

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

GUCCI AMERICA, INC.	:	
	:	Civil Action No. 09-6925-HB
Plaintiff,	:	
v.	:	District Judge Harold Baer, Jr.
	:	
FRONTLINE PROCESSING CORPORATION;	:	
WOODFOREST NATIONAL BANK;	:	
DURANGO MERCHANT SERVICES LLC d/b/a	:	
NATIONAL BANKCARD SYSTEMS OF	:	
DURANGO; ABC COMPANIES; and JOHN	:	
DOES,	:	
Defendants.	:	
	:	X

**DECLARATION OF CHARLES A. VERNON IN SUPPORT OF DEFENDANT
WOODFOREST'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, CHARLES A. VERNON, declare and state as follows:

1. I am Executive Vice President and General Counsel of Woodforest National Bank ("Woodforest"), a defendant in the above-noted action. I have personal knowledge of the facts and matters discussed in this declaration, and if called as a witness, could and would testify to the matters set forth below.

2. Woodforest is a bank, organized and existing under the laws of the United States, and having its principal place of business at 1330 Lake Robbins Drive, Suite 100,, The Woodlands, Texas 77380.

3. The merchant service provider for Woodforest is Delta Card Services, Inc., a Texas corporation which conducts business under the names Merchants' Choice Card Services, MCCS, Merchants' Choice Payment Solutions, and MCPS (hereafter collectively "DeltaCard").

4. Woodforest's policies prohibit approval of merchants engaged in illegal and prohibited activities. As examples, merchants engaged sales activities over the Internet involving child pornography, firearms, drugs, alcohol and tobacco would be illegal and would

also be prohibited by Visa and/or MasterCard. Woodforest's policies did not prohibit us from accepting merchants who were said to sell replicas.

5. I understand that Woodforest's policies are consistent with the policies of MasterCard and Visa which allow their credit cards to be used for the sale of replica merchants, but not for counterfeiters. The card associations such as MasterCard and Visa regularly notify processing banks regarding the types of sales that are prohibited. During the November 2006 to May 2008 time frame, no such notice was ever received from the associations prohibiting processing for merchants selling replicas. Attached as Exhibit A is a true and accurate copy of pages from MasterCard Rules involving prohibited practices and its current BRAM program. The recent BRAM program prohibits counterfeit products, but not replicas. Attached as Exhibit B is the Visa operation Regulations for preventing illegal activities. It also does not mention replicas.

6. I understand that on or about November 13, 2006, Woodforest accepted an application for the Laurette Company, an Internet merchant which advertised replica handbags for sale. Woodforest's policies would not have prohibited us from accepting credit card processing services at that time for Internet merchants selling replicas. I understand that on about June 2, 2008, Gucci obtained a "freeze order" prohibiting the Laurette Company from doing further business on its Web site and the site was closed down shortly thereafter.

7. I also understand, based on review of documents, that during the period November 2006 until May 2008, Woodforest accepted applications from other Internet merchant offering replica products. To my knowledge, over this entire period of time, Woodforest never received a single notice, letter, complaint, lawsuit or subpoena from any trademark owner complaining that the products sold on these Web sites were counterfeit products, and not just

replicas. During this entire period of time, Woodforest proceeded with the belief, confirmed by the absence of any complaint about the sales on these Web sites, that there was nothing improper with the replicas sold on these Web sites.

8. Had Woodforest received a notice from Gucci establishing that TheBagAddiction was selling counterfeit goods, we would have investigated the issue. If we had determined that the client was selling illegal merchandise, Woodforest would have immediately cancelled our services. Gucci had ample time and opportunity to so notify us and they failed to do so.

9. The first time that Woodforest received any notice that the products on the Laurette Company Web site might violate trademark rights or be counterfeit was on June 4, 2008 when Gucci sent a copy of the restraining order to Woodforest in the case of *Gucci America and Chloe v. Laurette Company*. Gucci then issued a subpoena to Woodforest on June 10, 2008 to provide documents. A true and accurate copy of the subpoena is attached as Exhibit C. Woodforest cooperated fully and timely with the subpoena from Gucci's attorneys, providing all documents regarding the Laurette Company Web site to counsel for Gucci.

