

Case No. 08-30920

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ASIKA M. NWEKE,

Defendant-Appellant.

Appeal from the United States District Court  
for the Western District of Louisiana

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REPLY BRIEF FOR APPELLANT

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Douglas Lee Harville, #27235  
The Harville Law Firm, LLC  
400 Travis Street, Suite 313  
Shreveport, LA 71101-3108  
Telephone: (318) 222-1700  
Telecopier: (318) 222-1701  
lee.harville@theharvillelawfirm.com  
Attorney for Asika M. Nweke

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**I. Government's Issue 1:**

The Government is correct in its assertion that the proper standard of review in this matter is for clear error. See, e.g., gov't br., 14. Under that standard of review, the defendant is not entitled to relief unless he can “show (1) there is an error, (2) that is clear and obvious, and (3) that affects his substantial rights.” United States v. Marek, 238 F.3d 310, 314 (5th Cir.), cert. denied, 534 U.S. 813 (2001), United States v. Palmer, 456 F.3d 484, 489 (5th Cir. 2006). Further, even “[i]f these factors are established, the decision to correct the forfeited error still lies within . . . [this Court's] sound discretion, which [it] will not exercise unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Marek, 238 F.3d at 315; accord Palmer, 456 F.3d at 489. For the reasons set forth in Asika Nweke's appellant brief and for those set forth below, the District Court committed error that was clear and obvious and that affected Nweke's substantial rights. Further, allowing the Government to use the items seized in the unconstitutional search of Nweke's goods would seriously affect the fairness, integrity, or public reputation of judicial proceedings because it would allow a conviction based on items seized in an unconstitutional general search without a warrant.

In its brief, the Government argues that “[t]he counterfeit nature of the merchandise was immediately apparent to the agents, although it may not have been immediately apparent to the public.” Gov’t br., 16. However, the Government also notes that the agents search of the merchandise included multiple calls to third parties, private/non-governmental corporate representatives, who helped the agents determine that certain items were counterfeit. Id. at 5-6. That is, in its brief, the Government admits, at least by implication, that the counterfeit nature of the merchandise was not readily apparent to agents, even though they “had ‘received extensive instruction and on-the-job experience in identifying counterfeit trademark goods.’” Gov’t br., 5. Instead, the agents required analysis and evaluation by outside private consultants who were not on site and who importantly were not members of the shopping public that had been invited into Nweke’s store.

Further, in its brief, the Government confirmed that the agents observed the absence of micro-printing on the back of certain trademark labels and that the agents noticed irregularities in the purported countries of origin for certain of Nweke’s goods. Id. at 6. That is, the Government has admitted that the agents searched Nweke’s goods in a manner in which regular customers did not view, and could not have viewed, the goods.

In Lewis v. United States, 385 U.S. 206, 211 (1966) (emphasis added), the United States Supreme Court noted that:

. . . . A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials . . . .

Accord United States v. Shelton, 337 F.3d 529, 538 n.30 (5th Cir. 2003) (quoting Lewis, 385 U.S. at 211, for the proposition “that not every entry to premises by invitation authorizes ‘an agent . . . to conduct a general search for incriminating materials’” (ellipses in original) and Gouled v. United States, 255 U.S. 298, 306 (1921), for the proposition “that a search by a government agent who enters a home or office ‘by stealth, or through social acquaintance, or in the guise of a business call’ is prohibited by the Fourth Amendment”), cert. denied, 540 U.S. 1229 (2004).

As noted in Nweke’s brief and in the Government’s brief, the agents did not “in the same manner as a private person, . . . accept an invitation to do business” and did not “enter upon the premises for the very purposes contemplated by the occupant.” Lewis, 385 U.S. at 211. Instead of perusing Nweke’s goods in

contemplation of purchasing them, trained agents, with assistance and advice of outside private consultants engaged over cell phones, conducted a detailed and thorough general search of the clothing, including looking for information secreted within tags on the clothing. This was “a general search for incriminating materials” that was not authorized by Nweke when he allowed customers and agents to enter his commercial clothing store.

Indeed, the search of Nweke’s goods seems similar to the search described in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) (citations omitted; emphasis added), wherein the United States Supreme Court noted that:

. . . . The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, . . . and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them.

