United States Court of Appeals
for the
Third Circuit

No. 15-3024

OROLOGIO OF SHORT HILLS INC;
OROLOGIO INTERNATIONAL LTD INC,

Appellants,

– v. –

THE SWATCH GROUP (U.S.) INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF and JOINT APPENDIX
Volume I of VI (Pages A-1 to A-20)

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United States Court of Appeals for the Third Circuit

<u>Corporate Disclosure Statement and Statement of Financial Interest</u>

No. 15-3024

Orologio of Short Hills, Inc. and Orologio International Ltd., Inc.

Plaintiffs-Appellants,

v.

The Swatch Group (U.S.) Inc.,

Defendant-Appellee.

<u>Instructions</u>

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Orologio of Short Hills, Inc. and Orologio International Ltd., Inc.
(Name of Party)
makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: Neither Appellant Orologio of Short Hills, Inc. nor Appellant Orologio International Ltd., Inc. have a parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. state, respectively, that they are privately held corporations and that no publicly held corporation owns 10% or more of their stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Ronald L. Israel, Esq.
(Signature of Counsel or Party)

Dated: 9/4/2015

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Jersey (the "District Court") had subject matter jurisdiction based upon (a) 28 U.S.C. 1331, for civil actions arising under the Constitution, laws, or treaties of the United States, and (b) 28 U.S.C 1367, for civil actions supplemental to a civil action for which the United States District Court has original jurisdiction.

This Court has jurisdiction over this appeal because on August 20, 2015, Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. (collectively, "Orologio") timely filed a Notice of Appeal with the Third Circuit appealing the District Court's July 23, 2015 Order. (A1). No cross-appeals have been filed. The Third Circuit has jurisdiction over Orologio's appeal pursuant to 28 U.S.C. 1291. The Order from which this appeal is taken, dated July 23, 2015, was a final order disposing of all claims at issue in the action. (A4).

ISSUES PRESENTED FOR REVIEW ON APPEAL

1. Did the District Court err in improperly employing a narrow interpretation of the New Jersey Franchise Practices Act ("FPA"), N.J.S.A. 56:10-1 et seq, definition of a "franchise," to effectively require that Orologio (a) demonstrate that it was the alter-ego of Appellee Swatch Group (U.S.), Inc. ("SGUS") rather than utilizing the actual broader definition of a franchise as set forth in the FPA, N.J.S.A. 56:10-3(a) and applicable case law, which can apply to a franchisee with as little as twenty percent of its revenue from the franchisor's goods; (b) identify a single contract setting forth the license given to it by SGUS, rather than use multiple writings and the parties' actual course of dealings, including SGUS's designation of Orologio as SGUS's "authorized dealer," in order to demonstrate the existence of a license, and (c) demonstrate that it was so under the control of SGUS that it would exclusively sell SGUS's products when the actual community of interest analysis requires consideration of multiple factors, all of which weigh in favor of Orologio's claims? (A4)[Order below]; (A6)[Opinion below]; (A1381 et seq)[Orologio's Rule 56.1 Statement].

2. Did the District Court err in rendering findings of fact with respect to Orologio's claim pursuant to the FPA despite the existence of a disputed record, concluding erroneously that (a) "Orologio is unable to point to any specific written arrangement granting it a license under the NJFPA," ignoring (i) several written

documents that governed the parties' relationship and licensing, (ii) Orologio's status as an "authorized dealer" of SGUS's goods, which New Jersey's courts have found demonstrates the existence of a license; and (b) "Orologio and [SGUS] did not share a community of interest within the meaning of the NJPFA" despite evidence of record that (i) SGUS exercised substantial control over Orologio's operations, (ii) Orologio's substantial investment in and reliance upon the Omega brand rendered it beholden to SGUS, and (iii) the parties had a partnership in which each symbiotically relied on the other? (A4); (A6); (A1381 et seq).

3. Did the District Court err (a) by determining the issue of whether Orologio competes with the other Omega retailers to which SGUS made available benefits in violation of the Robinson Patman Act, 15 U.S.C. 13 ("RPA"), because the issue of whether businesses compete is a question of fact for the jury; (b) by requiring a showing of competitive injury in order to sustain a Section 2(d) and/or 2(e) claim, where such requirement only exists for Section 2(a) claims; (c) by requiring a demonstration of lost sales to support a Section 2(d) and/or 2(e) claim, where no such requirement is in the statute; and (d) by misinterpreting (i) the RPA's "proportionally equal requirement" by failing to address whether SGUS provided promotional support to its competing retailers based upon objective criteria; and (ii) the RPA's "availability" requirement, which required SGUS to take affirmative steps reasonably designed to provide notice to competing retailers

of the availability of promotional services and allowances? (A4); (A6); (A1381 et seq).

4. Did the District Court err in rendering findings of fact with respect to Orologio's claim pursuant to the RPA, despite the existence of a disputed record, including concluding erroneously that (a) "Orologio failed to carry its burden in demonstrating who its actual competitors are," despite fact and expert evidence of record defining the relevant geographic market and identifying the Omega retailers within that market that compete with Orologio; (b) "there is nothing in the record suggesting that tagging these specific dealers led to Orologio's lost sales," despite extensive evidence of record, including reports from two experts in the field, determining the impact of SGUS's promotional expenditures on Omega retailer sales and the amount of damages that Orologio suffered as a result of SGUS's RPA violations; and (c) "the record shows that [SGUS] offered proportionally equal opportunities to Orologio and its other retailers," despite substantial evidence establishing that SGUS provided promotional and advertising benefits to Orologio's competitors (i) on an ad hoc basis and not pursuant to a plan based on objective criteria, and (ii) without making the promotional and advertising benefits available to all competing retailers? (A4); (A6); (A1381 et seq).

5. Did the District Court err because it failed to consider Orologio's affirmative motion for partial summary judgment on liability only for its RPA

claims, and should this Court, based upon its de novo review of the record, enter partial summary judgment in favor of Orologio where the record is undisputed that SGUS provided Orologio's competitors with tagging and co-op support without guidelines or objective standards and without giving Orologio access to similar support in violation of the RPA? (A4); (A6); (A96)[Orologio's Notice of Motion for Partial Summary Judgment].

6. Did the District Court err in ignoring the findings set forth in Magistrate Judge Madeline C. Arleo's July 16, 2014 Order that Orologio made a prima facie showing of spoliation by concluding that no spoliation had occurred and otherwise failing to consider the motion for a spoliation sanction? (A4); (A6); (A225)[Orologio's Notice of Motion to Strike].

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to Local Appellate Rule 28.1(a)(2), Orologio states that this case or proceeding has not been before this Court previously and it is unaware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal. A prior state court action is identified in the next section.

STATEMENT OF THE CASE

A. Procedural History and Orders From The District Court

Orologio filed its first action against SGUS on May 10, 2011 in the Superior Court of New Jersey, Chancery Division, Essex County bearing docket no. ESX-C-119-11 the "State Court Action"). (A918). The sole plaintiff in the State Court Action was Orologio of Short Hills, and only state law claims were asserted. (Id.) Because Orologio intended to pursue claims based upon the federal RPA, the parties stipulated to the voluntary dismissal of the State Court Action, with Orologio filing a single complaint setting forth all of its state and federal claims in the United States District Court for the District of New Jersey. (A1650) On November 22, 2011, Orologio filed this action. (A1432-A1457)[Complaint].

On January 19, 2015, Orologio moved for partial summary judgment with respect to liability on only a part of its RPA claims (namely, for disbursing of marketing support without standards or notice to Orologio). Orologio also moved for sanctions based upon SGUS's improper spoliation of evidence for which Magistrate Judge Arleo concluded Orologio made a prima facie showing. (A399)[July 16, 2014 Order]. Also on January 19, 2015, SGUS moved for summary judgment dismissing all of Orologio's claims. The District Court did not conduct oral argument. On July 23, 2015, the District Court issued an Opinion (the "Opinion") and Order: (a) granting SGUS's motion for summary judgment in its entirety, (b) denying Orologio's motion for partial summary judgment as "moot," and (c) denying Orologio's motion for sanctions by referencing it in a footnote. (A4, A6). On August 20, 2015, Orologio filed a Notice of Appeal. (A1).

B. Facts Relating to Franchise Practices Act and Robinson-Patman Act Claims.

1. Orologio Was an Omega Authorized Retailer and SGUS Franchisee For Nearly Twenty Years.

Orologio of Short Hills sells high end watches at The Mall at Short Hills, Millburn, New Jersey and has been in business since 1994. (A445)[SGUS Rule 56.1 Statement at ¶2]; (A1572)[Oppenheimer Dec. at ¶¶ 2-3]. Orologio of Paramus opened in 1988 and sold similar watches at the Garden State Plaza Mall, Paramus, New Jersey. (Id.) SGUS is the American affiliate of a Swiss watch manufacturer and distributes in the United States several different brands of watches, including watches with the brand name Omega. (A446; A1573).

From at or near their inception, both Orologio stores were designated by SGUS as an "authorized Omega dealer," an important designation because only authorized dealers are permitted to sell Omega products. Nevertheless, even authorized dealers must do so – as set forth in further detail below – in accordance with strict rules set forth by SGUS. (A1573). As an authorized Omega dealer, Orologio also services Omega products, further linking Orologio and Omega in the public mind. SGUS terminated Orologio of Short Hills without notice and without cause by letter dated April 18, 2011. (A968). Orologio filed suit shortly thereafter.

Although it offers several different brands, Orologio's business is dependent upon two internationally known brands that provide the bulk of its revenue (both in terms of gross sales and bottom line revenue) and act as an anchor to draw customers to the store. (A1573). One such brand is Omega (which provided 25% of Orologio's revenue), a leading brand manufactured by the Swiss-based Swatch Group, and distributed through its American distributor, SGUS.[1] (A1572-A1573). At all relevant times herein, Orologio dedicated half – and sometimes more – of its entry space to Omega-themed window displays and used Omega-themed displays within its store. (A949-A951)[photographs of Orologio storefront]. Although Orologio operated under its own name and sold multiple brands, the business was inextricably linked to SGUS in the sense that each store focused on Omega as the

[1] The other brand is Breitling. Orologio was forced to sue Breitling in 2006 pursuant to the FPA when Breitling attempted to terminate it, resulting in a confidential settlement whereby Orologio remains an authorized Breitling dealer.

most (or one of the two most) important brands featured in its stores. Orologio based its business around the expectation that its relationship with SGUS would continue.

2. The Parties' Relationship Has Been Governed By Several Writings Since Its Inception.

Several documents created by SGUS defined the parties' relationship:

a. **"Brand Policy Statement":** SGUS issued a "Brand Policy Statement" at the outset setting forth the rules for Orologio's status as an authorized dealer, including use of SGUS's intellectual property, product presentation, and advertising. (A1568-A1570).

b. **October 20, 2007 Email from SGUS's Account Representative:** On October 20, 2007, SGUS's Orologio account representative set the new terms of the parties' relationship pursuant to SGUS's "Selective Distribution Program," which were a condition of remaining an authorized dealer – setting a new piece requirement (the inventory minimum Orologio was required to purchase), and imposing onerous requirements. (A1484-A1485).

c. **"Brand Policy Statement":** SGUS also issued a mandatory "Brand Policy Statement" to all authorized retailers, in which Orologio was directed "to use[its] best efforts to preserve and enhance the image of [SGUS's] Brand names and the goodwill associated with [SGUS's] various trademarks." (A1618-A1619).

d. **Internet Brand Policy:** SGUS's mandatory Internet Brand Policy barred internet sales, set parameters on the use of SGUS's intellectual property on Orologio's website, and required a link to Omega's official website, and regulated sales generally. (A1524-A1530).

e. **"Partner Plans":** Beginning in about 2007, SGUS also required its authorized dealers to enter into periodic "Partner Plans," which Plaintiffs were falsely led to believe were the sole means to obtain co-op[2] advertising,

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[2] Co-op advertising is a retail industry practice whereby a manufacturer provides payment or credit to a retailer to pay for some or all of advertising that features the retailer and the manufacturer.

but which included a series of terms for a specific calendar year. (A1482; A948). See infra at § B-6 and B-7.

f. **“Credit Policy”:** SGUS’s “Credit Policy,” dated February 20, 2008, dictated SGUS’s payment terms. (A1460-A1461).

g. **“Replenishment Terms”:** Pursuant to “The Swatch Group (U.S.), Inc. Replenishment Terms,” SGUS dictated to Orologio the look of Orologio’s Omega “presentation space,” Orologio’s sales reporting obligations, payment terms, credit terms, and other day-to-day issues. (A1478-A1479).

h. **“Presentation and Sales Agreement”:** Through the “Presentation and Sales Agreement,” SGUS set a 75 watch piece requirement and rules for the display of Omega watches in a four-foot case, inventory assortment, and other issues. (A1480; A1578-A1579).

i. **“How to Display the Omega Collection”:** The written guidelines in “How to Display the Omega Collection” dictated how Omega products could be displayed at Orologio’s stores. (A1499-A1504).

For nearly every function Orologio performed as an authorized retailer, there was a written rule promulgated by SGUS. (A-496)[Oppenheimer Dep. at 145:4-146:2]. These written edicts implemented by SGUS, as well as the financial requirements to invest in the Omega brand, allowed SGUS to control Orologio, and Orologio would be terminated for violation of any of them. (A719-A720)[(Weigl Dep. at 70:9-19; 74:7-14).

3. Orologio and SGUS Each Had A Financial Interest In Their Joint Efforts to Sell Omega Products.

SGUS not only had an interest in the volume of Omega watches Orologio sold, but also required Orologio to make a substantial investment in the Omega brand. Orologio did not carry Omega watches on consignment; it was required to purchase and maintain a designated volume and assortment of watches purchased from SGUS. (A513-A514)[Oppenheimer Dep. at 214:13-218:9 (discussing obligations to buy Omega product)]. The piece requirement (which set minimum inventory) and the monthly replenishment requirement together mandated that each time Orologio sold an Omega watch, Orologio had to replenish its inventory. (A513-A514). Thus, Orologio was required to make an investment measuring in the hundreds of thousands of dollars for Omega inventory while giving SGUS a parallel financial interest in Orologio's sales of Omega watches. (Id.)

Because the sale of Omega watches was so essential, Orologio invested in marketing and advertising of Omega products, training of a sales force knowledgeable in Omega products, and dedicating display cases and window displays for the promotion of Omega products. Orologio made this financial and strategic commitment to Omega to the exclusion of other brands because of Omega's place in the market and because a business the size of Orologio simply could not afford to make a similar simultaneous commitment to other brands. See, e.g., (A1441-A1445)[Complaint at ¶¶ 32-48]; (A949-968)(photographs and other documents demonstrating link among parties); (A497, A513-A514)[Oppenheimer Dep. at 149:2-150:8, 214:13-218:9, and 150:14-151:14) (testimony re: same).

4. <u>SGUS Repeatedly Assured Orologio That They Were "Partners" and That The Two Were Working Together Towards a Common Goal.</u>

SGUS and Orologio cooperated to develop the Omega brand and achieve the parties' common goal of increasing sales. Together they promoted the Omega brand, trained Orologio's sales force to sell Omega products, and jointly pursued their common interest. Throughout their relationship, SGUS repeatedly referred to Orologio as its "partner," a title befitting the relationship as portrayed to the public. <u>See</u>, <u>e.g.</u>, (A1493; A1489; A1491; A1495)[letters referring to Orologio as a "partner"]; (A-719)[Weigl Dep. at 71:12-72:19 (admitting Orologio was partner)]; (A1484-A1485; A943; A1566-A1567)[emails referring to Orologio's support or commitment to SGUS]. Orologio, therefore, saw its role as a part of a larger effort by both SGUS and Orologio to grow the Omega brand.

Orologio and SGUS cooperated and coordinated activities toward a shared common goal of selling SGUS products, including: (a) installing store and window displays that dominated the look of Orologio's store; (b) conducting training sessions for Orologio employees required by SGUS, but where Orologio paid the employees' wages; and (c) hosting "trunk shows" in which an SGUS Omega representative would be present in Orologio's store to sell additional merchandise and display additional marketing material. (A949-A451)[photographs]; (A508-A509)[Oppenheimer Dep. at 196:16-198:10](as to the displays); (A1447)[Complaint, ¶ 57(a)]; (A958-A964)[emails re: training]; (A605-A606)[Swift Dep. at 117:9-120:2]; (A1448)[Complaint, ¶ 57(d)]; (A488)[Oppenheimer Dep. at 115:24-116:5] (trunk shows).

5. In Order To Market and Sell Omega Products, Orologio Utilized A License For Omega-Related Intellectual Property.

As part of the parties' joint efforts, SGUS granted Orologio a license to use SGUS's Omega-related intellectual property. This fostered in the public consciousness a close relationship and linkage between the two parties such that Orologio became known as a place where Omega watches not only could be purchased, but also serviced.

SGUS set rules for how Orologio could use SGUS's intellectual property. SGUS provided Orologio with written policies and procedures regarding how and when SGUS's Omega-related intellectual property could be displayed in advertising, at Orologio's retail location, and on the internet. See, e.g., (A1578-A1579[Presentation and Sales Agreement]; (A1524-A1530)[Omega Internet Brand Policy]; (A1553-1555)[Email from K. Gibson, with G. Swift on cc line, re: co-op advertising and referencing 2009 Advertising Guidelines]. Moreover, at SGUS's insistence, Orologio had in its store Omega themed stand-alone displays, display cases, and window displays. (See, e.g., A949-A955). Any person who visited

Orologio store over the years before Orologio was terminated would have seen the link between Orologio and Omega. Id.

Similarly, although SGUS permitted Orologio to use SGUS's tradename and product likenesses on Orologio's website, SGUS set rules regarding how such licensed intellectual property could be used. SGUS's Internet Brand Policy also included with it copyrighted "approved images" of Omega products that Orologio was permitted to use on their website, but barred the sale of products through the internet. (A1524-A1530)[Omega Internet Brand Policy]. SGUS provided copyrighted photographs of its Omega products for use on the Orologio website. (Id.) During its three-decades long relationship, Orologio used SGUS's intellectual property in the signage that was the focal point to the entrance to its store, on Orologio's print advertisements for which Orologio paid in whole or in part, and at times in billboards – all of which featured both the Orologio name and the tradename and likenesses owned by SGUS for the Omega brand. (A949-967).

6. Over Time, SGUS Changed The Relationship To Give It More Power Over Orologio and To Clandestinely Favor Other Retailers.

Although SGUS referred to Orologio as its partner, SGUS always maintained more power and dominated the relationship. SGUS unilaterally changed the parties' relationship in 2007 with the institution of the "Selective

Distribution Program," and eventually abused its power to conceal from Orologio benefits conferred upon Orologio's competitors but denied to Orologio.

In 2007, SGUS informed Orologio that continuation as an authorized dealer required participation in SGUS's "Selective Distribution Program." (A591-A593)[Swift Dep. at 61:22-66:5]; (A1484-A1485)[Email dated October 20, 2007]. The premise of the program was that SGUS reduced the number of its Omega retailers, but required those that remained to increase their investment in the brand. (Id.) This required Orologio to accept a piece requirement of 65 pieces (up from 40); thus, Orologio was required to purchase more Omega inventory to maintain that piece requirement, diminishing Orologio's ability to invest in other brands, and rendering it even more reliant on SGUS. (Id.; (A513-A514)[Oppenheimer Dep. at 214:13-218:9]). Further, Orologio also had to maintain relationships with other "high image brands that [were] similar to Omega" so that Orologio remained a "destination for high end watches." (A1484-A1485)[Email dated October 20, 2007]. SGUS also required that Orologio use Omega-themed window displays, case displays, and other in-store presentations, meaning that SGUS required Orologio make its public image intertwined with that of the Omega brand. (Id.)

7. The Partner Plans Changed To a Promotional Support Program.

(a) The Early Partner Plans

Beginning in about 2004, SGUS provided its authorized Omega retailers with a "Partner Plan." (See A1580-A1586)[Sample 2004 Partner Plan]). The Partner Plan was created as a way to assist retailers when SGUS reduced the margins on Omegas. Specifically, the Partner Plan paid retailers a percentage back on their Omega purchases from SGUS if the retailer met a target amount of sales and other requirements. (Id.) These early Partner Plans did not require promotional activities in order to obtain the rebates. (See id.; see also A2651-A2665; A2666-A2674)[Sample 2005 and 2006 Partner Plans]).

(b) SGUS Changed the Partner Plans To Be Linked To Advertising and Marketing Support.

In or about 2007, however, at the same time as SGUS moved to its Selective Distribution Program, the Partner Plan changed and became the mechanism for Omega retailers to obtain promotional support such as co-op from SGUS. (A2675-A2678; A2679-2683)[Sample 2007 and 2008 Partner Plans]; see also A948 [Orologio's 2009 Partner Plan]; A1573 [Oppenheimer Dec. at ¶ 10]. These later Partner Plans required retailers to propose a marketing plan whereby if the retailers met their sales goals (and other requirements), SGUS would give a credit for a portion of marketing expenses featuring the Omega brand and the retailer jointly (commonly referred to as "co-op" support). (Id.) In other words, instead of receiving a simple rebate as with the early Partner Plans, the new program provided that rebates were to be used for pre-approved co-op marketing.

The new Partner Plan was presented to Orologio as the only way in which retailers could receive promotional support from SGUS. (A1574)[Oppenheimer Dec. at ¶ 11]; see also generally A1463-1464 [Declaration of Barry Berman]. Orologio was left with the unmistakable – but false – understanding that co-op support could be obtained only through the Partner Plan. (Id.) Orologio was never informed that they could supposedly receive any promotional support, including co-op support, from SGUS other than through these new Partner Plans. (A1574)[Oppenheimer Dec. at ¶ 12]; see also A807-A808; 811-A812 [Kuiken Dep. at 77:5-78:7; 93:14-95:13; (A1074)[Sanchez Dep. at 87:13-88:2].

(c) SGUS Secretly Provided Co-Op Outside Of Partner Plan.

Orologio did not learn that co-op support was available outside the Partner Plans until discovery in this action. Other Omega retailers had the same experience. (A1463-A1464)[Berman Declaration]. During discovery, Orologio uncovered that SGUS provided millions of dollars in co-op support to Plaintiffs' competitors outside of the Partner Plan even after Orologio was told the Partner Plan was the sole means to obtain such support. (A619)[Swift Dep. at 170:14-172:22]; (A2794)[Fruda Dep. at 166:19-167:25]; (A2684-A2750)[SGUS Coop Advertising Report]. SGUS produced a spreadsheet identifying (1) the name of every Omega authorized dealer in the New Jersey, New York, Pennsylvania and Connecticut area that received co-op outside of the Partner Plan; and (2) the exact amounts each of these retailers received in this unlawful support. (Id.; (A2794)]Fruda Dep. at 166:19-167:25]; (A2684-2750)[SGUS Coop Advertising Report]). These retailers included such competitors as London Jewelers, Tourneau, American Wempe, Jay Roberts and Carat and Co. (Id.)

SGUS provided this co-op support outside of the Partner Plan to Orologio's competitors without any required objective standards or guidelines regarding (1) which retailers received such support, and (2) how much support these favored retailers received. (See A619)[Swift Dep. at 170:21-172:22]; (A729)]Weigl Dep. at 111:12-112:5]; (A808)[Kuiken Dep. at 81:12-15]). SGUS identified no guidelines, policies or writings that provide any criteria by which retailers could receive co-op support outside of the Partner Plan. (A1419)[Barnes Dec., ¶¶ 3-8]l; (A1587-A1601)[Sample Co-Op Commitment Agreements]). Documents produced by SGUS show that other retailers received different levels of support, unrelated to their sales or any other objective factor. In actuality, SGUS gave out millions of dollars in co-op outside of the Partner Plan at its whim, without notice to other retailers, and without standards to ensure that SGUS provided this support in a non-discriminatory manner. (See A2684-A2750 [SGUS Co-op Advertising Report].

8. SGUS Also Provided Favored Retailers With Free Marketing Support That Was Not Made Available to Orologio.

SGUS also routinely provided Orologio's competitors advertising support outside of the Partner Plan by "tagging"[3] Orologio's competitors in Omega advertisements without requiring these retailers to pay anything towards this advertising. (See A210-A211 [Sanchez Dep. at 100:17-103:4]).

For example, Omega's competitors were featured free of charge in print advertisements and on television commercials during Monday Night Football and the Olympics. (See A210-A211 [Sanchez Dep. at 101:22-102:21]; A826 [Kuiken Dep. at 151:14-152:19]; A634 [Swift Dep. at 231:17-232:7]; (A1418-A1419)[Barnes Dec., ¶¶ 2-11]. SGUS disbursed the free "tagging" to select retailers without any objective criteria or guidelines as required, and did not track or keep records of the tagging. (A211)[Sanchez Dep. at 102:23-25]; (A635)[Swift Dep. at 235:8-24].

[3] Tagging is where a manufacturer pays for an advertisement featuring a particular product, and identifies a "tagged" retailer as a place to purchase that product.

C. SGUS's Wrongdoing Continued During The Pendency Of This Action With The Destruction of Evidence.

SGUS's wrongdoing continued once discovery began. Orologio learned during discovery that its competitors were given free tagging, but could not ascertain precisely who received such tagging or in what form. Other than a few emails, SGUS was unable to produce any tagging-related documents, apparently because such documents do not exist. (See A276-A279 (SGUS Response to Request Nos. 56 and 66); A281-A292 [letters dated November 14, 2012, June 5, 2013 and July 18, 2013 from SGUS to Orologio]; A294-A295 [Letter from Orologio to District Court regarding tagging documents]).

As a result, although its prior requests should have elicited their production, Orologio requested copies of the television commercials which included the tagging. (Id.) A subpoena to SGUS's vendor storing the commercials revealed that SGUS had directed the destruction of the media files containing the commercials. (See A434; 437 [DeSanti Dep. at 33:16-25; 195:25:196-17]). Magistrate Judge Arleo, therefore, issued an order finding preliminarily that spoliation had occurred and directing further discovery. (See A399-A401 [Order]; see also A369 et seq [Transcript of Hearing at 11:16 et seq]). This discovery revealed that SGUS had not issued a litigation hold letter, that its President had personally approved the destruction of the tagged advertisements during discovery, and that the tagged advertisements themselves were the sole means to identify which retailers had been tagged in television commercials and when. (See A306-308; 309-311; 312-313 [e-mails directing/approving document destruction]; A434; A437 [DeSanti Dep. at 33:16-25; 195:25:196-17]).

SUMMARY OF THE ARGUMENT

The New Jersey Legislature and the United States Congress enacted the FPA and the RPA, respectively, to protect small retailers from being subject to abusive tactics inflicted upon them by larger distributors with the power to dictate the terms and conditions of the parties' relationship. The FPA bars termination without cause (and no cause is claimed here); the RPA protects smaller local retailers from inequitable treatment by manufacturers favoring larger national retailers. Here, Orologio, the owner and operator of local businesses that sell high-end watches, is precisely the sort of business that these laws are designed to protect. Rather than provide Orologio with the protections to which it was entitled, however, the District Court relied upon improperly narrow interpretations of both statutes, and made findings of fact despite a disputed record, to grant summary judgment to SGUS dismissing all of Orologio's claims. This result is contrary to federal and state law and the Federal Rules of Civil Procedure, and cannot stand.

The most obvious error made by the District Court is that it rendered findings of fact despite a disputed evidentiary record. Rather than grant Orologio the benefit of every inference available, the District Court reviewed the evidence, substituting its own factual conclusions for those that should have been rendered by the jury. With respect to the FPA claim, the District Court made factual findings on the written arrangement and community of interest requirements despite a contested record. For the RPA claims, the District Court also ignored a disputed record to conclude erroneously that Orologio failed to demonstrate competition with other preferred retailers, that tagging led to lost sales, and that promotional support was offered on an impermissibly ad hoc basis. For this reason alone, the District Court's decision cannot stand.

The FPA explicitly states that a franchisee is entitled to the protection of the FPA "where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise." N.J.S.A. 56:10-4. Thus, even if eighty percent (80%) of its revenue comes from outside the franchise relationship, the FPA bars termination of the retailer without cause. The District Court's decision, however, appears infected with the false notion that solely alter-ego franchisees – like a McDonalds or a Starbucks – are entitled to the protections of the FPA. The letter of the statute, and the cases interpreting it, dictate otherwise.

The same is true of the District Court's analysis of Orologio's RPA claim. 15 U.S.C. 13 et seq. Sections 2(d) and (e) of the RPA require sellers to make available allowances (such as cooperative advertising) and services (such as tagging) promoting resale on a proportionally equivalent basis to all competing customers. 15 U.S.C. 13(d) and (e). SGUS committed text book violations of the RPA by disbursing co-op support and tagging opportunities without any form of standard or guidelines, and without informing Orologio such support was available. These benefits were provided, in many cases, to larger more preferred retailers, leaving Orologio at precisely the sort of disadvantage the RPA is designed to protect against. As a result, the District Court's decision cannot stand.

ARGUMENT

POINT I

OROLOGIO'S FPA CLAIM MUST BE RESOLVED BY A JURY AFTER TRIAL

A. Standard of Review.

Upon a de novo review of the District Court's improper grant of summary judgment, this Court will determine that (a) the District Court improperly rendered findings of fact despite a disputed evidentiary record, and (b) utilized an improperly narrow interpretation of the FPA's definition of a franchise to do so. See, e.g., Boswell v. Eoon, 452 Fed. Appx. 107, 113 (3d Cir. 2011) (de novo review of grant of summary judgment). This standard of review applies to Points I, II, and III.

B. The District Court Made Factual Findings Despite a Disputed Evidentiary Record.

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see, e.g., Noble v. City of Camden, -- F. Supp.3d --, 2015 WL 3954047 (D.N.J. June 29, 2015) (Add32). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Moreover, the District Court is required to view any evidence in favor of the nonmoving party and extend any reasonable favorable inferences to be drawn from that evidence to that party. Hunt v. Cromartie, 526 U.S. 541, 552, 119 S. Ct. 1545 (1999).

Although the District Court acknowledged this well-established standard, rather than identifying the factual elements of a franchise claim in the FPA's definition of a franchise to determine if Orologio presented sufficient evidence to withstand the motion, the District Court identified its task as "to determine whether the relationship between Orologio and [SGUS] constituted a franchise under the NJFPA," and that to do so "this court must find that (1) [SGUS] granted a license to Orologio and (2) there was a 'community of interest' between the two parties." (A13). In this context, the District Court was not supposed to determine whether Orologio was a franchise, but rather whether there was sufficient evidence for a reasonable jury to so conclude.[4]

C. **The District Court Interpreted the FPA's Definition of a Franchise Far Too Narrowly.**

The District Court erred because it misinterpreted the FPA's definition of the term "franchise":

[4] The District Court apparently ignored the parties' Rule 56.1 Statements. In response to SGUS's statement, Orologio asserted that SGUS failed to provide evidentiary support for its assertions. Nevertheless, Orologio provided the District Court with not only citations to the record disputing SGUS's factual contentions, but also provided the District Court with a Counterstatement of Facts. (A1395-A1399; A1405-A1410 [Orologio Rule 56.1 Statement at Counterstatement, ¶¶ 11-27 (written arrangement) and ¶¶ 55-78 (community of interest]). The same is true of the facts underlying the RPA claims. See infra Point II.

> "Franchise" means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

N.J.S.A. 56:10-3(a). This requires: (a) writings that govern the relationship, (b) a license to use the franchisor's intellectual property, and (c) a community of interest among the parties.[5] Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324 (1992). The District Court erred by: (a) requiring Orologio to essentially be Omega's alter-ego, (b) requiring one document that sets forth the license granted by SGUS, and (c) failing to consider all of the community of interest factors. At each step, the District Court conducted its own evidentiary review of a disputed factual record.

1. The FPA Is Not Limited To The Traditional Alter-ego Franchisees.

Implicit within the Opinion is the false notion that the FPA's protections are limited to an alter-ego relationship like a McDonald's or other chain retailer. This is contrary to the letter of the statute and the explicit pronouncements of New Jersey's appellate courts. N.J.S.A. 56:10-4 provides that the protections afforded

[5] If the franchisee meets this test, and other requirements of the FPA, the franchisee is entitled to certain protections, including that it may not be terminated without cause. N.J.S.A. 56:10-5.

by the FPA are provided for any franchise so long as the relationship provides one-fifth of the franchisee's revenue:

> This act applies only: a. to a franchise … where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise….

N.J.S.A. 56:10-4. Thus, the Legislature contemplated that the FPA could apply where eighty percent of the revenue for the franchisee comes from outside the franchise relationship. Id. The FPA itself contemplates relationships far beyond the one that exists at a McDonalds and includes situations where, as here, the franchisee sells several different brands.

The New Jersey Supreme Court's decision in Instructional Systems, 130 N.J. at 354-55, demonstrates that the proper interpretation of the FPA is that its scope extends far beyond the traditional definition of a franchise. There, the New Jersey Supreme Court explicitly rejected the argument that the franchisee must be the alter-ego of the franchisor because the FPA explicitly includes franchisees that derive 80% of their revenue from sources outside the franchise relationship. Id. at 354-55 ("the addition of that language, 'more than 20%' of gross sales, seems to contemplate the creation of the 'fractional franchise'"); see, e.g., Engines, Inc. v. MAN Engines & Components, 2010 WL 3021871, *8 (D.N.J. July 29, 2010) (Add1) ("exclu[sion] from the [FPA's] reach a franchisee that derives 20% or less of gross sales from its franchisor, implies that a firm may be a franchisee even if only 21% of its gross sales are derived from the franchisor"). The fact that the Legislature required merely that the franchise relationship account for 20% of the franchisee's relationship means that the Legislature intended for the FPA to apply, as here, even where the franchisee has other supplier relationships that support its business. See also N.J.S.A. 56:10-2 (Legislative Findings requiring courts to take an expansive view of the FPA).

Nevertheless, the traditional notion of an alter-ego franchisee infected the District Court's opinion. In its discussion of the license requirement, the District Court improperly held that no license existed because "Orologio 'wrapped' itself around several major brands, including its best seller, Breitling." (A15). The existence of a license for purposes of the FPA does not require that Orologio wrap itself around solely SGUS or that it sell only SGUS's products. If this were the case, the FPA would require 100% of the franchisor's revenue be derived from the franchise relationship, which the statute explicitly does not provide.

Similarly, in its community of interest analysis, the District Court improperly held "Orologio was not economically dependent on [SGUS], as Orologio relied on several high-end brand watches, not just Omega." (A16). Again, this approach is contradicted by the letter of the statute. If the New Jersey Legislature wanted to limit the protection of the FPA to situations where the franchisee's dependence included reliance upon the franchisor to provide all (or even the majority) of its merchandise, it could have done so. Thus, the community of interest requirement cannot be interpreted to contradict – or create greater obligations than – the statute itself.

2. A Single Written Agreement With an Explicit License Is Not Required.

The District Court conflated the requirements within the definition of a franchise for a "written arrangement" and a "license," and improperly required that Orologio "point to [a] specific written arrangement granting it a license under the NJFPA." (A14)[Opinion at 9]. Although Orologio contends that the requirement for a written arrangement is distinct from the license requirement, the District Court's interpretation of the statute fails regardless of whether those requirements are linked because (a) there are writings sufficient to demonstrate a written arrangement conferring a license, and (b) the license requirement may be proven through the parties' course of dealings.

(a) The District Court Did Not Properly Interpret The Statute's Definition of a Written Arrangement.

The District Court erred because it ruled that because there was no formal contract conferring a license, no written arrangement existed: "Orologio is unable to point to any specific written arrangement granting it a license under the" FPA. (A14). The written arrangement requirement, however, does not require a single document setting forth all of the relationship's terms, including the grant of a license. Rather, the statute says "arrangement," not agreement, and does not require a formal contract defining all the terms of the license.

The holding in Lithuanian Commerce Corp., Ltd. v.. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998), demonstrates why the Opinion is improper. There, the court held that two letters exchanged by the parties met the written arrangement requirement of the FPA, and therefore, summary judgment could not be granted: "These letters suffice to raise a factual issue as to whether LCC had a written agreement with Sara Lee." 179 F.R.D. at 470. Thus, as in Lithuanian Commerce Corp., the FPA does not require a single document to define the relationship, and perhaps more importantly, allows parties to prove the existence of a license from the circumstances of the parties' relationship as well as their written agreements.

Instead of following the statute or Lithuanian Commerce Corp., the District Court improperly relied upon an almost forty year old decision from a state trial court for its analysis of the written arrangement issue, Finlay & Associates, Inc. v. Borg-Warner Corp., 147 N.J. Super. 210, 219-20 (Law Div. 1976). That case is rarely cited, and importantly, the parties there did not have any writing at all and the franchisor was not, as here, an authorized dealer of the defendant's goods – all of which render that decision of little import here. The District Court also relied improperly upon the decisions in Liberty Sales Asscocs., Inc. v. Dow Corning Corp., 816 F. Supp. 1004, 1010 (D.N.J. 1993) and Colt Industries Inc. v. Fidelco

Pum & Compressor Corp., 844 F.2d 117 (3d Cir. 1988). Neither involved any discussion of the meaning of the term “written arrangement” and both decisions are prior to the New Jersey Supreme Court’s expansive interpretation of the definition of a franchise in Instructional Systems. See Atlantic City Coin & Slot Service Co., Inc. v. IGT, 14 F. Supp.2d 644, 662 (D.N.J. 1998) (identifying Instructional Systems as the leading FPA authority). Although Instructional Systems did not address the written arrangement issue, the Supreme Court rejected rigid tests for an alter-ego-type franchise and embraced a definition of a franchise that permitted many types of arrangements qualifying for the protections of the FPA. Id.

As a result of this misinterpretation of the FPA, the District Court ignored evidence that the parties’ writings were more than sufficient for a reasonable juror to conclude that a license existed. Here, there were multiple writings (including the Partner Plan, the Brand Policy Statement, the written Internet rules, and the October 20, 2007 email confirming the conditions of Selective Distribution status) that, taken together, constituted the required written arrangement and which defined the manner in which Orologio could sell SGUS’s products and use SGUS’s intellectual property to do so.

(b) The Grant Of The License Does Not Need To Be An Explicit Licensing Agreement.

Contrary to the District Court's Opinion, Orologio is not required to identify a specific document conferring a license and identifying its scope and terms. New Jersey's courts have repeatedly held that to establish the existence of a license, the court is not required to look solely at the parties' documents. Rather, to establish the existence of a license between the parties, "the franchisee must, at a minimum, use the name of the franchisor in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the . . . licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee." Beilowitz v. General Motors Corp., 233 F. Supp.2d 631, 642 (D.N.J. 2002) (quoting Instructional Systems, 130 N.J. at 352). That is certainly true here, and SGUS has actually insisted that Orologio use its intellectual property for that purpose.

In fact, under New Jersey law, the mere fact that SGUS designated Orologio as an authorized dealer is alone dispositive on this issue and Orologio's claims must be presented to a jury. See, e.g., Neptune T.V. & Appl. Serv., Inc., v. Litton Microwave Cooking Products Div., 190 N.J. Super. 153, 160-61 (App. Div. 1983) (identifying authorized dealer status as central to the analysis); Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131, 1139-40 (3d Cir. 1991) (same); see Instructional Systems, 130 N.J. at 355 (reaffirming Neptune's focus in the license analysis on the parties' course of dealing).

As an authorized dealer, SGUS allowed Orologio to use the Omega trade name, likeness and other intellectual property in print advertising, billboards, signage at Orologio's location, and on the internet. SGUS went further however, setting strict rules for the use of their intellectual property. As a result, the perception was created in the public consciousness that Orologio's store was a place to buy or service Omega products. This is a license as that term is defined in the FPA. See also Lithuanian Commerce Corp. 179 F.R.D. at 471 (use of both parties' names on signage, truck, brochures, and other promotional devices sufficient evidence of license).

3. The District Court Failed to Consider All The Factors In the Community of Interest Analysis and Ignored Evidence To Reach Improper Factual Conclusions.

The community of interest analysis is a fact sensitive inquiry requiring review of several different factors. The District Court further erred because it (a) did not consider all of the community of interest factors and (b) rendered an improper factual finding on the control factor.

(a) The District Court Did Not Consider All Of The Community of Interest Factors.

The District Court acknowledged that there were multiple factors in the "community of interest" analysis: (1) the licensor's control over the licensee; (2)

the licensee's economic dependence on the licensor; (3) the disparity in bargaining power; and (4) the presence of a franchise specific investment by the licensee. (A15)[Opinion at 10](quoting Cassidy Podell Lynch, 944 F.2d at 1139-40). Review of the judicial decisions in this area demonstrates that courts consider all of these factors (not just one) as well as the parries' cooperation towards a common goal. For example, in Cassidy Podell, the Third Circuit closely examined each of the four factors identified above. 944 F.2d at 1144. Similarly, in Instructional Systems the New Jersey Supreme Court considered (a) inequitable bargaining power, (b) cooperation for common goals, and (c) control for its community of interest analysis. Thus, the District Court's decision to solely focus on one factor – the exercise of control – renders its Opinion untenable. (A16).

Here, the District Court never considered economic dependence, disparate bargaining power, or franchise specific investments – all of which weigh in favor of Orologio's claim. Economic dependence exists because Orologio built its business around the expectation that the parties would continue together. It invested in inventory, training, and the presentation of Omega-specific signage and windows. As Cassidy Podell explained, community is demonstrated by "years of effort required to gain specialized skills or knowledge valuable to market the licensed product efficiently, but of little use beyond that," present here. 944 F.2d at 1144. Similarly, disparate bargaining power exists, as demonstrated by the numerous rules imposed unilaterally by SGUS. (See infra at § B-3). Further, SGUS's onerous piece requirement prevented the development of other brands, making Orologio's purchase of Omega inventory an investment in the parties' future together.

Furthermore, as discussed above, the leading case in this area is the Supreme Court's decision in Instructional Systems, where the court considered not only inequitable bargaining power and control, but also cooperation for common goals as evidence of a community of interest. 130 N.J. 324. The District Court gave no consideration to this factor. However, there is ample evidence of cooperation for common goals here, including the parties' joint efforts to market and promote the Omega brand and SGUS's repeated references to Orologio as its partner. As a result, had the District Court conducted the proper analysis, it would have determined that, at the very least, a trial was needed on whether Orologio satisfied the community of interest element.

(b) There Is Ample Evidence Of Control.

