Schieffelin & Co., LLC v Piaggio Group Am., Inc.
2013 NY Slip Op 33085(U)
December 4, 2013
Sup Ct, New York County
Docket Number: 601778/2009
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

SCHIEFFELIN & COMPANY, LLC D/B/A VESPA SOHO,

Plaintiff,

-against-

PIAGGIO GROUP AMERICAS,INC.,

Defendant.

INDEX NO. 601778/2009

MOTION DATE July 8, 2013

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this application to dismiss action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: December 4, 2013

O. PETER SHERWOOD, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

SCHIEFFELIN & COMPANY, LLC,
D/B/A VESPA SOHO,

Plaintiff,

-against-

PIAGGIO GROUP AMERICAS, INC.

Defendant.

----------X

DECISION AND ORDER

Index No.: 601778/2009
Mot. Seq. Nos. 005

O. PETER SHERWOOD, J.:

I. OVERVIEW

In this action by plaintiff, Schieffelin & Company, LLC d/b/a Vespa Soho ("Schieffelin"), an authorized sales and service dealer of Vespa motor scooters, against defendant, Piaggio Group, the exclusive importer of Vespa motor scooters ("Piaggio"), seeks to recover compensatory damages, obtain an accounting and attorney fees. It asserts cause of action for tortious interference with contractual relations, violations of various sections of the New York State Franchised Motor Vehicle Dealer Act ("Dealer Act") stemming from Piaggio's alleged intentional procurement of breach of a contract between Schieffelin and non-party Andrew Hadjiminas, for the sale of plaintiff's Vespa franchise to Hadjiminas, as well as other acts. Plaintiff contends that Piaggio enticed Hadjiminas away by granting him the right to open a Brooklyn franchise of Vespa despite knowing of plaintiff's Non-Compete Agreement with Hadjiminas in which Hadjiminas agreed that for two years he would not attempt to open a Vespa dealership other than the one he was purchasing from plaintiff and also despite knowing that plaintiff was searching for a location to open a Brooklyn franchise. Defendant also permitted a competing business franchise, Vespa Potamkin, to open in Manhattan within six miles from Vespa Soho. On February 4, 2009, plaintiff filed a request with the Department of Motor Vehicles for an adjudicatory process when defendant allowed Potamkin Manhattan to open a franchise. In retaliation, on or about March 21, 2009, defendant served a 90-day notice terminating plaintiff's franchise. By letter dated October 14, 2009, Piaggio withdrew its 2009 Notice of Termination without prejudice.

On June 9, 2009, Schieffelin commenced this action by filing the summons and complaint, asserting ten causes of action: tortious interference with contract [defendant's contemplated sale to Hadjiminas] (First Cause of Action); Violation of Vehicle and Traffic Law ("VTL") § 466 (2) (Dealer Act, Article 17-A §§ 460 *et seq.*) (unreasonable restriction of sale of franchise) (Second Cause of Action); Violation of VTL § 463 (2)(d)(1) (unlawful termination of franchise agreement) (Third Cause of Action); Violation of VTL § 463 (2)(d)(1) (opening of new Manhattan franchise amounted to constructive termination of plaintiff's franchise without due cause) (Fourth Cause of Action); Violation of VTL § 463 (2)(e) (wrongful termination of franchise agreement) (Fifth Cause of Action); Violation of VTL § 463 (2)(CC)(1) (establishment of new Vespa franchise in Manhattan without good cause) (Sixth Cause of Action); Injunctive relief pursuant to VTL § 463(e)(1) enjoining Piaggio from terminating, suspending, canceling or restricting plaintiff's rights under franchise agreement (Seventh Cause of Action); Injunction pursuant to §21 of the Dealer Agreement between plaintiff and defendant enjoining Piaggio from the same conduct as specified in the Seventh Cause of Action (Eighth Cause of Action); breach of good faith and fair dealing (Ninth Cause of Action); and award of attorneys' fees, costs and disbursements pursuant to VTL § 469 (Tenth Cause of Action). Schieffelin seeks to recover damages of $1.7 million.

An amended complaint was served on or about June 13, 2011 by plaintiff's new counsel, Lance Grossman, pursuant to a stipulation between the parties. The amended complaint re-frames and restates the facts and asserts nine causes of action against Piaggio for tortious interference with contract as to its prospective sale to Hadjiminas (First Cause of Action); violations of VTL § 460 (Second Cause of Action); violation of VTL § 463 (d) (1) by serving a 2009 Letter of Termination later withdrawn by defendant (Third Cause of Action); violation of VTL § 463 by offering Hadjiminas pricing not offered to other dealers (Fourth Cause of Action); violation of VTL § 463 (2)(d)(1) by the operation by Potamkin of a new Vespa dealership in Manhattan (Fifth Cause of Action); violation of § 463 (2) (CC)(1) by the establishment without notification to plaintiff of a new Vespa Potamkin dealership in Manhattan (Sixth Cause of Action); breach of covenant of good faith and fair dealing (Seventh Cause of Action); violation of § 463 by selling Vespa motor scooters to the public through entities that do not have dealership agreements with Piaggio (Eighth Cause of Action); and an award of attorneys' fees pursuant to VTL § 469 (Ninth Cause of Action).

Issue was joined as to the amended complaint on July 1, 2011, by service of defendant's answer to the amended complaint in which defendant generally denies all material allegations of the amended complaint, and asserts eight affirmative defenses including failure to state a cause of action, the causes of action are barred by documentary evidence, Statute of Frauds, laches, unclean hands and estoppel, failure to mitigate damages, the statutory scheme cited in the Amended complaint is not applicable to the Brooklyn and Potamkin dealerships, and the parties' conduct is governed by the terms of a written contract.

