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12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

14 Louis Vuitton Malletier, S.A.,

15 Plaintiff,

16 v.

17 Akanoc Solutions, Inc., et al.

18 Defendants.

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

)
) OPPOSITION OF PLAINTIFF LOUIS
) VUITTON MALLETTIER, S.A. TO
) DEFENDANTS' MOTION IN LIMINE
) NO 1 TO EXCLUDE ALL TESTIMONY
) OF J. ANDREW COOMBS;
) DECLARATION OF J. ANDREW
) COOMBS

19 **INTRODUCTION**

20 The motion of Defendants to exclude the testimony of J. Andrew Coombs ("Coombs")
21 should be denied as moot. As noted in the moving papers, Coombs has not been designated as a
22 witness at any time by Louis Vuitton. Louis Vuitton has no intention to call Coombs or any
23 member of his staff as a witness in this matter. Declaration of J. Andrew Coombs, ¶ 2.

24 To the extent that the Defendants attempt to use this as a justification to bootstrap exclusion
25 of other conceivably related evidence, including evidence relating to the cease and desist letters,
26 that evidence is not covered by Defendants' motion, the evidence should be admissible in any
27 event in light of the policies favoring admissibility, and also because the letters are most probative
28 as to their receipt by Defendants. Defendants' motion should be denied as improper and
unfounded.

1 **A. The Rules of Evidence Favor Admissibility**

2 Motions in limine should be granted sparingly. Alliance Fin. Capital, Inc. v. Herzfeld, 2007
3 Bankr. LEXIS 4511, at *2 (N.D. Ga. December 17, 2007) citing Sperberg v. Goodyear Tire &
4 Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975); Middleby Corp. v. Hussmann Corp. 1992 U.S. Dist.
5 LEXIS 13138, at *9-10 (N.D. Ill. August 27, 1992). “A pretrial motion in limine forces a court to
6 decide the merits of introducing a piece of evidence without the benefit of the context of
7 trial.” CFM Communs., LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal.
8 2005); see also U.S. v. Marino, 200 F.3d 6, 11 (1st Cir. 1999) (recognizing that proffered evidence
9 can be more accurately assessed in the context of other evidence).

10 Evidence should be “excluded on a motion in limine only if the evidence is *clearly*
11 inadmissible for any purpose” (internal quotations omitted, emphasis added). Fresenius Med. Care
12 Holdings, Inc. v. Baxter Int’l, Inc., 2006 U.S. Dist. LEXIS 42159, at *14 (N.D. Cal. June 12,
13 2006). This means Defendants will have to overcome the well established policies favoring
14 admissibility. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 587 (1993) (“The Rules’ basic
15 standard of relevance thus is a liberal one.”); U.S. v. Curtin, 489 F.3d 935, 942 (9th Cir. 2007)
16 citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988) (the version of Rule 404(b) which
17 became law was intended to “plac[e] greater emphasis on admissibility than did the final Court
18 version”); see also U.S. v. Williams, 445 F.3d 724, 732 (4th Cir. 2006) (relief against admissibility
19 under Rule 403 should be granted sparingly); U.S. v. Fleming, 215 F.3d 930, 939 (9th Cir. 2000)
20 (Rule 403 favors admissibility); U.S. v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (“the
21 application of Rule 403 must be cautious and sparing”); F.R.E. 102 Adv. Comm. Notes (“rules are
22 to be liberally construed in favor of admissibility” within the bounds of the Rules to achieve goals
23 of “speedy, inexpensive, and fair trials designed to reach the truth”). Defendants fail to meet their
24 burden given the probative value of the evidence, the Rules, sound case law, and in light of these
25 policies.

1 **B. Exclusion of Coombs' Testimony Does Not Mandate Exclusion of Cease and Desist**
2 **Letters Transmitted to Defendants, Even If Those Demands Were Composed by**
3 **Coombs**

4 To the extent that the motion to exclude Coombs' testimony is an indirect challenge of
5 certain cease and desist letters enumerated in the attached Exhibit to the motion and considered as
6 such a motion despite its inaccurate caption, the motion should also be denied. Defendants'
7 argument for exclusion is based, first on the inaccurate assumption that Coombs' testimony is
8 required for admission of these exhibits and, second, on an inaccurate understanding of their
9 relevance.

