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 7

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

10	Louis Vuitton Malletier, S.A.,	)	Case No. C 07 3952 JW
11		)	
12	Plaintiff,	)	OPPOSITION OF PLAINTIFF LOUIS
13	v.	)	VUITTON MALLETIER, S.A. TO
14	Akanoc Solutions, Inc., et al.	)	DEFENDANTS' RULE 50(b) MOTION;
15		)	DECLARATION AND EXHIBITS IN
16	Defendants.	)	SUPPORT
		)	Date: February 22, 2010
		)	Time: 9:00 a.m.
		)	Court: Hon. James Ware

17  
 18 Plaintiff Louis Vuitton Malletier, S.A. ("Plaintiff" or "Louis Vuitton") submits that  
 19 Dendants Akanoc Solutions, Inc. ("Akanoc"), Managed Solutions Group, Inc. ("MSG")  
 20 (collectively the "ISP Defendants") and Steve Chen's ("Chen") (collectively "Defendants") Rule  
 21 50(b) Motions must be denied in light of the applicable legal standards, the weight and credibility  
 22 of the evidence offered at trial satisfying the requisite legal showings and supporting the jury's  
 23 verdict and its finding of liability and awarding damages for Defendants' contributory copyright  
 24 and trademark infringement.

25 Plaintiff incorporates herein and references its initial and supplemental responses to  
 26 Defendants' Rule 50(a) motions filed as Docket No.s 213 and 214 on August 24, 2009, and Docket  
 27 No. 237 on September 3, 2009, copies of which are attached hereto as Exhibits A-C to the  
 28 Declaration of J. Andrew Coombs for the Court's convenience.





# **EXHIBIT A**

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11		)	
12	Plaintiff,	)	OPPOSITION OF PLAINTIFF LOUIS
13	v.	)	VUITTON MALLETIER, S.A. TO
14	Akanoc Solutions, Inc., et al.	)	DEFENDANTS' RULE 50(a) MOTION
15	Defendants.	)	FOR JUDGMENT AS A MATTER OF
		)	LAW REGARDING: CONTRIBUTORY
		)	COPYRIGHT INFRINGEMENT CLAIM

16 **INTRODUCTION**

17 Plaintiff Louis Vuitton Malletier, S.A. ("Louis Vuitton" or "Plaintiff") files this Opposition  
18 to Defendants' Rule 50(a) Motion for Judgment as a Matter of Law Regarding Contributory  
19 Copyright Infringement Claim.

20 Defendants' motion betrays a profound misunderstanding of the standards applicable to a  
21 motion for judgment as a matter of law and for liability under the Copyright Act. Defendants'  
22 motion misapplies the holdings in the decision of the Ninth Circuit in *Subafilms, Ltd. v. MGM-*  
23 *Pathe Communications Co.*, 24 F. 3d 1088 (9<sup>th</sup> Cir. 1994), the evidence already introduced  
24 evidencing the elements of the claim for contributory copyright infringement, the standards for  
25 constructive knowledge as apply in this Circuit, including *Metro-Goldwyn-Mayer Studios, Inc. v.*  
26 *Grokster, Ltd.*, 545 U.S. 913 (2005) and the application of the safe harbor provided for by the  
27 *Digital Millennium Copyright Act* ("DMCA").

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**ARGUMENT**

**A. Introduction**

Although a motion for judgment as a matter of law may be filed at any time before submission of the case to the jury, it must be construed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where reasonable minds can differ, where the evidence is in dispute or when credibility is at issue, the motion is properly denied. *Id.* at 250-51.

In addition to Defendants’ fundamental misstatement of many of the applicable principles of law underpinning their motion, they cannot and do not meet their burden.

**B. Extraterritoriality of the Copyright Act; Acts of Underlying Infringement Occurred in the United States.**

Defendants engage in ongoing, persistent, willful conduct to facilitate the infringement of the Plaintiff’s copyrights. The rights infringed through Defendants’ assistance are extensive and enumerated in the Copyright Act. These include, for purposes of this action, the display of Plaintiff’s copyrights on webpages located on the Defendants’ servers, blocks from the courthouse, the distribution of copies of those images to Internet users both here in the United States and located elsewhere around the world with data originating from San Jose, California, the reproduction and sale of merchandise embodying unauthorized copies of those copyrights and the export/import of that merchandise into the United States. Any one of these acts (and Plaintiff argues **all** of these acts) provide the requisite territoriality.

Defendants’ argument on these issues is predicated upon the Ninth Circuit’s decision in *Subafilms, supra*, but Defendants fail to cite key portions of the authority. In *Subafilms*, the Plaintiff’s claim for copyright infringement against the defendant rested upon one central allegation. The overseas distribution of a film in which the Plaintiff owned applicable copyrights, was purportedly “authorized” by the defendant located in the United States. There was no allegation that any action – other than the underlying authorization – occurred within the United States. The copies were made, distributed, displayed and sold *entirely* outside the United States.

1 In arriving at its conclusion that United States courts could not address the Plaintiff's claim  
2 in that case, the Ninth Circuit did rule that "*wholly* extraterritorial acts of infringement cannot  
3 support a claim under the Copyright Act[.]" *Subafilms, supra*, at 1095 (emphasis added).  
4

5 What the Defendants omit, however, is "to the extent part of an 'act' of infringement occurs  
6 within the United States, then, although such act is completed in a foreign jurisdiction, those parties  
7 who contributed to the act within the United States may be rendered liable under American  
8 copyright law." *Id.* at fn 9, quoting from Nimmer § 17.02, at 17-19. Thus, Plaintiff meets its  
9 burden under *Subafilms* not only because part of the infringement occurred in the United States,  
10 some of the claims for infringement were completed entirely within the United States.

11 The presumption against extraterritoriality serves two purposes. First, it serves to protect  
12 against unintended clashes between our laws and those of other nations which could result in  
13 international discord. Second, it reflects the notion that when Congress legislates, it is primarily  
14 concerned with domestic conditions. *ARC Ecology v. U.S. Dept. of the Air Force*, 294 F. Supp. 2d  
15 1152, 1158 (N.D. Cal. 2003). These purposes are not advanced by Defendants interpretation of the  
16 applicable standards: whatever the difference in enforcement standards between the United States  
17 and China, there is no difference or dispute regarding the equivalent illegality of the underlying  
18 direct infringement. Moreover, there is ample testimony that Defendants and their customers  
19 clearly aim their goods and services at the United States marketplace.

20 There is no question that *part* of the acts of infringement proved thus far (and display  
21 entirely) occurred on Defendants' servers. This includes storage of the raw data (as described in  
22 Defendants' motion at 5:19-21) and provision of bandwidth through which that raw data can be  
23 distributed to users.

24 But there is far more supporting application of the Copyright Act to the Defendants'  
25 contributory copyright infringement. These acts include the marketing and distribution of copies in  
26 the United States and export of merchandise embodying the Plaintiff's copyrights to the United  
27 States. Moreover, these underlying direct infringements were *completed* in the United States. *See,*  
28 *Nimmer on Copyright*, Section 17.02 (2007) ("[R]egardless of how much infringing conduct may

1 or may not occur abroad, when violation of one of the exclusive rights in copyrighted works is  
2 completed within the United States, the activity becomes actionable under domestic law.")  
3 Plaintiff's investigator located in the United States, received what he viewed on the infringing  
4 websites that were hosted on Defendants' servers in San Jose. The appropriateness of the  
5 application of the Copyright Act is established.

6 The underlying acts of copyright infringement are clearly not *wholly* extraterritorial acts.  
7 While the counterfeit merchandise may be produced in China, it is in fact, as shown by the  
8 evidence presented by Plaintiff, specifically marketed and sold to persons within the United  
9 States.<sup>1</sup> Thus the underlying acts of direct infringement do, in part, occur within the United States  
10 and fall under the purview of the Copyright Act. In fact, "the mere act of importation" of the  
11 counterfeit copyrighted work alone constitutes infringement under the Copyright Act. *Parfums*  
12 *Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp 1378, 1383 (C.D. Cal. 1993); 17 U.S.C. §  
13 501(a). So, where an act of infringement occurs within the United States, including but not limited  
14 to the marketing, sale and importation of counterfeit Louis Vuitton merchandise more specifically,  
15 the Copyright Act is properly applied, as it is in this instance. *L.A. News Serv. v. Reuters Tel. Int'l,*  
16 *Ltd.*, 340 F.3d 926, 928 (9th Cir. 2003).

17 Moreover, Congress made clear that the Copyright Act should apply extraterritorially in  
18 instances where unauthorized importation of copyrighted works occurs, such as it has in this case.  
19 *Subafilms, Ltd., supra* at 1095; *see* 17 U.S.C.A. § 602(a). Louis Vuitton neither authorized the  
20 counterfeiting of its products and infringement of its copyrights nor their importation into the  
21 United States, as claimed by Defendants in their motion.

22 For these reasons it is unnecessary for the Court to address the still more far-fetched  
23 argument that computer users viewing of the infringing images is a fair use. Louis Vuitton makes  
24 no claim or allegation concerning any purported infringement by *Internet consumers* who view  
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<sup>1</sup> Most all of the websites are in English and some reference specific policies for customs seizures and refunds of "US\$18" should such seizure occur (e.g., Ex. 72.1), and many of the websites specifically provide for shipping rates to the United States (e.g., Ex. 63).

