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November 4, 2015

VIA ECF
Hon. George B. Daniels
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 1310
New York, N.Y. 10007

Re: Cargian v Breitling USA, Inc.
15 CV 01084 (GBD)(HP)

Dear Judge Daniels:

I represent the plaintiff in the above action and write to request:

1. A pre-trial conference pursuant to FRCP 16 requiring the presence of all parties to resurrect the written settlement agreement that was peremptorily withdrawn by Defendant
2. Amending the Scheduling Order to extend discovery dates
3. Permission to allow Plaintiff to amend his pleadings to add Breitling, SA as a Defendant.

To remind the Court, this is an action brought pursuant to Title VII of the Civil Rights Act, ADEA, and the New York City and State Human Rights laws alleging discrimination on the basis of gender, (non-stereotypical male), sexual orientation (gay), and age (over 50). For 23 years, Plaintiff was employed by Breitling USA ("USA"), a fully owned subsidiary of Breitling SA ("SA") , a high end watch maker. He was summarily terminated effective December 31, 2013. As alleged in his complaint, Plaintiff was a prized performer until 2011 when a new president, Thierry Prissert ("Prissert"), was hired by SA to head USA. Since that time, Plaintiff's position was in constant jeopardy. A macho, all boys atmosphere was established and Prissert began treating Plaintiff like one of the girls. He was excluded from sports conversations with Prissert, not invited to his home when other male reps were, not included in marketing events with exposure to the clients, and generally relegated him to the periphery of the sales force. In 2013, Prissert promoted Isaac Schafrath, a married man in his early 30s who had been a

college athlete and was the son of a professional football player, to Sales Representative. Schafrath had absolutely no sales experience at the time, but was nonetheless given part of Plaintiff's territory. Plaintiff's salary was reduced by $34,000. Upon Plaintiff's termination, Mr. Schafrath replaced him as the NE Regional Sales Representative, despite his lack of experience and unremarkable performance the prior year. Plaintiff alleges that these adverse actions culminating in his termination were the result of his sexual orientation–non stereotypical male–and his age.

1. Settlement Conference

On October 13, 2015, after a few weeks of discussion, Plaintiff, in writing, accepted the monetary settlement offered by Defendant, at which time, at the request of Defendant, the scheduled depositions of the primary company witnesses, the first of which was to occur on October 15, were cancelled. Within a few days counsel drafted and submitted to me a written Agreement reflecting the agreed upon financial terms together with the usual releases and secondary provisions. Indeed, as part of the inducement for Plaintiff to accept a financial settlement significantly lower than his demand, counsel suggested a division of the proceeds that would have beneficial tax consequences to Plaintiff. Over the next week or so agreement was also reached on all of the secondary terms. There was one last open issue relating to non-disparagement and references, the concept of which was not really contested. Counsel put forth a very reasonable either/or proposal in terms of language. I informed him that I would speak with my client and we would accept one of his two proposals. It was clear to counsel for both sides that this was a done deal.

On October 28, 2015, the date that the last of the cancelled depositions was to be held, I received a phone call from counsel for the defendant stating that Breitling was withdrawing its settlement offer. Mr. Singer, Defendant's counsel, refused to provide any explanation, reason, rationale, or proposal for any modification of what had been previously fully agreed to claiming any explanation would violate attorney client privilege. Defendant was simply walking away from the fully agreed to terms and the financial proposal it made.

In entering negotiations, I relied on the representations of counsel for the Defendant that the firm had authority to make the final financial offer. Indeed, counsel not only represents Breitling, but it also represents the third party insurer. When the final settlement offer was proposed by Mr. Singer, I was specifically told by him that the financial settlement could be confirmed because any differences between the Defendant and its insurer had been resolved.

Plaintiff is concerned that the Defendant may have been acting in bad faith specifically for the purpose of inducing Plaintiff to cancel their depositions and defer other discovery to prejudice him in pursuit of his claims. When counsel asked that the depositions be adjourned to facilitate settlement discussions, I responded that I could not do that unless we locked in the settlement number. The number was confirmed by Mr. Singer and as a consequence discovery was halted. I was comfortable urging acceptance of a settlement that comes nowhere near making Plaintiff whole. However, resolution today, though not making Plaintiff whole, would allow him to move on and avoid the rigors of litigation.

