



Fox Rothschild LLP
ATTORNEYS AT LAW

100 Park Avenue, Suite 1500
New York, NY 10017
Tel 212.878.7900 Fax 212.692.0940
www.foxrothschild.com

Zev Singer
Direct Dial: (212) 878-7928
Email Address: zsinger@foxrothschild.com

November 6, 2015

VIA ECF

Hon. George B. Daniels
United States District Judge
Southern District of New York
500 Pearl Street, Room 1310
New York, NY 10007

**Re: Cargian v. Breitling USA, Inc.
Civil Action No.: 15-cv-01084**

Your Honor:

We represent defendant Breitling USA, Inc. (“Breitling”) in the above-referenced matter. We write in response plaintiff Fred Cargian’s (“Plaintiff”) November 4, 2015 letter requesting a settlement conference, seeking to amend the current Scheduling Order, and requesting permission to amend his complaint nine months after it was initially filed (and three months after this Court’s Scheduling Order allowed for the amendment of pleadings).

By way of background, Breitling terminated Plaintiff’s employment as a sales representative at the end of 2013 for legitimate and non-discriminatory reasons. Specifically, in the four to five years prior to his termination, Plaintiff’s sales numbers relative to his goals were consistently among the lowest in the company and were steadily declining. Plaintiff regularly acted disrespectfully and inappropriately to his supervisors, including, among other things, cursing at Breitling’s President in front of clients at an event, openly declaring in front of the sales team that he would not work past 5 pm, and making unprofessional remarks in his self-evaluation. It was for these reasons, among others, that Plaintiff was terminated from his employment – it has nothing to do with his age, gender, or sexual orientation.

I. Plaintiff’s Request for a Settlement Conference

During October 2015, the parties engaged in good-faith settlement discussions. The parties did seem to reach an agreement in principle only on the monetary amount. However, even after the money-amount was agreed to in principle, the parties continued through numerous weeks’ worth of heated

negotiations and disagreements over the terms of the potential settlement agreement¹. On October 28, 2015, while these negotiations were still ongoing and before the agreement in principle was fully agreed upon or signed, Breitling informed Plaintiff that it had made the decision to withdraw its settlement offer. As such, there was not a “meeting of the minds” on all terms of an agreement and thus no agreement was reached. Therefore, there is no written settlement agreement to “resurrect.”

Breitling (and its counsel) negotiated in complete good-faith throughout the entire process. Plaintiff’s counsel has resorted to *ad hominem* attacks and baseless accusations of bad faith against Breitling, claiming - without a scintilla of evidence - that Breitling negotiated in bad faith for the purpose of inducing Plaintiff to adjourn discovery and depositions (yet she has failed to explain how this month-long adjournment prejudiced her client, as the depositions have already been promptly rescheduled to take place before the current discovery deadline). As further proof that this meritless and inappropriate accusation is being made merely out of frustration, in the same breath that Plaintiff claims this “prejudice” because of a one month long adjournment of depositions, he also seeks to amend his complaint to add a completely new party (which we urge the Court to deny, as will be discussed below) which, if granted, would certainly prolong and extend discovery in this case.

Similarly, presumably again out of frustration, counsel infers that our “refusal” to inform her of the reasons Breitling was withdrawing the settlement offer is somehow improper. We submit that not only are we under no obligation or duty to inform counsel of our client’s communication with us regarding the settlement, but informing her of our communications with our client regarding their decision-making process on the potential settlement would be a serious ethical violation.

After negotiating in good faith, the parties have failed to fully agree upon or execute any settlement. Breitling submits that this is an ordinary occurrence in litigation and any conference regarding the “settlement agreement” is unnecessary. However, should the Court be inclined to grant Plaintiff’s request for a settlement conference, we respectfully request that the conference be held with the Magistrate Judge assigned to this matter.

