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.	09 Civ. 6925 (HB)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FRONTLINE PROCESSING CORPORATION'S MOTION FOR AN ORDER LIMITING GUCCI'S PENDING DISCOVERY AND INFORMAL DISCOVERY CONFERENCE

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Plaintiff Gucci America, Inc. ("Gucci" or "Plaintiff") submits this memorandum of law in opposition to Defendant Frontline Processing Corporation's Motion for an Order Limiting Gucci's Pending Discovery and Informal Discovery Conference.

PRELIMINARY STATEMENT

On October 22, 2009, the parties appeared before this Court for a pre-trial conference. At that time, the Court issued an order that the parties could commence document discovery. *See* Pretrial Scheduling Order, dated Oct. 22, 2009 (Docket No. 10). On December 3, 2009, Plaintiff served its discovery demands on Defendant Frontline Processing Corporation ("Frontline"), which included a request for the production of certain documents relevant to the issues in this litigation. On February 1, 2010, Frontline filed the instant motion with this Court seeking an order limiting Plaintiff's discovery and requesting an informal discovery conference with the Court.

Frontline filed the instant motion even though Frontline never had a meet and confer with Plaintiff, as required by Federal Rule of Civil Procedure 26(c); even though Frontline never requested an informal discovery conference with the Court prior to filing its motion, as required by Rule 4(a) of Your Honor's individual rules and Local Rule 37.2 of the United States District Court for the Southern District of New York; and even though Frontline *never once* attempted to contact Plaintiff regarding the allegedly burdensome nature of Plaintiff's requests for production. Indeed, the only communication Plaintiff received from Frontline regarding these discovery requests was a late-December request for an extension of time to respond. Plaintiff granted that request and, on the day Frontline's discovery responses were due, it filed the instant motion. Frontline made no attempt to comply with these procedural requirements and, as a result, has forced Plaintiff to engage in this premature—and possibly unnecessary—motion practice.

Frontline's decision to file this motion the day its responses were due suggests a tactical decision to delay responding to Plaintiff's requests for production. Indeed, if Plaintiff's requests for production were as burdensome as Frontline would like the Court to believe, it is difficult to imagine that Frontline would not have contacted Plaintiff regarding the scope of these supposed "overly broad" demands in the nearly two months that passed since Plaintiff served Frontline with its discovery requests. Frontline has made no showing that responding to Plaintiff's document requests would be unduly burdensome. At best, Frontline has established that it is merely inconvenient to respond to document demands in a civil litigation—a fact with which nearly every civil litigant would agree. Inconvenience, however, is not a sufficient basis for excusing Frontline from responding to Plaintiff's document requests, nor is it a basis for imposing upon Plaintiff the costs of Frontline's compliance with its discovery obligations.

For the reasons set forth herein, Frontline's motion is both premature and without merit. Plaintiff respectfully requests that the Court deny Frontline's motion.

ARGUMENT

I. FRONTLINE'S FAILURE TO MEET AND CONFER WITH GUCCI PRIOR TO FILING ITS MOTION IS A CLEAR VIOLATION OF RULE 26(C) AND LOCAL RULE 37.2

Frontline's motion was filed in clear violation of Federal Rule of Civil Procedure 26(c)(1) and Local Rule 37.2, which is incorporated by reference into Rule 4(a) of Your Honor's individual rules of practice. Therefore, the motion should be dismissed as procedurally improper. *See Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 99 (S.D.N.Y. 1997) (finding that a party's "noncompliance with not just one, or even two, but three rules governing discovery disputes, leaves the Court with no alternative but to deny its motion [as improper]").

