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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)

)
) **REPLY IN SUPPORT OF DEFENDANTS'**
) **MOTION IN LIMINE #9 TO EXCLUDE**
) **TESTIMONY ABOUT THE**
) **GENUINENESS OF GOODS**

1 **I. RULE 701 BARS LAY OPINION TESTIMONY ABOUT THE GENUINENESS OF**
2 **VUITTON GOODS PURCHASED ON-LINE**

3 **A. Forming an Opinion About the Genuineness of Vuitton Goods Purchased on the**
4 **Internet Requires Specialized Knowledge**

5 Vuitton’s argument that its percipient witnesses can testify as to the genuineness of Vuitton
6 goods purchased on the Internet because it arises from their “personal familiarity with the product”
7 ignores the explicit requirements of Fed. R. Civ. P. Rule 701(c). Rule 701(c) allows a witness not
8 testifying as an expert to testify to opinions as long as the testimony is “not based on scientific,
9 technical or **other specialized knowledge** within the scope of Rule 702.”

10 As the court in *Jerden v. Amstutz*, 430 F.3d 1231, 1239-40 (9th Cir. 2005), a case Vuitton
11 incorrectly cites at page 3:15-16 of its brief, states:

12 Lay witnesses can permissibly base opinion testimony upon their
13 experience, but the Federal Rules of Evidence require that lay opinion
14 testimony be “. . . (c) not based on scientific, technical, or other
15 specialized knowledge within the scope of Rule 702.” Fed.R.Evid.
16 701.

17 *Jerden* makes clear that just because a witness is percipient to the facts means nothing if the opinion
18 is based on specialized knowledge:

19 “The mere percipience of a witness to the facts on which he wishes to
20 tender an opinion does not trump Rule 702.”

21 *Id.*, citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

22 In *Figueroa-Lopez*, the trial court allowed percipient witness DEA agents to opine that the
23 defendant’s actions were consistent with those of an experienced drug trafficker. The appellate court
24 reversed, finding the opinions to be based on specialized knowledge within the meaning of Rule 701
25 because they were “properly characterized as testimony based on the perceptions, education,
26 training, and experience of the witness.” The critical distinction between Federal Rules of Evidence
27 701 and 702 is whether a person with no specialized training would be allowed to opine to the jury
28 merely because that person was an eyewitness to the event:

The Government’s argument simply blurs the distinction between
Federal Rules of Evidence 701 and 702. Lay witness testimony is
governed by Rule 701, which limits opinions to those “rationally based
on the perception of the witness.” Rule 702, on the other hand,
governs admission of expert opinion testimony concerning

1 “specialized knowledge.” The testimony in this case is precisely the
2 type of “specialized knowledge” governed by Rule 702. . . . The mere
3 percipience of a witness to the facts on which he wishes to tender an
4 opinion does not trump Rule 702. Otherwise, a layperson witnessing
5 the removal of a bullet from a heart during an autopsy could opine as
6 to the cause of the decedent’s death. Surely a civilian bystander, or for
7 that matter a raw DEA recruit would not be allowed to interpret for the
8 jury Lopez’s behavior in the parking lot on May 25, 1995 as that of an
9 “experienced” trafficker merely because that person was an eyewitness
10 to the same.

11 *Id.* at 1246.

12 Rule 702 applies here because specialized knowledge is required to opine on whether an item
13 purchased from the Internet is or is not genuine Vuitton product. Vuitton’s Rule 30(b)(6) witness
14 admits as much. Nikolay Livadkin testified that it requires “significant expertise in recognizing
15 counterfeit products.” [Declaration of James A. Lowe (“Lowe Decl.”) ¶ 4, **Exhibit “1522”**
16 Deposition of Nicolay Livadkin (“Livadkin Depo.”) 20:18-21] Vuitton’s other witness, Robert
17 Holmes, testified that he occasionally receives training by brand owners to identify fake products,
18 but that he had not received such training for Vuitton products and would not be testifying about the
19 authenticity of any Louis Vuitton product at trial. [Supplemental Declaration of James A. Lowe. ¶ 4,
20 **Exhibit “1528”** Deposition of Robert L. Holmes (“Holmes Depo.”) 134-136] Rule 701 is not
21 implicated because a witness lacking specialized knowledge would be unable to testify about the
22 genuineness of Vuitton products purchased on the Internet.

