

# 16-3592-CV

---

**United States Court of Appeals**  
*for the*  
**Second Circuit**

---

FREDERICK M. CARGIAN,

*Plaintiff-Appellant,*

– v. –

BREITLING USA, INC.,

*Defendant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR DEFENDANT-APPELLEE**

---

---

JAMES M. LEMONEDES  
GLENN S. GRINDLINGER  
ZEV SINGER  
FOX ROTHSCHILD LLP  
*Attorneys for Defendant-Appellee*  
100 Park Avenue, 15<sup>th</sup> Floor  
New York, New York 10017  
(212) 878-7900

---

---

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Breitling USA, Inc. hereby certifies that it is a wholly owned subsidiary of Breitling SA, a Swiss corporation, and that no publically held corporation owns 10% or more of either Defendant-Appellee's or Breitling SA's stock.

FOX ROTHSCHILD LLP

By: s/ Glenn S. Grindlinger

James Lemonedes, Esq.

Glenn S. Grindlinger, Esq.

Zev Singer, Esq.

100 Park Avenue, Suite 1500

New York, New York 10017

Telephone: (212) 878-7900

Facsimile: (212) 692-0940

*Attorneys for Defendant-Appellee*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT .....	1
JURISDICTIONAL STATEMENT .....	8
COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	9
STATEMENT OF THE CASE.....	10
COUNTERSTATEMENT OF FACTS .....	11
A.        Background .....	11
B.        Compensation and Sales Goals of Sales Representatives.....	13
C.        Appellant’s Employment at Breitling .....	15
1.    Appellant’s Compensation.....	16
2.    Appellant’s Performance .....	17
a.    Appellant Failed to Meet His Sales Goals.....	17
b.    Other Performance Issues .....	19
3.    Changes to Plaintiff’s Sales Territory .....	20
4.    Miscellaneous Events.....	22
5.    Termination of Appellant’s Employment.....	24
LEGAL ARGUMENT .....	25
<b>POINT I</b> THE DISTRICT COURT DID NOT ERR IN HOLDING THAT SEXUAL ORIENTATION DISCRIMINATION IS NOT COGNIZABLE UNDER TITLE VII.....	25
A. <i>Simonton</i> Mandates Dismissal of Appellant’s Sexual Orientation Discrimination Claim .....	25
B.    The Legal Landscape Has Not Changed To Warrant Overturning <i>Simonton</i> .....	28

1.	The Fact That The Supreme Court Has Extended Constitutional Protections To Gays and Lesbians Has No Impact On Title VII .....	29
2.	No Deference Should Be Given To The EEOC’s <i>Baldwin</i> Decision.....	30
3.	The Second Circuit’s Decision in <i>Holcomb</i> Is Inapposite.....	33
4.	Christiansen’s Concurrence Does Not Alter The Result That Appellant’s Sexual Orientation Claim Is Not Cognizable Under Title VII.....	34
<b>POINT II</b>	<b>EVEN IF SEXUAL ORIENTATION DISCRIMINATION WAS COGNIZABLE UNDER TITLE VII, APPELLANT CANNOT PREVAIL ON SUCH A CLAIM .....</b>	<b>37</b>
<b>A.</b>	<b>Appellant Cannot Support A Prima Facie Case of Sexual Orientation Discrimination Under Title VII .....</b>	<b>37</b>
1.	Appellant Relies On Speculation And Conclusory Allegations, Which Are Insufficient.....	38
2.	Appellant Reliance On A Purported Macho Atmosphere Is Illusory .....	42
<b>B.</b>	<b>Appellant Cannot Show That Breitling’s Actions Were A Pretext For Sexual Orientation Discrimination. ....</b>	<b>44</b>
1.	Appellant’s Sales Goals.....	45
2.	Plaintiff’s Sales Performance .....	47
3.	The Performance Criticism Appellant Received from Breitling .....	48
4.	The Promotion of Isaac Schafrath .....	49
5.	Appellant’s Discipline .....	51

<b>POINT III</b> APPELLANT HAS ABANDONED HIS TITLE VII GENDER STEREOTYPING CLAIM.....	52
<b>POINT IV</b> THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO EXERCISE SUPPLEMENT JURISDICTION.....	55
CONCLUSION.....	57

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Alfano v. Costello</i> , 294 F.3d 365 (2d Cir. 2002) .....	48
<i>Amnesty Am. v. Town of W. Hartford</i> , 361 F.3d 113 (2d Cir. 2004) .....	45
<i>Barry v. Mukasey</i> , 282 Fed. Appx. 902 (2d Cir. 2008) (Summary Order) .....	54
<i>Bibby v. Phila. Coca Cola Bottling Co.</i> , 260 F.3d 257 (3rd Cir. 2001) .....	27, 32
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.</i> , 467 U.S. 837 (1984) .....	31
<i>Christiansen v. Omnicom Group, Inc.</i> , No. 16-748, 2017 WL 1130183 (2d Cir. March 27, 2017) .....	26, 27, 35, 54
<i>D’Amico v. City of N.Y.</i> , 132 F.3d 145 (2d Cir. 1998) .....	41
<i>Danzer v. Norden Systems, Inc.</i> , 151 F.3d 50 (2d Cir. 1998) .....	39, 48
<i>Dawson v. Bumble &amp; Bumble</i> , 398 F.3d 211 (2d Cir. 2005) .....	26, 43
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S.Ct. 2117 (2016) .....	32
<i>Evans v. Georgia Regional Hosp.</i> , Case No. 15-15234, 2017 WL 943925 (11th Cir. March 10, 2017) .....	28, 32
<i>Faldetta v. Lockheed Martin Corp.</i> , 2000 WL 1682759 (S.D.N.Y. Nov. 9, 2000) .....	48
<i>Flaherty v. Filardi</i> , 2007 WL 163112 (S.D.N.Y. Jan. 24, 2007) .....	45

<i>Garrett v. Garden City Hotel, Inc.</i> , No. 05-0962, 2007 U.S. Dist. LEXIS 31106 (E.D.N.Y. 2007)	39, 48
<i>Gen. Dynamics Land Sys, Inc. v. Cline</i> , 540 U.S. 581 (2004)	32
<i>Getler v. Cornell Weill University Medical College Dept. of Surgery</i> , 2007 WL 38276 (S.D.N.Y. 2007)	47
<i>Golden Pac. Bancorp v. FDIC</i> , 375 F.3d 196 (2d Cir. 2004)	41
<i>Hawana v. City of N.Y.</i> , 230 F. Supp. 2d 518 (S.D.N.Y. 2002)	41
<i>Higgins v. New Balance Athletic Show, Inc.</i> , 194 F.3d 252 (1st Cir. 1999)	27, 32
<i>Hively v. Ivy Tech Comm. College of Indiana</i> , No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017)	28, 35
<i>Holcomb v. Iona College</i> , 521 F.3d 130 (2d Cir. 2008)	29, 33, 34
<i>Hughes v. Bricklayers &amp; Allied Craftworkers Local 45</i> , 386 F.3d 101 (2d Cir. 2004)	4, 36, 53
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	31, 32
<i>Jackson v. Federal Express</i> , 766 F.3d 189 (2d Cir. 2014)	54
<i>Kulak v. City of N.Y.</i> , 88 F.3d 63 (2d Cir. 1996)	41
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	29
<i>Lizardo v. Denny’s, Inc.</i> , 270 F.3d 94 (2d Cir. 2001)	51

<i>LoSacco v. City of Middletown</i> , 71 F.3d 88 (2d Cir. 1995) .....	4, 53
<i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871 (1990).....	41
<i>Medina v. Income Support Div.</i> , 413 F.3d 1131 (10th Cir. 2005) .....	27, 32
<i>Moccio v. Cornell University</i> , 889 F. Supp. 2d 539 (S.D.N.Y. 2012) .....	40
<i>Obergefell v. Hodges</i> , 135 S.Ct. 2584 (2015).....	29
<i>Ochei v. All Care/Onward Healthcare</i> , No. 07 Civ. 0968, 2009 U.S. Dist. LEXIS 28993 (S.D.N.Y. 2009).....	38
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , 523 U.S. 75 (1998).....	26
<i>Paulose v. New York City Department of Education</i> , No. 05-9353, 2007 U.S. Dist. LEXIS 34146 (S.D.N.Y. 2007) .....	39
<i>Pelman ex rel. Peman v. McDonald’s Corp.</i> , 396 F.3d 508 (2d Cir. 2005) .....	53
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	26
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133 (2000).....	45
<i>Rene v. MGM Grand Hotel, Inc.</i> , 305 F.3d 1061 (9th Cir. 2002) .....	27, 32
<i>Robinson v. Harvard Protection Services</i> , 495 Fed.Appx. 140 (2d Cir. 2012) (Summary Order).....	4, 53
<i>Schwapp v. Town of Avon</i> , 118 F.3d 106 (2d Cir. 1997) .....	53

<i>Scott v. Coughlin</i> , 344 F.3d 282 (2d Cir. 2003) .....	41
<i>Shannon v. New York City Transit Authority</i> , 189 F.Supp.2d 55 (S.D.N.Y. 2002) .....	45
<i>Simonton v. Runyon</i> , 232 F.3d 33 (2d Cir. 2000) .....	2, 25, 26, 28, 31, 32
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134 (1944).....	31
<i>Stevens v. State Dep’t of Corr.</i> , No. 1:12-cv-3782, 2015 WL 1245355 (N.D. Ala. Mar. 18, 2015).....	31
<i>U.S. v. Windsor</i> , 133 S.Ct. 2675 (2013).....	29
<i>Valencia v. Lee</i> , 316 F.3d 299 (2d Cir. 2003) .....	55, 56
<i>Vickers v. Fairfield Med. Ctr.</i> , 453 F.3d 757 (6th Cir. 2006) .....	27, 32
<i>Vuona v. Merrill Lynch &amp; Co.</i> , 919 F.Supp. 2d 359 (S.D.N.Y. 2013) .....	40
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981).....	33
<i>Weinstock v. Columbia Univ.</i> , 224 F.3d 33 (2d Cir. 2000) .....	37
<i>Williamson v. A.G. Edwards &amp; Sons, Inc.</i> , 876 F.2d 69 (8th Cir. 1989) .....	27, 32
<b>Statutes</b>	
28 U.S.C. § 1291 .....	8

**Other Authorities**

*Allen v. Dep't of Homeland Sec.*,  
Appeal No. 0120091819, 2010 WL 497279 (E.E.O.C. Dec. 2,  
2010) .....30

*Baldwin v. Foux*,  
Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16,  
2015) .....29, 30

*Morrison v. Dep't of Navy*,  
Appeal No. 01930778, 1994 WL 746296 (E.E.O.C. Jun. 16, 1994).....30

## PRELIMINARY STATEMENT

Defendant-Appellant Breitling USA, Inc. (“Breitling”) submits this Brief in opposition to the appeal filed by Plaintiff-Appellant, Frederick Cargian (“Appellant” or “Cargian”) from a final judgment entered by District Judge George B. Daniels of the United States District Court for the Southern District of New York on September 29, 2016 granting Breitling’s motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in its entirety.