Furthermore, the District Court determination that "there was a lack of control and dependence because Orologio had the freedom to choose whether to conduct business with" SGUS (A15) is contrary to the record and contrary to the purpose of the FPA. Of course, the purpose of the FPA is to protect retailers who, because of their investment in a brand, become dependent on the supplier such that they will suffer severe damages without the seller's products. Under the District Court's analysis, no retailer could prevail on an FPA claim because it always has the "freedom to choose" whether to conduct business with the supplier.

In any event, the record demonstrates that once Orologio made the decision to carry SGUS's Omega brand, the investment in that brand rendered Orologio under SGUS's control – and subject to SGUS's one sided rule-making. The piece, assortment, and replenishment requirements worked together to require Orologio to make an investment measuring in the hundreds of thousands of dollars for Omega inventory, which was worthless if Orologio was not an authorized dealer. Importantly, the size of that investment made carrying other high-end[6] brands impossible. To make that investment worthwhile, Orologio further invested in marketing and advertising, training of a sales force knowledgeable in Omega products, dedication of display cases and windows for the promotion of Omega products – all to the exclusion of other brands. Furthermore, SGUS had substantial oversight of many of Orologio's day-to-day operations. This is precisely the sort of dependent relationship which the FPA is designed to protect from abuse.

[6] Although Orologio carried several brands beyond Omega and Breitling, those brands' importance pales in comparison to Omega and brands like it, which are a draw to the store and provide the lion's share of revenues.

POINT II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SGUS ON OROLOGIO'S ROBINSON-PATMAN ACT CLAIMS

The RPA was designed to prohibit the specific means of anticompetitive conduct engaged in by SGUS. Congress enacted the RPA to protect small businesses, like Orologio, from large suppliers, like SGUS, using their size advantages to extract more favorable prices and business terms. The RPA's goal is to establish a "level playing field" among competitors by preventing sellers from discriminating in the prices, services, and facilities they grant their customers. Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990). The District Court ignored the purpose of the statute, erroneously finding that (i) Orologio did not carry its burden in demonstrating who its actual competitors are when there was evidence in the record from experts and fact witnesses identifying Orologio's competitors, and (ii) SGUS did offer proportionally equal opportunities to Orologio and its other dealers despite evidence in the record establishing that SGUS provided advertising payments and promotional support without a plan or objective criteria as required by the RPA. (A17-A18).

A. <u>The Robinson-Patman Act's Prohibitions</u>

The RPA contains several distinct sections that prohibit a supplier or manufacturer (such as SGUS) from providing unfair price discounts or promotional support to certain favored customers or retailers. <u>See</u> 15 U.S.C. 13. Two sections of the RPA – 15 U.S.C. 13(d) and 13(e) (referred to as "Section 2(d)" and "Section 2(e)") – prohibit unfairly administered "[a]dvertising and promotional programs." <u>Alan's of Atlanta</u>, 903 F.2d at 1424. Section 2(d) "prohibits a seller from paying a customer for 'services or facilities' furnished by the customer in connection with the resale of the seller's product, unless the opportunity to receive such a payment is available to all of the seller's customers on 'proportionally equal terms.'" <u>Alan's of Atlanta</u>, 903 F.2d at 1419. Section 2(e) is very similar to Section 2(d), but instead of banning a seller from paying a customer for "services or facilities," Section 2(e) prohibits a seller from "furnishing to a customer a service or facility connected with the resale of the seller's product (rather than paying a customer for so furnishing), unless the opportunity to receive the seller's service or facility is available to all of the seller's customers on 'proportionally equal terms.'" <u>Id.</u>

Case law and the "Federal Trade Commission Guidelines for Advertising Allowances and Other Merchandising Payments and Services" ("FTC Guidelines") confirm that Sections 2(d) and 2(e) apply to a broad range of advertising and promotional support, including "co-op" and "tagging." Courts have held the provision of advertising allowances to select retailers (including co-op) without making such payment available on proportionally equal terms to all other competing retailers is a violation of Section 2(d). See, e.g., Lewis v. Philip Morris Inc., 355 F.3d 515 (6th Cir. 2004). The FTC Guidelines specifically refer to tagging select retailers without making such benefit available on proportionally equal terms to all other competing retailers as prohibited conduct under 2(e):

> Example 4: A seller should not identify or feature one or a few customers in its own advertising without making the same, or if impracticable, alternative services available on proportionally equal terms to customers competing with the identified customer or customers.

16 C.F.R. 240.9(b) (emphasis added). As such, both co-op support and tagging fall under the umbrella of promotional activities regulated by Sections 2(d) and 2(e).

Where a supplier provides promotional services or payments such as co-op or tagging to retailers, the supplier must make these payments or services "available to competing customers on proportionally equal terms" in order to not run afoul of Sections 2(d) or 2(e). Hygrade Milk & Cream Co., Inc. v. Tropicana Products, Inc., 1996 WL 257581, *13 (S.D.N.Y. May 16, 1996) (Add12). "Proportionally equal" means suppliers are prohibited from providing advertising payments or services to competing purchasers at the supplier's whim and not pursuant to a plan that is based on objective criteria. Alan's of Atlanta, 903 F.2d at 1423.

The FTC Guidelines further provide that "[a] seller who makes payments or furnishes services that come under the [RPA] should do so according to a plan," a concept ignored by the District Court. 16 C.F.R. 240.8 (section titled "Need for a Plan"). This is because if payments or services are not provided pursuant to a plan based on objective criteria, these payments or services are by definition not being provided on "proportionally equal" terms to all competitors as required by the RPA because there are no terms to make proportionally equal. (Id.) Here, SGUS's failure to furnish advertising payments or services (such as co-op and tagging) pursuant to an objective plan was Orologio's chief complaint, yet it was not even mentioned by the District Court.

In addition, an advertising or promotional program must be made "available" to all competing customers in order for Sections 2(d) and 2(e) to be satisfied. Hygrade Milk & Cream Co., Inc., 1996 WL 257581 at *12. "Available" means all competing customers have notice of the program in question. See id. at *8 (available requires being "known by the customers of a seller"). Thus, the manufacturer must provide notice to all of the retailers of all promotional support. Id.; 16 C.F.R. 240.10(b)); 16 C.F.R. 240.8 ("seller should inform competing customers of the plans available to them, in time for them to decide whether to participate"). Where a seller fails to take such steps, the seller has not complied with the RPA. Here, the District Court ignored the evidence that Orologio had no knowledge of the benefits that SGUS was providing to Orologio's competitors.

Finally, once a claimant has established that a supplier has violated Section 2(d) or 2(e) of the RPA, the claimant need only demonstrate that the violations caused some injury to claimant under a "relaxed standard of proof" where claimant "need not provide the kind of concrete, detailed proof of injury which is available in [non-antitrust] contexts." Id. at *16-*17; see also F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 58-59 (1959).

B. The District Court Improperly Determined That Orologio Failed to Demonstrate Competition.

The District Court's first error with respect to Orologio's RPA claims was its conclusion that Orologio had failed to establish competition among the Omega retailers. The issue of whether Orologio competes with the other Omega retailers to which SGUS made available benefits is a question of fact for the jury. Not only did the District Court usurp the jury's function by determining the issue, but it also improperly ignored a wealth of evidence (both fact and expert) in the record establishing that Orologio competes with the other Omega dealers that received benefits.

1. The Existence of Competition is a Fact Question for a Jury.

Whether businesses compete is an issue of fact. See, e.g., Sullivan v. National Football League, 34 F.3d 1091, 1098 (1st Cir. 1994), Cert. denied, 115 S.Ct. 1252 (1995); Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 2005 WL 724117, at * 7 (E.D. Pa. 2005); Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984), Cert. denied, 470 U.S. 1060 (1985); Town Sound and Custom Tops, Inc. v. Chrysler Motor Corps., 959 F.2d 468, 497 (3d Cir. 1992), Cert. denied, 506 U.S. 868 (1992); Michael Halebian N.J., Inc. v. Roppe Rubber Corp., 718 F. Supp. 348, 358 (D.N.J. 1989) The District Court erred in making the factual determination that Orologio failed to establish competition among the Omega dealers. On this basis alone, the District Court's Order granting summary judgment in favor of SGUS on Orologio's RPA claims should be reversed.

2. The Record Contains Extensive Evidence Establishing Competition Between Orologio and the Other Omega Dealers.

The District Court erroneously concluded that "the record is devoid of evidence of any competition between the dealers," despite evidence that Orologio competes with those Omega dealers to which SGUS made available advertising, marketing and promotional benefits to Orologio's exclusion in violation of the RPA. (A18). The District Court's conclusion suggests that it either incorrectly ignored an abundance of evidence below, or misconstrued the meaning of "competition."[7]

(a) The Meaning of Competition

Although the RPA does not define competition, Courts have explained that, "[t]he standard for showing actual competition is where, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e. all wholesalers or all retailers, and within the same geographic market." See, e.g., Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (2d Circ. 1987). The FTC Guidelines define "competing customers" as:

> all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

16 C.F.R. 240.5; 16 C.F.R. 240.5, Example 1 (providing example of competitor); see also Black's Law Dictionary 344 (10th ed. 2014) (defining competition as "the effort or action of two or more commercial interests to obtain the same business from third parties").

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[7] Notably, in inappropriately finding there is no competition, the District Court itself highlighted its use of an improper standard. The District Court stated, "[t]his Court is not persuaded that all Omega dealers that received co-op assistance were in fact competitors under the RPA." (A18) (emphasis added). In the context of summary judgment, Orologio should not have been required to "persuade" the District Court, but rather merely identify the material facts in dispute.

To establish competition, Orologio must show that it sells SGUS's Omega watches in the same geographic market as other SGUS Omega retailers. As shown below, the record contains extensive evidence including documents, testimony (from both Orologio and SGUS witnesses) and expert reports demonstrating that the other Omega retailers identified as having received unlawful promotional benefits are located in the same geographic market, and thus are Orologio's competitors. (See, e.g., A2551-A2559[Dos Santos Report at 36-44]). The District Court ignored all of this evidence, relying on SGUS's unsubstantiated blanket statements to improperly conclude that there is no competition as a matter of law.

(b) There Is Significant Expert and Factual Evidence Establishing that Orologio Competes with the Other Omega Retailers.

Orologio presented fact and expert evidence as to what Orologio's relevant market is and that other Omega retailers in the relevant market (i.e., Orologio's competitors) received promotional support from SGUS.

First, with respect to relevant geographic market, Orologio presented the District Court with the expert report of Joao C. Dos Santos, Managing Director of KPMG LLP, who conducted a detailed analysis of, among other things, the market in which Orologio competes. (A2551-A2559)[Dos Santos Report at 36-44]. As an initial matter, Dos Santos explained that defining the relevant market is defining where the competition takes place. "[R]elevant market" refers to

> [t]he market where competition takes place, at the intersection of the relevant product market (i.e., luxury brand watches, or more specifically Omega brand watches) and the relevant geographic market (i.e., New York, New Jersey, Connecticut, and Pennsylvania).

(A2551)[Dos Santos Report at 36].

To determine Orologio's relevant geographic market, Dos Santos mapped the geographic distribution of Orologio's customers by the zip codes identified in Orologio's historical customer invoices, establishing that Orologio generated considerable sales outside of New Jersey to customers who reside in Manhattan, Long Island, southern and eastern New York, as well as eastern Pennsylvania, and both eastern and western Connecticut – with the bulk of Orologio's out-of-state business being in New York. (Id. at A2553-A2554). This was presented in Dos Santos's narrative and on a map that he generated. (Id. at A2553).

That Orologio's business includes significant sales outside of New Jersey is not surprising. Many New Jersey residents work in Manhattan such that retailers in Manhattan are natural competitors of Orologio. (Id. at 2556). Dos Santos also analyzed the inter-state commuting flows indicating that residents of Orologio's core regional market (i.e., New York, New Jersey) typically have longer commutes and, by inference, are more willing to travel. (Id. at 2557). Further, Dos Santos opined that the abundance of transportation options in this region (i.e., public transportation network and commuter rail service) facilitates Orologio's ability to leverage meaningful interstate sales. (Id. at 2558-A2559). Indeed, Courts have found the ability of customers to travel freely between areas to purchase a product to be dispositive of the issue of competition. See Godfrey v. Pulitzer Pub. Co., 276 F.3d 405, 411 (8th Cir. 2002); see also Falls City Ind., 460 U.S. 428, 436-38 (1983).

The expert evidence with respect to the relevant geographic market was consistent with the fact evidence of record. For example, Ronald Oppenheimer, Orologio's owner with decades of industry experience, testified repeatedly that Orologio's market includes New Jersey, New York, Pennsylvania, and Connecticut. (A504; A485; A480)[Oppenheimer Dep. at 179:16-17; 101:14-104:9; 81:5-6]. SGUS itself acknowledged that New York Omega retailers are in the same geographic market as Orologio. For instance, SGUS assigns one representative (the Omega brand "Regional Manager Metro NY") to assist retailers in the New York/New Jersey region. (A1056)[Sanchez Dep. at 16:8-13]. That representative serviced Orologio and testified that the Mall at Short Hills was a "high end" destination mall that attracted New York customers. (A1064)[Sanchez Dep. at 46:7-47:2]. Indeed, the Mall at Short Hills advertises in Manhattan-based magazines. (A2552)[Dos Santos Report at 37). Finally, during discovery, SGUS's counsel admitted that Omega dealers in the relevant geographic market compete with Orologio by arguing that "documents about coop advertising" for those Omega dealers in the New Jersey, New York, Connecticut and Pennsylvania area should remain designated as "Attorneys Eyes Only" because they contained information involving Orologio's "competitors." (See A1573)[Oppenheimer Dec. at ¶ 7]; see also A143-A147 [Letter from SGUS Counsel]).

Once Dos Santos identified the relevant geographic market, he then analyzed the retailers selling SGUS's Omega watches in the relevant market by examining Omega wholesale purchases data and available Omega sales data. Of the over two hundred retailers of Omega watches in the United States, more than twenty were located within the relevant geographic market. Dos Santos verified that 15 of these regional competitors (having a total of 32 store locations in the market) received some measure of co-op support payment benefits in at least one month between January 2006 and December 2013. (A2554)[Dos Santos Report at 39]. Among the 15 regional competitors identified are Jay Roberts Jewelers, which is located in South Jersey, and Wempe, Tourneau and Carat and Co., which are located in Manhattan where many New Jersey residents work and shop.

In sum, Dos Santos defined the relevant geographic market in which Orologio does business, identified retailers who compete with Orologio in the relevant geographic market, and identified which competing retailers received advertising, marketing and promotional benefits from SGUS. The District Court overlooked Dos Santos' report (and the additional fact evidence) in its entirety. In fact, there is not one reference to Dos Santos' report anywhere in the District Court's opinion. Based on the foregoing, the District Court erred in summarily concluding that the record contains no evidence of competition. At a bare minimum, the evidence raises a disputed issue of fact with respect to competition.

C. The District Court Improperly Concluded that Orologio's RPA Claims Fail Because Orologio Purportedly Failed to Establish That SGUS's Tagging Led To Lost Sales.

The District Court compounded its improper finding that there is no evidence of competition by incorrectly concluding that "even if they [referring to Omega dealers in New York City that received tagging] were actual competitors, there is nothing in the record suggesting that tagging these specific dealers led to Orologio's lost sales" and that "[t]his lack of evidence alone is dispositive." (A17-A18). This is a misstatement of the law and ignores the facts.

The District Court relied upon and cited to Godfrey v. Pulitzer Publ'g Co., 276 F.3d 405, 411-12 (8th Cir. 2002) – a case involving price discrimination claims (2(a)), not promotional/services claims (2(d) and (e)), as in the present matter. In Godfrey, the court granted summary judgment dismissing a 2(a) claim because the record showed only one instance of a lost sale and the expert failed to provide "any tangible evidence, numerical or anecdotal, to show that the []dealers in fact compete." Id. In other words, there was no evidence of competitive injury. But this is not the standard for 2(d) and (e) claims. For 2(d) and (e) claims under the RPA (unlike for 2(a) claims), there is no requirement to show competitive injury (i.e., lost sales). A 2(d) or 2(e) case is established by proof of the discrimination itself. Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 440 U.S. 69, 79 (1979); Alan's of Atlanta, 903 F.2d at 1419; Alterman Foods, Inc. v. Federal Trade Commission, 497 F.2d 993, 1000 (5th Cir. 1974). The District Court erred to the extent it concluded that a failure to show lost sales is dispositive to a determination of whether the RPA has been violated.

Furthermore, the District Court inexplicably ignored critical evidence establishing that SGUS's tagging of Orologio's competitors (and other anticompetitive conduct) led to Orologio's lost sales. This ignored evidence was the expert report of an economist, Dr. Robert Kneuper ("Kneuper Report"). The Kneuper Report set forth the impact of SGUS's co-operative and tagging-related advertising expenditures on sales by Omega retailers in the relevant geographic market. (A2615-A2630). Kneuper did this by developing a model regarding Omega's retailer oriented co-op advertising expenditures and sales by Omega retailers. Kneuper found that, on average, every $1.00 increase in Omega's co-operative advertising is associated with a $3.30 to $3.96 increase in retailer sales of Omega watches. (A2625-A2628). Dos Santos then took Kneuper's figure and determined the amount of damages (including estimated lost profits) that Orologio suffered as a result of SGUS's RPA violations. (A2560-2586). Dos Santos did this by analyzing what Orologio's gross sales would have been had SGUS provided Orologio with, among other things, the co-op advertising support and tagging benefits that SGUS offered to Orologio's competitors. (A2566-A2585).[8]

The evidence presented by Orologio is precisely the type of analysis (i.e., estimates of what the gross sales would have been absent the discrimination) that the Supreme Court has determined to be sufficient to sustain an award of damages. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67 (1981). In fact, with respect to damages, the Supreme Court has lessened the stringency of proof requirements in antitrust cases because of the difficulties of showing exactly what position the plaintiff would have been in absent the defendant's violations of the antitrust laws. See id. In this regard, the Supreme Court has determined that damages may be awarded on plaintiff's estimate of possible sales absent the violation. See id.; Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123–24 (1969); see also Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1043 (9th Cir. 1987), aff'd, 496 U.S. 543 (1990). The District Court completely ignored this law and the

[8] Mr. Dos Santos calculated the amount of co-op support Orologio should have received based upon co-op support received by Orologio's competitors relative to Omega wholesale purchases made by that retailer (i.e., applying the proportionality requirement). (A2567-A2580).

evidence to erroneously conclude there is no evidence of lost sales as a result of SGUS's improper tagging.

D. The District Court Incorrectly Determined That SGUS's *Ad Hoc* Provision of Promotional Support to Orologio's Competitors Outside the Partner Plan Did Not Violate the RPA.

After incorrectly finding that there was no competition or lost sales, the District Court addressed the specific conduct identified by Orologio as violating the RPA. In just a few short sentences, the District Court concluded that SGUS's provision of co-op, tagging and slotting fees did not violate the RPA because it "offered proportionally equal opportunities to Orologio as to its other dealers." (A18). In reaching its conclusion, the District Court ignored mountains of evidence and demonstrated a complete misunderstanding of the facts which were set forth in Orologio's opposition to SGUS's motion.

1. The Partner Plan

Perhaps showing its greatest misunderstanding of the evidence and facts before it, the District Court made a cursory analysis of the type of promotional support offered through the Partner Plan and concluded that it was administered on a proportionally equal basis and, thus, the Partner Plan does not violate the RPA. The District Court completely misunderstood Orologio's claim and the operative facts with respect to the Partner Plan. With the exception of one instance as it relates to Tourneau (i.e., Tourneau wrongfully received a special exemption from SGUS when it failed to meet its targets), Orologio did not contend that the Partner

Plan was administered improperly. Rather, Orologio's RPA claims focus on SGUS's provision of additional promotional support outside of the Partner Plan during a time when Orologio was led to erroneously believe that promotional support could only be obtained through the Partner Plan.

Specifically, beginning about 2004, SGUS provided its authorized Omega retailers with a "Partner Plan." (See A1580-A1586 [Sample 2004 Partner Plan]). At the time, the Partner Plan was one of the documents governing SGUS's relationship with Omega retailers and was not a vehicle through which Omega retailers could obtain promotional support. In 2007, SGUS changed the Partner Plan to be, in part, a tool by which authorized Omega retailers could obtain SGUS's promotional support (if SGUS retailers achieved targeted sales goals they would receive money for promotional support). (See A2675-A2678; A2679-2683 [Sample 2007 and 2008 Partner Plans]; see also A948 [Plaintiffs' 2009 Partner Plan]; A1573-1574 [Oppenheimer Dec. at ¶ 10]).

The new Partner Plan was presented to Orologio as the only way in which retailers could receive promotional support from SGUS. (A1573-A1574; A1463-1464). Orologio was never informed that it could receive any promotional support, including co-op support, from SGUS outside of the new Partner Plans. (A1574; see also A807-808; A811-A812 [Kuiken Dep. at 77:5-78:7; 93:14-95:13]; A1074 [Sanchez Dep. at 87:13-88:2]). Notably, Orologio was not the only Omega retailer left in the dark; other non-favored retailers had the same understanding. (A1463-A1464)[Berman Declaration].

The District Court erred in focusing on the mechanics of the promotional support offered under the Partner Plan (i.e., whether it was offered to Omega retailers on a proportionally equal basis) rather than addressing Orologio's claim that SGUS provided promotional support outside of the Partner Plan without any standards during a time when Orologio was told that promotional support could only be obtained through the Partner Plan.

2. Co-Op

The District Court's misunderstanding of SGUS's improper distribution of co-op is evident from the first sentence of this portion of its opinion where the District Court states, "[t]his Court finds that the co-op program, which allowed dealers to apply for advertising support, complied with the RPA because Orologio had sufficient notice of the program." (A19).

First, there was no "co-op program." The District Court was referring to "Co-op Commitment" agreements relied upon by SGUS, which do not demonstrate the existence of a "program" or that co-op was offered to all retailers (much less on proportionately equal terms). The Co-op Commitment agreements are blank forms that were filled in by either the retailer or SGUS. Despite Orologio's discovery request, SGUS did not produce a single copy of these Co-op Commitment agreements for any Omega dealer in the NJ, NY, PA, or CT areas for the relevant time period. Instead, after several of these agreements were produced in response to subpoenas to Orologio's competitors, SGUS produced a spreadsheet identifying (1) the name of every Omega authorized dealer in the NJ, NY, PA, and CT area that received co-op outside of the Partner Plan; and (2) the dollar amount of unlawful support each of these retailers received. (Id.; A2794 [Fruda Dep. at 166:19-167:25]; A2684-A2570 [SGUS Coop Advertising Report]). The spreadsheet produced by SGUS established that, from 2007 through the date of Orologio's Complaint, SGUS routinely provided several of Orologio's competitors (including London Jewelers, Tourneau, Wempe, Jay Roberts and Carat and Co.) this ad hoc co-op support outside of the Partner Plan, amounting to more than $2 million in payments made. (See id.)

In addition, the few Co-op Commitment agreements that were produced by subpoenaed Omega retailers bear multiple different names (Co-op Commitment Agreements, Brand Initiated Co-Op Commitment Agreements, Regional Marketing Agreement, etc.) and show the amount of co-op being distributed without any connection to the retailers' sales or any other standards (and sometimes with no contribution by the retailer at all). (A1587-A1601)[Sample Co-Op Agreements]. It is apparent from the record that SGUS's co-op "program" was nothing more than haphazardly distributed benefits provided to Orologio's competitors at SGUS's whim in violation of the RPA, which was sometimes reflected in form agreements that SGUS did not even maintain.

This is confirmed by SGUS's own witnesses. Gregory Swift, President of SGUS's U.S. Omega brand operations, admitted that there were no standards or guidelines regarding how much co-op was available outside the Partner Plan. (See A619[Swift Dep. at 170:21-172:22] (emphasis added)). Tom Weigl, SGUS's National Accounts Manager for the Omega brand and Regional Sales Manager for Omega for the Metro New York region, confirmed that co-op was determined on a case-by case basis and there were no guidelines or policies setting forth whether or not a retailer would be entitled to co-op. (A729)[Weigl Dep. at 111:12-112:15]. Theresa Kuiken, SGUS's Marketing Director, also testified that there was no written criteria for obtaining co-op other than on the particular agreements that may have been signed by retailers. (A808)[Kuiken Dep. at 81:12-15]. Based upon these facts alone, the District Court erred in entering summary judgment on Orologio's RPA claims.

The "proportionally equal" requirement of Sections 2(d) and 2(e) of the RPA prohibit suppliers from providing advertising payments or services to competing purchasers at the supplier's whim and not pursuant to a plan that is based on objective criteria. Alan's of Atlanta, 903 F.2d at 1423. The District Court failed to even recite the objective plan requirement, let alone analyze whether SGUS complied with it (which it conceded it did not). Critically, the entire record establishes that SGUS provided co-op support outside of the Partner Plan to Orologio's competitors identified on the SGUS Coop Advertising Report (and not to Orologio) without any objective basis on which to determine (1) which retailers would be fortunate enough to receive such support and (2) how much co-op support these favored retailers would receive. (A2684-2750)[SGUS Coop Advertising Report]).

Even if the District Court could find that co-op was not arbitrarily administered, there is no question that there was no notice to Orologio of its availability. The record establishes that, after the evolution of the Partner Plan, Orologio was advised that co-op was not available other than through the Partner Plan. (A1463-A1464, A1574, A109-A110). In fact, Mr. Oppenheimer testified that he actually asked SGUS if any additional co-op opportunities were available in recent years, he was informed that there was no money in SGUS's budget for co-op. (See A489)[Oppenheimer Dep. at 117:12-18]. The same false impression was given to other Omega retailers, including Barry Berman of Fords Jewelers, who stated under oath that his understanding was that promotional support could only be obtained from SGUS through the Partner Plans. (A1463-A1464). Additionally, not one witness could confirm that Orologio was informed that it could have obtained co-op support (or tagging) outside of the Partner Plan, nor could any of them point to a written policy that instructs any of SGUS's employees to notify retailers of this opportunity. (See A110 [Derman Dec. at ¶¶ 40-41; A209 [Sanchez Dep. at 87:13-88:14]). The District Court, however, completely ignored these facts.

The District Court's conclusion that Orologio had sufficient notice of the program because it had received co-op advertising support "over the more than 20-year relationship, including in 2006," demonstrates the District Court's misunderstanding of the critical fact that the Partner Plan was not always a tool by which retailers could obtain promotional support. Again, Orologio only received co-op support outside of the Partner Plan before 2007 – before the Partner Plan became a vehicle by which retailers were to obtain promotional support from SGUS. (See A1574). Indeed, the District Court's determination that SGUS "had sufficient notice of the [co-op] program" (A19) belies the factual record and completely ignores SGUS's affirmative obligation under the RPA to make the co-op services "available" to Orologio. In this regard, the FTC has explained:

> It is settled law…that the term 'available' as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers. That which is not made known or that which is not offered cannot be considered as available. The choice must be that of the customer, not the seller. Any other interpretation would make evasion of the statute simplicity itself.

In the Matter of Exquisite Form Brassiere, Inc., 57 F.T.C. 1036, *3 (1960) (emphasis added).

The facts of record establish that SGUS failed to make co-op benefits available to all competing retailers pursuant to a plan based on objective criteria in violation of the RPA. Thus, the District Court's grant of SGUS's motion for summary judgment as to Orologio's RPA claims must be reversed.

3. Tagging

Despite SGUS's indisputable ad hoc disbursement of tagging to Orologio's competitors, the District Court disposed of this claim in just three short sentences. As with its co-op analysis, the District Court's tagging analysis demonstrates that it misunderstood and/or ignored the facts, as well as the relevant law.

Discovery revealed that SGUS routinely provided Orologio's competitors advertising support outside of the Partner Plan by "tagging" Orologio's competitors in Omega advertisements without requiring these retailers to pay anything towards this advertising. (A210-A211)[See Sanchez Dep. at 100:17-103:4]. Orologio's competitors were featured free of charge in Omega advertisements during nationally televised events, such as Monday Night Football and the Olympics. (See A210-A211 [Sanchez Dep. at 101:22-102:21]; A826 [Kuiken Dep. at 151:14-152:12]; A634 [Swift Dep. at 231:17-232:7]). As conceded by Marissa Sanchez, "tagging" provides a retailer "significant exposure" to potential customers without the retailer having to spend any of its own funds. (A602)[Swift Dep. at 102:4-15].

Critically, just like with the "co-op" that SGUS provided to select retailers outside of the Partner Plan, SGUS did not disburse these free "tagging" opportunities to select retailers pursuant to any objective criteria or guidelines. (A210-A211)[Sanchez Dep. at 102:23-25; (A109)[Orologio Rule 56.1 Statement at ¶¶ 34-36]). Furthermore, SGUS did not even track who received tagging, or when tagging occurred. Thus, SGUS failed to provide these opportunities to retailers on a "proportionally equal" basis as required by the RPA. Alan's of Atlanta, 903 F.2d at 1423. The District Court's opinion regarding "tagging" is void of any mention, much less an analysis, of SGUS's obligation to disburse tagging opportunities pursuant to any objective plan.

Moreover, as with its flawed co-op analysis, it is apparent that the District Court misunderstood the RPA requirement that SGUS make tagging "available" to all competing customers. In this regard, the District Court incorrectly concluded that there is no support for Orologio's tagging claim because "Orologio's witness testimony could not verify whether it had ever made a request for tagging, and there is no evidence that Orologio was unaware that it could make a tagging request." (A19).

The District Court is wrong for two reasons. First, as the courts and the FTC have uniformly held, passive availability (i.e., allowances being available to any customer who asks) is not sufficient. Alterman Foods, Inc., 497 F.2d at 1001. "To meet this requirement, a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs." Id.; Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480, 484 (2d Cir. 1962). Second, once Orologio showed that only certain competing customers received special promotional advertising and services, the burden of proving availability of similar promotional advertising and services to all competitors was on SGUS. R.H. Macy & Co. v. FTC, 326 F.2d 445, 450 (2d Cir. 1964). This burden was not satisfied by SGUS.

The undisputed facts establish that SGUS failed to make tagging benefits available to all retailers on a proportionally equal basis in violation of the RPA, requiring reversal.

4. Slotting Fees

SGUS also provided an Omega authorized retailer located in New York City, New York – Tourneau – with slotting fees and never made this opportunity available to Orologio or Orologio's competitors, much less pursuant to any objective plan or basis. (See A500 [Oppenheimer Dep. at 172:16-24]).

Notwithstanding these undisputed facts, the District Court improperly concluded that SGUS's provision of slotting fees only to Tourneau (one of Orologio's competitors) is not a violation of the RPA on the basis that (i) Tourneau received slotting fees because of its exceptional positioning of the product (unlike Orologio), (ii) SGUS "did not consider Orologio's positioning of Omega as conveying such value," and (iii) slotting fees themselves are generally not considered valuable. (A20).

"Slotting fees" (payments to a retailer for preferred shelf space) fall within Sections 2(d) and 2(e) of the RPA because they are provided in connection with the resale of a supplier's products. Hygrade Milk & Cream Co., Inc., 1996 WL 257581 at *13. Therefore, where "slotting fees" are not provided on "proportionally equal terms" to all competing retailers, this is a violation of the RPA, regardless of whether SGUS felt justified in providing these fees at SGUS's whim to a much larger Omega retailer. The District Court's conclusion that SGUS's provision of slotting fees to one retailer does not violate the RPA is plain wrong.

POINT III

OROLOGIO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS RPA CLAIMS SHOULD HAVE BEEN GRANTED

The District Court also erred in denying – actually, not considering – Orologio's motion for partial summary judgment as to liability only on its RPA claims. As set forth above, the record is undisputed that SGUS's distribution of tagging and co-op to Orologio's competitors violated the RPA. Specifically, SGUS provided these two central forms of promotional benefits on a purely ad hoc basis and without any guidelines, policies, or procedures and without notice to Orologio. Such conduct is text book violations of Section (d) and (e) of the RPA. Alan's of Atlanta, 903 F.2d at 1419; F.T.C. v. Simplicity Pattern Co., 360 U.S. at 64-71 (Section 2(d) of the RPA defines an offense which is illegal per se – unlike a pricing discrimination violation (2(a)); FTC Guidelines, 16 C.F.R. 240.9(b).

Orologio provided specific citations to the record for these assertions in its Rule 56.1 Statement and SGUS did not respond with actual evidence disputing those facts. (A102, A1729). Yet, the District Court did not even consider this motion. This Court should reverse the denial of Orologio's motion or, at a minimum, remand this motion to the District Court for consideration.

POINT IV

THE DISTRICT COURT DID NOT PROPERLY CONSIDER THE SPOLIATION MOTION

The District Court also erred because it gave scant consideration to Orologio's motion for sanctions based upon the spoliation of evidence, despite the fact that then Magistrate Judge Arleo previously found spoliation occurred and the discovery she ordered as a result revealed that SGUS never issued a litigation hold in this action, and gave misleading information about its preservation efforts.[9] (A399-A401)[Order].

The spoliation related to SGUS directing its vendor to destroy the media files for television advertisements containing "tagging" of SGUS's competitors during the pendency of the litigation. (A434-A437)[DeSanti Dep. at 33:16-25; 195:25:196-17]. The District Court concluded in a footnote that Orologio had failed to show that there was actual spoliation or bad faith on SGUS's part. How the District Court could have reached this conclusion is difficult to comprehend. Because SGUS kept no records and did not track its tagging of retailers, Orologio sought copies of the actual commercials with the tagging to obtain that information and to show the jury the impact of the tagging. When Orologio subpoenaed

[9] The standard of review for the denial of a motion for sanctions is ordinarily "abuse of discretion." See, e.g., Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. 2015). The cursory nature of the District Court's treatment of the issue demonstrates that, at the very least, the issue should be remanded for

SGUS's vendor who stored the commercials, Orologio learned that SGUS directed that vendor to destroy the commercials during the middle of discovery. As a result, and combined with SGUS's woeful preservation efforts, Orologio moved for sanctions seeking relief targeted to remedy the loss of the evidence. The District Court barely considered the motion. At a minimum, the spoliation application should be remanded to the District Court for proper consideration of the issue.

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reconsideration with directions to the District Court to provide a factual and legal basis for its decision.

CONCLUSION

For the foregoing reasons, Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. respectfully request that the Court reverse the District Court's Opinion and Order (a) granting Appellee Swatch Group (U.S.), Inc.'s motion for summary judgment, (b) denying Orologio's motion for partial summary judgment as moot, and (c) denying Orologio's motion to strike and for sanctions in relation to SGUS's spoliation of evidence.

Respectfully submitted,

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Dated: January 13, 2016

COMBINED CERTIFICATION

CERTIFICATE OF ADMISSION-BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1 that the attorneys, whose names appear on the foregoing Appellants' Brief, Adam K. Derman, Daniel D. Barnes and I, are members in good standing of the bar of this Court.

PRINTING SPECIFICATIONS AND WORD COUNT CERTIFICATION IN COMPLIANCE WITH F.R.A.P. 32 (A)

The foregoing Brief submitted by Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. was prepared on a computer using a Microsoft Word 2010 word processing program and complies with the typeface-style-volume limitation because a proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, certification of bar membership, certification of service, certificate of compliance and virus check, or any authorized addendum containing statutes, rules, regulations, etc., is 13,999.

CERTIFICATION OF IDENTICAL COMPLIANCE AND VIRUS CHECK PURSUANT TO L.A.R. 31.1

I, Ronald L. Israel, Esq., an attorney duly admitted to the bar of this Court, hereby certify that the text of the E-Brief filed on January 13, 2016, and the text of the hard copies of the opening brief filed by overnight mail via Federal Express on January 13, 2016, are identical. A virus check using SOPHOS, Version 10.3, was performed on the E-Brief and no viruses have been detected.

CERTIFICATION OF SERVICE UPON THE COURT AND COUNSEL

I, Ronald L. Israel, Esq., an attorney duly admitted to the bar of this Court, hereby certify that on January 13, 2016, I have caused the Opening Brief of Appellants Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. to be electronically filed and served and the following number of copies of the Brief of Appellants (with Appendix Volume I) and Appendix Volumes II, III, IV, V and VI to be sent via overnight mail (Federal Express) as indicated, in a properly addressed wrapper, to the following persons at their last known addresses noted below:

Marcia M. Waldron, Clerk
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(An original and six (6) hard copies of Appellants' Opening Brief and Volume I and four (4) hard copies of Joint Appendix Volumes II, III, IV, V and VI)

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Dated: January 13, 2016

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ADDENDUM

Table of Contents

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Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

ENGINES, INC., Plaintiff,
v.
MAN ENGINES & COMPONENTS, INC., Defendant.

Civil Action No. 10–277 (RMB/ KMW). | July 29, 2010.

West KeySummary

1 **Antitrust and Trade Regulation**
Particular Cases

A marine diesel engine dealer was likely to succeed in establishing that it was a "franchise" of a diesel engine importer and seller and thus, was entitled to a preliminary injunction enjoining the importer and seller from terminating the dealer agreement governing their relationship. The parties' relationship bore the very "indicia of control" that were the hallmark of a franchise "community of interest." The marine diesel engine dealer stood to lose tangible and intangible equities if it were to be forced to move from its business premises or change its name and product line upon termination by the diesel engine importer and seller. N.J.S.A. 56:10–3.

Cases that cite this headnote

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OPINION

BUMB, District Judge.

***1** This matter comes before the Court upon a motion for preliminary injunction, pursuant to Federal Rule of Civil Procedure 65(a), by plaintiff Engines, Inc. ("Engines"). A business that sells and repairs marine diesel engines, Engines is an authorized dealer for defendant MAN Engines & Components, Inc. ("MAN"). By this action, Engines seeks to enjoin MAN from terminating the Dealer Agreement governing their relationship. Engines and MAN agree that the resolution of this motion turns upon whether their relationship constitutes a "franchise" under the New Jersey Franchise Practices Act ("NJFPA" or "the Act"), N.J. Stat. Ann. § 56:10–1 *et seq.* Because the Court finds that Engines will likely succeed in establishing that it is a MAN franchise, the motion for preliminary injunction will be granted.

LEGAL STANDARD

In determining whether to issue a preliminary injunction, courts consider the following four factors: (1) the likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) the balance of hardships between the parties; and (4) the public interest. *Abbott Labs. v. Andrx Pharms., Inc.,* 473 F.3d 1196, 1200–01 (Fed.Cir.2007) (citations omitted)."These factors, taken individually, are not dispositive; rather, the district court must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested."*Hybritech, Inc. v. Abbott Labs.,* 849 F.2d 1446, 1451 (Fed.Cir.1988). On an application for a preliminary injunction, a plaintiff need only "make a showing of reasonable probability, not the certainty, of success on the merits."*Atlantic City Coin & Slot Serv. Co., Inc. v. IGT,* 14 F.Supp.2d 644, 657 (D.N.J.1998) (quoting *SK & F Co. v. Premo Pharm. Lab ., Inc.,* 625 F.2d 1055, 1066 (3d Cir.1980)).

FINDINGS OF FACT[1]

1. Engines has been engaged in the business of sales, service, and repair of marine diesel engines, as well as marine and industrial generators, in Atlantic County, New Jersey, since 1985. (Pecan Aff. ¶ 2.)

2. MAN is in the business of importing and selling MAN diesel engines for a variety of applications such as construction and agricultural machinery, rail vehicles, and marine engines. (Bruening Aff. ¶ 2.)

3. In October 1999, after concluding a period of negotiation and vetting, MAN and Engines, along with Performance Diesel Inc. (which is not a party to this litigation), executed a Dealer Agreement, which, in relevant part, provides that Engines shall be "a non-exclusive provider of [after-sale repair, conditioning or replacement] Services" and "a nonexclusive seller of Repowering Products"[2] to the owners of boats with MAN parts, (Dealer Agmt. ¶¶ 1–2). Engines is authorized to perform repairs on MAN engines, which repairs MAN pays Engines to perform when an engine is still under warranty. (*Id.* at ¶¶ 8–9.)Engines's performance of MAN warranty work—as well as its promotion of itself as a MAN dealer—attracts new customers to Engines, which customers then often purchase additional (non-warrantied) parts and services from Engines. (Pecan Aff. ¶ 113–14.)

***2** 4. Although the Dealer Agreement is trilateral, its term ends in full (that is, for all parties) if "terminated as herein provided." (Dealer Agmt. ¶ 27.) Since MAN seeks to terminate the Agreement pursuant to the "Without Cause" provision of ¶ 28, (Termination Ltr. [Def.'s Ex. B]), such termination would end the entire Agreement, including portions affecting Engines's relationship with Performance Diesel Inc.

5.*Tools and Equipment:*

a. The Dealer Agreement, in relevant part, provides:

i. that Engines shall "shall acquire and maintain in satisfactory condition all tools, test equipment, and instruments necessary and appropriate to carry out its Service activities and to install Repowering Products sold by it," (Dealer Agmt. ¶ 19.4); and

ii. that Engines shall "purchase from [MAN] the items set forth on Exhibit I annexed hereto and made a part hereof (the "Required Special Tool List"), as the same may be hereafter amended from time-to-time,"(*Id.*)

b. Engines has purchased approximately $15,000 to $20,000 in specialty tools, either from MAN directly or from Performance Diesel, Inc., which cannot be used on engines made by other manufacturers.[3]

c. Five years after becoming an authorized dealer, at MAN's request, Engines purchased from MAN a computer system, which included mandatory diagnostic cables and a software package, for approximately $10,000.[4](Pecan Supp. Aff. ¶¶ 23–28.) Engines pays MAN a monthly subscription fee, totaling approximately $1,475 annually, for use of the software. (Def.'s Opp'n Br. 7 n. 5.)

6. *Employee Training:*

a. The Dealer Agreement, in relevant part, provides:

i. that "at least one of [Engines's] employees [shall] attend a basic training course conducted by [MAN] for a period of no less than one week in order to certify such individual as [a MAN] Service Technician, which training course will be offered by [MAN] at no charge to [Engines]; provided, however, that [Engines] shall be responsible for the costs of transportation, lodging, meals, and other ancillary expenses incurred by its representative in connection with his or her attendance at such training course," (Dealer Agmt. ¶ 20); and

ii. that "further training that may become necessary during the term of this Agreement will be subject to separate arrangements."(*Id.*)

b. All six of Engines's technicians have taken at least three week-long basic training courses at MAN, for which Engines spent approximately $20,000 in travel and other incidental expenses. (Larry Pecan Ver. ¶¶ 14–16.)[5]

7. *Insurance:*

a. The Dealer Agreement, in relevant part, provides that Engines shall "obtain, at its sole expense and maintain in force, statutory workers' compensation insurance, casualty insurance, and comprehensive liability insurance coverage ... throughout the term of this Agreement, which insurance coverage shall name [MAN] and [Performance Diesel Inc.] as additional insureds thereunder," (Dealer Agmt. ¶¶ 5–6).

