United States Court of Appeals
for the
Third Circuit

No. 15-3024

OROLOGIO OF SHORT HILLS INC;
OROLOGIO INTERNATIONAL LTD INC,

Appellants,

– v. –

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

Appellee.

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

REPLY BRIEF FOR APPELLANTS

CHIESA SHAHINIAN & GIANTOMASI PC
One Boland Drive
West Orange, New Jersey 07052
(973) 325-1500

Attorneys for Appellants

On the Brief:
ADAM K. DERMAN
RONALD L. ISRAEL
DANIEL D. BARNES

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POINT I

SGUS CONCEDES THE DISTRICT COURT APPLIED THE WRONG STANDARD

Faced with the undeniable fact that the District Court improperly weighed evidence, Appellee Swatch Group (U.S.), Inc. ("SGUS") admits that the District Court rendered factual findings and thus invaded the province of the jury. Incredibly, SGUS claims that such findings are proper for a summary judgment motion when they are not. Boyle v. Allegheny, 139 F.3d 386 (3d Cir. 1998); Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 195-97 (3d Cir. 1998). SGUS asks this Court to repeat the District Court's error by reviewing these improper factual findings based upon a "clearly erroneous" standard instead of assessing whether there is a "genuine dispute as to any material fact." Fed.R.Civ.P. 56(a). The cases cited by SGUS on page 3 of its Brief for the clearly erroneous standard were rendered upon a review of the record after a trial. Anderson v. Bessemer City, 470 U.S. 564 (1985) and Lanning v. SEPTA, 181 F.3d 478 (3d Cir. 1999), cert. denied 528 U.S. 1131 (2000). The clearly erroneous standard has no application here and the District Court must be overturned.

The District Court's decision reads as though it were a post-trial evaluation of evidence, in violation of the Rule 56 standard. Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. (collectively, "Orologio") were not required to prevail, or even demonstrate a strong likelihood of success, but merely

demonstrate that the evidence is such that a reasonable jury could return a verdict in its favor. Whether Orologio meets the definition of a franchisee pursuant to the Franchise Practices Act ("FPA"), however, is a fact intensive inquiry for which summary judgment generally is inappropriate. The Supreme Court, in Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324, 346-47 (1992) ("ISI"), expressly held that only in the unusual case where the parties' written arrangements fully defined the parameters of their relationship could a summary judgment motion determine the existence of a franchise. In ISI, the Supreme Court concluded that when a court assesses a summary judgment motion relating to the definition of a franchise, the standard is the one used in all summary judgment motions:

> [T]he existence of the franchise is so closely related to the dispositive factual findings of "place of business," "license," and "community of interest" that … the appropriate standard is whether the evidence presented was sufficient to permit a factfinder to determine that the statutory requirements for the existence of a franchise were met.

Id. at 347 (emphasis added).[1]

The same is true of the District Court's treatment of Orologio's Robinson-Patman Act ("RPA") claims. For example, the cases are legion that the existence

[1] In ISI, the Supreme Court reviewed the record below "as if from a plenary trial" because although the matter was before the lower court after cross-motions for

of competition is a fact question that must be resolved by a jury. See e.g. Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 2005 WL 724117, at * 7 (E.D. Pa. 2005) (in RPA matters, "[t]he question of the existence of competition between two purchasers is a question of fact to be resolved by the jury or the trier of fact")(ADD-59); see infra at Point III-A. However, the District Court ignored these cases and the evidence of record demonstrating competition, and nevertheless made a finding that no such competition existed.

Thus, the District Court's decision must be overturned for the simple reason that it applied the wrong standard of review and rendered findings of fact despite a disputed record.

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summary judgment, the parties agreed to a stipulated record for determination of the existence of a franchise.

POINT II

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON APPELLANTS' FPA CLAIM

Faced with the fact that the FPA provides its protections even where the franchisee derives as little as 20% of its revenue from the relationship, SGUS chooses to ignore New Jersey law. Faced with the fact that Orologio offered sufficient evidence of record to demonstrate that it meets all of the elements of the franchise definition, SGUS resorts to misstating the law and the facts.

A. There Was Sufficient Evidence of a Written Arrangement Conferring a License To Orologio.

On the written arrangement requirement, SGUS does its best to confuse the issue by ignoring and misstating the facts (including the existence and terms of the parties' nine writings) and failing to address the most critical aspects of the judicial decision relied upon by Orologio, Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998) ("LCC").

SGUS never acknowledges or even addresses the nine writings identified by Orologio to satisfy the written arrangement requirement under the FPA. These include the "Omega Brand Policy Statement," an October 20, 2007 Email from SGUS's Account Representative, "Brand Policy Statement," the "Internet Brand Policy," "Partner Plans," "Credit Policy," "Replenishment Terms," "Presentation and Sales Agreement," and "How to Display the Omega Collection." (OB at 9-

10).[2] These documents define all aspects of the parties' course of dealing, including (i) how Orologio could sell, display, market or advertise Omega products, (ii) Orologio's use of Omega's tradename, likeness and intellectual property, (iii) the number, assortment, and timing of Orologio's product purchases, (iv) Orologio's sales goals and expectations, (v) the training of Orologio's salespeople, and (vi) the standards to remain an authorized dealer.

