

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FREDERICK M. CARGIAN,

Plaintiff,

against

BREITLING, USA, INC.,

Defendant.

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**15 CV 01084 (GBD)(HP)  
Plaintiff's Rule 56.1 Opposition To  
Summary Judgement and In  
Support Of His Claim**

Pursuant to Local Rule 56.1, Plaintiff responds to Defendant's Rule 56.1 statement as follows:

2. It was generally known by Breitling USA ("Breitling" or "defendant") employees, including management, that plaintiff is gay. Goodman Ex. 9<sup>1</sup>; Ex. 27, Prissert Tr. 61:13-15; Ex. 19, Morice Tr. 25:6-26:11; Ex. 28, Figueroa Tr. 153:12-19; Ex. 7, Roman Tr. 102:14-24.

10. Not material fact.

11. Not material fact.

14. In 2011, plaintiff was assigned Maryland, Virginia and D.C. previously assigned to Anderson. Delaware was assigned to him in 2010. At the same time Josh Haley ("Haley") was

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<sup>1</sup> Unless otherwise stated reference is to Exhibits attached to Goodman Affirmation.

assigned parts of Florida previously assigned to Anderson. Cargian Tr. 67:12-72:5; Ex. 4; Def. Admissions ¶¶12, 29.

17. Uncorroborated statement inadmissible in light of Defendant's refusal to produce Bodman for deposition. Defendant's allegation is contested by plaintiff's claim that to his personal knowledge Prissert set the goals. Cargian Aff. ¶ 15; Ex. 9, Cargian Tr. 222:25-223:16; 225:15-226:14.

18. See ¶ 17 supra. Also, defendant's veiled claim that Prissert followed Bodman's formula which explains why the 2011 goals were so high is contradicted by the fact that Plaintiff achieved the realistic goals established by Bodman from 2002 and onward. Cargian Aff. ¶ 8, 9.

19. In 2011 Thierry Prissert ("Prissert"), President of Breitling, Charles Anderson ("Anderson" or "Chuck Anderson"), Sales Manager, Sebastian Amstutz ("Amstutz"), Vice President of Administration, conducted the performance review process. Marie Bodman participated, however, it was Prissert who determined the sales goals for 2011. See ¶ 17 supra.

20. Plaintiff did not report to Bodman in 2011. The full quote reads: **Q.** Starting 1/1/11 you were reporting to Ms. Bodman and Mr. Prissert. **A.** Mr. Prissert Yes. Ex. 9, Cargian Tr. 61:8-18.

28. The criteria elaborated by defendant only applied in 2012. Under Prissert there were open ended subjective criteria. For example, in 2013 60% of the qualitative portion of the bonus was for "overall quality of work" which although listed certain factors such as "Reporting, Training, visits and planning, Company policy" there was no arithmetic formula to determine how each formula was measured. In 2013 Plaintiff was given the lowest rating for qualitative

bonus, thousands of dollars less than Rep. “X” who falsified call reports and expense records. Discussed further *infra*. Ex. 36, (Breitling 8984, 8952).

29. To the extent that a formula is applied, the value percentage may be the same for each rep, but the absolute achievement numbers will vary. For example, in 2012 Cargian was expected to make 275 visits and open 3 new qualified doors, whereas Rep X only had to open 2 new doors to make his qualitative bonus, and Patrick Cawthorne only had to make 250 visits. Management controlled the setting of those goals which differed between and among the reps. Ex. 35 (Breitling. 011, 8939-8944).

32. 2012 was not a particularly good year from Breitling. The overall increase in sales was 2.5% as compared with 2011 where the increase was 25.3% or 2010 when the increase was 34%. Goodman Ex. 10, 33, Cargian Aff., Ex. A, Pl. 0000280. The reps were never told that there was a formula used for determining the amount of the “special bonus” Cargian Aff. ¶ 21.

33. This is an uncorroborated statement by an interested party which the jury is not required to believe.

38. The President had the final say regarding the sales goals. In 2011, Cargian complained from the outset that there was no way that he could be expected to meet the huge increase in his goals for 2011, but his position was dismissed. Ex. 9, Cargian Tr. 208:13-21; 222:25-223:16; 225:15-226:14.

39-41 Tourneau, with corporate offices in New York City, is the largest luxury watch retailer in the world. Cargian originally opened the account for Breitling in the 1990s and continued to service the corporate account until his termination. Since Corporate bought for all of their stores nationally, plaintiff had the major responsibility for sales to the Tourneau stores.

However, the rep for the region would get credit for the sale, until 2012 when it became a house account and the house took the sales credit. Cargian also serviced the account, which included bi-monthly meetings with buyer, analyzing sales data; attending quarterly advertising and marketing meetings, overseeing accounts receivable; negotiating premium display positions; and training Tourneau's telemarketing department. Plaintiff estimates that he spent anywhere from 4-10 hours a week on Corporate Tourneau matters. Plaintiff continued his corporate responsibilities for sales to Tourneau even after it became a house account participating in sales meetings; marketing events, coordinating training; backup paper work. In addition, Plaintiff continued to service the Tourneau sales in his region. Cargian Aff. ¶ 10, 16.