After an unusually protracted discovery phase of this litigation, on April 26, 2013, plaintiff filed the Note of Issue for a jury trial. Piaggio now moves for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the amended complaint. Schieffelin opposes the motion and cross moves for partial summary judgment on its fourth and eighth causes of action.

II. BACKGROUND

Except as otherwise noted, the facts of this matter are derived from Piaggio's Rule 19-a Statement of Material Facts. Piaggio, a subsidiary of Piaggio & C. S.p.A. of Italy, is engaged in the business of importing into the United States motor vehicles, including motor scooters bearing the Vespa brand ("Vespa"), together with related parts and accessories for Vespa motor scooters.

Schieffelin was an authorized sales and service dealer of Vespa motor scooters pursuant to a written Authorized Dealer Sales and Service Agreement ("Dealer Agreement"), dated August 15, 2006. Pursuant to the Dealer Agreement, Schieffelin was granted "the non-exclusive privilege to sell" Vespa branded motor scooters, and related parts, accessories, clothing and merchandise, "the non-exclusive privilege to service Vespa Scooters" and the right to operate a Vespa Dealership at one Approved Location, specified as 13 Crosby Street in Manhattan (Ducci Aff. In Support, Exhibit "3", Dealer Agreement ¶ 1.1, p. 2). The term of the Dealer Agreement was for a period of three years commencing on August 15, 2006. Schieffelin did not have an agreement with Piaggio to operate a second Vespa dealership in Brooklyn or to sell or service Vespa motor scooters from any location in Brooklyn. Nor did Schieffelin have any exclusive territorial right to operate a Vespa dealership in Brooklyn.

By letter dated October 27, 2006, Piaggio gave Schieffelin a one year (October 27, 2006 through December 31, 2007) exclusive right to operate a Vespa dealership in Manhattan, conditioned upon Schieffelin purchasing an agreed number of Vespa scooters in 2007 (Ducci Aff. Exhibit "9"). The exclusivity period ended December 31, 2007 and was not renewed.

In or about August 2007, Schieffelin decided to sell its Vespa Dealership and placed the business up for sale with a business broker, Clear Rock Business Brokers ("Clear Rock") (Amended Compl. ¶ 19). In or about December 2007, Zachary Schieffelin introduced Andrew Hadjiminas to Mr. Paolo Timoni ("Timoni"), President and CEO of Piaggio, and asked that Timoni approve the sale of the Vespa Soho dealership to Hadjiminas. Timoni and Piaggio consented to the sale. A Letter of Intent for the proposed sale with a purchase price of $1.7 million was executed by Schieffelin and Hadjiminas (Ducci Aff. Exhibit "4"). In addition to the Letter of Intent and in connection with the discussions between Schieffelin and Hadjiminas, Hadjiminas executed a Confidentiality and Non-Disclosure agreement dated August 1, 2007 ("Confidentiality Agreement") (Plaintiff's Exhibit "4"). On August 30, 2007, Schieffelin and Hadjiminas entered into a separate Non-Compete Agreement and Non-Circumvention Agreement ("Non-Compete Agreement") (Ducci Aff. Exhibit "8"). The Non-Compete Agreement provides, in pertinent part, as follows:

> 2. Non-Circumvention. For a period of two (2) years following the Effective Date of this Agreement, Recipient shall not, without the prior written consent of Seller, which consent Seller may withhold in its sole discretion,
>
> a. Utilize any Confidential Information to circumvent or compete with Seller on the specific Business Opportunity which includes amongst other things any attempt to open a Piaggio or Vespa dealership other than the Business Opportunity currently contemplated between the parties or
>
> b. Utilize information furnished or disclosed to Recipient by a non-party to this Agreement without any obligation of confidentiality and through no wrongful act of the recipient Party, or information independently developed by Recipient relative to the Business Opportunity, to circumvent or compete with Seller on the specific Business Opportunity.

The Non-Compete Agreement identifies the "Business Opportunity" as the potential sale of all or substantially all of Schieffelin's assets, as well as assignment and assumption of all Schieffelin's agreements. Piaggio was not a party to either the Letter of Intent, the Confidentiality Agreement or the Non-Compete Agreement between Schieffelin and Hadjiminas.

On or about December 20, 2007, Hadjiminas formed Hadjiminas & Co. for the purpose of completing the contemplated transaction. Hadjiminas later attempted to lower the purchase price stated in the Letter of Intent from $1.7 million to $ 1 million leading to the formal termination of the Letter of Intent on or about January 15, 2008 (Ducci Aff. Exhibit "5"). Thereafter, Hadjiminas entered into a Dealer Agreement with Piaggio, dated February 25, 2008, to operate a Vespa dealership in Brooklyn (*id.* Exhibit "7"). Although Schieffelin operated a motor scooter sales and service facility in Brooklyn (from which location Schieffelin states it did not sell Vespa motor scooters), it did not have a right to sell Vespa products from any location other than the Crosby Street location.

On or about March 28, 2008, Schieffelin commenced an action against Hadjiminas in this court titled *Schieffelin & Co., LLC v Andrew Hadjiminas and Hadjiminas,* Index No. 104451/08 ("Hadjiminas Action") for breach of the proposed purchase and sale agreement, breach of the Confidentiality Agreement and breach of the Non-Compete Agreement by operating a Vespa Dealership in Brooklyn and using Schieffelin's confidential information to become an authorized Vespa dealer. That action is currently pending before Justice Wooten. On or about October 19, 2012, Plaintiff moved before Justice Wooten to consolidate that action with this case. There does not appear to have been any decision rendered on the motion for consolidation.