1 websites on Defendants' servers, as apparently set up at ¶ I.B.c.(2) and the Court need not concern  
2 itself with the fair use straw man Defendants strive to set up there.

3  
4 The data acquired during the court ordered inspection shows that photos of copies and  
5 unauthorized uses of Louis Vuitton's properties resided on Defendants' servers and it did not  
6 require an internet browser to view those photos.<sup>2</sup> See Exhibit 593.31. The infringing images were  
7 not "only 0s and 1s" they were visually complete and identical to their online counterparts. See  
8 Exhibits 611 and 613 re [www.bigworldshoes.com](http://www.bigworldshoes.com). Among other things, Defendants argument  
9 misses the point that the consumer's viewership *could not have occurred* but for the Defendants  
10 contributory infringement through serving up and distributing the data that consumers could view.  
11 And it was Defendants' continued offering of goods and services despite specific and general  
12 knowledge of their infringing customers that gave rise to the claims at issue. To take the view that  
13 the server hosts "only 0s and 1s" as apparently asserted by Defendants is inaccurate and would  
14 effectively and improperly insulate any online activity.

15 **C. Defendants' Motion Improperly Assumes Jurisdiction Over Underlying Direct**  
16 **Infringers is an Element Necessary to a Contributory Infringement Action.**

17 Defendants conflate their argument concerning proof of direct infringement with  
18 jurisdiction over direct infringers. Defendants leap from this unexplained conjunction to a  
19 discussion about personal jurisdiction over online activity. The only personal jurisdiction issue of  
20 relevance here is that which concerns the Defendants themselves. As they are all California  
21 residents and the activities at issue occur a mere "couple of blocks" from the Courthouse as  
22 testified to by one witness, there can be no argument about the propriety of personal jurisdiction.

23 Defendants' motion posits that because Louis Vuitton can not demonstrate that it has  
24 personal jurisdiction over the Chinese sellers, Defendants should escape liability for contributory  
25 copyright infringement. This is not the case.

26 The three elements required to establish contributory copyright liability are: (1) direct  
27 infringement by a primary infringer, (2) knowledge of the infringement, and (3) material

28 <sup>2</sup> Plaintiff's Expert specifically testified that Guidance Software computers are not connected to the internet for forensic purposes.

1 contribution to the infringement. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th  
 2 Cir. 2004); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). All that is  
 3 required is that an underlying direct infringement has occurred; there is no requirement that the  
 4 Court also have jurisdiction over third parties who are not Defendants in this case. There need not  
 5 be “substantial” or “continuous and systematic” contact by the underlying infringers with this  
 6 jurisdiction. The underlying infringers only need to have perpetrated the underlying infringement  
 7 of which the Defendants had knowledge and materially contributed.

8 **D. Plaintiff Has Proved All Elements of its Claims.**

9 **i. Plaintiff Has Shown Notice.**

10 The absurdity of Defendants’ construction of *Subafilms, supra*, is underscored by its  
 11 argument that it had no *specific* notice of any underlying direct infringement. This was  
 12 contradicted by evidence presented by the Plaintiff and by Defendants’ own Exhibit 1598.  
 13 Accordingly, the only way Defendants’ argument can pass muster is if all the notices of infringing  
 14 conduct they received are to be considered ignored because, irrespective of such notice and the  
 15 content located on servers in San Jose, their customers were located offshore. Acceptance of this  
 16 construction is at odds with common sense, the current law and could only foster an environment  
 17 where infringers (and other online criminals) would merely move their activity into a different  
 18 jurisdiction to insure that it could be caught by no national law. Defendants have admitted notice  
 19 and none of their attempts to discount these admissions should be accepted.

20 Plaintiff has also shown evidence of constructive knowledge sufficient to meet its burden of  
 21 proving notice. Defendants cite the Supreme Court decision in *Grokster*, claiming that it supports  
 22 the proposition that Defendants’ general knowledge that infringement could occur using their  
 23 servers does not constitute knowledge for purposes of contributory copyright infringement.  
 24 Defendants fail to cite, however, further language in the decision stating that “evidence of  
 25 infringement on a gigantic scale” occurring on the Grokster networks was enough to determine that  
 26 the defendant had the intent to induce copyright infringement and that information about the  
 27 general volume of infringing activity on a website could be considered when determining whether  
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1 or not a contributory infringer had the requisite knowledge to be held liable. *MGM Studios, Inc. v.*  
2 *Grokster, Ltd.*, 545 U.S. 913, 940 (2005). While knowledge of the existence of infringing potential  
3 or of particular methods of infringement is not enough to satisfy the knowledge requirement,  
4 Defendants' knowledge that a large volume of infringement was actually occurring on their servers  
5 is certainly enough to satisfy the knowledge requirement of contributory copyright infringement.

6 Courts have held in analogous situations that specific knowledge of infringement is not  
7 necessary to be held liable for contributory copyright infringement. Swap meet and flea market  
8 operators have been held contributorily liable where vendors sell counterfeit items where the  
9 operators were willfully blind to the vendor's infringing activities. *Fonovisa, supra*, at 265.

10 In *Fonovisa*, operators of swap meets where vendors offered for sale thousands of  
11 counterfeit recordings were notified via a letter from the Sheriff's office of the vendor's infringing  
12 conduct a year after a raid. *Id.* at 261. The Ninth Circuit held that this was indisputable evidence  
13 that the swap meet operators had the requisite knowledge that vendors were selling counterfeit  
14 recordings in order to be held liable for contributory copyright infringement. *Id.* If Defendants  
15 somehow avoided having actual knowledge of the massive amounts of infringement occurring on  
16 their servers, despite this lawsuit, a court ordered inspection of their servers and multiple notices,  
17 their willful blindness will satisfy the knowledge requirement of contributory copyright  
18 infringement.

19 **ii. Plaintiff Has Shown Material Contribution.**

20 Defendants do (finally) correctly state that it is Plaintiff's burden to prove "inducing,  
21 causing **OR** material contribution, citing among others, the governing Ninth Circuit decisions in  
22 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9<sup>th</sup> Cir. 1996) and *Metro-Goldwyn-Mayer*  
23 *Studios, Inc. v. Grokster, ltd.*, 380 F.3d 1154 (9<sup>th</sup> Cir. 2004). See also, *Perfect 10, Inc. v. Visa Int'l*  
24 *Service Assoc., et al.*, 494 F.3d 788, 795 (9<sup>th</sup> Cir. 2007) citing *Ellison v. Robertson*, 357 F.3d 1072,  
25 1076 (9<sup>th</sup> Cir. 2004).

26 The more readily established element is material contribution as outlined by Louis  
27 Vuitton's witnesses, the evidence of Defendants' advertising practices, as well as Defendant  
28

1 Chen's testimony concerning the sophisticated equipment and back ups in place at their facility as  
2 well as their physical location and proximity to the "internet backbone" as described at length by  
3 Defendants witnesses and counsel, among other things. The continued willful blindness of the  
4 Defendants also materially contributes to the counterfeiting and piracy occurring on Defendants'  
5 servers.

6 Liability has also been found to exist where the defendants provide the "site and facilities"  
7 for infringing activity, *Fonovisa*, 76 F.3d at 264, when "a computer system operator learns of  
8 specific infringing material available on his system and fails to purge such material from the  
9 system," *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9<sup>th</sup> Cir. 2007), or when a  
10 computer system operator knows that specific infringing materials are present on their systems and  
11 are able to take "simple measures" to limit infringement, they continue to provide access to the  
12 infringing materials. *Religious Tech. Ctr. V. Netcom On-Line Comm. Serv., Inc.*, 907 F. Supp.  
13 1361, 1375 (N.D. Cal. 1995). Defendants materially contribute to the infringing activity occurring  
14 their servers under all of these additional grounds for liability.

15 Defendants also cite that the inducement standard is defined by some courts as "actively  
16 and knowingly aid[ing] and abet[ting] another's direct infringement. Defendants' Motion p. 9:19-  
17 20; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9<sup>th</sup> Cir. 2001) ("liability  
18 exists if the defendant engages in personal conduct that encourages or assists the infringement").  
19 Plaintiff submits that viewing the evidence thus far in its favor satisfies this element as well.

20 **C. Defendants Are Not Eligible For DMCA Protection.**

21 Defendants' assertions predicated upon the DMCA are entirely improper.

22 First, as noted by them, it is not a complete defense but a limited immunity which specifies  
23 remedies which may be ordered where an ISP is otherwise eligible for protection. Motion, 11:1-2  
24 ("the protections include immunity from any copyright damage award and limitations on  
25 injunction"). As such it is not a basis for judgment as a matter of law.

26 Second, also as noted by Defendants, they first filed a designation of agent for service with  
27 the Copyright Office *after* the present action was filed. Motion, 10:24. Accordingly, Defendants  
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1 did not qualify for safe harbor immunity and, ultimately, this will be a matter on which judgment  
2 as a matter of law is properly ordered in favor of Plaintiff and against Defendants.