Ignoring all of this, SGUS inexplicably focuses on the allegations in the Complaint, not the summary judgment record. Thus, SGUS falsely contends that Orologio identified only one writing in its Complaint (AB at 9); however, in paragraph 50 and Exhibits A-C of the Complaint, Orologio identified several writings – including the Partner Plan and the central October 20, 2007 email through which SGUS defined the parties' relationship pursuant to the Selective Distribution Program. (A51-A52, A64-A72). SGUS then contends that Orologio did not identify "a writing during the parties' first 14 years" together (AB at 21), an assertion which is not true (the Brand Policy Statement was issued in 1993) and is utterly beside the point. (A1568-A1570). SGUS also contends that because its President testified that it maintained a corporate policy of not having written dealer agreements, no written arrangement could possibly exist. (AB at 19). SGUS's

[2] Citations to Appellee's Brief are "AB." Citations to Orologio's initial brief are "OB."

attempt to avoid the consequences of the FPA by not signing a dealer agreement is irrelevant in determining whether such a written arrangement exists. Finally, grasping at straws, SGUS actually addresses two of the writings (the Internet Brand Policy Statement and the Brand Policy Statement) with its oft-repeated end-of-the-world pronouncement that if these documents create a franchise, most businesses would be a franchise because they were standard directives. (AB at 21). However, the fact that several of the documents were not specific to Orologio does not make them less significant in determining whether a written arrangement exists under the FPA. To the contrary, neither the FPA nor any cases interpreting it require that the written arrangement be set forth in a document negotiated by the parties. (OB at 33-34).

SGUS's effort to address the holding in LCC further demonstrates the paucity of support for its position. LCC explicitly stands for the proposition that where a putative franchisee identifies a series of informal writings as the written arrangement, this prong of the definition may be satisfied and summary judgment should not be granted. (OB at 30). In LCC, the putative writings were an initial letter and confirming letter summarizing the parties' arrangement. 179 F.R.D. at 470. The facts here are very similar. In the October 20, 2007 email, SGUS defined the terms of the parties' relationship going forward, including an increase in the piece requirement, replenishment obligations, and rules about the appearance

of Orologio's store. Thus, just as in LCC, this email, and the other documents of record, "suffice to raise a factual issue as to whether [Orologio] had a written arrangement with" SGUS. 179 F.R.D. at 470. SGUS never addresses this aspect of the holding in LCC because it is dispositive on the issue. And, of course, this holding confirms that the District Court improperly applied the wrong standard rendering a finding of fact on this issue.

B. SGUS Misconstrues The License Requirement.

SGUS's claim and the District Court's erroneous finding that no license was conferred to Orologio are equally without merit. (AB at 22-23). SGUS does not bother to address the facts at issue or the cases interpreting the license aspect of the franchise definition, merely repeating the oft-noted admonition that furnishing advertising materials does not create a license. A thorough analysis of the cases in this area, and the facts at issue, demonstrates that the real elements are (a) a reasonable belief by consumers of a connection between franchisor and franchisee such that the franchisor is "vouching" for the franchisee and (b) "control" by the franchisor. Both are present here.

The leading license requirement case is Neptune T.V. & Appl. Serv., Inc. v. Litton Microwave Cooking Products Div., 190 N.J. Super. 153, 160 (App. Div. 1983). In Neptune, the Appellate Division held that a license exists when the franchisor in effect "vouches" for the franchisee because the "consuming public …

associates" the two together. Neptune, 190 N.J. Super. at 160. The vouching identified in Neptune also requires "control" by the franchisor over the franchisee with respect to the license:

> It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product.

Neptune, 190 N.J. Super. at 160 (citations omitted) (emphasis added). Like Neptune, Orologio's Omega-themed signage, designation as an authorized dealer, special Omega window displays dominating its store, ability to offer repairs and service, specialized training and Omega-specific expertise, permitted use of Omega copyrighted images on its website, and other manifestations of the license, together demonstrate that Orologio was not merely furnished advertising materials; Orologio became known to the consuming public that it was associated with SGUS and the Omega brand.

With respect to control, SGUS imposed its will over how Orologio conducted its business. For example, through the Internet Brand Policy, SGUS set the terms of how Orologio presented itself to the world by controlling the images Orologio used and prohibiting internet sales. SGUS mandated the number of watches Orologio was required to purchase through the piece requirement and controlled their display in such documents as the Partner Plan, the How to Display the Omega Collection document, and the Presentation and Sales Agreement. At

the very least, with all of the evidence that Orologio put into the record, the District Court's grant of summary judgment on the license issue must be overturned.

