IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

QVC, INC., **Plaintiff and** **Counterclaim Defendant,** **v.** **STARAD, INC. and CHRISTOPHER RADKO,** **Defendants and** **Counterclaim Plaintiffs**	**CIVIL ACTION** **NO. 03-5298**

MEMORANDUM OPINION AND ORDER

RUFE, J. **March 31, 2005**

On September 10, 2003, Starad, Inc. (the "Company") and Christopher Radko ("Radko" and together, "Starad") filed a declaratory judgment action against QVC, Inc., alleging antitrust violations, fraud and breach of contract. On September 19, 2003, QVC filed a separate action against Starad, alleging breach of contract, conversion and breach of a non-compete restrictive covenant. In its Answer to Starad's Complaint QVC also asserted counterclaims for fraud and accounting. The cases were consolidated on January 13, 2004.

Presently before the Court are the following motions: (1) Starad's Motion for Partial Summary Judgment on its declaratory judgment claims and on QVC's claim seeking a permanent injunction enforcing a restrictive non-compete covenant; (2) QVC's Motion for Partial Summary Judgment on Starad's Fraud Claim; and (3) Starad's Motion for Partial Summary Judgment on QVC's Fraud Claim.

I. BACKGROUND

A. The Ornaments

The following facts are not in dispute. Starad markets and sells ornaments, decorative home accents and accessories for holiday celebrations and festivities, some of which are marketed and sold under the trademark "Christopher Radko." The ornaments are exclusive designs of Starad. Radko is the Chief Executive Officer of the Company and the primary spokesperson for Starad products sold under the "Christopher Radko" trademark. QVC markets and sells products through direct response television programming**,** where customers can order products by various means, including by using toll free telephone numbers.

From 1997 through 2003, QVC acquired Starad's ornaments and home accessories via purchase orders and then marketed and sold this merchandise to its retail customers through, among other means, direct response television programming. QVC's purchase orders did not contain any covenants restricting Starad's right to market its products to other direct response television businesses.

B. The Agreement

On August 14, 2002, Starad and QVC entered into a license agreement (the "Agreement") granting QVC exclusive and non-exclusive rights to promote certain Starad apparel. The Agreement granted QVC the license to manufacture and promote "novelty embellished sweaters based upon the ornament designs of Christopher Radko," defining such sweaters as bearing trademarks and logos developed by Starad, including the words "Christopher Radko Goldstar," and to use these trademarks to promote the sweaters.

The Agreement also granted QVC the right to use Radko's "name, likeness, image, voice and performance" to promote the sweaters. Starad agreed to provide QVC with all necessary design, consulting and advisory services and other creative input to promote the sweaters, and to develop samples of proposed sweaters. The Agreement obligated Radko, if requested by QVC, to appear at least four times a year on QVC programs during which the sweaters "may be offered for sale." However, QVC made no representations with respect to the number of such appearances it could request. Further, although QVC agreed to pay Starad royalties on net revenue sales of the sweaters, it made no representations regarding the number of sweaters it would purchase, the frequency that the sweaters would be offered for sale by QVC, or of revenues to be generated from such sales.

The Agreement also contained a non-competition clause prohibiting Starad from promoting (1) the sweaters anywhere in the United States through any media, and (2) "any goods, services, or products," including the sweaters, on any direct response television program anywhere in the United States, i.e., on any of QVC's rival networks. The non-competition clause lasted for the duration of the Agreement and for one year following its termination or expiration.

The "Initial Term" of the Agreement commenced on August 14, 2002, and was set to expire one year after any sweater first aired on any QVC program. However, the Agreement automatically renewed for nine one-year terms ("Renewal Terms") unless (i) either party notified the other in writing of its intent to terminate, and (ii) net retail sales of sweaters during that term were less than the Minimum Amount. The Minimum Amount meant three million dollars in the Initial Term and for each Renewal Term, 110% of the Minimum Amount for the preceding term. Furthermore, if Starad elected to terminate the Agreement, it gave QVC a right to cure by purchasing or issuing orders for sweaters in quantities that, if sold during the then-current term, would yield net retail sales above the Minimum Amount.

