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June 17, 2010

VIA HAND DELIVERY

Hon. 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 10007-1312

Re: 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”) to provide the Court with a copy of the formal transcript from the deposition of Nathan Counley, whose testimony on behalf of Defendant Durango Merchant Services, LLC (“Durango”) was the subject of Plaintiff’s June 15th letter to the Court. As the attached transcript makes clear, 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 by running a file scrubbing program on multiple, non-networked computers *after* this Court indicated that it would be receptive to a motion to produce Mr. Counley’s hard drive; and 4) that he ran the file-scrubbing software on his computer several times, including the day or two prior to his deposition.

Plaintiff also wishes to respond to the letter submitted yesterday by counsel for Durango. Although three pages in length, Durango’s letter is short on substance and fails to address the serious issues raised by Plaintiff concerning Durango’s willful destruction of documents relevant to this litigation. Durango claims that its “files are mostly maintained in either their main office in Durango, Colorado, or in the home office of their sales agent [Mr. Counley] in Wisconsin,” and goes on to state that “no such [file scrubbing] program was has been run in Durango’s main office at any time.” *See* Durango Letter, dated June 16, 2010. Durango does not deny that Mr. Counley ran the Lavasoft file scrubbing software called “File Shredder” on the two computers he used to communicate with replica products merchants—including the old computer that he used to communicate with the Laurette defendants (Mr. Counley initially testified that he gave this computer to his mother and later recanted). Similarly, Durango does not deny that Mr. Counley purchased and ran the file

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scrubbing software on both computers after the issue of inspecting Durango's hard drives was discussed with this Court. Indeed, Mr. Counley testified under oath that this is exactly what he did, and that he ran the file scrubbing program the day or two before his deposition. See Nathan Counley Deposition Transcript, dated June 14, 2010 (Counley Dep. Tr.) at 190:23-192:6; 207:3-9. Mr. Counley also testified that he believed Bill Demopolis, Durango's Vice President of Business Development, "ran it on his [computer]" as well. *Id.* at 192:3-6. Further, because Durango's computers are not on a network, *id.* at 22:12-16, the destroyed data is not backed up to a network server. As Mr. Counley testified, only Durango's Outlook folders are backed up through a company called Intermedia, which deletes the items stored in Durango's Outlook folders on a weekly basis. *Id.* at 186:20-187:7. The Lavasoft website, excerpts from which are enclosed with this letter, explains quite clearly what its product does and what Mr. Counley's purpose was in running Lavasoft File Shredder on the two computers he used to communicate with counterfeiters and the other Defendants. Lavasoft's website states that the File Shredder program "permanently removes information from your computer by shredding selected files." The website goes on: "Lavasoft File Shredder helps you take control of the information you don't want anyone else to get their hands on, by permanently removing the files." Put simply, Mr. Counley did not "want anyone else to get their hands on" his emails, so he destroyed them.

Durango does not deny that it has failed to produce the email communications that Mr. Counley had with his replica merchants—only a portion of which are reflected in the documents produced by the defendants in the Laurette litigation or by the Defendants (other than Durango) in this case. Despite repeated requests from Plaintiff, Durango never came forth with any explanation as to why it has not produced email communications that Mr. Counley clearly sent and received from replica merchants, such as the email chain attached as Exhibit A to the Declaration of Jennifer Kirk. Mr. Counley's testimony makes clear that he used his two computers to send and receive such emails and that he used a file scrubbing software on these computers just weeks ago to permanently delete these emails from his hard drive.

As Plaintiff noted in its June 15th letter, Durango produced documents to Plaintiff on the eve of Mr. Counley's deposition and, indeed, continued to produce documents to Plaintiff while the deposition was being conducted.¹ Durango itself described these emails as "lead

¹ Durango's suggestion that it "went so far as to offer Nathan Counley for follow-up questioning by telephone" is a mischaracterization. Since Plaintiff's counsel did not have an opportunity to review the hundreds of pages that Durango had just produced, we offered to conduct a follow-up deposition by telephone rather than continuing the deposition for a second day, which Plaintiff was entitled to do.

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sheets”—generated by a merchant filling out an online application for services. These documents were pulled from a “customer service box” that was maintained for less than two years. Durango has not produced any lead sheets from the time period that Durango submitted dozens of applications to Defendants Woodforest National Bank or Frontline Processing Corporation on behalf of replica products merchants. Durango’s belated production of these lead sheets—more than six months after Plaintiff served its requests for production—does not negate the fact that it purposefully destroyed years worth of files and emails relevant to this litigation.

Further, certain of the statements made by Durango in yesterday’s letter are directly contradicted by Mr. Counley’s sworn testimony.² For example, although Durango now claims that it “has been advised to maintain all of its available files (electronic or otherwise) that may be relevant to the litigation, and has indeed done so,” Mr. Counley testified clearly and unequivocally that Durango was not advised as to its obligation to preserve documents that might be relevant to this litigation:

Q: Did anyone ever tell you that you had an obligation to hold onto documents that might be relevant to this lawsuit?

MR. WENGROVSKY: Objection for the record. Go ahead.

A: No.

See Counley Dep. Tr. at 192:24-193:5.

Lastly, although Durango claims that Plaintiff’s request for a conference is premature, Plaintiff’s counsel conducted a meet-and-confer with Mr. Wengrovsky at the conclusion of Mr. Counley’s deposition. I requested that his client cease running the file scrubbing software and that we would send a letter to Mr. Wengrovsky regarding this issue prior to requesting a conference with the Court. Mr. Wengrovsky’s cavalier response was that Plaintiff’s counsel could send a letter to Durango, but his response would be the same—that Durango has provided all of the relevant documents.

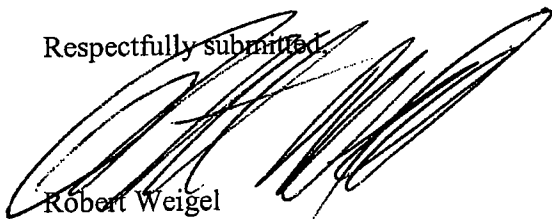
² Although Durango continues to portray itself as a “tiny company,” Mr. Counley testified that, in fact, Durango received “close to 2 million” dollars just in residuals in 2009 alone. *See* Counley Dep. Tr. At 102:3-10.

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Plaintiff therefore respectfully requests a conference at the Court's earliest convenience.

Respectfully submitted,



Robert Weigel

RLW/jch

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