

FOX ROTHSCHILD LLP
Glenn S. Grindlinger, Esq.
Zev Singer, Esq.
100 Park Avenue, Suite 1500
New York, NY 10017
Tel: (212) 878-7900
Fax: (212) 692-0940

Attorneys for Breitling USA, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDERICK M. CARGIAN,

Plaintiff,

- against -

BREITLING USA, INC.,

Defendant.

ECF Case

No. 15-cv-01084 (GBD)

**DEFENDANT’S REPLY TO
PLAINTIFF’S RESPONSE
TO DEFENDANT’S LOCAL
RULE 56.1 STATEMENT OF
UNDISPUTED FACTS AND
TO PLAINTIFF’S
COUNTERSTATEMENT
PURSUANT TO LOCAL
RULE 56.1**

Pursuant to Local Rule 56.1 of the Civil Rules of this Court (“Rule 56.1”), Defendant Breitling USA, Inc. (“Defendant” or “Breitling”) submits the following reply to plaintiff Frederick Cargian’s (“Plaintiff” or “Cargian”) March 28, 2016 Rule 56.1 Opposition to Summary Judgment and In Support of His Claims (“Plaintiff’s 56.1 Statement”)¹:

¹ Plaintiff’s 56.1 Statement consists of two parts: (i) Plaintiff’s Response to Defendant’s Rule 56.1 Statement (“Plaintiff’s Response to Defendant’s 56.1 Statement”); and (ii) Plaintiff’s Rule 56.1 Statement of Material Facts Supporting His Claim (“Plaintiff’s Counter 56.1”).

I. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S 56.1 STATEMENT

The following are Defendant's undisputed facts that Plaintiff objected to or qualified his response without proper citation or without properly denying the facts². Therefore, these facts

²As a preliminary matter, Plaintiff did not respond at all to the following numbered paragraphs from Defendant's February 29, 2016 Statement of Undisputed Material Facts (Docket No. 40). Specifically, Plaintiff did not respond to: ¶¶1,3-9, 12-13, 15-16, 21-27, 30-31, 34-37, 51-53, 55, 57, 59, 63-64, 72-73, 87, 89, 95-96, 100, 105-106, 108, 100, 114-115, 117, 119, 123, 125, 127-130, 134, 137, 140, 143, 145, 147-151, 158-159. Therefore, these paragraphs are to be deemed admitted. *See* Local Rule 56.1.

Furthermore, even with regard to the undisputed facts to which Plaintiff purports to have responded, Plaintiff's responses are utterly insufficient and blatantly fail to comply with Rule 56.1. In almost every single response, whether a purported denial or admission, Plaintiff has "improperly interject[ed] arguments and/or immaterial facts in response to facts asserted by Defendant[], often speaking past Defendant[']s asserted facts without specifically controverting those same facts." *See Baity v. Kralik*, 51 F.Supp.3d 414, 419 (S.D.N.Y. 2014). This practice was extensively and explicitly addressed in *Baity*, where the Court discussed the purposes and practice of Rule 56.1 statements. After much analysis, the Court in *Baity* determined that it would disregard "purported 'denials' in the plaintiff's 56.1 Statement that do not actually deny or refute the specific facts asserted by the defendants, are not supported by citations to admissible evidence in the record, are contradicted by other admissible evidence in the record, or that are improper legal arguments." *Id.* at 421; *see also Costello v. N.Y. State Nurses Ass'n*, 783 F.Supp.2d 656, 661 n. 5 (S.D.N.Y. 2011) (disregarding a plaintiff's responses to a defendant's Rule 56.1 Statement where the plaintiff responded with conclusory assertions or legal arguments); *Senno v. Elmsford Union Free Sch. Dist.*, 812 F.Supp.2d 454, 458 n. 1 (S.D.N.Y. 2011) (same); *Buckman v. Calyon Sec.*, 817 F.Supp.2d 322, 328 n. 42 (S.D.N.Y. 2011) (noting that "56.1 statements not explicitly denied by plaintiff are deemed admitted")

The *Baity* Court also pointed out, as is the exact case here: "a number of Plaintiff's purported denials quibble with Defendants' phraseology, but do not address the factual substance asserted by Defendants....In other instances, counsel neither admits nor denies a particular fact, but instead responds with equivocal statements....Some of Plaintiff's 56.1 statement responses include citations to evidence in the record...however, responses that 'do not point to any evidence in the record that may create a genuine issue of material fact do not function as denials, and will be deemed admissions of the stated fact.'" *Id.* at 418 (citing *Risco v. McHugh*, 868 F.Supp.2d 75, 86 n. 2 (S.D.N.Y.2012)). Here, Plaintiff engages in the exact same improper practices discussed by *Baity* and other Southern District of New York courts, and egregiously fails to deny or contravene Defendant's proposed undisputed material facts presented in its 56.1 Statement; rather, he interjects argument and improper commentary. Therefore, Defendant respectfully submits that, pursuant to applicable jurisprudence and Rule 56.1 itself, the assertions in Defendant's 56.1 Statement that have not been directly contravened be deemed admitted and the Court should disregard Plaintiff's improper argument, qualification, and characterization contained in his Response to Defendant's 56.1 Statement. *See also*, this Court's decisions in *Wright v. Goldman, Sachs & Co.*, 387 F.Supp.2d 314 (S.D.N.Y. 2005) (plaintiff's "unsupported, conclusory assertions and denials" cannot refute defendant's "properly-supported statements of material fact in its Rule 56.1 Statement", and "Courts in this circuit have not hesitated to deem admitted the facts in a movant's Local Civil Rule 56.1 Statement that have not been controverted by a Local Civil Rule 56.1 statement from the nonmoving

are deemed admitted pursuant to Local Rules 56.1(c) and 56.1(d). All numbered paragraphs herein refer to Defendant's Statement of Undisputed Facts dated February 29, 2016³ (Docket No. 40), and Plaintiff's 56.1 Statement:

2. Plaintiff self-identifies as a gay man, and his date of birth is November 23, 1960. *See* Complaint, annexed as Exhibit A⁴ to the Declaration of Zev Singer, filed and dated February 29, 2016 ("Singer Decl."), at ¶ 10.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

10. In approximately 1999, Annie Sommer became a sales representative at Breitling and Marie Bodman, Breitling's President at the time, decided to reassign part of Plaintiff's previously assigned territory to Ms. Sommer. *See* Plaintiff Dep., Exhibit D, at 69:13-18.

