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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GUCCI AMERICA, INC. Plaintiff, v. FRONTLINE PROCESSING CORPORATION; WOODFOREST NATIONAL BANK; DURANGO MERCHANT SERVICES LLC d/b/a NATIONAL BANKCARD SYSTEMS OF DURANGO; ABC COMPANIES; and JOHN DOES, Defendants.	: : : : : : : : : : : : : x	Civil Action No. 09-6925-HB District Judge Harold Baer, Jr.

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTIONS TO DISMISS UNDER FED. R. CIV. P 12(b)(6) AND 12(b)(2)

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I. INTRODUCTION

On its claim for direct trademark infringement, Gucci has not alleged that the defendants — who did nothing more than provide credit card processing services to Laurette — were directly involved in the actual sale of infringing goods; clearly they were not. Instead, Gucci alleges only that defendants were "indispensible participants" in Laurette's sale of allegedly counterfeit and infringing Gucci products. (Gucci Mem. (Dkt.27) 22.) On its claims for contributory and vicarious infringement, Gucci has not alleged that defendants had "direct control" over Laurette's infringing activities; demonstrably they did not. Instead, Gucci alleges only that defendants provided an "indispensible" or "essential" service to Laurette, which Gucci incorrectly equates with "direct control."

Perfect 10, Inc. v. Visa International Service Ass'n, 494 F.3d 788 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2871 (2008), is the only cited case that squarely addresses the potential liability of credit card processing companies for trademark infringement by their clients. While Gucci tries to distinguish the goods at issue in *Perfect 10* from those at issue here, as for the critical involvement of the credit card processing companies in the infringing activities, *Perfect 10* and this case are indistinguishable. And while it is true that, in both *Perfect 10* and here, the credit card processors could have affected the ability of the actual infringers to profit from their infringing activities, in neither *Perfect 10* nor here did the credit card processors have the power to stop those activities or remove infringing content from the Web sites. As to whether that "involvement" with the infringing sales is sufficient to hold the credit card processors vicariously liable for the infringement, *Perfect 10* unequivocally held that it is not:

> It is the websites' contracts with the *consumers* that bind the websites to provide the infringing images, not the websites' relationship with Defendants. The websites' contracts with Defendants are merely a means of settling the resulting debits and credits among the websites and the relevant consumers. We hold that Perfect 10 fails to state a claim for vicarious trademark infringement.

Id. at 808.

Again, *Perfect 10* recognized that the credit card processors could cut off their services to Web sites, making the infringers' business less profitable; but that does not establish "direct control" by the credit card processors over their clients' alleged infringement. Similarly, while these defendants could have made Laurette's business less profitable by refusing to provide credit card services — thereby forcing Laurette to use alternative payment methods — that also is not the "direct control" *over the infringing activities* required for liability to be found. And Gucci's pleaded allegations, even if deemed true, fall short of establishing that defendants provided the "marketplace" for Laurette's sale of the infringing and counterfeit goods, as also required to hold these defendants liable for the infringement. These critical pleading failures mandate that Gucci's complaint be dismissed.

II. GUCCI'S COMPLAINT FAILS TO STATE A CLAIM FOR TRADEMARK INFRINGEMENT

A. Gucci Has Failed To Adequately Plead Direct Infringement

Direct trademark infringement requires use in commerce of a counterfeit of a registered mark in connection with the sale or advertising of goods, or counterfeiting a registered mark and applying it to labels or advertisements to be used in commerce in connection with a sale or advertising of goods. 15 U.S.C. § 1114. The defendants here, of course, made no such use of Gucci's marks in commerce, nor does Gucci's complaint allege that they did.

According to Gucci, defendants "authorized a customer's credit card *before the sale was even complete* (Gucci Mem. 6 (emphasis in original)), "were involved in the sales process from start to finish, and the sales could not have been completed without them" (*id.* at 22). But Gucci's own description of the transaction (Coyle Decl. (Dkt.29) Exhs. 4, 5), which Gucci admits is fully consistent with defendants' description (*see* Defs. Mem. (Dkt.23) 5 n.1;Gucci Mem. 5-6), confirms that these defendants took no part in the actual authorization of the customer's credit card at all. Plainly, they did nothing of the sort.

