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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

LOUIS VUITTON MALLETIER, S.A.,

Plaintiff,

vs.

AKANOC SOLUTIONS, INC., et al.,

Defendants.

) Case No.: C 07-3952 JW (HRL)

) **DEFENDANTS' MOTION IN LIMINE #4**
) **TO EXCLUDE ALL TESTIMONY ABOUT**
) **COUNTERFEITING IN CHINA**

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 Defendants Akanoc Solutions, Inc., Managed Solutions Group, Inc. and Steve Chen
3 (“Defendants”) move for an order, in limine, precluding Plaintiff Louis Vuitton Malletier from
4 offering in evidence testimony about counterfeiting in China. This motion is set for hearing on
5 March 23, 2009.

6 Defendants move the Court to exclude testimony about counterfeiting in China on the
7 grounds that such testimony is inadmissible under Fed. R. Evid. 403 because it has no probative
8 value and is highly prejudicial.

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10 **I. AN ORDER IN LIMINE IS PROPER TO EXCLUDE TESTIMONY ABOUT DEFENDANTS’ ALLEGED REPUTATION**

11 A motion in limine is “any motion whether made before or during trial to exclude anticipated
12 prejudicial evidence before the evidence is actually offered.”¹ Obtaining a discretionary advance
13 ruling on the admission of specific evidence or resolving critical evidentiary issues at the outset
14 enhances the efficiency of the trial process.² Authority is also implied from “the district court’s
15 inherent authority to manage the course of trials.”³

16 Defendants move for this order in limine because it is anticipated that Vuitton will attempt to
17 provide testimony about counterfeiters in China that are not related, in any way, to any of the
18 Defendants in this case. Vuitton has tried to offer this testimony for no other reason but to create the
19 inference that because Defendant Chen is of Chinese descent, his support staff is of Chinese descent
20 and some of Defendants’ customers are located in China, they somehow must be affiliated with
21 counterfeiting activities in China. Admission of this testimony would not go towards proving any
22 material element of Vuitton’s case and would instead unduly prejudice the jury, thereby violating
23 Fed. R. Evid. 403.

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26 ¹*Luce v. United States*, 469 U.S. 38, 40 (1984).

27 ²*In re Japanese Electronic Products Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev’d on*
other grounds, 475 U.S. 574 (1986).

28 ³*Luce*, 469 U.S. at 41 n.4; *United States v. Holmquist*, 36 F.3d 154, 163 (1st Cir. 1994).

1 **II. STATEMENTS ABOUT COUNTERFEITING IN CHINA ARE INADMISSIBLE**
2 **UNDER FED. R. EVID. 403**

3 In opposition to Defendants’ motion for summary judgment, Vuitton offered testimony from
4 Nicolay Livadkin and Robert Holmes about counterfeiting operations in China. Such testimony
5 should be excluded at trial because it has no probative value and is highly prejudicial.

6 Nicolay Livadkin has testified that:

7 A significant percentage of the overall online counterfeiting activity as
8 it relates to the Louis Vuitton brand originates in the People’s
9 Republic of China.⁴

10 95 percent of all counterfeit products are manufactured in China.⁵

11 Chin[a] is a country where intellectual property is probably not as
12 perceived as so important as it is in western countries.⁶

13 Robert Holmes has testified that:

14 At least 75 percent of the cases I investigate with ‘Chinese
15 individuals,’ I mean Chinese in China, they often work with hosts who
16 set up stores for them.⁷

17 The common practice in China is to hire a drop-shipper to ship your
18 packages. The counterfeit trade is very segmented.⁸

19 This type of testimony should be excluded because it does not prove a material element of
20 either cause of action and instead prejudices the jury against the Defendants. This is not permissible
21 under Fed. R. Evid. 403, which states “evidence may be excluded if its probative value is
22 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the
23 jury.” It is prohibited ethnic stereotyping.