Plaintiff fails to admit or deny in violation of Rule 56.1. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

11. In approximately 2003, when Breitling hired Chuck Anderson, Ms. Bodman reassigned some of Plaintiff's territory to Mr. Anderson (including Delaware, Maryland, Washington DC, and Virginia territory) and assigned some of another sales representative's sales territory to Mr. Anderson. *See id.* at 71:12-20; *see also* Exhibit "C", Anderson Decl. at ¶ 5.

party); *Chen v. New Trend Apparel, Inc.*, 8 F.Supp.3d 406 (S.D.N.Y. 2014) (excusing noncompliance with Local Rule 56.1 by plaintiff represented by counsel would not be "in the interest of justice").

³ For the convenience of the Court, Breitling has included and retyped its original assertions from its 56.1 Statement that are referenced herein.

⁴ Unless otherwise indicated, references to all exhibits are to those annexed to the Declaration of Zev Singer, filed and dated February 29, 2016 ("Singer Decl."), previously submitted in support of Defendant's Motion for Summary Judgment.

Plaintiff fails to admit or deny in violation of Rule 56.1. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

14. In 2011, territory that had been previously assigned to Mr. Anderson was reassigned to Plaintiff, including accounts in Delaware, Maryland, Washington DC, and Virginia, all of which Plaintiff had previously serviced. *See* Plaintiff's Dep, Exhibit D, at 73:11-14, *see also* Anderson Decl. at ¶ 5, 9.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

17. For approximately three to six months, Mr. Prissert had a transition period/tryout period with Breitling, during which time Marie Bodman stayed employed and shared some of the duties of President with Mr. Prissert. *See* Prissert Dep., Exhibit E, at 45:13-21, 153:12-23, *see also* Prissert Decl. at ¶ 8.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation regarding the setting of his 2011 sales goals (which was not alleged in this particular fact). Furthermore, Plaintiff's claim that this statement is inadmissible has no support in law as it contains proper citations to deposition testimony and a valid witness declaration. Finally, Plaintiff's citation to his affidavit and deposition testimony does not contradict any portion of this alleged fact. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

18. During this transition period, Ms. Bodman educated Mr. Prissert on various business practices at Breitling, including, among other things, the methods by which the sales

representatives' goals had been previously set. *See* Prissert Dep., Exhibit E at 173:23-175:23, *see also* Prissert Decl. at ¶ 9.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation regarding who set his 2011 sales goal (which was not alleged in this particular fact). Furthermore, Plaintiff's claim that this statement is inadmissible has no support in law as it contains proper citations to deposition testimony and a valid witness declaration. Finally, Plaintiff's citation to his affidavit and deposition testimony and his comment regarding what goals he achieved in prior years does not contradict any portion of this alleged fact. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

19. During the transition period, Mr. Prissert sat in with Ms. Bodman at the performance reviews of the sales representatives at the beginning of 2011, at which time the sales representatives' sales goals for the year were given to them. *See* Prissert Dep., Exhibit E at 55:16-56:3, 153:24-154:12, *see also* Prissert Decl. at ¶ 21.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation regarding who else was at the performance review meetings and who set his 2011 sales goal (which was not alleged in this particular fact). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

20. After Ms. Bodman left her employment at Breitling in 2011, Plaintiff's direct supervisors until his employment ended at Breitling were Mr. Charles Anderson, the national sales manager for Breitling, and Thierry Prissert, the President. *See* Plaintiff's Dep., Exhibit D, at 61:23-62:14, *see also* Prissert Decl. at ¶ 10.

Plaintiff's citation to his deposition testimony does not contradict any portion of this alleged fact, and in fact supports the fact asserted by Defendant. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(d).

28. The criteria for this qualitative portion of the bonus changed from year to year, but it generally included criteria such as how many sales visits a sales representative had made for the year, how many trainings the sales representative performed, how many of the weekly activity reports ("call reports") the sales representative sent to management. *See* Amstutz Dep., Exhibit F, 80:12-23; *see also* Prissert Decl. at ¶ 14.

Plaintiff denies this fact but does not cite to the record in support of his denial, rather cites to the documents containing the bonuses themselves which do not contradict this factual assertion. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(d).

29. In any given year, the formula for calculating sales representatives' bonuses was the same for each sales representative -- there were no variations among the sales representatives. *See* Amstutz Dep, Exhibit F, 77:5-20.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

32. The Special 2012 Extra Bonus was paid to all sales representatives that year because it had been a particularly profitable year for Breitling. *See* Prissert Decl. at ¶ 16.

Plaintiff does not cite to admissible evidence to controvert this assertion, because his affidavit regarding the profitability of the company (or lack thereof) and the decision-making process for the awarding of sales bonuses is speculative, lacks foundation, and is

not based on any personal knowledge. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(d).

33. This Special 2012 Extra Bonus was paid to the sales representatives based upon their performance, with the special bonus being a percentage of each sales representative's base monthly salary, and the percentage dependent on the sales representative's overall performance (in both sales and qualitative categories). *See* Prissert Decl. at ¶ 16.

Plaintiff fails to admit or deny and fails to cite to the record to contravene this assertion, in violation of Rule 56.1. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c) and 56.1(d).

38. As a part of the process of the sales representatives' sales goals being set and before their yearly review meeting, the sales representatives would submit their own proposed sales goals for the upcoming year. *See* Plaintiff's Dep., Exhibit D, 208:13-21, 219:6-23; *see also* Anderson Decl. at ¶ 15.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

39. "Tourneau" is the name of a specific watch retailer that the Breitling sales representatives were responsible for servicing. *See* Anderson Decl. at ¶ 17.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

40. Tourneau sales were sometimes counted separately from the other sales in a sales representative's territory because Tourneau was considered a "house" account, separate from the

individual sales territories/regions, and the sales representatives could not control how many watches Tourneau bought from Breitling. *See* Excerpts from Deposition Transcript of Charles Anderson, dated November 24, 2015 (“Anderson Dep.”), annexed as Exhibit “H”, at 213:12, 246:13-17; *see also* Anderson Decl. at ¶ 17.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

41. In any given year, if a sales representative’s sales goals included goals for Tourneau sales, that sales representative would be given credit for Tourneau sales for that year in calculating the sales representative’s sales in relation to their sales goals. *See* Anderson Dep., Exhibit H, 249:17-251:18; *see also* Anderson Decl. at ¶ 18; Prissert Dep., Exhibit E, at 102:16-103:15.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(c).

42. The sales representatives’ actual sales they receive credit for (toward their annual sales goal) are tracked through Breitling computer system. *See* Anderson Decl. at ¶ 19; *see also* Prissert Dep., Exhibit E, 203:7-204.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument, improper discussion of discovery in this case, and self-serving statements regarding witness credibility and what questions were understood by witnesses at depositions. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

43. For each sale that is made within a sales representative's territory, the invoice for that sale is submitted to Breitling, inputted in Breitling's computer system, and attributed to the respective sales representative and his/her region. *See* Anderson Decl. at ¶ 19; *see also* Prissert Dep., Exhibit E, 203:7-204:9.