Neptune is not an outlier. The leading Supreme Court decision illuminating the term franchise, ISI, 130 N.J. at 353-54, relied upon Neptune for its analysis of the license issue. In ISI, the Supreme Court concluded that a license had been granted despite the fact that, like Orologio, the franchisee in ISI operated under its own name. What was important to the Supreme Court, and what exists here, is that the franchisor's products were linked in the public's mind with the franchisee. ISI, 130 N.J. at 139-40. Orologio was one of a select group of authorized Omega dealers with the ability to not only sell Omega products, but to offer warranties and to service them. Its staff was specially trained by SGUS in the particular features of Omega products and SGUS required Orologio to use the Omega tradename and product likeness in images it provided in Orologio's window displays, internet site, and advertising. Thus, as in ISI, "surely a factfinder could find the presence of the Neptune T.V. criteria [for a license] here." Id. at 354.

In sum, the District Court's decision on the license requirement should be overturned because it misapplied applicable law and made improper factual findings.

C. Community of Interest Is a Fact Intensive Analysis Requiring a Trial.

SGUS also never responds to Orologio's central argument with respect to the community of interest element – that this is a fact-sensitive inquiry requiring a jury determination. Rather, SGUS offers a skewed review of the relevant facts and decisional law, and then argues that its version of the events should be adopted by the Court. Neither the record nor the law support this approach.

Both the District Court and SGUS identify the four-part test set forth in Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131 (3d Cir. 1991) as determinative of the community of interest analysis: "(1) [SGUS's] control over Orologio, (2) [Orologio's] economic dependence on [SGUS]; (3) disparity in bargaining power, and (4) the presence of a franchise-specific investment by [Orologio]." 944 F.2d at 1140. Orologio offered ample evidence on each element:

Control. SGUS directed Orologio's actions and controlled every aspect of Orologio's sale of Omega products. In the Internet Sales Policy, SGUS not only barred internet sales, but also selected the images Orologio could use on its website. (A1524). In documents like "How to Display the Omega Collection," "Replenishment Terms," and "Partner Plans," SGUS dictated how Orologio could display and sell Omega products. (A1524, A1482, A948, A1478). SGUS's onerous piece, assortment, and replenishment mandates required Orologio to purchase inventory beyond what it viewed as its own needs. (Id.)

Dependence. As the Third Circuit explained in Cassidy Powell, community of interest is demonstrated by "years of effort required to gain specialized skills or knowledge valuable to market the licensed product efficiently, but of little use beyond that." 944 F.2d at 1144. That is precisely what happened here. Orologio built its business around the presumption that it could continue as an Omega dealer, not only because it wanted to sell Omega products, but because being known as an Omega dealer added to its ability to sell other products. Once Orologio decided to become an Omega dealer, the piece requirement made it impossible for Orologio to develop another brand of its stature, and once it lost Omega, Omega was impossible to replace because there are a limited number of brands that drive customers. When Orologio invested in inventory, training, and the presentation of Omega-specific signage, it did so because it depended upon a continuation of its relationship with SGUS.

Disparate Bargaining Power. Disparate bargaining power is demonstrated by the numerous rules imposed by SGUS. (See OB at §B-3). Each of the writings which SGUS imposed upon Orologio were a fait accompli. Orologio could either accept them or end its status as an authorized Omega dealer. There is no better example of this than the October 20, 2007 email – Orologio was given a stark choice, either accept the new Selective Distribution terms, or end its status as an Omega dealer. (A70).

Franchise-Specific Investments. Orologio's franchise-specific investments include the purchase of inventory, advertising it paid for featuring Omega products, dedication of its window displays to Omega-themed marketing, and payments for its salespeople to be Omega-trained. SGUS attempts to discount such investments by arguing that they are not franchise-specific. However, inventory purchased when Orologio possessed the imprimatur of an authorized Omega dealer is less valuable if Orologio cannot offer a warranty or service. Advertising and training geared to Omega products is worthless without the ability to sell Omega products. Similarly, Orologio devoted its window displays and its limited capital for the purchase of Omega inventory, making it impossible for Orologio to develop other significant brands or lines of revenue. This is evidence that should have been weighed by a jury, not the District Court in the context of a motion for summary judgment.

Moreover, the Supreme Court's decision in ISI suggests that these are not the only factors for a court to consider. The Supreme Court, again relying on Neptune, described community of interest as a "broad, elastic and elusive" concept and described a franchise as having a "symbiotic character" with a "consequent vulnerability of the alleged franchisee to an unconscionable loss of his tangible and intangible equities." 130 N.J. at 359. This is what the record demonstrates here. SGUS repeatedly referred to Orologio as its "partner," promised a long-term

commitment, and then, after rendering Orologio dependent upon the continuation of the relationship, abruptly ended it. Orologio built its business around the expectation that it would continue to be an authorized Omega dealer, and reap the rewards such a designation provides. The parties worked together through joint advertising and marketing efforts, including (a) Omega-themed advertising for which Orologio paid, (b) window displays dominating Orologio's storefront which Orologio displayed to the exclusion of others, (c) an internet site that used SGUS's copyrighted images, and (d) extensive displays of Omega products made in conformity with SGUS's rules. Orologio depended on SGUS because all of those efforts are worthless without the ability to sell Omega in the future. SGUS benefitted from all of Orologio's efforts on its behalf, and should not be permitted to walk away after decades of joint efforts. At the very least, a jury should decide the issue.

