

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**Nos.16-3413-cv
16-3664-cv**

[Filed November 2, 2017]

DARYL K. WASHINGTON,	)
SUNDAY PLAYERS, INC.,	)
<i>Plaintiffs-Appellants-Cross-Appellees,</i>	)
v.	)
	)
KELLWOOD COMPANY,	)
<i>Defendant-Appellee-Cross-Appellant.</i>	)

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood

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Marshall United States Courthouse, 40 Foley Square,
in the City of New York, on the 2nd day of November,
two thousand seventeen.

PRESENT: JOHN M. WALKER, JR.,
REENA RAGGI,
PETER W. HALL,
Circuit Judges.

APPEARING FOR APPELLANT:

DOUGLAS CAWLEY, McKool Smith, P.C.,
Dallas, Texas (Lauren Fornarotto, McKool
Smith, P.C., New York, New York; Meredith
Elkins, McKool Smith, P.C., Dallas, Texas;
Aubrey “Nick” Pittman, The Pittman Law Firm,
P.C., Dallas, Texas, *on the brief*).

APPEARING FOR APPELLEE:

JAMES M. HIRSCHHORN (Mark S. Olinsky,
Kenneth R. Schachter, Katherine M. Lieb, *on the
brief*), Sills Cummis & Gross, P.C., New York,
New York.

Appeal from a judgment of the United States
District Court for the Southern District of New York
(Sarah Netburn, *Magistrate Judge*).^{*}

UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED that the
judgment entered on September 30, 2016, is
AFFIRMED.

^{*} The parties consented to proceed before a magistrate judge for all
purposes pursuant to 28 U.S.C. § 636(c)(1).

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Plaintiffs Daryl K. Washington and Sunday Players, Inc. (collectively, “SP”) sued defendant Kellwood Company (“Kellwood”) for breach of a November 2003 license agreement (the “License Agreement”), pursuant to which Kellwood became the exclusive manufacturer, licensee, and promoter of SP’s athletic compression wear products. SP here appeals from the entry of a \$1.00 judgment notwithstanding a jury award of \$4.35 million and from the denial of a new trial on damages.¹ Kellwood cross-appeals from the liability judgment. We assume the parties’ familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Kellwood’s Liability Challenge

In challenging the liability judgment, Kellwood faults the district court’s (1) evidentiary rulings, and (2) determination that Kellwood was not absolved of its marketing obligations to SP by the License Agreement provision tying marketing outlays to total sales of SP products.²

¹ The district court initially granted SP a new trial on lost-business-value damages, but granted judgment notwithstanding the verdict when SP failed to proffer evidence that would establish such damages.

² We need not address Kellwood’s argument that the district court abused its discretion in excluding an Under Armour commercial, as the evidence was offered only as to damages, an issue on which we affirm the district court’s nominal judgment in Kellwood’s favor.

a. Evidentiary Rulings

Kellwood contends that the district court erred in (1) allowing a former SP marketing employee to give lay opinion testimony on the reasonableness of Kellwood's marketing efforts, and (2) excluding evidence of the profitability of Kellwood's performance-apparel division. We review both rulings for abuse of discretion, *see United States v. Natal*, 849 F.3d 530, 534 (2d Cir. 2017); *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 93 (2d Cir. 2012), which is not evident here.

The brief lay opinion testimony of a former SP employee was “rationally based on [his] perception” from the time of his SP employment. *See* Fed. R. Evid. 701(a). In any event, such testimony was harmless given concessions from Kellwood's witnesses that no marketing efforts were conducted. *See Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 183 (2d Cir. 2004) (holding that lay witness testimony arguably based on specialized knowledge reviewed only for harmless error). No different conclusion is warranted because SP's counsel in summation referred to the witness as an “expert” in marketing because the district court promptly gave a curative instruction, which the jury is presumed to have followed. *See, e.g., United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013).

As for the exclusion of evidence that Kellwood's performance-apparel division was profitable, we identify no abuse of discretion because that evidence was proffered only to rebut the argument that Kellwood had attempted to purchase SP, which was of

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tangential relevance to the reasonableness of Kellwood's marketing efforts.

b. Denial of Judgment as a Matter of Law

Kellwood argues that, as a matter of law, it had no marketing obligations to SP because the License Agreement limited its marketing expenditures based on SP's net sales, which were minimal. We review a district court's denial of a Fed. R. Civ. P. 50(b) motion *de novo*, applying the "same standard as the district court," and granting judgment only if the evidence, "viewed in the light most favorable to the nonmoving party," demonstrates that judgment for the movant was the only conclusion that reasonable persons could have reached. *Morse v. Fusto*, 804 F.3d 538, 546 (2d Cir. 2015). Like the district court, we conclude that Kellwood was not entitled to judgment on that basis.

Under New York law, which the License Agreement identifies as controlling, exclusive license agreements generally require, whether expressly or impliedly, the licensee to use reasonable efforts to market the licensor's products. *See, e.g., Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 923–24 (2d Cir. 1977); *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 680–82 (2d Cir. 1983). The License Agreement here is consistent with this requirement. *See* App'x 2992 ("Licensee shall promote the Licensed Products and exploit this Agreement granted herein as provided in Schedule A, Item 10."). No different conclusion is warranted by Schedule A, Item 10 of the License Agreement, which states that Kellwood "shall expend an amount equal to three percent (3%) of Net Sales of the License[d] Products towards marketing." *Id.* 2999. That clause identifies the minimum marketing

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expenditures to which Kellwood was obligated, and says nothing of the *efforts* it was required to employ in promoting SP's products. Indeed, this Circuit has squarely rejected the proposition that "technical compliance" with such "spending and appointment requirements" satisfies the exclusive licensee's obligation to make "reasonable efforts" to promote the licensor's products. *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d at 923. As for the sufficiency of the liability evidence, we are satisfied upon our independent review of the record that the jury had a legally sufficient basis to conclude that Kellwood failed adequately to market SP's products.

Accordingly, we identify no error in the denial of Kellwood's motion for judgment as a matter of law on liability.

