

EXHIBIT 14

OTTER PRODUCTS LLC

VS.

TRIPLENET PRICING INC

Deposition

KEVIN McPHERSON

12/19/2019

AB Court Reporting & Video

216 16th Street, Suite 600

Denver Colorado, 80202

303-296-0017

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-00510-CMA-MEH

OTTER PRODUCTS, LLC, et al.,

Plaintiffs,

vs.

TRIPLNET PRICING INC., et al.,

Defendants.

30(b)(6) DEPOSITION OF OTTER PRODUCTS, LLC,
AS GIVEN BY KEVIN McPHERSON
December 19, 2019

APPEARANCES:

VORYS, SATER, SEYMOUR AND PEASE LLP
By William D. Kloss, Esq.
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43215
Appearing on behalf of Plaintiffs.

THE ANTAR LAW FIRM, PLLC
By Solomon E. Antar, Esq.
Edward S. Antar, Esq.
26 Court Street
Suite 1200
Brooklyn, New York 11242
Appearing on behalf of Defendants.

Also present: Jennifer Becker Beard, Esq.

Pursuant to Notice and the Federal Rules of Civil Procedure, the 30(b)(6) deposition of OTTER PRODUCTS, LLC, as given by KEVIN McPHERSON, called by Defendants, was taken on Thursday, December 19, 2019, commencing at 8:46 a.m., at 2580 East Harmony Road, Suite 201, Fort Collins, Colorado, before Patricia M. Wrede, Registered Professional Reporter and Notary Public within and for the State of Colorado.

I N D E X

30(b)(6) DEPOSITION OF OTTER PRODUCTS, LLC,
AS GIVEN BY KEVIN McPHERSON

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(Exhibits 1 through 5 retained by Mr. S. Antar.)

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1 e-mail on it. That's all I would like to know, if
2 there are any negative reviews about, particularly,
3 Otter Products.

4 A Okay.

5 Q Which I have been unable to find.

6 A Okay.

7 (Exhibit 1 marked.)

8 Q (By Mr. S. Antar) You state in your
9 Complaint that my client, the defendant, as a
10 reseller, fails to comply with your quality control
11 requirements. Can you tell me to the best of your
12 knowledge what those requirements are?

13 A Sure. So --

14 Q Let's go through them one at a time.
15 Okay?

16 A Okay. So as part of our quality control
17 criteria, the first one is the safe handling and care
18 of our products, so that would entail maintaining a
19 very clean, pristine warehouse with an organized
20 system of maintaining the inventory levels of that
21 product so that we know what inventory our
22 distributors have at all times.

23 Maintain -- yes?

24 Q Let's do one at a time. Is that the first
25 one, safe handling and care?

1 A Yes.

2 Q And could you be a little more specific
3 about that?

4 A Sure. As I said, a very safe, clean
5 warehouse environment where it's -- the product is
6 secured in a safe manner where it's not mishandled,
7 damaged, there's no livestock, rabbits, that sort of
8 stuff, so it's in a very clean, safe environment.

9 Q Well, do you sell -- do any of your
10 distributors have livestock in their warehouses?

11 A There was one instance when we did a
12 distributor visit where there was rabbit cages in
13 that warehouse.

14 Q And how do you enforce this?

15 A We have our sales force do quarterly
16 business reviews with all of our distributors, and as
17 part of that review, they go on-site, and they have
18 the option to inspect the warehouse, and on some
19 instances we have.

20 But more to the point, if there is an
21 issue with our product and our customers have an
22 issue and there's damaged goods or something like
23 that, we can go directly back to that distributor and
24 address that issue because we'll have a direct line
25 of sight and know where that customer is getting

1 product, unlike in this instance we have no idea
2 where your client is getting its product, so if there
3 was an issue how do we address that?

4 Q Now, there are on-site reviews
5 periodically?

6 A Quarterly.

7 Q Quarterly. You sell to -- you sell to
8 Walmart?

9 A We sell to Walmart.

10 Q How many stores does Walmart have?

11 A I'm not sure.

12 Q I think about 33,000 stores.
13 Approximately?

14 A A lot.

15 Q Sell to Best Buy?

16 A We sell to Best Buy.

17 Q Do you know how many stores Best Buy has?

18 A I'm not sure.

19 Q I think about 1,800.

20 Do you sell to Target?

21 A We sell to Target.

22 Q I think Target has about 2,000.

23 So now is it your testimony that you have
24 representatives reviewing their procedures and going
25 down and inspecting their warehouses at least

1 quarterly?

2 A So Target is a reseller. They're not a
3 distributor. So Target, Walmart, Best Buy would buy
4 from a larger distributor, and we go and inspect the
5 distributor's warehouses.

