UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GUCCI AMERICA, INC., Plaintiff, -against- FRONTLINE PROCESSING CORPORATION, WOODFOREST NATIONAL BANK, DURANGO MERCHANT SERVICES LLC d/b/a NATIONAL BANKCARD SYSTEMS OF DURANGO, ABC COMPANIES and JOHN DOES, Defendants.	Case No. 09 CV 6925 (HB)

DEFENDANT FRONTLINE PROCESSING CORP.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR AN ORDER LIMITING GUCCI AMERICA, INC.'S PENDING DISCOVERY and INFORMAL DISCOVERY CONFERENCE

I. INTRODUCTION

This discovery dispute is the result of Plaintiff Gucci America, Inc. ("Gucci")'s services upon Defendant Frontline Processing Corporation ("Frontline") twenty-eight requests for production.[1] In responding thus far, Frontline has spent more than $25,000 trying to corral and review all the electronically stored information that appears potentially responsive to Gucci's overly broad requests. To fully respond, including to a variety of questions that are more reminiscent of a fishing expedition, Frontline will be forced to incur an additional estimated $250,000 in costs and fees. While that amount may be a drop in the bucket to Gucci, a company that reported revenue of 2.2 billion Euros in 2008 (of which 440,000,000 was earned from North America)[2], a quarter-million dollars represents a significant expense to Frontline, which is a small Montana business. Accordingly, Frontline, pursuant to Rule 26(b)(2)(C)(iii) moves this Court to limit the pending discovery served on Frontline, or, alternatively, order Gucci to pay the expenses involved in responding to Gucci's pending discovery.

II. BACKGROUND FACTS

On December 3, 2009, Gucci served ifs First Requests for Production on Frontline. Pl.'s First Req.'s for Production of Documents by Def. Frontline Processing Corp. 12 (Dec. 3, 2009) (attached as Exhibit A). This document was immediately reviewed by Frontline's counsel who determined that to respond, outside computer consultants would need to be employed. *See generally*, Aff. G. Trent Hooper (Feb. 1,

[1] Frontline has attached all of Gucci's Requests for Production as Exhibit A, hereto. Each Request for Production is incorporated by reference into this document to meet the requirements of L.R. 37.1. As this Court will see, *post*, at § III, the undue burden on Frontline predominantly stems for the cumulative effects of Gucci's discovery and Frontline's inclusion of certain Requests for Production should not be construed as a waiver of the applicability of this motion to all of Gucci's Requests for Production.

2010) (attached as Exhibit B). Frontline retained the services of Entré Technologies to assist with the secure capture and storage of Frontline's electronically stored information. *Id.*, ¶ 4. On January 6, 2010, attorney Hooper and Entré were on-site at Frontline, where they filled twenty-four hard drives with the contents of 19 active workstations, out-of-service workstations, and several computer servers. *Id.*, ¶ 5. Because of the sensitivity of the data, which has slowed efforts to respond to Gucci's document requests, particular safety measures have been developed and implemented. *Id.*, ¶¶ 6, 11, 15. Entré began searching the information on January 12, 2010 with broad terms meant to ensure that every possible responsive document to Gucci's extremely broad discovery requests would be included. *Id.*, ¶¶ 7-8. Upon completion, there remained 7.6 gigabytes of data. *Id.*, ¶ 9. The cost for Entré's services totaled more than $12,400. *Id.*, at ¶ 19.

Hooper did a preliminary review of the documents, but the efforts were hampered by the sheer magnitude of the data remaining and the fact that documents were still in their native formats. *Id.*, ¶ 10. Frontline then engaged the services of the consulting firm Lighthouse Document Technologies. *Id.*, ¶ 11. It took Lighthouse approximately 10 days to convert the native documents into .tif files. *Id.*, at ¶¶ 12-13. The 7.6 gigabytes converted into approximately 75,000 .tif files. *Id.*, at ¶ 12. The final bill from Lighthouse has not been received, but they estimated $6,000 to convert the files. *Id.*, at ¶ 20.