***3** b. Each year that Engines has been an authorized MAN dealer, it has purchased the mandated insurance and, as required, named MAN as an additional insured. (Pecan Aff. ¶ 25.) The precise amount that Engines has spent on this is unknown.

8. *Promotional Materials / Use of the MAN Mark:*

a. The Dealer Agreement, in relevant part, provides:

i. that Engines's "letterhead and invoice forms and other such similar documents shall, in addition to identifying [Engines] as an independent organization under its registered business name, identify [Engines] as an authorized Service Dealer for [MAN]," (Dealer Agmt. ¶ 22); and

ii. that Engines "shall not, without the express prior written consent of [MAN], use any [MAN] Trademark in signs, advertising, or elsewhere, except and to the extent permitted by this Agreement or otherwise by [MAN], and shall, in all events, conform to [MAN's] standards and specifications in that regard,"(*Id.*); and

iii. that "[u]pon termination of this Agreement, [Engines] shall immediately cease any and all use of all [MAN] Trademarks,"(*Id.*); and

iv. that Engines shall "display, at suitable locations at its facilities, advertising and publicity aides designating such facilities as an authorized sales dealership and service workshop for [MAN] Products,"(*Id.* at ¶ 19.3); and

v. that Engines shall "undertake appropriate promotion activities and public relations work to effectively promote its Service activities and the sale of Repowering Products, in all cases subject to the prior approval of [MAN] ...,"(*Id.* at ¶ 18); and

vi. that "all expenses incurred by [Engines] in connection with its activities hereunder (including those relating to ... communication expenses and the cost of advertising and public relations work) shall be borne solely by [Engines],"(*Id.* at ¶ 5.1.)

b. Engines prominently displays its affiliation with MAN in all of its materials: in the promotional literature it distributes at boat shows and fishing tournaments; in directories, trade journals, print and online advertising; on its signs, apparel, truck fleet, letterhead, and business cards. (Pecan Aff. ¶ 31–77.) For example, Engines is the only New Jersey dealer to have a full advertisement on the MPC Boater's Directory website, which advertisement prominently features the MAN name and logo and states that Engines provides "authorized service" for MAN. (*Id.* at 39.)Nearly all of these materials are paid for entirely by Engines.[6]

c. Customers that come to Engines's business location immediately see that Engines is associated with MAN. (*Id.* ¶ 68.)Customers encounter MAN's logo on the Engines's truck fleet parked outside its building. (*Id.*) Engines puts MAN posters, floormats, and other MAN materials, as well as plaques and certificates from MAN training programs and dealer awards, in prominent places in its facility. (*Id.* at ¶¶ 69–71.)When they are not otherwise being used at the trade shows, Engines displays its large banners, which feature the MAN name and logo, inside its building. (*Id.* at ¶ 72.)Engines employees sometimes wear Engines/MAN shirts that Engines designed and purchased. (*Id.* at ¶ 74.)

***4** d. Engines's extensive promotional efforts have helped build a market for MAN engines and parts.(*Id.* ¶ 29.)

9. *Purchase of MAN Products:*

a. The Dealer Agreement, in relevant part, provides:

i. Engines shall "maintain appropriate storage capacity and financial resources to establish a reasonable stock of Products (including both those used in connection with the performance of Services and the sale of Repowering Products) commensurate with expected sales and service Activity requirements and to account for potential fluctuations in availability and delivery," (Dealer Agmt. ¶ 19.1);

ii. Engines must purchase all MAN parts from Performance Diesel, Inc. (which Engines characterizes as "MAN's selected distributor"), and cannot "shop around" for better prices. (Pl.'s Br. 17–18 (citing Dealer Agmt. ¶¶ 11.1–3.))

b. Engines purchases over $100,000 in MAN parts annually, and maintains a significant stock of MAN parts to date. (Pecan Aff. ¶ 82; Pl.'s Repl. Br. 13.)

10. *Engines's Facilities:*

a. The Dealer Agreement, in relevant part, provides:

i. that Engines shall "maintain the condition of its sales and service facilities in a manner and at a level no less efficient and attractive as the same exists as of the Effective Date," (Dealer Agmt. ¶ 19.2); and

ii. that Engines will "allow [MAN] ... representatives free access to its building facilities, during normal business hours and upon reasonable notice, for the purpose of ascertaining [Engines's] compliance with its obligations under this agreement,"(*Id.* at ¶ 19.5).

b. MAN representatives have visited Engines's facilities numerous times (albeit not announced as an "inspection") and have never raised any concerns about the facilities' condition. (Pl.'s Repl. Br. 9 (citing Pecan Dep. at 117:13–118:1; 184:12–30).)

c. In 2006, Engines moved from Atlantic City to its present location in Pleasantville to accommodate its growing MAN-related business. (Pecan Aff. ¶¶ 97–101.) Had it not been for the work stemming from its relationship with MAN, Engines would not have needed the large facility it now occupies and it will not be able to use the enlarged space if the relationship is terminated.(*Id.*)

11. Engines's relationship with MAN requires it to accept cuts or give discounts to customers. (Pl.'s Br. 33.) For example, when Engines performs MAN's warranty work, it is reimbursed by MAN at a rate discounted from its standard retail pricing. (*Id.*)

12. Nearly every existing and prospective customer who comes into contact with Engines is aware of Engines's relationship with MAN. (Pl.'s Br. 9.)

13. A substantial portion (roughly one-half) of Engines's business is attributable to its relationship with MAN. (Pl.'s Br. 23–24, 34.)

a. Engines's gross sales in 2007, 2008, and 2009 were $1,232,194 .79, $1,383,302.60, and $1,097,324.67, respectively. Of such sales, the MAN-related portion was $586,286.97 (or 47.6 percent), $683,792.92 (or 49.4 percent), and $390,860.27 (or 35.6 percent),[7] respectively. (Pecan Aff. ¶¶ 88–96.)[8]

***5** b. Customers in need of MAN parts or service often reach Engines though MAN's website and directory of authorized dealers. (Pl.'s Br. 23–24.) Also, Engines receives profitable business by performing MAN warranty work, both from reimbursement by MAN and from the resulting relationships it develops with MAN customers. (*Id.*)

14. Engines has maintained that it is so dependent upon its relationship with MAN that it "will likely have to shut down its business operations" if the Dealer Agreement is terminated. (Pecan Aff. ¶ 113.) Although MAN has not specifically disputed this, MAN has sought to minimize the effect of its termination of the Dealer Agreement by arguing that Engines may still continue to service MAN's, and other manufacturer's, engines even if it is not an authorized MAN dealer. Because it is not clear whether MAN genuinely disputes Engines's position, the Court will make no finding as to this matter.

CONCLUSIONS OF LAW

1. Engines has established that it will suffer irreparable harm if the injunction is not granted, and that the balance of hardships between the parties, as well as the public interest, weighs in its favor. Because MAN does not dispute these factors, the Court may summarily find them satisfied. The only preliminary injunction factor that MAN disputes is Engines's likelihood of success on the merits. "On an application for a preliminary injunction in the early stages of a case, the plaintiff need only 'make a showing of reasonable probability, not the certainty, of success on the merits.' " *Beilowitz v. General Motors Corp.,* 233 F.Supp.2d 631, 639 (D.N.J.2002) (citing *Atlantic City Coin & Slot Serv. Co., Inc. v. IGT,* 14 F.Supp.2d 644, 657 (D.N.J.1998)).

2. To establish that it is likely to succeed on the merits, Engines must show a likelihood that: (a) its relationship with MAN constitutes a "franchise" under the NJFPA; and (b) it satisfies the "place of business" and "gross sales" requirements of the Act.

3. Engines must first show a likelihood that its relationship with MAN constitutes a "franchise" under the NJFPA. To make such a showing, Engines must establish a likelihood that three elements are satisfied:

a. "[A] written arrangement for a definite or indefinite period,"

b. "in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics,"

c. "and in which there is a community of interest in the marketing of goods or services at wholesale,

> retail, by lease, agreement, or otherwise."

N.J. Stat. Ann. § 56:10–3. Because the first two of these elements are not disputed, (Def.'s Opp'n Br. 12–13), the Court finds, without discussion, that they are satisfied. Accordingly, the Court turns to whether Engines shares a "community of interest" with MAN, as defined by the Act.

4. A "community of interest" exists

> when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skill that will be of minimal utility outside the franchise.

***6** *Instructional Systems, Inc. v. Computer Curriculum Corp.,* 130 N.J. 324, 359, 614 A.2d 124 (1992) (quoting *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.,* 944 F.2d 1131, 1143 (3d Cir.1991)). The Act requires that franchisor and franchisee share a community of interest because, "once a business has made substantial franchise-specific investments it loses all or virtually all of its original bargaining power regarding the continuation of the franchise."*Id.* at 357, 614 A.2d 124. Importantly, "[c]ommunity of interest means more than the mere fact that two parties share in profits or that the distributor rely on a single supplier."W. Michael Garner, 1 Franch. & Distr. Law & Prac. § 5:29 (WL 2010) (citing *Southern States Co-op., Inc. v. Global AG Associates, Inc.,* No. 06–1494, 2008 WL 834389, *4 (E.D.Pa. Mar.27, 2008)). Rather, in addition to such business entwinement, a franchise is characterized by certain "indicia of control" of franchisor over franchisee.*New Jersey American, Inc. v. Allied Corp.,* 875 F.2d 58, 62 (3d Cir.1989) (citing *Colt Industries Inc. v. Fidelco Pump & Compressor Corp.,* 844 F.2d 117 (3d Cir.1988)).

5. The Engines–MAN relationship bears the very "indicia of control" that are the hallmark of a franchise "community of interest." Describing such "indicia of control," the Third Circuit has said,

> In addition to the value of such tangible investments as a building designed to meet the style of the franchise, special equipment useful only to produce the franchise product, and franchise signs, a franchisee may lose such intangibles as business good will if it is forced to move from its business premises or change its name and product line upon termination by the franchisor.

New Jersey American, 875 F.2d at 62. Engines stands to lose all of the above-mentioned tangible and intangible equities:[9]

a. To accommodate its MAN-related business, Engines moved to a larger building, which it will not be able to fully use if its relationship with MAN ends;

> b. Engines purchased specialty tools and a computer system in service of its MAN-related business; while it may recoup some of the cost of these items, some (perhaps most) of the cost will not be recoverable; additionally, its intangible investment in mastering the use of such specialty equipment is not recoverable;
>
> c. Engines's affiliation with MAN is prominently displayed on its signs, truck fleet, promotional literature, advertisements, letterhead, business-cards, apparel, etc.; its investment in paying to produce these items, as well as its investment in developing a customer base that associates Engines with MAN products and services, will be a sunk cost if the relationship terminates;
>
> d. Engines has invested in sending its employees to numerous week-long MAN training sessions, paying employee salaries, as well as approximately $20,000 in travel and incidental expenses, for such training;
>
> e. Engines maintains a substantial inventory of MAN parts, which, it is not disputed, Engines will have significantly less opportunity to sell if the relationship terminates.[10]

***7** 6. While the MAN–Engines relationship accords to MAN substantial leverage over Engines, Engines by comparison retains little leverage over MAN. The cases defining a franchise "community of interest" focus on the importance of "unequal bargaining power" between franchisor and franchisee. *See, e.g., New Jersey American,* 875 F.2d at 63–64. Here, a substantial portion of Engines's business comes from the warranty work it performs for MAN, the consumer relationships that emerge from this warranty work, and consumers who find Engines through listings of MAN dealers. In sum, Engines relies heavily upon MAN. MAN, by contrast, can easily send its warranty work elsewhere, and Engines's sales of MAN parts does not yield a substantial portion of MAN's overall profits. The inequality of this relationship is indicative of a franchise.[11]

7. Much of MAN's argumentation relies upon the premise that Engines's investments in the putative franchise were not required by the Dealer Agreement. For example, MAN contends that Engines's extensive promotion of its relationship with MAN, as well as the expenses incurred by Engines in sending its employees to MAN training seminars, were undertaken voluntarily. (Def.'s Opp'n Br. 7, 6 n. 4.) This argument evinces a misunderstanding of the NJFPA. The Court's inquiry is not limited to the four-corners of the Dealer Agreement, nor should it be. The New Jersey Supreme Court has instructed that the putative franchise should be evaluated according to "the terms of the agreement between the parties *or the nature of the franchise business....*" *Instructional Systems,* 130 N.J. at 359, 614 A.2d 124 (emphasis added).[12] Business relationships evolve, and are not necessarily fully captured by their foundational contract. Here, at the very least, MAN acceded to, if not required, Engines's franchise-related expenses. (Indeed, it is peculiar for MAN to now characterize the participation of Engines employees in MAN training seminars as Engines's unilateral undertaking, since these seminars, it is not disputed, were sponsored, hosted, funded, and executed by MAN.)

8. MAN's argument that Engines's franchise-related investments were not required by the Dealer Agreement is invalid for yet a second reason. Whether or not the Dealer Agreement "required" Engines's investments, the Agreement clearly "contemplates such future investment." *New Jersey American,* 875 F.2d at 65. For example, the Agreement sets extensive terms for use of the MAN mark in Engines's literature and promotional materials. (*See, e.g.,* Dealer Agmt. ¶¶ 5.1, 18, 19.3, 22.) Thus, it cannot seriously be argued that such use, while possibly voluntary, is not within the scope of the relationship contemplated by the Agreement. Similarly, while the Dealer Agreement narrowly requires the training of only one Engines employee, it also provides, "further training ... may become necessary during the term of the agreement."(Dealer Agmt. ¶ 20.) Thus, it cannot seriously be disputed that such "further training", even if not specifically required by MAN, was contemplated by the Agreement.

***8** 9. The fact that Engines also sells products and services for MAN-competitors does not defeat the relationship's character as a franchise. The Third Circuit has said, "Although [courts should] consider this factor, [they] cannot place too much weight on it, since N.J. Stat. Ann. § 56:10–4, by excluding from the Act's reach a franchisee that derives 20% or less of gross sales from its franchisor, implies that a firm may be a franchisee even if only 21% of its gross sales are derived from the franchisor."*New Jersey American,* 875 F.2d at 63.

10. Engines and MAN share a "symbiotic" relationship, which is characteristic of a community of interest. *Instructional Systems,* 130 N.J. at 359–362, 614 A.2d 124 (citing *Neptune,* 190 N.J.Super. at 164, 462 A.2d 595; *Ziegler Co. v. Rexnord, Inc.,* 139 Wis.2d 593, 407 N.W.2d 873 (Wis.1987), *reh'g granted on other grounds,* 147 Wis.2d 308, 433 N.W.2d 8 (Wis.1988))."[O]ne guidepost to determine the existence of a community of interest is whether there is a 'continuing financial interest' between the companies."*Id.* at 360, 433 N.W.2d 8. MAN concedes that its dealer relationships are "necessary" to its profitability. (Def.'s Opp'n Br. 9.) This is so because MAN advertises the repair services of dealers like Engines, as well as the abundant parts availability provided by dealers like Engines, to induce customers to purchase MAN products. (Pecan Supp. Aff. ¶ 41.) Further, Engines's joint promotional initiatives help to build a customer base for both companies. Finally, customers for whom Engines performs satisfactory warranty work are more likely to become repeat customers for *both* Engines and MAN.

11. Of course, the interests of Engines and MAN are not perfectly aligned, and, as is common in a franchise relationship, their interests are sometimes at odds. For example, Engines's performance of particular warranty jobs is profitable for Engines but costly for MAN. This fact alone does not defeat the existence of a community of interest. Even when the interests of putative franchisor and franchisee are not perfectly aligned, a community of interest exists when the two entities "share[ ][a] financial interest in the operation of the dealership or the marketing of a good or service."*Instructional Systems,* 130 N.J. at 360, 614 A.2d 124. This shared financial interest is evidenced by " 'interdependence' between the parties, which refers to the 'degree to which the dealer and grantor cooperate, coordinate their activities and share common goals in their business relationship.' " *Id.* Here, examples of such interdependence are: that Engines provides a service (warranty work), which is "necessary" to MAN's profitability; that Engines promotes its relationship with MAN through advertising, etc., which builds a consumer base for both companies; that MAN provides and funds training for

Engines's employees; and that MAN sets standards for Engines's facilities and services.[13] Here, it is readily apparent that the "business relationship [is] more coordinated and interrelated than a typical vendor-vendee relationship." *Ziegler,* 407 N.W.2d at 881.

***9** 12. The *Neptune* case, on which MAN heavily relies, does not weigh to the contrary. *Neptune* held that a provider of Litton microwave repairs, Neptune T.V. & Appliance Service, Inc., was not a Litton franchise because,

> Litton's sole interest in the repair business was that Neptune perform the repairs in a satisfactory manner. Litton had no interest in the volume of plaintiff's business, and its own interests were best served if its products required as few warranty repairs as possible. Litton did not profit from nor had it performed its business through the repair operations, and Neptune did not contribute toward building Litton's business. Furthermore ..., Neptune ... was not particularly susceptible to abuse as a result of any inequitable-financial leverage between the parties.

Instructional Systems, 130 N.J. at 359, 614 A.2d 124 (citing *Neptune,* 190 N.J.Super. at 165–67, 462 A.2d 595). Although the core of the Engines–MAN relationship is similarly warranty repairs, the parallels to *Neptune* end there. First, microwaves are not analogous to marine engines, which often exceed $100,000 in cost and normally require occasional repair. For this reason, customers are likely to consider warranty repairs in purchasing marine engines, but not microwaves. Second, unlike in *Neptune,* MAN's interest in Engines's business does not stop at the quality of Engines's repairs. As previously discussed, Engines helps to build a customer base for MAN by, for example, promoting the MAN brand and its engines at trade shows and in advertising. Third, unlike in *Neptune,* MAN has profited from Engines's retail sales of MAN parts. Finally, for all of the previously mentioned reasons, Engines, unlike the putative franchisee of *Neptune,* is "particularly susceptible to abuse as a result of [the] inequitable-financial leverage between the parties."*Id.*[14]

13. Persuasive to the Court is Third Circuit dicta in *New Jersey American,* which characterized that case as presenting "an extremely close question of ... the meaning of [the] requirement that there be a 'community of interest' between franchisor and franchisee ...." 875 F.2d at 59. Presumably, if those facts gave rise to "an extremely close" case, then future cases whose facts bear more indicia of a "community of interest" will comfortably satisfy the requirement. That is precisely the case here. Facts suggesting that Engines more closely resembles a franchisee than NJA (the precedent cases's putative franchisee) are:

a. Here, MAN-related sales constitute Engines's greatest portion of sales; in *New Jersey American,* Bendix sales were outnumbered by sales of a competitor-product, Fasa. 875 F.2d at 59.

b. Here, Engines is required to use MAN's trademark. (*See, e.g.,* Dealer Agmt. ¶ 22 ("All publicity material, printed matter, and other publication referring to [Engines's] relationship with [MAN] shall bear the [MAN] name and the [MAN] Trademarks...."). No such requirement was present in *New Jersey American.* 875 F.2d at 59.

***10** c. Here, pricing for warranty work is controlled by MAN; in *New Jersey American,* NJA had "complete freedom to set prices ...." *Id.*

d. In *New Jersey American,* the putative franchise relationship "did not mandate that NJA invest in Bendix-specific capital equipment or good will."*Id.* at 60.Here, by contrast, it does. In fact, contractual requirements aside, NJA presented no evidence that it undertook any substantial investments in Allied's business. *Id.* at 63–64.Here, in sharp contrast, there is ample evidence of such investment: tools and equipment, training, and promotional materials.

e. In *New Jersey American,* the putative franchisor, Allied, often reimbursed NJA for advertising that incorporated Allied's name or mark, *id.;* here, by contrast, Engines alone has borne all joint advertising costs.

f. The operative contract in *New Jersey American*"was not a sales contract; rather, it set the terms under which future agreements to sell would be made."*Id.* at 59.The Dealer Agreement here, by contrast, promises to Engines the right to perform and be reimbursed for any warranty work presented by a MAN customer. In other words, the Dealer Agreement here guarantees to Engines actual sales of its services.

14. Accordingly, the Court finds that Engines has established a likelihood that it and MAN share a community of interest, as required by the NJFPA. Because all the statutory elements of a "franchise" are therefore satisfied, the Court finds a likelihood that Engines is a MAN franchise under the Act.

15. The above finding does not end the Court's inquiry, however. To qualify for protection under the NJFPA, in addition to showing a likelihood that it is a "franchise", Engines must show that it satisfies the Act's "place of business" and "gross sales" requirements. The Act applies only to

a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise ....

N.J. Stat. Ann. § 56:10–4. It is not disputed that the first and second elements—location and total sales—are easily satisfied here. (Def.'s Opp'n Br. 26.) MAN does, however, dispute that more than 20 percent of Engines's gross sales are intended to be or are derived from the putative franchise relationship (the third element). This dispute turns upon questions of law, not fact.

a. The parties do not dispute the relevant figures: Engines's gross sales in 2007, 2008, and 2009 were $1,232,194.79, $1,383,302.60, and $1,097,324.67, respectively. Of such sales, the MAN-related portion was $586,286.97 (or 47.6 percent), $683,792.92 (or 49.4 percent), and $390,860.27 (or 35.6 percent), respectively.

***11** b. MAN disputes that the relevant "gross sales" include *all* of Engines's MAN-related business; instead, MAN maintains that the relevant "gross sales" include only MAN warranty work performed by Engines, not other associated retail sales of MAN parts. As an initial matter, although MAN alluded to its position in the closing sentences of its opposition brief, it fully propounded this argument for the first time in a supplemental letter brief, which the Court largely struck as procedurally defective.[15](Ltr. Ord ., July 2, 2010 [Dkt. Ent. 33].) The Court therefore rejects MAN's position on this procedural basis.

c. Even if the Court were to entertain the argument for purposes of completeness, it would reject it. The complicating fact unique to this case is that the putative franchise agreement—the "Dealer Agreement"—is a trilateral, not bilateral, agreement. The contract promises to Engines the right to perform MAN warranty work, as well as the right to be an "authorized dealer" of MAN parts, supplied by the contract's third party, Performance Diesel Inc. MAN's argument rests upon its assumption that the only portion of the contract relevant to Engines's putative franchise status is the warranty work that MAN contractually promised to Engines. This slices the contract too thin. The contract is called a *"Dealer* Agreement" (emphasis added); it promises to Engines not just the warranty work, but also profit from other MAN-related business such as parts sales. The fact that the contract also promises to an intervening wholesale distributor the exclusive right to sell MAN parts to Engines does not alone excise Engines's sales of MAN parts from the franchise inquiry.[16]

The NJFPA pointedly requires that more than 20 percent of the franchisee's gross sales must be "derived from" or, importantly, *"intended to be...derived from"* the relationship. N .J. Stat. Ann. § 56:10–4(3) (emphasis added). In other words, the Court's inquiry is, broadly, whether the putative franchise agreement contemplates a benefit to the franchisee exceeding 20 percent of its sales. Here, the benefit to Engines contemplated by the Dealer Agreement is clearly more than the modest profit it would derive from just performing MAN warranty work.

16. For all of these reasons, the Court finds a likelihood that Engines enjoys protection as a franchisee under the NJFPA. Accordingly, Engines has established a likelihood of success on the merits. Because the other factors relevant to a motion for preliminary injunction are not in dispute, the Court finds that a preliminary injunction is appropriate.

CONCLUSION

In light of the findings of fact and conclusions of law contained herein, the Court will grant Engines's motion for preliminary injunction. An Order will accompany this Opinion.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3021871

Footnotes

1 All findings of fact are undisputed unless otherwise specified. The Court is aware that it may not "issue a preliminary injunction that depends upon the resolution of disputed issues of fact unless [it] first holds an evidentiary hearing."*Elliott v. Kiesewetter,* 98 F.3d 47, 53 (3d Cir.1996) (citing *Professional Plan Examiners of New Jersey, Inc. v. Lefante,* 750 F.2d 282, 288 (3d Cir.1984)). The Court declined to hold an evidentiary hearing here because it resolves the motion without relying upon disputed facts.

In some instances, the parties have disputed how the Dealer Agreement should be interpreted. Of course, "[c]ontract interpretation is usually a question of law in New Jersey."*SmithKline Beecham Corp. v. Rohm and Haas Co.,* 89 F.3d 154, 159 (3d Cir.1996) (citing *Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co.,* 767 F.2d 43, 47 (3d Cir.1985)).

2 "Repowering Products" are "Products sold by [Engines] to a Boat Owner to replace an existing Product or Competitive Product."(Dealer Agmt. ¶ 1.10.)

3 MAN does not dispute this proposition. Rather, MAN maintains that when the Dealer Agreement was executed, Engines represented to MAN that it already owned the relevant specialty tools, and, further, that the Dealer Agreement requires MAN to repurchase any specialty tools from Engines upon its termination. (Def.'s Opp'n Br. 7.) Notably, the Dealer Agreement provides for repurchase of the specialty tools at a discounted rate. (Dealer Agmt. ¶ 30.1(e) ("[T]he repurchase price therefor shall be the original purchase price paid by [Engines], less the value of the use of such materials ....")).

4 Upon termination of the Dealer Agreement, Engines may be able to recoup some of this cost. *See supra* note 3. It is not clear, however, whether the computer equipment would be subject to ¶ 30.1(e) of the Dealer Agreement.

5 MAN does not dispute this figure. Rather, MAN merely characterizes Engines's training-related expenses as "insignificant ancillary expenses." (Def.'s Opp'n Br. 7–8.) MAN also implies that Engines's $20,000 training expenditure was unnecessary because "all that MAN requires is that one of Engines's technicians attend a one-week training session."(*Id.* at 21 n. 11.)Taking as true this proposition, it is not disputed that Engines spent approximately $20,000 to send all six of its technicians to at least three MAN training sessions.

As discussed *infra,* although MAN contends that Engines did not have to attend all the training sessions that it did, the undisputed facts are that these sessions were provided by MAN, and the Dealer Agreement contemplated such training.

6 Briefing by Engines provides exhaustive detail about its investments in promoting its relationship with MAN. MAN does not dispute any of these facts. MAN responds only that Engines's promotional efforts were not required by the Dealer Agreement. (Def .'s Opp'n Br. 5–6.) The Court's legal conclusions, therefore, will rely only upon the fact of the extensive promotional efforts, not whether such efforts were contractually mandated.

7 Engines attributes 2009's somewhat lower percentage to withdrawn business resulting from the tensions that gave rise to this litigation.

8 MAN does not dispute the accuracy of these figures. *See infra* note 15 and accompanying discussion.

9 It is notable how similar Engines's potential loss of equities is to the lost equities mentioned in *Instructional Systems.*There, the Court "noted that the franchisee ... had purchased, in terms of tangible capital assets, the following: office facilities; specialized computers to demonstrate software and programs; promotional products; signs bearing the manufacturer's name; and computer upgrades. The ... franchisee had also maintained inventories."*Atlantic City Coin & Slot Serv. Co., Inc. v. IGT,* 14 F.Supp.2d 644, 662 (D.N.J.1998) (citing *Instructional Systems,* 130 N.J. at 357, 363, 614 A.2d 124).

10 Engines has said that it cannot estimate the value of its stock of MAN parts, but, as one indicator of the substantial size of this stock, Engines has proffered (and MAN does not dispute) that it purchases more than $100,000 in MAN parts annually. MAN contends that Engines will be free to sell such inventory after the Dealer Agreement terminates. (Def.'s

Opp'n Br. 19 n. 9.) MAN does not dispute, however, that the loss of MAN warranty work will, in turn, cause a loss of customers to purchase MAN parts from Engines. Thus, Engines will likely be left with fewer customers to purchase its large stock of inventory.

11 The inequality is embodied in the Dealer Agreement itself. To wit, the Agreement imposes a great many obligations upon Engines, while it imposes relatively few upon MAN. Notably, it affords only MAN the right to terminate for cause. (Dealer Agmt. ¶ 29.) This is presumably attributable to the paucity of obligations for which MAN is responsible. In other words, since the obligations created by the Agreement run mainly one-way, the right to terminate for failure to perform those obligations logically runs only in the opposite direction.

12 In *Atlantic City Coin & Slot Service Co., Inc. v. IGT,* Judge Brotman provided an excellent analysis of this very issue. 14 F.Supp.2d 644, 659–61 (D.N.J.1998).*Atlantic City* explains that earlier cases, particularly *Colt* and *Neptune,* focused on the "control" of franchisor over franchisee. Under this early doctrine, it may indeed have been dispositive that a franchisee's investments were not specifically mandated (as MAN now argues).*See Colt,* 844 F.2d at 120–21. Later cases effectively abrogated this early formulation, however, instead following the path suggested by Judge Rosenn's *Colt* dissent. The New Jersey Supreme Court's 1992 *Instructional Systems* decision "is noteworthy not only for what it says but also for what it does not say. Nowhere in the court's community of interest inquiry does it specifically adopt anything resembling the 'control' test superimposed on the Act by earlier federal decisions."*Atlantic City,* 14 F.Supp.2d at 661. In turn, the later Third Circuit case *Cooper Distributing Co., Inc. v. Amana Refrigeration,* 63 F.3d 262 (3d Cir.1995), followed the New Jersey Supreme Court's "quiet avoidance of the 'control' test ...." *Atlantic City,* 14 F.Supp.2d at 661. Rather than focus on control of franchisor over franchisee, courts assess a "community of interest" by the "symbiotic character of a true franchise arrangement and the consequent vulnerability of the alleged franchisee to an unconscionable loss of his tangible and intangible equities." *Instructional Systems,* 130 N.J. at 359, 614 A.2d 124 (citing *Neptune,* 190 N.J.Super. at 165, 462 A.2d 595).

13 MAN has maintained throughout this litigation that the reason for its desire to terminate its relationship with Engines is its dissatisfaction with the quality of Engines's repair work. (Def.'s Opp'n Br. 15 n. 7.) The implication, of course, is that bad work by Engines reflects poorly on MAN. (*Id.*) This certainly suggests the very sort of "interdependence" and "symbiosis" that the community of interest requirement contemplates.

14 Furthermore, the continuing precedential force of *Neptune* is a subject of doubt. The law has evolved substantially since *Neptune, see supra* note 12, and the New Jersey Supreme Court seemed to prefer the analysis of *Ziegler* in its discussion in the now-leading case, *Instructional Systems.* 130 N.J. at 359–62, 614 A.2d 124.

15 Apart from a few perfunctory sentences inserted at the close of MAN's opposition brief, MAN opted not to substantively dispute Engines's position regarding the Act's 20 percent threshold. (*See* Def.'s Opp'n Br. 26.) In this Court, such an omission constitutes a waiver. *Tsitsoulis v. Twp. of Denville,* No. 07–4544, 2009 WL 5205276, *8 (D.N.J. Dec.23, 2009) (citing *Conroy v. Leone,* 316 F. App'x 140, 144 n. 5 (3d Cir.2009); *see also United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs."). In an abundance of caution, the Court sought clarification from MAN, by way of Letter Order, of whether it disputed the figures offered in the briefs and exhibits submitted by Engines. [Dkt. Ent. 30.] Only then, for the first time, did MAN seize the opportunity to develop new legal argumentation and present new evidence in its supplemental letter brief. [Dkt. Ent. 31.] Engines objected to the supplemental submission on the grounds that, rather than squarely addressing the Court's request, MAN had presented new facts and arguments without the requisite leave of the Court, giving Engines no opportunity to respond. [Dkt. Ent. 32.] Accordingly, the Court largely struck MAN's brief as non-responsive and procedurally defective. [Dkt. Ent. 33.]

16 MAN persistently argues that Engines could sell MAN parts absent the Dealer Agreement; thus, MAN's argument goes, parts sales should not be included in a calculation of sales derived from the putative franchise. This argument strains credulity. The Dealer Agreement obviously contemplates a benefit to Engines that is a package of new business: warranty work and parts sales, yielding new customers who would, in turn, purchase more MAN parts and services from Engines.

Also, in a footnote, MAN says that *Neptune* stands for the proposition that only warranty work is relevant to the Act's 20 percent threshold. In fact, *Neptune* specifically leaves this question unresolved. *See*190 N.J.Super. at 158 n. 1, 462 A.2d 595 ("[T]he trial judge concluded ... that the dispute as to gross sales between the parties and the percentage of plaintiff's business represented thereby *did not require resolution. We concur."*(emphasis added)).

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1996 WL 257581
United States District Court, S.D. New York.

HYGRADE MILK & CREAM CO., INC., Terminal Dairies, Inc., Sunbeam Farms, Inc., Hytest Milk Corp., Gold Medal Farms, Inc., Queens Farms Dairy, Inc., Babylon Dairy Co., Inc., and Meadowbrook Farms, Inc., Plaintiffs,
v.
TROPICANA PRODUCTS, INC., and Tropicana Products Sales, Inc., Defendants.

No. 88 Civ. 2861 (SAS). | May 16, 1996.

OPINION AND ORDER

SCHEINDLIN, District Judge:

***1** Plaintiffs are suing Tropicana Products, Inc. and Tropicana Products Sales, Inc. (together, "Tropicana"), alleging that their pricing practices on sales of orange juice violate Sections 2(a), 2(d), and 2(e) of the Clayton Act, amended by the Robinson–Patman Act (the "Act"), 15 U.S.C. §§ 13(a), (d)–(e) (1973). Tropicana moves for summary judgment dismissing the complaint in its entirety or, alternatively, dismissing the claim for damages. Plaintiffs cross-move for partial summary judgment on their claim that Tropicana violated § 2(a) of the Act. For the reasons set forth below, Tropicana's motion is granted in part and denied in part and Plaintiffs' motion is denied.

BACKGROUND

I. *Facts*

Plaintiffs are milk distributors who purchase Tropicana orange juice for resale to various retailers, mostly bodegas, mom-and-pop grocery stores, chain stores, and cooperatives.[1] Of the eight Plaintiffs, Babylon Dairy, Inc. ("Babylon"), Queens Farms Dairy, Inc. ("Queens Farms"), and Gold Medal Farms, Inc. ("Gold Medal") are no longer in business. Plaintiffs Terminal Dairies, Inc., Sunbeam Farms, Inc., and Hytest Milk Corp. are wholly-owned subsidiaries of Hygrade Milk & Cream Co., Inc. ("Hygrade"); they are not and have never been direct customers of Tropicana. Hygrade, Queens Farms, Babylon, and Gold Medal all sold their own in-house brands of orange juice as well as Tropicana orange juice.

The focus of this lawsuit is Tropicana's promotional programs regarding orange juice sales in the New York metropolitan area, known as the "Citrus Bowl." Plaintiffs allege that Tropicana engages in unlawful price discrimination in violation of the Act. In particular, Plaintiffs allege that wholesale food distributors Royal Foods Distributors, Inc. ("Royal") and White Rose Dairy ("White Rose") (together, "Preferred Wholesalers") as well as direct buying chains Waldbaum's, Inc. ("Waldbaum's") and Supermarkets General Corp. ("Pathmark") (together, "Preferred Chains") receive promotions, discounts, and incentives which are unavailable to Plaintiffs or their customers on proportionally equal terms.

Tropicana sells its orange juice directly to 1) dairies; 2) routemen;[2] 3) wholesale food distributors; and 4) direct buying chain retailers. Tropicana has a single list price for its orange juice. Tropicana, however, offers many promotional allowances, discounts, and incentives to some of its purchasers. Tropicana has three promotional programs available to retailers.[3]

(1) The Basic Plan. This promotional allowance gives retailers a per case discount on each case of orange juice they purchase. In order to qualify for the allowance, the retailer must (a) notify Tropicana in advance that it intends to participate in the program, (b) engage in some form of advertising (for example, placing a sign in the window advertising the juice at a reduced price or printing a notice in a supermarket flyer), and (c) feature the product at a reduced price to be determined by the retailer. Tropicana's drivers periodically check to ensure that participating retailers are performing. There are approximately seven such promotions during a thirteen week period. Tropicana does not specifically require that any of the allowance be spent for advertising Tropicana products.

***2** (2) Case Volume Incentive ("CVI"). This program is only available to "chain" stores, i.e., cooperatives or direct buying chains. Under this program a retailer receives a discount if it runs some sort of promotion for the product and purchases more Tropicana product in a period than it had purchased in the same period in a previous year.

(3) Tactical Action Fund ("TAF"). Under this program

retailers are provided payments for extraordinary advertising performance like a price-reduced coupon or prominent placement of Tropicana product in a circular distributed by the retailer.

Plaintiffs contend that: 1) the Basic Plan is not practically available to their bodega customers or mom-and-pop customers (together, "bodegas" or "bodega customers"); 2) the Basic Plan is administered in a discriminatory fashion; 3) the CVI and TAF programs are not available to bodega customers; 4) "slotting allowances" and "price protection," described below, are given to various retailers but denied to bodega customers; 5) Preferred Wholesalers receive discounts, allowances, and benefits from Tropicana which are not available to them; and 6) Preferred Retailers receive discounts, allowances, and incentives which are not available to them.

DISCUSSION

II. *Legal Standard*

Summary judgment will be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The burden is on the moving party to demonstrate that no material factual dispute exists. *See Gallo v. Prudential Residential Services, Ltd.,* 22 F.3d 1219, 1223 (2d Cir.1994). All ambiguities must be resolved and all inferences must be drawn in favor of the party against whom summary judgment is sought. *See id.* Additionally, if the party opposing summary judgment sets forth a reasonable interpretation of a material fact that conflicts with the interpretation suggested by the movant, then summary judgment must be denied. *See Schering Corp. v. Home Ins. Co.,* 712 F.2d 4 (2d Cir.1983). However, "where the non-movant will bear the ultimate burden of proof at trial on an issue, the moving party's burden under Rule 56 will be satisfied if he can point to an absence of evidence to support an essential element on the non-moving party's claim." *Brady v. Town of Colchester,* 863 F.2d 205, 210–11 (2d Cir.1988).

Once the moving party has come forward with support demonstrating that there is no genuine issue of material fact to be tried, the burden shifts to the non-moving party to provide similar support setting forth specific facts about which a genuine triable issue remains. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Mere conclusory allegations will not suffice. *See*Fed.R.Civ.P. 56(e). Affidavits must be based on personal knowledge, not hearsay, and "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." *Id.; see also Beyah v. Coughlin,* 789 F.2d 986, 987 (2d Cir.1986); *Sellers v. M.C. Floor Crafters, Inc.,* 842 F.2d 639, 643 (2d Cir.1988). In considering the evidence, the trial court's task is "limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them." *Gallo,* 22 F.3d at 1224.

III. *Section 2(a) of the Robinson–Patman Act*

***3** In order for Plaintiffs to establish a violation of § 2(a)[4] they must show 1) that Tropicana "discriminat[ed] in price between different purchasers"; and 2) that "the effect of such discrimination may be substantially to lessen competition."[5] 15 U.S.C. § 13(a). Tropicana asserts that Plaintiffs have failed to establish both of these requirements.

Price discrimination, for the purposes of the Act, means nothing more than a price differential. *See, e.g., Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,* 842 F.2d 578, 584 (2d Cir.1987). Price discrimination may be either direct of indirect. *See*15 U.S.C. § 13(a). Direct price discrimination occurs when a seller charges different purchasers different prices; indirect price discrimination occurs when one buyer receives something of value which is not offered to another buyer. *See Robbins Flooring, Inc. v. Federal Floors, Inc.,* 445 F.Supp. 4, 8 (E.D.Pa.1977). There is no price discrimination, however, where a seller offers different prices to each of its purchasers, provided all competing purchasers have an equal opportunity to purchase the seller's product at the different prices. *See FLM Collision Parts, Inc. v. Ford Motor Co.,* 543 F.2d 1019, 1024 (2d Cir.1976), *cert. denied,*429 U.S. 1097 (1977).

A program which grants discounts or allowances to its customers in an unequal or discriminatory manner may constitute price discrimination. *See FTC v. Morton Salt Co.,* 334 U.S. 37, 42 (1948); *FLM Collision,* 543 F.2d at 1025–26. The Act requires that a seller who provides discounts or allowances must make them functionally (not just theoretically) available to all of its customers. *See Morton Salt,* 334 U.S. at 42 (volume discounts which were theoretically available to all customers but practically unavailable to smaller customers violated the Act). Functional availability, however, does not require that each customer be able to participate or benefit equally. *See L.S. Amster & Co. v. McNeil Labs., Inc.,* 504

F.Supp. 617, 623, 625 (S.D.N.Y.1980) (promotional allowance program which enabled some customers to profit more than others does not violate the Act as long as it is evenly administered and competing customers are able to participate to a significant degree).

Price discrimination standing alone does not violate the Act. *See Best Brands,* 842 F.2d at 584. Plaintiffs must also prove that the price discrimination causes competitive injury—"a reasonable possibility that the price difference may harm competition." *Falls City Indus. v. Vanco Beverage, Inc.,* 460 U.S. 428, 435 (1983). Actual harm to competition is not required. *Id.* Competitive injury is not limited to competition between the favored purchaser and disfavored purchaser; it also encompasses harm to competition between their customers.[6] *Id.* at 436.

A prima facie showing of competitive injury may be demonstrated by substantial price differentials to competing purchasers over time. *See Falls City,* 460 U.S. at 435 (citing *Morton Salt,* 334 U.S. at 46, 50–51). Competitive injury may also be shown by proof of lost sales or profits. *Falls City,* 460 U.S. at 434–35. Where competitive injury is inferred from a substantial price difference over time and plaintiffs cannot show evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales. *Id.* at 435.

***4** Thus, in order to support their § 2(a) claim, Plaintiffs must show that as a result of Tropicana's pricing practices: 1) there is a substantial price difference between the favored purchasers and the disfavored purchasers (price discrimination); and 2) there is a reasonable possibility that the price discrimination may harm competition (competitive injury). Plaintiffs claim that Tropicana's promotional programs are discriminatory and harm competition between their customers and Preferred Retailers, between themselves and Preferred Wholesalers, and between themselves and Preferred Retailers.