3  
4 Third, the DMCA safe harbor is an affirmative defense. As such, the Plaintiff has no  
5 burden of proof. *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 657 (E.D. Ill. 2002). It is  
6 Defendants' burden to show that they have fully complied with the provisions of the DMCA in  
7 order to seek its safe harbor protection and this they will be unable to do so, not only as noted  
8 above but for other reasons already before the Court including (but not limited to) the fact one  
9 Defendant, Managed Solutions Group, Inc. has no published terms of service to this day and the  
10 fact that neither ISP defendant took expeditious steps to disable access to the infringing material.

11 It is improper for Defendants to include an argument regarding the DMCA safe harbors in  
12 a Rule 50 motion when Defendants have yet to prove threshold applicability, and it is entirely  
13 Defendants' burden to show that they are eligible for safe harbor protection under the DMCA.

14 **CONCLUSION**

15 For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants'  
16 Motion for Judgment as a Matter of Law Regarding Copyright Infringement Claim.

17 Dated: August 24, 2009

J. Andrew Coombs, A Professional Corp.

18 /s/ J. Andrew Coombs

19 By: J. Andrew Coombs

Annie Wang

20 Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

# **EXHIBIT B**

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10 Louis Vuitton Malletier, S.A., )  
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15 ) DEFENDANTS' RULE 50(a) MOTION  
Akanoc Solutions, Inc., et al. ) FOR JUDGMENT AS A MATTER OF  
16 ) LAW REGARDING: CONTRIBUTORY  
17 ) TRADEMARK INFRINGEMENT CLAIM  
18 )  
19 Defendants. )  
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**INTRODUCTION**

29 Plaintiff Louis Vuitton Malletier, S.A. (“Louis Vuitton” or “Plaintiff”) files this Opposition  
30 to Defendants’ Rule 50(a) Motion for Judgment as a Matter of Law Regarding Contributory  
31 Trademark Infringement Claim. Once again Defendants mischaracterize the record and the  
32 applicable law in support of the untenable proposition that Plaintiff has failed to introduce evidence  
33 on each element of the claim for contributory trademark infringement. At root, Plaintiff must  
34 show, as stated in the leading decision *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456  
35 U.S. 844 (1982), namely: “if a manufacturer or distributor intentionally induces another to infringe  
36 a trademark, or if it continues to supply its product to one whom it knows or has reason to know is  
37 engaging in trademark infringement, the manufacturer or distributor is contributorily responsible  
38 for any harm done as a result of the deceit.” *Id.* at 854; *see, also, Fonovisa, Inc. v. Cherry Auction,*  
39 *Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

**ARGUMENT**

**A. Introduction**

Although a motion for judgment as a matter of law may be filed at any time before submission of the case to the jury, it must be construed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where reasonable minds can differ, where the evidence is in dispute or when credibility is at issue, the motion is properly denied. *Id.* at 250-51.

In addition to Defendants' fundamental misstatement of many of the applicable principles of law underpinning their motion, they cannot and do not meet their burden.

**B. Plaintiff Has Introduced Ample Proof on Each Element of Its Claim.**

**i. Evidence of Direct Infringement: Infringer "Identification".**

Defendants' scattershot contentions that Plaintiff has not presented evidence of underlying direct infringement are without merit. Plaintiff has introduced extensive evidence demonstrating the vast number of underlying infringements perpetrated with the use of Defendants' goods and services.<sup>1</sup>

As separately noted in Opposition to Defendants Motion for Judgment as a Matter of Law on Plaintiff's claim for contributory copyright infringement, Defendants improperly conflate the requirement to prove such infringement with the requirement that Plaintiff *identify* to the specifications desired by the Defendants of the underlying infringer. Plaintiff has provided multiple options to identify the direct infringer including by website, by Defendants' customer, and by payee information, but it is not enough for the Defendants. Defendants' desires in this arena do not comport with the requirements of the law and their motion is properly denied on this basis.

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<sup>1</sup> Because Defendants supply both goods and services, their argument predicated upon a supposed distinction rooted in the Ninth Circuit's decision in *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9<sup>th</sup> Cir. 1999) can be safely disregarded. Testimony has clearly established that the Defendants supply a package of goods and services which enable China-based customers to conduct Internet businesses through websites hosted in the United States. The bundle of goods and services include (i) a server, the elements of which were further elaborated upon by Defendant Chen in his testimony; (ii) an operating system and other "control panel" type software; (iii) router programming which insures interactivity with the Internet community; and (iv) bandwidth which provides underlying connectivity, among other things.

1 Defendants then leap from this unexplained conjunction to a discussion about personal  
2 jurisdiction over online activity. The only personal jurisdiction issue of relevance here is that  
3 which concerns the Defendants themselves. As they are all California residents and the activity at  
4 issue occurs a mere “couple of blocks” from the Courthouse as testified to by one witness, there  
5 can be no argument about the propriety of personal jurisdiction.

6 Defendants’ motion posits that because Louis Vuitton has not demonstrated that it has  
7 personal jurisdiction over the Chinese sellers, Defendants should escape liability for contributory  
8 trademark infringement. This is not the case.

9 The elements required to establish contributory trademark liability were outlined at the  
10 outset: all that is required is that an underlying direct infringement have occurred; there is no  
11 requirement that the Court also have jurisdiction over third parties who are not Defendants in this  
12 case. There need not be “substantial” or “continuous and systematic” contact by the underlying  
13 infringers with this jurisdiction. The underlying infringers only need to have perpetrated the  
14 underlying infringement of which the Defendants had knowledge, control and to which they  
15 materially contributed or concerning which they remained willfully blind.

16 **ii. Evidence of Direct Infringement: Use in Commerce**

17 Infringers enabled by the valuable assistance provided by Defendants, “use” Plaintiff’s  
18 trademarks in commerce. Any other conclusion is absurd.

19 First, Defendants ignore *any* use which occurs other than that which is “affixed” to the  
20 goods themselves. By this construction, no promotional materials or advertising could ever be  
21 construed a use in commerce and predicate for a claim for trademark infringement. This is  
22 contradicted by the very definition of “use in commerce” quoted by Defendants which clearly  
23 states that a mark shall be deemed to be used in commerce, on goods when “it is placed in any  
24 manner on the goods or their containers *or the displays associated therewith...*” 15 U.S.C. § 1127.  
25 The underlying direct infringers used Plaintiff’s trademarks not only on the infringing websites but  
26 also on the counterfeit product and accompanying packaging and promotional materials as well.  
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1 Second, Defendants make the stunning assertion that the promotion, display, sale and  
 2 importation into the United States of counterfeit knockoffs of Louis Vuitton's product does not  
 3 satisfy Plaintiff's burden to show likelihood of confusion. This argument merely needs to be stated  
 4 to be rejected. There is even a presumption at law which holds as true in common sense that the  
 5 entire purpose of a knock off product is to appear like the genuine, and confusion its very purpose  
 6 for existence.<sup>2</sup> Even were the Court to accept the argument that Plaintiff's election to make select  
 7 purchases for the purposes of developing evidence supporting its claims constituted some form of  
 8 retroactive endorsement of the underlying transaction such that the evidentiary transaction is not  
 9 itself infringing, the Defendants' argument requires still further leaps in logic, including the  
 10 conclusion that these same transactions cannot constitute evidence that other sales into the United  
 11 States did not occur. In view of testimony that Defendants deliberately aim their goods and  
 12 services at China-based customers who seek to develop United States business, this proposition  
 13 must be categorically rejected.<sup>3</sup>

14 Moreover, this argument also requires the Court to accept the proposition (also noted in  
 15 Opposition to the Motion on Contributory Copyright Infringement) that the storage and distribution  
 16 of offers of counterfeit merchandise – because stored in bits of 0s and 1s – cannot constitute the  
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18 <sup>2</sup> There is a presumption of confusion or confusion as a matter of law when dealing with counterfeit marks. *Brookfield*  
 19 *Communs. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1056 (9<sup>th</sup> Cir. 1999) ("In light of the virtual identity of marks, if  
 20 they were used with identical products or services likelihood of confusion would follow as a matter of course.");  
 21 *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d 234, 241 (4<sup>th</sup> Cir. 1997) ("Our cases make clear, however, that that  
 22 presumption arises only where the intentional copying is motivated by an "intent to exploit the good will created by an  
 23 already registered trademark"); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4<sup>th</sup> Cir. 1987) ("Where, as  
 24 here, one produces counterfeit goods in an apparent attempt to capitalize upon the popularity of, and demand for,  
 25 another's product, there is a presumption of a likelihood of confusion."); *see Lindy Pen Co. v. Bic Pen Corp.*, 796 F.2d  
 26 254, 256-57 (9<sup>th</sup> Cir. 1986) (reversing a district court's finding of no likelihood of confusion even though the six other  
 27 likelihood of confusion factors all weighed against a finding of likelihood of confusion); *Phillip Morris USA Inc. v.*  
 28 *Shalabi*, 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004) citing *Phillip Morris USA Inc. v. Felizardo*, 2004 U.S. Dist.  
 LEXIS 11154, at \*18 (S.D.N.Y. June 18, 2004) ("However, "in cases involving counterfeit marks, it is unnecessary to  
 perform the step-by-step examination . . . because counterfeit marks are inherently confusing."); *Phillip Morris USA*  
*Inc. v. Felizardo*, 2004 U.S. Dist. LEXIS 11154, at \*18 (S.D.N.Y. June 18, 2004) ("[C]ounterfeit marks are inherently  
 confusing."); *Gucci America, Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003);  
 ("[C]ounterfeits by their very nature, cause confusion. . . Indeed, confusing the customer is the whole purpose of  
 creating counterfeit goods."); *Microsoft Corp. v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995, 1007 fn. 11  
 (S.D. Tex. 2000) ("However, in the case of a counterfeit mark, likelihood of confusion is clear."); *Dial-A-Mattress*  
*Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1346 (E.D.N.Y. 1994) ("Moreover, confusion is simply  
 inevitable since the parties are selling the same products in the same channels of commerce under the guise of the  
 identical Dial-A-Mattress mark.").