During the relevant time-period, Breitling employed Cargian as a sales representative. As a sales representative, Cargian’s most important responsibility was to increase sales in his region and otherwise achieve sales goals. During the last few years of employment with Breitling, Cargian failed in this responsibility. In fact, not only did Cargian fail to achieve his sales goals during his last few years of employment, his sales actually decreased, even when changes to his territory are taken into account. Furthermore, during his last few years of employment, Cargian had an extremely negative attitude towards his job and his boss. He consistently refused to acknowledge any negative feedback that he received. Because of his poor performance and negative attitude, Breitling terminated Cargian’s employment.

In his Complaint, Cargian, who identifies as a gay man, alleges that Breitling discriminated against him on the basis of his gender and sexual orientation in

violation Title VII of the Civil Rights Act of 1964 (“Title VII”), New York State Human Rights Law, Executive Law § 296 *et seq.* (“HRL”), and the New York City Human Rights Law, New York City Administrative Code § 8-107 *et seq.* (“CHRL”).<sup>1</sup> Cargian claims that Breitling treated him less favorably than the other non-gay, sales representatives and that because he is not a “stereotypical male” sports fan, was the subject of gender stereotyping. Cargian also alleges that because of his gender, and sexual orientation, Breitling reassigned some of his sales territory to a heterosexual male during Cargian’s last year of employment with Breitling, reduced his salary, and ultimately terminated his employment.

In granting summary judgment to Breitling, the District Court made three key rulings. First, relying on this Court’s holding in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the District Court held that sexual orientation discrimination falls outside the scope of Title VII’s protections. Second, Appellant failed to make out a *prima facie* case of gender discrimination or gender stereotyping because he failed to present evidence that he suffered an adverse employment action under circumstances giving rise to an inference of intentional discrimination based on his membership in a protected class. Third, the Court declined to exercise supplement

---

<sup>1</sup> In his Complaint, Cargian also asserted that Breitling discriminated against him in the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, the HRL, and CHRL. Appellant does not appeal that portion of the District Court’s final judgment dismissing Cargian’s age discrimination claims.

jurisdiction over Appellant’s HRL and CHRL claim because of “the multiple issues of state [and city] law” raised under those statutes.

This Court should uphold the District Court’s ruling granting Breitling’s motion for summary judgment in its entirety and dismissing Appellant’s claims. This Court’s precedent holds that sexual orientation discrimination is not a cognizable claim under Title VII. In fact, nearly every appellate court that has reviewed the issue has reached the same conclusion. Furthermore, there have not been any changes to the text of Title VII nor Supreme Court precedent since this Court held that Title VII sexual discrimination claims are not cognizable. Therefore, this Court should follow its own precedent and reaffirm the fact that a sexual orientation discrimination is not cognizable under Title VII.

Appellant and Amici<sup>2</sup> would have this Court believe that the legal landscape has changed to such a degree that this Court should ignore its own precedent. Appellant and Amici are incorrect for at least three reasons.

---

<sup>2</sup> Breitling notes that a number of counsel who represent Amici in this matter have now also entered appearances for the Appellant. *See* Docket Nos. 56, 58, 92, and 9. After Appellant filed his initial brief (and before these counsel represented him), these parties requested permission from Breitling to file Amicus briefs, to which Breitling consented. Curiously, after the amicus briefs were filed, these counsel have now submitted notices of appearance to represent Appellant.

Presumably, such additional appearances were entered for Appellant either to allow counsel for the Amici to participate in the reply brief or to participate in oral argument, both of which an Amicus party would otherwise not be entitled to do without the Court’s permission (*see* FRAP 29(a)(7) and 29(a)(8), respectively).

First, while the Supreme Court has recognized that gays, lesbians, and bisexuals have certain Constitutional rights, those rulings have no impact on whether Title VII protects against sexual orientation discrimination. Indeed, whether a state can prevent gays and lesbians from marrying provides no guidance on whether Congress intended to prohibit private employers from engaging in sexual orientation discrimination. Nor does it provide any insight into whether Title VII protects against sexual orientation discrimination. As such, Appellant's and Amici's argument that the Constitutional protections to gays, lesbians, and bisexuals warrants a reversal of this Court's precedent is misplaced.

Second, Appellant and Amici contend that this Court should defer to the U.S. Equal Employment Opportunity Commission's ("EEOC") recent pronouncement that Title VII does protect against sexual orientation discrimination; however, this Court does not need to give any deference to such pronouncement. Under Supreme Court precedent, a court need not give deference

---

Breitling emphasizes that under well settled precedent, only issues that were raised in an appellant's principal brief are preserved, and issues or arguments not raised in the principal brief cannot be raised in a reply brief or at oral argument. *See Robinson v. Harvard Protection Services*, 495 Fed.Appx. 140, 141 (2d Cir. 2012) (Summary Order); *Hughes v. Bricklayers & Allied Craftworkers Local 45*, 386 F.3d 101, 104 n.1 (2d Cir. 2004); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995). Accordingly, Appellant's counsel (some of whom who are also counsel for Amici) should not be permitted to end-around this rule and make arguments in the reply brief or at oral argument that were not addressed in the Appellant's principal brief, even if those arguments appear in the Amicus briefs.

to an agency when the issue is one of pure statutory construction, the agency is wrong, or the agency reverses itself without explanation. All three are present at bar.

Whether Title VII includes sexual orientation discrimination within its parameters is an issue of pure statutory construction. Therefore, there is no reason to defer to the EEOC's interpretation of Title VII.

Further, the EEOC's interpretation that Title VII includes protections against sexual orientation discrimination is clearly erroneous. This Court has already held that it does not. In fact, nearly every Circuit Court that has addressed the issue has held that sexual orientation discrimination claims are cognizable under Title VII. Thus, there is no reasons to defer to the EEOC on this issue.

In addition, the EEOC has reversed its two decade contention that sexual orientation discrimination claims are not cognizable under Title VII without explanation. Indeed, in 1994, the EEOC ruled that sexual orientation discrimination claims were not cognizable under Title VII. This position was reaffirmed as recently as 2010. Yet, in 2015, the EEOC suddenly decided that sexual orientation discrimination was cognizable. However, the EEOC did not explain why it was reversing its two decade precedent that found to the contrary. Accordingly, the EEOC's position is not owed any deference.

Third, Appellant and Amici argue that sexual orientation discrimination is akin to associational discrimination. This is nothing but a red herring. There is nothing in the record to suggest that Appellant was treated differently *because* of his association with anyone. Indeed, there is nothing in the record to support any contention that Appellant was treated differently because he associated with men or with women. As such, this Court should ignore Appellant's and Amici's associational discrimination argument and reaffirm its precedent that sexual orientation discrimination is not covered by Title VII.

Moreover, even if sexual orientation discrimination claims were cognizable under Title VII, the District Court was correct in granting Breitling summary judgment. There is simply nothing in the record to support an inference that the adverse employment actions that Cargian suffered were the result of sexual orientation discrimination. Nor is there anything in the record to suggest that Breitling's stated reason for reducing Cargian's sales territory, cutting his salary, and eventually terminating his employment were a pretext for illegal discrimination. In fact, the record shows that Breitling took such actions *because* of Cargian's poor performance. Cargian has not and cannot show otherwise. Accordingly, the District Court correctly granted Breitling's motion for summary judgment dismissing his federal claims with prejudice.

From his Brief, it is apparent that Cargian has abandoned his gender-stereotyping claim under Title VII. In fact, Cargian does not make any arguments that the District Court erred in dismissing such claim. Therefore, this Court should affirm the District Court's dismissal of Appellant's Title VII gender stereotyping claim.

Finally, the District Court did not abuse its discretion in declining to exercise supplemental jurisdiction over Appellant's HRL and CHRL claim. Longstanding precedent of this Circuit is that it is not an abuse of discretion for a district court to decline to exercise supplemental jurisdiction over state and local law claims when the court has dismissed all claims over which it has original jurisdiction. That is exactly what happened in this case. After dismissing all federal claims, the District Court declined to exercise jurisdiction over Cargian's state and local law claims; thus, it could not have abused its discretion in doing so.

Accordingly, for all of the reasons set forth herein this Court should affirm the District Court's decision in its entirety to grant Breitling's motion for summary judgment.

## **JURISDICTIONAL STATEMENT**

Plaintiff-Appellant, Frederick Cargian, appeals a final judgment entered by District Judge George B. Daniels of the United States District Court for the Southern District of New York on September 29, 2016. In its final judgement, the District Court granted Defendant-Appellee Breitling USA, Inc.'s ("Breitling") motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and dismissed Appellant's federal claims with prejudice and declined to exercise supplement jurisdiction over Appellant's state and municipal law claims.

Appellant filed its Notice of Appeal on October 24, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Breitling neither disputes the timeliness of the appeal, nor that the appeal is from a final order of the District Court.

**COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Did the District Court err as a matter of law in concluding that sexual orientation discrimination is not a cognizable claim under Title VII?

Suggested Answer: No, the District Court's ruling was proper as a matter of law, as, to date, nearly every Circuit Court of Appeals including this Court that has reviewed the issue has found that sexual orientation discrimination is not a cognizable claim under Title VII.

2. Did the District Court err in granting summary judgment to Breitling?

Suggested Answer: No.

3. Did the District Court abuse its discretion in declining to exercise supplemental jurisdiction over Appellant's HRL and CHRL claims.

Suggested Answer: No.

## **STATEMENT OF THE CASE**

Breitling promotes and sells high-end watches in the United States. It is a wholly owned subsidiary of Breitling SA, a high-end manufacturer and distributor of watches. Appellant is a former Breitling sales representative.

This case concerns claims of employment discrimination. On February 17, 2015, Appellant filed a complaint against Breitling in the Southern District of New York. The complaint alleged that Breitling discriminated against Appellant and ultimately terminated his employment based on his age, gender, gender stereotyping, and sexual orientation in violation of Title VII, ADEA, the HRL, and the CHRL.

At the conclusion of discovery, Breitling moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On September 29, 2016, United States District Court Judge George Daniels granted Breitling's motion in its entirety, dismissing Appellant's complaint. On October 24, 2016, Appellant filed the instant appeal. The appeal does not challenge that portion of Judge Daniels' decision dismissing the age and gender stereotyping claims.

## COUNTERSTATEMENT OF FACTS

### **A. Background**

Breitling is in the business of selling and distributing high-end watches in the United States under the “Breitling” brand name. (A12, A49, and A301.<sup>3</sup>) To that end, Breitling employs sales representatives. (A49 and A301-304.) Each sales representative is responsible for a specific geographic region or territory to which he or she is assigned. (A49 and A302.) Each geographic territory is divided into a specific number of accounts, which are also called “point of sales” or “doors”. (*Id.*) The size of a sales representative’s geographic region and the number of doors within a region can fluctuate from year to year. (A65 and A302.)

The job duties of a sales representative include: increasing sales within the his/her geographic region; achieving sales goals; selling wholesale Breitling watches to retail dealers; traveling to each account in the geographic region and meeting with the retail agents; helping work on displays and presentation of Breitling product in retail stores; helping train retail agents on the Breitling brand; opening new accounts; providing weekly activity reports to management; and ensuring each account has the correct product and inventory. (A49, A83-85, and A301.) In the beginning of each year, Breitling management meets with each sales representative to discuss the prior year’s performance and their sales goals for the

---

<sup>3</sup> All references to “A\_” refer to the parties’ Joint Appendix previously filed with this Court.

current year. (A51-52 and A306.) In addition, at the beginning of each year, sales representatives and Breitling execute agreements, which contain, among other things, each sales representative's sales goals for the year, bonus potential for the year (and the formula by which the bonus, if any, would be calculated), and annual salary. (A50, A197-A211, and A304.)

Each sales representative's actual sales are tracked through Breitling computer system to which each sales representative has access. (A68, A69, A157-159, A181-182, and A307-308.) For each sale that is made, the invoice for that sale is submitted to Breitling, inputted into Breitling's computer system, and attributed to the respective sales representative. (A68, A157-159, and A307-308.)

In addition to the "Breitling" brand, sales representatives are also responsible for servicing "Tourneau" brand accounts. (A68 and A307.) In some years, Tourneau sales were counted separately from the other sales in a sales representative's territory. (*Id.* and A189-190.) However, in other years, Tourneau sales were aggregated with Breitling sales in a sales representative's territory. (*Id.*) In any given year, if Tourneau sales were excluded from a sales representative's territory, they were excluded for all sales representatives; conversely, if Tourneau sales were included in a sales representative's territory, they were included for all sales representatives. (A68, A149-150, A191-193, A307.)

In September 2010, Breitling hired Thierry Prissert to replace Marie Bodman as President. (A48, A131, A133, and A303.) For approximately three to six months, Breitling had a presidential transition period during which time Mr. Prissert and Ms. Bodman shared the duties of President. (A49-50, A132, A151, and A303.) During the transition, Mr. Prissert and Ms. Bodman met with the sales representatives to discuss their performance and set their sales goals for 2011. (A52, A132, A151-152, and A303.) Prior to her departure, the sales representatives reported to Ms. Bodman. (A81 and A303-304.) After Ms. Bodman left, the sales representatives reported to Mr. Prissert and Charles Anderson, who was promoted to Breitling's Sales Manager in 2011. (A50, A66, A81-82, and A303-304.)

#### **B. Compensation and Sales Goals of Sales Representatives**

Throughout the last ten years of Cargian's employment at Breitling, the compensation for sales representatives included two components: base salary and bonus. (A50 and A304.) From 2011-2013, Mr. Prissert, along with Breitling Vice President Sebastien Amstutz, set the annual salary for each sales representative. (A53, A170, and A309.) In setting base salaries, Mr. Prissert and Mr. Amstutz took into account the sales representative's seniority at Breitling, and the sales representative's performance. (*Id.* and A171.)

Breitling tied the bonus to a sales representative achieving specified sales goals and qualitative criteria. (A50-51, A67, A168, and A305.) While the specific formula for calculating a bonus changed from year to year, in any given year, the formula was the same for each sales representative -- there were no variations among the sales representatives. (*Id.*)

While the bonus potential for the sales representatives and the formula by which it was calculated fluctuated from year to year, it was always partially based on a sales representative's ability to meet the sales goals established for his/her respective territory. (*Id.*) If a sales representative met or surpassed his/her sales goals, he/she would receive his/her full quantitative bonus potential; if he/she failed to meet the sales goals, he/she would receive a bonus that was less than the full potential bonus. (*Id.*)

As a part of the process of sales representatives' sales goals being set, sales representatives would submit their own proposed sales goals for the upcoming year. (A67, A115, A119, and A307.) Management and each sales representative would then meet in January or February of each year to discuss the prior year's performance and the sales goals for the current year. (A51-52 and A306.) Ms. Bodman, Mr. Prissert, Mr. Amstutz, and Mr. Anderson were present at the 2010 yearly sales meeting (which occurred in January or February 2011) with each sales representative. (A119-120 and A306.) Mr. Prissert, Mr. Amstutz, and Mr.

Anderson were present at 2011 and 2012 yearly sales meetings (which occurred in January or February of the following year) with each representative. (*Id.*) Further, since 2010, all of the sales representatives would receive monthly or semi-annual emails from Breitling management informing them of their monthly and/or year-to-date sales for their territory. (A69, A158-159, A179-180, A213-220, and A308.)

From 2011-2013, Mr. Prissert, in consultation with Mr. Anderson, made the final decision regarding what part of the qualitative bonus each sales representative would receive. (A51, A169, and A305.) The conditions for the qualitative portion of the bonus changed yearly, but it generally included criteria such as the number of account visits a sales representative made, the number of trainings a sales representative conducted, and how often a sales representative submitted weekly activity reports (“call reports”) to management. (*Id.*)

### **C. Appellant’s Employment at Breitling**

In February 1990, Breitling hired Cargian as a training manager. (A78 and A301.) By 1996, Cargian had become a Breitling sales representative and continuously worked in that role until his employment with Breitling ended on December 31, 2013. (A79-80 and A301.) During his employment as a sales representative, Cargian’s geographic region was the Northeast region, which, depending on the year, covered accounts from Maine to Virginia. (A40.)

In 1999, Breitling hired Annie Sommer as a sales representative. (A86 and A302.) At that time, Ms. Bodman, Breitling's then President, decided to reassign part of Cargian's previously assigned territory to Ms. Sommer (mostly New England and part of New Jersey). (*Id.*) In 2003, Breitling hired Mr. Anderson as a sales representative. (A65, A87, and A302.) At that time, Ms. Bodman reassigned some of Cargian's territory to Mr. Anderson (including Delaware, Maryland, Washington DC, and Virginia territory). (*Id.*)

In 2011, Breitling promoted Mr. Anderson to sales manager, and reassigned his territory to other sales representatives. (A66 and A302.) Cargian was assigned accounts in Delaware, Maryland, the District of Columbia, and Virginia, all of which he had previously serviced. (*Id.* and A88.)

Until 2011, Cargian reported to Ms. Bodman. (A81-82.) After Ms. Bodman left Breitling in 2011, Cargian's direct supervisor until his employment with Breitling ended were Mr. Anderson and Mr. Prisster. (A50, A81-82, and A303-304).

### **1. Appellant's Compensation**

In 2010-2012, Cargian's base salary at Breitling was \$230,000. He was the highest paid sales representative during those years. (A53, A200, A 204, and A309-310.)

In 2013, as will be discussed below, Cargian's base salary was reduced \$196,000. (A54, A209, and A310.) Nevertheless, in 2013, Cargian was the third highest paid sales representative at Breitling. (A54 and A310.)

## **2. Appellant's Performance**

While employed at Breitling, Cargian had a number of performance issues, which ultimately led to the termination of his employment. (A56-58.)

### **a. Appellant Failed to Meet His Sales Goals**

Cargian did not achieve his sales goals at Breitling. (A56, A76-77, and A310.) In 2011, Cargian's sales goals, which was set by Ms. Bodman, were \$24,995,000 (including Tourneau sales). (A53, A200, and A315.) During 2011, Mr. Prissert and Mr. Anderson reduced Cargian's sales goals to \$23,760,000. (A70, A229, and A315.) In 2011, Cargian's sales at Breitling were approximately \$18,767,811 (including Tourneau sales) or 79% of his sales goals for the year. (*Id.* and A223.) In 2011, Breitling employed seven sales representatives and Cargian was the sales representative who achieved the lowest percentage of his sales goals. (A52, A70, and A315-A316.) Further, Cargian's 2011 total sales increased by only 5% from 2010, which was the lowest percentage increase among the sales representatives. (A70, A229, A282, and A316.)

