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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GUCCI AMERICA, INC.,

Plaintiff,

09-CV-6925

-against-

FRONTLINE PROCESSING CORPORATION, WOODFOREST
NATIONAL BANK, DURANGO MERCHANT SERVICES, LLC.
D/B/A NATIONAL BANKCARD SYSTEMS OF DURANGO

Defendants.

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DEPOSITION of the Defendant, DURANGO
MERCHANT SERVICES, LLC. by NATHAN COUNLEY, taken
by the Plaintiff, pursuant to Notice, held at the
offices of Gibson, Dunn & Crutcher, LLP., 200 Park
Avenue, New York, New York, on June 14, 2010, at
9:45 a.m., before a Notary Public of the State of
New York.

2	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">A P P E A R A N C E S:</p> <p>GIBSON, DUNN & CRUTCHER, LLP. Attorneys for Plaintiff 200 Park Avenue New York, New York 10166</p> <p>BY: ROBERT WEIGEL, ESQ. -and- ANNE M. COYLE, ESQ. -and- JENNIFER COLGAN HALTER, ESQ.</p> <p>LAW OFFICE OF TODD WENGROVSKY, PLLC. Attorneys for Defendant DURANGO MERCHANT SERVICES 285 Southfield Road Box 585 Calverton, New York 11933</p> <p>BY: TODD WENGROVSKY, ESQ.</p> <p>LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK, LLP. Attorneys for Defendant WOODFOREST NATIONAL BANK 600 South Avenue West Westfield, New Jersey 07090</p> <p>BY: CHARLES P. KENNEDY, ESQ.</p> <p style="text-align: center;">xxxxx</p>	4
3	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">S T I P U L A T I O N S</p> <p>IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that filing, sealing and certification, and the same are, hereby waived.</p> <p>IT IS FURTHER STIPULATED AND AGREED that all objections except as to the form of the question, shall be reserved to the time of the trial.</p> <p>IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed and sworn to by an officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.</p> <p style="text-align: center;">xxxxx</p>	5
2	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Counley</p> <p>NATHAN COUNLEY, Having been first duly sworn before a Notary Public of the State of New York, was examined and testified as follows:</p> <p>EXAMINATION BY MR. WEIGEL:</p> <p>Q State your name for the record, please?</p> <p>A Nathan Counley.</p> <p>Q Where do you live?</p> <p>A Madison, Wisconsin.</p> <p>Q Have you ever been deposed before in a lawsuit?</p> <p>A No.</p> <p>Q I don't want to know any details, but has your lawyer explained to you what was going to happen today?</p> <p>A For the most part, yes.</p> <p>Q I'm going to ask you questions. Do you understand that the oath you are under is the same oath you would be under if you were testifying before a judge and jury?</p> <p>A Yes.</p>	4
3	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Counley</p> <p>Q If at any point in time you don't understand any of my questions or you are confused by them, just let me know and I'll try to rephrase them. Is that understood?</p> <p>A Yes.</p> <p>Q If you need to take a break, just let me know. All I would ask is that you do it after you answer a question, not in the middle of a question if that's okay?</p> <p>A I understand.</p> <p>Q Can you give me your educational background just starting with high school?</p> <p>A High school, I went to Laramie, Wyoming. Beyond a high school degree, college was Fort Lewis in Durango, Colorado, a small liberal arts college, political science and minor in philosophy.</p> <p>Q When did you first become involved with Durango Merchants Services?</p> <p>A I started in January 2005.</p> <p>Q What position did you have?</p> <p>A Same thing today, sales manager.</p> <p>Q When did you graduate college?</p> <p>A I think it was 2005 -- 2004. I'm</p>	5

6	<p>1 Counley</p> <p>2 sorry.</p> <p>3 Q Having graduated college in 1978, you</p> <p>4 can't really not be sure of when you</p> <p>5 graduated college in 2004, 2005, but that's</p> <p>6 all right. Excuse me.</p> <p>7 Now, did you join Durango Merchant</p> <p>8 Services right after you graduated college?</p> <p>9 A No.</p> <p>10 Q What did you do in between?</p> <p>11 A Waited tables. I worked with adults</p> <p>12 with mental disabilities as well.</p> <p>13 Q How did you come to start working for</p> <p>14 Durango in 2005?</p> <p>15 A I used to ride dirt bikes with a buddy</p> <p>16 of mine who worked for Shane Kairalla. We</p> <p>17 all worked dirt bikes together and Shane said</p> <p>18 he was looking for someone. I said what do</p> <p>19 you do?</p> <p>20 Q At that point in time were you living</p> <p>21 in Durango?</p> <p>22 A Yes.</p> <p>23 Q When did you move to Madison?</p> <p>24 A Almost four years ago today. My wife</p> <p>25 at the time was a veterinary student.</p>	8
7	<p>1 Counley</p> <p>2 Q When you moved to Madison, you</p> <p>3 continued to work for Durango?</p> <p>4 A Yes.</p> <p>5 Q How many people work for Durango?</p> <p>6 A Now, I think we have six people. We</p> <p>7 just hired someone new a couple of months</p> <p>8 ago.</p> <p>9 Q When you started, how many people were</p> <p>10 there?</p> <p>11 A When I started, there was four.</p> <p>12 Q Can you give me the names of all the</p> <p>13 people that work there, starting with the</p> <p>14 four that worked there when you started?</p> <p>15 A Shane Kairalla is the president, Bill</p> <p>16 Demopolis is the second owner</p> <p>17 D-E-M-O-P-O-L-I-S, Brad Jess, J-E-S-S, and</p> <p>18 myself. I apologize there is actually seven</p> <p>19 people now. There is Audrey Berger</p> <p>20 B-E-R-G-E-R, Doug McLean, M-C-L-E-A-N. Doug</p> <p>21 started, I guess, halfway through '09 and</p> <p>22 then new Osha, O-S-H-A, Pauma, P-A-U-M-A, and</p> <p>23 he started just a few months ago.</p> <p>24 Q In terms of the corporate</p> <p>25 organization, you said that there are two</p>	9
6	<p>1 Counley</p> <p>2 owners of the business, Mr. Kairalla and I</p> <p>3 didn't get the other gentleman's name?</p> <p>4 A I guess technically Shane Kairalla is</p> <p>5 the only LLC member, but him and Bill are</p> <p>6 kind of partners in a sense I guess you could</p> <p>7 say. I don't know how it is. I don't think</p> <p>8 it's legally set up because Bill is in</p> <p>9 Canada, but --</p> <p>10 Q What Bill's last name?</p> <p>11 A Demopolis.</p> <p>12 Q Now, you said he's in Canada. Do you</p> <p>13 know where he lives?</p> <p>14 A Toronto.</p> <p>15 Q Now do you have a boss at Durango?</p> <p>16 A Shane.</p> <p>17 Q Is Mr. Demopolis also your boss?</p> <p>18 A Yes.</p> <p>19 Q Do you report to them in some regular</p> <p>20 fashion?</p> <p>21 A I mean if I'm rude to a customer and a</p> <p>22 customer calls in and complains, they will</p> <p>23 talk to them and Shane will reprimand me.</p> <p>24 Q Do you have an office in Madison that</p> <p>25 you work out of?</p>	8

10	<p>1 Counley</p> <p>2 say they get 50 percent meaning \$50, Nathan</p> <p>3 Counley gets 35 percent -- I'm trying to do</p> <p>4 the math -- and the remaining 65 percent Bill</p> <p>5 and Shane split. 60 percent to Shane and</p> <p>6 Bill 40 percent.</p> <p>7 Q When you say the agent gets 40 to</p> <p>8 50 percent, who is the agent?</p> <p>9 A Durango Merchant Services. We are</p> <p>10 broker for merchants' accounts and we have a</p> <p>11 wide range of agents that we market to and we</p> <p>12 say there are usually other ISOs who also do</p> <p>13 merchant account services and we tell them if</p> <p>14 you cannot get your accounts approved with</p> <p>15 your normal sales channel or your normal</p> <p>16 processing bank that you work with, send us</p> <p>17 your declines and if we can get them</p> <p>18 approved, we'll give you the 40 to</p> <p>19 50 percent.</p> <p>20 Q So now when you say they are an agent,</p> <p>21 are they an agent of Durango?</p> <p>22 A No. I think agent is a term we use in</p> <p>23 our industry, but it's not a legally binding</p> <p>24 kind of agent where they can speak on our</p> <p>25 behalf.</p>	12
11	<p>1 Counley</p> <p>2 Q Can you give me examples of the agents</p> <p>3 that Durango works with?</p> <p>4 A Yes, some. Gomerchant.com is a web</p> <p>5 hosting and shopping cart service. They have</p> <p>6 a processor that they work with. The</p> <p>7 processor that they work with can't get an</p> <p>8 account approved, they will send it to us</p> <p>9 secondary. That's an example of an agent.</p> <p>10 Q Can you tell me all the agents that</p> <p>11 you work with?</p> <p>12 A No, probably three or 400 agents over</p> <p>13 the years. I think Shane sends out 60 checks</p> <p>14 a month, so we have a lot of agents, but not</p> <p>15 all in the same business.</p> <p>16 Q Did you ever work with a group called</p> <p>17 The Transaction Group?</p> <p>18 A Yes.</p> <p>19 Q Are they an agent?</p> <p>20 A Yes.</p> <p>21 Q They would send you merchants that</p> <p>22 they have had declined by other banks?</p> <p>23 A Correct or maybe not just declined,</p> <p>24 but maybe they know that they can't get it</p> <p>25 placed.</p>	13
10	<p>1 Counley</p> <p>2 Q When you say send us their declines,</p> <p>3 what are you referring to?</p> <p>4 A If an account was declined because the</p> <p>5 merchant's credit is in poor shape and the</p> <p>6 bank didn't want to approve them, they will</p> <p>7 try to send them to us to see if we can get</p> <p>8 them approved.</p> <p>9 Q Besides Gomerchant and Transaction</p> <p>10 Group, are there any other agents that you</p> <p>11 can remember sitting here?</p> <p>12 A Yes, MerchantExpress.com, CDG, Take</p> <p>13 Cards Today, CreditCardTransactions.com,</p> <p>14 Creditcardstrans.com, off the top of my head.</p> <p>15 Q You said that these are other ISOs or</p> <p>16 other brokers; is that correct?</p> <p>17 A Yes.</p> <p>18 Q What did you mean by ISO?</p> <p>19 A In our industry an ISO stands for</p> <p>20 independent sales office. MLS stands for --</p> <p>21 in fact, I can't remember what MLS stands</p> <p>22 for. I think it's something -- I apologize.</p> <p>23 I shouldn't have brought the phrase up.</p> <p>24 Something salesperson. Kind of an</p> <p>25 independent salesperson that's not an ISO.</p>	12
11	<p>1 Counley</p> <p>2 Q When you use the word, you said other</p> <p>3 ISOs or other brokers, are those terms</p> <p>4 synonymous in your mind?</p> <p>5 A Well, yes, pretty much.</p> <p>6 Q These other ISOs that you work with</p> <p>7 that send you the merchants they know that</p> <p>8 they can't get approved or that have been</p> <p>9 declined, what does Durango do that's</p> <p>10 different from these other ISOs that allows</p> <p>11 you to get these merchants approved?</p> <p>12 A We work with banks with more liberal</p> <p>13 underwriting policies or risk management</p> <p>14 policies. So, when we -- a lot of banks are</p> <p>15 very conservative on the credit criteria they</p> <p>16 will have and let's say they will not accept</p> <p>17 a merchant as a credit FICO underneath 600 or</p> <p>18 650 and that's kind of a common practice, but</p> <p>19 some banks that we work with will take on a</p> <p>20 merchant that has poor credit, but sometimes</p> <p>21 they will have mitigating, you know, controls</p> <p>22 where they will have a reserve on the account</p> <p>23 where they hold back a percentage of sales,</p> <p>24 kind of like escrow to safeguard the loss.</p> <p>25 Q Are there certain types of businesses</p>	13

14	<p>1 Counley</p> <p>2 that certain banks just won't do?</p> <p>3 A Most banks, yes.</p> <p>4 Q Do you have banks that have more</p> <p>5 liberal underwriting standards with regard to</p> <p>6 types of businesses they will take on?</p> <p>7 A Some banks are -- yes.</p> <p>8 Q For example, you advise on your</p> <p>9 website that -- under the type of merchants I</p> <p>10 think you had adult oriented businesses. Are</p> <p>11 there certain banks that won't do adult</p> <p>12 oriented businesses?</p> <p>13 A Correct.</p> <p>14 Q Since you joined Durango in 2005, what</p> <p>15 banks have you personally placed accounts</p> <p>16 with?</p> <p>17 A I couldn't list them all off the top</p> <p>18 of my head, but primarily Humboldt,</p> <p>19 H-U-M-B-O-L-D-T and they recently changed</p> <p>20 their name M-O-N-E-R-I-S Moneris, Frontline,</p> <p>21 Woodforest, Pivotal, Merchants e-Solutions,</p> <p>22 that's e-Solutions, Optimal Payments, Voice</p> <p>23 Commerce V-O-I-C-E.</p> <p>24 That's the primary group. There might</p> <p>25 be some few accounts First Data or National</p>	16
15	<p>1 Counley</p> <p>2 Bank Card Systems, but that's it.</p> <p>3 Q Do you work with offshore banks as</p> <p>4 well?</p> <p>5 A Yes.</p> <p>6 Q Are any of the banks you just listed</p> <p>7 offshore banks?</p> <p>8 A Voice Commerce and Optimal. You have,</p> <p>9 I believe, our residual reports, so you have</p> <p>10 a list of all the bank names I think.</p> <p>11 Q I'll try to dig them out. Some of</p> <p>12 them came in late on Friday and I already had</p> <p>13 left the office, but we will try to get them</p> <p>14 out and see.</p> <p>15 Any other banks that you can remember</p> <p>16 as you sit here?</p> <p>17 A Not off the top of my head.</p> <p>18 Q Not all of these enterprises are</p> <p>19 banks; is that correct?</p> <p>20 A Yes. I mean I guess processors may be</p> <p>21 a better word to call it if we are going to</p> <p>22 be more specific.</p> <p>23 Q Do you understand what the term</p> <p>24 replica merchant means?</p> <p>25 A For us?</p>	17
14	<p>1 Counley</p> <p>2 Q Do you have an understanding of the</p> <p>3 term replica merchant?</p> <p>4 A For us replica meant similar looking.</p> <p>5 Q Did you understand that there were</p> <p>6 certain banks that didn't do replica</p> <p>7 products?</p> <p>8 A Yes.</p> <p>9 Q Did you get referrals from the ISOs</p> <p>10 that you worked with or replica merchants</p> <p>11 that had been declined by other banks?</p> <p>12 A Yes.</p> <p>13 Q Which of the banks on the list were</p> <p>14 you able to place replica merchants with, the</p> <p>15 banks that you just gave me?</p> <p>16 A Woodforest and Frontline.</p> <p>17 Q Did you place replica merchants with</p> <p>18 Humboldt?</p> <p>19 A No.</p> <p>20 Q Would they accept replica merchants?</p> <p>21 A No.</p> <p>22 MR. WENGROVSKY: If you know,</p> <p>23 go ahead.</p> <p>24 A I don't think so.</p> <p>25 Q Did you place replica merchants with</p>	16

18	<p>1 Counley</p> <p>2 merchants?</p> <p>3 MR. WENGROVSKY: If you know.</p> <p>4 A I don't really use First Data very</p> <p>5 often.</p> <p>6 Q How about National Bank Card?</p> <p>7 A I only have two to three accounts with</p> <p>8 them. I don't really send many accounts, so</p> <p>9 I don't think I tried there. That doesn't</p> <p>10 mean they did or didn't.</p> <p>11 Q Did you ever have a replica merchant</p> <p>12 that you tried to place with a bank that was</p> <p>13 declined?</p> <p>14 A Probably.</p> <p>15 Q Did you ever try and place any with</p> <p>16 Pivotal?</p> <p>17 A Perhaps.</p> <p>18 Q Did they ever accept any?</p> <p>19 A I don't think so.</p> <p>20 Q Did you have any discussions with them</p> <p>21 about whether they would accept replica</p> <p>22 merchants?</p> <p>23 A It's not really a discussion. If we</p> <p>24 send an application and the processor</p> <p>25 approves it, then we keep sending similar</p>	20
19	<p>1 Counley</p> <p>2 applications to the processor.</p> <p>3 Q Now, its your business to know which</p> <p>4 banks will accept which type of merchants;</p> <p>5 isn't that correct?</p> <p>6 A Yup, yes.</p> <p>7 Q You, in particular, in Durango, are</p> <p>8 experts in placing hard to place merchants;</p> <p>9 isn't that correct?</p> <p>10 A Yes.</p> <p>11 Q And that's why other ISOs come to you</p> <p>12 to try and place the merchants that they</p> <p>13 can't place themselves?</p> <p>14 A Usually most other ISOs only work with</p> <p>15 one processor so one or two processors and</p> <p>16 sometimes their shopping cart only works with</p> <p>17 one or two things, so they are kind of tight,</p> <p>18 but we are more of a broker format where we</p> <p>19 try to network and try to find different</p> <p>20 processors.</p> <p>21 Q But people come to you with merchants</p> <p>22 that they can't service themselves, correct?</p> <p>23 A Yes.</p> <p>24 Q Because if they come to you, they have</p> <p>25 to give a certain percentage of the residuals</p>	21
18	<p>1 Counley</p> <p>2 to Durango?</p> <p>3 A Correct, yes.</p> <p>4 Q If they place it themselves, they</p> <p>5 don't have to do that; isn't that correct?</p> <p>6 A Yes.</p> <p>7 Q So people only come to you with stuff</p> <p>8 that they can't handle themselves; isn't that</p> <p>9 fair?</p> <p>10 A Yes.</p> <p>11 MR. WEIGEL: Please mark this</p> <p>12 as Counley Exhibit 1.</p> <p>13 (Whereupon declaration of Shane</p> <p>14 Kairalla was marked Counley Exhibit 1</p> <p>15 for identification as of this date.)</p> <p>16 Q Mr. Counley, I put in front of you a</p> <p>17 declaration of Mr. Shane Kairalla. Do you</p> <p>18 see his signature on page 3?</p> <p>19 A Yes.</p> <p>20 Q Do you recognize that as his</p> <p>21 signature?</p> <p>22 A Yes.</p> <p>23 Q This is the Shane Kairalla who is the</p> <p>24 owner of Durango; is that correct?</p> <p>25 A Yes.</p>	20

22	<p>1 Counley</p> <p>2 Q How many people actually work in the</p> <p>3 office in Durango?</p> <p>4 A Currently three.</p> <p>5 Q Who is that?</p> <p>6 A Shane Kairalla, Audrey Berger and Osha</p> <p>7 Pauma.</p> <p>8 Q When you communicate the rest of the</p> <p>9 year when you are not in Durango, do you do</p> <p>10 that by e-mail?</p> <p>11 A Yes.</p> <p>12 Q Do you have some sort of network set</p> <p>13 up between your computer and the office's</p> <p>14 computer?</p> <p>15 A We all use different computers. It's</p> <p>16 not a fancy operation.</p> <p>17 Q What kind of computer do you have?</p> <p>18 A Right now I have an Asus laptop.</p> <p>19 Q For how long have you had that?</p> <p>20 A Since November of '90.</p> <p>21 Q What kind of a computer did you have</p> <p>22 before that?</p> <p>23 A Toshiba laptop.</p> <p>24 Q What happened to that?</p> <p>25 A I gave it to my mom.</p>	24
23	<p>1 Counley</p> <p>2 Q Did you download all of your files</p> <p>3 from that before you gave it to your mother?</p> <p>4 A I saved some files, but we don't save</p> <p>5 many files.</p> <p>6 Q Does your mother still have the</p> <p>7 computer?</p> <p>8 A Yes.</p> <p>9 Q If you asked for it, would she give it</p> <p>10 back to you for a little bit?</p> <p>11 A Probably.</p> <p>12 Q Now when you communicate with the</p> <p>13 banks that we just listed, you do that by</p> <p>14 e-mail as well?</p> <p>15 A Yes.</p> <p>16 Q Who do you communicate mostly with at</p> <p>17 Frontline?</p> <p>18 A Well, if I'm sending an application,</p> <p>19 then I send it to the underwriting</p> <p>20 department, who is these days Kim Smith and</p> <p>21 Christine Ross.</p> <p>22 Q You have sent e-mails to Hans</p> <p>23 Strickler of course?</p> <p>24 A That's after -- he's a risk manager.</p> <p>25 That's after the accounts are approved.</p>	25
24	<p>1 Counley</p> <p>2 Q Did you have communications with him</p> <p>3 after the accounts were approved?</p> <p>4 A Yes.</p> <p>5 Q Anyone else at Frontline?</p> <p>6 A Invariably through the course of</p> <p>7 business, Chanae is another person in the</p> <p>8 risk department. If a merchant ID isn't</p> <p>9 working, I might speak to Steve or --</p> <p>10 Q What e-mail account do you typically</p> <p>11 use?</p> <p>12 A My e-mail account</p> <p>13 Nathan@Durango-Direct.com.</p> <p>14 Q Where is the service maintained for</p> <p>15 that?</p> <p>16 A We use an e-mail server Intermedia.</p> <p>17 Q Does that store a certain amount of</p> <p>18 e-mails?</p> <p>19 A Yes.</p> <p>20 Q Do you know if any effort was made to</p> <p>21 search those e-mails that were stored in</p> <p>22 Intermedia?</p> <p>23 A Yes.</p> <p>24 Q Were any e-mails uncovered?</p> <p>25 A We don't have e-mails from that far.</p>	25

26	<p>1 Counley</p> <p>2 sent you yesterday from the customer service</p> <p>3 inbox.</p> <p>4 Q You rely on your income for residual</p> <p>5 payments, correct?</p> <p>6 A Yes.</p> <p>7 Q Do you have any records that evidence</p> <p>8 the fact that you are entitled to these</p> <p>9 residual payments for a particular merchant?</p> <p>10 A I don't really store those. I kind of</p> <p>11 trust Bill to make the payment and after</p> <p>12 that, I think Bill sent you the residual</p> <p>13 reports for the last several years, so he</p> <p>14 does have those records.</p> <p>15 Q What I want to know, when you send an</p> <p>16 account to a bank, do they send some</p> <p>17 confirmation that they have accepted the</p> <p>18 account?</p> <p>19 A I guess our system isn't as advanced</p> <p>20 as it should be. Probably should have</p> <p>21 something more thorough, a bookkeeper</p> <p>22 monitoring, but no, we really just rely on</p> <p>23 the residual reports.</p> <p>24 Q What I'm trying to figure out, do you</p> <p>25 just assume that the bank sends you the right</p>	28	<p>1 Counley</p> <p>2 MR. WEIGEL: Read it back.</p> <p>3 (Whereupon the record was read</p> <p>4 back by the reporter.)</p> <p>5 A I do make a list at the end of each</p> <p>6 month of accounts that I send to Bill so that</p> <p>7 we can add them to the agents' reports, if</p> <p>8 that's what you mean, but no.</p> <p>9 Q Do you create that on your computer?</p> <p>10 A Yes.</p> <p>11 Q Now does every merchant that you do</p> <p>12 business with pay the same percentage of</p> <p>13 their fees?</p> <p>14 A No.</p> <p>15 Q To the bank or to Durango?</p> <p>16 A No, merchants vary in pricing.</p> <p>17 Q How do you determine the pricing?</p> <p>18 A It depends on a number of factors. If</p> <p>19 they have previous processing history and</p> <p>20 they are specifically shopping for better</p> <p>21 rates then we try to accommodate, otherwise</p> <p>22 we kind of go off of industry standards and</p> <p>23 what the merchant will pay.</p> <p>24 Q Does Woodforest set the rate or does</p> <p>25 Durango set the rate?</p>
27	<p>1 Counley</p> <p>2 amount or do you make any effort to follow up</p> <p>3 and to check and to make sure that the bank</p> <p>4 hasn't made a good faith mistake even?</p> <p>5 A We should have a more advanced system,</p> <p>6 but we don't.</p> <p>7 Q So it's your testimony, as you sit</p> <p>8 here today that you maintain, you send the</p> <p>9 merchant off and you keep no records at all</p> <p>10 as to whether or not the account has been</p> <p>11 approved or how much you are owed in terms of</p> <p>12 residuals?</p> <p>13 MR. WENGROVSKY: I think the</p> <p>14 residual reports would be some form of</p> <p>15 evidence. I don't think I would word</p> <p>16 it that way.</p> <p>17 MR. WEIGEL: You can ask the</p> <p>18 question when it is your turn and you</p> <p>19 can word them as you wish. If you</p> <p>20 have an objection to mine, you can</p> <p>21 raise it. Otherwise, I would like an</p> <p>22 answer to my question.</p> <p>23 MR. WENGROVSKY: I just needed</p> <p>24 some clarification so we know what the</p> <p>25 question is.</p>	29	<p>1 Counley</p> <p>2 A On all banks, except for Frontline,</p> <p>3 Durango sets the rates.</p> <p>4 Q Does Woodforest have a typical rate</p> <p>5 that they charge?</p> <p>6 A The industry is fairly standard, most</p> <p>7 E commerce merchants pay from 2.2 to 2.7</p> <p>8 percent.</p> <p>9 Q Of that 2.2 to 2.7, how much of that</p> <p>10 goes to Woodforest?</p> <p>11 A It's very complicated how Visa and</p> <p>12 MasterCard do their splits, but roughly from</p> <p>13 my understanding, and I'm sure there is more</p> <p>14 to this than my understanding, but interest,</p> <p>15 my understanding is roughly 2 percent of that</p> <p>16 goes to Visa, MasterCard and over that is</p> <p>17 usually profit for the bank, the processor.</p> <p>18 Q Of that 2.2 to 2.7, how much goes to</p> <p>19 Durango?</p> <p>20 A Each processor we have different</p> <p>21 agreements with, but anywhere from 35 percent</p> <p>22 to 60 percent.</p> <p>23 Q Of the two points?</p> <p>24 A Of the percentage above their cost,</p> <p>25 which is roughly 2 percent, so if a merchant</p>

30	<p>1 Counley</p> <p>2 is getting charged 2.3 percent and their cost</p> <p>3 is 2 percent, if the processor's cost to</p> <p>4 Visa, MasterCard is 2 percent, the merchant</p> <p>5 is 2.3 percent and we have 30 basis points of</p> <p>6 cost and, you know, depending on our</p> <p>7 agreement with the bank to share profits,</p> <p>8 let's say it's 50 percent, to make math easy,</p> <p>9 15 basis points goes to Durango and 15 basis</p> <p>10 points goes to the processor.</p> <p>11 Q If you were able to charge someone</p> <p>12 3 percent, assuming you had the same 50/50</p> <p>13 split, you would get 4/10ths of a percent and</p> <p>14 Woodforest would get 4/10ths of a percent; is</p> <p>15 that the way it works?</p> <p>16 A Yes.</p> <p>17 Q The higher the rate you can charge the</p> <p>18 merchant, the more money that Durango gets</p> <p>19 and the more money Woodforest gets, correct?</p> <p>20 A And the more money we can pay our</p> <p>21 agents, correct.</p> <p>22 Q And Durango negotiates the rate with</p> <p>23 the merchant based upon what Durango thinks</p> <p>24 the merchant is willing to pay and the</p> <p>25 competition in the marketplace?</p>	32
31	<p>1 Counley</p> <p>2 A More or less, yes.</p> <p>3 Q How does Woodforest know the amount to</p> <p>4 charge the merchants?</p> <p>5 MR. KENNEDY: Objection. It</p> <p>6 calls for speculation.</p> <p>7 Q You can answer.</p> <p>8 A The contract that the merchant signs</p> <p>9 with Woodforest.</p> <p>10 Q And who prepares that contract?</p> <p>11 A The merchant signs the contract and</p> <p>12 sends it back to Durango and Durango forwards</p> <p>13 it to Woodforest.</p> <p>14 Q Do you typically help the merchant</p> <p>15 fill out the form?</p> <p>16 A Sometimes.</p> <p>17 Q I think we started off this whole line</p> <p>18 looking at Exhibit 1. Do you still have that</p> <p>19 in front of you?</p> <p>20 A Yes.</p> <p>21 Q Paragraph 8 says, "All of Durango</p> <p>22 Merchants Services, LLC records and</p> <p>23 documents, including records and documents</p> <p>24 relative to the present action, are located</p> <p>25 either within the State of Colorado or at the</p>	33
30	<p>1 Counley</p> <p>2 home office of Durango's account manager in</p> <p>3 the State of Wisconsin"; do you see that?</p> <p>4 A Yes.</p> <p>5 Q Is that an accurate statement?</p> <p>6 A Yes.</p> <p>7 Q What records do you maintain at your</p> <p>8 home office? Back up for a second.</p> <p>9 When it refers to the home office of</p> <p>10 Durango's account manager in the State of</p> <p>11 Wisconsin, that's referring to you, correct?</p> <p>12 A Correct.</p> <p>13 Q What records do you maintain in your</p> <p>14 home office?</p> <p>15 A We try not to save many records just</p> <p>16 for data security. Once the application is</p> <p>17 forwarded to the processor, we don't really</p> <p>18 have any need to store that any longer.</p> <p>19 Q Don't you need to know what rate the</p> <p>20 merchant is paying?</p> <p>21 A No.</p> <p>22 Q Aren't your residuals keyed off of</p> <p>23 that rate?</p> <p>24 A Yes.</p> <p>25 Q But you don't -- since the rate is not</p>	33