42-50. The computer system was not fully operated until 2011. Ex. 26, Amstutz Tr. 44:3-15. Moreover, Breitling never turned over the underlying documents supporting its summary conclusions, and often witness could not identify how they came up with their figures. Goodman Aff¶. This is particularly true for Defendant's Ex. K, Anderson's PowerPoint charts, heavily relied upon by Defendant for its conclusory analysis. Goodman Ex. 26, Amstutz Tr. 37:9-14; 38:2-20. These charts were manually generated by Anderson, and some of the data conflicted with other charts produced by Defendant. When witnesses were asked to explain the contradictions in the figures of the various charts, they could not. Id Amstutz Tr. 75:5-23; 125:5-126:7. Defendant's reliance on Sommer's testimony is misplaced. First, it was clear she was having trouble understanding defense counsel's question. Ex. 12, Sommer Tr. 69:25-70:7. As she testified, adjustments were made to the material she received and that was done manually; she did not know if the underlying material that was presented to her was accurate; basically she never knew if the figures they gave her were right or wrong, she just checked to see "if they looked right". Id. Sommer Tr. 79:17-83:14. The only sales figures that plaintiff can verify are

those reflected in Ex. A to his affidavit, which are based on Breitling records. See Goodman Aff. ¶ 4-6.

54. Not a material fact. As defendant admitted, Prissert only hired one person Isaac Schafrath (“Schafrath”). This does not address the salaries of plaintiff or the other sales reps, except Schafrath, all hired by Marie Bodman (“Bodman”).

56. Plaintiff was the highest paid sales rep in 2011, because his prior boss, Bodman, valued his service and in 2008 increased his salary to \$230,000. During his three years working for Prissert, Cargian received no increases in salary and in 2013 Prissert decreased his salary by \$35,000. Cargian Aff. ¶ 11; Ex. 4, Def. Admissions.

58. Again this was a salary established by Bodman who had been very critical of the employee (Rick Lambert) including a threat to terminate his employment, as was Prissert. Ex. 4.

60-62. in 2012, Cargian continued to make \$230,000, while Prissert raised the salary of every other rep. Lambert was raised \$18,000 despite the fact that he did not reach most of his qualitative performance goals. Ex 4.

65. This sales person was the newly hired Schafrath who had absolutely no sales experience prior to his promotion from vault manager, where his major responsibility was overseeing the inventory. Ex. 14, Schafrath Tr. 131:24-132:11, Ex. 31-32.

66. Not material without comparison with comparators (the other sales resp.) Moreover, prior to Prissert setting of goals, Cargian always met or came close to his goals, except during the recession when no rep did. Cargian Aff. ¶ 9, 21, Ex. A.

67-68. Every boss criticizes from time to time, but over-all Cargian had an outstanding career before the appointment of Prissert and was highly valued by Bodman. He opened the national Tourneau account and was given responsibility for Breitling's most important client; for 2002 through 2007 he increased his sales over the prior year from anywhere between 15% and 46%. He significantly exceeded his goals for three of those years, and attained 96% and 99% the other two years. In 2010 he increased his sales by 40% and had the highest gross sales. He received several awards for his achievements. Bodman increased his salary from a starting salary of \$35,000 to \$230,000 the highest paid rep. in recognition of his work. Cargian Aff. ¶¶ 8-9, Ex. A. Plaintiff's testimony of Bodman's respect is corroborated by the fact that after his termination she wrote a reference for him praising his "dedication to work," "integrity," "attention to detail," and knowledge. At the time, she was still employed by Breitling SA, Cargian Aff, Ex. B; and by Lisa Roman who was for many years the Director of Market and Training. Ex. 7, Roman Tr. 77:9- 79:4; 97:23-98:1; 85:14-:87:6.

69-71. Not material without comparative data. Moreover in support of the fact that Prissert and Anderson were papering Cargian's file, and holding him to a different standard, in 2012 plaintiff's bonus record shows that his goal was 275 visit and he met that 100% while also meeting his goal of opening 3 new doors. Goodman Ex. 35, Breitling 011. His goals were higher than his competitors. The goals for Haley, Lambert, and Cawthorn's were only 250 visits Ex. 35, Breitling 8942, 8939, 8943. Criddle also had a goal of 275 visits, but he too only had a 2 door goal for new business. Breitling 8940.

74. More papering of the files. A full reading of this document has Plaintiff's answer which was (1) it was a short week and (2) plaintiff nonetheless managed sales of \$620,000 through multiple phone visits. Def. Ex. M.

75. See 74 above. Defendant cherry picks and omits the fact that plaintiff sold \$620,000 worth of goods.

76-81. Plaintiff submits that Prissert and Anderson were papering his file to prepare for termination. 2012 was an unproductive year for the entire staff. Ex. 10, 15, 33. Anderson concedes that plaintiffs "territory has changed dramatically over the last few years" and that business was down for Rolex and Omega. As Anderson said "everyone is struggling." Def. Ex. U. Moreover, Defendant's own documents show that Plaintiff met his sales visit goals, and was making more visited than most of his comparators. Ex. 35, Breitling 011.

82-85. Plaintiff's was demoted effective 2013; a significant part of his territory was assigned to an inexperienced new sales rep and his salary was decreased by \$35,000. The offer to "help" is belied by the fact that Prissert increased his goals by 14%, while all the other reps, except Sommer were increased by 8%-10%. Cargian Aff. ¶ 25; Ex. 12, Sommer Tr. 59:9-14; 85:7-87:15. In 2013 sales reps X, Haley, and Haddad lost more sales than Cargian, yet seemingly no reprimands were said to them. In fact, in 2012 every sales rep but Lambert lost business. Ex. 16, Breitling 633. Further, defendant cherry picks the negative statements and does not mention the comment about the new account plaintiff opened, or the fact that plaintiff stays on top of payables better than the rest and how the staffs all like plaintiff and enjoy his visits. Def. Ex. U, Breitling 606.

86. Omitted is the following testimony by Plaintiff: "I don't think he really would [want me to succeed] because he was, that year [2013], constantly treating me different from all the straight guys that worked at the company...I don't think overall that he did [want me to succeed]." Ex. 9, Cargian Tr. 237:17-25.

