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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

11 Louis Vuitton Malletier, S.A.,

12 Plaintiff,

13 v.

14 Akanoc Solutions, Inc., et al.

15 Defendants.

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

) OPPOSITION OF PLAINTIFF LOUIS
) VUITTON MALLETTIER, S.A. TO
) DEFENDANTS' MOTION IN LIMINE
) NO. 2 TO EXCLUDE INTERNET
) MATERIAL AND TESTIMONY ABOUT
) INTERNET MATERIAL; DECLARATION
) OF J. ANDREW COOMBS, EXHIBITS IN
) SUPPORT

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INTRODUCTION

Defendants' Motion in Limine No. 2 to Exclude Internet Material and Testimony About Internet Material ("Motion No. 2") is properly denied on several separate and independent grounds. In addition to the fact that the data represented by these "Internet Materials" should have been produced by Defendants in response to Plaintiff's discovery requests (and this Court's orders compelling such production), the illogical effect of its argument would be to insulate otherwise illegal conduct merely because such conduct occurs online. Neither the case law nor the Federal Rules of Evidence justify such a radical outcome.

Defendants improperly seek to benefit from a situation of their own making: "It is fundamental that a party that does not provide discovery cannot profit from its own failure...and may be estopped from 'supporting or opposing designated claims or defenses.'" General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 1981 U.S. Dist. LEXIS 9374, at *60 (S.D. Cal. April 23, 1981) (quoting Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977)).

Defendants could have authenticated the material that is the subject of this motion, but they have not produced any website printout from any of the underlying infringing websites even though hosted on their servers. Defendants first claimed a crash destroyed pre-litigation files. Then, Defendants were silent as to why they did not visit publicly viewable websites that were pinged or traced to their servers by them as evidenced by emails they sent out to their "customers" identifying both the domain names and as well as the IP Address at issue. This motion is simply disguised to unfairly seek an advantage due to Defendants' own bad faith discovery failures and should be denied for that reason.

A. The Rules of Evidence Favor Admissibility

Motions in limine should be granted sparingly. Alliance Fin. Capital, Inc. v. Herzfeld, 2007 Bankr. LEXIS 4511, at *2 (N.D. Ga. December 17, 2007) citing Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975); Middleby Corp. v. Hussmann Corp. 1992 U.S. Dist. LEXIS 13138, at *9-10 (N.D. Ill. August 27, 1992). "A pretrial motion in limine forces a court to decide the merits of introducing a piece of evidence without the benefit of the context of trial."

1 CFM Communs., LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005); see
2 also U.S. v. Marino, 200 F.3d 6, 11 (1st Cir. 1999) (recognizing that proffered evidence can be
3 more accurately assessed in the context of other evidence).

4 Evidence should be “excluded on a motion in limine only if the evidence is *clearly*
5 inadmissible for any purpose” (internal quotations omitted, emphasis added). Fresenius Med. Care
6 Holdings, Inc. v. Baxter Int’l, Inc., 2006 U.S. Dist. LEXIS 42159, at *14 (N.D. Cal. June 12,
7 2006). This means Defendants will have to overcome the well established policies favoring
8 admissibility. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 587 (1993) (“The Rules’ basic
9 standard of relevance thus is a liberal one.”); U.S. v. Curtin, 489 F.3d 935, 942 (9th Cir. 2007)
10 citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988) (the version of Rule 404(b) which
11 became law was intended to “plac[e] greater emphasis on admissibility than did the final Court
12 version.”); see also U.S. v. Williams, 445 F.3d 724, 732 (4th Cir. 2006) (relief against admissibility
13 under Rule 403 should be granted sparingly); U.S. v. Fleming, 215 F.3d 930, 939 (9th Cir. 2000)
14 (Rule 403 favors admissibility); U.S. v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (“the
15 application of Rule 403 must be cautious and sparing”); F.R.E. 102 Adv. Comm. Notes (“rules are
16 to be liberally construed in favor of admissibility” within the bounds of the Rules to achieve goals
17 of “speedy, inexpensive, and fair trials designed to reach the truth”). Defendants fail to meet their
18 burden given the probative value of the evidence, the Rules, sound case law, and in light of these
19 policies.