<sup>3</sup> This evidence was introduced through Defendants' own webpage as well as through testimony of Defendant Chen.

1 distribution or display of anything recognized as a trademark. This is simply incorrect as  
 2 evidenced by photos, visible to the human eye, that clearly exhibit knockoffs of Plaintiff's  
 3 trademarks on Defendants' servers. *See* Exhibit 593.31. To endorse Defendants' argument would  
 4 effectively insulate all online communications, a conclusion at odds with common sense,  
 5 overwhelming case law and policy.

6 **iii. Use in Commerce: Extra-territorial Application.**

7 Defendants reiterate their bankrupt argument regarding extraterritorial application of the  
 8 Lanham Act. Although governed by different authority and slightly different standards than the  
 9 Copyright Act, the argument has no more traction in the trademark environment than it did in the  
 10 copyright environment.

11 The Lanham Act has "broad" extraterritorial application. *Ocean Garden v. Marktrade Co.*,  
 12 953 F.2d 500, 503 (9th Cir. 1991). Defendants' motion grossly mischaracterizes the extraterritorial  
 13 application of the Lanham Act and does not even set forth the proper test used by the Ninth Circuit  
 14 to determine extraterritorial jurisdiction under the Lanham Act. As stated by the Ninth Circuit in  
 15 *Reebok Int'l v. Marnatech Enters.*, 970 F.2d 552, 554 (1992) the extent of extraterritorial  
 16 application of the Lanham Act is governed by the same standards that apply to extraterritorial  
 17 application of the antitrust laws. The prior Ninth Circuit decision in *Timberline Lumber Co. v.*  
 18 *Bank of America Nat. Trust and Savings Assoc.*, 549 F.2d 597 (9th Cir. 1976) therefore sets forth  
 19 the tests to be employed in this Circuit.<sup>4</sup>

20 The test has three basic factors: (1) whether there is *some* effect on American foreign  
 21 commerce; (2) whether the effect is sufficiently great to present a cognizable injury to plaintiffs  
 22 under the Lanham Act; and (3) whether the interests of and links to American foreign commerce  
 23

24 <sup>4</sup> Even were the Court to decide this issue with reference to the standards articulated by the Supreme Court in 1952 in  
 25 *Steele v. Bulova Watch Co.*, 344 U.S. 280, those standards would inexorably lead to the same conclusion. As stated in  
 26 Defendants' motion, these are "(1) whether the defendant was a United States citizen; (2) whether the defendant's  
 27 conduct had a substantial effect on United States commerce; and (3) whether there was a conflict with trademark rights  
 28 established under foreign law." *Totalplan Corp. fo America v. Colborne*, 5 F3d 824, 830 (2d Cir. 1994). Defendants  
 then conveniently convert this test into one which measures whether the direct infringer (not the defendant as stated in  
 their own authorities) is a citizen – which they clearly are. Defendants cannot argue their conduct had no effects on  
 United States commerce and, in doing so, implicitly concede that there is therefore evidence of some effect which  
 immediately precludes entry of judgment based on this fact and, finally, they are silent on the issue of conflict with  
 foreign law as it is a given there is in fact no conflict in the laws of the United States and China on this point.

1 are sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial  
2 authority. *Id.* at 613.

3 The first factor is satisfied where “sales of infringing goods in a foreign country may have a  
4 sufficient effect on commerce to invoke Lanham Act jurisdiction.” *Ocean Garden*, 953 F.2d at  
5 503. The infringing goods sold by Defendants’ customers clearly have a sufficient effect on  
6 commerce. Flooding the internet with readily available knock-off goods will have numerous  
7 negative impacts on commerce. It is extremely harmful to Louis Vuitton’s reputation to have  
8 cheap, lower quality knock offs proliferate in the marketplace and hurts consumer’s confidence  
9 with regard to any item purchased on the internet.

10 The second prong is satisfied for much the same reason. Louis Vuitton is even more  
11 negatively affected when considering sales of counterfeit items outside the United States and courts  
12 have held that the sale of infringing goods into foreign countries can satisfy the second prong of the  
13 *Timberline* test. *Id.* Additionally, as exhibited by even potential jurors in the case, Louis Vuitton’s  
14 customers complain and are understandably upset with Plaintiff when knock offs devalue their  
15 genuine investment and the strength of Louis Vuitton’s trademarks. Louis Vuitton is a company  
16 that has a significant presence all over the world, including in the United States through corporate  
17 offices as well as production facilities in San Dimas, California. The effect of counterfeits at issue  
18 in this case on Plaintiff’s brands worldwide can not be understated. Louis Vuitton is injured by  
19 these additional concerns.

20 The third prong is clearly satisfied in this instance by America’s powerful interest in  
21 protecting the intellectual property rights of its citizens and protecting consumers. Louis Vuitton  
22 has acquired valid and enforceable trademarks. Using and promoting those trademarks for  
23 generations, many of Louis Vuitton’s trademarks have become famous marks and have achieved  
24 secondary meaning. Counterfeits undermine those investments and deceive consumers here, and  
25 abroad. The negative effects of counterfeit goods are widely known and the United States has an  
26 interest in eliminating their sale and punishing those who facilitate their production and sale.  
27  
28

1 Defendants' arguments that the Lanham Act should not apply in this instance are either  
2 wrong or irrelevant to the analysis. The citizenship of the direct infringers is irrelevant.  
3 Additionally, it is clear that the infringing activity perpetrated by Defendants' customers has a  
4 substantial effect in the United States. It is impossible for Plaintiff to obtain any sort of sales  
5 records from the infringing parties but it is common knowledge that counterfeit goods have an  
6 immensely negative effect on American commerce. To expect Louis Vuitton's investigators to  
7 purchase enough knock-off product to show a substantial effect is preposterous. Plaintiff's  
8 investigators have shown the ease with which an unsuspecting consumer can purchase a counterfeit  
9 product. This, with the additional reasons noted above, demonstrates the negative effect the  
10 infringers have on American commerce.

11 Defendants' argument that the Court needs jurisdiction over the direct infringers is also  
12 wrong. All that is required as that an underlying direct infringement have occurred; there is no  
13 requirement that the Court also have jurisdiction over third parties who are not Defendants in this  
14 case. There need not be "substantial" or "continuous and systematic" contact by the underlying  
15 infringers with this jurisdiction. The underlying infringers only need to have perpetrated the  
16 underlying infringement of which the Defendants had knowledge, control and to which they  
17 materially contributed or concerning which they remained willfully blind.

18 **iv. Continues to Supply a Product or Services.**

19 Once again, Defendants misstate the applicable standards and, in a desperate attempt to  
20 avoid the liability which should properly attach to their systematic, ongoing and knowing  
21 contributory infringement, seek to confuse applicable principles. As stated in *Inwood, supra*, "if a  
22 manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues  
23 to supply its product to one whom it knows or has reason to know is engaging in trademark  
24 infringement, the manufacturer or distributor is contributorially responsible for any harm done as a  
25 result of the deceit." *Id.* at 854.

26 Plaintiff asserts the Ninth Circuit decision in *Lockheed, supra*, requires consideration of  
27 additional elements, specifically "direct control and monitoring". However, the *Lockheed* case  
28

1 indicated that the test was to consider the “extent of control exercised by the defendant over the  
2 third party’s means of infringement” not that direct control and monitoring were required elements.  
3 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9<sup>th</sup> Cir. 1999). Defendants’  
4 attempt to add additional elements to the claim is properly rejected.

5 First, Defendants also provide goods. To suggest different standards apply with respect to  
6 their provision of goods (the server capacity, router and bandwidth), to other elements of the  
7 “package” sold by them would be unduly confusing.