88. 2011 was the year that plaintiff's goals were unobtainable, Prissert having increased them by 92% where no other rep was increased more than 76%. Cargian Aff. ¶¶ 14, 18; Ex. 4, Def. Admissions 34-54.

90. Defendant is aware that this was not a serious comment. At this sales meeting reps were told that his goal was at least 4% higher than anyone else; that the reps were losing their comp days; that the mandatory vacation time at Christmas and in the summer would be charged to their earned vacation. Also, it was at this meeting in 2013 that plaintiff was told that his territory was reduced and he was losing \$35,000 in salary. He, therefore, sarcastically said the work week should be reduced to go with these reduction. However, he continued to work as hard as ever, as reflected by the records which show he hardly ever used all of his comp time. Ex. 24; Ex. 12, Sommer Tr. 85:7-87:15.

91. Breitling's Human Rights Manager, Diana Figueroa ("Figueroa"), testified that self-evaluations are not taken seriously and are not a very effective tool. Plaintiff always returned his, but to the extent any of the sales reps bothered to even fill it out, everyone gives themselves a "5" the highest mark. Ex. 28, Figueroa Tr. 142:7-18, 141:17-19; 145:3-22.

92-93. Again defendant misleads by cherry picking deposition testimony. Cargian denies and did deny improper behavior at the Reno client event. His testimony is supported by others, and defendant's statements are inconsistent. Plaintiff did not curse at anyone, and certainly not at Prissert, although he did express in a general way his concern about being mistreated. Since the bowling area was huge (78 lanes) and noisy, Prissert's claim that he heard anything is his uncorroborated statement. In contrast, Sommer corroborated Cargian's version of events. Amstutz admits he was not in the area and heard and saw nothing, his only information came from Prissert. Ex. 26, Amstutz Tr. 214:6-218:4. Most significantly, Prissert sent plaintiff a

warning letter threatening termination, which plaintiff testifies mischaracterizes the events, without even first speaking with him to ascertain the facts. Compare that to the warning letter sent to Rep “X”<sup>2</sup> when it came to management’s attention that he lied on his call reports and claimed over \$8,000 in personal expense as business expenses. Ex. 25. In contrast, when Prissert and Amstutz learned of the accusations against “X” they met with him to hear what he had to say before deciding what action to take. Also, although Prissert in the warning letter says that plaintiff used the “f..” word in front of clients, that contradicts what he said in his original written statement to Amstutz when he claimed it was in the “vicinity” of clients. Ex. 9, Cargian Tr. 127:2-128:21; 168:17-169:15; Ex. 12, Sommer Tr. 60:12-61:21; 87:16-89:13. Goodman Aff. Ex. Breitling.

94. It was not against company policy to give associates cash gifts at Christmas. Ex. 28, Figueroa Tr. 52:24-53:8. Cargian had been giving cash Christmas gifts to assistants for years and it was always known by President Bodman who raised no objection. Cargian Aff. ¶ 29 and 30.

97. Prissert had the ultimate authority over the setting of the 2011 goals. Ex. 9, Cargian. Tr. 208:7-8; 225:15-226:11. Prissert assertion that Bodman set the goals is uncorroborated. A jury is not required to believe uncorroborated statements by interested witnesses. Moreover, Defendant’s refusal to produce Bodman for a deposition make this statement even more untrustworthy. Goodman Aff. ¶ 2.

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<sup>2</sup> Although defendant felt free to publicly identify the rep. plaintiff believes it is not necessary, and that defendant may be violating CT law relating to employee records. Where possible, as relates to this incident, plaintiff will refer to the individual as “X”.

98. Not admissible evidence. The power point presentations were manually compiled by Anderson and the underlying documents were never produced nor authenticated and conflict with other documents produced. See ¶ 44-50 supra.

99. Not admissible evidence since it is based on unreliable, manually gathered documents, where underlying documents were never produced.

101. Not admissible. What is agreed upon is that in 2011 plaintiff was the sales representative who had the highest sales goals and was given the greatest increase in goals over the past year. Ex. 4, Defendant's Admissions ¶¶ 34-54.

102. Not admissible evidence for the reasons stated above. In addition the prior year referred to is 2010. Defendant requested production of the power point records for 2010. On February 2, 2016, after discovery closed, defendant stated it refused to produce on the grounds that it was not relevant. Defendant cannot now rely on evidence that it denied plaintiff on the ground of relevancy. Ex. 39.

103. Not admissible. See Goodman Aff. ¶¶ 44-50, 98-99 101-102 supra.

104. In addition to not being legible, this document has never been authenticated as the document sent with the email.

107. In July 2012 Prissert reduced the sales goals of all sales reps based on difficult sales climate. Ex. 34, Breitling 9087-9098.

109. The document relied upon is not admissible. See ¶¶ 45-50, 98, 99, 101, and 102 supra. A clue to the unreliability of all of these statistics is the fact that defendant, who controls the information, alleges only that the numbers presented are "approximate". Prior to Prissert, all

sales reps knew the goals of the others. Starting in 2011 Prissert no longer published that information. Cargian ¶ 18. However, since defendant relies on uncorroborated documentation, than it concedes that in 2012 no sales rep, except Lambert achieved goal, and Lambert only sold \$21,437 above his goal. Def. Ex. K.

111-113. Not admissible evidence. See above.

