. See, e.g., *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987); *Blansett Pharmaceutical Co. v. Carmrick Labs., Inc.*, 25 U.S.P.Q. 2d 1473,1476 (T.T.A.B. 1992).

This proceeding presents the appropriate record for summary judgment to be entered in favor of Applicant because no additional, material facts could be uncovered through trial as to the issues this summary judgment motion raises. See *Pure Gold, Inc. v. Suntex (USA), Inc.*, 222 U.S.P.Q. 741, 744 n2 (Fed. Cir. 1984) (summary judgment "is to be encouraged in *inter partes* cases before the Trademark Trial and Appeal Board").

The party moving for summary judgment has the burden of demonstrating the absence of any genuine issues of material fact, and that it is entitled to judgment as a matter of law. See, e.g., Fed. R. Civ. P. 56(c); *Copelands' Enterprises, Inc. v CNV, Inc.* 945 F.2d 1563,1565-66 (Fed. Cir. 1991). When the moving party's motion is supported by evidence sufficient, if unopposed, to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a

matter of law, the non-moving party may not rest on mere denials or conclusory assertions, but must proffer countering evidence showing that there is a genuine factual dispute for trial. See Fed. R. Civ. P. 56(e); *Copelands' Enterprises*, supra 945 F.2d at 1564. A factual dispute is genuine only if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. See *Lloyd's Food Products, Inc. v. Eli's, Inc.* 987 F.2d 766,767 (Fed. Cir. 1993). On the record before this Board, there only can be one conclusion. Summary judgment is appropriate in favor of Opposer.

B. APPLICANT HAS NOT COMMITTED FRAUD WITH RESPECT TO THE OWNERSHIP OF THE METAL GEAR MARK

Opposer first challenges Applicant's right to registration on the basis of fraud with respect to Applicant's claim of ownership of the METAL GEAR mark. The sole basis for the claim revolves around the allegation of ownership. (Dep. TR of Tan, page 18, line 5-16) Opposer claims that the mark is really owned by Data Stor. Opposer claims that DataStor sold the goods to CompUSA prior to the first sale by Applicant in 2003, and therefore Applicant is not the owner of the mark. The facts are otherwise.²

For purposes of the Trademark Act, an applicant or registrant commits fraud by **knowingly**

² Mr. Tan testified in his deposition that he knows that CompUSA was selling METAL GEAR enclosures but it would just be a guess on his part as to when CompUSA first started selling the product. (Dep. TR of Tan, page 34, lines 9-16) He also doesn't know when CompUSA stopped selling METAL GEAR enclosures. (Dep. TR of Tan, page 45, lines 20-25 and page 46, lines 1-8) CompUSA may well have abandoned the sales prior to the filing of the application by Applicant for all that can be discerned from the records.

making a false statement as to a material fact in conjunction with a trademark application or registration. *Mister Leonard Inc. v. Jacques Leonard Couture Inc.*, 23 USPQ2d 1064, 1065 (TTAB 1992). To prove fraud, Opposer must show a representation by Applicant to the USPTO that is (1) false; (2) made with knowledge that it is false; and (3) material.

Fraud must be proven with clear and convincing evidence, and any doubt must be resolved against a finding of fraud. See *Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955 (TTAB 1986). See also *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981) [“The very nature of the charge of fraud requires that it be proven ‘to the hilt’...There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.”]. Furthermore, fraud will not lie if it can be proven that the statement, though false, was made with a reasonable and honest belief that it was true. *Woodstock’s Enterprises Inc. (California) v. Woodstock’s Enterprises Inc. (Oregon)*, 43 USPQ2d 1440 (TTAB 1997).

Applicant does not contest that a statement to the examiner regarding ownership of the trademark is a “material” statement. Applicant does contest that it made a false statement regarding ownership. Even if Applicant’s claim of ownership was false, Applicant contests that it knew, should have known or even had any suspicion that the claim of ownership was false.

Applicant is the owner of the mark because it created the mark and is using it as a trademark for its goods. *McCarthy on Trademarks* § 16:35 (4th ed.) (“Trademark ownership inures to the legal entity who is in fact using the mark as a symbol of origin.”). The evidence establishes that Applicant was in the business of selling hard drive enclosures. (Dec. Of Wang, Par. 2, 3) In 2003, Applicant entered into a relationship with Data Stor. (Dec. Of Wang, Par. 3) Prior to Applicant’s

introduction to Data Stor, Data Stor was not selling hard drive enclosures. (Dec. Of Wang, Par. 3) Applicant and Data Stor entered into an agreement for Data Stor to manufacture hard drive enclosures for Applicant under the METAL GEAR brand. (Dec. Of Wang, Par. 3) Because of the propensity of some Asian manufacturers to compete with their own customers, Applicant sought and was promised “exclusivity” in the US market by Data Stor for hard drive enclosures. (Dec. Of Wang, Par.3; Exhibit “A”) Accordingly, Applicant believed it was the owner of the METAL GEAR trademark at the time the application to register was filed. (Dec. Of Wang, Par. 6)

Sales were made by DataStor to a supplier who sold to CompUSA. (Dec. Of Chen, Par. 4) That supplier, Worldwide Marketing, is located in Asia. (Dec. Of Chen, Par. 4) Worldwide Marketing then sold the product to CompUSA. (Dec. Of Chen, Par. 4) The first sale, however, was in 2004, almost one year after Applicant was selling product bearing the mark in the US. (Dec. Of Chen, Par. 4) (Dec. Of Wang, Par. 2)

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.”)

In *Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.* 78 USPQ2d 1899 (TTAB 2006), a claim for cancellation of a registration was made on the basis that the registration was procured through fraud. The TTAB rejected the claim of fraud for failing to disclose uses of the trademark

by third parties and in doing so stated as follows:

“In this regard, we note that a trademark applicant has no duty to investigate potential conflicting uses that might be found through a trademark search, and therefore **there is no duty to investigate specific information such as when a third party may have started using a mark.** See e.g. *Money Store v. Harriscorp Finance, Inc.*, 689 F.2d 666, 216 USPQ 11 (7th Cir. 1982) [an applicant has no duty to investigate and report to the USPTO all other possible users of the same or similar mark].” (Emphasis added)

It may be that Data Stor did not live up to its agreement of exclusivity or it may be that DataStor did live up to its agreement because all sales were to Worldwide in Asia and not directly to CompUSA in the US. It may be that DataStor infringed on Applicant’s rights by selling enclosures to others under Applicant’s mark or it may be that DataStor did not infringe because the sales were made in Asia. The sales which eventually made its way to CompUSA are irrelevant, however, because Applicant was the first to sell product bearing the mark in the US and Applicant created the mark. Applicant is the owner of the mark.

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. As seen, Applicant created the mark and was promised by DataStor that DataStor would not sell METAL GEAR enclosures to any other entity selling in the US. (Exhibit “A”, Dec. Of Chen, Par. 3, Dec. Of

Wang, Par. 3) At the time the application to register was filed, Applicant believed it was the owner of the mark. (Dec. Of Wang, Par. 6) Having created the mark, and having been promised exclusivity, Applicant's belief that it owned the mark is reasonable and incontestable.

In fact, DataStor made a similar promise of exclusivity in 2005 to Opposer. (Dep. TR of Tan, page 39, lines 2-23) DataStor promised Opposer exclusivity with regard to the goods marked Galaxy Metal Gear Box, but not with respect to goods marked METAL GEAR. (Dep. TR of Tan, page 46, lines 21-25 and page 47, lines 1-2) Mr. Tan testified that it would be reasonable to rely on the promise of exclusivity from DataStor. (Dep. TR of Tan, page 39, lines 24-25 and page 40, lines 17-19) If it is reasonable for Opposer to rely on a promise of exclusivity, it is certainly reasonable for Applicant to rely on a promise of exclusivity. Indeed, Applicant has a stronger right to rely on the promise given that the promise was made to Applicant prior to the promise being made to Opposer.

Here, Applicant originated the mark. It created the mark and instructed its supplier to mark the product with METAL GEAR. Applicant obtained an agreement from its supplier that the supplier would not sell to anyone else in the United States. At the time the application to register was filed, Applicant believed it was the owner of the mark. Opposer cannot succeed on its fraud claim and summary judgment is appropriate.

