EISENBERG & SCHNELL LLP
ATTORNEYS AT LAW

February 15, 2016

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

HERBERT EISENBERG
LAURA S. SCHNELL

JULIAN R. BIRNBAUM
Of Counsel

JANICE GOODMAN
Of Counsel
Direct Dial
212-869-1940
jg@janicegoodmanlaw.com

Re: Cargian v Breitling USA
15 CV 01084 (GBD-HBP)

Dear Judge Daniels:

I write in reply to Defendant's opposition to Plaintiff's Appeal from Magistrate Pitman's Order denying permission to reconvene the deposition of Sebastian Amstutz ("Amstutz") for the limited purpose of questioning the witness on belatedly produced documents.

First, I apologize to the Court for mistakenly attributing testimony before Judge Pitman to Defense Counsel instead of myself. Since the Statute of Limitation for an appeal from a Magistrate's Order is short, in preparing Plaintiff's letter memo I relied upon the Rough Draft of the Transcript that I ordered from the reporter. A copy of page 32-33 of that transcript, which is affixed herewith as Exh. A, shows clearly that the cited passage was, in fact, originally attributed to Mr. Singer. I only received the final transcript with the correction the day before the filing of the appeal, which, although not an excuse, is an explanation for the honest error in citations to the transcript. [1]

All other citations to the Court transcript are correct in substance and only the page designations are wrong. I have attached herewith as Exh. B a copy of Plaintiff's original letter motion clearly marking the transcript page corrections. Those corrections are found at pages 3, 4 and 6 of Plaintiff's initial letter motion.

I suggest that Defendant's reliance on the erroneous transcript cite as reason for dismissal of the Appeal is a smoke screen to divert the Court's attention from the paucity of its arguments. Indeed, the point about the complication of the arithmetic was a very minor argument relegated to the last page of Plaintiff's memo. On the other hand Defendant presents no substantive

[1] Defendant's counsel was probably aware that the mistaken attribution was not a devious plot, but an unfortunate mistake because, as he points out, I cite page 32-33 which have nothing to do with the issue.

THE WOOLWORTH BUILDING
233 BROADWAY, SUITE 2704
NEW YORK, NEW YORK 10279
PHONE 212.966.8900
FAX 212.966.2505
eisenbergschnell.com

response to Plaintiff's major points which are: (1) he was denied the right to cross exam the witness regarding the disparity in bonuses between plaintiff and his comparators, particularly those parts of the bonus based on subjective criteria. See Pl. Moving papers at pps 3-5, and 7. Defendant continues to rely solely on the argument that Plaintiff was given every opportunity to inquire about the bonus process, but no place does Defendant address the issue that Plaintiff, without the documents, was denied the opportunity to question why certain comparators received higher discretionary bonuses than Plaintiff. Although the case law makes eminently clear that this type of comparative evidence can be a critical part of the circumstantial evidence available to a plaintiff, *Rosen v Thornburgh*, 928 F. 2d 528 (2d Cir. 1991), the Magistrate erroneously dismissed this argument as "far afield". Exh. E, Tr 38-41. (2) Contrary to Defendant's argument, Plaintiff did attempt to question the witness about the disparities, and whether a misbehaving representative was nonetheless given a discretionary bonus, but was thwarted since without the documents the witness could not recall. See Pl. Moving Letter at p 5.

Finally, Defendant fails to address the case law in this circuit which holds that Courts will typically reopen a deposition where there is new information on which a witness should be questioned. See Pl. Moving papers at 6-7.

Plaintiff is not seeking a second deposition[2] of Amstutz as argued by Defendant, but simply the reconvening of his deposition for two (2) hours limited to inquiry related to the belatedly produced documents. For the reasons stated in his Appeal, Plaintiff submits that the Magistrate's Order should be reversed.

Respectfully submitted,

Janice Goodman (0487)
Attorney for Plaintiff

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

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[2] Defendant does concede that the Amstutz deposition was only 6 hours long. Def. Opp. Letter at p 5.

EXHIBIT A

similar document with the handwriting at the deposition, was testified about for, I think it was more than 30 pages.

MAGISTRATE JUDGE PITMAN: All right. Just one second.