8 Second, such a distinction is not required. As noted in *Lockheed*, the Court adopted the  
9 distinction while noting that the “service” supplied by the defendant in *Fonovisa, supra*, was more  
10 akin to products than to services and that such services did not mandate a different standard for  
11 liability. *Id.* at 984. This is also based, in part on the common law responsibilities of a landlord for  
12 activity occurring on rented premises – to which this fact pattern more closely correlates. *Id.*; *see*  
13 *also, Hard Rock Café Licensing Corp. v. Concession Svcs., Inc.*, 955 F.2d 1143, 1148 (7<sup>th</sup> Cir.  
14 1992). This court also agreed that:

15 “In this case, Defendants’ activity as Internet service providers is more like the flea  
16 market proprietors in *Fonovisa* than the domain name translation service in *Lockheed*.  
17 Here, Defendants do not simply translate domain names into IP addresses. Defendants  
18 physically host websites on their servers and route internet traffic to and from those  
19 websites. This service is the Internet equivalent of leasing real estate. Defendants’  
20 services, combined with Defendants’ ability to remove infringing websites, entails a level  
21 of involvement and control that goes beyond “rote translation.” As with the flea market  
22 operators in *Fonovisa*, Defendants cannot remain “willfully blind” to trademark  
23 infringement taking place on their servers.”

24 *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., et al.*, CV 07-3952 JW, Docket #99,  
25 pp. 16:24- 17:5, Court’s Order Granting in Part and Denying in Part Defendants’ Motion for  
26 Summary Judgment (N.D. Cal. December 23, 2008). It is therefore law of the case that the  
27 heightened standard asserted on behalf of Defendants does not apply.

28 Defendants’ cited cases are also factually dissimilar and their holdings inapplicable. *Fare*  
*Deals Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678, 689 (D. Md. 2001) in particular  
was a case involving a domain name dispute. The parties there also did not have the kind of  
website- webhost relationship as exists in the present case. In *SB Designs v. Reebok Int’l, Ltd.*, 338

1 F. Supp. 2d 904, 913 (N.D. Ill. 2004) some allegedly infringing websites were not infringing at all  
 2 as containing fan postings and the like. *Id.* at 913. There was also no evidence that the allegedly  
 3 infringing websites were owned by, endorsed by, or otherwise affiliated with Reebok at all. *Id.* at  
 4 911-913. Unlike the Defendants here, Reebok was not alleged to have been the host of the  
 5 websites, nor were they found to have any actionable connection to the allegedly infringing  
 6 websites, period. *Habeeba's Dance for the Arts, Ltd. v. Knoblauch*, 430 F. Supp. 2d 709, (S.D.  
 7 Ohio 2006) is even more attenuated as it involved the alleged infringing use of plaintiff's  
 8 trademark in connection with a dance symposium put on by the defendant. The *Habeeba's* case  
 9 did not even involve websites or web hosts.

10 In contrast, Plaintiff's evidence clearly shows that Defendants continued to provide IP  
 11 addresses, connectivity and server space to infringing websites and counterfeiters, despite being  
 12 aware of their infringing nature and activities.<sup>5</sup> Plaintiff entered evidence that conclusively shows  
 13 Defendants marketing of server space and IP addresses to direct trademark infringers. Defendants  
 14 actively supported and promoted the infringing websites by continuously and purposefully ignoring  
 15 notices from trademark holders that notified Defendants of the infringing conduct occurring on  
 16 their servers. Defendants' contentions are without merit and their motion properly denied.

### 17 CONCLUSION

18 For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants'  
 19 Motion for Judgment as a Matter of Law Regarding Contributory Trademark Infringement Claim.

20 Dated: August 24, 2009

J. Andrew Coombs, A Professional Corp.

21  
 22 /s/ J. Andrew Coombs

23 By: J. Andrew Coombs

Annie Wang

24 Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

25  
 26  
 27  
 28 <sup>5</sup> For these same reasons, Defendants' arguments regarding willful blindness are properly rejected. Because Defendants provide goods (as well as services) the willful blindness standard for liability applies.

# **EXHIBIT C**

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7

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

10 Louis Vuitton Malletier, S.A., ) Case No. C 07 3952 JW  
11 )  
Plaintiff, ) SUPPLEMENTAL BRIEF RE  
12 v. ) APPLICABILITY OF US COPYRIGHT  
AND TRADEMARK LAWS TO  
13 Akanoc Solutions, Inc., et al. ) CALIFORNIA BASED WEB HOSTING  
DEFENDANTS; REQUEST FOR ENTRY  
14 Defendants. ) OF JUDGMENT  
15 )  
Trial: August 18, 2009-August 29, 2009  
16 )

17 TO THE COURT AND TO DEFENDANTS:

18 Pursuant to the Court’s request, Plaintiff Louis Vuitton Malletier, S.A. (“Plaintiff” or  
19 “Louis Vuitton”) submits the following Supplemental Brief re Applicability of US Copyright and  
20 Trademark Laws to California Based Web Hosting Defendants.

21  
22 DATED: September 3, 2009

J. Andrew Coombs, A Professional Corp.

23 By: /s/ J. Andrew Coombs  
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**INTRODUCTION**

1  
2  
3 Defendants’ argument that the imposition of liability upon their conduct constitutes an  
4 improper extra-territorial application of United States law is properly rejected. Judgment should  
5 be entered in favor of Plaintiff as provided for by the unanimous verdict in favor of Louis Vuitton.  
6 Defendants’ assertions represent a further unconscionable effort to avoid responsibility for their  
7 clearly willful, deliberate and contributory conduct. One need only ask whether Defendants would  
8 willingly submit to jurisdiction in the People’s Republic of China.

9 The law abhors a vacuum yet that is what the Defendants hope to create with respect to  
10 their conduct here.

11 Application of United States law is proper and appropriate for several separate and  
12 independent reasons, each of which warrants a rejection of Defendants’ arguments and entry of  
13 judgment. First, as previously set forth in Opposition to Defendants’ motions under Rule 50(a) the  
14 Court has jurisdiction over the underlying direct infringement – both because of offers made in the  
15 United States to American consumers and because product is shipped to those consumers pursuant  
16 to those offers. These activities violate Louis Vuitton’s display, distribution and importation rights  
17 under the Copyright Act and constitute infringing uses in commerce under the Lanham Act.

18 Second, the storage of these offers on Defendants’ servers and the routing of traffic to those  
19 servers using hardware and software located at the Defendants’ data center but a few blocks from  
20 the courthouse where the jury entered its verdict constitutes an infringement for purposes of the  
21 Copyright Act under long-established authority in the Ninth Circuit and elsewhere, and distinct  
22 uses in commerce for purposes of the Lanham Act.

23 There was no error in allowing the claims to be decided by the jury. The law is clear and  
24 practice dictates a consistent outcome. Defendants Akanoc Solutions, Inc., Managed Solutions  
25 Group, Inc. and Steve Chen must answer under the Copyright Act and Lanham Act for their acts of  
26 knowingly hosting counterfeit websites and facilitating sales of counterfeit and pirated product in  
27 the United States. There is no question that the laws apply according to controlling case law and  
28 the practicalities of the digital world.

## ARGUMENT

### A. Defendants Cannot Meet the Standard Required to Set Aside the Unanimous Verdict Reached in This Matter.

Cases decided under Rule 50 of the Federal Rules of Civil Procedure specify a high burden to undo a verdict reached by jury. Fed. R. Civ. P. 50 provides for judgment as a matter of law when “the evidence presented at trial permits only one reasonable conclusion.” *Torres v. City of L.A.*, 548 F.3d 1197, 1205 (9<sup>th</sup> Cir. 2008) citing *Santos v. Gates*, 287 F.3d 846, 851 (9<sup>th</sup> Cir. 2002). “A motion for a judgment as a matter of law is properly granted only if no reasonable juror could find in the non-moving party's favor.” *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1072 (9<sup>th</sup> Cir. 2005). “The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party.” *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9<sup>th</sup> Cir. 2000). “Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury.” *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9<sup>th</sup> Cir. 2001) (internal quotations omitted). “In making this determination, the court must not weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion.” *Harper v. City of L.A.*, 533 F.3d 1010, 1021 (9<sup>th</sup> Cir. 2007). “If sufficient evidence is presented to a jury on a particular issue and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict.” *Id. citing Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9<sup>th</sup> Cir. 1985). “The jury is the ‘constitutional tribunal provided for trying facts in courts of law.’” *Id. at 1021-22 citing Berry v. United States*, 312 U.S. 450, 453, 61 S. Ct. 637, 85 L. Ed. 945 (1941). In light of these governing principles, the unanimous eight juror verdict for Plaintiff should not be disturbed.

Defendants’ attempts to dodge responsibility for their actions have been a repeated theme. Despite the fact that virtually all of their contributory acts occurred in California, Defendants forward a groundless argument to claim that their actions are not subject to American law.

1 As described below, there are numerous separate and independent bases for the application  
2 federal intellectual property laws. Not only are there sufficient grounds for application of United  
3 States law to the underlying direct infringements, Defendants have acted with knowledge and  
4 continue to do business with those direct infringers. To say Defendants are not responsible for  
5 their actions here, in their home forum, at a courthouse a mere few blocks from their datacenter, is  
6 unfathomable and contrary to precedence and reason.