A. *Tropicana's Motion for Summary Judgment*

1. *Preferred Retailers and Plaintiffs' Customers*

Plaintiffs claim that Tropicana's pricing practices harm competition between direct buying chain retailers and Plaintiffs' customers. Plaintiffs contend that the Basic Plan is not functionally available to bodega customers because it is burdensome and economically impractical, and that it is administered in a discriminatory manner. Plaintiffs also claim that allowances, discounts, and incentives that are given to direct buying chains are not available to bodega customers.

a. *Availability of Basic Plan*

In order to inform retailers about the Basic Plan, Tropicana sent notifications describing the Plan to its wholesale distributors. *See* Deposition of Terry Schulke ("Schulke Dep."), Vice–President and Director of Grocery Sales for Tropicana, dated March 20, 1995, at 163, 165–66; Deposition of Richard Richer ("Richer Dep."), Director of Finance and Operations of the Eastern Division of Tropicana, dated March 29, 1995, at 142–43; Deposition of Lisa Scanlon ("Scanlon Dep."), Manager of Retail Operations for Tropicana, dated March 22, 1995, at 18; Deposition of William Meyer, Sr. ("Meyer, Sr.Dep."), President of Hygrade, dated April 10, 1995, at 199, 201; Deposition of William Schwartz ("Schwartz Dep."), President of Meadowbrook, dated April 24, 1995, at 222. Tropicana claims that it could not notify bodega customers directly because Plaintiffs would not provide them with customer lists. *See* Schulke Dep. at 159; Richer Dep. at 142–44. Tropicana also advertised the plan in Spanish and English in a trade journal called *Modern Grocer. See* Schulke Dep. at 159–60; Richer Dep. at 150; Scanlon Dep. at 18. Plaintiffs admit that their customers were not denied the opportunity to take advantage of the Basic Plan. *See* Meyer, Sr. Dep. at 241; Deposition of Jules Kotcher ("Kotcher Dep."), President of Babylon and Queens Farms, dated April 18, 1995, at 263–64. In fact, some bodega customers have participated in the Basic Plan. *See, e.g.,* Declaration of Billy Meyer, Jr. ("Meyer, Jr. Decl."), President of Hygrade, dated November 24, 1995, ¶ 25.

Plaintiffs nonetheless contend that the Plan is unworkable and uneconomical for bodegas and Plaintiffs. Plaintiffs had a significant responsibility in implementing the Plan for their bodega customers. Plaintiffs' drivers would solicit bodegas to participate in the promotional program. *See* Meyer, Sr. Dep. at 770; Kotcher Dep. at 326; Schwartz Dep. at 470. It was difficult for the drivers to do this because many bodega owners spoke Spanish and they did not. *See* Schwartz Dep. at 469. In order to facilitate this process, Hygrade produced a flyer describing the program in more understandable terms.[7] Plaintiffs paid the drivers a commission so that they would take the time to solicit bodegas. *See* Meyer, Sr. Dep. at 770. After a customer agreed to participate in the promotion, Plaintiffs notified Tropicana. *See* Meyer, Sr. Dep. at 770; Schwartz

Dep. at 472. Plaintiffs would then pick up advertising signs from Tropicana and deliver them to the bodegas. *See* Meyer, Sr. Dep. at 771; Schwartz Dep. at 471. Plaintiffs would check if the bodega was keeping the sign up for the entire week and report to Tropicana during the promotional week. *See* Schwartz Dep. at 471, 473. Plaintiffs maintained sales records for the bodega during the promotional period for submission to Tropicana. *See* Meyer, Sr. Dep. at 771. Plaintiffs then handled numerous complaints from bodegas who frequently had to wait for extended periods to receive their checks from Tropicana. *Id.* at 769; Kotcher Dep. at 325.

***5** The vast majority of bodega customers did not participate in the Basic Plan. *See, e.g.,* Meyer, Jr. Decl. ¶ 25. Tropicana contends that they chose not to do so because they did not want to comply with the Plan's minimal requirements. *See* Defendants' Reply Memorandum of Law in Support of Their Motion for Summary Judgment at 5–6. This might be so. However, it is also possible that the Plan was not functionally available to bodega customers. Tropicana's efforts to inform bodega customers of the Plan were limited. While Tropicana informed Plaintiffs of the Plan, Plaintiffs claim that Tropicana never requested a customer list. *See* Kotcher Dep. at 247–48, 324–25; Schwartz Dep. at 243, 374. Although Plaintiffs helped inform bodega customers of the Plan, they never entered into any agreement with Tropicana to do so. Ultimately, it is Tropicana's obligation to inform bodega customers about the Plan. *See* Guides for Advertising Allowances and Other Merchandising Payments and Services ("FTC Guides"), 16 C.F.R. § 240.11.[8] It is also questionable whether Tropicana's advertisements in a trade journal, which may not have been seen by bodega customers, provided effective notice. *Cf. Exquisite Form Brassiere, Inc. v. FTC,* 301 F.2d 499, 501 (D.C.Cir.1961), *cert. denied,*369 U.S. 888 (1962) (three advertisements in trade journal was insufficient notice). The inadequacy of the notice is evidenced by the fact that many former bodega customers claim that they were not aware of Tropicana's promotional program. *See* Bodega Declarations in Support of Plaintiffs' Cross–Motion to Amend the Complaint ("Bodega Declarations") ¶ 5. Additionally, those bodega customers who participated in the Plan faced difficulties obtaining promotional materials and receiving payment from Tropicana.

Moreover, Tropicana's promotional allowances bear no relationship to the value of services provided by the retailer. Such a program is inconsistent with the FTC Guides which state that sellers should not overpay for services and that the allowance should be spent solely for the purpose for which it was given. *See* FTC Guides, 16 C.F.R. § 240.12. It is true that a legitimate allowance program need not guarantee that all customers participate equally or benefit to the same degree, as long the program is evenly administered. *See L.S. Amster,* 504 F.Supp. at 623, 625. However, the fact that some retailers make thousands of dollars from the Plan while others do not even participate creates an inference that the Plan is not functionally available to all customers.

There is evidence that suggests that bodega customers did not understand the Basic Plan and did not want to comply with its requirements. *See* Meyer, Jr. Dep. at 369; Meyer, Sr. Dep. at 231–32, 240, 819–20. There is also a question of fact as to whether Tropicana requested customer lists from Plaintiffs. Based on the limited notice provided by Tropicana, the administrative difficulties faced by bodegas participating in the Plan, and the lack of any relationship between the allowance and the value of service provided, a reasonable jury could conclude that the Plan was not functionally available to bodega customers.

b. *Off–Invoice Payments*

***6** Tropicana permitted Pathmark and Waldbaum's to receive their allowances directly as a discount on their next bill, or "off-invoice." Bodega customers, in contrast, had to "billback" Tropicana after providing the required documentation. Bodega customers were required to submit a "verification" form, proof of advertising, and proof of purchase to Tropicana within 30 days of the promotion. Only after approving the documentation would Tropicana send a check to bodega customers. Tropicana asserts that the reason bodega customers do not receive off-invoice payments is that they do not purchase directly from Tropicana. Tropicana cannot deduct bodega customers' promotional allowance from their next bill because it does not bill them in the first place.

In *L.S. Amster,* 504 F.Supp. at 620, this Court found that the decision to grant allowances off-invoice is similar to the decision to extend credit. The decision not to grant allowances to a customer on an off-invoice basis will not violate the Act if it is based on a valid business consideration. *Id.* at 621–22; *see also Bouldis,* 711 F.2d at 1325 (discriminatory practices in the extension of credit do not violate § 2(a) where they are based on legitimate business reasons). Tropicana grants off-invoice payments to direct buying chains because they promise to perform the required promotional activity and historically have done so. *See* Schulke Dep. at 169–73. Wholesalers, on the other hand, do not have the authority to make such a commitment on behalf of independent retailers. Furthermore, bodegas have a poor record of complying with the required promotional activity. *See* Meyer, Jr. Dep at 369; Meyer, Sr. Dep. at 231–32, 240, 819–20. These considerations, coupled with the logistical difficulty of granting off-invoice allowances to bodega customers, are legitimate reasons for differential treatment. *See L.S. Amster,* 504 F.Supp. at 621–22 (granting off-invoice payments based on prior compliance with the requirements of promotional programs does not violate the Act). Moreover, Plaintiffs have not offered any competent proof that Tropicana's decision to deny off-invoice payments to bodega customers was motivated by anything other than business considerations.

c. *Pre–Pull*

Tropicana customers who participate in the promotional program may receive product which is eligible for the promotional allowance prior to the dates of the promotion. This time period is known as "pre-pull." This period may be different for different customers. *See* Ex. H to Declaration of Carl Person ("Nov. Person Decl."), attorney for Plaintiffs, dated November, 27, 1995. Pathmark and Waldbaum's, for example, have five days (or one week, as Tropicana does not deliver on the weekends) of pre-pull. *See* Deposition of Salvatore Olivito ("Olivito Dep."), Vice–President of Dairy for Pathmark, dated October 21, 1993, at 57–58; Deposition of Alexander Garofalo ("Garofalo Dep."), Chilled Products Sales Manager for Tropicana, dated December 3, 1993, at 11–12. As there are seven promotions in a thirteen week quarter, all of their purchases are eligible for the allowance. Plaintiffs, however, only receive one day of pre-pull on behalf of their customers.

***7** Tropicana claims that the purpose of pre-pull is to allow enough time to get the product in the stores for the promotion. *See* Defendants' Rule 3(g) Statement ("Def.3(g)") ¶ 61. Tropicana argues that this is necessary because only juice delivered for the promotion—as opposed to juice already existing in inventory—is eligible for the allowance. Tropicana, however, does not require all product which is eligible for a promotional allowance to be sold at a lower price. Thus, a customer may purchase product during the pre-pull period or the promotional period and sell it at the regular price after the promotion is over. Tropicana asserts that the reason for the discrepancy in pre-pull periods is that different customers have different delivery considerations. *See* Def. 3(g) ¶¶ 62–63. Bodegas usually receive daily deliveries. Chains and buying co-ops, on the other hand, usually take delivery at a central warehouse and then distribute the product to the several retail outlets. Some retailers only take delivery once a week. Tropicana claims that it adjusts the pre-pull period depending on the needs of the retailer. *See* Def. 3(g) ¶¶ 65, 87.

Tropicana's pre-pull practices permit all purchases by direct-buying chains to be eligible for promotional payments, but only permit purchases made by bodega customers for 6 out of 10 days to be eligible. This practice raises an inference of price discrimination. The net effect of this differential treatment is that direct buying chains receive lower prices (through promotional allowances) for nearly twice as long as bodega customers. Tropicana's argument that different pre-pull periods were necessary because of delivery considerations is neither relevant to the question whether a price difference and competitive injury resulted nor a defense to price discrimination under the Act. *See*15 U.S.C. §§ 13(a)–(b).

d. *TAF Program*

Tropicana claims that the TAF program is available to all retailers. *See* Schulke Aff. ¶ 10. Although some large supermarkets who are customers of Plaintiffs have received TAF money, *see* Def. 3(g) ¶ 74, Plaintiffs claim that this program was not available to bodega customers, *see, e.g.,* Meyer, Jr. Decl. ¶ 42. Furthermore, Tropicana's documentation describing the promotional program available to independent grocers makes no mention of the TAF program. *See* Exs. B and C to Declaration of Carl Person ("Oct. Person Decl."), dated October 18, 1995; Tropicana Ex. 20. Consequently, an issue of fact exists as to whether the TAF program was functionally available to bodega customers.

e. *CVI Program*

Tropicana admits that CVI funds are unavailable to individual bodegas. *See* Def. 3(g) ¶ 72. Tropicana claims that bodegas are excluded from this program because Tropicana is unable to track their purchases for the prior year. According to Tropicana, bodegas would be able to participate in this program if they banded together to form advertising co-ops. Tropicana, however, may not structure a promotional program in a manner that prevents a customer from participating. *Cf. Morton Salt,* 334 U.S. at 42–44 (quantity discounts which were theoretically available to all purchasers but functionally unavailable to small stores violate the Act). Although the CVI program is not available to individual bodegas, Tropicana contends that "*[v]iewed in their entirety,* promotional payments are available on proportionally equal terms to all competing retailers." Schulke Aff. ¶ 11 (emphasis added). However, a question of fact exists as to whether the exclusion of bodegas from participating in this program caused price discrimination and competitive injury.

f. *Slotting Allowances and Price Protection*

***8** Slotting allowances are payments traditionally made by a manufacturer to a retailer to obtain or retain shelf space for its products. Slotting allowances are designed to cover the retailer's administrative costs in providing and maintaining shelf space for a manufacturer's products. Tropicana admits to paying slotting allowances when demanded by a retailer. *See* Def. 3(g) ¶ 96. In fact, Tropicana claims to have paid slotting allowances to some of Plaintiffs' supermarket customers. *Id.* ¶ 97. Tropicana contends that it has never denied a request for slotting allowances from Plaintiffs' bodega customers—bodega customers have just never asked for one. *Id.* ¶ 98. Plaintiffs respond that their bodega customers never knew that it was available and under what terms it would be granted. *See* Plaintiffs' Response Rule 3(g) Statement ("Pls.Res.3(g)") ¶ 98. If the existence of a promotional program is not known by the customers of a seller, then it cannot be considered available to them in any meaningful way. *See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft,* 19 F.3d 745, 752 (1st Cir.1994). Consequently, a question of fact exists as to whether slotting allowances were functionally available to bodega customers.

"Price protection" is a practice that Tropicana occasionally engaged in when it raised its prices. Where a retailer has a commitment to an advertised promotional price and Tropicana increases its prices prior to the running of the ad, Tropicana will protect the retailer. Pathmark has requested price protection from Tropicana approximately fifteen times in a ten year period. *See* Olivito Dep. at 146–48. Plaintiffs claim that they did not know that Tropicana had a price protection program available for bodegas. *See, e.g.,* Meyer, Jr. Decl. ¶ 50. Some of Hygrade's customers have also received price protection from Tropicana under the same conditions as other retailers. *See* Def. 3(g) ¶ 103; Pls.Res. 3(g) ¶ 103. Hygrade claims, however, that this occurred only after it complained to Tropicana, and that it never knew that such a program existed. *See, e.g.,* Meyer, Jr. Decl. ¶ 50. Moreover, there is no indication that Tropicana ever informed Plaintiffs or their customers that price protection might be available. Accordingly, a question of fact also exists as to whether price protection was functionally available to bodega customers.

g. *Summary*

Resolving all ambiguities and drawing all inferences in Plaintiffs' favor, the evidence demonstrates that the Basic Plan, the TAF program, slotting allowances, and price protection were not available to bodegas. Additionally, the CVI program and equivalent pre-pull periods were denied to bodega customers. Thus, a rational jury could find that these differences constituted a substantial price discrimination over time between bodegas and direct buying chains. Accordingly, Tropicana's motion is only granted with respect to the use of off-invoice allowances. In all other respects, Tropicana's motion for summary judgment on this aspect of Plaintiffs' § 2(a) claim is denied.

2. *Preferred Wholesalers and Plaintiffs*

***9** Plaintiffs also claim that Tropicana's pricing practices harmed competition between themselves and their competitors Royal and White Rose.

a. *Allowances and Discounts*

Tropicana claims that all wholesalers, including Royal and White Rose, purchase product at the same price and that none of them received any discounts or allowances. *See* Garofalo Dep. at 53; Schulke Dep. at 23, 29; Richer Dep. at 47. Furthermore, Tropicana claims that retailers are equally eligible for promotional allowances regardless of the identity of their wholesaler. *See* Schulke Aff. ¶ 11; *see also* Deposition of Robert Price ("Price Dep."), former Vice–President for Sales and Marketing for Red Apple Supermarkets, dated June 16, 1995, at 13 (stating that any allowance that Red Apple received did not depend on which wholesaler supplied the product).

Plaintiffs, however, claim that retailers purchasing from Royal and White Rose are eligible for certain discounts and allowances which would not have been available to them had they purchased from Plaintiffs. In support of this allegation Plaintiffs submit three documents describing promotional allowances made available to Red Apple, a supermarket that purchased Tropicana product from both Hygrade and Royal. *See* Ex. K to Nov. Person Decl. Each document states on the first page that the allowance only applies to purchases made through Royal. *See id.* at 7832, 7834, 7845. Robert Price of Red Apple admitted that Red Apple, Tropicana, and Royal entered into an arrangement permitting Red Apple to purchase product from Royal for possibly "well in excess" of a dollar per case cheaper than it could from Hygrade. *See* Price Dep. at 15–16. Hygrade contends that it lost its Red Apple account to Royal as a result of this discriminatory treatment. A reasonable trier of fact could conclude that Tropicana discriminated against Plaintiffs by providing allowances or discounts to those who purchased from Preferred Wholesalers.

b. *Pre–Pull*

Plaintiffs claim that Royal and White Rose received preferential pre-pull periods for their customers. A Tropicana business record reveals that when certain retail customers purchased from Royal and White Rose they were given 100% pre-pull, but were given only one-day of pre-pull when purchasing from Plaintiffs. *See* Ex. H to Nov. Person Decl. Tropicana's response is that different retailers have different delivery requirements. This does not address the question of why the same retailer might have different pre-pull periods depending on the identity of the wholesaler.

c. *Off–Invoice*

In the 1980s, Royal decided to advance to certain customers the promotional allowance they would eventually receive. In turn, Tropicana agreed to pay the promotional allowance due to those retailers directly to Royal by deducting it from the invoice. Tropicana only paid the allowance to Royal after proof of performance was submitted. *See* Schulke Dep. at 131–32; Garofalo Dep. at 54–55. This effectively created an off-invoice arrangement for some of Royal's customers. Plaintiffs claim that Tropicana discriminated against them by refusing to extend such an arrangement to them on behalf of their bodega customers. As was the case for off-invoice payments, such a decision could reasonably be based on an erratic record of performance by bodega customers. *See* Meyer, Jr. Dep at 369; Meyer, St.Dep. at 231–32, 240, 819–20. In 1992, Tropicana made this arrangement available to all its customers, but Plaintiffs chose not to participate. Hygrade's president testified that Hygrade did not participate in this program because it feared that it would not get the money back from Tropicana. *See* Meyer, Sr.Dep. at 324. Plaintiffs' decision not to participate undermines their claim that they were damaged by Tropicana's earlier refusal to let them participate.

d. *Summary*

***10** As Plaintiffs and Preferred Wholesalers are both direct customers of Tropicana, Plaintiffs are claiming a secondary-line violation. Because Plaintiffs and Preferred Wholesalers are competitors, Plaintiffs must demonstrate a substantial price difference over time in order to establish their § 2(a) claim. *See Falls City,* 460 U.S. at 435. Drawing all inferences and resolving all ambiguities in Plaintiffs' favor, the evidence supports the conclusion that Tropicana provided allowances or discounts and extended pre-pull periods to retail customers of Preferred Wholesalers, but not to Plaintiffs' customers. Consequently, an issue of material fact has been raised as to whether these actions constitute substantial indirect price discrimination. Thus, summary judgment is denied as to Plaintiffs' claim that Tropicana's pricing practices harmed competition between Plaintiffs and Preferred Wholesalers. On the other hand, Tropicana's refusal to pay the bodegas' promotional allowances directly to Plaintiffs does not raise an inference of price discrimination resulting in a competitive injury.

3. *Favored Retailers and Plaintiffs*

Finally, Plaintiffs claim that Tropicana's pricing practices harmed competition between themselves and direct buying chains. There is no dispute that direct buying chains (which are retailers) received allowances which were unavailable to Plaintiffs (which are wholesalers). Thus, Tropicana in effect permits direct buying chains to purchase product for less than Plaintiffs. Tropicana claims that this practice does not violate the Act.

Tropicana contends that in order to violate § 2(a) "the favored and disfavored purchasers [must compete] at the same functional level, i.e., all wholesalers or all retailers, and within the same geographical market." *Best Brands,* 842 F.2d at 585. However, in *Texaco, Inc. v. Hasbrouck,* 496 U.S. 543, 567 (1990), the Supreme Court rejected the contention that § 2(a) categorically exempts price discrimination between wholesalers and retailers.[9] *See also Morton Salt,* 334 U.S. at 55; *J.T. Jones v. Metzger Dairy,* 334 F.2d 919, 924–25 (5th Cir.1964), *cert. denied,*379 U.S. 965 (1965).

As Plaintiffs are asserting a secondary-line injury, they must show that they were in actual competition with the direct buying chains in order to establish competitive injury. *See Best Brands,* 842 F.2d at 584. Plaintiffs must also show that "the probable effect of the discrimination would be to allow the 'favored competitor to draw sales or profits from the unfavored competitor.' " *Id.* at 584 (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 569–70 (1981) (Powell, J., dissenting in part)). Although Plaintiffs and direct buying chains primarily sell to different customers, Plaintiffs claim that the direct-buying chains were in effect acting as wholesalers in two different respects.

First, Plaintiffs claim that the direct buying chains were acting as wholesalers because they resold ("diverted") Tropicana product to customers other than the ultimate consumer. Tropicana claims that it discourages and consistently tries to stop such activity. Furthermore, Tropicana asserts that neither Waldbaum's nor Pathmark engaged in such diversionary activity within the Citrus Bowl area. *See* Def. 3(g) ¶¶ 104–06. However, Herbert Whitehead, former president of Dellwood Foods, Inc., testified that Dellwood purchased diverted Tropicana products from Waldbaum's and other direct buying chains. *See* Deposition of Herbert Whitehead, April 26, 1995, at 17–19. These purchases were $3,000 to $3,500 cheaper per trailer load than purchases from Tropicana and continued for a period of approximately five years. *See id.* at 19–21. Salvatore Olivito, Pathmark's Dairy Vice President, testified that Pathmark diverted Tropicana product through brokers located in New York or New Jersey, but that it stopped diverting product in January 1991 at the instruction of Tropicana. *See* Olivito Dep. at 15–16, 20, 26. Furthermore, Olivito claims that any product diverted by Pathmark was sent out of the New York marketing area. *See id.* at 104–05.

***11** Even assuming that Pathmark and Waldbaum's diverted some product into the New York marketing area, there is no evidence suggesting that any of it reached Plaintiffs' customers or the competitors of Plaintiffs' customers. More importantly, there is no evidence that Tropicana product was diverted to any retailers. Therefore, to the extent that direct buying chains were diverting product to wholesalers in the Citrus Bowl area, they were acting as a manufacturer, not a wholesaler. *See Kirby v. P.R. Mallory & Co.,* 489 F.2d 904, 909 (7th Cir.1973), *cert. denied,*417 U.S. 911 (1974) ("the litmus test of a wholesaler is the character of his selling, not his buying"). Thus, if direct buying chains were competing with anybody it was Tropicana or other diverters, not Plaintiffs. Plaintiffs themselves have purchased significant amounts of diverted product. *See* Meyer, Sr. Dep. at 360; Schwartz Dep. at 341; Deposition of Martin Fromm ("Fromm Dep."), President of Gold Medal, dated April 20, 1995, at 80–81; Kotcher Dep. at 194–97. The fact that there was a less expensive source from which Plaintiffs could purchase Tropicana product did not harm competition between Plaintiffs and direct buying chains.

Second, Plaintiffs claim that their bodega customers purchased Tropicana from direct buying chains instead of Plaintiffs because it was cheaper. In support of this contention Plaintiffs submit approximately 40 virtually identical declarations from former bodega customers. Each declaration states that "[s]ometimes we would buy Tropicana orange juice from the competing supermarket at these low prices, which was lower than the price which the Dairy was charging us at that time." *See* Bodega Declarations ¶ 3. The declarations do not state, however, that such purchases were from direct buying chains like Pathmark or Waldbaum's. Moreover, the declarations do not state how much or how often bodegas purchased Tropicana product from the supermarkets. The fact that bodegas also purchased product from a wholesaler at the same time, *see id.* ¶ 2, suggests that the purchases from supermarkets were not substantial. Accordingly, this evidence does not support the conclusion that Plaintiffs were in actual competition with direct buying chains.

Plaintiffs have offered no credible evidence that they were in competition with direct buying chains. Therefore, Tropicana's motion for summary judgment is granted with respect to Plaintiffs' claim of price discrimination as between Plaintiffs and direct buying chains.

B. *Plaintiffs' Motion for Partial Summary Judgment*

Plaintiffs and Tropicana disagree on whether Tropicana's promotional programs are available to bodegas. For the purpose of their motion for partial summary judgment, however, Plaintiffs accept that Tropicana's programs are available to bodegas. *See* Reply Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment at 3–4. The theory of Plaintiffs' motion is that promotional allowances which bear no relationship to the value of services provided by the customer violate § 2(a) of the Act.

***12** Plaintiffs claim, and Tropicana admits, that: 1) the retailer was not required to spend any portion of the allowance on advertising or promoting Tropicana products; 2) the cost to the retailer of promoting Tropicana products was not regulated by Tropicana; 3) there was no relationship between the amount of the allowance and the cost of promotion to the retailer; 4) the effect of the promotional allowance program was to give supermarkets a lower price than Plaintiffs; and 5) supermarkets were able to sell Tropicana product during promotional periods for lower prices than Plaintiffs were able to buy from Tropicana. Plaintiffs argue that these facts establish that the promotional program was a sham and that the allowances should have been given automatically to all customers.

In support of their contention, Plaintiffs cite several cases holding that allowances that were unrelated to the value of the services performed violated the Act. In these cases, however, none of the allowances were available to the plaintiffs. The relationship between the allowance and the value of the services only becomes relevant when the allowance is not available to all customers. Where an allowance is available to all competing customers, there is no discrimination in price and hence no competitive injury. *See FLM Collision,* 543 F.2d at 1025–26 (where a "lower price is available to all purchasers, not only in theory but in fact ... there is no violation"). Thus, a promotional program which provides payments to customers in excess of their costs of promotion does not violate § 2(a) where it is functionally available to competing purchasers on proportionally equal terms.[10] Plaintiffs' motion for partial summary judgment is denied as their theory cannot, as a matter of law, state a claim under § 2(a). Plaintiffs may eventually prevail, however, if they prove that Tropicana's promotional programs were not available to bodegas.

IV. *Sections 2(d) and 2(e) of the Robinson Patman Act*

Section 2(d)[11] of the Act prohibits sellers from providing payments to customers to be used in connection with the resale of goods unless the payments are available to all customers competing in the distribution of such products on proportionally equal terms. *See*15 U.S.C. § 13(d); *FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 350–53 (1967). Section 2(e)[12] is similar to § 2(d) except that it prohibits a seller from providing services (as opposed to payments for services) to customers to be used in connection with the resale of goods unless the services are available to all competing customers on proportionally equal terms. *See*15 U.S.C. § 13(e); *FTC v. Simplicity Pattern Co.,* 360 U.S. 55, 65 (1959). Although the language in these two sections is slightly different, courts have applied the same analysis to both. *See World of Sleep, Inc. v. La–Z–Boy Chair Co.,* 756 F.2d 1467, 1479 n. 6 (10th Cir.), *cert. denied,*474 U.S. 823 (1985); *Kirby,* 489 F.2d at 909.

13** In order to establish a violation of §§ 2(d) or (e), Plaintiffs must show that 1) Tropicana provided payments or services to customers in connection with the resale of goods; and 2) such payments or services were not available to competing customers on proportionally equal terms. 15 U.S.C. §§ 2(d)–(e); *Fred Meyer,* 390 U.S. at 355–57; *Alan's of Atlanta, Inc. v. Minolta Corp.,* 903 F.2d 1414, 1423–24 (11th Cir.1990); ***Bouldis, 711 F.2d at 1327–28; *Kirby,* 489 F.2d at 908. Sections 2(d) and (e), unlike 2(a), have no competitive injury requirement. *See Simplicity Pattern,* 360 U.S. at 66. Discrimination under §§ 2(d) and (e) is only unlawful if it reaches competing customers reselling on the same functional level; it does not require proportional equality between direct-buying retailers and wholesalers. *See Fred Meyer,* 390 U.S. at 348–49. Thus, discrimination between Plaintiffs and direct buying chains is not actionable under §§ 2(d) or (e). *See id.*

A. *In Connection With the Resale of Goods*

Under the Basic Plan, CVI program, and TAF program Tropicana provides payments in return for promotional activity by the retailer for the resale of Tropicana product. Also, the allowances which Plaintiffs allege were given to Preferred Wholesalers were for the purpose of reselling Tropicana product to retailers. Furthermore, price-protection and pre-pull are services provided by Tropicana to retailers to aid in the resale of the product. While slotting allowances are not given for advertising or promotion, they are used primarily to promote the resale of the seller's product by securing shelf space. *See* FTC Guides, 16 C.F.R. § 240.9 at 36 n. 1 ("The discriminatory purchase of shelf space, whether directly or by means of so-called allowances, may violate the Act...."). Thus, discriminatory treatment regarding these programs and services is within the scope of §§ 2(d) and (e).

As off-invoice payments are usually an advance of funds that must eventually be paid, they are similar to an extension of credit. *See L.S. Amster,* 504 F.Supp. at 620. Courts have held that discriminatory credit practices are outside the scope of §§ 2(d) and (e) as they generally do not relate to the resale of a supplier's goods. *See, e.g., Alan's of Atlanta,* 903 F.2d at 1424; ***Bouldis,*** 711 F.2d at 1328. Here, however, the off-invoice payments specifically relate to the payment of promotional allowances, not to the original sale of goods. Thus, these off-invoice payments are properly within the scope of §§ 2(d) and (e).

B. ***Availability on Proportionally Equal Terms***

Sections 2(d) and (e) require that a seller's promotional program be available on proportionally equal terms. The FTC Guides provide guidance as to when a promotional program will satisfy this requirements. FTC Guides, 16 C.F.R. §§ 240.1–240.15.

1. ***FTC Guides***

First, a customer must be informed of the existence of a promotional program. "The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances." FTC Guides, 16 C.F.R. § 240.10(b); *see also Alterman Foods, Inc. v. FTC,* 497 F.2d 993, 1001 (5th Cir.1974). While a seller may contract with its wholesalers to inform indirect purchasing retailers of a promotion, it remains ultimately responsible for providing the required notification. *See* FTC Guides, 16 C.F.R. § 240.11; *see also Fred Meyer,* 340 U.S. at 358.

***14** Second, a customer must be able to participate in the promotion in a practical sense. *See* FTC Guides, 16 C.F.R. § 240.10(a)(1). A promotion which, although theoretically available to all, effectively excludes smaller customers from participating violates the Act. In order to make promotional programs functionally available, a seller may have to offer "alternative terms and conditions under which customers can participate." *Id.* Furthermore, a seller "must take reasonable steps to ensure that the alternatives are proportionally equal, and ... inform all competing customers of the various alternative plans." *Id.* Where the seller has complied with these requirements, but the customer does not participate because it is reluctant to process the required paperwork to verify performance, the seller is not in violation of the functional availability requirement. *See id.* example 4.

Third, promotional payments or services must be made available to competing customers on proportionally equal terms. Although there is no single way to do this, basing the payments or services on the dollar volume or the quantity of product purchased will generally suffice. *See* FTC Guides, 16 C.F.R. § 240.9(a). "Where a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms." FTC Guides, 16 C.F.R. § 240.9(b).

Finally, the FTC Guides require a seller to take reasonable precautions that it is not overpaying for the services provided. *See* FTC Guides, 16 C.F.R. § 240.12. "The customer should expend the allowance solely for the purpose for which it was given." *Id.* If a seller knows or should know that the allowance is not being properly used, it should discontinue the payments or services. *Id.*

2. ***Tropicana's Programs***

Sections 2(d) and (e) are narrower in scope than § 2(a) as they do not reach discrimination between customers competing at different functional levels. However, as the FTC Guides and the statute demonstrate, and as Tropicana recognizes, compliance with §§ 2(d) and (e) is more difficult than compliance with § 2(a) with regard to customers competing at the same functional level.[13] Tropicana must make each promotional program functionally available to all competing customers on proportionally equal terms regardless of the effect on price or competition. As discussed above, there are questions of fact concerning the adequacy of notice provided by Tropicana, the bodegas' ability to participate in the promotional programs in a practical sense, and the availability of all of Tropicana's promotional programs to bodegas. Under these circumstances, a reasonable jury could conclude that Tropicana's practices relating to the Basic Plan, TAF program, CVI program, pre-pull, slotting allowances, and price protection were not functionally available to bodegas, as opposed to direct buying chains, on proportionally equal terms. As off-invoice payments were denied to bodegas for a valid business reason, this does not violate the Act. *See L.S. Amster,* 504 F.Supp. at 621. Thus, Tropicana's motion for summary judgment on Plaintiffs' §§ 2(d) and (e) claims is granted with respect to off-invoice payments. Tropicana's motion is denied in all other respects.

V. ***Meeting–Competition Defense***

***15** The meeting-competition defense of § 2(b)[14] relieves a seller from liability under the Act. *Falls City,* 460 U.S. at 438. The defense is an absolute defense to violations of §§ 2(a), (d), and (e) of the Act. *See Viviano Macaroni Co. v. FTC,* 411 F.2d 255 (3d Cir.1969); *Exquisite Form Brassiere,* 301 F.2d at 504; FTC Guides, 16 C.F.R. § 240.14; *see also Standard Oil Co. v. FTC,* 340 U.S. 231 (1951). In order to prevail on this defense, the seller must show "the existence of facts which would lead a reasonable prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Falls City,* 460 U.S. at 438 (internal quotation marks omitted). Furthermore, the seller's response must be "offered in good faith to 'meet not beat' the competitor's low price." *Id.* at 446. The burden of establishing this defense lies with Tropicana. *Id.* at 451.

Tropicana urges that its promotional pricing scheme was a good faith effort to meet the equally low prices of Minute Maid (a division of The Coca–Cola Company), Citrus Hill (a Proctor & Gamble Company), and other private label brands including Hygrade's 100% Pure Orange Juice. In support of this assertion, executives of several retail chains have testified that Tropicana's competitors provided them with discounts and that they requested discounts from Tropicana. *See* Olivito Dep. at 92–95 (Minute Maid provided a volume discount program similar to Tropicana's); Deposition of Ira Savoy ("Savoy Dep."), former Vice–President of Merchandising for Waldbaum, dated September 14, 1993, at 116 (Savoy requested promotional allowances from Tropicana); Deposition of Jeffrey Berger ("Berger Dep."), Chief Operating Officer for Food City Markets, Inc., dated June 14, 1995, at 26–27, 60–61, 69–70 (slotting allowances were received from Tropicana, Minute Maid, and other orange juice producers). Furthermore, Terry Schulke of Tropicana claims that his staff attempted to obtain documentation verifying a retailer's claim regarding a Tropicana competitor's promotional allowances.[15] *See* Schulke Aff. ¶ 15. Tropicana claims that its allowances are based on the competitive circumstances in the market. *Id.* ¶¶ 15–16. Finally, Schulke believes that Tropicana will lose sales if it does not maintain its promotional allowances. *Id.* ¶ 17.

This evidence is insufficient to satisfy Tropicana's burden for a number of reasons. First, it is unclear which manufacturer first instituted a promotional allowance program. *See* Olivito Dep. at 94–95. Tropicana's promotional program has been in effect for many years with little, if any, changes. As of 1988, Tropicana had no information on Minute Maid's promotional programs and no verification of Citrus Hill's promotional programs. *See* Ex. 1 to Schulke Aff. Tropicana has failed to establish that it reacted in response to a competitor's price, *see* Garofalo Dep. at 157–59, and therefore is not entitled to judgment based on the meeting competition defense. *See Checker Motors Corp. v. Chrysler Corp.,* 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd,*405 F.2d 319 (2d Cir.), *cert. denied,*394 U.S. 999 (1969).

***16** Second, there is no competent evidence that executives of retail chains told Tropicana the terms and conditions of their competitors' promotional programs. At best, Tropicana's information consisted of generalized assertions from retailers with an interest in convincing Tropicana that its allowances were too low. The cases cited by Tropicana (where summary judgment was granted) involved circumstances where the seller had particular information about a competitor's prices. The information allegedly known by Tropicana is not sufficient to establish, as a matter of law, either its good faith or the reasonableness of its promotional programs. *Cf. Corn Prods. Ref. Co. v. FTC,* 324 U.S. 726, 740–41 (1945) (evidence from witnesses who had no personal knowledge of competitor's transactions and who concluded that price discrimination was necessary was insufficient to establish meeting-competition defense).

Finally, summary judgment under the meeting-competition defense "is rarely, if ever, reachable." *Alan's of Atlanta,* 903 F.2d at 1425. As Tropicana bears the burden of proof on this defense at trial, it "must remove genuine doubt from the issue altogether" to be entitled to summary judgment. *Id.* As the defense requires determinations of reasonableness, good faith, and the beliefs of Tropicana executives, it inherently involves credibility issues which are best decided by a jury. *See id.* This case is no different. Whether the evidence supports the inference that the requirements of the meeting competition defense have been met is a "question for the trier of fact, not this Court." *Falls City,* 460 U.S. at 451. Tropicana's motion for summary judgment on the meeting-competition defense of § 2(b) is denied.

VI. *Damages*

In order to recover damages under § 4 of the Clayton Act Plaintiffs must establish that they suffered actual antitrust injury as a result of Tropicana's violation of the Act. *See J. Truett Payne,* 451 U.S. at 562; *see also World of Sleep,* 756 F.2d at 1479–80 (requirement of actual antitrust injury applies whether there was a violation of §§ 2(a), (d), or (e)). Plaintiffs, as wholesalers, have standing to recover damages that they suffered as a result of discrimination between their customers and direct buying chains.[16] *See Lago & Sons Dairy, Inc. v. H.P. Hood, Inc.,* 892 F.Supp. 325, 338–44 (D.N.H.1995); *Morris Electronics of Syracuse, Inc. v. Mattel, Inc.,* 595 F.Supp. 56, 57 (N.D.N.Y.1984). Tropicana contends that Plaintiffs have insufficient evidence to support an award of damages.

Assuming that Plaintiffs establish a violation of the Act, they need not provide "the kind of concrete, detailed proof of injury which is available in [non-antitrust] contexts." *J. Truett Payne,* 451 U.S. at 565 (quoting *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946)). This is because the "vagaries of the marketplace" create a "difficulty of ascertaining business damages." *J. Truett Payne,* 451 U.S. at 566. Moreover, this rule is justified because "it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* at 566–67. The question is whether the damages are based on a "just and reasonable inference" drawn from the evidence. *Id.* at 566.

***17** Under this relaxed standard of proof, damages have been awarded where there was limited evidentiary support. Damages have been awarded on the basis of a plaintiff's estimate of sales it could have made absent the violation. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969). Damages have also been awarded based on a comparison of a plaintiff's actual profits with the contemporaneous profits of a competitor who was not the victim of discrimination. *See Bigelow,* 327 U.S. 251.

In *J. Truett Payne,* 451 U.S. at 563–63, the plaintiff's evidence of damages consisted of his testimony and the testimony of an expert witness. The plaintiff claimed that he suffered a temporary four percent (4%) loss in sales because of defendant's discriminatory incentive programs. *Id.* The expert testified that the discrimination would artificially inflate retail prices and that the plaintiff was harmed because the favored retailers made more money per car. *Id.* at 564. While the Court characterized this evidence as "weak," it was insufficient to foreclose recovery before a determination of liability was made. *Id.* at 568. It is important to note, however, that this relaxed standard of proof applies to the amount of damages, not to whether the violation caused damage. *See, e.g., MCI Communications Corp. v. American Telephone & Telegraph Co.,* 708 F.2d 1081, 1161 (7th Cir.1982), *cert. denied,*464 U.S. 891 (1983) (once causation has been proved "in a reasonable manner," damages may be determined by a just and reasonable estimate).

A. *Plaintiffs' Evidence*

1. *Plaintiff Hygrade*

Hygrade claims that its sales of Tropicana product declined approximately 68 percent from 1984 to 1992. *See* Meyer, Jr. Decl. ¶ 54; Ex. Q to Nov. Person Decl. Some of Hygrade's former bodega customers state that they lost sales to supermarkets and that they left Hygrade because its prices were not competitive. *See* Bodega Declarations ¶¶ 2–3. Hygrade also contends that it lost its Red Apple account because of Tropicana's discriminatory practices. Red Apple was a chain account which enabled Hygrade to serve several stores. Robert Price of Red Apple testified that Red Apple only left Hygrade because Royal's prices were significantly cheaper. *See* Price Dep. at 10–12. This evidence of injury is sufficient to support an award of damages under the standards set forth in *J. Truett Payne.*

Tropicana argues that any sales lost by Hygrade (and other Plaintiffs) were not caused by Tropicana's promotional programs. Tropicana cites many other factors which may have led to a decline in Tropicana sales. *See* Def. 3(g) ¶ 125. Hygrade counters that while not every lost sale was due to Tropicana's promotional programs, most of them were. *See* Pls. Res. 3(g) ¶ 125; Meyer, Jr. Decl. ¶ 56. Plaintiffs must establish a causal connection between the injury and the violation of the Act. *See J. Truett Payne,* 451 U.S. at 562. The evidence presented creates a question of fact as to causation. There is considerable evidence that many aspects of Tropicana's promotional programs were denied to bodegas. Moreover, Hygrade's injury was substantial. A jury could find "as a matter of fact and with a fair degree of certainty" that Tropicana's discriminatory promotional programs were a material cause of Hygrade's injury. *Chrysler Credit Corp. v. J. Truett Payne Co.,* 670 F.2d 575, 581 (5th Cir.), *cert. denied,*459 U.S. 908 (1982). A question of fact remains as to what extent the other factors contributed to Hygrade's lost sales. Hygrade is entitled to damages to the extent that Tropicana is responsible for its injury. *See Falls City,* 460 U.S. at 437. Finally, Hygrade's inability to ascertain which sales of Tropicana were lost because of price discrimination is not fatal to its claim for damages. Once injury has been established, uncertainty as to the extent of damage does not preclude recovery. *J. Truett Payne,* 451 U.S. at 567 n. 5. Where the evidence of injury is sufficient, a jury may properly approximate the amount of damages. *Id.* at 567.

***18** Approximately one-third of Hygrade's customers took loans from Hygrade. The loans require that the customer must purchase all milk and juice products "exclusively and solely" from Hygrade.[17] Ex. 14 to Meyer, Jr. Dep. Tropicana argues that these loan agreements prevent Hygrade from claiming that it lost these accounts to any of the Preferred Buyers. This argument makes no sense. If Tropicana's illegal conduct caused the customers to breach these contracts, Tropicana remains liable. Thus, Hygrade may maintain its claim for damages.

2. *Other Plaintiffs*

The remaining Plaintiffs assert that they have "substantial evidence of lost sales." Schwartz Decl. ¶ 53; Kotcher Decl. ¶ 53; Fromm Decl. ¶ 53. Plaintiffs state that the precise amount of each of their purchases of Tropicana product is contained in the data processing records which were produced by Tropicana. Schwartz Decl. ¶ 57; Kotcher Decl. ¶ 57; Fromm Decl. ¶ 57. Unlike Hygrade, the remaining Plaintiffs make no specific claim that their sales of Tropicana product declined over time. They do not name any significant accounts that they lost. They offer no direct evidence of lost profits. They offer no expert testimony of lost sales. Other than Plaintiffs' generalized assertions, their evidence of injury consists of declarations from former bodega customers.

