IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

**UNITED STATES OF AMERICA**

**V.** **CRIMINAL NO. 05-324**

**MAMADOU DIALLO**

**TENTATIVE FINDINGS AND RULINGS**

On April 12, 2006, a jury convicted Defendant Mamadou Diallo ("Defendant") of trafficking in counterfeit goods in violation of 18 U.S.C. § 2320(a). On March 6, 2007, Judge Hardiman denied Defendant's Motion for Judgment of Acquittal.

Pursuant to Local Criminal Rule 32.1, counsel for the Government and for the Defendant each had an opportunity to submit objections to the Presentence Investigation Report ("PIR") and Addendum thereto prepared by the probation officer, Vonita Rae Baldt (the "Probation Officer"). In this case, the Government filed its Position With Respect to Sentencing Factors (Docket No. 103), indicating that it has no objections, additions or modifications to the PIR. Defendant filed a Position With Respect to Sentencing Factors (Docket No. 100) and Memorandum in support thereof (Docket No. 101) objecting to two aspects of the guideline calculations set forth in the PIR and correcting seven (7) facts set forth in the PIR. The objections and clarifications raised in Defendant's position are addressed below.

I. Defendant's Objections to the PIR

A. Facts Not Affecting Guideline Calculation

In Section B of Defendant's Position With Respect to Sentencing, Defendant makes several factual corrections to the PIR which do not affect the guideline calculation. Because this Court

agrees with the defendant's statement that correction of these facts does not affect the guideline calculation, the Court finds no need to address such facts in these tentative findings.

B. Objections Related to Grounds for Departure

Defendant's Position with Respect to Sentencing Factors and Memorandum in Support (Docket Nos. 100 & 101) object to the Probation Officer's conclusion in the PIR that she knows of no grounds for departure from his advisory federal guidelines sentencing range: 33 to 41 months imprisonment, based on a criminal history category of I, and a total offense level of 20. Defendant that submits there are two (2) grounds for a downward departure in this case: (1) acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a); and (2) pursuant to U.S.S.G § 2B5(b)(1)(B), the infringement amount in this case should be determined by looking to the "retail value of the infringing items," not the "retail value of the infringed items."

1. Downward Departure Based Upon Acceptance of Responsibility

Pursuant to U.S.S.G. § 3E.1.1, a two level decrease is available for acceptance of responsibility, even where a defendant has exercised his constitutional right to a trial, when the defendant does so for the purpose of asserting and preserving an issue that does not relate to factual guilt, "e.g. to. . .challenge. . . the application of a statute to his conduct." U.S.S.G. § 3E1.1, Application Note 2. Whether a defendant has "accepted responsibility" is a factual matter and is reviewed under a "clearly erroneous" standard. *See United States v. Rodriguez*, 975 F.2d 999, 1008 (3d Cir. 1992). Further, "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." Application Note 5 to U.S.S.G. 3E1.1. A defendant bears the burden of establishing by a preponderance of the evidence that a reduction under this provision is warranted.

*U.S. v. Rodriguez*, 975 F.2d at 1008.

Here, this Court has been advised that Mr. Diallo exercised his right to a trial, in part, given his immigration status. This Court also finds that Mr. Diallo agreed to and admitted the essential element of trafficking pursuant to 18 U.S.C. § 2320(a). That is, he admitted that he transported the goods in question with the intent to dispose of them to another for a thing of value. In addition, at trial, Mr. Diallo disputed only the legal application of the statute to his conduct. Finally, this Court finds that Mr. Diallo has cooperated with the Government at all times throughout his case. Moreover, since his trial, Mr. Diallo has been gainfully employed and has complied with all requests made upon him, including requests to appear before this Court. Accordingly, this Court finds that the Defendant, Mr. Diallo, has established by a preponderance of the evidence that he is entitled to a two (2) level decrease for acceptance of responsibility.

2. Downward Departure Based Upon Retail Value of the Infringing Items

Pursuant to U.S.S.G. § 2B5.3, the "infringement amount" for purposes of guideline calculation may be, depending upon the circumstances, the "retail value of the infringed items" (that is, in this case, the retail value of authentic designer handbags) or the "retail value of the infringing items" (that is, in this case, the retail value of the knock-off handbags). In cases such as the one at hand, where street vendors sell "knock-off" products at a price significantly less than the retail price of the authentic item, the difference between the retail value of the "infringed" items compared to the "infringing" items is significant. Comment 2 to U.S.S.G. § 2B5.3 sets forth certain circumstances under which the retail value of the *infringed* items should be used in calculating the infringement amount. Comment 2 also contemplates use of the value of the infringing items to determine the infringement amount where such circumstances are not present.