SGUS's reliance on Colt Indus., Inc. v. Fidelco Pump & Compressor Corp., 844 F.2d 117 (3d Cir. 1988) is misplaced because Colt pre-dates the Supreme Court's definitive decision in ISI. In addition, SGUS claims that Colt stands for the proposition that if the franchisee is not subject to sales quotas, and that any training and promotional programs are optional, the parties do not share a community of interest. (AB at 26). Putting aside that this is not the law, the

minimum inventory, piece, assortment, and replenishment requirements imposed by SGUS essentially function as a sales quota.

SGUS concludes its community of interest argument with the bold and false claim that it has an unfettered right to select with whom it will do business. (AB at 29). The FPA provides that once a franchise relationship is created, that relationship cannot be terminated by the franchisor unless there is cause and other procedural safeguards are met. N.J.S.A. 56:10-5. This is the essence of Orologio's claim; SGUS cannot terminate the parties' relationship so long as that relationship meets the definition of a franchise and the other requirements for the protections of the FPA.

POINT III

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' ROBINSON-PATMAN ACT CLAIM

A. SGUS Distorts the Facts and Law Regarding Competition.

In its opposition brief, SGUS confuses, misstates and mischaracterizes Orologio's arguments, the facts, and even the law. The most egregious example of this is SGUS's contention that Orologio claimed its market was all of NY, NJ, PA and CT. SGUS does the same for the law by creating factors and tests that do not exist and then arguing that SGUS has not met them. These tactics, which will be addressed in the discussion below, should be seen for what they truly are – an admission by SGUS that the facts support Orologio's RPA claims. An evaluation of the true record and applicable law demonstrates that these claims should be resolved by a trial.

1. Competition is an Issue of Fact for the Jury to Decide.

The first and perhaps most obvious error in the District Court's ruling was the determination that the dealers who received favorable treatment were not competitors of Orologio. Despite that Orologio's first RPA argument is that competition is a question of fact, SGUS buries its response to this argument and then claims that the cases cited by Orologio do not implicate the RPA and are otherwise inapposite. The cases cited by Orologio, however, expressly hold that competition is an issue of fact for the jury to decide. See Toledo, 2005 WL

724117 at * 7 (for RPA matters, "[t]he question of the existence of competition between two purchasers is a question of fact to be resolved by the jury or the trier of fact."); Sullivan v. National Football League, 34 F.3d 1091, 1098 (1st Cir. 1994), cert. denied, 115 S. Ct. 1252 (1995) ("The question of whether competition exists … is ultimately a question of fact."); Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984) ("[m]arket definition is a question of fact"), cert. denied, 470 U.S. 1060 (1985); Town Sound and Custom Tops, Inc. v. Chrysler Motor Corps., 959 F.2d 468, 497 (3d Cir. 1992) (market definition presents factual jury question), cert. denied, 506 U.S. 868 (1992); Michael Halebian N.J., Inc. v. Roppe Rubber Corp., 718 F. Supp. 348, 358 (D.N.J. 1989) ("relevant product and geographic market; … the area of effective competition within which the parties operate, is a question of fact").

SGUS fails to cite any authority to support a different conclusion. In fact, case law cited by SGUS elsewhere in its brief provides that the "relevant market is essentially a question of fact." T. Harris Young & Associates, Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991). Accordingly, the District Court's determination that Orologio did not demonstrate who its competitors were was a factual determination which should not have been decided by the District Court on summary judgment.

2. Orologio Never Claimed that All Omega Dealers in the Four-State Area Are Competitors for Purposes of the RPA Violations.

SGUS's primary argument regarding competition is a quintessential "straw-man" argument. SGUS asserts that "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." (AB at 31). SGUS then dispenses with this invented argument by asserting that the record does not support such a claim, stating "[t]here 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." (Id. at 32). This refrain – that Orologio cannot prove competition in all of the four-state area – is repeated throughout SGUS's brief. (AB at 31, 33-36, 39, 41 and 51).

Orologio never claimed that every authorized Omega dealer in the four-state area is a competitor or that they were all offered co-op, tagging, and promotional facilities to Orologio's exclusion. Rather, in the expert report of Joao DosSantos ("DosSantos Report"), Orologio identified the relevant market (outside of NJ) as Manhattan, Long Island, southern and eastern NY, as well as eastern PA, and both eastern and western CT – with the bulk of Orologio's out-of-state business being in NY. (OB at 46; A2554). Orologio referred to its "core regional market" as NJ and NY. (Id.)