In 2011, Cargian proposed that his 2012 sales goals should be \$16,475,000, excluding Tourneau. (A284-286 and A316.) Mr. Prissert in consultation with Mr.

Anderson set Cargian's sales goals for 2012 at \$16,500,000 (excluding Tourneau). (A53, A69, A204, and A316.) In July 2012, Mr. Prissert reduced Cargian's 2012 sales goal down to \$15,400,000. (A288 and A316.) At year-end, Cargian's 2012 sales excluding Tourneau were \$12,899,581, thereby achieving only 83.76% of his sales goal, and were \$938,000 less than Breitling had sold in the same territory the prior year. (A70, A232-233, A290, A292, and A316-317.) In 2012, Cargian was the sales representative who achieved the lowest percentage of his sales goals and whose total sales for his/her territory decreased by the largest percentage, (6.8%). (A71-72, A232-233, A292, and A317.)

In 2013, Mr. Prissert, in consultation with Mr. Anderson, decreased Cargian's sales territory and thus set his 2013 sales goals (excluding Tourneau) at \$11,200,000. (A53-54, A71, A142, A209, A317 and A319.) In September 2013, Mr. Prissert decided to reduce Cargian's sales goal to \$10,640,000. (A294 and A318.) In 2013, Cargian's sales were \$8,452,072 (excluding Tourneau), thereby achieving only 79% of his sales goal; this was \$1,357,393 less than Breitling had sold to the same accounts the year prior (a decrease of 13.8%). (A71, A113-114, A297 and A318.) In 2013, Breitling employed eight sales representatives. (A53 and A318.) In 2013, Cargian was tied for achieving the second lowest percentage of his sales goals. (A71 and A318.)

**b. Other Performance Issues**

During his employment at Breitling, Cargian received negative feedback about his performance from Ms. Bodman, Mr. Prissert, and Mr. Anderson. (A92-93 and A310.) Ms. Bodman criticized Cargian about his schedule and about “trying to get a certain account’s numbers up and asking why that specific account wasn’t doing better.” (A93-95 and A311.) Mr. Anderson criticized Cargian’s performance on similar topics, including questioning Cargian’s schedule, the number of account visits Cargian had made, and the performance of certain accounts. (A95-96, A98, and A311.) Similarly, Mr. Prissert criticized Cargian’s performance about the “numbers per account,” accounts that were underperforming, and Cargian’s schedule. (A97 and A311.) Ms. Bodman, Mr. Prissert, and Mr. Anderson all sent Cargian emails asking him to make more sales visits and to increase his sales. (A235-268 and A311-314.)

Further, on various occasions, Ms. Bodman, Mr. Prissert, and Mr. Anderson told Cargian that his sales numbers were low. (*Id.*) They informed him that he needed to increase his sales significantly. (*Id.*) They sent him numerous emails stressing that they were concerned about his sales numbers and imploring Cargian to increase his sales. (*Id.*) They discussed his declining sales at mid-year and year-end reviews, telling him that he needed to increase his sales. (*Id.*)

In addition, Cargian received written warnings unrelated to his poor sales. (A105-106, A278-280 and A315.) At a Breitling event in Reno in 2012, Plaintiff lost his temper. (A104 and A314.) As a result, he cursed at Mr. Prissert in front of colleagues and guests, which Mr. Prissert heard. (A57, A278, and A315.) Therefore, on September 18, 2012, Mr. Prissert issued Cargian a written warning, which stated, among other things, that Cargian had engaged in inappropriate behavior and cursed at the President of Breitling. (*Id.*)

In April 2012, Breitling learned that Cargian had been giving envelopes of cash to Breitling employees. (A57, A280 and A315.) Mr. Prissert believed that this was inappropriate and thus sent Cargian an email informing him that it was not acceptable at Breitling to give cash envelopes to colleagues. (*Id.*)

In 2013, Breitling discovered that a sales representative may have submitted false expense reports to Breitling for personal expenses, and misused his Breitling credit card. (A59, A136-137, A185-186, and A322-323.) In order to confirm their suspicions, Breitling conducted an investigation led by Mr. Anderson. (*Id.*) The investigation confirmed Breitling's suspicions and as a result, Mr. Prissert issued that sales representative a written warning. (A59, A138-139, and A323.)

### **3. Changes to Plaintiff's Sales Territory**

At the beginning of 2011, because of Mr. Anderson's promotion, Ms. Bodman assigned Cargian additional territory for which he would be responsible as

a sales representative; he received approximately 20 additional “doors” or accounts to cover. (A54, A66, A88, A153, A302, and A318-319.) As a result, Breitling increased his bonus potential. (A54 and A319.)

During 2011, Cargian requested that Southern Virginia, territory which had been added to his region, be assigned to a different sales representative. Breitling acquiesced to this request and reassigned the Southern Virginia territory to sales representative Rick Lambert. (A54, A66, and A319.) When the Southern Virginia territory was reassigned to Mr. Lambert, Cargian’s bonus potential was not reduced and Mr. Lambert’s was not increased. (*Id.*)

At the end of 2012 or the beginning of 2013, Mr. Prissert decided to reduce the territories of Cargian and Ms. Sommer. (A54, A142, and A319.) Mr. Prissert made this decision because: (i) the sales performance of these two sales representatives for 2012 was below expectations; (ii) he wanted to give both individuals a chance to succeed in a smaller territory; (iii) they were not handling the larger territory in the right manner, and (iv) sales in the two territories were not where they needed to be. (A54-55, A143, and A319-320.) In 2013, at the time that Cargian’s and Ms. Sommer’s territories were reduced, Mr. Prissert decided to reduce their base salaries as well. (A55 and A320.)

Mr. Prissert testified that at the same time that he decided to reduce Cargian’s territory and salary, a new sales representative would need to be added

to cover territory removed from Ms. Sommer and Cargian. (A55, A144-145, and A320.) Mr. Prissert decided to promote Isaac Schafrath, who had previously been the Vault Manager at Breitling, to sales representative. (A55 and A320.) Mr. Prissert testified that the reason he decided to promote Mr. Schafrath to the sales representative position was that: (i) Mr. Prissert preferred to promote someone from within the company, (ii) Mr. Schafrath was performing well in his current job, (iii) Mr. Schafrath had expressed a desire to do something else within the company, and (iv) Mr. Schafrath knew the brand and product very well. (A146-148 and A320.)

Mr. Schafrath did not perform well as a sales representative and as a result, Mr. Prissert demoted Mr. Schafrath. (A56.)

#### **4. Miscellaneous Events**

There is a yearly watch and jeweler show in Basel, Switzerland that the sales representatives attended. (A71, A174, and A321.) Generally, the city is so crowded during the show that there is a shortage of hotel rooms and the Breitling sales representatives, who attend, have to share rooms. (*Id.*) Cargian was invited to attend the 2011 watch and jeweler show and he would be sharing a room with Ms. Sommer. (A299, A321, and A440.) On March 15, 2011, Cargian sent an email to Monika Pieren, the head of events at Breitling Switzerland. (A299 and A321.) In the email, Cargian wrote: “Annie and I are rooming together this year

because of the mix of men and women from the US...Annie and I have shared rooms all the years we have attended. I think this is my 18<sup>th</sup>, Annie's 17<sup>th</sup>." (*Id.*)

Ms. Sommer is a good and close friend of Cargian's. (A89-90 and A321.) They socialize together and have taken vacations together. (*Id.* and A177-178.) On some of those vacations, Ms. Sommer and Cargian have shared a room. (A178, A182, and A322.)

In 2013, Breitling held an event in Crewe, England. (A14 and A59-60.) Mr. Prissert decided which sales representatives would attend. (A59-60.) He invited those sales representatives with clients who were attending the trip and whom Mr. Prissert believed had the highest potential for new Breitling business. (*Id.*) Both male and female sales representatives were not invited to the event in Crewe.<sup>4</sup> (A786.)

---

<sup>4</sup> Cargian asserts that all of the male sales representatives were invited except him. This is simply not true and not supported by the record. (A786.) In fact, Cargian makes factual statements throughout his brief that are not supported by the record. For example, on page 11 of Appellant's Brief and without any citation to the record, Cargian claims that in 2012, Cargian had the highest sales goals. This is not true. (A233.) On page 6, Cargian states that Breitling's marketing material has women with "exposed breasts"; yet the documents in the record to which he cites do not show any women with exposed breasts. (A553-556.) On page 33 of Appellant's Brief, Cargian claims that "the documents also substantiate that Cargian's sales performance was better than other sales reps who were retained." This is also untrue as those documents show that in 2013, Cargian was the second worst performing sales representative, and, in 2011 and 2012, he was the worst performing sales representative. (A56, A70-72, A76-77, A113-114, A229, A232-233, A282, A292, A297, A310, and A316-318.) Appellant's Brief is replete with such inaccuracies, exaggerations, and false statements.

## **5. Termination of Appellant's Employment**

Because of his poor sales performance in 2011-2013, Mr. Prissert decided to terminate Cargian's employment. (A57-58 and A323.) Therefore, on December 17, 2013, Breitling informed Cargian that it would not be renewing his employment contract and would be terminating his employment with Breitling, effective December 31, 2013. (A15 and A323.)

## LEGAL ARGUMENT

### POINT I

#### THE DISTRICT COURT DID NOT ERR IN HOLDING THAT SEXUAL ORIENTATION DISCRIMINATION IS NOT COGNIZABLE UNDER TITLE VII

Breitling's internal anti-discrimination policy, which is distributed to all employees, prohibits the Company from discriminating against employees on the basis of their sexual orientation. However, Breitling's internal policies go beyond the confines of the law, being more protective of employees than the law requires. Indeed, based on binding Second Circuit precedent, sexual orientation discrimination is not cognizable under Title VII and the District Court did not err in following such precedent.