2. SP's Damages Challenges

In challenging the district court's vacatur of the jury's \$4.35 million damages award, SP disputes the exclusion at trial of methodologies employed by its damages expert. SP also faults the district court's denial of a new damages trial, and its award of \$1 nominal damages.

a. Exclusion of Damages Testimony

We review decisions to exclude an expert methodology only for abuse of discretion, *see In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 658 (2d Cir. 2016), and identify none here. The district court acted within its discretion in excluding the expert's "market forecast" methodology as speculative, as it was premised only on the impressions of an MTV employee, and an MTV projection commissioned in anticipation of

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a potential commercial for SP.³ The same conclusion obtains as to SP's efforts to introduce the projections and surveys themselves.

Nor did the district court abuse its discretion in precluding the expert from testifying as to SP's lost business value as of January 2007, as the contract was breached in 2005, and New York law requires that the value of an income-producing asset be calculated on the date of the breach. *See Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 826 (2d Cir. 1990).

Finally, the district court did not abuse its discretion in precluding the expert from testifying about SP's expected profits through January 2010. That theory—which presumed that (1) the contract would have been profitable, (2) Kellwood would not have breached it, and (3) the parties would have renewed it upon its January 2007 expiration—was both speculative and belied by the contract itself, which gave Kellwood the unilateral right to decide whether to renew.

b. Motion for Judgment Notwithstanding the Jury Verdict

SP argues that the district court erred in granting judgment notwithstanding the jury's damages verdict on (1) SP's expectation of lost future profits, and (2) the lost value of SP's business at the time Kellwood broke off its exclusive manufacturing and marketing relationship with SP. As already discussed, we review

³ Magistrate Judge Dolinger identified this evidentiary concern and excluded the witness's testimony prior to the case being reassigned to Magistrate Judge Netburn.

the district court's decision on such a motion *de novo*, granting judgment only if there was but one verdict that the jury could reasonably have reached. *See Morse v. Fusto*, 804 F.3d at 546. Like the district court, we conclude that Kellwood was entitled to judgment as a matter of law on SP's damages claims.

1. Lost Future Profits

Under New York law, a plaintiff deprived of his entire stake in a business by a contractual breach may sue either for lost future profits or the lost value of his business on the date of breach. *See Schonfeld v. Hilliard*, 218 F.3d 164, 172, 175–76 (2d Cir. 2000). To prove lost profits, a plaintiff must demonstrate “both the existence and amount of such damages with reasonable certainty.” *Id.* at 172. Although the damages “need not be proven with mathematical precision, they must be capable of measurement based upon known reliable factors without undue speculation.” *Id.* (internal quotation marks omitted). “[E]vidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate.” *Id.* A new venture whose profits are “purely hypothetical” and that would require “untested” sales to “hypothetical” consumers does not support a damages award. *Id.* at 173 (internal quotation marks omitted).

As the district court correctly observed, SP failed to proffer evidence from which lost profits could be established with reasonable certainty. The sole profits calculations presented to the jury were those of its expert, who testified that, had Kellwood reasonably marketed SP's products, SP's 2005–2007 revenues would have been 50% of those of the compression wear

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market leader, Under Armour, in 2002–2004. Under Armour was not a reasonable comparator. At the time in question, Under Armour was an established business with annual sales between \$49.5 million and \$195 million. Indeed, by the end of 2002, it controlled approximately 80% of the market. By contrast, during the two-year comparison period, SP was a small start-up, producing a product similar to brand-name companies, but with no record of notable sales. Throughout its existence, SP sold less than \$200,000 in merchandise to only a few small retailers and high school and college athletic teams. The expert's testimony that SP's revenues were reasonably certain to increase from a few hundred thousand dollars to approximately \$80,000,000 in two years⁴ was so unfounded that it failed to establish any legal basis for awarding lost-profits damages.

In urging otherwise, SP argues that its profits were made certain by Kellwood's manufacturing resources and MTV's expressed willingness to produce a television commercial. The argument fails because Kellwood's *capacity* to produce SP's compression wear speaks not at all to whether consumers would purchase its products over those of competitors. Further, undisputed trial evidence showed that MTV offered Kellwood a draft agreement to run an SP commercial, but only if Kellwood, *inter alia*, (1) paid a deposit, (2) agreed to pay MTV a 5–8% royalty on SP's future sales, and (3) demonstrated that more than \$500,000 of SP's products could be sold. SP failed to show that it could meet this required sales threshold. Thus,

⁴ Under the License Agreement, SP was entitled to a 5% royalty on sales of its products.

assumptions that, but for Kellwood's breach, a commercial would have aired and consumers would have purchased millions of dollars in SP's products were "purely hypothetical." *Id.* at 172.

2. Lost Business Value Damages

Where lost future profits cannot be obtained, the "most accurate and immediate measure of damages" of a nascent business is its "market value . . . at the time of breach." *Id.* at 176. Such estimates are "inherently less speculative" than an estimation of future profits, as they may be measured by proof of "what a buyer is willing to pay for *the chance*" that the business will produce substantial income. *Id.* at 177 (emphasis in original). In proving such a claim, a plaintiff must nonetheless establish the value lost by the business with "reasonable certainty." *Id.*

As the district court correctly observed, SP's expert's \$532,000 lost-business-value calculation fails with the \$3.783 million lost-profits calculation, as both were premised on the same "yardstick" comparison to Under Armour's revenues. Nor could such damages be proved, as in *Schonfeld*, by reference to a "price at which the [business] would change hands between a willing buyer and a willing seller." *Id.* at 178 (internal quotation marks omitted). Although Washington himself testified that Kellwood had offered to purchase SP, no evidence was proffered to suggest the price at which the business might have changed hands at that time.

3. Nominal Damages

SP argues that it was entitled to present alternative damages evidence at a new trial, rather than to have

judgment entered in a nominal amount. This is particularly so, it contends, because the jury's liability verdict established the fact of Kellwood's breach. *See, e.g., id.* at 182 (“[P]ursuant to the wrongdoer rule, where . . . the existence of damage is certain, and the only uncertainty is as to its amount, . . . the burden of uncertainty as to the amount of damage is upon the wrongdoer.”) (internal quotation marks omitted); *see also Lexington Prods. Ltd. v. BD Commc'ns, Inc.*, 677 F.2d 251, 254 (2d Cir. 1982) (“Where the evidence shows such a clear and definite measure of damages, an award of nominal damages cannot stand.”). We do not agree.

