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12 UNITED STATES DISTRICT COURT
 13
 14 NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

15 Louis Vuitton Malletier, S.A.,
 16
 17 Plaintiff,
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 19 v.
 20
 21 Akanoc Solutions, Inc., et al.
 22
 23 Defendants.

24 Case No. C 07 3952 JW

25 OPPOSITION OF PLAINTIFF LOUIS
 26 VUITTON MALLETTIER, S.A. TO
 27 DEFENDANTS' MOTION FOR
 28 SUMMARY JUDGMENT

Date: September 8, 2008
 Time: 9:00 a.m.
 Court: Hon. James Ware

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1 Plaintiff Louis Vuitton Malletier, S.A. (“Plaintiff” or “Louis Vuitton”) submits this
2 Opposition to the Motion for Summary Judgment of Defendants Akanoc Solutions, Inc.
3 (“Akanoc”), Managed Solutions Group, Inc. (“MSG”) (collectively the “ISP Defendants”) and
4 Steven Chen (“Chen”). The ISP Defendants and Chen are collectively referred to herein as
5 Defendants.

6 **A. INTRODUCTION**

7 Defendants’ desperation to avoid trial on the merits is amply evidenced by their repeated
8 mischaracterization of the relevant legal standards and of the available evidence illustrating their
9 deplorable procedures (or, more accurately, lack of any procedures) in handling notices of
10 infringement transmitted by Louis Vuitton. Defendants’ arguments fail for a variety of reasons and
11 the propriety of denial of this motion for summary judgment is apparent in light of the record.

12 Among the more egregious errors in the Defendants’ motion include:

- 13 (i) The statement that Defendants’ own direct infringement must be proved
14 in order to state a claim for secondary liability when it is the admitted
15 infringement by third parties which is relevant to the analysis of
16 Plaintiff’s claims for secondary liability. Defendants’ Memorandum in
17 Support of Summary Judgment (hereinafter “Supporting Memo.”), 3:14-
18 4:1, 5:1- 13, 16:16- 22, 17:15- 17;
- 19 (ii) The suggestion that only intentional inducement of infringement can
20 support a claim for contributory trademark infringement when all of the
21 relevant authority shows that the continued provision of goods and
22 services with knowledge of infringement can also establish contributory
23 trademark liability apart from intentional inducement. Id. at 2:15;
- 24 (iii) The continued assertion of irrelevant federal statutes to justify
25 Defendants’ inaction, when those same arguments have already been
26 rejected by this Court in a discovery dispute, as a result of which the
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Defendants are precluded from re-litigating those issues. Id. at 12:2-13:20, 24:14-17;

- (iv) The articulation of post-litigation procedures as justification for denying claims based upon pre-litigation inaction when those procedural changes only evidence the greater (although still insufficient) degree of control the ISP Defendants can exercise when they elect to do so. Id. at 10:16-28, 17:27- 18:7; and
- (v) The mischaracterization of objectionable testimony by Plaintiff's 30(b)(6) witness when that testimony was expressly offered subject to objections fails to disprove the wealth of other evidence which satisfies the claims. Id. at 3:15, 5:26-6:2, 6:11-12, 11:22-23, 14:10-17 15:3-6, 17:9, 17:20-27, 19:3-4, 19:12-13, 21:4-7, 22:1-3, 23:7-9, 23:24-27, 24:23- 25:4.

As set forth more fully below, there is abundant evidence that the Defendants' reckless and wanton provision of goods and services on a wholesale basis to those engaged in offshore illegal enterprises targeting the U.S. market supports a finding of liability, and, presents disputed issues of material fact warranting denial of summary judgment.

B. STATEMENT OF FACTS

i. Summary

Plaintiff claims Contributory and Vicarious Trademark and Copyright Infringement against Defendants for failing to act even when repeatedly put on notice of abuse using its servers and Internet services. No claims for direct infringement are brought against the Defendants in this action. Rather, Plaintiff's claims for secondary liability are predicated upon undisputed underlying acts of direct infringement by website operators whose sites were hosted on servers admittedly owned and controlled by Defendants, and, to which Internet traffic is directed by Internet routers owned and controlled by Defendants.

Plaintiff identified a number of websites promoting, offering and selling counterfeit Louis Vuitton merchandise which were hosted by Defendants based on multiple corroborating sources of

1 information. Declaration of Nikolay Livadkin (“Livadkin Decl.”) at ¶¶ 11-19; Declaration of J.
2 Andrew Coombs (“Coombs Decl.”), ¶ 3, Ex. B, 34-37 (hereinafter “Holmes Depo.”). These
3 websites were operated from China and offered infringing goods located in China to be shipped to
4 consumers located in, among other places, the United States. Declaration of Robert L. Holmes
5 (“Holmes Decl.”), ¶¶ 3-15. Despite alleged server “crashes” and non-compliance with discovery
6 procedures, Louis Vuitton demonstrates that Defendants hosted websites from which counterfeit
7 products were sold and that they continued to host such sites long after notices were transmitted by
8 or on behalf of Plaintiff. Coombs Decl., ¶ 6.

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10 **ii. The Underlying Direct Infringement**

11 The ISP Defendants provide Internet goods and services which consists of, among other
12 things, routers linking Internet traffic to designated websites and servers (hardware) on which
13 Internet content can be accessed and stored. Coombs Decl., ¶ 2, Ex A, 39:4-23, 43:14-44:11,
14 47:15-49:23, 58:8-59:1 (hereinafter “Chen Depo.”). That certain of Defendants’ websites used
15 these goods and services to promote, offer, display and sell counterfeit Louis Vuitton merchandise
16 is not disputed. Indeed, by their Motion for Summary Judgment, Defendants raise no argument to
17 challenge the underlying elements of Plaintiff’s claims of direct infringement on the websites
18 which are implicated in this action.

