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10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

13 LOUIS VUITTON MALLETIER, S.A.,)	Case No.: C 07-3952 JW (HRL)
)	
14 Plaintiff,)	
)	DEFENDANTS' REPLY TO VUITTON'S
15 vs.)	OPPOSITION TO MOTION IN LIMINE #3
)	TO EXCLUDE ALL TESTIMONY ABOUT
)	DEFENDANTS' ALLEGED REPUTATION
)	
17 AKANOC SOLUTIONS, INC., et al.,)	
)	
18 Defendants.)	
)	
19 _____)	

1 **I. VUITTON’S REPUTATION TESTIMONY IS INADMISSIBLE**

2 Vuitton’s proffered reputation testimony is inadmissible hearsay under Federal Rules of
3 Evidence 801 and 802 and inadmissible character evidence under Federal Rule of Evidence 401.
4 This unduly prejudicial and inadmissible reputation testimony is not permitted by the law of the case
5 doctrine, nor is it admissible under any exception to the hearsay rule or as impeachment or habit
6 evidence.

7 **A. Vuitton’s Proffered Reputation Testimony Is Not Permitted by the Law of the**
8 **Case Doctrine**

9 Vuitton erroneously claims that the law of the case doctrine precludes Defendants’ motion in
10 limine to exclude Vuitton’s reputation testimony. Vuitton is incorrect for two reasons.

11 First, contrary to Vuitton’s argument, the admissibility of reputation testimony was not
12 determined in this Court’s December 23, 2008 Order Granting in Part and Denying in Part
13 Defendant’s Motion for Summary Judgment. There, the Court did not address admissibility of
14 evidence; it merely considered whether there was a genuine issue of material fact and if Defendants
15 were entitled to a judgment as a matter of law. *Celotex v. Catrett*, 417 U.S. 317, 323-24 (1986).
16 Because the Court did not determine the admissibility of any evidence in its December 23, 2008
17 order, there is no “law of the case” on this issue and the five-part test enumerated in *United States v.*
18 *Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998) does not apply.

19 Second, Vuitton also cannot invoke the law of the case doctrine because this doctrine is
20 limited to issues determined by the same court *on appeal*:

21 The “law of the case” doctrine provides that “one panel *of an*
22 *appellate court* will not as a general rule reconsider questions which
23 *another panel* has decided *on a prior appeal* in the same case.”
United States v. Scrivner, 189 F.3d 825, 827 (9th Cir.1999)

24 “[T]he prior decision of legal issues should be followed *on a later*
25 *appeal* ‘unless the evidence on a subsequent trial was substantially
26 different, controlling authority has since made a contrary decision of
the law applicable to such issues, or the decision was clearly erroneous
and would work a manifest injustice.’ ” *Merritt v. Mackey*, 932 F.2d
1317, 1320 (9th Cir.1991)

27 Vuitton cites *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998), but there the “law of the
28 case doctrine” was implicated only because the District Court did not follow a finding of the Ninth

1 Circuit Court of Appeals after remand:

2 Defendants Sherwood and Cuddy then appealed their convictions to
3 this court in a consolidated appeal. See *United States v. Sherwood*, 98
4 F.3d 402 (9th Cir.1996) (“*Sherwood I*”). We affirmed their
5 convictions but remanded to the district court the question whether it
properly departed upward based on Application Note 8 of U.S.S.G.
§ 2B3.2, which permits an upward departure if the offense involved “a
threat to a family member of the victim.”

6 * * *

7 First, the defendants note that our decision in *Sherwood I* stated that
8 the record did not support a finding that Ms. Wynn’s life was
9 threatened. Thus, they argue that the district court violated the “law of
the case” when it determined that the record did support such a
finding.

10 *Id.* at 1113.

11 Vuitton cannot invoke the law of the case doctrine because, not only is this doctrine limited
12 to cases on appeal, the Court has never ruled on the admissibility of Vuitton’s reputation testimony.

13 **B. Inadmissibility under Fed. R. Evid. 404**

14 Fed. R. Evid. 404(a) provides a rule of exclusion that bars the character testimony of
15 Vuitton’s witnesses. (“Evidence of a person’s character or a trait of character is not admissible for
16 the purpose of proving action in conformity therewith.”)

17 Vuitton’s witnesses propose testimony that falls squarely within Rule 404(a):

18 There were many [Internet] discussion boards that were identifying
19 these two companies that – what we call bulletproof hosts. A
bulletproof host is a host that would not respond to notifications from
trademark owners to preserve the hosting of its clients’ customers.¹

20 Their [Defendants’] reputation in the online community allows them a
21 certain amount of publicity. They’ve been known to be somewhat of a
bulletproof host.²

22 I understand Defendants have a reputation for hosting websites that
23 specialize in counterfeiting as well as spam activities.³

24 This testimony is inadmissible because it is being offered for a single reason – to show that

25 _____
26 ¹Declaration of James A. Lowe in support of Defendants’ Motion in Limine #3 to Exclude All
Testimony About Defendants’ Reputation (“Lowe Decl.”) ¶ 4, **Exhibit “1516”** Deposition of
Nicolay Livadkin (“Livadkin Depo.”) 139:16-19.