First, we have already concluded that SP failed to establish such damages as would satisfy New York law's requirement of reasonable certainty. Accordingly, because we affirm the district court's motion for judgment notwithstanding the verdict, we need not authorize any retrial. *Cf. Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (“[T]he authority of courts of appeals to direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.”); *accord Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). This is not a case, as in *Lexington Products*, where nominal damages were unwarranted, as SP had no sales history or contractual entitlements from which damages could reasonably be calculated. *See Lexington Prods. v. BD Commc'ns, Inc.*, 677 F.2d at 253–54.

Second, and in any event, SP failed to demonstrate an ability to proffer evidence of damages with

reasonable certainty for use at any new trial. Given the opportunity to put forward such evidence, SP instead provided projections from Kellwood, MTV, and Washington about what SP's sales might have been, and of the value of other established and proven clothing brands, with values in the range of hundreds of millions of dollars. But we have already explained why such optimistic projections and valuations by reference to name-brand companies failed to establish damages with reasonable certainty.

The cases SP cites for the proposition that its principals could testify to expectations of future revenues are likewise inapposite, as they arose in the context of established companies. *Compare Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 265 (2d Cir. 1995) (deeming testimony regarding “flattening out” of profits permissible against backdrop of sales “over a period of years”), and *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1174–77 (3d Cir. 1993) (deeming damages established with reasonable certainty based on testimony from company owner, where company had operational history, and performance had “surpassed” owner’s projections in past years), with *Von der Ruhr v. Immtech Int’l, Inc.*, 570 F.3d 858, 862–65 (7th Cir. 2009) (explaining that it is a “difficult task . . . (1) to prove lost profits damages (2) in a complex market (3) from a product that has never been sold (4) without [valid] expert testimony”), and *US Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687, 690 (8th Cir. 2009) (rejecting testimony by company president where “record demonstrate[d] that [he] could not identify any customer interested in buying . . . a specific amount of [the product] at a specific price”).

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Accordingly, we conclude that the district court did not err in granting Kellwood judgment as a matter of law on SP's damages claims, and in entering a nominal-damages award of \$1.00 in SP's favor.

3. Conclusion

We have considered the parties' other arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature, "Catherine O'Hagan Wolfe", written in black ink. The signature is positioned over a circular official seal. The seal is divided into two horizontal halves: the top half is red and the bottom half is blue. The words "UNITED STATES" are written in white at the top of the seal, and "SECOND CIRCUIT" is written in white in the center. The words "COURT OF APPEALS" are written in white at the bottom of the seal. There are small white stars on either side of the central text.

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

05-CV-10034 (SN)

[Filed September 6, 2016]

DARYL K. WASHINGTON, et al.,	)
	)
Plaintiffs,	)
	)
-against-	)
	)
KELLWOOD COMPANY,	)
	)
Defendant.	)

OPINION & ORDER

SARAH NETBURN, United States Magistrate Judge:

This case is set for retrial after the Court vacated the jury's damages award. The jury found that Kellwood Company had breached its licensing agreement with the plaintiffs (collectively, "Sunday Players") by failing to use reasonable efforts to market their start-up sports clothing brand. (The Court had previously found two other breaches of the contract.) The jury awarded lost profits in the amount of \$4,350,000. But the verdict was too speculative. It relied on expert testimony that the fledgling Sunday Players would have sold half the volume of Under

Armour, the market leader. The Court ruled as a matter of law that the expert's testimony amounted to "sheer surmise and conjecture" that was insufficient to support the verdict. ECF No. 212 at 28-29 (Order on Motion for Judgment as a Matter of Law ("JMOL Order")). But the Court also concluded that evidence in the record could show that Kellwood's breaches caused Sunday Players to lose business value. Retrial was scheduled on the question of damages. The plaintiffs' expert testimony was to be excluded as more prejudicial than probative.

The parties dispute the scope of issues to be retried. Kellwood asserts that the retrial is limited to determining the value of Sunday Players as of the date of breach, March 15, 2005. Kellwood seeks to exclude all other evidence and argues that without an expert witness, Sunday Players cannot establish non-speculative damage to their brand. Sunday Players argues that it should be allowed to retry a vast array of issues to overcome the deficiencies in their proof identified in the JMOL Order. Sunday Players seeks between \$5 million and \$140 million in damages—staggering figures in light of the Court's earlier ruling vacating a smaller verdict. Sunday Players argues that it can prove those damages through comparisons to Under Armour and Phat Fashions, a brand Kellwood bought for \$140 million.

The second trial is not an opportunity to retry Sunday Players's original case. The JMOL Order put to rest both of Sunday Players's theories of damages. Sunday Players could not prove that Under Armour was an adequate market comparator, and it could not prove that Phat Fashion's purchase price was relevant

to Sunday Players's value. Accordingly, the Court grants Kellwood's motion *in limine* in full. The Court also grants Sunday Players's motion to exclude the testimony of Kellwood's expert Gary Trugman. Given these rulings, the Court concludes as a matter of law that Sunday Players cannot marshal sufficient admissible evidence to prove its damages claims. Accordingly, the trial is adjourned. The Court will hear oral argument on why it should not modify the JMOL Order to award the plaintiffs nominal damages.

I. Law of the Case Doctrine

This Opinion and Order relies on decisions the Court has made in the past, including its Order on Summary Judgment and the JMOL Order.¹ "Under the law of the case doctrine, a decision on an issue made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." In re PCH Assocs., 949 F.2d 585, 592 (2d Cir. 1991). This doctrine is grounded in "the desire to save judicial time" and the principle that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.). Nevertheless, the law of the case "does not rigidly bind a court to its former decisions, but is only addressed to its good sense." Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d Cir. 1924) (L. Hand, J.). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new

¹ It also assumes that the reader has read those opinions and is familiar with this case.

evidence, or the need to correct a clear error or prevent manifest injustice.” Virgin Atlantic Airways, Ltd. v. Nat’l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted).

II. Evidence of Lost Profits Will be Excluded

Kellwood contends that all evidence of lost profits should be excluded because the JMOL Order precludes any theory of lost profits damages. Further, Kellwood argues that Sunday Players, as a new business, cannot prove lost profits without expert testimony. The plaintiffs counter that they should have a second opportunity to prove that Under Armour was an adequate comparator company and that Sunday Players was not a new business.