34	<p>1 Counley</p> <p>2 Q They are interested in you charging as</p> <p>3 much as you can to the merchants; is that</p> <p>4 correct?</p> <p>5 A I would assume so.</p> <p>6 Q Do you know the specific percentage</p> <p>7 that Durango shares with Woodforest?</p> <p>8 MR. WENGROVSKY: Objection.</p> <p>9 Can you clarify that?</p> <p>10 MR. WEIGEL: Sure.</p> <p>11 Q You said that pretty much you share</p> <p>12 with Woodforest everything you charge the</p> <p>13 merchant over 2 percent; is that correct?</p> <p>14 A Yes.</p> <p>15 Q What I want to know is, as you sit</p> <p>16 here today, do you know what the percentage</p> <p>17 is that Durango gets and the percentage that</p> <p>18 Woodforest gets of the amount that you charge</p> <p>19 the merchant over 2 percent?</p> <p>20 MR. KENNEDY: Is this for any</p> <p>21 particular account?</p> <p>22 MR. WENGROVSKY: That's the</p> <p>23 nature of the objection.</p> <p>24 Q I'm asking, I guess, does it vary by</p> <p>25 merchant?</p>	36
35	<p>1 Counley</p> <p>2 A No, it's set.</p> <p>3 Q What is the percentage?</p> <p>4 A Durango doesn't -- we actually don't</p> <p>5 send accounts to Woodforest. We were sending</p> <p>6 them through another group and so that group</p> <p>7 got paid 40 percent of Woodforest profits and</p> <p>8 then that group gave us 75 percent of that 40</p> <p>9 percent, so overall 38 percent.</p> <p>10 Q You got 38 percent of Woodforest</p> <p>11 profits; is that correct?</p> <p>12 A No, 30.</p> <p>13 Q What is the group that you sent it to?</p> <p>14 A Joe Montella Merchant Services, U.S.A.</p> <p>15 Q Is that part of Merchant Credit</p> <p>16 Services or MCCS?</p> <p>17 A I don't think so, but I'm not</p> <p>18 100 percent sure, but I don't think so.</p> <p>19 Q Joseph Montella you said?</p> <p>20 A Correct, Joe.</p> <p>21 Q Do you know where he operates out of?</p> <p>22 A Arizona. Phoenix.</p> <p>23 Q Did you have a written agreement with</p> <p>24 him?</p> <p>25 A Yes.</p>	37
36	<p>1 Counley</p> <p>2 Q Now, when you sent a merchant to</p> <p>3 Woodforest, did you send it directly to them?</p> <p>4 A Joe Montella.</p> <p>5 Q And then he would forward it on?</p> <p>6 A Correct.</p> <p>7 Q Did you ever send stuff directly to</p> <p>8 Woodforest?</p> <p>9 A No.</p> <p>10 MR. WEIGEL: Mark this as</p> <p>11 Counley Exhibit 2.</p> <p>12 (Whereupon e-mail was marked</p> <p>13 Counley Exhibit 2 for identification</p> <p>14 as of this date.)</p> <p>15 Q Mr. Counley, have you ever seen this</p> <p>16 document before?</p> <p>17 A Yes.</p> <p>18 Q When did you last see it?</p> <p>19 A When we provided it to you last</p> <p>20 August.</p> <p>21 Q Where was it located?</p> <p>22 A This one I had in my Outlook for some</p> <p>23 reason.</p> <p>24 Q So you happen to keep this e-mail, but</p> <p>25 not others?</p>	37

38	<p>1 Counley</p> <p>2 agent's name.</p> <p>3 Q Does this website -- at this time did</p> <p>4 it send you lead regularly?</p> <p>5 A They did for a short period, but it</p> <p>6 was not a long-lived relationship, no.</p> <p>7 Q Did they get compensated for providing</p> <p>8 you leads?</p> <p>9 A Yes.</p> <p>10 Q How were they compensated?</p> <p>11 A Same as we discussed previously. The</p> <p>12 percentage of the profits were shared with</p> <p>13 them.</p> <p>14 Q Can you walk me through the process of</p> <p>15 what happened in this case when you got this</p> <p>16 lead?</p> <p>17 A When a lead comes in, you call or</p> <p>18 e-mail the merchant. If they have previous</p> <p>19 processing statements, we ask for the</p> <p>20 statements. We prepare a quote for them. If</p> <p>21 they say yes, I would like to move forward</p> <p>22 with those rates, then we send them the</p> <p>23 application.</p> <p>24 Q Now, this lead indicated that the</p> <p>25 description of the business was replica</p>	40	<p>1 Counley</p> <p>2 credit cards, et cetera, so that's more --</p> <p>3 chargebacks is more on that side.</p> <p>4 Q Well, isn't it true you also help with</p> <p>5 chargebacks and you make sure people who are</p> <p>6 buying from websites such as this one</p> <p>7 understand that they are not buying genuine</p> <p>8 goods?</p> <p>9 A Regarding your e-mails that you have</p> <p>10 copies with with Hans, we were informed by</p> <p>11 Frontline that the merchant needed to add</p> <p>12 this in.</p> <p>13 Q They had to add in language on the</p> <p>14 checkout page that indicated that the</p> <p>15 potential buyer understood that they were</p> <p>16 buying a replica product and not a genuine</p> <p>17 product; isn't that correct?</p> <p>18 A That they were buying a replica</p> <p>19 product, correct.</p> <p>20 Q And the reason that that was done was</p> <p>21 to reduce chargebacks?</p> <p>22 A Correct.</p> <p>23 Q How does that reduce chargebacks?</p> <p>24 A So that the customer does not believe</p> <p>25 that they are purchasing -- so the customer</p>
39	<p>1 Counley</p> <p>2 handbags and accessories; do you see that?</p> <p>3 A Yes.</p> <p>4 Q So you understood that they were not</p> <p>5 selling genuine Gucci products?</p> <p>6 A I understood they were selling replica</p> <p>7 handbags.</p> <p>8 Q You understood that these were not</p> <p>9 Gucci handbags made by Gucci, correct?</p> <p>10 A I don't know if they were sending</p> <p>11 Gucci handbags or not.</p> <p>12 Q Well, did you make any effort to look</p> <p>13 at the websites?</p> <p>14 A Our job is not to look at websites.</p> <p>15 We do look at websites to make sure there is</p> <p>16 a live website. We try to make sure there is</p> <p>17 a refund policy and a contact us page online,</p> <p>18 but besides that, it's not our job to look</p> <p>19 through websites.</p> <p>20 Q It is your job to minimize</p> <p>21 chargebacks; isn't it?</p> <p>22 A It is our job to help merchants</p> <p>23 understand where chargebacks come from and</p> <p>24 try to, you know, work on -- most chargebacks</p> <p>25 are either fraud related, you know, stolen</p>	41	<p>1 Counley</p> <p>2 is aware that they are buying a replica</p> <p>3 handbag.</p> <p>4 Q And not a genuine one, correct?</p> <p>5 A Correct.</p> <p>6 MR. WEIGEL: Mark this as</p> <p>7 Counley 3.</p> <p>8 (Whereupon series of e-mails</p> <p>9 was marked Counley Exhibit 3 for</p> <p>10 identification as of this date.)</p> <p>11 Q Going back to Exhibit 2 for a second</p> <p>12 while I still have that in front of you. I</p> <p>13 see at the top it says follow-up flag and</p> <p>14 then flag status?</p> <p>15 A Yes.</p> <p>16 Q What does that mean?</p> <p>17 A In Outlook you can put -- it says</p> <p>18 follow-up, so I get a lead in, we e-mail the</p> <p>19 merchant. Follow-up in two days if we</p> <p>20 haven't heard back.</p> <p>21 Q Now, when it says completed there, is</p> <p>22 that something you inserted?</p> <p>23 A I think that's just how Outlook works</p> <p>24 when the notice comes up and you hit done.</p> <p>25 Q That indicates that you followed up</p>

42	<p>1 Counley</p> <p>2 with the merchant?</p> <p>3 A Yes.</p> <p>4 Q Going to Counley 3, it's a series of</p> <p>5 e-mails starting with one that you sent on</p> <p>6 September 11, 2006; do you see that?</p> <p>7 A Which one?</p> <p>8 MR. WENGROVSKY: Are you</p> <p>9 starting with the final page, Bob?</p> <p>10 MR. WEIGEL: Yes, I'm starting</p> <p>11 with the first e-mail to Mr. Counley.</p> <p>12 Q Do you see the September 11, 2006</p> <p>13 e-mail sent at 7:32 in the morning, the</p> <p>14 bottom one, the last page?</p> <p>15 MR. WENGROVSKY: My last page</p> <p>16 has a September 22nd.</p> <p>17 A We -- it's an e-mail from Hans</p> <p>18 Strickler on the last page.</p> <p>19 MR. WEIGEL: I would like this</p> <p>20 exhibit to be 48024 to 48028 and 48029</p> <p>21 is just a stray e-mail. So just let's</p> <p>22 start off again.</p> <p>23 Q Do you have 48024 going through 48028?</p> <p>24 A Yes.</p> <p>25 Q If you look at page 4 of 5 at the</p>	44	<p>1 Counley</p> <p>2 off easier with them.</p> <p>3 Q You did, in fact, share the residuals</p> <p>4 with them, correct?</p> <p>5 A I'm pretty sure. Bill handles the</p> <p>6 residual reports, but I would assume so.</p> <p>7 Q But it would be Durango that would</p> <p>8 determine the rate that was charged to the</p> <p>9 client, correct?</p> <p>10 A With Woodforest accounts, yes.</p> <p>11 Q With Frontline, no?</p> <p>12 A No, not always.</p> <p>13 Q Now, you go on to say "We have an</p> <p>14 offshore bank that is willing to accept</p> <p>15 startup or lower volume replica merchants and</p> <p>16 with competitive rates"; do you see that?</p> <p>17 A Correct.</p> <p>18 Q You are proposing a discount rate of</p> <p>19 6.95 to 7.95 percent. Do you see that on the</p> <p>20 last page?</p> <p>21 A Yes.</p> <p>22 Q That is not really competitive with</p> <p>23 the 2.2 or the 2.75 rate that you mentioned</p> <p>24 earlier as being sort of standard, correct?</p> <p>25 A You are correct.</p>
43	<p>1 Counley</p> <p>2 bottom, you see the first e-mail in a chain</p> <p>3 dated Monday, September 11, 2006 at 7:32 a.m.</p> <p>4 sent by you to admin at thebagaddiction.com?</p> <p>5 A Yes.</p> <p>6 Q That is your address at the bottom,</p> <p>7 isn't it?</p> <p>8 A Yes.</p> <p>9 Q And you recognize this as an e-mail</p> <p>10 that you sent?</p> <p>11 A Apparently, yes.</p> <p>12 Q You sent this in response to the lead</p> <p>13 that we just looked at that's Counley Exhibit</p> <p>14 2?</p> <p>15 A Correct.</p> <p>16 Q You thanked Jennifer for the</p> <p>17 application through our partners at Merchant</p> <p>18 Metro?</p> <p>19 A Yes.</p> <p>20 Q And when you say our partners, you</p> <p>21 were referring to the fact that Merchant</p> <p>22 Metro was an agent and you shared residuals</p> <p>23 with them?</p> <p>24 A For lack of a better word for the</p> <p>25 merchants, we say partners. It seems to come</p>	45	<p>1 Counley</p> <p>2 Q How could it be that a 6.95 to 7.95</p> <p>3 rate would be competitive as you use the term</p> <p>4 here?</p> <p>5 A A lot of banks don't like startup</p> <p>6 accounts, so if the merchant is willing to</p> <p>7 pay than -- I mean there are banks out there</p> <p>8 that charge higher percentages.</p> <p>9 Q So, you thought that this was a</p> <p>10 competitive rate because they were a startup</p> <p>11 replica merchant?</p> <p>12 MR. WENGROVSKY: I believe the</p> <p>13 testimony was startup merchant</p> <p>14 relative to the last question, if you</p> <p>15 want to read that back.</p> <p>16 MR. WEIGEL: No, I don't</p> <p>17 actually -- if you have an objection,</p> <p>18 the rules in this district are that</p> <p>19 you object to the form. Speaking</p> <p>20 objections are not really appropriate.</p> <p>21 Can you read the question back?</p> <p>22 MR. WENGROVSKY: If there is a</p> <p>23 mischaracterization of the testimony</p> <p>24 in the question, I will bring it to</p> <p>25 your attention.</p>

46	<p>1 Counley</p> <p>2 MR. WEIGEL: Read it back.</p> <p>3 MR. WENGROVSKY: It's not the</p> <p>4 effort that I question at all, I</p> <p>5 realize you are trying to -- if you</p> <p>6 misspeak and add a word into the</p> <p>7 response, we have a problem on the</p> <p>8 record.</p> <p>9 MR. WEIGEL: Read it back and</p> <p>10 the witness will listen carefully to</p> <p>11 the question and then he will answer</p> <p>12 it.</p> <p>13 (Whereupon the record was read</p> <p>14 back by the reporter.)</p> <p>15 A I believe my answer beforehand was a</p> <p>16 lot of banks do not like to accept startup</p> <p>17 merchant accounts is what Todd is referring</p> <p>18 to.</p> <p>19 Q I understand that. My question to you</p> <p>20 was this a competitive rate because they were</p> <p>21 a startup replica merchant?</p> <p>22 A No, any of the offshore processors</p> <p>23 don't -- doesn't really matter what you are</p> <p>24 selling. If you are a startup, you are a</p> <p>25 startup.</p>	48
47	<p>1 Counley</p> <p>2 Q Okay. Why did you propose sending her</p> <p>3 to an offshore bank?</p> <p>4 A At the time we didn't have a -- we</p> <p>5 didn't know banks in the U.S. that would</p> <p>6 accept her account.</p> <p>7 Q Why not? Were there not banks in the</p> <p>8 U.S. that would accept startup accounts?</p> <p>9 A We just had not one approved yet. We</p> <p>10 just had not submitted one and had one</p> <p>11 approved.</p> <p>12 Q You never had a startup account</p> <p>13 approved at a U.S. bank as of 2006?</p> <p>14 A Oh, I see what you mean. No,</p> <p>15 specifically, specifically related to</p> <p>16 replica.</p> <p>17 Q So the reason you couldn't find a U.S.</p> <p>18 bank and you were proposing an offshore bank</p> <p>19 was because it was a startup replica account?</p> <p>20 A You are correct.</p> <p>21 Q What was the offshore bank that you</p> <p>22 were proposing?</p> <p>23 A I believe at this time it was</p> <p>24 Intabill.</p> <p>25 Q Do you know where they were located?</p>	49
	<p>1 Counley</p> <p>2 A They were out of Australia, but they</p> <p>3 are no longer in business.</p> <p>4 Q Did offshore banks typically have</p> <p>5 looser underwriting standards than U.S.</p> <p>6 domestic banks?</p> <p>7 A Yes.</p> <p>8 Q Did they typically charge higher rates</p> <p>9 as well?</p> <p>10 A Yes.</p> <p>11 Q Why do banks underwrite merchant</p> <p>12 accounts? Why do they care if it's a startup</p> <p>13 or not?</p> <p>14 A Banks have a liability when a merchant</p> <p>15 processes credit cards. Every credit card</p> <p>16 transaction has a six month chargeback</p> <p>17 window, so if the merchant is applying for</p> <p>18 processing 10,000 a month in sales at the end</p> <p>19 of six months, there is, for lack of a better</p> <p>20 word, 60,000-dollar liability, so, I guess, a</p> <p>21 provisional credit is a better way to say.</p> <p>22 Merchant processes a credit card</p> <p>23 transaction. Processor funds the money to</p> <p>24 the merchant, but customers can issue a</p> <p>25 chargeback for up to six months on a</p>	

50	<p>1 Counley</p> <p>2 A A direct account is with optimal</p> <p>3 payments. If you get a merchant account in</p> <p>4 the EU, you have to set up a corporation in</p> <p>5 the EU and that you have a merchant account</p> <p>6 specifically issued to that European</p> <p>7 corporation, but with Intabill you did not</p> <p>8 have to have a corporation in Australia to</p> <p>9 get it, so --</p> <p>10 Q Why is that referred to as a</p> <p>11 third-party processor?</p> <p>12 A Third-party processor had higher rates</p> <p>13 so --</p> <p>14 Q Makes them a third party as opposed to</p> <p>15 a first party?</p> <p>16 A Sometimes the descriptor, the words</p> <p>17 that appear in a customer's credit card</p> <p>18 statement on a third-party account may be</p> <p>19 shared with a processor instead of having</p> <p>20 your own customer descriptor show up on the</p> <p>21 customer's credit card statement, which is</p> <p>22 what all direct merchant accounts do have.</p> <p>23 Q If it's a direct merchant account, if</p> <p>24 I were to buy something, it would show up</p> <p>25 with the name of the merchant on my monthly</p>	52	<p>1 Counley</p> <p>2 A I do like to think I have good</p> <p>3 customer service.</p> <p>4 Q You say "No, offshore banks do not run</p> <p>5 credit, nor do they pull the 'TMF' list or</p> <p>6 'MATCH' list, so if you are on that, it is</p> <p>7 not a problem." Stop right there for a</p> <p>8 second. What is a TMF list?</p> <p>9 A Terminated match file and it's like a</p> <p>10 black list or blackball list. If the</p> <p>11 merchant gets an account terminated by a</p> <p>12 processor in the U.S., they will usually end</p> <p>13 up on that and it's very difficult for them</p> <p>14 to get another merchant account in the U.S.</p> <p>15 Q Okay.</p> <p>16 A So a lot of merchants end up at</p> <p>17 offshore banks for that reason. And that</p> <p>18 they also don't run personal credit, which is</p> <p>19 another issue in the U.S. of getting merchant</p> <p>20 accounts.</p> <p>21 Q Do the offshore banks have the same</p> <p>22 risk vis-a-vis the merchant as the U.S. banks</p> <p>23 do?</p> <p>24 A Yes, but that's why they are charging</p> <p>25 the higher rates.</p>
51	<p>1 Counley</p> <p>2 statement; is that correct?</p> <p>3 A Yes.</p> <p>4 Q But if it's a third-party account, it</p> <p>5 might have the name of the processor instead</p> <p>6 of the name of the merchant?</p> <p>7 A Correct.</p> <p>8 Q Are third-party processors typically</p> <p>9 banks?</p> <p>10 A Again, the definition of bank and</p> <p>11 processors is used pretty liberally, probably</p> <p>12 not appropriately, in a lot of these e-mails.</p> <p>13 Q Now, in response to your e-mail,</p> <p>14 Jennifer sends you an e-mail with two</p> <p>15 questions, "We have a processing history with</p> <p>16 card service. Does that matter? Do they run</p> <p>17 credit at this bank? What is their criteria</p> <p>18 for acceptance? Thanks." Do you see that?</p> <p>19 A Yes.</p> <p>20 Q Do you remember responding to this?</p> <p>21 A Yes, I see it here.</p> <p>22 Q Okay and it says "Jennifer, very sorry</p> <p>23 for not getting back sooner." I guess you</p> <p>24 waited three hours to respond; is that</p> <p>25 correct?</p>	53	<p>1 Counley</p> <p>2 Q So the offshore banks typically charge</p> <p>3 a higher rate for the higher risk that they</p> <p>4 are taking on; is that correct?</p> <p>5 A Correct.</p> <p>6 Q Is the match list the same as the TMF</p> <p>7 list?</p> <p>8 A Correct.</p> <p>9 Q Just different words for the same</p> <p>10 thing?</p> <p>11 A Terminated match file, so match,</p> <p>12 match.</p> <p>13 Q Got you.</p> <p>14 You go on to ask a question. "When</p> <p>15 you say you have processing history, was it</p> <p>16 good history, or did it end bad? If you do</p> <p>17 have clean processing statements (low</p> <p>18 chargebacks) then that will help."</p> <p>19 She responds "Our processing history</p> <p>20 is fine. We had to close because we were</p> <p>21 selling replicas". Do you see that?</p> <p>22 A Yes.</p> <p>23 Q What did you understand her to mean</p> <p>24 when she said we had to close because we were</p> <p>25 selling replicas?</p>

54	<p>1 Counley</p> <p>2 A They were selling handbags that looked</p> <p>3 similar to other products.</p> <p>4 Q Why would that cause her to have to</p> <p>5 close?</p> <p>6 A Most banks in the U.S. are very</p> <p>7 conservative. I think in 2006 even a lot of</p> <p>8 banks still considered any commerce merchant</p> <p>9 account high risk. We are just into the</p> <p>10 e-Commerce era now. Even today we have</p> <p>11 banks, if it's an online merchant account,</p> <p>12 they are skittish about approving it.</p> <p>13 Q But she didn't say she had to close</p> <p>14 because she was online merchant?</p> <p>15 A Correct.</p> <p>16 Q She said because she was selling</p> <p>17 replicas?</p> <p>18 A Correct.</p> <p>19 Q Isn't also the case most U.S. banks</p> <p>20 won't do replicas?</p> <p>21 A I'm not aware -- I guess you can say I</p> <p>22 am aware of it and we sent all of our</p> <p>23 accounts to Woodforest and Frontline.</p> <p>24 Q Your response to her "Sounds good.</p> <p>25 Then please include the last three months of</p>	56	<p>1 Counley</p> <p>2 A Yes.</p> <p>3 Q You respond to that "Good news. I</p> <p>4 just found out our U.S. bank can do replica</p> <p>5 accounts now. We can write you a</p> <p>6 3.95 percent; do you see that?</p> <p>7 A Yes.</p> <p>8 Q Now, what bank were you referring to</p> <p>9 there?</p> <p>10 A To be honest, I don't call recall from</p> <p>11 memory if it was Frontline or Woodforest.</p> <p>12 Q But it was one of the two of them?</p> <p>13 A Yes.</p> <p>14 Q Do you remember you opened an account</p> <p>15 first at Frontline for her and subsequently</p> <p>16 at Woodforest?</p> <p>17 A I believe that's how it is.</p> <p>18 Q I'll get you the documents. We can</p> <p>19 write you a 3.95 percent; do you see that?</p> <p>20 A Yes.</p> <p>21 Q Who determined that 3.95 percent?</p> <p>22 A I did.</p> <p>23 Q What were the factors that went into</p> <p>24 you deciding to charge 3.95 percent?</p> <p>25 A A lot of higher risk merchants would</p>
55	<p>1 Counley</p> <p>2 processing from CSI then with your</p> <p>3 application or six months if you have it.</p> <p>4 This will help to possibly negotiate lower</p> <p>5 rates."</p> <p>6 Why would her processing history help</p> <p>7 to negotiate lower rates for her?</p> <p>8 A Because it shows again the risk is</p> <p>9 mainly with the chargeback liability, so if</p> <p>10 she has processing history with low</p> <p>11 chargebacks, it helps the processor feel more</p> <p>12 comfortable with the account.</p> <p>13 Q She sends you an e-mail that sends --</p> <p>14 same day, September 11, "Fax sent. Let me</p> <p>15 know if you receive. Thanks"?</p> <p>16 A Correct.</p> <p>17 Q And then you respond early the next</p> <p>18 morning, "Received the application, but not</p> <p>19 any of the supporting documents requested on</p> <p>20 the last page." Do you see that?</p> <p>21 A Yes.</p> <p>22 Q And then she says, "I've attached</p> <p>23 three months of statements to this e-mail and</p> <p>24 will fax remaining documents. Please let me</p> <p>25 know if they come through okay."</p>	57	<p>1 Counley</p> <p>2 charge rates from 3 1/2 to 4 percent. I</p> <p>3 think many other merchants in other</p> <p>4 industries pay those types of rates, so I</p> <p>5 think that's just kind of a general tier.</p> <p>6 Q Now, she was not a startup company,</p> <p>7 right? She had a processing history at this</p> <p>8 point?</p> <p>9 A Apparently.</p> <p>10 Q So, the reason they were a higher risk</p> <p>11 merchant is because they were selling replica</p> <p>12 products?</p> <p>13 A It was an account -- correct.</p> <p>14 Q When you say setup fee is only 285; do</p> <p>15 you see that?</p> <p>16 A Correct.</p> <p>17 Q Where does that money go?</p> <p>18 A Same revenue share as with the</p> <p>19 residuals.</p> <p>20 Q So with regard to this one, let's</p> <p>21 pretend the 285 is 300 so we might be able to</p> <p>22 do the math in our heads.</p> <p>23 A Okay, actually, I retract my last</p> <p>24 statement. The setup fee we do not share it</p> <p>25 with the processors. We share it with the</p>

58	<p>1 Counley</p> <p>2 agents.</p> <p>3 Q Okay, so you would share that with</p> <p>4 Merchant Metro?</p> <p>5 A Yes.</p> <p>6 Q So they would get 40 percent?</p> <p>7 A 40 to 50 percent and I get 35 percent,</p> <p>8 Bill and Shane --</p> <p>9 Q They split the rest?</p> <p>10 A Yes.</p> <p>11 Q And then Jennifer responds "Okay,</p> <p>12 sounds good. I just got your message.</p> <p>13 Sounds like a much better plan. I already</p> <p>14 have an authorize.net gateway too that I</p> <p>15 signed up for prior to getting card service,</p> <p>16 so we're good to go if I can secure a</p> <p>17 processor. Let me know what else you need</p> <p>18 from me." Do you see that?</p> <p>19 A Yes.</p> <p>20 Q What is an authorized.net gateway?</p> <p>21 A It's a gateway that sends transactions</p> <p>22 from the merchant's website to the processor.</p> <p>23 Q Do you typically set that up for the</p> <p>24 merchant or do they set that up themselves?</p> <p>25 A Sometimes we set them up. Sometimes</p>	60	<p>1 Counley</p> <p>2 A Melissa Gampel, P-E-L or B-E-L.</p> <p>3 Q Anyone else you can think of?</p> <p>4 A Yes. I can't remember the lady's name</p> <p>5 though. There was another lady and another</p> <p>6 gentleman, Rich something, Catwalk Purses.</p> <p>7 Q Catwalk Purses?</p> <p>8 A Yes.</p> <p>9 Q Did she also sent you one, the Purse</p> <p>10 Scene?</p> <p>11 A I can't recall.</p> <p>12 Q The last e-mail in this chain</p> <p>13 "Jennifer, sounds good" and you send her the</p> <p>14 application; do you see that?</p> <p>15 A Yes.</p> <p>16 MR. WEIGEL: We have been going</p> <p>17 at this for a hour and a half. Why</p> <p>18 don't we take a short break?</p> <p>19 THE WITNESS: Why don't we?</p> <p>20 (Whereupon a discussion was</p> <p>21 held off the record.)</p> <p>22 MR. WEIGEL: Mark this as</p> <p>23 Exhibit 4.</p> <p>24 (Whereupon application to</p> <p>25 Woodforest was marked Counley Exhibit</p>
59	<p>1 Counley</p> <p>2 they already have one. Sometimes they set</p> <p>3 them up.</p> <p>4 Q She goes on to say "I have several</p> <p>5 friends in this field I can refer to you if</p> <p>6 this goes through okay." Do you see that?</p> <p>7 A Yes.</p> <p>8 Q Did, in fact, Jennifer send you --</p> <p>9 this is Jennifer Kirk, correct?</p> <p>10 A Yes.</p> <p>11 Q Did you know her name at that point in</p> <p>12 time?</p> <p>13 A I'm not sure if I knew more than what</p> <p>14 is on here as the e-mail, but I knew it was</p> <p>15 Jennifer.</p> <p>16 Q Eventually they fill out an</p> <p>17 application?</p> <p>18 A Correct. When she returned the</p> <p>19 application.</p> <p>20 Q You knew who it was?</p> <p>21 A Yes.</p> <p>22 Q Did she subsequently send you other</p> <p>23 friends in the replica field?</p> <p>24 A Correct, yes.</p> <p>25 Q Who else did she send to you?</p>	61	<p>1 Counley</p> <p>2 4 for identification as of this date.)</p> <p>3 Q Mr. Counley, do you recognize Exhibit</p> <p>4 4?</p> <p>5 A Yes.</p> <p>6 Q Did you help prepare this?</p> <p>7 A Yes.</p> <p>8 Q Which parts of this did you help</p> <p>9 prepare?</p> <p>10 A I probably typed in the company name,</p> <p>11 address, principal name.</p> <p>12 Q Do you have a template for this form</p> <p>13 on your computer or did you at the time?</p> <p>14 A I have the original application, but</p> <p>15 it's not typed in. I don't know what you</p> <p>16 mean by template.</p> <p>17 Q Do you have the ability to -- I'm not</p> <p>18 very sophisticated with computers, but can</p> <p>19 you pull this up on your computer screen and</p> <p>20 type in these things?</p> <p>21 A Yes.</p> <p>22 Q When you pull it up on your computer</p> <p>23 screen, it has this Woodforest National Bank</p> <p>24 and MCCS logo?</p> <p>25 A Yes.</p>

62	<p>1 Counley</p> <p>2 Q You would then type it in</p> <p>3 electronically on your screen and then you</p> <p>4 would send it off to the client; is that how</p> <p>5 it works?</p> <p>6 A Correct.</p> <p>7 Q Where did you get the information</p> <p>8 here?</p> <p>9 A What's the date on this?</p> <p>10 Q If you look at the top left, there is</p> <p>11 a fax header November 15, 2006; do you see</p> <p>12 that?</p> <p>13 A Yes. Sometimes I'll have the merchant</p> <p>14 send me the voided check and driver's license</p> <p>15 first and then I grab the address and name</p> <p>16 and type it in. Saves the merchant a step</p> <p>17 and if the bank can get it and they can't</p> <p>18 read it, it makes things more complicated.</p> <p>19 Q Did you fill this out when you were</p> <p>20 talking to her on the telephone?</p> <p>21 A Not really. It's too time consuming.</p> <p>22 Q The way it works, you fill it out and</p> <p>23 you fax it to the merchant to be signed?</p> <p>24 A Or e-mail.</p> <p>25 Q Can you tell from the header, the fax</p>	64	<p>1 Counley</p> <p>2 Q In there it indicates a handbag</p> <p>3 company in China; do you see that?</p> <p>4 A Yes.</p> <p>5 Q So, you knew at this point in time</p> <p>6 that these bags were not manufactured by</p> <p>7 Gucci, correct?</p> <p>8 MR. WENGROVSKY: Objection. Go</p> <p>9 ahead.</p> <p>10 A I don't know if they were Gucci bags,</p> <p>11 but I do see it says China is where the</p> <p>12 product is purchased.</p> <p>13 Q Did you ever look at the website?</p> <p>14 A For refund policy and contact</p> <p>15 information.</p> <p>16 Q Did you look at the website to confirm</p> <p>17 that they disclosed that they were selling</p> <p>18 replica products and not original products?</p> <p>19 A I believe this one we had already done</p> <p>20 that. This was after Frontline, Hans'</p> <p>21 e-mail.</p> <p>22 Q Well, actually I don't remember</p> <p>23 exactly.</p> <p>24 A Yes.</p> <p>25 Q But at the time you sent this, you had</p>
63	<p>1 Counley</p> <p>2 heading on the top, was it faxed to you then</p> <p>3 with a signature; is that how it works?</p> <p>4 A Correct.</p> <p>5 Q So you filled it out and you sent it</p> <p>6 by e-mail and then it was printed out, signed</p> <p>7 and faxed back to you?</p> <p>8 A I mean I would partially fill it out.</p> <p>9 I usually don't have enough information to</p> <p>10 fill it out completely. Anyone can type in a</p> <p>11 PDF.</p> <p>12 Q If you look at the merchant processing</p> <p>13 agreement which would be the third page, the</p> <p>14 third page of this exhibit, it says</p> <p>15 description of product; do you see that?</p> <p>16 A Yes.</p> <p>17 Q It says designer handbags?</p> <p>18 A Correct.</p> <p>19 Q It's a little blurry on this copy.</p> <p>20 Can you read the third question?</p> <p>21 A No.</p> <p>22 Q Let me see if I can do this, list the</p> <p>23 names and addresses of vendors from something</p> <p>24 the product is purchased.</p> <p>25 A Sounding close enough.</p>	65	<p>1 Counley</p> <p>2 confirmed they had disclosed that they were</p> <p>3 selling replica products; is that correct?</p> <p>4 A Correct.</p> <p>5 Q Because there would be more exposure</p> <p>6 to a bank if, in fact, they were selling</p> <p>7 replica products, but representing that they</p> <p>8 were real, correct?</p> <p>9 MR. KENNEDY: Objection. Calls</p> <p>10 for someone else's state of mind.</p> <p>11 A Again, we don't make policies. If a</p> <p>12 bank tells us a website needs to have such</p> <p>13 and such on it, then it makes sense for us</p> <p>14 when sending other applications to take that</p> <p>15 same advice and tell the merchant the bank is</p> <p>16 going to want them on there. Why don't you</p> <p>17 go ahead and do it now.</p> <p>18 Q Are there consequences to Durango if</p> <p>19 the merchant has too many chargebacks?</p> <p>20 A Yes. It depends on the agreement that</p> <p>21 we have with the bank. I mean, in general,</p> <p>22 we don't want the relationship with the bank</p> <p>23 where they think Durango sends them accounts</p> <p>24 that cause them losses. They wouldn't really</p> <p>25 appreciate our business and might impact</p>

