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June 23, 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:

I represent defendant Durango Merchant Services, LLC. in the above-referenced matter. This is to request re-scheduling of the evidentiary hearing currently scheduled for Wednesday, June 30, 2010 at 11:00am.

Two representatives of Durango, namely owner Shane Kairalla and sales agent Nathan Counley, wish to participate in the hearing but are unable to attend due to conflict. Such is in part due to Mr. Kairalla and Mr. Counley's need to travel to New York from Colorado and Wisconsin, respectively.

There have been no prior requests for adjournment of this hearing by either party, and it is respectfully requested that the hearing be scheduled for a date after July 9, 2010.

In addition, it is respectfully requested that the Court consider the following information in advance of the evidentiary hearing, and possibly in lieu of an evidentiary hearing.

Attached hereto is a sworn Affidavit of Nathan Counley, who had been deposed by Plaintiff Gucci in both an individual capacity and as Durango's 30(b)(6) witness. The Affidavit confirms the following key points with regard to the present discovery dispute:

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1. No “file scrubbing” was performed on any of the computers at Durango’s main office in Durango, Colorado at any time;
2. At no point did Durango “scrub” anything relevant to this case;
3. Any “file scrubbing” performed by sales agent Nathan Counley was on laptop computers (which can be lost or stolen) in his home office in Wisconsin and, importantly, was after appropriate searches were made and relevant documents provided in response to Gucci’s discovery requests;
4. Likewise, any “file scrubbing” by Durango member Bill Demopolis was on his computer in his home office in Toronto and, importantly, was after appropriate searches were made and relevant documents provided;
5. In fact, Bill Demopolis does not deal with merchants, and is not even a sales agent. Rather, Bill Demopolis’ function is to manage payouts to independent agents as well as to manage all residual reports from credit card processing banks – responsibilities that are unrelated to the present discovery dispute;
6. Counley and Demopolis ran the software only to protect old merchant credit card applications, not e-mails (see pages 189-190 of the Counley deposition transcript). This was to protect customer data on the applications – files that had already been deleted over the years;
- 7 Durango recently learned that just “deleting” the files is not enough to insure that all sensitive customer data (i.e. social security numbers) is actually removed;
8. As stated to Gucci several times (including in Durango’s January 29, 2010 Answers to Interrogatories), Durango does not typically store old e-mails. If Gucci received copies of any such e-mails from *merchants*’ computers, such is not a reflection on Durango or Durango’s conduct during discovery;
9. Durango, in good faith, has produced no fewer than 480 relatively recent merchant-related e-mails regarding any topic that could possibly be considered relevant to this litigation;
10. Counley testified at deposition that he had recently found an old *backup* file that had old “lead sheets,” **which will be produced to Gucci on or before Monday, June 28, 2010**. Upon further inspection, the file also includes e-mails, which proves that he did not “scrub” old e-mails. Otherwise, the e-mails would not exist for production at this time. Therefore, producing images of the entire hard drives is unnecessary, especially since the hard drives include completely irrelevant personal information (such as family documents and photographs) as well as privileged attorney-client communications.

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11. Durango's *profits* as a result of its 2009 revenues of approximately 2,000,000 were a mere fraction of such figure, because approximately 40-50% of its revenues is paid to sales agents, and the remainder must cover all of Durango's overhead and expenses;

12. Replica accounts – which Durango stopped servicing when served with this lawsuit – made up less than 1% of Durango's accounts.

Finally, Gucci argues that Durango was not advised to retain certain files and points to a particular exchange from Nathan Counley's deposition to make this argument. Such is a moot point in light of the fact that Durango has indeed retained all relevant files during the litigation. Still, in the interest of accuracy, please note that Nathan Counley was deposed by Gucci in both an individual capacity and as Durango's 30(b)(6) witness. Both depositions were merged together (rather than being on separate transcripts), which led to some confusion. Gucci's counsel asked Mr. Counley if "you" were advised to retain certain files. Nathan Counley understood the word "you" to mean *himself personally*, as distinguished from Durango Merchant Services, LLC., hence counsel's objection on the record. Counsel had indeed informed its *client* (Durango Merchant Services, LLC.) of required procedures including file retention, but most of counsel's communications with Durango were with its owners, Shane Kairalla and Bill Demopolis.

Should the Court have any questions regarding the foregoing, counsel is available for a telephone conference at the Court's convenience.

Respectfully submitted,

/s/ Todd Wengrovsky

Todd Wengrovsky