20 **B. Authentication Requirements are Amply Satisfied**

21 “The bar for authentication is not particularly high... The proponent need not rule out all
22 possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what
23 it purports to be.” U.S. v. Gagliardi, 506 F.3d 140, 151 (2d Cir. 2007) (citations omitted). The
24 authentication requirement is satisfied with “evidence sufficient to support a finding that the matter
25 in question is what its proponent claims.” U.S. v. Pang, 362 F.3d 1187, 1193 (9th Cir. 2004) citing
26 F.R.E. 901(a). A foundation through personal knowledge is unnecessary, a proper foundation “can
27 rest on any manner permitted by Federal Rule of Evidence 901(b) or 902.” Id. citing Orr v. Bank

1 of America, 285 F.3d 764, 774 (9th Cir. 2002); see also F.R.E. 901(b) (specifically stating
2 illustrations are listed “not by way of limitation”). The proponent “need only make a prima facie
3 showing of authenticity, as ‘the rule requires only that the court admit evidence if sufficient proof
4 has been introduced so that a reasonable juror could find in favor of authenticity or identification.’”
5 U.S. v. Tank, 200 F.3d 627, 630 (9th Cir. 2000). Rule 901(a) defines a standard of admissibility
6 that is rather general or elastic. Moose Creek, Inc. et al. v. Abercrombie & Fitch Co., 331 F. Supp.
7 2d 1214, 1225 fn. 4 (C.D. Cal. 2004). “A document can be authenticated [under Rule 901(b)(1)]
8 by a witness who wrote it, signed it, used it, or saw others do so.” Orr, 285 F.3d at 774 fn. 8 citing
9 31 Wright & Gold, Federal Practice & Procedure: Evidence § 7106, 43 (2000).

10 None of the cases cited by Defendants support their overreaching and unrealistic motion to
11 exclude the evidence here. Instead, Courts deciding issues similar to the ones in the present case,
12 have admitted such evidence. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146,
13 1154 (C.D. Cal 2002) (in unfair business practices, copyright and trademark infringement case for
14 online infringement, recognizing that “computer printouts are the only practical method by which
15 the allegations of the complaint can be brought before the Court”) see also Moose Creek, Inc., 331
16 F. Supp. 2d at 1225 fn. 4 (admitting even unauthenticated website printouts in context of other uses
17 of trademark online in a preliminary injunction motion).

18 Unlike the authentication issues cited in those cases by Defendants, Plaintiff does not seek
19 to introduce complex accounting records or government reports for purposes of establishing the
20 truth of the underlying accounting data. Here, like Moose Creek and Perfect 10 cases noted above,
21 Plaintiff seeks to introduce evidence of (i) website offers easily observed (and intended to be easily
22 observed) by any consumer routinely using the Internet and (ii) website printouts corroborating or
23 evidencing the results of “pings” separately undertaken by Plaintiff and/or its investigator.¹

24
25 ¹ Defendants’ repeated references to the reliability of WHOIS data contained in those records is a
26 red herring. First, Plaintiff does not seek to introduce the data for purposes of such WHOIS data
27 and, if that is the issue, Louis Vuitton will stipulate to redaction of individual WHOIS information
28 from those records. Second, even were the WHOIS data relevant for Plaintiff’s purposes, it is not
whether that data is accurate (in the sense it accurately relates the contact information for an
identified registrant) but whether it accurately reflects data stored on the registry (which is not
disputed).

1 **C. The Internet Material Can Be Authenticated by Defendants**

2 Had Defendants complied with their discovery obligations, the relevant internet materials
3 would have been authenticated by them. As the host, they could have produced content on their
4 server which would have evidenced the underlying infringement and their hosting of that
5 underlying infringing content. Having failed to produce such discovery, even in response to this
6 Court's orders, Defendants cannot now be heard to complain that such evidence obtained by
7 Plaintiff should be excluded.

8 Regardless, based upon Defendants' emails to their "customers" and the "customers'"
9 responses (the very few that were produced), Defendants have provided evidence that in fact
10 authenticates that some of the websites were hosted by Defendants at the time of Louis Vuitton's
11 notice to them. Declaration of J. Andrew Coombs ("Coombs Decl.") at ¶ 2, Ex. A. Defendants
12 own testimony shows that these emails to the customers would not exist but for Defendants'
13 identification of the websites on their servers. Plaintiff's printouts merely illustrate the particular
14 copyrights and trademarks infringed that Defendants did not detail in their emails as well as the
15 same website on different occasions post-notice, still up, infringing and hosted by Defendants.