6 Q But you inspect the distributors'
7 warehouses, but how about resellers, do you inspect
8 their warehouses?

9 A We do quarterly reviews of resellers as
10 well. We do test buys and have an audit sheet to
11 ensure those products that come in meet our
12 adequately standards. We also review all of our
13 online resellers' websites to check to see if they
14 have positive feedback. If they do not, we address
15 that.

16 Q Just hold off around there. I'm not
17 talking about websites. I'm talking about physical
18 examination of each premises.

19 A Sure.

20 Q Do you have anybody going down to these
21 stores or to these warehouses and making reports?

22 A Yes. We have field representatives in the
23 field that go to all the Targets. They'd meet with
24 Target, they meet with Best Buy, they meet with
25 Walmart at their physical locations, not at their

1 corporate headquarters. Same with AT&T and Verizon.
2 And those field reps are there to look at the
3 product, to make sure the displays are correct and
4 displaying our product in a manner that's consistent
5 with our brand guidelines.

6 Q Okay. And they write reports on this,
7 they give you back reports?

8 A They give back reports to the salespeople,
9 yes.

10 Q So we can assume you must have tens of
11 thousands of reports.

12 A I don't think it's reports like that.
13 It's probably more reports like on sales, how many
14 sales they generated, what the new POP looks like.
15 If there was an issue, they would certainly address
16 it there.

17 Q But I'm not interested in their sales.
18 I'm interested in the actual safe handling and care
19 reports and what comes back to you.

20 A Sure.

21 Q Is there anything like that? Is there
22 anything like that in your files?

23 A No, there is not.

24 Q So if there's nothing like that in your
25 files and you have no documentation, how is it

1 enforced?

2 A Like I said, the field reps go out in the
3 field, and if there is an issue, then we'll address
4 it there, and if there's a customer issue with
5 quality, we can jump on a plane and fly to that
6 distributor and take care of that issue right then
7 and there.

8 Q Well, do you get reports back from the
9 field reps who go out to each individual store?

10 Let me -- retracted. Let me pull that
11 back.

12 Do you have any reports from field reps
13 where there are problems?

14 A Not to my knowledge. Not that I have
15 seen.

16 Q So on all of these stores of Target, of
17 Walmart, et cetera, et cetera, there's not one
18 negative report.

19 A That's not been brought to my attention,
20 but these stores are the creme de la creme. I mean,
21 you're talking big box stores, which are the premier
22 stores that people go shop at, so I would expect
23 there not to be a problem there. I mean, we're not
24 talking about some mom-and-pop shop, corner store.

25 Q What is the next item that you would have

1 for your quality control?

2 A As part of our quality control, we have to
3 make sure that customers have a way to get in contact
4 with the reseller, so there would be an e-mail, phone
5 number, address, stuff like that.

6 Q How?

7 A What do you mean?

8 Q You say you have to make sure that a
9 customer can get in contact with a reseller. That
10 would be from whom the customer purchases the item.

11 A Correct.

12 Q Wouldn't the customer have a receipt or
13 payment or some sort of document showing who the --
14 who he purchased or who she purchased it from?

15 A Not all the time. For example, I mean,
16 with your client, we did a purchase from him. It
17 didn't come with any documentation stating that. As
18 a matter of fact, we actually named the wrong
19 defendant because he had such a misleading way of
20 identifying himself. It was only through our counsel
21 we could identify your client.

22 Q Well, we sell on Amazon, and Amazon has
23 the information of who the seller is.

24 A That's not accurate. It has a name and it
25 has some random address, but it doesn't have any way

1 an authorized distributor, so if Amazon bought from
2 your client, then they probably would not be
3 following our quality controls if that product came
4 from your client.

5 Q So then Amazon would be selling something
6 in your estimation that is illegal?

7 MR. KLOSS: Objection to the form of that
8 question.

9 You can answer.

10 Q (By Mr. S. Antar) You may answer.

11 A Yes.

12 Q And have you ever made any complaints to
13 Amazon?

14 A We do quality inspections of Amazon quite
15 frequently, and if we do have an issue with Amazon,
16 we'll take it up with them. But, quite frankly, we
17 ship direct to Amazon, so the product they get comes
18 from our distribution center, and I've been to my
19 distribution center many, many times, and I can tell
20 you that it definitely meets our quality controls.

21 Q Now, if my client sells -- if my client
22 buys from Ingram Micro and then sells to Amazon, is
23 that product any different than if Amazon would buy
24 it directly from you?

25 A Yes, it would be different, because the

1 warranty would not apply, because Ingram Micro is not
2 authorized to sell to your client; therefore, the
3 warranty would stop at that point in time.