II. Plaintiff’s Request to Amend Discovery Order

A. Depositions of Defendants’ Witnesses

The very day that Breitling informed Plaintiff of its withdrawal of the settlement offer, we asked Plaintiff’s counsel what dates she would propose for rescheduling the outstanding depositions. The next day, she requested that Breitling provide available deposition dates for the three defendant witnesses Plaintiff wishes to depose. Within two business days, Breitling provided Plaintiff with 4 or 5 available dates for each witness (and further offered to provide more dates should those not work for Plaintiff). Plaintiff’s contention that the very specific order of the witnesses was “heavily negotiated”, is simply not true – Plaintiff has unilaterally demanded this specific order and there was never any “negotiation” over it. However, in an effort to avoid unnecessary conflict, Breitling agreed to this order and provided

¹ By way of example, at the time that Breitling informed Plaintiff that the settlement offer was being withdrawn, the parties had not yet agreed upon the issues of: Plaintiff’s request for a general release from Breitling, the issues of potential confidentiality and non-disparagement, and what, if anything, the parties’ could say publicly regarding the settlement.

the first available deposition date for the “first” witness in Plaintiff’s self-imposed order.²

At this juncture, we believe there is no need for Court intervention on this issue of deposition scheduling. The depositions of defendant’s witnesses have been scheduled for the end of November and early December, and in fact these dates were provided to Plaintiff (and discussions between the parties regarding scheduling were ongoing) before counsel even submitted her November 4 letter to the Court.

B. Extension of Discovery to January 31, 2016

As indicated to Plaintiff’s counsel when she sought Breitling’s consent, Breitling consents to Plaintiff’s one-month extension request for discovery to end on January 31, 2016.

C. Dispositive Motions Schedule

On November 4, 2015, Plaintiff’s counsel emailed me asking if, in connection with her request to extend the discovery deadline, we would consent to a proposed briefing schedule for any dispositive motions (with the dates she proposes in her November 4 letter to the Court). I responded with a counter proposal, asking for a bit more time to file motions, requesting that the parties agree to: February 29, 2016 as the date by which the parties would have to file dispositive motions, March 21 or March 28, 2016 as the date by which opposition would be filed, and April 8 or April 15 for the reply date. Counsel never responded to our counter-proposal on these dates, but simply wrote to the Court with her own proposed dates, asking that dispositive motions be due merely 13 days after the close of discovery.

Breitling respectfully requests that should the Court grant Plaintiff’s request to extend discovery to January 31, 2016, the Court accept Breitling’s above-suggested dispositive motion briefing schedule. This single-Plaintiff discrimination case is document-heavy (to date Breitling has produced 8,791 pages of document discovery) and Breitling’s request for approximately one month to file any dispositive motion is certainly not unreasonable.

III. Plaintiff’s Request to Amend the Pleadings

A. Plaintiff’s Request is Untimely

According to the Court’s Scheduling Order (Docket No. 16), the time by which the pleadings in this matter could have been amended was August 7, 2015. Plaintiff has not put forth any valid excuse for his delay in seeking amendment of the complaint to add Breitling SA, the parent company of Breitling USA and an entity he has known about from even before he commenced the instant lawsuit. In fact, as discussed above, at the same time that Plaintiff takes issue with a one-month stay of discovery due to good-faith settlement discussions, arguing that this delay “prejudiced” him, he now seeks to add a new party to this litigation nine months after it was commenced, which would no doubt significantly extend this litigation.³ It is apparent the Plaintiff only now seeks to amend the pleadings to add Breitling

² The “first” witness that Plaintiff request was Mr. Charles Anderson, Sales Director for Breitling USA. Mr. Anderson has a personal family medical matter next week, and will be traveling across the country for business the following week (the week of November 16), so his first available date for deposition is November 23, which we offered to Plaintiff.

³ Should the Court grant Plaintiff’s late application to amend the complaint to add Breitling SA as a defendant, that entity would presumably need time to find counsel, answer the complaint, and conduct discovery from the very beginning, including the full document discovery and depositions.

SA as party in retaliation for Breitling USA's withdrawal of its settlement offer. This Court should not condone such tit-for-tat behavior.