16 **D. Defendants' Stated Intent To Rely Upon the Same Data Estops Them From**
17 **Objecting Now**

18 Arin.net and DomainTools.com printouts should be admitted because Defendants
19 themselves intended to rely on them as stated in their Initial Disclosures. Coombs Decl. at ¶ 3, Ex.
20 B (Defendants' Initial Disclosures). "Authentication can be accomplished by judicial admission,
21 such as stipulation or production of the items at issue in response to a discovery request" and where
22 offered by the party opponent. MGM Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 972
23 (C.D. Cal. 1996); see also Maljack Productions, Inc. v. Goodtimes Home Video Corp., 81 F.3d
24 881, 889 n.12 (9th Cir. 1996). Defendants intended to rely on these same documents until they
25 changed their position for strategic purposes. Defendants attack the credibility of WHOIS
26 information generally, but do not attack ping results, proof of their ownership of certain IP
27 Addresses, and do not delve into which of the thousands of pages of internet materials they believe
28

1 was hacked or forged. See also Coombs Decl. at ¶ 4, Ex. C (Defendants' Responses to Requests
2 for Admission ("Defendants' Admissions") (verifying ownership of listed IP Addresses).

3 Defendants' motion is silent as relating to pinging results and their ownership of certain IP
4 Addresses but to the extent those results from online sources are included in the materials
5 Defendants seek to exclude, they should also be admitted because Defendants have relied on the
6 same method for locating websites off of the Internet and have admitted to ownership of specified
7 IP Addresses. Coombs Decl. at ¶¶ 5-6, Ex.s D-E (Deposition of Steve Chen ("Chen Depo.") at pp.
8 24-25, 114-115, 120-127, 186-194 and Deposition of Juliana Luk ("Luk Depo.") at p. 30)
9 (Defendants' employee pings domain names on the Internet), Ex.s K-L; see also Defendants'
10 Admissions. As the Court has pointed out, as supported by the testimony of Defendant Steve Chen
11 and Juliana Luk, and as illustrated in Defendants' internal emails, Defendants also use pinging, and
12 notably from a source off of the Internet. Coombs Decl. Ex.s D-E, K-L; Judge Ware's Motion for
13 Summary Judgment Ruling at p. 6, fn. 10 (overruling objection to pinging evidence). They cannot
14 now complain those results are inadmissible when they themselves rely on those functions, using
15 the Internet, to locate websites for themselves. Defendants' motion should be denied.

16 **E. The Internet Material Can be Authenticated by Plaintiff's Witnesses**

17 Website printouts, particularly relating to intellectual property cases involving infringing
18 content on websites, can be authenticated by the person who printed the copies or if the copies
19 were printed under the declarant's direction.² Perfect 10, Inc., 213 F. Supp. 2d at 1154 (describing
20 Defendants' cited case St. Clair as "a more extreme view") citing U.S. v. Tank, 200 F.3d 627, 630
21 (9th Cir. 2000). Plaintiff's witnesses have already attested to these investigations of hundreds of
22 websites. Coombs Decl. at ¶ 7-8, Ex.s F-G (Declaration of Nikolay Livadkin in Support of
23 Opposition to Defendants' Motion for Summary Judgment ("Livadkin Decl.") at ¶¶ 8, 18 and
24 Declaration of Robert Holmes in Support of Opposition to Defendants' Motion for Summary

25 ² Defendants attempt to set up a straw man by reference to testimony disclaiming knowledge of
26 specific websites present to Louis Vuitton's witness at the time of his deposition should be
27 disregarded. Defendants requested "all" copies of various documents and Defendants' election to
28 examine Louis Vuitton's witness with reference to printouts which were generated otherwise than
by the Plaintiff's representative does not disqualify all printouts, including those generated by him
or at his office under his direction.

1 Judgment (“Holmes Decl.”) at ¶¶ 2-16). In a case such as this, where the infringements occurred
2 online, “computer printouts are the only practical method by which the allegations of the complaint
3 can be brought before the Court.” Perfect 10, Inc., 213 F. Supp. 2d at 1154. Defendants’ motion
4 should be denied.

5 Even according to Defendants’ authority, the Internet Material may be authenticated by
6 Plaintiff’s witnesses. Defendants quote an unpublished case “To be authenticated, someone with
7 knowledge of the accuracy of the contents of the internet print-outs must testify.” Internet
8 Specialities West, Inc. v. ISPWest, No. CV 05-3296 FMC AJWx (C.D. Cal. Sept. 19, 2006).

