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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 #13**
) **TO EXCLUDE THE TESTIMONY OF**
) **JOSEPH T. MURIN AND PHIL COOPER**

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
4 (“Vuitton”) from offering in evidence any testimony from Joseph T. Murin and Phil Cooper. This
5 testimony is properly excluded because it is inadmissible lay witness testimony under Fed. R. Evid.
6 701(c).

7 The motion will be heard on July 6, 2009 at 3:00 p.m. in Courtroom 8, Fourth Floor of the
8 U.S. Courthouse, 280 South 1st Street, San Jose, California.

9 **I. AN ORDER IN LIMINE IS PROPER TO EXCLUDE ANTICIPATED EVIDENCE**
10 **AT TRIAL**

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.” *Luce v. United States*, 469 U.S. 38, 40
13 (1984). Obtaining a discretionary advance ruling on the admission of specific evidence or resolving
14 critical evidentiary issues at the outset enhances the efficiency of the trial process. *In re Japanese*
15 *Electronic Products Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir. 1983), *rev’d on other grounds*, 475
16 U.S. 574 (1986). Authority is also implied from “the district court’s inherent authority to manage
17 the course of trials.” *Luce*, 469 U.S. at 41 n.4; *United States v. Holmquist*, 36 F.3d 154, 163 (1st Cir.
18 1994)

19 **II. MURIN AND COOPER’S TESTIMONY IS INADMISSIBLE LAY WITNESS**
20 **TESTIMONY**

21 Thirteen months after discovery closed on April 28, 2008, Vuitton designated two new lay
22 witnesses, Joseph T. Murin and Phil Cooper on May 21, 2009,¹ whose testimony should be
23 excluded. It is anticipated that Murin and Cooper, who are both computer forensic examiners
24 employed at Guidance Software, Inc., will be testifying about topics related to computer forensics
25 that constitute inadmissible lay witness testimony under Fed. R. Evid. 701(c).

26 Both Murin and Cooper have not been designated as expert witnesses under Fed. R. Evid.

27 _____
28 ¹ Declaration of James A. Lowe (“Lowe Decl.”) ¶4, Vuitton’s Supplemental Disclosure of Cooper
and Murin, attached as **Exhibit “1597.”**

1 26(a)(2) nor have they prepared expert witness reports. They will, therefore, be lay witnesses and
2 the admissibility of their testimony is governed by Fed. R. Evid. 701(c):

3 If the witness is not testifying as an expert, the witness' testimony in
4 the form of opinions or inferences is limited to those opinions or
5 inferences which are (c) not based on scientific, technical, or other
6 specialized knowledge within the scope of Rule 702.

7 Rule 701(c) is intended to “[forbid] the admission of expert testimony dressed in lay witness
8 clothing.” *U.S. v. Testerman*, 263 Fed. Appx. 328 (4th Cir. 2008). “Lay testimony ‘results from a
9 process of reasoning familiar in everyday life,’ whereas “an expert's testimony results from a process
10 of reasoning which can be mastered only by specialists in the field.” *U.S. v. White*, 492 F.3d 380,
11 401 (6th Cir. 2007); *U.S. v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005) (citing to Rule 701 Advisory
12 Committee’s Notes).

13 Any computer-related testimony from Murin or Cooper will be inadmissible under Rule
14 701(c) because such testimony, particularly combining forensic examination of computers, is not the
15 result of a “process of reasoning familiar in everyday life.” In *U.S. v. Ganier*, 468 F.3d 920, 925
16 (6th Cir.2006), the Court specifically excluded lay witness testimony from a *computer forensic*
17 *examiner*, finding such testimony to be highly specialized. (finding that “the forensic tests Drueck
18 ran are more akin to specialized medical tests run by physicians” and that “the interpretation Drueck
19 needed to apply to make sense of the software reports” required specialized knowledge). Similarly,
20 any computer-related testimony from either Murin or Cooper will necessarily be inadmissible lay
21 witness testimony under Rule 701(c).

22 Vuitton has designated as an expert witness another computer forensic examiner, Michael
23 Wilson, who did submit reports and has been deposed.

24 Defendants refer the Court to the same arguments made in their motion in limine #9 to
25 exclude the testimony of Nicolay Livadkin about the genuineness of goods.

26 **III. CONCLUSION**

27 Defendants respectfully request that the Court enter an order precluding Vuitton from

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1 offering in evidence any testimony from Joseph T. Murin and Phil Cooper.

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3 Dated: July 2, 2009

GAUNTLETT & ASSOCIATES

4
5 By: /s/James A. Lowe

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12 Managed Solutions Group, Inc.,
13 and Steve Chen
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