**C. METAL GEAR IS NOT DESCRIPTIVE OF COMPUTER
HARD DRIVE ENCLOSURES**

Opposer also claims that the METAL GEAR registration should be denied because the mark is descriptive. Opposer has the burden of establishing by a preponderance of the evidence that

METAL GEAR is merely descriptive of hard drive enclosures. *Racine Industries, Inc. v. Bane-Clene Corp.*, 35 USPQ2d 1832, 1837 (TTAB 1994).

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Moreover, the immediate idea must be conveyed with some "degree of particularity." *In re Entenmann's Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990), *aff'd* 90-1495 (Fed. Cir. Feb. 13, 1991); *In re TMS Corporation of the Americas*, 200 USPQ 57, 59 (TTAB 1987).

A mark is descriptive if it "forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [and/or services]." *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 765 (2d Cir. 1976). In order to be descriptive, the mark must immediately convey information as to the qualities, features or characteristics of the goods and/or services with a "degree of particularity." *Plus Products v. Medical Modalities Associates, Inc.*, 211 USPQ 1199, 1204-1205 (TTAB 1981). See *In re Diet Tabs, Inc.*, 231 USPQ 587, 588 (TTAB 1986); *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 952 (TTAB 1981); *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

The determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context

in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977). The fact that a term may be descriptive of certain goods is not determinative of whether it is descriptive of other goods, even if the goods are closely related. *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994).

A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Simply because a term may have some association with the goods or services does not mean that the mark is merely descriptive. *In re Marriott Corp.*, 517 F.2d 1364, 186 USPQ 218, 222 (CCPA 1975) (“Nor do we view the slogan WE SMILE MORE as descriptive of hotel, restaurant, or convention services... [T]he slogan mark before us would at most suggest the facial expression of persons performing the services. It does not describe the services themselves”)

Even though two words may, by themselves, be descriptive, a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549 USPQ 382 (C.C.P.A. 1968) (holding SUGAR & SPICE not to be merely descriptive of bakery products). In determining whether a mark is merely descriptive, one must consider the mark in its entirety. *Concurrent Technologies Inc. v. Concurrent Technologies Corp.*, 12 USPQ2d 1054, 1057 (TTAB 1989).

Opposer has a paucity of facts that it relies on in this matter. However, as will be seen those facts do not support this Opposition. Applying the facts to the law shows that the mark is not merely descriptive of Applicant’s product. Accordingly, summary judgment is appropriate.

First, Opposer has not designated an expert in this matter. (Declaration of Olson, Par. 4). It has produced a designated representative, Antonio Tan, to testify to the issue of descriptiveness. His testimony proves the mark is not merely descriptive.

The product in question is a metal or plastic case into which a computer hard drive is installed. (Dep. TR of Tan, page 20, lines 5-17) There are no moving parts inside. (Dep. TR of Tan, page 20, lines 18-22) The only thing inside is a small circuit board that allows the hard drive to communicate with the computer. (Dep. TR of Tan, page 20, lines 23-25) There are no mechanical parts or gears inside. (Dep. TR of Tan, page 21, lines 1-6)

According to Mr. Tan, DataStor has only sold enclosures bearing the mark METAL GEAR to three companies, i.e. Applicant, Opposer and CompUSA. (Dep. TR of Tan, page 27, lines 13-25, and page 28, line 1) DataStor has also sold identical enclosures to a fourth company under the brand name ICY BOX. (Dep. TR of Tan, page 26, lines 15-17, page 27, lines 1-7) Other than those enclosures manufactured by Applicant or by DataStor, no other manufacturer uses the mark METAL GEAR on its enclosures. (Dep. TR of Tan, page 48, lines 5-7) To Mr. Tan, the mark METAL GEAR **does not** convey some idea about one of the parts or ingredients of the enclosures. (Dep. TR of Tan, page 48, lines 14-17) Nor does it convey some idea about a characteristic of the enclosure. (Dep. TR of Tan, page 48, lines 19-22) The METAL GEAR mark does not convey any idea about any features of the enclosures. (Dep. TR of Tan, page 48, lines 24-25, page 49, line 1) There is nothing about the mark that makes Mr. Tan, the person most knowledgeable at Opposer, think that METAL GEAR describes the Applicant's enclosures.

“Q. Is there anything about the trademark Metal Gear that makes you think it

describes the enclosure?

...

THE WITNESS: No.” (Dep. TR of Tan, page 52, lines 24-25, page 53, lines 1-2)

Second, while Opposer has identified several registrations in its Initial Disclosures (Exhibit “B”) as supporting its position, in reality the documents are of limited value. It is true that there are numerous registrations which have been issued requiring a disclaimer of either “Metal” or “Gear.” However, none of those registrations involve goods which are identical or even similar to the goods of Applicant. The fact that a term may be descriptive of certain goods is not determinative of whether it is descriptive of other goods, even if the goods are closely related. *In re Stroh Brewery Co.*, supra.

On the other hand, registration has been allowed for METAL GEAR for flashlights in the same International Class which applies to Applicant’s goods. (See Exhibit “E”) While Exhibit E does not involve goods identical to the Applicant’s, it does show that in some circumstances the examiners feel that the mark is registrable.

Third, there is no dictionary definition of “Metal Gear.” (See Exhibit “C”). The mark is an undefined combination of words. Opposer may try to force the proverbial square peg into a round hole by arguing that one needs to look at the definition of each word as though it was the only word in the mark. The law is to the contrary, however. In determining whether a mark is merely descriptive, one must consider the mark in its entirety. *Concurrent Technologies Inc.*, supra. Even though two words may, by themselves, be descriptive, a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning. *In re*

Colonial Stores, Inc., supra.

Finally, Opposer may attempt to attach some significance to the examiner's requirement that "Metal" be disclaimed as a condition of approval of DAT's application to register the mark. There is no significance, however. TMEP §1213 states as follows:

"The purpose of a disclaimer is to permit the registration of a mark that is registrable as a whole but contains matter that would not be registrable standing alone, without creating a false impression of the extent of the registrant's right with respect to certain elements in the mark. As stated in *Horlick's Malted Milk Co. v. Borden Co.*, 295 F. 232, 234, 1924 C.D. 197, 199 (D.C. Cir. 1924):

[T]he fact that a mark contains descriptive words is not enough to warrant a refusal to register it. Unless it consists only of such words, it may not be refused a place on the registry of the Patent Office.

The significance of a disclaimer is conveyed in the following statement:

As used in trade mark registrations, a disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

Sprague Electric Co. v. Erie Resistor Corp., 101 USPQ 486, 486-87 (Comm'r Pats. 1954).

A disclaimer may be limited to pertain to only certain classes, or to only certain goods or services.”

The disclaimer of “Metal” by Applicant as a condition of approval of its application has no impact on the analysis in this case. The mark is METAL GEAR and that combination of words is the mark to be analyzed in determining whether registration is appropriate.

The product is a plastic and metal container with a circuit board inside. A hard drive can be attached to the PC board and the goods can then be used as a portable hard drive. There are no moving parts and no “gears” inside the enclosure. No one can conclude that METAL GEAR immediately conveys the idea of a rectangular container without engaging in fantasy.

Does METAL GEAR immediately convey an impression of a quality, characteristic, function, ingredient, attribute or feature of the Applicant’s product? The answer is a resounding NO, as evidence by the photographs of the product, its description in the record and the examiner’s approval of the application to register and, perhaps more telling, by the admissions of the person most knowledgeable at Opposer on the subject. (“Q. Is there anything about the trademark Metal Gear that makes you think it describes the enclosure? THE WITNESS: No.”)

Opposer cannot prove the mark is merely descriptive because it is not. There is no reason or need for further proceedings in this matter. Summary judgment in Applicant’s favor is mandated.

III. CONCLUSION

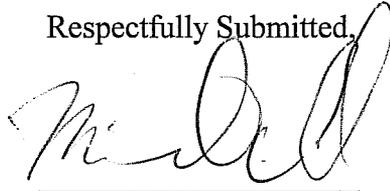
It is clear that there was no fraud by Applicant that would serve as a basis for refusal to register the mark. Applicant is clearly the owner of METAL GEAR for use on hard drive enclosures.

Whether others, including the Opposer, may have infringed on Applicant's rights is irrelevant. Applicant had a reasonable and honest belief in the truth of its claim of ownership at the time the application was filed, given that applicant originated the mark and had a promise from Datastor that Datastor would not sell to others in the US. There is no evidence to prove fraud.

Further, there is no evidence to show that METAL GEAR is descriptive of hard drive enclosures. A combination mark must be viewed in its entirety, not by its individual components. There is no evidence to show that one would immediately picture Applicant's product when hearing METAL GEAR or that when seeing Applicant's product one would exclaim "METAL GEAR". Even calling the mark suggestive of the product requires a stretch of the imagination. Summary judgment is appropriately entered in Applicant's favor.