9 As to the Domaintools.com and other hosting related documents, Robert Holmes testified
10 that he not only checked his hosting conclusions twice, but triple checked such information. In his
11 deposition, he made it clear that DomainTools.com printouts are a reader-friendly format for
12 information that he has already verified. Coombs Decl. at ¶ 9, Ex. H (Deposition of Robert
13 Holmes (“Holmes Depo.”) at pp. 112-122). Additionally, Mr. Holmes made several purchases
14 from a number of the websites, based upon the offers he saw, paying the listing price and later
15 receiving the product pictured. The fact he received what was offered and paid the price listed on
16 the websites only corroborates that he had knowledge of the accuracy of the contents of the
17 websites. Moreover Defendants’ isolated comments about one particular printout shown to Mr.
18 Holmes during his deposition should not be misconstrued that Mr. Holmes would not be able to
19 testify as to any others, or any relating to the hundreds of websites he stated he had investigated.
20 Id. at 152-153. Defendants misrepresent the testimony. Contrary to Defendants’ further
21 misstatements, Mr. Livadkin also testified that he personally verifies pinged or traced websites
22 (actions utilized by Defendants themselves) that were accurately reflected in DomainTools.com
23 printouts and other sources. Livadkin Decl., ¶ 8. Mr. Livadkin also testified as to the process of
24 printing out the websites on the dates reflected on those printouts sufficient to meet F.R.E.
25 901(b)(9). Coombs Decl. at ¶ 10, Ex. I (Deposition of Nikolay Livadkin (“Livadkin Depo.”) at pp.
26 17-19, 77-78, 101). That Mr. Livadkin did not personally print out some of the exhibits shown to
27

1 him at the time of the deposition does not mean that he did not print any of the exhibits nor that
2 they were not all printed at his direction.

3 Defendants' twisting of Mr. Livadkin's statements on the sometimes false WHOIS
4 information, yet another device used by infringers to escape accountability aside from giving their
5 business to bulletproof hosts such as Defendants, does not speak to the offers for counterfeit Louis
6 Vuitton product on the websites, or to their hosting status by Defendants. If anything, the false
7 WHOIS information only further supports a finding that the offers for purported "Louis Vuitton"
8 products on the various websites were for counterfeits or "replicas" as the operators were
9 attempting to avoid accountability. The Internet printouts that reflect false WHOIS information do
10 not alter the information, but rather transmit the information that is offered at that time. Even if
11 falsely offered by a counterfeiter, that information is still probative.

12 **F. The Internet Material Can Be Authenticated by Comparison and by Their**
13 **Appearance, Contents, Substance, Internal Patterns or Other Distinctive**
14 **Characteristics**

15 In the context of the internet, courts consider the distinctive characteristics of a website in
16 making a finding of authenticity. Premier Nutrition, Inc. v. Organic Food Bar, Inc., 2008 U.S.
17 Dist. LEXIS 78353 *16-17, 86 U.S.P.Q.2D (BNA) 1344 (C.D. Cal. March 27, 2008). Thus,
18 another basis for authentication is through the cross-reference of the websites. Many of the
19 websites reference another of the websites. Multiple websites are often mirror images of each
20 other with minor changes. See Coombs Decl. at ¶ 11, Ex. J. These websites are thus self-
21 authenticating because they refer to one another, not through links alone, but through the two
22 different domain names. The identical nature of these websites is no coincidence and the websites
23 act to verify each other.

24 To the extent the same website was visited on different occasions those website printouts
25 should also be admitted so the jury can compare the printouts and determine the applicable weight
26 it wishes to afford as to whether or not that website is the same website, and if it was offering
27 Louis Vuitton product. The website images from different dates speak to the continued
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1 infringements occurring and the hosting status printouts address Defendants' continued shielding
2 of those websites so that they can stay online and in business.

3 The hosting status related documents showing Defendants' hosting of certain websites does
4 not appear to be issues raised by Defendants, because they are in essence, summaries or ping
5 results as to a particular domain name on a particular date, a method also used by Defendants.