Again, in this matter, the agents engaged in a full-fledged inspection of Nweke’s goods before they seized them. The agents were not acting as normal

customers, and their seizures were not based solely on probable cause based on items in plain view as viewed by ordinary customers. Therefore, Magistrate Judge Hornsby plainly erred to the extent that he concluded that Nweke had no reasonable expectation of privacy at Classy Fashions when Nweke's goods were seized because his booth was open to the public for business at that time and that the agents lawfully seized Nweke's goods, after the agents observed Nweke's goods were contraband and that the agents had observed Nweke's goods in plain/open view from a lawful vantage point.

Moreover, this plain error affected Nweke's substantial rights because it allowed the Government to use this illegally seized evidence and evidence derived therefrom to obtain Nweke's conviction, a conviction that could not have been obtained without the illegally seized evidence and the evidence derived therefrom.

## **II. Government's Issue 2:**

The Government argues that Nweke stipulated to the counterfeit nature of Nweke's goods. See, e.g., gov't br., 9, 13, 19-24. However, a review of the stipulations establishes that Nweke intended to stipulate to authenticity and admissibility of the affidavits accompanying the stipulations. However, with the exception of the Akademiks and Apple Bottoms stipulations, there is no indication that Nweke stipulated or intended to stipulate to the counterfeit nature of any of Nweke's goods.

Accordingly, these "stipulations cannot themselves provide sufficient evidence to" establish that Nweke's goods were counterfeit. But see United States v. Kleinschmidt, 596 F.2d 133, 136 (5th Cir.), cert. denied, 444 U.S. 927 (1979); cf., United States v. Abbott, 265 F. App'x 307, 309-10 (5th Cir. Feb. 13, 2008). Rather, the stipulations were meant as a way to expedite the introduction of evidence to the jury and to avoid having to present "live" witness testimony from representatives of the trademark owners.

Further, as noted in Nweke's brief, it is clear that Judge Stagg, who was able to judge the credibility of the Government's expert witness, did not believe that the Government proved, and that this Court should find that the Government did not prove, each of the elements of 18 U.S.C. § 2320(a) as to each of the eleven

counts for which the jury convicted Nweke. Specifically, this Court should find that the Government failed to meet its burden of establishing that Nweke used a counterfeit mark because the Government failed to establish that Nweke's goods were likely to confuse, cause mistake, or deceive. Therefore, the Government failed to establish the elements of 18 U.S.C. § 2320(e)(1)(A)(i)-(iv) as to some or all of the counts for which the jury convicted Nweke.

Because a reasonable jury would have doubted whether the evidence at trial proved an essential element underlying some or all of Nweke's convictions, Nweke respectfully submits that this Court must reverse the judgment and vacate the sentence based on the jury's verdict.

### CONCLUSION

For the above reasons, the defendant-appellant, ASIKA M. NWEKE, respectfully requests that this Court (1) find that the District Court erred when it denied Nweke's motion to suppress; (2) find that a reasonable jury would have doubted whether the evidence proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke's convictions; and

(3)(a) reverse the judgment and vacate the sentence based on the illegal and unconstitutional seizure of Nweke's goods and/or the jury's verdict; and  
(b) remand this matter to the District Court for further proceedings in light of this Court's opinion.

Respectfully submitted,

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Douglas Lee Harville #27235  
The Harville Law Firm, LLC  
400 Travis Street, Suite 313  
Shreveport, LA 71101-3108  
Telephone: (318) 222-1700  
Telecopier: (318) 222-1701  
lee.harville@theharvillelawfirm.com  
Attorney for Asika M. Nweke

CERTIFICATE OF SERVICE

I, DOUGLAS LEE HARVILLE, certify that today, April 13, 2009, two copies of the reply brief for appellant and an electronic copy of the reply brief were served upon opposing counsel:

AUSA Cristina Walker  
United States Courthouse  
300 Fannin Street, Suite 3201  
Shreveport, Louisiana 71101-3068,

by placing a copy of same in the United States Mail, properly addressed and with adequate postage affixed thereon.

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Douglas Lee Harville #27235