

Exhibit 66

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 GUCCI AMERICA,

4 Plaintiff,

5 v.

09 CV 6925 (HB)

6 FRONTLINE PROCESSING, INC.,

7 Defendant.

8 -----X
9 New York, N.Y.
June 30, 2010
11:30 a.m.

10 Before:

11 HON. HAROLD BAER, JR.,

12 District Judge

13 APPEARANCES

14 GIBSON DUNN & CRUTCHER, LLP
15 Attorneys for Plaintiff

16 ROBERT L. WEIGEL

17 ANNE M. COYLE

JENNIFER COLGAN HALTER

JANA CHECA CHONG

18 TODD WENGROVSKY

Attorney for Defendant Durango

19 WILLIAM L. MENTZIK

20 Attorney for Defendant Woodforest National Bank

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1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: Gucci America v. Durango. Counsel,
4 state your appearances. Plaintiff?

5 MR. WEIGEL: Robert Weigel.

6 THE DEPUTY CLERK: Defendant?

7 MR. WENGROVSKY: Todd Wengrovsky for Defendant
8 Durango.

9 MR. MENTZIK: William Mentzik for defendant
10 Woodforest.

11 MR. WEIGEL: Your Honor, with me is Janet Checa Chong,
12 Ann Coyle and Jennifer Halter. Ms. Checa Chong is admitted to
13 the bar of the State of New York but her admission to this
14 Court is pending. With your Honor's permission, I would ask
15 she be allowed to sit at counsel table.

16 THE COURT: Very well. The first page of the Law
17 Journal suggests Gucci isn't good at that, but I presume you
18 are admitted somewhere.

19 MR. WEIGEL: Yes, your Honor. Thank you.

20 THE COURT: All right, this is essentially Gucci's
21 hearing at my behest. So why don't you carry the ball or at
22 least begin to carry the ball, Mr. Weigel?

23 MR. WEIGEL: Certainly, your Honor. Just very, very
24 briefly. This case is very simple. I took Mr. Counley's
25 deposition. He testified he was never told of a litigation

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1 hold. He was never told prior to the deposition that he had an
2 obligation to --

3 THE COURT: I guess what I wonder, if he's here we can
4 put him on the stand rather than listening -- not that you
5 won't do it well.

6 MR. WEIGEL: Thank you, your Honor. Absolutely.
7 Plaintiff Gucci America calls Nathan Counley. Would your Honor
8 like me to examine from the podium?

9 THE COURT: Podium is good. I think it's better for
10 the witness, the reporter and me.

11 NATHAN COUNLEY,

12 called as a witness by the Plaintiff,

13 having been duly sworn, testified as follows:

14 THE COURT: Generally, just for your information,
15 since we have a brand new deputy here, let me suggest that we
16 swear people when they're standing.

17 THE DEPUTY CLERK: Thank you.

18 THE COURT: Go ahead.

19 DIRECT EXAMINATION

20 BY MR. WEIGEL:

21 Q. Mr. Counley, could you state your position at Durango?

22 A. Sales manager.

23 Q. You were also designated as a 30(b)(6) witness for Durango
24 when you testified at your deposition on June 14, is that
25 correct?

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Counley - direct

1 A. Correct.

2 Q. And at your deposition you testified that you had no idea
3 what a litigation hold was, is that correct?

4 A. It's more that I never heard that phrase before.

5 Q. And you testified that no one told you that you had an
6 obligation to preserve relevant documents, isn't that correct?

7 A. No. I just said I wasn't aware of a litigation hold, which
8 was a phrase I wasn't familiar with.

9 MR. WEIGEL: Your Honor, I actually have an affidavit
10 that we prepared in a very short brief. The affidavit has a
11 copy of Mr. Counley's deposition in it. I was wondering if I
12 might hand it up and your Honor could follow along.

13 THE COURT: You might show him some, if any, prior
14 inconsistent statements if there are any. But I'll be glad to
15 look at it.

16 MR. WEIGEL: Your Honor, may I approach the witness?

17 THE COURT: You may.

18 MR. WEIGEL: Should I mark the transcript as an
19 exhibit, your Honor?

20 THE COURT: Why don't you do that? We'll mark it as
21 Court Exhibit A.

22 BY MR. WEIGEL:

23 Q. Mr. Counley, I've handed you what's been marked as Court's
24 Exhibit A, which is a copy of the transcript of your
25 deposition, and I would ask you turn to page 192, line 24.

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Counley - direct

1 A. Okay.

2 Q. I asked you the following question: "Did anyone ever tell
3 you that you had an obligation to hold on to documents that
4 might be relevant to this lawsuit?"

5 THE COURT: Why don't we do it a little differently,
6 Mr. Weigel? Why don't you ask him if you made these answers to
7 these questions and then start from where you started already.

8 MR. WEIGEL: Okay.

9 Q. Do you see the question that begins at line 24 and ends at
10 line 5 of page 193?

11 A. Yes.

12 Q. And did I ask that question and did you give that answer in
13 front of a court reporter?

14 A. Yes.

15 Q. And you testified in response to my question, "did anyone
16 ever tell you that you had an obligation" --

17 THE COURT: Wait a minute. It's just another
18 question, right? So why don't you just keep going? I mean,
19 there's no testimony other than this transcript, is there?
20 When you say you testified, what are you referring to?

21 Q. You gave that testimony at the deposition, is that correct,
22 Mr. Counley?

23 A. Yes.

24 THE COURT: You made that answer to that question,
25 right? Right. Let's keep going.

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Counley - direct

1 Q. And were you truthful when you gave that answer?

2 A. I don't know why I said that then. Todd had told us that
3 we do need to hold on to documents. I don't know, looking at
4 it now.

5 Q. Well, in fact, you continued to delete e-mails after the
6 complaint was filed in this lawsuit, isn't that correct?

7 A. Yes.

8 Q. And no one told you that it was improper for you to delete
9 e-mails, is that correct?

10 A. They're just ongoing e-mails. We always deleted e-mails as
11 we went along.

12 Q. And you don't know what was in the e-mails that you deleted
13 since this complaint was filed in August of 2009, do you?

14 A. No.

15 Q. And you continued to receive residuals from replica
16 merchants after August of '09, isn't that correct?

17 A. Not very many. But yes.

18 Q. You did have ongoing clients who were replica merchants?

19 A. There were very few and far between, but I believe so.

20 Q. And you -- well. You purchased and ran a file scrubbing
21 program called Lavasoft, is that not correct?

22 A. Yes.

23 Q. And you ran it on a Toshiba laptop that you had used in
24 your business prior to November 2009 correct?

25 A. Correct.

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Counley - direct

1 Q. And you testified in your deposition that you had given
2 that laptop to your mother and later in the deposition you
3 recanted and said you still had it, is that correct?

4 A. Correct.

5 Q. And you ran that filing scrubbing program not only on the
6 Toshiba laptop, but you have a new laptop, is that right, an
7 Asus?

8 A. I think it said Asus, but yes.

9 THE COURT: How do you come to buy a scrubbing program
10 in the first place?

11 THE WITNESS: I purchased it over the internet.

12 THE COURT: Why?

13 THE WITNESS: We had read an article that said that
14 deleting files isn't safe. We have applications with
15 merchants' Social Security numbers and driver's license number
16 and home address and all their confidential information and
17 it's not safe for us if we lost a laptop or someone stole it to
18 have all that information still accessible. We could be liable
19 for quite a -- we could be put out of business if we had to
20 report that and, you know, fix the problem if everyone's
21 information got stolen.

22 THE COURT: Who would you be reporting it to?

23 THE WITNESS: There are state laws that if customers'
24 confidential information, such as Social Security numbers and
25 driver's license that we're required to report to different

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Counley - direct

1 state agencies.

2 THE COURT: Do you know what law that is?

3 THE WITNESS: I don't know the law numbers or what
4 bill they are, but I know there are laws in Colorado and
5 Wisconsin.

6 THE COURT: Go ahead, Mr. Weigel.

7 BY MR. WEIGEL:

8 Q. You ran the Lavasoft file shredding program on the Toshiba
9 laptop and also on the Asus laptop that you currently use,
10 correct?

11 A. Correct.

12 Q. And you ran it on both computers multiple times?

13 A. Correct.

14 Q. And you did that with the intention of making sure that the
15 hard drives on those computers could not be recreated, is that
16 correct?