On December 22, 2008, Piaggio entered into an Authorized Sales and Service Agreement with another entity, Hummer of Manhattan, LLC d/b/a Vespa Potamkin Manhattan ("Vespa Potamkin") (Ducci Aff. Exhibit "10"). As noted, no exclusivity agreement was then in effect between Piaggio and Schieffelin.

In March 2009, Piaggio sent Schieffelin a Notice of Termination of their Dealer Agreement as a result of certain enumerated breaches thereof. Piaggio continued to supply new vehicles, parts and accessories to Schieffelin for the Vespa Soho dealership. Piaggio rescinded the Notice of Termination by letter dated October 14, 2009 (*id.* Exhibit "12").

III. DISCUSSION

A. Standard of Review on Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Tortious Interference with Contract/Business Relations (First Cause of Action)

The first cause of action in the amended complaint alleges a hybrid claim for tortious interference with contractual and business relations, specifically, that Piaggio, despite having knowledge of the Confidentiality Agreement and Non-Compete Agreement entered into between Schieffelin and Hadjiminas, as well as the Letter of Intent and Asset Purchase Agreement, intentionally and through wrongful and improper means procured the breach of such agreements by entering into an authorized dealer agreement for Hadjiminas to operate a Vespa dealership in Brooklyn.

To sustain a cause of action for tortious interference with contract, plaintiff must allege: (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of such contract; and (4) damages (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). A plaintiff "must allege that the contract would not have been breached 'but for' the defendant's conduct" (*id*).

The amended complaint also seems to allege a cause of action for totrtious interference with business relations, which is a distinct cause of action with different elements (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). The requisite elements of a claim for tortious interference with business relations are: (1) that the plaintiff had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that defendant's interference caused injury to the business relationship with the third party (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]).

Piaggio contends that it had no knowledge of the Non-Compete Agreement when it entered the Dealer Agreement with Hadjiminas on February 25, 2008. Piaggio notes that this contention is supported by the deposition testimony of its former President, Paolo Timoni, that Piaggio made a decision to award a dealership to Hadjiminas without having knowledge of the Non-Compete Agreement and it was only after the fact that Piaggio was informed of the existence of such agreement. Piaggio contends that its first knowledge of the Non-Compete Agreement was when Schieffelin's attorney provided a copy on March 13, 2008, *i.e.*, after the Dealer Agreement was signed.

As an additional reason for rejecting Schieffelin's first cause of action, Piaggio observes that in the Hadjiminas Action, Justice Stallman found that the Non-Compete Agreement was unenforceable because it did not contain any geographic limitation and also that it was an unreasonable restrictive covenant. Accordingly, Piaggio concludes there is no underlying contract that could be breached. Further, Piaggio maintains that its entry into the Brooklyn Dealership was proper as Schieffelin was only authorized to sell Vespa products from the Approved location on Crosby Street in Manhattan, not from any location in Brooklyn. Moreover, it entered into such agreement only after Schieffelin advised Piaggio in January 2008 that the sale of Vespa Soho did not close. Piaggio adds that its decision to enter an agreement establishing a Brooklyn dealership was economically driven, *i.e.*, to sell more Vespa products, and there is no evidence in the record that such decision was motivated by an improper intent to cause a breach of the Non-Compete Agreement.

In sum, Piaggio argues that the tortious interference with contract/ tortious interference with business relations cause of action must be dismissed as the requisite elements for such claims have not been established on the record.

Schieffelin responds that the record contains evidence that Piaggio knew of the Non-Compete Agreement when it entered the Dealer Agreement with Hadjiminas. Such evidence is as follows:

- An e-mail dated January 24, 2008 from Hadjiminas to Gary Pietruszewski, Piaggio's Vice-President of Sales, discussing the sale of Vespa Soho and Hadjiminas' counter offer in which Hadjiminas stated "If Zach [Schieffelin] is in agreement to waive confidentiality, we are more than willing to walk you through our valuation and the red flags we found that warranted discounts." (Plaintiff's Exhibits "15 " and "37 ")

- An e-mail dated December 20, 2007 from Hadjiminas to Dan Salomone of Piaggio indicating that he was attaching the Letter of Intent between Schieffelin and himself and the draft of the Asset Purchase Agreement which were then forwarded to Gary Pietruszewski who responded that "[u]nless I get the order form [sic] Zach . . . there is no meeting on Friday" apparently regarding the sale of Vespa Soho.

Rather than producing evidence that Piaggio received or knew of the Non-Compete Agreement, it asserts that the Letter of Intent a copy of which was sent to Piaggio on December 20,

2007 and which contained a confidentiality clause and an exclusivity clause raises a question of fact as to whether Piaggio knew enough about the underlying agreement for purposes of establishing a cause of action for tortious interference with contract.

After over four years of litigation, the evidence plaintiff has produced in an effort to rebut defendants' evidentiary proof in the form of deposition testimony that Piaggio was not aware of the Non-Compete Agreement when it entered into the Dealer Agreement with Hadjiminas, falls short of raising a triable issue of fact. The potential sale of Vespa Soho had already been terminated prior to the Hadjiminas Dealer Agreement. Moreover, assuming the Non-Compete Agreement remained in effect, despite termination of the agreement to sell Vespa Soho, mere knowledge of a confidentiality provision in the Letter of Intent, is not evidence of knowledge of an agreement not to compete. Plaintiff has failed to come forward with evidentiary proof to demonstrate Piaggio's awareness of any valid non-competition agreement between plaintiff and Hadjiminas. In any event, Piaggio consented to the sale of Vespa Soho and there is nothing in the record to show that it engaged in any improper conduct to interfere with the proposed sale. The record is clear that the reason the sale did not close was due to a failure of the parties to agree on price. Plaintiff's disappointment with both the failure to sell its franchise and its failure to obtain Piaggio's approval to move its dealership from Manhattan to Brooklyn following the expiration of its lease at the Crosby Street location cannot support a claim for tortious interference with either contract or business relations. The first cause of action in the amended complaint must be dismissed.

