

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

200 Park Avenue
New York, NY 10166-0193
Tel 212.351.4000
www.gibsondunn.com

June 15, 2010

Robert Weigel
Direct: 212.351.3845
Fax: 212.351.5236
RWeigel@gibsondunn.com

Client: T 35409-00028

VIA HAND DELIVERYHon. Harold Baer, Jr.
United States District Judge
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Room 2230
New York, New York 10007-1312Re: Gucci America, Inc. v. Frontline Processing Corp., et al., 09 Civ. 6925 (SDNY) (HB)

Dear Judge Baer:

I write on behalf of Plaintiff Gucci America, Inc. (“Plaintiff”) in the above-captioned action to bring to the Court’s attention a very serious issue that was uncovered during yesterday’s deposition of Nathan Counley, who testified as a witness for Defendant Durango Merchant Services, LLC (“Durango”) pursuant to Federal Rule of Civil Procedure 30(b)(1) and 30(b)(6). As the Court may recall, during the last telephone conference with the Court on May 19, 2010, Plaintiff expressed grave concerns regarding the sufficiency of Durango’s document production and expressed an intent to seek an order allowing it to image Durango’s hard drives. Just yesterday, Plaintiff asked Durango’s representative about what documents may or may not exist on the hard drives, and Mr. Counley testified that Durango never instituted a litigation hold for documents relating to this lawsuit. Even more egregiously, Mr. Counley testified that he purchased a file-scrubbing program “a couple of weeks ago” and that he used it to wipe the hard drives of some or all of Durango’s senior executives. *See* Rough Transcript of Deposition of Nathan Counley, dated June 14, 2010 (“Counley Rough Dep. Tr.”) at 186:20-21. Mr. Counley testified that the program was last run “[y]esterday or the day before” his deposition. *Id.* at 202:9-13.

During his deposition, Mr. Counley testified that: 1) he used email as his primary means of communications internally at Durango, for communications with credit card processors, and for communications with replica products merchants; 2) Durango failed to preserve documents and emails after it was served with Plaintiff’s Complaint in this action (and, apparently, Durango’s counsel did not instruct them to do so); 3) Durango took affirmative steps to destroy documents and emails that would have been responsive to Plaintiff’s requests for production; and 4) that he ran the file-scrubbing software on his computer several times, including the day or two prior to his deposition. Provided below are excerpts from the rough copy of Mr. Counley’s deposition transcript:

GIBSON DUNN

Hon. Harold Baer, Jr.
June 15, 2010
Page 2

Q: When you communicate the rest of the year when you are not in Durango, do you do that by e-mail?

A: Yes.

* * *

Q: Now when you communicate with the banks that we just listed, you do that by e-mail as well?

A: Yes.

* * *

Q: While we are back on Counley [Exhibit] four, do you know where you this application to?

A: Like I said I usually e-mail the applications to the merchant.

Q: You e-mailed it to the merchant and then it came back signed to you?

A: Yes.

Q: What did you do with it?

A: Then I e-mailed it to the process[or].

Counley Rough Dep. Tr. 19:4-7; 20:8-10; 74:7-16.

Q: Are you familiar with the concept of a litigation hold?

A: No.

Id. at 184:12-14.

Q: Did you continue your usual practice of deleting emails after you received the complaint in August of 2009?

A: Yes, the sent emails I continued to delete.

Id. at 185:5-9.

Q: So as you sit here today you really don't know what you deleted after August of 09, is that fair?

A: Yes, I don't have reason to store all the emails.

Q: Did you ever run any file scrubbing program on your computer?

A: Yes.

Q: When did you last run that program?

A: We bought them, I bought software I think Bill bought, we all bought it a couple of weeks ago. We read an article just deleting files is not really safe if your computer was stolen, someone can still recreate the files. . . .

* * *

Q: Do you know the date on which you ran the program?

A: I probably ran it several times.

GIBSON DUNN

Hon. Harold Baer, Jr.
June 15, 2010
Page 3

Q: When did you last run it?
A: Yesterday or the day before.

Id. at 186:10-124; 202:9-13.

Q: Did anyone ever tell you that you had an obligation to hold on to the documents that might be relevant to this lawsuit?
MR. WENGROVSKY: Objection for the record. Go ahead.
A: No.

Id. at 188:12-17.

By way of background, Durango received Plaintiff's requests for production on December 4, 2009. Durango's responses to these requests were anything but forthcoming, which necessitated a series of letters and emails between counsel for Plaintiff and Durango. On May 10, 2010, Plaintiff submitted a letter to the Court requesting a conference with Your Honor to discuss, *inter alia*, the significant deficiencies in Durango's document production. Among the issues noted in Plaintiff's letter were Durango's production of only a handful of emails—six in total—even though Mr. Counley used email as regular means of communicating with the replica merchants he serviced. Plaintiff even provided examples of such emails to Durango, which had been produced to Plaintiff by Jennifer Kirk in the Laurette litigation. While representing to Plaintiff's counsel and this Court that Durango "has conducted a diligent and thorough search, including a search of electronic records, and Durango does not have any additional relevant document [*sic*] within its custody or control," Durango offered no explanation as to why it had failed to produce these communications. In response to Plaintiff's request, the Court held a telephonic conference with the parties on May 19, 2010. During the conference, the Court indicated that it would entertain an application by Plaintiff to inspect Durango's hard drives.