See Defendant's Response to ¶ 42.

44. Since 2010 through the conclusion of Plaintiff's employment at Breitling, all of the sales representatives would receive monthly or semi-annual emails from Breitling management informing them of their monthly and/or year-to-date sales for their territory. *See* Prissert Dep., Exhibit E, 204:10-205:2; *see also* Anderson Decl. at ¶ 21; Excerpts from Deposition Transcript of Annie Sommer dated January 21, 2016 ("Sommer Dep."), annexed as Exhibit "G", at 68:21-69:15, Sampling of Monthly Sales Emails, annexed as Exhibit "J".

See Defendant's Response to ¶ 42.

45. In addition, since at least 2003, the sales representatives at Breitling had access to the Breitling computer system that tracked the invoices and tracked their sales by territory. *See* Prissert Dep., Exhibit E, at 204:10-205:2; *see also* Anderson Decl. at ¶22; Sommer Dep., Exhibit G, at 70:16-71:8.

See Defendant's Response to ¶ 42.

46. Since at least 2003, at any time, the sales representatives could log in to that computer system to check their monthly or annual sales. *See* Prissert Dep., Exhibit E, 204:10-205:2; *see also* Anderson Decl. at ¶ 22; Sommer Dep., Exhibit G, at 70:16-71:8.

See Defendant's Response to ¶ 42.

47. From 2010-2013, Breitling management held annual sales meetings to, among other things, review the sales representatives' sales numbers for the year, discuss the progress of

the company, the business goals of the company moving forward, and other business matters. *See* Anderson Decl. at ¶ 23.

See Defendant's Response to ¶ 42.

48. From 2010-2013, all of the sales representatives were required to (and in fact did) attend these annual sales meetings. *See* Anderson Decl. at ¶ 24; *see also* Prissert Dep., Exhibit E, 262:12-22,

See Defendant's Response to ¶ 42.

49. At these annual sales meetings, the sales representatives, as a group, were presented with a PowerPoint presentation that was created by Mr. Anderson. *See* Anderson Decl. at ¶ 25; *see also* Prissert Dep., Exhibit E, at 262:21-21.

See Defendant's Response to ¶ 42.

50. In Mr. Anderson's PowerPoint presentations at the annual sales meeting, there were slides that showed the sales representatives' performance and sales numbers for the prior year. *See* Anderson Decl. at ¶ 25; *see also* Sampling of PowerPoint Slides, annexed as Exhibit "K".

See Defendant's Response to ¶ 42.

54. In setting the sales representatives' base salaries, things that were considered included seniority at Breitling and the salary that a sales representative was making before he/she came to work at Breitling. *See* Amstutz Dep., Exhibit F, 228:11-229:3; *see also* Anderson Dep., Exhibit H, at 281:12-283:17.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

56. In 2011, Plaintiff was the highest paid sales representative at Breitling. *See* Prissert Decl. at ¶ 26.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

58. In 2011, the sales representative at Breitling with the lowest base salary was a heterosexual male, and he was making \$152,500 in base salary. *See* Prissert Decl. at ¶ 27.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

60. In 2012, Plaintiff was the highest paid sales representative at Breitling. *See* Prissert Decl. at ¶ 28.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

61. In 2012, the sales representative with the next highest salary after Plaintiff was making \$215,000 in base salary. *See* Prissert Decl. at ¶ 29.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

62. In 2012, the sales representative at Breitling with the lowest base salary was a heterosexual male, and he was making \$170,500 in base salary. *See* Prissert Decl. at ¶29.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

65. In 2013, the sales representative at Breitling with the lowest base salary was a heterosexual male, and he was making \$85,000 in base salary. *See* Prissert Decl. at ¶ 31.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

66. Plaintiff did not always surpass or achieve his sales goals at Breitling. *See* Plaintiff Dep., Exhibit D, 34:19-35:20; *see also* Prissert Decl. at ¶ 42.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c).

67. During Plaintiff's employment at Breitling, he received negative feedback about his performance from Ms. Bodman, Mr. Prissert, and Mr. Anderson. *See* Plaintiff Dep., Exhibit D, 121:22-122:4.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument, unsupported statements with no citation to the record (i.e. "every boss criticizes from time to time"), and self-serving and irrelevant statements regarding his claims of his general performance prior to 2011. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

68. Plaintiff testified that Ms. Bodman gave Plaintiff negative feedback about his schedule and about “trying to get a certain account’s numbers up and asking why that specific account wasn’t doing better.” *See id.* at 122:5-9, 123:23-124:4.

See Defendant’s Response to ¶ 67.

69. Plaintiff testified that Mr. Anderson criticized Plaintiff’s performance on similar topics that Ms. Bodman had criticized, including questioning Plaintiff’s schedule, how many visits Plaintiff had made, and regarding the performance of certain accounts. *See id.* at 124:21-125:21.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument and unsupported statements with no citation to the record (i.e. “Prissert and Anderson were papering Cargian’s file”). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

70. Plaintiff testified that Mr. Prissert criticized Plaintiff’s performance about the “numbers per account,” certain accounts that were not performing, and Plaintiff’s schedule. *See id.* at 126:13-17.

See Defendant’s Response to ¶ 69.

71. Plaintiff testified that Mr. Anderson and Mr. Prissert asked him to make more sales visits. *See id.* at 131:9-13.

See Defendant’s Response to ¶ 69.

74. On June 14, 2011, Mr. Prissert sent Plaintiff the email annexed as Exhibit “M”, that read, in part, “I am almost speechless when I read your call report...No visits on June 7 and 8..?!...That is not at all what I expect from you or any other rep, furthermore that we agreed to reduce your territory last Thursday (because you said you were overwhelmed and was working

too much) and expect you to schedule travel and visit more accounts every week...” *See* Exhibit M.

See Defendant’s Response to ¶ 67.

75. Plaintiff responded to Mr. Prissert’s June 14, 2011 email, writing, in part: “I only wish I was sitting around having margaritas while I am not at a store as you all seem to think.” *See id.*

See Defendant’s Response to ¶ 67.

76. On February 15, 2012, Mr. Anderson sent Plaintiff the email annexed as Exhibit “N”, that read, in part, “My surprise was to see office days on Monday and Tuesday last week—meaning there were three in a row. We simply can’t stay behind our desks and accomplish our goals...Looking at the month there are not a lot of visits...I/we are here to help in any way we can...” *See* Exhibit N.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument and unsupported statements with no citation to the record (i.e. “Prissert and Anderson were papering his file”). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

77. On July 16, 2012, Mr. Anderson sent Plaintiff the email annexed as Exhibit “O” that read, in part, “Attached are your June 30 results...There are some concerns with the results...” *See* Exhibit O.