Further, the information that Plaintiff uses to argue that Breitling SA is a single employer in conjunction with Breitling USA is information that Plaintiff has had access to and has known about for months. Indeed, the majority of information in Plaintiff's letter requesting this amendment to his complaint comes from the Plaintiff himself, knowledge that he acquired during his employment at Breitling USA (which ended in December 2013) and therefore he certainly was aware of this information since the very beginning of this litigation. In addition, the deposition of the former head of Breitling USA marketing, that Plaintiff makes reference to in his November 4 letter, occurred on June 17, 2015, *two months* before the deadline to amend the pleadings. Also, the "corporate information" that Plaintiff claims there was a "delay" in his receiving (when in reality it was due to a legitimate good-faith discovery dispute), was provided to Plaintiff on August 14, 2015, only a week after the pleadings amendment deadline. Plaintiff has acquired no new information about the relationship between Breitling SA and Breitling USA since that time, and yet has waited three months to make this application.

Plaintiff was fully aware of the existence of Breitling SA well before he commenced this litigation, and in fact on July 27, 2015 counsel for Plaintiff argued to the Magistrate Judge at a discovery conference that Breitling SA and Breitling USA were interrelated (this discussion was with regard to a requested deposition of a Breitling SA employee who was a former Breitling USA employee). Yet, three months after the Court Ordered deadline to amend the pleadings, Plaintiff now seeks to amend the complaint to add this entity. Breitling submits that the very late submission of this application to amend the complaint is merely an effort by Plaintiff, out of frustration with the withdrawn settlement offer, to punitively drag Breitling USA's parent company, Breitling SA, into this litigation. It should be denied.

B. Breitling SA is not Plaintiff's Employer and the "Single Employer Doctrine" Does Not Apply in this Case

Should the Court not agree that Plaintiff's application to amend the complaint is untimely, the application should still be denied because Breitling SA is not Plaintiff's employer and the "single employer doctrine" does not apply here. Therefore, such an amendment would be futile.

Title VII has a specific definition of the term "employer" for the purpose of establishing liability. It is clear based on the record that Plaintiff was at all times an employee of Breitling USA, rather than its parent company, Breitling SA. In determining whether an employment relationship exists between a putative employer and putative employee under Title VII, the courts generally rely on the well-established "payroll method" as "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *Walters v. Metro Educ. Enters.*, 519 U.S. 202, 206 (1997). Here, it is undisputed that Plaintiff appeared on the payroll of Breitling USA and never appeared on the payroll of Breitling SA. Therefore, it is clear that Breitling SA did not have the requisite employment relationship with Plaintiff to be deemed her employer under Title VII.

Since Plaintiff was not an employee of Breitling SA under the payroll method, Breitling SA can only be considered his employer if an exception applies. Plaintiff claims that the single employer doctrine exception applies – it does not.

Under the ‘single employer doctrine’, in limited circumstances, a parent company may be held liable for a subsidiary’s violations of Title VII when the parent company “dominates” the subsidiary to such an extent that the parent and subsidiary can be deemed one and the same. *See Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 250 (S.D.N.Y. 2007). The Second Circuit has developed a four-part test to ascertain whether the parent and subsidiary can be deemed to be a “single employer”. *See Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995). “[A] parent and a subsidiary cannot be found to represent a single, integrated enterprise in the absence of evidence of: (1) interrelation of operations; (2) centralized control of labor relations, (3) common management, and (4) common ownership and financial control.” *Id.* While no factor is dispositive, the courts do focus their review on the second element of “centralized control of labor relations” in determining whether this doctrine applies. *See id.* An evaluation of these four factors weighs heavily in favor of the argument that Breitling USA and Breitling SA are not a single employer and that this exception does not apply to these facts.