10. At no time while Woodforest was processing credit card payments for the Laurette Company were we informed that the products of TheBagAddiction were not replicas, but counterfeit products.

I declare under penalty and perjury that the foregoing is true and correct.

Executed on July 30th 2010

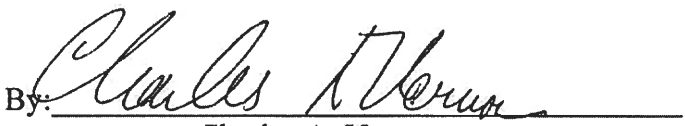
By: 
Charles A. Vernon

EXHIBIT A

5.11.6 Other Forms of Payment

A Merchant must not accept any payment from a customer in any other form (for example, cash or check) with respect to a charge for products or services reflected on a TID resulting from the use of a Card. A Merchant also must not accept a Card as payment for products or services for which the Merchant has received or expects to receive payment in any other form, whether from the customer or a third party.

5.11.7 Illegal or Brand-damaging Transactions

A Merchant must not submit for payment into interchange, and an Acquirer must not accept from a Merchant for submission into interchange, any Transaction that is illegal, or in the sole discretion of the Corporation, may damage the goodwill of the Corporation or reflect negatively on the Marks.

The Corporation considers any of the following activities to be in violation of this Rule:

1. The sale or offer of sale of a product or service other than in full compliance with law then applicable to the Acquirer, Issuer, Merchant, Cardholder, Cards, or the Corporation.
2. The sale of a product or service, including an image, which is patently offensive and lacks serious artistic value (such as, by way of example and not limitation, images of nonconsensual sexual behavior, sexual exploitation of a minor, nonconsensual mutilation of a person or body part, and bestiality), or any other material that the Corporation deems unacceptable to sell in connection with a Mark.

An Acquirer that has been notified of a Merchant's noncompliance with this Rule and that fails promptly to cause the noncompliant practice to cease, or that has been notified multiple times regarding violations of this Rule, is subject, at the Acquirer's expense, and in addition to any other noncompliance assessment or other discipline, or both, to any one or more of the following:

1. A RAMP Level 3 review as described in the *Security Rules and Procedures* manual
2. An audit at the sole expense of the Acquirer by a third party selected by the Corporation, of the Acquirer's acquiring practices

The Corporation may list a Merchant which the Corporation determines is noncompliant with this Rule on the MATCH system. (See chapter 11 of the *Security Rules and Procedures* manual.)

BRAM Compliance Program Overview

BRAM Compliance = Brand
Protection



To help preserve the integrity and goodwill of our payment system, MasterCard has a Business Risk Assessment and Mitigation (BRAM) program that protects our customers against illegal and brand-damaging transactions.

The BRAM program serves to restrict access to the MasterCard system by merchants whose products and services may pose significant fraud, regulatory, or legal risks.

BRAM Merchant categories

The following examples include some merchant categories that fall under the BRAM program:

- Illegal prescription drugs
- Illegal tobacco product sales
- Counterfeit and copyright infringing merchandise
- Child pornography
- Illicit Web sites depicting violence and extreme sexual violence
- Bestiality

For monitoring purposes, acquirers also are required to register **legal** gambling and tobacco merchants. Registration is also required for prescription drug merchants who are selling products in a non-face-to-face environment. However, it is important that acquirers exercise appropriate measures to determine whether merchants offering those products and services are operating legally.

BRAM best practices

After merchant agreements are established, it's important for acquirers to initiate an ongoing fraud-prevention strategy with merchants. Below are the best practices MasterCard recommends acquirers follow to meet BRAM requirements.

- Perform due diligence when on-boarding.
- Regularly review and monitor merchant Web sites and business activities to confirm that all activities involving the MasterCard mark are conducted in a legal and ethical manner.
- Continually monitor announcements by regulatory bodies to stay informed of legislation that affects eCommerce products that are considered illegal.
- Use a BRAM-certified vendor for monitoring purposes.