Orologio supported this identification of its market with (a) an expert report based upon a review of sales records, a zip code analysis, and industry literature (A2513-2601); (b) testimony from SGUS's Regional Manager Metro NY conceding that the mall in which Orologio is located services NY customers (A1064); (c) SGUS's own definition of the "Metro New York" region (Orologio's region) to include New York City, Long Island, New Jersey and Westchester (A1056); and (d) a basic understanding of the metropolitan NY area (i.e., recognizing that people who commute for work between NY and NJ naturally shop in both locations). Orologio presented no evidence that dealers in the distant cities mentioned by SGUS actually compete with Orologio for customers (or received promotional support to Orologio's exclusion) because there is no such claim.

After identifying the market, Orologio's expert identified the dealers who received favorable treatment through co-op and/or tagging. Specifically, Orologio's expert identified fourteen competitors (out of 22 in the four-state area) located in NJ (4), NYC (4), the Philadelphia area (2), Queens (2), Nassau (1), and Greenwich (1) who received favorable treatment. (A2552-A2557; A2568).

Thus, the Court should reject SGUS's arguments regarding Orologio's inability to prove competition because they are premised upon (and purport to rebut) claims that were never advanced by Orologio. The record contains more than sufficient evidence for a jury to decide the issue of competition. Accordingly,

the Order granting summary judgment on Orologio's RPA claims should be reversed.

3. SGUS Misstates the Law Regarding Competition and Overlooks Extensive Evidence in the Record Regarding Orologio's Competitors.

SGUS also misstates the law regarding how to establish competition. In the face of well-settled law explaining that competition is determined by geographic market, SGUS makes a blatantly false claim that this standard was abrogated in Toledo, 2006 WL 2385519. In Toledo, the district court addressed the proper approach to proving competitive injury in unique-natured competitive bidding cases involving several phases of bidding. The district court favored the direct competition evidence approach there because the geographic approach failed to measure whether dealers were treated equally in head-to-head bidding situations. The holding did not abrogate the geographic approach to determining competition in all RPA matters.

SGUS's baseless assertions regarding the law continue. SGUS repeatedly creates lists of elements it claims are necessary to show competition, without citation to any controlling case law. (See AB at 40). For example, SGUS claims that Orologio is required to submit evidence in the form of company records data, consumer studies or surveys, etc., that "proves that Orologio… was engaged in actual, proven competition with every Omega-favored purchaser in a four-state

region at the time of the alleged RPA violation,"[3] citing to Best Brands Bev., Inc. v. Falsaff Brewing Corp., 842 F.2d 578, 584-585 (2d Cir. 1987). (AB at 41). Best is a 2(a) pricing discrimination case addressing what a plaintiff must show (e.g., favored competitor drew sales or profits from him) in order to prove competitive injury – an element not required here. Notably, in discussing whether dealers compete (as opposed to whether there is competitive injury), the Second Circuit in Best held that competition is proven where it is shown "the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Id. at 584-85.

SGUS also asserts that "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." (AB at 35). Orologio is not required to present a cross-elasticity study to demonstrate competition. Lewis v. Philip Morris Inc., 355 F.3d 515, 531 (6th Cir. 2004). Additionally, the record contains an expert analysis identifying those favored retailers who are Orologio's competitors (i.e., located in the same geographic market and competing for the same customers) and

[3] This is another example of SGUS asserting the mythical four-state competitor argument. For purposes of RPA, Orologio is only required to show one Omega dealer that received assistance to Orologio's exclusion was a competitor. See F.T.C. v. Fred Meyer, 390 U.S. 341, 352 (1968); (A2568). Orologio has shown fourteen.

which of them received promotional assistance from SGUS to Orologio's exclusion. (A2513-A2601). Again, the DosSantos Report defines Orologio's relevant market to include NJ, Manhattan, Long Island, southern and eastern NY, eastern PA, and both eastern and western CT (with the bulk of the market outside of NJ being NY). (A2554). DosSantos mapped the geographic distribution of Orologio's customers by the zip codes identified in Orologio's historical customer invoices. (A2552). Within Orologio's geographic market**,** almost three-quarters of Orologio's customers live within 10 miles of a regional competitor. (A2556). Thus, the DosSantos Report provides evidence that Orologio and the favored retailers (identified by name) compete for the same customers. The DosSantos Report even gave a specific example, pointing out an instance where a customer in Southwestern CT – who could have shopped at the Greenwich location of Manfredi – purchased products from Orologio in NJ. (A2553).

Vanco Beverages, Inc. v. Falls City Industries, Inc., 654 F.2d 1224 (7th Cir. 1981), rev'd on other grounds, 460 U.S. 428 (1983), is instructional. The Seventh Circuit affirmed the district court's finding, after trial, that retailers in different counties/states were in a "unified market" and thus in competition based upon evidence similar to that presented here. Specifically, the Seventh Circuit noted the close proximity of the counties where the dealers were located and their connection by an interstate highway. Id. at 1228 (Compare A2556-A2558). The Seventh

Circuit also noted the massive flow of residents between the counties/states to work. Id. (Compare A2556). There was also evidence that advertising was directed at residents of both areas as if they constituted one market. Id. (Compare A2552). Notably, such evidence was sufficient in Vanco to sustain a finding of competition under the more stringent "clearly erroneous" standard after a trial on the merits. It is inconceivable how the District Court here completely ignored this evidence, which at the very least raises a question of fact regarding whether competition exists.