On the “interrelation of operations” prong, courts look at various factors including: “(1) whether the parent was involved directly in the subsidiary’s daily decisions relating to production, distribution, marketing, and advertising; (2) whether the two entities shared employees, services, records, and equipment; (3) whether the entities commingled bank accounts, accounts receivable, inventories, and credit lines; (4) whether the parent maintained the subsidiary’s books; (5) whether the parent issued the subsidiary’s paychecks; and (6) whether the parent prepared and filed the subsidiary’s tax returns.” *Velez*, 244 F.R.D. at 252 (citing *Herman v. Blockbuster Entm’t Group*, 18 F. Supp. 2d 304, 309 (S.D.N.Y. 1998)). The court in *Velez* found that the plaintiff’s evidence, including shared office space, access to the same phone directory and intranet services, and the parent’s filing of a consolidated tax return, were not sufficient to establish an interrelationship of operations between the parent and subsidiary. *Velez*, 24 F.R.D. at 252-53 (noting “[i]f such routine connections among corporate affiliates necessitated a finding of interrelated operations, most large corporate families would count as a single enterprises for Title VII purposes.”). Here, Breitling SA does not share office space with Breitling USA; in fact Breitling SA does not maintain office space, own or lease any property, conduct business, or have any employees in the same country as Breitling USA. Additionally, the two entities file separate tax returns, prepare their own respective financial statements, keep separate books and records, and separate bank accounts. Plaintiff’s compensation information from Breitling USA’s payroll provider identifies Breitling USA as their client, and makes no mention at all of Breitling SA. In the aggregate, the degree of “interrelation” between Breitling SA and Breitling USA is nothing more than a “routine connection[] among corporate affiliates” that does not warrant a finding of interrelated operations. *Velez*, 244 F.R.D. at 252.

Contrary to Plaintiff’s assertions in the November 4 letter, no Breitling SA employees come to the United States on a regular basis to discuss finances or budgets with Breitling USA. In fact, while it is true that Breitling SA does indeed approve the annual budget for Breitling USA (as do most parents in the usual parent-subsidiary relationship), such approval is on the macro level- Breitling USA sets its own salaries, bonuses, and specific budget lines items. Once the overall budget is approved by Breitling SA, Breitling USA makes the decision if and how much bonuses are paid to its sales representatives.

In addition, Plaintiff has misstated the relationship between Breitling USA and Breitling SA with regard to marketing and branding of Breitling watches. The product line and the general communication message or marketing theme is determined by Breitling SA, the parent company. However, once that is passed along to the subsidiaries, Breitling USA (or the other subsidiaries) create their own individual

marketing strategy to implement the message. Indeed, this is the very purpose that Breitling USA has its own marketing director – to create and implement various marketing strategies (this is evidenced by the deposition of Breitling USA’s former marketing director, referenced above).

Similarly, Breitling SA provides the general architecture and guidelines with regard to training, but the specific content and rollout of training is customized and developed by the local training team in Breitling USA (and by the training director at Breitling USA, a specific position created for this purpose). It is certainly not true that Breitling SA has to approve all training that is developed by Breitling USA

Like any other parent company, Breitling SA does indeed hold a yearly sales meeting to present its new watch collection. In essence, this meeting is a fair - that takes place during the “Basel World Expo” - similar to a car show where the parent company releases and shows off its collection. It is absolutely not a meeting that lays out any requirements or rules for the sales representatives, despite Plaintiff’s claims.

With regard to the “E-reader” Plaintiff references, he again presents inaccurate facts to the Court. Breitling SA has instituted an “E-warranty” system in which every authorized dealer in the world who carries Breitling watches has one of these systems in their store to automatically activate the warranty for every watch that is sold and to track inventory of watches. This system has nothing to do with the evaluation of performance of any sales representatives, and in fact the stores themselves possess the system, not the sales representatives. As will be discussed, Breitling USA is the sole evaluator of its sales representative’s performance.

In assessing the “control of labor relations” prong, the critical question to be asked is “what entity made the final decision regarding employment matters related to the person claiming discrimination.” *Velez*, 244 F.R.D. at 250. To determine the answer to this question, the courts review various factors including whether: (1) there are separate human resource departments, *see Balut v. Moral Elec. Sys.*, 988 F. Supp. 339, 347 (S.D.N.Y. 1997); (2) there are independent policies and decision-making related to employment status, including hiring, discipline, and termination of employees, *see Meng*, 73 F. Supp. 2d at 404; (3) employment applications are being sent to the subsidiary versus the parent entity, *see Cook*, 69 F.3d at 1241; (4) the subsidiary must clear all major employment decisions with the parent, *see id.*; and (5) employees are routinely shifted back and forth between the parent and the subsidiary, *see Meng*, 73 F. Supp. 2d at 403. Here, all hiring within Breitling USA is done fully on its own accord, with no input or guidance from Breitling SA. In fact, by way of example, Breitling USA’s newest sales representative, Melanie Chudd, had not even met or spoken to anyone from Breitling SA until months after she was hired by Breitling USA.