Following the May 19th conference, Plaintiff made every effort to resolve its discovery dispute with Durango without necessitating further intervention from the Court. Plaintiff sought additional information from Durango regarding the process by which it searched for documents in order to ascertain whether filing a motion to inspect Durango's hard drive was necessary. As before, Durango continued in its representation that it had conducted a thorough and diligent search, but refused to respond to Plaintiff's pointed inquiries as to the specifics of how the search was conducted, including Plaintiff's request that Durango provide a list of the keywords it used in conducting its search. The testimony elicited from Mr. Counley yesterday makes it clear that a search of Durango's hard drives is unlikely to yield any usable documents, since the hard drives have been wiped clean after the Court indicated that it would entertain a motion requiring their inspection.

GIBSON DUNN

Hon. Harold Baer, Jr.
June 15, 2010
Page 4

At yesterday's deposition, Mr. Counley testified that he ran the file-scrubbing software on both his current laptop, which he has been using since November 2009, and the Toshiba laptop he previously used for several years. *Id.* at 19:13-19; 187:11-14. When questioned regarding the email chain attached to the Declaration of Jennifer Kirk, filed in connection with Plaintiff's opposition to Defendants' motions to dismiss (Docket No. 28-2), Mr. Counley testified that he was using the Toshiba laptop at the time these emails were sent. *Id.* at 181:2-4. Although Durango made a belated production of emails on the eve of Mr. Counley's deposition, Mr. Counley testified that these e-mail were located in "a backup of some Outlook file that I had made in my documents folder that I wasn't aware of and so it's mainly lead sheets that we had gotten." *Id.* at 22:15-18. As Mr. Counley's testimony reflects, these emails are comprised of so-called "lead sheets" and do not contain Mr. Counley's regular correspondence with his merchants, such as the email chain attached to Ms. Kirk's declaration. Mr. Counley's communications with admitted counterfeiters and other replica products merchants are clearly relevant to the subject matter of this litigation. Equally clear is the fact that these emails have now been erased from Mr. Counley's hard drive three times over.

It is no accident that Durango purchased and used file-scrubbing software after the May 19th conference during which the Court suggested that it would entertain Plaintiff's request to image Durango's hard drives. Mr. Counley testified that Durango purchased its file-scrubbing software "a couple of weeks ago" and it has been run at least "several times" since then, including the weekend prior to Mr. Counley's deposition. *Id.* at 186:20-21; 202:9-13. These files were purposefully deleted, as evidenced by Mr. Counley's statement that "we all read an article" that "just deleting files is not really safe" because "someone can still recreate the files." *Id.* at 186:21-24. Durango's intention in running the program was clear—to delete files and emails so that they could not be recreated.

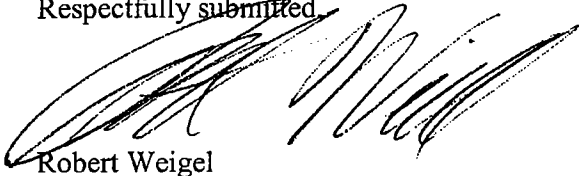
Plaintiff respectfully requests that the Court schedule a conference pursuant to Your Honor's Individual Rule 4(A) so that Plaintiff may apply for leave to file a motion seeking sanctions against Durango for its egregious misconduct. Under similar circumstances, this Court has concluded that sanctions are warranted. *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, (S.D.N.Y.) (2009) (Baer, J.) ("Based on this evidence, it is clear that Defendants' 'wiping' of the Seven Hard Drives was intentional and in bad faith, and their failure to ensure that all documents—including emails, to the extent they existed—were preserved before intentionally disposing of employees' hard drives was at least grossly negligent.") (precluding Defendants from asserting affirmative defenses to plaintiffs' claims of copyright infringement); *see also Global Naps, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 93 (1st Cir. 2010) (affirming the district court's grant of a default judgment "as a

GIBSON DUNN

Hon. Harold Baer, Jr.
June 15, 2010
Page 5

sanction for willful discovery misconduct"). Plaintiff is available at the Court's convenience to discuss this matter in further detail.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert Weigel', written over a horizontal line.

Robert Weigel

RLW/jch

cc: Fritz Pierce, Esq. (via email)
William Mentlik, Esq. (via email)
Todd Wengrovsky, Esq. (via email)