6 **G. The Internet Material Can Be Authenticated by Judicial Notice**

7 "It is not uncommon for courts to take judicial notice of factual information found on the
8 world wide web." O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007)
9 (court abused discretion by failing to take judicial notice of actual earnings history by Northrop on
10 the internet); see e.g., Lund v. Leprino Foods Co., No. 06-431, 2007 U.S. Dist. LEXIS 46705, 2007
11 WL 1775474 at * 1 n.3 (E.D. Cal. June 20, 2007); City of Monroe Employees Ret. Sys. v.
12 Bridgestone Corp., 399 F.3d 651, 655 n.1 (6th Cir. 2005) (taking judicial notice of a term defined
13 on the website of the National Association of Securities Dealers, Inc.); Schaffer v. Clinton, 240
14 F.3d 878, 885 n.8 (10th Cir. 2001) (taking judicial notice of information found in a political
15 reference almanac and citing to the almanac's website); cf. Grimes Navigant Consulting, Inc., 185
16 F. Supp. 2d 906, 913 (N.D. Ill. 2002) (taking judicial notice of published stock prices found on the
17 world wide web); Caldwell v. Caldwell, 420 F. Supp. 2d 1102, 1105 (N.D. Cal. 2006) (taking
18 judicial notice of webpages from Understanding Evolution and National Center for Science
19 Education's mission and "voices for evolution" webpage).

20 It is not disputed that government websites are often cited by Courts, but it is also not
21 uncommon for courts, including the United States Supreme Court, to consider evidence of
22 privately published internet materials and to cite to such internet material. Till v. SCS Credit
23 Corp., 541 U.S. 465, 477 fn.14 (2004) (citing and considering website printouts of Balmoral
24 Financial Corporation at <http://www.balmoral.com/bdip.htm> and 1st National Finance Association
25 DIP Division at <http://www.loanmallusa.com/dip.htm> re their advertisements); Moose Creek, Inc.,
26 331 F. Supp. 2d at 1225 fn. 4 (admitting unauthenticated printouts from various third party retail
27 websites); U.S. v. Standring, 2005 U.S. Dist. LEXIS 41330, *4-5 (S.D. Ohio Oct. 19, 2005)

1 (admitting printouts from third-party non-governmental websites foiagen.com and
2 sovereignandfree.com); U.S. v. Starzecpyzel, 880 F. Supp. 1027, 1035 fn. 7 (S.D.N.Y. 1995)
3 (citing internet search results even and links to the State University of New York and Nijmegen
4 Institute for Cognition and Information in the Netherlands websites).

5 Courts have admitted compilations of websites by third party website companies
6 particularly when the evidence does not fit neatly into any of the non-exhaustive examples listed in
7 Rule 901. See Masters v. UHS of Delaware, Inc., 2008 U.S. Dist. LEXIS 107383, *5 (E.D.
8 Missouri Oct. 21, 2008) (admitting Internet Archive pages from www.archive.org) citing Telewizja
9 Polska USA, Inc. v. Echostar Satellite Corp., 2004 U.S. Dist. LEXIS 20845, 2004 WL 2367740, at
10 *18 (N.D. Ill. Oct. 15, 2004) (objector presented “no evidence that the Internet Archive is
11 unreliable or biased. And [objector] has neither denied that the exhibit represents the contents of
12 its website on the dates in question, nor come forward with its own evidence challenging the
13 veracity of the exhibit.... [Objector] is free to raise its concerns regarding reliability with the
14 jury.”). Here, Defendants have provided no evidence that the websites would have reason to
15 incriminate themselves or that the hosting status documents are unreliable as relating to ping
16 results and conclusions as to Defendants as hosts in particular, or any kind of bias by
17 Domaintools.com or any of the other Internet tools, for example. Defendants do not challenge any
18 content on any of the websites in any particularized form. In light of the inherent indicia of
19 reliability contained in the websites and the automatic collection of data by ping, and
20 domaintools.com for example, the internet material should all be admitted.

21 Defendants’ speculative argument as to hackers altering information on the Internet is
22 simply unrealistic in light of the thousands of web pages gathered by Plaintiff. The web pages
23 themselves have indicia of truthfulness in the sheer number of websites that are infringing and
24 found to be hosted by Defendants. Also, most of the same web pages look nearly identical on
25 different dates, some domains reference other domains on their web pages, multiple web pages
26 correlate in terms of format and offers, and similar domain names that may only differ by a “.com”
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1 or “.net” are almost identical. There has been no proof of any such hacking offered by Defendants
2 and the bulk of the web pages, literally thousands of pages, prove otherwise.