A closer look at reporting requirements

When we find a merchant engaged in a BRAM violation, MasterCard will notify the acquirer and request that it either immediately discontinue the relationship with the merchant, or have the

merchant cease the practice that violates MasterCard standards. In cases of alleged intellectual property rights violations, an acquirer must conduct an investigation and provide a response to both MasterCard and the person alleging the infringement within 30 days of receiving the initial notice by MasterCard about the allegation.

For more information, please contact Heidi Davidson, Group Head & Senior Vice President Franchise Development at Heidi_Davidson@mastercard.com.

EXHIBIT B

Core Principle 8.4

Protect Against Illegal Activities

Preventing Illegal Activities in the Visa System

Participants in the Visa system agree to take appropriate measures to prevent the Visa system from being used for or associated with illegal activities. These include, but are not limited to, child pornography, money laundering or financing terrorist activities. Because Visa payments can be subject to a variety of anti-money laundering laws in many countries, participants in the Visa system are also responsible for complying with these laws, including, for participants in the U.S. Region, the Bank Secrecy Act and the USA PATRIOT Act.

ID#: 010410-010410-0007816

Security and Fraud Control Requirements

General Security and Fraud Control Requirements

Risk Management and Fraud Control Standards and Compliance - AP Region

An AP Member must have a risk management/security and fraud control function.

ID#: 010410-010410-0007739

Fraud Control Contact Availability - AP Region

An AP Member's security and fraud control contact must be available (although not necessarily on duty, on-site) 24 hours a day, 7 days a week.

ID#: 010410-010410-0000614

Security and Fraud Control Staff Information Access - AP Region

Security and fraud control staff of an AP Member must have access to at least 6 months of Cardholder and Merchant activity information, as well as the authority to provide, upon request:

- Basic Cardholder identity information and any other relevant information
- Reported or suspected fraudulent account activity
- Details about any Card loss or theft

ID#: 010410-010410-0000615

EXHIBIT C

**Issued by the
UNITED STATES DISTRICT COURT
Southern District of Texas**

Gucci America, Inc. and Chloé SAS
V.

SUBPOENA IN A CIVIL CASE

Laurette Company, Inc., et al.

Case Number:¹ 08 Civ. 5065 (LAK) (SDNY)

TO: Charles A. Vernon
Woodforest National Bank and Woodforest Bank
25231 Grogan's Mill Road, Suite 175
The Woodlands, Texas 77380

- YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

- YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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- YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

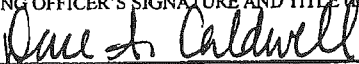
Please see Schedule A

PLACE Dace Caldwell, Gibson, Dunn & Crutcher LLP c/o Esquire Services, 3101 Louisiana St., Ste. 300, Houston, Texas 77002	DATE AND TIME 7/7/2008 9:00 am
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- YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  Attorney for Plaintiffs	DATE 6/10/2008
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ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Dace A. Caldwell c/o Gibson, Dunn & Crutcher LLP; 1050 Connecticut Ave. NW, Washington, DC 20036
phone: (202) 887-3780

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE _____ SIGNATURE OF SERVER _____

ADDRESS OF SERVER _____

Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

(c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) **Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
- (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

SCHEDULE A
TO SUBPOENA DUCES TECUM TO WOODFOREST NATIONAL BANK

INSTRUCTIONS

1. If you object to producing any document (in whole or in part) based on any privilege, you should state the nature of the privilege claimed and the basis thereof; identify and describe the document and the reason for which it was created; identify the creator of the document and all persons named on it, to whom the document was sent, for whose use it was prepared, and state the date of the document. This information should be set forth separately in a privilege list.

2. If you claim that any request is beyond the scope of permissible discovery, specify each and every ground on which such claim rests.