17 A. Did it so that the applications that were on there weren't
18 vulnerable to getting stolen.

19 Q. When you say applications, what do you mean?

20 A. The merchants' applications that they had filed with the
21 bank. We had deleted applications all along. We tried to be
22 safe with the data, but --

23 THE COURT: This is an independent decision you made
24 in order to keep information as confidential as possible, to
25 buy this machine?

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Counley - direct

1 THE WITNESS: Me and Bill and Shane talked about it.

2 THE COURT: You and who?

3 THE WITNESS: Bill Demopolis and Shane Kairalla.

4 THE COURT: And it was decided among the three of you
5 to buy this machine?

6 THE WITNESS: Shane meant to run it, but he hadn't
7 gotten to it yet.

8 Q. And you said this happened --

9 MR. WEIGEL: I'm sorry, your Honor. Were you done?

10 THE COURT: Yes.

11 Q. You said you ran this a couple of weeks before your
12 deposition?

13 A. Correct.

14 Q. And your deposition was on June 14, 2010, correct?

15 A. Correct.

16 Q. Did anyone ever tell you that we had requested the
17 production of your hard drive at a conference on a telephone
18 before Judge Baer on May 19?

19 A. I don't remember hearing that before. I've read the
20 affidavit since that states you did request that.

21 Q. Do you remember the periodical in which the article
22 appeared that caused you to have this concern?

23 MR. WENGROVSKY: Objection.

24 THE COURT: Overruled.

25 A. Not off the top of my head. I do remember reading an

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Counley - direct

1 article before we did this. We went back and tried to find the
2 article. I believe it's a Jones Daily article. I think we
3 have the URL, if you need it.

4 MR. WEIGEL: Your Honor, may I approach? I'd like to
5 mark some applications.

6 THE COURT: You may. I don't need to see them. I
7 assume he wants to show them to the witness when they're
8 marked.

9 Q. Mr. Counley, I've hand you a package of applications that
10 was supplied by Woodforest National Bank. You can tell that by
11 the WNB number at the bottom corner. Do you see that?

12 A. Yes.

13 Q. When you said you were trying to delete applications, was
14 this the sort of documentation you were trying to delete?

15 A. Correct.

16 Q. Now, I put a couple in there, but can you see that the
17 first one is for a website called DressForEnvy.com?

18 A. Yes.

19 Q. And do you see that it lists as the product sold a replica
20 product?

21 A. Yes.

22 Q. And it shows the monthly bank card limit? Do you see that?

23 A. I do.

24 Q. Does that indicate how many purchases they would be allowed
25 to process?

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Counley - direct

1 A. Well, it's kind of a maximum that the banks allows them to
2 do in the beginning, but most merchants that apply rarely do
3 the volume that they think that they're going to do.

4 Q. But it is an indication of the potential volume that this
5 website could have sold in terms of replica product?

6 A. It's what they're thinking that they can sell.

7 Q. Okay. Turn to the next one in there,
8 CarbonCopyReplicas.com. That also indicates that that sells
9 replica bags, correct?

10 A. Yes.

11 Q. And there's information there about the owner of the
12 website and his address and so forth?

13 A. Correct.

14 Q. Do you see that? On these -- and I've got a series of
15 these applications. They'll also list where the merchant
16 acquires the replica products from, don't they?

17 A. It asks for their -- the vendor.

18 Q. And you prepared at least portions of these affidavits and
19 then sent them off to the merchant to fill them out and then
20 you forward them on to the bank, correct?

21 A. Yeah. Sometimes I would type in the address or their
22 addresses or things like that, just to speed up the process.

23 Q. And this is the type of material you were trying to delete
24 from your hard drive, correct?

25 A. That's correct.

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Counley - direct

1 Q. And you submitted these to a number of different banks,
2 correct, not just Woodforest?

3 A. Yes.

4 Q. You submitted to Frontline?

5 A. Yes.

6 Q. An offshore bank called InterBill, I believe?

7 A. Yes.

8 Q. And your intent in running this file scrubbing program was
9 to make sure that no one who looked at your hard drive could
10 recover these applications, correct?

11 A. From a security standpoint, yes.

12 Q. Now, each merchant was charged a discount rate, correct?

13 A. Correct.

14 Q. And your company received a percentage of that discount
15 rate?

16 A. Correct.

17 Q. And that varied by merchant, correct?

18 A. Every merchant is usually different.

19 Q. You would size up the merchant and decide what you thought
20 the traffic would bear and you would charge them what you
21 thought they would pay?

22 A. More or less.

23 Q. And it was between three and a half and 4 percent usually
24 for replica merchants, correct?

25 A. That's correct.

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Counley - direct

1 Q. Now, I think you testified at your deposition, or let me
2 just ask you, is there any way that today you would be able to
3 tell what the price was that you were charging these merchants
4 without looking at the application?

5 A. We could ask the bank for a copy of their last processing
6 statement.

7 Q. Your compensation is based upon that rate, correct?

8 A. Correct.

9 Q. And it's your testimony that you didn't ever keep a copy of
10 any document that actually set forth that rate, is that
11 correct?

12 A. Correct.

13 Q. Why did you run the software multiple times?

14 A. Just to err on the side of caution.

15 Q. You sent about 135 applications to Woodforest, is that
16 correct?

17 A. I think that's what the numbers we looked at from them last
18 time showed.

19 Q. Not all of them were for replica merchants, but certainly
20 many of them were, correct?

21 A. I don't know what percentage. 10, 15 percent.

22 Q. And you sent replica merchants to Frontline and to
23 InterBill as well, correct?

24 A. Correct.

25 Q. Did you check to confirm that the applications that you

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Counley - direct

1 were trying to erase from your hard drive were in fact erased?

2 A. No, I wouldn't know how to do that.

3 Q. Is that why you ran it multiple times?

4 A. I guess to side on the err of caution, correct.

5 MR. WEIGEL: I have no further questions, your Honor.

6 THE COURT: Anything from anybody else?

7 MR. WENGROVSKY: Yes, I have some questions for

8 Mr. Counley, your Honor.

9 CROSS-EXAMINATION

10 BY MR. WENGROVSKY:

11 Q. Mr. Counley, does Durango receive and forward applications
12 to credit card processing banks?

13 A. Yes.

14 Q. Once an application is forwarded by Durango to one of the
15 banks, does Durango have a need to keep a copy of the
16 merchant's application?

17 A. No.

18 Q. Why not?

19 A. There's too much liability if someone were to get at the
20 application and they have the merchant's Social Security number
21 and driver's license number and date of birth, they could do
22 identity theft and if that happened, the thousands of
23 applications we had processed, the costs involved in fixing
24 that would probably put us under.

25 Q. If there were a security breach the likes of which you

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Counley - cross

1 mentioned, would Durango be required to disclose to all of its
2 customers that there has in fact been a leak of customer
3 information?

4 A. From the state laws that I looked at, I saw a summary of
5 them, it said yeah, we had to report to certain government
6 agencies.

7 Q. Mr. Counley, do you use a laptop computer?

8 A. Yes.

9 Q. Do you know anyone who has ever had a laptop stolen or
10 lost?

11 A. My wife and I were traveling to her parents' house
12 Christmas of '08 and we had our car broken into and her laptop
13 was stolen.

14 Q. Now, did you perform a search of your files in response to
15 plaintiff's discovery requests in this litigation?

16 A. Yes.

17 Q. Did that search include a search of your electronic files?

18 A. Yes.

19 Q. Did you specifically make any effort to search your
20 computer or computers for e-mails that are relevant to this
21 litigation?

22 A. Yes.

23 Q. And did you produce the relevant files that you found in
24 your search?

25 A. Yes.

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Counley - cross

1 Q. Did that include the production of electronic files?

2 A. Yes.

3 Q. Have you produced any e-mails to Gucci?

4 A. Yes. I think yesterday I sent over 500 or 600 e-mails.

5 Q. Had you produced any previously?

6 A. We had produced some, but I'm working on a new computer now
7 that didn't have the old e-mails back from '06, '07, '08.

8 Q. Do you know if Durango had produced any e-mails prior to
9 the 5 or 600 that you mentioned?

10 A. Yeah. Shane Kairalla also produced e-mails from our
11 customer service inbox that we hadn't thought to look through
12 for these lead sheets yet.