February 20, 2009

Respectfully Submitted,



Michael C. Olson Reg. No. 45,728

LAW OFFICE OF MICHAEL C. OLSON, P.C.
1400 Bristol Street N., Ste 270
Newport Beach, California 92660
Tel. (949) 442-8940
Fax. (949) 442-8935
email: molson@lawyer.com

Attorneys for Applicant
Direct Access Technology, Inc.

Opposition No. 91184213

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** was served on Jen-Feng Lee, counsel for applicant on this 23th 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

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

Michael C. Olson

FROM :

FAX NO. :

Feb. 20 2009 06:06PM P1

**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 GARY CHEN

I, Gary Chen, declare as follows:

1. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would truthfully and competently testify to the following.

2. I was formerly employed by Datastor Technology Company, Ltd. (hereinafter called "DATASTOR") in Taiwan. DATASTOR manufactured external hard drive enclosures under several

Opposition No. 91184213

FROM :

FAX NO. :

Feb. 20 2009 06:06PM P2

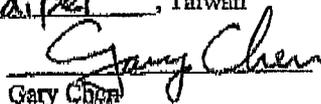
brand names for different customers. While employed at DATASTOR, my job duties included sales of hard drive enclosures to customers of DATASTOR.

3. At the time I started working for DATASTOR, that company was already selling hard drive enclosures to Direct Access Technology under the trademark METAL GEAR. At the time I started working for DATASTOR, I understood that Direct Access Technology had the exclusive right to sell METAL GEAR enclosures in the United States... Exhibit "A" is a copy of the email I sent to Patriok at Direct Access Technology, which confirms the arrangement.

4. I am familiar with CompUSA. That company is now bankrupt, but it used to buy its product from a company in Asia called Worldwide Marketing. Worldwide Marketing was a customer of mine while I was employed at DATASTOR. I was the first person at DATASTOR to sell hard drive enclosures to Worldwide Marketing. The first sale of hard drive enclosures bearing the METAL GEAR mark were made to Worldwide Marketing in 2004. Direct Access Technology was the first company to sell METAL GEAR hard drive enclosures manufactured by DATASTOR in the United States.

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 20, 2009 at Taipei, Taiwan


Gary Chen

Opposition No. 91184213

FROM :

FAX NO. :

Feb. 20 2009 06:07PM P3

EXHIBIT A

FROM :

FAX NO. :

Feb. 20 2009 06:07PM P4

Page 1 of 1

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.datastortechn.com
Tel: +886-2-8976-9100 Ext. 241
Fax: +886-2-8976-9108

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

DIRECT - 00710

**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 PATRICK WANG IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

I, Patrick Wang, declare as follows:

1. I am employed by, and an officer of, Applicant, Direct Access Technology, Inc. (hereinafter "DAT") I have been employed by Applicant since 1994. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would truthfully and

Opposition No. 91184213

competently testify to the following.

2. DAT first began selling enclosures marked METAL GEAR in the United States on or about May 14, 2003 and is still selling the enclosures at this time. External hard drive enclosures are containers into which a hard drive is installed. A picture of DAT's product is attached as Exhibit "D." The enclosure is then attached to a computer via a USB or other connector. Computer files can be stored on the hard drive in the enclosure. The enclosure has no gears or any moving parts. Inside the container is a PC board which allows for communication between the hard drive and the computer, after the hard drive is installed into the enclosure.

3. DAT is the owner of the mark as I personally created the mark for use by DAT. At one time, DAT obtained its hard drive enclosures from Data Stor. Prior to my dealings with Data Stor, DAT was buying hard drive enclosures from another supplier. Some time prior to 2003 I was approached by Data Stor about buying products from them. Data Stor represented that it was looking to manufacture a new product. I investigated their product line and learned that Data Stor was not manufacturing hard drive enclosures. I advised Data Stor that DAT would buy hard drive enclosures from Data Stor if they could supply a product comparable to and at a better price than DAT's then supplier. I insisted that DAT receive exclusivity with respect to the U.S. territory, as I have had experience with other manufacturers selling our product to our competitors. Data Stor assured me that it would not sell hard drive enclosures to any other company in the United States and that DAT would have exclusivity in the U.S. market. A copy of email I received from Data Stor confirming

DAT's exclusivity in the US is attached as Exhibit "A." DAT has not bought product from Data Stor since 2006 and since that date has manufactured METAL GEAR enclosures at Applicant's own factory. When DAT first consulted with Data Stor about Data Stor manufacturing enclosures for Applicant, an agreement was reached that Data Stor would not sell to any other company in the US under the METAL GEAR mark and that Applicant would have "exclusivity" on the product.

4. Opposer is owned, in part, by Garry Ching and Geoffrey Ching. These two individuals used to work for DAT. They left the company in 2004. While employed at DAT they became familiar with the products of DAT as well as its customers and suppliers, since they worked in the shipping and receiving departments. One former customer of DAT was a company called TechDepot. This company was secretly owned by Garry Ching and Geoffrey Ching while in the employ of DAT. Among the products sold to TechDepot were METAL GEAR hard drive enclosures. Later TechDepot began buying products direct from the supplier of DAT.

5. From time to time, during the course of my employment with Direct Access Technology, I would receive communication from customers who bought products of the Applicant and thought they were products of Direct Access Technology. Each instance involved a customer who complained about the quality of the Applicant's products. Sometimes the communication was by phone and sometimes by email. Direct Access Technologies has no records showing the number of calls from customers who contacted it complaining of Applicant's products.

6. I authorized the filing of the application to register METAL GEAR as a trademark of DAT. I believed at the time the application to register the METAL GEAR application was filed by DAT that DAT was the owner of the METAL GEAR trademark for use on hard drive enclosures. I still believe that is true. It is my belief that anyone selling hard drive enclosures in the United States that did not originate with DAT is selling infringing products.

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 8th, 2009 at City of Industry, California


Patrick Wang

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)	
)	
vs.)	
)	
)	
Direct Access Technology, Inc.)	
)	
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 attended the deposition of Tony Tan. A copy of the pages of his deposition transcript cited in the Motion for Summary Judgment are attached hereto.

3. 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.

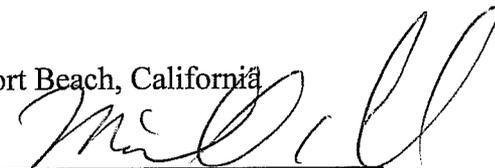
4. During these proceedings, both parties have served Initial Disclosures. Opposer's Initial Disclosures are attached hereto as Exhibit B. Opposer failed to designate or disclose any expert witnesses in this matter in accordance with the TTAB's order.

5. Attached hereto as Exhibit "C" is are printouts I made from various online dictionary websites including the Merriam Webster dictionary website, American Heritage dictionary (Bartleby.com website) and the MSN Encarta dictionary website. All dictionaries show that there is no definition for "Metal Gear."

6. Exhibit "E" is a true and correct copy of the registration, Status and Info Sheet and Assignment sheet on registration number 3190111 for the mark Metal Gear as used on flashlights, as printed out by me from the USPTO website on February 20, 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 February 20, 2009 at Newport Beach, California


Michael C. Olson

Opposition No. 91184213

DEPOSITION OF ANTONIO TAN

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.,)
)
 Opposer,)
)
 vs.)
)
 Direct Access Technology, Inc.,)
)
 Applicant.)
)

**CERTIFIED
COPY**

Opposition No. 91184213

DEPOSITION OF: ANTONIO TAN

Person Most Knowledgeable - Galaxy Metal Gear, Inc.

Newport Beach, California

February 13, 2009

Reported by: Kimberlee Castro, CSR No. 11459
Certified Shorthand Reporter

1 A Okay.

2 Q You're employed by Galaxy Metal Gear?

3 A Yes.

4 Q And are you an officer in the company?

5 A Yes.

6 Q Okay. What's your position?

7 A Vice-president.

8 Q And the other officers of the company are who?

9 A Garry Ching and Geoffrey Ching.

10 Q And Garry is G-A-R-R-Y; Ching is C-H --

11 A C-H-I-N-G.

12 Q And how about Geoffrey?

13 A G-E-O-F-F-R-E-Y.

14 Q Now, Garry and Geoffrey used to be employed by

15 Direct Access Technology, correct?

16 A Yes.

17 Q Then they went with you to form Galaxy Metal Gear?

18 A Yes.

19 Q Galaxy Metal Gear filed an opposition to the

20 trademark application of Direct Access Technology, right?