23 **B. The Ninth Circuit Limits Application of the Particularized Knowledge Language
24 to One Narrow Context**

25 The Advisory Committee Note to Rule 701 provides that the 2000 Amendments that added
26 subdivision (c) were not intended to affect longstanding rules that allow a court to “permit[] the
27 owner or officer of a business to testify to the value or projected profits of a business, without the
28 necessity of qualifying the witness as an accountant, appraiser or similar expert.” Fed. R. Civ. P.
Rule 701, Advisory Committee Note (2000 Amendments). The Committee noted that the testimony
is admitted under Rule 701 “not because of experience, training, or specialized knowledge within the
realm of an expert, but because of the *particularized knowledge* that the witness has by virtue of his
or her position in his business.” *Id.* The Committee wanted to make clear that the Supreme Court

1 did not intend to foreclose lay testimony from a business owner testifying about the value of the
2 business:

3 The amendment is not intended to affect the “prototypical example[s]
4 of the type of evidence contemplated by the adoption of Rule 701. . . .
5 For example, most courts have permitted the owner or officer of a
6 business to testify to the value or projected profits of a business,
7 without the necessity of qualifying the witness as an accountant,
8 appraiser, or similar expert.

9 Federal Rules of Evidence, Rule 701, Advisory Committee Notes (2000).

10 Noting that the Ninth Circuit had not yet addressed the scope of the paragraph of the
11 Advisory Committee Note to Rule 701 regarding lay opinion testimony based on particularized
12 knowledge,¹ this Court in *Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 504098, at *4 (N.D.
13 Cal. 2008) considered the “particularized knowledge” language and limited it to one specific
14 context:

15 The court finds these cases persuasive only **in the limited context**
16 **described in the advisory committee note regarding testimony**
17 **about one’s business, and it does not believe they can be read to**
18 **support a broader “particularized knowledge” exception** to the
19 expert disclosure rules. As a general matter, “[l]ay opinion testimony
20 is admissible only to help the jury or the court to understand the facts
21 about which the witness is testifying **and not to provide specialized**
22 **explanations or interpretations that an untrained layman could**
23 **not make if perceiving the same acts or events.”** [citing *United*
24 *States v. Conn*, 297 F.3d 548, 554 (7th Cir. 2002) (quoting *United*
25 *States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001))] [Emphasis
26 added.]

27 Vuitton’s witnesses admit that spotting fake Vuitton merchandise requires specialized
28 training. Mr. Livadkin testified at his Rule 30(b)(6) deposition in this case: “I have significant
29 *expertise* in recognizing counterfeit products.” Livadkin Depo. 20:18-19. Mr. Holmes testified that,
30 despite conducting counterfeit investigations for Vuitton for over 25 years, he was unable to spot
31 brand fakes without specialized training. Holmes Depo. 68:11-13, 134-136. Rule 702 is implicated
32 because determining the genuineness of Vuitton goods purchased on the Internet requires specialized

33 _____
34 ¹*Hynix*, 2008 WL 504098, at *4 n.4 (“The Ninth Circuit has not addressed the paragraph of the
35 advisory committee note endorsing lay opinion testimony based on particularized knowledge. It has,
36 however, favorably relied on a related paragraph of the note about identifying drugs. [citing *United*
37 *States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006)]”).

1 explanations or interpretations that an untrained layman (even one who has worked with Vuitton for
2 many years) could not make. Certainly a layman or juror would not have the knowledge to
3 determine if a proffered handbag is a genuine Vuitton or a clever fake.

4 **C. The Law of the Case Doctrine Only Applies to Issues Determined on Appeal**

5 Incredibly, Vuitton attempts to argue that the “law of the case” precludes any inquiry by this
6 Court into whether Mr. Livadkin can testify as to the genuineness of Vuitton products. At page 5 of
7 its opposition, Vuitton cites selective language from case law to mask the fact that the law of the
8 case doctrine is limited to issues determined *on appeal*:

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

13 “[T]he prior decision of legal issues should be followed *on a later*
14 *appeal* ‘unless the evidence on a subsequent trial was substantially
15 different, controlling authority has since made a contrary decision of
16 the law applicable to such issues, or the decision was clearly erroneous
17 and would work a manifest injustice.’ ” *Merritt v. Mackey*, 932 F.2d
18 1317, 1320 (9th Cir.1991)

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

22 Defendants Sherwood and Cuddy then appealed their convictions to
23 this court in a consolidated appeal. See *United States v. Sherwood*, 98
24 F.3d 402 (9th Cir.1996) (“*Sherwood I*”). We affirmed their
25 convictions but remanded to the district court the question whether it
26 properly departed upward based on Application Note 8 of U.S.S.G.
27 § 2B3.2, which permits an upward departure if the offense involved “a
28 threat to a family member of the victim.”