66	<p>1 Counley</p> <p>2 approvals or delay application times, put us</p> <p>3 at the bottom of the pile.</p> <p>4 Q So because of that, when you look at a</p> <p>5 website, you would at least make some effort</p> <p>6 to make sure that they make adequate</p> <p>7 disclosures so there will not be as many</p> <p>8 chargebacks?</p> <p>9 A It's not really our job to underwrite</p> <p>10 accounts, no.</p> <p>11 Q My question is not whether it's your</p> <p>12 job to underwrite accounts. Whether you make</p> <p>13 any effort at all when a merchant has lots of</p> <p>14 chargebacks?</p> <p>15 A I mean if they don't have proper</p> <p>16 refund policy, if the refund policy says no</p> <p>17 refunds, we might say that's not really going</p> <p>18 to get you very far because customers will</p> <p>19 just do a chargeback, you know, full contact</p> <p>20 information.</p> <p>21 Q Does the type of product that a</p> <p>22 merchant sells impact your pricing to that</p> <p>23 merchant?</p> <p>24 A No.</p> <p>25 Q So when determining what price to</p>	68	<p>1 Counley</p> <p>2 normally would have paid 1.75.</p> <p>3 Q And the reason they paid more is</p> <p>4 because there were not so many banks doing</p> <p>5 that business?</p> <p>6 A Sure, supply and demand.</p> <p>7 Q With regard to replica merchants, you</p> <p>8 were able to charge a higher fee for replica</p> <p>9 merchants because there were not that many</p> <p>10 banks willing to do them, correct?</p> <p>11 A Correct.</p> <p>12 Q In fact, you charged the Laurette</p> <p>13 Company 3.95 percent, correct, the first one</p> <p>14 I believe?</p> <p>15 MR. KENNEDY: I object to the</p> <p>16 question. That was what was on the</p> <p>17 quote.</p> <p>18 Q What is the quote you gave them?</p> <p>19 A 3.75.</p> <p>20 Q Why did you choose a lower price here?</p> <p>21 A She may have requested lower pricing</p> <p>22 based on relationship. I'm not sure.</p> <p>23 Q Why is it that you charge the higher</p> <p>24 price for a replica handbag merchant than for</p> <p>25 your typical pricing for an escort merchant?</p>
67	<p>1 Counley</p> <p>2 charge someone, you don't consider whether or</p> <p>3 not they have other alternatives that they</p> <p>4 can go to?</p> <p>5 A Are you saying is our pricing with the</p> <p>6 processor affected by product?</p> <p>7 Q No, to the merchant. You determine</p> <p>8 the price that the merchant pays for the</p> <p>9 processing services, correct?</p> <p>10 A Yes.</p> <p>11 Q Is that price determined in part by</p> <p>12 whether or not you think the merchant can get</p> <p>13 these credit card processing services from</p> <p>14 someone else?</p> <p>15 A Sure. Like travel accounts generally</p> <p>16 pay 3 percent.</p> <p>17 Q But escort merchants might pay a</p> <p>18 higher percentage, correct?</p> <p>19 A Right.</p> <p>20 Q What is the typical charge for an</p> <p>21 escort merchant?</p> <p>22 A I think we are doing -- mind you, we</p> <p>23 only had three escort accounts, but -- maybe</p> <p>24 more. I don't think many. I think we were</p> <p>25 doing retail accounts around 2.25 where they</p>	69	<p>1 Counley</p> <p>2 A You are kind of talking about two</p> <p>3 different types of accounts. Retail they had</p> <p>4 a machine and retail accounts pay lower rates</p> <p>5 anyway, so 2.25 is higher than other retail</p> <p>6 merchants pay, 1.7, 1.75.</p> <p>7 Q Can you explain, when you were</p> <p>8 discussing the 3.75 rate on this form, it</p> <p>9 says MOTO Internet. What does that mean?</p> <p>10 A There are two different types of</p> <p>11 accounts, retail accounts which if you are on</p> <p>12 the left, retail means you are swiping the</p> <p>13 card through a terminal like at the store,</p> <p>14 that means the card is present and card</p> <p>15 present transactions have lower risk because</p> <p>16 the clerk is supposed to verify the ID or get</p> <p>17 a signature because they are delivered</p> <p>18 immediately. All e-Commerce accounts are</p> <p>19 higher risk. All e-Commerce pay higher rates</p> <p>20 than retail.</p> <p>21 Q What does MOTO stand for?</p> <p>22 A Mail order, telephone order.</p> <p>23 Q And the Internet means goods ordered</p> <p>24 over the internet?</p> <p>25 A Yes.</p>

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1 Counley

2 Q Does your signature appear on this

3 form?

4 A No, I don't think so.

5 Q Do you see where it says for all

6 corporations on the fourth page?

7 A Yes.

8 Q Do you know that signature?

9 A It appears to match the signature on

10 the left.

11 Q That is Ms. Kirk's signature?

12 A I assume.

13 Q Can you tell me where the application

14 stops?

15 A The page with the signatures is the

16 last page.

17 Q The material that's after that, was

18 that -- that was not material that you

19 provided to Woodforest?

20 A No. Only the three pages of the

21 application and the voided check.

22 Q You said you did check the return

23 policy, is that correct, on the website?

24 A Yes.

25 Q Why do you do that?

71

1 Counley

2 A To make sure that they have one

3 because they need to understand that

4 customers have six months to do a chargeback,

5 if they don't have a good refund policy.

6 It's one of the main problems merchants have

7 not being liberal enough in refunds.

8 Q If you turn a few pages in to this,

9 you will see some --

10 A On the refund policy underwriting,

11 every bank we work with, if it's an

12 e-Commerce merchant, they wouldn't refund --

13 so it's an underwriting requirement, it

14 wouldn't make sense for us to send an

15 application in. It's just going to get

16 kicked out.

17 Q Well, it's your job to know which

18 banks will take which merchants, correct?

19 A It's a learning process and it's

20 always changing.

21 Q How did you first come in contact with

22 Woodforest?

23 MR. WENGROVSKY: Objection. Go

24 ahead.

25 A I'm pretty sure that I was searching

72

1 Counley

2 for a bank to do adult merchant accounts like

3 DVD's and I just searched on the internet and

4 I think I found Merchant Services U.S.A.'s

5 website and I called and spoke to who turned

6 out to be Joe Montella and he said you can do

7 the adult account, so I started sending those

8 probably and at some point I'm pretty sure

9 this is the first replica account I ever did,

10 so we submitted these. The bank approved

11 them and we said if they take these, we'll

12 send them more.

13 Q So you were actually the one within

14 Durango who established the contact with

15 Woodforest?

16 A Yes.

17 Q At the time you sent Woodforest this

18 account, had you sent them other accounts?

19 A Yes.

20 Q Did you believe that they had a more

21 liberal underwriting policy than most banks

22 in the United States?

23 MR. KENNEDY: Object to the

24 form.

25 A Yes. I mean that's why we started

73

1 Counley

2 sending them -- I'm pretty sure we started

3 with the adult and DVD stuff.

4 Q Is the fact that they are willing to

5 take or were willing to take adult merchants

6 make them more liberal than other banks in

7 terms of their underwriting policy?

8 A Yes. And as far as we are using the

9 term liberal and whatnot.

10 Q By liberal I mean more willing to take

11 merchants that other people aren't willing to

12 take?

13 A Yes.

14 Q Do you see the shipping return policy

15 for The Bag Addiction? There is a screen

16 shot about halfway through this exhibit?

17 MR. WENGROVSKY: It's like the

18 ninth page.

19 A Shipping and returning, returns and

20 exchanging?

21 Q Yes. Is that what you reviewed before

22 sending this on to Frontline and Woodforest?

23 A I can't be certain if it's -- if it

24 was that. It would appear so from the

25 printout.

74	<p>1 Counley</p> <p>2 Q Okay. You don't remember, but this</p> <p>3 looks --</p> <p>4 A It looks like a typical return policy.</p> <p>5 Q You see it lists the Gucci brand over</p> <p>6 on the left on this page?</p> <p>7 A I do.</p> <p>8 Q If you turn in a few pages, you will</p> <p>9 start to see screen shots of Gucci</p> <p>10 pocketbooks?</p> <p>11 A Okay.</p> <p>12 Q The first one here is a Guccissima</p> <p>13 with a list price \$1,050 and our price is</p> <p>14 \$175. You save \$875?</p> <p>15 A Yes.</p> <p>16 Q When you were reviewing this website,</p> <p>17 did you happen to notice that they were</p> <p>18 selling Gucci pocketbooks?</p> <p>19 A I don't recall.</p> <p>20 Q Do you have reason to believe when you</p> <p>21 sent this account off to Frontline or</p> <p>22 Woodforest that, in fact, The Bag Addiction</p> <p>23 was selling Gucci pocketbooks?</p> <p>24 MR. KENNEDY: Objection.</p> <p>25 Q At the time you sent this over to</p>	76
75	<p>1 Counley</p> <p>2 Frontline, are you aware that they were</p> <p>3 selling Gucci replicas?</p> <p>4 MR. KENNEDY: At the time you</p> <p>5 sent the application?</p> <p>6 Q Yes.</p> <p>7 MR. KENNEDY: And was it to</p> <p>8 Frontline.</p> <p>9 Q Frontline.</p> <p>10 A It's not my job to review websites for</p> <p>11 products. I don't spend time doing that.</p> <p>12 You are saying that the website changed from</p> <p>13 Frontline to this?</p> <p>14 Q I don't believe so.</p> <p>15 A I guess I'm not clear what you are</p> <p>16 asking.</p> <p>17 Q Is the return policy the first thing</p> <p>18 that pops up when you get to a website?</p> <p>19 A No, you usually start on the home</p> <p>20 page.</p> <p>21 Q In winding your way through to the</p> <p>22 return policy, is it really your testimony</p> <p>23 that you didn't notice that the website was</p> <p>24 selling replica Gucci purses?</p> <p>25 MR. WENGROVSKY: Objection.</p>	77
	<p>1 Counley</p> <p>2 A (No response.)</p> <p>3 Q You can answer.</p> <p>4 A What's the whole objection thing mean?</p> <p>5 MR. WENGROVSKY: It's noted for</p> <p>6 the record and with certain more rare</p> <p>7 exceptions like an attorney-client</p> <p>8 privilege, you would still answer.</p> <p>9 THE WITNESS: All right.</p> <p>10 A Again we don't -- it's not our job to</p> <p>11 review the website for the products. If it</p> <p>12 has a specific name or whatnot, I'm not</p> <p>13 really there to do that. I just make sure</p> <p>14 the application is complete, send it to the</p> <p>15 processor. The processor reviews the</p> <p>16 website. Do I specifically remember seeing</p> <p>17 Gucci? No.</p> <p>18 Q Do you remember specifically not</p> <p>19 seeing Gucci?</p> <p>20 MR. WENGROVSKY: Objection.</p> <p>21 Q Do you, as you sit here today, have</p> <p>22 any recollection one way or another whether</p> <p>23 you noticed that the website was selling</p> <p>24 replica Gucci handbags?</p> <p>25 A I'm not much of a fashion connoisseur.</p>	

20 (Pages 74 to 77)

78

1 Counley
2 Q Looking under MCCS, Merchant Bank Card
3 Agreement, I'm still on Counley 4.
4 MR. WENGROVSKY: Top right.
5 A All right.
6 Q It says rep name?
7 A It has my name.
8 Q Right. So you were the rep for MCCS;
9 is that correct?
10 MR. WENGROVSKY: Objection.
11 MR. KENNEDY: I object to the
12 question as well.
13 Q What do the initials REP stand for?
14 A Rep is a good assumption.
15 Q You were the rep on this account,
16 correct?
17 A Yes. Although, I mean, technically it
18 goes through Joe Montella MS, U.S.A., but we
19 put our name on it. We're the rep.
20 Q Underneath there is a rep number. Do
21 you see that?
22 A Yes.
23 Q CE21, what does that mean?
24 A I'm assuming some rep code from
25 Woodforest. Again, I'm pretty sure that was

79

1 Counley
2 issued.
3 Q Let me see if I can clear that up. I
4 didn't mean to make that a hard question.
5 A I assume it's an agent ID from
6 Woodforest and MUD number same thing, but I'm
7 not sure what the difference is.
8 MR. WEIGEL: Mark this as
9 Exhibit 6.
10 (Whereupon contract sales
11 application was marked Counley Exhibit
12 6 for identification as of this date.)
13 Q Do you recognize Exhibit 6?
14 A Yes, but I'm not sure. It's signed in
15 my name instead of Durango -- I'm not sure
16 why it's signed in my name.
17 Q Now, at the bottom it says signature
18 of applicant. Is that your signature?
19 A It is.
20 Q And the address given here, was that
21 your address in 2005?
22 A No, that's Durango Merchant Services'
23 address in 2005.
24 Q How about the cell phone numbers; what
25 numbers are those?

80

1 Counley
2 A Durango Merchant Services.
3 Q Including the home phone?
4 A That's our office number. Still is.
5 Q How about the fax number?
6 A Same office fax number.
7 Q Were you in Wisconsin at this point in
8 time?
9 A No.
10 Q You were in Durango?
11 A Yes.
12 Q You were in Durango for about a year
13 or so before you moved to Wisconsin while you
14 were working -- you were in Durango working
15 for Durango Merchants for a year before you
16 moved to Wisconsin; is that correct?
17 A I can't remember if it's one and a
18 half years or two and a half years. I'm
19 trying to put it together. I moved to
20 Wisconsin in the summer of either '06 or '07.
21 If my wife was here, she could give you
22 better answers.
23 Q And this says "Submitted by Marketing
24 Unit 278"?
25 A Yes.

81

1 Counley
2 Q What is marketing unit 278?
3 A I have no idea.
4 Q Sale rep number at CE21; do you see
5 that?
6 A Yes.
7 Q When you wrote rep CE21 on Counley
8 Exhibit 4, the application for the Laurette
9 Company to Woodforest, that's referencing
10 this sales number; is that correct?
11 A Yes. Again, I don't -- the
12 applications were usually sent to us when
13 there is a new application. Joe says use
14 this application now and the numbers would be
15 in there, so I never really paid attention to
16 this, but I think you are in line here. It
17 looks like the agent ID.
18 Q You had signed on for this contract in
19 March of 2005; is that correct?
20 A Yes.
21 Q And I think we determined that you
22 were submitting this application November of
23 2006, correct?
24 A Correct.
25 Q Now, if you turn to the second page of

82	<p>1 Counley</p> <p>2 Counley 6, this is an agreement between</p> <p>3 Merchant Choice Card Services and Nathan</p> <p>4 Counley; do you see that?</p> <p>5 A I do.</p> <p>6 Q Do you have any reason to believe that</p> <p>7 you didn't sign this associate agreement?</p> <p>8 A No, it's my signature. I don't. I'm</p> <p>9 really unclear why it says Nathan Counley</p> <p>10 name instead of Durango Merchant Services. I</p> <p>11 think Shane just told me to put it in my name</p> <p>12 for some reason.</p> <p>13 Q But you shared the revenue you got on</p> <p>14 the Laurette account and the other account</p> <p>15 you sent to Woodforest with Durango?</p> <p>16 A The agreement is between Durango and</p> <p>17 whoever. This is the only thing that has my</p> <p>18 name on it that you will find and I don't</p> <p>19 know why it is like this. It shouldn't be.</p> <p>20 Q Do you believe there is a separate</p> <p>21 agreement between Durango and M CCS or Durango</p> <p>22 and Woodforest National Bank?</p> <p>23 A No.</p> <p>24 Q This is the agreement between them?</p> <p>25 A Yes.</p>	84
83	<p>1 Counley</p> <p>2 Q The first whereas "Whereas M CCS is</p> <p>3 engaged in the activities marketing bankcard</p> <p>4 services to merchants, including but not</p> <p>5 limited to, solicitation of merchants,</p> <p>6 background investigation of merchants, site</p> <p>7 inspections of merchants' premises, sales of</p> <p>8 equipment for credit and/or debit card</p> <p>9 transaction processing, supplies and</p> <p>10 training." Do you see that?</p> <p>11 A Yes.</p> <p>12 Q And then the next one says "Whereas,</p> <p>13 the Associate desires to be a member of M CCS'</p> <p>14 sales force which is composed of a group of</p> <p>15 independent contractors who have entered into</p> <p>16 agreements with M CCS pursuant to which they</p> <p>17 are authorized to engage in the business as</p> <p>18 described above for M CCS". Do you see that?</p> <p>19 A Yes.</p> <p>20 Q You signed this agreement, correct?</p> <p>21 A Correct.</p> <p>22 Q Did you undertake to do the things</p> <p>23 that M CCS set forth in the first paragraph?</p> <p>24 MR. KENNEDY: I object to the</p> <p>25 question.</p>	85
84	<p>1 Counley</p> <p>2 A I did sign the agreement, but more</p> <p>3 just to send the account through.</p> <p>4 Q Let's take it one by one. The first</p> <p>5 thing they referred to is solicitation of</p> <p>6 merchants; did you do that?</p> <p>7 A Well, we don't really solicit. We</p> <p>8 have a website and we have agents, if that's</p> <p>9 what you mean by solicit.</p> <p>10 Q You do go out and find merchants in</p> <p>11 some way or another, correct?</p> <p>12 A Yes.</p> <p>13 Q Do you do a background investigation</p> <p>14 of merchants?</p> <p>15 A No.</p> <p>16 Q Do you do site inspections of the</p> <p>17 merchants' premises?</p> <p>18 A No.</p> <p>19 Q You don't sell equipment, do you?</p> <p>20 A Not usually, no.</p> <p>21 Q Does Durango have any business</p> <p>22 marketing terminals?</p> <p>23 A We have some probably five or six</p> <p>24 terminals in our office and I would say we --</p> <p>25 no, it's not the focus of ours.</p>	85

86	<p>1 Counley</p> <p>2 that?</p> <p>3 A Yes.</p> <p>4 Q Were there any guidelines that MCCS</p> <p>5 gave you about the type of merchants that it</p> <p>6 was willing to take on?</p> <p>7 A No.</p> <p>8 Q Item 5 says "Participate in the</p> <p>9 training that will be provided by MCCS"; do</p> <p>10 you see that?</p> <p>11 A I received no training.</p> <p>12 Q That was my question. Did you ever</p> <p>13 receive any training from MCCS?</p> <p>14 A No.</p> <p>15 Q I was looking on this and I couldn't</p> <p>16 find the revenue sharing provisions here.</p> <p>17 Are they in this document or in some other</p> <p>18 document?</p> <p>19 A Yes, there was probably something done</p> <p>20 between Joe Montella and Durango which I</p> <p>21 could probably find for you.</p> <p>22 Q You think there is a separate</p> <p>23 agreement besides this one that defines a</p> <p>24 split of the --</p> <p>25 A Yes.</p>	88
87	<p>1 Counley</p> <p>2 Q Of the residuals?</p> <p>3 A Yes. It's a small role in the</p> <p>4 processing. It's kind of just -- there is</p> <p>5 not -- it's informal, but yes, I'm sure we</p> <p>6 have something.</p> <p>7 Q Who negotiated the fee split?</p> <p>8 A Either myself or Shane.</p> <p>9 Q Do you remember when you negotiated</p> <p>10 it?</p> <p>11 A I would assume right around the time</p> <p>12 of the agreement.</p> <p>13 Q So in March of '05 give or take?</p> <p>14 A Yes.</p> <p>15 Q Now, let's go back to Counley Exhibit</p> <p>16 5. This is the agreement that you submitted</p> <p>17 to Frontline; is that correct?</p> <p>18 A No, it doesn't appear signed or</p> <p>19 completed, so I don't see how it could be.</p> <p>20 MR. WEIGEL: I will find that</p> <p>21 at lunch. I think there is another</p> <p>22 version of this.</p> <p>23 Mark this as Exhibit 7.</p> <p>24 (Whereupon agent agreement was</p> <p>25 marked Counley Exhibit 7 for</p>	89
	<p>1 Counley</p> <p>2 identification as of this date.)</p> <p>3 Q Do you recognize the Counley Exhibit</p> <p>4 7?</p> <p>5 A Yes.</p> <p>6 Q What is it?</p> <p>7 A It's the Frontline and Durango agent</p> <p>8 agreement. Agent is a -- I think different</p> <p>9 term in our industry than what you guys are</p> <p>10 used to using agent for.</p> <p>11 Q Who signed this?</p> <p>12 A Shane Kairalla.</p> <p>13 Q What do you understand the term agent</p> <p>14 to mean?</p> <p>15 A For us an agent is someone who sends</p> <p>16 accounts.</p> <p>17 Q Someone who goes out and finds</p> <p>18 accounts for the bank?</p> <p>19 A And does the footwork of filling in</p> <p>20 the application, helping the merchant get the</p> <p>21 completed application to the underwriter</p> <p>22 department.</p> <p>23 Q And you also get to determine pricing,</p> <p>24 correct?</p> <p>25 A Yes.</p>	

23 (Pages 86 to 89)

90

1 Counley
2 A 2 of 9 and forward through 9 of 9 I
3 recognize.
4 Q Okay. And that's your name at the end
5 of it?
6 A At the end of?
7 Q Page 9.
8 A That's correct.
9 Q In your e-mail to Jennifer Kirk you
10 said "Good news. I just learned that our
11 U.S. bank will accept replica accounts." Do
12 you remember that?
13 A Yes.
14 Q Do you remember how you learned that
15 U.S. Bank decided to accept replica accounts?
16 A No. Either I called and spoke to an
17 underwriter or I e-mailed them. Probably
18 what I did was I probably sent them an e-mail
19 or I called them and said would you look at
20 this website? Is this something you would
21 take a look at if we sent you the application
22 and they either replied via e-mail or called
23 me or said on the phone yes, send an
24 application.
25 Q Is that someone at Frontline that you

91

1 Counley
2 spoke to?
3 A Yes.
4 Q Do you have any recollection whether
5 it was a phone call or an e-mail?
6 A I don't and I don't remember who I
7 spoke to either.
8 Q Was Frontline the only bank that you
9 went to to see if you could find someone to
10 process for Laurette?
11 A Probably I asked other banks if they
12 would do this. I mean that's kind of the
13 typical scenario for us. We get a website
14 and I'll call or e-mail different banks and
15 if someone says they will take a look at it,
16 then we send them that bank's application.
17 Q Do you have any recollection what
18 other banks you called?
19 A No.
20 Q Did you have other banks that you did
21 more work with than Frontline at this time
22 period, 2006?
23 A I did a fair amount of work with --
24 our main banks were Humboldt, Frontline,
25 Woodforest and Pivotal.

92

1 Counley
2 Q In terms of the size of your
3 relationship in 2006, can you put those in
4 any sort of order?
5 A That would be difficult. I would be
6 making a guess and I could be wrong.
7 Q Does one of them stand out as having
8 more business than the others?
9 A They are probably fairly equal.
10 Q I think I may have asked you this
11 before, but would Humboldt or Pivotal do
12 replica accounts?
13 A No.
14 Q Do you remember speaking with anybody
15 at Humboldt or Pivotal about whether they
16 were do replica accounts?
17 A I don't remember it explicitly, but
18 chances are good that I did ask them or else
19 I would have submitted an application as
20 well.
21 Q So you believe at the time that you
22 submitted this application to Frontline, that
23 Humboldt and Pivotal won't do replica --
24 MR. WENGROVSKY: Objection.
25 A Yes, otherwise I would have submitted

93

1 Counley
2 an application to them and let them determine
3 whether they would approve the account or
4 not.
5 Q Now you see this Frontline application
6 was submitted in November of 2006 -- I'm
7 sorry -- Frontline was submitted in
8 September 2006 and Woodforest was submitted
9 in November 2006; do you see that?
10 A Yes.
11 Q Why did you submit to Frontline first?
12 A Perhaps I hadn't asked Woodforest.
13 I'm not sure. I am going to speculate here
14 perhaps. I did not ask Woodforest yet.
15 Q Do you have any recollection?
16 MR. KENNEDY: I object to the
17 speculation.
18 Q Do you have any recollection how it
19 came to be that you then made a subsequent
20 application on their behalf to Woodforest?
21 A At some point in time I must have
22 asked Joe is this something we could submit?
23 Q Do you remember him saying yes?
24 A Otherwise I wouldn't have submitted
25 the application. What was your name again?