The JMOL Order precludes any evidence of lost profits at the retrial. The Court concluded that Sunday Players did not have a “track record from which to prove the existence of lost profits.” ECF No. 212 at 14. The plaintiffs relied solely on expert evidence showing that the historical sales of a comparable company could serve as an adequate “yardstick” for Sunday Players’s lost profits. Scott A. Barnes, the expert, testified that Under Armour was a comparable company, but the Court concluded that Sunday Players had failed as a matter of law to prove the comparison. Sunday Players has not shown a compelling reason for the Court to revisit those rulings.

Sunday Players argues that the lay opinion testimony of its principals will be sufficient to prove lost profits damages. In its pretrial submission, it proffers witnesses who would testify to “projected profits” of the company. See ECF NO. 221 at 9-12 (Trial

witness list). But there is no evidence—including no testimony from the first trial—that any of the Sunday Players’s principals *projected* profits beyond their hope that they would be wildly successful in a market dominated by Under Armour. The evidence is plain that no one—from Sunday Players or Kellwood—did any analysis about how much money the License Agreement might generate. At a minimum, a business owner “must be able to point to some sales data or independent market report indicating that the business venture could make sales and be profitable.” Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc., 07-cv-7483 (RJH), 2010 WL 4892646, at *10 (S.D.N.Y. Dec. 2, 2010). In the case of an established business, that sales data could include a past sales history. But Sunday Players has no track record. In the absence of such evidence, it must avail itself of an expert comparison to another company to bridge the gap in its proof. See, e.g., Celebrity Cruises, Inc. v. Essef Corp., 478 F. Supp. 2d 440, 448-49 (S.D.N.Y. 2007). Its choice for a yardstick comparison has already been excluded as baseless.

Even if Sunday Players’s principals were competent to estimate lost profits, the JMOL Order would preclude any argument that the losses were caused by Kellwood’s breaches. The JMOL Order exhaustively detailed the gaps in Sunday Players’s causation theory. See ECF No. 212 at 16-20. Sunday Players did not offer expert evidence showing that its preferred marketing strategy would have led to vast profits. And its lay opinion testimony stopped short of providing specific details that would have supported such a conclusion. Sunday Players has not shown a compelling reason to revisit those rulings, and they will not be relitigated.

III. Kellwood's Expert Will be Excluded

Sunday Players moves to exclude the testimony of Gary Trugman, Kellwood's proffered expert witness. According to Sunday Players, Trugman cannot offer expert testimony about the company's value because he did not independently value the company. Sunday Players argues that Trugman's testimony was relevant only in rebuttal to Barnes's testimony, which the Court has already precluded. Kellwood counters that Trugman can testify because his report plainly stated that Sunday Players had no value.

Sunday Players has the better argument. Trugman's expert report, the Court's Daubert Order, and his actual testimony all indicate that he was a rebuttal witness. Trugman's report proffered seven expert conclusions that each related to deficiencies in Barnes's report. The Daubert Order ruled that Trugman's testimony was admissible only "to help the trier of fact to understand the evidence as presented by the Barnes Report." ECF No. 57 at 77 (Daubert Order) (internal quotation marks omitted). And Trugman himself testified that he was asked only to rebut Barnes's testimony and not to provide an independent estimate of the damages in the case. See ECF No. 180 at 36-38 (Trial Tr. at 1455:12-1457:7). In fact, when asked whether he could help the jury to "arrive at the right number for the appropriate damages in this case," Trugman responded: "I don't think it is my job." Id. at 37 (Tr. 1456:19-22).

Trugman's testimony was only admissible as rebuttal to Barnes. Barnes is excluded from retrial, and so is Trugman.

IV. The Lost Value Evidence is Insufficient to Prove the Claimed Damages

Market value damages “are based on future profits as estimated by potential buyers who form the market and reflect the buyer’s discount for the fact that the profits would be postponed and uncertain.” ECF No. 212 at 28 (JMOL Order, internal quotation marks omitted). In other words, the market value of a business “represents what a buyer is willing to pay for *the chance* to earn the speculative profits.” Schonfeld v. Hilliard, 218 F.3d 164, 177 (2d Cir. 2000). In determining the market value of an asset, a plaintiff can rely on prior income history, expert opinion, evidence of sales of comparable assets, the testimony of the business’s owner, and evidence of recent sales or recent offers for the company. See id. at 178-79.

Sunday Players seeks damages in an amount between \$5 million and \$140 million, but its proffered evidence will not support a lost value verdict of that size. It cannot show that its past profits justify a valuation in the millions, nor can it rely on speculative future profits. It cannot offer expert testimony of its value. It cannot offer admissible evidence of sales of comparable assets because the Court has already concluded that Under Armour and Phat Fashions are not comparable. Its owners are not competent to give a valuation estimate because the company had no significant track record. And it cannot present evidence of recent sales or recent offers to buy Sunday Players.

Sunday Players argues that its proffered witnesses can prove that the company had value through testimony regarding their past sales, marketing plans, the product’s quality, and the company’s connection to

potential professional athlete endorsers. But the Court has already decided that this testimony was not sufficient to prove lost profits. For the same reason, it is not admissible to prove that the company had value. The lay expert testimony about Sunday Players's marketing efforts, product quality, and connection to athletes lacks specific data that would allow a jury to assess any value of the company.

Even if this evidence were probative, it is meaningless without expert testimony to quantify the value of the past sales and assets. Past sales are relevant for a valuation only if they are accompanied by expert testimony explaining their importance to a potential buyer. Likewise, intangible assets like the company's brand name, its marketing plans, the quality of its clothing, and its connection to professional athletes are meaningless without expert testimony. Sunday Players already chose its expert, Barnes, and his theory relied entirely on the yardstick comparison with Under Armour. He did not opine on the value of the company's assets, and Sunday Players has no testimony that would transform qualitative assessments of the company's merits into quantitative assessments of its value.

A. Prior Income

At the first trial, Sunday Players presented evidence that it had been selling product before signing the License Agreement. It also showed that its principals continued making sales during the period of the contract. But these total sales were minor, amounting to less than two hundred thousand dollars. They do not provide a basis for a multimillion dollar damages verdict. And if they did, Sunday Players

would have to provide expert testimony explaining why.