C. Dealer Act VTL § 466 (2) (Second Cause of Action)

The second cause of action in the amended complaint alleges that Piaggio violated VTL § 466 (2). That section provides, in pertinent part, that:

> It shall be deemed an unreasonable restriction upon the sale or transfer of a dealership for a franchisor (i) directly or indirectly to prevent or attempt to prevent a franchised motor vehicle dealer from obtaining the fair value of the franchise or the fair value of the dealership as a going concern. . .

Piaggio contends that this cause of action must be dismissed as a matter of law because it is undisputed Piaggio approved the sale of Vespa Soho to Hadjiminas and that Piaggio did not place any restrictions on the sale in violation of § 466 (2).

In response, Schieffelin maintains that Piaggio thwarted the proposed sale of Vespa Soho. Plaintiff refers to Pietruszewski's responsive e-mail of December 20, 2007 *(see above)* claiming that Piaggio was requiring Schieffelin to order additional Vespa motor scooters as a condition of meeting to discuss the proposed sale. Moreover, plaintiff contends that after being introduced to Hadjiminas in late 2007, Piaggio had been independently communicating with Hadjiminas and engaged in coercive action by requiring plaintiff to order more motor scooters as a condition of meeting to discuss the potential sale. Plaintiff states that such actions prevented plaintiff from obtaining the fair value of its franchise.

Schieffelin's arguments are based upon a tortured reading of the December 20, 2007 e-mail. The word "form" in the e-mail was clearly a typographical error. The word "from" was actually intended. It is equally clear from the email thread that Piaggio was seeking information from Schieffelin as to whether a meeting to discuss the proposed sale was actually going to take place. The court notes that the information regarding the meeting was revealed by the potential buyer Hadjiminas. Piaggio appears to have been waiting until Schieffelin weighed in. Other than its own interpretation of the subject e-mail, Schieffelin has produced no evidentiary proof to support its claim that Piaggio's consent to the sale hinged upon Schieffelin ordering more Vespa motor scooters. Accordingly, Schieffelin's arguments concerning Piaggio's alleged coercion in denying Schieffelin the fair market value of its franchise must fail for want of evidentiary support in the record.

Schieffelin asserts that other evidence that Piaggio prevented plaintiff from obtaining the fair value of its franchise is to be found in Piaggio's refusal to allow plaintiff to open a Brooklyn Vespa dealership while awarding a dealership to Hadjiminas, its establishment of two new dealerships (Vespa Potamkin and Hadjiminas) in Vespa Soho's relevant market, its failure to give plaintiff notice concerning the opening of Vespa Potamkin, seeking to terminate Vespa Soho's Dealer Agreement in response to plaintiff's filing of an adjudicatory proceeding and the lawsuit instituted against Hadjiminas, and its provision to Hadjiminas of price and product breaks that were not afforded to plaintiff.

These assertions amount to a claim that Piaggio's refusal to accord plaintiff additional concessions that could have enhanced the value of its franchise, violates the statute. The law contains no such requirement. As previously noted, plaintiff did not have an exclusive right to operate a Vespa Dealership in Manhattan after the exclusivity agreement expired on December 31, 2007. Plaintiff did not have a right to open a Vespa Dealership in Brooklyn. Thus, Piaggio's actions in entering into the Dealer Agreements leading to the opening of the Vespa Potamkin and Hadjiminas franchises cannot be deemed to be improper or connected to plaintiff's claim that Piaggio prevented it from obtaining fair value on the sale of Vespa Soho. In any event, the e-mail from Hadjiminas to Gary Pietruszewski, upon which plaintiff relies, appears to indicate that Hadjiminas decided to reduce its offer based upon its independent review of the plaintiff's financials and not any action by defendant. Therefore, the second cause of action must be dismissed.

D. Dealer Act VTL § 463 (2)(d)(1) (Third and Fifth Causes of Action)

In its third cause of action, plaintiff alleges that Piaggio's issuance of its March 2009 Termination Notice seeking to terminate the Vespa Soho franchise was wrongful, without due cause, and undertaken in bad faith, the basis thereof being pretextual and undertaken to hide the true purpose of the termination. As a result, plaintiff alleges that Piaggio violated Section 463 (2)(d)(1) of the Dealer Act and that it sustained legal expenses in the sum of $40,000.00, which it contends it is entitled to recover under VTL § 469.

The fifth cause of action also asserts a violation of VTL § 463 (2)(d)(1)on the basis of a claim that the awarding of franchises to Vespa Potamkin and Hadjiminas were improper restrictions upon plaintiff's right to own and operate a Vespa dealership and reduced the value of Vespa Soho's relevant market area. Plaintiff asserts that such conduct amounted to a "constructive termination" of the Dealer Agreement for which plaintiff seeks damages of $1,700,000.00.

Section 463 (2)(d)(1) of the Dealer Act provides, as follows:

> It shall be unlawful for any franchisor, notwithstanding the terms of any franchise contract:
>
> * * *
>
> (d)(1) To terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise. A franchisor shall notify a franchised motor vehicle dealer, in writing, of its intention to terminate, cancel or refuse to renew the franchise of such dealer at least ninety days

> before the effective date thereof, stating the specific grounds for such termination, cancellation or refusal to renew. In no event shall the term of any such franchise expire without the written consent of the franchised motor dealer involved prior to the expiration of at least ninety days following such written notice except as hereinafter provided.