116. Sales goals for all reps were reduced. Goodman Ex. 34.

118. In 2013, Plaintiff was demoted to a reduced territory. Plaintiff's sales goals for 2013 were nonetheless increased by 14%, when no other rep was increased more than 10% (except Sommer). Ex. 9, Cargian Tr. 149:5-12; Ex. 12, Sommer Tr. 85:7- 87:15, Cargian Aff. ¶ 34. Although plaintiff does not accept them as accurate, the charts relied upon by defendant concede that in 2013 "X" achieved only 75% of his goals and Haley only achieved 79% of his goals, the same as plaintiff. No one achieved their goal, except Lambert and that was only by about \$8,000. Also, as the evidence of the arbitrary establishment of goal in 2013 Lambert's (Rick) goal was decreased as was Cawthorne (Patrick) and Haddad. Because they had reduced goals, in 2013 is that Lambert and Cawthorne had the highest achievement of goals. Ex. 5, Breitling 636.

120. See response to ¶ 118 supra. Moreover, in addition to usual sales, plaintiff was told if he got corporate sales, a new area of sale, he would be rewarded with commission. He did make one corporate sale, but his YTD sales for 2013 does not reflect the value of that sale. Ex. 12, Sommer Tr. 20:9-13.

121. Not admissible. The information was never authenticated nor underlying documentation offered to establish how capability was determined.

122. This is uncorroborated testimony based solely on Prissert's affidavit. Defendant offers no documentary evidence to support its claim that Plaintiff received 20 more doors and indeed refused to answer the request for admission regarding Haley and Cargian increase of doors in 2011. Although Defendant denied Plaintiff's numerous requests to qualify the answer as the rules require, and as defendant did when it suited its purpose. Cargian Aff. ¶ 17, Ex. 4, Def. Admissions ¶ 1 and 36.

124. Bodman participated in the process, however, it was Prissert who determined the sales goals for 2011. Ex. 9, Cargian Tr. 222:25-223:16; 225:15-226:14.

126. The reasons for the change in bonus goes to defendant's intent. There is no documentary evidence supporting Prissert's assertion. Plaintiff claims that increasing the potential bonus was meaningless. Plaintiff's goal was increased by \$12 million representing a 92% increase in the prior year's goal, higher than any other rep and a 58% increase over what he sold the prior year. Plaintiff on multiple occasions told management that the goal was totally unrealistic. In contrast, Josh Haley, who was assigned Anderson's Florida territory had his goals increased only a \$6.8 mill increase and only an increase of only a 38.9% increase over 2010 actual sales. Ex. 4, Defendant's Admissions ¶¶ 34-36, and 46- 48; Cargian Aff. ¶¶ 14 and 15.

131-132. The jury is not required to believe the uncorroborated statement of an interested witness, Prissert. Moreover, Sommer testified that Prissert never mentioned performance as a reason for the change in territory. Prissert told her that the change was being made so that she and Fred could concentrate on making corporate sales and to give her more of a chance to be with her family. Ex. 12, Sommer Tr. 20:1-13. (emphasis added) There is also evidence that the decision to promote Schafrath was made well before the decision to split the territory. See Pl. 56.1 infra statement re: the promotion of Schafrath as the reason to terminate

Cargian. There is no documentation supporting defendant's claim as to when the decision to promote Schafrath was made. Ex. 13, Anderson Tr. 90:22-91:4.

135. Not material and irrelevant.

136. See ¶ 131-132 supra.

138. Although there were other employees within the company more experienced in sales than Schafrath. Prissert only considered Schafrath. Ex. 14, Schafrath Tr. 114:5-16; Cargian Aff.

¶ 24. Prissert knew that Schafrath had absolutely no sales experience. Anderson, his sales manager, did not think it a good idea and at the time said, it would "take some time to get the kid up to speed" (emphasis added). Ex. 13, Anderson Tr. 325:16-327:19. Vault manager, also called logistics manager, essentially conducts inventory, credits returns process sales orders maintains stock repairs and makes sure shipments are fulfilled. Ex. 32.

139. There was no meaningful mechanism particularly when the perpetrator of the conduct is the President. Haddad complained to Anderson, but he did not think it was worthy of raising with either Prissert or Figueroa, the Manager of HR. Roman wrote a letter contesting a reprimand, and received what was essentially a "how dare you" question me. Prissert sent Cargian a warning letter without any investigation of the facts and sent him a reprimand for alleged violation of a policy that did not exist. Ex. 37.

141. Contradicted by both Cargian and Sommer testimony. Defendant knows that they are misinterpreting the e-mail to Pieren and that both Cargian and Ms. Sommer were very upset by being assigned to share a room. No question but that everyone had to share rooms with someone. Breitling assigned the rooms, and simply told the rep with whom they would share. Sommer was told by Prissert that she was sharing with Cargian. She does not recall complaining

to him possibly because she was fearful of complaining to the President. Over the 18 years of attending the conference, plaintiff almost on all but one prior occasion a room with one of the male reps. Most of the time he shared with Rick Lambert. Many years earlier he had been assigned to share with Ms. Sommer, but that never happened again. Ms. Sommer and Plaintiff, although good friends, did not want to share a room and thought it inappropriate. Ms. Sommer was very uncomfortable, and because she was so upset Plaintiff tried to at least get a larger room to make it a bit more comfortable. When Plaintiff said over the 18 years they shared rooms, as defendant knows, he was simply referring to the fact that he understood that sharing was necessary, not that he and Ms. Sommer shared a room, which they had not. Cargian Aff. ¶ 17(c), Ex. 9, Cargian Tr. 100:3-101:11; Ex. 12, Sommer Tr. 16:11-18:10; 76:5-12.

142. Sommer testified that she would not lie under oath even for a very good friend. Ex. 12, Sommer Tr. 37:16-22. This is a credibility issue for the jury.

144. Inadmissible and irrelevant. Lay persons are not qualified to testify on the ultimate issue of law. Federal Rule of Evidence 701.