21 A Yes.

22 Q Are you the person most knowledgeable at Galaxy

23 Metal Gear for the basis of filing that opposition?

24 A Yes.

25 Q Are you the one who approved or instructed lawyers

1 A Is there any other ways or --

2 Q Right.

3 A They have sent letter to our customer claiming
4 that they own the Metal Gear.

5 Q What I'm talking about is, DAT filed an
6 application to register the trademark. And they filed it
7 with the trademark office. And in the application, they
8 said that they own the Metal Gear trademark. And you said
9 that one fact that you know of regarding the fraud is that
10 DAT does not own the Metal Gear trademark. What I want to
11 know is, is there any other thing that DAT told the
12 trademark office that you believe was fraudulent?

13 A That I believe was fraudulent. Is there any
14 other, right?

15 Q Right.

16 A No.

17 Q Okay. So let's talk about the ownership of the
18 Metal Gear mark.

19 Now, were you at any meetings between DAT and
20 datastor regarding the creation of the Metal Gear
21 trademark?

22 MR. LEE: Objection, vague.

23 Are you talking about any specific time frame?

24 MR. OLSON: No, anytime.

25 /////

1 BY MR. OLSON:

2 Q Have you ever been at a meeting with a
3 representative of DAT and a representative of datastor
4 where the discussion was about the creation of the mark?

5 A With DAT and datastor?

6 Q Right.

7 A No. You were saying Metal Gear mark, right?

8 Q Right. Do you have any knowledge that DAT was not
9 selling enclosures bearing Metal Gear trademark in the
10 United States in 2003?

11 A Repeat that question again.

12 Q Would you agree that datastor -- strike that.

13 Would you agree that DAT first began selling
14 enclosures in the U.S. in 2003 bearing the mark Metal Gear?

15 A If I was aware of that?

16 Q Yeah, are you aware?

17 A Yes.

18 Q Have you -- had you seen their -- DAT's Metal Gear
19 enclosures on the market in 2003?

20 A Yes.

21 Q And had you or one of the companies you've been
22 affiliated with purchased Metal Gear enclosures from DAT in
23 2003?

24 A If one of our companies -- yes.

25 Q Do you recall when you first bought -- one of your

1 companies, not you personally, but one of your companies
2 first bought a product, an enclosure, from DAT with the
3 mark Metal Gear?

4 A I don't recall the date.

5 Q By the way, can you just des, for the record, what
6 an enclosure is?

7 A Enclosure is a metal case that you put a hard
8 drive on to make it an external device for a computer.

9 Q So it's like an external hard drive, but when you
10 sell it, or DAT sells it, or any other retailer sells it,
11 there's no hard drive actually inside yet, correct?

12 A Correct.

13 Q Now, some of them are made of plastic not of
14 metal, correct?

15 A Correct.

16 Q And some are metal, right?

17 A Correct.

18 Q And are there any moving parts inside the
19 enclosure as you guys sell it?

20 A Moving parts?

21 Q Right.

22 A No.

23 Q Is it basically a small circuit board that allows
24 the computer to communicate with the hard drive?

25 A Correct.

1 Q And would it be correct that there are no moving
2 mechanical parts or gears or anything like that inside
3 that?

4 A Correct.

5 Q Correct?

6 A Correct.

7 MR. LEE: A little bit of clarification.

8 When you're asking circuit board, are you
9 referring to what we know commonly known as PCB, that kind
10 of circuit board?

11 MR. OLSON: Sure.

12 BY MR. OLSON:

13 Q That's what you understood, right?

14 A Yes.

15 MR. OLSON: We've been using the old terminology.

16 MR. LEE: Yes, because I don't know what can be in
17 an enclosure, so --

18 MR. OLSON: Okay.

19 BY MR. OLSON:

20 Q Now, going back to the issue of fraud. Was any
21 company that you're affiliated with the first purchaser of
22 Metal Gear enclosures from datastor?

23 A The first purchaser from my company?

24 Q No. Okay. Datastor supplied -- supplies -- well,
25 strike that.

1 Q Blue only?

2 A Correct.

3 Q And how many did you order?

4 A Should be about -- I couldn't recall. Four or
5 five hundred pieces.

6 Q Now, do you have personal knowledge that any
7 company other than one of your companies or DAT or CompUSA
8 bought Metal Gear enclosures from datastor at the time?

9 A Repeat the question again.

10 Q Do you have personal knowledge that any company
11 other than one of your companies or DAT or CompUSA bought
12 Metal Gear enclosures from datastor?

13 A Do I have any knowledge other than those three
14 companies --

15 Q Right.

16 A -- bought -- there's another company who bought.
17 It's called Icy Box. They also buy from datastor.

18 Q Do you know when they started buying from
19 datastor?

20 A No.

21 Q Do you know where they're located?

22 A No.

23 Q How do you know that they're buying from datastor?

24 A I have seen the mark that they have bought the
25 same exact features, the same exact look.

1 Q And it says Metal Gear on it?

2 A It says Icy Box.

3 Q So you mean it looks identical to --

4 A Identical to the one that we have been buying from
5 datastor.

6 Q But instead of saying Metal Gear, it says Icy Box?

7 A Yes.

8 Q Do you have knowledge that anyone other than your
9 company and Tech Depot -- strike that.

10 Your company and DAT and CompUSA ever bought Metal
11 Gear enclosures from datastor?

12 A Repeat that.

13 Q Okay. Datastor, to your understanding,
14 manufactures enclosures with the Metal Gear mark on it,
15 right?

16 A Correct.

17 Q Okay. Your company has bought those enclosures,
18 correct?

19 A Correct.

20 Q And DAT has bought those enclosures, correct?

21 A Correct.

22 Q Do you know if any other company bought those
23 enclosures with Metal Gear on it?

24 A CompUSA.

25 Q Okay. Anyone else?

1 A Not to my knowledge.
2 Q Do you have any personal knowledge where CompUSA
3 got their enclosures from?
4 A With datastor.
5 Q How do you know?
6 A I've seen the mark on their boxes with Metal Gear.
7 Q Okay. But how do you know they bought it from
8 datastor?
9 A I've seen the retail package on their store.
10 Q Have you seen any invoice from datastor to
11 CompUSA?
12 A No.
13 Q Did you ask anyone at CompUSA where they bought it
14 from?
15 A Not CompUSA, no.
16 Q Would it be fair to say that based on what you saw
17 at CompUSA, the packaging and the product, it's your
18 assumption that they bought direct from datastor?
19 A No, because I know there's a sales that was
20 selling to us told us that they did sell to CompUSA.
21 Q A sales rep from datastor?
22 A Datastor.
23 Q Ms. Momo Chen?
24 A Momo Chen. I believe that was before that --
25 THE COURT REPORTER: I'm sorry?

1 Q Isn't it true that datastor never manufactured any
2 enclosures with red, green, and blue LED lights until 2005?

3 MR. LEE: Objection, speculation.

4 THE WITNESS: I'm not really sure.

5 BY MR. OLSON:

6 Q Isn't it true that you are not really sure that
7 CompUSA was selling this product in 2001 or 2002?

8 A Repeat that question again.

9 Q You're not sure that CompUSA was selling this
10 product in 2001 or 2002, the product that's in the picture
11 in Exhibit 1?

12 A I'm not really sure.

13 Q Would it be fair to say that it would just be a
14 guess on your part as to when CompUSA first started selling
15 Metal Gear enclosures?

16 A Yes.

17 Q I'm going to show you what was marked as Exhibit 3
18 at Momo Chen's deposition, and we'll remark it Exhibit 2.

19 Did you have a chance to read it?

20 A Yes.

21 Q Did you ever see this e-mail before.

22 MR. LEE: Objection, lack of foundation,
23 speculation.

24 BY MR. OLSON:

25 Q Have you ever seen Exhibit 2 before?

1 A To us all three of us.

2 Q You were personally present when someone at
3 datastor said you have exclusivity?

4 A Yes.

5 Q And who said that?

6 A I believe it was Momo Chen under Anderson Chen's
7 approval.

8 Q Did Anderson actually promise you exclusivity, or
9 did Momo tell you Anderson said you had exclusivity?

10 A As I recall, they told -- it was Anderson's
11 approval that we're going to get exclusivity on the Galaxy
12 Metal Gear.