13 Q. Do you have a sense of how many e-mails were produced by
14 Shane at that time?

15 A. I think that was also close to 500.

16 Q. So there were -- were there over a thousand e-mails
17 produced?

18 A. Correct.

19 Q. So those e-mails were not shredded by any program, then?

20 A. No, absolutely not.

21 Q. Now, does, prior to the litigation, did Durango always
22 store old e-mails?

23 A. No.

24 Q. And why not?

25 A. Well, for one, for data security. Again, we said we e-mail

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Counley - cross

1 the applications to the banks, so it doesn't make sense for us
2 if we'd always been deleting applications to have the e-mails
3 with the applications still in our e-mail sent folder.

4 Q. Nathan, do you know how many e-mails you send or receive
5 per day personally?

6 A. Probably around 150.

7 Q. Do you have a sense of how many e-mails Durango as a
8 business would send or receive per day?

9 A. I couldn't get into specifics, but I probably on the
10 heavier end and Shane probably sends less, maybe half as much
11 as me.

12 Q. Are you aware of any storage limit in your e-mail program?

13 A. Yeah. That's the thing with Outlook, the other reason we
14 don't store too many e-mails, because after we get over a
15 certain file size, two or three gigabytes, Outlook starts
16 crashing.

17 Q. Did you have that problem with Outlook before?

18 A. Definitely. We had the problem, our Outlook gets too big,
19 the search doesn't function, it doesn't work, it will just not
20 open. It has problems. We've researched that, you can find
21 lots of information.

22 Q. Do you know if any other Durango members have had that
23 crashing problem?

24 A. We've all had problems with Outlook not working properly.
25 That's one of the reasons I've kept our Outlook folder smaller.

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Counley - cross

1 Q. Back to this file scrubbing as we called it at the
2 deposition. Did you use this Lavasoft program before or after
3 you conducted your search for relevant files for discovery?

4 A. After.

5 Q. Just to clarify. You did your search, you produced your
6 relevant files and then ran this file scrubbing program?

7 MR. WEIGEL: Leading.

8 THE COURT: Did you object?

9 MR. WEIGEL: I did, your Honor. I'm objecting. It's
10 leading.

11 THE COURT: Well, it's really perfectly all right with
12 me, so I'll overrule the objection.

13 A. Correct.

14 Q. Prior to purchasing any file scrubbing software had Durango
15 taken any other measures to ensure that customer information
16 would not fall into the wrong hands?

17 A. We started putting passwords on all of our laptops. We
18 didn't really have that on there before. Bill Demopolis and
19 Shane Kairalla, I think they installed some software called
20 LoJack that can do a remote wipe of the laptops if they're
21 stolen. They discussed it with me and I thought I had done it,
22 but for some reason I can't find that I did install it. But
23 it's something we're going to do on all our laptops.

24 Q. Do you know when Bill or Shane would have purchased the
25 LoJack program?

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Counley - cross

1 A. I think it was shortly after my wife's laptop was stolen
2 and we were talking about it on our conference call and decided
3 that we need to make sure that our e-mails and merchant
4 applications are safe in case something happens.

5 Q. My apologies, I think you said this, but when was your
6 wife's laptop stolen?

7 A. It was Christmas eve, 2008.

8 Q. Was that prior to this litigation?

9 A. Yes. Well -- yes.

10 Q. Do you have any sense of what the LoJack program costs?

11 A. I remember looking at it, I thought I signed up for it. I
12 must not have. But I remember it's -- I'm not going to
13 speculate. It was 30 or \$60 a year. Something reasonable.

14 Q. Okay, and back to this file scrubbing. What types of files
15 were scrubbed?

16 A. It's not the types of files. We just ran it on the free
17 disk space so whatever had been deleted in the past I guess
18 gets scrubbed.

19 Q. Just for my own benefit, did you identify particular
20 classes or types of files to scrub?

21 A. No.

22 Q. Okay. And was the scrubbing program only used on
23 previously deleted files, is that what you said?

24 A. Correct.

25 Q. As far as you know, was any file scrubbing program used on

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Counley - cross

1 any of the computers at the company's main office in Durango,
2 Colorado?

3 A. Not yet. We would like to so that we can have that
4 merchant's applications be safe, but not yet, no.

5 Q. Mr. Counley, are you aware of Durango scrubbing any files
6 relevant to this case?

7 A. No.

8 Q. Back to the merchant application that opposing counsel had
9 mentioned. There was some discussion of a monthly processing
10 limit from the credit card processing banks. Is there a
11 standard limit that you typically see?

12 A. Most merchants, \$10,000 is a pretty typical number that
13 merchants request. After \$10,000 the banks kind of get more
14 stringent on their underwriting. They maybe want to ask for
15 bank statements or tax returns, so 10,000 is just kind of a
16 generic number where the banks don't ask for much but the
17 merchants can get started.

18 Q. Did Durango produce in discovery any residual reports?

19 A. We provided our master residual reports for I think the
20 last five years which would show every bank that we received
21 residuals from, even InterBill.

22 Q. What else is found on a residual report besides a list of
23 the processing bank?

24 A. I guess the agent that we paid out.

25 Q. And does it also list the merchant in question?

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Counley - cross

1 A. It does.

2 Q. Does it list the amount of residual income that Durango
3 would receive per account?

4 A. Correct.

5 Q. And again, I believe you said that the residual reports
6 list the processing banks?

7 A. Correct.

8 Q. If Durango were to have scrubbed or shredded merchant
9 applications, which included Social Security numbers and
10 driver's license ID numbers, but produced the residual reports,
11 would Gucci still have access to a list of every processing
12 bank Durango uses?

13 A. A list of every processing bank we used and every account
14 that we were paid on.

15 Q. If you produced the residual reports, would Gucci have
16 access to all of Durango's revenue figures?

17 A. Correct.

18 Q. And if you produced the residual reports, Gucci would have
19 access to which merchants were currently active as compared to
20 closed?

21 A. Correct.

22 Q. And did Durango produce all its available master residual
23 reports?

24 A. They did.

25 MR. WENGROVSKY: I have no further questions, your

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Counley - cross

1 Honor.

2 THE COURT: So I understand, Mr. Counley, your
3 testimony, is it fair to say that your testimony is to the
4 effect that the purchase of the scrubbing machine had no
5 connection whatsoever with this litigation?

6 THE WITNESS: Correct.

7 THE COURT: And is it fair to say that the use of that
8 scrubbing machine as you chose to use it had no connection with
9 this litigation?

10 THE WITNESS: Correct.

11 THE COURT: Do you have any further questions,
12 Mr. Weigel?

13 MR. WEIGEL: I do, your Honor. Maybe five minutes.
14 Your Honor, may I approach? I'd just like to mark a document.

15 THE COURT: You may.

16 REDIRECT EXAMINATION

17 BY MR. WEIGEL:

18 Q. Mr. Counley, I've handed you what's been marked as
19 Durango's response to plaintiff's first request for production.
20 First, if you could turn to the last page. Do you see that's
21 dated January 21, 2010?

22 A. Yes.

23 Q. Now, you said that you use about 150 e-mails a day,
24 correct?

25 A. Correct.

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Counley - redirect

1 Q. And that you produced 400 e-mails yesterday. Why did you
2 produce those e-mails yesterday instead of earlier?

3 A. I mentioned in my deposition that I found the backup e-mail
4 folder on my old Toshiba that I hadn't found previously.

5 Q. And when did you find that?

6 A. Shortly before the deposition.

7 Q. And you made diligent efforts to produce it as soon as you
8 located it?

9 A. Correct.

10 Q. And you found it a day or two before your deposition?

11 A. I don't remember when specifically, but, yeah, shortly
12 before.

13 Q. And yet you ran the file shredding program several weeks
14 before, is that correct?

15 A. Correct.

16 Q. So you ran the file shredding program before you searched
17 for and found these 400 e-mails, is that what you're saying?

18 A. I just ran the file shredding program on the empty disk
19 space.

20 Q. Now, you said you searched your laptop. Did you find any
21 applications on your laptop?

22 A. No, they were already deleted.

23 Q. And so you didn't produce any applications, is that
24 correct?

25 A. Correct.

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Counley - redirect

1 Q. And when you ran the file shredding program your purpose
2 was to make sure that those applications that had been deleted
3 could not be recovered by anybody, is that correct?

