15-3024

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

OROLOGIO OF SHORT HILLS, INC.; OROLOGIO INTERNATIONAL LTD., INC.,

Appellants,

—v.—

THE SWATCH GROUP (U.S.) INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE

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Corporate Disclosure Statement and
Statement of Financial Interest

No. 15-3024

Orologio of Short Hills Inc. and Orologio International Ltd., Inc.

v.

The Swatch Group (U.S.) Inc.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The Swatch Group (U.S.) Inc.
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: The Swatch Group Ltd.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

The Swatch Group Ltd. (listed on SIX Swiss Exchange)

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

The Swatch Group Ltd. is the parent of The Swatch Group (U.S.) Inc. and owns 100% of the shares of The Swatch Group (U.S.) Inc., a Delaware company.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

(Signature of Counsel or Party)

Dated: 03/01/16

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COUNTER-STATEMENT OF ISSUES FOR REVIEW ON APPEAL

1. Did the District Court err in finding that Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. (collectively, "Orologio") did not (i) meet the statutory definition of a franchise; and (ii) was not a statutory franchisee under the New Jersey Franchise Practices Act ("NJFPA"), N.J.S.A. 56:10-1, et seq.? (A4 Order); (A6 Decision).

2. Did the District Court err in concluding Orologio failed to evidence its competitors as required under 15 U.S.C. 13 Sections 2(d) and (e) of the Robinson-Patman Act ("RPA"), dismissing Orologio's RPA claims? (A17-18)

3. Did the District Court err in concluding that there is nothing in the record that Orologio lost any customers or sales due to allegedly disproportionate tagging, slotting fees, co-op facilities, or other benefits allegedly offered to other dealers? (A17-18)

4. Did the District Court err in finding that as a matter of fact, even if Orologio demonstrated its competitors for purposes of RPA §§ 2(d) and 2(e), The Swatch Group (U.S.) Inc. ("SGUS") (by its Omega brand) offered proportionally equal opportunities to Orologio and its other dealers, requiring dismissal of Orologio's RPA claims? (A18)

5. Did the District Court err because it denied Orologio's partial motion for summary judgment on liability for Orologio's RPA claims when SGUS was entitled to summary judgment dismissing the Complaint as a matter of law? (A20)

6. Did the District Court err in denying Orologio's motion to strike SGUS's answer and for sanctions, on the basis of SGUS's alleged spoliation of evidence? (A11)

The answer to all of these questions is: No.

STANDARD OF REVIEW

Summary judgment is proper under Fed. R. Civ. P. 56 if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 281 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993). Summary judgment should issue "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To defeat such a motion, the non-moving party must affirmatively set forth facts showing there is a genuine issue for trial – "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The standard of review for the District Court's grant of summary judgment is plenary, and the Court of Appeals should apply the same test utilized by the District Court. Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co. of Maryland, 989 F.2d 635, 637 (3d Cir. 1993). Review of the District Court's interpretation of the writings between the parties is de novo. Post v. St. Paul Travelers Ins. Co., 691 F.3d 500, 514 (3d Cir. 2012).

This Court should only disturb the District Court's factual findings, including that SGUS accorded Orologio proportionally equal promotional and other facilities, under a "clearly erroneous standard." Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985); Lanning v. SEPTA, 181 F.3d 478, 481 (3d Cir. 1999), cert. denied, 528 U.S. 1131 (2000).

The District Court's order denying Orologio's motion for spoliation is reviewed for abuse of discretion. Peterson v. AG Pa., 551 Fed. Appx. 626, 627-628 (3d Cir. 2014).

COUNTER-STATEMENT OF THE CASE AND RELEVANT FACTS

A. Preliminary Statement

SGUS operates the United States business of various Swiss watch brands of The Swatch Group Ltd., a Swiss company which owns numerous well-known brands including Breguet, Omega, Blancpain, Rado, Tissot, Longines, Jaquet Droz, Glashutte, Hamilton, Swatch and others. (A572 [¶ 11], 586-87, 592) Like most luxury watch brands, Omega has over the past several years shifted from department store and individually-owned jewelers as its primary points of sale to company-owned stores (A593-95), and lawfully terminated Orologio's Mall at Short Hills authorized dealership on April 18, 2011, years after Orologio International Ltd., Inc. ("Orologio GSP") voluntarily closed its Garden State Plaza Mall store. (A6, 45-46)

Orologio sued SGUS in the New Jersey Superior Court for an injunction, claiming that it was improperly terminated as a *de jure* NJFPA franchisee. New Jersey Superior Court Judge Harriet Farber Klein denied Orologio's injunction (A1049), and Orologio's subsequent motions to the Appellate Division for Rule 2:11-2 summary disposition and R. 2:2-4 leave to appeal were denied. (A1051) In November 2011, Orologio commenced this action alleging the exact same NJFPA claim, but adding the RPA count, conferring subject matter jurisdiction to change courts.

On January 19, 2015, Orologio moved for partial RPA summary judgment, and SGUS moved for summary judgment dismissing the Complaint, which the District Court granted in a July 23, 2015 Opinion and Order (the "Decision") (A4-20). On August 20, 2015 Orologio filed a Notice of Appeal. (A1)

Orologio brings this appeal after having operated for more than 17 years as an Omega authorized dealer (along with being an authorized dealer for numerous other brands, including other SGUS brands) but now claims that all along, it was actually an NJFPA franchisee. Orologio also blames alleged RPA violations for its commercial failure, despite Orologio being a robust participant in the promotional and advertising facilities it now scrutinizes under antitrust laws.

The District Court properly observed that Orologio was not a statutory NJFPA franchise, and similarly did not suffer from RPA violations, having been presented (and participated) in the same incentive programs as every other Omega dealer. Moreover, the District Court properly recognized that Orologio has not even identified its competitors as required under the RPA, rejecting Orologio's claim that every Omega retailer in New Jersey, New York, Connecticut, and Pennsylvania competed with Orologio. Such an absurd argument was dismissed by the District Court because there is no evidence that every dealer in these states competes with Orologio, let alone was favored by SGUS such that Orologio lost any sales.

Perhaps the most dispositive finding by the District Court was that *"[e]ven if Orologio had demonstrated who its actual competitors were, the record shows that Swatch offered proportionally equal opportunities to Orologio and its other dealers."* (A18) Thus, even if Orologio's competitors included every Omega retailer in New Jersey, New York, Connecticut, and Pennsylvania, SGUS nonetheless offered Orologio proportionally equal promotional opportunities as these dealers, a finding of fact that should not be disturbed on appeal.

The record indisputably confirms there are no disputed material facts which prevented the District Court from granting summary judgment dismissing Orologio's NJFPA and RPA claims, both of which find no factual rescue from years of discovery, which only proved that SGUS offered Orologio the same or proportionally the same terms as its other dealers and never entered into an NJFPA franchise with Orologio. Over the course of this lawsuit, Orologio presented its legal theories to the New Jersey Superior Court, the New Jersey Appellate Division (twice) and the District Court, and no court has made any NJFPA or RPA finding that supports any Orologio theory of relief.

Similarly, Orologio's discredited motion for sanctions based upon alleged SGUS spoliation met the same fate because, when examined on its merits, it was easily dismissed in a Decision footnote. That Orologio needs to dredge-up a faux spoliation argument to rescue its case speaks eloquently to the merits of its NJFPA and RPA claims.

The fact is, Orologio presented to the District Court no material issues of fact warranting denial of SGUS's summary judgment motion, and cannot claim with any credible legal support that the law requires a jury to discern whether Orologio competed with every dealer in a four-state area or was denied proportionally equal advertising and other benefits over its long relationship with SGUS. Orologio heaved upon the District Court volumes of discovery and deposition testimony conducted over four years, but upon close examination, Judge Susan D. Wigenton properly distilled the evidence, finding that SGUS not only offered the same proportionate advertising and commercial benefits to Orologio and its other dealers, but that Orologio actually participated in all of the programs offered by SGUS over the years.

Orologio now tests its NJFPA theory before its third court in New Jersey, and its RPA claim before a second court. This Court should reject Orologio's appeal not only upon the law and undisputed facts, but also because it is clear that Orologio is merely a disgruntled terminated dealer which enjoyed nearly two decades of sales with Omega, but even greater success with other brands, which demonstrates that Orologio not only did not rely to its detriment upon the strength of Omega, but has continued just fine, enjoying greater overall sales since being terminated. That is, the record is clear that Orologio's sales have increased since Orologio was terminated, discrediting that alleged RPA violations harmed Orologio as a disfavored dealer, a false claim Orologio has been unsuccessfully peddling to New Jersey federal courts for many years (addressed below).

This Court should affirm the District Court's reasoned Decision because there are no material factual questions which bear upon any of the legal issues presented by Orologio in this appeal, and there can be no dispute that SGUS remains entitled to dismissal of the Complaint as a matter of law.

For the reasons which follow, the District Court's denial of Orologio's motion for partial summary judgment also should be affirmed because Orologio cannot maintain a claim for SGUS's violation of RPA §§ 2(d)-(e).

B. Background of Orologio

Orologio is a high-end watch store, operating for 28 years. (A445) Orologio GSP operated for 22 years (id. at ¶ 1), and over the two stores' combined 50 years of operation, they never once claimed to have a contract with SGUS. Orologio in this appeal materially mischaracterizes its relationship with SGUS to manufacture an NJFPA claim and to seek treble RPA damages, even though Orologio was treated the same as every other Omega dealer in the country, let alone around the four-state area in which Orologio claims it competes against all Omega sellers.

Like all Omega accounts, Orologio never received a written license or dealer agreement, in accordance with SGUS's corporate policy not to offer written retailer contracts. (A571-72 [¶¶ 5-7], 574 [¶ 19], 592, 615, 693 [¶¶ 2-3], 695 [¶ 10]) None of SGUS's brands authorize dealers through written retailer agreements. (A615)

The Complaint does not allege a written agreement with SGUS from Orologio's 1988 corporate inception through 2008, when Orologio alleges that an

Omega nationwide merchandising program offering credit margin return was a secretly disguised NJFPA written "license." (A51-52) During those prior decades, Orologio also never alleged it was mistreated under the RPA or that preferred dealers received advertising allowances, a claim that only surfaced after Omega was terminated in favor of an SGUS company-owned store at the Short Hills mall.