#### **A. *Simonton* Mandates Dismissal of Appellant's Sexual Orientation Discrimination Claim**

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), after reviewing in detail the legislative history of Title VII and the subsequent attempts to amend that statute, the Second Circuit unequivocally held that "Title VII does not proscribe discrimination because of sexual orientation." *Id.* at 36. In reaching this conclusion, the Court noted that "we are informed by Congress' rejection, on numerous occasions, of bills that would have extended Title VII's protections to people based on their sexual preferences . . . [as it] is strong evidence of

congressional intent on the face of consistent judicial decisions refusing to interpret “sex” to include sexual orientation.” *Id.* at 35 (internal citations omitted).

Five years later, in *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), the Second Circuit revisited the issue of whether sexual orientation discrimination was cognizable under Title VII. In *Dawson*, the Second Circuit stated that “to the extent that [plaintiff] is alleging discrimination based upon her lesbianism, [plaintiff] cannot satisfy the first element of a *prima facie* case under Title VII because the statute does not recognize homosexuals as a protected class.” *Id.* at 217-218.

Both *Dawson* and *Simonton* were issued after the Supreme Court issued its decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Thus, the *Dawson* and *Simonton* panels were aware of both of these cases, and, in fact, the decisions reference them in detail. Nevertheless, both the *Dawson* and *Simonton* panels held that sexual orientation discrimination was not cognizable under Title VII.

Further, the Second Circuit recently reaffirmed the fact that sexual orientation discrimination claims are not cognizable under Title VII. *See Christiansen v. Omnicom Group, Inc.*, No. 16-748, 2017 WL 1130183, at \*2 (2d Cir. March 27, 2017). In *Christiansen*, the Court noted that it was bound by the *Dawson* and *Simonton* decisions and therefore it affirmed the dismissal of

plaintiff's Title VII sexual orientation claim. *See id.* This case is no different and therefore Cargian's Title VII sexual orientation discrimination claim was properly dismissed by the District Court.

Moreover, nearly every Circuit Court of Appeals to have reviewed the issue has held that sexual orientation discrimination is not a cognizable claim under Title VII. *See Higgins v. New Balance Athletic Show, Inc.*, 194 F.3d 252, 259 (1<sup>st</sup> Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3<sup>rd</sup> Cir. 2001) ("title VII does not afford a cause of action for discrimination based upon sexual orientation . . . ."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6<sup>th</sup> Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8<sup>th</sup> Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9<sup>th</sup> Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10<sup>th</sup> Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality. . . .

Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”)(internal quotations omitted); *Evans v. Georgia Regional Hosp.*, Case No. 15-15234, 2017 WL 943925, at \*5 (11<sup>th</sup> Cir. March 10, 2017) (“Evans next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action.”); *but see Hively v. Ivy Tech Comm. College of Indiana*, No. 15-1720, 2017 WL 1230393, at \*7 (7<sup>th</sup> Cir. Apr. 4, 2017) (holding that sexual orientation discrimination is a type of sex discrimination cognizable under Title VII).

Based on Second Circuit precedent and the overwhelming majority of decisions from other Circuits, the District Court correctly held that Cargian did not have a cognizable claim of sexual orientation discrimination under Title VII. As such, the District Court properly dismissed Cargian’s Title VII claim for sexual orientation discrimination.

**B. The Legal Landscape Has Not Changed  
To Warrant Overturning *Simonton***

Appellant and Amici contend that, since *Simonton*, the legal landscape has changed and therefore *Simonton* should be overturned. Specifically, they argue that *Simonton* is no longer viable because: (i) the Supreme Court has extended Constitutional protections to individuals based on their sexual orientation; (ii) the EEOC held that sexual orientation discrimination claims are cognizable under Title

VII in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015) and this decision should be given deference; and (iii) *Simonton* cannot be reconciled with *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008). Appellant and Amici are incorrect.

**1. The Fact That The Supreme Court Has Extended Constitutional Protections To Gays and Lesbians Has No Impact On Title VII**

Appellant contends that because the Supreme Court has extended constitutional protections to individuals based on their sexual orientation, *Simonton* should be overturned. Appellant's argument is specious.

While it is true that the Supreme Court has expounded upon the rights of gay, lesbian, and bisexual individuals in the constitution context, *see, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that state statute criminalizing homosexual sex violated Due Process Clause of the Constitution); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) (holding that definition of marriage under the Defense of Marriage Act violated Fifth Amendment to the Constitution); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that state statutes that prohibited homosexual marriages violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment), these cases simply have no bearing on whether Title VII protects employees of private employers from discrimination on the basis of their sexual orientation. These cases do not say anything about whether sexual

orientation discrimination is cognizable under Title VII.

Further, they do not impact *Simonton's* conclusion that Title VII does not recognize such claims. Whether the state can prohibit gays and lesbians from marrying does not address the issue of whether Congress intended to include sexual orientation discrimination within the parameters of Title VII. Nor do these decisions give any insight into whether sexual orientation discrimination claims are cognizable under Title VII, which is purely an issue of statutory construction, not Fourteenth Amendment jurisprudence. Accordingly, the fact that Constitutional Rights have been extended to gays, lesbians, and bisexuals has no bearing on the issues in this case and do not present a reason to overturn the long-standing precedent of this Circuit that sexual orientation claims are not cognizable under Title VII.

## **2. No Deference Should Be Given To The EEOC's *Baldwin* Decision**

In *Baldwin*, the EEOC flip-flopped, overturning twenty years of its own precedent to rule that Title VII protects employees from sexual orientation discrimination under Title VII.<sup>5</sup> 2015 WL 4397641 at \*1. Appellant and Amici

---

<sup>5</sup> Previously, the EEOC had ruled that sexual orientation discrimination was not cognizable under Title VII. *See Morrison v. Dep't of Navy*, Appeal No. 01930778, 1994 WL 746296, at \*3 (E.E.O.C. Jun. 16, 1994) (holding that Title does not prohibit sexual orientation discrimination); *Allen v. Dep't of Homeland Sec.*, Appeal No. 0120091819, 2010 WL 4972791, at \*3 (E.E.O.C.; Dec. 2, 2010) ("Complainant claimed that he was discriminated against on the basis of his sexual

argue that this Court owes deference to the EEOC's *Baldwin* decision and therefore *Simonton* should be overturned. Appellant and Amici are wrong.

The EEOC's *Baldwin* decision is not owed any deference under either *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) for at least three reasons. First, the Supreme Court has held that an agency opinion is not owed deference when the issue is one of pure statutory construction. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987). This is such a case. Appellant's sexual orientation discrimination claim turns on whether Title VII's protections cover sexual orientation discrimination. Thus, it is a case of pure statutory construction: does the language of Title VII cover sexual orientation discrimination? Neither the language of Title VII nor its legislative history refer to sexual orientation. *See generally, Simonton*, 232 F.3d 35-38. Indeed, sexual orientation is glaringly absent from the statute. *See Stevens v. State Dep't of Corr.*, No. 1:12-cv-3782, 2015 WL 1245355, at \*7 (N.D. Ala. Mar. 18, 2015) ("Noticeably absent from the statute is any protection against discrimination on account of sexual orientation."). The Second Circuit has already held that based on the text of the statute and its legislative history, Title VII was not intended to cover, and does not protect orientation. Title VII's prohibition of discrimination does not include sexual preference or orientation as a basis.").

against, sexual orientation discrimination. *See Simonton*, 232 F.3d. at 36. As such, this Court need not defer to the EEOC's decision in *Baldwin*.

Second, the Supreme Court has held that *Chevron* and *Skidmore* deference are not warranted, when the agency is "clearly wrong". *See Gen. Dynamics Land Sys, Inc. v. Cline*, 540 U.S. 581, 600 (2004). Here, the EEOC's decision in *Baldwin* is clearly wrong. As set forth above, nearly every Circuit Court of Appeals to have reviewed the issue has found that sexual orientation discrimination is not cognizable under Title VII. *See Higgins*, 194 F.3d at 259; *Bibby*, 260 F.3d at 261; *Vickers*, 453 F.3d at 762; *Williamson*, 876 F.2d at 70; *Rene*, 305 F.3d at 1063-64; *Medina*, 413 F.3d at 1135; *Evans*, 2017 WL 943925, at \*5. More importantly, on numerous occasions, the Second Circuit has found sexual orientation discrimination not to be a cognizable claim under Title VII. *See, e.g., Simonton*, 232 F.3d at 36. As such, the *Baldwin* decision is clearly erroneous and, thus, is not owed any deference.

Third, the Supreme Court has instructed that an agency's opinion is not owed deference when the agency changes its position without a detailed explanation of why it is changing its position. *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *see also INS*, 480 U.S. at 446 n.30 ("An agency's interpretation of a relevant provision

which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view”) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). The EEOC’s decision in *Baldwin* is directly opposite the EEOC’s decisions in *Allen* and *Morrison*. Yet, in *Baldwin* the EEOC does not even reference the *Allen* decision, much less explain why the Agency was reversing itself from the position it took in *Allen* only five years earlier. As for *Morrison*, *Baldwin* briefly mentions *Morrison* in passing in a footnote, but *Baldwin* does not explain why the EEOC is deviating from the holding in *Morrison* that sexual orientation claims are not cognizable under Title VII. *Baldwin*’s failure to explain the reasons for its reversal undermines the *Baldwin* decision, and, thus, under Supreme Court precedent, the *Baldwin* decision is not entitled to deference.

Accordingly, this Court should not defer to the EEOC’s opinion in *Baldwin* and therefore there is no reason to disturb the Second Circuit’s holding in *Simonton* and its progeny that sexual orientation discrimination is not cognizable under Title VII.

### **3. The Second Circuit’s Decision in *Holcomb* Is Inapposite**

Cargian contends that the Second Circuit’s decision in *Holcomb* cannot be reconciled with *Simonton* and therefore this Court should overturn *Simonton*. Cargian’s argument is nothing more than a red herring.

In *Holcomb*, the Second Circuit held that “an employer may violate Title VII

if it takes action against an employee because of the employee's association with a person of another race.” 521 F.3d at 132. In other words, an employee may have a cognizable Title VII claim for associating with individuals of a different race. Cargian contends that under this logic, Title VII prohibits sexual orientation discrimination.