There is no dispute that, in their processing of the credit card transactions, defendants WNB and Frontline do no more than transmit authorization requests from the merchant's terminals to a network. The network then sends those requests to the cardholders' issuing banks (*not* to the defendants), which either approve or decline the transactions. Defendants act as nothing more than a conduit for transmitting the network response back to the merchant; they play no role in determining whether or not authorization should be given. The sales transaction is thus completed between the merchant and the cardholder without any direct involvement by these defendants whatsoever. Again, defendants WNB and Frontline act merely as conduits, similar in function to the telephone or cable company transmission lines that connect with the credit card company's network and by which information is electronically transmitted to and from the cardholder's bank.

Gucci also incorrectly asserts that defendants in effect loan money to merchants. On the contrary, WNB and Frontline are liable only to the cardholder's bank for refunds to customers from chargebacks, only if the merchant is no longer in business. (Gucci Mem. 6-7.) Defendants have no control over the sales transactions and do not "lend money" to the merchants.

Not surprisingly, Gucci cites no authority to support its assertion that companies providing credit card processing services are actually engaged in sales or advertising of infringing goods sold by their clients. Although, unlike Gucci, the plaintiff in *Perfect 10* never alleged that the defendant credit card processing companies were involved in direct trademark infringement, the court there rejected any notion that such could be the case. *See Perfect 10,* 494 F.3d at 808. Here, the direct infringer is Laurette who advertised and sold the infringing goods, not Frontline and WNB who merely transmitted information and settled accounts, or Durango who merely acted as a broker to connect the merchant with the processors.

Gucci also responds to an argument defendants never made; namely, that Laurette's disclaimer of authenticity was sufficient to avoid all "confusion" concerning Laurette's products that have now been found to be counterfeit and infringing Gucci products. (*See* Gucci Mem. 23-24.) But confusion or not, what matters is only that these defendants had no involvement in advertising or selling those products, as would be required to hold defendants liable for direct infringement. Accordingly, Gucci's claim for direct trademark infringement and counterfeiting must be dismissed.

B. Gucci Has Failed to Adequately Plead Contributory Infringement

1. Failure to Adequately Plead "Direct Control"

As Gucci concedes, contributory trademark infringement requires allegations that the defendants had exercised "direct control and monitoring of the instrumentality used by the third party to infringe the plaintiff's mark." (Gucci Mem. 27.) Still, Gucci tries to expand existing law by asserting that, under *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982), and its progeny, a party that continues to provide "essential" services to a merchant known to infringe is itself an infringer. (*Id.* at 2.) But this is clearly at odds with the consistent analysis of the applicable law by this Court and others. (*See* Defs. Mem. 8-11.)

"Direct control" and "monitoring" of Laurette's activities by defendants are not alleged in Gucci's complaint. Instead, Gucci simply agrees that credit card processing is "necessary" for merchants of replica products to operate profitably. (*Id.* at 30.) Gucci's continued assertion that defendants could have stopped providing services to Laurette (*id.* at 2), however, provides no substitute for the requisite allegations of "direct control" over Laurette's infringing advertising and sales. The complaint's failure to allege facts establishing that "direct control" is thus fatal to Gucci's claim, and requires dismissal.

Again, *Perfect 10* is the only cited case in which a contributory or vicarious infringement claim was asserted against credit card processors. And in rejecting plaintiff's attempt there to hold the credit card processors liable, the Ninth Circuit could not have been more clear as to the requirement of "direct control" over infringing activities needed for liability:

> Perfect 10 claims that the "product" or "instrumentality" at issue here is the credit card payment network through which Defendants process payments for infringing material. As discussed at length above, this network is not the instrument used to infringe Perfect 10's trademarks; that infringement occurs without any involvement of Defendants and their payment systems. Perfect 10 has not alleged that Defendants have the power to remove infringing material from these websites or directly stop their distribution over the Internet. At most, Perfect 10 alleges that Defendants can choose to stop processing payments to these websites and that this refusal might have the practical effect of stopping or reducing the infringing activity. This, without more, does not constitute "direct control."