10 The transmission of the cease and desist letters (the only evidentiary fact concerning which
11 Coombs or his staff could conceivably testify) is not relevant. What is relevant is the notice those
12 letters provided to Defendants and the act (or inaction) in response to such letters. See, for
13 example, N. Light Tech., Inc. v. N. Lights Club, 236 F.3d 57, 65 (1st Cir. 2007) (use of defendant's
14 disregard of legitimate cease and desist letters as evidence of bad faith).¹ Authentication by
15 Defendants, if authentication is required, is the relevant evidentiary fact. Moreover, the letters are
16 not being introduced as evidence of the truth of their content, but as evidence of notice to the
17 Defendants. The letters are not, therefore, hearsay.

18 Finally, Defendants are estopped from urging exclusion of the cease and desist letters on
19 the grounds asserted. Defendants, through counsel, requested that evidence of further infringement
20 be transmitted to the attention of defense counsel. Declaration of J. Andrew Coombs, ¶ 3.

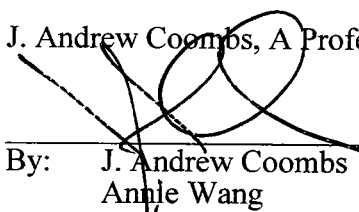
21 ¹ This is doubly true where, as here, Defendants failed to take measures to protect evidence upon
22 receipt of the numerous cease and desist letters transmitted in this case. A cease and desist letter
23 triggers the duty to preserve evidence, even prior to the filing of litigation. Cf. Fox v. Riverdeep,
24 Inc., No. 07 Civ. 13622, 2008 U.S. Dist. LEXIS 101633, at *18-19, 2008 WL 5244297, at *7 (E.D.
25 Mich. Dec. 16, 2008) (awarding sanctions where defendant in copyright infringement case failed to
26 preserve evidence, including e-mails, once it received cease and desist letter); Google Inc. v.
27 American Blind & Wall Paper Factory, Inc., No. 03 Civ. 5340 JF (RS), 2007 U.S. Dist. LEXIS
28 48309, at *4, 2007 WL 1848665, at *1 (N.D. Cal. June 27, 2007) (holding that defendant's duty to
 preserve relevant evidence arose no later than the date the complaint was served and that this duty
 "likely arose some eighteen months earlier" when it received a cease and desist letter); Arista
 Records LLC, et al. v. Usenet.com, Inc., No. 07 Civ. 8822 (HB) (THK), 2009 U.S. Dist. LEXIS
 5185 (S.D.N.Y. Jan. 26, 2009) ("Where copyright infringement is alleged, and a cease and desist
 letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of
 litigation.").

1 Defendants cannot now be heard to object to the notice so provided and in the manner requested by
2 Defendants. Moreover, should Defendants elect to dispute receipt of the notice evidenced by the
3 cease and desist letters, it is Defendants' counsel, not Coombs, who would be the pertinent witness
4 and whose own request in the litigation has created the dilemma noted by Defendants' first motion
5 in limine.

6 For the foregoing reasons, the motion should be denied.

7
8 Dated: March 9, 2009

J. Andrew Coombs, A Professional Corp.

9
10 
11 By: J. Andrew Coombs
12 Annie Wang
13 Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

DECLARATION OF J. ANDREW COOMBS

I, J. Andrew Coombs, declare as follows:

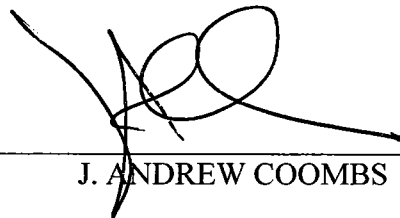
1. I am an attorney at law and duly admitted to practice before the courts of the United States District Court for the Northern District of California. I submit this declaration in support of the Opposition of Plaintiff Louis Vuitton to Defendants' Motion in Limine No. 1 in an action styled Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., et al., Case No. C 07-3952 JW. I have personal knowledge of the following facts and, if called as a witness.

2. Louis Vuitton has not at any time designated me or any individual employed by J. Andrew Coombs, A P.C. as a witness in this matter.

3. I participated in the early planning meeting of counsel in November, 2007. During that conference, James Lowe, counsel for Defendants asked that, from the date of that meeting forward, all notices of infringing activity which the Plaintiff wished to transmit to Defendants should be transmitted to the attention of his office.

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

Executed this 9th day of March, 2009, at Glendale, California.



J. ANDREW COOMBS