Piaggio maintains that the 2009 Termination Notice was issued properly based upon, *inter alia,* Schieffelin's unauthorized sale of Piaggio products from a separate non-Vespa dealership located at 69 Guernsey Street in Brooklyn, previously known as "McCarren Motors" and now operating under the name "Carbon Negative"; Schieffelin's unauthorized use of Piaggio trademarks on the website of www.mccarrenmotors.com; and Schieffelin's bad faith registration and use of the domain name www.vespabrooklyn.com without Piaggio's consent. Piaggio voluntarily withdrew the Termination Notice in a letter dated October 14, 2009, in response to an Order to Show Cause filed by plaintiff on June 9, 2009. Justice Yates, to whom this action was previously assigned, subsequently denied the Order to Show Cause as moot based upon Piaggio's October 14, 2009 withdrawal letter.

Piaggio again terminated Schieffelin's Dealer Agreement on November 1, 2012, based on Schieffelin's unauthorized use of the Vespa Soho website to promote Carbon Negative in connection with plaintiff's announced relocation of Vespa Soho to Brooklyn upon the expiration of its lease at the Soho facility; unauthorized creation of hyperlinks within the Vespa Soho website to direct customers to www.carbonnegative.com; and unauthorized use of Vespa trademarks on www.carbonnegative.com to create the impression that Carbon Negative was a Vespa dealership.[1]

Piaggio claims that the third cause of action must be dismissed as it issued the March 2009 Termination Notice for good cause and Schieffelin's request for attorneys' fees was denied by Justice Yates in connection with the June 9, 2009 Order to Show Cause.

Piaggio seeks dismissal of the constructive termination claim contending that there is no reference in section 463 (2)(d)(1) to a claim for constructive termination. Piaggio argues that the law refers to termination of a written franchise contract. Under section 462 (6) of the Dealer Act, a

[1]The November 1, 2012 Termination Notice is the subject of another action pending before me, commenced by Schieffelin on December 31, 2012, titled *Schieffelin & Company, LLC d/b/a Vespa Soho v Piaggio Group Americas, Inc.*, Index No. 654592/2012. A motion to dismiss that case is decided in a separate Decision and Order issued this same date.

"franchise" is defined as "a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a franchised motor dealer a license to use a trade name, service mark or related characteristic". Thus, Piaggio avers that the additional franchises did not deprive Schieffelin of the franchise rights afforded under the law. Schieffelin's rights which were "the non-exclusive privilege to sell Products from the Approved Location", a privilege that was not impaired by franchises Piaggio awarded to *other* entities.

In opposition, Schieffelin reiterates that Piaggio destroyed its business by: (1) procuring the breach of its contracts with Hadjiminas; (2) refusing to allow Schieffelin to open a Brooklyn franchise while awarding same to Hadjiminas; (3) establishing two Vespa dealerships in Vespa Soho's relevant market; (4) failing to provide proper notice to Vespa Soho concerning the opening of Vespa Potamkin; (5) seeking to terminate Vespa Soho's Dealer Agreement in response to Vespa Soho's filing of an adjudicatory proceeding and commencing a lawsuit against Hadjiminas; and (6) providing Hadjiminas with product and price breaks not afforded to Schieffelin.

It is not disputed that the Dealer Agreement is determinative of the contractual relationship between Schieffelin and Piaggio. The Dealer Agreement provides that the rights and privileges granted thereunder were non-exclusive, that plaintiff's authorization to sell and service Vespa Products was limited to the Approved Location and that plaintiff could not sell or service Vespa Products at any other location or move its place of business for the sale or service of Vespa Products without Vespa's prior written consent. Except for the expired one-year exclusive, the Dealer Agreement does not reserve to plaintiff any market or territory.

Schieffelin relies on a line of federal decisions in asserting that a constructive termination claim can be made under the New York Dealer Act. (*See Peterheit v S.B. Thomas, Inc.*, 63 F3d 1169, 1183 [2d Cir. 1995], *cert denied* 517 US 119 [1996]; *Arthur Glick Truck Sales, Inc. v General Motors*, 865 F2d 494 [2d Cir 1989]; *Crest Cadillac Oldsmobile, Inc. v General Motors Corp.*, 2005 WL 3591871 [N.D.N.Y. 2005]; *Robert Basil Motors, Inc. v General Motors Corp.*, 2004 WL 1125164 [W.D.N.Y. 2004]). In *Petereit*, the Second Circuit construed the State of Connecticut's Franchise Act as providing for potential liability of a franchisor on the ground of constructive termination when a franchisor's actions result in a substantial decline in net income. However, the Second Circuit also held that a franchisor's realignment of a franchisee's territories is not alone

sufficient to be deemed a constructive termination unless it is shown to have resulted in a substantial decline in franchisee net income. In *Robert Basil* and *Crest*, the plaintiffs, two Oldsmobile dealerships, argued that General Motors' decision to phase out the heavy-duty truck line sold by the plaintiffs' dealerships amounted to a constructive termination of their respective franchises in violation of section 463 (2)(d)(1) of the New York Dealer Act. In both cases, the courts agreed as General Motor had completely discontinued manufacturing the line of vehicles sold by the plaintiffs' dealerships. In *Glick*, the plaintiff was a General Motor franchisee who sold light-, medium-, and heavy-duty trucks. Upon being notified that General Motor would no longer offer heavy-duty trucks for sale in North America, plaintiff commenced an action alleging that General Motor's discontinuance of the heavy-duty line constituted a termination of its franchise within the meaning of section 463 (2)(d)(1). The Second Circuit held that there was a genuine issue as to whether the plaintiff's heavy-duty truck line was a separate franchise that had been terminated when General Motor discontinued the sale of such trucks. The court rejected General Motor's argument that there was no termination because the plaintiff was still able to sell light- and medium-duty trucks.