94	<p>1 Counley</p> <p>2 Q Weigel, W-E-I-G-E-L.</p> <p>3 A Okay.</p> <p>4 Q First name is Bob.</p> <p>5 A Thanks.</p> <p>6 MR. WEIGEL: Please mark this</p> <p>7 as Counley 9.</p> <p>8 (Whereupon Application Report</p> <p>9 was marked Counley Exhibit 9 for</p> <p>10 identification as of this date.)</p> <p>11 MR. WEIGEL: And please mark</p> <p>12 this as Counley 10.</p> <p>13 (Whereupon Application report</p> <p>14 was marked Counley Exhibit 10 for</p> <p>15 identification as of this date.)</p> <p>16 Q Looking at Counley 9, it has rep</p> <p>17 number CE21 and MUD number 277. Do you see</p> <p>18 that?</p> <p>19 A Yes.</p> <p>20 Q And then Counley 10 has the same rep</p> <p>21 number and a different MUD number?</p> <p>22 A Okay.</p> <p>23 Q Do you know why they have you down</p> <p>24 under two different MUD numbers?</p> <p>25 A I have no idea.</p>	96	<p>1 Counley</p> <p>2 A Myself or someone in Durango.</p> <p>3 Q Okay. Did you receive residuals from</p> <p>4 all of these?</p> <p>5 A Durango did, yes.</p> <p>6 Q Did you personally receive a share of</p> <p>7 those residuals?</p> <p>8 A On the accounts that were mine.</p> <p>9 Q Let's go through the first two were</p> <p>10 declined. The next one says dress4envy.com.</p> <p>11 Was that one that you submitted?</p> <p>12 A Sounds familiar.</p> <p>13 Q You see the word yes after that?</p> <p>14 A I do.</p> <p>15 Q You didn't write that in, right?</p> <p>16 A No.</p> <p>17 Q Is Dress 4 Envy a replica merchant?</p> <p>18 A I can't tell you just by the name.</p> <p>19 Q Let's turn to the next one</p> <p>20 Freshnewkickz; is that one of your merchants?</p> <p>21 A I believe so.</p> <p>22 Q And then is that a replica merchant?</p> <p>23 A I'm assuming it has to do with shoes.</p> <p>24 Whether or not it's replica, I can't recall</p> <p>25 right now.</p>
95	<p>1 Counley</p> <p>2 Q You don't have any understanding as to</p> <p>3 why you are down for two different MUD</p> <p>4 numbers?</p> <p>5 A No.</p> <p>6 Q MUD stands for?</p> <p>7 A I have no idea.</p> <p>8 Q No idea?</p> <p>9 A No idea.</p> <p>10 Q Could MUD stand for marketing unit?</p> <p>11 A It could.</p> <p>12 Q If you look at Counley Exhibit 6 when</p> <p>13 you signed on --</p> <p>14 A These numbers, that's not my</p> <p>15 handwriting. I don't know if those numbers</p> <p>16 were there before I signed it or not. All</p> <p>17 right, marketing unit, it might -- sorry for</p> <p>18 half sentences.</p> <p>19 Q These are two documents. Let's focus</p> <p>20 on Counley 9 for a second.</p> <p>21 Do you recognize the names of these</p> <p>22 websites or merchants?</p> <p>23 A Yes, for the most part, yes.</p> <p>24 Q And these are all merchants that you</p> <p>25 submitted to Woodforest?</p>	97	<p>1 Counley</p> <p>2 Q The next one is Tracy Sales, Inc. and</p> <p>3 next to it says adult; do you see that?</p> <p>4 A Yes.</p> <p>5 Q Is that an adult business?</p> <p>6 A Apparently.</p> <p>7 Q Do you recognize the name of the</p> <p>8 enterprise?</p> <p>9 A Yes, I don't remember the specifics of</p> <p>10 the account, but a lot of adult merchants</p> <p>11 will have just the generic company name.</p> <p>12 Q The next one says costlesswatches.com?</p> <p>13 A Yes.</p> <p>14 Q Was that a replica merchant?</p> <p>15 A Just by looking at the name, I can see</p> <p>16 they sell watches, but I don't recall the</p> <p>17 account details specifically.</p> <p>18 Q Just going down the list, if you look</p> <p>19 at the descriptions on the right, are there</p> <p>20 any that strike you as being erroneous?</p> <p>21 MR. WENGROVSKY: You are</p> <p>22 talking about the handwritten ones?</p> <p>23 MR. WEIGEL: Right.</p> <p>24 A I guess the yes means that someone</p> <p>25 here thinks that they were something or --</p>

98	<p>1 Counley</p> <p>2 everything else, I mean escort, adult, yes,</p> <p>3 that all looks about right.</p> <p>4 Q 3 Apples Media, it says mirror up</p> <p>5 above. So that's mirroring that it's adult?</p> <p>6 A Correct.</p> <p>7 Q About what SSS Enterprises Auto; can</p> <p>8 you tell me what their business is?</p> <p>9 A I'm having trouble reading the</p> <p>10 handwriting, but it looks like it says Mobil</p> <p>11 Auto Repair.</p> <p>12 Q Going down you have 3 Apples Media and</p> <p>13 then there is BVCCigarshop.com?</p> <p>14 A Yes.</p> <p>15 Q Why would a cigar retailer do business</p> <p>16 with you?</p> <p>17 MR. WENGROVSKY: Objection.</p> <p>18 A Same thing. It's an account type that</p> <p>19 a lot of banks would not approve because I</p> <p>20 don't know why, but --</p> <p>21 Q Are people concerned with the sale of</p> <p>22 tobacco to minors over the Internet?</p> <p>23 A It's probably a legitimate concern.</p> <p>24 Q Drillsandcutters.com; do you see that?</p> <p>25 A Yes.</p>	100	<p>1 Counley</p> <p>2 A You have to remember --</p> <p>3 MR. WENGROVSKY: Objection to</p> <p>4 the question. Go ahead.</p> <p>5 MR. KENNEDY: Yes, I object it</p> <p>6 calls for speculation.</p> <p>7 A Not all accounts we do are high risk,</p> <p>8 so we do have -- I mean we do see low risk</p> <p>9 accounts. We have merchants that do have</p> <p>10 previous history that want better rates or</p> <p>11 oftentimes better customer service. There</p> <p>12 are a lot of shops out there that can't get</p> <p>13 someone on the phone and talk to and that's</p> <p>14 kind of our niche; you can pick up the phone</p> <p>15 and call us.</p> <p>16 Q Your niche is providing good customer</p> <p>17 service to your clients?</p> <p>18 A Yes.</p> <p>19 Q You understand their business needs</p> <p>20 and you try to meet them; is that correct?</p> <p>21 A If they have a question, we try to get</p> <p>22 them in touch with the right people.</p> <p>23 Q I have to ask, what is The Mob, Inc.?</p> <p>24 A I really don't know.</p> <p>25 Q You won't actually provide credit card</p>
99	<p>1 Counley</p> <p>2 Q Do you know what they sell?</p> <p>3 A It says drills and if I remember that</p> <p>4 one, I think it was just random machinery</p> <p>5 stuff.</p> <p>6 Q The next one says</p> <p>7 Isopureprotein diet.com. That's protein</p> <p>8 products; is that right?</p> <p>9 A Yes.</p> <p>10 Q Why do merchants like that use</p> <p>11 Durango?</p> <p>12 A Herbal supplements is another thing</p> <p>13 that a lot of banks are not comfortable with</p> <p>14 because they don't want to get in the</p> <p>15 practice of trying to determine which</p> <p>16 products are allowed and which products</p> <p>17 aren't.</p> <p>18 Q Bodygenic.com you have down as</p> <p>19 vitamins?</p> <p>20 A Yes.</p> <p>21 Q The other one WI Home Bargains; can</p> <p>22 you tell what that is?</p> <p>23 A It looks like advertising.</p> <p>24 Q Why would an advertising operation use</p> <p>25 Woodforest?</p>	101	<p>1 Counley</p> <p>2 services to the mafia?</p> <p>3 A No.</p> <p>4 Q So there are some businesses that you</p> <p>5 wouldn't be engaged in, correct?</p> <p>6 A Probably for fear of our families'</p> <p>7 lives and things like that.</p> <p>8 Q Is it fair to say, with the exception</p> <p>9 of drillsandcutters.com, that the other</p> <p>10 websites on this page that you sent to</p> <p>11 Woodforest were high risk merchants?</p> <p>12 A No, I don't know what Maximum Mojo is</p> <p>13 and Mob, Inc. and Plaza Stores, but besides</p> <p>14 those, yes.</p> <p>15 Q Do you recognize these as all websites</p> <p>16 that you sent to Woodforest at or about the</p> <p>17 times listed on the left?</p> <p>18 A I recognize -- I mean I've personally</p> <p>19 sent up 1,400 or 1,500 accounts in five and a</p> <p>20 half years, so they might look familiar.</p> <p>21 Q How many of those accounts still</p> <p>22 provide you with residuals?</p> <p>23 A I would say 500/600 max.</p> <p>24 Q Let's look at Counley Exhibit 10.</p> <p>25 A It might be higher than 500. I was</p>

102	<p>1 Counley</p> <p>2 shooting from the hip.</p> <p>3 Q Okay. Can you tell me how much money</p> <p>4 you received in residuals, let's say, in</p> <p>5 2009?</p> <p>6 A Durango or myself?</p> <p>7 Q Let's start with you personally.</p> <p>8 A 214,000.</p> <p>9 Q How about Durango?</p> <p>10 A I think it was close to 2 million.</p> <p>11 Q Okay. Looking at Counley 10, on the</p> <p>12 first page do you recognize any of these</p> <p>13 websites as websites that you have sent to</p> <p>14 Woodforest?</p> <p>15 A I recognize a good number of them.</p> <p>16 Q Which ones do you recognize?</p> <p>17 A Rod Rock Hard Productions.</p> <p>18 Q What did they do?</p> <p>19 A That was an adult account.</p> <p>20 Q Which other ones?</p> <p>21 A VRE Internet was also adult.</p> <p>22 Q Okay.</p> <p>23 A Match Making Moms, I remember that.</p> <p>24 That was a dating website for moms to set</p> <p>25 their kids up with. It sounds like a good</p>	104	<p>1 Counley</p> <p>2 Q I think you may have skipped the</p> <p>3 second page.</p> <p>4 A I'm sorry. Do you want me to go back</p> <p>5 to page 2?</p> <p>6 Q Yes. Let's just do this logically.</p> <p>7 Do you recognize any of these websites?</p> <p>8 A Again, they are all vaguely familiar.</p> <p>9 Q Any of the websites on this page, do</p> <p>10 you recollect whether they were replica</p> <p>11 websites, websites selling replica products?</p> <p>12 A Looking at the account names, it</p> <p>13 doesn't appear to be -- I mean we went</p> <p>14 through this just the other day. We went</p> <p>15 through our residual reports and tried to</p> <p>16 pick out bags, sunglasses, watches. That's</p> <p>17 kind of the same idea we are doing here,</p> <p>18 trying to figure out by the account name what</p> <p>19 they are selling.</p> <p>20 MR. WEIGEL: Off the record.</p> <p>21 (Whereupon a luncheon recess</p> <p>22 was taken.)</p> <p>23 BY MR. WEIGEL:</p> <p>24 Q Mr. Counley, starting with Counley</p> <p>25 Exhibit 10, I think we are on page 3 and this</p>
103	<p>1 Counley</p> <p>2 idea. She said she was on Oprah, I think.</p> <p>3 Q Any other ones?</p> <p>4 A I can't remember. Again, they all</p> <p>5 seem vaguely familiar.</p> <p>6 Q Did anyone else at Durango submit</p> <p>7 merchants to Woodforest under your rep</p> <p>8 number?</p> <p>9 A Yes. Everybody used my rep number.</p> <p>10 Q Do you believe you were involved in</p> <p>11 some way or another with all the ones on this</p> <p>12 page?</p> <p>13 A I couldn't answer that.</p> <p>14 Q Do you recognize any of the ones on</p> <p>15 the second page?</p> <p>16 A Yes, most of these are going to be</p> <p>17 vaguely familiar if I look at them and try to</p> <p>18 think back.</p> <p>19 Q Do you know if any of the ones on this</p> <p>20 page were replica merchants?</p> <p>21 A Discount Replicas, that's the one that</p> <p>22 stands out for me.</p> <p>23 Q What page number are you looking at?</p> <p>24 MR. KENNEDY: I think he's on</p> <p>25 the third page.</p>	105	<p>1 Counley</p> <p>2 is the application report issued by</p> <p>3 Woodforest. We were on the third page and I</p> <p>4 want to direct your attention to a couple of</p> <p>5 different merchants.</p> <p>6 One is called pinkcalyx.com. Do you</p> <p>7 remember that?</p> <p>8 A Yes.</p> <p>9 Q Do you remember that that entity is a</p> <p>10 replica merchant?</p> <p>11 A No.</p> <p>12 Q How about Shopping Addiction; do you</p> <p>13 know if they are a replica merchant?</p> <p>14 A That one I think was.</p> <p>15 Q I think you mentioned previously that</p> <p>16 Discount Replicas was a replica merchant?</p> <p>17 A I think that was in the list of</p> <p>18 accounts we sent over, a list of reports and</p> <p>19 it says replica.</p> <p>20 Q What about Liltrendybabies.com?</p> <p>21 A I don't remember that one being --</p> <p>22 Q How about Prime Time Enterprises?</p> <p>23 A No.</p> <p>24 Q Lee Luxury Bags?</p> <p>25 A We discussed this one. I discussed it</p>

110	<p>1 Counley</p> <p>2 proposing to send Jennifer Kirk to?</p> <p>3 A Yes.</p> <p>4 Q Did you actually, in fact, send any</p> <p>5 websites to Intabill for replica products?</p> <p>6 A Probably.</p> <p>7 Q Did you receive residuals?</p> <p>8 A Yes.</p> <p>9 Q Do you remember what websites you sent</p> <p>10 to Intabill?</p> <p>11 A No.</p> <p>12 Q Are you familiar with a website</p> <p>13 highriskusmerchantaccount.com?</p> <p>14 A An agent of ours, most likely. I</p> <p>15 don't know. I would have to see what you are</p> <p>16 referencing. I don't know if this matters.</p> <p>17 There are agents of ours that have similar</p> <p>18 domain names. If it's the same one you are</p> <p>19 talking about, I don't know.</p> <p>20 MR. WEIGEL: Mark this Counley</p> <p>21 11.</p> <p>22 (Whereupon printout from High</p> <p>23 Risk Merchant Accounts website was</p> <p>24 marked Counley Exhibit 11 for</p> <p>25 identification as of this date.)</p>	112	<p>1 Counley</p> <p>2 they are, we need to update the website</p> <p>3 because after we received the subpoena from</p> <p>4 Gucci, we stopped taking replica.</p> <p>5 Q When did you stop taking replica</p> <p>6 products?</p> <p>7 A When we received the subpoena from</p> <p>8 Gucci regarding this case.</p> <p>9 Q Before you were sued?</p> <p>10 A I think the subpoena and then we</p> <p>11 discussed it and that's when we made kind of</p> <p>12 a policy change not to do it any longer.</p> <p>13 Q Did you continue to accept residuals</p> <p>14 from the accounts you had set up?</p> <p>15 MR. WENGROVSKY: Objection. Go</p> <p>16 ahead.</p> <p>17 A Yes, I don't see why they would stop</p> <p>18 sending residuals.</p> <p>19 Q Okay.</p> <p>20 A No one notified us not to accept</p> <p>21 replica.</p> <p>22 Q And this -- when you said it has your</p> <p>23 Apply Now button, you are referring to the</p> <p>24 symbol on the sort of right-hand side of the</p> <p>25 page that says Apply Now 95 Percent Approval?</p>
111	<p>1 Counley</p> <p>2 Q What I have handed you is Counley</p> <p>3 Exhibit 11 is a screen shot. I think the</p> <p>4 website is highriskusmerchantaccount.com. Do</p> <p>5 you have it in front of you?</p> <p>6 A Yes.</p> <p>7 Q Is this operation affiliated with</p> <p>8 Durango at all?</p> <p>9 A By the looks of it, it appears to be</p> <p>10 an agent of ours because it has our Apply Now</p> <p>11 button on the right-hand side, but it's not</p> <p>12 our website, no.</p> <p>13 Q Do you know who operates this website?</p> <p>14 A I would have to ask Bill.</p> <p>15 Q Are you familiar with an outfit</p> <p>16 referred to as HR Payment Processing in San</p> <p>17 Antonio, Texas?</p> <p>18 A No, but that doesn't mean that they</p> <p>19 are not part of Durango or affiliated with</p> <p>20 Durango.</p> <p>21 Q Do you know if Durango is currently</p> <p>22 accepting applications from this agent?</p> <p>23 A From where?</p> <p>24 Q From this website.</p> <p>25 A This one? I don't believe so. If</p>	113	<p>1 Counley</p> <p>2 A Correct.</p> <p>3 Q If you click on that, where does it</p> <p>4 send you?</p> <p>5 A An application page on Durango's</p> <p>6 website.</p> <p>7 Q You see here that they do list replica</p> <p>8 products as one of the products that you</p> <p>9 accept?</p> <p>10 A Yes. Is this a current printout of</p> <p>11 their website?</p> <p>12 Q Yes. It was printed out on June 13.</p> <p>13 A I'll have to follow-up with them and</p> <p>14 tell them to update it.</p> <p>15 MR. WEIGEL: Mark this as</p> <p>16 Counley Exhibit 12.</p> <p>17 (Whereupon printout from</p> <p>18 Merchant Accounts website was marked</p> <p>19 Counley Exhibit 12 for identification</p> <p>20 as of this date.)</p> <p>21 Q I think you said earlier that you have</p> <p>22 done work with The Transaction Group?</p> <p>23 A Yes.</p> <p>24 Q Who is that?</p> <p>25 A Michael Rupkalvis, R-U-P-K-A-L-V-I-S.</p>

118	<p>1 Counley</p> <p>2 replica products, you declined to process</p> <p>3 that application?</p> <p>4 A Yes. You will see that confirmed in</p> <p>5 the other customer service list.</p> <p>6 Q Why did you choose to do that?</p> <p>7 A It's not worth it. If we are paying</p> <p>8 for a bunch of lawyers and trips to get sued</p> <p>9 over, we are a small company. We don't have</p> <p>10 the resources to take on this kind of thing.</p> <p>11 Q You are certain that you are not now</p> <p>12 accepting replica merchants?</p> <p>13 A Unless they are lying to us on the</p> <p>14 applications.</p> <p>15 MR. WEIGEL: Please mark this</p> <p>16 as Counley Exhibit 15.</p> <p>17 (Whereupon application to</p> <p>18 Woodforest was marked Counley Exhibit</p> <p>19 15 for identification as of this</p> <p>20 date.)</p> <p>21 Q Mr. Counley, I've handed you</p> <p>22 Exhibit 15. Do you recognize this as an</p> <p>23 application that you helped to submit to</p> <p>24 Woodforest for a website entitled</p> <p>25 freshnewkickz.com?</p>	120
119	<p>1 Counley</p> <p>2 A Yes, I think so.</p> <p>3 Q Do you see a date on the top there?</p> <p>4 A December of '07, right.</p> <p>5 Q I see a December 4, 2007 date at the</p> <p>6 top. Do you see that?</p> <p>7 A Okay. It's hard for me to read.</p> <p>8 Q Do you see it on the upper left-hand</p> <p>9 side there?</p> <p>10 A Yes, sorry.</p> <p>11 Q Do you have any reason to doubt you</p> <p>12 submitted this application on behalf of Fresh</p> <p>13 New Kickz on or about December 4, 2007?</p> <p>14 A No.</p> <p>15 Q This application indicates that they</p> <p>16 are clearly selling replica products,</p> <p>17 correct?</p> <p>18 A Correct.</p> <p>19 Q And they indicate that the products</p> <p>20 are made in China; do you see that?</p> <p>21 A Okay.</p> <p>22 Q It says "List the name and addresses</p> <p>23 of vendors from whom the product is</p> <p>24 purchased" and it says "Vendors listed as</p> <p>25 trade references"?</p>	121
120	<p>1 Counley</p> <p>2 A I do.</p> <p>3 Q You see that it's the Jie Mei Trade</p> <p>4 Company Limited in Fujian, China?</p> <p>5 A Yes.</p> <p>6 Q And you charged them a rate of 3.5?</p> <p>7 A Yes.</p> <p>8 Q Do you have any idea how that was</p> <p>9 determined?</p> <p>10 A Three and a half to 4 percent is</p> <p>11 general rate that a lot of high risk</p> <p>12 merchants pay.</p> <p>13 Q The last few pages of this exhibit are</p> <p>14 screen shots on the website?</p> <p>15 A Okay.</p> <p>16 Q Do you remember reviewing this</p> <p>17 website?</p> <p>18 A No.</p> <p>19 Q Do you believe you reviewed this</p> <p>20 website?</p> <p>21 A We probably did look for policy and</p> <p>22 contact information.</p> <p>23 Q Do you see under product it lists</p> <p>24 Gucci shoes and I guess the fifth or the</p> <p>25 sixth up from the bottom?</p>	121

122	<p>1 Counley</p> <p>2 applications, but for the time being I want</p> <p>3 you to assume some of them say 278 and some</p> <p>4 say 277 under the merchants -- the MUD</p> <p>5 number.</p> <p>6 A All right.</p> <p>7 Q Do you have any understanding as to</p> <p>8 when you use one versus the other?</p> <p>9 MR. WENGROVSKY: Objection.</p> <p>10 A I never made any changes to that area.</p> <p>11 Q Did you cross off 278 and write 277</p> <p>12 there?</p> <p>13 A I never made any changes to that area.</p> <p>14 Q This was just on the application when</p> <p>15 it came up on your computer screen?</p> <p>16 A Someone else, after I sent this in,</p> <p>17 made that change.</p> <p>18 Q You have on your computer --</p> <p>19 A 278 would appear on the screen.</p> <p>20 Q This application would come up on your</p> <p>21 screen and it would already have 278 on it?</p> <p>22 A Right.</p> <p>23 Q You can see Dress 4 Envy lists the</p> <p>24 product as replica products?</p> <p>25 A Yes.</p>	124	<p>1 Counley</p> <p>2 Q So basically you also judge it based</p> <p>3 upon whether you think they have someplace</p> <p>4 else to go?</p> <p>5 A Yes. There are other processors doing</p> <p>6 replica accounts, so no one is going to pay</p> <p>7 18 percent.</p> <p>8 Q During this time period and I guess</p> <p>9 this one was sent in November of 2007; do you</p> <p>10 see that?</p> <p>11 A Yes.</p> <p>12 Q During this time period who were your</p> <p>13 other competitors in terms of finding banks</p> <p>14 to process credit cards for replica</p> <p>15 merchants?</p> <p>16 A There is still a lot -- I mean to this</p> <p>17 day, Durango gets contacted by processors</p> <p>18 trying to have us send them business and they</p> <p>19 say we accept replica products. To this day</p> <p>20 there are still processors out there or other</p> <p>21 brokerage firms, so, I couldn't give you a</p> <p>22 list of all of the people out there. I mean</p> <p>23 there is a lot of brokers like Durango.</p> <p>24 Q I'm asking you, sitting here today,</p> <p>25 whether you have any names that come to mind</p>
123	<p>1 Counley</p> <p>2 Q Is that something you would have</p> <p>3 written in?</p> <p>4 A Yes. We did do that on some of these.</p> <p>5 Q Can you tell what you typed in and</p> <p>6 what the merchant typed in?</p> <p>7 A No, because anyone can type in with</p> <p>8 Adobe. I can't recall if I typed in</p> <p>9 information or they did.</p> <p>10 Q Where they say list the names and</p> <p>11 addresses of vendors from whom the product</p> <p>12 was purchased, it says See Trade Reference;</p> <p>13 do you see that?</p> <p>14 A Yes.</p> <p>15 Q It lists Popular Way?</p> <p>16 A Yes. I'm not sure who Popular Way is.</p> <p>17 Q Now, this merchant you charged 3.75.</p> <p>18 Do you know how you came upon that rate?</p> <p>19 A Again, I mean it's just a range and</p> <p>20 sometimes we -- this probably sounds bad, but</p> <p>21 sometimes if the merchant is more difficult</p> <p>22 to deal with, they call and they're pushy and</p> <p>23 hard to communicate. I'm sure you have a</p> <p>24 similar situation. If this guy is going to</p> <p>25 cost a little more of my time, you know.</p>	125	<p>1 Counley</p> <p>2 that are competitors or were competitors of</p> <p>3 yours at this time for placing replica</p> <p>4 product merchants?</p> <p>5 A One off the top of my head is AVPS,</p> <p>6 AVP Solutions.</p> <p>7 Q Anyone else that you can think of?</p> <p>8 A Not off the top of my head, but I know</p> <p>9 there are others.</p> <p>10 Q Again, under Dress 4 Envy website, did</p> <p>11 you review that website before submitting the</p> <p>12 application?</p> <p>13 A It's the same as the last application,</p> <p>14 we do check for refund policy and contact</p> <p>15 information. I do see now on the printout it</p> <p>16 says Gucci on here.</p> <p>17 Q It lists a number of Gucci shoe</p> <p>18 products, right? There are pictures of Gucci</p> <p>19 shoes?</p> <p>20 A There are.</p> <p>21 Q And then in the men's category it says</p> <p>22 Gucci in terms of the brands they carry. Do</p> <p>23 you see that?</p> <p>24 A I see that.</p> <p>25 Q And also in the woman's category it</p>

134	<p>1 Counley</p> <p>2 2007. Do you see that?</p> <p>3 A Yes.</p> <p>4 Q That indicates that they were selling</p> <p>5 replica watches?</p> <p>6 A It does.</p> <p>7 Q Was this another individual which was</p> <p>8 referred to you by Jennifer Kirk?</p> <p>9 A Yes. Now that I'm looking at it, I do</p> <p>10 remember the name and I see that Laurette</p> <p>11 Company is listed as a reference on the</p> <p>12 application.</p> <p>13 Q Did you ever check any of the</p> <p>14 references?</p> <p>15 A No, it's not our job to check</p> <p>16 references.</p> <p>17 Q Did you ever speak to Mr. Norlie?</p> <p>18 A A lot of merchants I deal with are</p> <p>19 primarily e-mail. I don't know if I spoke</p> <p>20 with him.</p> <p>21 Q Was this a website that was</p> <p>22 successful?</p> <p>23 MR. WENGROVSKY: Objection.</p> <p>24 Q Did you get residuals from this</p> <p>25 website?</p>	136	<p>1 Counley</p> <p>2 Q Did you happen to see under men's</p> <p>3 watches that they carry Gucci products?</p> <p>4 A I see that now.</p> <p>5 Q Under women's watches they list Gucci</p> <p>6 products?</p> <p>7 A I do see that now.</p> <p>8 Q Do you see where it says "Are you</p> <p>9 watches authentic" and it says "All products</p> <p>10 sold are exact replicas and not being sold or</p> <p>11 represented as original." Do you see that?</p> <p>12 A I do. I do now.</p> <p>13 Q Do you have any reason to doubt that</p> <p>14 you knew that these -- this website</p> <p>15 hotshotwatches.com were selling replica Gucci</p> <p>16 watches at the time you submitted the</p> <p>17 account?</p> <p>18 MR. WENGROVSKY: Objection.</p> <p>19 A Read that back.</p> <p>20 (Whereupon the record was read</p> <p>21 back by the reporter.)</p> <p>22 A It's the same question. We knew they</p> <p>23 had replica watches. Whether or not they</p> <p>24 were selling replica Gucci products, I'm not</p> <p>25 sure.</p>
135	<p>1 Counley</p> <p>2 A I would have to look at the residual</p> <p>3 reports.</p> <p>4 Q If you look at the description of</p> <p>5 products sold, it says selling replica</p> <p>6 watches?</p> <p>7 A Yes.</p> <p>8 Q It says the watches are coming from EH</p> <p>9 Best Fashion in Guangzhou, China?</p> <p>10 A Correct.</p> <p>11 Q If you flip to the next page under</p> <p>12 Frequently Asked Questions, these were</p> <p>13 printed out of the website. Can you see</p> <p>14 that?</p> <p>15 A I do.</p> <p>16 Q You reviewed the website to make sure</p> <p>17 they had a returns or exchange policy,</p> <p>18 correct?</p> <p>19 A Right.</p> <p>20 Q Did you review this page?</p> <p>21 A I must have clicked on this page and</p> <p>22 once I saw the return policy then my job is</p> <p>23 done.</p> <p>24 Q Okay?</p> <p>25 A I don't know -- well, go ahead.</p>	137	<p>1 Counley</p> <p>2 Q Do you have any doubt that you could</p> <p>3 have determined what kind of products they</p> <p>4 were selling if you just looked through the</p> <p>5 website?</p> <p>6 MR. WENGROVSKY: Objection.</p> <p>7 A It's not our job to review for</p> <p>8 products or underwrite accounts.</p> <p>9 Q I understand, but do you have any</p> <p>10 doubt that if you wanted to find out what</p> <p>11 kind of products they were selling, you could</p> <p>12 have looked at the website and determined it?</p> <p>13 MR. WENGROVSKY: Repeat the</p> <p>14 objection.</p> <p>15 A If that was our role in the process,</p> <p>16 we could do that, but that's not our role.</p> <p>17 Q I understand you say it's not your</p> <p>18 role, but it wouldn't have been difficult for</p> <p>19 you to determine what products they were</p> <p>20 selling; is that correct?</p> <p>21 MR. WENGROVSKY: That's been</p> <p>22 asked and answered.</p> <p>23 Q You can answer until he tells you not</p> <p>24 to.</p> <p>25 A Okay, I suppose, but our duty isn't to</p>

138	<p>1 Counley</p> <p>2 be a police force where we review products</p> <p>3 and see if they are doing trademark</p> <p>4 infringement or not. I don't know what it</p> <p>5 takes to be able to tell if they are selling</p> <p>6 trademark products or not.</p> <p>7 I don't know what it would take, so</p> <p>8 would it be difficult or not? Would I have</p> <p>9 to be educated and know the market? I don't</p> <p>10 know. I can't answer that.</p> <p>11 MR. WEIGEL: Mark this as</p> <p>12 Counley Exhibit 20.</p> <p>13 (Whereupon application to</p> <p>14 Woodforest was marked Counley Exhibit</p> <p>15 20 for identification as of this</p> <p>16 date.)</p> <p>17 Q Going back to Exhibit 9 for a second.</p> <p>18 Would you accept and submit an application</p> <p>19 such as the one for Hot Shot Watches today?</p> <p>20 A No.</p> <p>21 Q Why not?</p> <p>22 A Same answer as before. Replica</p> <p>23 products are not a venture we are looking to</p> <p>24 get into given the legal complications.</p> <p>25 Q Turning your attention to Exhibit 20,</p>	140	<p>1 Counley</p> <p>2 A Correct.</p> <p>3 Q These folks are only paying</p> <p>4 3.25 percent. Do you know how they managed</p> <p>5 to negotiate that rate?</p> <p>6 A No. I don't recall the specific</p> <p>7 circumstances that resulted in the lower</p> <p>8 rate.</p> <p>9 Q Looking at the fax header for a</p> <p>10 second, you see the first page of the</p> <p>11 application starts out 2 of 6 and there is 3</p> <p>12 of six and then for some reason it goes to 6</p> <p>13 of 6?</p> <p>14 A Correct.</p> <p>15 Q I don't know where the middle pages</p> <p>16 went. You see there is a "to" number at the</p> <p>17 top? It says "To: 18009711063"?</p> <p>18 A Yes.</p> <p>19 Q Is there your fax number?</p> <p>20 A No.</p> <p>21 Q Is that the fax number for Joe</p> <p>22 Montella in Arizona?</p> <p>23 A I didn't fax these to Joe, so I would</p> <p>24 say no, but I'm not really sure of the</p> <p>25 process once I sent them to Joe.</p>
139	<p>1 Counley</p> <p>2 this is an application you submitted on</p> <p>3 behalf of charismatic.com; do you see that?</p> <p>4 A Yes.</p> <p>5 Q Do you know who referred this customer</p> <p>6 to you?</p> <p>7 A No, not off the top of my head.</p> <p>8 Q Okay. Again, they indicate plainly on</p> <p>9 the front of this application that they sell</p> <p>10 replica products?</p> <p>11 A That's true.</p> <p>12 Q Is that something that you typed in?</p> <p>13 A I think I must have. It seems to be a</p> <p>14 pattern, so I'm going to assume that I was</p> <p>15 the one putting that in there.</p> <p>16 Q Where it says description of products</p> <p>17 sold, it says replica products; do you see</p> <p>18 that?</p> <p>19 A Yes.</p> <p>20 Q And again it says see trade reference</p> <p>21 where it is asking who the vendors were it</p> <p>22 was purchasing from?</p> <p>23 A Correct.</p> <p>24 Q And that is an address in China, a</p> <p>25 company in China?</p>	141	<p>1 Counley</p> <p>2 Q You don't know if you looked at the</p> <p>3 screen shots on the back of this or not?</p> <p>4 A The same answer as before. Once I</p> <p>5 have seen they have a refunds policy, we can</p> <p>6 submit the application.</p> <p>7 Q You can tell that this website is</p> <p>8 selling Gucci products; is that correct?</p> <p>9 MR. WENGROVSKY: Currently?</p> <p>10 MR. WEIGEL: At the time this</p> <p>11 website -- at the time the screen</p> <p>12 shots were made.</p> <p>13 MR. WENGROVSKY: What is the</p> <p>14 question?</p> <p>15 Q Can you today tell that they were</p> <p>16 selling Gucci products at the time this</p> <p>17 screen shot was made?</p> <p>18 A Yes.</p> <p>19 Q You see it says here</p> <p>20 "Charismaticstyle.com offers a range of</p> <p>21 replica bags so perfect that unless you let</p> <p>22 the cat out of the bag, no one will know that</p> <p>23 they are the original"? Do you see that?</p> <p>24 A I do.</p> <p>25 Q It says "We are not affiliated in any</p>