Id., 494 F.3d at 807 (citations omitted).

Gucci's attempts to distinguish *Perfect 10* are unavailing. For example, Gucci argues that *Perfect 10* can be distinguished from this case because *Perfect 10* involved payments to adult entertainment Web sites that are not illegal (*see* Gucci Mem. 32); but that is a distinction without a difference. What matters is that the defendants' alleged involvement in the acts of trademark infringement in *Perfect 10* are identical to those Gucci alleges here.

After acknowledging *Perfect 10*'s finding that the contributory infringement claim failed because "the infringement occurs without any involvement of Defendants and their payment systems" (Gucci Mem. 33 (quoting *Perfect 10*, 494 F.3d at 808 [sic 807])), Gucci discounts this authority and claims the court so held only because "the cost of allowing one more customer to view the pornographic images was slight," and that "an infringing website could be supported by advertising revenue and did not need defendants' payment processing services to operate. *Id.*" (Gucci Mem. 33). But contrary to Gucci's implication (by its use of an "*id.*" citation), the Ninth

Circuit said nothing of the sort. Just as here, the complaint in *Perfect 10* alleged that credit card processors were liable for infringement by third parties who used the credit card services of the defendants; and the complaint was dismissed because the defendants had no direct control over the infringing activities.

Gucci also attempts to distinguish *Perfect 10* by arguing it was primarily a copyright infringement case. In doing so, Gucci ignores the court's careful treatment of the contributory trademark infringement issue. *See Perfect 10*, 494 F.3d at 806-08.

Finally, Gucci claims that *Perfect 10* involved the provision of services, not the sale of goods. (Gucci Mem. 33-34.) But the allegations and facts relating to the defendants' involvement in the alleged infringement in *Perfect 10* are the same as those here. The defendants in *Perfect 10* were Visa, MasterCard and, as here, affiliated banks and data processing services, who processed "credit card payments to websites that infringe Perfect 10's intellectual property . . . ," *id.* at 792, which the court found did not "assist or enable internet users to locate infringing material, and . . . do not distribute it," *id.* at 797. The court so found while noting that the credit card services "do, as alleged, make infringement more profitable, and people are generally more inclined to engage in an activity when it is financially profitable," and also that the Web sites in *Perfect 10* might have found another funding mechanism if credit card services were halted. *Id.* at 797. Likewise here, absent defendants' services, Laurette might have chosen a different payment method, *e.g.*, checks, money orders, or debit cards. But none of that matters, as the court in *Perfect 10* held that companies providing credit card services were not liable for contributory trademark infringement because they did not have "direct control" over the instrumentality of that infringement. *Id.* at 807. The allegations found insufficient in

Perfect 10 are essentially the same as the allegations here; and as in *Perfect 10*, such allegations are insufficient to state a claim.

2. Failure To Adequately Plead "Marketplace"

Having failed to adequately plead "direct control," Gucci mischaracterizes defendants as parties who provided a "marketplace" for Laurette's infringing sales, comparable to a flea market or Internet site. Thus, Gucci argues that defendants provide a similar service to eBay, which was held to provide a "marketplace" for Internet sales in *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 505-06 (S.D.N.Y. 2008). Simply stated, defendants' activities here are not alleged to be and are nothing like the activities that were held in *Tiffany* to have provided the "marketplace" for the infringing Internet sales. *See id.* at 506-07. And while defendant WNB may have a list of businesses with which it will not do business, it does not and cannot, like eBay, exercise control over what is listed on a client's Web site.

Gucci also argues that defendants provide a marketplace for infringement, as did the Internet service providers in *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 591 F. Supp. 2d 1098 (N.D. Cal. 2008). But, as Gucci recognizes, the defendants in *Akanoc* had the ability to "terminate websites," and provided Internet services analogous to a flea market proprietor:

> In this case, Defendants' activity as Internet service providers is more like the flea market proprietors in *Fonovisa* than the domain name translation service in *Lockheed*. Here, Defendants do not simply translate domain names into IP addresses. Defendants physically host websites on their servers and route internet traffic to and from those websites. This service is the Internet equivalent of leasing real estate.