13 Q Okay. The enclosures?

14 A Enclosures.

15 Q And when was that?

16 A It should be around, based on my knowledge, maybe
17 around 2005.

18 Q So around the time you first agreed to buy Galaxy
19 Metal Gear from -- well, strike that.

20 Around the time Galaxy Metal Gear first started
21 buying product from datastor, Galaxy Metal Gear was
22 promised exclusivity by Momo Chen?

23 A Yes.

24 Q Did you believe that promise of exclusivity?

25 A Yes.

1 Q Did you get a written confirmation of exclusivity?

2 A We -- we might have. We might have.

3 Q You're not sure?

4 A I'm not sure.

5 Q Okay. Was it your understanding that you still
6 have exclusivity with datastor?

7 A On Galaxy Metal Gear, correct.

8 Q Do you believe your understanding is reasonable?

9 A Yes.

10 Q Do you know whether datastor has offered Galaxy
11 Metal Gear enclosures to other importers?

12 A No.

13 Q Would it surprise you if you found out that Galaxy
14 Metal Gear enclosures were being offered for sale by
15 datastor to other importers?

16 A Yes.

17 Q Do you believe it's reasonable to rely on
18 datastor's promise of exclusivity?

19 A If it's reasonable to rely on them, yes.

20 Q Okay. Other than the one product that's depicted
21 in Exhibit Number 1, do you have any other documents that
22 show CompUSA sold Metal Gear enclosures?

23 A Any other documents?

24 Q Right.

25 A No.

1 Q Isn't it true the first aluminum one came out
2 around 2003?

3 A I'm not sure.

4 Q Well, if somebody said the first aluminum one came
5 out in 2003, you would not dispute that, would you?

6 A I would not dispute that.

7 Q Okay. Have you talked with any of the prior
8 owners or salespeople of CompUSA to see when they first got
9 involved in the Metal Gear business?

10 A No.

11 Q Do you know who any of those people are?

12 A No.

13 Q After CompUSA went bankrupt, then their Web site
14 or web name or whatever was bought by Tiger Direct or
15 something, wasn't it?

16 A Correct.

17 Q Do you recall when that was?

18 A In 2008. Could be 2007. I don't know. Maybe.
19 I'm not sure.

20 Q Do you know, talking about the old CompUSA before
21 Tiger Direct bought them, do you know when the old CompUSA
22 last purchased Metal Gear enclosures from datastor?

23 A I don't know.

24 Q Do you know if it was 2006?

25 A I'm not sure.

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Q 2005?

A (Nods.)

Q Don't know?

A Don't know.

Q 2007?

A Don't know.

Q It would just be a guess, right?

A Yes.

MR. OLSON: Okay. Why don't we take, like, a short break. I'm kind of finished with the fraud thing, then the rest of it should go pretty quick.

MR. LEE: Okay.

(Off the record.)

MR. OLSON: Back on record.

MR. LEE: Just one point of clarification. When deponent was asked about being promised exclusivity by datastor, that exclusivity refers to Galaxy Metal Gear box, and we just try to clarify this.

MR. OLSON: Right.

BY MR. OLSON:

Q Just so it's clear. Galaxy -- your company was promised exclusivity by datastor with regard to Galaxy Metal Gear box enclosures?

A Correct.

Q Your company was not promised exclusivity with

1 regard to Metal Gear enclosures?

2 A Correct.

3 Q By the way, would it be fair to say that you have
4 no personal knowledge of how the Metal Gear mark was
5 created?

6 A No.

7 Q That's true, correct?

8 A That's true.

9 Q Okay. And is it true you have no personal
10 knowledge of the date the Metal Gear mark was created?

11 A That's true.

12 Q Is there anything about the mark Metal Gear that
13 tells you about the quality of the enclosure?

14 MR. LEE: Objection, calling for legal conclusion.

15 THE WITNESS: Is there anything that -- no.

16 BY MR. OLSON:

17 Q Okay. By the way, other than the video game Metal
18 Gear, have you seen Metal Gear used as a trademark on any
19 products other than the enclosures manufactured by
20 datastor?

21 A Metal Gear other than the video game? There's
22 gear and then gear box -- there's game gear, but I have no
23 idea.

24 Q But in the computer field, other than the video
25 game Metal Gear, have you seen it, Metal Gear on anything

1 other than enclosures?

2 A Other than enclosures?

3 Q Right.

4 A I'm not sure.

5 Q Have you seen Metal Gear on enclosures
6 manufactured by someone other than datastor or DAT?

7 A No.

8 Q Does the term -- the -- strike that.

9 Does the mark Metal Gear convey to you some kind
10 of idea about the function of the enclosure?

11 MR. LEE: Objection, calling for legal conclusion.

12 THE WITNESS: No.

13 BY MR. OLSON:

14 Q Does the mark Metal Gear convey some kind of idea
15 about one of the parts or ingredients of the enclosure?

16 MR. LEE: Same objection.

17 THE WITNESS: No.

18 BY MR. OLSON:

19 Q Does the mark Metal Gear convey to you some kind
20 of idea about the characteristic of the enclosure?

21 MR. LEE: Same objection.

22 THE WITNESS: No.

23 BY MR. OLSON:

24 Q Does the mark Metal Gear convey to you some idea
25 about one of the features of the enclosure?

1 A No.

2 MR. LEE: Same objection.

3 BY MR. OLSON:

4 Q What -- what's your job duty at Galaxy Metal Gear?

5 A I sell enclosures to customers. And I do some
6 exports for the customers, too.

7 Q Are you the only one who does sales or other
8 people do sales?

9 A Other people do sales.

10 Q Do the three officers all do sales?

11 A Yes.

12 Q Is the customer list divided somehow or is it just
13 based on who you know?

14 A It's divided, but we help each other out, too.

15 Q Is it divided, like, by territory? Like, some
16 people have East Coast, some people have West Coast?

17 A No. It's just divided to whoever gets to talk to
18 the customers, whoever takes care of the customers.

19 Q Your company is a small company, right?

20 A Correct.

21 Q How many employees total do you have?

22 A Four.

23 Q Four.

24 A Five.

25 Q Five?

1 multimedia enclosures.

2 Q Do you sell cables with Metal Gear -- or Galaxy
3 Metal Gear on them?

4 A Galaxy mark on the cables.

5 Q Anything other than enclosures and cables?

6 A Not that I know of.

7 Q How did --

8 A Switch. Yeah, there's a switch, HDMI, with
9 Galaxy mark on it.

10 MR. LEE: What kind of switch?

11 THE WITNESS: HDMI switch.

12 BY MR. OLSON:

13 Q And the HDMI switch basically allows you to plug
14 multiple devices into the switch. And then one goes to the
15 TV set so that you can have -- if you only had one HDMI
16 slot on your TV, you can use multiple devices, right?

17 A Correct.

18 Q Any other products you sell with Galaxy Metal Gear
19 on it?

20 A So far, that's it.

21 Q How about with Metal Gear, do you sell anything
22 other than enclosures?

23 A Metal Gear? Just enclosures.

24 Q Is there anything about the trademark Metal Gear
25 that makes you think it describes the enclosure?

1 MR. LEE: Objection, calling for legal conclusion.

2 THE WITNESS: No.

3 MR. OLSON: Okay. I think that's it. Let's go
4 off the record.

5 (Off the record.)

6 MR. OLSON: Back on record.

7 BY MR. OLSON:

8 Q Are you also selling a product, the D-I-V-X, DivX?

9 A That's the multimedia.

10 Q Multimedia?

11 A Yes.

12 Q Can you describe what that is?

13 A It's a device -- it's an enclosure that you can
14 put a hard drive on, you can hook it up directly to your TV
15 and view your pictures, your movies, and play that on the
16 TV.

17 Q Now, DivX, that's a kind of format that's used for
18 movies and things, right?

19 A Correct.

20 Q Okay.

21 A It's a decoding format.

22 Q Right. Like mpeg or something else, correct?

23 A Correct.

24 Q Now, you're not claiming that's a trademark of
25 yours, are you?

EXHIBITS

EXHIBIT A

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

EXHIBIT B

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

3
4 In the matter of Application Serial No.: 78914975
5 Filed: 6/22/2006
6 Mark: METAL GEAR

7 GALAXY METAL GEAR, INC.,
8 Opposer,
9 vs.
10 DIRECT ACCESS TECHNOLOGY, INC.
11 Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

12
13
14 **OPPOSER'S INITIAL DISCLOSURES**

15
16 Pursuant to 37 CFR Part 2 of the Code of Federal Regulations, Opposer, Galaxy Metal
17 Gear, Inc. ("Galaxy" hereinafter), by its attorneys of record, hereby provide the following
18 initial disclosures. The disclosures are based on documentation and information that are
19 currently and reasonably available to Galaxy at this time. Galaxy reserves its right to modify
20 these disclosures based on discovery, investigation, or any new or revised information that is
21 made available to Galaxy or is or may be discovered.