These cases are inapposite. Piaggio did not eliminate the product Schieffelin was authorized to sell. In fact, Schieffelin continued to sell Vespa products after the sale with Hadjiminas fell through in January of 2008. It continued to do so until November 1, 2012 when the franchise was terminated. Thus, assuming, *arguendo,* that a constructive termination argument may be made under section 463 (2)(d)(1), Schieffelin has failed to proffer evidentiary proof that any action by Piaggio in authorizing new dealerships in Manhattan and Brooklyn constituted a constructive termination. The third and fifth causes of action alleged in the amended complaint must be dismissed.

E. Violation of Section 463 of the Dealer Act (Fourth Cause of Action)

In the fourth cause of action, Plaintiff alleges that Piaggio violated Section 463 of the Dealer Act by offering Hadjiminas "pricing not offered to other [Vespa] dealers and providing Hadjiminas with cash or in kind support for the opening of his dealership which was not offered to other dealers" (Amended Complaint, ¶ 109). Although not identified in the amended complaint, plaintiff contends that certain programs or incentives provided by Piaggio violated section 463. Specifically, plaintiff argues that a benefit Piaggio gave to dealers who agreed to sell Vespa products exclusively is unlawful; that in October 2008 Piaggio unlawfully allowed Hadjiminas to move a portion of its

commitment to purchase a certain minimum number of vehicles through its Annual Order Program ("AOP") from the 2008 Program Year to the 2009 Program Year, thereby enabling Hadjiminas to be eligible to receive the financial benefit of the Annual Order Bonus Program which benefit was not extended to other franchisees; and that offering to give Hadjiminas a $4,000 credit in the co-op advertising program in exchange for Hadjiminas accepting 10 additional vehicles at year-end 2008 while failing to give a similar incentive to plaintiff was discriminatory.

Section 463 titled "Unfair business practices by franchisors" provides in paragraphs (2)(g) and (2)(aa) thereof that:

> It shall be unlawful for any franchisor, notwithstanding the terms of any franchise contract:
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> * * *
>
> (g) To sell or offer to sell any new motor vehicle to any franchised motor vehicle dealer at a lower actual price therefor than the actual price offered to any other franchised motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price . . . This paragraph shall not be construed to prevent the offering of incentive programs or other discounts provided such incentives or discounts are reasonably available to all franchised motor vehicle dealers in this state on a proportionately equal basis.
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> * * *
>
> (aa) To: (1) sell directly to a franchised motor vehicle dealer or, to or through a franchised motor vehicle dealer in which the franchisor owns any interest or controls the management, directly or indirectly, motor vehicle, parts, warranties, or services at a price that is lower than the price which the franchisor charges to all other franchised motor vehicle dealers.

Piaggio contends that Schieffelin failed to identify or describe the programs or incentives that are alleged to have allowed Hadjinminas to obtain new motor vehicles at a lower actual cost than offered to other Vespa dealers. Piaggio contends that there is no dispute that it did not give

Hadjiminas any cash or "in kind support" in connection with the opening of Hadjiminas' dealership. Piaggio adds that it offers all programs or incentives to its dealers on an equal basis and it is up to the dealers to decide whether or not to participate in any program or incentive offered by Piaggio.

In support of these arguments, Piaggio submitted an affidavit of its Treasurer, Edoardo Ducci, who attests to the same facts, to wit, that any incentive programs including bonus programs, the opportunity to purchase prior model year vehicles at discounted prices, and credits for dealer advertising are made available to every Piaggio dealer on an equal basis. Ducci also denies that Hadjiminas was offered any incentive or payment that was not made available to Schieffelin or other Piaggio dealers. Piaggio claims that nothing in the record rebuts these facts.

Schieffelin claims that certain incentives and bonuses offered to Hadjiminas were not available to Vespa Soho on a proportionally equal basis and, therefore, violated the Section 463 (2)(g) and 463 (2)(aa). Specifically, Schieffelin contends that Piaggio offered an Exclusivity Bonus Program whereby dealers who exclusively sold Vespa motor scooters received a 2%-3% co-op payment on every sale that was not available to dealers who did not exclusively sell Vespa products. Thus, Piggio stopped extending the bonus to Vespa Soho upon learning that it had begun selling other brands, while extending such benefit to Hadjiminas.

Schieffelin contends further that in October 2008, Piaggio decreased Hadjiminas's dealership's 2008 Annual Order Program ("AOP") allotment which it alleges made it easier to earn "participating" dealer status granted to dealers who satisfy their annual AOP allotment. Apparently, only participating dealers are eligible for the Annual Order Bonus Program. Schieffelin claims that because Piaggio treated Hadjiminas more favorably, it was able to purchase and sell new Vespas at substantially lower prices than those purchased and sold by plaintiff, thereby giving Hadjiminas a competitive advantage over plaintiff.

In reply, Piaggio disputes that it engaged in any discriminatory practices. It contends that the Co-Op Credit Program provides neither cash payment nor a discount on the purchase price charged dealers for new motor scooters. Rather, as Ducci testified at his deposition, the Co-Op Credit Program was solely to support dealers on the cost of local advertising. Under this program, Piaggio would review receipts for local advertising and promotions submitted by dealers and would authorize issuance of a credit to dealers to be used against invoices for parts, not new vehicles.