Former bodega customers claim that they stopped purchasing Tropicana product from Plaintiffs because Plaintiffs' competitors were offering lower prices. *See* Bodega Declarations ¶ 2; *see also* Schwartz Decl. ¶¶ 54, 56; Kotcher Decl. ¶¶ 54, 56; Fromm Decl. ¶¶ 54, 56. Plaintiffs must prove, however, that any losses they suffered were caused by Tropicana's alleged discrimination. *J. Truett Payne,* 451 U.S. at 562. As Plaintiffs do not allege jobbers to be Preferred Buyers, any customers lost to jobbers are not relevant to this lawsuit. Similarly, any customers Plaintiffs lost to other wholesalers, who are not Preferred Buyers, was not caused by Tropicana's alleged discrimination. Only one of Plaintiffs' former customers claims that it switched to White Rose because of lower prices. Such a limited loss of sales cannot possibly show that Plaintiffs suffered any actual injury. *See Allen Pen Co. v. Springfield Photo Mount Co.,* 653 F.2d 17, 21 (1st Cir.1981) (price difference affecting 1 ½% to 2% of sales is insufficient to warrant an inference of actual injury).

The bodega owners believe that they lost sales to supermarkets and that they therefore purchased less product from Plaintiffs. *See* Bodega Declarations ¶ 3. The bodegas also claim that they "sometimes" purchased Tropicana product from the supermarkets to sell to the public. *Id.* Thus, Plaintiffs contend that bodegas would have purchased more Tropicana product from them if Tropicana's promotional programs were not discriminatory. These claims by bodegas, however, are vague and speculative. Both of these claims assume that the bodegas would have participated in the promotional program if it were administered legally. In order to recover damages Plaintiffs must show that they actually suffered an injury, not merely that there is a reasonable likelihood of injury. *See J. Truett Payne,* 451 U.S. at 562. At best, the bodega owners' belief that their sales were affected suggests that Plaintiffs might have suffered an injury. Significantly, bodega owners offer no evidence that they themselves suffered any lost sales as a result of Tropicana's promotional programs.

***19** Assuming, *arguendo,* that Plaintiffs suffered some injury due to lost sales from bodegas, the Bodega Declarations suggest that it was insignificant. The bodegas have not indicated the quantity of sales that they lost to supermarkets. Furthermore, bodegas continued to purchase Tropicana product from a wholesaler at the same time that they purchased Tropicana product from the supermarkets. *See* Bodega Declarations ¶ 2. This suggests that the amount of orange juice bodegas purchased from supermarkets was insubstantial. Plaintiffs also failed to submit evidence as to the percentage of lost sales.

The Bodega Declarations, by themselves, do not establish that Plaintiffs suffered actual antitrust injury. *See Allen Pen,* 653 F.2d at 21. At best, they indicate a speculative and insignificant loss of sales. Accordingly, Tropicana's motion dismissing the claim for damages by Plaintiffs other than Hygrade is granted.

CONCLUSION

For the reasons discussed above: 1) Tropicana's motion for summary judgment on Plaintiffs' § 2(a) claim is granted as to Tropicana's off-invoice program and Plaintiffs' claim that competition was harmed between Plaintiffs and direct-buying chains, but is denied in all other respects; 2) Tropicana's motion for summary judgment on Plaintiffs' §§ 2(d) and (e) claims is granted as to Tropicana's off-invoice program but denied in all other respects; 3) Tropicana's motion for summary judgment on the meeting competition defense is denied; 4) Tropicana's motion dismissing Plaintiffs' claim for damages is denied with respect to Plaintiff Hygrade and granted with respect to the other Plaintiffs; and 5) Plaintiffs' motion for partial summary judgment on their § 2(a) claim is denied.

SO ORDERED:

All Citations

Not Reported in F.Supp., 1996 WL 257581, 1996-1 Trade Cases P 71,438

Footnotes

1 There are generally two types of cooperatives. A buying co-op is a group of stores which join together under a common name, make their purchases through a central buying office, and warehouse their product in a jointly owned facility. Buying co-ops purchase directly from Tropicana. An advertising co-op is a group of independent stores which advertise under a common name. These independent stores may purchase product from any distributor and are still eligible for promotional allowances because of the amount of advertising they provide. *See* Affidavit of Terry Schulke ("Schulke Aff."), Vice–President and Director of Grocery Sales for Tropicana, October 1995, ¶¶ 7–8.

2 Routemen, or jobbers, are independent truck drivers who sell Tropicana product to various retail customers. In both the original Complaint, filed on April 20, 1988, and the First Amended Complaint, filed on August 1, 1988, Plaintiffs alleged that Tropicana engaged in discriminatory practices in favor of jobbers. In the Second Amended Complaint, filed on February 26, 1993, Plaintiffs acknowledge jobbers as purchasers of Tropicana, but define "Favored Buyers" as "direct buying chains, including Defendants Pathmark and Waldbaum's, and [ ] wholesale food distributors, including Defendants White Rose and Royal Food." Second Amended Complaint ¶ 20. There are no allegations of discriminatory practices involving jobbers in the Second Amended Complaint. On January 23, 1996, this Court denied Plaintiffs' motion to amend the complaint to include jobbers as Favored Buyers. *See* Transcript of Oral Argument ("Tr."), at 32. Plaintiffs now argue that the words "wholesale food distributor" include jobbers. The Complaint, however, separately defines jobbers and wholesale food distributors. *See* Second Amended Complaint ¶ 19. Accordingly, any alleged differential treatment of jobbers will not be considered.

3 Tropicana claims that these programs are open to all retailers regardless of whether they purchase from Tropicana or a wholesaler. Plaintiffs, however, contend that these programs were not functionally available to their customers.

4 Section 2(a) states, in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....

15 U.S.C. § 13(a) (1973).

5 The statute also requires that the sales to the different purchasers occurred in interstate commerce and were of commodities of like grade and quality. *See*15 U.S.C. § 13(a). Neither of these requirements are at issue here.

6 Typically competitive injury may occur at three levels. First, a primary-line injury occurs where the seller's price discrimination harms competition with the seller's competitors. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993). Second, a secondary-line injury occurs where a seller's price discrimination harms competition between the favored purchasers and disfavored purchasers. *See, e.g., F.T.C. v. Sun Oil Co.,* 371 U.S. 505 (1963). In order to establish a secondary-line violation the favored purchasers and disfavored purchasers must be in actual competition. *See Best Brands,* 842 F.2d at 584. Third, a tertiary-line violation occurs where the seller's price discrimination harms competition between the customers of the favored purchasers and disfavored purchasers even though the favored purchasers and disfavored purchasers do not compete. *See Falls City,* 460 U.S. at 436.

7 Tropicana claims that Hygrade's flyer misrepresented the terms and conditions of the promotion.

8 The FTC Guides are designed to help businesses comply with the requirements of §§ 2(d) and (e) of the Act. The Guides are based on the language and legislative history of the Act as well as court decisions construing the Act. *See* FTC Guides, 16 C.F.R. § 240.1 (1995). They do not have the force of law. *Id.* Such guidelines, however, have the "power to persuade, if lacking the power to control." *General Electric Co. v. Gilbert,* 429 U.S. 125, 142 (1976) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)); *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 257 (1991). The weight to be given the Guides depends on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [and their] inconsistency with earlier and later pronouncements." *Skidmore,* 323 U.S. at 140. Without discussing these factors in detail, I note that the FTC Guides' position on a customer's use of promotional allowances has been substantially the same throughout the period relevant to this lawsuit. *See*16 C.F.R. § 240.11 (1984).

9 While the holding of *Best Brands* is no longer controlling, it does support the proposition that competitive injury is much less likely to occur as a result of price discrimination between retailers and wholesalers because they generally

compete in different markets. *See Hasbrouck,* 496 U.S. at 580 (Scalia, J., concurring in the judgment).

10 Plaintiffs also rely on § 240.12 of the FTC Guides, which states that the customer should spend the promotional allowance for the purpose that it was given. This reliance is misplaced. The FTC Guides, which provide guidelines for complying with §§ 2(d) and (e) of the Act, do not alter the fact that price discrimination and competitive injury must be proved in order to establish a violation of § 2(a).

11 Section 2(d) states:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d) (1973).

12 Section 2(e) states:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (1973).

13 Michael Malina, counsel for Tropicana, stated: "The suggestion that somehow there might be a violation of Section 2(a) when there's no violation of Section 2(d) turns this statute upside-down, because Sections 2(d) and 2(e) are more stringent than Section 2(a)...." Tr. at 33.

14 Section 2(b) states, in relevant part:

> That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (1973).

15 Tropicana has submitted documentation of a Minute Maid consumer coupon promotion and various advertisements of Minute Maid orange juice. *See* Ex. 1 to Schulke Aff. There is also an ambiguous document concerning "off-invoice" and "ad allowance" programs by Minute Maid. *Id.* Finally, there is a Tropicana inter-office correspondence, dated May 31, 1989, stating that Minute Maid is paying A & P $12,500 per orange juice ad.

16 Tropicana did not challenge Plaintiffs' claim of standing in its brief in support of its motion for summary judgment.

17 Meadowbrook, Gold Medal, Babylon, and Queens Farms also made similar loans to their customers.

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2015 WL 5166954
Only the Westlaw citation is currently available.
United States Court of Appeals,
Sixth Circuit.

Onofre LOPEZ, Plaintiff–Appellant,
v.
CITY OF CLEVELAND, et al.,
Defendants–Appellees.

No. 14–4277. | Sept. 4, 2015.

Synopsis
Background: Administrator of suspect's estate brought § 1983 action against city and city police officers, who shot suspect, alleging that officers violated suspect's Fourth Amendment right to be free from excessive force, as well as various Ohio laws. The United States District Court for the Northern District of Ohio, Patricia A. Gaughan, J., 2014 WL 6673851, entered summary judgment in favor of officers and city. Administrator appealed.

Holding: The Court of Appeals, Quist, J., sitting by designation, held that genuine issues of material fact existed as to whether suspect presented imminent threat of serious harm such that police officers' use of deadly force was reasonable, precluding summary judgment.

Reversed and remanded.

West Headnotes (1)

[1] **Federal Civil Procedure**
Civil Rights Cases in General

Genuine issues of material fact existed as to whether suspect, who refused to drop machete, presented imminent threat of serious harm such that police officers' use of deadly force was reasonable, precluding summary judgment in § 1983 action against officers for allegedly using excessive force in violation of suspect's Fourth Amendment rights. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

On Appeal from the United States District Court for the Northern District of Ohio.
Before BOGGS and DONALD, Circuit Judges; and QUIST, District Judge.[*]

OPINION

QUIST, District Judge.

*1 Cleveland police officers shot and killed Illuminado Lopez during a confrontation in which Lopez refused to drop a machete. Lopez's brother, acting as the Administrator of Lopez's estate, sued the City of Cleveland and the five officers who shot at Lopez,[1] asserting constitutional claims under 42 U.S.C. § 1983 and supplemental claims under Ohio law. After the parties conducted discovery, the district court entered summary judgment in favor of Defendants, concluding that Defendant Officers acted reasonably in using deadly force because Lopez presented an imminent threat of serious harm to someone. Because we hold that there are disputed issues of material fact regarding whether Lopez posed a significant threat to others, we reverse the judgment of the district court.

I.

During the evening of July 29, 2011, Lopez was visiting his friend, Maria Cruz, at her home. Lopez's sisters, Melba Cartagena (Melba) and Adelaida Pla, lived in the two houses on either side of the building where Cruz lived. At some point, Lopez got into an argument with Melba's son, Samuel Cartagena (Samuel), and used a baseball bat to break the windows in Samuel's car. Melba called the police in response to Lopez's actions.

Schramm and Milner heard a radio dispatch that an individual was threatening a family member and had a bat, and these officers were the first to arrive on the scene. The officers found Lopez sitting in the middle of the street with a beer bottle. At some point shortly thereafter, the officers noticed that Lopez was holding a machete, and they ordered him to drop it. When Lopez refused to comply, Milner shot Lopez with a taser. The taser did not affect Lopez, however, who removed the taser probes from his body. The officers then drew their firearms and radioed for backup.

Shortly thereafter, Carraway, Daugenti, and Tankersley arrived on the scene. The officers tased Lopez two more times, but the tasers had no effect, and Lopez cut the taser wires with his machete. At some point, Lopez moved from the street to the sidewalk in front of Cruz's house. The officers continued to shout at Lopez to drop the machete.

From this point on, the facts are in dispute. Pla testified that when Lopez reached the sidewalk, she approached him and asked him to drop the machete. During that time, she yelled to the officers that she was Lopez's sister, that he was sick, and that she could calm him down and get the machete from him. At some point, however, she grew tired of shouting and walked toward her house. Lopez then shouted at Pla to take the machete from him, and she walked toward him, again shouting that she would get the machete. Pla testified that when she reached a point about seven feet from Lopez, he turned to his right, in her direction, with the machete at his side. At that point, the officers began to fire.

Melba and her son, Noel Cartagena (Noel), both described the moments preceding the shooting differently than Pla. Melba testified that Lopez brought the machete over his head as if he were about to harm himself, and then turned to his left, in the direction of Melba, and asked Melba if that was the way she wanted him to die. Defendant Officers then began shooting. Similarly, Noel testified that Lopez said he was going to stab himself if the officers did not shoot him, and then he brought the machete above his head, toward himself. Noel stated that Lopez was facing the officers, however, and did not turn toward either the right or left.

***2** Defendant Officers all testified that they did not know who Pla was at the time of the shooting. They also testified that Lopez raised the machete above his head and turned toward Pla immediately before shooting, although their exact descriptions of these final moments varied slightly. Schramm testified that Lopez brought the machete over his head and turned the upper part of his body toward Pla. Similarly, Daugenti testified that Lopez raised the machete over his head while facing forward and then turned toward Pla, who was running toward Lopez. Milner testified that Pla got within five feet of Lopez, and that Lopez turned toward Pla and raised the machete over his head. Tankersley testified that Lopez turned toward Pla with the machete held over his head and made a gesture like he was swinging it at her. Finally, Carraway testified that Pla ran toward Lopez, and that Lopez raised the machete above his head in a threatening manner and turned toward her.

Officers on the scene fired at Lopez, and three bullets struck him. Plaintiff's forensic pathologist, Werner Spitz, M.D., testified that the wounds indicated that Lopez was shot from the front and did not support a conclusion that Lopez had his arms stretched above his head or that he was turned toward the right.

Plaintiff filed this action alleging that Defendants violated Lopez's Fourth Amendment right to be free from excessive force, as well as various Ohio laws. After the district court dismissed some of Plaintiff's state-law claims against Defendant City of Cleveland, the parties proceeded to discovery. Following discovery, the district court granted Defendants' motion for summary judgment on the remaining claims, holding that Defendant Officers did not violate Lopez's Fourth Amendment rights. On that basis, the district court concluded that Defendant Officers were entitled to qualified immunity and immunity under Ohio law and dismissed the claims against Defendant City of Cleveland.

II.

We review a district court's grant of summary judgment de novo. *Sigley v. City of Parma Heights,* 437 F.3d 527, 532 (6th Cir.2006). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a)."In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.' " *Tolan v. Cotton,* —— U.S. ——, ——, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014) (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

"In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry."*Tolan,* 134 S.Ct. at 1865. Under the first prong, a court must determine whether "the facts, '[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a [federal] right [.]' " *Id.*(quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Under the second prong, a court must determine whether the right was "clearly established" at the time of the alleged violation. *Id.* at 1866. "[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* This is "an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " *Id.* (quoting *Anderson,* 477 U.S. at 249).

III.

***3** On appeal, Plaintiff argues that the district court improperly granted summary judgment because there are genuine disputes of material fact regarding whether Defendant Officers used excessive force in shooting Lopez and whether they were entitled to immunity under Ohio law.

A. Fourth Amendment Excessive Force

"*[A]ll* claims that law enforcement have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Supreme Court has explained that the use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others...."*Tennessee v. Garner,* 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In evaluating an excessive force claim, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."*Graham,* 490 U.S. at 396. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."*Id.* at 396–37. As such, the reasonableness standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case."*Burchett v. Kiefer,* 310 F.3d 937, 944 (6th Cir.2002).

The Court has identified three non-exhaustive factors for lower courts to consider in determining the reasonableness of a police officer's use of force: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight. *Graham,* 490 U.S. at 396. Nonetheless, the ultimate inquiry is "whether the totality of the circumstances" justified the use of force. *Livermore v. Lubelan,* 476 F.3d 397, 404 (6th Cir.2007) (internal quotation marks omitted).

The central issue in this appeal is whether, viewing the evidence in the light most favorable to Lopez, Defendant Officers had probable cause to believe that Lopez posed a serious risk of harm to the officers or others. Defendant Officers testified uniformly that they believed that Pla was in imminent danger at the time they fired at Lopez. It is impossible to determine whether this belief was reasonable, however, without resolving factual disputes in the record.

These factual disputes are material because they concern the nature of any movement that Lopez may have made just before the shooting. While Defendant Officers testified that Lopez raised the machete and turned toward Pla, other witnesses described the events differently. Pla stated that Lopez turned toward her with the machete held at his side, while Melba recalled that Lopez raised the machete and turned away from Pla (and toward Melba). Noel stated that Lopez never turned in either direction, but remained facing the officers. Moreover, Melba and Noel each testified that Lopez made statements indicating an intent to commit suicide and raised the machete as though intending to harm himself.

***4** Defendants suggest that the force used was not excessive based on *Chappell v. City of Cleveland,* 585 F.3d 901 (6th Cir.2009). However, the circumstances of Lopez's shooting, when viewed in the light most favorable to Plaintiff, are materially different than those presented in *Chappell.*Although both cases involved a suspect who refused to drop a knife, the circumstances in *Chappell* presented a far more immediate threat of danger. In that case, there was undisputed evidence that the suspect was moving quickly toward officers with a knife held high, and "had closed to within five to seven feet in a dark, cluttered, enclosed space."*Id.* at 911. Moreover, the officers "were backed up against a wall in the small bedroom and there was no ready means of retreat or escape."*Id.* Thus, the court found that if the officers had hesitated even a second, they would have been within arm's reach of the suspect and vulnerable to serious injury. *Id.*

In this case, by contrast, the parties dispute whether Lopez made any movement at all toward Pla. Viewing the facts in the light most favorable to Plaintiff, Lopez turned his body away from Pla as she was moving toward him. Moreover, there is evidence that he did not raise the machete at all, or raised it in a way that indicated only that he intended to harm himself. In other words, there is a dispute of fact as to whether Lopez made any movement in those final moments that could reasonably be interpreted as threatening Pla.

"This Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force."*Sova v. City of Mt. Pleasant,* 142 F.3d 898, 903 (6th Cir.1998). Thus, where the reasonableness of the officers' use of force depends on which version of the facts one accepts, "the jury, not the judge, must determine liability."*Id.* In this case, there are contentious factual disputes about the nature of Lopez's movements just before the shooting. Those disputes go to the heart of whether it was reasonable for Defendant Officers to use deadly force. Because the reasonableness of their actions depends on which version of the facts one accepts, the question must go to the jury. Accordingly, we reverse the district court's grant of summary judgment to Defendant Officers on Plaintiff's Fourth Amendment claim.[2]

B. Municipal Liability

A plaintiff seeking to hold a municipality liable for its officers' conduct must demonstrate "(1) that a constitutional violation occurred; and (2) that the [municipality] is responsible for that violation."*Graham v. Cnty. of Washtenaw,* 358 F.3d 377, 382 (6th Cir.2004) (internal quotation marks omitted). The district court dismissed Plaintiff's § 1983 claim against Defendant City of Cleveland based on its conclusion that no constitutional violation occurred. Given our holding as to that issue, we also reverse the district court's holding on municipal liability and remand for further consideration in light of these proceedings.

C. State Law Claims

***5** The district court held that because Defendant Officers did not use excessive force, they were entitled to immunity under state law. In light of our holding regarding the use of excessive force, we reverse the district court's holding on this issue and remand for the district court to determine the issue of immunity under state law.

IV. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for proceedings consistent with this opinion.

All Citations

--- Fed.Appx. ----, 2015 WL 5166954

Footnotes

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

1 The named officers are David Schramm, Amy Milner, Amy Carraway, Donato Daugenti, and Michael Tankersley.

2 In light of its holding that there was no constitutional violation, the district court did not analyze the "clearly established" prong of the qualified-immunity analysis, and Defendants have made no argument regarding that prong on appeal. Nonetheless, we note that the law was clearly established that officers could not use deadly force unless they had probable cause to believe that an individual posed a serious risk of harm to officers or others. *See Ciminillo v. Streicher,* 434 F.3d 461, 468 (6th Cir.2006). Because there are disputes of fact that go directly to that issue, Defendant Officers could not establish that they were entitled to qualified immunity based on the "clearly established" prong. *See Tolan,* 134 S.Ct. at 1865–66 (explaining that a court may not resolve disputes of fact under either prong of the qualified immunity analysis).

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2015 WL 3954047
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Robert NOBLE, Plaintiff,
v.
CITY OF CAMDEN, Officer Jeffrey W. Frampton, Officer Christopher Frucci, Officer John Doe, Defendants.

Civil No. 13–4391 (JBS/AMD). | Signed June 29, 2015.

Synopsis
Background: Arrestee brought § 1983 action against city and police officers for excessive force, false arrest, and malicious prosecution, in violation of Fourth Amendment. Defendants moved for summary judgment.

Holdings: The District Court, Simandle, Chief Judge, held that:

[1] fact issues precluded summary judgment on *Monell* claim based on theory that city failed to investigate complaints of excessive force;

[2] arrestee could not maintain *Monell* claim based on failure to train theory;

[3] fact issues precluded summary judgment on § 1983 excessive force claim;

[4] fact issues precluded summary judgment on § 1983 false arrest and malicious prosecution claims; but

[5] District Court was barred from considering state law tort claims.

Motion granted in part and denied in part.

West Headnotes (45)

[1] **Federal Civil Procedure**
Hearing and Determination

City defendants' inclusion of deposition statements from defendants and plaintiff which contradicted each other did not render defendants' statement of material facts inadequate, for summary judgment purposes in § 1983 action for excessive force, false arrest, and malicious prosecution; defendants satisfied purposes of local summary judgment rule by indicating clearly, through citations to both testimony of plaintiff and defendants, which facts were disputed and which were not. U.S.C.A. Const.Amend. 4; Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983; U.S.Dist.Ct.Rules D.N.J., Civil Rule 56.1.

Cases that cite this headnote

[2] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

To prevail on a *Monell* claim under § 1983, a plaintiff must first establish that the municipality had a policy or custom that deprived him of his constitutional rights; in other words, plaintiff must show that the municipality, through one of its policymakers, affirmatively proclaimed the policy, or acquiesced in the widespread custom, that caused the violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

To prevail on *Monell* claim under § 1983, a plaintiff may show the existence of a policy when a decision-maker with final authority issues an official proclamation, policy, or edict. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

"Custom," as element of *Monell* claim under § 1983, may be established by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[5] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

Once a § 1983 plaintiff asserting a *Monell* claim identifies a municipal policy or custom, he must demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[6] **Civil Rights**
Lack of Control, Training, or Supervision; Knowledge and Inaction

In context of *Monell* claim under § 1983, if policy or custom does not facially violate federal law, causation can be established only by demonstrating that the municipal action was taken with deliberate indifference as to its known or obvious consequences; showing of simple or even heightened negligence will not suffice. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[7] **Civil Rights**
Lack of Control, Training, or Supervision; Knowledge and Inaction

For a § 1983 claim of failure to train or supervise municipal employees, the plaintiff must show that the failure to provide training or supervision amounted to deliberate indifference to the rights of persons with whom the employee will come into contact. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[8] **Civil Rights**
Lack of Control, Training, or Supervision; Knowledge and Inaction

"Deliberate indifference," as element of § 1983 claim of failure to train or supervise municipal employees, may be demonstrated by showing a pattern of violations which puts the municipal employee on notice that a new program is necessary, or a single incident violation where the need for training was patently obvious. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[9] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

Proof of the existence of an unlawful policy or custom is not enough to maintain § 1983 action against municipality; plaintiff must additionally prove that the policy or custom was the proximate cause of the injuries suffered. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[10] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

To establish "causation," as element of *Monell* claim under § 1983, plaintiff must demonstrate a "plausible nexus" or "affirmative link" between the custom and the specific deprivation of constitutional rights at issue. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[11] **Federal Civil Procedure**
Civil Rights Cases in General

Genuine issues of material fact existed as to whether city was deliberately indifferent in investigating claims of excessive force, and as to whether city had custom of ignoring or failing to properly and promptly investigate excessive force complaints against police officers for years preceding incident involving arrestee, precluding summary judgment on arrestee's § 1983 *Monell* claim based on theory that arrestee's injuries resulted from city's failure to conduct timely and meaningful investigations into claims of excessive force. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[12] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

To prevail on *Monell* claim under § 1983, a plaintiff must prove that municipal policy or custom was proximate cause of injuries suffered. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[13] **Civil Rights**
Criminal Law Enforcement; Prisons

There was no evidence of lack of training or supervision within city police department with respect to use of excessive force, or that any deficiency in training contributed to violation of arrestee's Fourth Amendment rights, thus precluding arrestee's § 1983 *Monell* claim based on failure to train theory. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[14] **Civil Rights**
Government Agencies and Officers

Doctrine of qualified immunity balances two important interests in § 1983 action, namely, the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[15] **Civil Rights**
Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

Under doctrine of "qualified immunity," government officials are immune from liability for civil damages under § 1983 as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[16] **Civil Rights**
Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

In § 1983 action, qualified immunity will not act as a shield for the official who knows or should know he is acting outside the law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[17] **Civil Rights**
Government Agencies and Officers

In each § 1983 case in which qualified immunity is asserted, government's interests must be balanced against the citizens' interest in vindicating their constitutional rights, as well as the public interest in holding officials accountable when they exercise power irresponsibly. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[18] **Civil Rights**
Government Agencies and Officers
Civil Rights
Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

Qualified immunity claim in § 1983 action is traditionally analyzed in two steps; first, court must decide whether the facts alleged, taken in light most favorable to the plaintiff, make out the violation of a constitutional right, and second, court must examine whether the right at issue was "clearly established" at the time of the challenged conduct. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[19] **Civil Rights**
Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

To be "clearly established," for qualified immunity purposes in § 1983 action, a right must be sufficiently clear such that a reasonable official would have known that his conduct was unlawful. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[20] **Civil Rights**
Government Agencies and Officers

Two prongs of qualified immunity inquiry in § 1983 action need not be analyzed in sequential order; courts have discretion to decide which of the two prongs to tackle first. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[21] **Federal Civil Procedure**
Civil Rights Cases in General
Federal Civil Procedure
Presumptions

At summary judgment, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion, and in § 1983 qualified immunity cases, this usually means adopting the plaintiff's version of the facts. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[22] **Federal Civil Procedure**
Civil Rights Cases in General

On summary judgment in § 1983 action, qualified immunity inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right, and whether that right was clearly established. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.; 42

U.S.C.A. § 1983.

Cases that cite this headnote

[23] **Federal Civil Procedure**
Civil Rights Cases in General

Although the question of qualified immunity in § 1983 action is generally a question of law, a genuine issue of material fact will preclude summary judgment on qualified immunity. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[24] **Federal Civil Procedure**
Civil Rights Cases in General

Court must deny summary judgment on qualified immunity in § 1983 action if on the plaintiff's version of the facts, defendants violated the plaintiff's clearly established constitutional rights. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[25] **Arrest**
Use of Force

To state a § 1983 claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a seizure occurred and that it was unreasonable. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[26] **Arrest**
Use of Force

Use of excessive force is itself an unlawful seizure under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[27] **Arrest**
Use of Force

To determine reasonableness of seizure, in context of § 1983 Fourth Amendment excessive force claim, court asks whether officer's conduct was "objectively reasonable" in light of totality of circumstances, without regard to underlying intent or motivation. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[28] **Arrest**
Use of Force

"Objective reasonableness" inquiry for § 1983 Fourth Amendment excessive force claims requires an examination of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[29] **Federal Civil Procedure**
Civil Rights Cases in General

Genuine issues of material fact existed as to whether city police officers used gratuitous force against arrestee who had been restrained, and as to whether arrestee was resisting arrest, precluding summary judgment on arrestee's § 1983 Fourth Amendment excessive force claim against officers, and as to officers' claim that they were entitled to qualified immunity. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[30] **Arrest**
Use of Force

Gratuitous use of force against an arrestee who has already been restrained violates the Fourth Amendment. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[31] **Civil Rights**
Sheriffs, Police, and Other Peace Officers

It was clearly established, for qualified immunity purposes in arrestee's § 1983 action alleging that city police officers used excessive force against him, that beating unarmed suspect who was not resisting arrest violated Fourth Amendment's prohibition against excessive force. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[32] **Civil Rights**
Sheriffs, Police, and Other Peace Officers

Qualified immunity inquiry in § 1983 action for excessive force does not turn on defendants' good faith, and an inquiry into whether individual officers acted in good faith is incompatible with a proper Fourth Amendment analysis, and has no bearing on whether a particular seizure was unreasonable. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[33] **Civil Rights**
Sheriffs, Police, and Other Peace Officers

In analyzing the qualified immunity defense to a § 1983 claim of false arrest, the first step is to determine whether plaintiff has alleged a deprivation of an actual constitutional right. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[34] **Civil Rights**
Arrest and Detention

An arrest without probable cause is a constitutional violation and gives rise to a cause of action for false arrest under § 1983. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[35] **Civil Rights**
Arrest and Detention

Inquiry for false arrest claims under § 1983 is essentially one of reasonableness: whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[36] **Civil Rights**
Arrest and Detention

An officer violates an individual's Fourth

Amendment right to be free from false arrest, for purposes of § 1983 false arrest claim, if it was not objectively reasonable for the officer to believe that probable cause existed at the time of the arrest. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[37] **Civil Rights**
Sheriffs, Police, and Other Peace Officers

Arresting officers are entitled to qualified immunity from § 1983 false arrest claim if a reasonable officer could have believed that probable cause existed to arrest plaintiff in light of clearly established law and the information officers possessed. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[38] **Federal Civil Procedure**
Civil Rights Cases in General

Genuine issues of material fact existed as to whether city police officer had probable cause to arrest suspect who allegedly gave one officer two-handed shove to chest, precluding summary judgment on arrestee's § 1983 Fourth Amendment false arrest and malicious prosecution claims against officers, and as to officers' claim that they were entitled to qualified immunity. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[39] **Civil Rights**
Arrest and Detention

In context of § 1983 false arrest claim, resisting arrest charge cannot provide probable cause for the arrest ab initio. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[40] **Civil Rights**
Sheriffs, Police, and Other Peace Officers

It was clearly established, for qualified immunity purposes in arrestee's § 1983 action for false arrest and malicious prosecution, that probable cause for arrest did not exist where circumstances did not suggest that individual had committed or was about to commit crime. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[41] **Civil Rights**
Criminal Prosecutions

To prove the constitutional tort of malicious prosecution under § 1983, a plaintiff must show that (1) the defendants initiated a criminal proceeding, (2) the criminal proceeding ended in the plaintiff's favor, (3) the proceeding was initiated without probable cause, (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice, and (5) the plaintiff suffered a deprivation of liberty consistent with the concept of "seizure." U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[42] **Municipal Corporations**
Necessity and Purpose

Providing notice of claim under New Jersey Tort Claims Act (NJTCA) within 90 days achieves several goals: it allows public entity time to review the claim and to promptly investigate the facts and prepare a defense, provides entity an opportunity to settle meritorious claims before bringing suit, grants entity an opportunity to correct the conditions which gave rise to the claim, and allows entity to inform the state in advance as to the expected liability. N.J.S.A. 59:8–3, 59:8–8.

Cases that cite this headnote

[43] **Municipal Corporations**
Effect of Delay or Failure to Give

Arrestee failed to file notice of claim against city and police officers before filing suit in district court, as required by New Jersey Tort Claims Act (NJTCA), and thus district court was barred from considering arrestee's state tort claims against those defendants under NJTCA. N.J.S.A. 59:8–3, 59:8–8.

Cases that cite this headnote

[44] **Municipal Corporations**
Service or Presentation; Time Therefor

Arrestee's claims against city and police officers under New Jersey Tort Claims Act (NJTCA) accrued, and 90-day period for filing notice of claim began to run, on date on which incident in which officers allegedly used excessive force occurred, not on date that criminal charges against arrestee were dismissed. N.J.S.A. 59:8–3, 59:8–8.

Cases that cite this headnote

[45] **Municipal Corporations**
Excuses For, and Relief From, Delay or Failure

After one-year limitation has passed, court is without authority to relieve a plaintiff from his failure to have filed a notice of claim under New Jersey Tort Claims Act (NJTCA), and a consequent action at law must fail. N.J.S.A. 59:8–8, 59:8–9.

Cases that cite this headnote

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James H. Waller, Esq., Haddon Heights, NJ, for Defendant Officer Christopher Frucci.

OPINION

SIMANDLE, Chief Judge:

I. INTRODUCTION

***1** This case is about Plaintiff Robert Noble's encounter, one evening in January 2012, with several members of the Camden Police Department, which began when Defendant Christopher Frucci approached Plaintiff as Plaintiff was taking a nap in his car. A scuffle ensued with Frucci and Defendant Officer Jeffrey Frampton, and Plaintiff was brought directly to the hospital after the encounter for medical treatment. He suffered a fractured rib, bruises, and abrasions as a result of being punched and kicked by the officers. Plaintiff was charged with aggravated assault and resisting arrest, but the charges were later dropped.

Plaintiff filed this suit under 42 U.S.C. § 1983, alleging Fourth Amendment violations of excessive force, false arrest, and malicious prosecution, and various state tort claims against Frucci and Frampton, as well as *Monell* claims against the City of Camden for having a policy or custom of using excessive force, and for failing to train and supervise its officers on the appropriate use of force. Presently before the Court are summary judgment motions by the City of Camden and Officer Jeffrey

Frampton [Docket Item 24], and Officer Christopher Frucci [Docket Item 22].

Certain key facts in this case are contested. Defendants contend that during the encounter, Plaintiff shoved Frampton in the chest and resisted when Defendants then tried to arrest him for assault. They argue that in the ensuing scuffle, Frampton and Frucci struck and punched Plaintiff a few times in the knee, arm, and face. Plaintiff contends that he made no move against either officer and that he was punched and kicked by at least four officers repeatedly for five minutes or more while he was restrained.

Notwithstanding the factual dispute, Frampton and Frucci seek to dismiss the Fourth Amendment claims against them, arguing that their use of force against Plaintiff was objectively reasonable under the circumstances; that they had probable cause to arrest Plaintiff because Plaintiff shoved Frampton; and that they are shielded by qualified immunity. They also argue that Plaintiff's state tort claims must be dismissed because Plaintiff failed to file a notice of claim as required by the New Jersey Tort Claims Act. N.J.S.A. 59:8–8.

The City of Camden seeks dismissal of the *Monell* claims, arguing that there is no evidence of a policy or custom of using excessive force, nor any evidence of improper training or supervision.

For the reasons set forth below, the Court will deny summary judgment on Plaintiff's Fourth Amendment claims against Frampton and Frucci and the *Monell* claim against the City of Camden for failing to investigate the use of excessive force. The Court will grant summary judgment on all other claims.

II. BACKGROUND

A. Summary Judgment Record

The Court begins with the summary judgment record.[1] After finishing work on a private residence on the evening of January 26, 2012, Plaintiff Robert Noble, a self-employed remodeler of residential homes, drove his part-time assistant, Adam Lee, home to Mr. Lee's residence on Norris Street in Camden, New Jersey. At about 6:30 p.m., after dropping Mr. Lee off, Plaintiff parked his car on Norris Street to take a nap before driving home. (Def. Statement of Material Facts ("SMF") [Docket Item 21] 7–12.)

***2** At around the same time, members of the Camden Police Department were in the area assisting New Jersey state parole officers with home visits of parolees. Defendants Officer Jeffrey Frampton and Officer Christopher Frucci were among the officers providing assistance. Frampton and Frucci were wearing plain clothes with either sweatshirts or vests that said "POLICE" across the chest. (Dep. of Christopher Frucci ("Frucci Dep.") [Docket Item 21] 47:16–48:13; SMF 15–16.) Plaintiff asserts that they were also wearing black ski masks that obscured the entire face except for the eyes. (Dep. of Robert Noble ("Noble Dep.") [Docket Item 24] 49:15–50:3.)

While Frampton and Frucci were securing the outside of one home on Norris Street, Frucci noticed Plaintiff's truck parked on the corner of Morton and Norris Street. (Frucci Dep. 42:22–43:3.) According to Frucci, the corner of Morton and Norris is a "high crime, high drug, high gun, violent area."(Frucci Dep. 41:22–24.) Frucci approached the truck to investigate.

The following facts are in dispute. According to Defendants, Frucci states that he saw Plaintiff "laid back" in the driver's seat, not in an upright, driving position. (Frucci Dep. 44:6–20.) He shined his flashlight into the truck, banged on the window, and said, in sum and substance, "Hey, what's going on? Are you okay?"(*Id.* 45:25–46:21.) According to Frucci, once Plaintiff awoke, he "was immediately belligerent and angry" and was "moving real fast and aggressive in the car."(*Id.* 49:6–10.) Frucci alleges that he then identified himself as "Camden Police," told Plaintiff to "calm down," and asked Plaintiff if he was all right. Plaintiff responded by becoming more belligerent and telling Frucci to "get that f* * * * * * light out of my face."(*Id.* 49:15–21; Frampton Dep. 41:4–7.) Frucci continued to train his flashlight on Plaintiff, but claims that he specifically did not shine the flashlight in Plaintiff's face. (Frucci Dep. 52:23–53:2.)

According to Frucci, Plaintiff then "aggressively came out of the car,""screaming belligerently, hands in the air flailing around."(Frucci Dep. 54:12–17.) Frampton testified at deposition that Frucci asked Plaintiff to get out of the car, but Frucci testified that he never asked Plaintiff to get out. (*Compare* Frampton Dep. 42:22–25 *with* Frucci Dep. 53:18–20.) Frampton then walked over to where Plaintiff and Frucci were standing. Both officers yelled at Plaintiff "numerous times" to calm down. (Frampton Dep. 49:19–50:15.) According to both Frampton and Frucci, Plaintiff then shoved Frampton in the chest with both hands. (Frucci Dep. 55:2–7, 61:15–25; Frampton Dep. 45:12–14; 47:16–18.) Defendants then tried to place Plaintiff under arrest for assault. (Frucci Dep. 62:6–9; Frampton Dep. 57:1–2.)

Frampton and Frucci attempted to handcuff Plaintiff but Plaintiff fought the officers, so Frampton grabbed Plaintiff by the legs and "took him to the ground." (Frampton Dep. 57:6–10; 61:21–62:9.) Plaintiff fell face first and landed on his stomach. (Frampton Dep. 64:22–65:3.) Plaintiff had his arms underneath his body and kept resisting when Defendants tried to pull his arms out to handcuff him. (Frampton Dep. 66:23–67:6.) Defendants told Plaintiff that he was under arrest and yelled at Plaintiff to "stop resisting," and "give me your hands. I'm trying to handcuff you."(Frucci Dep. 65:4–6.; Frampton Dep. 65:24–66:3.) According to Defendants, during the struggle on the ground which lasted approximately 30 seconds, Frampton punched Plaintiff's face twice (Frampton Dep. 67:15–21; 68:8–19), and Frucci kneed Plaintiff three to five times in the rib or shoulder plexus area and thigh, and punched Plaintiff's arm and leg three to five times. (Frucci Dep. 65:10–66:17.) Frampton and Frucci were then able to get Plaintiff's arm out and handcuff him. (Frampton Dep. 68:8–19.)

***3** Frucci testified that other officers came over when they heard the altercation, but only he and Frampton were involved in the physical struggle with Plaintiff. (Frucci Dep. 68:21–69:16.)

By contrast, Plaintiff alleges that he was taking a nap in his truck with his dog when he was awoken by the sound of someone opening and shutting his passenger side door. (Noble Dep. 37:19–25.) He noticed two flashlights and a gun outside the window of his truck and was initially disoriented. (*Id.* 44:8–45:6.) Plaintiff then heard two people repeatedly say, "Out of the truck, mother f* * * * * *." (*Id.* 45:9–16.) Plaintiff rolled down his window and asked who they were, but they did not identify themselves and Plaintiff did not hear either of them say that they were police. (*Id.* 48:21–49:8.) The two officers continued to yell at Plaintiff to "get out of the truck." (*Id.* 51:15–18.) Plaintiff told the officers that he was getting out of his truck slowly. He opened the door and stepped out of his car with his hands in the air. (*Id.* 52:15–17; 53:23–54:1.)

Plaintiff testified at deposition that he repeatedly asked the men to identify themselves but they refused to do so and instead continued to yell at Plaintiff. He was not certain that they were police officers because they had no visible badge and the front of their clothing was obscured by the flashlights and gun. (Noble Dep. 50:4–16; 54:21–55:5; 55:25–56:3.). According to Plaintiff, Defendant Frampton then said, "You get cocky with me, mother* * * * *, I'll kick your a* *." (*Id.* 56:9–20; 58:5–9.) Frampton approached Plaintiff while Plaintiff had his hands up in the air. As Frampton approached, Plaintiff turned to face the door of his truck, and Frampton grabbed one arm and twisted it. Frucci approached Plaintiff from the other side and "ran right into [Plaintiff]" in a "piledrive" and grabbed Plaintiff's other arm. (*Id.* 59:25–61:7.) Plaintiff denies shoving or punching Frampton and testified that he was not resisting arrest. (Noble Dep. 114:17–22; 141:24–142:3.)

Plaintiff testified that while his arms were being restrained, he was hit in the back from behind by at least two other officers and felt a nightstick being poked into his back. (Noble Dep. 65:5–23.) Frampton and Frucci were holding Plaintiff by his forearms and had Plaintiff nearly off the ground. (*Id.* 67:2–68:7.) At some point, Plaintiff's head was smashed into his truck and Frampton punched him in the face four or five times. (*Id.* 69:5–7; 70:6–14.) He was also repeatedly kicked in the legs as officers continued to punch him. Plaintiff testified that this went on for about five minutes. (*Id.* 73:23–74:8; 77:7–10.) He was unarmed and asserts that he was not resisting arrest. (*Id.* 71:21–25.)