* * *

First, the defendants note that our decision in *Sherwood I* stated that
the record did not support a finding that Ms. Wynn’s life was
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.

Id. at 1113.

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1 **D. Defendants Have Suffered Substantial Prejudice by Vuitton’s Decision to**
2 **Disregard the Expert Disclosure Requirements of This Court**

3 Vuitton’s claim that it has “substantially complied” with the requirements of Rule 702 and
4 the orders of this Court regarding disclosure of expert witnesses is baseless. The deadline to disclose
5 experts in this case was **not** 90 days prior to trial as Vuitton claims. (Opp. 6:17-27) The Court’s
6 November 15, 2007 Scheduling Order explicitly provided that *experts were to be disclosed 63 days*
7 *before the April 28, 2008 close of discovery:*

8 Any party wishing to present expert witness testimony with respect to
9 a claim or defense shall lodge with the Court and serve on all other
10 parties the name, address, qualifications, resume, and a written report
11 which complies with Fed.R.Civ.P. 26(a)(2)(B) **63 days before close of**
12 **discovery.**

13 Scheduling Order, p. 3:4-7 [Doc. 23] (emphasis in original).

14 The Scheduling Order made clear that disclosure of experts 63 days before discovery cutoff
15 was **mandatory** for “regular employees” “who may be called to provide expert opinion testimony”:

16 Expert witness disclosure **must be made** with respect to a person who
17 is either (a) specially retained or specially employed to provide expert
18 testimony pursuant to Fed.R.Evid. 702 or (b) **a regular employee** or
19 agent or treating physician **who may be called to provide expert**
20 **opinion testimony.**

21 Scheduling Order, p. 3:7-10 [Doc. 23] (emphasis added).

22 Defendants have suffered substantial prejudice as a result of Vuitton’s decision to ignore the
23 Court’s November 15, 2007 Scheduling Order. Defendants have received no report, and have not
24 received an opportunity to depose Mr. Livadkin or any other witness as an expert. Defendants had
25 no opportunity to obtain a rebuttal expert. Defendants have never been given the opportunity to
26 object to the qualifications or proposed testimony of Vuitton’s experts, or file a motion to exclude an
27 expert, as set forth in paragraph 6 of the Scheduling Order:

28 Any party objecting to the qualifications or proposed testimony of an
expert must file, serve, and notice a motion to exclude the expert or
any portion of the expert’s testimony in writing in accordance with
Civil Local Rules 7-2, for hearing no later than **42 DAYS AFTER**
BOTH EXPERT AND REBUTTAL EXPERT DISCLOSURES
ON A MONDAY (LAW AND MOTION DAY) at 9:00 a.m. and
preferably before or on the same day as the discovery cutoff date at
9:00 a.m.

1 Scheduling Order, p. 3:7-10 [Doc. 23].

2 This is exactly the scenario the Court was seeking to avoid by setting forth explicit expert
3 witness disclosure requirements in its November 15, 2007 Scheduling Order. It is now just three
4 weeks before trial. Defendants are still unaware what the exact scope of Mr. Livadkin's proposed
5 expert testimony would be. No expert witness reports have been proffered by Vuitton, even
6 belatedly (they were due over a year ago). There is no practical opportunity to depose experts or to
7 prepare for trial. Instead, Vuitton expects the Defendants to defend themselves in a "bet the
8 company" jury trial against a rich, powerful international company that blatantly and intentionally
9 disregards orders of the Court to suit itself; and to do so without the benefit of any expert reports or
10 expert witness depositions.

11 **II. CONCLUSION**

12 For the foregoing reasons, Defendants move to exclude any testimony by Livadkin and
13 Holmes or any undisclosed witness about the genuineness of goods that Vuitton intends to introduce
14 as evidence.

15
16 Dated: March 16, 2009

GAUNTLETT & ASSOCIATES

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