See Defendant’s Response to ¶ 76.

78. On July 23, 2012, Mr. Prissert sent Plaintiff the email annexed as Exhibit “P”, that read, in part, “Hope you can catch up to the \$15,400,000 target...Good luck to you...” *See* Exhibit P.

See Defendant's Response to ¶ 76.

79. On August 13, 2012, Mr. Anderson sent Plaintiff the email annexed as Exhibit "Q", that read, in part, "the average price of pieces sold is the lowest of the regions...if you were to match the B[reitling] USA average this year it would be...reducing your shortfall." *See* Exhibit Q.

See Defendant's Response to ¶ 76.

80. On September 26, 2012, Mr. Prissert sent Plaintiff the email annexed as Exhibit "R", that read, in part, "We are very concerned that the results in your region are still far behind expectations and also the only region double digit down versus last year numbers...you are -19% versus 2011...the only other region behind last year is -3% versus last year...In 2011, your territory was already the least performing one (growth over 2010) which means , as we discussed several times, that Breitling business is 'melting' in the Northeast 1 and we are loosing [sic] market share in your area since January 2010...I am very concerned that you might not reach **any** of the goals, we set in January, (quantitative and qualitative) for your territory...We are running out of time!" *See* Exhibit R.

See Defendant's Response to ¶ 76.

81. On October 5, 2012, Mr. Anderson sent Plaintiff the email annexed as Exhibit "S", that read, in part, "With respect to your region, we see that the total sell in is the most challenged area for B[reitling] USA down 19.9% versus 2011 YTD." *See* Exhibit S.

See Defendant's Response to ¶ 76.

82. On March 5, 2013, Mr. Anderson sent Plaintiff the email annexed as Exhibit "T", that read, in part, "Your region has suffered a lot over the last two years and falling short this year is not an option. I will help you in any way I can." *See* Exhibit T.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

83. On May 24, 2013, Mr. Anderson sent Plaintiff the email annexed as Exhibit “U”, that read, in part, “You have a very important region and not so long ago when I was still covering MD and VA, it was the second most sales generating region we had. Today, it has fallen back dramatically in sell in....” *See* Exhibit U.

See Defendant’s Response to ¶ 82.

84. On June 4, 2013, Mr. Prissert sent Plaintiff the email annexed as Exhibit “V”, that read, in part, “I am concerned in the trend of your numbers...We heave [*sic*] been repeating again and again that your schedule of visits is too light and that you should spend more time at the store...Your results...show me that you are not really using all the tools you have or capitalizing on opportunities...In other words, you keep doing it your ways and ate [*sic*] the pace you think is right...I just want to reiterate that achieving your target is key to us and for you (especially this year, after your region has been reduced so you can focus on less accounts and be more productive)...Finally, I want you to succeed and achieve your goals but I am not sure you are doing all that you can and need to be doing to make it happen.” *See* Exhibit V.

See Defendant’s Response to ¶ 82.

85. On September 11, 2013, Mr. Prissert sent Plaintiff the email annexed as Exhibit “W”, that submitted to Plaintiff his new sales goals, and that read, in part, “Hope you make it happen in the next months...Wishing you to succeed!” *See* Exhibit W.

See Defendant’s Response to ¶ 82.

86. Plaintiff testified, with regard to the September 11, 2013 email from Mr. Prissert (Exhibit W and marked at Plaintiff's deposition as Exhibit B-24) that he believed that Mr. Prissert wanted Plaintiff to succeed. *See* Plaintiff's Dep., Exhibit D, at 236:19-237:16.

See Defendant's Response to ¶ 82.

88. Plaintiff received the Year-end 2011 performance review annexed as Exhibit "Y", which states, in part, "Fred had a tough year and missed his target by \$5 mio[sic]!..Fred did not send all his call reports." *See* Exhibit Y; *see also* Plaintiff's Dep., Exhibit D, at 186:6-16.

See Defendant's Response to ¶ 82.

90. At the 2012, Breitling sales meeting, Plaintiff stated, in front of all of the other sales representatives, that he would only work until 5 o'clock. *See* Plaintiff Dep. at 148:17-151:3.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation and improper argument and unsupported statements with no citation to the record (i.e. "Defendant is aware that this was not a serious statement.") Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

91. In Plaintiff's 2012 self-evaluation, in response to the question "Would he/she be better in another position?", Plaintiff wrote "Yes, president." *See* 2012 Self Evaluation annexed as Exhibit "AA"; *see also* Plaintiff's Dep., Exhibit D, 175:10-177:17.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

92. At a Breitling event in Reno in 2012, Plaintiff lost his temper. *See* Plaintiff's Dep., Exhibit D, at 166:10-11.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation and improper argument. Plaintiff fails to cite to the record to contravene this statement, which is taken directly from his deposition. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

93. On September 18, 2012, Plaintiff received a written warning from Mr. Prissert, which stated, among other things, that Plaintiff engaged in inappropriate behavior and language and cursed at Mr. Prissert, the President of Breitling, in front of colleagues and guests at a bowling outing in Reno on September 16, 2012. *See* Written Warning Email, annexed as Exhibit “BB”, *see also* Plaintiff’s Dep. at 169:24-170:3.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation and improper argument. Plaintiff fails to cite to the record to contravene the fact that he did in fact receive the written warning discussed in this assertion. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

94. On April 9, 2012, Plaintiff received an email from Mr. Prissert, annexed as Exhibit “CC”, in which Mr. Prissert informed Plaintiff that it was not acceptable at Breitling to give cash envelopes to colleagues. *See* Exhibit CC.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation and improper argument. Plaintiff fails to cite to the record to contravene the fact that he did in fact receive the email discussed in this assertion. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

97. Ms. Bodman made the ultimate decision on how much to set Plaintiff’s 2011 sales goal. *See* Prissert Decl. at ¶ 22.

Plaintiff does not cite to admissible evidence to controvert this assertion, because his self-serving affidavit regarding who set the 2011 sales goals is speculative, lacks foundation, and is not based on any personal knowledge – Plaintiff was not involved in the setting of the sales goals for the sales representatives. Plaintiff’s argument regarding the potential deposition of Ms. Bodman is improper for a 56.1 statement, as well as the fact that Plaintiff himself could have made efforts to depose Ms. Bodman through the Hague Convention, which he did not. Therefore, this fact should be deemed admitted pursuant to Rule 56.1(d).