B. Expert Testimony

Sunday Players cannot offer any expert evidence of the company's value. In the first trial, the plaintiffs offered an expert valuation that relied on "sheer surmise and conjecture" and was set aside. See ECF No. 212 at 20-26, 29. In accordance with the JMOL Order, the Court will preclude Barnes from testifying. Id. at 29. The plaintiffs are not entitled to propound any new expert evidence in support of an alternative valuation theory.

C. Evidence of Sales of Comparable Assets

The plaintiffs argue that they can offer evidence that Kellwood bought Phat Fashions for \$140 million as evidence of Sunday Players's value. And they seek to introduce evidence of Under Armour's sales history as something a hypothetical buyer would consider when pricing Sunday Players. But they have not established that either company was comparable to Sunday Players, and evidence relating to them is not relevant to prove lost value.

1. Phat Fashions

The plaintiffs argue that Phat Fashions was comparable to Sunday Players because Kellwood's CEO purportedly told them that Phat Farm "could be" Sunday Players. The Court has already determined that this testimony, if true, "was mere flattery, not an objective value comparison, and it provided no basis for concluding that Sunday Players was worth millions of dollars." ECF No. 212 at 41. That is the law of the case.

At the first trial, the plaintiffs did not establish that Phat Fashions was in any way comparable to Sunday Players because they did not establish that they sold similar clothing, shared customers, or had similar market share and capitalization. Trial established “only that Phat Fashions was already well-established when Kellwood bought it. Sunday Players was, by contrast, an anonymous start-up.” Id.

Sunday Players reads the Court’s JMOL Order as offering it a second chance to lay the foundation that Phat Fashions and Sunday Players were comparable companies. It does not. Sales of comparable businesses are only useful for determining an asset’s market value because they help estimate the market’s assessment of a chance to earn profits. Schonfeld, 218 F.3d at 177-78. The two businesses must therefore have closely related products, marketplaces, and past history of profits. As the Court has already concluded, trial evidence showed that Phat Fashions was already an established brand when Kellwood bought it. Sunday Players was not. There is no reason to think that the price Kellwood paid for Phat Fashions has any relevance to Sunday Players’s business value. Allowing the jury to hear evidence that suggests otherwise will lead to mischief. It must therefore be excluded as more prejudicial than probative. Fed R. Evid. 403.

2. Under Armour

Sunday Players argues that it can introduce Under Armour’s history of past sales to prove its lost value. The JMOL Order already refuted this argument. At trial, the plaintiffs failed to prove that Under Armour was comparable to Sunday Players. The Court has already exhaustively examined the evidence for this

comparison, and it will not do so again. See ECF No. 212 at 16-26. Accordingly, any evidence of Under Armour's sales history is not admissible because it would be more prejudicial than probative. Fed. R. Evid. 403.

Sunday Players argues that the Court overlooked evidence that an entity it calls "Sunday Players/Kellwood" was comparable to Under Armour in part because of Kellwood's extensive manufacturing and marketing power. But Sunday Players cannot claim any value based on *Kellwood's* assets. The question is what a willing buyer would have paid for Sunday Players and Sunday Players alone—including whatever manufacturing, market penetration, and product delivery capabilities it had in March 2005. No reasonable purchaser would calculate a company's value based on assets that it does not own.

Sunday Players also argues that a willing purchaser would have considered Under Armour's profit history in taking into account profits Sunday Players would have earned if Kellwood had not breached. But the Court has already ruled that Sunday Players *has not proven lost profits*. And the Court has already ruled that Under Armour's historical performance *is not relevant* to determining any profits Sunday Players might have earned. Even in the absence of those rulings, evidence of Under Armour's profit history would be excluded. When valuing Sunday Players, a factfinder must look to the actual historical evidence of its value. It need not "guess what would have happened in some alternate world" where Sunday Players achieved the same success as Under Armour. ECF No. 212 at 28.

Finally, the plaintiffs seek to introduce additional evidence that they believe will prove that the companies were comparable. But the plaintiffs already chose their trial evidence, and it was not sufficient to prove that point. That is the law of the case. The parties have had their battle and will not stage a reenactment. Zdanok, 327 F.2d at 953.

D. The Testimony of Sunday Players's Owners

Kellwood argues that Sunday Players's owners are not competent to estimate the company's value. Sunday Players argues that the Federal Rules of Evidence permit a business owner to testify as a lay opinion witness based on his or her own knowledge of the company's operations and value.

Federal Rule of Evidence 701 authorizes lay opinion testimony only when it is "rationally based on the witness's perception," "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. The rule authorizes "the owner or officer of a business to testify to the value or projected profits of the business without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701 Advisory Comm. Notes, 2000 Amendments. This testimony is admitted "because of the particularized knowledge that the witness has by virtue of his or her position in the business." Id.

But owners can give lay opinion evidence only on matters that are within their personal knowledge and experience. Rule 701 assumes that a business owner will draw his or her valuation from an established

track record. When a business does not have such a track record, and the business owner has no experience running a similar business, the lay opinion testimony will not be admissible. For example, in Von Der Ruhr v. Immtech Int'l, Inc., the court excluded the testimony of a business owner who “intended to testify to his expectations of millions of dollars in profits from a brand new drug, which had not been approved by the FDA, which still needed a corporate partner, and for which no competitive market analysis had been conducted.” 570 F.3d 858, 863 (7th Cir. 2009). The court concluded that his expectations exceeded his knowledge because the owner had no personal experience taking a drug to market or even making money off of pharmaceuticals. Id. at 863-64. Similarly, the court in Ho Myung Moolsan, Co. v. Manitou Mineral Water, Inc. rejected a business owner’s “wildly speculative sales projections” that were “supported neither by data of actual sales nor independent market research.” 07-cv-7483 (RJH), 2010 WL 4892646, at *10-11 (S.D.N.Y. Dec. 2, 2010); see also US Salt, Inc. v. Broken Arrow, Inc., 563 F.3d 687, 690 (8th Cir. 2009); In re Marketxt Holdings Corp., 04-12078 (ALG), 2011 WL 1422012, at *2-3 (Bankr. S.D.N.Y. Jan. 7, 2011).