(Pause)

Well, I mean, I'm just doing some quick math, and it looks like, on Mr. Criddle, the handwritten 3,120 was deducted from the total 2012 bonus, 54,385. When you make that subtraction, you're left with the



*** UNCERTIFIED ROUGH DRAFT **

remainder of 51,265, which is the other handwritten number there. So it looks like the 3,120 was deducted from the 54,385.

Was there -- were the numbers on Cargian's summary similar, and did the math work out the same way?

MR. SINGER: Your Honor, we could not really quite figure it out. I

might have spent an hour because it -- you know, it was complicated. We could not figure it out.

MAGISTRATE JUDGE PITMAN: Well --

MS. GOODMAN: But he just --

MAGISTRATE JUDGE PITMAN: But this is basic, second grade arithmetic.

MS. GOODMAN: Okay. But, for example, this special extra bonus was not on Mr. Cargian's, so that's something --

MAGISTRATE JUDGE PITMAN: No -- no, hold on a second. Do you have Mr. Cargian's sales summary?

MS. GOODMAN: No. The document



*** UNCERTIFIED ROUGH DRAFT **

that Mr. Singer references is not here.

I went through the process --

THE COURT: One second. One second.

Mr. Singer, do you have it?

MR. SINGER: I don't, your Honor.

Exhibit B

EISENBERG & SCHNELL LLP
ATTORNEYS AT LAW

February 4 , 2016

HERBERT EISENBERG
LAURA S. SCHNELL

JULIAN R. BIRNBAUM
Of Counsel

JANICE GOODMAN
Of Counsel
Direct Dial
212-869-1940
jg@janicegoodmanlaw.com

**VIA ECF**
Hon. George B. Daniels
U.S. District Court Judge
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New York, N.Y. 10007

Re: Cargian v Breitling USA
15 CV 01084 (GBD-HBP)
Appeal from Magistrate's Order

Dear Judge Daniels:

I represent Plaintiff in the above referenced employment discrimination action and submit this letter motion to appeal from Magistrate Judge Pitman's Order of January 21, 2016 (Exh. A) denying Plaintiff's request for a continuation of the deposition of Sebastian Amstutz ("Amstutz"), because critical documents were not produced until after the Amstutz deposition. Plaintiff requests that he be allowed to question Amstutz for up to two (2) hours on the newly produced documents.

**BACKGROUND**

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). Plaintiff was employed by Breitling USA ("Breitling"), a high end watch maker, as a Sales Representative in the Northeast Region for 23 years when he was summarily terminated effective December 31, 2013.

As alleged in his complaint, Plaintiff's performance was outstanding. He was a prized employee until a new president, Thierry Prissert ("Prissert") was appointed. Prissert raised his sales goal by some $13 million dollars, an amount impossible to reach and an increase significantly greater

THE WOOLWORTH BUILDING
233 BROADWAY, SUITE 2704
NEW YORK, NEW YORK 10279

PHONE 212.966.8900
FAX 212.966.2505
eisenbergschnell.com

than that established for any of the other six (6) regional sales representatives, the comparators in this case. There is now also significant evidence that plaintiff was treated like "one of the girls"–excluded from sports conversations with Prissert, not included in marketing events with exposure to the clients, and generally on the periphery of the sales force.

In 2013, Prissert promoted Isaac Schafrath ("Schafrath"), a straight man in his early 30s with absolutely no sales experience, to Regional Sales Representative and gave him part of Plaintiff's territory. At the same time, Plaintiff's base salary was reduced by $34,000. Upon plaintiff's termination, Schafrath replaced him as the NE Regional Sales Representative, despite his unremarkable performance, subsequently demonstrated by the fact that he was removed from the selling position a year later. Plaintiff alleges that these adverse actions culminating in his termination were the result of his sexual orientation and his age.

**PROCEEDING BEFORE MAGISTRATE JUDGE PITMAN**

On July 29, 2015, over Defendant's objection, Judge Pitman ordered that Defendant "produce the portion of personnel files of the comparators identified by plaintiff that include performance reviews, sales performance...compensation." ( Exh. B) Those comparators are the other Sales Reps employed during the relevant period. Production was made and Plaintiff was assured that everything that could be located was produced.