98. In 2011, Plaintiff’s sales at Breitling were approximately \$18,767,811, including Tourneau sales. *See* Exhibit K (at BREITLING_9031 and BREITLING_9052); *see also* 2011 Sales Chart annexed as Exhibit “DD” (BREITLING_8804); Anderson Decl at ¶ 28.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument, improper discussion of discovery in this case, and self-serving statements regarding witness credibility and what questions were understood by witnesses at depositions. Defendant’s citation regarding these PowerPoint presentations and the sales numbers contained in this factual assertion is sufficient for their admissibility (*see* ¶¶47-50 and 98). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

99. Plaintiff’s 2011 sales were approximately \$4,992,189 less than the sales goals that had been set for him that year, and he achieved only 79% of his set sales goal. *See id.*

See Defendant’s Response to ¶ 98.

101. In 2011, Plaintiff was the sales representative who achieved the lowest percentage of his sales goals. *See* Anderson Decl. at ¶ 29.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported statement regarding the admissibility of this information. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

102. Plaintiff's 2011 sales were approximately \$850,645 more than Breitling had sold to the same territory the year prior (an increase of 5%). *See* Exhibit DD; *see also* Exhibit K (at BREITLING_9052) *see also* Anderson Decl. at ¶ 30.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported statement regarding the admissibility of this information and improper argument regarding discovery. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

103. In 2011, Plaintiff was the sales representative who increased his sales as compared to the same territory the prior year by the lowest percentage (5%) out of seven sales representatives. *See* Exhibit K (at BREITLING_9052); *see also* Anderson Decl. at ¶ 30.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported statement regarding the admissibility of this information, improper argument regarding discovery, and citation to an attorney's affirmation which is not proper (*see* Defendant's Reply Memorandum of Law). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

104. On December 20, 2011, Plaintiff emailed Mr. Prissert and Mr. Anderson, attaching his proposed sales goals for the upcoming year, 2012, in which he projected his sales

would be \$16,475,000, excluding Tourneau sales. *See* Email dated December 20, 2011, Exhibit EE.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported statement regarding the admissibility of this information. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

107. In July 2012, Mr. Prissert decided to reduce Plaintiff's sales goal by 1.1 million dollars, down to \$15,400,000 (excluding Tourneau sales). *See* 2012 Goal Reduction Email, as Exhibit FF.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

109. Plaintiff's 2012 sales were approximately \$2,500,419 less than the sales goals that had been set for him that year (he achieved only 83.76% of his sales goal). *See id.*; *see also* Anderson Decl. at ¶ 32.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument, improper discussion of discovery in this case. Defendant's citations regarding the sales numbers contained in this factual assertion is sufficient for their admissibility. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

111. In 2012, Plaintiff was the sales representative who achieved the lowest percentage of his sales goals. *See* Exhibit K (at BREITLING_9073); *see also* Anderson Decl. at ¶ 33.

***See* Defendant's Response to ¶ 109.**

112. Plaintiff's 2012 sales were approximately \$938,000 less than Breitling had sold to the same territory the year prior (a decrease of approximately 6.8%). *See* Exhibit HH (at BREITLING_8808); *see also* Exhibit K (at BREITLING_9065); Anderson Decl. at ¶ 34.

See Defendant's Response to ¶ 109.

113. In 2012, Plaintiff was the sales representative whose sales, as compared to the same territory the prior year, decreased by the highest percentage (6.8%). *See* Exhibit K (at BREITLING_9065); *see also* Anderson Decl. at ¶ 34.

See Defendant's Response to ¶ 109.

116. In September 2013, Mr. Prissert decided to reduce Plaintiff's sales goal by \$560,000, so that his new goal would be \$10,640,000 (excluding Tourneau sales). *See* 2013 Goal Reduction Email, Exhibit II.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

118. Plaintiff's 2013 sales were approximately \$2,187,928 less than the sales goals that had been set for him that year (he achieved only 79% of his sales goal). *See* Exhibits II, JJ, *see also* Anderson Decl. at ¶ 36.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

120. In 2013, Plaintiff was tied for achieving the second lowest percentage of his sales goals. *See* Anderson Decl. at ¶ 37.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

121. Plaintiff's 2013 sales were approximately \$1,357,393 less than Breitling had sold to the same territory the year prior (a decrease of approximately 13.8%). *See* Exhibit JJ; *see also* Anderson Decl. at ¶ 38.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported statement regarding the admissibility of this information. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

122. At the beginning of 2011, Plaintiff was given additional territory for which he would be responsible as a sales representative; he received approximately 20 additional "doors" or accounts to cover. *See* Prissert Dep., Exhibit E, 165:10-13; *see also* Prissert Decl. at ¶ 32.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported argument regarding the weight of this evidence. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

124. Plaintiff testified that Ms. Bodman was the one who decided to assign him the new territory in the beginning of 2011 that had previously been serviced by Mr. Anderson. *See* Plaintiff Dep., Exhibit D, 73:8-22.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation that does not controvert the factual assertion. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

126. Because Plaintiff had been assigned the additional territory, Breitling increased his bonus potential from \$45,000 to \$55,000. *See* Prissert Decl. at ¶ 32.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported argument regarding the weight of this evidence. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

131. Mr. Prissert discussed this decision with Mr. Anderson and Mr. Amstutz. *See id.* at 86:23-87:14.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported argument regarding the weight of this evidence. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

132. Mr. Prissert testified that the reason he reduced the territories of Ms. Sommer and Plaintiff was because: (i) the sales performance of these two sales representatives for 2012 was below expectations; (ii) Mr. Prissert wanted to give both individuals a chance to succeed in a smaller territory; (iii) they were not handling the larger territory in the right manner, and (iv) sales in the two territories were not where they needed to be and the salespeople were not achieving their goals in those territories, so they needed restructuring. *See* Prissert Dep., Exhibit E, at 87:15-24.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including an unsupported argument regarding the weight of this evidence. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

135. Mr. Prissert was 44 years old at the time he decided to reduce Plaintiff's salary. *See* Prissert Decl. at ¶ 37.

Plaintiff fails to admit or deny in violation of Rule 56.1. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

136. Mr. Prissert testified that at the same time that Mr. Prissert decided to reduce Plaintiff's territory and salary, a new sales representative would need to be added to cover territory removed from Ms. Sommer and Plaintiff. *See* Prissert Dep., Exhibit E, at 88:20-89:13.

See Defendant's Response to ¶ 131.