As the Court has already found, Sunday Players had no significant history of past sales. See ECF No. 212 at 14-15. It was a start-up apparel company that strove to break into a market at the early stages of its growth. It had no sure route to success. Sunday Players’s principals cannot therefore draw from their prior experience of running the company to estimate its value. Nor can they draw from any experience in launching analogous companies. Sunday Players’s officers and employees already testified at the first

trial, and the plaintiffs did not show that any of them had experience running an apparel company or launching a new sports apparel brand. None of the witnesses had ever bought or sold a clothing company before and none of them had prior experience licensing their intellectual property. The Court has seen no evidence suggesting that the plaintiffs held back any evidence proving otherwise. The witnesses' firsthand experience was limited to selling to small retailers and local colleges and high schools. The sales totaled less than two hundred thousand dollars. Testimony about those sales might be relevant to show that Sunday Players had a modest value at the time of breach. It is not sufficient to show that the company was worth millions of dollars.

Of the plaintiffs' remaining proffered witnesses, two appear to be former NFL players (Clinton Portis and Takeo Spikes) who would each testify as "a business owner and consumer of apparel." ECF No. 221 at 10. Their general observations about running a business and wearing clothes would not be relevant for quantifying Sunday Players's business value. Two witnesses, Willie Jackson and Rick King, would testify about their "observations as a business owner and operative in sales, advertising, marketing, athletic apparel, business operations, and the industry generally." *Id.* at 10-11. But general observations about the athletic apparel industry would not be relevant for proving Sunday Players's value. Any lay opinion offered by these witnesses would be inadmissible because they are not the "owner or officer" of Sunday Players and do not have the requisite personal knowledge of its operations. Fed. R. Evid. 701 Advisory Comm. Notes, 2000 Amendments. Finally, Megan

Hughes, who apparently had a role in developing Sunday Players's product line, would testify about her "research and experience in the industry generally." ECF No. 221 at 9. But she also lacks the requisite personal knowledge of Sunday Players's operations because she was not its owner or officer. Even assuming she had personal knowledge of the company's operations, her testimony would suffer from the same flaws as the owners' and officers'—the company had no track record and she is not an expert at valuing business assets.

E. Evidence of Prior Offers or Sales

The record shows that Sunday Players had never been bought or sold before. At trial, Washington testified that Kellwood offered to buy the company, but he did not give a firm offer amount. The plaintiffs argue that Kellwood's contemporaneous purchase of Phat Fashions should serve as a benchmark for its value because Kellwood told a Sunday Players principal that this "could be Sunday Players one day." ECF No. 172 at 177 (Tr. 551:23-25). The Court has already decided that this evidence will be excluded. Kellwood's flattery cannot be construed as a bona fide offer to buy the company for \$140 million.

F. Sales and Marketing Evidence Will be Excluded

At trial, Sunday Players failed to prove that it would have made millions of dollars in profits if only Kellwood had followed its preferred marketing strategy. See ECF No. 212 at 16-20. The plaintiffs presented no expert testimony in support, and its lay testimony was insufficient as a matter of law to prove

their case. For the same reason, this testimony cannot prove lost business value.

Christopher Plumlee, the company's director of sales, proposed to copy Under Armour's "top-down" and "bottom-up" approach to marketing. Id. at 5. But he presented no specific evidence showing how marketing drives sales. He had no data on how much money Under Armour had spent on marketing, where it targeted its marketing, or how a marketing strategy would have to cope with a changed marketplace following Under Armour's success. In short, "he had no basis for concluding that a company could break into the compression apparel market simply by following the same path that Under Armour had already taken." Id. at 18. Angela Jackson, a former MTV executive, testified about MTV's promises to market and promote Sunday Players. But her testimony was also void of specifics about the effectiveness of MTV marketing, the scale of marketing required to launch a new brand, and the size of a campaign that would be required to compete with Under Armour. Id. Moreover, as discussed in the JMOL Order, any MTV marketing was itself speculative, as it was triggered only after \$500,000 of completed sales. Together, the testimony of Plumlee and Jackson was not enough to show a link between marketing and lost profits, and, for the same reason, it is not relevant to a calculation of lost value, which is merely a measure of what a buyer would pay for a chance at future profits.

Even if testimony of Sunday Players's sales and marketing efforts were probative of its value, it would be useless without expert testimony. The effect of sales and marketing on market value is "beyond the ken of

the average juror.” *Id.* at 35. It may be that the sales experience and marketing plans of Plumlee and Sunday Players’s other principals had value on the marketplace. It may be that an investor would pay something for Sunday Players’s brand name and quality apparel, its connection to professional athletes, and the potential interest of merchandisers and consumers. But placing a value on those assets requires expertise, and the plaintiffs chose not to proffer an expert on marketing. It can therefore offer no admissible testimony, aside from sheer surmise and speculation, ascribing any quantifiable value to its intangible assets.

CONCLUSION

The Court GRANTS Kellwood’s motion *in limine* and the plaintiffs’ motion to exclude the testimony of Gary Trugman. The trial scheduled to begin September 13, 2016, is ADJOURNED. The parties are ORDERED to present oral argument on September 7, 2016, at 10:00 a.m. in Courtroom 219, Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, New York, on why the Court should not reconsider the JMOL Order and grant judgment as a matter of law for the plaintiffs and award \$1. Fed. R. Civ. P. 50.

SO ORDERED.

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/s/ _____
SARAH NETBURN
United States Magistrate Judge

DATED: New York, New York
September 6, 2016

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**Nos.16-3413(L)
16-3664 (XAP)**

[Filed December 20, 2017]

Daryl K. Washington, Sunday Players, Inc.,	)
	)
Plaintiffs-Appellants-Cross-Appellees,	)
v.	)
	)
Kellwood Company,	)
	)
Defendant-Appellee-Cross-Appellant.	)
	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand seventeen.

ORDER

Appellants-Cross-Appellees, Sunday Players, Inc., and Daryl K. Washington, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active

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members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A handwritten signature in black ink, reading "Catherine O'Hagan Wolfe". The signature is written in a cursive style. A circular court seal is partially visible behind the signature, overlapping the "O" in "O'Hagan". The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

APPENDIX D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

05-CV-10034 (SN)

[Filed December 4, 2015]

DARYL K. WASHINGTON, et al.,	)
	)
Plaintiffs,	)
	)
-against-	)
	)
KELLWOOD COMPANY,	)
	)
Defendant.	)

OPINION & ORDER

SARAH NETBURN, United States Magistrate Judge:

Defendant Kellwood Company moves to vacate the October 14, 2015 notice of case reassignment that transferred this matter to my docket for all purposes. Kellwood asserts that it consented only to the jurisdiction of the original presiding magistrate judge and not to the jurisdiction of any other magistrate judge. Thus, Kellwood argues, the reassignment was invalid.