C. The Omega National Merchandising Programs that Orologio Misrepresent Collectively Form a Written Franchise Arrangement

Orologio elevates Omega's nationally implemented credit incentive program forms as the NJFPA statutory-required writing. Orologio asks the Court to choose between several forms and guidelines issued by Omega over nearly two decades to all of its dealers which present incentive programs and selling criteria in order for the seller to maintain its authorized dealership. Because all of SGUS's retailers were dealers at-will, that is, sellers authorized without, by SGUS's design, written dealership contracts, SGUS's brands periodically issued voluntary credit incentive programs and guidelines regarding sales environments.

1. The Omega National "Selective Distribution" Form Standards

For instance, one such Omega national program was the 2006 "Selective Distribution" (A48 [¶¶ 34-35], 51 [¶ 50], 59 [¶ 89]) that, as the name suggests, was merely an internal form depicting how Omega expects its dealers to carry the brand. (A573-74 [¶¶ 14, 17-18], 595-96, 638, 640-41, 697 [¶ 18]) Dealers which did not meet this standard were not opened by Omega, and authorized dealers who ceased meeting Omega's store standards may be closed. Id. The Omega "Selective Distribution" program was a nationally implemented list of standards for Omega to open and maintain accounts; the reality was (and remains), that SGUS is not restricted from terminating authorized dealers that do not comply with the high-end standards Omega prefers, and the "Selective Distribution" list of standards assists Omega in monitoring its dealers' performance. (A592, 594-96)

2. Omega's National "Partner Plans" During 2008-2009

Orologio focuses on Omega's "Partner Plan" for its NJFPA 'writing' and alleged RPA mischief, which was nothing more than a program that returned to dealers decreased wholesale margins. (A572-73 [¶¶ 9, 11-13], 613-16, 695-96 [¶¶ 12-14]) After Omega adjusted its wholesale pricing, it incentivized retailers to maintain certain inventory levels and reach sales goals to recapture the decreased margin through the program. Id. The "Partner Plan" was presented to all Omega retailers id., and Orologio participated for some of the years the program existed, but did not sell enough watches to qualify in other years. (A502, 572-73 [¶¶ 9, 11-13], 613-15, 617, 695-97 [¶¶ 12-16], 699-700 [¶¶ 26-27], 731, 733 (conceding the Partner Plan program was voluntary))

The Partner Plan and Omega's Selective Distribution program were not NJFPA licenses or contracts as Orologio now falsely portrays; they were voluntary programs memorialized by internal forms to verify the eligibility and credit worthiness of Omega's participating retail accounts, allowing the retailer to recapture reduced watch margins and to secure Omega advertising support. Id. Unchallenged and undisputed evidence confirms the Partner Plan was optional, validated by Orologio's participation in the Partner Plan over most of its existence.

For instance, Orologio participated in the 2004 Partner Plan, accumulating $2,394 in credit, but was less successful in the 2005 program, securing only $788 in credit. (A572-573 [¶ 12], 1102) Orologio declined to participate in 2007, and missed its sales goals in the 2008 and 2009 Partner Plans. Id. Thus, Orologio's participation in the Partner Plan illustrates the company program was nationwide, but dealers like Orologio, with tepid sales, had difficulty achieving credit, a failure of Orologio's sales performance that does not provoke antitrust scrutiny.

Orologio's claim that Omega's incentive program shifted to a disguised co-op plan misrepresents not only the language and intent of the Partner Plan eligibility forms, but also the purpose of the merchandising program. The 2008-2009 Partner Plans – the only NJFPA writings identified in the Complaint and Orologio's chief RPA culprit (A43-45 [¶¶ 18, 22-24], 51-52 [¶ 50]) – are mere forms for Omega's U.S. dealers to insert fill-in-the-blank information for jointly negotiated sales goals that, if met, trigger credit for the next year's order. (A613-15, 617, 618, 620-23)

The Partner Plan was offered to all Omega retailers (id.), and cannot by its nature anchor Orologio's NJFPA 'written arrangement' argument, much less convey special treatment to other dealers under Orologio's RPA theory. To the contrary, the Partner Plan was technically a form which invited dealers to participate in the incentive program and, in actual practice, ultimately revealed Orologio's inability to meet yearly sales goals.

Orologio does not dispute that Omega required its accounts to carry a minimum selection of inventory and present the brand in a certain way, particularly given that customers shopping for $4,000+ watches expect dealers to display a mature selling environment, carry a wide assortment, and have warranty and product knowledge. (A574 [¶ 20], 592, 608-10, 694-95 [¶¶ 5, 10-11], 697 [¶ 18])

Orologio's website boasts that it is *"Your Complete Watch Store"* which appeals to *"discerning clientele"* demanding the world's *"finest timepieces"* (www.orologio.us), confirming that Orologio's customers expect a sophisticated seller displaying various high-end brands in a mature environment with a wide assortment to browse. Omega expecting dealers to maintain certain inventory levels; properly display the brand; and to maintain a high-end store image (A592, 608-10, 695 [¶ 11]) is not the hallmark of supplier interdependency portrayed by Orologio in its NJFPA claim, but indicative of the standards of luxury watch brands like Omega. Id.

D. Orologio Misrepresents its Economic Independence on Omega

At p. 8, of its Brief, Orologio maintains that Omega captured 25% of Orologio's revenue, an alleged 'fact' that SGUS does not challenge on summary judgment but will be contested if the Decision is vacated because Orologio improperly lumps repairs, servicing, bracelets, batteries, and other sales in that revenue claim. But, even assuming 25% of Orologio's revenue in any given year was attributed to Omega sales, Orologio was never encouraged to rely upon Omega for this percentage of its business. (A46-47 [¶¶ 30, 33], 55 [¶¶ 62, 65], 59 [¶ 90], 595) Like all Omega U.S. accounts, Orologio was not required to carry Omega exclusively or to the detriment of other brands; to the contrary, Omega dealers are encouraged to carry multiple high-end brands, a practice which attracts consumers to stores. (A574, 592, 594) That Orologio carried limited luxury brands rendering it susceptible to possible harm if one is lost, is a non-NJFPA and non-RPA insured business strategy. (A595)

Orologio's business acumen was exposed by it threatening bankruptcy four times over five years in lawsuits against watch brands, Breitling (A1142 [¶ 1], 1155-56 [¶¶ 53, 54, 56]) and Tag Heuer (A1164 [¶ 2], 1186-87 [¶¶ 97, 98-100]), in addition to suing Omega in the Superior Court action (A918-19 [¶ 2], 924 [¶ 26], 932-33 [¶¶ 61, 62, 66]) and SGUS in this lawsuit (A57-58 [¶¶ 76-79]). That is, since 2006, when Orologio sued Breitling, though 2009, when Orologio sued Tag

Heuer for the same RPA claim, through 2011 when Orologio sued SGUS in state and federal court, Orologio has claimed that the loss of a single brand – in the prior cases Breitling and Tag Heuer, and in this case, Omega, will shutter its business. Id.

The truth? For 2011-2013, the last year in which complete sales discovery was produced in this case, Orologio's sales have increased or remained nearly the same each year, with sales increasing by more than 10%. (A1940-60) As for Orologio's claim that losing Omega will cause its demise, Orologio remains in business today, with 2013 its most successful year on record! Id.

Orologio falsely informed two New Jersey state courts and the District Court in various pleadings, declarations, and statements that it would 'go out of business' if Omega was lost as a brand, the same claim Orologio advanced to the District Court in its lawsuits against Breitling and Tag Heuer, which also terminated Orologio. Of course, Orologio remains in business, but its recidivist allegations demonstrate the commercial danger of creating an NJFPA franchise from a common authorized dealer relationship like the one between Omega and Orologio.

The routine loss of a brand by a retailer like Orologio specializing in numerous high-end watch lines is not the type of relationship the NJFPA was designed to protect. Orologio's serial threats in multiple lawsuits of imminent closure if a single brand is lost suggest a failed business strategy rather than an

NJFPA franchise. Orologio's repeated RPA claims have met the same fate because Orologio portrays its inability to maintain certain brands as it being a constant victim of antitrust abuse; the truth is, dealers like Orologio pick-up and lose various brands, and each loss cannot be reversed by asserting RPA violations.

Given Orologio's Tag Heuer and Breitling litigation experience, Orologio no doubt knew when it acquired Omega inventory, advertised, attended no-cost training sessions, and accepted no-cost promotional displays, things Orologio now claims are elements of NJFPA interdependency, that such investment was in furtherance of an authorized dealership, especially given that, unlike Breitling and Tag Heuer, Orologio never had a written license or distribution agreement with Omega. (A615)

E. <u>**Business Writings Between the Parties**</u>

The District Court found that Orologio was treated the same as every other U.S. Omega dealer. (A18) Orologio challenges this conclusion by advancing "writings" that it claims shows either Omega's control over Orologio for purposes of its NJFPA claim, or was a vehicle for Omega to mistreat Orologio under the RPA. Orologio starts with the SGUS's "Brand Policy Statement" (Orologio Brief, pp. 9, 32), but it is undisputed that this one-page writing is merely a guide for how dealers are to present Omega in their store. (A598, 604-5, 628)

Similarly, the Partner Plan form was not an NJFPA-eligible writing, but was indisputably "offered to all Omega authorized dealers equally and proportionally." (A617, 731, 733) That is, the Partner Plans "were the same for everybody" (A617, 730, 732) and did not convert every participating New Jersey dealer into an NJFPA franchisee.