4 A. That is correct.

5 Q. And no one told you that you had an obligation to preserve
6 the applications, is that correct?

7 MR. WENGROVSKY: Objection.

8 THE COURT: Overruled. You may answer.

9 A. We were aware that we were supposed to save relevant
10 documents. I don't know why we didn't think that there would
11 be possible relevant applications still on there, but again,
12 out of the thousands and thousands of applications we've done,
13 only 20 or 30 of these accounts are replica. We were really
14 just trying to make our merchants' data safe.

15 Q. I'd just like to direct your attention to request for
16 production 13 which is on page 7 of the response to the
17 document demand. Do you see there that we specifically ask for
18 all documents, including any documents stored electronically,
19 referring/relating to merchants whose websites sell replica
20 products, including, but not limited to, any application, and
21 so forth?

22 A. Yes.

23 Q. Did anyone ever discuss this document demand with you and
24 the need to locate and produce applications?

25 A. I don't -- they were already deleted, so I don't think it

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Counley - redirect

1 was really something we thought about. I mean, we didn't, we
2 didn't really know that we could retrieve the deleted
3 information and then when we read the article and we figured
4 out that some thieves could put it back together somehow, I
5 don't know how, I guess we didn't really contemplate that Gucci
6 may be able to do that, and therefore we shouldn't run the
7 software.

8 MR. WEIGEL: Your Honor, may I approach? I just want
9 to hand up a residual report.

10 THE COURT: You're welcome to. Is that something
11 you're giving me or marking or giving to the witness or what
12 are you doing with it?

13 MR. WEIGEL: I'm marking it. Excuse me, would you
14 mark that as Exhibit D? Thank you.

15 Q. Mr. Counley, can you identify Exhibit D for the Court,
16 please?

17 A. This is a summary of residual reports that Bill Demopolis
18 put together that were all potentially replica-related
19 merchants from the different processors.

20 Q. And when you were discussing with your counsel about the
21 residual reports that were being produced to us, this is what
22 you were talking about?

23 A. I think we've produced a couple of different residual
24 reports. This one was just a summary of replica ones
25 specifically.

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Counley - redirect

1 Q. And this doesn't -- there was information on the
2 application concerning these merchants that is not on this
3 replica report -- on this residual report, is that correct?

4 A. Well, driver's license number, Social Security numbers, but
5 if you want to know the volume that the merchant processed,
6 that's all, the banks will have all that information.

7 Q. Well, if you wanted to know who supplied the counterfeit
8 goods, does the residual reports tell you?

9 A. No.

10 Q. If you wanted to know the address of the merchant, does the
11 residual report tell you?

12 A. The bank will still have that information. The bank will
13 still have the merchant's application which will, if they have
14 the vendor on it, they still have.

15 Q. Why do you think the banks still keep the merchant
16 information if you feel the need to destroy it?

17 A. The bank owns the information. We're just brokers. We're
18 just passing the application back and forth.

19 MR. WEIGEL: Thank you.

20 THE COURT: You're excused. Thank you very much.

21 (Witness excused)

22 THE COURT: Anything further, Mr. Weigel?

23 MR. WEIGEL: Your Honor, I was just going to put on
24 the stand Mr. Bolas, who is a computer forensics expert to
25 explain what the software that was run does to the computer and

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Counley - redirect

1 the hard drive.

2 THE COURT: Fine.

3 JEFFREY BOLAS,

4 called as a witness by the Plaintiff,

5 having been duly sworn, testified as follows:

6 MR. WEIGEL: Your Honor, I'd like to mark this as
7 Exhibit E.

8 THE COURT: The last one I have is B. What is this?
9 E? What happened to C and D? The last one I marked as B. If
10 you marked it as D, I'll be glad to change it. Okay.

11 DIRECT EXAMINATION

12 BY MR. WEIGEL:

13 Q. Please state your name for the record, please?

14 A. Jeffrey Bolas.

15 Q. Mr. Bolas, by whom are you employed?

16 A. Stroz Friedberg.

17 Q. What is Stroz Friedberg?

18 A. Stroz Friedberg is a technical services and consulting firm
19 that specializes in digital forensic and electronic discovery.

20 Q. What is your position at that firm?

21 A. Assistant director of digital forensics.

22 Q. What education do you have that's relevant to your
23 position?

24 A. I hold a bachelor's degree in computer science.

25 Q. Do you hold any other certificates?

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Bolas - direct

1 A. Yes. I also have a professional certification called ENCE,
2 which is a certification in Encase, which is a common forensic
3 analysis application.

4 Q. And have you been qualified to testify in a court as an
5 expert witness previously?

6 A. Yes, sir.

7 Q. On what occasion?

8 A. I testified in federal court in Eastern District of New
9 York in 2008. I've also testified in state court in Texas.

10 MR. WEIGEL: Your Honor, would I tender Mr. Bolas as
11 an expert.

12 THE COURT: Very well. I'll accept him in that role.
13 Hearing no objection. But even if I heard one, I think I
14 accept him.

15 MR. WENGROVSKY: No objection.

16 Q. What did you do to prepare to testify today?

17 A. I reviewed the affidavit from Mr. Counley from June 14th --
18 excuse me, his deposition testimony from June 14, as well as
19 his subsequent affidavit. I also purchased, examined and
20 tested a piece of software called File Shredder, which is
21 distributed by a company called Lavasoft.

22 Q. And --

23 THE COURT: That's the scrubber we've been talking
24 about.

25 THE WITNESS: Yes, sir, file scrubber or a disk wiping

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Bolas - direct

1 utility.

2 Q. What does File Shredder do?

3 A. File Shredder is a program that allows a user to
4 selectively delete files, folders or the free space, free disk
5 space on a computer hard drive in a way that renders that
6 content irretrievable, even by forensic means.

7 Q. And do you know how it does that?

8 A. Yes. It identifies the specific sectors on a computer hard
9 drive where the data in question resides, and then overwrites
10 those sectors with zeros or random data.

11 Q. And did you prepare any screenshots from that program?

12 A. Yes, sir.

13 Q. And are those in front of you as Exhibit E?

14 A. Yes, they are.

15 Q. Could you explain why you prepared these?

16 A. These were simply aids in my discussion with the attorneys,
17 Gibson Dunn, in order to illustrate what the user would see
18 when running this program, as well as examples of the kinds of
19 logs and information the user receives when they delete data in
20 different ways.

21 Q. Could you walk us through the screens and explain what each
22 of them does?

23 A. Yes. Figure 1 is the welcome screen, the first screen a
24 user sees when they launch the program, and as you can see,
25 there are four basic options or functionalities that the

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Bolas - direct

1 program provides. You can target specific files and folders
2 for irretrievable wiping. You can securely wipe the contents
3 of your recycle bin. You can wipe certain system files which
4 include the cache of your internet browser, or you can wipe the
5 free disk space on your computer.

6 THE COURT: Do most people who want to get rid of what
7 they have on their computer just delete or do they buy File
8 Shredder or the like?

9 THE WITNESS: I would expect that most people simply
10 delete data by sending it to the recycle bin or hitting delete.
11 But it's important to note that the article that Mr. Counley is
12 referring to is correct, that when a user deletes a file, it's
13 not really gone. A forensic expert can find it in the free
14 space of a hard drive until such time as it has been
15 overwritten by something else.

16 Q. So is the File Shredder designed to keep people like you
17 from uncovering data in the free space of somebody's hard
18 drive?

19 A. Yes.

20 Q. Can you recover data from the free spaces on a hard drive
21 if they have not run something like File Shredder?

22 A. Yes. A forensic utility can look at not only the active
23 files but the unallocated or free space on a hard drive.

24 Q. Is that a fairly standard practice in your industry?

25 A. Yes, it is.

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Bolas - direct

1 Q. And have you in fact been able to recover data from hard
2 drives that have been just deleted as I would ordinarily
3 consider it, by pushing the delete button?

4 A. Yes.

5 Q. All right, I think we were on the first page. Can you take
6 us through the rest of these screenshots, please?

7 A. Figure 2, the second page, is a screenshot of some of the
8 settings that the program has, and it is notable that this is a
9 program that creates logs of its disk wiping activities. Those
10 logs are created automatically by default and will remain on
11 the hard drive, providing information about the specific files,
12 folders or incidents when a user deleted free space. However,
13 a user can also select to delete those logs in a secure way,
14 thus removing the evidence that evidence have been deleted.