Id. at 1112. In contrast, the defendants here could not terminate Laurette's Web site, and did not provide the "marketplace" or means by which Laurette conducted its business on the Internet.

C. Gucci Has Failed To Adequately Plead Inducement Of Infringement

Although its complaint does not allege that defendants engaged in intentional inducement of infringement, Gucci now asserts that defendants did. Active inducement requires "affirmative acts" by defendants "suggesting" or inducing third parties (*e.g.*, Laurette) to infringe Gucci's trademarks. *See Perfect 10*, 494 F.3d at 807. While Gucci now claims that the defendants actively solicited credit card processing services from merchants for replica products (Gucci Mem. 27), its complaint does not allege that defendants induced Laurette *to infringe* — only that they may have induced Laurette to accept their credit card services. In this regard, Gucci notes that Durango and Frontline were involved in suggesting that Laurette include a disclaimer on its Web site that the items purchased "are replicas, not originals." (*Id.*) But this suggestion did not cause Laurette to infringe Gucci's marks; if anything, it encouraged Laurette to *truthfully* represent the nature of its goods. It was Laurette's sales of goods, which turned out to be counterfeit, that caused the infringement, not the inclusion of the check box disclaimer.

D. Gucci Has Failed To Adequately Plead Vicarious Infringement

Vicarious trademark infringement requires an apparent or actual partnership, authority to bind one another in transactions with third parties, or joint ownership or control over the infringing product. Gucci persists in arguing that it has pled vicarious infringement, even though its complaint contains no such allegation. Defendants Frontline and WNB provided credit card processing services for Laurette (as they do for tens of thousands of other customers), and that is all. Gucci's reference to the typical chargeback procedure (Gucci Mem. 34-35) is unpersuasive. The chargeback process depends on contracts between the banks and Laurette, or directly between the banks and the credit card companies. Laurette had no authority to and did not bind WNB or Frontline to a contract with anyone else. Most importantly, Gucci's complaint makes no such allegation, as would be required for vicarious liability to be found.

E. Gucci Failed To Adequately Plead That **Defendants Knew Laurette Was Selling Counterfeit Goods**

By focusing its opposition on defendants' alleged knowledge of Laurette's activities while failing to allege direct control over those activities, Gucci puts the cart before the horse. Since Gucci cannot establish a claim for contributory trademark infringement without sufficiently alleging the requisite element of direct control — which Gucci has not — the complaint can be dismissed without the Court even reaching the issue of defendants' knowledge.

In any event, as to defendants' knowledge, the complaint alleges that, because the defendants admittedly knew Laurette was selling "replicas," they must have known Laurette was trafficking in "counterfeits." To make this point, Gucci repeatedly uses the word "counterfeit" in place of "replica" throughout its brief. And without any citation of authority, Gucci boldly claims that a "reasonably prudent person would certainly understand the word 'counterfeit' is interchangeable with words like 'replica' . . . ." (Gucci Mem. 29.) The words "replica" and "counterfeit," however, have different meanings. A "replica" is a reproduction, usually a look-alike, but not necessarily a "counterfeit" that uses another's trademark. (Defs. Mem. 18-19.) Simply stated, while every counterfeit may be a replica, the reverse is not true; every replica is *not* a counterfeit. And as defendants have shown, all the documents mentioned in the complaint refer to "replicas" and not "counterfeit" goods. (*Id.* at 17-22.)

Ignoring this critical difference, Gucci contends that Laurette's Web site explicitly disclosed Laurette to be a counterfeiter, and that the defendants had direct knowledge that the Web site "was selling only counterfeit merchandise." (Gucci Mem. 1-2.) Indeed, Gucci goes so far as to state flatly: "Woodforest's files shows it knew Laurette was selling counterfeits. *Id.* ¶¶ 73-81." (*Id.* at 8.) But the Laurette Web Site mentioned only "replicas" and said the products were "not being sold or represented as original." (Compl. ¶ 32.)