22
23
24 A. KNOWN WITNESSES

25
26 On information and belief, Galaxy provides the name and, if known, the address and
27 telephone number of each individual likely to have discoverable information that Galaxy may
28

1 use to support Galaxy's claims or refute Applicant's defenses unless solely for impeachment, as
2 follows:

- 3
4
5 1) Antonio Tan
6 c/o Kenneth Tanji, Jr.
7 WorldEsquire Law Firm LLP
8 80 South Lake Avenue, #708
9 Pasadena, CA 91101
10 Telephone: (626) 795-5555
11 Fax: (626) 795-5533
12

13 Antonio Tan is an officer of Galaxy. Tan will provide testimony and regarding his
14 knowledge of the operations of Galaxy, including but not limited to the corporate structure and
15 sales and marketing of products by Galaxy; the sales and marketing of products by DataStor
16 Technology; and the sales and marketing of products by Applicant.
17
18

- 19
20 2) Gary Ching
21 c/o Kenneth Tanji, Jr.
22 WorldEsquire Law Firm LLP
23 80 South Lake Avenue, #708
24 Pasadena, CA 91101
25 Telephone: (626) 795-5555
26 Fax: (626) 795-5533
27
28

Opposer's Initial Disclosures

1 Gary Ching is an officer of Galaxy. Gary Ching will provide testimony and regarding
2 his knowledge of the operations of Galaxy, including but not limited to the corporate structure
3 and sales and marketing of products by Galaxy; the sales and marketing of products by
4 DataStor Technology; and the sales and marketing of products by Applicant.
5

6
7 3) Geoffrey Ching
8 c/o Kenneth Tanji, Jr.
9
10 WorldEsquire Law Firm LLP
11 80 South Lake Avenue, #708
12 Pasadena, CA 91101
13 Telephone: (626) 795-5555
14 Fax: (626) 795-5533
15

16 Geoffrey Ching is an officer of Galaxy. Geoffrey Ching will provide testimony and
17 regarding his knowledge of the operations of Galaxy, including but not limited to the corporate
18 structure and sales and marketing of products by Galaxy; the sales and marketing of products
19 by DataStor Technology; and the sales and marketing of products by Applicant.
20

21
22 4) Anderson Wang
23 DataStor Technology
24 4F, No. 393, Jixian Road
25 Luzhou City, Taipei County 247, Taiwan (R.O.C.)
26 Telephone: 886-2-2285-9120
27 Fax: 886-2-2285-9011
28

Opposer's Initial Disclosures

1 Anderson Wang is an officer of DataStor. Wang will provide testimony and regarding
2 his knowledge of the operations of DataStor, including but not limited to the corporate structure
3 and sales and marketing of products by DataStor; the sales and marketing of products by
4 Galaxy; and the sales and marketing of products by Applicant.
5

6 Discovery and investigation is continuing for other witnesses that have knowledge of
7 relevant matters.
8

9
10 B. DOCUMENTS AND THINGS

11 Galaxy identifies the following documents and things, as defined by the Evidence Code,
12 that are currently in its possession, custody, or control and that Galaxy may use to support
13 Galaxy's claims or refute Applicant's defenses unless solely for impeachment, as follows:
14

15
16 1) Documents pertaining to the registration of the trademark "Metal Gear" by
17 Applicant.

18 2) Documents pertaining to the registration of other trademarks similar to "Metal
19 Gear," including but not limited to "Metal Gear," "Tune Gear," "Yukon Gear & Axle," "Pet
20 Gear Inc.," "Metal Shop,"
21

22 Discovery and investigation is continuing for other documents that are in the custody
23 and control of other parties and entities.
24

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26 C. DAMAGES

27 None. Galaxy is not seeking monetary damages in this proceeding.
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D. INSURANCE

There is no liability insurance policy covering Galaxy for the claims in this action.

Dated: August , 2008

Respectfully submitted,
/ktanji/

WorldEsquire Law Firm
Jen-Feng (Jeff) Lee
Attorneys for Opposer,
Galaxy Metal Gear Inc.
WorldEsquire Law Firm
80 S. Lake Ave., #708
Pasadena, CA 91101
Tel: 626-795-5555
Fax: 626-795-5533

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CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a copy of the foregoing Applicant's Answer to Notice of Opposition was served on the Opposer by mailing a true copy thereof by first class mail, postage prepaid to the following address on August 28, 2007.

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

/jflee/

Jen-Feng Lee

Opposer's Initial Disclosures

Typed Drawing

Word Mark HEALTH GEAR

Goods and Services IC 025. US 022 039. G & S: Medical professional and patient clothing; namely jackets, pants, shirts, skirts, tops, bottoms, gowns, dresses, robes, shorts, belts, headwear. FIRST USE: 19920901. FIRST USE IN COMMERCE: 19920901

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78253727

Filing Date May 23, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition February 10, 2004

Registration Number 2838781

Registration Date May 4, 2004

Owner (REGISTRANT) Health Gear Inc CORPORATION CONNECTICUT
17 Cricket Lane Burlington CONNECTICUT 06013

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE
"GEAR" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

Typed Drawing

Word Mark MOMMY GEAR

Goods and Services IC 035. US 100 101 102. G & S: retail stores and online retail stores featuring breastfeeding, maternity and baby products, namely, breastfeeding clothing; maternity clothing; baby blankets; infant and toddler clothing; nursing bras; maternity bras; breastpumps; breastfeeding equipment; educational material such as books, magazines and videos relating to pregnancy, breastfeeding and parenting; breast pads; breast milk storage products; baby slings; baby carriers; maternity support pillows; breastfeeding support pillows; infant and toddler feeding products; infant and toddler toys; food, beverage and supplement products for pregnant and breastfeeding mothers. FIRST USE: 19960700. FIRST USE IN COMMERCE: 19960700

Mark Drawing Code (1) TYPED DRAWING

Serial Number 76504080

Filing Date April 4, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition November 25, 2003

Registration Number 2814822

Registration Date February 17, 2004

Owner (REGISTRANT) Mommy Gear, Ltd. CORPORATION
PENNSYLVANIA 110 Oakview Drive Ligonier PENNSYLVANIA 15658

Attorney of Record Thomas C. Wettach

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GEAR" APART FROM THE MARK AS SHOWN

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE



Word Mark NIGHT GEAR

Goods and Services IC 009. US 021 023 026 036 038. G & S: Binoculars, Monoculars, Image-Spotting Vision Scopes and Lenses therefor. FIRST USE: 20021007. FIRST USE IN COMMERCE: 20021007

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 01.01.03 - Star - a single star with five points
26.09.02 - Plain single line squares; Squares, plain single line
26.09.12 - Squares with bars, bands and lines
26.11.21 - Rectangles that are completely or partially shaded
26.11.27 - Oblongs not used as carriers for words, letters or designs

Serial Number 76462022

Filing Date October 25, 2002

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition December 30, 2003

Registration Number 2824587

Registration Date March 23, 2004

Owner (REGISTRANT) ELITE BRANDS INC. CORPORATION NEW YORK 350 FIFTH AVENUE, SUITE 821 NEW YORK NEW YORK 10118

Attorney of Record RICHARD E. CARMEN

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "NIGHT GEAR" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

yped Drawing

Word Mark CLEVER GEAR
Goods and Services IC 035. US 100 101 102. G & S: Mail order catalog services featuring general merchandise and electronics. FIRST USE: 20000424. FIRST USE IN COMMERCE: 20000424
Mark Drawing Code (1) TYPED DRAWING
Serial Number 76325611
Filing Date October 15, 2001
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition April 9, 2002
Registration Number 2588447
Registration Date July 2, 2002
Owner (REGISTRANT) Johnson Smith Company CORPORATION
FLORIDA 4514 19th St Ct East Bradenton FLORIDA 34203
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE
"GEAR" APART FROM THE MARK AS SHOWN
Type of Mark SERVICE MARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE



Word Mark ROAD GEAR

Goods and Services IC 028. US 022 023 038 050. G & S: playthings, namely, die cast toy vehicles; die cast toy vehicle play sets; large toy vehicles, namely, cars, trucks, flight vehicles, boats, and recreational sports vehicles; battery operated toy vehicles; remote control toy vehicles; radio controlled toy vehicles; toy trains; and model race toy vehicle sets. FIRST USE: 19990915. FIRST USE IN COMMERCE: 19991001

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 18.11.01 - Inner tubes; Tire marks; Tires; Tubes, tire
26.05.02 - Plain single line triangles; Triangles, plain single line
26.05.21 - Triangles that are completely or partially shaded
26.17.07 - Heat, lines depicting; Lines depicting speed, propulsion, heat or wind; Propulsion, lines depicting; Speed, lines depicting; Wind, lines depicting

Serial Number 76112675

Filing Date August 18, 2000

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition July 31, 2001

Registration Number 2600295

Registration Date July 30, 2002

Owner (REGISTRANT) SHOPKO STORES, INC. CORPORATION WISCONSIN 700 Pilgrim Way Green Bay WISCONSIN 54304

(LAST LISTED OWNER) SHOPKO STORES OPERATING CO., LLC CORPORATION DELAWARE 700 PILGRIM WAY GREEN BAY WISCONSIN 54307

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record SUSAN A BUCKNA

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GEAR" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

Typed Drawing

Word Mark METAL SHOP

Goods and Services IC 006. US 002 012 013 014 023 025 050. G & S: metal hardware and fasteners, namely, hinges, brackets, pull handles, corner irons, angle irons, braces, stove bolts, hanger bolts, toggle bolts, machine screws, sheet metal screws, screw eyes, cup hooks, shoulder hooks, washers, picture hangers, cap nuts, screw anchors, sleeve anchors, drive-in anchors, thumb tacks, lag shields, case catches, and gate catches. FIRST USE: 19931013. FIRST USE IN COMMERCE: 19940401

Mark Drawing Code (1) TYPED DRAWING

Serial Number 75180816

Filing Date October 15, 1996

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition September 16, 1997

Registration Number 2119468

Registration Date December 9, 1997

Owner (REGISTRANT) Menard, Inc. CORPORATION WISCONSIN 4777 Menard Drive Eau Claire WISCONSIN 54703

Attorney of Record Robert L. Geske

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "METAL" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20071015.

Renewal 1ST RENEWAL 20071015

Live/Dead Indicator LIVE

METAL GEAR

Word Mark METAL GEAR

Goods and Services IC 041. US 100 101 107. G & S: Entertainment services, namely, providing on-line non-downloadable computer games via wireless Internet to video game machines, mobile phones and computers; providing online computer games via network between communications networks and computers. FIRST USE: 20060314. FIRST USE IN COMMERCE: 20060314

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 76645897

Filing Date August 30, 2005

Current Filing Basis 1A

Original Filing Basis 1B

Published for Opposition January 30, 2007

Registration Number 3379063

Registration Date February 5, 2008

Owner (REGISTRANT) KONAMI DIGITAL ENTERTAINMENT CO., LTD. CORPORATION JAPAN 9-7-2 Akasaka, Minato-ku Tokyo JAPAN

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record JEFFREY H. KAUFMAN

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

metal gear

Word Mark	METAL GEAR
Goods and Services	IC 009. US 021 023 026 036 038. G & S: enclosures for external computer hard drives. FIRST USE: 20030514. FIRST USE IN COMMERCE: 20030514
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78914975
Filing Date	June 22, 2006
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 22, 2008
Owner	(APPLICANT) Direct Access Technology Inc CORPORATION CALIFORNIA 19957 East Harrison City of Industry CALIFORNIA 91789
Attorney of Record	Michael C. Olson
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "METAL" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

Typed Drawing

Word Mark METAL GEAR

Goods and Services IC 028. US 022 023 038. G & S: COMPUTER GAME PROGRAMS, VIDEO OUTPUT GAME MACHINES, AND INSTRUCTIONAL MATERIALS THEREFOR. FIRST USE: 19880107. FIRST USE IN COMMERCE: 19880107

Mark Drawing Code (1) TYPED DRAWING

Serial Number 73729672

Filing Date May 20, 1988

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition May 9, 1989

Registration Number 1550282

Registration Date August 1, 1989

Owner (REGISTRANT) ULTRA SOFTWARE CORPORATION
CORPORATION ILLINOIS 240 GERRY STREET WOOD DALE
ILLINOIS 601911118

(LAST LISTED OWNER) KONAMI DIGITAL ENTERTAINMENT
CO., LTD. CORPORATION JAPAN 6-10-1, ROPPONGI, MINATO-
KU TOKYO JAPAN

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record KATHLEEN A. RHEINTGEN

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

Live/Dead Indicator LIVE

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/563772

APPLICANT: Vermont Juvenile Furniture Manufacturing ETC.

76563772

CORRESPONDENT ADDRESS:
KEVIN ELLICOTT
ELLCOTT & ELLICOTT
1 SCALE AVENUE
SUITE 112
RUTLAND, VT 05701

RETURN ADDRESS:
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

MARK: PET GEAR INC

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE.

Serial Number 76/563772

The assigned examining attorney has reviewed the referenced application and determined the following:

Search Results

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

Nevertheless, the applicant's mark cannot be approved for publication unless and until the following issues are satisfactorily addressed:

Identification of Goods

The identification of goods is unacceptable because it contains items that are classified in more than one International

Exhibit B, page 16

Class. Specifically, animal crates are in Class 21 and animal bedding is in Class 20. The applicant must amend the application to either delete one class of goods or follow the procedure for prosecuting a combined class application.

The applicant may amend to adopt one or both of the following, if accurate:

Animal bedding, namely, cedar bedding housed within a container, a soft and pliable polyurethane foam overlay, all wrapped within a pliable soft covering, in International Class 20.

Animal containers, namely, foldable collapsible crates, in International Class 21.

Please note that, while the identification of goods may be amended to clarify or limit the goods, adding to the goods or broadening the scope of the goods is not permitted. 37 C.F.R. §2.71(a); TMEP §1402.06. Therefore, applicant may not amend the identification to include goods that are not within the scope of the goods set forth in the present identification.

Disclaimer

Applicant must disclaim all wording in the mark because it merely describes the applicant's goods. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.03(a). GEAR is defined as "clothing and accessories". See the attached definition. Thus, PET GEAR is descriptive of accessories for pets, such as the applicant's animal containers and bedding. INC. must be disclaimed, as it is merely an entity designation. The examining attorney has attached copies of registrations for marks in which GEAR has been disclaimed. This is further evidence that this portion of the applicant's mark is descriptive.

The computerized printing format for the Office's *Trademark Official Gazette* requires a standardized format for a disclaimer. TMEP §1213.08(a)(i). The following is the standard format used by the Office:

No claim is made to the exclusive right to use "PET GEAR, INC." apart from the mark as shown.

See In re Owatonna Tool Co., 231 USPQ 493 (Comm'r Pats. 1983).

If the applicant has any questions or needs assistance in responding to this Office Action, please contact the assigned examining attorney.

/Kimberly Frye/

Kimberly Frye

Trademark Examining Attorney

Law Office 113

(703) 308-9113 ext. 125



Word Mark PET GEAR INC

Goods and Services IC 020. US 002 013 022 025 032 050. G & S: ANIMAL BEDDING, NAMELY, CEDAR BEDDING HOUSED WITHIN A CONTAINER, A SOFT AND PLIABLE POLYURETHANE FOAM OVERLAY, ALL WRAPPED WITHIN A PLIABLE SOFT COVERING. FIRST USE: 20030401. FIRST USE IN COMMERCE: 20031119

IC 021. US 002 013 023 029 030 033 040 050. G & S: ANIMAL CONTAINERS, NAMELY, FOLDABLE COLLAPSIBLE CRATES. FIRST USE: 20030401. FIRST USE IN COMMERCE: 20031119

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 03.13.01 - Feet, animal; Foot prints, nonhuman; Paws and paw prints

Serial Number 76563772

Filing Date December 8, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition April 19, 2005

Registration Number 2965888

Registration Date July 12, 2005

Owner (REGISTRANT) Vermont Juvenile Furniture Manufacturing, Inc. CORPORATION VERMONT 192 Sheldon Ave. West Rutland VERMONT 05777

Attorney of Record Kevin Ellicott

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PET GEAR, INC". APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