Omega's "Co-op Commitment Agreement" was a form furnished to all retailers to apply for Omega advertising assistance. (A618-19, 622, 624) This program was distinct from the Partner Plan, meaning that if dealers did not achieve Partner Plan credit because of inadequate sales (such as Orologio), they still had the opportunity to obtain Omega co-op assistance. (A619-20, 622, 624 ("Every account, authorized Omega dealer, has the opportunity to propose a media plan."), 625, 728-29) It is not disputed that Orologio never made a co-op or media proposal to Omega that was declined. (A488)

SUMMARY OF THE ARGUMENT

The District Court did not render findings of fact that are better preserved for a jury because of a disputed record, nor substitute its own conclusions about the material facts that warranted dismissing Orologio's Complaint on summary judgment. The overwhelming body of NJFPA law easily confirms that Orologio is not a statutory franchise, particularly because Orologio was simply an authorized Omega dealer, as it was for numerous other brands. The District Court did not employ an ‘alter-ego’ standard, but observed that Orologio, the purveyor of many watch brands, has no NJFPA hallmark of a franchise relationship with SGUS and never made an Omega-specific investment in its business.

SGUS treated Orologio the same as all of its national network of authorized dealers, encouraging Orologio to participate in credit incentive plans, co-op and promotional opportunities, and other benefits made available to Orologio, as determined by the District Court. Judge Wigenton’s careful analysis of the various promotional facilities made available to Orologio and all Omega dealers, coupled with Orologio’s participation in all of these programs and benefits while spending most of its time on SGUS credit hold, renders fatal Orologio’s claim that SGUS violated the RPA. The District Court’s finding that SGUS offered proportionally equal opportunities to Orologio and its other dealers is well-grounded in the case’s undisputed facts. Because Orologio failed to identify its competitors and cannot remedy other RPA §§ 2(d)-(e) infirmities, summary judgment dismissing Orologio’s barely pleaded and non-supported RPA claim is warranted.

ARGUMENT

Point I

THERE ARE NO SET OF FACTS UNDER WHICH OROLOGIO COULD POSSIBLY MAINTAIN THAT IT IS AN NJFPA STATUTORY FRANCHISE

The District Court properly observed that the first thing a putative New Jersey franchisee must establish is that it meets the statutory definition of a "franchise." (A13); see Neptune T.V. & Appl. Serv., Inc. v. Litton Microwave Cooking Prods. Div., Litton Sys., Inc., 190 N.J. Super. 153, 158 (App. Div. 1983) ("Neptune T.V.") Whether the targeted business relationship is an NJFPA "franchise" presents a mixed question of fact and law, Cassidy Podell Lynch, Inc. v. Snydergeneral Corp., 944 F.2d 1131, 1137 (3d Cir. 1991), contemplating the parties' writings (to satisfy the 'written license' requirement) and the parties' pattern of dealing (to examine whether there is a 'community of interest'). Id. at 1138.

Orologio maintains the Court improperly considered whether Orologio was a statutory franchise rather than defer the question to a jury. (Orologio Brief, p. 26) But this argument ignores that there must be "a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party." Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). Orologio must establish a genuine issue of material fact, not just create "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

A. No Written Arrangement for a License Between SGUS and Orologio

Orologio argues the District Court improperly invoked an alter-ego standard when discerning the parties' writings. (Orologio Brief, pp. 27-29) Judge Wigenton, however, highlighted the NJFPA's "written arrangement" requirement twice in the Decision, which indicates the District Court did not require a written agreement as Orologio falsely maintains. (A13-14) The District Court did not use "alter-ego" or implement an "alter-ego" standard, nor did the Decision refer to "alter-ego" authority in dismissing Orologio's NJFPA claim.

It is important not to ignore Orologio's Complaint (A39), which identifies only one NJFPA-related writing between the parties, Orologio's 2008-2009 Partner Plan forms. (A51-52 [¶ 50]) Orologio now promotes the form to an NJFPA writing, but the only testimony on the subject by Omega's President, Gregory Swift, confirms that SGUS had no written dealership agreement with Orologio or any other U.S. dealer as part of its corporate policy. (A592, 571-72 [¶¶ 5-7], 615, 641, 693 [¶¶ 2-3], 695 [¶ 10])

From Orologio's 1994 opening as an Omega account (A42 [¶ 10], 571 [¶ 4]) through its April 2011 termination, SGUS never had a written dealership or license agreement with Orologio (or with any other U.S. retailer). (A571-72 [¶¶ 5-7], 592, 615, 641-642, 693 [¶¶ 2-3]) Each year's Partner Plan was a voluntary program participation form submitted by the dealer to secure credit if the retailer achieved certain sales. (Id.; A502-503, 513, 613-15) The Partner Plan was a year-to-year form, with Orologio's last participation in 2009, when the program ended, and therefore the form was not an NJFPA license. (A614) Orologio continued as an authorized dealer through April 2011, meaning the Partner Plan had no bearing on Orologio's retailer status with Omega.

Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998), rev'd in part, 248 F.3d 1130 (3d Cir. 2000) does not compel a different result because the plaintiff, LCC devoted its entire business to distributing Sara Lee hosiery and entered into an arrangement in which it would become the sole distributor in certain Balkan countries. Id. at 470. Two notarized letters merely confirmed LCC's retention as the exclusive L'eggs distributor, and LCC was established for that purpose. Id. Moreover, LCC opened a facility devoted to Sara Lee's business, purchased vans and billboards, sponsored sporting events affixed with the L'eggs logo and LCC name, issued brochures, and took other commercial steps to establish itself as the sole distributor of L'eggs pantyhose in these territories, all brand-specific investments. Id. at 471.

Orologio's business was devoted to multiple brands and included no Omega-specific investment other than purchasing at wholesale Omega watches for resale.

Moreover, the District Court in Sara Lee observed LCC "had begun to focus its resources, activities and efforts almost exclusively (at least 95%) on the L'eggs line of products, and ceased virtually all other business operations and product sales unrelated to L'eggs products." Id. Orologio, of course, can make no such claim because its investment was in numerous watch brands.

Orologio points to no writing during the parties' first 14 years which supports its NJFPA claim, but only later subverts as the NJFPA "written arrangement" the 2008-2009 Partner Plans, a nationwide incentive program offered to all Omega dealers. See Iannuzzi v. Exxon Co., U.S.A., 572 F. Supp. 716, 725 (D.N.J. 1983) (absent actual written agreement, no NJFPA franchise).

Orologio also subverts Omega's "Internet Rules" and Brand Policy Statement, which were similarly issued to all Omega dealers and merely confer Omega's on-line sales policy and other guidelines about marketing. If these writings and the Partner Plan suffice to establish an NJFPA "written arrangement," the NJFPA would elevate most New Jersey businesses to a franchise. Here, there are no sets of facts which elevate these types of writings – Omega notices to all dealers – to a "written arrangement" under the NJFPA, and Orologio advances no authority which comes close to converting such common dispatches to an NJFPA statutory franchise.

B. <u>There is No "License" Between Orologio and SGUS</u>

There is no dispute that Omega furnished at no charge display materials to Orologio, like it does for all U.S. dealers. (A573-74 [¶¶ 15-17], 607); <u>see</u> <u>Southern States Coop., Inc. v. Global AG Assocs., Inc.</u>, No. 06-1494, 2008 U.S. Dist. LEXIS 25858, at *22 (E.D. Pa. Mar. 27, 2008) (furnishing of advertising materials not meet NJFPA license). An NJFPA 'license' does not contemplate a supplier merely furnishing advertising materials to a dealer or authorizing the account to display its name. <u>See</u> <u>e.g.</u>, <u>Finlay & Assocs., Inc. v. Borg-Warner Corp.</u>, 146 N.J. Super. 210 (Law Div. 1976) ("Obviously, someone who sells a product has to, or wants to make known that he has it."), <u>aff'd</u>, 155 N.J. Super. 331 (App. Div.), <u>cert. denied</u>, 77 N.J. 467 (1978); <u>Liberty Sales Assocs., Inc. v. Dow Corning Corp.</u>, 816 F. Supp. 1004 (D.N.J. 1993) (no NJFPA license if manufacturer supplies displays and advertising materials).

As an authorized dealer, Orologio was permitted to use Omega's trademark (Omega furnished counter displays, catalogs, and literature) but such use does not establish an interdependence sufficient to convert the relationship to licensor-licensee. <u>See</u> <u>Atlantic City Coin & Slot Serv. Co. v. IGT</u>, 14 F. Supp. 2d 644, 664 (D.N.J. 1988) (authorization or requirement to use licensor name not create NJFPA license). For instance, in <u>Colt Indus., Inc. v. Fidelco Pump & Compressor Corp.</u>, 844 F.2d 117 (3d Cir. 1988), the seller, Fidelco, sought to prevent termination of a

Colt distribution agreement, id. at 118, and the parties' contract authorized Fidelco to display Colt's name and to announce it was a Colt distributor, id. at 119. The Third Circuit observed that, *"if this limited agreement constitutes a license to use a trademark, then any business selling a name brand product would, under New Jersey law, necessarily be considered as holding a license."* Id. at 120. Similarly, the use of Omega's name, likeness, logo, and intellectual property was not a license within the meaning of the NJFPA. Id.

In Instructional Sys., Inc. v. Computer Curric. Corp., 130 N.J. 324 (1992) ("ISI"), rev'd in part on other grounds, 35 F3d 813 (3d Cir. 1994), plaintiff served as an exclusive regional seller for CompCorp. Under the agreement, plaintiff was required to promote CompCorp's name, trademark, and products. Id. at 353. The N.J. Supreme Court observed that in instances in which 50% or more of a store's sales were derived from a single brand, an NJFPA 'license' is not evident because otherwise every dealer-manufacturer relationship would be converted to a license. Id. at 352. While the ISI court ultimately concluded the parties' reseller agreement conveyed an NJFPA license, it was based on the dealer being precluded from selling competitive products and for having to remain exclusive to the manufacturer. Id. at 354-355. Orologio, of course had no similar requirement.

Orologio argues that Liberty Sales Assocs., Inc., 816 F. Supp. at 1004 was supplanted by ISI, but the question there, as here, was whether on summary judgment Dow, an industrial foam manufacturer, granted an NJFPA license to a dealer under a 'Master Seller Agreement.' Referring to Neptune T.V., the court observed that an NJFPA license *"is one in which the franchisee wraps himself with the trade name of the franchisor and relies on the franchisor's goodwill to induce the public to buy."* Id. at 1010. Here, Orologio historically counted Breitling as its biggest seller (A46 [¶ 30], 918 [¶¶ 14, 49]), 'wrapping itself' around Breitling and also 'wrapping itself' around its other brands, including Tag Heuer, Movado, Baum & Mercier, Swiss Army, Ball, Longines, and others. (A918 [¶¶ 14, 49, 65], 1940-60) Orologio never 'wrapped itself' around Omega.