138. Mr. Prissert testified that the reason he decided to promote Mr. Schafrath to the sales representative position was that: (i) Mr. Prissert preferred to promote someone from within the company, (ii) he wanted to give a chance to an employee of the company who had worked for Breitling for many years, (iii) Mr. Schafrath was performing well in his current job, (iv) Mr. Schafrath had expressed a desire to do something else within the company, (v) Mr. Schafrath knew the brand very well, and (vi) Mr. Schafrath knew the product very well. *See* Prissert Dep., Exhibit E, at 92:19-94:2.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including arguments without proper citation to the record. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

139. Plaintiff never made a complaint to anyone at Breitling that he was being harassed or treated differently because of his age, sexual orientation, or gender. *See* Plaintiff's Dep., Exhibit D, at 288:12-21.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including arguments without any support or proper citation

to the record (i.e. “there was no meaningful mechanism...”). Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

141. On March 15, 2011, Plaintiff sent an email to Monika Pieren, the head of events at Breitling Switzerland, requesting a specific kind of room for himself and Ms. Sommer for the Basel, Switzerland trip, and wrote in the email “Annie and I are rooming together this year because of the mix of men and women from the US...Annie and I have shared rooms all the years we have attended. I think this is my 18th, Annie’s 17th.” *See* March 15, 2011 Email, Exhibit KK; *see also* Plaintiff’s Dep., Exhibit D, at 108:5-21.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper arguments without any support or proper citation to the record. Plaintiff has not cited to any admissible evidence contravening the fact that he sent the email. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

142. Annie Sommer is a good and close friend of Plaintiff’s, and was his closest friend at Breitling. *See* Plaintiff’s Depo., Exhibit D, at 103:19-104:12

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including improper argument regarding credibility issues. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

144. Ms. Sommer does not believe that Mr. Cargian was treated any worse than anyone else at Breitling because he’s gay. *See* Sommer Dep., Exhibit G, at 39:24-40:3.

Plaintiff fails to admit or deny in violation of Rule 56.1, and the testimony of someone who Plaintiff alleges is a “me too” witness is relevant and admissible. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

146. Ms. Sommer and Plaintiff have shared rooms on some of those vacations that they took together. *See id.*, at 63:17-20, 71:21-25.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary and explanation, including characterization of Ms. Sommer's testimony even though Plaintiff has not cited to any admissible evidence contravening the fact that Ms. Sommer testified that she and Plaintiff shared rooms on vacations. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

152. In 2013, Breitling uncovered the fact that sales representative Brian Criddle had misrepresented his customer visits, submitted false expense reports to Breitling for personal expenses, and misused his Breitling credit card. *See* Prissert Dep., Exhibit E, at 61:19-62:15; *see also* Anderson Dep., Exhibit H, at 102:7-19.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary, explanation, and improper argument for a 56.1 Statement. Further, Plaintiff, fails to cite to any admissible evidence contravening the facts asserted. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

153. After Mr. Anderson saw a discrepancy in Mr. Criddle's expense report, he conducted an investigation and made the determination that Mr. Criddle had been untruthful on his reporting to Breitling. *See* Anderson Dep., Exhibit H, at 103:5-12.

***See* Defendant's Response to ¶ 152.**

154. As a result of Mr. Criddle's misrepresentations, he received a written warning from Breitling. *See* Prissert Dep., Exhibit E, at 64:24-65:9.

***See* Defendant's Response to ¶ 152.**

155. Mr. Prissert was the person who decided to give Mr. Criddle the warning. *See id.*

See Defendant's Response to ¶ 152.

156. Once Mr. Prissert learned of Mr. Criddle's untruthful reporting to Breitling, Mr. Prissert decided to give Mr. Criddle the written warning, regardless of Mr. Criddle's explanation and whether Mr. Criddle admitted his wrongdoing or not. *See* Prissert Dep., Exhibit E, at 68:13-69:5; *see also* Prissert Decl. at ¶ 54; Anderson Dep., Exhibit H, at 109:22-110:3.

See Defendant's Response to ¶ 152.

157. On or about December 13, 2013, Breitling informed Plaintiff that it would not be renewing his employment contract and would be terminating his employment with Breitling, effective December 31, 2013. *See* Plaintiff's Dep., Exhibit D, at 216:8-217:12.

Defendant's citation was a clerical error and the parties agree that within the first two weeks of December 2013, Plaintiff was informed that his employment at Breitling would be terminated effective December 31, 2013.

160. At the time Plaintiff left the employment of Breitling, in December 2013, there were 7 other sales representatives working at Breitling: Annie Sommer, 47 years old, Beth Haddad, 45 years old, Brian Criddle, 48 years old, Josh Haley, 40 years old, Patrick Cawthorne, 49 years old, Rick Lambert, 47 years old, and Isaac Schafrath, 33 years old. *See* Prissert Decl. at ¶ 51.

Plaintiff fails to admit or deny in violation of Rule 56.1, but rather adds commentary, explanation, and improper argument for a 56.1 Statement. Further, Plaintiff fails to cite to any admissible evidence contravening the facts asserted. Therefore, this fact should be deemed admitted pursuant to Rules 56.1(c) and 56.1(d).

II. REPLY TO PLAINTIFF'S COUNTER 56.1⁵

161. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of the picture and thus the assertions are not supported by citation to admissible evidence. Defendant admits that Exhibit "18" attached to the Affirmation of Counsel for Plaintiff ("Pl. Counsel Aff.") is a painting by a famous artist named Kevin Kelly that is displayed in the office of the President of Breitling SA, Breitling, USA's parent company. *See* Prissert Decl. at ¶62. Defendant further denies the materiality of the assertions.

162. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of the atmosphere at Breitling⁶ and do not support the assertion that Breitling's merchandising is addressed to straight men; thus, the assertions are not supported by citations to admissible evidence. Rather, the testimony cited indicates that Breitling sells a product "that we cater to men." *See* Exhibit 8 attached to Pl. Counsel Aff., at 141:13-22.

163. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of the paintings or statute, and thus the assertions are not supported by citation to admissible evidence. Furthermore, Plaintiff did not produce the document attached to the Cargian Affidavit as Exhibit "C" in discovery, and attaches it for the first time in his Opposition to Defendant's Motion for Summary Judgment. While the exhibit appears to be a picture of the

⁵ Regarding Plaintiff's Counter 56.1, Defendant responds herein to some of Plaintiff's assertions, however in not responding to certain paragraphs of Plaintiff's Counter 56.1, Defendant is neither denying nor admitting the truth thereof, but deem a response unnecessary for purposes of a motion for summary judgment. All numbered paragraphs herein refer to Plaintiff's Counter 56.1 Statement (Docket No. 46).