3. If you find any document request or term used in a request to be vague, ambiguous, subject to varying interpretations, or unclear, state what portion of the request or term you find to be vague, ambiguous, subject to varying interpretations, or unclear, state your understanding of the request or term, and respond in accordance with that understanding.

4. Draft or non-identical copies are to be considered separate documents for purposes of these requests.

5. If any responsive document is no longer in existence, cannot be located or is not in your possession, custody or control, identify it, describe its subject matter and describe its disposition (including without limitation identifying the person or persons (a) having knowledge of the contents of the document and/or its destruction, deletion or disposition and (b) responsible for its destruction, deletion or other disposition.

6. To the extent you believe that any responsive document is not within your possession, but rather, is within the possession of a separate Woodforest National Bank entity (defined below), either produce the responsive document or identify the entity that may possess the responsive document and identify the responsive document that you believe that entity may possess.

DEFINITIONS

1. "All" includes the term "each" or "any," and vice versa. The singular shall include the plural, and the disjunctive shall include the conjunctive, and vice versa.

2. "Communication" means every conceivable manner or means of disclosure, transfer, or exchange of oral, electronic, digital or written information between or among one or more persons or entities, including but not limited to, writings, correspondence, meetings, conferences, conversations, dialogues, discussions, interviews, consultations, agreements, inquiries, and any other expressions or understandings, whether made face-to-face, by telephone, mail, facsimile, computer or otherwise.

3. “Concerning” means, in whole or in part with respect to, in connection with, referring to, relating to, describing, evidencing, constituting, substantiating, purporting, embodying, establishing, identifying, listing, stating, comprising, connected with, memorializing, recording, commenting on or upon, responding to, showing, demonstrating, analyzing, reflecting, representing, supporting, explaining, consisting of, regarding, discussing, containing, setting forth, disclosing, explaining, summarizing, pertaining to, or otherwise having any logical or factual connection to the subject matter, of the document request.

4. “Defendants” means Laurette Company, Inc., Jennifer Marie Mattchen a/k/a Jennifer Marie Kirk a/k/a Jennifer Besson, and Patrick B. Kirk, all doing business as TheBagAddiction.com, as well as their officers, directors, agents, representatives, and all persons acting on their behalf.

5. “Defendants’ website” means the website available at the URL: www.TheBagAddiction.com.

6. “Document” is synonymous with the usage of that term in Rule 34 of the Federal Rules of Civil Procedure, and includes, without limitation, writings, e-mails, reports, papers, notes, accounts, memoranda, correspondence, communications, worksheets, workpapers, analyses, contracts, charts, schedules, agreements, working papers, corporate records, minutes of meetings, books of account, ledger books, notebooks, desk calendars, photographs, films, slides, audiotape, videotape, appointment books, diaries, drafts, memoranda of meetings or conversations, graphs, telephone records, computer tapes, computer discs, optical discs, laser discs, computer cards and computer printouts and other data compilations from which information can be obtained or translated all electronic, mechanical, magnetic, optical or electric data, records or representations of any kind (including computer data, computer files, computer programs, hard drives, floppy disks, compact disks, tapes and cards existing on desktop computers, laptop computers, notebook computers, personal digital assistant computers, servers, backup tapes or any other medium), and any other form of physical media.

7. “Litigation” means the lawsuit filed in the United States District Court for the Southern District of New York, captioned as *Gucci America, Inc. et al. v. Laurette Company, Inc., et al.*, 08 Civ. 5065 (L.A.K.) (S.D.N.Y.).

8. “Woodforest National Bank” means any member bank or organization of Woodforest National Bank, including but not limited to its predecessors, parents, affiliates, subsidiaries, officers, directors, board members, managers, attorneys, employees, agents, representatives, consultants, or any other person or entity acting for, at the direction of, or on behalf of Woodforest National Bank.

9. “You” and “your” mean Woodforest National Bank, as defined above.

DOCUMENTS TO BE PRODUCED

Please produce the following documents or things in your custody, possession or control:

1. All documents concerning payments or transfers of money between Defendants or Defendants’ website and Woodforest National Bank, including but not limited to the transfer of