19 Defendants do not contest Louis Vuitton’s ownership rights in its copyrights and
20 trademarks. Supporting Memo., 3:8- 9, 16:12. Defendants also admit that some infringing use of
21 Louis Vuitton’s properties has occurred, Supporting Memo., at p. 3:16, and that “a small fraction of
22 Websites hosted by their customers may from time to time contain objectionable content, including
23 possibly offering counterfeit goods for sale.” Defendants’ Opposition to Motion to Compel
24 (Docket Document 37) at 1:25- 2:1.

25 Even were the Defendants to try to dispute the underlying infringement occurring on the
26 underlying websites, evidence submitted in support of this Opposition easily demonstrates the
27 existence of disputed issues of material fact, namely: (i) Internet websites hosting offers of product
28 embodying Louis Vuitton’s underlying intellectual property rights; (Livadkin Decl., ¶¶ 12-19,

1 Holmes Decl., ¶¶ 3-15, Holmes Depo., 167:17- 168:13); (ii) the infringing nature of the offers
2 appearing on those websites (Livadkin Decl., ¶ 5); and (iii) the fact such websites were hosted on
3 servers owned by Defendants and to which Internet traffic was directed through Internet routers
4 owned by Defendants (Holmes Decl., ¶¶ 3-15).

5 **iii. The Plaintiff's Notices**

6 Despite statutory formalities enacted ten years ago and despite industry practices following
7 upon the enactment of those formalities, prior to the lawsuit, the ISP Defendants filed no notice
8 with the United States Copyright Office to designate an agent for service of notices of infringement
9 conforming with the Digital Millennium Copyright Act ("DMCA"). Chen Depo., 111:8-13;
10 Livadkin Decl., ¶ 11. Despite statutory requirements that an ISP publish terms of service which,
11 among other things, specify the manner in which notices of infringement can be served, Defendant
12 MSG maintained no active website, let alone the required terms of service. Livadkin Decl., ¶ 11.¹

13 Plaintiff sent multiple notices, by email and by hand delivery, to all known addresses for
14 Defendants regarding a number of infringing websites. Id., ¶¶ 11-17. The reminder notices were
15 only sent because the infringing offers remained accessible using Defendants' goods and services.
16 Id.² No response to any of Louis Vuitton's pre-litigation notices was ever received by Louis
17 Vuitton. Id.

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22 ¹ It appears that this dereliction compounded the difficulties associated with providing more
23 efficient notice because certain of Louis Vuitton's notices were first transmitted after Defendant
24 MSG spun off part of its business to Defendant Chen's erstwhile partner, Jacques Pham. Chen
25 Depo., 32:15-34:19, 35:1-35:23. Because Mr. Pham's "Managed Solutions Group" operated with
26 the same name, maintained a website and was historically associated with IP addresses assigned to
27 Defendant MSG, a couple of Louis Vuitton's notices were addressed to the spun off entity instead
28 of Defendant MSG. Livadkin Decl., ¶ 11. This error was corrected and subsequent notices were
sent to Defendant MSG's address of record (Livadkin Decl., ¶¶ 12-19) although it appears those
notices received no more attention than those addressed to Mr. Pham's business.

² Defendants do not dispute transmission of the demands. Defendants do dispute receipt of those
transmitted to Mr. Pham, but do not and cannot dispute receipt and, therefore, notice, concerning
all others. Coombs Decl., Ex. E (sample emails transmitted in response to post-litigation
demands).

1 **iv. The Defendants’ Control and Inaction**

2 **a. The ISP Defendants’ Control**

3 Defendants do not dispute that the ISP Defendants own servers, maintain a server
4 “environment” and operate a business using those servers in northern California accepting payment
5 for use of their equipment and personnel. Chen Depo., 30:13-16, 39:4-23, 43:14-44:11, 45:4,
6 47:15-49:23, 58:8-59:1.

7 The ISP Defendants hold ultimate control over those servers as they can, and do, pull the
8 plug, “disable”, “terminate” or “discontinue” service due to unacceptable behavior of which
9 Defendants are notified by third parties, including instances where noncompliant abusers move IP
10 Addresses within Defendants’ assigned IP blocks. Chen Depo., 28:13-29:13, 70:19-71:15, 83:5-
11 84:9, 136:4-19; Coombs Decl., ¶ 5, Ex D (hereinafter “Lone Depo.”), 24:6- 25:18; Coombs Decl., ¶
12 4, Ex C (hereinafter “Luk Depo.”), 14:20-22, 21:19-22:12, 35:19-36:1, 56:1-22, 66:7-67:22, 70:3-
13 14, 73:10-74:6. The “unplugging” process simply requires an email and about 30 minutes. Luk
14 Depo., 22:7-12; Chen Depo., 71:10-15, 84:10-16. Defendants routinely inspect website content
15 and also request password information from their “customers” to inspect and insure that
16 complained of, offending material has been removed before reinstituting service. Chen Depo.,
17 23:14-23, 127:1-10, 130:4-133:12, 136:9-15; Luk Depo., 65:6-10.

18 Additionally, Defendants “re-set” passwords when servers are ‘returned’ or ‘abandoned.’
19 Fn. 3 of Magistrate Judge Lloyd’s Order. However, Defendants kept almost no records despite
20 urging others to do so, and did not register an agent with the Copyright Office to receive
21 complaints. Luk Depo., 19:8-23, 31:12-32:5, 75:15-76:19; Chen Depo., 93:1-25, 111:1-13.
22 Defendants also routinely monitor bandwidth usage of their servers, inspect content on their servers
23 in response to abuse complaints from third parties, and in some instances, take extra precaution for
24 certain “big” companies like Microsoft, eBay and PayPal. Luk Depo., 22:13-24:4, 26:2-8, 49:22-
25 24, 65:6-10, 66:4-67:22; Chen Depo., 23:14-23, 64:4-65:23, 127:1-10, 130:4-133:12, 136:9-15.
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1 identifying Defendants than Defendants did to identify their “customers” internally. Livadkin
2 Decl., ¶ 8; Holmes Depo., 112:24-122:3.