3 Defendants also state they have no means of challenging the information but that is untrue
4 and simply not a bar to admission of this evidence. Defendants have offered no evidence that the
5 websites, identified by domain name and publicly available, were different than what Plaintiff’s
6 printouts show. Defendants do not deny that Louis Vuitton sent multiple cease and desist requests
7 to Defendants based upon infringements on the internet that must have been viewed and pinged or
8 traced to Defendants that Defendants themselves could have viewed. Defendants do not dispute
9 that Louis Vuitton purchased and received products, as depicted on the websites, in the amounts
10 reflected on the websites, and with monies paid to a number of these websites. The persistent
11 theme that gave rise to this litigation of Defendants doing nothing when they could have and
12 resorting to unfounded excuses of feigned and imaginary handicaps, is precisely why they should
13 not be allowed to exclude highly probative and inherently reliable information from the case that
14 concerns core, highly disputed issues.

15 **H. The Internet Material is Not Hearsay**

16 It has been widely held that information generated instantaneously by the computer without
17 the assistance or input of a person, such as the header information on a web page, is not hearsay.
18 U.S. v. Washington, 498 F.3d 225, 233 (4th Cir. 2007); U.S. v. Hamilton, 413 F.3d 1138, 1142-43
19 (10th Cir. 2005) (concluding that the computer-generated header information accompanying
20 pornographic images retrieved from the Internet was not a hearsay statement because there was no
21 “person” acting as a declarant); U.S. v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003) (concluding
22 that an automatically generated time stamp on a fax was not a hearsay statement because it was not
23 uttered by a person); People v. Holowko, 109 Ill. 2d 187, 486 N.E.2d 877, 878-79 (Ill. 1985)
24 (concluding “that the printout of results of computerized telephone tracing equipment is not
25 hearsay evidence” but rather “a self-generated record of its operations”) (citations omitted);
26 *McCormick On Evidence*, § 294(b), at 447 (John W. Strong ed., 5th ed. 1999) (computer-generated
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1 records should not be considered hearsay because “such records are not the counterpart of a
2 statement by a human declarant”).

3 Even Defendants’ authorities have “accepted the printout containing the ‘internet domain
4 address’ and the ‘date on which it was printed’ as sufficient for *authentication* under Rule 901(a).”
5 Williams v. Long, 585 F. Supp. 2d 679, 688 (D. Md. 2008) (in the context of government
6 webpages). Thus, the hosting status documents are admissible to show the automatic function and
7 results of pinging, and the website printouts are admissible to show what was publicly viewable on
8 the automatically generated date and domain name reflected on the page.

9 Additionally, in circumstances more akin to the present case, Courts have held that
10 evidence of website content on a particular date is not hearsay. Perfect 10, Inc., 213 F. Supp. 2d at
11 1155 (“To the extent these images and text are being introduced to show the images and text found
12 on the websites, they are not statements at all - and thus fall outside the ambit of the hearsay
13 rule.”); see also Telewizja Polska USA, Inc. v. Echostar Satellite Corp., 2004 U.S. Dist. LEXIS
14 20845, 2004 WL 2367740, at *16 (N.D. Ill. Oct. 15, 2004) (rejecting “double hearsay” arguments
15 regarding website printouts). The printouts from the various infringing websites show what
16 websites were operational and what content was publicly viewable on a specific date. They are not
17 hearsay.

18 Also, often times the website printouts are not offered for the truth of the matter asserted
19 and thus, are not hearsay. F.R.E. 801. The majority of the website printouts are not offered for
20 their truth to the extent they claim they are selling “real” Louis Vuitton products, but are actually
21 selling counterfeits. Coombs Decl. at ¶ 11, Ex. J. Also, some of the website printouts are offered
22 to show that multiple websites are really run by the same individual or group of people most likely
23 working in concert because they are identical and also because the domain names are very similar
24 or nearly identical. Id. In these instances, what is actually on the websites is not at issue, it is that
25 they are the same. These sets of websites are also offered to rebut Defendants’ statements that
26 there is no way to tell who is behind a website and that the problem is unmanageable for them.
27 They are simply not offered for their truth and are not hearsay.