146. Defendant again knows it is misstating the testimony. Plaintiff and Sommer did not vacation together. What Sommer was referring to are the vacation trips that Bodman arranged for the reps to take time together before or after the Basel trip. The only other time that the two vacationed together is when Plaintiff attended Sommer's 50<sup>th</sup> birthday party along with her family and friends in Quebec. Ex. 12, Sommer Tr. 73:4-74:17.

152-156. The expense report falsifications were significantly more serious than expressed. For several months Rep "X" submitted call reports claiming to be visiting customers when in fact he was he was simply taking days off for personal enjoyment. For example, he

would claim expenses for travel to Las Vegas to make customer visits, when in fact he was in California. This went on for at least several months. Ex. 26, Amstutz Tr. 118:2-11; 127:24-128:21; 130:19-131:13; Ex. 13, Anderson Tr. 102:7-103:4; Ex. 27, Prissert Tr. 61:19-62:15. When questioned at first he continued to lie to his bosses. Ex. 13, Anderson Tr. 110:13-111:10.

Most significantly, no warning letter and no action was taken against “X” until there was a full investigation including interviewing X”. Ex. 26, Amstutz Tr. 218:12-219:11. Amstutz statement of the process contradicts Prissert who claims he took with or without meeting “X”. Prissert Decl. ¶ 54. Amstutz testified that Prissert wanted to talk with “X” before deciding what action to take. Id. Amstutz Tr. 132:2-3. He further testified that that was also Anderson’s position. Id. Amstutz, who it should be remembered is in charge of HR, testified that there was no disciplinary action taken against “X” except that he had to repay the money he improperly claimed. Id. Tr. 134:20-135:9 “X” was given a “warning” signed by the HR Manager Diane Figueroa, who was not involved in the investigation and has no responsibility for the sales force except for administrative processing of payroll etc. Ex. 28, Figueroa Tr. 79:12-22; Ex. 26, Amstutz Tr. 135:10-14. Contrast this treatment with the peremptory action taken against Cargian, without investigation, for allegedly cursing and the fact that he received a warning from the President of the company, not an uninvolved lower level manager. Also contrast with the reprimand by the President claiming he violated a policy which was not a policy at all.

157. Defendant’s citation to an unrelated matter appears to be a clerical error. On December 17, 2013, Plaintiff was told that he was terminated effective December 31, 2013, but that he should cease performing any duties for Breitling as of that day and he was to return all equipment promptly. Cargian Aff. ¶ 26.

160. In terms of head count plaintiff was replaced by a 33 year straight male, Isaac Schafrath, the inexperienced vault manager who was elevated the year before to take over part of plaintiff's territory. Schafrath failed not only in the amount of sale but also to communicate with clients and management and was terminated from his position as sales rep at the end of 2014. However, unlike plaintiff, another position was created for him. Ex. 14, Schafrath Tr. 276:15-277:3; 275:13-23; 277:2. See Def. 56.1 ¶ supra.

**PLAINTIFF'S RULE 56.1 STATEMENT OF MATERIAL FACTS SUPPORTING HIS CLAIM**

**A. MACHO ATMOSPHERE WHICH EXCLUDES WOMEN AND GAY MEN**

161. The President of Breitling SA, the parent company where staff goes annually for meetings, has prominently displayed in his office a picture of a female spread legged with an exposed crotch showing pubic hairs being leered over by a male figure on the brink of pouncing. Female employees are forewarned about entering. Ex. 19, Morice Tr. 103:25-104:18, Ex. 18.

162. The atmosphere at Breitling USA ("Breitling" or "defendant"), both in the office and in its sales program is overwhelmingly macho. Its merchandising is addressed to straight men. Ex. 8, Vessely Tr. 141:25-144:7, Ex. 17.

163. The boutique retail store operated by Breitling on East 57th Street Manhattan is filled with provocative paintings bordering on the pornographic. There is also a statue again of a scantily clad female with an exposed crotch area, though attired in panties, straddling what appears to be a phallic symbol. Cargian Aff. Ex. C; Ex. 19, Morice Tr: 106:23-107:11.

164. Breitling used images of half-clad females with exposed breasts and crotches in provocative poses as collateral material (coasters, iPad covers, mouse pads, etc.) to merchandise its goods. This material is used to entice heterosexual males. Ex. 27, Prissert Tr. 138:14-140:2; Ex. 8, Vessely Tr. 141:25-144:7.

**B. COMPLAINTS OF GENDER BASED DISCRIMINATION AGAINST WOMEN AND PLAINTIFF**

165. In June 2013, sales rep Beth Haddad (“Haddad”) sent emails to Sales Manager, Charles Anderson (“Anderson”), complaining that Prissert, the President of Breitling discriminated against her because of her gender. Ex. 20.

166. Haddad’s complaint was explicit: “I will not be treated like a second class citizen by [Prissert]... His comments about going to work with the girls in ch[Switzerland] is uncalled for, as is his treatment of the “boys vs the girls.” Id.

167. Anderson’s claim that he did not believe Haddad’s complaint was about gender (Anderson sworn declaration ¶ 14) is patently untrue. At his deposition Anderson was asked: “Q. Did you understand that Ms. Haddad was complaining that she was being treated unfairly because she was a woman. A. Yes.” Ex. 13, Anderson Tr. 54:10-15. He did not report the complaint to Figueroa or mention it to Prissert.

168. Lisa Roman (“Roman”)<sup>3</sup>, formerly the Director of Marketing and Training, complained of sex and age discrimination to Diane Figueroa (“Figueroa”), Manager of HR, describing the boy’s club atmosphere which excluded women and the Plaintiff. Ex. 7, Roman Tr. 34:13-35:2.