3 Defendants can show no action was taken in response to Louis Vuitton’s complaints prior
4 to litigation. Luk Depo., 52:12-19; Chen Depo., 100:13-104:12, 108:12-22, 109:12-110:10.
5 Defendants’ stated reformed procedures after the lawsuit was filed only show the amount of control
6 they have always possessed but chose not to exercise in the past. Plaintiff’s evidence demonstrates
7 that, whatever action or inaction followed from its notices, the underlying infringement which was
8 the subject of those notices persisted despite such notifications. Livadkin Decl., ¶¶ 12-17. The
9 alleged “crash” of email servers which purportedly occurred shortly before the lawsuit was filed
10 destroyed critical information predating the lawsuit. Supporting Memo., 8:13-16; Chen Depo.,
11 108:12-22. Though Defendant Chen states he “immediately” searched for the websites specifically
12 listed in the complaint after service of the lawsuit, Chen did not explain why Defendants piled
13 unopened mail, specifically including correspondence from Louis Vuitton, on an unoccupied desk
14 at Defendants’ place of business for nearly an entire year. Chen Depo., 100:13-104:12, 109:12-
15 111:7. The whereabouts of the neglected mail is, apparently, still unknown. Id., 110:7-10.
16 Defendants keep no files of abuse complaints or repeat infringers. Luk Depo., 19:8-11, 31:12-32:1
17 (employee’s faulty memory is her only record, to illustrate, Luk stated “How can I remember so
18 many things?”). Instead, Defendants have a history of erasing data and point to the purported
19 “crash” as the overused excuse for a lack of production of any documents relating to any website
20 content or pre-litigation related abuse complaints from Plaintiff, period. Chen Depo., 40:3-9,
21 92:15-93:25, 108:12-22; Coombs Decl., ¶ 9; Supporting Memo, 8:15.

22 Defendants have been notified since as early as November of 2007, of additional specified
23 websites, most of which were the subject of discovery requests to and from Defendants and
24 deposition questions by Defendants which produced thousands of pages of responsive documents
25 by Plaintiff. Coombs Decl., ¶ 8. Louis Vuitton continued to bring websites to Defendants’
26 attention which were located on routed through IP Addresses allocated to Defendants and/or
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1 located on servers owned, operated and maintained by the Defendants as discovered by pinging
2 those websites in the manner described in the Supporting Memo. Livadkin Decl., ¶¶ 8, 18.

3 Defendants' inaction allowed websites which were illegally reproducing, displaying, and
4 distributing counterfeit goods to reside on the Defendants' servers to which Internet traffic was
5 directed by the ISP Defendants' routers. Coombs Decl., ¶ 6; Livadkin Decl., ¶¶ 11-19. Some of
6 the repeat infringers were Defendants' best "customers." Coombs Decl., ¶ 6; Chen Depo., 60:17-
7 24, 143:16-144:12. Despite notice of infringement, Defendants appear to continue to do business
8 with these same individuals, and allow them to continue to use Defendants' product and services
9 without recourse. Defendants' own policy of penalizing abusers is rarely enforced or simply not
10 enforced. Luk Depo., 33:22-34:12, 62:5-8; Chen Depo., 67:18-69:17. Defendants enjoy the
11 benefits of infringement and do nothing to stop it despite a right and ability to do so.

12 **c. Defendant Steven Chen**

13 Defendant Chen is the sole owner and General Manager of the ISP Defendants. Chen
14 Depo., 7:18-8:13, 34:14-19. As such, Chen is engaged in the day-to-day management of almost all
15 aspects of the ISP Defendants' businesses. Among those areas over which Chen plays an active
16 role is the response to abuse complaints, specifically including responses to notices of infringement
17 addressed to the "abuse" email address at each of the ISP Defendants. Chen Depo., 22:24- 23:5.
18 Chen's testimony is that he actively reviews the abuse email box, selectively handles notices
19 addressed to that mailbox and addresses follow up above and beyond the ISP Defendants more
20 usual forwarding of complaints to China-based "distributors" for handling. Id.

21 **C. ARGUMENT**

22 **i. The Standard for Summary Judgment**

23 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and
24 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
25 material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.
26 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one
27 that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v.
28

1 Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the evidence
2 is such that a reasonable jury could return a verdict for the nonmoving party, summary judgment is
3 not proper. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968). "All that is
4 required is that sufficient evidence supporting the claimed factual dispute be shown to require a
5 jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 288-89. If
6 reasonable minds could differ as to the import of the evidence, summary judgment is not proper.
7 Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949). The judge's function at the summary judgment
8 stage is not to weigh the evidence and determine the truth of the matter but only to determine
9 whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

10 The party moving for summary judgment bears the initial burden of establishing the
11 absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that
12 negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S.
13 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Alternatively, the movant can demonstrate
14 that the non-moving party cannot provide evidence to support an essential element upon which it
15 will bear the burden of proof at trial. Id.