The motion is denied. In the consent order, the parties unambiguously consented to the jurisdiction of

“a magistrate judge,” meaning any magistrate judge. Thus, the transfer to my docket was valid, and I have jurisdiction over these proceedings.

BACKGROUND

This breach of contract case has been pending since 2005. In 2014, according to Kellwood’s counsel, the district judge’s courtroom deputy suggested consenting to magistrate judge jurisdiction. Kellwood’s counsel “understood from this conversation that, if Kellwood did not execute the consent, further delay . . . would result.” At the time of that conversation, the Honorable Michael H. Dolinger was the assigned magistrate judge. Based on a representation by the deputy, Kellwood’s counsel “understood that Kellwood was consenting to have the case heard by Judge Dolinger . . . and not providing a general consent to any magistrate judge.” Kellwood’s counsel “undertook extensive research into Judge Dolinger’s background and decisions” and “ultimately felt comfortable” with his jurisdiction “given his approximately thirty years of experience as a magistrate judge.”

On October 2, 2014, the parties consented to magistrate judge jurisdiction. The consent form read: “The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.” By the same document, the district judge ordered the case “referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgement in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.” Judge Dolinger’s name did not appear in the text of the

document. His initials were handwritten into the case caption.

Judge Dolinger handled proceedings until October 2015, when he ruled on a motion for summary judgment. In anticipation of Judge Dolinger's pending retirement, this matter was transferred to my docket on October 14, 2015. The case is ready for a jury trial.

Kellwood's counsel now argues that Kellwood consented only to the jurisdiction of Judge Dolinger and not to the jurisdiction of any other magistrate judge. Kellwood's counsel contends that his off-the-record conversations with the district judge's deputy caused him to expect that Judge Dolinger, and only Judge Dolinger, would be assigned to the case. He also asserts that, although the consent order did not explicitly mention Judge Dolinger by name, the placement of his initials in the caption limited the scope of Kellwood's consent.

DISCUSSION

"Upon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court. . . ." 28 U.S.C. § 636(c)(1). "In giving magistrate judges case-dispositive civil authority, Congress hoped to relieve the district courts' mounting queue of civil cases and thereby improve access to the courts for all groups." Roell v. Withrow, 538 U.S. 580, 588 (2003) (internal quotation marks omitted). Once given, consent to a magistrate judge may be withdrawn only on the court's own motion "for good cause shown" or on

a party's motion based on "extraordinary circumstances." 28 U.S.C. § 636(c)(4); see McCarthy v. Bronson, 906 F.2d 835, 838 (2d Cir. 1990). These requirements prevent gamesmanship. When a party comes to rue an adverse ruling, she cannot simply return to the district judge. The magistrate judge's authority is binding.

Courts have found that parties who have consented to the jurisdiction by "a magistrate judge," have consented to "jurisdiction by any magistrate judge." Wilhelm v. Rotman, 680 F.3d 1113, 1119 (9th Cir. 2012). See also MacNeil v. Americold Corp., 735 F. Supp. 32, 39 (D. Mass. 1990) ("As long as other magistrates were available in this District, the consent agreement—which provides for 'trial before . . . a United States Magistrate' . . . would remain in effect and this case would be referred to another magistrate for trial."). Conversely, a "consent that specifies a particular magistrate judge by name" does not constitute consent to the jurisdiction of a different magistrate judge. Kalan v. City of St. Francis, 274 F.3d 1150, 1151-52 (7th Cir. 2001) ("The consent specified Magistrate Judge R.L. Bittner by name (as opposed to stating that the parties consented to proceed before 'a' magistrate judge.)"). See also Mendes Junior Int'l Co. v. M/V Sokai Maru, 978 F.2d 920, 921 (5th Cir. 1992) (Because "the only written consent and the only order of reference . . . are expressly for Magistrate Judge Karen Brown, Magistrate Judge Stacy lacked all authority to enter judgment in this case.").

When Kellwood and the plaintiffs consented to the jurisdiction of "a magistrate judge," they waived their right to have their case heard by an Article III judge.

By the plain terms of the consent order, the parties consented to the jurisdiction of *any* magistrate judge, including the present one. The consent order did not specify Judge Dolinger by name or limit the scope of the parties' consent in any other way. Kellwood now wants to infer a limitation on the order's effectiveness based on an off-the-record conversation with a courtroom deputy. But Kellwood is a sophisticated litigant represented by highly experienced counsel. If Kellwood wanted to consent to Judge Dolinger's exclusive jurisdiction, it should have done so explicitly.

Nor does the inclusion of Judge Dolinger's initials in the caption muddy the order's clarity. The notation, which appears to have been made by the district judge when she approved the order, was merely "informational." See Wilhelm, 680 F.3d at 1119. It was not part of the order's operative language, and it did not limit the scope of Kellwood's consent.

Kellwood relies on two cases from the Western District of New York. In Sell v. Conway, the court vacated a transfer order to a different magistrate judge because the Clerk of Court had included with the consent form a letter advising that the parties "may consent to proceed to disposition of the case before Magistrate Judge Marian W. Payson pursuant to 28 U.S.C. § 636(c)." 10-cv-6182 (MWP), 2011 WL 5325978, at *1 (W.D.N.Y. Nov. 4, 2011). In Williams v. Conway, the court vacated a transfer order to a magistrate judge because the court had made an "explicit indication" that a different magistrate judge would preside. 07-cv-756(Sr), 2011 U.S. Dist. LEXIS 94786, at *2 (W.D.N.Y. Aug. 24, 2011). Neither case changes the result here. Sell diverges significantly from this case because it

includes an on-the-record representation by the court that the parties would consent to a named magistrate judge. Williams is also distinguishable if the court's "explicit indication" included a consent form naming a specific magistrate judge, or the court indicated on the record that a certain judge would preside. To the extent that either case can be read to hold that courts should look to extrinsic evidence when a party has unambiguously consented to the jurisdiction of "a magistrate judge," they conflict not only with the weight of opinion on this particular issue, but also with the fundamental rule that the plain language of an agreement controls.