27 ²Lowe Decl. ¶ 5, **Exhibit “1517”** Deposition of Robert Holmes (“Holmes Depo.”) 189:13-22.

28 ³Lowe Decl. ¶ 7, **Exhibit “1514”** Declaration of Robert Holmes (“Holmes Decl.”) ¶ 2.

1 Defendants have acted in conformity with this alleged bad reputation. That the testimony does not
2 even relate to these Defendants is another Vuitton mistake.

3 Vuitton unsuccessfully claims that its witnesses' testimony is admissible under Fed. R. Evid.
4 404(b), which provides a narrow exception to admissibility for character evidence that shows "proof
5 of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or
6 accident." But Vuitton's witness testimony does not tend to prove any of these things; it only goes
7 towards showing conformity. Vuitton essentially admits this by completely failing to specifically
8 explain how its witness testimony would tend to show proof of motive, opportunity, intent,
9 preparation, plan, knowledge, identity, or absence of mistake or accident.

10 **C. Vuitton's Inadmissible Reputation Testimony Is Not "In Issue" in the Case**

11 Vuitton's reputation evidence is inadmissible under Fed. R. Evid. 404. Vuitton claims that
12 its reputation testimony is admissible because it is "inextricably intertwined" with or "intricately
13 related" to charged conduct that it helps the factfinder form a more complete picture of the activity.
14 But none of the cases that Vuitton cites, *United States v. Hale*, 448 F.3d 971, 985 (7th Cir. 2006),
15 *United States v. Paladino*, 401 F.3d 471, 475 (7th Cir. 2005), *United States v. Gougis*, 432 F.3d 735,
16 742 (7th Cir. 2005), and *Stewart v. United States*, 311 F.2d 109, 112 (9th Cir. 1962), support
17 Vuitton's argument.

18 In *Hale*, the court only addressed the trial court's balancing of probative value versus
19 prejudicial effect, not admissibility under Fed. R. Evid. 404. In *Paladino*, 401 F.3d at 474, a case
20 involving investment fraud, one of the defendants objected that Rule 404 prevented the government
21 from presenting evidence that she had pled guilty to federal fraud charges in 1988 and had been
22 banned by the SEC. The court held that this evidence could be admitted only because "what made
23 the representation misleading was precisely her history; that history was therefore direct evidence of
24 guilt rather than evidence merely of bad character." *Id.* at 475. Two significant distinctions render
25 *Paladino* inapposite here. First, the evidence at issue in *Paladino* was of the defendant's actual prior
26 convictions, whereas here, Defendants have never been sued, let alone convicted or found to have
27 ever violated any laws. Second, the evidence in *Paladino* was admissible under Rule 404(b) because
28 it was evidence of the defendant's preparation and plan. *Id.* at 476. Vuitton's witness testimony,

1 that Defendants are “bulletproof hosts” and have a bad reputation, does not go towards proving any
2 preparation, plan or any other purpose under Rule 404(b). Vuitton’s reliance on *United States v.*
3 *Gougis*, 432 F.3d 735, 742 (7th Cir. 2005) and *Stewart v. United States*, 311 F.2d 109, 112 (9th Cir.
4 1962) is also misguided for the same reasons, namely, that neither of these cases involve reputation
5 testimony that fails to prove any preparation, plan or any other purpose under Rule 404(b).

6 Vuitton’s argument is also plainly illogical. Vuitton essentially argues that its vague and
7 baseless testimony that Defendants are “known to be” criminals is admissible because Defendants
8 actually *are* criminals. But Defendants have never been found liable for any wrongdoing, and while
9 Rule 404(b) lays out specific exceptions where reputation testimony is admissible, none of those
10 apply here. Vuitton’s proffered reputation testimony is false and inadmissible under Rule 404(a)
11 because it is untrue and its only purpose is to show conformity with bad character. It is nothing but
12 an effort to falsely smear the Defendants.

13 **D. Vuitton’s Inadmissible Reputation Testimony Fails the Ninth Circuit Four-Part**
14 **Test**

15 Vuitton’s reputation evidence is inadmissible even under the Ninth Circuit “four-part test”
16 which allows admission of evidence when: (1) it proves a material element of the offense for which
17 the defendant is now charged; (2) in certain cases, the prior conduct must be similar to the charged
18 conduct; (3) proof of the prior conduct must be based upon sufficient evidence; and (4) the prior
19 conduct must not be too remote in time. *United States v. Basinger*, 60 F.3d 1400, 1408 (9th Cir.
20 1995).