1 **I. Even If Hearsay, the Internet Material Is Properly Admitted**

2 Even if the Court disagrees with the above, the infringing offers for Louis Vuitton products
3 and the web pages relating to the Defendants' hosting status are also admissible even if hearsay
4 because they fall under the residual exception. This type of evidence has not been accounted for
5 under Rule 803 or 804 but have equivalent circumstantial guarantees of trustworthiness. F.R.E.
6 807. In this case, where Defendants have not provided any such documents, and Plaintiff's claims
7 absolutely require evidence of publicly viewed evidence and hosting results, the residual exception
8 is particularly applicable. Here, the Court can determine that (A) the internet material is offered as
9 evidence of material facts, specifically, publicly viewed infringing websites and Defendants'
10 hosting of those websites on particular dates, (B) the internet material is more probative on the
11 point for which it is offered than any other evidence which the proponent can procure through
12 reasonable efforts, particularly in light of Defendants' discovery failures, and (C) the general
13 purpose of the rules and the interests of justice will best be served by admission of the internet
14 material. Here, justice requires that the fact finder be allowed to weigh evidence that not only
15 speaks to Defendants' continued disregard of intellectual property rights, but also the broader,
16 widespread effect of Defendants' unacceptable behavior, and the sheer volume of counterfeiting
17 taking place on Defendants' servers. The jury should at least be able to see the evidence and
18 decide what weight it wants to afford these materials. They are intrinsically reliable because they
19 advance a profit driven enterprise, albeit unlawful, that depends on the continuity of their online
20 presence to the public and truthfulness in their extremely low offers.

21 **J. The Internet Material is Extremely Probative and There is No Unfair**
22 **Prejudice to Defendants**

23 Relief against admissibility under Rule 403 should be granted sparingly as Rule 403 favors
24 admissibility. Fleming, 215 F.3d at 939; see also Hankey, 203 F.3d at 1172. Some circuits have
25 required that the unfair prejudice be "exceedingly great" while looking at the evidence "most
26 favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect..."
27 U.S. v. Stout, 509 F.3d 796, 806 (6th Cir. 2007).

1 There is little evidence more probative in this case than the vast number of underlying
2 infringements occurring on the websites and proof of Defendants' continued hosting of those same
3 infringing websites having been placed on notice of their underlying illegal activity. The internet
4 materials are all relevant to the case and extremely illustrative of the continuing problem that
5 forced Plaintiff to pursue the present action in the first place. These materials are particularly
6 probative in light of the void of documents produced by Defendants despite a right and ability to do
7 so. Both Magistrate Judge Lloyd and this Court agreed that Defendants should have produced the
8 electronic documents. To the extent Defendants sandbagged the discovery process and now the
9 inspection protocol, makes this material particularly probative. Defendants should not be allowed
10 to profit from their discovery failures. General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290,
11 1981 U.S. Dist. LEXIS 9374, at *60 (S.D. Cal. April 23, 1981) (quoting Dellums v. Powell, 566
12 F.2d 231, 235 (D.C. Cir. 1977)). Defendants should not be rewarded for failing to cooperate in
13 discovery and forcing Plaintiff to independently develop this information from reliable, publicly
14 available means.

15 Case law supports the admission of such evidence in intellectual property cases based on
16 online infringement due to the recognition that "computer printouts are the only practical method
17 by which the allegations of the complaint can be brought before the Court". Perfect 10, Inc., 213
18 F. Supp. 2d at 1154. Defendants' chance of being unfairly prejudiced by some misinformation
19 when literally thousands of pages point to them is miniscule to nonexistent, particularly when
20 Plaintiff's investigator often double and triple checks his information. Ironically, Defendants'
21 statement that "the multitude of scams, hoaxes and untruths that proliferate on the Internet solely
22 because of some users' baseless trust in the veracity of material appearing on a computer screen" is
23 precisely the reason why Louis Vuitton has had to institute this action to combat the proliferation
24 of counterfeiters who have taken up residence on Defendants' servers. Infringing website
25 operators are cashing in on unsuspecting consumers and Defendants materially aid and protect
26 these counterfeiters. All of the internet material should be admitted to the jury in light of
27 Defendants' failure to produce documents, Plaintiff's authentication and verification of the data,
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1 the inherent reliability of the evidence, and the several other means of authentication that speak to
2 not only the broad reasoning behind Plaintiff's claims of liability, but also to the core issues of
3 notice and continued infringement.

4 Prior controlling decisions have acknowledged that "services or products that facilitate
5 access to websites throughout the world can significantly magnify the effects" of infringing
6 conduct and that in certain instances, seeking compliance from providers may be the only
7 meaningful way for copyright holders to protect their rights. Perfect 10, Inc. v. Amazon.com, Inc.,
8 508 F.3d 1146, 1172 (9th Cir. 2007). In this case, this could not be more applicable. The array of
9 websites infringing Plaintiff's intellectual property is precisely why this action against the internet
10 service provider is necessary and appropriate. The scale of the problem and Defendants' part, are
11 what they are. The website printouts and the hosting information support Plaintiff's claims and
12 there is no other way to illustrate for the jury the issues, the scope of the problem, and the policy
13 behind Plaintiff's requested relief. Thus, they are highly probative and material and should be
14 admitted.