B. SGUS Conflates Competitive Injury with Actual Injury.

Competitive injury and antitrust injury (also referred to as "actual injury") are two distinct concepts. Competitive injury involves injury to competition through a defendant's actions. Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 214 (2d Cir. 2015). Unlike 2(a) claims, there is no requirement to show competitive injury in a 2(d) or 2(e) case. Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 440 U.S. 69, 79 (1979). Actual injury requires the plaintiff to connect its losses to the behavior violating the RPA under a less stringent proof standard. Cash, 799 F.3d at 214. The Supreme Court has observed:

> the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices,

> profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969).

Notwithstanding the foregoing, SGUS conflates the two concepts, citing to cases addressing the more stringent standards for competitive injury in arguing that Orologio has failed to demonstrate actual injury. SGUS cites to Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) for the proposition that, in order to show actual injury, Orologio is required to show SGUS's support to other dealers "actually diverted sales or profits from Orologio or that Orologio actually lost a customer to a favored dealer." SGUS is wrong. Volvo involves a 2(a) claim, for which competitive injury is required. The Supreme Court in Volvo explained, "[a] hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." Id. at 177 (emphasis provided). The Supreme Court in Volvo did not even decide whether there was sufficient proof of actual injury since the Supreme Court found the plaintiff failed to establish competitive injury. Id. at 176-180.

SGUS suggests that Orologio improperly relied upon the "automatic damages" rule, which has been rejected by the Supreme Court. (AB at 45). Orologio never argued that damages are "automatic" or that actual injury is not required. Rather, Orologio simply pointed out, as the Supreme Court did in

Simplicity Pattern, 360 U.S. at 64-71, that section 2(d) of the RPA defines an offense which is illegal per se. Orologio identified substantial evidence in the record of actual injury. (OB at 50-51). Dr. Robert Kneuper's expert report ("Kneuper Report") analyzed the impact of SGUS's improper promotional expenditures on sales by Omega retailers in the relevant market (i.e., dollars earned by Orologio's competitors as a result of the advertising). (A2615-A2630). The DosSantos Report calculated the amount of damages that Orologio suffered as a result of SGUS's RPA violations (i.e., what it would have made had SGUS provided it with proportionally equal promotional assistance). (A2560-2586). SGUS has no answer for this but to make the circular argument that, while Orologio's experts may have established that Orologio suffered damages, SGUS should not be liable because it claims that Orologio received proportionally equal benefits. (AB at 47-48).

The Supreme Court has determined that damages may be awarded on plaintiff's estimate of possible sales absent the violation. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (comparison of plaintiff's actual profits with contemporaneous profits of competing theater sufficient to show damages); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67 (1981); Zenith Radio, 395 U.S. at 123-24. Accordingly, the record contains sufficient evidence to establish actual injury or, at the very least, to raise an issue of fact as to the same.

C. SGUS Provided Ad Hoc Promotional Support to Orologio's Competitors Outside the Partner Plan In Violation of the RPA.

1. SGUS's Attempts to Undermine Orologio's Argument Regarding the Partner Plan Fail.

SGUS continues to misstate Orologio's argument with respect to the Partner Plan. Except for one instance, Orologio is not claiming that co-op was administered unfairly or disproportionally under the Partner Plan. Orologio's central issue with the Partner Plan is that Orologio was falsely led to believe that the new Partner Plan (beginning in 2007) was the sole means to obtain co-op advertising support when SGUS was, in fact, providing co-op (and other advertising) support to favored retailers (and not to Orologio) outside of the Partner Plan beginning in 2007. (OB at 53-55).

SGUS also attempts to undermine the post-2006 Partner Plan's role in the RPA violations by blatantly misstating that it was not a mechanism through which retailers could obtain promotional support. (AB at 52). Beginning in 2007, the Partner Plan changed from a purely rebate program to tying the rebate to a commitment for promotional support by the retailers. Under the new Partner Plan, if the retailer satisfied certain requirements delineated in the Partner Plan, SGUS would credit the retailer a portion of the expenses that the retailer had expended to advertise the Omega brand alongside the retailer's name against its purchase of Omega products. (A2675-A2678; A2679-2683; see also A948). SGUS's own

witness testified that the Partner Plan "was a mechanism" by which retailers could get co-op advertising. (A622). It is obvious by the objective criteria identified in the Partner Plan that it was created to comply with the RPA. The problem – of course – was the existence of co-op outside the Partner Plan with no link to any standards and no notice to all retailers that created the RPA violations.