On December 9, 2015, I conducted the deposition of Amstutz, Vice President of Breitling . Among his responsibilities is participating in the performance reviews of each Sales Rep; making notations on a performance review sheet; and computing and designating the bonus each Rep is to receive as a reflection of his/her performance. At his deposition, Amstutz identified a review document from Cargian's file which reflected comments made at the personnel review session and the bonus' given as a consequence. (Exh. C) Although this document is prepared for all Reps, Defendant had not produced copies of those reviews for any of the other Reps. However, at his deposition Amstutz testified that there were such reviews for all reps and those were retained by the company.

Although it was clear that those documents should have been produced in the summer of 2015 pursuant to Judge Pitman's Order, when I asked for them at the deposition, Defendant's counsel insisted that I put the request in writing and that he would "take it under advisement." To avoid contentious confrontation, I followed that request. To further prolong the process, Defendant's counsel took the position that documents requested at a deposition were like any

other document request and he had 30 days in which to respond. Defendant made no allowance for the fact that these documents should have been earlier produced pursuant to the Judge's Order.

The personnel review sheets which reflected performance review and bonus compensation were not produced until January 11, 2016, 6 months after the Judge's Order and one month after the Amstutz deposition. It was clear that to fully interpret the reviews given to comparators, Amstutz testimony was necessary. For example, in 2012 Plaintiff was given a Special Bonus of $4,800, while from the material received on January 11, 2016 Plaintiff learned for the first time that a comparator, Brian Criddle ("Criddle"), received a special bonus of $8,960. Plaintiff was denied an ability to question Amstutz on why Criddle, a comparator with a similar type of territory, was treated more favorably then Plaintiff since previously we had no documents providing that information. (Exh.D).

On January 18, 2016, I requested resumption of the Amstutz deposition for the limited purpose of questioning based on the documents just produced. Receiving no response, on January 20, 2016 Plaintiff petitioned Judge Pitman to compel production of the witness.[1] Judge Pitman held a telephone conference on January 21, 2016. (Exh E) At that conference Defendant asserted three (3) basic positions:

**1.** Defendant claimed it did not disobey the Court's earlier Order. While not denying that the contested review sheets fell within the definition of documents ordered to be produced, Defendant argued that "in a sense that those [documents] were not kept with the personnel files, for some reason or other, which we don't know–they were in a separate location, which —which we found out later." (Exh. E, Tr. ~~13-14~~ 11-12)[2] Defendant went on to say it did not object to the production.

As Plaintiff pointed out to the Magistrate, this is not a motion for contempt or even for

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[1] Time was of the essence since discovery was scheduled to close on January 31, 2016.

[2] Interestingly, Defendant never explained why it had produced Plaintiff's review form, yet did not realize that there should be similar documents regarding the comparators.

sanctions.[3] Plaintiff's only concern is that he is being prejudiced by denial of the opportunity to cross examine Amstutz on the issue of the disparity in bonuses, particularly as relates to those portions of the bonus based on subjective criteria. Without such ability, Defendant, on its summary judgment motion, may state any reason it wants to justify such disparities, and Plaintiff will be denied an opportunity to contest.

2. Defendant further claimed that Plaintiff spent ample time questioning Amstutz about the bonus structure in general using the Cargian document (Exh. C), and that Amstutz testified that the formula was the same for all Reps and, therefore, there was no need for further deposition. Defense counsel went on to conclude that just because there are different actual numbers that is not really relevant; Amstutz testified fully and completely and counsel had every opportunity to ask about the process, the calculations, how it was done, how it was calculated, and it was Plaintiff's fault if she did not ask the questions. (Exh. E, Tr. ~~15-16~~ 13-14)[4]

Plaintiff submits that contrary to Defendant's position, the difference in numbers, that is how each Rep was evaluated, is very relevant. Although the process may have been the same, and certain formulas were the same, Plaintiff was clearly entitled to cross examine the witness as to the disparity in the numbers, particularly where there were disparities in bonus awards based on subjective criteria.

It is important for the Court to understand Breitlings bonus structure, which has two parts: (a) a certain percentage (which has changed over the years) is based on a quantitative analysis–that is sales made versus goals set. This is a simple arithmetic calculation; (b) the other part is a qualitative analysis some of which is based on subjective criteria.