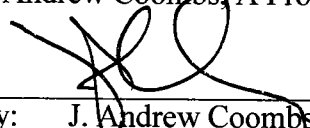
15 "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially
16 outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless
17 trials are to be conducted as scenarios, or unreal facts tailored and sanitized for the occasion, the
18 application of Rule 403 must be cautious and sparing. Its major function is limited to excluding
19 matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial
20 effect." Hankey, 203 F.3d at 1172. In the absence of any documents produced by Defendants,
21 Plaintiff's evidence regarding the underlying infringing websites as they were viewable by the
22 public on an automatically time stamped date, evidence showing the hosting status of those
23 websites by Defendants that was verified, and in some instances double and triple checked, that
24 was also supported by Defendants' responses to requests for admission, is all crucial, extremely
25 probative, not unfairly prejudicial and should be admissible. Plaintiff, like Defendants, used the
26 pinging method and purports to offer the Domaintools.com printouts that simply organize various
27 sources of data, not only WHOIS information, but pinging results, ownership of IP Addresses, at
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1 times snapshots of cached versions of the websites, among other things, to help package the data in
2 a way that would be easy for a juror to understand. Plaintiff even completed orders from some of
3 the websites even though Plaintiff was able to identify an infringing site just by reviewing its
4 offers. Plaintiff has gone above and beyond its duties to gather evidence despite Defendants'
5 efforts to sandbag. The internet materials are sufficiently reliable and Plaintiff should be allowed
6 to present its case in the interests of fairness and the pursuit of justice.

7 For the foregoing reasons, Defendants' Motion No. 2 should be denied.

8
9 Dated: March 9, 2009

J. Andrew Coombs, A Professional Corp.

10 
11 By: J. Andrew Coombs
Annie Wang

12 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 duly admitted to practice before the Courts of the State of California and the United States District Court for the Northern District of California. I am counsel of record for Plaintiff Louis Vuitton Malletier, S.A. ("Plaintiff" or "Louis Vuitton") in an action styled Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., et al., Case No. C 07 3952 JW. I submit this declaration in support of Plaintiff's Opposition to Defendants' Motion in Limine No. 2. Except as otherwise stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows.

2. Attached Exhibit A are true and correct copies of representative emails produced by Defendants in this matter."

3. Attached Exhibit B is a true and accurate copy of Defendants' Initial Disclosures.

4. Attached Exhibit C is a true and accurate copy of selected portions of Defendant's Responses to Requests for Admission.

5. Attached Exhibit D is a true and accurate copy of portions of the transcript from the deposition testimony of Steve Chen, individually and as the Rule 30(b)(6) witness for each of the two corporate defendants in this matter, which took place on or about April 8-9, 2008.

6. Attached Exhibit E is a true and accurate copy of portions of the transcript from the deposition testimony of Juliana Luk, which took place on or about April 12, 2008.

7. Attached Exhibit F is a true and accurate copy of the Declaration of Nikolay Livadkin in Support of Opposition to Defendants' Motion for Summary Judgment.

8. Attached Exhibit G is a true and accurate copy of the Declaration of Robert Holmes in Support of Opposition to Defendants' Motion for Summary Judgment.

9. Attached Exhibit H is a true and accurate copy of portions of the transcript from the deposition testimony of Robert L. Holmes, which took place on or about April 1, 2008.

10. Attached Exhibit I is a true and accurate copy of portions of the transcript from the deposition testimony of Nikolay Livadkin, which took place on or about April 23, 2008.

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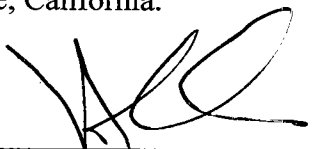
11. Attached Exhibit J are true and correct copies from Plaintiff's Document Production (websites printouts).

12. Attached Exhibit K is a true and accurate copy of the Declaration of Steve Chen and Exhibit 1501 filed by Defendants May 19, 2008, in support of their Motion for Summary Judgment.

13. Attached Exhibit L is a true and accurate copy of the Declaration of Juliana Luk filed by Defendants May 19, 2008, in support of their Motion for Summary Judgment.

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