7 **B. Copyright.**

8 **1. United States Law Is Properly Applied to Direct Infringements**  
9 **Occurring in the United States.**

10 **a. Direct Infringement by Copying onto Defendants' Servers.**

11 Unauthorized copying, display and distribution infringe the exclusive rights of the  
12 copyright owner. 17 U.S.C. §501. These acts are not disputed by Defendants – only whether any  
13 of these acts occurred within the United States. This too cannot seriously be disputed, especially  
14 in view of established authority finding that the fixation of data that infringes alone constitutes  
15 copying for purposes of the Copyright Act. Moreover, there is ample evidence in both evidence  
16 from individual websites<sup>1</sup> and in Defendants' promotional materials (Exhibit 583) to show that the  
17 infringing offers were aimed at the US marketplace.

18 Copyright protection applies to original works of authorship “fixed in any tangible medium  
19 of expression, now known or later developed, from which they can be perceived, reproduced, or  
20 otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. §102.  
21 This definition squarely includes data files and even 0’s and 1’s, if necessary, to the extent they  
22 require the aid of a machine or device to be perceived, and specifically, communicated to the  
23

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24 <sup>1</sup> To name just a few examples from the Admitted Exhibits: (1) most all of the websites were in English  
25 even if operated by non-U.S. or Chinese nationals; (2) shipping costs to the United States were pre-  
26 calculated (Ex.s 63, 72.1, 360.1); (3) prices for the counterfeit products, prices for discounts, prices for  
27 shipping and penalties were all expressed in US Dollars (Ex.s 72.1, 81, 98.3, 116, 163, 173, 210, 212, 360,  
28 588, 590, 611, 613); (4) measures regarding seizure at customs were specifically stated and included  
restocking fees in US Dollars (Ex. 72.1); (5) some websites included the trademarks of PayPal, FedEx,  
UPS, and other US companies on the pages advertising counterfeit Louis Vuitton product (Ex.s 13  
(attachments), 63, 63.2, 94, 163) and (6) some websites specifically included links to “USA” specific EMS  
Tracking websites (Ex. 356 p.2).

1 Defendants and internet users in the public at large. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d  
2 1146, 1160 (9<sup>th</sup> Cir. 2007) (“The computer owner shows a copy "by means of a . . . device or  
3 process" when the owner uses the computer to fill the computer screen with the photographic  
4 image stored on that computer, or by communicating the stored image electronically to another  
5 person's computer.”).

6 Evidence was presented in the record that infringing pictures could be viewed in the normal  
7 visual sense on the servers owned and controlled by Defendants, or, that they could be accessed  
8 and were accessed by the Defendants and members of the general public in the United States on  
9 numerous occasions through standard internet browsers. The work is “fixed” when its  
10 “embodiment in a copy...is sufficiently permanent or stable to permit it to be perceived,  
11 reproduced, or otherwise communicated for a period of more than a transitory duration.” 17  
12 U.S.C. §101; *Perfect 10, Inc.*, 508 F.3d at 1160 (“In sum, based on the plain language of the  
13 statute, a person displays a photographic image by using a computer to fill a computer screen with  
14 a copy of the photographic image fixed in the computer's memory.”). The infringing copies in the  
15 present case are not briefly, automatically, or transitorily stored, but instead, reside on Defendants’  
16 servers for months, and in some cases, years. E.g., bag925.com (subject of complaints beginning  
17 in February, 2007, was also found to be residing on Defendants’ servers during the trial, more than  
18 two years later in August, 2009).

19 Courts have repeatedly held that uploading content can be a basis for finding direct  
20 infringement for systems operators. *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 683  
21 (N.D. Cal. 1994) (“The unauthorized copying of copyrighted computer programs is prima facie an  
22 infringement of the copyright,” in a case involving electronic bulletin board operators). Courts  
23 have also held that the mere loading of infringing software onto a computer creates an infringing  
24 copy. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9<sup>th</sup> Cir. 1993); *NLFC, Inc. v.*  
25 *Devcom Mid-Am., Inc.*, 45 F.3d 231, 235 (7<sup>th</sup> Cir. 1995); *Stenograph L.L.C. v. Bossard Assocs.*,  
26 144 F.3d 96, 100 (D.C. Cir. 1998) (“The language of the Copyright Act, case law, and common  
27 sense support the proposition that the installation of software onto a computer results in "copying"  
28

1 within the meaning of the Copyright Act” *also citing* 2 MELVILLE B. NIMMER & DAVID  
3 NIMMER, *NIMMER ON COPYRIGHT* § 8.08[A][1], at 8-113 (1997) (“the Act’s language ‘makes  
4 clear that the input of a work into a computer results in the making of a copy’”); *Lowry’s Reports,*  
5 *Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 745 (D. Md. 2003) (stating “[u]nauthorized  
6 electronic transmission of copyrighted text, from the memory of one computer into the memory of  
7 another, creates an infringing “copy” under the Copyright Act.”); *Advanced Computer Servs. of*  
8 *Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 364 fn. 9 (E.D. Va. 1994) *citing* *Vault Corp. v.*  
9 *Quaid Software, Ltd.*, 847 F.2d 255, 260 (5th Cir. 1988) (“the act of loading a program from a  
10 medium of storage into a computer’s memory constitutes a copy of the program”); *ISC-Bunker*  
11 *Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1332 (N.D. Ill. 1990).

12 An abundant number of cases clearly establish that mere storage of software (programs,  
13 data, code, etc.) is infringing because it necessarily makes a copy, and is sufficient to trigger  
14 liability. The fact that the physical characteristic of the store data is allegedly unreadable<sup>2</sup> without  
15 the aid of additional software does not alter this fact. These cases correctly focus on the computer  
16 on which the copy resides, not the location of the uploader or user. Accordingly, Defendants’  
17 additional actions that took place in the United States subject them to the authority of the  
18 Copyright Act.

19 Defendants do not dispute the key fact that the forensic inspection of just a sample of  
20 Defendants’ servers revealed over one thousand websites that were responsive to searches for  
21 Louis Vuitton keywords, and some websites that were found were the subject of notices of  
22 infringement from more than a year preceding the inspection. One kind of direct infringement of  
23 Louis Vuitton’s copyrights occurred through the display and offer for sale of counterfeit goods that  
24 originated from websites hosted on Defendants’ servers and transmitted through their routers. The  
25 Defendants materially contributed to all of that infringement here, in their data center in San Jose  
26 and corporate office in Fremont, even though they were given notice of the rampant piracy taking  
27 place on their systems.

28 <sup>2</sup> Defendants’ expert testified that he needed to run a specific, separate program to reduce the image he had identified into 1’s and 0’s thereby admitting to fabricating Defendants’ Exhibits 1548 and 1549.



1 Even if for the moment the Court is inclined to entertain Defendants' meritless argument  
2 that Louis Vuitton somehow authorized the sale of pirated goods through the actions of its  
3 investigator, §602(a)'s application to even non-piratical goods indicates that it is the unauthorized  
4 nature of the infringer seller's acts that gives rise to infringement and that liability is not influenced  
5 by the actions of the purchaser or even the copyright owner who may have originally manufactured  
6 the good under its authority.

7 Additionally, courts have repeatedly upheld findings of infringement and awards of  
8 damages based upon investigatory efforts and have understood the purpose of investigatory  
9 purchases to confirm infringement so that lawsuits, if necessary, have additional evidentiary  
10 support. Some courts have expressly outlined this understanding that investigators do not  
11 authorize unlawful copying by conducting their investigations and unauthorized copies made at the  
12 request of investigators are still infringing. *Olan Mills Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348  
13 (8<sup>th</sup> Cir. 1994); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008); *Ryan v.*  
14 *Carl Corp.*, 23 F. Supp. 2d 1146, 1149 (N.D. Cal. 1998). To hold otherwise would severely inhibit  
15 a copyright owner's ability to police and enforce its rights and would encourage cases to be filed  
16 based on less substantiated evidence. Such a holding would be contrary to law and good practice.  
17 In addition to the numerous bases for a finding of direct infringement under US copyright law is  
18 the Defendants' customers' unlawful importation of piratical goods.

## 19 **2. Application of United States Law to Defendants' Own Conduct.**

20 Although it should be clear from the fact that United States law is properly applied to the  
21 underlying direct infringement enabled by Defendants' contributory conduct, the Court can  
22 separately find that United States law applies due to the Defendants' own role in this infringing  
23 activity.

24 The continued storage and maintenance of servers housing infringing copies by a web host  
25 after being given notice proved Louis Vuitton's claim for contributory infringement. As described  
26 above, the uploaded data is itself infringing. Continuing to aid the public distribution of such  
27 material with notice supports a finding that a service provider is liable for contributory  
28

1 infringement for that direct infringement. *Religious Technology Center, et al. v. Netcom On-Line*  
2 *Communication Services, Inc., et al.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995); *Sega Enterprises*  
3 *Ltd. v. MAPHIA*, 857 F. Supp. 679, 683 (N.D. Cal. 1994); *MAI Systems Corp. v. Peal Computer,*  
4 *Inc.*, 991 F.2d 511, 518 (9<sup>th</sup> Cir. 1993); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4<sup>th</sup>  
5 Cir. 2004) (stating ISP can be indirectly liable for users downloading infringing content onto  
6 RAM). In fact, the realities of the electronic world and intellectual property infringement in that  
7 space has been recognized by controlling case law for even less involved acts of contribution.