4 Q And how does a consumer know this?

5 A Well, the consumer -- it's written in the
6 warranty in the packaging. So the warranty
7 explicitly states that the product is warranted only
8 if purchased from an authorized -- excuse me,
9 authorized reseller.

10 Q But the consumer already made the purchase
11 and went home with it.

12 A And --

13 Q And then would open the package, correct?

14 A Correct.

15 Q So how do you notify -- how do you notify
16 the consumer? Is there any markings on the outside
17 of your packages?

18 A It depends.

19 Q Tell me what it depends upon.

20 A So we have authorized resellers on Amazon,
21 and as part of that, they sticker the product that
22 says this product is an authorized product from this
23 authorized reseller.

24 Q And the packages would have that?

25 A Yes.

1 from products that are bought from a distributor and
2 products that we bought for resale. Can you tell me
3 how we would know that difference?

4 MR. KLOSS: You're talking about physical
5 difference.

6 MR. S. ANTAR: Yes, physical -- I'd like
7 to know.

8 A Yeah, as I stated earlier, I would be able
9 to tell the difference between product from our
10 authorized resellers on Amazon and the product that
11 your client is selling through Amazon, because we
12 sticker our authorized product that's sold on Amazon,
13 so if you went to a retail store, that wouldn't be
14 stickered, but I'll take a look at them.

15 Q (By Mr. S. Antar) Well, look at them and
16 just tell me what you think of them.

17 By the way, while you're looking at them,
18 Best Buy in Brooklyn is horrible. Everything is all
19 over the floors. Everything is just terrible over
20 there. You might want to send a representative out
21 there.

22 And after you finish looking at them,
23 leave one warranty out.

24 MR. S. ANTAR: Lawyers make the worst
25 witnesses, right? Because they know too much.

1 Q (By Mr. S. Antar) Can you tell me anything
2 about those three items that you looked at?

3 A Well, one item is a specific item to a
4 different store because the SKU is different, so this
5 SKU has a 57852 and the other SKU has a 5991, so this
6 SKU is specific to a certain retail store.

7 Q And the other two?

8 A That's the general SKUs.

9 Q Excuse me?

10 A The general SKUs. So sometimes we'll have
11 like a general, we call it an OTR, or OtterBox, SKU
12 that's general to all resellers, and then some
13 resellers because of, I don't know, different
14 configurations or whatever, will do a specific SKU.

15 So this SKU is specific to a store. I'm
16 not sure which store, but it could be Best Buy or
17 Target or --

18 Q Any store.

19 A Yeah, but that's --

20 Q And the other two, can you tell if the
21 other two were purchased from a store or a reseller?

22 A Not based on appearance, no.

23 Q I'll ask you, is there any material
24 difference between these items?

25 A Yeah. If it was purchased from an

1 unauthorized reseller, as stated in the warranty, the
2 warranty wouldn't apply. That says it in this
3 warranty.

4 Q Is that the only material difference?

5 A If it came from an unauthorized reseller,
6 I assume they didn't adhere to our quality controls,
7 so therefore, because they didn't adhere to our
8 quality controls and the warranty wouldn't apply,
9 then that would be a material difference.

10 Q And do you sell product in the state of
11 New York?

12 A I believe we sell product in the state of
13 New York.

14 Q And has anybody ever commenced any sort of
15 class action or action against your company because
16 of -- because of certain provisions of the law in New
17 York that you cannot limit a warranty because an item
18 has been purchased from a particular dealer or
19 non-dealer?

20 A I'm not aware of any class action lawsuit.

21 Q You know, let me -- I might be able to
22 even quote that for the record.

23 Just let me quote for the record section
24 369-B of New York general business law, which states,
25 quote: Manufacturer's Warranty and Guarantee. A, a

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1 Q Reporting?

2 A Correct.

3 Q Okay.

4 A So we require all of our distributors to
5 send us sell-through reports, and the reason for that
6 is to make sure that they're selling to the
7 authorized resellers that we authorize them to sell
8 to. So we take those sell-through reports and we
9 reconcile them with the white list that we send to
10 our distributors on a daily or weekly basis so we can
11 ensure that only those authorized resellers are
12 getting product.

13 Q And how does this benefit the customer?

14 A It benefits the customer because we want
15 to make sure that the product they're getting is
16 quality product, being handled in our quality
17 controls, and in the places that we want the product
18 to be in. For example, we don't sell to kiosks in
19 malls, we don't sell in flea markets, we don't allow
20 our resellers to sell on eBay, and with a very few
21 select secondary market distributors, we don't let
22 them sell on Amazon Marketplace either.