Schieffelin has not shown that Piaggio's incentive programs were operated in a discriminatory manner. The record shows that Schieffelin was offered opportunities to participate in various incentive programs. In early 2008 Piaggio and Schieffelin engaged in negotiations that would have allowed Soho to open a Vespa dealership in Brooklyn and in addition, allow it to extend its exclusivity agreement in Manhattan but that the parties were unable to come to mutually acceptable terms. Schieffelin continued to sell and service competing products at its Brooklyn location. Unlike Hadjiminas who had entered into an exclusivity agreement, Schieffelin did not receive the 2-3% co-op benefit. Schieffelin also reduced his 2008 AOP allocation to 457 from his 2007 AOP allocation of 543 (Ex. 12 and 13 to Plaintiff's Rule 19-A submission).

F. Violation of Section 463 (2)(cc)(1)Dealer Act (Sixth Cause of Action)

In its sixth cause of action, Schieffelin alleges that Piaggio failed to notify it concerning the establishment of Vespa Potamkin, which Schieffelin claims Piaggio approved without good cause in violation of Section 463 (2)(cc)(1).

That statutory provision states that it is unlawful:

> To enter into a franchise establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer into the relevant market area of an existing new motor vehicle dealer of the same line make unless the franchisor provides notice pursuant to the terms of this subdivision. All dealers that have a relevant market area that encompasses the proposed site shall be entitled to written notice, via certified mail return receipt requested, informing them of the proposed addition or relocation.

Piaggio contends that Section 463 (2)(cc)(1) does not apply as it did not become effective until January 1, 2009 after Piaggio had executed a Dealer Agreement with Potamkin in December 2008.

Schieffelin asserts that Piaggio is collaterally estopped from making this argument as it was raised before the Administrative Law Judge in the Adjudicatory Proceeding before the New York State Department of Motor Vehicles Division of Safety and Business Hearings who denied Piaggio's motion to dismiss on the ground that Schieefelin lacked standing under the statute as the new franchise was granted prior to its effective date. The Administrative Law Judge held that there were

unresolved material issues of fact requiring a hearing. Thereafter, Schieffelin withdrew the Adjudicatory Proceeding without prejudice to prosecuting the same claim in this action.

On these undisputed facts, it cannot be said that Piaggio had a full and fair opportunity to contest the issue of whether this statute governs Piaggio's conduct in granting the Vespa Potamkin dealership franchise. The Administrative Law Judge did not decide the issue but merely held that a hearing was required. Piaggio was denied the opportunity to test its argument as Schieffelin withdrew the Adjudiciatory Proceeding before a hearing was conducted. On these facts, collateral estoppel does not apply. The statutory provision was not in effect when the conduct complained of occurred. It is not applicable. Thus, the sixth cause of action shall be dismissed.

G. Breach of Covenant of Good Faith and Fair Dealing (Seventh Cause of Action)

It is axiomatic that every contract contains an implied covenant of good faith and fair dealing (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). However, "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886).

The conduct which Schieffelin alleges in the Amended Complaint breaches the covenant of good faith and fair dealing are: (1) procuring the breach of Vespa Soho's contracts with Hadjiminas; (2) refusing to allow plaintiff to open a Brooklyn Vespa dealership while awarding such dealership to Hadjiminas; (3) providing Hadjiminas incentives not available to other dealers; (4) allowing Hadjiminas to open a dealership on terms that are different from those required of other dealers; (5) establishing Vespa Potamkin in the Soho market without good cause or proper notice to plaintiff; and (6) seeking to terminate plaintiff's Dealer Agreement in bad faith and retaliation of plaintiff's lawful actions.

Under the guise of this claim, plaintiff seeks to assert claims well beyond the rights provided for in the Dealer Agreement. Moreover, as plaintiff's counsel conceded at oral argument, these claims are duplicative of claims made to support other causes of action. Moreover, plaintiff alleges certain conduct by Piaggio in connection with Hadjiminas' franchise which are not supported by evidentiary proof. Accordingly, the seventh cause of action must be dismissed.

H. Violation of Section 463 (2) (h), (s) and (y) (Eighth Cause of Action)

In the eighth cause of action, plaintiff alleges that Piaggio violated Section 463 (2) (h), (s) and (y) of the Dealer Act by selling Vespa motor scooters to the public through entities that do not have dealer agreements with Piaggio, including Gilt.com.

Subsection (h), (s) and (y) of Section 463 (2) state:

> It shall be unlawful for any franchisor, notwithstanding the terms of any franchise agreement:
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> * * *
>
> (h) To sell or offer to sell any new motor vehicle to any person, except a distributor, at a lower actual price therefor than the actual price offered and charged to a franchised motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device which results in such lesser actual price.
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> * * *
>
> (s) To grant a commission to any person other than a franchised motor vehicle dealer within the state involved in the sale of a new motor vehicle by such franchised motor vehicle dealer without said franchised motor vehicle dealer's written consent. This prohibition shall not apply to sales incentive programs for employees of franchised motor vehicle dealers as long as the payments are made by the franchisor to such employees and not charged to the dealer.
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> * * *
>
> (y) Subject to the provision of paragraph (w) of this subdivision, to sell or offer to sell or lease or offer to lease a motor vehicle other than a franchised motor vehicle dealer in this state; provided, however, that this paragraph shall not apply to sales or leases of new motor vehicles made by a franchisor to its employees, immediate family members of employees, retirees or immediate family members of retirees which are hereby authorized notwithstanding the provision of section four hundred fifteen of this title. Nothing in this paragraph shall prohibit a franchisor from utilizing direct marketing designed to generate leads via mail, phone, or any other medium, provided that leads developed thereby are referred to the franchised motor dealers in this state and in proximity to the consumer pursuant to the fair and equitable system of allocating such leads or to the franchised motor vehicle dealer as specified by the consumer.