24 The elements of contributory copyright infringement are (1) knowledge of another’s
25 infringement and (2) either (a) material contribution to the infringement or inducement of the
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27 ⁴ Declaration of James A. Lowe (“Lowe Decl.”) ¶6, “**Exhibit 1513**” Declaration of Nicolay
28 Livadkin (“Livadkin Decl.”) ¶4]

⁵ Lowe Decl. ¶4, “**Exhibit 1518**”, Deposition of Nicolay Livadkin (“Livadkin Depo.”) 22:14-16

⁶ *Id.* at Livadkin Depo. 24:1-3

⁷ Lowe Decl. ¶5, “**Exhibit 1519**” Deposition of Robert Holmes (“Holmes Depo.”) 90:1-5

⁸ *Id.* at Holmes Depo. 77:16-20

1 infringement. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 807 (9th Cir. (Cal.) 2007). The
2 elements of contributory trademark infringement are (1) intentional inducement of infringement and
3 (2) continuing to supply an infringing product to an infringer with knowledge that the infringer is
4 mislabeling the product supplied. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855, 102
5 S.Ct. 2182, 72 L.Ed.2d 606 (1982). When providing a service, the second prong of the *Inwood* test
6 may be satisfied by showing “direct control or monitoring.” *Lockheed Martin Corp. v. Network*
7 *Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir.1999). Any statement about counterfeiting in China is
8 not direct evidence that proves any element of either cause of action as it pertains to the Defendants.
9 This testimony does not show that Defendants had knowledge of individual users’ infringement. It
10 does not show that Defendants materially contributed to or induced infringement. It does not show
11 that Defendants directly controlled or monitored infringing activities. Admission of this testimony
12 would be akin to admitting testimony that “many Italian people are involved in organized crime” in a
13 case against a Defendant of Italian descent on trial for criminal activity. Such testimony is
14 prejudicial and its almost nonexistent probative value is heavily outweighed by its prejudicial nature.

15 Holmes and Livadkin’s testimony about Chinese counterfeiters would have a unduly
16 prejudicial effect on the jury by causing them to believe that Defendants’ obvious connection with
17 China suggests association with Chinese counterfeiters. The Ninth Circuit has explicitly ruled that
18 such testimony is inadmissible. In *U.S. v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000), the Ninth
19 Circuit overruled a District Court’s admission of witness testimony about the ethnicity of “other
20 Cuban drug dealers” on the basis that such testimony was not relevant and “merely made it seem
21 more likely in the eyes of the jury that [Defendants] Cabrera and Mulgado were drug dealers because
22 of their ethnicity.” The Ninth Circuit emphasized that such testimony was not admissible under Rule
23 403 because “People cannot be tried on the basis of their ethnic backgrounds or national origin.” *Id.*
24 at 597.

25 In *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9th Cir. 2001), the Ninth
26 Circuit explicitly emphasized that such testimony is inadmissible in civil cases. In *Jinro*, the Court
27 overruled a District Court’s admission of a witness’ testimony about “the propensity of Korean
28 businesses” to evade Korean currency laws through various illegal schemes. *Id.* at 1005-1006. Even

1 though the witness claimed that his “impressionistic generalizations about Korean businesses [were]
2 based on his personal investigative experiences,” the Ninth Circuit held that “allowing an expert
3 witness in a civil action to generalize that most Korean businesses are corrupt, are not to be trusted
4 and will engage in complicated business transactions to evade Korean currency laws is tantamount to
5 ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype.”
6 *Id.* at 1005, 1007.

7 Livadkin’s prior testimony about counterfeiting in China is “tantamount to ethnic or cultural
8 stereotyping.” His testimony does not have any probative value because it would not be material or
9 relevant and because it does not make any relevant fact more or less likely. Because the probative
10 value is outweighed by the prejudicial effect, the Court should exclude this testimony under Fed. R.
11 Evid. 403.

12 **III. CONCLUSION**

13 The Defendants move to exclude any testimony concerning counterfeiting in China on the
14 grounds that such testimony is inadmissible under Fed. R. Evid. 403 because it has no probative
15 value and is highly prejudicial.

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17 Dated: February 23, 2009

GAUNTLETT & ASSOCIATES

18
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