23 Q But you allow Amazon to sell on their own
24 marketplace, correct?

25 A We sell directly to Amazon.

1 Q And did you ever -- do you ever attempt to
2 have Amazon prevent any resellers from listing their
3 products?

4 A As I'm in charge of global
5 anti-counterfeiting, when I found a counterfeiter
6 selling product, I do report that counterfeit product
7 to Amazon through their brand registry portal.

8 Q I'm not speaking about counterfeiting.
9 I'm speaking about products purchased from an
10 authorized dealer, an authorized distributor, and
11 then sold on Amazon. Have you ever made any
12 complaints to Amazon?

13 A No.

14 Q And did you ever ask Amazon to stop these
15 sales?

16 A No.

17 Q Would it not be benefit to your quality
18 controls to have Amazon stop these sells from
19 resellers?

20 A I mean, it would be beneficial to our
21 quality controls if there was no unauthorized
22 resellers on Amazon, but Amazon's position is that
23 they're an open marketplace.

24 Q So you have attempted to make complaints
25 or you have made complaints to Amazon that there

1 was --

2 A No.

3 Q No. Just let it go without even asking
4 Amazon anything?

5 MR. KLOSS: Complaints with regards to
6 other --

7 Q (By Mr. S. Antar) Complaints regarding
8 sales by Otter Products by unauthorized distributors.

9 MR. KLOSS: Fair enough.

10 A No.

11 Q (By Mr. S. Antar) What other quality
12 control besides what you have testified to can you
13 tell us about?

14 A There's one more, but it's slipping my
15 mind. I believe it's in the Complaint, though.

16 Q Do you know if Amazon compels sellers on
17 their site to offer a warranty?

18 A I believe they do. I think if you -- if
19 the seller links to the ASIN and lists it as new,
20 then that explicitly states that it comes with a
21 manufacturer's warranty.

22 Q And do you know if Amazon doubles the
23 warranty?

24 A I don't understand.

25 Q Well, does Amazon give their own warranty,

1 climate?

2 A I think that it has to be stored in a
3 secure -- I think it has to be -- I'm not sure --
4 quite sure if it has to be a controlled climate with
5 AC and everything else, but I know that it can't be
6 subject to, like, extreme weather conditions so to
7 speak.

8 Q And that is a very important item to you,
9 correct?

10 A Well, we don't want the -- we wouldn't
11 want the product coming back like with mold and
12 mildew like I've seen with some other unauthorized
13 resellers.

14 Q So when you say it cannot be subject to
15 extreme weather conditions, how do you enforce that?
16 What do you do?

17 A As I explained before, we have quarterly
18 business reviews, so our salespeople go out to the
19 distributors once a quarter. They go over the
20 financials, they go over everything else, and they
21 actually do a warehouse visit as well if they want to
22 so ...

23 Q Do they walk through the warehouses?

24 A Sometimes they do.

25 Q And send you back reports?

1 record.

2 MR. KLOSS: I understand. Fair enough. I
3 just want to be fair to the witness.

4 Q (By Mr. S. Antar) Do you know if my client
5 sold defective Otter products?

6 A I don't know. Not to my knowledge.

7 Q You stated that my client sold poor
8 quality products. Can you tell me if my client sold
9 poor quality Otter products?

10 A Not to my knowledge.

11 Q Did you ever try or do you monitor the
12 reviews of the clients that you sell your products
13 to?

14 A Yes, we do.

15 Q And do you get any negative reviews for
16 Walmart?

17 A I don't know right now. We do monitor the
18 reviews, and we do take note of that.

19 Q I'll ask you to produce them. I'll ask
20 your counsel to produce the reviews that you receive
21 from Walmart.

22 How about Target? Do you monitor the
23 reviews from Target?

24 A Yes, we do.

25 Q And do you get negative reviews?

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1 A I'm not sure. My staff does that.

2 Q And --

3 MR. KLOSS: Object to the form of the
4 question. Go ahead.

5 MR. S. ANTAR: I'll make one demand after
6 all this.

7 Q (By Mr. S. Antar) Do you make -- do you
8 monitor negative reviews or any reviews for Best Buy?

9 A Yes, we do.

10 Q Do you know if you get any negative
11 reviews for Best Buy?

12 A None that has come to my attention.

13 Q Tell me all of your -- all of your vendees
14 that you follow reviews on to see what their reviews
15 may be, negative or positive. Which vendees?

16 A I can't get into all their names because
17 we have about 20 authorized online resellers that we
18 review, but definitely Walmart, Best Buy, Amazon,
19 Target, B&H Photo, and there's, you know, 16 other
20 online authorized resellers that we monitor.

21 MR. S. ANTAR: I'm going to ask that those
22 documents be produced.

23 MR. KLOSS: It's not been established that
24 there's any documents to be produced, but we will
25 respond to your --