169. Roman testified that among other discriminatory acts, Prissert would call her “dear”. He did not call the men dear. Id Tr. 32:9-13.

170. Prissert called plaintiff “darling”. Ex. 9, Cargian Tr. 293:24-294:8.

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<sup>3</sup> Defendant may try to argue that Roman’s employment was terminated in 2014 and therefore is untrustworthy. That is clearly an issue of credibility that the jury can decide.

171. Roman was aware that other women complained including Haddad, sales rep Annie Sommer (“Sommer”) and Manager of Inside Sales, Susan McDonald (“McDonald”). Ex.7, Roman Tr. 36:12-38:1.

172. Roman testified that Prissert treated plaintiff differently than the men and, like the women, excluded him from his inner circle. Id Tr. 99:2-15, 101:12-21.

173. Sommer testified that women were excluded from contact with Prissert because of the boy’s club atmosphere. Ex. 12, Sommer Tr. 31:16-23, 46:11-20.

174. Both Sommer and Roman testified that plaintiff was excluded and treated like the girls. Ex. 12, Sommer Tr. 11:10-22, Ex. 7, Roman Tr. 98:16-99:15; 101:12-21.

175. Melissa Vessely (“Vessely”), the present Manager of Training, who was hired by Prissert, testified that Haddad did share with her concerns about treatment of the female reps. Vessely Tr. 111:14-112:3

176. Prissert did not accept complaints. Roman brought her concerns to the attention of Figueroa. Figueroa suggested that she submit a written response to Prissert’s letter of admonition. Roman did so only to be greeted by a letter from Prissert in which he expressed anger at her for daring to question his authority. In his response, Prissert said “Please understand they you have no say as to how, when or why warnings are delivered”. Ex. 7, Roman Tr. 38:14-39:11, Ex. 37.

177. Plaintiff complained to Roman that he was not invited to the celebrity golfing events which were, among other things, networking opportunities. Ex. 7, Roman Tr. 103:20-25.

178. Roman testified that she would receive lists of attendees to these golfing events from Prissert. She did not recall ever seeing Plaintiff's name on the list of invitees. Ex. 7, Roman Tr. 103:20-104:24.

179. Plaintiff and the 2 female reps were not invited to a major marketing event in Crewe, England, while all the men were invited. Breitling features a Bentley watch live. In 2013 Breitling organized a major trip to Crewe, England, home of Bentley, to promote sales of the Bentley watch with major customers. This was a prestigious event, plus a fun filled weekend with customers who were taken on plane rides and entertained in London. All of the male sales reps were invited to attend, except plaintiff. None of the female representatives were invited. Cargian. Aff ¶ 37a.; Ex. 7, Roman Tr. 91:13-15; Ex. 13, Anderson Tr. 287:6-288:8, 290:13-291:3; Ex. 27 Prissert 116:8-118:18.

180. Prissert claims that Breitling customers with the highest potential for Bentley sales were invited, together with their reps. Defendant's own submission supports the fact that plaintiff had a higher number of Bentley stores (which Breitling calls doors) than 2 of the men who were invited. Ex. 33<sup>4</sup>, Breitling 9063 shows that plaintiff had 25 Bentley doors as compared with Lambert, and Cawthorne with only 22 and 14 respectively. Both of them were invited. Haley had only one more Breitling more than plaintiff and he was invited. Anderson concedes that at least one of plaintiff's customers who was invited was a champion store, meaning it had a high potential for Bentley sales. Goodman Ex. 13, Anderson Tr. 300:22-302:7; Cargian Aff. ¶ 37a.

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<sup>4</sup> Although Plaintiff seriously questions the authenticity of this document, since Defendant chooses to rely on it, it is an admission against interest.

**C. PLAINTIFF'S PERFORMANCE**

181. Plaintiff had an outstanding career at Breitling until Prissert took over as President in 2011, at which point he was excluded from the mainstream of the company and, along with the women was treated as a second class citizen. See generally plaintiff's affidavit.

182. At the time of his hiring in February 1990 as the National Training Manager Breitling had very little exposure in the United States market with sales of only \$2M to \$4M and a staff of only 6 or 7. By 2013 sales grew to over \$100M and the staff to about 140. Pl. Aff. ¶ 8-10.

183. Plaintiff played a significant role in that growth of Breitling. Each year from 2002 through 2007, he increased his sales over the prior year from anywhere between 15% and 46%. Three of those years he was significantly over his sales goal by 118-130%. The two other years he attained 96% and 99% of budget. The recession hit in 2008 and 2009 and everyone lost sales and missed budget. By 2010 plaintiff again increased his sales by 40% and again had the highest gross sales of all reps. Id.

184. In addition, he opened the Tourneau account nationally. Tourneau is the largest luxury watch retailer in the world. The Corporate offices, located in New York, does the buying for its stores throughout the country. This was and is the single largest retail account for Breitling. Plaintiff continued to service that corporate account till his termination, as well as the eight (8) individual Tourneau Stores in the Northeast region. Cargian Aff. ¶¶ 10, 16.

185. Bodman had great regard for Cargian and his performance. His salary was \$35,000 increased to \$230,000 by 2008, which was the highest of any sales rep. Cargian Aff. ¶ 11. Upon his termination Bodman provided a letter of reference lauding him for his "dedication to the job"

“integrity” “attention to detail” and “knowledge”. She provided that endorsement, although she was still an employee of Breitling SA, the corporate parent. Cargian Aff. ¶, Ex B.