Federal Rule of Civil Procedure 26(c)(1) requires that a party moving for a protective order "include a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1). Notably, Frontline did not include such a certification with its motion because Frontline made no attempt to confer with Plaintiff prior to filing its motion. Indeed, the only communication between Plaintiff and Frontline regarding these discovery requests was Frontline's request in late December for an extension of time to respond, which Plaintiff granted. At no time prior to filing its motion did Frontline ever contact Plaintiff regarding the supposed "burden of Gucci's requests on Frontline." *See* Defendant Frontline's Motion for an Order Limiting Gucci's Pending Discovery and Informal Discovery Conference, dated Feb. 1, 2010 (Docket No. 34.)

Further, Frontline's motion also runs afoul of Local Rule 37.2. Frontline's request for an informal discovery conference at the same time it seeks substantive relief on its motion is in clear violation of Local Rule 37.2 and this Court's Individual Rule 4(a). Pursuant to Rule 4(a) of this Court's Individual Rules, any discovery-related motions must follow Local Civil Rule 37.2, which provides:

> No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.

See Local Rule 37.2. As it is clear from Frontline's motion, in which Frontline requests the required "informal conference with the court," no such discovery conference has yet taken place. Frontline's motion, therefore, is premature under both the Federal Rules, this Court's Individual Rules, and the Local Rules and should be dismissed.

II. FRONTLINE HAS FAILED TO ESTABLISH ANY "UNDUE BURDEN" IN RESPONDING TO PLAINTIFF'S DOCUMENT REQUESTS

Even if Frontline's motion did not suffer from fatal procedural defects, Frontline would lose on the merits of its request for a protective order. Federal Rule of Civil Procedure 26(b)(1) provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Even a cursory review of Plaintiff's requests for production shows that the documents Plaintiff seeks meet this standard. Further, Frontline has failed to meet its burden of demonstrating that responding to Plaintiff's requests for production would be unduly burdensome. *See ABC Rug & Carpet Cleaning Service, Inc. v. ABC Rug Cleaners, Inc.*, 2009 WL 105503, at *5 (S.D.N.Y. Jan. 14, 2009) (rejecting defendants' argument it would be "unduly burdensome" to respond to plaintiffs' document request where defendants failed to demonstrate that compliance with the request "would result in burden or expense significant enough for relevant information central to the issue of Plaintiffs' asserted damages to be precluded from discovery").

A. Plaintiff's Requests Are Narrowly Tailored and Seek the Production of Documents Relevant to the Claims and Defenses At Issue in this Litigation

The Court "will only limit the discovery of relevant information when it determines that '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.'" *Id.* (quoting Fed. R. Civ. P. 26(b)(2)(C)(iii)). Frontline has failed to come forth with anything but unsupported assertions in support of its request to limit Plaintiff's requests for production.

In attempting to shirk its discovery obligations, Frontline inexplicably ignores the wealth of case law in the Second Circuit on the issue of discovery and, instead, relies heavily upon decisions from the Tenth Circuit and Sixth Circuit that are neither directly on point nor binding upon this Court. Second Circuit law makes clear that the discovery obligations Frontline seeks to avoid are typical of the inconveniences associated with discovery in any litigation, and do not impose an undue burden upon Frontline. *See In re Worldcom, Inc.*, 2008 WL 427896, at *5 (S.D.N.Y. Feb. 14, 2008) (requiring production of documents and noting that "the mere fact that discovery may involve large volumes of documents or may be burdensome does not, by itself, excuse compliance with discovery requests"); *see also ABC Rug & Carpet Cleaning Service, Inc.* 2009 WL 105503, at *5 ("Defendants' unsupported assertions that ABC Rug Cleaners is a small business that does not keep sophisticated records notwithstanding, Defendants point to no specific reasons why compliance with [Plaintiffs'] request would be unduly burdensome.").