At some point during this beating, Plaintiff realized that he had handcuffs "on both of [his] hands." (Noble Dep. 76:25–77:1.) He recalled that he was then "slammed [ ] into the street" and that the four or so police officers, including Frampton and Frucci, kicked him and stood on his head, stomach, ribs, back, hands, and feet, while he was lying on the ground on his side. (*Id.* 77:2–6.) Plaintiff estimates that he was kicked approximately 20 times. (*Id.* 81:8–10.) He also testified that a number of people on the street witnessed the assault, and that one man told Plaintiff that he videotaped the encounter. (Noble Dep. 82:17–83:4; 138: 12–139:25.)

***4** Plaintiff nearly lost consciousness during this time. (Noble Dep. 82:7–16.) The beating stopped when he heard an officer say, "I think we're killing him." Officers pulled Plaintiff off the ground and placed him into the back of a police car. (*Id.* 83:20–25; 84:8–25.) Frampton and Frucci drove him to Virtua Hospital for treatment. (*Id.* 89:7014.)

Plaintiff stated at deposition that he suffered a fracture in one of his ribs and sustained some bruises, cuts, and abrasions. (Noble Dep. 170:13–171:4.)[2]

After being discharged from the hospital, Plaintiff was taken to the police administration building where he was questioned for approximately 45 minutes by Frampton. (Noble Dep. 121:14–16.) After Plaintiff was given a copy of the charges against him, Frampton and Frucci drove him back to his truck, which was still parked on Norris Street. Plaintiff was released on his own recognizance and no bail was ever set. (*Id.* 123:15–124:20.) Plaintiff was charged with aggravated assault and resisting arrest, but the charges were subsequently dismissed. (Noble Dep. 142:21–23.)

Plaintiff testified at deposition that his bruises and cuts have since healed, but that he continues to have pain in his left and right shoulders and cannot move his left arm above his head. (Noble Dep. 170:13–14; 168:19–169:20.)

***Expert Report*[3]**

Plaintiff submitted a 13–page expert report from Richard Rivera, a retired municipal police officer and consultant in police practices, policy, procedures, and training. (Rivera Report [Docket Item 24].) According to Mr. Rivera, Frucci and Frampton escalated the confrontation with Plaintiff by shouting at Plaintiff, invading his private space, and failing to communicate clearly with each other and with Plaintiff. (Rivera Report at 6–7.) Mr. Rivera opined that "it was [Defendants'] inability to verbally communicate with [Plaintiff] in the first place that led to their use of force and arrest of [Plaintiff]," and that the force used by Defendants was "excessive and avoidable." (*Id.* at 7.)

Mr. Rivera also reviewed discovery records and records from the Camden Police Department Internal Affairs Unit ("IAU"). (Rivera Report at 3.) He noted that the IAU investigated few complaints of excessive force in 2001 and 2002. In 2001, the IAU had 128 pending cases of excessive force and investigated only 11 cases. In 2002, the IAU investigated only six allegations of excessive force out of 174 pending cases. (*Id.* at 9.) Between 2001 and 2007, the Police Department received a total of 485 allegations of excessive force and only two complaints were sustained as rule violations. (*Id.* at 9.) Mr. Rivera also noted that the IAU suffered from a severe backlog of cases. A 2009 audit revealed that the unit still had 227 open cases dating as far back as 2002. (*Id.* at 9.)

Mr. Rivera opined that the lack of timely IAU investigations contributed to officer misconduct. (Rivera Report at 9.) He noted that a total of 19 excessive force complaints had been lodged against Frampton and Frucci, and opined that the officers should have been removed from public contact given the frequent number of complaints against them. (*Id.* at 9–10.) He also noted that the Police Department "was aware of the backlogs and established an early warning system to flag unwanted behavior" but nonetheless failed to act in a timely manner to investigate complaints and prevent misconduct by officers. (*Id.* at 9.) Frampton and Frucci were among ten officers in 2004 and 2005 who were flagged by the early warning system for monitoring and supervision, and Frampton was flagged again in 2006. (*Id.* at 12.)

***5** Mr. Rivera concluded that the internal affairs unit was "inept in investigating serious allegations of misconduct including force incidents and overwhelmed to the point that officers with multiple open investigations were allowed to continue contact with the community."(*Id.* at 8.)

B. Procedural Background

Plaintiff Robert Noble filed this Complaint on July 19, 2013 against Defendants the City of Camden, Jeffrey Frampton, Christopher Frucci, and unnamed John Doe officers. [Docket Item 1.] Plaintiff asserts claims against Frampton, Frucci, and John Doe police officers under 42 U.S.C. § 1983 for excessive use of force (Count One), false arrest (Count Two), and malicious prosecution (Count Three), in violation of the Fourth Amendment; as well as state law claims for assault and battery (Count Six), false imprisonment (Count Seven), false arrest (Count Eight), malicious prosecution (Count Nine), and conspiracy (Count Ten). Plaintiff also asserts *Monell* claims under 42 U.S.C. § 1983 against the City of Camden for various "constitutional deprivations caused by inadequate policies, procedures, and customs" (Count Four), failure to train, and failure to supervise (Count Five).

Following the close of discovery, Defendants moved for summary judgment. [Docket Items 21 and 22.] The City of Camden argues that the *Monell* claims cannot be sustained because Mr. Rivera's report does not include any specifics about prior complaints against Frampton or Frucci, and Plaintiff cannot demonstrate a pattern of excessive force because he has not shown how previous incidents were similar to the incident in this case. (Def. Reply [Docket Item 26] at 5–6.)

Frampton and Frucci argue that they are entitled to qualified immunity. (City of Camden and Frampton Br. [Docket Item 21] at 14–16; Frucci Br. [Docket Item 22] at 5–6.) They also argue that Plaintiff has not shown a Fourth Amendment excessive force violation because the force used was objectively reasonable, and that Plaintiff has not demonstrated Fourth Amendment violations for malicious prosecution and false arrest because Defendants had probable cause to arrest and charge Plaintiff based on "the plethora of activity Plaintiff engaged in ... up to and including the point wherein he shoved Lt. Frampton prior to being handcuffed."(Def. Reply at 8; City of Camden and Frampton Br. at 16–17; Frucci Br. 6–8.)[4]Finally, they argue that Plaintiff's state law claims must dismissed because Plaintiff failed to file a notice of claim prior to filing suit, as required under the New Jersey Tort Claims Act.N.J.S.A. 59:8–8. (City of Camden and Frampton Br. at 18–21; Frucci Br. at 8.)

Plaintiff argues that summary judgment must be denied because Defendants' 56.1(a) statement included facts that were disputed. With respect to the *Monell* claims, Plaintiff argues that Mr. Rivera's expert report sufficiently demonstrates that Frampton and Frucci exhibited a pattern of excessive force that was ignored by the IAU. (Pl. Opp'n to City of Camden and Frampton [Docket Item 24] at 9–10.) With respect to the individual Fourth Amendment claims, Plaintiff contends that qualified immunity does not protect officers who intentionally and maliciously violated Plaintiff's Fourth Amendment rights, and that factual disputes surrounding the use of force and the circumstances of Plaintiff's arrest prevent summary judgment on those claims. (*Id.* at 10–15; Pl. Opp'n to Frucci [Docket Item 25] at 2–6.) With respect to the state law claims, Plaintiff argues that the New Jersey Tort Claims Act does not provide protection for misconduct that is intentional, malicious, and willful. (Pl. Opp'n to City of Camden and Frampton at 16; Pl. Opp'n to Frucci at 6.)

III. STANDARD OF REVIEW

***6** At summary judgment, the moving party bears the initial burden of demonstrating that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is made, the burden shifts to the non-moving party, who must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing a motion for summary judgment, the court is required to examine the evidence in light most favorable to the non-moving party, and resolve all reasonable inferences in that party's favor. *Hunt v. Cromartie,* 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999); *Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir.2007).

A factual dispute is material when it "might affect the outcome of the suit under the governing law," and genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party " 'need not match, item for item, each piece of evidence proffered by the movant,' " but must simply present more than a "mere scintilla" of evidence on which a jury could reasonably find for the non-moving party. *Boyle v. Cnty. of Allegheny Pennsylvania,* 139 F.3d 386, 393 (3d Cir.1998) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," no genuine issue for trial exists and summary judgment shall be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted).

The Court exercises subject matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331, and exercises supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

IV. DISCUSSION

A. Defendants' Rule 56.1 Statement

[1] Local Rule 56.1(a) requires the party moving for summary judgment to provide a "statement which sets forth material facts as to which there does not exist a genuine issue."Loc. Civ. R. 56.1(a). Plaintiff argues that because Defendants included deposition statements from Defendants and Plaintiff which contradict each other, Defendants failed to abide by Rule 56.1 and their summary judgment motion must be denied. (Pl. Opp'n to City of Camden and Frampton at 7.) Plaintiff points to the following from Defendants' statement of facts as an example of Defendants' error:

> 38. Unprovoked, Plaintiff then pushed Sgt. Frampton with both hands on Sgt. Frampton's chest knocking Sgt. Frampton backwards.
>
> 39. Plaintiff denies pushing Sgt. Frampton.

(Pl. Opp'n to City of Camden and Frampton at 7.)

The Court finds no merit in Plaintiff's argument, or in their rigid interpretation of Rule 56.1. The purpose of a Rule 56.1 statement is to narrow and clarify the issues for the Court, *see Durkin v. Wabash Nat'l,* No. 10–2013, 2013 WL 1314744, at *6 (D.N.J. Mar. 28, 2013), and to "assist [the court] in identifying whether material facts are, or are not, in dispute in a summary judgment motion."Loc. Civ. R. 56.1, Comment 2a. (2015); *see also Cataldo v. Moses,* 361 F.Supp.2d 420, 426 (D.N.J.2004) ("The purpose of a Rule 56.1 statement is to narrow the issues before the District Court...." (quotations and citations omitted)). Although Rule 56.1 states on its face that the moving party should identify "facts as to which there does not exist a genuine dispute," the comments to the Rule make clear that disputed facts may also be included. Loc. Civ. R. 56.1, Comment 2a. (2015) (noting that a Rule 56.1 statement "should be clear and unambiguous in specifying the disputed *and undisputed* issues and facts.") (emphasis added).

***7** In addition, courts in this district have noted that a single joint statement identifying disputed and undisputed facts is preferred. *See, e.g.,* L. Civ. R. 56.1, Comment 2c. (2015) ("Although the rule does not require it, whenever it is possible, a single joint statement of disputed and undisputed facts should be submitted"); *Robinson v. Ricci,* 2012 WL 1067909 at *6 (Mar. 29, 2012) (noting preference for a single joint Rule 56.1 statement); *Riker v. CMS, Inc.,* No. 10–1752, 2011 WL 6756953, at *5 (D.N.J. Dec. 22, 2011) (stating same); *Milligan v. Sentry Exteriors, Inc.,* No. 00–2279, 2005 WL 1229791, at *1 n. 3 (D.N.J. May 24, 2005) (recommending that parties submit a single Rule 56.1 statement in the future).

Defendants have satisfied the purpose of Rule 56.1 by indicating clearly, through citations to both Plaintiff's and Defendants' testimony, which facts are disputed and which are not. By anticipating and identifying the facts on which the parties disagree, Defendants have made it easier for the Court to identify the pertinent issues in the case. *See* Allyn Lite, *New Jersey Federal Practice Rules,* L. Civ. R. 56.1, comment 2 (2015) (Rule 56.1(a) requires parties to submit a statement identifying material facts "in such fashion that the Court can easily determine if a genuine dispute exists."). The Court will accept Defendants' Rule 56.1 statement, and dismissal of Defendants' motion for summary judgment motion is not warranted.

B. *Monell* Claims against Defendant the City of Camden (Counts Four and Five)

Plaintiff brings two claims against the City of Camden under *Monell.*First, he argues that the City of Camden "systematically failed to properly investigate [ ] complaints and respond to officer misconduct," as demonstrated by the internal affairs files showing a pattern of excessive force by Frampton and Frucci. (Pl. Opp'n to City of Camden and Frampton Br. at 9–10.) He also argues that the City of Camden failed to train and supervise on the use of force and proper arrests. (*Id.* at 10.)

[2] [3] [4] In *Monell v. Dep't of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court established that municipalities and other government entities were "persons" subject to liability under 42 U.S.C. § 1983 for constitutional rights violations, but that they were not liable under the doctrine of respondeat superior for the misconduct of its employees. *Monell,* 436 U.S. at 690–692, 98 S.Ct. 2018; *see also City of Oklahoma City v. Tuttle,* 471 U.S. 808, 810, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). To prevail on a *Monell* claim, a plaintiff must first establish that the municipality had a policy or custom that deprived him of his constitutional rights. *McTernan v. City of York,* 564 F.3d 636, 657 (3d Cir.2009) (quoting *Beck v. City of Pittsburgh,* 89 F.3d 966, 971 (3d Cir.1996)). In other words, the plaintiff must show that the municipality, through one of its policymakers, affirmatively proclaimed the policy, or acquiesced in the widespread custom, that caused the violation. *Watson v. Abington Twp.,* 478 F.3d 144, 155–156 (3d Cir.2007). A plaintiff may show the existence of a policy when a decision-maker with final authority issues an official proclamation, policy, or edict. *Bielevicz v. Dubinon,* 915 F.2d 845, 850 (3d Cir.1990). Custom may be established by showing that a given course of conduct, "although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law."*Id.; see also Watson,* 478 F.3d at 155–56; *Natale v. Camden Cnty. Corr. Fac.,* 318 F.3d 575, 584 (3d Cir.2003) (defining "custom" as " 'an act that has not been formally approved by an appropriate decisionmaker,' but that is 'so widespread as to have the force of law.'" (quoting *Board of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997))).

***8** [5] [6] [7] [8] [9] [10] Once a § 1983 plaintiff identifies a municipal policy or custom, he must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged."*Brown,* 520 U.S. at 404, 117 S.Ct. 1382. If the policy or custom does not facially violate federal law, causation can be established only by "demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice."*Id.* at 407, 117 S.Ct. 1382 (citations omitted); *Berg v. Cnty. of Allegheny,* 219 F.3d 261, 276 (3d Cir.2000). For a § 1983 claim of failure to train or supervise municipal employees, the plaintiff must show that the failure to provide training or supervision amounted to " 'deliberate indifference' to the rights of persons with whom the employee will come into contact."*Thomas v. Cumberland Cnty.,* 749 F.3d 217, 222 (3d Cir.2014). Deliberate indifference may be demonstrated by showing a pattern of violations which puts the municipal employee on notice that a new program is necessary; or a single incident violation where the need for training was patently obvious. *Id.* at 223.[5]

[11] [12] Citing to Mr. Rivera's report, Plaintiff contends that the fact that a Frampton and Frucci remained on the police force Proof of the existence of an unlawful policy or custom is not enough to maintain a § 1983 action. A plaintiff must additionally prove that the policy or custom was the proximate cause of the injuries suffered. *Watson,* 478 F.3d at 156; *Losch v. Borough of Parkesburg,* 736 F.2d 903, 910 (3d Cir.1984). To despite having a total of 19 excessive force complaints lodged against them prior to this incident demonstrates that the City of Camden was deliberately indifferent to a pattern of excessive force. Plaintiff argues that the City's failure to promptly investigate the large number of civilian complaints also demonstrates its deliberate indifference. (Pl. Br. at 10.) Citing *Merman v. City of Camden,* 824 F.Supp.2d 581, 591 (D.N.J.2010), Defendant argues that without further context or detail about the prior complaints, the evidence is insufficient as a matter of law to demonstrate that the Camden Police Department had a pattern of using excessive force.

In *Merman,* the plaintiff, who was physically injured and detained by Camden police officers following a concert, brought claims against individual Camden police officers for excessive force, as well as *Monell* claims against the City of Camden for failure to investigate civilian complaints and failure to supervise or discipline its officers. 824 F.Supp.2d at 587–88. In support of her *Monell* claims, the plaintiff provided statistical data from the City's Office of Internal Affairs showing an escalating number of excessive force complaints against police officers over the years, and noted that few of these complaints ever resulted in a finding of misconduct. Plaintiff also pointed to a sample of 40 reports from Internal Affairs and argued that civilian complaints of excessive force were often inadequately investigated. While the district court noted that "statistical evidence alone may not justify a jury's finding that a municipal policy or custom authorizes or condones the unconstitutional acts of police officers," 824 F.Supp.2d at 591, the court ultimately held that the plaintiff had presented sufficient evidence from which a reasonable jury could conclude that the City's inadequate investigation into excessive force complaints amounted to deliberate indifference towards foreseeable constitutional violations. *Id.* at 594.

***9** The Court finds that Plaintiff has provided sufficient evidence from which a reasonable jury could conclude that the City was deliberately indifferent in investigating claims of excessive force. Plaintiff has provided an expert report from Mr. Rivera, who came to similar conclusions after examining civilian complaint files from the Internal Affairs Unit. Mr. Rivera noted that there was a consistent backlog of cases involving alleged officer misconduct that were pending before the IAU, which demonstrated a lack of "standard of care to thoroughly and timely investigate" allegations of abuse. As an example, he noted that in 2009, 227 cases from 2002 had yet to be resolved. (Rivera Report, at 9.) He opined that the Police Department was aware of the backlog but nonetheless failed to act in a timely manner to investigate complaints. In particular, Mr. Rivera noted that of the 19 total excessive force complaints lodged against Frampton and Frucci, two cases against Frampton dating back to 2005 and two cases against Frucci dating back to 2006 were still awaiting investigation in 2009.[6](Rivera Report at 9.)

In addition to the backlog, Mr. Rivera noted that the cases that were investigated were flawed and poorly investigated, as demonstrated in part by the low number of disciplinary actions. Between 2001 and 2007, the Police Department received a total of 485 allegations of excessive force, but only two complaints were sustained as rule violations. (Rivera Report at 9.) Only 11 allegations of excessive force were investigated in 2001, and only six allegations of excessive force were investigated in 2002. Mr. Rivera also stated that he reviewed investigative files for Frampton and Frucci as well as for other officers, and concluded that the investigators assigned to cases "are not impartial, do not conduct thorough investigations and inject opinions and judgments."(*Id.* at 12.)

Viewing the evidence in light most favorable to Plaintiff, a reasonable jury could find from this evidence that the City had a custom of ignoring or failing to properly and promptly investigate unconstitutional excessive force complaints against Camden police officers for years preceding this incident, and by its inaction was deliberately indifferent to the need for such investigations to protect persons against excessive force during arrests, and was thus in part complicit in the misconduct that ensued. *See Beck v. City of Pittsburgh,* 89 F.3d 966, 971 (3d Cir.1996) (noting that custom may "be established by evidence of knowledge and acquiescence"); *Monaco v. City of Camden,* No. 04–2406, 2008 WL 8738213, at *8 (Apr. 14, 2008) (Simandle, J.) (failure to investigate plaintiff's excessive force allegation until nearly three years after incident took place was evidence of existence of a policy or custom of failing to timely investigate claims of police misconduct). A reasonable jury could also find evidence in the record connecting the failure to investigate with the constitutional violation at issue in this case. For example, it was Mr. Rivera's opinion, based upon his examination of the IAU files, that Frampton and Frucci should have been removed from their positions prior to the incident in this case due to the frequency and nature of previous complaints against them (*Id.* at 9.)[7]*See also Monaco,* 2008 WL 8738213, at *9 (reasonable jury could draw a causal connection between plaintiff's injuries at the hands of police officers and municipality's failure to conduct adequate investigations into complaints of police misconduct).

***10** Defendants do not dispute the substance of Mr. Rivera's expert report. They argue only that Mr. Rivera's report failed to detail the specifics of the prior excessive force claims against Frampton and Frucci and does not show how those prior allegations are similar to Plaintiff's excessive force allegations in this case. (Def. Reply at 5–6.) The Court disagrees. To demonstrate the City's knowledge and acceptance of police misconduct, Plaintiff is not required to prove that each prior excessive force complaint "deserved discipline and how the misconduct in those situations was similar to that of Plaintiff."(Def. Reply at 6.) Rather, Plaintiff need only present sufficient evidence that there were numerous allegations of abuse which Defendants knew about and failed to properly investigate. *See Beck,* 89 F.3d at 973 ("[W]ritten complaints were sufficient for a reasonable jury to infer that [Defendants] knew, or should have known, of [the officer's] violent behavior in arresting citizens."). Plaintiff has presented expert evidence that the two Defendant officers in this case had previously accumulated 19 complaints against them for use of excessive force; that the officers had been flagged for monitoring and supervision in 2004 and 2005; and that past complaints against the officers had not been timely or properly investigated. (Pl. Opp'n to City of Camden and Frampton Br. at 9, 10, 12.) Mr. Rivera had also examined the underlying IAU files for Frampton and Frucci and concluded that had timely investigations taken place, Frampton and Frucci would have been removed from their position before the events in this case. On this basis, a reasonable jury could conclude that Defendants' failure to investigate amounted to deliberate indifference.

Although the record before the Court contains Mr. Rivera's report but not the IAU investigations and files Mr. Rivera had examined, Mr. Rivera stated that his opinions were based upon a review of the substance of internal investigation files, not just the statistics generated from those files. This Court has, in the past, found expert reports presenting similar evidence sufficient to deny summary judgment on *Monell* claims, and will do so today. *See, e.g., Malik v. Hannah,* 799 F.Supp.2d 355, 363 (D.N.J.2011) (Simandle, J.) (entering judgment for plaintiff as a matter of law on *Monell* claim against City of Camden for having a custom of tolerating excessive force where, among other things, uncontested evidence showed that there were a large number of citizen complaints for excessive force against police officers in the years prior to plaintiff's injury and defendant had a custom of ignoring such violations); *D'Arrigo v. Gloucester City,* No. 04–5967, 2007 WL 1755970, at *13 (D.N.J. June 19, 2007) (Simandle, J.) (denying summary judgment on *Monell* claim against city for failure to properly investigate and/or discipline officers accused of using excessive force where plaintiff presented evidence showing that no officer had been fired for a disciplinary reason in twenty five years).[8]

***11** It would be a reasonable inference for a jury to find that the City of Camden had a custom of performing inadequate investigations of citizen complaints of police brutality, and which reflected an indifference to the allegedly excessive use of force by its officers. The Court will therefore permit Plaintiff's *Monell* claim against the City to proceed under a theory that Plaintiff's injuries resulted from the City's failure to conduct timely and meaningful investigations into claims of excessive force.

The Court will, however, dismiss Plaintiff's claim for failure to train and supervise officers on the use of force and proper arrests (Count Five). The Supreme Court stated in *City of Canton v. Harris* that "[i]n resolving the issue of a city's liability [for failure to train], the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform."489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).*City of Canton* also teaches that to sustain a claim based on a failure to train theory, "the identified deficiency in a city's training program must be closely related to the ultimate injury" and a plaintiff must prove "that the deficiency in training actually caused the police officers' indifference to her medical needs."*Id.* at 391, 109 S.Ct. 1197.

[13] Plaintiff has provided no evidence that there was a lack of training or supervision within the Camden Police Department. Although Mr. Rivera stated in his report that Defendant failed to properly train and supervise its officers, his report makes no mention of what training or supervision was even provided by the Police Department on arrests and use of force, or the substance or frequency of the training. Nor has Plaintiff identified the precise deficiency in training or how the deficiency contributed to a violation of Plaintiff's constitutional rights, as required by the Supreme Court and this Circuit. *See, e.g., Colburn v. Upper Darby Twp.,* 946 F.2d 1017, 1030 (3d Cir.1991) (emphasizing that plaintiff "must identify a failure to provide specific training that has a causal nexus with his or her injury and must demonstrate that the failure to provide that specific training can reasonably be said to reflect a deliberate indifference to whether constitutional

deprivations of the kind alleged occur"); *Lapella v. City of Atlantic City,* No. 10–2454, 2012 WL 2952411, at *6 (D.N.J. July 18, 2012) (Simandle, J.) (to sustain an inadequate training theory, plaintiff must identify the precise deficiency in training); *Malignaggi v. Cnty. of Gloucester,* 855 F.Supp. 74, 77 (D.N.J.1994) (stating same). Accordingly, the Court will grant summary judgment and dismiss Plaintiff's failure to train claim.

C. Fourth Amendment claims against Defendants Officer Frampton and Officer Frucci

Defendants Frampton and Frucci move for summary judgment on Counts One, Two, and Three, which asserts claims against them under 42 U.S.C. § 1983 for excessive use of force, false arrest, and malicious prosecution. They also invoke qualified immunity, arguing that all evidence indicates that Defendants acted reasonably under the circumstances and they must therefore be immune from suit. (City of Camden and Frampton Br. at 14–16; Frucci Br. at 5–6.) Reciting a different version of facts, Plaintiff argues that Defendants are not entitled to qualified immunity because there was no probable cause to believe Plaintiff had committed any crime; and Defendants' actions in "brutally and maliciously" assaulting Plaintiff clearly violated the Fourth Amendment. (Pl. Opp'n to City of Camden and Frampton Br. at 12–14; Pl. Oppn to Frucci Br. at 2–4.)

***12** The Court will address each Fourth Amendment claim below, turning first to the question of qualified immunity, and, if qualified immunity is to be denied, to the question of whether summary judgment should be granted for the claim.

1. *The qualified immunity analysis requires courts to analyze the facts in light most favorable to the party asserting the injury.*

[14] [15] [16] [17] The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."*Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Under this doctrine, government officials are immune from liability for civil damages as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."*Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Kelly v. Borough of Carlisle,* 622 F.3d 248, 253 (3d Cir.2010). Qualified immunity will not, however, act as a shield for "the official who knows or should know he is acting outside the law."*Butz v. Economou,* 438 U.S. 478, 506–07, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). In each case, the government's interests must be balanced against the citizens' interest in vindicating their constitutional rights, as well as the public interest in holding officials accountable "when they exercise power irresponsibly." *Pearson,* 555 U.S. at 231, 129 S.Ct. 808.

[18] [19] [20] The qualified immunity claim is traditionally analyzed in two steps. First, the court must decide whether the facts alleged, taken light most favorable to the plaintiff, makes out the violation of a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Next, the court must examine whether the right at issue was "clearly established" at the time of the challenged conduct. To be "clearly established," a right must be sufficiently clear such that a reasonable official would have known that his conduct was unlawful. *Reichle v. Howards,* ––– U.S. ––––, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012). Most recently, in *Taylor v. Barkes,* the Supreme Court emphasized again that while a case directly on point is not required to show that a right was "clearly established," " 'existing precedent must have placed the statutory or constitutional question beyond debate.' " ––– U.S. ––––, 135 S.Ct. 2042, 2044, ––– L.Ed.2d –––– (2015) (quoting *Ashcroft v. al-Kidd,* ––– U.S. ––––, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011)). The two prongs to the qualified immunity inquiry need not be analyzed in sequential order; courts have discretion to decide which of the two prongs to tackle first. *al-Kidd,* 131 S.Ct. at 2080; *Pearson,* 555 U.S. at 236, 129 S.Ct. 808.

Before turning to the question of whether Defendants are entitled to qualified immunity on each of Plaintiff's Fourth Amendment claims, the Court notes that much of the qualified immunity dispute in this case turns on which facts the Court is to credit. Defendant's argument is that under their version of events, Defendants acted reasonably under the Fourth Amendment because Frampton and Frucci "at all times utilized the force necessary to gain compliance of Plaintiff."(City of Camden and Frampton Br. at 16.) They also argue that Defendant had probable cause to arrest Plaintiff because Plaintiff pushed Frampton with both hands. (Frucci Br. at 6.) Plaintiff, on the other hand, contends that Defendants maliciously attacked Plaintiff when Plaintiff had committed no crime, and thus their actions clearly violated the Fourth Amendment. (Pl. Opp'n to Frucci Br. at 4.)

***13** [21] [22] At summary judgment, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam); *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. "In qualified immunity cases, this usually means adopting ... the plaintiff's version of the facts."*Scott v. Harris,* 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In other words, the inquiry is the following: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right", and that the right was clearly established?*Saucier,* 533 U.S. at 201, 121 S.Ct. 2151.

[23] [24] Although the question of qualified immunity is generally a question of law, "a genuine issue of material fact will preclude summary judgment on qualified immunity."*Giles v. Kearney,* 571 F.3d 318, 326 (3d Cir.2009); *see also Curley v. Klem,* 298 F.3d 271, 278 (3d Cir.2002) (noting that "a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis."). The court must deny summary judgment if on the plaintiff's version of the facts, defendants violated the plaintiff's clearly established constitutional rights. *Giles,* 571 F.3d at 327 (finding that district court was wrong to dismiss Eighth Amendment claims on qualified immunity grounds because there was a factual dispute as to whether plaintiff had ceased resisting when he was kicked by officers, and court "must accept [the plaintiff's] version of the facts.").

The Court now turns to Plaintiff's Fourth Amendment claims.

2. *Defendants are not entitled to qualified immunity on the excessive force claim, and summary judgment on that claim is not warranted.*

[25] [26]"To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable."*Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), quoted in *Abraham v. Raso,* 183 F.3d 279, 288 (3d Cir.1999).*See also Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard")."The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment."*Couden v. Duffy,* 446 F.3d 483, 496 (3d Cir.2006).

[27] [28] To determine the reasonableness of a seizure, the court asks whether the officer's conduct was "objectively reasonable" in light of the totality of the circumstances, without regard to the underlying intent or motivation. *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citing *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *Kopec v. Tate,* 361 F.3d 772, 776 (3d Cir.2004). The "objective reasonableness" inquiry requires an examination of the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."*Graham,* 490 U.S. at 396, 109 S.Ct. 1865. The Court should not apply "the 20/20 vision of hindsight," but should instead consider the "perspective of a reasonable officer on the scene."*Id.; see also Kopec,* 361 F.3d at 777.

***14** [29] Here, Defendants Frampton and Frucci testified that Plaintiff was aggressive from the moment they woke him inside his truck. They testified that they approached the truck to ask Plaintiff if he was all right, but that Plaintiff "aggressively came out of the car,""screaming belligerently, hands in the air flailing around."(Frucci Dep. 54:12–17.) According to Defendants, Plaintiff then shoved Frampton with two hands, which gave Defendants probable cause for arrest, but because Plaintiff fought the officers, Defendants were forced to take him down to the ground. Defendants testified that Plaintiff continued to resist being handcuffed while on the ground, and that they punched his face, arm, leg, ribs, and thigh several times in order to get his hands out from underneath him. They testified that the struggle on the ground lasted approximately 30 seconds, and that they stopped hitting Plaintiff once they placed him in handcuffs.

Plaintiff's version of what happened is markedly different. He testified that he awoke to police officers screaming at him to get out of his truck. He repeatedly asked Frampton and Frucci to identify themselves but they did not. He further testified that despite exiting his truck peacefully with his hands up in the air, four officers, including Frampton and Frucci, repeatedly kicked and punched Plaintiff in the face and smashed his head into the windshield of his truck while both of Plaintiff's arms were restrained. Plaintiff testified that even after handcuffs were placed on him, the officers slammed him to the ground and continued to kick him while standing on his head, stomach, ribs, back, hands, and feet. He that the assault lasted for about five minutes and he was kicked at least 20 times. Plaintiff disputes that he was resisting arrest at any point and denies ever shoving Frampton.

The summary judgment record consists almost entirely of Plaintiff's testimony and the testimony of Defendants Frampton and Frucci. The contrasting accounts of what happened presents factual issues as to the degree of force actually employed and its reasonableness, and there is no other evidence in the record that clearly supports or contradicts one version of events over the other. This is clearly not a case where Plaintiff's version of events "is so utterly discredited by the record that no reasonable jury could have believed him."*Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Viewing the facts in light most favorable to Plaintiff, as this Court must, a reasonable jury could credit Plaintiff's testimony and find that Plaintiff was not resisting arrest during the any part of the encounter; police officers punched and kicked him while his arms were restrained; and that, after taking Plaintiff to the ground and placing handcuffs on him, officers continued to beat and kick Plaintiff and stand on him for approximately five minutes while Plaintiff was lying on the ground.

[30] Under these set of facts, Defendants' conduct was not "objectively reasonable" and Plaintiff has satisfied the first prong of the qualified immunity analysis.[9]The gratuitous use of force against an arrestee who has already been restrained violates the Fourth Amendment. *See Couden v. Duffy,* 446 F.3d 483, 497 (3d Cir.2006) (finding force excessive as a matter of law where plaintiff was not "resisting arrest or attempting to flee" at the time force was used); *Robinson v. Andrews,* 2014 WL 4662237 at *9 (Sept. 18, 2014) (denying qualified immunity where officer kicked plaintiff after he was already subdued, handcuffed, and unable to pose any threat to the officer's safety); *Weber v. Rodriguez,* No. 07–2097, 2011 WL 2555358, at *5 (June 27, 2011) (a reasonable juror could conclude that force used against the plaintiff violated the Fourth Amendment when officers hit him on the head with a baton, punched and assaulted him after they handcuffed and subdued him); *Barker v. Keezer,* No. 08–1487, 2010 WL 2760728, at *3 (D.N.J. July 8, 2010) (finding that repeatedly smashing the head of a restrained arrestee into the pavement constituted excessive force because such conduct "would appear to serve no purpose other than to inflict bodily harm"); *Hurt v. City of Atlantic City,* No. 08–3053, 2010 WL 703193 (D.N.J. Feb. 24, 2010) (holding that a beating a plaintiff for six or seven minutes after bringing him to the ground and handcuffing him constitutes excessive force); *Brown v. Camden Cnty. Counsel,* No. 06–6095, 2007 WL 433326, at *3 (D.N.J. Feb. 2, 2007) (holding that plaintiff may be able to establish that defendant is liable for using excessive force in violation of the Fourth Amendment where he asserts that defendant savagely beat plaintiff, even though plaintiff did not possess a weapon, resist arrest, or attempt to flee).

***15** [31] [32] The Court also finds that the second prong has been satisfied. *See Saucier,* 533 U.S. at 202, 121 S.Ct. 2151 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). At the time Defendants acted, the law was clear that beating an unarmed suspect who was not resisting arrest violates the Fourth Amendment's prohibition against excessive force. *See, e.g., Giles v. Kearney,* 571 F.3d 318, 326 (3d Cir.2009) ("[A]t the time of the incident in 2001, it was established that an officer may not kick or otherwise use gratuitous force against an inmate who has been subdued."); *Blazek v. City of Iowa City,* 761 F.3d 920, 925 (8th Cir.2014) ("It was clearly established in 2009 that when a person is subdued and restrained with handcuffs, a "gratuitous and completely unnecessary act of violence" is unreasonable and violates the Fourth Amendment."); *Morrison v. Bd. of Trustees of Green Twp.,* 583 F.3d 394, 404 (6th Cir.2009) ("This Court has consistently held in light of the reasonableness standard that 'use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.'" (quoting *Baker v. City of Hamilton,* 471 F.3d 601, 607–08 (6th Cir.2006))); *Jennings v. Jones,* 499 F.3d 2, 16–17 (1st Cir.2007) (holding that reasonable officer should have known that it was unconstitutional to increase the use of physical force after an arrestee who has been resisting arrest stops resisting and warns officers that they are hurting him).

Applying the evidence most favorable to Plaintiff, a reasonable officer could not have believed that beating an unarmed man who was not resisting arrest with punches and kicks while his arms were restrained, slamming him to the ground and standing on various parts of his body, then kicking him approximately 20 more times while he was lying on the ground, was lawful. *See Marshall v. Keansburg Borough,* No. 13–533, 2013 WL 6095475, at *7 (D.N.J. Nov. 20, 2013) ("[N]o reasonable office in the Defendant Officers' positions would have believed that that throwing Plaintiff into their police vehicle, kicking Plaintiff's legs out from him, tackling Plaintiff to the ground, kneeing Plaintiff in his ribs and back, and choking Plaintiff was a lawful, reasonable amount of force to use under the circumstances."). It would have been clear to a police officer making an arrest that once Plaintiff no long posed a risk of harm to police officers, the continued beating was excessive and unconstitutional. Defendants Frampton and Frucci are not entitled to qualified immunity.[10]

Defendants separately seek summary judgment on the claim of excessive force, an argument the Court readily rejects. As discussed above, there is a material dispute over whether Defendants used gratuitous force against Plaintiff and whether Plaintiff was resisting arrest. Since a reasonable juror could credit Plaintiff's version of the facts and find that Defendants' conduct violated the Fourth Amendment, summary judgment is not warranted. Plaintiff's excessive force claim (Count One) may proceed.

3. *Defendants are not entitled to qualified immunity on the false arrest claim, and summary judgment is not warranted on the false arrest and malicious prosecution claims (Counts Two and Three)*

[33] [34] [35] [36] [37] In analyzing the qualified immunity defense to a claim of false arrest,[11] the first step is to determine whether Plaintiff has alleged a deprivation of an actual constitutional right. An "arrest without probable cause is a constitutional violation" and gives rise to a cause of action for false arrest under 42 U.S.C. § 1983. *Patzig v. O'Neil,* 577 F.2d 841, 848 (3d Cir.1978); *see also O'Connor v. City of Philadelphia,* 233 Fed.Appx. 161, 164 (3d Cir.2007). The Third Circuit has held that courts must apply a "common sense approach," based on the totality of the circumstances, to determine whether there was probable cause to arrest. *Paff v. Kaltenbach,* 204 F.3d 425, 436 (3d Cir.2000). The inquiry is essentially one of reasonableness: "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."*Devenpeck v. Alford,* 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); *see also Maryland v. Pringle,* 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). Put another way, a defendant officer violates an individual's Fourth Amendment right to be free from false arrest if it was not objectively reasonable for the officer to believe that probable cause existed at the time of the arrest. *Johnson ex rel. Johnson v. City of Pleasantville,* No. 05–4258, 2007 WL 1412271, at *4 (D.N.J. May 14, 2007) (Simandle, J.). Defendants are entitled to qualified immunity "if a reasonable officer could have believed that probable cause existed" to arrest Plaintiff "in light of clearly established law and the information the [arresting] officers possessed."*Hunter v. Bryant,* 502 U.S. 224, 228–29, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Anderson,* 483 U.S. at 641, 107 S.Ct. 3034; *Blaylock v. City of Philadelphia,* 504 F.3d 405, 411 (3d Cir.2007).

***16** [38] Whether Defendants had probable cause to arrest Plaintiff is squarely in dispute in this case. Defendants hinge their argument on the fact that probable cause was established when Plaintiff pushed Frampton. (*See* Frucci Br. at 6) ("When Defendant Frampton came on to the scene, the Plaintiff pushed him with both hands on the chest. At that point Defendants had probable cause to arrest the Plaintiff.") At deposition, Frampton and Frucci testified that the initial basis for arresting Plaintiff was Plaintiff's alleged shove. Specifically, Frucci testified that after Plaintiff gave Frampton a two-handed push to the chest, "at that point, I told [Plaintiff] he was under arrest and ... tried [to] ... place him in handcuffs."(Frucci Dep. 61:15–62:9.) Frampton similarly testified that "[a]t that point [after being pushed], Frucci and I attempted to place [Plaintiff] under arrest for assault."(Frampton Dep. 57:1–2.) Plaintiff, however, denies that he ever pushed or shoved Frampton. He insists, in other words, that the event which gave rise to probable cause for his arrest never happened.

[39] Viewing the evidence in light most favorable to the Plaintiff, there is a genuine dispute whether Plaintiff's conduct reasonably gave Defendants probable cause to arrest him. According to Plaintiff, Defendants approached his truck and yelled at him to get out of his vehicle, and, after Plaintiff stepped out of his truck with hands raised, Frampton initiated physical contact by grabbing Plaintiff's arm. Plaintiff testified that officers then began hitting and punching him, and at some point handcuffs were placed on him. Under Plaintiff's set of facts, it was not objectively reasonable for Defendants to believe that probable cause existed because there was no basis to suspect that Plaintiff had committed or was about to commit a crime. *See Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (noting that arrest without warrant is constitutionally valid if "at the moment the arrest was made ... the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."). Indeed, Defendants all but conceded at deposition that they did not suspect Plaintiff of drinking or committing any unlawful activity when they approached his truck and before Plaintiff allegedly shoved Frampton. Defendants did not smell alcohol on his breath or notice anything in or around his truck that aroused suspicion. They did not ask to see Plaintiff's license or registration number. (*See* Frucci Dep. 46:11–15, 53:15–11; Frampton Dep. 45:17–20.)[12]

[40] At the time Defendants acted, it was clearly established that probable cause for arrest does not exist where the circumstances do not suggest that an individual had committed or was about to commit a crime. Reasonable officials in Defendants' position would have understood that their actions violated Plaintiff's rights. Defendants are not entitled to qualified immunity. *See Giles v. Kearney,* 571 F.3d 318, 326 (3d Cir.2009); *Curley v. Klem,* 298 F.3d 271, 278 (3d Cir.2002) (noting that "a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis.").

***17** Defendants also move for summary judgment on the false arrest claim. As discussed above, there is a genuine material dispute whether Plaintiff's conduct gave rise to probable cause for an arrest. Resolution of this issue requires a credibility determination that this Court cannot make at this stage, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and the evidence is not so clearly one-sided that a jury must find in favor of one party, especially after giving Plaintiff the benefit of all justifiable inferences. Defendants are not entitled to summary judgment.

[41] The Court will also permit Plaintiff's malicious prosecution claim to proceed because the factual dispute identified above also prevents summary judgment on this claim.[13]To prove the constitutional tort of malicious prosecution, the plaintiff must show that (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered a deprivation of liberty consistent with the concept of "seizure." *Johnson v. Knorr,* 477 F.3d 75, 81–82 (3d Cir.2007); *Merkle v. Upper Dublin Sch. Dist.,* 211 F.3d 782, 791 (3d Cir.2000); *Gallo v. Philadelphia,* 161 F.3d 217, 222 (3d Cir.1998).

In moving for summary judgment on this claim, Defendants argue only that the third and fourth prongs have not been met, because probable cause existed based upon the summary judgment record, and Defendants did not act maliciously "in their brief interaction with Plaintiff."(City of Camden and Frampton Br. at 17.) The Court does not agree.