16 Once the moving party meets its initial burden, the non-moving party must "go beyond the
17 pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and
18 admissions on file,' [and] designate 'specific facts showing that there is a genuine issue for trial.'"
19 Id., 324 (quoting Fed. R. Civ. P. 56(e)). The non-movant "may not rest upon the mere allegations
20 or denials of the adverse party's pleading." Fed. R. Civ. P. 56(e); Valandingham v. Bojorquez, 866
21 F.2d 1135, 1137 (9th Cir. 1989). However, any inferences drawn from the underlying facts must
22 be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus.
23 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

24 Defendants fail to meet their initial burden because they cite inapplicable law and
25 mischaracterize the record. Their motion should be denied. Plaintiff introduces ample evidence to
26 demonstrate that there are genuine issues of material fact. Therefore, Defendants' motion seeking
27 summary judgment should be denied in its entirety.
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1 reformation of protocol in responding to abuse complaints post-litigation demonstrates a degree of
2 control which can be (and should have been) exercised by Defendants all along.³ Second,
3 Defendants conveniently ignore numerous parts of the record which amply demonstrate the willful
4 blindness standard for contributory liability which, as outlined below, is not the only standard for
5 secondary liability in this context, nor the only one which warrants imposition of liability on the
6 Defendants herein.⁴

7
8 **a. Contributory Copyright Infringement**

9 The Ninth Circuit has stated that “[o]ne infringes contributorily by intentionally inducing or
10 encouraging direct infringement, and infringes vicariously by profiting from direct infringement
11 while declining to exercise a right to stop or limit it.” Perfect 10, Inc. v. Amazon.com, Inc., et al.,
12 508 F.3d 1146, 1169 (9th Cir. 2007) citing the Supreme Court decision of Metro-Goldwin-Mayer
13 Studios, Inc. v. Grokster, Ltd., (“Grokster”), 545 U.S. 913, 930 (2005). Prior controlling decisions
14 have acknowledged that “services or products that facilitate access to websites throughout the
15 world can significantly magnify the effects” of infringing conduct and that in certain instances,
16 seeking compliance from providers may be the only meaningful way for copyright holders to
17 protect their rights. Perfect 10, Inc., 508 F.3d at 1172.

18 Defendants actively marketed their products and services to Chinese based “customers”
19 who wanted to do business in the United States and obtained a reputation for providing dedicated
20 servers in the United States and hosting to counterfeiters. Holmes Depo., 148:4-20, 153:9-15;
21 Supporting Memo., 4:8, 4:19-22, fn 5; Lone Depo., 11:18-17:23. However, Defendants are unable
22 to adduce any record of their conduct prior to service of the lawsuit other than stating that the one

23 ³ Abundant authority supports the proposition that damages and injunctive relief are appropriate
24 notwithstanding later, non-infringing behavior by the Defendants. Lyons Partnership, L.P. v.
25 Morris Costumes, et al., 354 F.3d 789, 800 (4th Cir. 2001) (“voluntary discontinuation of
26 challenged practices by a defendant does not necessarily moot a lawsuit...defendants ‘face a heavy
burden to establish mootness...because otherwise they would simply be free to “return to [their]
old way” after the threat of a lawsuit has passed’...” (and cases cited therein).

27 ⁴ Defendants’ argument on an “inducement” theory of liability is not applicable as Defendants are
28 not distributing a device or software and are not de-centralized from the infringing activity in any
way, as the website content is hosted on servers owned, operated, supervised and monitored by
them.

1 registered letter they recall receiving was added to a pile of nearly an entire year's worth of
2 unopened mail. Luk Depo., 52:12-19; Chen Depo., 100:13-104:12, 108:12-22, 109:12-110:10.
3 Plaintiff sent initial notices and when they were ignored, sent "reminder" or follow up notices, all
4 the while the infringing websites remained active and in business as Defendants did not enforce
5 their own policies of police by preference. Livadkin Decl., ¶¶ 11-18; Luk Depo., 22:1-24:4, 26:2-
6 8, 33:22-34:12, 62:5-8, 65:3-67:22, 68:9-20, 73:3-18 (Louis Vuitton was not a "big" company that
7 Defendants' employee had even heard of); Chen Depo., 23:18-23, 67:18-69:17, 127:1-10, 130:4-
8 133:12, 136:9-19. Accordingly, the only relevant and admissible evidence is (i) Plaintiff received
9 no response to any of its notices; and (ii) the goods and services of the ISP Defendants continued to
10 be used to facilitate access to the underlying infringing activity notwithstanding its transmission of
11 such notices to the best available addresses made available by Defendants. Livadkin Decl., ¶¶ 12-
12 18.

13 A defendant may be liable for contributory copyright infringement if it knew of the
14 infringing activity, and induced, caused, or materially contributed to the infringing conduct of
15 another. Perfect 10, Inc., 508 F.3d at 1171. Under Grokster, the Supreme Court found that an
16 actor may be contributorily liable for taking steps that are substantially certain to result in direct
17 infringement, noting that contributory infringement is rooted in tort-law concepts of imputed intent.
18 Id., citing 545 U.S. at 934-35. On point, the Ninth Circuit has held that "a computer system
19 operator can be held contributorily liable if it has actual knowledge that specific infringing material
20 is available using its system, and can take simple measures to prevent further damage to
21 copyrighted works, yet continues to provide access to infringing works." Id. at 1172 (citations
22 omitted); see also A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001) (in the
23 context of a provider of Internet access or services, "if a computer system operator learns of
24 specific infringing material available on his system and fails to purge such material from the
25 system, the operator knows of and contributes to direct infringement," finding liability for
26 knowledge, assistance and failure to block access to infringing content); see also Religious
27 Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1374
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1 (N.D. Cal. 1995) (finding electronic bulletin board operator contributorily liable for failing to
2 delete an infringing post). Additionally, in the Perfect 10, Inc. case, the Ninth Circuit was not
3 persuaded by the fact that “Google’s assistance is available to all websites, not just infringing
4 ones.” 508 F.3d at 1172.