Upon receipt of the .tif files, a document review began in earnest. *Id.*, ¶ 14. Two attorneys, including Hooper, spent several hours reviewing documents on January 30,

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[2] *See* http://www.ppr.com/front__sectionId-232_Changelang-en.html (accessed Feb. 1, 2010). Please note, PPR is the publicly traded company that owns Gucci and various other luxury brands.

2010. *Id*., at ¶ 14. The two attorneys together, without redacting, averaged approximately 250 documents per hour. *Id*.

III. ARGUMENT

A. Under Fed. R. Civ. P. 26(b)(2)(C)(iii), The Court Should Limit The Pending Discovery Or Order Gucci To Incur the Costs Associated With Frontline Fully Responding.

The Federal Rules of Civil Procedure include practical limits on the scope of discovery. Specifically, pursuant to Rule 26(b)(2)(C)(iii):

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that … (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

The 2006 Amendment Advisory Committee Notes indicate that "the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information[.]" Fed. R. Civ. P. 26, Advisory Comm. Notes (2006 Amend.); *see also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 8, § 2008.1 (Apr. Supp. 2009) ("One method for regulating discovery requests that infringe on the limitations of Rule 26(b)(2) is to condition orders that such discovery go forward on the payment by the party seeking discovery or part or all of the resulting expenses incurred by the responding party."). The Advisory Committee Notes from both 1983 and 1993 indicate that these protections were added "to encourage judges to be more aggressive in identifying and

discouraging discovery overuse" and "to enable the court to keep tighter rein on the extent of discovery."

When limiting discovery under Rule 26(b)(2)(C) courts "take a common-sense approach to both the importance of the case and the propriety of undertaking the expense of requested discovery without treating the factors spelled out in the amendment as talismans." *Id.*, at § 2008.1, p. 122. This is evidenced in *Kock v. Kock Industries, Inc.* 203 F.3d 1202 (10th Cir. 2000). There, a variety of Koch Industries stockholders who sold their interest pursuant to a shareholder purchase agreement sued the defendant and various officers and directors for misrepresentation and fraud associated with the deal. *Id.*, at 1208. After filing a second amended complaint alleging fraudulent accounting, the plaintiffs served "broad discovery" that was promptly limited by the court. *Id.*, at 1210. The discovery sought production of all loans and transactions by Kock Industries for a ten year period as well as all records of the defendant's oil and gas reserves. *Id*, at 1237. The magistrate limited the discovery and the district court affirmed on the grounds that "the burden and expense of producing these documents far outweighed the Plaintiffs' mere hope that they might find something upon which to base a claim." *Id.*, at 1238. The Tenth Circuit affirmed, holding:

> The Plaintiffs attempted to justify their extraordinarily expansive discovery requests as relevant to two broad, non-specific allegations contained in their Second Amended Complaint. When a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process. That is what occurred here. The limits which Rule 26(b)(2)(iii) place upon discovery are aimed at just such a tactic. Utilizing its discretionary power under this rule, the district court appropriately recognized that the likely benefit of this attempted fishing expedition was speculative at best.

Id.

Surles v. Greyhound Lines, Inc. is likewise instructive. There, the Sixth Circuit Court of Appeals affirmed the district court's discovery limitations on overly broad and unduly burdensome discovery requests under Rule 26(b)(2)(C). 474 F.3d 288, 304-06 (6th Cir. 2007). There Surles received an $8,000,000 jury verdict for injuries sustained in a bus accident that occurred during a struggle between the bus driver and another passenger. *Id*., at 291-92. In discovery Surles requested "any and all documents and/or incident reports generated as a result of any other violent episodes which have occurred on a Greyhound bus since 1975" and "all memoranda or other notes of the defendant which concerns [sic] terrorist activity, criminal conduct, unruly passengers or decorum or conduct on buses[.]" *Id*., at 292. Greyhound attempted to respond but eventually had to seek a protective order. *Id*., at 305-06. In support, Greyhound provided an affidavit that showed responding to those discovery requests for a four year period took approximately two weeks and more than 180 hours. *Id*., at 306. Further, expanding discovery to fifteen years would have cost Greyhound approximately $141,000. *Id*. Even if the Court required four additional years of production over what Greyhound provided, it would have taken over 2,150 hours and cost over $44,000. Faced with these facts, the Sixth Circuit affirmed the district court's protective order limiting discovery to avoid undue burden.