Gucci also contends that the defendants were at least willfully blind, citing to a comment from *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992): "To be willfully blind, a person must suspect wrongdoing and deliberately fail to investigate." Gucci's complaint, however, does not allege that defendants suspected any wrongdoing by Laurette; at worst, defendants understood only that Laurette was selling "replicas," as Laurette represented it was. Gucci also distorts comments by the court in *Tiffany* regarding a search engine used by eBay, and makes the spurious assertion that the *Tiffany* court believed the term "replica" indicated counterfeit items. (Gucci Mem. 29-30.) Nowhere, however, did the court ever say that a "replica" is a "counterfeit." The court merely commented on certain words that eBay monitored from Web sites to determine whether listings would be flagged for "a more in-depth review" before concluding whether or not they should be removed from the eBay marketplace. *Tiffany*, 576 F. Supp. 2d at 477-78. *Tiffany* does not suggest that all replicas are counterfeits, or otherwise support Gucci's claims here.

III. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS

A. Sections 302(a)(1) And 302(a)(3) Of New York C.P.L.R. Do Not Confer Personal Jurisdiction

Jurisdiction under § 302(a)(1)[1] requires two elements: (1) defendants' transaction of business in New York; and (2) plaintiff's claims must arise from that business activity. A claim arises from a transaction when there is a substantial relationship between the transaction and the claim asserted; a merely coincidental connection is insufficient.

Gucci's claims against defendants do not arise out of any conduct in New York. Gucci accuses defendants of providing "indispensible" credit processing services to Laurette. But

[1] Other than asserting "jurisdiction over all Defendants pursuant to § 301" (Gucci Mem. 12), Gucci never articulates how § 301 confers jurisdiction. Significantly, Gucci failed to plead § 301 as a basis for conferring jurisdiction over these defendants. (*See* Compl. ¶¶ 19-23.)

defendants had no business, commercial, or contractual dealings *in New York* with Laurette (a California entity). Defendants' involvement in credit processing for Laurette occurred entirely outside of New York. Tellingly, Jennifer Kirk of Laurette does not contend that any activities involving Jennifer Kirk, Laurette, or TheBagAddiction.com occurred in New York. (*See* Kirk Decl. (Dkt.28).) The exercise of jurisdiction over a defendant who conducts all its actions out-of-state is unreasonable and offends traditional notions of substantial justice. *Chloe v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518, 526 (S.D.N.Y. 2008).

The fact that electronic transactions may have tangentially "involved New York financial institutions" is merely a coincidental connection, and has nothing to do with Gucci's claim. Neither Frontline nor WNB process transactions directly through Visa or MasterCard. (Reply Kittler Aff. ¶¶ 3, 5; Reply Vernon Decl. ¶ 4.) Visa is headquartered in California, not New York. (Reply Vernon Decl. ¶ 2.) While MasterCard is headquartered in New York, that by itself is without significance. Gucci articulates no business activities between defendants and MasterCard occurring in New York out of which Gucci's claims arose.

Frontline does not process transactions directly through HSBC. Frontline has never had direct contact with HSBC concerning a merchant services contract, including its merchant services contract with Laurette. HSBC's inclusion in merchant services contracts is a function of HSBC's access to the ACH System, which facilitates electronic commerce by providing a secure payments system. The ACH System is utilized by millions of merchants, and only several money center banks, many of which are in New York, have access to the ACH System. (Reply Kittler Aff. ¶¶ 3, 4.) The relationship is merely a coincidental fact of accessing the infrastructure necessary to conduct electronic commerce.

If accepted, Gucci's personal jurisdiction theory would be limitless. Millions of entities engaging in electronic commerce must access the ACH System, or affiliate with credit card services such as Visa or MasterCard. Under Gucci's view, anyone, "in every corner of the world," [2] regardless of any actual connections with New York, would risk being subject to jurisdiction in New York.