2. SGUS Distorts the Facts Regarding Co-op.

When finally addressing the real problem – co-op outside the Partner Plan – SGUS distorts the facts and the relevant timeline of events regarding co-op (conflating co-op distributed prior to the new Partner Plan's implementation in 2007 with co-op distributed outside of the new Partner Plan in and after 2007) to artificially support its general assertion that Orologio knew about and received co-op outside of the Partner Plan. The argument by SGUS is disputed, distorted and unsupported.

First, SGUS still refers to co-op outside the Partner Plan as a "program" when it is not. SGUS's "program" was nothing more than forms that were occasionally filled out in connection with the disbursement of funds to favored SGUS retailers who asked for and received co-op outside of the Partner Plan. If there truly was a co-op "program," why would any retailers choose to participate in the Partner Plan, which tied promotional support to purchases? SGUS primarily argues that Orologio knew about the co-op "program." While this is completely

disputed – Orologio found out about co-op outside of the Partner Plan in discovery (OB at 17-18) – Orologio's knowledge regarding the availability of co-op outside of the new Partner Plan is irrelevant. Under the RPA, SGUS was required to make co-op available to Orologio on proportionally equal terms. Even assuming Orologio had knowledge of the co-op (which it did not) when it made a general request for support from SGUS, SGUS's denial of that request when it was providing the co-op to Orologio's competitors is dispositive on the issue of whether SGUS made co-op "available" to Orologio -- regardless of Orologio's knowledge.

Notwithstanding this flaw, Orologio is compelled to address SGUS's arguments and misrepresented facts. First, SGUS claims that Orologio concedes "it never made a co-op or media proposal to Omega that was declined. Thus, Orologio knew of the co-op opportunities and participated and was never declined." (AB at 54). Similarly, SGUS claims that Orologio knew about Omega's "co-op allowance program" because it asked for co-op assistance and Orologio obtained co-op assistance outside of Omega's Partner Plan. (AB at 55). The premise that "Orologio never made a co-op media proposal that was declined" (which is false) does not support the conclusion that Orologio knew of co-op opportunities. Setting aside their lack of logic, however, these statements misleadingly ignore critical, significant facts.

The only time that Orologio received co-op assistance outside of the Partner Plan was during the time prior to when the Partner Plan became a vehicle to obtain promotional support (i.e., 2007). Orologio did not meet the criteria to receive co-op support under the Partner Plan after 2007 (and thus did not receive such support), nor did it receive any co-op support outside the Partner Plan after 2007 inasmuch as it was led to believe that co-op was only available through the new Partner Plan. That Orologio received co-op support from SGUS prior to 2007 is irrelevant here.

Orologio never conceded that it never made a co-op or media proposal to Omega that was declined. Rather, because Orologio did not meet the standards for co-op under the new Partner Plan, Orologio asked SGUS if any additional co-op opportunities were available in recent years and was told that there was no money in SGUS's budget for co-op. (A489). This inquiry does not evidence that Orologio knew about the availability of co-op outside the Partner Plan. In any event, whether Orologio was aware of the availability of co-op outside of the Partner Plan is irrelevant here because SGUS failed to make it available to Orologio when asked.

3. SGUS Does Not Address Orologio's Argument That SGUS Failed to Offer Promotional Support Pursuant to any Plan or Objective Criteria.

SGUS has completely ignored Orologio's central argument that SGUS failed to administer its promotional support pursuant to a plan that is based on objective criteria. Alan's of Atlanta, Inc., 903 F.2d at 1423. Documents of record establish that, from 2007 through the date of Orologio's Complaint, SGUS routinely provided several of Orologio's competitors (identified in the DosSantos Report) ad hoc co-op support outside of the Partner Plan, amounting to more than $2 million in payments made. (A2684-A2570). There is absolutely no connection between the amount of co-op being distributed to the retailers' sales or any other standards. (A1587-A1601). SGUS witnesses testified that SGUS provided co-op support outside the Partner Plan with no objective standards or guidelines. (A619; A729; A808). Likewise, the evidence demonstrates that SGUS provided tagging without any objective standards or guidelines regarding who qualified for "tagging" or the frequency of the "tagging" to be provided. (A109; A211 [Sanchez Dep. 102:23-25]).

4. SGUS Offered Tagging to Favored Dealers On Several Occasions.

In perhaps its weakest defense of discriminatory conduct, SGUS argues that its tagging did not violate the RPA because Orologio knew about it. This is flawed for many reasons.

First, SGUS's argument that Orologio was aware of the existence of tagging because it had been tagged by other brands is nonsensical. That Orologio was aware of the existence of tagging as a theoretical possibility does not mean it was aware that SGUS offered tagging. Equally baseless is SGUS's argument that Orologio knew about tagging because Orologio concedes that it was never denied tagging by SGUS. (AB at 44). Orologio was not aware that SGUS provided promotional benefits in the form of tagging to its retailers. Thus, SGUS never denied Orologio tagging because Orologio never knew to ask for it. Indeed, had Orologio been aware that SGUS provided tagging with "no strings attached," why would Orologio have passed up asking for such a benefit?

