

GIBSON DUNN

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June 11, 2010

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Client: T 35409-00028

Todd Wengrovsky
Law Office of Todd Wengrovsky, PLLC
285 Southfield Road, Box 585
Calverton, NY 11933Re: Gucci America, Inc. v. Frontline Processing Corp., et al., 09 Civ. 6925 (SDNY) (HB)

Dear Mr. Wengrovsky:

We are in receipt of your letter dated June 4, 2010. On the whole, your letter suggests a fundamental misunderstanding regarding Durango's obligations in responding to Plaintiff's discovery requests, but your assertion that "the 'search terms' issue is largely irrelevant to Durango" is particularly alarming. The Federal Rules make it "explicit" that "the producing party has the obligation to search available electronic systems for the information demanded" and "it cannot be argue that a party should ever be relieved of its obligation to produce accessible data merely because it takes time and effort to find what is necessary." See *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007), citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283-84 (S.D.N.Y. 2003).

The cavalier attitude with which your client seems to approach its discovery obligations is deeply troubling. As a party to this action, Durango must conduct a reasonable search for responsive documents, including electronic communications, in the locations where such documents are likely to be found. Durango's assertion that it is a "small company" does not relieve it from complying with its obligation to respond to the document requests served by Plaintiff more than six months ago. See *Billups v. West*, No. 95 Civ. 1146, 1997 WL 100798, *2 (S.D.N.Y. Mar. 6, 1997) ("The time limits set forth in the Federal Rules of Civil Procedure are *not* optional. They are mandatory for *all* litigants—large or small, public or private.") (emphasis in original). Neither the Federal Rules nor the caselaw of this District permit a party to avoid preserving, searching for, or producing responsive documents simply because the litigant is a "small company." Further, despite Durango's self-serving representation that it was "merely a broker" for replica merchants, the documents show that Nathan Counley played an instrumental role in connecting dozens of replica merchants with credit card processors.

In your May 17, 2010 letter to the Court, you represented that Durango "has conducted a diligent and thorough search, including a search of electronic records, and Durango does not have any additional relevant document[s] within its custody or control." However, on numerous occasions, we have inquired regarding Durango's failure to produce electronic

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communications and pointed to e-mails that Nathan Counley sent and received from replica merchants Stephanie Walker and Jennifer Kirk—e-mails that were never produced by Durango. Durango has never offered an explanation for this inconsistency. In addition, contrary to Durango's representation to the Court that it has no additional documents responsive to Plaintiff's requests, it is clear from your recent letter that Durango does, in fact, maintain "lead sheets" that are clearly relevant, non-privileged and responsive to Plaintiff's document requests. Durango admits that these lead sheets are "discoverable documents," yet Durango has only produced lead sheets for two replica merchants out of the dozens (or more) to whom it provided its merchant broker services. Also, attached to your June 4 letter were residual reports reflecting the fees Durango earned from certain replica merchants, but Durango provided no explanation as to why these reports were not previously produced to Plaintiff. Further, Durango's evasive response to Plaintiff's repeated requests for the keywords Durango used in searching for potentially responsive documents suggests that Durango did not actually conduct a search of its electronic communications. Although you have represented that Durango conducted a diligent search for responsive documents, the facts strongly suggest otherwise.

Please note that to the extent that any documents were deleted by Durango after its duty to preserve such documents arose, we intend to pursue appropriate remedies before Judge Baer to address any such spoliation. *See Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 139, 141 (S.D.N.Y. 2009) (Baer, J.) ("[W]hen evidence is destroyed in bad faith or with gross negligence, that alone has been found to be sufficient to support an inference that the missing evidence would have been favorable to the prejudiced party, and thus relevant.") (holding that defendants were precluded from asserting affirmative defenses in response to plaintiff's infringement claims).

Given that Mr. Counley's deposition is scheduled begin on Monday morning, we will have no alternative but to contact the Court to request a discovery conference regarding the continuing deficiencies in Durango's document production if we do not receive your complete production by 12:00 p.m. tomorrow, Saturday, June 12, 2010. Also, per the Court's suggestion during the last conference, we will include an application to inspect and copy the hard drives of all computers and servers within Durango's possession, custody or control, including any personal home computers used by Mr. Counley for purposes of conducting business on behalf of Durango. Please let us know whether or not you will consent to such an application at the same time that you provide your response as to these other issues.

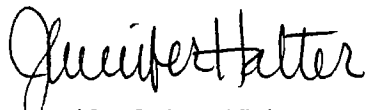
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Sincerely,

A handwritten signature in black ink that reads "Jennifer Halter". The signature is written in a cursive, flowing style with a large initial "J".

Jennifer Colgan Halter

JCH/jch