8 For example, in the *Grokster* case, Grokster did not even store the infringing data on its  
9 servers but rather, provided software for others to infringe. *Metro-Goldwyn-Mayer Studios, Inc. v.*  
10 *Grokster, Ltd.*, 545 U.S. 913 (2005). While the Supreme Court applied an “inducement” theory,  
11 the scenario before us is much more concrete. In *Grokster*, there was certainly not the kind of  
12 control over the data or the fixation of the data that exists on Defendants’ servers in their  
13 datacenter in San Jose. The very source of the infringing material was on Defendants’ servers and  
14 the very first “hop” onto the internet of any infringing copies was from Defendants’ router.  
15 Defendant Chen provided ample testimony about the desirability of his systems situated so close to  
16 the Internet backbone as well as sophisticated cooling and power supplies, 24 hour, 7 days a week  
17 service, and other additional means to ensure continuous internet access to material located on  
18 Defendants’ servers. These services were continually provided to infringers despite specific and  
19 general notice. Therefore, Defendants’ involvement satisfies the requirements of a finding of  
20 infringement as well as of the applicability of the Copyright Act.

21 Defendants’ were even more directly involved in the underlying direct infringement than  
22 the defendant in *Napster*, where a “peer to peer” network was established and infringing material  
23 was made accessible using in part, Napster’s network servers and server-side software. *A&M*  
24 *Records, Inc., et al. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9<sup>th</sup> Cir. 2001). Unlike Napster where  
25 individuals were connected to individual “host” computers from all over the world, Defendants’  
26 servers *are* the host servers, these host servers are located in one place, in one data center in San  
27 Jose, California, and Defendants have absolute control over the accessibility of any infringing  
28

1 conduct of which they are aware. The Ninth Circuit has cited numerous times, "if a computer  
2 system operator learns of specific infringing material available on his system and fails to purge  
3 such material from the system, the operator knows of and contributes to direct infringement."  
4 *Perfect 10, Inc.*, 508 F.3d at 1171; *Napster*, 239 F.3d at 1021. There is no question that the  
5 unauthorized copying and storage of a copyrighted work on a server is infringing. It has been time  
6 and again found to be so by controlling authority. In addition to the unauthorized copying and  
7 storage on Defendants' servers, it is Defendants' knowledge and continued provision of services  
8 that indisputably occur here, that satisfies the jurisdictional and elemental nexus under the law of  
9 contributory copyright infringement.

10 Defendants' cited authority is distinguishable or inapplicable. In particular, Defendants'  
11 cite *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 717 (9<sup>th</sup> Cir. 2007) and specifically include  
12 the portion where the Court states that "Google's computers do not store the photographic  
13 images..." Defendants' Moving Papers pp. 5:28-6:2. This authority is inapplicable on its face  
14 because it is undisputed that Defendants' servers store the images in their image form and  
15 broadcast them online through Defendants' routers. Defendant Chen, Defendants' expert and  
16 Defendants' employee Andrew Cheng confirmed these facts. Defendants' expert in particular,  
17 testified that he had to use a specific program to create the 0's and 1's that Defendants' referenced  
18 at trial and in their motion. The distinction of visually perceptible images versus 0's and 1's was  
19 fabricated by the Defendants and admittedly so. This argument is meritless.

20 Furthermore, "[b]oth *Napster* and *Netcom* acknowledge that services or products that  
21 facilitate access to websites throughout the world can significantly magnify the effects of  
22 otherwise immaterial infringing activities." *Perfect 10, Inc.*, 508 F.3d at 1172, citing *Napster*, 239  
23 F.3d at 1022; *Netcom*, 907 F. Supp. at 1375. The Supreme Court has acknowledged that "[t]he  
24 argument for imposing indirect liability' is particularly 'powerful' when individuals using the  
25 defendant's software could make a huge number of infringing downloads every day." *Grokster*,  
26 545 U.S. at 929. Moreover, copyright holders cannot protect their rights in a meaningful way  
27 unless they can hold providers of such services or products accountable for their actions pursuant  
28

1 to a test such as that enunciated in *Napster*. *See Id.* at 929-30 ("When a widely shared service or  
 2 product is used to commit infringement, it may be impossible to enforce rights in the protected  
 3 work effectively against all direct infringers, the only practical alternative being to go against the  
 4 distributor of the copying device for secondary liability on a theory of contributory or vicarious  
 5 infringement.""). *Perfect 10, Inc.*, 508 F.3d at 1172. The recognition of the sheer volume of  
 6 infringement that are made possible by service providers, such as web hosts and these Defendants,  
 7 further support application of the laws to Defendants here.

8 Controlling law on the extraterritorial application of the Copyright Act overwhelmingly  
 9 supports the same conclusion that Defendants must answer to US Copyright Law.<sup>3</sup>

10 **C. Trademark.**

11 Defendants' bankrupt argument regarding extraterritorial application of the Lanham Act  
 12 can be given no greater credence with respect to Louis Vuitton's claim for contributory trademark  
 13 infringement. Although governed by different authority and standards, the Defendants' argument  
 14 has no more traction to trademark than it does to copyright.

15 Indeed, trademark law has broader extraterritorial application than copyright. *Nintendo of*  
 16 *Am. v. Aeropower Co.*, 34 F.3d 246, 249-50 fn. 5 (4<sup>th</sup> Cir. 1994). This is reflected by controlling  
 17 authority holding that the Lanham Act applies upon entry of infringing goods into foreign trade  
 18 zones so long as the trademark was validly registered. *Ocean Garden v. Marktrade Co.*, 953 F.2d  
 19 500, 505 (9th Cir. 1991) ("entry of infringing goods into a foreign trade zone is a sufficient act in  
 20 commerce to trigger subject matter jurisdiction in federal courts under the Lanham Act, which, by  
 21 definition, can only be brought to vindicate marks that enjoy protection in the United States by  
 22 virtue of proper registration."). Plaintiff far exceeds the required standards given the more than  
 23 ample evidence presented that supports the jury's findings.

24 Furthermore, the acts at issue in the present case, most of which occurred in the United  
 25 States, clearly establish the propriety of Lanham Act application under overwhelming Ninth  
 26

27 <sup>3</sup> Citation concerning the applicability of copyright law to the present case given "any" act of infringement  
 28 occurring here, and further discussion re *Subafilms* was included in Plaintiff's Opposition to Defendants'  
 Motion for Judgment, Docket No. 213, and will not be repeated herein.

1 Circuit authority and the facts of this case. The Defendants' fail to show that a reasonable juror  
2 could not have found for Plaintiff as a matter of law. *Supra section B.(2)*.

3 **1. The Lanham Act Applies to Use in Commerce of the Underlying Direct**  
4 **Infringements at Issue in the Case and Has Applied to Acts Even More**  
5 **Attenuated than the Direct Counterfeiting At Issue Here.**

6 “The Supreme Court has held that the “in commerce” requirement should be construed  
7 liberally because the Lanham Act ‘confers broad jurisdictional powers upon the courts of the  
8 United States.’” *Fin. Express LLC v. Nowcom Corp.*, 564 F. Supp. 2d 1160, 1172 (C.D. Cal.  
9 2008) *citing Steele v. Bulova Watch Co.*, 344 U.S. 280, 283 (1952). Many appellate courts,  
10 including the Ninth Circuit have found that “commerce” under the Lanham Act necessarily  
11 includes all the explicitly identified variants of interstate commerce. *Playboy Enter., Inc., v.*  
12 *Netscape Commc'ns Corp.*, 354 F.3d 1020, 1024 fn 11 (9th Cir. 2004); *Int'l Bancorp, LLC v.*  
13 *Societe Des Bains De Mer Et Du Cercle Des Etrangers*, 329 F.3d 359, 364 (4<sup>th</sup> Cir. 2003)  
14 (equating reach of Lanham Act to any commerce covered by the Commerce Clause of the  
15 Constitution including foreign trade. *Id.* at 364-66); *United We Stand Am., Inc. v. United We Stand,*  
16 *Am. N.Y., Inc.*, 128 F.3d 86, 92 (2d Cir. 1997) (same); *Planetary Motion, Inc. v. Techsplosion, Inc.*,  
17 261 F.3d 1188, 1194 (11<sup>th</sup> Cir. 2001) (same). The Ninth Circuit has commented that there is no  
18 requirement of even an actual “sale” for proper application of the Lanham Act if the “use” is in  
19 connection with the sale of goods and services.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672,  
20 679 (9<sup>th</sup> Cir. 2005). The Ninth Circuit has addressed this question in the Internet context  
21 specifically, and presumed that the use of protected marks was “in commerce” concerning even  
22 more indirect uses such as domain name registration and keyword stuffing or keying. *Brookfield*  
23 *Communs. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1053 (9<sup>th</sup> Cir. 1999) and *Playboy Enter., Inc.*,  
24 354 F.3d at 1024. Thus, the hosting of offers for products infringing valid, long standing United  
25 States trademarks by United States based websites in the United States where product reached the  
26 United States, is a straightforward application of the Lanham Act. There can be no serious  
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1 question as to the use of the marks in commerce, nor can there be any serious doubt as to the  
2 applicability of the Lanham Act to this case.