15 Q. Do you know what Mr. Counley ran?

16 A. Well, according to his testimony, the function of this
17 program that he ran was the secure wiping of free disk space.

18 Q. And in your experience after this program has been run to
19 wipe the free disk space, is any data recoverable from the free
20 disk space?

21 A. No.

22 Q. If this program had not been run, do you believe that you
23 would have been able to recover data from Mr. Counley's hard
24 drive?

25 A. I can only state that the data available in the free disk

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Bolas - direct

1 space on his hard drives would have been different and may have
2 contained recoverable files or fragments of files, but having
3 never seen the hard drives, I have no knowledge of what may
4 have existed there before.

5 Q. If Mr. Counley has deleted the logs of what he deleted,
6 will there be any way for anyone to know what was on the free
7 space of his hard drive?

8 A. No, I don't believe so.

9 MR. WEIGEL: Thank you. No further questions.

10 THE COURT: Anything from anybody else?

11 MR. WENGROVSKY: Yes, I have some brief questions for
12 Mr. Bolas.

13 CROSS-EXAMINATION

14 BY MR. WENGROVSKY:

15 Q. Mr. Bolas, must one be a forensic specialist in order to
16 retrieve files that have been deleted but not shredded?

17 A. Not necessarily. There are file recovery programs that
18 people can purchase that can be used by everyday users.

19 Q. If I wanted to purchase such a program, where would I be
20 able to get that?

21 A. Offhand, I don't know, but I imagine a general search of
22 the internet would identify a number of data recovery programs
23 you can purchase.

24 Q. Do you have any sense of what that would cost me?

25 A. I'm sure they vary in price. I don't know.

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Bolas - cross

1 Q. Were you familiar with this Lavasoft brand File Shredder
2 software before the Gibson Dunn firm discussed it with you
3 recently?

4 A. No, not this specific program.

5 Q. Were you aware of similar programs, perhaps from
6 competitors?

7 A. Yes.

8 Q. When did you first become familiar with them?

9 THE COURT: With which?

10 MR. WENGROVSKY: I'm sorry?

11 THE COURT: Familiar with what? This machine or the
12 others?

13 Q. Any of the competitor programs within this class, the file
14 shredding software in general.

15 A. I've been aware of the existence of such programs for
16 years.

17 Q. About how many years, approximately?

18 A. Four or five.

19 Q. Do you know what types of people or businesses would
20 ordinarily use this File Shredder type of program?

21 A. Generally speaking, I imagine it varies a great deal.

22 THE COURT: Don't imagine. If you don't know, forget
23 it.

24 A. I can -- certain industries may use wiping utilities in
25 order to, for example, sanitize hard drives before their

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Bolas - cross

1 disposal.

2 Q. Do you know of any such industries?

3 A. The financial industry, for example.

4 MR. WENGROVSKY: I have no further questions, your
5 Honor.

6 THE COURT: You're excused. Thank you very much.
7 Anything else?

8 MR. WEIGEL: Your Honor, I'll call Mr. Demopolis.

9 WILLIAM DEMOPOLIS,

10 called as a witness by the Plaintiff,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. WEIGEL:

14 Q. Good morning, Mr. Demopolis.

15 A. Good morning.

16 THE COURT: It used to be. It used to be morning.

17 MR. WEIGEL: Sorry, your Honor.

18 THE COURT: That's all right, but I just mention it
19 only because we only have about a half an hour of my time left.

20 MR. WEIGEL: I will be less than five minutes with
21 this witness, your Honor.

22 Q. Mr. Demopolis, can you state your position at Durango?

23 A. Yes. I basically look after the reporting, the residual
24 reporting only and I look after the agent's network. So I was
25 the one that build the reports that would show what agents

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Demopolis - direct

1 needed to be paid, their part of the residual, what account
2 managers on our end need to be paid their residual, and what
3 the Durango earned.

4 Q. Are you a partner or a partial owner in Durango?

5 A. I am the vice president of business development and agent
6 development within Durango.

7 Q. And are you a co-owner of the company?

8 A. We have an agreement where whatever's left over after we
9 pay out to the account managers into the agents that I would
10 receive a percentage on whatever was earned.

11 Q. And are you Mr. Counley's boss? Or one of Mr. Counley's
12 bosses?

13 A. I would say that I am a person that would not necessarily
14 tell Nathan what to do in that sense. I have nothing to do on
15 the account side at all, the merchant account side at all.

16 Q. Now, did you purchase the Lavasoft file shredding program?

17 A. I did.

18 Q. And did you run that on your computer?

19 A. I did.

20 Q. When did you do that?

21 A. I did it, Nathan and I, we usually have a weekly conference
22 call and we talked about it. We knew about the -- we had
23 always talked about it, and basically I ran it probably
24 shortly, maybe two weeks after or a week after Nathan did.

25 However, I only ran it on the free disk space, so I didn't pick

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Demopolis - direct

1 any files for it to run on. So basically it was deleting any
2 information that I had deleted in my e-mail.

3 Q. Now, in the affidavit that he submitted, Mr. Counley
4 indicated that the reason he ran the program was to delete old
5 merchant credit card applications. Was that your purpose as
6 well?

7 A. No.

8 Q. What was your purpose?

9 A. Because I'm on the agent side, agents sign agreements with
10 us and you'll have -- we sent you the folder in the stuff we've
11 already sent to show you an example. But agents would send me
12 different information. They would send me the agent's
13 agreement, they would send me a W9 form or a 1099 form. Some
14 of them by e-mail would send me their Social Security number,
15 their ENI number and basically a void check with their account
16 number and their transit number on it. So that's the
17 information that I would get. I don't get any merchant
18 applications on my computer.

19 Q. When you say agents, these are people who go out and
20 solicit merchants such as replica merchants, is that correct?

21 A. They go out and they would basically try to generate
22 merchant accounts. So they could send us a variety of
23 accounts, and in regards to replica accounts, we would get
24 replica accounts, but it would be a very slim, small
25 percentage.

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Demopolis - direct

1 Q. Were you told to preserve your documents relative to this
2 lawsuit?

3 A. Yes. But as I stated before, any relevant document, I did
4 the search, all the e-mails that came up on my computer when I
5 did the search with the search terms were basically carbon
6 copies, because I do not have that information on my computer.
7 So, for example, if there was a carbon copy that went to the
8 customer service e-mail box, then I had the carbon copy that
9 was sent to me. As far as any sort of discussions between
10 merchants and the account managers, I do not have any of that
11 information.

12 Q. Did you make any attempt to search the free space on your
13 computer?

14 A. No.

15 Q. And you didn't do that before you ran the file shredding
16 program, is that correct?

17 A. That's correct.

18 Q. You don't know what was on the free space of your computer
19 when you ran the file shredding program?

20 A. I know that any e-mail that I would have deleted that was
21 in my recycle bin would have been taken off with the program.
22 So, the types of things that would have been there, there were
23 old agent agreements, there were agents that had sent me a void
24 check, scanned, there were agents that had sent me their Social
25 Security numbers or their EIN number. There could have been

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Demopolis - direct

1 agreements that needed to be changed when an agent sent it back
2 and we need to make adjustments on the agreement. Then I may
3 have deleted the original because I sent a different one. So
4 those would have been the types of things that I would have
5 deleted in the Outlook program because I'm not on the merchant
6 side.

7 MR. WEIGEL: Thank you.

8 THE COURT: Anybody else?

9 MR. WENGROVSKY: Yes. A brief line of questioning,
10 your Honor.

11 CROSS-EXAMINATION

12 BY MR. WENGROVSKY:

13 Q. Mr. Demopolis, I think you testified that you have been
14 copied or cc'd on some e-mails that were to or from other
15 Durango members?

16 A. That's correct.

17 Q. Have those e-mails on which you were copied been produced
18 by Durango? The ones relevant to this litigation?

19 A. Yes.

20 Q. And did you perform a search of your files in response to
21 Gucci's discovery requests?

22 A. Yes, I did.

23 Q. Did your search include a search of your electronic files?

24 A. Yes.

25 Q. Did you make any efforts, specifically, to search your

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Demopolis - Cross

1 computer for e-mails relevant to this litigation?