SGUS's tagging argument also ignores its obligation to inform its competing customers of the availability of tagging benefits. See Hygrade Milk & Fruit Co. v. Tropicana Products, Inc., 1996 WL 257851 (S.D.N.Y. May 16, 1996) at *8 (ADD-17); Alterman Foods, Inc., 497 F.2d at 1001 ("To meet [the availability] requirement, a supplier must not merely be willing, if asked, to make an equivalent

deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs.")

SGUS also misrepresents tagging evidence in the record. The record identifies four regional competitors by name (Wempe, London Jewelers, Tourneau and William Barthman) having received tagging benefits on at least eight separate occasions between 2008 and 2010. (A2574-A2576 [DosSantos Report]). These tagging benefits were provided by way of local billboards, television commercials, and magazines. (Id.) Moreover, the record contains expert reports demonstrating that Orologio suffered economic damages as a result of SGUS's provision of tagging to Orologio's competitors. (A2573-2580; A2620-2628). Finally, that Orologio's Complaint does not specifically mention "tagging" (a form of advertisement) is inconsequential. Orologio alleged that SGUS violated the RPA "by, among other things, failing to provide Plaintiffs advertising, marketing and promotional benefits provided to other dealers." (A39).

5. SGUS's Provision of Slotting Fees Only to Tourneau Violates the RPA.

SGUS admits to paying slotting fees to only Tourneau (one of Orologio's competitors) but argues that slotting fees are not actionable under Sections 2(d) and (e) of the RPA. SGUS is wrong. While slotting allowances are not given for advertising or promotion, they are used primarily to promote the resale of the seller's product by securing shelf space. FTC Guides, 16 C.F.R. § 240.9 at 36 n. 1;

Hygrade, 1996 WL 257581, at *13 (finding discriminatory treatment regarding slotting is within the scope of §§ 2(d) and (e)).

SGUS also asserts its fall-back argument -- that Orologio never requested a slotting fee that was declined by SGUS. Orologio was not aware that SGUS provided slotting fees as a form of promotional services and therefore did not ask. Again, it is SGUS's obligation to make its competing retailers aware of the promotional services available. See Id. at *8. Accordingly, SGUS violated the RPA by not providing slotting fees on proportionally equal terms to all retailers.

CONCLUSION

For these reasons, Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. respectfully request that this Court reverse the District Court's Opinion and Order.

Respectfully submitted,

CHIESA SHAHINIAN
& GIANTOMASI PC

s/Ronald L. Israel

Adam K. Derman
(Attorney NJ Bar Id. No. 007131995)
Ronald L. Israel
(Attorney NJ Bar Id. No. 040231996)
Daniel D. Barnes
(Attorney NJ Bar Id. No. 024581996)

One Boland Drive
West Orange, New Jersey 07052
Telephone: (973) 325-1500
Facsimile: (973) 325-1501

Attorneys for Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc.

Dated: April 1, 2016

CERTIFICATE OF ADMISSION-BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1 that the attorneys, whose names appear on the foregoing Appellants' Brief, Adam K. Derman, Daniel D. Barnes and I, are members in good standing of the bar of this Court.

PRINTING SPECIFICATIONS AND WORD COUNT CERTIFICATION IN COMPLIANCE WITH F.R.A.P. 32 (a)

The foregoing Brief submitted by Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. was prepared on a computer using a Microsoft Word 2010 word processing program and complies with the typeface-style-volume limitation because a proportionally spaced typeface was used, as follows:

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CERTIFICATION OF IDENTICAL COMPLIANCE AND VIRUS CHECK PURSUANT TO L.A.R. 31.1

I, Ronald L. Israel, Esq., an attorney duly admitted to the bar of this Court, hereby certify that the text of the E-Brief filed on April 1, 2016, and the text of the hard copies of the reply brief filed by overnight mail via Federal Express on April 1, 2016, are identical. A virus check using SOPHOS, Version 10.3, was performed on the E-Brief and no viruses have been detected.

CERTIFICATION OF SERVICE UPON THE COURT AND COUNSEL

I, Ronald L. Israel, Esq., an attorney duly admitted to the bar of this Court, hereby certify that on April 1, 2016, I have caused the Reply Brief of Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. to be electronically filed and served and the following number of copies of the Reply Brief of Appellants to be sent via overnight mail (Federal Express) as indicated, in a properly addressed wrapper, to the following persons at their last known addresses noted below:

Marcia M. Waldron, Clerk
United States Court of Appeals For The Third Circuit
Office of the Clerk
601 Market Street, Room 21400
Philadelphia, PA 19106-1790
(An original and six (6) hard copies of Appellants' Reply Brief)

Samuel D. Levy, Esq.
Craig M. Flanders, Esq.
WUERSCH & GERING LLP
100 Wall Street, 10th Floor
New York, New York 10005
Counsel for The Swatch Group (U.S.) Inc.
(One (1) hard copy of Appellants' Reply Brief)

Dated: April 1, 2016

s/Ronald L. Israel
Ronald L. Israel
(Attorney NJ Bar Id. No. 040231996)