3 The record strongly supports the jury's finding. There was clearly use in commerce of  
4 Plaintiff's trademarks on the counterfeit product and packaging obtained by Plaintiff's  
5 investigator, as well as from the website printouts admitted into evidence. There was no dispute  
6 that the items purchased by the investigator were imported into the United States, nor was there  
7 any dispute that the websites at issue were commercial, hosted on Defendants' servers in San Jose,  
8 and displayed the very infringing products that were later received by the investigator in the United  
9 States. The jury was diligent in satisfying themselves that there was evidence in the record to  
10 support the damages award they entered. The questions that the jury posed to counsel and the  
11 Court is further evidence of this diligence and methodical examination of the record. *See* Docket  
12 No. 234. Defendants' attempts to flatly ignore evidence in the record (inexplicably disregarding  
13 images that were stored on the servers as shown in Ex. 593.31 and testimony from Plaintiff's  
14 witnesses of personal knowledge of uses in commerce) or, interject their own additional elements  
15 to the claim of trademark infringement (such as the requirement of surveys to show confusion,  
16 personal jurisdiction over the direct infringements, or evidence of promotion of the counterfeit  
17 marks, etc.) should be summarily rejected.

18 Defendants' argument that no reasonable juror could find "use in commerce" in the record  
19 is simply without merit. Defendants' motions should be denied.

20 **2. Even the Heightened Standard For Applicability of the Lanham Act**  
21 **Employed by the Court Was Met Due to the Nature and Volume of**  
22 **Counterfeiting Taking Place on Defendants' Servers.**

23 Defendants' trademark based arguments are additionally without merit as the Court  
24 instructed the jury on what Plaintiff believes was a higher burden that necessary concerning the  
25 applicability of the Lanham Act to foreign acts, requiring that those acts "substantially affect"  
26 commerce rather than just have "some affect."<sup>4</sup> *Wells Fargo & Co. v. Wells Fargo Express Co.*,

27 \_\_\_\_\_  
28 <sup>4</sup> Citation and further explanation concerning the applicable standard was included in Plaintiff's Opposition  
to Defendants' Motion for Judgment, Docket No. 214, and will not be repeated herein. See also *Wells*

1 556 F.2d 406, 428 (9<sup>th</sup> Cir. 1977) (stating “although foreign activities must of course have *some*  
2 effect on United States foreign commerce before they can be reached, we disagree with the district  
3 court's requirement that that effect must be "substantial." *Bulova* contains no such requirement.”);  
4 *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Reebok Int’l v. Marnatech Enters.*, 970 F.2d  
5 552, 554 (9<sup>th</sup> Cir.1992); *Ocean Garden*, 953 F.2d at 503; *Timberline Lumber Co. v. Bank of*  
6 *America Nat. Trust and Savings Assoc.*, 549 F.2d 597 (9<sup>th</sup> Cir. 1976); *see also American Rice v.*  
7 *Arkansas Rice Growers Coop. Ass’n*, 701 F.2d 408, 414 (5<sup>th</sup> Cir. 1983) (absence of any one factor  
8 is not dispositive). In any case, the jury’s verdict is in line with the “broad” extraterritorial  
9 application of the Lanham Act and controlling Ninth Circuit authority has demonstrated this  
10 liberality in attaching Lanham Act jurisdiction when a shipment of infringing goods enters even a  
11 United States trade zone. *Ocean Garden*, 953 F.2d at 503. Despite the application of a higher  
12 standard than was necessary, the jury still found for the Plaintiff and its unanimous verdict must  
13 not be set aside.

14 The impropriety of Defendants’ contentions can be exhibited by its heading “The Lanham  
15 Act Does Not Apply to Direct Infringement By Foreign Nationals Outside the United States”  
16 which is directly contradicted by controlling precedent and Defendants’ own cited case law just  
17 one page later. Defendants’ Moving Papers pp.5:23, 6:23; compare *Reebok Int’l, Ltd.*, 970 F.2d at  
18 556 (individual defendant and principal of the corporate defendant was a Mexican citizen); *Mattel,*  
19 *Inc. v. MCA Records*, 296 F.3d 894, 900 (9<sup>th</sup> Cir. 2002) (affirming extraterritorial application of  
20 Lanham Act to foreign defendants); *see also Reebok Int'l v. McLaughlin*, 49 F.3d 1387, 1390 (9<sup>th</sup>  
21 Cir. 1995) (stating “this court has held that the Lanham Act may properly be applied to foreign  
22 defendants' activities outside the United States.”); *see also e.g., Nintendo of Am.*, 34 F.3d at 248  
23 and 252 (affirming determination that all Taiwanese defendants were liable for the various  
24 violations of federal and state law found, including Lanham Act violations). The Lanham Act has  
25 and does apply to the acts of foreign nationals.

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*Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9<sup>th</sup> Cir. 1977) for a list of considerations to  
consider extraterritorial application of the Lanham Act.

1 Additional grounds for application of the Lanham Act exist when the actions of the  
2 infringers are directed towards the United States, like those of Defendants' customers. Exercise of  
3 the very broad reach of the trademark laws is entirely appropriate particularly when the websites  
4 were purposefully based in the United States on Defendants' servers close to the Internet backbone  
5 to take advantage of speed and infrastructure, and the websites specifically targeted American  
6 consumers as reflected on the websites themselves<sup>5</sup> and aptly expressed by Defendants' own  
7 advertisements, see Exhibit 583, that businesses overseas could better target American consumers  
8 through being hosted by web hosts like the Defendants.

9 Furthermore, Defendants for some inexplicable reason ignore the fact that they are all  
10 United States citizens, and most all of the contributorily infringing acts to which they are charged  
11 occurred in the United States. Had Plaintiff brought suit in China, Defendants would be making  
12 the same arguments concerning their own "bulletproof" status there. Such a result would be  
13 completely unjust.

14 There was also substantial and largely undisputed evidence in the record of the  
15 proliferation of counterfeit websites and their illegal wares originating from Defendants' servers in  
16 San Jose. Similar to the *Bulova Watch Co.* case, involving a defendant located outside the United  
17 States selling counterfeit goods that were manufactured abroad but shipped into the United States  
18 causing the requisite harm, 344 U.S. at 287-88, the infringing goods sold by Defendants'  
19 customers clearly have the sufficient adverse effect on United States commerce and those sales  
20 would not have occurred but for access and transmission of infringements from websites residing  
21 on Defendants' servers. Flooding the internet with readily available knock-off goods, that are  
22 illegal, have numerous negative impacts on commerce that the jury could reasonably conclude  
23 were sufficiently damaging. It was also reasonable for the jury to conclude that counterfeits are  
24 extremely harmful to the reputation of a luxury goods company like Louis Vuitton, who has a  
25 significant United States presence, precisely because counterfeits are cheap, of lower quality, and  
26 proliferate in the marketplace improperly reducing the scarcity of Louis Vuitton's genuine product.

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<sup>5</sup> See footnote 1.

1 Counterfeits and counterfeiting websites also hurt consumer's confidence in Louis Vuitton's  
 2 ability to maintain the value of its name and its true products. The jury also heard testimony  
 3 concerning customer complaints into its call center in San Francisco, the role of Louis Vuitton's  
 4 San Dimas, California manufacturing facility, and also the sizeable budget that Louis Vuitton has  
 5 to expend to deal with counterfeiters and those that aid and contribute to the counterfeiting like the  
 6 Defendants in this case. The jury had ample support to find that Defendants' and their customers'  
 7 acts affected United States commerce under either the "some affects" or "substantially affects"  
 8 tests.

9 As outlined above, even as the Court instructed and the jury applied a higher standard  
 10 under *Bulova Watch Co.*, 344 U.S. 280 (1952), the jury still found liability against Defendants.  
 11 The jury had ample evidence of the impact of the actions of Defendants and their customers on  
 12 United States commerce. There was no dispute that Defendants were based in San Jose,  
 13 specifically advertised their services to those that wanted to do business in the United States, or  
 14 that the datacenter at which the infringing websites were hosted, was just a few blocks from the  
 15 courthouse. There was no error on the issues of the applicability of the Lanham Act to the case  
 16 and the unanimous eight-person verdict is the strongest testament as to the sufficiency of the  
 17 evidence on these issues.<sup>6</sup>

### 18 CONCLUSION

19 For the foregoing reasons, Plaintiff respectfully requests that the Court deny both of  
 20 Defendants' Motions for Judgment as a Matter of Law and enter Judgment in favor of Plaintiff  
 21 consistent with the jury's unanimous verdict.

22  
 23 Dated: September 3, 2009

J. Andrew Coombs, A Professional Corp.

24 /s/ J. Andrew Coombs

25 By: J. Andrew Coombs

Annie Wang

26 Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

27 <sup>6</sup> The Court specifically requested further briefing on the applicability of the laws to the infringing acts at  
 28 issue and Plaintiff did not address other of Defendants' arguments concerning the applicable legal standards  
 in this Supplemental Brief. Should the Court require additional briefing on the standards of liability,  
 Plaintiff can do so at the Court's direction.