Gucci America, Inc. v. Frontline Processing Corporation et al Doc. 46 Att. 17

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via Fax (212) 805-7901 June 16, 2010

Hon. Harold Baer, Jr.
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Gucci v. Durango Merchant Services, LLC., et. al.
SDNY 09-CV-6925

Dear Judge Baer:

This is submitted in reply to Plaintiff Gucci's letter dated June 15, 2010 regarding the allegedly insufficient document production of Defendant Durango Merchant Services, LLC.

To place Gucci's letter in its proper context, it must be reiterated that Gucci, a designer of handbags, has sued Durango Merchant Services, LLC. for *trademark infringement and counterfeiting* even though Durango is merely a tiny company that acts as a "middleman" to refer retail merchants to *credit card processing* banks. To make this stretch, Gucci relies on the argument that a small portion of Durango's customers offered "replica" products (amounting to less than 1% of Durango's business). Durango's position regarding its utter lack of liability is well outlined in its currently-pending Motion to Dismiss dated October 30, 2010 and need not be repeated here.

Relative to Gucci's allegations of allegedly-insufficient document production, it is critical to note that Durango's Rule 30(b)(6) witness, Nathan Counley, testified that Durango stopped accepting replica-related merchant applications upon service of the present lawsuit (due solely to the legal fees and hassles caused by this litigation). As such, all merchant applications received by Durango during the litigation are automatically irrelevant to the litigation, and are therefore not responsive to any Gucci discovery request. For the purposes of example, if Durango were to receive an application from a merchant who is a travel agent or a retailer of electronic products, Durango is simply under no obligation to produce such papers to Gucci. Durango had been advised to maintain all of its available files (electronic or otherwise) that may be relevant to the litigation, and has indeed done so.

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As explained to Gucci on multiple occasions, Durango's files are mostly maintained in either their main office in Durango, Colorado, or in the home office of their sales agent in Wisconsin. The Wisconsin sales agent, Nathan Counley, testified that he uses a laptop computer for his sales work, which includes receiving merchant applications for credit card processing.

Each merchant application contains the merchant's social security number, date of birth, bank account number, driver's license identification number, and other highly-sensitive information. When Nathan Counley receives such applications, he forwards them to processing banks (such as the co-Defendants). After the merchant application is approved by a processing bank (including a "replica" account, which the processing bank stated was perfectly acceptable), the processing bank sends Durango monthly reports regarding the account. Therefore, Nathan Counley has no reason whatsoever to keep the applications on his laptop computer. Laptop computers can be lost or stolen. As such – and especially because all applications received during the litigation are not relevant to Gucci's Complaint – Nathan Counley correctly took all necessary steps to insure that the security of his clients' vital information would not be compromised.

In fact, upon information and belief, many states now have "Security Breach Statutes" which require public disclosure of computer security breaches in which unencrypted confidential information of any resident *may have been* compromised. In the event of a breach (which is defined in California for example as "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business"), Durango would be required to inform all of its applicant / merchants that a breach of their personal information has occurred. This would even include merchants whose accounts were never approved by the processing banks. Such could spell the end of a small brokerage like Durango's and clearly needs to be avoided at all costs.

Upon information and belief, the failure to implement adequate safeguards to protect customer data may expose a financial services organization to violations of requirements imposed by the following:

• the Gramm-Leach-Bliley Act ("GLBA");
• FTC Final Safeguards;
• State laws including **Colorado Rev. Stat. 6-1-716** (the state in which Durango is located); **Wisconsin Stat. 134.98** (the state in which Durango's sales agent Nathan Counley is located); and **California: Civil Code 1798.29** (a state in which Durango has business);
• Payment Card Industry ("PCI") Security Standards.

Furthermore, as expressly stated in Durango's Answer to Gucci's Interrogatory Number 11 **dated January 29, 2010**, "*Durango does not generally keep records on merchants once they are set-up for more than three months due to privacy concerns.*" **As such, it is wholly improper for Gucci to *now* argue that Durango's practice of removing files for security purposes is a *new one* that was established *after* the Court Telephone Conference of May 19, 2010.**

As for the notion that a "file scrubbing" program was used on Durango's computers in its main office in Durango, Colorado, this is to confirm that no such program has been run in Durango's main office at any time. As such, we are unclear as to why Gucci chose to exhaust the Court's valuable resources with their June 15, 2010 letter rather than simply asking counsel for clarification regarding this point. Instead, Durango has only discussed installing and running "scrubbing" software on its main office computers, because it recently learned that just "deleting" the files is not enough to insure that all sensitive merchant data is actually removed.

Consistent with the foregoing, Durango has produced no fewer than 480 merchant-related e-mails regarding any topic that could possibly be considered relevant to this frivolous litigation. Importantly, if Gucci's "conspiracy theory" regarding document destruction were true, Durango would have deleted or "scrubbed" the 480 e-mails, but obviously did not.

It is also important to note that Durango's production of all of the e-mails was coupled with all of Durango's available "residual reports" received from the processing banks regarding credit card processing of all of the possible merchants at issue. Such production was also coupled with the precise list of search terms used by Durango to search its electronic files. As such, we are unclear as to why Gucci's June 15, 2010 letter complained that no such list was provided.

Finally, on June 14, 2010, Durango went so far as to offer Nathan Counley for follow-up questioning by telephone in the event that Gucci had any questions regarding Durango's e-mails, residual reports, or search term list. Under such circumstances, Gucci's request for Court intervention is especially premature and unnecessary.

In sum, because Durango (a middleman in the *credit card processing* field) has produced all of its available relevant documents in good faith (during litigation regarding *someone else's* infringement of *handbags*), no sanctions should be imposed by the Court.

Sincerely,

/s/ Todd Wengrovsky

Todd Wengrovsky