Orologio conducted business under its own name, not embracing Omega in the company's identity, and not representing to consumers that it was exclusively or even mostly an Omega dealer. See Finlay & Assocs., Inc., 146 N.J. Super. at 220 (distributor did not conduct business under manufacturer's name). The District Court observed no evidence *"that a special relationship existed between the parties beyond Orologio's straightforward advertising and selling of Swatch's Omega watches . . . the furnishing of advertising materials, coupled with Orologio's lack of reliance on Omega's brand, did not create a license under the NJFPA."* (A15) That is because no NJFPA 'license' is evident between SGUS and Orologio, and because New Jersey courts have long held that if a supplier merely furnishes advertising materials to a dealer, authorizing the account to display its name alongside the supplier's name on the displays, an NJFPA license is not created. See e.g., Finlay & Assocs., Inc., 146 N.J. Super. at 219 ("Obviously, someone who sells a product has to, or wants to make known that he has it."); Cassidy Podell Lynch, Inc., 944 F.2d at 1139. Indeed, authorization and/or a requirement to use the Omega name in Orologio's business does not create a license; otherwise every seller-retailer relationship would be converted into a franchise. See Atlantic City Coin & Slot Serv. Co., 14 F. Supp. 2d at 664; ISI, 130 N.J. at 352.

C. There is No "Community of Interest" Between Orologio and SGUS

Orologio correctly observes that the statutory phrase "community of interest" focuses on several factors: (i) licensor's control over the licensee; (ii) licensee's economic dependence on the licensor; (iii) disparity in bargaining power; and (iv) the presence of a franchise-specific investment by the licensee. Cassidy Podell Lynch, Inc., 944 F.2d at 1140; ISI, 130 N.J. at 358-366. SGUS does not urge this Court to focus on any single factor.[1]

[1] Atlantic City Coin & Slot Serv. Co., Inc., 14 F. Supp. 2d at 659-61, distanced itself from the "control" element noted by Colt Indus. and other decisions, suggesting that Judge Rosenn's Colt Indus. dissent is a more prevailing view, id., citing Cooper Distrib. Co., Inc. v. Amana Refrig., 63 F.3d 262 (3d Cir. 1995). Atlantic City Coin moved the focus from control over the alleged franchisee to a "vulnerability" and "unconscionable loss" inquiry. ISI, 130 N.J. at 359. Either way, Orologio does not come close to meeting such an elevated standard.

Omega did not require sales quotas as part of a 'community of interest' between the parties, and any Omega-furnished training or incentive program was optional. (A574 [¶ 20], 502, 572-73, 605, 613-15, 695-97). This type of relationship caused the Court in Colt Indus. to conclude that the dealer, Fidelco, *"failed to establish that it was subject to the whim, direction and control of a more powerful entity whose withdrawal from the relationship would shock a court's sense of equity."* Colt Indus., Inc., 844 F.2d at 120-121.

It is important that Orologio in prior lawsuits against Breitling and Tag Heuer argued that it was "dependent" on those two competing brands, during a time when Orologio was an Omega dealer. (A1142 [¶¶ 17, 32, 33, 35, 57], 1163 [¶¶ 22, 24, 36, 39, 48, 53]) Orologio therefore picks-and-chooses when it proclaims a watch brand creates interdependency, undermining that it had any legitimate NJFPA 'community of interest' with Omega at the same time, or ever. Indeed, while Orologio maintains that it "built its business around the expectation the parties would continue together," (Orologio Brief, p. 35), its prior lawsuits against Breitling and Tag Heuer discredit this claim, as does the fact that Orologio was not contractually bound to SGUS and, other than inventory, never made an Omega-specific investment.

In Neptune T.V., the Superior Court focused on the factor of 'economic dependence,' 190 N.J. Super. at 160, with the court finding that the existence of a licensed service center and service contract between the parties, coupled with the plaintiff being authorized to advertise itself as affiliated with the defendant in letterhead, business cards, and displays, did not rise to the level of NJFPA 'community of interest.' Id. at 161, 167. The only investment Orologio made in Omega was inventory; Orologio created a store around numerous other brands. (A1142 [¶¶ 17, 32, 33, 35, 57], 1163 [¶¶ 22, 24, 36, 39, 48, 53]; see New Jersey American, Inc. v. The Allied Corp., 875 F.2d 58, 65 (3d Cir. 1989) (plaintiff relied on multiple suppliers for business); A592 ("every dealer, every account has the ability to stop doing business with Omega,"))

While Orologio claims to have made an 'investment' in Omega, the only charges Orologio could have incurred were in paying store rent, purchasing inventory, and employing staff, all non-SGUS investments because Orologio's in-store Omega advertising and display materials were furnished at no cost. (A573-74 [¶¶ 15-18], 606-7). A "'*community of interest exists when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skill that will be of minimal utility outside the franchise.*'" ISI, 130 N.J. at 359 (quoting Cassidy Podell Lynch, Inc., 944 F.2d at 1143). Such investments are usually "tangible capital investments, such as 'a building designed to meet the style of the franchise, special equipment useful only to produce the franchise product, and franchise signs.'" Id. at 356 (citation omitted). Here, Orologio's rent and utilities, employee salaries, etc., also served its other leading brands. (A1940-60) Given that Orologio's sales increased after losing Omega (A1960), any investment by Orologio in its store benefitted its other brands and overall sales performance.

Even if Orologio became dependent on a single or a few brands, such reliance is not a basis to find an NJFPA 'community of interest.' See Cassidy Podell Lynch, Inc., 944 F.2d at 1142 (reliance on a single supplier does not automatically qualify distributor for NJFPA protection). If dependence on a single supplier elevated all New Jersey business relationships to an NJFPA franchise, every exclusive distributor could unilaterally elect to convert its business to a franchise without regard to the shared intent of the parties in entering into the distributor relationship. This is not a tenable result contemplated by the NJFPA.

The knowledge and customer base Orologio acquired during its relationship with Omega is not franchise-specific – it is transferable, indeed, so transferable that Orologio increased its sales and business after it was terminated as an authorized Omega dealer.[2] (A1960) See DeLuca v. Allstate Ins. Co., No. BER-C-185-11, 2011 N.J. Super. Unpub. LEXIS 3140, at *63, 66 (N.J. Super. Ct. Ch. Div. Dec. 28, 2011) (no 'community of interest' because parties never characterized

[2] Orologio continues to sell other SGUS brands such as Tissot. (A1960)

their relationship as a franchise and there was no written agreement using the term), aff'd, 2014 N.J. Super. Unpub. LEXIS 1090 (N.J. Super. Ct. App. Div. May 13, 2014).

Orologio cannot dispute that Omega has a right to decide with whom it will deal, the same way that Orologio had the right not to deal with SGUS. (A592) See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) ("a manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."); U.S. v. Colgate & Co., 250 U.S. 300 (1919) (manufacturer may freely exercise discretion as to parties with whom it will deal).

While Orologio laments that it was terminated, its overall business has not suffered, and there is no NJFPA requirement that Orologio is entitled to be reinstated as an authorized dealer. The law permits SGUS to decide which authorized dealers with whom it will deal, and those it will not deal. Id. In this case, Orologio was not an NJFPA statutory franchise – not even close under prevailing law – and is not entitled to be reinstated as an Omega dealer.

Point II

SUMMARY JUDGMENT DISMISSING OROLOGIO'S ROBINSON-PATMAN ACT CLAIMS IS APPROPRIATE BECAUSE OROLOGIO HAS NOT PROVEN WHAT PROMOTIONAL FACILITIES WERE OFFERED TO OTHER SPECIFIC COMPETING DEALERS NOR HAS OROLOGIO SUFFERED ANY DIVERSION OF CUSTOMERS OR LOST SALES

The District Court correctly found that Orologio has not identified which alleged competing dealers obtained favorable tagging, co-op, slotting fees, or other facilities, which preferences actually diverted customers and sales from Orologio. (A17-18) Orologio cannot identify a single retailer that received a specific promotional facility from Omega that was never offered to Orologio, and the acceptance of such benefit caused a customer which otherwise may have shopped Orologio's Short Hills store to instead visit the competing dealer at a store anywhere in the states of Pennsylvania, New Jersey, New York, or Connecticut, and make a purchase that otherwise would have been made at Orologio.

Further, Orologio cannot identify a single promotional facility, co-op advertising benefit, or instance of tagging that was made available to a competing dealer, which facility caused the diversion of a customer, with such diversion resulting in a sale that otherwise may have been enjoyed by Orologio.

Why? Because, as the District Court observed, it is undisputed that every program offered by Omega to its dealers was equally offered to Orologio (A18), which was not only aware of Omega's promotional facilities, but participated in them along with Omega's other dealers. Orologio's RPA claim is merely an after-thought strategy to move Orologio into federal court after its failed N.J. Superior Court injunction.

A. Orologio's Mythical Four-State Competitors

Orologio frames the District Court's first error as concluding that: *"Orologio fails to carry its burden in demonstrating who its actual competitors are."* (A17) Orologio maintains that every authorized Omega dealer in New Jersey, Pennsylvania, New York, and Connecticut is a competitor, and each such dealer was allegedly offered non-specified co-op, tagging, and promotional facilities to which Orologio was excluded, allegedly leading to diverted customers and lost sales. Not only are both parts of this argument factually inaccurate (not every Omega dealer in four states is an Orologio competitor and these dealers did not individually or collectively divert Orologio customer or sales), but Orologio limited its 'competitors' in its Complaint to only New Jersey/New York dealers (A43 [¶¶ 14-16]), and limited the alleged RPA violations to only certain promotional allowances. Id. at ¶ 2.