⁶ Throughout Plaintiff's Counter 56.1, Plaintiff makes unsupported and argumentative characterizations that are simply not supported in the record, are not supported by his citations to the record, and do not comply with Rule 56.1. This is a stark example – Plaintiff asserts as material fact in this paragraph that the atmosphere at Breitling is "overwhelmingly macho", however *none* of Plaintiff references to the record support that assertion/argument whatsoever. Rather, Plaintiff cites to exhibits, affidavits, and deposition testimony and then characterizes and argues as he sees fit. Plaintiff does this throughout his Counter 56.1, and Defendant submits that these characterizations in Plaintiff's assertions should be utterly rejected and should not considered by the Court as Plaintiff has blatantly violated Local Rule 56.1 in his Counter 56.1 Statement.

statue that is in Breitling's 57th Street store, Defendant cannot admit or deny what it actually depicts. Defendant further denies the materiality of the assertions.

164. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Breitling's marketing materials nor that the materials are used to "entice heterosexual males." In addition, Plaintiff has not attached pages 138-140 of Mr. Prissert's deposition as cited. Thus, the assertions are not supported by citation to admissible evidence. Defendant admits that it uses collateral marketing material. *See* Prissert Decl. at ¶¶ 62, 64-65. Defendant further denies the materiality of the assertions.

165. **Denied.** The citation by Plaintiff does not support Plaintiff's subjective characterizations of the email and thus the assertions are not supported by citation to admissible evidence. Defendant admits that Exhibit 20 attached to Plaintiff's Counsel's Affirmation is an email chain sent between Ms. Haddad and Mr. Anderson. Defendant further denies the materiality of the assertions.

166. **Denied.** *See* Defendant's Response to ¶ 165.

167. **Denied.** *See* Anderson Decl. at ¶ 44. Defendant further denies the materiality of the assertions.

168. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Ms. Roman's alleged conversations with Ms. Figueroa as being complaints of sex and age discrimination, and thus the assertions are not supported by citation to admissible evidence. Defendant further denies the materiality of the assertions.

169-170. Defendant denies the materiality of these assertions.

171. **Denied.** The citations by Plaintiff do not support Plaintiff's assertions regarding what other people may have said, nor has Plaintiff attached pages 36-37 Ms. Roman's deposition

as cited; thus, the assertions are not supported by citation to admissible evidence. Defendant further denies the materiality of the assertions.

172. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Ms. Roman's testimony⁷, and thus the assertions are not supported by citation to admissible evidence. Rather, Ms. Roman testified that in her observation, Cargian was not a part of the betting games and golf outings, that she had an "insulated view" in her office, and that she was aware of "general feedback" that Cargian and Prissert "weren't getting along kind of thing". *See* Ex. 7 attached to Pl. Counsel Aff., at pages 99 and 101. Defendant further denies the materiality of the assertions.

173. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Ms. Sommer's testimony, and thus the assertions are not supported by citation to admissible evidence.

174. **Denied.** *See* Defendant's Responses to ¶¶ 172-173.

175. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Ms. Vessely's testimony, and thus the assertions are not supported by citation to admissible evidence. Rather, Ms. Vessely testified that Ms. Haddad had told her that Haddad felt that Mr. Prissert did not like her. *See* Ex. 8 attached to Pl. Counsel Decl. at pages 11-112. Defendant further denies the materiality of the assertions.

176. **Denied.** The assertions are not supported by citation to admissible (or any) evidence. Furthermore, the citations by Plaintiff do not support Plaintiff's subjective characterizations of Ms. Roman's testimony, as her testimony (cited by Plaintiff in this assertion)

⁷ This is another stark example, among many, where Plaintiff has characterized the record and made improper argument and commentary in his Counter 56.1 Statement that are wholly uncorroborated by the record he cites to herein. Again, Plaintiff does this for the majority of his Counter 56.1 Statement and it should be rejected by the Court.

was regarding her unhappiness with performance write-ups she received, and had nothing to do with any complaints regarding discrimination or her gender. Defendant further denies the materiality of the assertions.

179. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of the event, whether it is "prestigious", and who was invited; thus, the assertions are not supported by citation to admissible evidence. Rather, Mr. Prissert specifically testified (in the citations made by Plaintiff in this assertion) that he does not know if he would consider the event "prestigious". In addition, Plaintiff has cited to no admissible evidence that all of the male sales representatives were invited to the event (in fact, Mr. Criddle was not invited). Defendant further denies the materiality of the assertions.

180. **Denied.** The assertions are not supported by citation to admissible evidence; in particular, the affirmation of an attorney is not admissible evidence. Furthermore, the citations do not support Plaintiff's statements in these assertions. Defendant further denies the materiality of the assertions.

181-188. Defendant denies the materiality of these assertions, and further objects on the basis that Plaintiff has not cited to admissible evidence - his affidavit is speculative, lacks foundation, and is inadmissible with regard to Breitling's business to which he did not have personal knowledge.

189. **Denied.** The assertions are not supported by citation to admissible evidence, as Plaintiff himself was not involved in the setting of his 2011 sales goals and thus his testimony on that issue is speculative at best. It was in fact Ms. Bodman, who was still President of Breitling at the end of 2010 and the beginning of 2011 when Plaintiff's sales goals were set, who made the ultimate decision in setting Plaintiff's sales goals. *See* Prissert Decl. at ¶¶ 8-9, 21- 22. Defendant

admits that Mr. Prissert made the final decisions regarding Plaintiff's sales goals for 2012 and 2013.

190. **Denied.** *See* Defendant's Response to ¶ 189 regarding as to who set the 2011 sales goals. Defendant admits the beginning of year sales goals numbers for Plaintiff asserted in this paragraph.

193. **Denied.** *See* Prissert Dep., Exhibit E, 165:10-13; *see also* Prissert Decl. at ¶ 32.

195. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations and comparisons of the different territories as being "most similar"; thus, the assertions are not supported by citation to admissible evidence. Defendant admits the beginning of year sales goals numbers for Mr. Criddle asserted by Plaintiff in this paragraph. Defendant further denies the materiality of the assertions.

197. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of "unrealistic sales goals", nor has Plaintiff established a valid foundation for his self-created sales numbers attached to his affidavit as Exhibit A; thus, the assertions are not supported by citation to admissible evidence.

198. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of "unobtainable sales goals". Furthermore, the assertions regarding how the sales representatives' performance was judged are not supported by citation to admissible evidence as Plaintiff himself was not involved in judging their performance and thus his affidavit on that issue is speculative. As such, the assertions are not supported by citation to admissible evidence. In contrast, the sales representatives were judged, among other things, by both their actual year over year sales and their obtaining their sales goals. *See* Prissert Decl. at ¶¶ 13,14,17, *see also* Exhibit "K", attached to the Declaration of Zev Singer.

199. **Admitted.**

201. **Denied.** The citations by Plaintiff do not support Plaintiff's assertions. In fact, Plaintiff's sales goal at the beginning of 2012 was set as \$16,500,00 (excluding Tourneau sales), and his sales goal at the beginning of 2013 was set at \$11,200,00, more than \$5,000,000 *less* than his 2012 sales goal. *See* Plaintiff's 2012 and 2013 Employment Agreements, Exhibit I (at BREITLING_577 and BREITLING_583, respectively), attached to the Declaration of Zev Singer.