First, the same factual dispute that precluded summary judgment on Plaintiff's false arrest claim also precludes this Court from finding that Defendants had probable cause to bring charges against Plaintiff for aggravated assault. *See Brockington v. City of Philadelphia,* 354 F.Supp.2d 563, 569–70 (E.D.Pa.2005) (denying summary judgment on malicious prosecution claim and false arrest claim brought under 42 U.S.C. § 1983 because genuine issue of fact existed as to whether officer had probable cause to arrest plaintiff). Similarly, because Plaintiff testified repeatedly that he never resisted arrest, factual issues also remain as to whether the resisting arrest charge was brought with probable cause. With respect to the question of whether Defendants acted with malice, a reasonable jury could find, viewing the evidence in light most favorable to Plaintiff, that Defendants brought the charges against Plaintiff when Plaintiff did not assault either officer and did not resist arrest. A reasonable jury could therefore conclude that in bringing the charges without probable cause, Defendant acted for a purpose other than to bring Plaintiff to justice. *See Montgomery v. De Simone,* 159 F.3d 120, 126 (3d Cir.1998) (reversing grant of summary judgment on malicious prosecution charge and noting that summary judgment on that claim is "only appropriate if ... resolving all inferences in [plaintiff's] favor, a reasonable jury could not find a lack of probable cause for [plaintiff's] stop and arrest."); *Brockington,* 354 F.Supp.2d at 570 (because the facts suggested that defendant falsified a probable cause finding, a "natural conclusion" was that defendant acted with malice).

***18** Accordingly, the Court will deny summary judgment on the malicious prosecution claim and allow it to proceed to trial.

D. The state law claims against Defendants must be dismissed for failure to comply with the NJTCA's notice of claim requirement

The New Jersey Tort Claims Act ("NJTCA") requires notice of a claim of injury against a public entity to be presented within ninety days of the accrual of a cause of action. *See*N.J.S.A. 59:8–3 ("No action shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.")[14] After the notice of claim is filed, a plaintiff must wait six months before filing suit against the public entity or employee in an appropriate court. *Id.* A plaintiff is forever barred from recovering damages from a public entity if "he fail[s] to file his claim with the public entity within ninety (90) days...."N.J.S.A. 59:8–8.

[42] Providing such notice within 90 days achieves several goals. It allows the public entity time to review the claim and to promptly investigate the facts and prepare a defense; provides them an opportunity to settle

meritorious claims before bringing suit; grants them an opportunity to correct the conditions which gave rise to the claim; and allows them to inform the State in advance as to the expected liability. *Velez v. City of Jersey City,* 180 N.J. 284, 850 A.2d 1238, 1242 (2004); *see also*N.J.S.A. 59:8–3, Comment.

[43] Because Plaintiff concedes that a notice of claim was never filed before Plaintiff filed suit in this court, the Court is barred by N.J.S.A. 59:8–8 from considering Plaintiff's state tort claims. *See, e.g., Guzman v. City of Perth Amboy,* 214 N.J.Super. 167, 518 A.2d 758, 760–61 (1986) (holding that plaintiff's claims were barred because plaintiff failed to comply with the notice requirement under N.J.S.A. 59:8–8); *Pinckney v. Jersey City,* 140 N.J.Super. 96, 355 A.2d 214, 215 (1976) (holding that plaintiff's NJTCA claims were barred by the express terms of N.J.S.A. 59:8–8 because plaintiff failed to file a claim within 90 days and failed to move within one year to file a late notice of claim).

Plaintiff's argument, that the notice requirement does not reach actions by public employees classified under N.J.S.A. 59:3–14 as actions constituting a crime, actual fraud, actual malice, or willful misconduct, has been squarely rejected by the New Jersey Supreme Court. *See Velez,* 850 A.2d at 1246 (holding that the NJTCA's notice requirements apply to conduct described in N.J.S.A. 59:3–14); *see also Davis v. Twp. of Paulsboro,* 371 F.Supp.2d 611, 619 (D.N.J.2005) (citing *Velez* and noting that the notice of claim provisions apply to causes of action based on the intentional conduct of public employees).

[44] The Court must also reject Plaintiff's argument that the claims did not accrue until June 21, 2013, after the criminal charges against Plaintiff were dismissed, and that Plaintiff's filing of a complaint in this court satisfies the notice requirement. As the New Jersey Supreme Court held in *Beauchamp v. Amedio,* 164 N.J. 111, 751 A.2d 1047, 1052 (2000), "[T]he notice [requirements are] triggered by the occurrence of injury and [notice] must be filed in order for a complaint to be lodged against the public entity."Plaintiff's claims accrued on January 26, 2012, the date on which the incident occurred. *See Beauchamp,* 751 A.2d at 1052 ("A claim accrues on the date of the accident or incident that gives rise to any injury, however slight, that would be actionable if inflicted by a private citizen"); *Cliett v. City of Ocean City,* No. 06–4368, 2007 WL 2459446, at *3 (D.N.J. Aug. 24, 2007) (Simandle, J.) ("[T]he accrual date of a claim is the date on which the alleged tort is committed or the negligent action or omission occurred."). Even if Plaintiff's claim accrued on the date the criminal charges were dismissed, the filing of the Complaint in this case does not satisfy the notice requirement. *See Guzman,* 518 A.2d at 760 ("[T]he filing of a complaint would not be a substitute for the notice required by statute, whether the complaint was filed within the 90–day or the one-year period."); *Baker v. Allen,* No. 03–2600, 2006 WL 1128712, at *16 (D.N.J. Apr. 24, 2006) ("Strict compliance is required to satisfy the Tort Claims Act, and the filing of a complaint is not a substitute for a notice of claim.").

***19** [45] Although Plaintiff has not moved to file a late notice of claim, the Court notes that it has no discretion to grant him the opportunity to do so. The NJTCA states that a claimant who fails to file a notice of claim within 90 days "may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby."N.J.S.A. 59:8–9. In other words, N.J.S.A. authorizes the court, in its discretion, to extend the time for filing a notice of claim to a period not exceeding one year following accrual of the cause of action. Here, however, Plaintiff's claim accrued on January 26, 2012, and the one-year limitation expired on January 26, 2013. "After the one-year limitation has passed, 'the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail.'"*Pilonero v. Twp. of Old Bridge,* 236 N.J.Super. 529, 566 A.2d 546, 548 (1989) (quoting *Speer v. Armstrong,* 168 N.J.Super. 251, 402 A.2d 963, 965 (1979)); *see also Anaya v. Vernon Twp.,* 139 N.J.Super. 409, 354 A.2d 338, 340 (1976) (noting that court had no authority to permit filing of late notice of claim because notice was filed more than one year after date on which claim accrued), certif. denied, 71 N.J. 494, 366 A.2d 650 (1976).

Because Plaintiff did not file a notice of claim pursuant to N.J.S.A. 59:8–8, Plaintiff's state law claims (Counts Six through Ten) are barred and will be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, the Court will deny summary judgment on Plaintiff's Fourth Amendment claims against Frampton and Frucci (Counts One, Two, and Three), deny summary judgment on the *Monell* claim against the City of Camden for failure to investigate the use of excessive force (Count Four), and grant summary judgment on all other claims. The accompanying Order will be entered.

All Citations

--- F.Supp.3d ----, 2015 WL 3954047

Footnotes

1 Pursuant to Local Civil Rule 56.1, Defendants City of Camden and Officer Frampton filed a statement of material facts along with their motion for summary judgment. (City of Camden and Frampton Br. [Docket Item 21] at 1–8.) Defendant Officer Frucci joins in the City of Camden and Officer Frampton's statement of facts in his motion for summary judgment. (Frucci Br. [Docket Item 22] at 3.) As Plaintiff did not file a supplemental statement of facts, the Court relied primarily on Defendants' statement of material facts and Plaintiff's responsive statement. The Court also found it necessary to include additional facts and testimony from the summary judgment record in order to present a fuller record from which to decide the pending motions.

2 The summary judgment record does not include any medical records detailing Plaintiff's injury or the treatment he received. Plaintiff testified at other times that the encounter left him with broken ribs, but then answered in the affirmative when asked whether he actually suffered a single rib fracture. (Noble Dep. 170:13–171:4.)

3 Although Plaintiff alleges *Monell* claims against the City of Camden for acquiescing to a custom of excessive force and failing to train and supervise officers on the use of force, Plaintiff failed to include facts related to these claims in a supplemental statement of facts and referred to facts in the expert report only in his opposition brief, in contrast to what Local R. 56.1 requires. *See* Loc. Civ. R. 56.1(a) ("[T]he opponent may also furnish a supplemental statement of disputed material facts ... if necessary to substantiate the factual basis for opposition."). The Court has examined the expert report and, finding it necessary to consider the expert opinion of Dr. Rivera in order to fully address all claims raised in the complaint, recites those facts it deems relevant here.

4 Defendant Frucci makes no argument with respect to Plaintiff's malicious prosecution claim.

5 Proof of the existence of an unlawful policy or custom is not enough to maintain a § 1983 action. A plaintiff must additionally prove that the policy or custom was the proximate cause of the injuries suffered. *Watson,* 478 F.3d at 156; *Losch v. Borough of Parkesburg,* 736 F.2d 903, 910 (3d Cir.1984). To establish causation, the plaintiff must demonstrate a "plausible nexus" or "affirmative link" between the custom and the specific deprivation of constitutional rights at issue. *Bielevicz,* 915 F.2d at 850.

6 It is unclear whether these cases had been resolved by the time the present incident occurred.

7 Plaintiff notes that he possesses all of the IAU files against Frampton and Frucci and "can show how the Camden Internal Affairs department systematically failed to properly investigate the complaints and respond to officer misconduct."(Pl. Opp'n to City of Camden and Frucci Br. at 10.)

8 As Mr. Rivera's report appeared to have examined only files from 2009 and prior, Plaintiff should be prepared to prove at trial that the pattern of ignoring excessive force complaints continued beyond 2009.

9 Although Defendants' argument with respect to qualified immunity is not a model of clarity, Defendant Frampton appears to concede that the first prong has been met. (Def. City of Camden and Frampton Br. at 16) ("Moving Defendants acknowledge Plaintiff has alleged a deprivation of a constitutional right.").

10 The Court readily rejects Defendants' argument that "the officers acted in good faith and are entitled to qualified immunity."(Def. City of Camden and Frucci Br. at 16.) The qualified immunity inquiry does not turn on Defendants' good faith, and an inquiry into whether individual officers acted in "good faith" "is incompatible with a proper Fourth Amendment analysis," and has no bearing on whether a particular seizure was "unreasonable." *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *see id.*("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

11 Although Defendants' brief is unclear, Defendant Frucci appears to make some argument that he is entitled to qualified immunity on the claim of false arrest. (*See* Frucci Br. at 6) (contending, in qualified immunity section, that Defendant "had probable cause to arrest the Plaintiff" when Plaintiff pushed Frampton with both hands). The Court will therefore address the issue of qualified immunity.

12 Defendant Frampton appears to argue that probable cause existed because Plaintiff was resisting arrest. (*See* City of Camden and Frampton Br. at 16–17) (noting that "Plaintiff existed his vehicle and did not allow himself to be handcuffed" and that "probable cause existed to arrest Plaintiff based upon said facts. It is undisputed that Plaintiff would not allow either officer to handcuff him after he exited the van."). However, in order for the police to have properly arrested Plaintiff, they must have had probable cause for the initial arrest on the aggravated assault. As the Third Circuit has observed, a "resisting arrest charge "[cannot] provide [ ] probable cause for the arrest ab initio."" *Groman v. Twp. of Manalapan,* 47 F.3d 628, 635 (3d Cir.1995); *see also Trafton v. City of Woodbury,* 799 F.Supp.2d 417, 436 (D.N.J.2011) (holding that disorderly conduct, assault, and resisting arrest cannot provide justification for Plaintiff's initial arrest because they "all arose either during or after Plaintiff's arrest.").

13 Defendant Frucci does not address the malicious prosecution claim in his brief. Defendant Frampton seeks summary judgment on the malicious prosecution claim but does not assert a qualified immunity defense. (*See* City of Camden and Frampton Br. at 16–17.)

14 The NJTCA sets forth the procedures a claimant must follow before bringing a tort claim against the state, or, as is relevant here, a "local public entity." N.J. Stat. Ann. § 59:1–1 et seq. The notice of claim must be presented to the Attorney General or the agency involved in the alleged wrongful act and must include, among other things, (1) the name and address of the claimant; (2) the address for sending communication about the claim (2) the date, place, and other circumstances of the occurrence which gave rise to the claim; (3) a general description of the known injury, damage, or loss incurred "so far as it may be known at the time"; (4) the name of the public entity, employee, or employees causing the injury; and (5) the amount claimed as of the date of presentation of the claim. N.J.S.A. 59:8–4.

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2005 WL 724117
United States District Court,
E.D. Pennsylvania.

TOLEDO MACK SALES & SERVICE, INC., Plaintiff,
v.
MACK TRUCKS, INC., Defendant.
MACK TRUCKS, INC., Counterclaim Plaintiff,
v.
TOLEDO MACK SALES & SERVICE, INC., Counterclaim Defendant.

No. Civ.A. 02-CV-4373. | March 29, 2005.

Attorneys and Law Firms

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Barak Bassman, Daniel J. Boland, Jeremy Heep, Pepper Hamilton LLP, Philadelphia, PA, for Defendant.

MEMORANDUM

BUCKWALTER, J.

***1** Presently before the Court are Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims. For the reasons stated below, Defendant's Motion for Summary Judgment is DENIED, and Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims is DENIED.

I. INTRODUCTION

Toledo Mack Sales & Service, Inc. ("Toledo Mack" or "Plaintiff/Counterclaim Defendant"), commenced this antitrust action against Mack Trucks, Inc. ("Mack Trucks," "Mack" or "Defendant/Counterclaim Plaintiff") in the Eastern District of Pennsylvania on July 1, 2002. Toledo Mack's Complaint contained seven causes of action: (1) agreements in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a); (3) violation of Section 445.1574 of the Michigan Franchise Investment Law; (4) violation of the Ohio Motor Vehicle Dealer Law, OH. REV.CODE ANN. § 4517.59; (5) tortious interference with prospective business relations; (6) breach of the Distributor Agreement; and (7) breach of the implied covenant of good faith and fair dealing.

Mack Trucks filed a Counterclaim on August 22, 2002, alleging misappropriation of trade secrets and confidential business information, copyright infringement, breach of contract, and civil conspiracy. On April 2, 2004, Mack Trucks moved for summary judgment as to Toledo Mack's seven causes of action, to which Toledo Mack responded. Additionally, on April 2, 2004, Toledo Mack moved for summary judgment as to Mack Trucks' Counterclaims, to which Mack Trucks responded.

On March 27, 2003, based on Toledo Mack's misappropriation of trade secrets, Mack Trucks sent notice of termination of Toledo Mack's distributorship, which Toledo Mack protested. On July 30, 2004, the Hearing Examiner upheld Toledo Mack's protest and found that Mack Trucks did not have good cause to terminate Toledo Mack's distributorship. On August 30, 2004, the Hearing Examiner's ruling was approved by the Ohio Motor Vehicle Dealer's Board. On October 4, 2004, the last brief was filed.

II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."FED. R. CIV. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Big Apple BMW, Inc. v. BMW of North America, Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992) (stating that in a motion for summary judgment, "where the non-moving party's evidence contradicts the movant's, the non-movant's must be taken as true.").

***2** Although the Supreme Court has emphasized that *Rule*

56 makes absolutely no distinction between antitrust and other cases, the Supreme Court has cautioned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."*Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Those three factors are clearly present in this case.

III. MACK TRUCKS' MOTION FOR SUMMARY JUDGMENT

Defendant Mack Trucks moves for summary judgment as to all of Toledo Mack's claims, asserting that there are no disputed issues of material fact to submit to a jury. We disagree, for the reasons provided herein.

A. Section 1 of the Sherman Act

Plaintiff Toledo Mack alleges that through three horizontal agreements, Defendant Mack Trucks has unreasonably restrained trade in violation of Section 1 of the Sherman Act ("Section 1").[1] First, Toledo Mack alleges that in 1989, Mack Trucks conspired with its dealers-Toledo Mack's horizontal competitors-to restrain price competition and allocate markets by restricting sales assistance discounts to sales occurring within a dealer's local area of responsibility ("AOR"). Second, Toledo Mack alleges that Mack Trucks conspired with McClain, McNeilus, and Heil ("Body Builders"), to restrain price competition and allocate markets. Third, Toledo Mack alleges that Mack Trucks conspired with the three Body Builders to refrain from selling to independent distributors.

As to the first agreement, Mack Trucks contends at the outset that: (1) there is no evidence of any exclusive territories, and (2) the claim is time-barred by the statute of limitations because there is no evidence of any post-1989 conspiracy. As to the last two agreements, Mack Trucks argues that summary judgment should be granted because Toledo Mack was not injured by the asserted violations, and thus has no standing to challenge the violations.

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal."15 U.S.C. § 1 (2004).Section 1 only prohibits contracts, combinations, or conspiracies that unreasonably restrain trade. *Bus. Elec. Corp. v. Sharp Elec. Corp.,* 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Some restraints of trade are *per se* unreasonable, while others require an elaborate analysis pursuant to the "rule of reason."[2]*See InterVest Inc. v. Bloomberg, L.P.,* 340 F.3d 144, 158 (3d Cir.2003).

Restraints of trade are *per se* unreasonable when they are "manifestly anticompetitive" or "would always or almost always tend to restrict competition."*Rossi,* 156 F.3d at 461.Because of their "pernicious effect on competition and lack of redeeming virtue," these restraints are "conclusively presumed to unreasonably restrain competition" without an elaborate analysis.*Id.* These types of restraints are thus considered *per se* violations of Section 1.

***3** Horizontal territorial limitations are *per se* violations of Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Horizontal territorial limitation agreements therefore must be analyzed under the *per se* standard. As a result, Plaintiff needs only prove that: (1) defendant contracted, combined or conspired with its dealers/body builders; and (2) the conspiracy was the proximate cause of the plaintiff's injury.[3]

1. *First Agreement*

Toledo Mack first alleges that Mack Trucks conspired with its dealers to restrain price competition and allocate markets by restricting sales assistance discounts to sales occurring only within a dealer's AOR. Plaintiff further contends that this conspiracy began in 1989, and through Mack Trucks' efforts to fraudulently conceal it, has continued well over the statute of limitations period. In turn, Defendant Mack Truck argues that this claim is time-barred by the statute of limitations because there is no evidence of any post-1989 conspiracy, and there is no evidence of any exclusive AORs.

In an antitrust case, the question of the commencement of the statute of limitations is a question of fact to be resolved by the jury or the trier of fact. *Morton's Market, Inc., v. Gustafson's Dairy, Inc.,* 198 F.3d 823, 828 (11th Cir.1999); *In re Beef Indust. Antitrust Litig.,* 600 F.2d 1148, 1169-70 (5th Cir.1979). Where the plaintiff's evidence suggests the defendant committed overt acts in furtherance of a conspiracy during the statutory period, summary judgment on statute of limitations grounds is inappropriate.*Pennsylvania Dental Assoc. v. Med. Serv. Assoc.,* 484 U.S. 851, 108 S.Ct. 153, 98 L.Ed.2d 109 (1987) ("there is evidence of overt acts in furtherance of the conspiracy occurring within the limitations period ... therefore, even if the four-year statute of limitations [is] applicable ... the claim [is] not time-barred.").

In this case, Toledo Mack's evidence suggests that the defendant committed overt acts in furtherance of the price fixing and market allocation conspiracy during the statutory period. For instance, Plaintiff evidences that Mack Trucks delayed sales assistance discounts so Toledo Mack would lose sales; refused to ship parts to customers outside of Toledo Mack's AOR; imposed arbitrary restrictions on Toledo Mack's ability to compete with other Mack dealers outside Toledo Mack's local AOR; failed to grant Toledo Mack the discounts available to other competing dealers; and terminated Toledo Mack's franchise. Therefore, genuine material issues of fact exist as to whether the price fixing and market allocation conspiracy between Defendant and its dealers is a continuing conspiracy.

Fraudulent concealment of a conspiracy also tolls the statute of limitations in an antitrust case. To establish fraudulent concealment and toll the statute of limitations, three elements must be present: (1) defendant must wrongfully conceal its actions; (2) the plaintiff must fail to discover the operative facts or the basis of its cause of action within the statute of limitations period; and (3) plaintiff must exercise due diligence until discovery of the facts. *Tetratec Corp. v. E.I. Dupont de Nemours & Co.,* 1991 U.S. Dist. LEXIS 2589, *14-19 (E.D.Pa.1991). A self-concealing conspiracy may satisfy the wrongful concealment element of the fraudulent concealment doctrine.*Bethlehem Steel Corp. v. Fischbach and Moore, Inc.,* 641 F.Supp. 271, 275 (E.D.Pa.1986).

***4** Here, Toledo Mack has raised genuine issues of fact as to fraudulent concealment. Although Defendant argues there is no evidence of fraudulent concealment, the evidence adduced by Plaintiff describes affirmative acts allegedly performed by Mack Trucks to conceal the conspiracy. Toledo Mack alleges that prior to this litigation, because it did not have access to Mack Trucks' internal records, it had no way of knowing that Toledo Mack consistently received lower sales assistance discounts than other competing dealers. Additionally, Toledo Mack notes that when it inquired about the sales assistance discount issue, it was advised that it was being treated equally with other dealers. Accordingly, genuine material issues of fact exists as to whether the statute of limitations was tolled by Mack Trucks' fraudulent concealment of the conspiracy.

Upon a complete review of the evidence, the Court determines that the record is replete with genuine issues of material facts as to whether Toledo Mack's claim against the price fixing and market allocation conspiracy between Mack Trucks and its dealers is barred by the statute of limitations. Accordingly, summary judgment is not appropriate.

Defendant Mack Truck further contends there is no evidence of an agreement to geographically divide territories or allocate customers. Defendant claims that Toledo Mack's evidence is insufficient to show concerted action between Defendant and its dealers or the identity of Defendant's co-conspirators.

The existence of an agreement is "the very essence of a *section 1* claim."*Alvord-Polk, Inc. v. Schumacher & Co.,* 37 F.3d 996, 999 (3d Cir.1994). A plaintiff may rely on direct or circumstantial evidence to show that genuine issues of fact exist as to concerted action in responding to a motion for summary judgment. *Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 465 (3d Cir.1998). Where a plaintiff solely relies on circumstantial evidence, inference from that evidence must "exclude the possibility that the alleged conspirators acted independently."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)(citing *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). In other words, there must be some evidence which would support a finding of concerted behavior. *Big Apple BMW,* 974 F.2d at 1365.

However, when a plaintiff offers direct evidence of concerted action, the analyses set forth in *Matsushita* and *Monsanto* do not apply. *Alvord-Polk, Inc. v. Schumacher & Co.,* 37 F.3d 996, 1001 (3d Cir.1994). In *Big Apple BMW,* the Third Circuit held that if an "opponent has exceeded the 'mere scintilla' threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent."*Big Apple BMW,* 974 F.2d at 1363.

Because Toledo Mack has presented direct and circumstantial evidence from which a rational jury or trier of fact may infer that Mack Trucks advanced pretextual reasons for its policies, and might in turn infer that Mack Trucks acted in concert with its dealers to fix prices and allocate markets in violation of Section 1 of the Sherman Act, the Court finds that summary judgment as to this claim is also inappropriate.

2. *Second and Third Agreements*

***5** Toledo Mack also alleges that through two other horizontal agreements, Mack Trucks has unreasonably restrained trade in violation of Section 1 of the Sherman Act. Toledo Mack contends that Mack Trucks conspired with McClain, McNeilus, and Heil, the largest Body Builders, to restrain price competition and allocate markets. Toledo Mack specifically argues that Mack Trucks had an agreement with the Body Builders that: (1) the Body Builders will not sell to third-party distributors, or to established Mack customers; and (2) the Body Builders will receive preferential discounted pricing on Mack Trucks, and Mack will not provide similar preferential discounted pricing to Toledo Mack and other Mack dealers.

Mack Trucks argues summary judgment should be granted because Toledo Mack was not injured by the agreements with the Body Builders, and thus has no standing to assert Section 1 violations. Specifically, Mack Trucks alleges that the agreements with the Body Builders "would decrease competition for Mack dealers ... and Toledo Mack would face less competition."Mack Trucks relies on *Matsushita* and *ARCO* to support its premise that "an antitrust plaintiff, like Toledo Mack here, does not have standing to sue when it stands to gain from the alleged agreements to restrain trade."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 582-83, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Atlantic Richfield Co. ("ARCO") v. USA Petroleum Co.,* 495 U.S. 328, 336-37, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

In turn, Toledo Mack argues that the agreements amounted to price fixing which was detrimental to Toledo Mack in its attempts to compete with the Body Builders. *See* Email from J. Favia to C. Bond 4/23/03, Ex. 145. Toledo Mack then presents excerpts of Dr. Gollop's Report, Toledo Mack's expert, that suggest Toledo Mack was injured by the agreements. *See* Gollop Report at Section 4.3.1., Section 4.3.2., Ex. 14. Plaintiff further posits and evidences that the cases cited by Defendant, *Matsushita* and *ARCO,* are distinguishable from the case at hand because Toledo Mack "does not stand to gain one iota from the conspiracy between Mack Trucks and the Body Builders."*Pace Elec. Inc., v. Canon Computer Sys., Inc.,* 213 F.3d 118, 124 (3d Cir.2000).

In *Angelico v. Lehigh Valley Hosp., Inc.,* 184 F.3d 268, 274 (3d Cir.1999), the Third Circuit held that to secure standing in an antitrust case, Plaintiff must establish:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

***6** After applying the *Angelico* analysis to this case, the Court finds that Toledo Mack has standing to challenge the agreements between Mack Trucks and the Body Builders. First, Toledo Mack has adduced evidence indicating that the agreements between Mack Trucks and the Body Builders were intended to and have caused harm to Toledo Mack because it received less favorable pricing which affected its ability to compete with Body Builders for sales to non-established Mack customers. Second, there is evidence in the record that suggests that Toledo Mack's injury-lost sales to existing and potential customers-is the direct result of horizontal agreements to allocate markets and fix prices, precisely the type of injury the antitrust laws are intended to redress.

Lastly, the record offers evidence that leads the Court to conclude that Toledo Mack has satisfied the third, fourth, and fifth factors of the *Angelico* standing analysis. The Court finds that summary judgment is denied as to this claim.

B. Robinson-Patman Act

Toledo Mack avers a secondary line violation, claiming Mack Trucks' price discrimination injured competition among Mack Trucks' customers, i.e. Toledo Mack, the Body Builders, and other Mack dealers. Specifically, Toledo Mack argues that Mack Trucks violated the Robinson-Patman Act ("RPA") because it sold chassis of like grade and quality to the Body Builders and other Mack distributors at preferential prices.

To prove its claim, Toledo Mack must allege and show that: (1) Mack Trucks' sales to Toledo Mack and Mack Trucks' Favored Purchasers involved interstate commerce; (2) Mack Trucks discriminated in price between Toledo Mack and at least one other favored purchaser; (3) the trucks Mack sold at disparate prices were of "like grade and quality"; and (4) Mack Trucks' price discrimination had a prohibited effect on competition. *See Texaco Inc. v. Hasbrouck,* 496 U.S. 542, 556 (1990); *Bacon v. Texaco, Inc.,* 503 F.2d 946, 948 (5th

Cir.1974). In addition, because the Robinson-Patman Act prohibits price discrimination "between different purchasers," 15 U.S.C. § 13(a), Toledo Mack has to show there were actual sales at two different prices to two different Mack customers, i.e. a sale to itself and a sale to another Mack favored purchaser.*Crossroads Cogeneration Corp. v. Orange & Rockland Utils.,* 159 F.3d 129, 142 (3d Cir.1998) ("[m]erely offering lower prices to a customer does not state a price discrimination claim."); *Shaw's Inc. v. Wilson-Jones Co.,* 105 F.2d 331, 333 (3d Cir.1939). Accordingly, Toledo Mack must show it is a "purchaser," within the meaning of the RPA.

Mack Trucks contends that summary judgment should be granted as to this claim because Toledo Mack cannot meet any of the RPA's four requirements. Mack Trucks avers that: (1) there is no evidence of actual competition between Toledo Mack and Mack Trucks' favored purchasers; (2) there is no evidence that the trucks Mack sells are of "like grade and quality;" (3) there is no evidence of actual injury in the form of lost sales to Body Builders; and (4) Toledo Mack cannot meet the "two completed sales" requirement because it is not a "purchaser."

1. ***Actual Competition***

***7** The RPA requires that at least one of the alleged discriminatory sales occur "in commerce," or cross a state boundary. *See Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). Furthermore, to establish a violation of the Act in a secondary line case, a plaintiff must prove that it engaged in actual competition with the favored purchasers at the time of the discriminatory sales. *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.,* 63 F.3d 1267, 1272 (3d Cir.1995)."The standard for showing actual competition is where, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e. all wholesalers or all retailers, and within the same geographic market."*Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,* 842 F.2d 578, 585 (2d Cir.1987).

Mack Trucks contends Toledo Mack has no evidence of actual competition between Toledo Mack and Mack Trucks' favored purchasers. Toledo Mack has presented evidence indicating that it competed against Mack Trucks' favored purchasers and Body Builders during the entire time Mack Trucks allegedly charged its discriminatory prices. Toledo Mack further posits that it competed nationwide to sell Mack Trucks to its end-users, and it actually made truck sales throughout the United States.

The question of the existence of competition between two purchasers is a question of fact to be resolved by the jury or the trier of fact. After a careful and complete review of the evidence, the Court determines that the record contains genuine issues of material fact as to the existence of competition between Toledo Mack and Mack Trucks' favored purchasers. As such, the Court will allow a jury to determine the issue.

2. ***Two Purchase Requirement***

"The Robinson-Patman Act applies where a seller discriminates in its pricing to two different purchasers."15 U.S.C. § 13(a) (2004). Mack Trucks contends competitive bidding situations do not implicate the RPA because an unsuccessful bidder is not a purchaser. Mack Trucks emphasizes that some of Toledo Mack's proof involves situations where Toledo Mack did not purchase trucks from Mack. Toledo Mack did not purchase trucks from Mack in the head-to-head competition with another dealer for the Florida Rock contract, for instance, because the other dealer got the contract. Similarly, Toledo Mack did not actually purchase trucks from Mack in situations where Toledo Mack compared its unsuccessful bid to other dealers' successful sales based on sales assistance concessions.

An unsuccessful bidder is not a purchaser within the meaning of the RPA. *SeeShaw's Inc. v. Wilson-Jones Co.,* 105 F.2d 331, 333 (3d Cir.1939); *Crossroads Cogeneration,* 159 F.3d at 142 ("[m]erely offering lower prices to a customers does not state a price discrimination claim."). When Toledo Mack unsuccessfully bid on contracts because Mack Trucks' price concessions were not favorable enough to obtain the contracts, Toledo Mack did not actually purchase trucks from Mack. Mack Trucks may have offered to sell trucks to Toledo Mack at a higher price than it offered to other dealers, but mere offers to sell do not violate the RPA.

***8** This conclusion is consistent with the decision of some courts that hold that price discrimination in the competitive bidding process does not violate the RPA because only one of the two competitors actually made a purchase. *See, e.g., Crossroads Cogeneration,* 159 F.3d at 142 ("at least two other circuits [the Fourth and Eighth] have required dismissal when two sales are not alleged."); *Shaw's Inc.,* 105 F.2d at 333 ("[The RPA] does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party."); *Vanco Indus. v. Specialty Plastic Prods., Inc.,* 1989 U.S. Dist. LEXIS 4450, *5 (E.D.Pa.1989) ("price quotations or offers to sell are not sufficient to show price discrimination under the [RPA], the seller must have actually sold its products."); *Reeder-Simco GMC v. Volvo GM Heavy Truck,* No. 02-2462, 2004 U.S.App. LEXIS 14231 (8th Cir.2004) ("price discrimination in the competitive bidding process does not violate the RPA because only one of the two competitors ... makes a purchase.").*But see American Can Co. v. Bruce's Juices, Inc.,* 187 F.2d 919, 924 (5th Cir.1951) (proposing an exception to the "two purchase requirement" when the plaintiff's failure to purchase is due to defendant's discriminatory pricing practices).

In this case, however, there is evidence that indicates Toledo Mack was more than an unsuccessful bidder. Toledo Mack supplemented its expert report and compared those successful sales to actual sales made by other dealers during the same time period. Toledo Mack alleges that its supplemental analysis once more reveals a pattern of price discrimination against Toledo Mack with respect to "actual sales." Although Mack Truck challenges the sufficiency of the actual purchase-to-purchase comparison on the ground that the report shows no discrimination, the Court finds that the successful bids noted in Toledo Mack's supplemental expert report gives Toledo Mack "purchaser" status. Thus, Toledo Mack is entitled to pursue a claim for price discrimination under the RPA. *See DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.,* 990 F.2d 1186, 1202 (11th Cir.1993) (holding that even "minimal sales" made by an otherwise unsuccessful bidder are enough for bidder to state an RPA claim).

3. *Like Grade and Quality*

To establish an RPA violation, Toledo Mack must show the comparative sales involve trucks of like grade and quality. 15 U.S.C. § 13(a). Items are not of like grade and quality "if there are substantial physical differences in products affecting consumer use, preference or marketability."*FTC v. Borden Co.,* 383 U.S. 367 (1966); *Checker Motors Corp. v. Chrysler Corp.,* 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd,*405 F.2d 319 (2d Cir.1969). Mack Trucks argues the sales-to-sales comparisons made by Toledo Mack involve trucks with different major components that affect consumer preference and marketability. In support of its contention, Mack Trucks points to declarations which aver that differences in truck components-particularly engine types and number of axles-affect pricing and sales assistance concessions, and therefore, influence a consumer's decision to purchase. Toledo Mack, however, offers declaration testimonies, showing that any differences in truck components are inconsequential since the trucks sold to Toledo Mack and Mack's favored purchasers were of "like grade and quality."

***9** Upon review of the record, and as demonstrated above, this Court finds that the question of whether the trucks sold to Toledo Mack and Mack's favored purchasers were of "like grade and quality" presents a genuine issue of fact disputed by the parties and should be reserved for the jury to decide. Thus, this issue cannot properly be resolved upon summary judgment.

4. *Injury/Damages*

a. Competitive Injury

The RPA prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition ... or to injure, destroy, or prevent competition."15 U.S.C. § 13(a) (2004). However, the RPA does not "require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect."*Corn Prods. Ref. Co. v. Fed. Trade Comm'n,* 324 U.S. 726, 742, 65 S.Ct. 961, 89 L.Ed. 1320 (1945).

In *J.F. Feeser, Inc. v. Serv-A-Portion Inc.,* 909 F.2d 1524, 1535 (3d Cir.1990), the Third Circuit held that injury to competition can be shown in two ways. "First, plaintiff may introduce direct evidence that disfavored competitors lost sales or profits as a result of the discrimination."*Falls City Indus. v. Vanco Beverage,* 460 U.S. 428, 437-38, 103 S.Ct. 1282, 75 L.Ed.2d 174 (1983). In other words, one way to demonstrate that a discriminatory practice likely injured competition is by proving injury to individual competitors. "Second, [a plaintiff] can show that the favored competitor received a substantial price reduction over a substantial period of time, which gives rise to a permissible inference of competitive injury."*Fed. Trade Comm'n v. Morton Salt Co.,* 334 U.S. 37, 50-51, 68 S.Ct. 822, 92 L.Ed. 1196 (1948). Mack Trucks argues Toledo Mack failed to demonstrate a reasonable possibility of competitive injury because Toledo Mack has no evidence of losing sales to a specific customer due to price discrimination.

Toledo Mack presents evidence that shows Mack Trucks' price discrimination practices date back to 1989, when Mack Trucks instituted pricing policies to suppress Toledo Mack's sales to customers outside of its AOR. Toledo Mack, in its expert report, further found it consistently received less favorable pricing than Mack Trucks' favored purchasers. *See* Harris Rep., 1/19/04, at 10-16, Ex. 123. In addition, Mack's policy was effective in restricting Toledo Mack's ability to compete. In 1998, before Mack Trucks implemented its discriminatory pricing policy, Toledo Mack sold 166 Mack Trucks. In 1990, within the first full year of Mack's discriminatory policy, Toledo Mack's sales were reduced to 86. Accordingly, Toledo Mack claims its sales subsequently declined every year between 1990 and 1998. *See* Nichols Report at 4, Ex. 211.

Because Toledo Mack has presented evidence from which a reasonable jury or trier of fact may infer that Mack Trucks' discriminatory concessions resulted in lost profits and sales to Toledo Mack and other dealers, and that favored competitors received substantial price reductions, the Court determines that summary judgment as to this claim is not appropriate.

b. Actual Injury

***10** Section 4 of the Clayton Act, 15 U.S.C. § 15 (2004), provides that "any person ... injured in his business ... by reasons of anything forbidden in the antitrust laws may sue ... in [a] district court ... and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees."Once the plaintiff meets its burden of proving damages, "some uncertainty with respect to the amount of damage will not preclude recovery."*J.F. Feeser Inc.,* 909 F.2d at 1539.

Mack Trucks argues Toledo Mack has no evidence of actual injury. However, Toledo Mack has presented substantial evidence to prove competitive and actual injury. Toledo Mack's expert report concluded that Mack Trucks' price discrimination caused Toledo Mack damages of $18.7 million. Furthermore, unlike the plaintiffs in *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.,* 63 F.3d 1267, 1276 (3d Cir.1995), Toledo Mack has offered documentary evidence as to the effect of the price discrimination on sales, and it has identified lost sales as a result of Mack Trucks' discriminatory conduct.

As such, the Court finds that there is sufficient evidence in the record to support an inference of causation. Accordingly, the ultimate conclusion as to what that evidence proves is reserved for the jury or trier of fact, therefore summary judgment as to this claim is denied.

C. Ohio Motor Vehicle Dealer Law

The Ohio Motor Vehicle Dealer Law ("Ohio Act") provides that no franchisor shall "sell, lease, or rent goods or motor vehicles, or render any service normally performed and required of franchisees under the franchise agreement with the franchisor, in unfair competition with the franchise...."OHIO REV.CODE ANN. § 4517.59(E) (2004). Toledo Mack alleges Mack Trucks has violated section 4517.59(E) by "selling directly to National Accounts and offering preferential pricing and other terms to certain customers and favored dealers in unfair competition with Toledo Mack."

Upon careful and complete review of the evidence presented by both parties, the Court finds that this claim cannot be properly disposed of in a motion for summary judgment since the questions of whether Mack Trucks' conduct is unfair, or whether Mack Trucks competed with Toledo Mack, are inherently factual issues.

D. Michigan Franchise Investment Law

The Michigan Franchise Investment Law ("Michigan Law") prohibits a manufacturer from "sell[-ing] any new motor vehicle directly to a retail customer other than through its franchised dealers, unless the retail customer is a nonprofit organization or a federal, state, or local government or agency."MICH. COMP. LAWS § 445.1574(I). Defendant Mack Trucks contends that Toledo Mack's claim cannot survive because the statute does not apply to distributors located outside of Michigan, and Toledo Mack is located in Ohio. Moreover, even if Toledo Mack were "located" in Michigan, Toledo Mack has no evidence of sales lost to "retail customers" to which Mack Truck sells directly.

***11** Toledo Mack, however, argues that the Michigan Law applies in this case because Toledo Mack's assigned AOR includes Lenawee County, Michigan. *See* Distributor Agreement at Supplement, Ex. 222. While Toledo Mack does not have a building in the state of Michigan, its assigned market area includes Lenawee County, and it does business in Michigan. Furthermore, Toledo Mack presents additional evidence which indicates Toledo Mack tried to sell to retail customers in Michigan.

As such, the Court will allow a jury to determine whether Mack Trucks violated the Michigan Franchise Investment Law by trying to sell trucks to retail customers in Michigan.

E. Common Law Claims

1. *Tortious Interference with Prospective Business Relations*

A federal court sitting in diversity must apply the conflict of law rules of the forum state. *Klaxon v. Stentor Electric Manufacturing Co., Inc.,* 313 U.S. 487, 61 S.Ct. 1020, 85

L.Ed. 1477 (1941). As such, the Court must apply Pennsylvania's choice of law rules to determine which substantive law governs Toledo Mack's tortious interference claim. A proper conflict of laws analysis suggests Ohio "has the greater interest in the application of its law."Thus, Ohio's law should be applied because Ohio has more substantial contacts to Toledo Mack's claims. *Data Based Systems Int'l Inc. v. Hewlett-Packard Co.,* No. 00-CV-4425, 2001 U.S. Dist. LEXIS 17402 at *12 (E.D.Pa. Sept. 26, 2001); *CAT Internet Serv., Inc. v. Magazines.com Inc.,* No. 00-2135, 2001 U.S. Dist. LEXIS 8, *6 (E.D.Pa. Jan. 4, 2001). Ohio Law recognizes claims for tortious interference with prospective economic relations where the defendant's conduct is directed towards the plaintiff or a third party. *See Lucas v. Monroe Co.,* 203 F.3d 964, 979 (6th Cir.2000); Restatement (Second) of Torts § 766B(b).

Mack Trucks argues Toledo Mack has no evidence to support its claim "because [Toledo Mack] has no evidence of any interference with a customer with whom it had a reasonable probability of doing business."Toledo Mack, nonetheless, has produced substantial evidence of Mack Trucks' interference with Toledo Mack's prospective contractual relations in the manner in which Mack Trucks handled requests for sales assistance, including: (1) delays in responding to assistance requests; (2) instances in which Mack Trucks notified competing dealers of Toledo Mack's attempts to make a sale through the cross-check procedure; and (3) efforts to prohibit Toledo Mack from soliciting business outside of its AOR.

Furthermore, Toledo Mack has introduced evidence that demonstrates Mack Trucks tortiously interfered with Toledo Mack's customer relationships by inducing specific customers not to buy from Toledo Mack. Mack Trucks allegedly interfered with Toledo Mack's attempts to sell to certain large end-users, and Mack Trucks ultimately usurped all sales to these National Accounts. Additionally, Mack Trucks offered its National Account leasing companies special pricing that was unavailable to dealers. *See* Flaherty Dep. 11/8/03 at 246-47, Ex. 13; Flaherty Dep. 1/8/04 at 21, Ex. 10. Toledo Mack also specifically identified a myriad of potential customers with whom it had "a reasonable likelihood or a probability" of prospective business relationships. *See* Suppl. Interrogatory Responses at No. 10., Ex. 215. M. Yeager Dep. at 89-90. Toledo Mack was allegedly engaged in negotiations with the identified prospective customers, but they were unwilling to pay Toledo Mack the higher prices it was forced to charge as a result of Mack Trucks' discriminatory pricing concessions. Toledo Mack, in support of its contentions, kept notes of comments from customers who bought trucks at lower prices from other dealers. *See* D. Yeager Aff. at ¶ 12, Ex. 83; *See* Transcript of Telephone Conversation between D. Yeager and R. Loumis at 3-5, Ex. 227.