21 The reason that Vuitton’s reputation evidence fails this test is exemplified by its statement
22 that “Defendants’ status as bulletproof hosts proves knowledge of infringing activity.” But
23 Defendants do not have a “status” as bulletproof hosts because they have *never been found* to be
24 bulletproof hosts (whatever that term means). Vuitton’s vague and baseless reputation testimony
25 clearly fails every requirement of the four-part test, and most notably, the third requirement that
26 requires that “proof of the prior conduct must be based upon sufficient evidence.” Vuitton’s
27 witnesses essentially testify that they have heard, from an unknown third party, that Defendants are
28 criminals. This is not “sufficient evidence” and this inadmissible testimony fails to qualify under the

1 Ninth Circuit four-part rule.

2 **E. Vuitton’s Reputation Testimony Is Inadmissible as Hearsay**

3 Vuitton’s reputation testimony is hearsay under Fed. R. Evid. 801 and 802. It is not
4 admissible under Fed. R. Evid. 803(21). Rule 803(21) states that testimony as to the “[r]eputation of
5 a person’s character among associates or in the community [is not excluded by the hearsay rule, even
6 though the declarant is available as a witness].” But Vuitton’s reputation testimony is not character
7 testimony.

8 This distinction is illustrated in *United States v. Arroyo*, 406 F.3d 881(7th Cir. 2005). There,
9 the court excluded, as hearsay, a memo referencing third-party testimony that the defendant was
10 “believed to have ‘ripped’ two kilograms of cocaine during a drug sale.” *Id.* at 887. In ruling that
11 this memo was inadmissible under Fed. R. Evid. 803(21), the court pointed out that “the statements
12 defendant sought to admit were not related to his character, but rather to a rumor about a specific
13 prior act and others’ intentions to harm him. This information does not establish the ‘[r]eputation of
14 [defendant’s] character among associates or in the community.’ ” *Id.* at 888. This is exactly the type
15 of testimony that Vuitton is offering. Vuitton’s witness testimony that Defendants “are known to be
16 bulletproof hosts” is merely a false rumor that does not establish character. Such testimony is
17 inadmissible hearsay.

18 Vuitton is not entitled to present its proffered reputation evidence because Defendants have
19 not “opened the door” to such testimony. While it is true that Defendants have stated that they have
20 taken appropriate action, consistent with protocol and industry practices, these statements reflect
21 facts, not character. Defendants have not, in any way, “opened the door” to rebuttal character
22 evidence.

23 **F. Impeachment**

24 Despite Vuitton’s contrived claims, it is well established that hearsay reputation testimony
25 cannot be used for impeachment purposes. *In re Hanford Nuclear Reservation Litigation*, 534 F.3d
26 986, 1011-12 (9th Cir. 2008) (holding that “the use of statements should not have been used to
27 impeach [witness] because they were inadmissible hearsay.”) Vuitton cannot offer its reputation
28 testimony for impeachment purposes.

1 **G. Reputation Testimony Is Not Habit Evidence**

2 Vuitton’s witness testimony is not habit evidence under Fed. R. Evid. 406. The Ninth Circuit
3 has recognized that “examples of conduct submitted for the purpose of establishing habit must be
4 ‘carefully scrutinized to ensure that they are numerous enough to justify an inference of systematic
5 conduct.’” *Mathes v. The Clipper Fleet*, 774 F.2d 980, 984 (9th Cir. 1985). Vuitton’s hearsay
6 testimony fails this scrutiny. Vuitton’s testimony is based on what witnesses allegedly “heard” from
7 unknown third parties. It is not nearly enough to justify an inference of systematic conduct Fed. R.
8 Evid. 406.

9 **H. Reputation Testimony Is Unduly Prejudicial**

10 Vuitton’s reputation testimony is inadmissible under Fed. R. Evid. 403 because “although
11 relevant, evidence may be excluded if its probative value is substantially outweighed by the danger
12 of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403. Vuitton’s
13 testimony about Defendants’ “reputation” is highly prejudicial, yet it has little or no probative value.
14 If admitted, Vuitton’s reputation testimony would cause jurors to believe that Defendants’ alleged
15 reputation was based in truth and that their actions were in conformity with that reputation. Such
16 testimony would not have any probative value because the testimony would not be material or
17 relevant to any of the elements of contributory copyright and trademark infringement.

18 **II. CONCLUSION**

19 The Defendants move to exclude any Vuitton testimony concerning Defendants’ alleged
20 reputation because this testimony is inadmissible character evidence, hearsay, and overly prejudicial.

21 Dated: March 16, 2009

GAUNTLETT & ASSOCIATES

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