5 Here, Defendants were sent multiple notices over a period of time of infringing conduct
6 occurring on websites hosted by them but did nothing in response. Livadkin Decl., ¶¶ 11-18; Luk
7 Depo., 52:12-19; Chen Depo., 100:13-104:12, 108:12-22, 109:12-110:10 (putting a registered letter
8 in a pile of unopened mail should constitute an infringing level of inaction for purposes of this
9 analysis); Supporting Memo., 8:10-20 (Defendants can only state that they must have done
10 something contrary to their own employee’s testimony that until recently she had never seen a
11 Louis Vuitton complaint before and had never heard of Louis Vuitton. Luk Depo., 52:12-19, 68:9-
12 20).

13 Defendants’ business of knowingly providing server capacity to “customers” engaged in
14 infringing activity is also consistent with the Ninth Circuit’s jurisprudence of finding liability in the
15 case of one who knowingly provides the “site and facilities” for the underlying infringement.
16 Perfect 10, Inc., 494 F.3d at 789-90 (discussing findings of liability in Fonovisa, Inc. v. Cherry
17 Auction, Inc., et al., 76 F.3d 259, 264 (9th Cir. 1996), where flea market proprietor provided
18 environment for sales to thrive and benefitted from the sale of pirated works and Napster, 239 F.3d
19 at 1022, where Napster was found to have materially contributed to users’ direct infringement by
20 providing “site and facilities” for that infringement). In finding against liability in the Perfect 10,
21 Inc. v. VISA case, the Ninth Circuit Court noted that Visa did not **operate the servers on which**
22 **infringing websites reside.** Id. at 800 (emphasis added). Here, such goods and services are
23 precisely among those provided and why Defendants are liable.

24 Additionally, the counterfeit purchases received from various websites hosted by
25 Defendants indicated Chinese return addresses. Holmes Decl., ¶¶ 3-15; Livadkin Decl., ¶ 6.
26 Defendants are known hosts of counterfeiters. Holmes Depo., 148:4-20, 153:5-11. Defendants
27 admit they market themselves specifically to Chinese “customers” who want to do business in the
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1 United States and who want to benefit from the dedicated services of Defendants' servers which
2 are located in the United States. Chen Depo., 20:5-22; Supporting Memo., 4:8, 4:19-22, fn 5; Lone
3 Depo., 11:18- 17:23. In fact, Defendants' have made a name for themselves in China. Lone
4 Depo., 14:9-16 (stating that Defendants or their "partners" are the top search result "hits" for "U.S.
5 servers" in Chinese on Google). Thus, the specialized elements of Defendants' products and
6 services, Defendants' acts to market themselves as an ideal environment for Chinese based
7 businesses who want to do business in the United States, and their history for hosting
8 counterfeiters, is consistent with the reasoning in Fonovisa and Napster, as contributing the site and
9 facilities to an infringer's enterprise.

10 Defendants' do not meet their burden and disputed issues of material fact preclude liability
11 for contributory copyright infringement.

12 **b. Contributory Trademark Infringement**

13 Secondary liability for trademark infringement is about control.

14 Defendants rent IP Addresses on their servers but unquestionably retain physical possession
15 of the servers and thus the content that resides on the servers. Like a landlord, Defendants have a
16 legal duty to control illegal activities on their "real estate" (IP Addresses) or in their "environment"
17 and liability arose when Defendants failed to take action as to illegal use of their servers, even
18 when put on notice. Chen Depo., 45:4 (describing server space as "environment"); see Lockheed
19 Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999) (discussing extent of
20 control and monitoring of the instrumentality used by a third party to infringe drawing from
21 common-law responsibilities of a landlord regarding illegal activity on a rented premises).

22 Secondary liability for trademark infringement shares common roots in tort law with
23 secondary liability for copyright infringement. Perfect 10, Inc., 508 F.3d at 1171, citing 545 U.S.
24 at 934-35; see also Hard Rock Cafe Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143,
25 1148-49 (7th Cir. 1992). The record offers abundant evidence relating to Defendants' actual
26 knowledge, ability to control, and continued supply of its product and services to infringers, to
27 defeat Defendants' motion for summary judgment on the trademark claims.
28

1 To be liable for contributory trademark infringement, a defendant must *either* (a)
2 intentionally induce the primary infringer to infringe or (ii) “continue to supply an infringing
3 product to an infringer with knowledge that the infringer is mislabeling the particular product
4 supplied. Perfect 10, Inc., 494 F.3d at 807.⁵ Where the defendant’s contribution concerns the
5 provision of services, Courts have modified the test to “consider the extent of control exercised by
6 the defendant over the third party’s means of infringement... Direct control and monitoring of the
7 instrumentality used by a third party to infringe” permits a finding of contributory trademark
8 infringement. Lockheed Martin Corp., 194 F.3d at 984-85; see also Sealy, Inc. v. Easy Living,
9 Inc., 743 F.2d 1378, 1382 (9th Cir. 1984) (one who intentionally induces another to infringe a
10 trademark or supplies, knowing or having reason to know the materials supplied will be used to
11 infringe a trademark, is contributorily liable for trademark infringement).