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1 Counley
2 way with the designers whose items we offer
3 in our online store." Do you see that, at
4 the very bottom there?
5 A I do.
6 Q Was it important to you that a website
7 such as charismaticstyle.com included a
8 disclaimer to indicate to customers that it
9 was selling replicas and not originals?
10 MR. WENGROVSKY: Just a
11 clarification. By you, do you mean
12 Nathan individually or Durango
13 Merchant Services?
14 MR. WEIGEL: Either.
15 MR. WENGROVSKY: Okay.
16 A Yes, I think that was the general
17 practice once Frontline, after Bag Addiction,
18 told us that customers need to be aware that
19 they are replicas, I'm pretty sure we told
20 all the other merchants they had to follow
21 suit, otherwise we would be wasting time.
22 Q Do you remember who you had that
23 conversation with at Frontline?
24 MR. WENGROVSKY: Objection.
25 A I have seen the e-mails from Hans

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1 Counley
2 Strickler.
3 Q Did you ever have a conversation with
4 Mr. Strickler or a face-to-face meeting?
5 A Yes, I have had many phone calls with
6 Hans Strickler.
7 Q Did you ever discuss the need to
8 disclose the fact that a replica merchant was
9 selling replicas over the phone with him?
10 MR. WENGROVSKY: Do you mind
11 reading that back?
12 (Whereupon the record was read
13 back by the reporter.)
14 MR. WEIGEL: That was a really
15 bad question. Let me rephrase it.
16 Q Did you ever discuss, over the
17 telephone with Mr. Strickler, the need for a
18 replica merchant to disclose that they were
19 selling replica products on their website?
20 MR. WENGROVSKY: Disclose to
21 whom I think would be helpful.
22 Q Disclose to their customers.
23 A It's quite possible. I don't remember
24 a specific conversation, but it's very likely
25 that in addition to the e-mail Hans sent

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1 Counley
2 about this, we also had a phone conversation
3 concerning the same topic of disclosing to
4 customers.
5 MR. WEIGEL: Mark this as
6 Counley Exhibit 21.
7 (Whereupon application to
8 Woodforest was marked Counley Exhibit
9 21 for identification as of this
10 date.)
11 Q Now again, Exhibit 21 is an
12 application that you submitted on behalf of
13 Prime Time Enterprises; do you see that?
14 A Yes.
15 Q Again, this was faxed to the same 800
16 number, (800) 971-1063?
17 A I think that's a Woodforest fax
18 number.
19 Q You think so?
20 A It must be.
21 Q Do you see that this gentleman
22 receives his product from Huaren H-U-A-R-E-N
23 Trading? Do you see that?
24 A Yes.
25 Q Did you understand that these were

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1 Counley
2 replica products?
3 A It's what the application states,
4 correct.
5 MR. KENNEDY: Can you point out
6 where you are reading that?
7 THE WITNESS: Top of page 2.
8 Q It says replica and athletic wear. Is
9 that what you are referring to?
10 A Yes.
11 Q If you look at the screen shots behind
12 it, you will see they are selling a number of
13 Gucci products?
14 A Yes.
15 Q I take it you don't remember whether
16 you knew at the time that they were selling
17 replica Gucci products or not; is that
18 correct?
19 A I don't even know that Gucci makes
20 shoes so, no. I'm not trying to be smart.
21 It says here Gucci -- dress it up or down
22 when walking or jogging or even for every day
23 use. No, I don't recall.
24 Q They will be very disappointed to know
25 that you don't know that they make shoes. In

146	<p>1 Counley</p> <p>2 all seriousness, whether Gucci made shoes or</p> <p>3 not, did you know that this website was</p> <p>4 selling shoes that purported to be made by</p> <p>5 Gucci?</p> <p>6 MR. KENNEDY: Objection to the</p> <p>7 form of the question.</p> <p>8 A I knew the website sold products that</p> <p>9 are replicas. I did not know they were</p> <p>10 selling replica products that had Gucci's</p> <p>11 trademark.</p> <p>12 MR. WEIGEL: Mark this as</p> <p>13 Counley Exhibit 22.</p> <p>14 (Whereupon application to</p> <p>15 Woodforest was marked Counley Exhibit</p> <p>16 22 for identification as of this</p> <p>17 date.)</p> <p>18 Q Exhibit 22 is an application that you</p> <p>19 submitted to Woodforest on behalf of</p> <p>20 Leeluxurybags.com; do you see that?</p> <p>21 A Yes, but I don't recall this one.</p> <p>22 Q This has your name on it?</p> <p>23 A I realize -- I think everyone in</p> <p>24 Durango uses the same application and</p> <p>25 sometimes my name didn't get taken off. For</p>	148	<p>1 Counley</p> <p>2 A This one was an agent Chris Ortega and</p> <p>3 I just remember him because he was a colorful</p> <p>4 person to work with.</p> <p>5 Q Can you see from the two screen shots</p> <p>6 that are attached here that they sell replica</p> <p>7 Gucci products?</p> <p>8 A I do see that on the screen shots. Or</p> <p>9 rather can I -- can I add to that? I see</p> <p>10 they have Gucci listed on the left-hand side,</p> <p>11 but I don't see any Gucci products.</p> <p>12 Q There are particular pages of the</p> <p>13 website attached to this that only refer to</p> <p>14 Chloe products?</p> <p>15 A Correct.</p> <p>16 Q But they do list Gucci as one of the</p> <p>17 brands they carry?</p> <p>18 A They do have Gucci listed on the</p> <p>19 left-hand side.</p> <p>20 MR. WEIGEL: Please mark this</p> <p>21 as Counley Exhibit 23.</p> <p>22 (Whereupon application to</p> <p>23 Woodforest was marked Counley Exhibit</p> <p>24 23 for identification as of this</p> <p>25 date.)</p>
147	<p>1 Counley</p> <p>2 the purposes of your question, I'm not sure</p> <p>3 if it matters if I sent it in or if Shane</p> <p>4 sent it in, does it?</p> <p>5 Q So, you are confident that somebody at</p> <p>6 Durango sent it in; whether it was you or</p> <p>7 not, you don't know?</p> <p>8 A Correct.</p> <p>9 Q Do you think it might have been</p> <p>10 somebody else at Durango?</p> <p>11 A I think this one was because there is</p> <p>12 an -- on some communication we had from there</p> <p>13 is from Lee Luxury Lines and Lee Luxury Bags.</p> <p>14 I saw that, two Lee Luxury.</p> <p>15 Q If you see on the application you will</p> <p>16 see it has both.</p> <p>17 A Oh, okay.</p> <p>18 Q Does that refresh your recollection in</p> <p>19 any way?</p> <p>20 A Yes. I think this one was not sent in</p> <p>21 by me but someone at Durango.</p> <p>22 Q Do you know if this was referred to</p> <p>23 you by somebody?</p> <p>24 A Yes.</p> <p>25 Q Who referred this one to Durango?</p>	149	<p>1 Counley</p> <p>2 Q Exhibit 23 is another application that</p> <p>3 you submitted to Woodforest on behalf of</p> <p>4 freshstyles.com; do you see that?</p> <p>5 A No.</p> <p>6 Q Exhibit 23 was submitted by you on</p> <p>7 behalf of thepurseboutique.com; do you see</p> <p>8 that?</p> <p>9 A Correct.</p> <p>10 Q And that was a merchant that was</p> <p>11 located in East Northport, New York; do you</p> <p>12 see that?</p> <p>13 A I do.</p> <p>14 Q And she was proposing that she was</p> <p>15 going to be doing \$25,000 per month; do you</p> <p>16 see that?</p> <p>17 A I do.</p> <p>18 Q Was this a merchant that was referred</p> <p>19 to you by Jennifer Kirk?</p> <p>20 A Yes.</p> <p>21 Q Did you have any trouble or any</p> <p>22 problem doing with a merchant in New York?</p> <p>23 MR. WENGROVSKY: Objection.</p> <p>24 A I'm not sure --</p> <p>25 MR. WENGROVSKY: Can you be</p>

150	<p>1 Counley</p> <p>2 more specific?</p> <p>3 Q I'll ask a different question.</p> <p>4 Durango didn't have any policy against doing</p> <p>5 work with merchants in New York?</p> <p>6 A We don't target New York for business,</p> <p>7 but if someone from New York wants us to</p> <p>8 submit an application, we will.</p> <p>9 Q Do you know how many merchants you</p> <p>10 personally submitted applications for that</p> <p>11 came from New York?</p> <p>12 A Really I would have great difficulty</p> <p>13 finding that answer, but I would assume it's</p> <p>14 not a large percentage.</p> <p>15 Q Is there any reason that you would get</p> <p>16 less New Yorkers than any other state in the</p> <p>17 union?</p> <p>18 A I'm not sure. In my memory I don't</p> <p>19 recall doing business with a lot of New</p> <p>20 Yorkers. For some reason, it doesn't seem</p> <p>21 like a state that I got a lot of applications</p> <p>22 from, but there is nothing physically</p> <p>23 limiting New Yorkers from applying.</p> <p>24 Q Well, you said you didn't specifically</p> <p>25 target New York, but did you specifically</p>	152	<p>1 Counley</p> <p>2 for New York and he had five or six people</p> <p>3 who were agents?</p> <p>4 A Correct.</p> <p>5 Q Do you remember the names of any of</p> <p>6 them?</p> <p>7 A I didn't ask.</p> <p>8 MR. WENGROVSKY: I can</p> <p>9 represent to you that that included</p> <p>10 past and/or current. I believe it was</p> <p>11 an all encompassing list from</p> <p>12 beginning of the company.</p> <p>13 THE WITNESS: Five or six and</p> <p>14 of those only two or three are active.</p> <p>15 I don't think some are even sending us</p> <p>16 accounts anymore.</p> <p>17 Q Do you have merchants in New York that</p> <p>18 you get residuals from?</p> <p>19 A Most likely, yes.</p> <p>20 Q Do you know how many?</p> <p>21 A I think we represented to you earlier</p> <p>22 that it was a small percentage.</p> <p>23 Q I'm just asking how many in all</p> <p>24 numbers?</p> <p>25 A No.</p>
151	<p>1 Counley</p> <p>2 target any state?</p> <p>3 A No.</p> <p>4 Q So you were just as likely to get an</p> <p>5 application from New York as any other state?</p> <p>6 MR. WENGROVSKY: Objection.</p> <p>7 A We don't -- of the 300 to 400 agents</p> <p>8 we have that send us things, I think five max</p> <p>9 were ever from New York, so our agent base</p> <p>10 wasn't really New York focused.</p> <p>11 Q Who were your agents in New York?</p> <p>12 A I would have to get that from Bill for</p> <p>13 you.</p> <p>14 Q Is there a listing somewhere of all of</p> <p>15 your agents?</p> <p>16 A No, it would just be all of the --</p> <p>17 it's really informal. It's just Bill's</p> <p>18 contact --</p> <p>19 Q How do you know, as you are sitting</p> <p>20 here, that it was only five or six from New</p> <p>21 York?</p> <p>22 A I talked with him on the phone last</p> <p>23 week about it and he went through his contact</p> <p>24 list for New York.</p> <p>25 Q So he went through his contact list</p>	153	<p>1 Counley</p> <p>2 Q Do you know how much money Durango</p> <p>3 receives every month in residuals from</p> <p>4 merchants based in New York?</p> <p>5 A I believe it represents a small</p> <p>6 percentage.</p> <p>7 Q I'm just asking you if you know.</p> <p>8 A No.</p> <p>9 Q Do you know if it's \$10,000 a month?</p> <p>10 A I would doubt it.</p> <p>11 Q Do you know if it's \$100,000 a month?</p> <p>12 A I'm pretty sure it's not.</p> <p>13 Q Are you aware that Melissa Gampel was</p> <p>14 in the same business as Jennifer Kirk?</p> <p>15 A Yes.</p> <p>16 Q And you know that Melissa Gampel was</p> <p>17 selling replica handbags; is that correct?</p> <p>18 A Yes.</p> <p>19 Q How did you come up with the 3.75</p> <p>20 percent rate for Melissa Gampel?</p> <p>21 A Standard rates that went out to almost</p> <p>22 all these merchants.</p> <p>23 Q If you flip toward the back of the</p> <p>24 exhibit, the second to the last page, it has</p> <p>25 a bad fax -- bad copy of a fax of Ms. Gampel</p>

154	<p>1 Counley</p> <p>2 driver's license. Do you see that?</p> <p>3 A Yes.</p> <p>4 Q Was that something that was sent to</p> <p>5 you?</p> <p>6 A Yes, it had to have been. I don't</p> <p>7 know why it's in the middle of all of these</p> <p>8 pages. I didn't put them in this order and I</p> <p>9 didn't supply these other pages.</p> <p>10 Q Do you see screen shots describing the</p> <p>11 returns and exchanges policy?</p> <p>12 A You will have to give me a minute to</p> <p>13 find the page.</p> <p>14 Q Try WNB00580.</p> <p>15 A 58?</p> <p>16 Q 580?</p> <p>17 A 580. Yes.</p> <p>18 Q You see that?</p> <p>19 A Yes.</p> <p>20 Q Did you review this page before you</p> <p>21 submitted the application?</p> <p>22 A I reviewed the returns policy,</p> <p>23 correct.</p> <p>24 Q Do you see under hottest sellers it</p> <p>25 lists Gucci there on the left?</p>	156	<p>1 Counley</p> <p>2 MR. WEIGEL: Please mark this</p> <p>3 as Exhibit 24.</p> <p>4 (Whereupon application to</p> <p>5 Woodforest was marked Counley Exhibit</p> <p>6 24 for identification as of this</p> <p>7 date.)</p> <p>8 Q Exhibit 24 is an application that you</p> <p>9 submitted on behalf of freshstyles.com. Do</p> <p>10 you see that?</p> <p>11 A Yes.</p> <p>12 Q And they are located in Brooklyn, New</p> <p>13 York. Do you see that?</p> <p>14 A Yes.</p> <p>15 Q They are selling replica clothing and</p> <p>16 watches?</p> <p>17 A Yes.</p> <p>18 Q Where it says description of products</p> <p>19 sold, it says replica clothing and watches;</p> <p>20 do you see that?</p> <p>21 A Yes.</p> <p>22 Q Is that something you typed in?</p> <p>23 A Seems consistent with the other</p> <p>24 applications, so I'm going to assume so.</p> <p>25 Q Now, on this one it looks like you</p>
155	<p>1 Counley</p> <p>2 A I do see that on the screen print</p> <p>3 here.</p> <p>4 Q Did you make these screen shots and</p> <p>5 include them with the application?</p> <p>6 A No.</p> <p>7 Q So you reviewed the returns and</p> <p>8 exchanges policy, but you don't usually make</p> <p>9 a screen shot of it?</p> <p>10 A I scroll to the page. I see it and</p> <p>11 close the window.</p> <p>12 Q Ms. Gampel's driver's license was from</p> <p>13 New York?</p> <p>14 A I did notice that.</p> <p>15 Q Can you turn back to Exhibit 20 for a</p> <p>16 second? That's charismaticstyle.com; do you</p> <p>17 see that?</p> <p>18 A Correct.</p> <p>19 Q That business is also located in New</p> <p>20 York; is that correct?</p> <p>21 A That is correct.</p> <p>22 Q Do you know what referred this website</p> <p>23 to you?</p> <p>24 A No, I think you asked me that already.</p> <p>25 No.</p>	157	<p>1 Counley</p> <p>2 typed in certain things and the rest was</p> <p>3 filled in by handwriting. Do you see that?</p> <p>4 A Correct.</p> <p>5 Q Do you think on this website that the</p> <p>6 typewritten portions are the things that you</p> <p>7 filled in?</p> <p>8 MR. WENGROVSKY: On this</p> <p>9 application. You said website.</p> <p>10 Q On this application, Exhibit 24, did</p> <p>11 you fill in the typewritten portions and the</p> <p>12 merchant filled in the handwritten portions?</p> <p>13 Is that your understanding?</p> <p>14 A I think that would be a fair</p> <p>15 assumption.</p> <p>16 Q You see on the last page of this</p> <p>17 exhibit which was faxed again to that same</p> <p>18 800 number; do you see that?</p> <p>19 A I do.</p> <p>20 Q "Freshstyle.com -The place to get the</p> <p>21 hottest gear --Home Jacob watch Gucci"; do</p> <p>22 you see that?</p> <p>23 A It does say Gucci. I don't remember</p> <p>24 what this guy was selling. I see it says</p> <p>25 belt buckles there and I vaguely remember</p>

158	<p>1 Counley</p> <p>2 something about belt buckles.</p> <p>3 Q Do you know if they were selling Gucci</p> <p>4 products or not?</p> <p>5 A I don't.</p> <p>6 MR. WEIGEL: Would this be a</p> <p>7 good time to take a break?</p> <p>8 THE WITNESS: It would be a</p> <p>9 great time to take a break.</p> <p>10 (Brief recess taken.)</p> <p>11 MR. WEIGEL: Please mark this</p> <p>12 as Counley Exhibit 25.</p> <p>13 (Whereupon listing of residual</p> <p>14 reports was marked Counley Exhibit 25</p> <p>15 for identification as of this date.)</p> <p>16 Q Exhibit 25 is a single sheet. Can you</p> <p>17 identify Exhibit 25, please?</p> <p>18 A No. I can take a guess at it, but I</p> <p>19 have never seen this before.</p> <p>20 Q You have never seen this before?</p> <p>21 A No.</p> <p>22 Q Does this look like a listing of the</p> <p>23 sales for the Laurette Company?</p> <p>24 A It looks like a listing of the</p> <p>25 residual reports from the Laurette Company to</p>	160	<p>1 Counley</p> <p>2 can get an account approved at Humboldt</p> <p>3 without having to pay 25 percent, yes, you</p> <p>4 are correct.</p> <p>5 Q But if Humboldt won't approve it</p> <p>6 because of the type of merchant, for example,</p> <p>7 then you are willing to submit it through</p> <p>8 Mr. Montella through Woodforest; is that</p> <p>9 correct?</p> <p>10 A Correct.</p> <p>11 Q It says charge-off at the bottom. Do</p> <p>12 you know what that refers to?</p> <p>13 A I do not.</p> <p>14 Q Now, under sales it lists a total of</p> <p>15 \$903,000 to Woodforest; do you see that?</p> <p>16 A I do.</p> <p>17 Q Is that consistent with your</p> <p>18 understanding as to how much business was</p> <p>19 submitted through Woodforest by Laurette?</p> <p>20 A It seems about right.</p> <p>21 Q How does that compare to the business</p> <p>22 that was submitted through Frontline?</p> <p>23 A I would say they are comparable.</p> <p>24 Q Then it says number of sales. I</p> <p>25 assume that's the number of different</p>
159	<p>1 Counley</p> <p>2 Joe Montella.</p> <p>3 Q It says MUD278 Montella. Do you see</p> <p>4 that?</p> <p>5 A Yes. That's why I said that.</p> <p>6 Q Is that the same Joe Montella that you</p> <p>7 submit the applications to?</p> <p>8 A Correct.</p> <p>9 Q How much of the residuals do you have</p> <p>10 to give to Mr. Montella?</p> <p>11 A 25 percent.</p> <p>12 Q Do you have any banks that you deal</p> <p>13 with directly without an individual such as a</p> <p>14 Mr. Montella in the middle?</p> <p>15 A Most of them are direct.</p> <p>16 Q Are direct?</p> <p>17 A Yes.</p> <p>18 Q So for most of them you don't have to</p> <p>19 pay the 25 percent to somebody else?</p> <p>20 A Correct.</p> <p>21 Q So is it fair to say you only submit</p> <p>22 to Woodforest the accounts that you can't</p> <p>23 place somewhere else because you have to pay</p> <p>24 25 percent to Mr. Montella first?</p> <p>25 A It's a combination of factors. If we</p>	161	<p>1 Counley</p> <p>2 purchases?</p> <p>3 A I'm not really sure what that means.</p> <p>4 Q How about returns; do you know what</p> <p>5 that column means?</p> <p>6 A Refunds.</p> <p>7 Q Is that different from chargebacks?</p> <p>8 A Yes.</p> <p>9 Q How do they differ?</p> <p>10 A Refund is when the merchant</p> <p>11 voluntarily issues the credit back.</p> <p>12 Chargeback is when the customer calls the</p> <p>13 card issuing bank and forces the money back.</p> <p>14 Q Are merchants penalized for the number</p> <p>15 of returns they have?</p> <p>16 A Not typically.</p> <p>17 Q Are they penalized for the number of</p> <p>18 chargebacks?</p> <p>19 A Well, depending on the bank. They get</p> <p>20 a 25 or 30-dollar fee per chargeback and</p> <p>21 typically the banks don't like them to have</p> <p>22 more than one percent chargeback ratio, but</p> <p>23 it's a loose --</p> <p>24 Q This indicates that they had</p> <p>25 chargebacks of -- 45 chargebacks in March of</p>

162	<p>1 Counley</p> <p>2 '08; do you see that?</p> <p>3 A I see that, but I'm not sure how it</p> <p>4 could be because it says chargeback dollars</p> <p>5 580. Those numbers don't match up.</p> <p>6 Q So you think perhaps it's a mistake?</p> <p>7 A I would have to guess it's a typo.</p> <p>8 Q What do you understand the next column</p> <p>9 to be; month-end fees?</p> <p>10 A Fees decide the discount rate paid</p> <p>11 so -- I guess the column to the right is</p> <p>12 daily discount and that's the qualified</p> <p>13 discount rate. Again, I'm speaking on this</p> <p>14 report which I'm not familiar with, so it</p> <p>15 could either mean the other additional fees,</p> <p>16 like transaction charges is 25 cents per</p> <p>17 transaction and the \$25 per chargeback fee.</p> <p>18 I'm not sure what else that would include.</p> <p>19 Q Do you get to share in those fees?</p> <p>20 A Yes.</p> <p>21 Q Do you know how the net profit figure</p> <p>22 is computed?</p> <p>23 A Not to the penny, but there is a, you</p> <p>24 know, there is the cost that Visa, MasterCard</p> <p>25 charges the bank processor on the discount</p>	164	<p>1 Counley</p> <p>2 Q Is this the kind of report that you</p> <p>3 have seen previously?</p> <p>4 A Yes.</p> <p>5 Q Can you describe what the first five</p> <p>6 columns represent?</p> <p>7 A Yes. First column is the month of</p> <p>8 residual report. The second column is</p> <p>9 residuals earned from Frontline aligned with</p> <p>10 the columns from the first column aligned</p> <p>11 with the rows. Third column Merchant Express</p> <p>12 that was paid on this account, and then the</p> <p>13 remainder is what stayed in Durango and then</p> <p>14 you see the percentage and the fifth column</p> <p>15 paid to Nathan Counley and then in the sixth</p> <p>16 column you see residuals that were split</p> <p>17 between Shane and Bill.</p> <p>18 Q So you made about \$3,800 and Durango</p> <p>19 made about \$7,000 from Frontline's processing</p> <p>20 of The Bag Addiction?</p> <p>21 A Correct.</p> <p>22 Q And there is a separate series of</p> <p>23 columns starting with Woodforest. What do</p> <p>24 those columns represent?</p> <p>25 A Same columns as for Frontline,</p>
163	<p>1 Counley</p> <p>2 rate and on the per transaction fee and then</p> <p>3 the markup or the profit above these discount</p> <p>4 rates and per transaction fees what tallies</p> <p>5 into the net profit.</p> <p>6 Q It says MUD residual and MCPS income</p> <p>7 and I think those two numbers add up to the</p> <p>8 net profit; do you see that?</p> <p>9 A Yes.</p> <p>10 Q Do you know what those two columns</p> <p>11 represent?</p> <p>12 A Again, having not seen it before, MUD</p> <p>13 residual I'm assuming means MUD number 278,</p> <p>14 Montella and that's what was paid to Joe</p> <p>15 Montella and MCPS is what Woodforest kept as</p> <p>16 profit.</p> <p>17 Q The last column is what Woodforest</p> <p>18 kept as profit?</p> <p>19 A Correct.</p> <p>20 MR. WEIGEL: Mark this as 26.</p> <p>21 (Whereupon report of residuals</p> <p>22 was marked Counley Exhibit 26 for</p> <p>23 identification as of this date.)</p> <p>24 A It's a Durango report of residuals</p> <p>25 earned on bagaddiction.com merchant account.</p>	165	<p>1 Counley</p> <p>2 Woodforest total residual earned by month.</p> <p>3 Metro Merchant is the agent listed, but if</p> <p>4 you scroll down to the bottom of this page,</p> <p>5 you will see for some reason Metro Merchant</p> <p>6 was not paid past February '07 due to an</p> <p>7 agreement issue and Merchant Express was paid</p> <p>8 as the agent.</p> <p>9 I'm not sure if we received the lead</p> <p>10 the second time or what happened exactly</p> <p>11 there. So it looks like Metro Merchant was</p> <p>12 paid through December '06 and then after that</p> <p>13 only Merchant Express was paid as the agent</p> <p>14 and then the column across to the right, so</p> <p>15 we have Woodforest total residuals, Metro</p> <p>16 Merchant paid out, remaining residuals and</p> <p>17 then Durango and the percentage to Nathan</p> <p>18 Counley and the percentage to Shane and Bill.</p> <p>19 Q When you look at the total Woodforest</p> <p>20 residual of \$8,900 that compares to the MUD</p> <p>21 residual on Exhibit 25 of 11,446; do you see</p> <p>22 that?</p> <p>23 A Yes.</p> <p>24 Q The difference between those two is</p> <p>25 the amount that went to Mr. Montella?</p>

166	<p>1 Counley</p> <p>2 A Should be.</p> <p>3 Q Did Durango receive its money directly</p> <p>4 from Woodforest or did it come from</p> <p>5 Mr. Montella?</p> <p>6 A Mr. Montella.</p> <p>7 Q Was Mr. Montella part of the MCCA</p> <p>8 companies?</p> <p>9 A I'm not really sure.</p> <p>10 Q We looked earlier -- you became an</p> <p>11 agent of MCCA, do you remember that?</p> <p>12 MR. WENGROVSKY: Objection.</p> <p>13 MR. WEIGEL: I can go back and</p> <p>14 find it.</p> <p>15 A Let me look at it real quick.</p> <p>16 Q Exhibit 6?</p> <p>17 A Yes, associate agreement.</p> <p>18 Q Is that the agreement by which you</p> <p>19 were working with Mr. Montella?</p> <p>20 A No, I think there is something else.</p> <p>21 I can get that to you this week.</p> <p>22 Q Do you know how Exhibit 26 came to be</p> <p>23 created?</p> <p>24 A The report was created by Bill</p> <p>25 Demopolis.</p>	168	<p>1 Counley</p> <p>2 (Whereupon residual report was</p> <p>3 marked Counley Exhibit 28 for</p> <p>4 identification as of this date.)</p> <p>5 THE WITNESS: Were these given</p> <p>6 to you at the same time, both of these</p> <p>7 reports?</p> <p>8 MR. WEIGEL: I understand they</p> <p>9 were.</p> <p>10 A All right. They both appear to be</p> <p>11 residual reporting for all of the income</p> <p>12 earned on the accounts that we could identify</p> <p>13 as possible replica accounts when we went</p> <p>14 through our residual reports to show you the</p> <p>15 income we earned.</p> <p>16 Q Could you just explain to me what the</p> <p>17 columns mean?</p> <p>18 A On 27, column one is month. Column</p> <p>19 two is account name. Column three is total</p> <p>20 residual reported to us. Column four is</p> <p>21 percentage paid out to the agent. Column</p> <p>22 five is percentage paid out to Nathan</p> <p>23 Counley. Column six is the remainder split</p> <p>24 between Bill and Shane.</p> <p>25 Q Okay.</p>
167	<p>1 Counley</p> <p>2 Q Is that something that was prepared in</p> <p>3 the ordinary course of business or did he do</p> <p>4 it just for this lawsuit?</p> <p>5 A I think this one was done specifically</p> <p>6 for this lawsuit.</p> <p>7 Q Do you typically see something like</p> <p>8 this on a monthly basis or any sort of</p> <p>9 periodic basis?</p> <p>10 A Yes, Bill puts together residual</p> <p>11 reports every month. I think I sent you the</p> <p>12 master residual reports. I'm not sure if you</p> <p>13 had time to review Friday or Saturday.</p> <p>14 MR. WEIGEL: Let me mark this</p> <p>15 as Exhibit 27.</p> <p>16 (Whereupon residual report was</p> <p>17 marked Counley Exhibit 27 for</p> <p>18 identification as of this date.)</p> <p>19 Q Can you identify Exhibit 27?</p> <p>20 A 27 is a residual reporting that Bill</p> <p>21 Demopolis prepared for Gucci to show residual</p> <p>22 income, all replica accounts that we were</p> <p>23 aware of.</p> <p>24 MR. WEIGEL: Let me mark</p> <p>25 Exhibit 28 at the same time.</p>	169	<p>1 Counley</p> <p>2 A 28, column one is month. Column two</p> <p>3 is account name. Column three is profit</p> <p>4 reported to the processor to Durango. Column</p> <p>5 four is agent revenue share and I'm assuming</p> <p>6 that since there is nothing in here that</p> <p>7 these are accounts that did not have an agent</p> <p>8 listed on it and that's the difference</p> <p>9 between 27 and 28. Column five of</p> <p>10 Exhibit 28, percentage to Nathan Counley.</p> <p>11 Column six is remainder split between Bill</p> <p>12 and Shane.</p> <p>13 Q Do you know which credit card</p> <p>14 processors were paying the residuals for</p> <p>15 which account?</p> <p>16 A It's not marked, but we can go back</p> <p>17 and mark that in if you need.</p> <p>18 Q Do you have a database that would</p> <p>19 allow you to do that?</p> <p>20 A We sent you all of our residual</p> <p>21 reports. You will be able to go in and see</p> <p>22 every account.</p> <p>23 Q Every account that you think has been</p> <p>24 selling replica?</p> <p>25 A Every account period.</p>

170

1 Counley

2 Q Do you recognize any of these accounts

3 as to where you placed them?

4 A Well, just going over the ten

5 Woodforest applications we went through

6 earlier this afternoon, I can see several of

7 these there that are Woodforest related.

8 Q Do you know why certain things end up

9 on Exhibit 27 versus Exhibit 28?

10 A Yes, I think the difference was 28

11 there is no agent on the account. They just

12 applied directly through Durango or referred

13 to us by someone.