The District Court correctly observed that *"[not] all Omega dealers that received co-op assistance were in fact competitors under the RPA, as the record is devoid of evidence of any competition between the dealers."* (A18) The record remains empty of evidence that every authorized New York, Connecticut, New

Jersey, and Pennsylvania Omega dealer is a competitor of Orologio (geographically, actually, or otherwise). There is no evidence, for instance, that dealers in Schenectady, Atlantic City, Hartford, Buffalo, Pittsburgh, or other similar distant cities actually compete with Orologio for customers. See L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 424 (11th Cir. 1984) (Sherman Act market of alleged four-state area rejected because no evidence sellers in four states actually competed and no submission of sales patterns to support such a claim).

The Complaint (and record) excludes reference to any specific dealers located in four neighboring states that compete with Orologio for the same sales, an RPA requirement. See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (no § 2(a) RPA violation if no actual competition between dealers for same customers); George Haug Co., Inc. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 145 (2d Cir. 1998) (§§ 2(d)-(e) claims require alleged disfavored dealers compete in same geographic area). Even if particular dealers, say, in Manhattan, are identified as competitors, Orologio must identify the (i) exact facilities or promotional support these retailers received to the exclusion of Orologio; (ii) allowances furnished that Orologio requested but was denied; (iii) lost opportunity sales by Orologio; (iv) lost customers as a result of such preferential treatment; and (v) lost sales as a direct and proximate result of such favoritism. Volvo Trucks N. Am., Inc., 546 U.S. at 177-180; see also, Hygrade Milk & Cream Co., Inc. v. Tropicana Prods., Inc., No. 88 Civ. 2861, 1996 U.S. Dist. LEXIS 6598, at *11-12, 18 (S.D.N.Y. May 16, 1996). No evidence of any of these RPA prerequisites exists, let alone in any evidentiary form.

Orologio boasts in its Complaint that when it started, *"the market for 'high-end watches' was thought to be quite small . . ."* (See A42 [¶ 10]) Orologio does not explain how or when that local New Jersey "small market" blossomed such that customers from four states frequent Orologio's Short Hills store, or when Orologio's alleged four-state customer base expanded such that every authorized dealer in Connecticut, Pennsylvania, New York, and New Jersey suddenly became a competitor for the same customers and sales.[3]

Orologio's history does not suggest it attracts customers from such a wide region because Orologio GSP closed (A518) in the face of the now-alleged burgeoning cross-elasticity of demand that Orologio claims draws customers from a four-state region. That is, if Orologio's customer base is so dynamic and elastic, its shuttered Garden State Plaza store (which is physically closer to New York City

[3] Orologio does not explain why dealers in Maryland, Massachusetts, Rhode Island, Delaware, New Hampshire, and other states which have metropolitan areas geographically closer than retailers in, say, Western Pennsylvania, Southern New Jersey, Northern Connecticut, and Western and Northern New York, are not competitors. If customers from Short Hills or Manhattan are willing to travel to Pittsburgh, Schenectady, Buffalo, Hartford and other similar distances, they are likely equally as willing to travel to Omega dealers in Boston, Rhode Island, Delaware, Baltimore, Washington D.C., and similar locations which are closer.

and Connecticut then Short Hills) would not have closed because the alleged four-state customers would traffic Garden State Plaza because of the cross-elastic demand for product among such a wide breadth of customers. If any Orologio store should have closed due to tepid sales, the Short Hills location would be a more likely candidate. (A520)

Orologio neglects to identify the exact authorized dealers which it competes against; a study of their sales that could be attributed to Orologio absent an RPA violation; whether there is a cross-elasticity of demand by customers and for sales among dealers in the four-state area; whether customers in the four-state area travel equally to all such dealers for price or store experience, or due to promotional or advertising support or supported by any study; whether customers were drawn to a particular dealer due to advertising, co-op, or promotional support that was not offered to Orologio (when Orologio was not on credit hold, a rare occurrence) (A852-917); when all of these dealers started competing; or the alleged details of favorable Omega treatment for advertising facilities to these four-state dealers in violation of RPA §§ 2(d) or 2(e), all of which proximately caused customers to avoid Orologio's one store in favor of dealers' stores spread throughout four states. Orologio makes no attempt to explain the absence of this evidence, instead arguing that such inquiries trigger factual questions that are not suitable for summary judgment.

Under RPA §§ 2(d)-(e), however, a complaining party must be in competition with the favored party at the same functional level. Abbott Labs. v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976) (citing FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963). Orologio neglects to furnish a cross-elasticity study nor has Orologio demonstrated competition between its single store and every Omega dealer in a four-state area other than citing to an SGUS-furnished list of Omega dealers in these four states. See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 708-710 (9th Cir. 1964) (seller may discriminate in the provision of services to customers located in separate geographic markets since they do not compete for the same consumers); Carlo C. Gelardi Corp. v. Miller Brewing Co., 421 F. Supp. 237, 245-246 (D.N.J. 1976) (essential element of RPA price discrimination is existence of competition in provable form).

Orologio presents no surveys or studies that addresses a cross-elasticity analysis or even legitimately surmises that a Pittsburgh, Hartford, Buffalo, Atlantic City, Philadelphia, or Schenectady dealer competes for the same customers as Orologio in Short Hills. No such study exists even for New York City Omega dealers because there is no evidence that Manhattan or Queens customers frequent Orologio's store and compare Omega references or even prices. While Ronald Oppenheimer, Orologio's President, testified that he notices shoppers from the four states at his stores, that is inadmissible hearsay. See Stelwagon Mfg. Co. v. Tarmac

Roofing Sys., Inc., 63 F.3d 1267 (3d Cir. 1995) (testimony of customers not dealing with manufacturer rejected because evidence admitted under Rule 803(3) but was used to prove truth of fact asserted), cert. denied, 516 U.S. 1172 (1996).

Orologio presents nothing more than a list of Omega dealers in four states and leaps to the conclusion they all compete with Orologio, without any survey, analysis, or evidence that all (or, indeed, any) of these dealers actually and factually compete with Orologio for the same customers. T. Harris Young & Assoc., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991) (in Sherman Act antitrust claim, location of competitors, pricing practices, and transportation costs considered when determining geographic market), cert. denied, 502 U.S. 1013 (1991).

Orologio also fails to submit evidence that it lost a single customer to any dealer in the four-state area due to alleged favorable treatment by SGUS, and has failed to identify a single sale lost to a competing dealer as a result of alleged mistreatment under the RPA. See Godfrey v. Pulitzer Publ'g Co., 276 F.3d 405, 412 (8th Cir. 2002) (summary judgment even if lost business to competition; expert did "not provide . . . any tangible evidence, numerical or anecdotal, to show that the branch dealers in fact competed.")

Orologio's Dos Santos (expert) Report (A1839-1926) does not automatically create factual issues in this regard merely because it confirms receipts from

Orologio customers self-identifying their non-confirmed addresses. (A1877-82) See Video Serv. of Am., Inc. v. Maxell Corp. of Am., No. 04-2594, 2007 U.S. Dist. LEXIS 54107, at *18 (D.N.J. July 26, 2007) (summary judgment because plaintiff did not evidence RPA § 2(a) claim would lessen competition, a required RPA showing).

Orologio's authorities on this subject do not implicate the RPA and are otherwise inapposite for Orologio's proposition that determining whether parties are RPA competitors is typically a fact issue. See, i.e., Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984) (test of relevant "market" for Sherman Act claim, not competition under RPA), cert. denied, 470 US. 1060 (1985); Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 497 (3d Cir.) (case involved Clayton Act § 3 tying claim), cert. denied, 506 U.S. 868 (1992); Sullivan v. NFL, 34 F.3d 1091, 1098 (1st Cir. 1994) (Sherman Act § 1 claim focused on factual issue of whether NFL owners compete; no finding that competition a fact issue); Michael Halebian N.J., Inc. v. Roppe Rubber Corp., 718 F. Supp. 348, 359 (D.N.J. 1989) (Sherman Act § 2 case granting summary judgment dismissing claim).

Similarly, Orologio cites Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., No. 02-4373, 2005 U.S. Dist. LEXIS 11052 (E.D. Pa. Mar. 29, 2005), an abrogated RPA § 2(a) price discrimination case which rejected a geographic approach to defining a competitive RPA market, and ultimately granted summary judgment dismissing the RPA claim because there was no competitive injury as a matter of law. Id. at *14-15. The subsequent appellate history of Toledo Mack confirms the geographic approach now advocated by Orologio was vacated in favor of direct competition evidence, which is not supplied by Orologio. See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., No. 02-4373, 2006 U.S. Dist. LEXIS 58148, at *8-13 (E.D. Pa. Aug. 16, 2006).

To determine whether Orologio competes with every Omega dealer in the four states, the Third Circuit has observed that "two parties are in competition only where, after a 'careful analysis of each party's customers,' we determine that the parties are 'each directly after the same dollar.'" Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 214 (3d Cir. 2007) (quoting M. C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1068, n.20 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976)). There is no evidence Orologio and another alleged preferred Omega dealer compete for the "same dollar." Injury is inferred from "proof of a substantial price discrimination between competing purchasers over time." Falls City Indus. v. Vanco Bev., Inc., 460 U.S. 428, 435 (1983). Orologio referring to a list of Omega dealers in four states includes no evidence that Orologio actually competes for customers with any of these dealers "for the same dollar."

The Dos Santos Report's examination of customer receipts does not validate competition between Orologio and dealers in four states for the same customers (Orologio Brief, p. 46) because the receipts were not exclusively for Omega sales but included customers obtaining repairs, service, accessories, batteries, or non-luxury watch purchases. (A2551) See L.A. Draper & Son, 735 F.2d at 424 ("actual sales patterns [in RPA case] . . . can also be virtually meaningless.") Moreover, the Dos Santos Report does not assert that merely because New Jersey residents work in Manhattan and local transportation options in "this region" (Orologio Brief, p. 47) facilitate travel, every dealer in Connecticut, Pennsylvania, New Jersey, and New York are Orologio's competitors such that co-op or other benefits afforded to such dealer is the measure against which Orologio's RPA treatment should be considered. While car and train service allows Northern New Jersey residents to travel throughout these states, there is no evidence a putative customer will travel to Pittsburgh or Buffalo to price an Omega watch that could be purchased at Orologio's Short Hills store, or that residents throughout these four states equally will travel to Short Hills to shop at Orologio for the same watch.