Regardless, Gucci's claims do not arise out of any relationship between defendants and HSBC, Visa, or MasterCard. Gucci's claims arise out of the purportedly indispensible services defendants provided to Laurette. Section 302(a)(1) does not confer jurisdiction.

Under Section 302(a)(3)(i), Gucci must show that each defendant *regularly* does or solicits business, or engages in any other *persistent* course of conduct, or derives *substantial* revenue from goods used or consumed, or services rendered, *in New York*.

Defendants do not regularly conduct, solicit, or engage in business in New York. (*See* Kittler Decl. (Dkt.20); Vernon Decl. (Dkt.21); Kairalla Aff. (Dkt.22).) Defendants do not derive substantial revenue from New York. All the defendants derive one percent (1%) or less of their revenue from New York, and less than 0.32% of the merchants Frontline has dealt with since its inception had New York addresses. Where an entity derives only 4% of its sales from New York, and otherwise has no establishment or employees in New York, personal jurisdiction is absent. *See Chunky Corp. v. Blumenthal Bros. Chocolate Co.*, 299 F. Supp. 110, 113 (S.D.N.Y. 1969). Section 302(a)(3)(i), therefore, does not confer jurisdiction here.

To assert jurisdiction under § 302(a)(3)(ii), Gucci must show defendants expected, or should reasonably have expected, the alleged tort to have consequences in New York. Gucci asserts that Frontline and WNB "learned that Laurette shipped merchandise to customers in New

[2] As noted on Visa's Web site, "Visa payment transactions take place every second of every day *in every corner of the world*." (Dkt.29-6) (emphasis added).)

York during the course of their investigation of chargebacks, and therefore had actual knowledge that they were facilitating the sale of counterfeit Gucci products in New York." (Gucci Mem. 14, 15.) Chargebacks arose and were resolved based on the defendants' relationships with the *merchant*, Laurette, a California entity. If Frontline and WNB received chargeback information, the location of the *customer*, even if it could be determined, was immaterial to addressing the chargeback. (Reply Kittler Aff. ¶¶ 6-7.) Because defendants had no reason to expect their actions to have consequences in New York, Section 302(a)(3)(ii) cannot confer jurisdiction.

B. <u>This Court Does Not Have General Jurisdiction Over Defendants</u>

None of the defendants engage in "continuous, permanent, and substantial activity" in New York. (*See* Dkt.20, 21, 22.) Gucci's conclusory assertion that general jurisdiction exists over defendants is unfounded — a conclusion reinforced by Gucci's failure even to plead general jurisdiction over defendants. (*See* Compl. ¶¶ 19-23.)

Frontline and WNB do not process credit transactions directly through any New York financial institution. Contrary to Gucci's assertions, WNB has no agent working for it in New York. MCCS of NY, LLC ("MCCS of NY"), the company Gucci identifies as WNB's agent, is not related to WNB. The two entities are completely separate. Merchants' Choice Card Services ("MCCS") is an assumed name for Delta Card Services ("Delta"), a Texas corporation. Delta and WNB are legally separate entities acting independent of one another. Delta contracts with independently owned companies all over the country, that refer merchant contract business to WNB. One such independent company is MCCS of NY, which has no ownership relationship to MCCS (even though it uses a similar name), to Delta, or to WNB. MCCS of NY is not WNB's or Delta's agent. (Reply Vernon Decl. ¶¶ 5-8.)

Gucci's brief is devoid of any connections between Durango and New York, aside from efforts to affiliate Durango with Frontline and WNB, and the assertion that, although the "amount" of Durango's New York revenue is negligible, it is the "nature" of the revenue that matters.[3] (Gucci Mem. 19.) Gucci does not articulate how the "nature" of Durango's insubstantial revenue warrants hauling a five employee Colorado business that provided broker services for companies outside of New York into a New York court.