Cargian's argument is misplaced. There is nothing in the record to suggest that Cargian associated with anyone much less that Breitling took an adverse employment action *because* of any such purported association. Indeed, there is nothing in the record indicating that Cargian associated with individuals of a particular class protected by Title VII and that Breitling discriminated against Cargian because of such association. Accordingly, there is no basis for any associational claim at bar. This fact nullifies Cargian's reliance on *Holcomb* and demonstrates that this Court does not need to resolve any purported conflict between *Holcomb* and *Simonton*.

Therefore, the District Court did not err when it relied on *Simonton* and its progeny to reject Appellant's Title VII claim of sexual orientation discrimination.

**4. Christiansen's Concurrence Does Not Alter The Result That Appellant's Sexual Orientation Claim Is Not Cognizable Under Title VII**

In the *Christiansen* concurrence, Chief Judge Katzmman argues that the Second Circuit should reconsider its precedent in *Simonton* in the appropriate case.

*Christiansen*, 2017 WL 1130183 at \*4. Chief Judge Katzmann explains that, in his opinion, sexual orientation discrimination constitutes sex discrimination if (i) it involves a situation where the plaintiff is treated differently because of his or her sex; (ii) it concerns unlawful associational discrimination; or (iii) there is impermissible gender stereotyping.<sup>6</sup> *See id.* However, the record shows that none of these factors are present in the instant case and therefore this is not the appropriate case for this Court to reconsider its holding in *Simonton* that sexual orientation discrimination is not a cognizable claim under Title VII.

First, Chief Judge Katzmann contends that sexual orientation discrimination is sex discrimination if the employer treats similarly-situated employees differently because of their sex. *See id.* at 5. Even if this is true, which *Breitling* does not concede, the record shows that *Cargian* was not treated differently because of his sex. In short, *Cargian* suffered three adverse employment actions: (i) a reduction in his territory; (ii) a salary reduction; and (iii) the termination of his employment. With respect to the first two issues, *Ms. Sommer* suffered similar adverse

---

<sup>6</sup> In finding that sexual discrimination claims are cognizable under Title VII, the Seventh Circuit relied on the first two rationales described by Judge Katzmann. *See Hively*, 2015 WL 1230393, \*5. As detailed herein, the record shows that *Cargian* was not treated differently than similarly-situated employees because of his sex. Nor is there any evidence in the record that he was he treated differently because of his association with any third party. As such, the rationale used by the *Hively* Court to hold that sexual orientation discrimination is a form of sex discrimination does not withstand scrutiny under the facts of this case.

employment actions. Thus, Cargian cannot argue that he suffered a reduction in his salary or his territory because of his sex. As for the termination of his employment, the record shows that Cargian was the poorest performing sales representative and his poor performance was the reason for his termination. His poor performance has nothing to do with his sex. Accordingly, the instant case does not support a claim of sexual orientation discrimination under Chief Judge Katzmann's first theory.

Second, as set forth above, there is nothing in the record to support any claim that Breitling treated Cargian differently because of whom he associated. In fact, there is nothing in the record to suggest that Breitling took any action against Cargian because of his association with certain individuals of a particular class protected by Title VII. Therefore, there is no basis for an associational discrimination claim under Chief Judge Katzmann's second theory.

Third, Cargian cannot show that he suffered from gender stereotyping and more importantly, as set forth below, he has abandoned such a claim. The District Court held that Cargian's gender stereotyping claim under Title VII failed as a matter of law. *See* A799-801. In Appellant's Brief, Cargian does not make any arguments that the District Court ruled incorrectly on this issue. In fact, he does not argue that he was a victim of gender stereotyping. As such, he has abandoned such a claim. *See Hughes v. Bricklayers & Allied Craftworkers Local 45*, 386 F.3d

101, 104 n.1 (2d Cir. 2004) (“On appeal, [Plaintiff-Appellants] have abandoned certain claims advanced below by not raising them in their brief to this Court). Therefore, Chief Judge Katzmann’s third theory of how sexual orientation discrimination falls under Title VII does not support Cargian’s claim.

Accordingly, this is not the appropriate case for this Court to reexamine its holding in *Simonton* that sexual orientation discrimination is not cognizable under Title VII. As such, the District Court’s opinion dismissing Cargian’s Title VII claim should be affirmed.

## POINT II

### **EVEN IF SEXUAL ORIENTATION DISCRIMINATION WAS COGNIZABLE UNDER TITLE VII, APPELLANT CANNOT PREVAIL ON SUCH A CLAIM**

#### **A. Appellant Cannot Support A Prima Facie Case of Sexual Orientation Discrimination Under Title VII**

Even if Appellant had a cognizable Title VII sexual orientation discrimination claim, any such claim would fail because his allegations are solely conclusory and he cannot establish a *prima facie* case. To establish a *prima facie* case of sexual orientation discrimination, a plaintiff must demonstrate the following: (1) he was within the protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000).

Assuming sexual orientation discrimination was a viable claims under Title VII, Breitling would not contest that Cargian is within a protected class (gay man) or that certain adverse actions occurred, specifically his salary reduction and termination. However, Cargian cannot proffer a viable sexual orientation discrimination claim under Title VII because Cargian he show that any adverse employment action occurred under circumstances giving rise to an inference of discrimination. Cargian offers nothing but conclusory and speculative assertions that the adverse employment actions were taken for discriminatory reasons.

**1. Appellant Relies On Speculation And Conclusory Allegations, Which Are Insufficient**

Cargian offers nothing more than “mere unsupported speculation” that he was discriminated against on the basis of his sexual orientation, which is wholly insufficient to meet his *prima facie* burden. *See Ochei v. All Care/Onward Healthcare*, No. 07 Civ. 0968, 2009 U.S. Dist. LEXIS 28993 at \*29 (S.D.N.Y. 2009). Indeed, unlike in *Christiansen*, Cargian alleges no direct evidence of discrimination, nor is there any evidence in the form of remarks or actions showing animosity towards Appellant’s sexual orientation. Cargian himself admits that the decision maker with regard to his termination, Mr. Prissert, made absolutely no comments regarding his sexual orientation.<sup>7</sup> *See* A127 and A322. In the absence

---

<sup>7</sup> Cargian does allege that Mr. Anderson made one comment/joke about his sexual orientation, asserting that Mr. Anderson said “because you’re gay you didn't get

of any such evidence, Cargian cannot establish that Breitling's actions were motivated by discrimination. *See Paulose v. New York City Department of Education*, No. 05-9353, 2007 U.S. Dist. LEXIS 34146, at \*29-30 (S.D.N.Y. 2007); *Garrett v. Garden City Hotel, Inc.*, No. 05-0962, 2007 U.S. Dist. LEXIS 31106, at \*49 (E.D.N.Y. 2007).

Instead, Cargian relies essentially on conclusory allegations that he was treated differently based upon the fact that he is gay. Cargian asserts that as evidence of discriminatory animus toward him on the basis of his sexual orientation, Mr. Prissert assigned him to share a room with Ms. Sommer at an annual Breitling sales trip to Basel, Switzerland. *See* A14. However, this allegation is not evidence of any discrimination against Cargian because *all* of the sales representatives needed to share rooms on the Switzerland trips due to a shortage of hotel rooms. *See* A71. Furthermore, Cargian and Ms. Sommer had in fact chosen to share a room together on occasion when they were on vacation together. *See* A177-178, A182, A299, and A321-322. Cargian admitted that Ms. Sommer was a close friend of his. *See* A89-90 and A321. In fact, on March 15,

---

that.” *See* A128 and A322. However, this joke/comment, made by a non-decision maker, is not sufficient to establish an inference of discrimination in relation to Cargian's termination. *See Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 56 (2d Cir. 1998) (“Stray remarks, even if made by a decision maker, do not constitute sufficient evidence [to support] a case of employment discrimination.”)

2011, Plaintiff wrote an email to the head of events of Breitling, Switzerland requesting a specific kind of room for himself and Ms. Sommer for the Switzerland trip, and stating “Annie and I are rooming together this year because of the mix of men and women from the US...Annie and I have shared rooms all the years we have attended. I think this is my 18<sup>th</sup>, Annie’s 17<sup>th</sup>.” *See* A299. Cargian and Mr. Sommer had voluntarily chosen to share rooms on some occasions, and Cargian stated in an email that he and Ms. Sommer had been sharing rooms for years, long before Mr. Prissert joined Breitling. Therefore, even if Cargian and Ms. Sommer were assigned to share rooms on the Switzerland trip, this is not evidence of sexual orientation discrimination.

In fact, Appellant cannot cite to any specific or direct evidence that any actions that he believes were discriminatory had anything to do with his sexual orientation. He simply relies on conclusory assertions, which he cannot do. *See Moccio v. Cornell University*, 889 F. Supp. 2d 539, 528 (S.D.N.Y. 2012) (observing that conclusory allegations are not enough to support an inference of discrimination); *see also Vuona v. Merrill Lynch & Co.*, 919 F.Supp. 2d 359, 370 (S.D.N.Y. 2013) (“[C]onclusory allegations or denials cannot by themselves create a genuine issue of material fact”). Indeed, at summary judgment, Cargian cannot rely on mere allegations, denials, conjectures, or conclusory statements, but must present affirmative and specific evidence showing that there is a genuine issue for

trial. *See Kulak v. City of N.Y.*, 88 F.3d 63, 71 (2d Cir. 1996); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 902 (1990) (“‘conclusory’ allegations unsupported by ‘specific’ evidence will be insufficient to establish a genuine issue of fact”). Appellant cannot do so and therefore his sexual orientation claim was properly dismissed.

As for the decrease in Cargian’s territory, reduction of his salary, and termination of his employment, there is simply nothing in the record to support that such adverse actions – the only adverse actions that Cargian suffered – were due to his sexual orientation. Rather, the undisputed facts show that these adverse actions were taken because of Cargian’s poor performance, *see* A54-55, A57-58, A143, A319-320, and A323, not for any discriminatory animus.