2 A. I did.

3 Q. Did you produce the relevant files?

4 A. I've started to, yes. Because they were carbon copied,
5 that was the question that I had, since the e-mails were
6 already there, they weren't e-mails to me, and it was just in
7 the customer service bin, so, yes.

8 Q. You were not the sender or the receiver personally of the
9 e-mails?

10 A. Correct.

11 Q. You testified that you had run the Lavasoft program on your
12 computer. Was that before or after you conducted your search
13 for files relevant to this litigation?

14 A. Before.

15 Q. Now, prior to purchasing the Lavasoft program, had you
16 taken any other security measures to insure that customer
17 information could not be leaked?

18 A. Yes. I purchased LoJack. It's a tracing program that if
19 somebody physically took my computer and went out of their
20 house and went somewhere, the moment that they booted the
21 computer and it accesses the internet, it does two things: It
22 notifies LoJack that the computer has been stolen, because I
23 would have reported the theft, and number two, it does a remote
24 data wipe.

25 Q. Back to the Lavasoft program. What types of files were

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Demopolis - Cross

1 scrubbed from the computer?

2 A. I didn't scrub any files. I didn't specifically go in and
3 say I need to get rid of this file, I need to get rid of that
4 file. I basically pressed the one that reads the free space
5 and the reason I did that is because in the Outlook mail
6 obviously I had been deleting mail and putting it in the
7 recycle bin. I thought it was gone. We found out that it
8 wasn't and the only way to get rid of it was to use the free
9 disk space. That's what I used.

10 MR. WENGROVSKY: No further questions, your Honor.

11 THE COURT: Anything, Mr. Weigel? I gather not.
12 You're excused. Thank you very much.

13 MR. WEIGEL: No, your Honor. Thank you.

14 (Witness excused)

15 THE COURT: Anything further?

16 MR. WENGROVSKY: I'd like to call Mr. Kairalla for a
17 very brief line of questions.

18 THE COURT: I assume you're finished.

19 MR. WEIGEL: I am, your Honor, thank you.

20 THE COURT: Very well.

21 SHANE KAIRALLA,

22 called as a witness by the Defendant,

23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. WENGROVSKY:

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Kairalla - direct

1 Q. Mr. Kairalla, are you an owner of Durango Merchant
2 Services?

3 A. Yes.

4 Q. And what are your responsibilities at Durango?

5 A. I pretty much do everything. Accounting, customer service,
6 hiring, training.

7 Q. And where do you work out of?

8 A. Durango, Colorado.

9 Q. Is that the company's main office?

10 A. Yes, sir.

11 Q. Where does Mr. Counley work out of?

12 A. Currently he lives in Wisconsin and works out of there.
13 He's worked in my office years ago when we first started
14 together.

15 Q. Does Mr. Counley work from a home office?

16 A. He does.

17 Q. What about Mr. Demopolis; where is he located?

18 A. He's in Burlington, Ontario, in Canada.

19 Q. And does Mr. Demopolis work from a home office as well?

20 A. He does.

21 Q. Did you perform a search of both your own and Durango's
22 computers for files relevant to this litigation?

23 A. Yes, I did. I searched my Outlook. I tried to look in any
24 application folders for accounts that would have been relevant.

25 There was a customer service inbox. We're on an exchange

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Kairalla - direct

1 server system. I'm not sure if you know what that is. Our
2 e-mail logs into our servers where all of our e-mails are
3 stored. When I did the search, nothing really came up there.
4 But when I realized that we had our customer service inbox
5 where we try to keep old e-mails so we know who we've dealt
6 with in the past, our customer service manager searches leads
7 and before she forwards the leads she looks in that box, so
8 that's a place we don't delete e-mails. It doesn't have any
9 sensitive information in there where we would need to delete
10 e-mails.

11 So after I realized the search that I did on my
12 computer didn't include that, I did a search on there and did
13 find quite a few e-mails that would have been relevant to the
14 case, and I provided those, which was quite a few. I think it
15 was four or five hundred e-mails. I did all the search terms
16 that you guys suggested. I tried to go off that list; bags,
17 replicas, whatever, and provided those e-mails, yes.

18 Q. So Durango -- did Durango maintain and produce the entire
19 relevant contents of that customer service folder?

20 A. Yes, we did.

21 Q. And the customer service e-mails are things that do not
22 include actual merchant applications?

23 A. That's right. It only includes our original leads and
24 which manager was forwarded the lead and we called our first
25 response e-mail, so we know, we copied the agent on that e-mail

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Kairalla - direct

1 and customer service, so we know who is working the account,
2 which manager. So if there's a question our customer service
3 manager can search through there, find out which applicable
4 manager to forward the call, so if a customer calls in looking
5 for an answer to a question on an account.

6 Q. Mr. Kairalla, did you do any file shredding on your
7 computers?

8 A. No, I did not.

9 Q. Was there any file shredding done on any of the computers
10 in the company's main office in Colorado?

11 A. No, there was not. We talked about it. We're always
12 talking about customer security and you know we have weekly
13 meetings and we're always discussing different things that we
14 can do. I never got around to doing the file shredding. We
15 talked about doing it, I just never bought the software and did
16 it. Then this issue came up and certainly didn't want to do it
17 after that.

18 Q. Understood. Have you read any articles regarding computer
19 data security?

20 A. I did. We talked about the, when it came up originally,
21 there was an article, we talked about it and I have read that
22 article.

23 Q. Do you recall when you first read an article of this sort?

24 A. We read stuff all the time. There was a huge breach with
25 Heartland Bank several years ago where we were reading a lot of

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Kairalla - direct

1 security-related documents on what we need to do to protect
2 security-related information.

3 Q. If you could explain what happened in that breach event?

4 A. Heartland is one of the top three credit card processors in
5 the country and evidently there was a huge breach of their
6 data. I'm not sure on the specifics of how it got breached,
7 but I know millions of people's credit cards were breached and
8 it was a big -- I know they got fined, very seriously fined
9 from Visa and Master Card.

10 Q. What security measures have you taken on the computers
11 within your control in Colorado?

12 A. Besides passwords, we bought that LoJack software. When
13 Nathan's wife's computer got stolen it really scared us into
14 what could happen, so about that time we got that LoJack
15 software. Different processors that we work with require
16 different formats of sending them encrypted information, so
17 just being conscious of trying to encrypt data and getting rid
18 of applications we don't need on our systems.

19 Q. And do you know approximately when you purchased the LoJack
20 software?

21 A. It was the exact same time that Bill did. Christmas 2008,
22 I guess.

23 Q. And that was before this litigation?

24 A. That's right.

25 Q. Does Durango receive applications from high-risk merchants?

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Kairalla - direct

1 A. Internet businesses in general are considered high risk by
2 the processors. Retail are low risk, internet is high risk,
3 simply because there's no signature, face-to-face transaction,
4 so the vast majority of all the accounts we do are
5 internet-based. We do retail accounts, we do everything from A
6 to Z. So high risk is just a general term. Any internet
7 account is considered high risk because of the fact that
8 there's no card present during the transaction. There's all
9 different levels of high risk, but in general internet
10 businesses are considered high risk. The reason for that is if
11 there's a chargeback or dispute, it's very hard for a merchant
12 to win that without a signature on a receipt.

13 Q. A signature from the customer or end user?

14 A. From the customer, that's correct.

15 Q. What were Durango's approximate total profits resulting
16 from the Bag Addiction account that was identified in the
17 complaint?

18 A. I'm not sure. I think we provided those numbers, though.
19 Bill put together a report for Gucci on that.

20 Q. Does Durango currently accept applications from merchants
21 who sell replica products?

22 A. No. We might receive requests for a merchant account, but
23 we don't -- ever since this started, we definitely, you know,
24 when we became aware that there was an issue surrounding this,
25 we stopped trying to assist anybody having to do with replica.

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Kairalla - direct

1 Q. Are any of the replica accounts that Durango had received
2 in the past still active today?

3 A. I believe there was one that we came across, I think we
4 brought it to your attention at one of the banks, Merchant
5 E-solutions, that we thought possibly could be replica.

6 Q. And what if anything did you do about that?

7 A. I believe -- I'm not really sure what we did. I haven't
8 done anything about that personally.

9 Q. And approximately what percentage of Durango's accounts
10 were replica merchants?

11 A. I would say way less than 1 percent. I mean, over the
12 years that I've been in this business, ten years we probably
13 processed approximately 8,000 applications and as far as I
14 know, based on this litigation, I think we had 20, 20 accounts
15 that were actually replica accounts.