186. Roman, who was hired after Cargian, testified to his outstanding reputation. She testified that he was one of the top sales reps from 2002-2010; he had an outstanding reputation, he was easy to work with very responsible and responsive for his accounts; he was always good at getting accounts to marketing events and that Bodman had respect for him. Ex. 7, Roman Tr. 77:9-79:4; 97:23-98:1; 85:14-87:6;

187. Melissa Vessely (“Vessely”), who was hired by Prissert in 2012 and took over as Training Manager, similarly complimented plaintiff’s work. In terms of training, she described plaintiff as “very knowledgeable and well respected by the team.” Ex. 8, Vessely Tr. 110:14-17. She found him cooperative, liked by clients, helpful and generally did a good job. Ex. 8, Vessely Tr. 95:24-96:23; 100:20-24.

188. Plaintiff was also recognized by his peers and he was awarded several Breitling prizes for his work. In 2003 he was recognized by the NYSJewlers Assoc. as “Favorite Watch Rep.” Cargian Ex. C. He was awarded the Sully award by Breitling for producing the greatest increase in sales in 2010 over 2009. The award was presented to him by Anderson and Bodman. Ex. 13, Anderson Tr. 215:20-217:22.

**D. DISCRIMINATORY SETTING OF SALES GOALS**

189. Starting in 2011, when he was first appointed president, Prissert, made the final determinations regarding sales goals. Ex. 9, Cargian Tr. 222:25-223:16; 225:22-226:14.

190. In 2011 Prissert increased Cargian's goal from \$13,000,000 to \$24,995,000 which was an increase of \$11,995,000, \$12M representing a 92.2% increase over the prior year. Ex. 4, Def. Responses to Admissions, ¶¶ 33, 35.

191. Josh Haley ("Haley"), who was also assigned new doors, had his goals raised from \$10,660,000 to \$17,470,00 representing a 63% increase. Id ¶¶ 45-47

192. Patrick Cawthorne's ("Cawthorne") were raised by only \$3M. Id ¶¶

193. Although Plaintiff was assigned three new areas—Maryland and Northern Virginia and D.C., that represented only a net increase of 5 doors. Cargian Aff. ¶ 17.

194. Haley was assigned new territory in Western Florida, which added at least 6 new doors. Ex. 9, Def. Admissions ¶ 29.

195. Sales rep Brian Criddle ("Criddle"), whose region (northern California) is most similar to Plaintiff's in terms of volume (2010 sales \$12,928,861 compared to plaintiff's \$14,643,582) had his goals raised only 4.4M or 63% from \$13,250,000 to \$17,625,000. Id ¶40 – 42.

196. Rick Lambert's ("Lambert") 2010 goal was \$7,355,000 raised to \$12,800,000, or 74%. Id ¶¶ 48 & 50.

197. Although plaintiff did not reach the unrealistic sales goal in 2011, he in fact did increase sales over 2010. Cargian Aff. Ex. A.

198. After establishing unobtainable sales goals, defendant then focused primarily on plaintiff's failure to meet those goals. However, the measure of performance was year over year

performance. In other words, the extent to which the rep increased his/her sales over the prior year. Cargian Aff ¶ 7; Ex. 15-16.

199. Each month the sales reps were given statistics that showed how they did that month over the same month the prior year and at the end of the year they received a summary of their year over year performance. Id.

201. In 2013, although plaintiff's territory was decreased, his goals were increased by 14%. Cargian Aff. 34; Ex. 12, Sommer Tr. 85:7- 87:15.

202. No other sales rep, except Sommer, was increased more than 10%. Ex. 12, Sommer Tr. 85:7- 87:15; Ex. 9, Cargian Tr. 149:5-12.

**E. DEMOTION AND REPLACEMENT BY INEXPERIENCED YOUNGER MAN**

203. In December 2012 Prissert demoted plaintiff by removing significant portions of his territory and promoting Isaac Schafrath ("Schafrath") from Vault Manager to sales rep to take over a large portion of Plaintiff's territory. Because of the decrease in responsibility Plaintiff's salary was to be reduced by \$35,000. Cargian Aff ¶ 23.

205. Schafrath, who was born June 26, 1979, who was 33 years old at the time, was almost 20 years younger than plaintiff. Ex. 14, Schafrath Tr. 10:5-7.

206. At the time of promotion to sales rep, Schafrath had absolutely no prior sales experience. He was working as the Vault Manager, which entailed maintaining inventory, checking orders, maintaining repairs, crediting returns and other miscellaneous work to assure the safe keeping of the valuable products. Ex. 32.

207. Prior to his employment at Breitling, Schafrath's only experiences were short term jobs as a bartender and kitchen assistant; a carpenter's assistant, and a video production assistant for the Ohio State University Varsity football team. Ex. 31.

208. Schafrath fit into the boys club atmosphere of the work place. He had been a student athlete, with a lacrosse scholarship to Butler University, and a father, Dick Schafrath, who was a star football player at Ohio State, and an all pro-player for the Cleveland Browns. On at least 5 occasions that Schafrath can recall, Prissert engaged him in conversations about his father. Ex. 14, Schafrath Tr. 13:11-21; 17:21-18:10; 76:18-78:16.

209. Anderson, Prissert's sales manager with whom he consults, did not think the promotion a good idea. At the time he said, it would "take some time to get the kid up to speed" (emphasis added). Ex. 13, Anderson Tr. 23:5-17; 325:16-327:19.

#### **F. DISCRIMINATORY DISCIPLINARY TREATMENT**

210. Male sales rep "X" committed a serious breach of ethics and workplace policy by lying on his call reports and by misrepresenting to management that he was seeing clients when in fact he was taking personal time and claiming personal expenses for those trips as business expenses. Ex 25.