There is no dispute that Omega sells the same products to its network of dealers throughout the country. (A638, 641) There is no mention in the Complaint (A39) that Connecticut and Pennsylvania dealers compete with Orologio for buyers, nor is a single customer identified in the Dos Santos Report who allegedly purchased an Omega watch from a New York, New Jersey, Connecticut, or Pennsylvania retailer which the customer learned about from advertising assisted through an Omega co-op or tagging program excluding Orologio. See George Haug Co., Inc., 148 F.3d at 145 (party alleging §§ 2(d)-(e) violation must show it competes with favored dealer in the same geographic area).

Orologio cannot identify (i) each actual competitor for purposes of an RPA §§ 2(d) and 2(e) claim; (ii) the competitors which actually received favorable Omega advertising treatment to the exclusion of Orologio with such benefit proximately causing a lost sale to Orologio; (iii) the actual favorable treatment accorded to a specific competitor or the preferred facilities furnished, frequency, and volume of promotional support which proximately led to a specific lost sale or diverted customer; (iv) whether any dealer, let alone all dealers comprising a four-state area, compete with Orologio in its Short Hills Mall location and the cross-elasticity of such customer demand; (v) any customer who visited a competing retailer instead of Orologio due to Omega-assisted advertising or tagging favoring such alleged dealer; and (vi) any customer who learned of a competing dealer through a promotional facility offered to the dealer but not to Orologio.

Orologio cites to Mr. Oppenheimer's customer experience as proof of competition among four states of dealers, but when asked at deposition about his competitors, Orologio's President testified that he was unaware of any study or survey which captures data about the location of Orologio's customers. (A483) Orologio avoids Mr. Oppenheimer's testimony that because he personally travels between Manhattan and Short Hills, there must be a cross-elasticity of demand for Omega watches by consumers who travel between the states to shop for price. (A480-84) Mr. Oppenheimer's theory contravenes the RPA §§ 2(d)-(e) requirement that alleged favored customers must be competitors with the claimed disfavored customer. Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585, 588 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972). When pressed about whether the same New York City residents may instead travel to Orologio to shop, Mr. Oppenheimer testified "does that happen, I guess it does." (A485) See Godfrey, 276 F.3d at 412 (summary judgment dismissing RPA claim because disfavored dealer cited one instance of business loss to demonstrate competition; no evidence or studies that alleged dealers competed).

Orologio submits no admissible evidence in the form of company records, data, consumer studies or surveys, cross-elasticity surveys, company sales analysis, or anything which proves that Orologio, as an alleged disfavored purchaser, was engaged in actual, proven competition with every Omega-favored purchaser in a four-state region at the time of the alleged RPA violation.[4] See Best Brands Bev.,

[4] Orologio's argument that SGUS's counsel admitted that four states of authorized dealers compete with Orologio is a dangerous mischaracterization of the facts. (A1573; Orologio Brief, pp. 47-48) The letter from SGUS's counsel concerned the

Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584-585 (2d Cir. 1987) ("[i]n a secondary-line case, plaintiff must show that the probable effect of the discrimination would be to allow the 'favored competitor to draw sales or profits from him, the unfavored competitor."' (citing J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 569-70 (1981)); Carlo C. Gelardi Corp., 421 F. Supp. at 245 (competitive nexus between claimed favored and disfavored customers required).

B. SGUS Offered Proportionally Equal Terms to Orologio

The District Court at p. 13 of its Decision found that as a matter of fact, *"the record shows that Swatch offered proportionally equal opportunities to Orologio and its other dealers."* Judge Wigenton considered the promotional and other opportunities SGUS offered to its Omega dealers before finding that each was proportionally offered to Orologio. The undisputed facts confirm this finding, as detailed below.

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production of Omega dealer information by SGUS and its confidentiality designation; the letter at pp. 1-2 provides*"the documents about coop advertising (arranged by account) detail and explain many aspects of the proprietary relationship SGUS has with many accounts which Orologio claims are competitors . . . to dealers Orologio considers as competitors . . . Orologio, which announces itself as a competitor. . . competitor accounts in the view of Orologio"* (emphasis supplied). (A1573) That is, the letter described the Omega accounts which Orologio attributes as competitors, not the accounts SGUS or Omega consider as competitors. Id. The Court should ignore any false, desperate, and intentionally misleading inference that SGUS or its counsel validated Orologio's invented competition theory.

The District Court's conclusion of what "the record shows" regarding the proportionate offering of promotional facilities among Orologio and other Omega dealers should not be disturbed unless the bases for such a finding was 'clearly erroneous.' See Lanning , 181 F.3d at 481 ("must not disturb the factual findings of the District Court unless [they are] clearly erroneous."). For this finding of fact to be vacated, the standard is high: 'clearly erroneous' is interpreted to mean that a reviewing court can disregard a factual conclusion only if the Court is "left with the definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). Thus, "[i]t is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972). As the U.S. Supreme Court has explained:

> *This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.*

Bessemer City, 470 U.S. at 573-574 (quotations and citations omitted); accord PA Prison Soc'y v. Cortes, 622 F.3d 215, 231 (3d Cir. 2010), cert. denied, 563 U.S. 904 (2011); Krasnov, 465 F.2d at 1302.

1. 'Tagging' Was Not Exclusively Offered to Favored Dealers

Orologio challenges the District Court's finding that there is no evidence SGUS disproportionally offered promotional tagging to alleged favored Omega dealers. (A19; Orologio Brief, pp. 49-52) The District Court's finding is not 'clearly erroneous' because there is no dispute Orologio was aware of the existence of tagging because it was tagged by other brands (A487-89), and Orologio concedes there was never an instance in which Orologio was denied tagging by Omega. Id.

The only examples of tagging identified by Orologio are a Monday Night Football Omega ad and the London Olympics. (A487) Orologio does not identify whether the alleged favored dealer enjoyed greater sales from being tagged; whether exposure from the tag diverted customers from Orologio; and whether the dealer is an Orologio competitor. As for the London Olympics, such tagging occurred in 2012 when the London Olympics was staged, more than one year after Orologio was terminated in April 2011 (A56 [¶ 69]), and therefore cannot be a legitimate example of disfavored RPA treatment.

No claim of disproportionate tagging is identified in the Complaint (A39, *passim*), and Orologio offers no evidence that any customer actually visited a 'tagged' dealer instead of Orologio, and actually made a purchase. Nor is there a study or survey that customers were steered to a 'tagged' dealer; indeed, there is no evidence that tagging resulted in any tangible harm to Orologio or actually resulted in any tangible benefit to a tagged dealer.

2. Orologio Fails to Demonstrate Antitrust Injury

Orologio argues the District Court misstated the law when finding that Orologio failed to evidence any lost sales or actual harm as a result of alleged disfavored tagging. (Orologio Brief, p. 49) This is a red herring argument that misstates Judge Wigenton's findings, and Orologio is wrong on the law. In J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 563, the Supreme Court rejected the "automatic damages" rule under RPA § 2(a), a holding that is equally applicable to a violation of §§ 2(d) and 2(e) under Section 4 of the Clayton Act. World of Sleep, Inc. v. Laz-Z-Boy Chair Co., 756 F.2d 1467, 1480 (10th Cir.), cert. denied, 474 U.S. 823 (1985); Interstate Cigar Co., Inc. v. Sterling Drug, Inc., 655 F.2d 29, 31 (2d Cir. 1981); Allen Pen Co., Inc. v. Springfield Photo Mount Co., 653 F.2d 17, 22-23 (1st Cir. 1981). Orologio is wrong when it claims that it merely can assert an RPA violation; it also must make a showing of actual injury and that the claimed RPA violation affected its ability to compete with favored dealers. J. Truett Payne Co., 451 U.S. at 563-564; Drug Mart Pharm. Corp. v. American Home Prods. Corp., No. 93-CV-5148, 2012 U.S. Dist. LEXIS 115882, at *44 (E.D.N.Y. Aug. 16, 2012) (RPA claim "requires a showing of substantial competitive injury . . . and de minimus [lost] sales . . . are insufficient to establish such an injury"), aff'd, 799 F.3d 202 (2d Cir. 2015).

"Actual injury" is different in the RPA context from Sherman Act injury to competition. See George Haug Co., 148 F.3d at 145. ("No injury to competition need be demonstrated" for claims under §§ 2(d)(e)). The focus of 'antitrust injury' is on whether the challenged conduct has actually caused harm to the plaintiff. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004); Intimate Bookshop, Inc. v. Barnes & Noble, Inc., No. 98 Civ. 5564, 2003 U.S. Dist. LEXIS 17231, at *3 (S.D.N.Y. Sept. 30, 2003) ("If it is going to have standing to recover damages as a private plaintiff, [must] demonstrate that it suffered actual injury to its business as a result of the price discrimination – the antitrust injury requirement.").

The District Court correctly observed that Orologio does not demonstrate direct evidence of harm it actually suffered by alleged favored Omega dealers receiving alleged beneficial and discriminatory promotional allowances that otherwise would have resulted in greater sales if such allowances were furnished to Orologio. See Stelwagon Mfg. Co., 63 F.3d at 1273-74 (RPA plaintiff must show "some *direct evidence*" illustrating a causal link between discrimination and injury) (emphasis in original); Mathias v. Daily News, L.P.,152 F. Supp. 2d 465, 478 (S.D.N.Y. 2001) (to establish antitrust injury, "the harm must result from a competition-reducing aspect or effect of defendant's behavior, and it must flow from conduct that the antitrust laws clearly condemn.").

Orologio does not show SGUS's alleged favored treatment of other unidentified dealers actually diverted sales or profits from Orologio or that Orologio actually lost a customer to a favored dealer, a requirement under the law. See Volvo Trucks, N. Am., Inc., 546 U.S. at 177 (citing Fall City Indus., Inc. v. Vanco Bev., Inc. 460 U.S. 428, 437-38 (1983)). Orologio also does not evidence that another dealer received "a significant price reduction over a substantial period of time" to support a permissible inference of competitive injury. Volvo Trucks, N. Am., Inc., 546 U.S. at 177 (citing FTC v. Morton Salt Co., 334 U.S. 37 (1948)).