From year to year the bonus formula was changed. (Exh.F, Tr. 100-101) and the importance of the qualitative (more subjective) bonus was expanded. In 2013 a new qualitative

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[3] Indeed, Defendant's failure to timely produce denied Plaintiff the opportunity to examine Prissert on the material. However, Plaintiff was prepared to limit his request to only reconvening the Amstutz deposition.

[4] Plaintiff believes Defendant's claim that 30 pages of testimony was devoted to this subject is an overstatement. The Court was never directed to the 30 pages being claimed, which in any event is irrelevant.

category was established "overall Quality of Work Bonus" with just vague components such as Reporting, training, visits & planning, Company Policy. (Exh F) Also, as described above, there was no formula for the awarding of Special Bonuses in 2012 and there were clear disparities in treatment where Plaintiff received the third lowest special bonus.

Moreover, Plaintiff indeed did ask the relevant questions about the bonus computations of the comparators based on the one document that she had which was only Exh. C, Cargian's performance/sales review. However, as proof of why the documents were necessary for a full examination, the witness was not able to recall without the documents. For example, counsel attempted to examine Amstutz about whether Sales Rep "X" [5] was given a bonus for quality of work in 2013. This became a significant issue. In 2013, X violated company policy by falsifying information on his expense account first regarding claims of visiting clients, when he was on personal business and second he claimed as business expense what were personal expenses. Defendant became aware of this misbehavior, and Counsel asked Amstutz whether X was given a bonus for qualitative work ("Quality of Work bonus) in light of his flagrant violations of company policies. Amstutz response was "I don't recall what we –I mean I would need to check" I asked if to the best of his recollection did he receive at least some money for the qualitative perfoformance . Again he responded "I would need to check" Then when I tried to probe Amstutz further counsel interrupted further questioning by demanding document requests be directed to him (Exh F, Tr. 118-122). This could lead to critical information relating to pretext. In light of his misconduct, why would he be given a more favorable bonus than Plaintiff. Clearly if I had the document regarding X's salary/performance review that may well have refreshed his recollection to enable him to respond.

Because Plaintiff was denied cross examination on this issue, Defendant may well feel free to say whatever it wants on its summary judgement motion as to why there is a disparity, or how they came up with the special bonus, and subjective bonus calculation. Plaintiff having been denied any ability to cross examine will be unable to contest, or to use the information affirmatively to show disparate treatment.

3. Defendant's final argument was that Plaintiff already exhausted his 7 hour limitation. Plaintiff submits that this fact is irrelevant. The way the deposition was conducted may

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[5] Though not required, to protect an uninvolved third party plaintiff will not use his name.

well have changed based on having the requested documents. Much unnecessary time was spent trying to uncover information not available because of lack of records.

Moreover, the parties were on the record for only 6 hours and 6 minutes. The deposition began at 10:05 and ended at 5:46. There was a 10 minutes recess in the morning; a 1 hour 15 minute lunch break; one 5 minute recess in the afternoon and a second 13 minute recess later that afternoon.

**B. Magistrate Judge's Decision**

In denying Plaintiff's application, the Court adopted Breitling's argument that (1) Plaintiff had every opportunity to question Amstutz about the bonus structure; the formula used to determine bonus; and how each bonus was arrived at ; (2) the handwritten notes on the review papers could be easily deciphered and what could not be was too "trivial" to warrant reconvening a deposition. The Court totally ignored Plaintiff's argument regarding whether X was given a bonus in 2013 despite misbehavior. (Exh. E, Tr ~~35-37~~ 32-34). The Magistrate ultimately dismissed the argument as "far afield". (Exh. E. Tr. ~~43-45~~ 38-41).

For the reasons stated below, Plaintiff requests that the Magistrate's Order be reversed and that the Amstutz deposition be reconvened for two hours of questioning limited to matters related to the newly produced performance/sales reviews.

