

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

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GUCCI AMERICA, INC.,

Plaintiff,

-against-

**AFFIDAVIT OF
SHANE KAIRALLA
IN SUPPORT OF
DURANGO'S
OPPOSITION TO
GUCCI'S MOTION FOR
SUMMARY JUDGMENT**

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

Index No. 09-CV-6925

Defendants.
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I, Shane Kairalla, hereby declare as follows:

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

2. I make this affidavit in support of Defendants' motion to dismiss for lack of personal jurisdiction.

3. Durango acts as a referral service, or broker, to bridge retailer / merchants with entities that offer credit card processing services. Durango's role is to send merchant account applications to processing banks for the processing banks to decide whether the accounts are acceptable.

4. Durango does not process credit transactions. There is no approval process from Durango, as it is not Durango's role to engage in any form of underwriting.

5. Frontline specifically indicated that "replica" merchant accounts were acceptable.

6. Because processing banks indicated that replica accounts were acceptable, Durango added the term “replica” to its website as part of a lengthy list of acceptable merchant account types.

7. In the standard processing agreement between the merchant and the credit card processing bank, the merchant specifically warrants “that Merchant will comply fully with all federal, state and local laws, rules and regulations applicable to its business.”

8. Any merchant can easily change the contents of their website, without Durango’s knowledge, after their processing account is approved.

9. Durango does not, and has never specifically solicited “replica” merchant business.

10. Durango uses no metatags, Google “AdWords,” or other search engine key words that would enable it to target replica merchants in particular.

11. Upon being served with this lawsuit, Durango elected to stop accepting replica merchant applications altogether and even informed its network of independent agents that replica accounts were no longer acceptable.

12. Replica merchants comprised less than 1% of Durango’s total business.

13. Durango, who has brokered better than 5,000 merchant accounts, far more regularly services clients who deal in travel accommodations, communications services, financial services, herbal supplements, online services, and property management and rental services, to name a few industries.

14. Durango acted as a broker regarding the “BagAddiction” website in exchange for a flat set up fee of \$195.00, plus a miniscule residual percentage of sales processed by the merchant. Such amounted to a mere total of \$13,544.75 in profits to Durango.

15. Durango does not categorize merchants as “high risk.” Rather, “high risk” is a banking industry phrase that simply refers to merchants with a higher risk of customer chargebacks than other merchants, or of causing a financial loss to the processing bank if the merchant cannot financially cover chargebacks received.

16. All e-commerce and telephone order businesses are “higher risk” than traditional “brick and mortar” stores simply because they do not physically swipe the customers’ credit cards and do not obtain customers’ signatures, therefore the risk of chargebacks due to fraud or fulfillment issues is greater (since the product is not delivered immediately).

17. Many types of business models carry higher levels of risk of chargebacks for a variety of reasons. Such include the following:

- Merchants with poor personal credit;
- Travel and travel-related services,
- Timeshare advertising,
- Credit repair services,
- Collections agencies,
- Computers and electronics sold online,
- Herbal supplements
- Software downloads,
- Calling card services,
- “Voip” or voice over Internet protocol calling services,
- Financial consulting services,
- Online jewelry stores,

- Stock tip services,
- Telemarketing services,
- Dating services,
- Merchants selling high-ticket items, i.e. goods with an average price of over \$500.00;
- Merchants that sell a future deliverable product or service i.e. memberships;
- Tickets to sports, concerts, and other future events;
- merchants that were previously terminated and placed on the “Terminated Match File.”

18. Durango did not review the merchants’ product lines, as such is outside the scope of Durango’s responsibilities.

19. The suggestion for Laurette to use a disclaimer on its website did not originally come from Durango (who is only a broker), but rather came from defendant Frontline (who was the credit card processing bank).

20. Not a single merchant application received by Durango stated “counterfeit.”

21. Most of the relevant applications received by Durango identified the goods as “handbags,” “athleticwear,” or other generic and benign product descriptors.

22. Durango did not shred the full contents of any hard drives. Durango removed only selected files from certain hard drives to insure that its clients’ most sensitive personal information could not be compromised.

23. Durango produced its voluminous “master residual reports” to Gucci, which itemized all merchant accounts (replica or otherwise), the banks that processed the accounts, the independent agents that referred the accounts to Durango, and the exact revenues Durango received as a result of each account.

24. All of the numbers reflected in Durango's already-produced residual reports were perfectly corroborated by both Frontline's and Woodforest's document production, and Woodforest produced all of the merchant applications at issue.

25. Prior to receiving papers from Gucci, Durango did not know that Laurette and their BagAddiction website were selling counterfeit merchandise.

26. Prior to receiving papers from Gucci, Durango did not see the BagAddiction website screenshots that were included in the Gucci's Complaint.

27. Prior to receiving Gucci's Motion for Summary Judgment, Durango was not aware that merchant Ben Menachem had been sued for trademark infringement or counterfeiting.

28. Durango did not understand the terms "replica" to be synonymous with "counterfeit" or that "replica": in any way referred to unlawful activity (since the market is replete with legitimate replica products).

29. Durango did not suspect any wrongdoing on behalf of Laurette, and it is not Durango's job to investigate merchants and the details of their product lines – such is the responsibility of credit card processing banks such as Frontline. After a merchant is approved, Durango simply moves on to the next account

30. But for receiving a trademark registration for its own corporate name, prior to this litigation, Durango had no experience with trademark law.

31. Durango has no need to keep copies of old merchant applications after Durango has forwarded the applications to the credit card processing banks. This is because the banks provide Durango with "residual reports" that show all merchant account activity.

32. Durango's purchase of the Lavasoft product was merely the most recent mechanism used in an ongoing effort to insure data security. Prior mechanisms used by Durango included requiring password access to computer operating systems, utilizing encryption software, and the purchase and installation of "Lo-Jack" for their computers.

I declare under the penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Dated: Durango, Colorado
August 1, 2010

A handwritten signature in black ink, appearing to read "Shane Kairalla", written over a horizontal line.

SHANE KAIRALLA,
Durango Merchant Services, LLC.