202. *See* Defendant's Response to ¶ 201.

203. **Deny** Plaintiff's characterizations regarding "demotion" and why Mr. Schafrath was promoted. *See* Defendant's 56.1 Statement at ¶¶130-138, and the cites therein. Defendant admits the remainder of the facts asserted in this paragraph.

206. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of Schafrath's prior experience. In contrast, *see* Defendant's 56.1 Statement at ¶138, and the citations therein, regarding the reasons for Schafrath's promotion. Defendant further denies the materiality of the assertions.

208. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of "the boys club atmosphere"; thus, these assertions are not supported by citation to admissible evidence. Defendant admits Schafrath was a student athlete and has a father who had played college and professional football, and that in "five times total" Mr. Schafrath talked to Mr. Prissert about his father. *See* Plaintiff's citations in this paragraph. Defendant further denies the materiality of the assertions.

209. **Denied.** The citations by Plaintiff do not support Plaintiff's assertions. Rather, Mr. Anderson testified that, after the fact, at the time of his deposition, he does not think it was a

good idea to put Mr. Schafrath into that position. *See* Plaintiff's citations in this paragraph. Defendant admits that Mr. Anderson stated that it would take some time to get Mr. Schafrath up to speed. Defendant further denies the materiality of the assertions.

210. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of "a serious breach of ethics and workplace policy", thus these assertions are not supported by citation to admissible evidence. Defendant admits that this sales representative misrepresented his whereabouts and misused his corporate credit card. Defendant further denies the materiality of the assertions.

213. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations of "a full investigation", thus these assertions are not supported by citation to admissible evidence. Defendant admits that the sales representative was interviewed before he received his disciplinary warning. Defendant further denies the materiality of the assertions.

214. **Denied.** The citations by Plaintiff do not support Plaintiff's assertion that "no disciplinary action was taken". Rather, the sales representative was in fact given a disciplinary warning and made to repay money to the company. *See* Plaintiff's citations in this paragraph. Defendant further denies the materiality of the assertions.

216. **Denied.** This paragraph does not contain factual assertions, but rather improper argument and unsupported characterizations ("significantly less serious and unproven charge") that are improper for a 56.1 Statement.⁸ Defendant further denies the materiality of the assertions.

⁸ This is another prime example of Plaintiff's failure to comply with Rule 56.1. Plaintiff's use of the word "contrast" (which he uses numerous times throughout his Counter 56.1) is pure argument that has no place in a 56.1 statement, and his subjective characterization of "significantly less serious and unproven" is unsupported by any valid citation to the record and should be in his memorandum of law, not his 56.1 statement.

220. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations and argument of "questionable at best," "tucked away," "highly unlikely,"; thus, these assertions are not supported by citation to admissible evidence. Defendant further denies the materiality of the assertions.

221. **Denied.** The citations by Plaintiff do not support Plaintiff's assertion regarding "Amstutz, who supported Prissert's claim"; thus, these assertions are not supported by citation to admissible evidence. Defendant admits that Mr. Amstutz stated that he only knew about the allegation from Mr. Prissert.

222. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument and unsupported characterizations that are improper for a 56.1 Statement. Defendant further denies the materiality of the assertions.

223. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument and unsupported characterizations that are improper for a 56.1 Statement. Defendant further denies the materiality of the assertions.

225. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations and argument of "yet without any investigation"; thus, these assertions are not supported by citation to admissible evidence. Defendant admits that Plaintiff's Ex. 21 was a warning sent letter sent by Mr. Prissert to Plaintiff.

226. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument ("contrast") and unsupported characterizations that are improper for a 56.1 Statement. Defendant further denies the materiality of the assertions.

228. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument (“contrast”) and unsupported characterizations that are improper for a 56.1 Statement. Defendant further denies the materiality of the assertions.

230. **Denied.** The citations by Plaintiff do not support Plaintiff’s assertion regarding “no such policy”; thus, these assertions are not supported by citation to admissible evidence. Rather, Ms. Figueroa testified that there was nothing in the company handbook regarding giving gifts, not that it was not against company policy. *See* Plaintiff’s citations in this paragraph.

231. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument and unsupported characterizations that are improper for a 56.1 Statement. The citations cited by Plaintiff do not support the assertions therein. Defendant further denies the materiality of the assertions.

232. **Denied.** The citations by Plaintiff do not support Plaintiff’s assertion regarding the representative referenced; rather, the exhibit indicates that he made 75% of his sales goals. *See* Plaintiff’s citations in this paragraph. Defendant further denies the materiality of the assertions.

234. **Denied.** The citations by Plaintiff do not support Plaintiff’s assertion regarding his 2013 sales goals achievement; rather, the exhibit indicates that he made 79% of his sales goals in 2013. *See* Plaintiff’s citations in this paragraph.

237. **Denied.** This paragraph does not contain factual assertions supported by citation to admissible evidence, but rather contain improper argument and unsupported characterizations that are improper for a 56.1 Statement. Furthermore, the citations cited by Plaintiff do not support the assertions therein. Defendant further denies the materiality of the assertions.

238. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations and argument of "only". In addition, the citations by Plaintiff do not support Plaintiff's assertion regarding his 2013 qualitative bonus; rather, the exhibit indicates that his 2013 qualitative bonus was \$7,980. *See* Plaintiff's citations in this paragraph.

239. **Denied.** The citations by Plaintiff do not support Plaintiff's subjective characterizations and argument of "despite the fact...". In addition, the citations by Plaintiff do not support Plaintiff's assertion regarding his 2013 bonus for reports; rather, the exhibit indicates that his 2013 bonus for "report" was \$3,000. *See* Plaintiff's citations in this paragraph. Defendant further denies the materiality of the assertions.

240. **Denied.** The citations by Plaintiff do not support Plaintiff's assertion regarding sales rep "X"'s 2013 sales. *See* Plaintiff's citations in this paragraph. Defendant further denies the materiality of the assertions.

241. **Denied.** The citations by Plaintiff do not support Plaintiff's assertion regarding sales rep "X"'s 2013 sales. *See* Plaintiff's citations in this paragraph. Defendant further denies the materiality of the assertions.

Dated: April 18, 2016
New York, New York

FOX ROTHSCHILD LLP

/s/ Zev Singer

By: _____

Glenn S. Grindlinger
Zev Singer

100 Park Avenue, Suite 1500
New York, New York 10017
(212) 878-7900

Attorneys for Breitling USA, Inc.