#

#



Word Mark YUKON GEAR & AXLE

Goods and Services IC 012. US 019 021 023 031 035 044. G & S: AXLE AND DIFFERENTIAL COMPONENTS FOR LAND VEHICLES, NAMELY, PINION NUTS, PINION NUT WASHERS, PINION YOKE, PINION FLANGE, DUST SHIELDS, PINION SEALS, SLINGERS, FRONT PINION BEARINGS, FRONT PINION RACES, CRUSH SLEEVES, AXLE HOUSING, WHEEL BEARINGS, OUTER AXLE SEALS, AXLES, AXLE STUDS, BACKING PLATE NUTS, BACKING PLATE BOLT, SIDE GEAR THRUST WASHERS, SIDE GEARS, PINION GEARS, PINION GEAR THRUST WASHERS, C-CLIPS, CROSS PIN SHAFT, CARRIER SHIMS, CARRIER BEARING RACE, CARRIER BEARING CAPS, CARRIER BEARING CAP BOLTS, CARRIER BEARING, RING GEAR BOLTS, COVER BOLTS, COVERS, FILL PLUGS, OPEN CARRIER CASES, CROSS PIN BOLTS, RING GEARS, PINION GEARS, RING AND PINION SETS, PINION DEPTH SHIMS, REAR PINION BEARING, REAR PINION RACES, BAFFLES, PRE LOAD PLATES, DRIVEN CLUTCHES, DRIVE CLUTCHES, CLUTCH GUIDES, LIMITED SLIP DIFFERENTIAL CARRIER CASES, LIMITED SLIP CARRIER CASES, THIRD MEMBER CASES, SPOOLS, MINI-SPOOLS, ANTILOCK BRAKE SYSTEM EXCITER TONE RINGS, AXLE BEARING RETAINERS, STUB AXLES, PILOT BEARINGS, PINION SUPPORTS, LIMITED SLIP DIFFERENTIALS. FIRST USE: 19990401. FIRST USE IN COMMERCE: 19990401

IC 037. US 100 103 106. G & S: Installation of axle and differential components for land vehicles. FIRST USE: 19990401. FIRST USE IN COMMERCE: 19990401

Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 03.01.14 - Bears other than Panda bears; Bears, koala; Bears, polar; Black bears; Grizzly bears; Koala bears; Polar bears
 03.01.16 - Heads of cats, dogs, wolves, foxes, bears
 03.01.24 - Stylized cats, dogs, wolves, foxes, bears
 18.15.03 - Other road signs
 24.17.14 - Ampersands (&); At symbol (@); Brackets, punctuation; Commas; Diacritical marks; Emoticons (icons expressing emotion); Exclamation points (!); Punctuation marks; Question marks (?)

Serial Number 75696891
Filing Date May 3, 1999
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition March 5, 2002
Registration 2572544

#

#

TARR Status **ASSIGN Status** **TDR** **TTAB Status** (Use the "Back" button of the Internet Browser to return to TESS)

TUNE GEAR

Word Mark TUNE GEAR
Goods and Services IC 009. US 021 023 026 036 038. G & S: Cases for electronic devices, namely, cd players, mp3 players. FIRST USE: 20051001. FIRST USE IN COMMERCE: 20051001
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Design Search Code
Serial Number 78675995
Filing Date July 22, 2005
Current Filing Basis 1A
Original Filing Basis 1B
Published for Opposition April 18, 2006
Registration Number 3178553
Registration Date November 28, 2006
Owner (REGISTRANT) FONEGEAR, LLC LTD LIAB CO MICHIGAN 269 Executive Drive Troy MICHIGAN 48083
Attorney of Record Julie A. Greenberg
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GEAR" APART FROM THE MARK AS SHOWN
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

#

EXHIBIT C



Merriam-Webster
OnLine

- Home
- Visit Our Sites
- Premium Services
- Downloads
- Word of the Day
- Word Games
- Open Dictionary
- Spelling Bee Hive
- Word for the Wise
- Online Store
- Help
- About Us

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Dictionary Thesaurus Spanish/English Medical

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| 7. metameres | 8. middle-ager |
| 9. materiels | 10. materiel |
| 11. mattered | 12. metered |
| 13. metalworks | 14. meteoroidal |
| 15. metalloidal | 16. nettle rash |
| 17. metamere | 18. materials |
| 19. materially | 20. meter maid |

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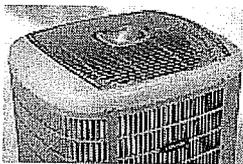
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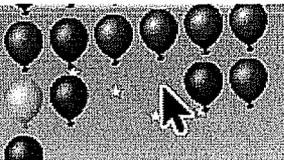
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- metagalaxy
- metage
- metagenesis
- metagnathous
- Metairie
- metal
- metal.
- metal detector
- metallanguage
- metaldehyde
- metalhead
- metalinguistic
- metalinguistics
- metall-
- metall.
- metallic
- metallic bond

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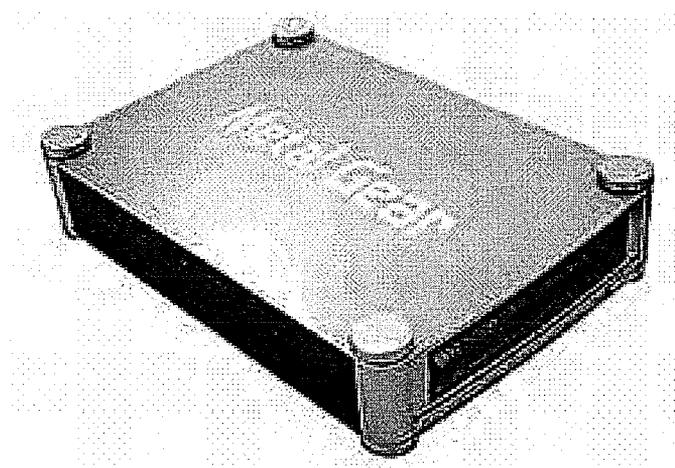


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METAL GEAR

Word Mark	METAL GEAR
Goods and Services	IC 011. US 013 021 023 031 034. G & S: Flashlights. FIRST USE: 20050703. FIRST USE IN COMMERCE: 20050703
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78622615
Filing Date	May 4, 2005
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	March 7, 2006
Registration Number	3190111
Registration Date	December 26, 2006
Owner	(REGISTRANT) Dorcy International, Inc. CORPORATION OHIO 2700 Port Road Columbus OHIO 43217
Attorney of Record	Kathleen A. Kress
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "METAL" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Registration Number: 3190111

Mark

METAL GEAR

(words only): METAL GEAR

Standard Character claim: Yes

Current Status: Registered.

Date of Status: 2006-12-26

Filing Date: 2005-05-04

Transformed into a National Application: No

Registration Date: 2006-12-26

Register: Principal

Law Office Assigned: LAW OFFICE 111

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 650 -Publication And Issue Section

Date In Location: 2006-11-17

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Dorcy International, Inc.

Address:

Dorcy International, Inc.
2700 Port Road

Columbus, OH 43217
United States
Legal Entity Type: Corporation
State or Country of Incorporation: Ohio
Phone Number: 614/497-5830

GOODS AND/OR SERVICES

International Class: 011
Class Status: Active
Flashlights
Basis: 1(a)
First Use Date: 2005-07-03
First Use in Commerce Date: 2005-07-03

ADDITIONAL INFORMATION

Disclaimer: "METAL"

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PROSECUTION HISTORY

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- 2006-12-26 - Registered - Principal Register
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- 2006-11-01 - Assigned To LIE
- 2006-10-25 - Allowed for Registration - Principal Register (SOU accepted)
- 2006-10-20 - Statement of use processing complete
- 2006-09-22 - Amendment to Use filed
- 2006-09-22 - TEAS Statement of Use Received
- 2006-05-30 - Noa Mailed - SOU Required From Applicant
- 2006-03-07 - Published for opposition
- 2006-02-15 - Notice of publication

2006-01-26 - Law Office Publication Review Completed
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2006-01-04 - Teas/Email Correspondence Entered
2005-12-29 - Communication received from applicant
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2005-12-05 - Non-final action e-mailed
2005-12-05 - Non-Final Action Written
2005-12-02 - Assigned To Examiner
2005-05-12 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

Kathleen A. Kress

Correspondent

KATHLEEN A. KRESS
SHUMAKER, LOOP & KENDRICK, LLP
1000 JACKSON ST
TOLEDO, OH 43624-1573
Phone Number: 419/321-1292
Fax Number: 419/241-6894

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