Accepting Kellwood's argument would encourage judge shopping. The rules ensuring magistrate judges' impartiality, "including ethical rules about the activities in which they may engage and . . . disqualification rules, put them on a par with Article III judges when they are exercising judicial power," and thus, "the general rule that one may not choose one's judge in federal court should not have an exception for magistrate judges." Hatcher v. Indianapolis, 323 F.3d 513, 518 (7th Cir. 2003). Kellwood is entitled only to "an unbiased judge" not to a judge who makes Kellwood feel comfortable. In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988). Absent cause to question my impartiality, which Kellwood does not have, it cannot demand a different judge.

Finally, Kellwood has not argued that "extraordinary circumstances" justify the withdrawal of its consent. See 28 U.S.C. § 636(c)(4). Nor could it. A party who spends more than a decade litigating a

dispute in federal court should not be surprised to become intimate with the life cycle of the bench. The retirement of a jurist as learned and experienced as Judge Dolinger is a great loss for the Southern District of New York, but it is hardly “extraordinary” for a retiring judge to leave his cases to a newer one.

CONCLUSION

For the foregoing reasons, Kellwood’s motion is DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 100.

SO ORDERED.

/s/_____
SARAH NETBURN
United States Magistrate Judge

DATED: New York, New York
December 4, 2015

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APPENDIX E

Comparison of Yardstick Companies

[See Fold-Out Exhibit]

Comparison of Yardstick Companies

Comparison Categories	Under Armour	Sunday Players
Catchy brand logos, trademarks and catch phrases	 “Protect this House”	 “Look Good... Feel Good... Play Great!”
Company principals and owners	Former college athlete	Former college athletes and professional athletes
Breakout year	“Hit its competitive stride” in 2003	Expected breakout would have been 2003-2004 with the Kellwood agreement
Competition	The Companies were direct competitors	The two companies were direct competitors as demonstrated by evidence that Kellwood viewed them as competitors; MTV viewed them as competitors; Footlocker indicated it was looking to choose “between” the companies; some of the professional athletes and high school and college teams that saw or used both brands considered them competitors
Market entry and expertise	Under Armour was beginning to grow in the compressions apparel industry In the early years, Under Armour had to develop manufacturing, distribution and retail channel relationships from scratch	Sunday Players brand would be able to rapidly accelerate its entry into the market by leveraging Kellwood’s resources. As one of the largest apparel manufacturers and distributors in the United States, Kellwood has been a significant supplier to department stores and mass retailers, specialty boutiques and catalogs. Among these retailers included 56 national retailers on Ex. 8 Kellwood had also manufactured compression wear for both private label and Reebok. Kellwood selected the Sunday Players brand as its choice to market as an alternative to Under Armour

Comparison Categories	Under Armour	Sunday Players
Marketing strategy	During the 2002-2004 time period, Under Armour’ s distribution channels began to evolve and expand into the larger national sports retailers	The disclosed marketing intent of Kellwood for the Sunday Player’s brand (and supported by the MTV Agreement) was to leverage Kellwood’s relationships with the national retailers at the same time that Under Armour’ s market channel expansion was just beginning during the 2003-2004 time period
Television advertising	Launched its first-ever TV campaign in 2003, the Protect this House® TV commercial featuring former University of Maryland football player Under Armour’ s actual experience, they entered into a marketing relationship with ESPN in or about October 2003	Kellwood/Sunday Players “plan” was to market on television and radio (see, e.g., the proposed MTV contract) MTV was offering similar promotion and product placement opportunities to Kellwood/Sunday Players as what ESPN offered to Under Armour
Expected initial endorsers of the brand	Athletes and teams	Athletes and teams
Retail connections	Prior to 2002, Under Armour did not have the historical relationships with the mass retail distribution channel	Kellwood claimed to have the historical relationships with the mass retail distribution channel
Target customers and demographics	Athletes and the everyday person worldwide interested in remaining physically active	Athletes and the everyday person worldwide interested in remaining physically active
Products offered	In the 2003-2005 timeframe, the company focused almost exclusively on compression wear apparel, gradually adding other products Overall, the companies manufactured, distributed and sold similar products	In the 2003-2005 timeframe, the company’s products were principally compression sports apparel Overall, the companies manufactured, distributed and sold similar products
Concept behind the company’s compressions designs	To engineer apparel with moisture-wicking performance fibers to keep athletes cool, dry and light in hot and sweaty conditions. Also, the compression wear apparel was expected to help athletes recover faster	To engineer apparel with moisture-wicking performance fibers to keep athletes cool, dry and light in hot and sweaty conditions. Also, the compression wear apparel was expected to help athletes recover faster
Design ideas	CEO/owner, a former athlete, conducted research and submitted design ideas	Sunday Players principals (e.g. Washington, Kelly, Reese and Plumlee) are all former athletes who conducted research into the industry and submitted design ideas

Comparison Categories	Under Armour	Sunday Players
Look and feel of apparel products	Similar in attractiveness to consumers	Similar in attractiveness to consumers; SP products thought by some to “feel” better than Under Armour products
Distribution strategy	Transitioned its customer base and retail distribution channels from mom and pops, universities and specialty stores into the broader mass retail and mass sports specialty stores	Kellwood/Sunday Players “plan” was a trending of product sales from early adopter retail channels (i.e., mom and pops, universities and specialty stores) to mass retail and mass sports specialty stores
Manufacturing and distribution capabilities	In 2004, Under Armour was required to use 18 different manufacturing facilities located in 18 different countries abroad	Kellwood had superior manufacturing and distribution capabilities than that of Under Armour Kellwood owned its manufacturing facilities and would have had superior delivery time
Could meet demands for expected quantities of product	As shown from actual results, Under Armour was equipped and able to produce sufficient quantities of the product to meet these additional sales	Kellwood/Sunday Players was staffed, equipped and able to produce sufficient quantities of the product to meet these additional sales
Financial position and capital resources	Under Armour had modest financial assets in the 2002-2005 period	Kellwood was a multi-billion corporation (much larger than Under Armour) and could have budgeted for any necessary expenditures

APPENDIX F

**28 U.S.C. § 636 - Jurisdiction, powers, and
temporary assignment**

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time

United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate

judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt Authority.—

(1) In general.—

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A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.—

A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.—

In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.—

In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.—

The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.—Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

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(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.—

The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a

magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.