Given the fact that counsel for both parties have expended many hours to resolution of the claims and that counsel clearly had full authorization from the Defendant and its insurer to make the confirmed settlement offer and the terms were all agreed to, there is reason to believe that with assistance of the Court in meeting directly with the parties, including the insurance company, this settlement is salvageable.

2. Amending Scheduling Order to Extend Discovery Dates

The present Scheduling Order closes discovery on December 31, 2015. The request for an extension is necessitated by Defendant's cancelling all depositions based on its settlement offer. The depositions of three principal witnesses were scheduled for October 15, Charles Anderson, Sales Manager; October 22, Thierry Prissert, CEO; and October 28, Sebastian Amstutz, VP of Finance. These all need to be rescheduled in the same order. Maintaining this order of deposition, which had been heavily negotiated, was critical to Plaintiff. Although I was available starting the week of the 8th of November, the earliest date that Defendant agreed to produce Mr. Anderson was November 23rd claiming personal and unidentified business commitments made him unavailable any earlier. Although there are dates in serial order where both the witness and counsel are available, Defendant's counsel refuses to hold more than one deposition in any week because there are unexplained "moving parts" that make that impossible.

Originally the depositions were scheduled to allow Plaintiff sufficient time for follow up, such as requesting documents not previously produced and only first identified during the deposition. In the past, Defendant's counsel insisted on his full 30 days to make such production. Second, Plaintiff plans to submit Requests for Admissions, which greatly assists the parties and Court's in streamlining the case. Plaintiff obviously needs the deposition transcripts to formulate the Requests, which must be made thirty days prior to the close of discovery. Finally, given the upcoming holidays, much time is lost in November and December. Therefore, the request for an extension of one month extension is more than reasonable.

I also request that the following Amendments be made to the scheduling order: any dispositive motion be made no later than February 16, 2016, opposition by March 7th and Reply by March 25th. This follows almost precisely the time allotment agreed to in the original Order.

3. Permitting Plaintiff To Amend His Pleadings

Plaintiff seeks to amend his pleadings to add SA, the parent company to USA, as a Defendant under the single enterprise theory. The original scheduling order required that all amendments be made by August 7, 2015. However, only through discovery, all of which took months because Defendant contested all requests for corporate information, has Plaintiff obtained sufficient evidence to enable him to make a good faith allegation regarding the single enterprise claim.

The single employer theory, is generally applied to parent and subsidiary companies, requires that the "court must consider whether 'an employee formally employed by one entity…has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity'" *Arculeo v On-Site Sales & Marketing LLC,* 425 F 3d 193, 198 (2d Cir. 2005). Whether two related entities are sufficiently integrated to be treated as a single employer is an issue of fact. The 4 part test established by the Second Circuit is: 1. Interrelation of operations; 2. Centralized control of labor relations; 3. Common management; 4. Common ownership or financial control. *Cook v Arrowsmith Shelburne, Inc.*, 69 F. 3d 1235 (2d Cir. 1995). There is more than sufficient evidence regarding these factors to allow Plaintiff to amend his pleadings to pursue the claim.

In terms of common ownership, management and financial control, Defendant's Rule 7.1 Disclosure Statement identifies that USA is a wholly owned subsidiary of SA. Common management and financial control is evidenced by a document production, pursuant to Magistrate Pitman's Order, which identifies the fact that SA management controls the management of USA. Breitling is a family owned business started by Ernest Schneider, the father of the present President of SA, Theodore Schneider. At all times relevant, Theodore Schneider was and is also the Chairman of the Board of Directors of USA. The second member of the three (3) person USA Board of Directors is Dominique Stolle, an SA employee and member of the Board of Directors of SA. The third USA Board member is Prissert, the present CEO of USA. However, he was hired by SA to this position in 2011 and is subject to termination by the SA Board. .

The officers of USA are also all controlled by SA. Dominique Stolle, of SA, is the Treasurer of USA. Prissert the President and CEO and Amstutz, the VP of Finance were both hired by and are subject to termination by SA and its President Theodore Schneider.