211. For several months "X" submitted reports which, for example, claimed that he was visiting customers in Las Vegas for which he would claim expenses, when in fact expense vouchers would show he was in California. This went on for at least several months. Ex. 26, Amstutz Tr. 118:2-11; 127:24-128:21; 130:19-131:13; Ex. 13, Anderson Tr. 102:7-103-3; Ex. 27 Prissert Tr. 61:19-62:15.

212. When questioned first he continued to lie to his bosses. Ex. 13, Anderson Tr. 110:13-111:10.

213. Before making any final decisions regarding the misbehavior, there was a full investigation including interviewing “X”. Ex. 26, Amstutz Tr: 218:12-219:11.

214. Amstutz testified that he recommended termination but Prissert wanted to interview “X” before making a decisions. Id Tr. 130:6-131:7; 132:2-3. No disciplinary action was taken against “X” except that he had to repay the money he improperly claimed were business expenses. Ex. 26, Amstutz Tr. 134:20-135:9.

215. X was given a “warning” signed by the HR Manager Diane Figueroa who was not involved in the investigation and has no responsibility for the sales force except for administrative processing of paperwork. Ex. 28, Figueroa Tr. 79:12-22; Ex. 26, Amstutz Tr. 135:10-14.

216. Contrast this treatment with the peremptory action taken against Plaintiff for a significantly less serious and unproven charge. Pl. Aff ¶¶ 31-32.

217. Prissert claims that on September 16, 2012, Plaintiff approached him and in front of guests and colleagues yelled at me and used the word “fuck” to me.” Prissert Aff. ¶ 46-47.

218. Two days later, on September 18, 2012 Prissert , not the HR manager, sent Cargian a stern Written Warning, both e-mail and hard copy, repeating the allegation that plaintiff yelled at him using the word “f...”. Ex. 21.

219. Cargian disputes the allegations and claims that he never cursed at the President, although he had been very upset by the President’s treatment. Cargian Aff. ¶ 31.

220. The record shows Prissert's allegations are questionable at best. This alleged event happened at a 78 lane noisy bowling alley. At the time that plaintiff allegedly used the offensive language, Prissert was tucked away in a corner of the 78 lane bowling alley, which was extremely noisy. It is highly unlikely that he heard anything since he was at least 15 feet away from Cargian, very possibly more. Cargian Aff. ¶ 31; Ex. 12, Sommer Tr. 60:12-61:21; 87:16-89:13; Pl. Aff.

221. Amstutz, who supported Prissert's claim, admitted that he did not hear anything and only knew about the allegation from Prissert. Ex. 26, Amstutz Tr. 214:6-218:4

222. Also, there are admissions that Prissert clearly embellished his story, which draws questions of credibility. When he originally wrote to Amstutz informing him of what he was claiming, Prissert never said that the alleged improper behavior happened in front of guests. What he said is that it was "almost in front of clients and staff" basically conceding it was not in front of them. Ex. 23, Breitling 1444.

223. Also, in the first statement of the event, he never claimed that plaintiff yelled "fuck" to him. He only claimed that he used the "f" word. Id. Use of the "f" word is definitely not uncommon at Breitling. Ex. 7, Roman Tr. 35:21-25; Email Breitling 1466.

224. Purposefully left blank.

225. Yet without any investigation, 2 days later Prissert sent a Warning letter, signed by the President himself, not the HR Manager. Ex. 21.

226. Contrast to "X" where Anderson had uncovered the necessary documents to prove that "X" was lying, and "X" continued to lie yet, there was still a full investigation and the

warning letter was not issued until after Prissert, Amstutz and Anderson met with X. Ex. 26, Amstutz Tr. 218:12-219:11.

227. Amstutz recommended termination but he said Prissert just wanted to speak with “X” before making a decision. Ex. 26, Amstutz Tr. 130:6-131:7; 132:2-3.

228. Also contrast the treatment of “X” to the reprimand Prissert personally sent to Cargian because he was giving cash Christmas gifts to his assistants, Pl. Aff. ¶ 29.

229. Plaintiff usually gave such cash gifts to his personal assistant and to the Inside Sales Manager, which Bodman was aware of and had criticized. Id.

230. Although Prissert says the reprimand was for violating company policy (Prissert Aff ¶, 45) there was no such policy. Ex. 28, Figueroa Tr. 52:24-53:8

231. Despite the fact that the behavior did not violate any rules, the President himself sent Cargian a reprimand claiming violation of policy, while a warning letter for what is essentially theft and lying comes from the HR manager, who has no authority over sales personnel except for ancillary paper work. Ex. 28, Figueroa Tr. 79:12-22.

## **G. TERMINATION**

232. In 2013 “X” made only 70% of his goal. Ex. 5.

233. In 2013 “X” had a goal of opening 2 new doors. He did not open any new door. Ex. 36, Breitling 8952.

234. In 2013, Cargian made 76% of his goal. Ex. 5.

235. In 2013 In 2013 Cargian had a goal of opening 2 new stores. He met that goal.

Ex. 36, Breitling 8984.

236. Sales reps are given part of their bonus for “overall quality of work” (Qualitative bonus). See generally, Ex. 36.

237. In 2013 “X” received \$10,300 as his qualitative bonus, despite the fact that he opened no new stores, lied on his call reports, charges \$5,000 of personal expenses to the business, and did not make as many customer visits as Cargian. Ex. 36, Breitling 8984.

238. In 2013 Cargian’s qualitative bonus was only \$7,400. Id.

239. In 2013 “X” received a \$3,500 bonus for “reporting” despite the fact that he misrepresented on his call reports and expense reports. Ex. 36, Breitling 8952.

240. In 2013, “X” sales were down 19.84%. Ex. 16, Breitling 633.

241. In 2013 “X” sales were down 15.21%. Id.

Dated: March 28, 2016  
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