14 Q Now, was this a spreadsheet that

15 someone prepared by going through the --

16 manually going through the database?

17 A Manually going through our master

18 residual reports that Bill put together.

19 Q Who did that?

20 A Bill Demopolis.

21 Q Do you know when he did that?

22 A I think he prepared 27 and 28 for you

23 last week or two weeks ago. When did you get

24 these? Recently, correct?

25 Q Yes. Recently. I don't remember

171

1 Counley

2 exactly.

3 MR. WENGROVSKY: I can

4 represent to you that for our

5 convenience Durango prepared 27 and

6 28, again the difference being, as I

7 explained in the cover e-mail to your

8 office, 27 included merchant accounts

9 that were possibly replicas that were

10 referred to Durango from independent

11 agents. 28 our possible merchant

12 accounts that came directly to Durango

13 without any agent involved.

14 Thereafter, Durango produced the

15 totality of residual reports for all

16 merchants regardless whether they

17 appeared to be replica related or not.

18 This is just a subset for

19 convenience for you to see the most

20 relevant.

21 Q Please take a minute and go through

22 both of these. I want to know if you

23 remember any websites selling replica

24 products that you don't see listed here that

25 you processed.

172

1 Counley

2 A It looks complete to me unless we are

3 missing something. If you include Exhibit 26

4 with Bag Addiction, 26, 27 and 28 appear

5 complete.

6 Q Did you help Mr. Demopolis come up

7 with a list of websites that was potentially

8 selling replica products?

9 A No. He did this by going through and

10 looking at the account names. He did ask me

11 if I thought what Kicks meant and I explained

12 it was shoes, so that's why he added them on.

13

14 Q You had indicated that you thought

15 perhaps you had sent certain merchants to

16 offshore banks that were replica merchants;

17 do you remember that?

18 A Yes.

19 Q Do you remember which merchants those

20 were?

21 A That was again several years ago.

22 Q Do you know if they are on this list?

23 A No, I don't believe they are on the

24 list.

25 Q If you wanted to find out what those

173

1 Counley

2 merchants were, how would you go about doing

3 it?

4 A Well, we would have to see if Bill had

5 any old residual reports for Intabill.

6 Q Are there residual reports for

7 Intabill someplace?

8 A I can't answer that.

9 MR. WENGROVSKY: You may

10 already have that in the recent

11 production. If Durango maintained any

12 records, we forwarded all residual

13 reports for all merchant accounts to

14 you.

15 THE WITNESS: They have been

16 out of business for years though.

17 Q Did you ever use any offshore banks

18 besides Intabill?

19 A Not for replica related.

20 Q Which ones did you use for non-replica

21 related?

22 A We used a processor called Bardo

23 B-A-R-D-O for a few accounts.

24 Q Did you ever use one for Valitor out

25 of Iceland?

<p style="text-align: right;">174</p> <p>1 Counley</p> <p>2 A Yes.</p> <p>3 Q What kind of accounts did you send to</p> <p>4 Valitor?</p> <p>5 A I believe we have an account there now</p> <p>6 that sells financial advice, software for</p> <p>7 trading markets. I don't think we have any</p> <p>8 other accounts there.</p> <p>9 Q Did you ever place any replica</p> <p>10 merchants with Valitor?</p> <p>11 A I don't believe so.</p> <p>12 Q Valitor is located in Iceland?</p> <p>13 A Yes.</p> <p>14 Q When you do business with them, how do</p> <p>15 you communicate?</p> <p>16 A We go through an agent of theirs. His</p> <p>17 name is R-E-A-V-I-S and the company is WTZI.</p> <p>18 Q Where are they located?</p> <p>19 A In the states.</p> <p>20 Q WTZI?</p> <p>21 A Yes.</p> <p>22 Q Do you know in which state?</p> <p>23 A No.</p> <p>24 (Whereupon Declaration of</p> <p>25 Jennifer Kirk was marked Counley</p>	<p style="text-align: right;">176</p> <p>1 Counley</p> <p>2 important?</p> <p>3 A Correct.</p> <p>4 Q Don't you advertise on your website</p> <p>5 that nine out of ten transactions done on the</p> <p>6 internet are done through credit cards?</p> <p>7 A I believe you are right.</p> <p>8 Q Nine out of ten people using credit</p> <p>9 cards, don't you think that's very important</p> <p>10 to your business?</p> <p>11 MR. WENGROVSKY: Objection.</p> <p>12 A Important, but to what degree, I guess</p> <p>13 I can't say.</p> <p>14 Q You represent to merchants on your</p> <p>15 website that if they gain the ability to</p> <p>16 process credit cards that that will improve</p> <p>17 their business, correct?</p> <p>18 A True.</p> <p>19 Q You say on your website "Accepting</p> <p>20 credit cards with a merchant account can</p> <p>21 increase your sales potential by 75 million</p> <p>22 customers in the U.S. alone with an</p> <p>23 exclamation point. Is that an accurate</p> <p>24 statement?</p> <p>25 A It is.</p>
<p style="text-align: right;">175</p> <p>1 Counley</p> <p>2 Exhibit 29 for identification as of</p> <p>3 this date.)</p> <p>4 Q Have you had an opportunity to review</p> <p>5 Exhibit 29 before?</p> <p>6 A Yes -- well, yes.</p> <p>7 Q When did you first see it?</p> <p>8 A I believe Todd forwarded this to us, I</p> <p>9 can't remember when, but I'm assuming the</p> <p>10 file date is --</p> <p>11 Q Did you ever have any discussions with</p> <p>12 Ms. Kirk about this lawsuit?</p> <p>13 A No.</p> <p>14 Q How about with her husband?</p> <p>15 A No.</p> <p>16 Q Did you ever discuss this lawsuit with</p> <p>17 any of your customers?</p> <p>18 A No.</p> <p>19 Q Is there anything in Ms. Kirk's</p> <p>20 declaration that you believe is untrue?</p> <p>21 A Number one, the ability to use credit</p> <p>22 cards, to accept payment via credit cards.</p> <p>23 It's helpful. I don't feel it's very</p> <p>24 important.</p> <p>25 Q You feel it's helpful, but not very</p>	<p style="text-align: right;">177</p> <p>1 Counley</p> <p>2 Q You go on to say on your website</p> <p>3 credit card processing analysts estimate nine</p> <p>4 out of ten people use credit cards for their</p> <p>5 online orders. Is that an accurate</p> <p>6 statement?</p> <p>7 A I'm not disagreeing with you.</p> <p>8 Q You are just disagreeing that nine out</p> <p>9 of ten is very important; is that correct?</p> <p>10 MR. WENGROVSKY: Objection.</p> <p>11 A I would say it's very helpful, but</p> <p>12 isn't very important.</p> <p>13 Q You would agree that the ability to</p> <p>14 process credit cards enables a merchant to</p> <p>15 have a much broader range of potential</p> <p>16 customers; is that correct?</p> <p>17 A You are correct.</p> <p>18 Q If a merchant is able to accept credit</p> <p>19 cards, it's likely to increase their sales?</p> <p>20 A You are correct.</p> <p>21 Q Attached to Exhibit 29 are a series of</p> <p>22 e-mails and a fax. Do you see those?</p> <p>23 A I do.</p> <p>24 Q Do you recognize this correspondence?</p> <p>25 A I do.</p>

45 (Pages 174 to 177)

178	<p>1 Counley</p> <p>2 Q Did you send the e-mails that are</p> <p>3 attached to Exhibit 29?</p> <p>4 A Yes.</p> <p>5 Q Hans Strickler that is here is from</p> <p>6 Frontline, correct?</p> <p>7 A Correct.</p> <p>8 Q And Mr. Strickler insisted that The</p> <p>9 Bag Addiction add a check box on its website,</p> <p>10 correct?</p> <p>11 A Correct.</p> <p>12 Q What did that check box say?</p> <p>13 A Two check boxes. I agree to the terms</p> <p>14 and conditions on the site. I understand</p> <p>15 these items being purchased are replicas, not</p> <p>16 originals.</p> <p>17 Q Why was that important to add to the</p> <p>18 site?</p> <p>19 A This is something that Frontline told</p> <p>20 us that the merchant should do, so I'd be</p> <p>21 speaking on behalf of Frontline.</p> <p>22 Q What did Frontline tell you the</p> <p>23 merchant should do?</p> <p>24 A If I'm reading it correctly, it</p> <p>25 appears Hans tells the merchant, if you don't</p>	180	<p>1 Counley</p> <p>2 numbers at the top; one is a 413 and the</p> <p>3 other is a 416?</p> <p>4 A Yes.</p> <p>5 Q Is one of them yours?</p> <p>6 A 413.</p> <p>7 Q That's your fax number?</p> <p>8 A Yes.</p> <p>9 Q These screen shots were faxed to you</p> <p>10 and then you faxed them on to Ms. Kirk; is</p> <p>11 that correct?</p> <p>12 A I don't recall receiving this fax even</p> <p>13 though my fax number is listed there.</p> <p>14 Q Well, let's look.</p> <p>15 A Yes, it says "Jen, Hans is referring</p> <p>16 to the attached fax." So Hans must have</p> <p>17 faxed these five pages to me and "he's made</p> <p>18 notes on the PDF, where it would be best to</p> <p>19 add in the truncated terms and conditions to</p> <p>20 help avoid these type of chargebacks." So,</p> <p>21 yes, Frontline confirmed to us that these</p> <p>22 merchants should have a check box and we</p> <p>23 forwarded that communication to the merchant.</p> <p>24 Q Were those inserted into this PDF by</p> <p>25 Frontline as you understand it?</p>
179	<p>1 Counley</p> <p>2 have the check box, you are going to lose</p> <p>3 chargebacks.</p> <p>4 Q Why is that?</p> <p>5 MR. WENGROVSKY: Objection.</p> <p>6 Q Why does having a check box help with</p> <p>7 chargebacks?</p> <p>8 MR. WENGROVSKY: Repeat the</p> <p>9 objection. Go ahead.</p> <p>10 A Because then the customer cannot claim</p> <p>11 that products were not as represented as in</p> <p>12 doing the chargeback.</p> <p>13 Q Because then the customer knows they</p> <p>14 are buying a product that is not genuine?</p> <p>15 A They know that they are buying a</p> <p>16 replica product.</p> <p>17 Q You see there is a fax attached to</p> <p>18 this e-mail chain?</p> <p>19 A Which page?</p> <p>20 Q You see the one that was Bag</p> <p>21 Addiction, the screen shot?</p> <p>22 A With 1 of 5 in the bottom right?</p> <p>23 Q Yes, and 1 of 5 in the top right too?</p> <p>24 A Yes.</p> <p>25 Q You see there are two telephone</p>	181	<p>1 Counley</p> <p>2 A As I understand it.</p> <p>3 Q You can tell from looking at the</p> <p>4 left-hand side here that this website was</p> <p>5 selling replica Gucci products, can't you?</p> <p>6 A I can see that they have Gucci listed.</p> <p>7 I cannot see if they have replica Gucci</p> <p>8 products.</p> <p>9 Q In a number of places or I guess in</p> <p>10 two places, it lists the brands. Do you see</p> <p>11 it, where it says our brands on the first --</p> <p>12 on 1 of 5 and 3 of 5 on the left-hand side</p> <p>13 where it says Our Brands?</p> <p>14 A Yes.</p> <p>15 Q If you carry into the next page, in</p> <p>16 both instances Gucci is the first name at the</p> <p>17 top of the list?</p> <p>18 MR. WENGROVSKY: First name at</p> <p>19 the top of the next page.</p> <p>20 Q It says Our Brands and then in both</p> <p>21 instances on page 2 of 5 and page 4 of 5,</p> <p>22 Gucci is the brand that is listed at the top</p> <p>23 of the page on the left-hand side?</p> <p>24 MR. KENNEDY: Can you show me</p> <p>25 where you are pointing?</p>

182	<p>1 Counley</p> <p>2 Q Let's try it again. Do you see Gucci</p> <p>3 on the top of the list that appears on the</p> <p>4 left-hand side of the page on page 2 of 5?</p> <p>5 MR. KENNEDY: When you say 2 of</p> <p>6 5, you are referring to the</p> <p>7 handwritten 2 of 5, not the</p> <p>8 typewritten, right? Am I on the right</p> <p>9 page?</p> <p>10 MR. WEIGEL: It says 2 of 5 of</p> <p>11 the fax that was sent to Mr. Counley.</p> <p>12 MR. KENNEDY: I see.</p> <p>13 A I do see.</p> <p>14 MR. WENGROVSKY: I would like</p> <p>15 to clarify for the record that Gucci</p> <p>16 is not the first or top listed under</p> <p>17 the our brand section, but is</p> <p>18 coincidentally the first listed on the</p> <p>19 second page because that's where it</p> <p>20 came back on alphabetically.</p> <p>21 Q Now that you totally forgot the</p> <p>22 question, do you see at the top of page 2 of</p> <p>23 5 on the fax sent to you the word Gucci in</p> <p>24 the column Our Brands?</p> <p>25 A Yes.</p>	184	<p>1 Counley</p> <p>2 good objection, but the rest is all</p> <p>3 speaking and really inappropriate.</p> <p>4 A Do I need to answer?</p> <p>5 Q Yes, you do, but let me rephrase it.</p> <p>6 Do you have any reason to believe that</p> <p>7 you were unable to read those words when you</p> <p>8 received the fax on page 1 of 5 that is part</p> <p>9 of Exhibit 29?</p> <p>10 A I don't have any reason to believe I</p> <p>11 needed to read the fax that we were</p> <p>12 talking -- we were talking about terms of</p> <p>13 service check box.</p> <p>14 Q Did you read the language of the check</p> <p>15 box that was inserted?</p> <p>16 A I did.</p> <p>17 Q And you understood that everybody</p> <p>18 making a purchase on this website had to</p> <p>19 check that box; is that what Mr. Strickland</p> <p>20 was asking you to make sure about?</p> <p>21 A You are correct.</p> <p>22 Q As a result of that you have insisted</p> <p>23 in the future that other websites plainly</p> <p>24 indicate that they were selling replica</p> <p>25 products; is that correct?</p>
183	<p>1 Counley</p> <p>2 Q Do you see Gucci listed on page 4 of 5</p> <p>3 in the column listed in Our Brands?</p> <p>4 A Yes.</p> <p>5 Q You know all the items, at least in</p> <p>6 this point of time, all the items being sold</p> <p>7 here are replicas?</p> <p>8 A No.</p> <p>9 Q Look at the front page of page 1 of 5</p> <p>10 where it says in the middle of the page,</p> <p>11 "Please note as stated on our site all of our</p> <p>12 items are replicas. By purchasing you are</p> <p>13 acknowledging the fact that they are replicas</p> <p>14 and not to be presented as originals." Do</p> <p>15 you see that?</p> <p>16 A I am seeing that now.</p> <p>17 Q Do you have any reason to believe that</p> <p>18 you were not able to read those words when</p> <p>19 you got the fax?</p> <p>20 MR. WENGROVSKY: Objection. I</p> <p>21 don't recall hearing whether this has</p> <p>22 been reviewed at that time or not or</p> <p>23 whether it was just forwarded.</p> <p>24 MR. WEIGEL: You can say</p> <p>25 foundation. That's fine. That's a</p>	185	<p>1 Counley</p> <p>2 A You are correct.</p> <p>3 Q And that was done to avoid chargebacks</p> <p>4 which have all sorts of consequences that we</p> <p>5 discussed previously, correct?</p> <p>6 A Correct.</p> <p>7 Q Did you make any effort to search for</p> <p>8 any e-mails on your computer? I'm referring</p> <p>9 to the e-mails attached to Exhibit 29.</p> <p>10 A Yes.</p> <p>11 Q Were you able to find them?</p> <p>12 A No.</p> <p>13 Q What computer were you using at the</p> <p>14 time that these e-mails were sent?</p> <p>15 A The Toshiba.</p> <p>16 Q When did you give the Toshiba to your</p> <p>17 mother?</p> <p>18 A I've not given it to her yet. She's</p> <p>19 asked me to give it to her for months, but I</p> <p>20 have not yet.</p> <p>21 Q So it's still in your possession?</p> <p>22 A Yes.</p> <p>23 Q Did you make any effort to search the</p> <p>24 hard drive of that computer to locate e-mails</p> <p>25 that were called for by our document request?</p>

186	<p>1 Counley</p> <p>2 A Yes.</p> <p>3 Q It's your position that you have not</p> <p>4 located any?</p> <p>5 A Like I said, I did find a backup</p> <p>6 Outlook file that had some old leads in it,</p> <p>7 but I don't have these e-mails.</p> <p>8 Q I may have asked you before, but where</p> <p>9 is the Durangodirect.com server located?</p> <p>10 A Intermedia.net.</p> <p>11 Q Did you make any effort to call</p> <p>12 Intermedia to see if they had any documents</p> <p>13 responsive to the subpoena that was served</p> <p>14 upon you?</p> <p>15 A They said they don't have anything</p> <p>16 that's been deleted off the server.</p> <p>17 Q Do you pay Intermedia to maintain the</p> <p>18 Durangodirect.com address?</p> <p>19 A Outlook e-mail.</p> <p>20 Q Do they maintain those files for any</p> <p>21 period of time?</p> <p>22 A I believe they told us after -- there</p> <p>23 is nothing maintained for seven days, so they</p> <p>24 told us they do have an archiving service</p> <p>25 which -- an archiving service if we had</p>	188	<p>1 Counley</p> <p>2 e-mails on a regular basis?</p> <p>3 A Absolutely.</p> <p>4 Q Did you stop deleting e-mails relevant</p> <p>5 to this case when you first got the subpoena</p> <p>6 in 2008?</p> <p>7 MR. WENGROVSKY: I'm sorry,</p> <p>8 when you say this case, do you mean --</p> <p>9 MR. WEIGEL: Laurette.</p> <p>10 MR. WENGROVSKY: August of '09.</p> <p>11 MR. WEIGEL: No, when you first</p> <p>12 got the subpoena in LA.</p> <p>13 Q I'm asking first did you stop deleting</p> <p>14 e-mails when you received the subpoena</p> <p>15 relating to the Laurette Company in 2008?</p> <p>16 A I can see if I say no here, I would be</p> <p>17 probably in trouble, but we still didn't keep</p> <p>18 my sent folder longer than a couple of</p> <p>19 months. It's too big. I do 150, 200 e-mails</p> <p>20 a day and we have a storage limit in</p> <p>21 Intermedia and Outlook starts crashing if you</p> <p>22 keep more than a couple of gigabytes of data.</p> <p>23 Q Are you familiar with the concept of a</p> <p>24 litigation hold?</p> <p>25 A No.</p>
187	<p>1 Counley</p> <p>2 signed up for it, everything would be</p> <p>3 archived, but they don't do it -- so if we</p> <p>4 were a law firm and required to archive all</p> <p>5 e-mails, they would have that.</p> <p>6 Q Do they maintain any backup tapes?</p> <p>7 A Not that I'm aware of.</p> <p>8 Q How much do you pay Intermedia for the</p> <p>9 service; do you know?</p> <p>10 A About 100, 125 bucks a month.</p> <p>11 Q And they don't store any e-mails for</p> <p>12 more than seven days?</p> <p>13 A That's what they told us.</p> <p>14 Q Who communicated with Intermedia?</p> <p>15 A I called them.</p> <p>16 Q Who did you speak to?</p> <p>17 A Customer service representative.</p> <p>18 Q They told you they had no e-mails for</p> <p>19 your account?</p> <p>20 A I asked them if an e-mail had been</p> <p>21 deleted, is it possible to retrieve it? We</p> <p>22 don't keep all e-mails that are that old. So</p> <p>23 if they said it was seven days and they are</p> <p>24 deleted two years ago.</p> <p>25 Q Well, do you go through and delete</p>	189	<p>1 Counley</p> <p>2 Q Did the company institute any sort of</p> <p>3 a hold on its documents once it received a</p> <p>4 copy of the Complaint in this lawsuit?</p> <p>5 A Again, we are a small company.</p> <p>6 Nothing that we are familiar with, haven't</p> <p>7 been involved with anything like this in the</p> <p>8 past.</p> <p>9 Q So you continued to delete e-mails</p> <p>10 after you got the Complaint?</p> <p>11 MR. WENGROVSKY: Objection.</p> <p>12 I'm not sure we are talking about the</p> <p>13 same thing as far as relevance.</p> <p>14 MR. WEIGEL: Let me see what I</p> <p>15 can do here.</p> <p>16 MR. WENGROVSKY: Okay. Go</p> <p>17 ahead.</p> <p>18 Q Did you continue your usual practice</p> <p>19 of deleting e-mails after you received the</p> <p>20 Complaint in August of 2009?</p> <p>21 A Yes. The sent e-mails I continued to</p> <p>22 delete.</p> <p>23 Q Did any of the e-mails that you</p> <p>24 deleted refer to any of the replica merchants</p> <p>25 that we have been discussing today?</p>

190	<p>1 Counley</p> <p>2 A I think they were mostly closed by</p> <p>3 this point in time.</p> <p>4 Q I think we just looked at one that was</p> <p>5 submitted in '09. Do you remember that?</p> <p>6 MR. WENGROVSKY: I believe that</p> <p>7 was early '09 prelitigation no?</p> <p>8 MR. WEIGEL: Yes, I agree.</p> <p>9 Q But do you remember that we looked at</p> <p>10 one that was just submitted in early '09?</p> <p>11 A (No response.)</p> <p>12 Q I can pull it out if you want?</p> <p>13 A For the benefit of doubt, yes. You</p> <p>14 don't need to pull it out. I trust you.</p> <p>15 Q Okay.</p> <p>16 A Yes.</p> <p>17 Q The question is do you have any basis</p> <p>18 of knowing whether the e-mails you deleted</p> <p>19 after August of 2009 related to any replica</p> <p>20 merchants or not?</p> <p>21 A It was not specifically deleted for</p> <p>22 those reasons, but it's just always deleted.</p> <p>23 Q So as you sit here today, you really</p> <p>24 don't know what you deleted after August of</p> <p>25 '09; is that fair?</p>	192	<p>1 Counley</p> <p>2 A I ran it on the Toshiba and the Asus.</p> <p>3 Q Was it run on any other computers at</p> <p>4 Durango?</p> <p>5 A I believe Bill ran it on his.</p> <p>6 Otherwise I'm not sure.</p> <p>7 Q Are there various security options</p> <p>8 when running that software?</p> <p>9 A Like what?</p> <p>10 Q Like I've seen a computer -- one</p> <p>11 called Window Washer, one which has different</p> <p>12 settings. You can sort of wash it or wash it</p> <p>13 with bleach. Did it have different security</p> <p>14 settings?</p> <p>15 A I'm not really sure.</p> <p>16 Q Why did you run it on the Toshiba?</p> <p>17 A I used to use that computer. It had</p> <p>18 applications that had already been deleted,</p> <p>19 but since we read the article telling us that</p> <p>20 files weren't actually safe, then I figured</p> <p>21 we probably should run it in case it was</p> <p>22 stolen or before I give it to my mom and she</p> <p>23 is in custody of it.</p> <p>24 Q Did anyone ever tell you that you had</p> <p>25 an obligation to hold onto documents that</p>
191	<p>1 Counley</p> <p>2 A Yes, I don't have reason to store all</p> <p>3 the e-mails.</p> <p>4 Q Did you ever run any file scrubbing</p> <p>5 program on your computer?</p> <p>6 A Yes.</p> <p>7 Q When did you last run that program?</p> <p>8 A We bought them -- I bought software --</p> <p>9 I think Bill bought -- we all bought it a</p> <p>10 couple of weeks ago. We read an article just</p> <p>11 deleting files is not really safe. If your</p> <p>12 computer was stolen, someone can still</p> <p>13 recreate the files. We have always deleted</p> <p>14 our applications because there is no need to</p> <p>15 keep them on our hard drives and if someone</p> <p>16 was to steal your laptops and get into the</p> <p>17 hard drive and recreate whatever, we would be</p> <p>18 liable and have to go through all the PCI</p> <p>19 industry and contact all of your customers</p> <p>20 and tell them that we have compromised their</p> <p>21 data for failing to safeguard it.</p> <p>22 Q What program did you purchase?</p> <p>23 A Lavasoft.</p> <p>24 Q What computers did you run that</p> <p>25 software on?</p>	193	<p>1 Counley</p> <p>2 might be relevant to this lawsuit?</p> <p>3 MR. WENGROVSKY: Objection for</p> <p>4 the record. Go ahead.</p> <p>5 A No.</p> <p>6 MR. WEIGEL: Let's take a short</p> <p>7 break off the record.</p> <p>8 (Whereupon a discussion was</p> <p>9 held off the record.)</p> <p>10 MR. WEIGEL: Please mark this</p> <p>11 as Exhibit 30.</p> <p>12 (Whereupon screen shot of</p> <p>13 Durango website was marked Counley</p> <p>14 Exhibit 30 for identification as of</p> <p>15 this date.)</p> <p>16 Q Do you have Exhibit 30 in front of</p> <p>17 you?</p> <p>18 A I do.</p> <p>19 Q Is that a true copy of the screen shot</p> <p>20 of how your website looked back in 2008?</p> <p>21 A July 22, 2008, yes.</p> <p>22 Q When it said Our Merchants, it</p> <p>23 included -- you specifically reference</p> <p>24 replica products, do you see that?</p> <p>25 A Yes, we put a list on our website of</p>

194	<p>1 Counley</p> <p>2 accounts that processors had approved. Our</p> <p>3 niches we tell agents to send us accounts</p> <p>4 that can get approved. We take applications.</p> <p>5 We submit them to processors. We run them up</p> <p>6 the flagpole. Whatever comes back approved,</p> <p>7 we keep sending the same apps to the same</p> <p>8 banks and we put it on our website that we</p> <p>9 got these approved by the processor.</p> <p>10 Q Is that what you mean when you say on</p> <p>11 the website we specialize in hard to acquire</p> <p>12 accounts?</p> <p>13 A Correct.</p> <p>14 Q When you say hard to acquire accounts,</p> <p>15 is that a reference to placing the account</p> <p>16 with the bank?</p> <p>17 A It's hard for the merchant to acquire</p> <p>18 a merchant account.</p> <p>19 Q Do you agree with the statement that</p> <p>20 you are a world leading consultant group for</p> <p>21 high risk and low risk merchants?</p> <p>22 A It may be a little self-placating.</p> <p>23 Q Self-grandizing perhaps?</p> <p>24 A Self-grandizing. I guess placating</p> <p>25 isn't the right word. Puffing our chests a</p>	196	<p>1 Counley</p> <p>2 A I'm sure we got that quote from</p> <p>3 somewhere valid at some point in time.</p> <p>4 Q You don't have any reason to think</p> <p>5 it's not true?</p> <p>6 A If it's not true, it wouldn't be</p> <p>7 incorrect by a large amount. It's probably</p> <p>8 ballpark correct.</p> <p>9 Q Is that figure roughly the amount of</p> <p>10 Americans you believe have credit cards?</p> <p>11 A I don't know why I'm nitpicking this</p> <p>12 with you. I don't know where the quote came</p> <p>13 from. To me it seems about correct. It</p> <p>14 seems reasonable to say. I can't 100 percent</p> <p>15 verify for you if it's correct or not.</p> <p>16 MR. WEIGEL: Mark this as 31.</p> <p>17 (Whereupon screen shot from</p> <p>18 Durango website was marked Counley</p> <p>19 Exhibit 31 for identification as of</p> <p>20 this date.)</p> <p>21 Q Is Exhibit 31 a true copy of the</p> <p>22 frequently asked questions section of your</p> <p>23 website as of December 2009?</p> <p>24 A It appears to be, yes.</p> <p>25 Q Question 2, "Why is pricing for your</p>
195	<p>1 Counley</p> <p>2 little bit maybe. That's kind of a long and</p> <p>3 complicated answer.</p> <p>4 Q Let me ask you this. Do you believe</p> <p>5 that you are among the best in the business</p> <p>6 for helping merchants acquiring hard to</p> <p>7 acquire accounts?</p> <p>8 A I don't know if we are the best in the</p> <p>9 business, but we do help merchants acquire</p> <p>10 high risk accounts and we like to think our</p> <p>11 customer service is good.</p> <p>12 Q Do you disagree with the statement</p> <p>13 that credit card processing analysts estimate</p> <p>14 nine out of ten people use a credit card for</p> <p>15 their online orders?</p> <p>16 A I don't know where that quote came</p> <p>17 from. I can't verify it but common sense</p> <p>18 wise it seems to make sense.</p> <p>19 Q You say "Accepting credit cards with a</p> <p>20 merchant account can increase your sales</p> <p>21 potential by 75 million customers in the U.S.</p> <p>22 alone"; do you see that?</p> <p>23 A I do.</p> <p>24 Q Do you believe that to be an accurate</p> <p>25 statement?</p>	197	<p>1 Counley</p> <p>2 merchant account services not listed on your</p> <p>3 website"; do you see that?</p> <p>4 A Yes.</p> <p>5 Q It says "We work with 25 plus banks</p> <p>6 worldwide and pricing varies widely by</p> <p>7 country and between business models." What</p> <p>8 did you mean that it varies widely between</p> <p>9 business models?</p> <p>10 A A retail merchant swiping cards in</p> <p>11 person for T-shirts will pay 1.7 percent and</p> <p>12 an e-Commerce merchant swiping credit cards</p> <p>13 for T-shirts online will pay 2.3,</p> <p>14 2.5 percent.</p> <p>15 Q And a replica merchant can pay between</p> <p>16 3.5 and 4 percent?</p> <p>17 A Correct.</p> <p>18 Q Is there any listing within Durango of</p> <p>19 ranges or does everyone just know what the</p> <p>20 ranges are?</p> <p>21 A There is no official listing. It's a</p> <p>22 pretty small company. Me and Brad, we</p> <p>23 usually have some sort of agreement, not</p> <p>24 agreement but discussion, are these</p> <p>25 appropriate rates? Is this what you are</p>