Piaggio contends that its sale of discontinued Vespa motor scooters marketed through Gilt.com does not violate Section 463 of the Dealer Act. It states that the models sold through Gilt.com were prior year models that were not purchased by Piaggio's dealers during the prior model year and that such models were first offered to Piaggio's dealers at standard wholesale prices during the calendar year in which they were manufactured and again at significantly discounted prices before being listed on Gilt.com. Thus, such overstock scooters were available to Piaggio dealers at the same price as marketed on Gilt.com. Schieffelin does not dispute these facts.

Piaggio also states that Gilt.com served as an advertising medium which allowed Piaggio's dealers to increase their customer base. Gilt.com was available to all Piaggio dealers for participation on an equal basis.

Schieffelin disputes that the terms of the Gilt.com arrangement generated leads for dealers. It claims that Gilt.com violates Section 463 (y) in that Piaggio sold the vehicles and instead paid Vespa dealers commissions. Schieffelin emphasizes that on sales made through Gilt.com, payment is received by Piaggio, not the dealer. Plaintiff claims that the arrangement also violates Section 463 (s) as it grants a commission to Gilt.com, which is not a franchised motor vehicle dealer. Lastly, Schieffelin avers that although the Vespa motor scooters offered on Gilt.com are overstock, they nonetheless are new vehicles and, as such, are still subject to Section 463 (2)(h).

In reply, Piaggio claims that the Gilt.com program is an internet marketing service that lists non-current models of Vespa motor scooters that were sold by individual dealers. Gilt.com located potential customers and then referred them to the dealer located closest to the customer. The scooters were sold out of the dealer's existing inventory. Otherwise the dealer would document the sale and deliver the vehicle to the customer from Piaggio inventory. Neither Piaggio or Gilt.com sold directly to the customer. Piaggio paid Gilt.com a fee for the marketing service (*see* Ducci Affd.).

There is no dispute that the vehicles are documented and delivered to the consumer at Vespa dealerships. Regarding the entity that sells the vehicle, the marketing agreement between Piaggio and Gilt provides at section 8e that:

> Piaggio dealers will be merchant of record for the Sale(s) and [Piaggio] acknowledges that Gilt is not licensed or authorized to sell vehicles. The actual final delivery will take place through authorized Piaggio dealers.

Thus, the admissible evidence shows that the actual sales were made through authorized Vespa dealerships. Gilt.com serves as a marketing agent for Piaggio and its network of dealerships. It is a conduit through which consumers can find and purchase overstock motor scooters. The claim that Piaggio violated VTL §463(2) must be rejected and the eighth cause of action dismissed.

I. Attorneys' Fees under Section 469 of the Dealer Act

Section 469 of the Dealer Act, titled "Private actions" provides, in relevant part, that:

> A franchised motor dealer who is or may be aggrieved by a violation of this article shall be entitled to . . . sue for, and have, injunctive relief and damages in any court of the state having jurisdiction over the parties. In any such judicial action or proceeding, the court may award necessary costs and disbursements plus a reasonable attorney's fee to any party.

In its ninth cause of action, plaintiff seeks to recover an award of attorneys' fees in amount not less than $50,000.00 for prosecuting this action seeking to recover for violations of the Dealer Act. Because all of the plaintiff's claims must be dismissed, its demand for an award of attorneys' fees must be dismissed.

As the prevailing party, Piaggio seeks to recover its attorneys' fees, costs and disbursements for defending this action and an inquest to determine its reasonable attorneys' fees. Under New York law, a party may generally recover attorneys' fees only if it is the prevailing party. To be considered a prevailing party, such party must succeed with respect to the central relief sought (*see Nestor v McDowell,* 81 NY2d 410, 415 [1993]; *25 E. 83 Corp. v 83rd St. Assocs.,* 213 AD2d 269 [1st Dept. 1995]; *see also Village of Hempstead v Taliercio,* 8 AD3d 476 [2d Dept 2004]). Because defendant's motion for summary judgment must be granted, Piaggio is the prevailing party. Under section 469 the court has the discretion to award Piaggio its costs, disbursements and attorneys' fees incurred in defending the action (see General Motors Corp. v Villa Marin Chevrolet, Inc., 240 F Supp 2d 182 [SDNY 2002]). Piaggio shall be awarded its reasonable attorney fees upon presentation

of evidentiary support for the amount to be awarded. The matter will be referred to a Special Referee to hear and recommend an amount of the award.

Accordingly, it is hereby

ORDERED that the motion of defendant, Piaggio Group America, Inc., for summary judgment dismissing the amended complaint is GRANTED and the complaint is DISMISSED with costs and disbursements as to defendant Piaggio Group America, Inc., as taxed by the Clerk upon the submission of an appropriate bill of costs and the request pursuant to section 469 of the Dealer Act for an award of attorney fees is GRANTED; and it is further

ORDERED that the cross-motion of plaintiff, Schieffelin & Company, LLC, for partial summary judgment as to the Fourth and Eighth Causes of Action is DENIED; and it is further

ORDERED that the portion of the defendant's motion as seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees defendant Piaggio Group America, Inc., may recover against the plaintiff, Schieffelin & Co. LLC is referred to a Special Referee to hear and report; and it is further

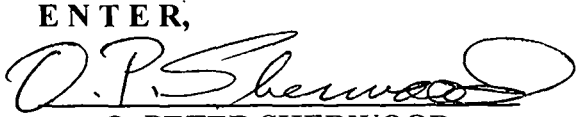
ORDERED that counsel for the defendant shall, within twenty (20) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[2], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ORDERED that the Clerk is directed to enter judgment against plaintiff, Schieffelin & Company, LLC and in favor of defendant, Piaggio Group America, Inc., accordingly.

This constitutes the decision and order of the court.

DATED: December 4, 2013

E N T E R,



O. PETER SHERWOOD
J.S.C.

[2]Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "references" section of the "Courthouse Procedures" link).