C. The Exercise Of Personal Jurisdiction Over Defendants Does Not Comport With The Requirements Of Due Process

Defendants did not purposefully avail themselves of conducting business in New York. Defendants, who do business in Montana, Texas, and Colorado, entered into relationships with Laurette, a California entity, to process credit transactions. Defendants' processing of credit transactions for Laurette occurred entirely outside New York, and the location of Laurette's customers was immaterial to defendants' activities with Laurette.

Traditional notions of substantial justice weigh against the exercise of personal jurisdiction. The burden of litigating in New York is considerable, and significantly outweighs the costs of litigating in an alternative forum. All defendants' records, files, and witnesses relevant to this litigation are outside New York, and defendants' activities related to this action occurred outside New York. Although New York has an interest in adjudicating a dispute involving harm to its residents, so too do Montana, Texas, and Colorado. And Montana, Texas, and Colorado have a greater interest than New York in seeing that their resident corporations do not engage in counterfeiting or trademark infringement.

[3] When not addressing Frontline or WNB specifically, Gucci generally lumps "defendants" into a general processing of credit transaction rubric. Durango does not process credit transactions. It serves as a broker "to bridge retailer/merchants with entities that offer credit card processing services." (Kairalla Aff. (Dkt.22) ¶¶ 6, 18-20.)

D. Jurisdictional Discovery Is Unnecessary <u>And Adds Nothing To What Is Already Known</u>

The District Court has wide latitude to determine the scope of discovery, if any, and is "typically within its discretion to deny jurisdictional discovery when the plaintiff has not made out a prima facie case for jurisdiction." *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 401 (2d Cir. 2009) (internal quotations omitted).

Gucci asserts that "jurisdictional discovery into Defendants' marketing and sales of credit card processing services and banking relationships in New York is appropriate," and that "discovery is warranted to determine the value and frequency of credit card transactions processed on behalf of [WNB] and Frontline in New York." (Gucci Mem. 19 n.8, 20.) Defendants neither solicit business in New York nor conduct any direct marketing in New York. Defendants' banking relationships, if any, with New York have been described in affidavits and briefing. Defendants' miniscule revenue earned from New York activities has been stated. (Kittler Decl. ¶¶ 6, 7, 10, 11; Vernon Decl. ¶¶ 7, 9, Kairalla Aff. ¶¶ 11, 16.)

The facts Gucci alleges would be needed in discovery to further address jurisdiction have been developed. A *prima facie case* of jurisdiction cannot be made. Discovery would just waste time and resources to rehash what is already known.

IV. <u>CONCLUSION</u>

Based on the foregoing arguments, defendants respectfully request that the Court dismiss the complaint for failure to state a claim and lack of personal jurisdiction.

Respectfully submitted,

Herbert I. Pierce III
Jeffery J. Oven
Christopher C. Stoneback
G. Trenton Hooper
Crowley Fleck PLLP
490 N 31st Street

LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK, LLP
600 South Avenue West
Westfield, NJ 07090
Attorneys for Defendant Woodforest National Bank

Suite 500 TW2
Billings, MT 59101
Tel: 406-252-3441
E-mail: joven@crowleyfleck.com
fpierce@crowleyfleck.com
cstoneback@crowleyfleck.com
thooper@crowleyfleck.com

- and -

Stanley L. Lane, Jr.
OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.
230 Park Avenue
New York, NY 10169
Attorneys for Defendant Frontline Processing Corporation

By /s/ Stanley L. Lane, Jr.
Stanley L. Lane, Jr. (SL 8400)
Tel: 212.661.9100
E-mail: slane@oshr.com

By /s/ Charles P. Kennedy
Charles P. Kennedy (CK 9917)
Tel: 908.654.5000
E-mail: ckennedy@ldlkm.com
wmentlik@ldlkm.com
gparadise@ldlkm.com
litigation@ldlkm.com

Law Offices of Todd Wengrovsky, PLLC.
285 Southfield Road
Box 585
Calverton, NY 11933
Attorneys for Defendant Durango Merchant Services LLC d/b/a National Bankcard Systems of Durango

By /s/ Todd Wengrovsky
Todd Wengrovsky (TW 4823)
Tel: 631.727.3400
E-mail: Contact@TWlegal.com

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