Defendant agues that the proper calculation of the infringement amount in this case is determined by using the retail value of the *infringing* items. The Court has read the testimony from the trial transcript as to the value of the subject items and has viewed a sampling of the items in question. The Court is inclined to agree with the defendant for the following reasons: (1) upon viewing a sampling of the infringing items, the Court finds that the infringing items would not appear to a reasonably informed purchaser to be identical or substantially equivalent to the infringed items; (2) given the context of the purchase of the items (i.e. at a flea market) and the price of the items, such items could not appear to a reasonably informed purchaser to be identical or substantially equivalent to the infringed items; (3) the retail prices of the infringing items utilized by the defendant are significantly less than 75% of the price of the infringed items; and (4) the retail value of the infringed item does not provide an accurate assessment of the pecuniary harm to the copyright or trademark owner; indeed, the retail value of the infringing item provides a more accurate assessment of the harm. Accordingly, this Court finds that the proper calculation of the infringement amount in this case is determined by using the retail value of the *infringing* items, not the *infringed* items.

## II. Result

1. Trademark Counterfeiting, a violation of 18 U.S.C. § 2320(a) calls for a base offense level of 8. *See* U.S.S.G. § 2B5.3(a).

2. As set forth above, defendant is entitled to a two (2) level decrease for acceptance of responsibility pursuant to U.S.S.G. § 3E.1.1.

3. Defendant's criminal history category is I.

4. Pursuant to U.S.S.G. § 2B5.3(b)(1)(B), the Court is directed to the loss table at U.S.S.G. § 2B1.1 if the loss to date exceeds $5,000.

5. The Court then questions whether the loss level is B, where the Court would add 2 offense levels, or loss level G, where the Court would add 12 offense levels to the base offense level.

6. Pursuant to § 2B5.3, Commentary, Application Note 2(A)(i)(I), if the infringing item appears to a reasonably informed purchaser to be identical or substantially equivalent to the infringed item, the infringement amount shall be determined by the retail value of the infringed item multiplied by the number of infringing items seized. As such, the loss is approximately $214,870, which calls for a 12 level increase pursuant to U.S.S.G. § 2B1.1(b)(1)(G).

7. Accordingly, if the adjusted offense level is 18, the appropriate loss level is G, and defendant's advisory sentencing range is 27 to 33 months imprisonment, based on criminal history category of I, and a total offense level of 18.

8. On the other hand, if the appropriate loss level is B, *i.e.* the loss is between $5,935 and $7,195, (the retail value of the infringing items as the appropriate measure of the infringement amount), the total offense level would be reduced to either 8 or 10, depending upon the outcome of this Court's decision as to the value of the Lacoste items, as set forth in Defendant's Position With Respect to Sentencing. The Court will take evidence and make a determination as to this issue during the sentencing hearing.

9. Accordingly, an offense level of 8, based on a criminal history category of I, would result in a sentence in Zone A of the guideline range (0-6 months).

10. Alternatively, an offense level of 10, based on a criminal history category of I would result in a sentence in Zone B of the guideline range (6-12 months).

11. Pursuant to 18 U.S.C. § 2320(a), Defendant is subject to a term of imprisonment of not more than 10 years.

12. Pursuant to U.S.S.G. § 5C1.1(f), Defendant is not eligible for probation.

13. Pursuant to 18 U.S.C. § 3561(c)(1), Defendant is eligible for a term of probation of not less than 1 and not more than 5 years.

14. Pursuant to 18 U.S.C. § 3583(b)(2), if a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than 3 years.

15. Pursuant to U.S.S.G. § 5D1.2(a)(2), the guideline range for supervised release is at least 2 years, but not more than 3 years.

16. Pursuant to 18 U.S.C. § 2320(a), the maximum fine for the instant offense is $2,000,000.

17. Pursuant to U.S.S.G. § 5E1.2(c)(3), the fine range for the instant offense is $7,5000 to $2,000,000.

18. Pursuant to 18 U.S.C. § 3663A and U.S.S.G § 5E1.1, restitution shall be ordered in this case.

19. Defendant must pay a special assessment of $100, pursuant to 18 U.S.C. §3013.

20. Based upon the Supplemental Addendum to the Presentence Report, the Court finds that a fine is not appropriate in this case, given the financial circumstances of the defendant.

21. The Court recognizes that restitution is mandatory in this case, however the Court notes that, based upon the Supplemental Addendum to the Presentence Report, the defendant has little or no means by which to pay restitution. Upon hearing testimony regarding the value to be attributed to the Lacoste items, the Court will make a determination as to the appropriate amount of restitution in this case. At this time, the Court is inclined to order that restitution be paid incrementally, in an amount per month that will not substantially interfere with the defendant's ability to provide for his family.

III. Other

The Court will also entertain argument on the potential for probation and/or work release per the recent Third Circuit decision in *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005).

As noted, the Court will consider evidence regarding the Lacoste items at the sentencing hearing.

Except as stated herein, the Court accepts the PIR and the Addenda thereto as accurate. The sentencing hearing will proceed in accordance with the foregoing findings and rulings. To the extent that either party would like to address these findings and rulings prior to the sentencing hearing, notice should be provided to Deputy Clerk Galovich so that a scheduled time for a conference with counsel can be arranged prior to sentencing.

Date: August 8, 2007

s/ Nora Barry Fischer
Nora Barry Fischer
United States District Judge

cc: All ECF registered counsel
U.S. Probation Office