The only thing Orologio argues is that its expert, Dr. Kneuper created a model which forecasted that if SGUS increased Orologio's co-op advertising, such increase would have resulted in higher sales, and Mr. Dos Santos then adopted that model in calculating damages assuming an increase in Omega marketing support. (Orologio Brief, pp. 50-51) Well, of course, Orologio maintains that an increase in SGUS-funded advertising may have resulted in an increase in Orologio's sales, but that assumes Orologio was disfavored in any promotional program offered by

Omega, which the District Court concluded did not occur. (A18) In fact, Judge Wigenton specifically found that *"Swatch offered proportionally equal opportunities to Orologio and its other dealers"* id., a finding that is not 'clearly erroneous' or "completely devoid of minimum evidentiary support displaying some hue of credibility." Krasnov, 465 F.2d at 1302. Merely because Dr. Kneuper ties more sales to increased advertising does not mean Orologio proved that tagging other dealers disfavored Orologio or actually led to increased sales by alleged favored Omega dealers. See Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 215 (2d Cir. 2015) (§ 2(d) claim requires plaintiff to establish antitrust injury); Genesee Vending, Inc. v. R.J. Reynolds Tobacco Co., No. 04-71834, 2005 U.S. Dist. LEXIS 17442, at *8 (E.D. Mich. May 2, 2005) (§§ 2(d)-(e) claim requires proof of actual injury to business).

Orologio has not demonstrated whether (i) tagging caused increased customer traffic to the favored dealer; (ii) such dealer was actually a competitor of Orologio; (iii) such dealer benefitted from diverted customers as a direct result of the alleged tagging; (iv) any increased sales resulted, and (v) Orologio was actually harmed. See World of Sleep, Inc., 756 F.2d at 1480 (must show lack of proportionate advertising allowance compromised ability to compete with favored dealers). Dr. Kneuper's theory that increased advertising results in increased sales does not answer any of these inquiries and does not resolve Orologio's failure to submit any evidence – because there is none – about the proximate relationship between tagging and any alleged harm to Orologio. Indeed, that is likely because Orologio's sales actually increased after it was terminated by Omega! (A1954-58)

Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc., 354 F. Supp. 2d 293 (S.D.N.Y. 2004) is illustrative of this point. Maddaloni Jewelers sued Rolex for RPA §§ 2(d)-(e) violations after being terminated as a Rolex dealer because Rolex offered certain holiday displays, advertising facilities, and promotional support to other dealers, excluding Maddaloni because it allegedly refused to pay graft to Rolex managers. Id. at 297, 308. The Court dismissed the terminated dealer's RPA claim because the dealer demonstrated no link between the disfavored promotional allowances and any actual damages, such as lost sales in favor of the preferred Rolex dealers. Id. at 308. The court also noted that the dealer's out-of-pocket expenditures to make-up for disfavored RPA facilities are not RPA antitrust injuries. Id. The court based this finding on the indisputable antitrust maxim that Maddaloni Jewelers had to evidence actual injury, as opposed to just an underlying RPA violation, which is what Orologio now maintains. See George Haug Co., Inc., 148 F.3d at 145.

As Maddaloni Jewelers learned in its dispute with Rolex, antitrust injury, as opposed to the underlying discriminatory conduct under RPA §§ 2(d) and 2(e), is not measured by merely claiming disproportionate promotional support to favored retailers; instead, antitrust injury is shown through provable lost sales. Maddaloni Jewelers, Inc., 354 F. Supp. 2d at 308; see World of Sleep, Inc., 756 F.2d at 1480 (RPA 2(e) claim rejected if cannot prove actual injury from disproportionate advertising allotments); Hygrade Milk & Cream Co., Inc., 1996 U.S. Dist. LEXIS 6598, at *18 (summary judgment dismissing RPA claim because plaintiffs' evidence of antitrust injury vague and speculative).

Orologio does not identify a single, provable lost sale but only speculates through Dr. Kneuper that more advertising = greater sales. Orologio in this case issued more than 20 subpoenas to Omega dealers (Orologio Brief, p. 55), obtaining their sales records, and still cannot make such a showing. Nor can Orologio prove that a single customer visited another dealer because she was lured by an advertisement promoted through Omega's tagging or co-op allowance.

Orologio's attempt to demonstrate a competitive injury by alleging preferential treatment to dealers spread over four states, known as a *Morton Salt* inference, lacks proof of actual lost sales or even possibly lost sales to favored purchasers. Falls City Indus., Inc., 460 U.S. at 435; see also, FTC v. Morton Salt Co., 334 U.S. 37, 50-51 (1948) (violation inferred from substantial price discrimination between competitors).[5]

[5] Orologio's argument at p. 50 of its brief that it does not have to demonstrate 'competitive injury' under RPA §§ 2(d) and 2(e) belies the only 'injury' claim in Orologio's Complaint, found at ¶ 87, which alleges *"Omega's discriminatory*

In Volvo Trucks N. Am., Inc., the Supreme Court made clear that in a secondary-line § 2(a) Robinson-Patman case, the "hallmark of the requisite competitive injury" is the diversion of sales from a disfavored purchaser to a favored purchaser. 564 U.S. at 177. While Volvo was an RPA price discrimination case, the Supreme Court made clear that any discrimination must "affect substantially" competition between the favored purchaser and the plaintiff. Id. at 180. In particular, the Supreme Court inquired into the number of instances in which plaintiff and a favored purchaser competed head-to-head, and sought instances where sales had been diverted to the favored dealer. Id. at 179-80.

Orologio offers no table, survey, or analysis on actual lost sales to any alleged favored Omega dealer in any state, let alone all Omega dealers in four states. See Stelwagon Mfg. Co., 63 F.3d at 1272 (evidence of lost sales or profits required to avoid summary judgment); Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 572 (1990) ("[A] plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also make some showing of actual injury attributable to something the antitrust laws were designed to prevent."); H.L. Hayden Co. of NY v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1022 (2d Cir. 1989) (no antitrust injury because no connection between losses and RPA violating

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conduct has resulted in competitive injury to Plaintiffs." (A59) Thus, Orologio in its pleading alleges only a 'competitive injury,' contrary to what Orologio now maintains on appeal is the test of damages.

behavior); Interstate Cigar Co., 655 F.2d at 31 ("[P]laintiffs failed to introduce substantial evidence showing that they were actually injured" by the alleged antitrust violation).

3. The Partner Plan Was Equally Offered to All Omega Dealers

Orologio's revisionist interpretation of Omega's Partner Plan as a disguised promotional facilities discrimination vehicle was rejected by the District Court. (A18-19) The program allowed participating dealers to recapture decreased margins on Omega watch wholesale prices. (A572-73 [¶¶ 9, 11-13], 613-15, 617, 695-96 [¶¶ 12-14]) The Partner Plan was offered to all Omega retailers to secure credit allowances based upon the dealer's self-projected and jointly negotiated sales target over the program year. (Id.; see A495) The Partner Plan was voluntary, and Orologio participated in the program every year of its existence except for 2007. (A495-96, 502 (conceding the Partner Plan program was voluntary), 513, 572-573 [¶¶ 9, 11-13], 613-15, 617, 696-97 [¶¶ 12-16], 699-700 [¶¶ 26-27], 731, 733)

Orologio claims the Partner Plan evolved into a program to obtain promotional support, but while that claim is false, the Court should not be drawn into the trap of discerning whether the Partner Plan had a hidden, factually disputed purpose, because it is irrelevant. The evidence demonstrates the Partner Plan indisputably resulted in credit being generally applied to future dealer purchases, not credit for advertising. (A513, 572-73 [¶¶ 9, 11-13], 613-15, 617, 695-97 [¶¶ 12-16], 699-70 [¶¶ 26-27], 731, 733) Because the Partner Plan was established for all dealers to enjoy margin differentials lost due to a change in Omega's wholesale prices to retailers, the credit was applied to future orders, as long as the dealer met the eligibility requirements for its year of participation. (A572-73 [¶¶ 9, 11-13], 613-15, 617, 695-96 [¶¶ 12-14])

On summary judgment, it is speculative to infer that Omega's Partner Plan was functionally beyond Orologio's reach as a disguised promotional facilities program. <u>See</u> <u>Bouldis v. U.S. Suzuki Motor Corp.</u>, 711 F.2d 1319, 1327 (6th Cir. 1983) (no discrimination when buyer's inability to take advantage of discount or allowances within buyer's control); <u>Shreve Equip., Inc. v. Clay Equip. Corp.</u>, 650 F.2d 101, 105 (6th Cir.), <u>cert.</u> <u>denied</u>, 454 U.S. 897 (1981); <u>Edward J. Sweeney & Sons Co. v. Texaco, Inc.</u>, 637 F.2d 105, 121 (3d Cir. 1980), <u>cert.</u> <u>denied</u>, 451 U.S. 911 (1981); <u>Chapman v. Rudd Paint & Varnish Co.</u>, 409 F.2d 635, 643 (9th Cir. 1969).

The Partner Plan program could not act as the disguised discrimination vehicle that Orologio claims because, as observed by the District Court (A18), it was "offered to all Omega authorized dealers equally and proportionally." (A617; <u>see</u> <u>also</u>, A731, 733) That is, the Partner Plans "were the same for everybody." (A617; <u>see</u> <u>also</u>, A731-32)

4. No Alleged Co-Op Allowances to Omega's Favored Dealers

Orologio confuses that Omega's independent "Co-op Commitment Agreements" were eligibility forms for Omega's co-op program furnished to all retailers to apply for SGUS advertising assistance. (A618-19, 622, 624) Omega's Co-op Commitment program was independent of the Partner Plan, meaning that if dealers did not achieve Partner Plan program credit because the dealer failed to meet sales goals (such as Orologio), they still had the opportunity to obtain SGUS co-op assistance. (A619-20, 622, 624 ("Every account, authorized Omega dealer, has the opportunity to propose a media plan."), 625, 728-29) Orologio concedes that it never made a co-op or media proposal to Omega that was declined. (A488) Thus, Orologio knew of the co-op opportunities and participated, and was never declined. Id.