12 Defendants were ultimately responsible and able to control the content that resides on their
13 servers through content inspection, monitoring, unplugging or disabling of IP Addresses, and
14 ultimately, terminating “customers.” Chen Depo., 28:1-29:13, 70:19-71:15, 83:5-84:9, 136:4-19;
15 Lone Depo., 24:6- 25:18; Luk Depo., 14:20-22, 21:19-22:12, 35:19-36:1, 56:1-22, 66:7-67:22,
16 70:3-14, 73:10-74:6. Defendants are able to monitor websites not only because they are publicly
17 viewable, but when disabled, Defendants request password information to inspect the content on
18 the server and insure that complained of, offending material has been removed before reinstituting
19 service. Chen Depo., 23:18-23, 127:1-10, 130:4-133:12, 136:4-19. Additionally, Defendants have
20 stated that they are able to “re-set” passwords when servers are ‘returned’ or ‘abandoned.’ Fn. 3 of
21 Magistrate Judge Lloyd’s Order. Defendants also monitor internally by unplugging abusers for
22 moving from one IP Address owned by Defendants to another IP Address owned by Defendants,
23 an action that would absolutely require monitoring. Chen Depo., 136:4-19. Thus, Defendants
24 have, selectively, and certainly not with regard to Louis Vuitton’s complaints in the past, exhibited

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26 ⁵ While the Defendants appear to argue that intentional inducement must be proved to establish
27 contributory trademark liability, the Defendants’ own authorities do not stand for such a
28 proposition, as is evident from the decision in Perfect 10, Inc., 494 F.3d at 807. Moreover, even
were liability so narrowly construed, Plaintiff sets forth below several disputed issues of fact
relating to the ISP Defendants’ inducement of infringement by the third party website operators
and the alleged intermediate distributors.

1 not only an ability to exercise total control, but a track record of removing and disabling infringing
2 activity for other parties. Luk Depo., 22:19-23, 23:22-24:4, 26:2-8, 66:20-22, 68:1-8, 73:10-14;
3 Chen Depo., 23:3-23, 127:1-10, 130:4-133:12, 136:4-19. Here, they simply chose not to act in
4 response to Louis Vuitton’s demands.

5 Even after put on notice of the infringement, Defendants failed to act and admitted that their
6 own penalties for abuse were rarely enforced or not enforced at all. Luk Depo., 33:22-34:12, 62:5-
7 8; Chen Depo., 67:18-69:17. Defendants’ allowance of infringing activity to continue (for some of
8 their best “customers”) promoted the sales of counterfeit goods on websites hosted by Defendants
9 and their ultimate control and history of monitoring for other complaining entities, gives rise to
10 liability for their failure to act in response to Louis Vuitton’s complaints.⁶

11 v. **Defendants Have Not Met Their Initial Burden on Plaintiff’s Claims for**
12 **Vicarious Copyright or Trademark Infringement**

13 As apparent throughout, Defendants’ continued mischaracterization of the applicable law
14 and the record persists in their failed arguments against a finding of vicarious liability.

15 a. **Vicarious Copyright Infringement**

16 Vicarious copyright infringement is shown when the defendant profited directly from the
17 infringing activity “while declining to exercise a right to stop or limit it.” Grokster, 545 U.S., 930.
18 To succeed, a plaintiff must show the defendant had the right and ability to supervise or control the
19 infringing activity of the direct infringer and that it derived a direct financial benefit from the
20 infringement. Perfect 10, Inc., 508 F.3d at 1173. “The ability to block infringers’ access to a
21 particular environment for any reason whatsoever is evidence of the right and ability to supervise.”
22 Napster, Inc., 239 F.3d at 1023. A direct financial benefit exists where “the availability of
23 infringing material ‘acts as a “draw” for customers’”. Ellison v. Robertson, et al., 357 F.3d 1072,
24

25 ⁶ Defendants restate their failed argument regarding the Stored Communications Act and are
26 precluded from relitigating issues already resolved against them: the Stored Communications Act
27 simply does not apply. Defendants are now collaterally estopped from re-litigating this issue.
28 Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir. 1979) (The doctrine of issue
preclusion prevents relitigation of all issues of fact or law that were actually litigated and
necessarily decided in a prior proceeding.).

1 1078 (9th Cir. 2004) citing Napster, 239 at F.3d at 1023. The Ninth Circuit expressly stated that
2 there was not a “quantification requirement” or a requirement that the draw be “substantial”, but
3 noted the financial benefit may be found when the value of the services lies in providing access to
4 infringing material. Ellison, 357 F.3d at 1078-79. Defendants provide the ultimate access to
5 infringing material residing on their servers in addition to other valuable services which cater to a
6 counterfeiting operation.

7 Defendants’ had a legal right and practical ability to block or police use of its servers, and
8 did so at will with the ease of sending an email. Supporting Memo., 10:2-4, 24:4 (Defendants can
9 prohibit abuse under their “User Agreement”); Chen Depo., 28:13-29:13, 70:19-71:15, 83:5-84:9,
10 136:4-19; Luk Depo., 14:20-22, 21:19-22:12, 35:19-36:1, 56:1-22, 66:7-67:22, 70:3-14, 73:10-
11 74:6; Lone Depo., 24:6- 25:18. Defendants were able to easily take away the tools the offending
12 websites used to reproduce, distribute and alter infringing images over the Internet and products in
13 commerce through the unplugging or disabling of IP Addresses, but chose not to do so for Louis
14 Vuitton. Luk Depo., 22:7-12; Chen Depo., 71:10-15, 84:10-16 (describing the “unplug” process as
15 sending an email and taking about half an hour). Defendants instead, routinely acted on behalf of
16 other complaining parties. Luk Depo., 22:19-23, 23:22-24:4, 26:2-8, 66:20-22, 68:1-8, 73:10-14;
17 Chen Depo., 23:3-23, 127:1-10, 130:4-133:12, 136:4-19. Like the swap meet owner in Fonovisa,
18 Defendants not only had the right (and did in their case), to stop offending use through unplugging
19 or disabling but through that right, had the ability to control the activities occurring on their
20 servers. 76 F.3d at 262.