**LEGAL STANDARDS**

A Magistrate Judge's Order resolving a non-dispositive motion may be set aside if found to be "clearly erroneous or contrary to law." Fed. R. Civ. P. 72 (a); 28 USC § 636 (b)(1)(A). "A finding is clearly erroneous when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Concrete Pipe and Products of Ca. Inc. V Constr. Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622, 113 S. Ct. 2264 (1993)(citation omitted). See also,
*Gualandi v. Adams,* 385 F. 3d 236,240 (2d Cir. 2004). An order is contrary to the law "when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Catskill Dev., L.L.C v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002).

The Court has discretion to make a determination that it is fair and equitable under all the relevant circumstances to reopen a deposition. *Ganci v. U.S. Limousine Service Ltd.,* 2001 WL

4407461 *2 (E.D.N.Y. , Sept. 21, 2011) citing *Innomed Labs LLC v Alza Corp.*, 211 FRD 237,239 (S.D.N.Y. 2002). "Courts will typically reopen a deposition where there is new information on which a witness should be questioned" *Id* citing *Vincent v Mortman, M.D. and Sharon OB/GYN Associates,* 2006 WL 726680 (D. Conn. March 17, 2006). See also; *Sentry Ins. V Brand Mgmt Inc.,* 2012 WL 3288178 *8 (E.D.N.Y. August 10, 2012); *Keck v. Union Bank of Switzerland,* 1997 WL 411931 *1 (S.D.N.Y. July 22, 1997)

**A. The Magistrates Ruling Was Clearly Erroneous**

There is little question but that the disputed documents should have been produced in August 2015 and been available for examination at all depositions. Moreover, there can be little doubt that the performance/sales reviews for 2011 - 2013 are consequential to Plaintiff's claim that he was treated less favorably than the comparators in terms of his compensation once Prissert became President.

As this Court well knows, employers who discriminate are unlikely to leave a smoking gun. *Rosen v Thornburgh,* 928 F. 2d 528,533 (2d Cir. 1991). A plaintiff charging discrimination is usually constrained to rely on the cumulative weight of circumstantial evidence. Id (citations ommitted) Therefore, a plaintiff who must shoulder the burden of proving [pretext] should not normally be denied the information necessary to establish that claim" *Lineen v Metcalf & Eddy, Inc.*, 1997 WL 73763 (S.D.N.Y. 1997).

In this instance, Plaintiff was denied an opportunity to cross examine Defendant's witness on the rationale for granting his comparators higher bonuses, based on subjective criteria. Clearly plaintiff will be prejudiced in responding to the inevitable summary judgment motion having been denied access to this information.

It is also clear that failure to elicit the significant information was not the fault of Plaintiff. As the record demonstrates, counsel asked the relevant questions to ascertain information about the comparators, but the witness was unable to respond without the documents.

Also, the Magistrate's belief that calculating the bonus based on the notations on the personnel/sales review sheets was self evident is misplaced. First, he only had one of the 6 documents in front of him. Second, even Defendant does not agree that the calculating process is simple and easily discernable from the face of the document. When asked by the Magistrate whether the math worked out the same way for all the sales reps, Defense counsel replied "Your Honor, we could not really quite figure it out. I might have spent an hour because you know, it

was complicated. We could not figure it out." (Exh. E. Tr. 32-33).

A continued deposition would not be cumulative or unduly burdensome and is consistent with Plaintiff's entitlement under Rule 26. See: *Ganci.* Plaintiff submits that based on the totality of the circumstances it is clear that a mistake has been made. Fairness and equity requires the reconvening of the deposition and that Plaintiff be given the opportunity to cross examine on the belatedly produced documents.

B. **The Ruling is Contrary to the Law**

In addition to the factors established in Point A above, the Magistrate committed legal error in dismissing as "far afield" Plaintiff's request to question the witness as to whether a comparator (X) was given a bonus based on quality of work despite his submitting false expense and work reports. Clearly, plaintiff should have been entitled to develop evidence as to whether a comparator was treated as harshly as plaintiff for failure to abide by company rules.

**CONCLUSION**

For the above stated reasons, the Magistrate's Order should be reversed; the deposition of Amstutz should be reconvened and Plaintiff should be allowed two hours of examination based on the belatedly produced documents.

Respectfully submitted,

Janice Goodman (0487)
Attorney for Plaintiff

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