RPA §§ 2(d) and 2(e) do not require a formal written policy statement for sellers offering promotional facilities to its dealers. Mr. Oppenheimer testified that Orologio repeatedly asked for co-op assistance (A487 ("We asked for co-op") ("We asked for co-op all the time."), and received co-op assistance from Omega, 488 (Q: "It's fair to say . . . that Orologio was given co-op by Omega, wasn't it, over the years? A: Over the more than 20-year relationship? Q: Yes. A: Yes, but not recently [2013 deposition]") ("We definitely asked often for – well asked often about promotional opportunities, events, clearly that could have been tagging . . .”))

Mr. Oppenheimer also confirmed Orologio’s knowledge that Omega co-op assistance was separate from Omega’s Partner Plan program:

> *Q:* *If you declined [to participate in the Partner Plan program], then you still could have gone to Omega and asked for co-op advertising dollars, couldn’t you?*
>
> *A:* *We did ask for co-op separately. Because partner plan seems to have evolved into a co-op program but we did go and ask for co-op separately . . .*

(A502) (emphasis supplied)

Orologio was aware of Omega’s co-op allowance program because it repeatedly requested co-op assistance (A487-88) and received co-op help from Omega. (A525) And, Orologio obtained co-op assistance outside of Omega’s Partner Plan program. Id. See Labrador, Inc. v. The Iams Co., No. CV 94-4463, 1995 U.S. Dist. LEXIS 21149, at *18 (C.D. Cal. Sept. 19, 1995) (promotion and display requirements did not render program unavailable), aff’d on other grounds, 1997 U.S. App. LEXIS 418 (9th Cir. Jan. 8, 1997). All Omega dealers were informed that co-op was available (A728-29), as evidenced by Orologio’s repeated co-op assistance requests. (A487-88)

The RPA does not prohibit manufacturers from utilizing promotional arrangements or other incentive-based sales programs. Smith Wholesale Co. v. R.J.

Reynolds Tobacco Co., 477 F.3d 854, 866 (6th Cir. 2007) ("a manufacturer may utilize promotional arrangements and provide financial incentives to favor its product… [which] will lead to different outcomes for different purchasers"). An RPA plaintiff must allege more than failing to receive a promotional allowance; it must prove that the claimed disadvantage adversely affected the retailer's ability to compete with favored competitors. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 737 (9th Cir. 1987); Allen Pen Co., Inc., 653 F.2d at 23 (§ 2(e) "injury . . . must be something more than failure to obtain a sporadic advantage once made available to a single competitor.").

5. Orologio Was Not Harmed by Slotting Fees Paid to Tourneau

Slotting fees generally are used to promote the resale of a seller's product by securing shelf space. See FTC Guides, 16 C.F.R. § 240.9, at 36, n.1. Off-invoice payments may be construed as an advance of funds, but they are similar to an extension of credit, see L.S. Amster & Co., Inc. v. McNeil Labs., Inc., 504 F. Supp. 617, 620 (S.D.N.Y. 1980), which is outside the scope of RPA §§ 2(d) and 2(e) because such fees do not relate to the resale of a supplier's goods. Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1424 (11th Cir. 1990); Bouldis, 711 F.2d at 1328; Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110, 122 (E.D.N.Y. 1976).

Tourneau, the country's largest luxury watch dealer, was paid a slotting fee, but only for two stores, 57th Street in Manhattan and Las Vegas, because, as the District Court noted (A9, 20), of the availability of a unique brand presentation that only those two stores in the United States could offer. (A637-38) Tourneau prominently featured Omega in special stand-alone displays at the store entrance, but Orologio positioned Omega at the back of its Short Hills Mall second floor store (A503), which did not warrant the payment of a slotting fee. See El Aguila Food Prods. Inc. v. Gruma Corp., 301 F. Supp. 2d 612, 632-633 (S.D. Tex. 2003) (slotting fees not RPA pricing claim or §§ 2(d)(e) claim because nothing of value was conveyed), aff'd, 131 Fed. Appx. 450 (5th Cir. 2005). Orologio never requested a slotting fee for a more favorable Omega placement that was declined by Omega. (A503) Even if it did, slotting fees are not actionable under RPA §§ 2(d)-(e). Id. See Alan's of Atlanta, Inc., 903 F.2d at 1424; Bouldis, 711 F.2d at 1328; Diehl & Sons, Inc., 426 F. Supp. at 122.

Point III

THE DISTRICT COURT PROPERLY DISMISSED OROLOGIO'S SPOLIATION MOTION AS "WEAK" BECAUSE THERE WAS NO ACTUAL SPOLIATION

Orologio fails to cite a single authority that overturned a denial of spoliation sanctions, let alone under circumstances of this case. "[A] finding of bad faith is pivotal to a spoliation determination . . . Withholding requires intent." Bull v. UPS, 665 F.3d 68, 79 (3d Cir. 2012). In the absence of bad faith, a denial of a spoliation request is categorically not an abuse of discretion. Peterson, 551 Fed. Appx. at 628 (denial of spoliation sanctions where no bad faith shown even though evidence relevant). Mere negligence in spoliation is insufficient; instead the party seeking sanctions must demonstrate the discovery was suppressed "in order to prevent it from being used by the adverse party." U.S. v. Nelson, 481 Fed. Appx. 40, 42 (3d Cir. 2012); Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods., 489 F.3d 568, 579 (3d Cir. 2007) (upholding denial of spoliation motion in absence of intent).

Here, the alleged spoliation involved a few "tagged" Omega television commercials stored by a third-party SGUS vendor, Digital Generation, Inc. ("DG"). The undisputed record shows that a low level SGUS marketing employee without knowledge of the lawsuit directed DG to destroy a handful of dated commercials to: (i) eliminate administrative inconvenience and costs of monthly vendor storage fees; and (ii) comply with Omega's copyright obligation to destroy media under expired limited image licenses (for example with the owners of James Bond) with third-party partners. (A1306, 1993-95, 2001-003) Orologio does not maintain that the directive to destroy commercials was motivated by an intent to suppress evidence, but instead, as Magistrate Judge Arleo noted, at worst, "*spoliation was negligent, [Orologio's counsel] has not said this is plot. He has* *not said this was intentional*." (A1237)[6] The absence of "bad faith" is dipositive and requires affirmance.

Orologio claims, without any citation, that "SGUS kept no records and did not track its tagging of retailers." (Orologio Brief, p. 64) In reality, the record shows SGUS produced (and Orologio had access to): (i) SGUS "Media Plan" databases detailing instances of SGUS tagging payments by retailer and medium; (ii) SAP data runs showing co-op and partner plan tagging; (iii) two of the four allegedly destroyed tagged commercials for claimed competitors; (iv) master "taggable" (i.e. the same advertising without the three second reference to the retailer) commercials for each of the destroyed advertisements; (v) an inventory list of tagged commercials; (vi) invoicing for tagging of commercials; (vii) correspondence related to tagging; (viii) testimony of instances of tagging; and (ix) requests for admissions regarding payments for tagging. (A1210 [¶ 10], 1211, 1213-16 [¶¶ 3, 6, 13], 1977-79, 1980-86, 1987-88, 2045, 2384-2440, 2442-60) Orologio offers no argument why these are insufficient sources of discovery.

Even assuming Orologio made a *prima facie* case of liability for spoliation, Orologio fails to address any of the factors for why sanctions are proper. <u>Schmid v.</u>

[6] Orologio misrepresents that Magistrate Judge Arleo previously found spoliation occurred. Judge Arleo merely ruled on the substantially lower threshold of a "preliminary showing of spoliation sufficient to permit further discovery on the issue." – discovery which ultimately revealed no sanctionable conduct. (A1376)

Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994). Instead, Orologio concludes the District Court gave insufficient attention to the topic, but while the District Court is not required to articulate the detailed findings Orologio prefers (see e.g., Fed. R. Civ. P. 52(a)(3)), the Decision confirms the parties' submissions were considered (and cited), and the motion specifically rejected. (A6). The Court specifically found: (i) no SGUS bad faith or attempt to obstruct; and (ii) the alleged spoliated evidence was "not required to prove that claim, as there are many other avenues available for proof." Id. That is not a finding of an abuse of discretion.

Point IV

OROLOGIO HAS ADVANCED NO BASIS TO WARRANT PARTIAL SUMMARY JUDGMENT ON ITS RPA CLAIM

For all of the reasons above regarding why Orologio's RPA claim is factually and legally deficient, there is no basis to reverse the District Court and grant Orologio partial RPA summary judgment. Orologio offers no relevant authority which warrants partial RPA summary judgment, and there is no set of facts which suggest the District Court's Decision should be reversed.

CONCLUSION

Based on the foregoing, SGUS respectfully requests the Court to affirm the District Court's Opinion and Order, including affirming the denial of Orologio's motion to strike and for sanctions and Orologio's motion for partial RPA summary judgment.

Dated: March 1, 2016
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CERTIFICATE OF BAR MEMBERSHIP

The undersigned certifies that pursuant to Third Circuit Local Appellate Rule 28.3(d) and 46.1, the attorneys whose names appear on this Brief, Samuel D. Levy (admitted September 3, 2015) and Craig M. Flanders (admitted September 3, 2015), are admitted to the bar of this Court for this appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface Microsoft Word and complies with the typeface-style-volume limitation of Fed. R. App. P. 32(a)(7)(B): Times New Roman, 14 pt., double line spacing.

The total number of words in the Brief in compliance with Fed. R. App. P. 31(a) and as exempted by Fed. R. App. P. 32(a)(7)(B) is: 13,999.

INDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Third Circuit L.A.R. 31.1(c), I certify that the foregoing E-Brief and the hard copies of the brief have identical text. I certify that a virus detection program, Vipre-Version 6.2.5530, was run on the file and that no virus was detected.

Dated: March 1, 2016
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CERTIFICATE OF SERVICE

I certify that on March 1, 2016, I electronically filed the foregoing BRIEF OF APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I certify that seven hard copies of the foregoing BRIEF OF APPELLEE were sent by FedEx to the Office of the Clerk for the Third Circuit, on March 1, 2016, the same day the electronic copy was filed.

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