21 Defendants derived a direct financial benefit from the infringement through payment of use
22 of its server space to some of their best “customers” and at times, their services, which may have
23 partially contributed to the lack of action taken in response to Louis Vuitton’s complaints. Coombs
24 Decl., ¶¶ 6; Chen Depo., 60:17-25, 143:16-144:6. “Turning a blind eye to detectable acts of
25 infringement for the sake of profit gives rise to liability.” Napster, 29 F.3d at 1023. Defendants
26 were put on notice by Louis Vuitton through a series of letters. Livadkin Decl., ¶¶ 11-18.
27 Defendants’ state that their “customers” agreed to acceptable uses of their services but in the same
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1 breath state that the very same acceptable use policy prevented them from accessing content
2 without permission from their “customers.” Supporting Memo., 10:2-6, 24:4 (quotations added).
3 Regardless of this internal contradiction, Defendants routinely enforced their policy in cases of
4 Spamhaus, pornography, Microsoft intellectual property infringements, eBay fraud, and PayPal
5 intellectual property infringements at the very least, and more “carefully” since about September
6 2007. Luk Depo., 22:19-23, 23:22-24:4, 26:2-8, 66:20-22, 68:1-8, 73:10-14; Chen Depo., 23:3-23,
7 127:1-10, 130:4-133:12, 136:4-19. Defendants’ routinely policed their servers and as a matter of
8 policy, would and did pull the plug on infringing websites.

9 Further, documents produced thus far show that some of Defendants’ best “customers”
10 were related to the infringing websites. Coombs Decl., Ex. E; Chen Depo., 60:17-25, 143:16-144:6
11 (citing IT5, Alice Chen or Zhonghh.it8 as one of Defendants’ best “customers” and “boysee” as
12 well as NoraQ and Lin Lin as others). Additionally, Defendants’ advertised themselves directly to
13 individuals located in China and boasted of their dedicated services and U.S. based servers.
14 Supporting Memo., 4:8, 4:19-22, fn 5; Lone Depo., 11:18- 17:23. Defendants’ hosting provided
15 access to infringing websites which were selling counterfeit goods. Holmes Decl., ¶¶ 3-15;
16 Livadkin Decl., ¶¶ 11-20. The availability of the Defendants’ dedicated servers and U.S. based
17 location, coupled with Defendants’ employee’s language skills, satisfies the kind of “draw” that
18 infringers would be looking to utilize for their illegal business. Thus, the second prong of the test
19 is established and Plaintiff has met its burden.

20 Due to Defendants’ ultimate ownership, possession and selective exercise of power over the
21 content of the servers, Defendants are also liable for vicarious trademark infringement.

22 **b. Vicarious Trademark Infringement**

23 Vicarious trademark infringement is found where the “defendant and the infringer have an
24 apparent or actual partnership, have authority to bind one another in transactions with third parties
25 or exercise joint ownership or control over the infringing product.” Perfect 10, Inc., 494 F.3d at
26 807. An Internet search engine’s control over the appearance of another’s advertisements on its
27 search results pages which unlawfully used a trademark owner’s property stated a claim for
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1 vicarious trademark infringement. Government Employees Insurance Company v. Google, Inc., et
2 al., 330 F. Supp. 2d 700, 705 (E.D. Va. 2004). Defendants are liable under the test.

3 Defendants have described a “partner” relationship with its “customers.” Lone Depo.,
4 14:9-16 (describing first 20 hits on Google for particular search stating “at least 15 will be partners
5 of ours. So they would know about our position within this industry.”). Defendants send
6 complaints to their “partners” for follow up and often trust the word of these “customers” when
7 reinstituting service. Luk Depo., 59:14-19. Additionally, Defendants are unable to establish a “re-
8 seller” arrangement through any contract (none were produced in this litigation) or any kind of
9 arms-length relationship between themselves and the website operators.

10 Defendants also ultimately control the content on their servers and routinely exercise their
11 unplugging, disabling and termination rights with respect to abuse of their property for other
12 complaining parties. Luk Depo., 22:19-23, 23:22-24:4, 26:2-8, 66:20-22, 68:1-8, 73:10-14; Chen
13 Depo., 23:3-23, 127:1-10, 130:4-133:12, 136:4-19; Lone Depo. 24:6- 25:18. However, Defendants
14 continued to accept payment for their products and services, allowing infringements of Louis
15 Vuitton’s intellectual properties to continue without recourse, despite notice.

16 Defendants’ sole part-time employee designated to forward abuse complaints stated that
17 until recently she never saw a Louis Vuitton complaint and had never heard of Louis Vuitton. Luk
18 Depo., 52:12-19, 68:9-20. Defendant Chen stated unequivocally that he received one letter from
19 Louis Vuitton at his home, but merely took it to work and placed it on a pile of about a year’s
20 worth of unopened mail. Chen Depo., 100:13-104:12, 108:12-22, 109:12-110:10. Defendants had
21 no formal policy in place. Id., 85:22-86:2. Only as of around September 2007 did Defendants
22 begin to institute guidelines for responding to complaints about illegal activity, and indications are
23 that the prior policy was at best haphazard. Luk Depo., 16:18-22, 31:6-32:1, 75:24-76:15
24 (employee’s faulty memory is Defendants’ only record of abuse complaints, to illustrate, Luk
25 stated “How can I remember so many things?”). In any case, there was no action taken as to Louis
26 Vuitton’s complaints, Livadkin Decl .at ¶¶ 12-20, and virtually no penalty enforced by Defendants,
27 Luk Depo., 33:22-34:12, 62:5-8; Chen Depo., 67:18-69:17, allowing illegal activities to continue.
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1 For Defendants' "partnership" with the offending parties and ownership of the servers on which the
2 infringing content resided, and subsequent failure to act, despite notice, Defendants should be
3 found liable for vicarious trademark infringement.