Although Frontline makes specific reference to only *two* of Plaintiff's requests for production,[1] Frontline seems to take the position that it would be unduly burdensome for it to respond to *any* of Plaintiff's requests for production. However, Frontline cites to no case law, in

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[1] Frontline's reading of Request for Production No. 25 suggests confusion regarding the scope of this request that may have been alleviated if Frontline had adhered to the requirements of Rule 26(c)(1) and engaged in a meet and confer prior to filing this motion. Frontline asserts, incorrectly, that this request "asks for the details of *every* transaction Frontline has handled since 2003." *See* 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, dated Feb. 1, 2010 ("Frontline Br.") (Docket No. 35). To the contrary, this request is limited in scope to documents "sufficient to show any accounts held by or on behalf of Frontline" into which Frontline receives funds for its merchants from various credit card companies, such as MasterCard, prior to transferring those funds to the merchants' accounts. *See* Plaintiff's First Request for the Production of Documents By Defendant Frontline Processing Corporation, dated Dec. 3, 2009 (Docket No. 35, Ex. A).

Similarly, Frontline's objection to Request for Production No. 11 misses the point. Frontline admitted in its motion to dismiss that it did business with Laurette knowing that their website, TheBagAddiction.com, sold replicas. These replicas included counterfeit Gucci products. Therefore, a request for Frontline to produce documents relating to "Replica Products," as defined in Plaintiff's requests for production, is entirely relevant.

this District or elsewhere, that would support its request to avoid responding to the entirety of Plaintiff's requests for production. Frontline's position is an untenable one. Indeed, Frontline noticeably avoids providing any basis for its assertion that all of Plaintiff's requests for production are "overly broad" or "unduly burdensome."

As detailed in the Complaint, Laurette was an admitted counterfeiter for whom Frontline knowingly processed credit card sales transactions. (Docket No. 1). It is difficult to believe then that Frontline seriously contends that Plaintiff's requests for documents regarding Frontline's relationship with Laurette are overly broad or irrelevant to this litigation. Request for Production No. 1 for instance seeks the production of "[a]ll documents, including any documents stored electronically, relating to Laurette's merchant services account with Frontline, including, but not limited to, all internal memoranda, e-mails, correspondence, account statements, and any documents reflecting any review by Frontline of Laurette's business operations." (Docket No. 35, Ex. A).

Similarly, Request for Production No. 8 seeks "[a]ll documents . . . concerning or relating to chargebacks or requests for refunds received by Frontline relating to the sale of any product bearing the Gucci Marks where the purchaser requesting the chargeback asserted that the product bearing the Gucci Marks was not genuine or authentic." (Docket No. 35, Ex. A). Plaintiff's Complaint alleges that Frontline engaged in various forms of trademark infringement. It is plain then that documents responsive to this request are likely to lead to the discovery of admissible information or to be relevant to the claims at issue in this litigation. Frontline has failed to come forth with any legitimate reason why this Court should deny or limit Plaintiff's access to such documents.

B. Frontline's Request for Cost-Shifting Is Without Merit And Should Be Denied

Frontline asserts that, if the Court denies its motion to limit Plaintiff's discovery, the Court should then impose the entire costs of Frontline's discovery obligations onto Plaintiff. (Frontline Br. at 4-9). Frontline's request is without merit and should be denied. First, "cost shifting is potentially appropriate only when inaccessible data is sought." *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) ("*Zubulake III*"). As the Court stated in the first *Zubulake* decision:

> [W]hether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format . . . . [A]ny data that is retained in a machine readable format is typically accessible. . . . A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.

Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 318, 324 (S.D.N.Y. 2003) ("*Zubulake I*"). It is clear from Frontline's own description of the data retrieved that it was kept in an "accessible" format and, therefore, cost-shifting would be inappropriate. *Id.* ("For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing the responsive data.").

Second, even if Frontline could establish that the data it retrieved was "inaccessible"—an assertion that Frontline does not make—the cost-shifting would be limited only to the recovery of such data, not its review and production. *See Zubulake III*, 216 F.R.D. at 290-91 ("[T]he responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.").

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Frontline's motion.

Dated: New York, New York
February 8, 2010

Respectfully submitted,

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