198	<p>1 Counley</p> <p>2 charging? For a while we weren't charging</p> <p>3 kind of ballpark, so we kind of agreed to</p> <p>4 keep it similar so they wouldn't see we were</p> <p>5 quoting different merchants different rates,</p> <p>6 but there is no --</p> <p>7 Q Each employee sets -- can set his own</p> <p>8 rate, but you agreed to keep it within the</p> <p>9 same ballpark; is that what you are saying?</p> <p>10 A That's fair.</p> <p>11 Q I think we covered this question 6,</p> <p>12 "Why is there 'underwriting' on a merchant</p> <p>13 account?" Do you agree that is generally an</p> <p>14 accurate description of why there is</p> <p>15 underwriting on a merchant account?</p> <p>16 A I think it's general. It's a good</p> <p>17 description of why underwriting is performed</p> <p>18 and kind of an overview on risk on merchant</p> <p>19 accounts. On reading it, I'm not sure if we</p> <p>20 should be characterizing it as a loan or</p> <p>21 provisional credit to the merchant for six</p> <p>22 months. I'm not sure that's the proper</p> <p>23 phrasing, but I think that's done just to</p> <p>24 kind of explain to the merchant about the</p> <p>25 chargeback liability.</p>	200
199	<p>1 Counley</p> <p>2 Q It conveys a sense that the bank is</p> <p>3 exposed for the amount of the revenue for six</p> <p>4 months; is that correct?</p> <p>5 A Right.</p> <p>6 Q Just in your own words, what does the</p> <p>7 term underwriting mean?</p> <p>8 A I think every processor has different</p> <p>9 procedures that they do. I know all the U.S.</p> <p>10 banks do credit check. They pull someone's</p> <p>11 credit. They have different criteria that</p> <p>12 they base it on. Otherwise I'm not really</p> <p>13 privy to what they all do for underwriting.</p> <p>14 I know they have different things that they</p> <p>15 look at but.</p> <p>16 Q Is it important -- do the banks</p> <p>17 actually look at the websites and make sure</p> <p>18 there is a business there?</p> <p>19 A I would guess -- I'm pretty sure they</p> <p>20 would have to.</p> <p>21 Q They have to because if there is not a</p> <p>22 business there, they are exposed, correct?</p> <p>23 A Right.</p> <p>24 MR. WEIGEL: Mark this as</p> <p>25 Exhibit 32.</p>	201
200	<p>1 Counley</p> <p>2 (Whereupon screen shot from</p> <p>3 Durango website was marked Counley</p> <p>4 Exhibit 32 for identification as of</p> <p>5 this date.)</p> <p>6 Q Do you recognize Exhibit 32 as a</p> <p>7 screen shot from your website dated as of</p> <p>8 August 25, 2009?</p> <p>9 A It would appear so.</p> <p>10 Q Do you see under the Our Merchants</p> <p>11 category that you are still listing replica</p> <p>12 products as of August 25, 2009?</p> <p>13 A I'm not sure the time it took our web</p> <p>14 master to get those off, but around that time</p> <p>15 is when we asked him to remove it.</p> <p>16 Q At least at that point in time, did</p> <p>17 you have merchants who were engaged in all of</p> <p>18 those various activities?</p> <p>19 A Everything is -- everything on there,</p> <p>20 except for the replica products, which I'm</p> <p>21 not 100 percent sure when the accounts died</p> <p>22 off, but I think around here is when we</p> <p>23 discussed that we stopped.</p> <p>24 MR. WEIGEL: Please mark this</p> <p>25 as Exhibit 33.</p>	201

202	<p>1 Counley</p> <p>2 A We submitted applications. Everyone</p> <p>3 said no and we just decided not to keep --</p> <p>4 Q How about pyramid marketing?</p> <p>5 A Yes, same thing. A lot of -- some of</p> <p>6 our banks have a list of accounts that they</p> <p>7 will not accept, so some of these things are</p> <p>8 just -- let me see Humboldt, Pivotal, they</p> <p>9 see pyramid marketing. We try it at another</p> <p>10 bank and it says declined.</p> <p>11 Q Did you ever try to place any pyramid</p> <p>12 marketing merchants?</p> <p>13 A We have submitted merchants that said</p> <p>14 that they were MLM multi-level marketing, but</p> <p>15 the bank on review said no, this is pyramid</p> <p>16 marketing and they declined it.</p> <p>17 Q Okay.</p> <p>18 A But I don't think anyone applied to us</p> <p>19 and said this is a Ponzi scheme.</p> <p>20 Q How about programs on how to apply for</p> <p>21 low interest credit cards?</p> <p>22 A Again it's probably something we tried</p> <p>23 it in the past and weren't successful.</p> <p>24 Q How about products originally from</p> <p>25 Cuba, Lybia, Syria, Iraq, Iran, Nigeria, et</p>	204	<p>1 Counley</p> <p>2 Q Definitely you tried?</p> <p>3 A No. They have put in a preapplication</p> <p>4 with us, but I don't think we tried to put</p> <p>5 them. Just with all the e-mail scams, it</p> <p>6 seems reasonable not to.</p> <p>7 Q So is it fair to say that you would at</p> <p>8 least examine the applications enough to</p> <p>9 determine if the respective merchant engaged</p> <p>10 in any of these prohibited activities?</p> <p>11 A You mean like child pornography?</p> <p>12 Q Yes.</p> <p>13 A Pulled up the website and went looking</p> <p>14 for refund policy and there is underage nude</p> <p>15 photos, then that's pretty obvious and it</p> <p>16 doesn't take a skilled eye to spot that.</p> <p>17 Q Same with drug paraphernalia?</p> <p>18 A It doesn't take a skilled eye for a</p> <p>19 glass pipe.</p> <p>20 Q So, in other words, you would, before</p> <p>21 you would submit an application to a</p> <p>22 Woodforest or Frontline, you would at least</p> <p>23 check to make sure it didn't meet any of the</p> <p>24 criteria that is listed on the list of denied</p> <p>25 merchant activities?</p>
203	<p>1 Counley</p> <p>2 cetera?</p> <p>3 A It just seemed like a good idea -- I'm</p> <p>4 sorry. North Korea, Iraq, Iran, Afghanistan,</p> <p>5 these are areas known for high fraud and</p> <p>6 Nigeria all the e-mail scams.</p> <p>7 Q Did you exclude these because someone</p> <p>8 told you you should exclude them or did you</p> <p>9 exclude them because of experience?</p> <p>10 A The offshore banks we had worked with</p> <p>11 generally did not like to set startup</p> <p>12 accounts outside of the United States or</p> <p>13 Europe and especially if it was -- not that</p> <p>14 we ever saw many, but if it was a startup</p> <p>15 account from Iraq, no one is really excited</p> <p>16 about that.</p> <p>17 Q Did you ever have a startup account</p> <p>18 from Iraq?</p> <p>19 A A preapplication with us or --</p> <p>20 Q Preapplication from you?</p> <p>21 A Yes, probably.</p> <p>22 Q How about Iran?</p> <p>23 A I couldn't say.</p> <p>24 Q Nigeria?</p> <p>25 A Definitely.</p>	205	<p>1 Counley</p> <p>2 A Either that or the merchant tells us</p> <p>3 in the preapplication what they are selling.</p> <p>4 Q Did you ever find in checking websites</p> <p>5 that, for example, there was child</p> <p>6 pornography and you chose not to do business</p> <p>7 with them?</p> <p>8 A Not that I can remember. It just</p> <p>9 seemed like a good thing to put on the</p> <p>10 website.</p> <p>11 Q Do you intend to put replica merchants</p> <p>12 on this list too?</p> <p>13 A I have no idea why it's not there</p> <p>14 already.</p> <p>15 Q So at some point in time you intend to</p> <p>16 put it there?</p> <p>17 A We wear a lot of hats in small</p> <p>18 business and updating websites is something</p> <p>19 that gets behind.</p> <p>20 Q When somebody gets around to it, you</p> <p>21 intend to put replica; is that correct?</p> <p>22 MR. WENGROVSKY: This is dated</p> <p>23 March of '09. I don't know what the</p> <p>24 current status is.</p> <p>25 A I don't think it's there yet.</p>

<p style="text-align: right;">206</p> <p>1 Counley</p> <p>2 Q You intend to have it put up there?</p> <p>3 A Absolutely, yes.</p> <p>4 Q And when you put it up there, you</p> <p>5 intend to enforce it, correct?</p> <p>6 A It's not an industry that we are</p> <p>7 looking to work with due to the high cost and</p> <p>8 the trouble that it's caused.</p> <p>9 Q Does Durango have any insurance that</p> <p>10 could potentially cover this lawsuit?</p> <p>11 A No.</p> <p>12 Q You said you read an article which led</p> <p>13 you to buy the file shredding program?</p> <p>14 A Yes.</p> <p>15 Q Do you remember where you saw that</p> <p>16 article?</p> <p>17 A No.</p> <p>18 Q Do you know where you bought the file</p> <p>19 shredding program from?</p> <p>20 A C.net or download.com. One of those</p> <p>21 sites.</p> <p>22 Q Did you buy it with a credit card?</p> <p>23 A Yes.</p> <p>24 Q Do you know the date in which you</p> <p>25 bought it?</p>	<p style="text-align: right;">208</p> <p>1 Counley</p> <p>2 that "I received an e-mail from Louis Vuitton</p> <p>3 for thepurses.com. That is more than</p> <p>4 half my business"; do you see that?</p> <p>5 A I do.</p> <p>6 Q What do you understand that to mean?</p> <p>7 A I'm not really sure.</p> <p>8 Q Did you understand that Louis</p> <p>9 Vuitton --</p> <p>10 A Obviously knowing what I do now about</p> <p>11 these law cases, anyone reading this e-mail</p> <p>12 would think that's what I should have</p> <p>13 assumed.</p> <p>14 Q Did you, in fact, have this e-mail</p> <p>15 discussion with Stephanie Walker at the time?</p> <p>16 A I can't deny this. It's my e-mail</p> <p>17 Q Did you help her set up another -- add</p> <p>18 Celebrity Style Bags to her account?</p> <p>19 A Yes, but if I did, they should be able</p> <p>20 to confirm it at the merchant, the processor.</p> <p>21 Q Did you receive residuals from</p> <p>22 celebritystylebags.com?</p> <p>23 A Yes. Sometimes it's reported under a</p> <p>24 different DBA for the company name.</p> <p>25 Q Did I see possibly it was under the</p>
<p style="text-align: right;">207</p> <p>1 Counley</p> <p>2 A No, but I can get it.</p> <p>3 Q Do you know the date on which you ran</p> <p>4 the program?</p> <p>5 A I probably ran it several times.</p> <p>6 Q When did you last run it?</p> <p>7 A Yesterday or the day before.</p> <p>8 Q Why did you run it several times?</p> <p>9 A Why not? It's a safety procedure.</p> <p>10 MR. WEIGEL: Mark this as</p> <p>11 Exhibit 34.</p> <p>12 (Whereupon e-mail chain was</p> <p>13 marked Counley Exhibit 34 for</p> <p>14 identification as of this date.)</p> <p>15 Q This is a chain of e-mails started on</p> <p>16 May 30th, 2007 at 7:56 a.m.; do you see that?</p> <p>17 A Yes.</p> <p>18 Q And that is from Stephanie Walker.</p> <p>19 She is one of your clients; is that correct?</p> <p>20 A Yes.</p> <p>21 Q And she tells you that she wants to</p> <p>22 add a new domain name to her account; is that</p> <p>23 correct?</p> <p>24 A It appears so.</p> <p>25 Q And the reason for this she says is</p>	<p style="text-align: right;">209</p> <p>1 Counley</p> <p>2 name Strive Handbags?</p> <p>3 A Is that Strive Handbags?</p> <p>4 Q Yes, your response back to her says</p> <p>5 "Adding URL's to your account isn't a big</p> <p>6 problem, since your DBA is Strive Handbags."</p> <p>7 Do you see that?</p> <p>8 A Okay. So this is Strive Handbags.</p> <p>9 Q Was this placed with Frontline or with</p> <p>10 Woodforest or both?</p> <p>11 A Do you mind if I look at it?</p> <p>12 Q No, please. If there is something</p> <p>13 that helps your recollection, go ahead.</p> <p>14 MR. WENGROVSKY: I don't know</p> <p>15 if yours are still in order, but it</p> <p>16 looks like 17 was Stephanie Walker</p> <p>17 related, if that speeds you up.</p> <p>18 A 17 shows Stephanie Walker and Strive</p> <p>19 Handbags was at Woodforest. Whether or not</p> <p>20 she had a second account at Frontline.</p> <p>21 MR. WEIGEL: Mark this as</p> <p>22 Exhibit 35.</p> <p>23 (Whereupon application to</p> <p>24 Frontline was marked Counley Exhibit</p> <p>25 35 for identification as of this</p>

210	<p>1 Counley</p> <p>2 date.)</p> <p>3 Q Does that help you refresh your</p> <p>4 recollection that Stephanie Walker also had</p> <p>5 an account with Frontline?</p> <p>6 A Yes.</p> <p>7 Q And did she have an account with</p> <p>8 Frontline?</p> <p>9 A Apparently, yes.</p> <p>10 Q Did you receive residuals from</p> <p>11 Frontline as well?</p> <p>12 A Yes. And you should have a copy of</p> <p>13 all of the residuals earned from Bill's</p> <p>14 master report.</p> <p>15 Q Are you familiar with a company named</p> <p>16 CRRD Operating Company, Inc. doing business</p> <p>17 as merchantaccountguy.com creditcards.com?</p> <p>18 A Creditcards.com?</p> <p>19 MR. WEIGEL: Let me see if I</p> <p>20 can refresh your recollection. Please</p> <p>21 mark this as Exhibit 36.</p> <p>22 (Whereupon Complaint was marked</p> <p>23 Counley Exhibit 36 for identification</p> <p>24 as of this date.)</p> <p>25 A Yes, I do remember this now.</p>	212	<p>1 Counley</p> <p>2 break. I think I am done. Off the</p> <p>3 record.</p> <p>4 (Whereupon a discussion was</p> <p>5 held off the record.)</p> <p>6</p> <p>7 EXAMINATION BY</p> <p>8 MR. KENNEDY:</p> <p>9 Q Mr. Counley, I'm Charles Kennedy. I</p> <p>10 am the attorney for one of the Defendants</p> <p>11 Woodforest National Bank in this matter. I</p> <p>12 have some questions I'm going to ask you.</p> <p>13 The same instructions will apply as for the</p> <p>14 questions that you were asked by Mr. Weigel</p> <p>15 in this case.</p> <p>16 Mr. Counley, you understand that this</p> <p>17 case involves certain business that was done</p> <p>18 by banks on behalf of the Laurette companies?</p> <p>19 A Yes.</p> <p>20 Q And the Laurette companies operated a</p> <p>21 website called thebagaddiction.com; is that</p> <p>22 correct?</p> <p>23 A Correct.</p> <p>24 Q I would like you to take, if you</p> <p>25 would, Exhibit 2. It should be in front of</p>
211	<p>1 Counley</p> <p>2 Q What business are these folks in?</p> <p>3 A I guess they are in a website</p> <p>4 marketing. They appear to advertise for</p> <p>5 merchants services and then are agents for</p> <p>6 other credit card processors.</p> <p>7 Q Are they an agent for Durango Merchant</p> <p>8 Services as well?</p> <p>9 A No.</p> <p>10 Q Have they ever placed any accounts</p> <p>11 with you?</p> <p>12 A No.</p> <p>13 Q These folks were using your trademark</p> <p>14 to sell their services?</p> <p>15 A And we asked them twice and they still</p> <p>16 continued to do it.</p> <p>17 Q Did you believe it was harming your</p> <p>18 business because they were using your</p> <p>19 trademark to market their products?</p> <p>20 A Especially because we asked them twice</p> <p>21 not to do it and they continued to do it.</p> <p>22 Q Do you remember when you first ran the</p> <p>23 file shredding program on your computer?</p> <p>24 A No.</p> <p>25 MR. WEIGEL: Let's take a</p>	213	<p>1 Counley</p> <p>2 you.</p> <p>3 A All right.</p> <p>4 Q Is Exhibit 2 an e-mail that was sent</p> <p>5 to you?</p> <p>6 A Yes.</p> <p>7 Q What date was it sent?</p> <p>8 A September 10, '06.</p> <p>9 Q Was this the first time you had</p> <p>10 noticed that there was -- the Laurette</p> <p>11 Company was looking for credit card services?</p> <p>12 A Yes.</p> <p>13 Q At this time you were informed that</p> <p>14 the description of the business was replica</p> <p>15 handbags and accessories; is that correct?</p> <p>16 A Correct.</p> <p>17 Q If you take Exhibit 3?</p> <p>18 A All right.</p> <p>19 Q This is an e-mail exchange in</p> <p>20 September of 2006 between you and a Jennifer</p> <p>21 Mattchen; is that correct?</p> <p>22 A Correct.</p> <p>23 Q Who is Jennifer Mattchen?</p> <p>24 A Apparently the alternate name, I</p> <p>25 believe Jennifer Kirk is her real name.</p>

214	<p>1 Counley</p> <p>2 Q Who was Jennifer Kirk? Was she the</p> <p>3 principle of the Laurette Company that you</p> <p>4 dealt with?</p> <p>5 A Correct.</p> <p>6 Q Is this the communication that you had</p> <p>7 with Jennifer Mattchen or Jennifer Kirk as</p> <p>8 you later came to know her by which you made</p> <p>9 an application to obtain credit card services</p> <p>10 for The Bag Addiction?</p> <p>11 A Yes.</p> <p>12 Q If you turn to the second page of this</p> <p>13 Exhibit 3, at the top there is the e-mail</p> <p>14 exchange you to Jennifer, September 14, 2006,</p> <p>15 where you say "Good news. I just found our</p> <p>16 U.S. bank can do replica accounts now." Do</p> <p>17 you see that?</p> <p>18 A Yes.</p> <p>19 Q Is that what you told her?</p> <p>20 A That is my e-mail to her, correct.</p> <p>21 Q I know Mr. Weigel asked you some</p> <p>22 questions about that and you were not certain</p> <p>23 at the time who the U.S. bank was. Are you</p> <p>24 now certain that that U.S. bank that you were</p> <p>25 referring to was Frontline?</p>	216	<p>1 Counley</p> <p>2 The Bag Addiction and subsequently provide</p> <p>3 credit card services?</p> <p>4 A Yes.</p> <p>5 Q At this time Woodforest wasn't even in</p> <p>6 the picture with respect to The Bag</p> <p>7 Addiction.com; isn't that correct?</p> <p>8 A Correct.</p> <p>9 Q Did you actually set up credit card</p> <p>10 services through Frontline and The Bag</p> <p>11 Addiction became operational as of</p> <p>12 September 2006?</p> <p>13 A We didn't set it up, but Bag Addiction</p> <p>14 was approved and started processing by</p> <p>15 Frontline in 2006.</p> <p>16 Q It was advertising the replica</p> <p>17 handbags for that period of time and making</p> <p>18 sales and when the sales were processed</p> <p>19 through credit cards, it was all done by</p> <p>20 Frontline during that period of time; is that</p> <p>21 correct?</p> <p>22 A Correct.</p> <p>23 MR. KENNEDY: Mark this</p> <p>24 Exhibit 38.</p> <p>25 (Whereupon application to</p>
215	<p>1 Counley</p> <p>2 A Yes.</p> <p>3 Q It was not Woodforest; is that</p> <p>4 correct?</p> <p>5 A Correct.</p> <p>6 MR. WEIGEL: I'm just going to</p> <p>7 have an objection.</p> <p>8 MR. KENNEDY: He's not my</p> <p>9 witness, but your objection is noted.</p> <p>10 Can you please mark this as</p> <p>11 Exhibit 37.</p> <p>12 (Whereupon application to</p> <p>13 Frontline was marked Counley Exhibit</p> <p>14 37 for identification as of this</p> <p>15 date.)</p> <p>16 Q Mr. Counley, Exhibit 37, can you</p> <p>17 identify that as being the application that</p> <p>18 you filed on behalf of the Laurette Company</p> <p>19 for The Bag Addiction with Frontline?</p> <p>20 A Yes.</p> <p>21 Q What was the date that you filed that</p> <p>22 application?</p> <p>23 A September 15, 2006 is when it's signed</p> <p>24 by the merchant.</p> <p>25 Q Did Frontline approve the account for</p>	217	<p>1 Counley</p> <p>2 Woodforest was marked Counley Exhibit</p> <p>3 38 for identification as of this</p> <p>4 date.)</p> <p>5 Q Mr. Counley, you have just been handed</p> <p>6 Exhibit 38 and I'll state for the record that</p> <p>7 Exhibit 38 is -- it comprises the first four</p> <p>8 pages of what was marked previously as</p> <p>9 Exhibit 4 and I'm going to ask you whether</p> <p>10 Exhibit 38 is the entirety of the application</p> <p>11 you filed with Woodforest for the Laurette</p> <p>12 Company?</p> <p>13 A Well, there would have been a driver's</p> <p>14 license included. Is that what you mean? Or</p> <p>15 the agreement application?</p> <p>16 Q Well, in addition to -- let's start</p> <p>17 with that. Is Exhibit 38 the agreement</p> <p>18 application that you filed --</p> <p>19 A Yes.</p> <p>20 Q -- with Woodforest National Bank?</p> <p>21 A Yes.</p> <p>22 Q And that was for the Laurette Company,</p> <p>23 correct?</p> <p>24 A Correct.</p> <p>25 Q And at the time that you filed that,</p>

218	<p>1 Counley</p> <p>2 credit card services were already being</p> <p>3 provided for the Laurette Company by</p> <p>4 Frontline?</p> <p>5 A Correct.</p> <p>6 Q Now, what, in addition to Exhibit 38,</p> <p>7 would you have provided to Woodforest for</p> <p>8 purposes of this application?</p> <p>9 A Copy of driver's license, Articles of</p> <p>10 Incorporation and the processing statements</p> <p>11 from Frontline which they would have had two</p> <p>12 months' worth, September and October.</p> <p>13 Q Describe what the processing</p> <p>14 statements looked like.</p> <p>15 A It's just a monthly summary of her</p> <p>16 credit card sales through Frontline for each</p> <p>17 month.</p> <p>18 Q Did you provide Woodforest National</p> <p>19 Bank with any portion of the website for The</p> <p>20 Bag Addiction that was then in operation?</p> <p>21 A The website is listed on the</p> <p>22 application.</p> <p>23 Q Did you provide any screen shots from</p> <p>24 the website or anything else?</p> <p>25 A No.</p>	220	<p>1 Counley</p> <p>2 processing volume.</p> <p>3 Q What was the volume limit that</p> <p>4 Frontline had?</p> <p>5 A I think at the time 50,000.</p> <p>6 Q Now, could you have gone to Frontline</p> <p>7 and asked to have the limit increased?</p> <p>8 A It is possible to ask that. Usually</p> <p>9 banks don't like to do that in the first</p> <p>10 three months. I'm not sure who did ask or</p> <p>11 not. Some merchants also liked to have two</p> <p>12 merchant accounts. Even if they could get</p> <p>13 additional volume at the first bank, they</p> <p>14 like to have two accounts so they don't have</p> <p>15 all their eggs in one basket.</p> <p>16 Q Did the Laurette Company or any of its</p> <p>17 principals ask you to get a second account or</p> <p>18 was that something that you suggested</p> <p>19 yourself?</p> <p>20 A A number of merchants have second</p> <p>21 accounts. I'm not sure if she asked us or we</p> <p>22 suggested it.</p> <p>23 Q And the reasoning behind getting the</p> <p>24 second account with Woodforest National Bank</p> <p>25 was it because of the limit, the \$50,000</p>
219	<p>1 Counley</p> <p>2 Q Within the description on Exhibit 38</p> <p>3 of the products, which is about a third of</p> <p>4 the way down on the left side of this form,</p> <p>5 read how you described what the products were</p> <p>6 for this website.</p> <p>7 A Designer handbags.</p> <p>8 Q Above that -- it's written wholesale</p> <p>9 slash retail; do you see that?</p> <p>10 A Yes.</p> <p>11 Q Did you write that in?</p> <p>12 A No.</p> <p>13 Q Do you know who did?</p> <p>14 A I do not.</p> <p>15 Q Is it fair to say that the reason you</p> <p>16 decided to file an application with</p> <p>17 Woodforest, although Frontline was already</p> <p>18 providing the credit card services, is</p> <p>19 because you were concerned that The Bag</p> <p>20 Addiction might reach the limits of the</p> <p>21 Frontline agreement?</p> <p>22 A Which limits?</p> <p>23 Q The dollar limit as to how much</p> <p>24 processing they could do through Frontline?</p> <p>25 A Right. She needed additional</p>	221	<p>1 Counley</p> <p>2 limit that Frontline had for its account?</p> <p>3 A I'm not sure if it was the limit or</p> <p>4 she wanted two accounts.</p> <p>5 MR. KENNEDY: Mark this as</p> <p>6 Exhibit 39.</p> <p>7 (Whereupon e-mail exchange was</p> <p>8 marked Counley Exhibit 39 for</p> <p>9 identification as of this date.)</p> <p>10 Q Mr. Counley, I've just handed you what</p> <p>11 has been marked as Exhibit 39. Would you</p> <p>12 take a minute to look at that, please?</p> <p>13 A All right.</p> <p>14 Q Do you recognize first the e-mail</p> <p>15 exchange that comprises Exhibit 39?</p> <p>16 A I don't remember it.</p> <p>17 Q Do you know notice that you are copied</p> <p>18 on this e-mail exchange?</p> <p>19 A I do.</p> <p>20 Q Having reviewed it, do you see this to</p> <p>21 be an exchange between Hans Strickler of</p> <p>22 Frontline and Pat Kirk of Laurette Company</p> <p>23 regarding the question as to why there is a</p> <p>24 second source?</p> <p>25 A I do.</p>

222	<p>1 Counley</p> <p>2 Q Did you understand that, at least the</p> <p>3 reason stated by Pat Kirk to Frontline, as to</p> <p>4 why there was a second source, namely</p> <p>5 Woodforest, was because of the limit that</p> <p>6 Frontline had of \$50,000?</p> <p>7 A Correct.</p> <p>8 Q Did you understand, as a result of</p> <p>9 this exchange in October 2007, that the limit</p> <p>10 was increased to 75,000 for Frontline's</p> <p>11 business?</p> <p>12 A Correct.</p> <p>13 Q Look at the second e-mail on the first</p> <p>14 page of Exhibit 39 and this is the one dated</p> <p>15 October 8, 2007. It's from Pat Kirk to Hans</p> <p>16 Strickler and you've been copied on this. Do</p> <p>17 you see that?</p> <p>18 A I do.</p> <p>19 Q Pat Kirk says "We actually have</p> <p>20 another website we use and, therefore, have</p> <p>21 another bank, Woodforest, that we process</p> <p>22 through. When volume amounts got close, we</p> <p>23 would occasionally switch over to Woodforest</p> <p>24 on The Bag Addiction"; do you see that</p> <p>25 statement?</p>	224	<p>1 Counley</p> <p>2 identification as of this date.)</p> <p>3 Q I've handed you a copy of Exhibit 40</p> <p>4 which is the production document we received</p> <p>5 from Gucci, GUCCI0047235.</p> <p>6 MR. WEIGEL: Off the record.</p> <p>7 (Whereupon a discussion was</p> <p>8 held off the record.)</p> <p>9 Q Have you had a chance to read Exhibit</p> <p>10 40, Mr. Counley?</p> <p>11 A Yes.</p> <p>12 Q Do you see the third paragraph? Did</p> <p>13 you have a chance to review that?</p> <p>14 A Yes.</p> <p>15 Q This is referring to at least a draft</p> <p>16 of a Kirk declaration and let me ask you, was</p> <p>17 the information set forth in the third</p> <p>18 paragraph correct?</p> <p>19 A I can't recall if that's what I told</p> <p>20 her, Kirk not to continue to use the other</p> <p>21 thing.</p> <p>22 Q Let me ask you this, was it correct,</p> <p>23 this statement, and I'm going to focus on it,</p> <p>24 next to the last sentence in that paragraph</p> <p>25 "Mr. Counley told me that was because</p>
223	<p>1 Counley</p> <p>2 A I do.</p> <p>3 Q Do you have any reason to believe that</p> <p>4 what Mr. Kirk said was incorrect?</p> <p>5 A I don't know if they had another</p> <p>6 website, so I don't know that that was said.</p> <p>7 Q Do you understand that, at least from</p> <p>8 the point of view of The Bag Addiction, the</p> <p>9 reason they had a second account with</p> <p>10 Woodforest was simply to handle the situation</p> <p>11 where the volumes might get too high and they</p> <p>12 start approaching the limit with Frontline,</p> <p>13 they would, therefore, use the Woodforest</p> <p>14 account?</p> <p>15 MR. WEIGEL: Objection to form.</p> <p>16 A Yes.</p> <p>17 Q You understood that that was at least</p> <p>18 the thinking of the Kirks?</p> <p>19 A Right.</p> <p>20 MR. WEIGEL: Objection.</p> <p>21 Foundation.</p> <p>22 MR. KENNEDY: Can you mark this</p> <p>23 as Exhibit 40.</p> <p>24 (Whereupon GUCCI0047235 was</p> <p>25 marked Counley Exhibit 40 for</p>	225	<p>1 Counley</p> <p>2 Frontline wanted all the fees associated with</p> <p>3 the credit card processing, but told me to</p> <p>4 continue using both banks."</p> <p>5 My question is did Frontline say that</p> <p>6 they wanted all the fees associated with</p> <p>7 credit card processing through The Bag</p> <p>8 Addiction?</p> <p>9 A Well, I honestly can't recall that</p> <p>10 conversation. Am I allowed to say that?</p> <p>11 Q You can if you didn't recall it.</p> <p>12 A All right.</p> <p>13 Q Let's go back as far as The Bag</p> <p>14 Addiction goes, that was set up as an</p> <p>15 operational business doing, as far as you</p> <p>16 know, what it did during the entire course of</p> <p>17 its business life, underfunding solely or</p> <p>18 under credit card processing solely by</p> <p>19 Frontline before you put in an application to</p> <p>20 Woodforest?</p> <p>21 A That's true.</p> <p>22 MR. WEIGEL: Can I have that</p> <p>23 question back.</p> <p>24 (Whereupon the record was read</p> <p>25 back by the reporter.)</p>