***12** Toledo Mack has presented evidence that Mack Trucks offered special deals and low prices to National Accounts-and these special deals and prices were not readily available to the dealers. Toledo Mack contends that Mack Trucks' special deals and low prices induced the National Accounts to buy directly from Mack Trucks instead of Mack dealers. Accordingly, the question of whether these customers would have bought from Toledo Mack without Mack Trucks' interference is a question of fact to be resolved by the jury or trier of fact. Thus, the Court cannot dispose of this claim in a motion for summary judgment.

2. *Breach of Contract*

In order to succeed on its claim of breach of contract, Toledo Mack must establish: (1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages. *Gorski v. Smith,* 812 A.2d 683, 692 (Pa.Super.2002). Toledo Mack claims Mack Trucks breached the Distributor Agreement by failing to pay a commission for 316 trucks allegedly sold into its AOR by Mack's National Accounts Department. Mack Trucks argues that, according to the Distributor Agreement, Toledo Mack is only entitled to a commission on a National Account sale in its AOR if Toledo Mack either "perform[ed] the usual functions of conditioning and delivery" or "engaged in activities which contributed to the sale."*See* Distributor Agreement at ¶ 7, Ex.222. Mack Trucks contends Toledo Mack has not produced evidence it performed either function.

Toledo Mack, however, has produced service records, including customer repair orders, dating from 1995 to the present which reflect service done by Toledo Mack on trucks belonging to National Account customers in Toledo Mack's AOR that bought directly from Mack Trucks. *See* D. Yeager Aff. at ¶¶ 16-22. Based on Toledo Mack's records, approximately 316 trucks were sold by Mack Trucks and placed into service within Toledo Mack's AOR, but Mack Trucks never paid or credited Toledo Mack for its service. *See* D. Yeager Aff., Ex. 83.

As such, the Court will allow a jury to determine whether Mack Trucks breached the Distributor Agreement. Therefore, Mack Trucks' Motion for Summary Judgment relating to Toledo Mack's breach of contract claim is denied.

3. *Breach of the Duty of Good Faith and Fair Dealing*

"Every contract in Pennsylvania imposes a duty of good faith and fair dealing in its performance and enforcement."*Donahue v. Fed. Express Corp.,* 753 A.2d 238, 242 (Pa.Super.2000). The Pennsylvania Supreme Court has also ruled that the duty of good faith and fair dealing applies to franchise contracts.*Witmer v. Exxon Corp.,* 495 Pa. 540, 434 A.2d 122 (1981); *See Atlantic Richfield Co. v. Razumic,* 480 Pa. 366, 390 A.2d 736 (1978).

Mack Trucks contends Toledo Mack's breach of the duty of good faith and fair dealing claim fails because it is duplicative. Toledo Mack, however, argues that no other claim asserted by Toledo Mack focuses on Mack Trucks' deceptive conduct designed to drive Toledo Mack out of business. The Court finds Toledo Mack's cause of action for breach of the implied covenant of good faith and fair dealing is not duplicative.

***13** Accordingly, summary judgment is inappropriate. Consequently, a jury or trier of fact shall decide whether Mack Trucks breached its implied duty of good faith and fair dealing with Toledo Mack.

IV. TOLEDO MACK'S MOTION FOR SUMMARY JUDGMENT AS TO MACK TRUCKS' COUNTERCLAIMS

Plaintiff/Counterclaim Defendant Toledo Mack moves for summary judgment relating to Defendant/Counterclaim Plaintiff Mack Trucks' Counterclaims for misappropriation of trade secrets and confidential business information, copyright infringement, breach of contract, and civil conspiracy.

In light of the Ohio Motor Vehicle Dealer's Board Order ("Board"), the Court will not address the misappropriation of trade secrets claim as Mack Trucks concedes the Board's Order has preclusive effect as to this claim. The Court, however, finds that the Board's Order did not have any preclusive effect as to the misappropriation of confidential business information, copyright infringement, breach of contract, and civil conspiracy claims.

A. Misappropriation of Confidential Business Information

The elements of the misappropriation of confidential business information claim are as follows:

> One who, for purposes of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information.

Den-Tal-Ez, 556 A.2d at 1231, citing Rest. Torts § 759. Confidential business information merely consists of non-public information about a business. Comment b to Rest. Torts § 759.

Mack Trucks has adduced evidence suggesting that MACSPEC 2001, the microfiche, and the price lists to PAI, Northwest Truck, and Illinois Diesel are each confidential business information because none are publicly available. Mack Trucks further contends Toledo Mack procured this information through fraudulent and improper means to advance the business interests of Mack's rivals: PAI, Northwest Truck, and Illinois Diesel.

After a careful and complete review of the evidence presented by both parties, the Court finds that there are genuine issues of material fact relating to the elements of Mack Trucks' misappropriation of confidential business information claim. Accordingly, the Court will allow a jury to determine whether Toledo Mack misappropriated confidential business information from Mack Trucks.

B. Copyright Infringement Claim

To establish a *prima facie* case of copyright infringement, plaintiff must prove the following: (1) ownership of a valid copyright; and (2) violation of one of the copyright owner's exclusive rights of ownership. *See Educ. Test Serv. v. Katzman,* 793 F.2d 533, 538 (3d Cir.1986). The parties do not dispute that Mack Trucks owns a valid copyright in the software and database contained in MACSPEC 2001 and the database contained in the microfiche. The parties dispute, however, whether a violation of one of the copyright owner's exclusive rights of ownership occurred.

***14** Specifically, Toledo Mack argues that Mack Trucks cannot show Toledo Mack violated Mack's exclusive right to distribute its copyrighted works. Mack Trucks also argues its actions were protected pursuant to the first sale doctrine because the doctrine permits the owner of a copy of work to redistribute that particular copy. 17 U.S.C. § 109 (2004) (indicating that a lawful owner of a copy of a copyrighted work may, sometimes, be able to redistribute his own copy without the copyright owner's consent).

The record suggests, however, that Toledo Mack violated Mack Trucks' exclusive distribution right. For example, Mack Trucks argues that Toledo Mack is jointly and severally liable for PAI's violations of Mack's exclusive right of reproduction, as PAI repeatedly printed pages from MACSPEC 2001 and the microfiche. Yavari Dep. Tr. at 106.10-106.13; Ruble Dep. Tr. at 88.9-88.14. PAI printed pages from the microfiche at least two or three times each week for at least five years. Ruble Dep. Tr. at 89.12-90.8. Mack Trucks further avers Toledo Mack is liable for this copying because it knowingly materially contributed to PAI's infringing acts, as Toledo Mack provided PAI with the copyrighted materials that PAI illegally reproduced. *SeeGershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d Cir.1971) ("one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing activity of another, may be held liable as a 'contributory' infringer."); Trial Tr. at 905.10-911.9 (2/5/04, Testimony of J. Toth); Yavari Dep. Tr. at 176.5-177.5; May Dep. Tr. at 95.9-96.12.; Toth Dep. Tr. at 143.22-144.3, 252.24-253.4.

The record also suggests that Toledo Mack cannot successfully claim that its actions were protected by the first sale doctrine since courts have held that "entering a license agreement is not a 'sale' for purposes of the first sale doctrine."*Microsoft Corp. v. Harmony Computers & Elec., Inc.,* 846 F.Supp. 208, 212-13 (E.D.N.Y.1994) (suggesting that a mere licensee of copyrighted work has no right to distribute copies without the copyright owner's consent).

Because Counterclaim Plaintiff/Defendant Mack Trucks has presented evidence from which a reasonable jury could determine the following: (1) Toledo Mack-with knowledge-materially contributed to PAI's copyright infringement activity, in violation of Mack Trucks' exclusive right to distribute its copyrighted works pursuant to 17 U.S.C. § 106(3); and (2) Toledo Mack is a mere licensee, not an owner of the copyrighted works, the Court finds there is a genuine issue of material fact as to Toledo Mack's copyright infringement liability. Summary judgment is thus inappropriate.

C. Breach of Contract

Mack Trucks' claim for breach of contract arises from Toledo Mack's breach of its license agreement for MACSPEC 2001 by illegally providing the system to PAI and Northwest Truck. First Amended Counterclaims ¶¶ 71-76. Under Pennsylvania law, the elements of a claim for breach of contract are: (1) the existence of a contract including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. *Ware Communications, Inc. v. Rodale Press, Inc.,* 332 F.3d 218, 225-26 (3d Cir.2003) (quoting *CoreStates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1058 (Pa.Super.Ct.1999)).

***15** Toledo Mack makes three contentions in support of its summary judgment motion on this count. First, Toledo Mack contends that the license agreement applies only to MACSPEC II, and not to MACSPEC 2001. Second, Toledo Mack avers that it allegedly canceled the agreement. Finally, Counterclaim Defendant Toledo Mack argues that Mr. Yuzuik's January 29, 2002 letter waived the license agreement's restriction on third party distribution.

Mack Trucks, however, introduces evidence in the record that indicates: (1) Toledo Mack signed a license agreement for MACSPEC II, the predecessor system to MACSPEC 2001; (2) MACSPEC 2001 is the same software as MACSPEC II, except the 2001 version operates on Windows 98, whereas MACSPEC II could only operate on earlier versions of Windows. (Trial Tr. At 95.16-96.2, 104.14-105.6 (2/2/04, Testimony of R. Yuzuik)); (3) when Toledo Mack ordered its copies of MACSPEC 2001, Mack Trucks did not enter into new license agreements or training for MACSPEC 2001 with any existing MACSPEC II licensees because the systems are virtually identical. (Trial Tr. at 95.13-96.24, 98.19-99.9 (2/2/04, Testimony of R. Yuzuik)); (Trial Tr. at 1161.7-1161.17 (2/5/04, Testimony of D. Covey)); and (4) Toledo Mack admits that MACSPEC 2001 and MACSPEC II are allegedly the same. (Trial Tr. at 860.9-860.14 (2/5/04, Testimony of J. Toth)).

Furthermore, Mack Trucks introduces evidence that Toledo Mack did not cancel the licensing agreement in a February 2001 letter because the letter merely cancelled a MACSPEC II "system," and indicated that Toledo Mack owed no more license fees for that particular returned copy of MACSPEC II. *See* Letter dated February 2, 2001 from R. Yuzuik to Toledo Mack ("This letter is to confirm the cancellation and return of your MACSPEC II *system*" (emphasis added)) (Exh. 28). Even Toledo Mack's Parts Manager, who returned the MACSPEC II copy, testified that he did not believe that the February 2001 letter cancelled the license agreement, but rather stopped further billing on the returned copy. Toth Dep. Tr. at 203.8-103.18.

Additionally, evidence in the record indicates that Mr. Yuzuik's letter did not waive Toledo Mack's license agreement restriction on third party distribution because the letter itself was directed to "Parts Managers" of authorized Mack dealers and states that the only "customers" authorized to order MACSPEC 2001 were entities which were authorized to receive the microfiche databases. Exh. 29. Trial Tr. at 118.23-119.17 (2/2/04) (emphasis added); Trial Tr. at 891.13-902.20 (2/5/04, Testimony of J. Toth). Furthermore, Toledo Mack testified that it deliberately did not inform Yuzuik that it was ordering MACSPEC 2001 for PAI because he believed that Mack Trucks would object. Toth Dep. Tr. At 180.7-181.2.

The questions of whether: (1) Toledo Mack's license agreement applies only to MACSPEC II, and not to MACSPEC 2001; (2) Toledo Mack cancelled the licensing agreement; and (3) Yuzuik's letter waived the license agreement's restriction on third party distribution, are questions of fact to be resolved by the jury or the trier of fact.

***16** After complete review of the evidence, the Court determines that the record is replete with genuine issues of material facts as to whether Toledo Mack breached its license agreement for MACSPEC 2001 by illegally providing the system to PAI and Northwest Truck. Accordingly, Toledo Mack's Motion for Summary Judgment in relation to Mack Trucks' breach of contract claim is denied.

D. Civil Conspiracy

To successfully establish a claim for civil conspiracy, Mack Trucks must show that "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means."*Neyer, Tiseo & Hindo Ltd. v. Russell,* No. Civ. 92-2983, 1993 WL 53579 at *5 (E.D.Pa. Mar.3, 1993). Toledo Mack avers that Mack Trucks can neither show an underlying unlawful act nor the requisite intent.

In light of the Court's finding that genuine issues of material fact exist regarding Mack Trucks' misappropriation of confidential business information and copyright infringement, and there is circumstantial evidence the in record which suggests Toledo Mack conspired to with PAI to injure Mack Trucks,[4] the Court shall deny Counterclaim Defendant's Motion for Summary Judgment relating to Mack Trucks' civil conspiracy claim.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is denied and Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims is denied.

ORDER

AND NOW, this 29th day of March, 2005, upon consideration of Defendant Mack Trucks' Motion for Summary Judgment (Docket No. 54), Plaintiff Toledo Mack's Response thereto (Docket No. 58), Defendant's Reply (Docket No. 59), Plaintiff's Sur-Reply (Docket No. 62), Defendant's Supplemental Reply (Docket No. 63), Plaintiff's Reply in Response to the Supplemental Reply (Docket No. 64), and Plaintiff's Motion for Leave to Supplement its Summary Judgment Briefs (Docket No. 65); Plaintiff Toledo Mack's Motion for Summary Judgment of Mack Trucks' Counterclaims (Docket.No. 55), Defendant's Response thereto (Docket No. 57), Plaintiff's Reply (Docket No. 60), Defendant's Sur-Reply (Docket No. 61), Plaintiff's Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims (Docket No. 66), and Defendant's Reply in Further Opposition to Plaintiff's Motion for Summary Judgment (Docket No. 68), it is ORDERED that Defendant's Motion for Summary Judgment is DENIED, and Plaintiff's Motion for Summary Judgment of Defendant's Counterclaims in DENIED.

Counsel for the parties are directed to schedule a status conference with the court to discuss the setting of a trial date, the filing of pretrial memorandums, etc.

All Citations

Not Reported in F.Supp.2d, 2005 WL 724117, 2006-2 Trade Cases P 75,494

Footnotes

1 A conspiracy is horizontal "when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies."*Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 465 (3d Cir.1998).

2 In order to establish a violation of Section 1 under the "rule of reason," a plaintiff must prove the following: (1) defendants contracted, combined, or conspired among each other; (2) the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) the plaintiffs were injured as a proximate result of that conspiracy. *Tunis Bros. Co. v. Ford Motor Co.,* 763 F.2d 1482 (3d Cir.1985).

3 Because *per se* analysis applies, prongs two and three of the rule of reason test are conclusively presumed satisfied, and do not need to be addressed. *Rossi,* 156 F.3d at 464-65.

4 Intent to injure in a civil conspiracy claim may be establish through circumstantial evidence. *Reading Radio, Inc. v. Fink,* 833 A.2d 199, 212 (Pa.Super.Ct.2003); *Patient Transfer Sys., Inc. v. Patient Handling Sys., Inc.,* No. Civ. A. 97-CV-1568, 1999 WL 54568 at *11 (E.D. Pa. Jan 29, 1999). Here, evidence of a conspiracy to misappropriate intellectual property for Mack's competitor provides sufficient circumstantial evidence of intent to defeat summary judgment.

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JOINT APPENDIX
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OROLOGIO OF SHORT HILLS, INC. and OROLOGIO INTERNATIONAL LTD., INC., Plaintiffs, v. THE SWATCH GROUP (U.S.) INC., Defendant.	Civil Action No. 11-cv-6854-SDW-SCM Hon. Susan D. Wigenton, U.S.D.J. **NOTICE OF APPEAL TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT**

Notice is hereby given that Plaintiffs Orologio of Short Hills, Inc. and Orologio International Ltd., Inc. (together, "Orologio") in the above-named case hereby appeal to the United States Court of Appeals for the Third Circuit from the July 23, 2015 Order (Dkt. No. 2:11-cv-6854-SDW-SCM, Doc. No. 142) and Opinion (Dkt. No. 2:11-cv-6854-SDW-SCM, Doc. No. 141) entered in this action by the United States District Court for the District of New Jersey granting Defendant Swatch Group (U.S.), Inc.'s ("SGUS") motion for summary judgment, denying as moot Orologio's motion for partial summary judgment, and denying Orologio's motion to strike SGUS's Answer and for other sanctions based upon SGUS's spoliation of evidence.

Respectfully submitted,

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Dated: August 20, 2015

5425355

CERTIFICATION OF SERVICE

I hereby certify that on this date, I caused two (2) copies of the foregoing Notice of Appeal to be filed with the Clerk of Court of the United States District Court for the District of New Jersey via Federal Express and one (1) copy of the foregoing Notice of Appeal to be electronically filed via the CM/ECF system and served on the following counsel of record via ECF and via Federal Express:

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RONALD L. ISRAEL

Dated: August 20, 2015

5425355

NOT FOR PUBLICATION

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

OROLOGIO OF SHORT HILLS, INC. and OROLOGIO INTERNATIONAL LTD., INC., Plaintiffs, v. THE SWATCH GROUP (U.S.) LTD., INC., Defendant.	Civil Action No. 11-6854 **ORDER** July 23, 2015

WIGENTON, District Judge.

This matter, having come before this Court on (1) The Swatch Group's ("Defendant" or "Swatch") Motion for Summary Judgment pursuant to FED. R. CIV. P. 56., (Dkt. No. 109) (2) Orologio of Short Hills ("Orologio") and Orologio International Ltd.'s ("Orologio International") (collectively, "Plaintiffs") Motion for Partial Summary Judgment pursuant to FED. R. CIV. P. 56 (Dkt. No. 103), and (3) Plaintiffs' Motion Strike Defendant's Answer and for other sanctions based upon Defendant's spoliation of evidence ("Motion to Strike") (Dkt. No. 106), and this Court, having carefully considered the submissions and arguments of the parties, for the reasons stated in this Court's Opinion dated July 23, 2015,

IT IS on this 23rd day of July, 2015,

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment is **DENIED** as **MOOT**; and it is further

ORDERED that Plaintiffs' Motion to Strike is **DENIED**.

SO ORDERED.

s/ Susan D. Wigenton, U.S.D.J.

Orig: Clerk
cc: Parties
Magistrate Judge Steven C. Mannion

NOT FOR PUBLICATION

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

OROLOGIO OF SHORT HILLS, INC. and OROLOGIO INTERNATIONAL LTD., INC., Plaintiffs, v. THE SWATCH GROUP (U.S.) LTD., INC., Defendant.	Civil Action No. 11-6854 **OPINION** July 23, 2015

WIGENTON, District Judge.

Before this Court is The Swatch Group's ("Defendant" or "Swatch") Motion for Summary Judgment pursuant to FED. R. CIV. P. 56. Orologio of Short Hills and Orologio International Ltd. (collectively, "Plaintiffs" or "Orologio") move for Partial Summary Judgment pursuant to FED. R. CIV. P. 56 and to Strike Defendant's Answer and for other sanctions based upon Defendant's spoliation of evidence ("Motion to Strike"). This Court has jurisdiction over this action pursuant to 28 U.S.C § 1331. Venue is proper pursuant to 28 U.S.C. § 1391.

For the reasons discussed below, this Court **GRANTS** Defendant's Motion for Summary Judgment. As such, Plaintiffs' Partial Motion for Summary Judgment is **DENIED** as **MOOT**. Plaintiffs' Motion to Strike is **DENIED.**

FACTUAL BACKGROUND

In 1988, Orologio opened a store formerly located at the Garden State Plaza Mall in Paramus, New Jersey. (Compl. ¶¶ 10, 12.) In 1994, it opened a store at The Mall at Short Hills in

Short Hills, New Jersey. (*Id.* at ¶ 12.) Orologio is a retailer of high-end watches who allegedly competes with retailers in the "cross-elastic" "New Jersey/New York" market. (*Id.* at ¶¶ 1, 14-16.) From the outset, Orologio sold Swatch's Omega products.[1] (*Id.* at ¶ 12.)

Swatch is a corporation with its principal place of business located in Weehawken, New Jersey. (Compl. ¶ 7.) It is a subsidiary of The Swatch Group, Ltd., a Swiss Holding Company that owns various watch brands. (Dkt. No. 109, Ex. B, ¶ 2.) Among these brands, Omega is a high-end watch brand. (*Id.*, Ex. B. ¶¶ 17-19; Ex. C., pp. 62, 71, 137; Ex. D, ¶ 18.) Swatch sells Omega via authorized dealers, such as Orologio. (*See id.*, Ex. C, pp. 180-182.) Authorized dealers buy Omega from Swatch and then resell it to customers. (*Id.*) Dealers may cease selling Omega at any time. (*Id.*, Ex. C, pp. 64-65, 154-156, 261; Ex. B ¶ 19.)

Swatch contends that no written agreement exists between it and Orologio within the meaning of the New Jersey Franchise Practices Act, N.J.S.A. § 56:10-3 ("NJFPA"). (Dkt. No. 109, Ex. B, ¶¶ 5-7; Ex. C, pp. 154-156, 261, 263; Ex. D, ¶¶ 2-3, 10.) Orologio, however, primarily argues that the following constitute written arrangements under the NJFPA: (a) a "Brand Policy Statement" issued by Swatch to all authorized dealers detailing how to handle, display, and present Omega at the retailer's store. (*Id.*, Ex. C, pp. 86, 89.); (b) Swatch's written Internet Brand Policy for the use of its proprietary images and products on the retailer's website. (*Id.*, Ex. E, pp. 78-79.); (c) Swatch's "Selective Distribution Program," which was used to govern its selection of dealers authorized to sell Omega products. (*Id.*, Ex. B, ¶¶ 14, 17-18; Ex. C, pp. 76-77, 79; Ex. D, ¶ 18.); and (d) a voluntary "Partner Plan" program administered by Swatch to enable dealers to obtain a flat fee percentage credit on future sales in exchange for dealers achieving a mutually agreed-upon

[1] Plaintiffs sold several major brands, including its biggest seller, Breitling. (Dkt. 1 ¶¶ 30; State Ct. Verified Compl. ¶¶ 14, 49, 65, Ex. H; Orologio Sales Reports 2011-2014, Ex. N.)

minimum sales threshold. (*Id.*, Ex. B, ¶¶ 9, 11-13; Ex. C, pp 149-152, 154, 162; Ex. D, ¶¶ 12-14). The program required all dealers to carry a sixty-five unit minimum assortment of Omega watches. (*Id.*, Ex. C, pp. 128-129, 131, 132-133.) Orologio participated in the Partner Plan. (*Id.*, Ex. A, 171.) Orologio accumulated the following credits under the Partner Plan: $2,394 in 2004 and $788 in 2005. In 2007, Orologio did not participate in the Partner Plan. (*Id.*, Ex. B. ¶ 12; Ex. M.) In 2008-2009, it did not achieve the required sales goals that would have triggered a credit. (*Id.*)

Additionally, Omega's "Co-op Commitment Agreement" allowed authorized dealers to apply to Swatch for advertising support. (*Id.*, Ex. C, pp. 168, 170-172, 175-176, 185, 192, 196, 206; Ex. E, pp. 109-110; Ex. F pp. 75-77, 80.) The co-op support program is separate from the Partner Plan program. (*Id.*, Ex. C, pp. 153, 168, 185.) Co-op support was advertising in which the dealer and Swatch shared the costs of advertising equally. (*Id.*, Ex. E, 33; Ex. F, 28-29, 80, 84-86; Ex. L, 87.) Although Orologio claims that after 2007 dealers had inadequate notice of the co-op policy, all authorized dealers could apply for, and present, a co-op or media plan to Swatch. (*Id.* Ex. C, pp. 170-172, 175, 192, 196.) Two types of co-ops exist: a dealer Co-op Commitment Agreement and a Brand-Initiated Co-op Commitment Agreement. (*Id.* at 205.) Swatch allocated co-op support to dealers on a case-by-case basis.[2] (*Id.*, Ex. E, pp. 109-110.) Orologio received co-op advertising support "over the more than 20-year relationship," including in 2006. (*Id.*, Ex. A, 113-116.)

Additional support existed. First, dealers were sometimes "tagged," or referenced, in Swatch-initiated advertisements. (*Id.*, Ex. C, 280.) Dealers did not pay to be tagged in such

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[2] Allegedly, Orologio requested co-op support on an ongoing basis, but was told there was no money. (Dkt. No. 109, Ex. A, 113-117.) Swatch asserts that Orologio's co-op inquiries were general and that Orologio never proposed a specific co-op proposal. (Dkt No. 109, Rule 56.1 Statement, 6:38).

advertisements. (*Id.*, Ex. C, 227.) Orologio's witness testimony could not verify whether it had made a specific request for tagging. (*Id.*, Ex. A, 113.) Second, dealers could also request that Swatch pay a slotting fee in exchange for placing Swatch's pieces in prime shelf space in the store.[3] In testimony, Orologio did not confirm that it had specifically requested a slotting fee. (*Id.*, 173-176.)

As a part of its branding strategy, Swatch provided free training and education to its authorized dealers. (*Id.*, Ex. B, ¶ 20; Ex. C, pp. 117-118.) It also furnished free displays to dealers, including the "James Bond" and "NASA Moon Landing" displays given to Orologio. (*Id.*, Ex. B, ¶15-18; Ex. C, pp. 121-122.) Swatch sponsored a special event for Orologio at the Garden State Plaza Mall store, for which it paid for an exhibit of a NASA lunar module. Swatch also provided custom display cases to Orologio for display of Omega products. (*Id.*, Ex. A, pp. 267-269.) Swatch placed authorized dealers on its website so that customers interested in its products may purchase from them. (*Id.*, Ex. A, pp. 244-246.) Although Orologio store information was located on the website, for some temporary period of time, Orologio was excluded from the website's map of company stores due to error. (*Id.*) Despite Orologio's testimony suggesting a strong likelihood that Orologio lost business due to this temporary lapse, it has not specifically identified lost sales or customers. (*See id.*)

Although all authorized dealers had the same ability to order products from Swatch, limited edition items were made available on a "first-come-first-served" basis to all authorized dealers in good credit standing. (*Id.*, Ex. C, pp. 249, 261; Ex. E, pp. 187-188.) As a result, Orologio did not receive at least two limited edition watches. (*Id.*, Ex. E, pp. 189:4-190:16.) Therefore, Orologio

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[3] Slotting fees have been provided to only one retail store (Tourneau), because of exceptional positioning in its New York City and Las Vegas stores. (*Id.*, Ex. C, pp. 243-247.)

enrolled in the Selective Distribution program in order to obtain better access to Swatch's products. (*Id.*, Ex. A, pp. 293-295.)

Orologio was allegedly placed on credit hold because "periodically" in the years after 2009 its payments were "past due." (*Id.*, Ex. E, 198.) Orologio also allegedly did not maintain monthly assortments or required product replenishments for Swatch's Omega products. (*Id.*, Ex. E, pp. 197-200; Ex. G.)

On April 18, 2011, Swatch terminated Orologio as an authorized dealer because Swatch was in the process of opening an Omega boutique in the same mall. (*Id.*, Ex. C, pp. 267-268, 274, 277.) Swatch claims that it opened the company store consistent with an industry-wide trend away from authorized "mom-and-pop" dealerships and toward company stores. (Dkt. No. 109, Def.'s Br., 8.) Orologio's business actually increased after it was terminated as an Omega dealer. (*See* Orologio Sales Reports 2011-2014, Ex. N.)

PROCEDURAL HISTORY

On May 10, 2011, Orologio filed a lawsuit alleging a violation of the New Jersey Franchise Practices Act against Omega USA in New Jersey Superior Court, Chancery Division, General Equity Part, Essex County ("New Jersey Superior Court"). (*Id.*, Ex. H.) Orologio requested a preliminary injunction against Swatch's termination of Orologio as an authorized dealer. (*Id.,* Ex. I, pp. 4:5-5:6.) On June 8, 2011, that court denied the request after oral argument. (*Id.*, Ex. J.) On August 10, 2011, the New Jersey Superior Court, Appellate Division, denied Orologio's motions for leave to appeal and summary disposition. (*Id.*, Ex. K.)[4]

[4] Orologio asserts that the parties agreed to a voluntary dismissal without prejudice. (Dkt. No. 126, 7:33.)

Orologio filed its Complaint in this Court on November 22, 2011. (Dkt. No 1.) It alleges: a violation of the Robinson-Patman Act ("Count I"), a violation of the New Jersey Franchise Practices Act ("Count II"), and a breach of the covenant of good faith and fair dealing ("Count III"). (Compl. ¶¶ 80-100.) Orologio further seeks a declaratory judgment and injunctive relief ("Count IV"). (*Id.* at ¶ 101-103.)

On January 19, 2015, Orologio moved for partial summary judgment pursuant to FED. R. CIV. P. 56 with respect to its Robinson-Patman Act, 15 U.S.C. § 13, claims (Count I).[5] (Dkt. No. 103.) On January 26, 2015, Swatch filed its brief in opposition. (Dkt. No. 112.) On February 20, 2015, Orologio filed its reply. (Dkt. No. 125.)

On January 19, 2015, Swatch moved for summary judgment pursuant to FED. R. CIV. P. 56. (Dkt. No. 109). On February, 4, 2015, Orologio filed its brief in opposition. (Dkt. No. 118.) On February 20, 2015, Swatch filed its reply. (Dkt. No. 126.)

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

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[5] On January 19, 2015, Orologio moved to strike Swatch's Answer and for other Sanctions based on Swatch's alleged spoliation of evidence, namely, the tagged Omega commercials. (Dkt. No. 106.) On January 26, 2015, Swatch filed its brief in opposition. (Dkt. No. 113.) On February 20, 2015, Orologio filed its reply. (Dkt. No. 124.) This Court finds that Orologio has failed to show bad faith on Swatch's part, or an attempt to obstruct Orologio, or that there was actual spoliation by Swatch. *See Bull v. United Parcel Service, Inc.*, 665 F.3d 68, 73 (3d Cir. 2012). Orologio's issues regarding the commercials to support its "tagging" claim are weak. The actual commercials are not required to prove that claim, as there are many other avenues available for proof. Accordingly, the Motion to Strike is denied in its entirety, including the adverse negative inference and attorneys' fees requests.

genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is only "material" for purposes of a summary judgment motion if a dispute over that fact "might affect the outcome of the suit under the governing law." (*Id.* at 248.) A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The dispute is not genuine if it merely involves "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party meets its initial burden, the burden then shifts to the nonmovant who must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations, speculations, unsupported assertions or denials of its pleadings. *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255).

The nonmoving party "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (quoting *Celotex Corp.*, 477 U.S. at 325). Further, the nonmoving party is required to "point to concrete evidence in the record which supports each essential element of its case." *Black Car Assistance Corp. v. New Jersey*, 351 F. Supp. 2d 284, 286 (D.N.J. 2004). If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which . . . [it has] the burden of proof," then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-23.

Furthermore, in deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The nonmoving party cannot defeat summary judgment simply by asserting that certain evidence submitted by the moving party is not credible. *S.E.C. v. Antar*, 44 Fed. Appx. 548, 554 (3d Cir. 2002).

DISCUSSION

I. New Jersey Franchise Practices Act ("NJFPA")

To maintain a claim under the NJFPA, Orologio must prove it had a franchise arrangement with Swatch. *See Neptune T.V. & Appl. Serv., Inc. v. Litton Microwave Cooking Prods. Div., Litton Sys., Inc.*, 190 N.J. Super. 153, 158 (App. Div. 1983). The NJFPA provides:

> "Franchise" means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

N.J.S.A. § 56:10-3(a) (emphasis added). Hence, to determine whether the relationship between Orologio and Swatch constituted a franchise under the NJFPA, this Court must find that (1) Swatch granted a license to Orologio, and (2) there was a "community of interest" between the parties. *See Colt Indus., Inc. v. Fidelco Pump & Compressor Corp.*, 844 F.2d 117, 119 (3d Cir. 1988).[6]

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[6] In addition, the NJFPA applies only to:

> [A] franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next

A. Written Arrangement for a License

Orologio contends that various documents issued by Swatch, including the Brand Policy Statement, Internet Brand Policy, Selective Distribution Program, and the voluntary Partner Plan, each constitute a "written arrangement" under the NJFPA. Orologio also argues that Swatch "granted" it a license to use Omega's trademarks.

This Court finds that Orologio is unable to point to any specific written arrangement granting it a license under the NJFPA. *See Finlay & Assocs., Inc. v. Borg-Warner Corp.*, 146 N.J. Super. 210, 219-20 (Law Div. 1976) (finding that under the NJFPA, the term "grant" "relates to the requirement of a writing," the word "license" "implies a proprietary interest," and "oral permission [is] not [] enough under the statute"). Moreover, no license was granted to Orologio because Swatch merely provided Orologio with advertising materials such as window and counter displays. (Swift Cert. ¶¶ 15-17, Ex. B; Swift Tr. pp. 121-122, Ex. C); *Colt*, 844 F.2d at 119 ("The [m]ere furnishing of advertising materials . . . does not fulfill the letter or intent of the Franchise Practices Act.") (quoting *Finlay*, 146 N.J. Super. at 219) (internal quotation marks omitted). Similarly, in *Colt*, the Third Circuit examined an agreement authorizing Fidelco to display Colt's trademark and to advertise that it was a Colt distributor. 844 F.2d at 119. The Third Circuit noted that "if this limited agreement constitutes a license to use a trademark, then any business selling a name brand product would, under New Jersey law, necessarily be considered as holding a license." *Id.* at 120.

> preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise.

N.J.S.A. § 56:10-4(a).

The NJFPA license "is one in which the franchisee wraps himself with the trade name of the franchisor and relies on the franchisor's goodwill to induce the public to buy." *Liberty Sales Assocs., Inc. v. Dow Corning Corp.*, 816 F. Supp. 1004, 1010 (D.N.J. 1993). "The trademark, tradename reference means and implies use of that name in the very business title of the franchisee and a holding out or perhaps representation to the public of some special relationship or connection. Simply selling goods or distributing materials which bear the manufacturer's name or trademark does not license use of the trademark." *Finlay*, 146 N.J. Super. at 219 (internal quotation marks omitted). Here, Orologio "wrapped" itself around several major brands, including its biggest seller, Breitling. (Dkt. 1 ¶¶ 30; State Ct. Verified Compl. ¶¶ 14, 49, 65, Ex. H; Orologio Sales Reports 2011-2014, Ex. N.) There is no indication that a special relationship existed between the parties beyond Orologio's straightforward advertising and selling of Swatch's Omega watches. Therefore, this Court finds that the furnishing of advertising materials, coupled with Orologio's lack of reliance on Omega's brand, did not create a license under the NJFPA. As Orologio fails to satisfy a necessary element required to establish an NJFPA claim, summary judgment as to this claim is warranted.

B. Community of interest

Even assuming, *arguendo*, that the license factor was satisfied, there was no community of interest between the parties. New Jersey courts analyzing the "community of interest" aspect focus on several factors, including: "(1) [the] licensor's control over the licensee, (2) the licensee's economic dependence on the licensor, (3) disparity in bargaining power; and (4) the presence of a franchise-specific investment by the licensee." *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1140 (3d Cir. 1991). Economic dependence is the most important factor in the community of interest inquiry. *Cooper Distrib. Co. Inc. v. Amanda Refrig. Inc.,* 63 F.3d 262, 272 (3d Cir. 1995).

This Court finds that Orologio and Swatch did not share a community of interest within the meaning of the NJFPA. Based on the record, there was a lack of control and dependence because Orologio had the freedom to choose whether to conduct business with Swatch. (Swift Tr. pp. 64-65, Ex. C.) Orologio was not economically dependent on Swatch, as Orologio relied on several high-end watch brands, not just Omega. More importantly, Orologio's business actually increased after it was terminated as an Omega dealer. (*See* Orologio Sales Reports 2011-2014, Ex. N.); *New Jersey American, Inc. v. The Allied Corp.*, 875 F.2d 58, 65 (3d Cir. 1989) (finding no community of interest because the plaintiff relied not only on the defendant's supplies but also on supplies from several manufacturers). Thus, the absence of a community of interest warrants summary judgment on the NJFPA claim.

II. Robinson-Patman Act ("RPA")

The RPA, enacted in 1936, amended the Clayton Act's regulation of price discrimination by addressing fairness concerns for small distributors who were being threatened by the influx of chain stores. *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1422 (11th Cir. 1990). The RPA's goal is to ensure "that businessmen at the same functional level . . . start on equal competitive footing so far as price is concerned" and "to assure that all sellers regardless of size, competing directly for the same customers . . . receive evenhanded treatment from their suppliers." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1967).

Orologio alleges violations of Sections 2(d) and 2(e) of the RPA.[7] Section 2(e) is substantially similar to § 2(d) except that § 2(e) prevents "a seller from providing services (as opposed to payments for services) to customers to be used in connection with the resale of goods unless the services are available to all competing customers on proportionally equal terms." *Hygrade Milk & Cream Co., Inc. v. Tropicana Products, Inc.*, 1996 WL 257581, *12-13 (S.D.N.Y. May 16, 1996); *see also* 15 U.S.C. §§ 13(d), (e); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Despite the slightly different language of these sections, courts apply the same analysis to both. *See World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1479 n. 6 (10th Cir.), cert. denied, 474 U.S. 823 (1985); *Hygrade Milk & Cream Co.,* 1996 WL 257581 at *12. In sum, §§ 2(d) and 2(e) require that purchasers "be given an equal opportunity to participate in certain types of seller programs relating to the resale of products, such as advertising and promotional programs, and that the benefits under those programs be disbursed on equal terms to purchasers in proportion to some objective value of their participation." *Alan's of Atlanta*, 903 F.2d at 1423. "Any method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period." 16 C.F.R. § 240.9(a).

Orologio fails to carry its burden in demonstrating who its actual competitors are. *See Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 166-68 (2006); *see also Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 390 (10th Cir. 1985) (noting that Sections §§ 2(d) and 2(e) require that "the favored and disfavored customers stand in some competitive relationship with one another"). In an effort to identify its competitors, Orologio cites

[7] Orologio's Complaint also briefly alleges price discrimination under RPA § 2(a). (Dkt. No. 1, ¶ 86.) This claim will be dismissed, as Orologio fails to advance any facts or evidence supporting the claim that Swatch offered discounted watches to favored dealers.

to the Fruda deposition, where a list of all Omega dealers that obtained co-op assistance in Connecticut, New Jersey, New York, and Pennsylvania was presented. (*See* Dkt. No. 121-13.) This Court is not persuaded that all Omega dealers that received co-op assistance were in fact competitors under the RPA, as the record is devoid of evidence of any competition between the dealers. Orologio also lists specific dealers in the New York City area that received tagging from Swatch, including London Jewelers, Wempe, Carat, JB Hudson, and Bachendorf's. There is no evidence, however, that these dealers compete with Orologio, and even if they were actual competitors, there is nothing in the record suggesting that tagging these specific dealers led to Orologio's lost sales. *See Godfrey v. Pulitzer Publ'g Co.*, 276 F.3d 405, 411-12 (8th Cir. 2002) (holding that summary judgment was properly granted because the record showed only one instance of a lost sale and the expert failed to provide "any tangible evidence, numerical or anecdotal, to show that the [] dealers in fact compete" under the RPA). This lack of evidence alone is dispositive.

Even if Orologio had demonstrated who its actual competitors were, the record shows that Swatch offered proportionally equal opportunities to Orologio and its other dealers. Orologio primarily argues that Swatch discriminated against it in administrating the Partner Plan, the co-op program, tagging, and slotting fees. This Court will briefly discuss each program in turn.

A. Partner Plan

The undisputed facts demonstrate that the Partner Plan was administered proportionally equal based upon the participating dealers' product turnover. The Partner Plan, which Orologio participated in, was a voluntary program that enabled dealers to obtain a flat fee percentage credit on future sales in exchange for dealers achieving a mutually agreed-upon minimum sales threshold. The program required all dealers to carry a sixty-five unit minimum assortment of

Omega watches. In 2008 to 2009, Orologio did not achieve the required sales goals that would have triggered a credit. Such volume requirements are acceptable under the RPA because they properly allow for service adjustments based upon the dealers' capabilities, such as was the situation here, where Orologio was placed on credit hold for past due payments. *See Simplicity Pattern Co.*, 360 U.S. at 61 n. 4. Hence, the Partner Plan presents no violation of the RPA.

B. Co-op

This Court finds that the co-op program, which allowed dealers to apply for advertising support, complied with the RPA because Orologio had sufficient notice of the program. *See Labrador, Inc. v. Iams Co.*, 1995 WL 714454, *6 (C.D. Cal. Sept. 19, 1995), *aff'd*, 1997 WL 8450 (9th Cir. Jan. 8, 1997). Although Orologio claims that after 2007 dealers had inadequate notice of the co-op policy, all authorized dealers could apply for and present a co-op or media plan to Swatch. In fact, Orologio had adequate notice, as it had received co-op advertising support "over the more than 20-year relationship," including in 2006. As such, the co-op program complied with the RPA.

C. Tagging

Orologio argues that Swatch improperly provided Orologio's alleged competitors free "tagging," or referencing, in Swatch-initiated advertisements without providing Orologio with notice of these opportunities. However, Orologio's witness testimony could not verify whether it had ever made a request for tagging, and there is no evidence that Orologio was unaware that it could make a tagging request. Therefore, this Court does not find support for improper tagging under the RPA.

D. Slotting Fees

Similarly, Orologio argues that Swatch did not inform it of the opportunity to request that Swatch pay a slotting fee in exchange for placing Swatch's pieces in prime shelf space in the store. However, Swatch offered slotting fees to only one retail store, Tourneau, because of exceptional positioning in its New York City and Las Vegas stores. Because Swatch did not consider Orologio's positioning of Omega as conveying such value and because slotting fees themselves are generally not considered valuable, no RPA violation occurred. *See El Aguila Food Products, Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612, 632-33 (S.D. Tex. 2003), *aff'd*, 131 Fed. Appx. 450 (5th Cir. 2005).

CONCLUSION

For the reasons stated above, Orologio is not a franchise under the NJFPA. Additionally, Orologio fails to meet the required criteria for either a Section 2(d) or 2(e) claim. Accordingly, this Court **GRANTS** Defendant's Motion for Summary Judgment. As such, Plaintiffs' Partial Motion for Summary Judgment is **DENIED** as **MOOT**. Plaintiffs' Motion to Strike is **DENIED**.

s/ Susan D. Wigenton, U.S.D.J.

Orig: Clerk
cc: Parties
Magistrate Judge Steven C. Mannion