16 Q. Out of approximately 8,000?

17 A. 8,000 applications that we've handled or processed.

18 Q. Now, during the time prelitigation that Durango was
19 forwarding applications from replica merchants to credit card
20 processing banks, were you aware of any issue with replica
21 merchants or any complaints against them from designers?

22 A. No. Several of the banks that we worked with say they were
23 okay.

24 Q. Did co-defendant Frontline indicate that replica accounts
25 were acceptable?

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Kairalla - direct

1 A. Yes, they did. We wouldn't have sent the applications if
2 they didn't.

3 Q. Does Durango do any underwriting work?

4 A. Absolutely not..

5 THE COURT: What are we really doing here? This is
6 really a spoliation hearing. That's all I'm interested in.

7 Q. Just to wrap it up, does Durango make any recommendations
8 to merchants regarding the contents of their websites?

9 A. No.

10 MR. WENGROVSKY: I have no further questions, your
11 Honor.

12 THE COURT: Anything, Mr. Weigel?

13 MR. WEIGEL: Yes, briefly.

14 CROSS-EXAMINATION

15 BY MR. WEIGEL:

16 Q. You don't dispute that Mr. Demopolis and Mr. Counley ran
17 the File Shredder program on their computers, do you?

18 A. No, I don't.

19 Q. And you personally have no idea what they managed to delete
20 when they ran that program, correct?

21 A. No.

22 Q. And --

23 A. I don't think it would be anything relevant to this case.

24 Q. You really don't know.

25 THE COURT: That's a good answer.

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Kairalla - cross

1 A. I mean, because we did searches before, prior to that.

2 Q. Now, you run your e-mail on an e-mail server company called
3 Intermedia, right?

4 A. We have for the past few years, I believe, yeah.

5 Q. And did you ask Intermedia to start archiving your e-mails
6 when this lawsuit started?

7 A. No, we did not.

8 Q. In fact, did you ask --

9 A. I didn't know that was something we needed to do.

10 Q. Nobody told you you needed to start preserving relevant
11 e-mails during that time?

12 A. Anything relevant to this case we were told, yes.

13 Q. When were you told that?

14 A. When we first started dealing with Mr. Wengrovsky.

15 Q. You accepted replica merchants up to the time this lawsuit
16 was filed, correct?

17 A. Yes.

18 Q. And it was when this lawsuit came about that you decided
19 you wouldn't accept them anymore?

20 A. That's right. We thought that would be a good idea.

21 Q. Did you notify the merchants you were working with by
22 e-mail that you were going to stop working with them?

23 A. I don't know how many merchants we actually had at that
24 time that we knew were doing replica or not, but I did notify
25 my staff and employees that we want to be -- we do not want to

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1 deal with anybody that has anything to do with replica,
2 assisting them with banks, even though the banks say that they
3 were okay.

4 Q. But you were still okay in getting residuals from those
5 accounts, correct?

6 A. I never thought of that.

7 Q. You said that you had 20 applications, I think Mr. Counley
8 might have said it was 20 to 30, but how many of those
9 applications have you produced in this lawsuit?

10 A. I'm not sure.

11 Q. In fact, you produced none, isn't that correct?

12 THE COURT: To your knowledge.

13 A. To my knowledge, I didn't personally produce any
14 applications. I couldn't find any applications that had to do
15 with replica.

16 Q. You were talking about this security breach with some other
17 company, but you've never had individual credit card numbers on
18 your computer, right? I mean, if I go and buy something from a
19 website, Durango doesn't end up with that credit card number,
20 do they?

21 A. No, we didn't.

22 Q. So the breach you were talking about was when somehow
23 individuals' credit cards were --

24 A. We do have people's credit card information on our computer
25 which may pay us for a setup fee or a terminal. We basically

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1 have, people's credit card information are on our computers.

2 Q. But you don't have -- not every purchase --

3 A. Maximum amounts --

4 THE COURT: You got to wait until he finishes his
5 question. Otherwise the reporter can't get either of you.

6 THE WITNESS: I'm sorry.

7 MR. WEIGEL: Nothing further.

8 THE COURT: All right. You're excused. Anything
9 further? Very well. Mr. Weigel, do you want to tell us
10 something for a few minutes about how we ought to come out as a
11 consequence of all your pearls?

12 MR. WEIGEL: Certainly, your Honor. I was explaining
13 this case to an expert witness of mine in another case and I
14 said to him, I read this guy's deposition he said he ran a file
15 shredding program. And the witness turned to me and said
16 sometimes I guess the documents must be so bad that you're
17 better off taking whatever sanctions you get from deleting the
18 files than from producing them. And I looked at him and I
19 said, "That can't be right," and it shouldn't be right.

20 These folks run a \$2 million a year business. They
21 process replica merchants knowingly. The applications we
22 submitted, your Honor, show that they're doing replica
23 merchants. They know what they were doing. They were sued,
24 they received a subpoena in this lawsuit, in the underlying
25 lawsuit, the Laurette lawsuit in 1998. They were sued in this

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1 case in August 2009. They and every other litigant in this
2 courtroom were obliged to put on a hold. Mr. Counley testified
3 in his deposition he was never told he had some obligation to
4 preserve the e-mails and he did not preserve e-mails, and Mr.
5 Counley said that he was told that those e-mails get deleted
6 every seven days. We got barely a handful of e-mails after
7 months of back and forth.

8 We sent a letter to this Court. We had a conference.
9 At that conference I suggested to your Honor that we would like
10 to get a copy of the hard drives of the relevant computers so
11 that we could examine them and find out if there were e-mails
12 on them. After that, two senior executives of the company buy
13 a file shredding program whose only purpose is to make it sure
14 that if those hard drives were produced or stolen or whatever,
15 that somebody could not recover the information that they had
16 previously deleted.

17 Whether it's 20 applications or 30 applications,
18 whether it's e-mails, whether it's other information, it's
19 relevant to the fact that not only did they facilitate the
20 Laurette counterfeiters, but they facilitated all these other
21 counterfeiters as well.

22 And Mr. Counley testified that he sends out 150
23 e-mails a day. We don't know right now what was on that hard
24 drive that they deleted. And it can't be our burden to prove
25 it. We know that Mr. Counley, however, said that there were

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1 applications, applications of merchants and we produced and he
2 identified applications and those applications have relevant
3 information to this lawsuit: The number of different merchants
4 that are selling replica products, the types of products
5 they're selling, the website information, all sorts of
6 information that would be relevant to this computer, and we're
7 entitled to a presumption that this was done, it was done
8 deliberately. It was done deliberately and it was done with
9 the intention of making this information unrecoverable, and
10 we're entitled to sanctions as a result of that. It was
11 intentional spoliation of evidence.

12 Not only should they preserve the e-mail, but they
13 should not have bought a file shredding program. So we ask
14 your Honor that we be awarded a default judgment in this case
15 because we're never going to know what was on those hard drives
16 other than what Mr. Counley is willing to admit was on them,
17 which was applications, which is what he was trying to delete
18 and which were undeniably relevant.

19 THE COURT: We're not going to that extent. I gather
20 there is no further need, according at least to your expert,
21 for you to look at their hard drive, because you won't get
22 anything. Is that your understanding? I mean, there's no
23 sense now in your looking to the computers, because they've
24 been cleaned. Or is there? It's a question.

25 MR. WEIGEL: The question is, your Honor, we don't

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1 know what Mr. Counley deleted. There is a log of what was
2 deleted in the computer program. Now, Mr. Counley as our
3 expert testified, he could have deleted the log of what he
4 deleted, but we don't know if he did that or not, and in my
5 experience in another case that I had, even though you could
6 not recover the data of what was deleted, sometimes there are
7 scraps of information hiding out in the computer that would
8 give you a file name, for example, and might give you a clue as
9 to what the files were that were actually deleted. So at the
10 very least we would like a forensic image of the hard drive
11 done by a third party who is responsible to let us know exactly
12 what they did delete, and I think we're entitled to a
13 presumption that what was on there was relevant and damaging to
14 their case. And I do think we're entitled to a default
15 judgment.

