

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
GUCCI AMERICA, INC.,

Plaintiff,

-against-

AFFIDAVIT OF NATHAN COUNLEY

Index No. 09-CV-6925

FRONTLINE PROCESSING CORPORATION,
WOODFOREST NATIONAL BANK, DURANGO
MERCHANT SERVICES, LLC., d/b/a NATIONAL
BANKCARD SYSTEMS OF DURANGO,

Defendants.
-----X

I, Nathan Counley, hereby declare as follows:

I am competent to testify and I have firsthand knowledge of the matters set forth herein, as I am a sales agent of Defendant Durango Merchant Services, LLC.

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 me was on laptop computers (which can be lost or stolen) in my 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. Bill Demopolis and I 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. I testified at deposition that I had recently found an old *backup* file that had old “lead sheets,” which I will produce to Gucci on or before Monday, June 28, 2010. Upon further inspection, the file also includes e-mails, which proves that I 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.

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.

Dated: Madison, Wisconsin
June 23, 2010


NATHAN COUNLEY,
Durango Merchant Services, LLC.

Sworn to before me this
23rd day of June, 2010


NOTARY PUBLIC

My Commission expires February 9, 2014