Simply put, Appellant has not presented evidence to show that any of the alleged adverse actions taken by Breitling were motivated by discriminatory animus based upon his sexual orientation. *See Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir. 2004) (“The non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful”) (quoting *D’Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998)); *Hawana v. City of N.Y.*, 230 F. Supp. 2d 518, 528 (S.D.N.Y. 2002) (observing that conclusory assumptions are not enough to support an inference of discriminatory motives); *see also Scott v. Coughlin*, 344

F.3d 282, 287 (2d Cir. 2003) (“Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment”). Accordingly, even if cognizable under Title VII, Cargian’s claim of sexual orientation discrimination would fail as a matter of law.

## **2. Appellant Reliance On A Purported Macho Atmosphere Is Illusory**

Cargian contends that there was a “macho atmosphere” at Breitling and this atmosphere somehow is evidence that the adverse employment actions taken against Cargian were based on his discriminatory animus. Cargian’s assertions are far-fetched and do not support his sexual orientation discrimination claim.

Cargian claims that the “macho atmosphere” consisted of: (i) talking about sports; (ii) Breitling’s marketing materials were aimed at heterosexual men; and (iii) there is allegedly offensive artwork in the office of the President of Breitling’s parent company in Switzerland. None of these allegations support Cargian’s claim.

Talking about sports or being excluded from discussions because one is not a sports’ fan does not evidence sexual orientation discrimination. Indeed, being a sports fan or having an interest in sports is a *hobby* that is not, in and of itself, a stereotypical notion about how men and women behave nor does it disproportionately affect individuals based on their sexual orientation. In short, Cargian cannot demonstrate that not being a sports fan evidences sexual orientation

discrimination, resulting in his suffering any adverse employment action at the hands of Breitling.<sup>8</sup> *Cf. Dawson*, 398 F.3d at 217-18 (holding that plaintiff produced no evidence from which the Court could plausibly infer that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action at the hands of the employer).

Breitling's marketing materials also do not demonstrate sexual orientation discrimination. Breitling has used automotive and military symbols (including its "bomb girl" pinup image from World War II) for decades and well before Mr. Prissert, the primary alleged discriminator, joined the company. *See* A61. Appellant has not and cannot demonstrate how these marketing materials impacted his employment, much less that because of these marketing materials, he suffered an adverse employment action. *See* A800.

Similarly, Cargian has not shown how artwork that hangs in the office of the President of Breitling's parent company had any bearing on the decisions made with respect to Appellant's employment. Indeed, Cargian does not explain how as a result of such artwork, he suffered an adverse employment action because of his sexual orientation. And there is nothing in the record to suggest that the artwork influenced his employment in any manner, much less a discriminatory manner.

---

<sup>8</sup> Further, contrary to Cargian's assertion, there is nothing in the record to support Appellant's assertion that Breitling treated him or anyone else differently because the individual lacked an interest in sports.

Accordingly, Cargian cannot show that any adverse employment action that he suffered gives rise to an inference of sexual orientation discrimination. Therefore, even if sexual orientation discrimination were cognizable under Title VII, Cargian could not prove a *prima facie* case of discrimination.

**B. Appellant Cannot Show That Breitling's Actions Were A Pretext For Sexual Orientation Discrimination.**

Even if Appellant could prove a *prima facie* case of sexual orientation discrimination – which he cannot do – Cargian cannot show that Breitling actions were a pretext for unlawful discrimination. As such, the District Court correctly granted summary judgment to Breitling.

Cargian does not dispute that Breitling has articulated legitimate non-discriminatory business reasons for the employment actions it took. Rather, he contends that such business reasons were a pretext for discrimination. However, he relies solely on conjecture and speculation, unsupported by admissible evidence, to challenge Breitling's business decisions. Cargian argues that Breitling's business decisions were a pretext for discrimination because: (i) Cargian was given "unattainable" sales goals; (ii) the documents supporting Breitling assertion that Cargian had poor sales numbers are unreliable and "inadmissible"; (iii) Cargian's performance prior to 2011 was allegedly superb and thus the extensive performance criticism that he received must have been done to "paper" his file; (iv) the timing and fact of Mr. Schafrath's promotion; and (v)

Breitling unfairly disciplined Cargian and did not treat him in the same manner as a “similarly-situated” employee. These arguments are wholly without merit.

### 1. Appellant’s Sales Goals

Cargian alleges his 2011 sales goals were set by Mr. Prissert to be intentionally “unattainable”. However, these sales goals were not set by Mr. Prissert<sup>9</sup>, rather they were set by Ms. Bodman, who Cargian does not accuse of discrimination. *See* A53 and A300. Cargian now claims by affidavit that “it was Prissert who had the ultimate responsibility for setting the unobtainable goals.” *See* A694. However, Cargian has no personal knowledge as to who set his 2011 sales goals; he played no role in the process of setting the goals. Thus, his assertion as to who set his 2011 sales goals is pure speculation and should be rejected. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 131 n. 12 (2d Cir. 2004) (district court free to disregard speculation in affidavits); *Flaherty v. Filardi*, 2007 WL 163112, \*4–5 (S.D.N.Y. Jan. 24, 2007) (disregarding

---

<sup>9</sup> Cargian cites *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) for the proposition that uncorroborated testimony of an interested witness is not typically considered on a summary judgment motion. However, *Reeves* actually states that the court should give “credence” to evidence that is not contradicted and from a disinterested witness, and is silent about whether uncorroborated testimony of an interested witness should be considered on a motion for summary judgment. In fact, the Court can certainly accept the facts set forth in Mr. Prissert’s and Anderson’s declarations because all statements made therein are based on their personal knowledge. *See Shannon v. New York City Transit Authority*, 189 F.Supp.2d 55 (S.D.N.Y. 2002) (motion to strike party-employee’s affidavit denied, as it was based on personal knowledge).

inadmissible portions of plaintiff's affidavit in analyzing summary judgment motion).

Regarding 2012, Cargian's claim of "unfair" sales goals is utter nonsense. Although he claims his 2012 sales goals were also set unfairly high, he submitted his *very own* proposed 2012 sales goals to Breitling, which were virtually the same number that was actually set as his 2012 sales goals. *See* A119, A204, A284-286, A307, and A316. In addition, in 2012, Mr. Prissert reduced Cargian's sales goals to a level below the level that Cargian initially proposed. *See* A284-286, A288, and A316. Thus, his assertion that his 2012 sales goals were unfairly set cannot withstand scrutiny.

As for 2013, Cargian does not even argue that his sales goals were unfairly set or were somehow unachievable. Nevertheless, Mr. Prissert and Mr. Anderson reduced Cargian's sales goals during the middle of 2013. *See* A294 and A318. Yet, he still could not meet this reduced sales goal, and he offers no explanation as to why he could not achieve this reduced figure. *See* A71, A113-114, A297, and A318. Thus, Cargian's assertion that he was given unrealistic sales goals is nothing but a post-hoc excuse for his poor performance and they certainly do not demonstrate that Breitling's action were a pretext for discrimination.

Moreover, even if Cargian disagrees with *how* his sales goals were set, "the [law] does not prevent an employer from establishing unrealistic job performance

standards, if indeed they were, nor does it prevent micro-management.” *Getler v. Cornell Weill University Medical College Dept. of Surgery*, 2007 WL 38276, at \*10 (S.D.N.Y. 2007). Therefore, Cargian’s complaints about his sales goals does not establish pretext.

## **2. Plaintiff’s Sales Performance**

Breitling’s admissible uncontroverted documentation supports its legitimate business reason for Cargian’s termination - his low sales performance and failure to meet sales goals. Indeed, in his last three years of employment, Cargian did not achieve his sales goals. *See* A56, A76-77, and A310. Further, in two of the last three years of employment, Cargian achieved the lowest percentage of his sales goals when compared to the other sales representatives; in the other year, he was the second lowest. *See* A52, A70-72, A232-233, A292, and A315-A318. In his last three years of employment, Cargian’s sales in his territory increased by the lowest amount among the sales representatives, and in fact decreased in his last two years of employment. *See* A70-72, A113-114, A229, A232-233, A282, A292, A297, and A316-A318. In short, Cargian’s sales performance was terrible the last three years of his employment with Breitling.

In response, Cargian relies on his own sales data and submits speculative, inadmissible evidence that asks the Court to second-guess Breitling’s sales data. In short, Cargian asks the Court to become a “super personnel” department to second-

guess Breitling performance criteria for its employees. *See Faldetta v. Lockheed Martin Corp.*, 2000 WL 1682759, at \*9-10 (S.D.N.Y. Nov. 9, 2000) (“Absent evidence of discrimination, it is not the province of the Court to sit as a super-personnel department that reexamines an entity’s business decisions.”); *see also Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002). This is not permitted. As such, the undisputed evidence shows that Cargian was a poor performer during his last three years of employment. Therefore, Cargian cannot prove that Breitling’s legitimate, non-discriminatory reason for terminating his employment – Cargian’s poor performance – was a pretext for discrimination.

Accordingly, the District Court correctly dismissed Cargian’s Title VII claim.

### **3. The Performance Criticism Appellant Received from Breitling**

Cargian argues that because his job performance prior to 2011 was allegedly superior, the criticism he received and the declines in his performance under Mr. Prissert’s supervision must have been pre-textual. Cargian is incorrect.

Cargian’s uncorroborated allegations regarding his performance prior to 2011 are irrelevant because “sudden and unexpected downturns in performance reports cannot, by themselves, provide the basis for a discrimination action.” *Danzer*, 151 F.3d at 56; *Garrett*, 2007 U.S. Dist. LEXIS 31106, \*45-46 (plaintiff’s receipt of good performance evaluations in the past, standing alone, does not create

a genuine factual issue as to whether discrimination was the actual motive behind plaintiff's discharge).

Accordingly, the mere fact that Cargian believes that he was an excellent performer prior to 2011 are irrelevant and cannot show that Breitling's legitimate, non-discriminatory reasons for Cargian's termination were a pretext for sexual orientation discrimination.