When considering the practical effects of the scope of the requests from Gucci, requiring Frontline to absorb that expense would be unfair and allow Gucci to use discovery to wage a war of attrition on Frontline. *But see* Fed. R. Civ. P. 26(b)(1), 1983 Advisory Comm. Notes (predecessor to Rule 26(b)(2)(C)(iii)) ("The court must …

prevent the use of discovery to wage a war of attrition or as a device to coerce a party[.]"). Thus far, Frontline has invested over $25,000 trying to respond to Gucci's overly broad discovery requests. Frontline has now isolated approximately 75,000 documents that are potentially responsive to the discovery requests from Gucci. With two attorneys working on document review, each averaging 125 documents per hour, it will take approximately 600 hours to complete the review. Factoring in the need to redact a variety of protected information (e.g., credit card numbers, expiration dates, and social security numbers), pull out privileged documents, and draft a Rule 26(b)(5) conforming privilege log, we anticipate the time necessary to respond would be approximately 1200 hours, or fifty days of two associates working 24 hours per day. Paying the standard B-rate for Mr. Hooper (which is less than other associates who would be involved in the document review and substantially less than New York rates), Frontline will be required to spend upwards of an additional $200,000 to respond to the pending requests for production. Here, the Court should follow the district courts in *Greyhound* and *Kock*, as affirmed by the Sixth and Tenth Circuits, respectively, and either limit the discovery that has been asked or order that Gucci pay for the production costs.

Furthermore, as this direct impact is driven by Gucci's requests for production, a review of certain examples of Gucci's questions is necessary to appreciate why this process is so time consuming and expensive. For instance, Gucci asked for Frontline to produce "Documents, including any documents stored electronically, sufficient to show any accounts held by or on behalf of Frontline into which payments from MasterCard, Visa, Discover, or American Express were deposited, and any accounts into which such

payments may have been transferred." Request for Production No. 25. Since Frontline's entire business is the processing of credit card payments issued by MasterCard, Visa, Discover, and American Express, this request asks for details of *every* transaction Frontline has handled since 2003.

In addition to the undue economic burden on Frontline to respond, the Southern District recognizes a "privacy burden" which Gucci cannot overcome. *See Labrew v. City of New York*, 2009 WL 3747165 *1 (S.D.N.Y. Nov. 5, 2009) (privacy rights of individuals subject to request for production outweighed need of plaintiff, therefore, pursuant to Rule 26(b)(2)(C)(iii), the discovery would not be allowed).

Similarly overbroad, Gucci requested "[a]ll documents, including any documents stored electronically, referring or relating to merchants whose websites sell Replica Products, including, but not limited to, any applications, account statements of such merchants, diligence materials, approval memoranda, sales data, e-mails, and other correspondence." Request for Production No. 11. First off, Frontline objects to Gucci's definition of "Replica Product" as it is misleading because this lawsuit concerns infringing counterfeit products rather than licensed replica products. Needless to say, like the prior question, the businesses with whom Frontline works have a privacy interest in their applications and account statements that Gucci cannot overcome. *See Labrew*, 2009 WL 3747165. Furthermore, this request is so broad that it would reach every possible reference to any merchant utilizing Frontline's processing services that happen to sell "Replica Products" regardless of whether the products are authentic, licensed or something else.

IV. CONCLUSION

The burden on Frontline to respond to Gucci's requests is significant and well beyond the threshold showing of "undue." Considering the overbreadth of the discovery served on Frontline by Gucci, if Gucci insists on having these questions answered, it should be required to bear the costs involved. Otherwise, the Court should limit the requests for production to reasonable bounds.

Dated this 1st day of February, 2010.

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