Additionally, Breitling USA has its own human resource department and employees are not shifted back and forth between Breitling SA and Breitling USA. All performance evaluations, discipline, staffing decisions, hiring decisions, and termination decisions with regard to Breitling USA employees are *solely* determined by Breitling USA, without having to clear any of these decisions with Breitling SA. The Breitling SA Director of International Sales does in fact travel with various salespeople employed by Breitling SA subsidiaries throughout the world, however these trips are *not* to evaluate or judge performance, but rather to observe how the Breitling brands are being marketed and presented in various cities throughout the globe. Ultimately, Breitling SA does not control the labor relations of Breitling USA – it does not make any of the day to day management or personnel decisions whatsoever. Therefore this prong of the single employer test is not satisfied.

The common management prong and common ownership prongs have been deemed to be less important in the eyes of the courts “as they represent ordinary aspects of the parent subsidiary relationship.” *Meng*, 73 F. Supp. 2d at 403. As such, the courts have recognized that the “mere existence” of both common management and common ownership are not sufficient to warrant treating a parent and subsidiary as a single employer for the purposes of establishing liability. *See id.* In determining what constitutes common management, courts provide parents and their subsidiaries a fair degree of latitude. Courts will evaluate evidence demonstrating that there is a separate hierarchy between the parent and subsidiary. *See Balut*, 988 F. Supp. at 347. However, courts have held that even a shared CFO is not sufficient to demonstrate common management where “the two entities maintained distinct management structures”. *Herman*, 18 F. Supp. 2d at 313. Here, the entities do not share common management -- the entities possess separate management structures and they have separate CEO’s, decision makers, and decision making processes . Because Breitling SA is the parent company of Breitling USA, the entities may meet the common ownership or financial control prong, however this finding alone is not sufficient to warrant applying the single employer doctrine. *See Velez*, 244 F.R.D. at 254 (holding that the parent entity’s ownership of the accused subsidiary was insufficient on its own “to support an integrated-enterprise theory of liability.”). Therefore, on the aggregate, the record supports the argument that Breitling USA and Breitling SA are not a ‘single employer’ and that this exception does not apply to these facts⁴.

For all of these reasons, Plaintiff’s late application to amend the complaint should be denied.

We thank the Court for its consideration of all of these matters.

Respectfully submitted,

FOX ROTHSCHILD LLP



Zev Singer

CC: All counsel of record (via ECF)

⁴ Under the New York State Human Rights Law, a similar test has been established, as the four elements to consider in determining whether an entity is Plaintiff’s employer under that statute are whether the putative employer: 1) selected or engaged the servant; 2) paid salary or wages; 3) had the power of dismissal; and 4) had the power of control of the servant’s conduct/performance of work. *See State Division of Human Rights v. GTE Corporation*, 109 A.D.2d 1082, 1083 (4th Dep’t. 1985); *see also, Germakian v. Kenny International Corp.*, 151 A.D.2d 342 (1st Dep’t. 1989) (“The essential element is control over the conduct of another including selection, payment of wages and power of dismissal”); *Bayard v. Riccitelli*, 952 F.Supp. 977, (E.D.N.Y. 1997) (of the factors a court must consider in determining whether a parent should be considered an employer under the Human Rights Law, the “most important ... is the degree of control the parent company exercises over policy making and the means and manner of an employee’s work performance”.) As discussed above in relation to the ‘single employer’ exception, it is clear that Breitling SA does not do the hiring, payment of wages, termination, performance, or disciplinary decisions with regard to Breitling USA employees, nor does it control the day to day work performance or duties of Breitling USA employees.