#### **4. The Promotion of Isaac Schafrath**

Cargian's assertion that the timing of Mr. Schafrath's promotion evidences pretext has no support. While Mr. Schafrath testified that in Summer 2012 he accompanied Mr. Anderson on a sales trip, the fact that Mr. Schafrath was independently being considered for a promotion by Breitling does not mean that Cargian's territory and salary were reduced *because* Mr. Schafrath was being considered for a promotion. Indeed, the record shows that Cargian's territory was reduced because: (i) Appellant was not performing well as evidenced by his poor sales numbers, (ii) Mr. Prissert wanted to give Cargian the opportunity to succeed in a smaller territory; and (iii) Cargian's larger territory was not being handled in the right manner and thus it needed restructuring. *See* A143 and A319-320. In addition, at the same time that Breitling reduced Cargian's territory and salary, it also reduced the territory and salary of Ms. Sommer, who is heterosexual. *See*

A54-55. Cargian cannot point to anything in the record to show that Breitling reasons for changing Cargian's territory were false or pre-textual.

Further, Mr. Prissert explained that the reason he decided to promote Mr. Schafrath was that Mr. Schafrath was performing well in his current job, had expressed a desire to do something else within Breitling, and he knew the brand and product very well. *See* A146-148 and A320. Cargian now seeks to second-guess Mr. Prissert's decision to promote Mr. Schafrath, alleging that because Mr. Schafrath did not have specific sales experience, his promotion *must* have been for discriminatory reasons. However, Mr. Prissert explained that when Cargian (and Ms. Sommer) had their territories and salary reduced because the territories were not performing well, Mr. Prissert decided to give Mr. Schafrath a chance as a sales representative<sup>10</sup> as additional territory now had to be covered.<sup>11</sup> *See* A54-55, A142-145, and A319-320.

In addition, Appellant's claim that Prissert favored Mr. Schafrath is undercut by the fact that Mr. Prissert *admitted* retrospectively that it had been a mistake to

---

<sup>10</sup> Nothing in record supports Cargian's claim that Mr. Prissert had any kind of special "relationship" with Mr. Schafrath or that Mr. Schafrath was a member of Mr. Prissert's "inner-circle." Appellant is simply making up facts.

<sup>11</sup> Moreover, from time to time in the regular course of business, Breitling would shift territory among the sales representatives. *See* A65. For example, in 2003, when Mr. Anderson was hired, Ms. Bodman took territory away from Cargian and gave it to Mr. Anderson. *See id.* This territory was reassigned to Cargian when Mr. Anderson was promoted to Sales Manager in 2011. *See* A66.

promote Mr. Schafrath, and Mr. Prissert ultimately demoted Mr. Schafrath. *See* A56. Accordingly, the promotion of Mr. Schafrath does not support Cargian's contention that Breitling's legitimate, non-discriminatory reasons for the adverse employment actions that he suffered were a pretext for unlawful discrimination.

### **5. Appellant's Discipline**

Finally, Cargian alleges that he was treated differently than a similarly-situated sales representative with regard to discipline. Specifically, that he was disciplined more harshly than heterosexual male sales representative "X". This is utter nonsense.

To be "similarly situated," there needs to be a "reasonably close resemblance to facts and circumstances" of a plaintiff's and comparator's cases. *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir. 2001). Here, the facts surrounding Cargian's disciplinary write-up for publicly cursing at Mr. Prissert, his boss and President of the Company, are not comparable to sales representative "X"'s misuse of company funds. Primarily, Cargian takes issue with the fact that an alleged "full investigation" occurred in reference to "X", while Cargian was summarily given a write-up from Mr. Prissert. However, in Cargian case, Prissert was physically present for the alleged conduct and heard the comment, so there was no reason for Mr. Prissert to conduct an "investigation"- he saw and heard what had transpired. *See* A278.

In “X”’s case, Mr. Anderson believed he discovered discrepancies with “X”’s expense reports; therefore, Mr. Anderson and Breitling management spent time analyzing records to determine whether wrongdoing had in fact occurred. *See* A136-137, A185-186, and A322. Furthermore, “X” also received a stern disciplinary warning for his misconduct, and “X” paid back the company funds. *See* A59, A138-141, A187-188, A323, and A581. Cargian has not shown that Breitling treated “X” more favorably, nor are the two incidents comparable to draw any inference about how Breitling treated the two employees.

Accordingly, Cargian cannot show that any of the action taken by Breitling were a pretext for sexual orientation discrimination and therefore Appellant’s Title VII claim was properly dismissed.

### **POINT III**

#### **APPELLANT HAS ABANDONED HIS TITLE VII GENDER STEREOTYPING CLAIM**

In his Opening Brief, Cargian states he is not appealing the District Court’s dismissal of his claim under the Age Discrimination in Employment Act. *See* Appellant’s Brief and Special Appendix at p. 4, n.1. However, Cargian does not address the District Court’s dismissal of his Title VII gender stereotyping claim. Nevertheless, it is clear that Cargian has abandoned this claim.

Under Second Circuit precedent, a party is deemed to have abandoned claims when the party does not raise them in the party's brief. *See Robinson v. Harvard Protection Services*, 495 Fed.Appx. 140, 141 (2d Cir. 2012) (Summary Order) (“Robinson has waived any specific challenge to the district court’s decision because he does not raise any arguments directed at the merits of the district court’s opinion in his opening brief to this court.”); *Hughes*, 386 F.3d at 104 n.1 (“On appeal, [Plaintiff-Appellants] have abandoned certain claims advanced below by not raising them in their brief to this Court); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (holding that issues not raised in an appellate brief are considered abandoned). Here, Cargian present no arguments in his brief as to why the District Court erred when it dismissed his Title VII gender stereotyping claim. In fact, Cargian presents no arguments whatsoever concerning his gender stereotyping claim.

To the extent Appellant asserts that he references his gender stereotyping claim in his Brief any such contention would be unavailing because Cargian *does not argue* that the District Court erred when it granted summary judgment to Breitling on such claim. *See Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (“mere referencing of other claim does not constitute an argument on appeal” and therefore such claims are deemed abandoned.); *see also Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) (holding that

plaintiff abandoned claim where the “brief on appeal contain no argument as to why the district court’s dismissal of the claims asserted . . . was incorrect.”); *Barry v. Mukasey*, 282 Fed. Appx. 902, 903 (2d Cir. 2008) (Summary Order) (“Issues not sufficiently argued in briefs are considered waived[.]”). Indeed, Cargian does not argue that the District Court erred when it granted summary judgment to Breitling on his gender stereotyping claim. Further, any purported references to gender stereotyping in Appellant’s Brief occur under the heading “IF SEXUAL ORIENTATION IS HELD TO BE PROTECTED UNDER TITLE VII THAN SUMMARY JUDGMENT SHOULD BE DENIED AND THIS CASE REMANDED FOR TRIAL”. Thus, Cargian argues that he has a claim for sexual orientation discrimination under Title VII but not gender stereotyping, which is already a cognizable claim. *See Christiansen*, 2017 WL 1130183, \*3. As such, it is clear that Cargian has abandoned his Title VII gender stereotyping claim. *See Jackson v. Federal Express*, 766 F.3d 189, 196 (2d Cir. 2014) (“Where abandonment by a counseled party is not explicit,” the court may infer abandonment “from the papers and circumstances viewed as a whole.”);

Accordingly, Cargian has abandoned his Title VII gender stereotyping claim and the District Court’s decision to dismiss that claim should be affirmed.

## POINT IV

### **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO EXERCISE SUPPLEMENT JURISDICTION**

Contrary to Cargian’s assertion the District Court did not dismiss Cargian’s HRL and CHRL claims “[w]ithout comment”. Rather, the District Court noted that there were “multiple issues of state law implicated by [Appellant’s] remaining claims” and therefore it declined to exercise jurisdiction over Cargian’s HRL and CHRL claims. A802. This decision was entirely correct and in line with Second Circuit precedent.

The decision by a district court to exercise supplemental jurisdiction is reviewed under an abuse-of-discretion standard. *Valencia v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003). Clearly, the District Court did not abuse its discretion in declining to exercise jurisdiction over Cargian’s state and local law claims. Indeed, when a district court dismisses all claims over which it has original jurisdiction, the regular course of action approved by the Second Circuit is for the district court to decline to exercise jurisdiction over any remaining claims under state or local law. *See id.* In fact, Cargian does not argue that the District Court abused its discretion in declining to exercise supplemental jurisdiction over Cargian’s HRL and CHRL claims. This is exactly what occurred in this case and therefore the District Court did not abuse its discretion in following this customary course of action. Indeed, the Second Circuit has routinely held that it would be an

abuse-of-discretion for a district court to exercise jurisdiction after it has dismissed all claims over which it has original jurisdiction plaintiff's federal claims. *See, e.g., id.* at 306.

Accordingly, the District Court did not abuse its discretion when it declined to exercise jurisdiction over Cargian's HRL and CHRL claims and instead dismissed such claims without prejudice.

## CONCLUSION

For all of the foregoing reasons, Breitling respectfully requests that this Court deny Appellant's appeal and affirm the District Court's decision to award summary judgment to Breitling and dismiss Appellant's Title VII claim with prejudice and his HRL and CHRL claims without prejudice.

Dated:           New York, New York   Respectfully submitted,  
                  April 27, 2016

FOX ROTHSCHILD LLP  
By: s/ Glenn S. Grindlinger  
      James Lemonedes, Esq.  
      Glenn S. Grindlinger, Esq.  
      Zev Singer, Esq.  
      100 Park Avenue, Suite 1500  
      New York, New York 10017  
      Telephone: (212) 878-7900  
      Facsimile: (212) 692-0940

*Attorneys for Defendant-Appellee, Breitling  
USA, Inc.*

**CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF  
APPELLATE PROCEDURE 32(A)(7)(C)(I)**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A). It contains 12,353 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font type.

Dated: April 27, 2017  
New York, New York

/s/ Glenn S. Grindlinger  
Glenn S. Grindlinger, Esq.