4 **vi. Genuine Issues of Material Fact Preclude Summary Judgment**

5 The material facts in dispute which prevent the Court from granting summary judgment in
6 favor of Defendants mainly arise from Defendants' own contradictory assertions. Genuine issues
7 of material facts exist within Defendants' own evidence about Defendants' knowledge, whether the
8 complained of websites were ever hosted on Defendants' servers and the true relationship between
9 Defendants and the website operators, at a minimum. As discovery is not yet complete, and
10 execution of Magistrate Judge Lloyd's recent discovery order is pending, more information is
11 expected to further support Plaintiff's claims.

12 As an example of Defendants' internal confusion, which is pervasive throughout the record,
13 Defendants' Motion alone presents a series of clear falsities and contradictions including:

- 14 1. Defendants state they do not know what kind of activity rests on the servers and yet, can list
15 several of those unknown uses. Supporting Memo., 4:8-12.
 - 16 2. Defendants state they have an acceptable use policy but state they do not have a right to
17 access content located on their servers, but then again, state they unplug "customers," in the
18 same breath. Id. at 10:2-6, 24:3-5.
 - 19 3. Defendants state that they have relationships with resellers and do not do business with any
20 website operators, Id. at 3:25-4:1, 14:24-25, but have failed to point to any contract with
21 any alleged distributor, many of which Defendants claim only to know by their "email"
22 identity.
 - 23 4. Defendants state that Louis Vuitton fails to prove its case on direct infringement when
24 direct infringement by Defendants is not a claim in this litigation. Id. at 3:9, 3:14-4:1, 5:1-
25 13, 16:16-22, 17:15-17.
 - 26 5. Defendant MSG provides "unmanaged" solutions despite its name. Id. at 10:7-8.
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- 1 6. Louis Vuitton’s letters “may have eventually been sent to a correct address”, Id. 17:26,
2 even though Defendant Chen admits he received at least one notice at his home. Chen
3 Depo., 100:13-104:12, 109:12-111:7.
- 4 7. Defendants’ “conscious efforts to respond to allegedly infringing domains” included not
5 addressing mail delivered to them personally, and instead adding it to a pile of almost an
6 entire year’s worth of unopened mail on an unoccupied desk in the office. Supporting
7 Memo., 7:23; Chen Depo., 100:13-104:12, 109:12-111:7.
- 8 8. Defendants describe their efforts in responding to abuse complaints as “conscious”,
9 Supporting Memo., 7:23, and “practical” Id. at 18:7, when they have no record keeping of
10 any sort relating to abuse complaints except for the faulty memory of a part-time employee
11 who claims that until recently she had never received any complaint from Louis Vuitton.
12 Luk Depo., 19:8-11, 31:12-32:1, 52:12-19, 68:9-20.
- 13 9. Defendants state that 4 of the 5 websites listed in the original complaint were not hosted by
14 them, Supporting Memo., 8:5-7, when in an email they clearly state they did host one of the
15 websites listed in the complaint. See Coombs Decl. Ex. E.
- 16 10. Defendants state Plaintiff’s proof is inadmissible hearsay, Supporting Memo., 19:18- 21:12,
17 even though they are the result of pinging, the same method used by Defendants to identify
18 IP Addresses, Id. at 18:5, and some of the documents themselves are of the same type once
19 identified by them. See Coombs Decl., Ex. F.
- 20 11. Defendants state they “do not and cannot monitor the use made of their equipment and
21 Internet access”, Supporting Memo., 4:13, when they clearly do. Chen Depo., 28:13-29:13,
22 70:19-71:15, 83:5-84:9, 136:4-19; Lone Depo., 24:6- 25:18; Luk Depo., 14:20-22, 21:19-
23 22:12, 35:19-36:1, 56:1-22, 66:7-67:22, 70:3-14, 73:10-74:6.

24 The above internal contradictions are just a few of the reasons why summary judgment in
25 favor of Defendants should be flatly denied.
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1 DomainTools.com printouts were never wrong. Holmes Depo., 112:24-122:3. In Moose Creek,
2 Inc. v. Abercrombie & Fitch, Co., 331 F. Supp. 2d 1214 (C.D. Cal. 2004), the court considered
3 unauthenticated internet documents submitted by plaintiffs in support of their motion for
4 preliminary injunction for trademark infringement. The court stated: Fed. R. E. 901(a) defines a
5 standard of admissibility that is rather general or elastic: the evidence must merely be sufficient to
6 support a finding that the matter in question is what proponent claims. The DomainTools.com
7 printouts were merely a way to neatly package the information. Holmes Depo., 114:10-14.
8 Defendants also object to printouts from infringing websites though they bear the URL as well as a
9 date stamp, whose ultimate significance here (the hosting information) was verified through
10 multiple means.

11 The best evidence for all Internet related printouts would be Defendants' own records, but
12 they claim to have none. Defendants continually try to point to their own shortcomings in the
13 discovery process and convert it into Plaintiff's failure to make a showing on an essential element.
14 Plaintiff has proven its case despite Defendants' litigation strategy of providing no information or
15 contradictory information. Defendants' failure to provide documentation simply shows bad faith
16 and an inability to prove up any defense or claim of any arms length relationship with its alleged
17 "resellers". No proof of any such reseller relationship has ever been produced nor has it ever been
18 accepted as truth. Instead, the evidence shows, and printouts such as DomainTools.com package
19 information that supports, that Defendants continue to do business with known infringers.

20 CONCLUSION

21 For the foregoing reasons, Plaintiff respectfully requests the Court deny Defendants'
22 motion for summary judgment.
23

24 Dated: August 18, 2008

J. Andrew Coombs, A Professional Corp.

25 /s/ J. Andrew Coombs

26 By: J. Andrew Coombs

Annie S. Wang

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