226	<p>1 Counley</p> <p>2 MR. WEIGEL: Objection.</p> <p>3 Q Would you take a look at Exhibit 26?</p> <p>4 That should be in front of you.</p> <p>5 A Okay.</p> <p>6 Q In terms of residuals that Durango got</p> <p>7 from the Frontline or from Woodforest for The</p> <p>8 Bag Addiction, did you have a different</p> <p>9 percentage that determined the residual you</p> <p>10 got?</p> <p>11 A (No response.)</p> <p>12 Q Let me try to rephrase the question.</p> <p>13 I see you are puzzled by it.</p> <p>14 If I understood your testimony earlier</p> <p>15 correctly, the residual you received was</p> <p>16 based on the profit that was made by either</p> <p>17 Woodforest or Frontline; is that correct?</p> <p>18 A Correct. I received a percentage of</p> <p>19 the profit no matter which processor</p> <p>20 issued --</p> <p>21 Q Was it the same percentage regardless</p> <p>22 of whether it was Woodforest or Frontline?</p> <p>23 A Yes.</p> <p>24 Q What was that percentage?</p> <p>25 A On any income 40 to 50 percent goes to</p>	228	<p>1 Counley</p> <p>2 Q Is it correct for all of the</p> <p>3 processing that was done for The Bag</p> <p>4 Addiction, that the Frontline share, the</p> <p>5 Frontline residual was this number that's on</p> <p>6 the first column under Frontline, which is a</p> <p>7 little more than \$18,000?</p> <p>8 A Yes.</p> <p>9 Q If we wanted to determine what the</p> <p>10 total residual was for Woodforest, that's the</p> <p>11 sixth column on Exhibit 26 and that number is</p> <p>12 a little bit less than 9,000; is that</p> <p>13 correct?</p> <p>14 A That's actually the seventh column and</p> <p>15 that's a little bit less than 9,000.</p> <p>16 Q Wouldn't that indicate that Frontline</p> <p>17 did virtually twice the credit card</p> <p>18 processing for The Bag Addiction that</p> <p>19 Woodforest did?</p> <p>20 A Yes. Since the rates were fairly</p> <p>21 similar at both places for the merchant, then</p> <p>22 you could assume that.</p> <p>23 Q Mr. Weigel asked you, he pointed out</p> <p>24 from one of the documents that the Woodforest</p> <p>25 processing was some \$900,000 that Woodforest</p>
227	<p>1 Counley</p> <p>2 the agent, 35 percent of the remainder goes</p> <p>3 to me and then the remainder of that is split</p> <p>4 60/40 to Shane and Bill.</p> <p>5 Q When you say 35 percent goes to you,</p> <p>6 were you speaking of that's what would go to</p> <p>7 Durango?</p> <p>8 A So if we have an account with \$100</p> <p>9 profit, 40 or 50 percent, \$40 or \$50 goes to</p> <p>10 the agent, the remaining.</p> <p>11 Q Who was the agent in that case, is</p> <p>12 that Woodforest or Frontline?</p> <p>13 A Here I'll try to do it more clearly.</p> <p>14 If we have \$100 profit from an account and if</p> <p>15 Merchant Express is the agent and let's say</p> <p>16 they are at 40 percent revenue sharing. They</p> <p>17 would receive \$40. Of the remaining \$60,</p> <p>18 35 percent of it is paid to Nathan Counley</p> <p>19 and then the remaining 65 percent of it is</p> <p>20 paid -- is split between Bill and Shane.</p> <p>21 Q When you started out with the \$100</p> <p>22 profit, is that the profit by the credit card</p> <p>23 processing entity such as Frontline or</p> <p>24 Woodforest?</p> <p>25 A Yes.</p>	229	<p>1 Counley</p> <p>2 had processed?</p> <p>3 A Wait. I have to retract the last</p> <p>4 answer. If you remember, Joe Montella gets</p> <p>5 25 percent of the residuals before it gets to</p> <p>6 us, so this number is slightly less from</p> <p>7 Woodforest's total if Joe took 25 percent of</p> <p>8 it. So, if you want to derive numbers, I</p> <p>9 don't think we can use the residuals to get</p> <p>10 to the total sales --</p> <p>11 Q Isn't the difference greater than a</p> <p>12 25 percent difference? You are talking two</p> <p>13 to one between the residuals for Frontline</p> <p>14 and Woodforest as shown on Exhibit 26?</p> <p>15 A Yes, I'm not sure. Clearly Frontline</p> <p>16 did more sales for the merchant, yes. To</p> <p>17 what degree, what ratio exactly, it would be</p> <p>18 a little cumbersome to figure out from this.</p> <p>19 Q Do you have records that would</p> <p>20 indicate how much business in credit card</p> <p>21 processing Frontline did for The Bag</p> <p>22 Addiction?</p> <p>23 A If Frontline hasn't supplied it</p> <p>24 already to Gucci -- I would assume they did.</p> <p>25 If not, we may be able to get the information</p>

230	<p>1 Counley</p> <p>2 from Bill on residuals.</p> <p>3 Q Did you submit anything to Gucci that</p> <p>4 would indicate how much Frontline did?</p> <p>5 A I don't believe so.</p> <p>6 Q Would you take Exhibit 25? It's the</p> <p>7 one page chart and I know Mr. Weigel had you</p> <p>8 go across the columns and tell us what the</p> <p>9 column meant. What is the column that would</p> <p>10 tell us what the net profit made by</p> <p>11 Woodforest National Bank for all of its</p> <p>12 credit card processing services for The Bag</p> <p>13 Addiction or for the Laurette Company was?</p> <p>14 A From my understanding, the far right</p> <p>15 column, MCPS income.</p> <p>16 Q Are you able to make out the number</p> <p>17 there which I will represent on the record</p> <p>18 and see if that appears to be it \$16,505.86?</p> <p>19 A Correct.</p> <p>20 Q That's the total profit, as far as you</p> <p>21 understand it, based on this record that you</p> <p>22 testified about that Woodforest National Bank</p> <p>23 made for all of its credit card processing</p> <p>24 for The Bag Addiction?</p> <p>25 A These are not my -- our reports, but</p>	232	<p>1 Counley</p> <p>2 their name with Frontline change to The</p> <p>3 Shopping Addiction?</p> <p>4 A I do recall that.</p> <p>5 Q I have put a flag on a page. First,</p> <p>6 could you tell us what the Bates number is of</p> <p>7 that page within the exhibit?</p> <p>8 A Gucci-000-7232.</p> <p>9 Q And there is a total, a sales total</p> <p>10 there for the amount of credit card</p> <p>11 processing; is that correct?</p> <p>12 A Correct.</p> <p>13 Q Could you read what number there is?</p> <p>14 A \$1,152,553.69.</p> <p>15 Q Do you have a recollection one way or</p> <p>16 another if that is an approximate number</p> <p>17 volume of the credit card processing by</p> <p>18 Frontline?</p> <p>19 A I don't have any reason to believe it</p> <p>20 would be incorrect.</p> <p>21 Q Could you take out Exhibit 6, please?</p> <p>22 A All right.</p> <p>23 Q You recall Mr. Weigel was asking you</p> <p>24 whether you were an agent of -- I'm sorry --</p> <p>25 Woodforest at different points during your</p>
231	<p>1 Counley</p> <p>2 if we are to believe the numbers here, that</p> <p>3 should be correct.</p> <p>4 MR. KENNEDY: Please mark this</p> <p>5 as Exhibit 41.</p> <p>6 (Whereupon Gucci 7211 through</p> <p>7 7246 was marked Counley Exhibit 41 for</p> <p>8 identification as of this date.)</p> <p>9 Q Mr. Counley, I'm showing you what has</p> <p>10 been marked as Exhibit 41 and if you would</p> <p>11 hand it to me for just one second, I want to</p> <p>12 read the numbers on the record just so we</p> <p>13 have that. It's production number Gucci 7211</p> <p>14 through 7246.</p> <p>15 My first question of you is whether</p> <p>16 you have seen this document before?</p> <p>17 A No.</p> <p>18 Q Do you have an understanding, just</p> <p>19 based on the format of the document, that it</p> <p>20 purports to show the sales processed by</p> <p>21 Frontline for The Bag Addiction?</p> <p>22 A Yes, sales history and it has the</p> <p>23 merchant name and the merchant ID number.</p> <p>24 Q Did there come a time when The Bag</p> <p>25 Addiction, the Laurette Company asked to have</p>	233	<p>1 Counley</p> <p>2 examination?</p> <p>3 A Correct.</p> <p>4 Q This Exhibit 6 is indeed a contract</p> <p>5 that you had; is that correct?</p> <p>6 A Correct.</p> <p>7 Q Would you turn to the second page of</p> <p>8 Exhibit 6 and under paragraph capital C, I'll</p> <p>9 read the first sentence. It says "The sales</p> <p>10 associate's relationship with M CCS is that of</p> <p>11 an independent contractor, not an employee or</p> <p>12 agent of M CCS"; do you see that?</p> <p>13 A Yes.</p> <p>14 Q This is the agreement -- if you flip</p> <p>15 to the next page -- that you signed that</p> <p>16 documents your relationship with M CCS, is</p> <p>17 that right?</p> <p>18 A Correct.</p> <p>19 Q So, to the question whether or not you</p> <p>20 are an agent of M CCS, what would the answer</p> <p>21 to that be?</p> <p>22 A No.</p> <p>23 Q Likewise were you ever an agent of</p> <p>24 Woodforest National Bank?</p> <p>25 A No. Agent is a term we loosely use in</p>

<p style="text-align: right;">234</p> <p>1 Counley 2 our industry, but like I said earlier, it's 3 probably not the correct term, an independent 4 contractor -- 5 MR. WEIGEL: Objection. Calls 6 for a legal conclusion. 7 Q Exhibit 38 which I hope you have right 8 in front of you? 9 A Yes. 10 Q That's the application that you 11 submitted? 12 A Correct. 13 Q Would it be fair to say that in 14 submitting that application, you didn't have 15 the ability on behalf of Woodforest National 16 Bank to approve the application that was 17 being made by the Laurette Company, correct? 18 A Certainly not. 19 Q So you couldn't act on behalf of 20 Woodforest National Bank; is that right? 21 A We don't control the underwriting 22 process at all. 23 Q Have you ever had a direct 24 conversation with a Woodforest National Bank 25 employee to your recollection?</p>	<p style="text-align: right;">236</p> <p>1 Counley 2 Woodforest National Bank, correct? 3 A Yes. 4 Q At the time that this application was 5 made of Exhibit 38 to Woodforest National 6 Bank, you were aware that the products of The 7 Bag Addiction were replicas, correct? 8 A Correct. 9 Q But you didn't have any awareness as 10 to whether or not they were counterfeits; is 11 that fair? 12 A No. 13 MR. WEIGEL: Objection. 14 Leading. 15 Q You didn't advise Woodforest National 16 Bank at any time that these products were 17 counterfeit, correct? 18 A No. 19 Q To preface the questions I've raised, 20 I'm not saying one way or another whether 21 they were counterfeit, but as far as you 22 knew, you didn't know one way or another 23 whether the products on The Bag Addiction 24 site were counterfeit; is that correct? 25 MR. WEIGEL: Objection.</p>
<p style="text-align: right;">235</p> <p>1 Counley 2 A No. 3 Q Would you take Exhibit 29, please? 4 A Okay. 5 Q This is the exhibit where you 6 testified about a recommendation being made 7 to The Bag Addiction to have a box put on 8 their website where a purchaser would have to 9 check that they understood that the items 10 being purchased are replicas and not 11 originals; is that correct? 12 A It's communication we forwarded on 13 behalf of Frontline. 14 Q Is it your testimony that that was a 15 suggestion by Frontline? 16 A Yes. 17 Q Would it be correct to say Woodforest 18 was not even in the loop on these e-mails 19 between Hans Strickler and Jennifer Kirk? 20 A That's correct. 21 Q Just so we are clear there, are three 22 pages of e-mails within this document that 23 set forth the communications between you and 24 Jennifer Kirk and Hans Strickler and none of 25 this correspondence was even sent to</p>	<p style="text-align: right;">237</p> <p>1 Counley 2 Leading. 3 A No. 4 Q Okay? 5 A We are not underwriters. We are not 6 risk managers. We don't police the accounts. 7 We are not trademark experts. It said 8 replicas which we assume meant look a like 9 and if the banks approved it, then so be it. 10 Q Just to be complete, you didn't 11 communicate anything to Woodforest National 12 Bank that would have alerted them to whether 13 these products were replicas or counterfeits 14 or anything of the sort; is that right? 15 A That's not really my job. We had the 16 merchant fill out the application and include 17 their website. Then the processors handle 18 the underwriting process from there. 19 Q Was The Bag Addiction the first 20 company that was a replica company that you 21 applied to Woodforest with? 22 A Correct. 23 Q The date of that application was and I 24 know we have been through this, that was the 25 November 14, 2006, that's the one that's</p>

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1 Counley
2 right there?
3 A November 13 is when it was signed, but
4 sometimes it takes a day or two to process.
5 Q Now, Mr. Weigel went through Exhibits
6 15 through 24, which were additional accounts
7 that you testified about that you had
8 submitted applications to Woodforest and I
9 think he identified those or you identified
10 those as being replicas. Do you recall that
11 testimony?
12 A Yes.
13 Q Here's what I'm going to do to try to
14 shorten things, which is, first I'll ask to
15 have this marked as the next exhibit, 42.
16 (Whereupon notes of websites
17 and dates was marked Counley Exhibit
18 42 for identification as of this
19 date.)
20 MR. KENNEDY: Bob, those are my
21 notes of what the websites are as well
22 as the date. I just want to get his
23 confirmation.
24 MR. WEIGEL: The dates are on
25 the record, but you can show him if

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1 Counley
2 you want.
3 Q Mr. Counley, let me hand you what's
4 been marked as Exhibit 42 and just ask you to
5 confirm -- those go through these exhibits 15
6 through 24 and they set forth the date of the
7 application. I would just like to get your
8 confirmation that those are indeed the dates
9 of these applications?
10 A You have to allow me a minute to
11 confirm.
12 Q Thank you.
13 A I only see at this time on -- I only
14 see the date on the fax header. The fax
15 header says 4/17, but there is no signature
16 or stamp.
17 Q Okay. Is the fax header sufficient
18 for you to say that's the date of the
19 application?
20 A Looks correct.
21 Q Okay.
22 A These dates all appear correct 2006
23 and 2007.
24 Q Can I ask you to sign and date
25 Exhibit -- whatever number is on that exhibit

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1 Counley
2 just so we have confirmation that that's
3 indeed the correct dates.
4 MR. WENGROVSKY: 42 is the most
5 recent exhibit.
6 MR. WEIGEL: I'm going to
7 object. The witness is testifying
8 under oath. You need him to deface
9 the exhibit.
10 MR. KENNEDY: That's okay.
11 I'll do without that.
12 Q Your testimony is that the dates on
13 Exhibit 42 are accurate; is that correct?
14 A They do appear to be accurate.
15 Q Mr. Counley, when did you first hear
16 that Gucci was raising an issue as to
17 trademark counterfeiting or trademark
18 infringement with respect to merchandise on
19 The Bag Addiction website?
20 A I don't have confirmations in front of
21 me, but apparently you guys served the
22 subpoena in August of '08.
23 Q Now, would it be correct to say that
24 every one of those websites that you
25 submitted to Woodforest National Bank came

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1 Counley
2 between -- they were after The Bag Addiction
3 had been submitted and before you gained
4 notice that there was any issue with alleged
5 trademark infringement or counterfeiting?
6 A Correct.
7 MR. WEIGEL: Objection.
8 Foundation. Leading.
9 Q During this entire period of time is
10 it accurate to say that you didn't -- you
11 weren't aware of there being any issue with
12 any of these replica websites?
13 A That's correct.
14 MR. WEIGEL: Again, leading.
15 Q Mr. Weigel asked you about some matter
16 dealing with Stephanie Walker and there was
17 potentially some notice she may have
18 received. My question is, did you
19 communicate anything about that to Woodforest
20 National Bank?
21 A No, and you can see in my e-mails that
22 I didn't comment on it with her. I mean you
23 can assume that I didn't really know what
24 that meant.
25 Q You didn't know what it meant. You

242	<p>1 Counley</p> <p>2 didn't think it was an issue and you didn't</p> <p>3 communicate it to Woodforest National Bank in</p> <p>4 any manner?</p> <p>5 A Correct.</p> <p>6 MR. WEIGEL: Objection.</p> <p>7 Leading.</p> <p>8 Q I do want to go back to Exhibit 26</p> <p>9 just for a minute.</p> <p>10 A All right.</p> <p>11 Q And we are dealing with the difference</p> <p>12 between the second column, is that -- that's</p> <p>13 the one that shows the Frontline residual</p> <p>14 amount, correct?</p> <p>15 A Right.</p> <p>16 Q And then I think you pointed out it</p> <p>17 was the seventh line, which is a Woodforest</p> <p>18 residual amount, correct?</p> <p>19 A Yes, correct.</p> <p>20 Q In order to have a comparison of</p> <p>21 apples to apples, would you add 25 percent to</p> <p>22 the Woodforest amount to take account for</p> <p>23 what went to Mr. Montella?</p> <p>24 A Well, there are two things. We would</p> <p>25 have to add 25 percent which went to</p>	244	<p>1 Counley</p> <p>2 exhibit a listing of all of the accounts that</p> <p>3 your company Durango did with Woodforest?</p> <p>4 A Yes. I would have to compare it to</p> <p>5 our residual reports, but yes, it looks</p> <p>6 complete.</p> <p>7 Q Exhibit 10 appears to be -- appears to</p> <p>8 end as of September 2007 and then it looks</p> <p>9 like in Exhibit 9 you pick up with October of</p> <p>10 2007 and take it through to August of 2009;</p> <p>11 is that correct?</p> <p>12 A Yes.</p> <p>13 Q Now is it correct to say that there</p> <p>14 was no application that you submitted for a</p> <p>15 replica company to Woodforest after April of</p> <p>16 2008?</p> <p>17 A Correct.</p> <p>18 Q I'm going to inform you that</p> <p>19 Woodforest received a subpoena on June 10,</p> <p>20 2008 from the Laurette case, much like your</p> <p>21 company did, and would it be accurate to say</p> <p>22 that, as far as you know, Woodforest never</p> <p>23 approved of a replica account since the date</p> <p>24 that they received that subpoena in June of</p> <p>25 2008?</p>
243	<p>1 Counley</p> <p>2 Mr. Montella and then Frontline -- they were</p> <p>3 paying out, I think, a higher percentage of</p> <p>4 their profits to Durango than Woodforest was</p> <p>5 paying to Joe.</p> <p>6 Q Do you know how much or what the</p> <p>7 difference was?</p> <p>8 A Frontline, like most banks, pay out 50</p> <p>9 percent of its profits to its contractors or</p> <p>10 agents, whatever you want to call it, but I</p> <p>11 believe, I'm not 100 percent sure on this, we</p> <p>12 have to look at the numbers, but I believe</p> <p>13 Woodforest pays out 40 percent to its</p> <p>14 contractors.</p> <p>15 Q And we would have to correct for those</p> <p>16 two variables to do a comparison; is that</p> <p>17 correct?</p> <p>18 A Right.</p> <p>19 MR. KENNEDY: Off the record.</p> <p>20 (Whereupon a discussion was</p> <p>21 held off the record.)</p> <p>22 Q Mr. Counley, would you please take</p> <p>23 Exhibits 9 and 10?</p> <p>24 A All right.</p> <p>25 Q Starting with Exhibit 10 is that</p>	245	<p>1 Counley</p> <p>2 MR. WEIGEL: I object to</p> <p>3 foundation.</p> <p>4 A Yes, going by the approval list, that</p> <p>5 would be correct.</p> <p>6 MR. WEIGEL: Are you referring</p> <p>7 only to websites that Mr. Counley</p> <p>8 presented?</p> <p>9 MR. KENNEDY: Yes, as far as he</p> <p>10 knows, that all I can say, absolutely.</p> <p>11 Q You understood that question, didn't</p> <p>12 you? As far as you know, you are not aware</p> <p>13 of Woodforest ever approving, doing credit</p> <p>14 card funding for a replica website after June</p> <p>15 of 2008?</p> <p>16 A Correct.</p> <p>17 Q Did anyone from Woodforest provide you</p> <p>18 any information that they were not accepting</p> <p>19 replica websites or business for replica</p> <p>20 merchants at any time?</p> <p>21 A No, we don't receive communication</p> <p>22 from Woodforest anyway. Off the top of my</p> <p>23 head I think Joe Montella told us that you</p> <p>24 stopped accepting applications for replicas.</p> <p>25 Q Do you know approximately when that</p>

246	<p>1 Counley</p> <p>2 occurred?</p> <p>3 A I don't. Going from this list I would</p> <p>4 assume about the time that you guys received</p> <p>5 the subpoena, there has been no more accounts</p> <p>6 since then.</p> <p>7 Q Did you ever receive a communication</p> <p>8 from anyone at Woodforest National Bank to</p> <p>9 the effect that they thought any of the</p> <p>10 merchandise being sold on The Bag Addiction</p> <p>11 was counterfeit merchandise?</p> <p>12 A No.</p> <p>13 Q Are you aware of Woodforest National</p> <p>14 Bank ever obtaining a handbag from The Bag</p> <p>15 Addiction?</p> <p>16 A No.</p> <p>17 Q Going back to that list as I marked as</p> <p>18 a recent exhibit --</p> <p>19 MR. WENGROVSKY: 42 is the</p> <p>20 handwritten list.</p> <p>21 Q Is it accurate to say that for all of</p> <p>22 these different replica merchants that</p> <p>23 Mr. Weigel took you through during that time</p> <p>24 period dating from December 2006 through to</p> <p>25 December 2007, during that time period, that</p>	248	<p>1 Counley</p> <p>2 on it as an application number?</p> <p>3 A 781091 -- yes, it's the same.</p> <p>4 Q Do you have any understanding as to</p> <p>5 why they are listed as Shopping Addiction</p> <p>6 instead of The Bag Addiction?</p> <p>7 A I'm assuming they contacted the</p> <p>8 processor to change their DBA name.</p> <p>9 Q It is your testimony, as far as you</p> <p>10 know, the net profit made by Woodforest</p> <p>11 National Bank from this entire venture in</p> <p>12 processing credit card payments for The Bag</p> <p>13 Addiction is something a little greater than</p> <p>14 \$16,000?</p> <p>15 A Correct.</p> <p>16 MR. WEIGEL: Objection.</p> <p>17 Foundation. Leading.</p> <p>18 Q Have you done a computation as to what</p> <p>19 alleged profit Durango has made?</p> <p>20 A Yes, let me pull up the -- it's</p> <p>21 Exhibit 26, shows Durango profit.</p> <p>22 Q Okay. How much is it?</p> <p>23 A From Woodforest alone?</p> <p>24 Q Yes.</p> <p>25 A Woodforest residuals paid to Durango</p>
247	<p>1 Counley</p> <p>2 as far as you're aware, none of the companies</p> <p>3 whose products were -- replicas were being</p> <p>4 sold ever had complained to the websites?</p> <p>5 A Had any of these companies received a</p> <p>6 subpoena or a notice from Gucci?</p> <p>7 Q Yes or from any of the companies whose</p> <p>8 products they said they were selling replicas</p> <p>9 of and I would include a subpoena, a</p> <p>10 Complaint, anything of that sort; were you</p> <p>11 aware of any of that?</p> <p>12 A Not that I'm aware of.</p> <p>13 Q We have been talking about The Bag</p> <p>14 Addiction, but if you go on Exhibit 10 to the</p> <p>15 third page -- I was trying to locate the one</p> <p>16 that would be The Bag Addiction for</p> <p>17 Woodforest National Bank. It's got the date</p> <p>18 November 16, 2006, client WF Woodforest</p> <p>19 application 781091 and it's listed as</p> <p>20 Shopping Addiction. Is that to your</p> <p>21 understanding The Bag Addiction?</p> <p>22 A Yes.</p> <p>23 Q And now just to make that consistent,</p> <p>24 would you look at Exhibit 38, which is the</p> <p>25 application? Does that have the same number</p>	249	<p>1 Counley</p> <p>2 is 8,935; 533 paid out to Metro Merchant the</p> <p>3 agent, 2,941 paid to Nathan Counley and 5,462</p> <p>4 split with Shane and Bill.</p> <p>5 Q When Gucci asked Durango who were the</p> <p>6 companies that were processing the credit</p> <p>7 card payments, did Durango tell Gucci that it</p> <p>8 was Woodforest and Frontline?</p> <p>9 A At what point in time?</p> <p>10 Q When a subpoena was issued and you</p> <p>11 were requested to provide that information.</p> <p>12 A I cannot recall.</p> <p>13 Q Let me see if I can refresh memory.</p> <p>14 Mark this Exhibit 43.</p> <p>15 MR. WEIGEL: Lacks foundation.</p> <p>16 (Whereupon e-mail chain was</p> <p>17 marked Counley Exhibit 43 for</p> <p>18 identification as of this date.)</p> <p>19 Q Do you have Exhibit 43? Dealing with</p> <p>20 the first e-mail on Exhibit 43, do you see</p> <p>21 that Shane Kairalla has advised Gucci's</p> <p>22 counsel that Frontline and Woodforest are the</p> <p>23 two processors?</p> <p>24 A Yes.</p> <p>25 Q As far as you know, did Woodforest</p>

250	<p>1 Counley</p> <p>2 cooperate in providing whatever documents</p> <p>3 were requested by Gucci by subpoena?</p> <p>4 MR. WEIGEL: Objection.</p> <p>5 Foundation.</p> <p>6 A I wouldn't be able to know the answer.</p> <p>7 MR. KENNEDY: I have no further</p> <p>8 questions.</p> <p>9 MR. WEIGEL: Let me ask one</p> <p>10 really quick question.</p> <p>11</p> <p>12 CONTINUED EXAMINATION</p> <p>13 BY MR. WEIGEL:</p> <p>14 Q Mr. Counley, is there any way that a</p> <p>15 brand owner, such as Gucci, can determine who</p> <p>16 is processing the website's credit cards from</p> <p>17 the website itself?</p> <p>18</p> <p>19 (Continued on next page for</p> <p>20 jurat.)</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	252	<p>2 I N D E X</p> <p>3 WITNESS EXAMINATION BY PAGE</p> <p>4 NATHAN COUNLEY MR. WEIGEL 4, 250</p> <p>5 MR. KENNEDY 212</p> <p>6</p> <p>7 EXHIBITS</p> <p>8 COUNLEY'S</p> <p>9 FOR IDENTIFICATION DESCRIPTION PAGE</p> <p>10 Exhibit 1 Declaration of Shane Kairalla 20</p> <p>11 Exhibit 2 E-mail 36</p> <p>12 Exhibit 3 Series of e-mails 41</p> <p>13 Exhibit 4 Application to Woodforest 61</p> <p>14 Exhibit 5 Application to Frontline 77</p> <p>15 Exhibit 6 Contract sales application 79</p> <p>16 Exhibit 7 Agent agreement 88</p> <p>17 Exhibit 8 Fax with application to Frontline 89</p> <p>18 Exhibit 9 Application report 94</p> <p>19 Exhibit 10 Application report 94</p> <p>20 Exhibit 11 Screen shot from High Rick Merchant 111</p> <p> Accounts website</p> <p>21</p> <p>22 Exhibit 12 Printout from Merchant Accounts website 113</p> <p>23</p> <p>24 Exhibit 13 E-mails 116</p> <p>25 Exhibit 14 E-mails 116</p>
251	<p>1 Counley</p> <p>2 A Not that I'm aware of, no.</p> <p>3 MR. WEIGEL: Thank you.</p> <p>4 MR. KENNEDY: No further</p> <p>5 questions.</p> <p>6 (Time noted: 6:45 p.m.)</p> <p>7</p> <p>8 _____</p> <p>9 NATHAN COUNLEY</p> <p>10</p> <p>11 Subscribed and sworn to before me</p> <p>12 this _____ day of _____, 2010.</p> <p>13</p> <p>14 _____</p> <p>15 NOTARY PUBLIC</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	253	<p>2 EXHIBITS</p> <p>3 COUNLEY'S</p> <p>4 FOR IDENTIFICATION DESCRIPTION PAGE</p> <p>5 Exhibit 15 Application to Woodforest 118</p> <p>6 Exhibit 16 Application to Woodforest 121</p> <p>7 Exhibit 17 Application to Woodforest 128</p> <p>8 Exhibit 18 Application to Woodforest 129</p> <p>9 Exhibit 19 Application 133</p> <p>10 Exhibit 20 Application to Woodforest 138</p> <p>11 Exhibit 21 Application to Woodforest 144</p> <p>12 Exhibit 22 Application to Woodforest 146</p> <p>13 Exhibit 23 Application to Woodforest 149</p> <p>14 Exhibit 24 Application to Woodforest 156</p> <p>15 Exhibit 25 Listing of residual reports 158</p> <p>16 Exhibit 26 Report of residuals 163</p> <p>17 Exhibit 27 Residual report 167</p> <p>18 Exhibit 28 Residual report 168</p> <p>19 Exhibit 29 Declaration of Jennifer Kirk 175</p> <p>20 Exhibit 30 Screen shot of Durango website 193</p> <p>21 Exhibit 31 Screen shot from Durango website 196</p> <p>22 Exhibit 32 Screen shot from Durango website 200</p> <p>23 Exhibit 33 List of denied activities 201</p> <p>24 Exhibit 34 E-mail chain 207</p> <p>25</p>

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255	<p>2 CERTIFICATE</p> <p>3 I, DEBBIE SALINE, hereby certify that</p> <p>4 the DEPOSITION of NATHAN COUNLEY was held before</p> <p>5 me on the 14th day of June, 2010; that said</p> <p>6 witness was duly sworn before the commencement of</p> <p>7 his testimony; that the testimony was taken</p> <p>8 stenographically by myself and then transcribed by</p> <p>9 myself; that the party was represented by counsel</p> <p>10 as appears herein;</p> <p>11 That the within transcript is a true</p> <p>12 record of the DEPOSITION of said witness;</p> <p>13 That I am not connected by blood or</p> <p>14 marriage with any of the parties; that I am not</p> <p>15 interested directly or indirectly in the outcome</p> <p>16 of this matter; that I am not in the employ of any</p> <p>17 of the counsel.</p> <p>18 IN WITNESS WHEREOF, I have hereunto set</p> <p>19 my hand this 17th day of June, 2010.</p> <p>20</p> <p>21 _____</p> <p style="text-align: center;">DEBBIE SALINE</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>		

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