16 THE COURT: I'm not doubting for a moment that you
17 think so.

18 MR. WEIGEL: They should not be allowed to benefit or
19 put themselves in a better position by running a file shredding
20 program after your Honor indicated that you would be willing to
21 entertain a motion to produce the very hard drive they had
22 wiped.

23 THE COURT: Well, Mr. Wengrovsky, do you have some
24 thoughts that you would like to share with us on this issue?

25 MR. WENGROVSKY: I do. I'll try to keep it brief,

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1 your Honor. First of all, there was a reference to Durango
2 being a \$2 million company. They're a five or six employee
3 outfit, depending on whether or not Shane, the owner, is
4 included in that mix. In their best year their revenues
5 approach 2 million. This is revenues, not profits. The
6 profits are a fraction of that, unfortunately. Most of the
7 money gets paid out to agents and what have you.

8 More importantly, all of these witnesses testified
9 that they first searched their files, electronic or otherwise,
10 for relevant information for this case and then, subsequently,
11 ran the Lavasoft program. So I have to admit, I really don't
12 see what the problem is with that, especially since we have
13 produced over a thousand relevant e-mails. And I'm talking
14 about communications directly between Durango and merchants,
15 yes, merchants who sold products that they represented to be
16 replicas. So how can the thousand e-mails be both produced and
17 shredded at the same time? I don't know. Your Honor, I don't
18 see where the conspiracy theory or the allegation is coming
19 from.

20 I know that this plaintiff has a lot of litigation and
21 I know that they have a lot of infringement problems, and I
22 know why. I suspect that they've over the years had a handful
23 of defendants that were probably very difficult to deal with,
24 probably extremely uncooperative and perhaps that's caused them
25 to look at all defendants through a certain set of glasses.

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1 These guys are not that problem. They have in good faith
2 produced whatever they had.

3 Now, in support of sanctions, prior to this memorandum
4 that was handed to me this morning and I've never seen before,
5 they've relied on two and only two cases. One of them,
6 conveniently enough, is from your Honor, copyright case, music
7 downloads, Arista Records, and the other was in the First
8 Circuit in Boston, I think. As you know, you did not hit the
9 defendants in the download case with a default judgment. That
10 is what happened up in the First Circuit.

11 I have to tell you I was very entertained going
12 through the details of both cases, but especially the First
13 Circuit one. How do you get yourself hit with a default
14 judgment over your discovery conduct? Well, it came in a few
15 ways. First of all, it was a telecommunications case, not a
16 copyright or trademark, but the fact remains it was a default
17 judgment from discovery conduct. In that case a bookkeeper,
18 number one, testified that she did not recall writing any
19 checks that had had her name on it whatsoever. And she then
20 testified a few minutes later that she did not recall what the
21 company's procedures were for receiving payments or writing
22 checks for bills. Even worse, she then testified, this was a
23 great idea, that on the eve of the scheduled inspection at the
24 office by investigators from the other side, she dropped a
25 computer down a flight of steps. I'm not making this stuff up.

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1 Fast forward to the next year. Naturally, she has a
2 new computer, and what happens then? Third thing is she runs
3 LavaSoft type software. That happens to be something I think
4 put out by Microsoft, but basically same deal. She claims that
5 she runs it for the sole purpose of extracting and completely
6 deleting family, personal information, and yes, lo and behold
7 she accidentally wiped out through who knows how many screens,
8 perhaps Mr. Bolas can help us with that, she accidentally wipes
9 out all of the company's financials. So that is what the
10 federal court system tells us where a default judgment would be
11 appropriate. I don't think that even belongs in today's
12 discussion.

13 A little closer to home, but still not quite, there
14 was your Honor's decision in the music download case. What
15 happened there, as you know, was that the defendant was hit
16 with a sanction where they were not allowed to assert
17 affirmative defense that they had put forth in their initial
18 answer. How that happens, just to summarize, first, we're
19 dealing with the direct infringer in that case, not someone on
20 the sidelines like Durango, but that company had already
21 violated a court order. They were already sanctioned in
22 discovery. Then and only then did that Court hit them with the
23 removal of the affirmative defense. In addition to completely
24 wiping clean, by that I mean deleting the contents of seven
25 hard drives, which first they said was four and subsequently

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1 got caught and admitted that it was seven, in addition to that,
2 they made sure that certain witnesses would be unavailable. I
3 would suggest that we are nowhere near that.

4 I don't think sanctions are in any way necessary here.
5 For what it's worth, as I put in my letter to your Honor last
6 Friday, we've even agreed to voluntarily get Gucci the
7 production of the hard drive images, provided, of course, that
8 they do not have access to privileged attorney-client
9 communications, which I tell you over the years are a pretty
10 good amount by now. We're working on the logistics of that
11 right now. Gucci and Durango have both approached ways to
12 attack and go about that problem and I'm confident we can have
13 that resolved soon enough. Ultimately, that's it. I just
14 don't see sanctions being appropriate here. Thank you.

15 MR. WEIGEL: May I respond for just a minute, your
16 Honor?

17 THE COURT: A minute.

18 MR. WEIGEL: We received a total of six e-mails prior
19 to the conference we had with your Honor. The idea that all
20 this searching was going on and so forth, we were told on
21 June 11 that Durango was continuing its search of records
22 pursuant to our request and is now using information from
23 Frontline to check. They ran this Lavasoft program before they
24 started producing the e-mails, and the fact that they produced
25 400 e-mails, for a gentleman who sent out 150 e-mails a day,

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1 that they just happened to find in the corner of their
2 computer, they love to turn on the amount, but the number of
3 e-mails is not terribly relevant except for the fact it seems
4 surprisingly small given what the man does for a living. But
5 they did not produce e-mails until yesterday, apparently. They
6 ran the software weeks ago. It was an intentional attempt to
7 delete relevant information and we are entitled to a
8 presumption of that, and he said as much. He said why he did
9 it and why he did it, you never heard Mr. Wengrovsky talk about
10 any applications that were produced. Can't say they were
11 relevant. They went in there for the purpose of deleting them
12 because if they knew we had all the applications, we would know
13 how many replica and content merchants they serviced and we
14 would know what witnesses to talk to and it would be very
15 helpful to our case and they intentionally destroyed that
16 information.

17 THE COURT: All right, everybody. Let me look at this
18 transcript and read whatever I've received in the way of briefs
19 and we'll fashion some remedy of some sort either now or as we
20 move along in the pipeline towards a trial.

21 MR. WENGROVSKY: Your Honor, if I could just make one
22 comment. I believe we need to straighten out one piece of
23 factual information. Mr. Kairalla, the owner of Durango,
24 already testified that replica merchants were about 20 out of
25 8,000 merchants that they had serviced over the years.

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1 Mr. Weigel seems dissatisfied with us producing only a thousand
2 relevant e-mails when compared to the company having done
3 several hundred a day for some time. Just to be absolutely
4 sure so we're on the same page, Durango is under no obligation
5 to produce every e-mail from every account. They serve as
6 travel agents, they serve as people who sell all kinds of
7 products. The relevant e-mails totaled over a thousand, that's
8 what was produced. That's why that number is produced.

9 And finally, I'd just like to remind the Court that
10 Durango produced all of its residual reports. Again, these
11 things show who is the merchant, who is the processing bank,
12 how much actually did the merchant do, what amount did Durango
13 get from that, who was the agent that got it to Durango in the
14 first place. All in reports, all produced.

15 MR. MENTZIK: Your Honor, if I may, one housekeeping
16 matter on behalf of Woodforest, as long as I'm here. Under the
17 current scheduling order summary judgment motions are due this
18 Friday. Our answer is not actually due until July 14, given
19 your opinion last week. I discussed it with Mr. Weigel, with
20 your Honor's position, there's one summary judgment motion on
21 one issue we plan to file relates to the ability of Gucci to
22 collect statutory damages. It's a very focused issue based on
23 the statute. Mr. Weigel is agreeable that we can file that
24 summary judgment along with our answer. With your Honor's
25 permission, we would like to do so.

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1 THE COURT: When is that likely to happen?

2 MR. MENTZIK: Within two weeks.

3 THE COURT: Fine.

4 MR. MENTZIK: Thank you, your Honor.

5 THE COURT: We'll reserve decision, but thank you all.

6 I learned a lot about washing or scrubbing, whatever.

7 (Adjourned)

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