SA also exercises financial controls over USA. Annually, in January or February, a Mr. Fecker (phonetic) from the finance division of SA comes to USA HQ to work on USA's budget development. All budgets, which includes salaries and bonuses, are then submitted to Theodore Schneider whose approval is required. In addition to Plaintiff's knowledge of these facts, in discovery Defendant produced an email from Marie Bodman, former President of USA and now an employee of SA, in which she informs the sales staff that unless they pick up production, SA will not be approving the bonuses.

There is also significant interrelation of operations. Plaintiff was a Sales Executive for USA, but all sales promotions, marketing plans and strategies that he was required to follow were established by SA. USA Sales Executives trained sales reps at the client establishments employing a training system SA established. Any training developed by USA had to be approved by SA before executed. Once a year the several hundred sales representatives from USA and the other worldwide SA subsidiaries were required to attend a sales meeting in Basel, Switzerland to be trained regarding new products and marketing strategies which they were required to follow. In addition, usually about once a year a representative from SA would address a sales conference in USA. Moreover, SA specifically established certain work tools and procedures that the USA sales representatives were ordered to follow such as use of an electronic system called the E-reader system. The E-Reader is an electronic device that each sales rep was required to carry allowing him to analyze sales and assess inventory at the various stores where they sold, including calculating number of sales, style of watch color, income etc. This inventory analysis was automatically sent electronically to USA management and simultaneously to the President of SA, Theodore Schneider, where evaluation of performance was made.

Further, there is deposition testimony from the former head of USA marketing attesting to the fact that SA established marketing policies to be applied in the US. In fact, some of those very marketing tools go to the macho atmosphere at USA which is evidence of the boys' only locker room atmosphere at USA, that Plaintiff submits evidences discriminatory animus. For example, a hand out and a Breitling mouse pad that sales reps were given for their clients featured a half-naked woman riding a bomb—clearly a phallic symbol. This was a required sales tool for USA sales reps.

In addition, the Director of International Sales employed by SA traveled to the US at least once or twice a year to meet with key clients of USA. Typically the Director would travel with USA's Sales Manager, Chuck Anderson and CEO, Thierry Prissert, to meet with key accounts and observe sales functioning. The SA Director would also travel with sales reps to aid in marketing and sales. Over the years she traveled with Plaintiff on about 10 occasions.

Finally, centralized control of labor relations. As described above, the President of SA selects all executives of USA as he does for all subsidiaries, and closely monitors performance. For example, in about 2012, 2013 he assigned his son, Ted Schneider Jr. to USA for training/orientation and ultimately appointed him CEO of Breitling, Canada. Plaintiff was told by Ms. Bodman that although she developed a short list of potential successors, this list was presented to Theordore Schneider, who had ultimate and complete authority to choose the present CEO of USA. Also as described above, SA establishes salary and bonus budgets. Moreover, as described above, the standards by which performance of the sales reps was measured, such as the effective use of sales tools, and the observations of the SA Executives who traveled with sales reps and visited customers, were used in evaluating performance. Discovery also revealed several instances where the president of SA directly addressed his displeasure with Plaintiff and desire to see him terminated or forced out. Finally, one of the Plaintiff's major allegations regarding evidence of gender discrimination was the fact that at the annual sales conference in Basel, Switzerland he was assigned to sharing a room with a female colleague. (Compl. ₱ 29(d)). That assignment was made by Monika Pierren, a manager in special events for SA.

CONSULTATION WITH OPPOSING COUNSEL

I have written to counsel as to each request that I make asking if they consent, and we have further communicated on discovery issues. Some issues were resolved: defendant says it will finally produce the documents previously ordered by Judge Pitman by the end of this week. . Defendant also agrees to the January 31st date for the close of discovery, but does not agree to Plaintiff's proposed schedule for dispositive motions. Defendant does not consent to convening a conference to resurrect settlement nor to allowing Plaintiff to amend his complaint. Finally, we are attempting to resolve the issue of deposition dates, however that question may also need the court's assistance.

No prior request has been made for this relief.

Respectfully submitted,

Janice Goodman
Attorney to Plaintiff

Cc: Zev Singer, Esq. (Via ECF)
Glenn Grindlinger (Via ECF)