On June 23, 2003, QVC issued its first purchase orders for the sweaters, totaling $46,311.00 (at cost). On July 14, 2003, Starad informed QVC that QVC's failure to perform repudiated the Agreement and Starad considered the Agreement void and non-binding. QVC responded on July 21, 2003, pointing out that QVC made no representations in the Agreement regarding the number of sweaters it would purchase, and that QVC recently issued several purchase orders for the sweaters. QVC's letter also averred that the Initial Term of the Agreement has not yet started because no sweaters had aired on any QVC program to date, that the Agreement was in full force, and that QVC expected Starad to honor its obligations.

On August 26, 2003, Starad contracted with the Home Shopping Network ("HSN"), QVC's competitor, to market the ornaments, and Radko has since appeared on HSN's television programs. On September 8, 2003, Starad informed QVC that Radko would not appear on QVC's television programs. On September 15, 2003, QVC sought to return $446,285 worth of ornaments to Starad for a cash refund.

C. Starad's Complaint

Starad alleges that QVC entered into the Agreement to prevent Starad from selling the ornaments to QVC's competitors. QVC splits the market for direct response television with three other entities, with QVC's market share in excess of sixty percent. Its revenues are double those of HSN, despite the fact that QVC's "reach" (the number of homes to which its programming is distributed) is allegedly only six to seven percent larger than HSN's reach. According to Starad, QVC's market dominance results from its use of unreasonable and overly broad non-compete provisions in exclusive dealing agreements with its vendors.

Starad alleges that ornaments under Radko's trademark are one of its main product lines, and that from 1998 through 2002 Radko appeared on QVC to market the ornaments. After discussing the potential for expansion of Starad's "brand" into ready-to-wear products, QVC and Starad entered into the Agreement. During the negotiations QVC employees represented that the proposed Agreement and especially its non-compete provision were boilerplate and non-negotiable. Starad relied on QVC's representations of its dedication to Starad's brand when Starad executed the Agreement. At the same time that QVC was expressing its devotion to Starad's brand, it was aware that sales of Starad's brand had decreased and was allegedly planning to de-emphasize it.

As of July 14, 2003, QVC allegedly had not aired *any* programming to promote Starad's sweaters, purchased any sweaters, or paid any royalties to Starad. Starad contends that its July 14, 2003 letter to QVC validly terminated the Agreement.

D. QVC's Complaint

QVC alleges that Starad breached the terms of QVC's purchase orders for ornaments by refusing to refund QVC $929,000.00 for unsold ornaments which QVC properly returned in spring of 2003, and by subsequently refusing to accept ornaments QVC attempted to return in September of 2003. QVC further alleges that Starad knew Radko's appearance "on air" was critical to QVC's decision to purchase any ornaments, because Radko's public *persona* is critical to successful marketing of his ornaments.

QVC alleges that marketing of both the ornaments and the sweaters is intertwined because the sweaters are based on Starad's unique ornament designs, and the Agreement's non-compete provision governs promotion of the sweaters and promotion of other Starad products, including the ornaments. Relying on Radko's promises to appear on QVC at least four times a year pursuant to the Agreement. and on Starad's representations that Radko would so appear, QVC ordered $46,311.00 worth of sweaters and at least $1.5 million worth of ornaments. QVC could not sell this merchandise because Radko did not appear on-air as required by the Agreement. Thus, according to QVC, Starad breached the Agreement in August of 2003 when it contracted with HSN to market the ornaments, and in September of 2003, when it notified QVC that Radko would not appear on QVC to promote any products.

II. STARAD'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS DECLARATORY CLAIMS

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the non-moving party.[2]

Starad argues that the Agreement is illusory and unenforceable because it leaves performance to the discretion of QVC, lacks consideration or, alternatively, that it was validly terminated by Starad. Starad also argues that the non-compete clause is unenforceable as a matter of law.[3]

A. Validity of the Agreement

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[1] Celotex Corp. v. Catreet, 477 U.S. 317, 322-32 (1986).

[2] See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[3] The Agreement provides, and the parties agree, that Pennsylvania law governs.

The Court must first determine whether the contract is ambiguous.[4] Where the written terms of the contract are not ambiguous and can only be read one way, the Court will interpret the contract as a matter of law.[5] The parties do not argue that the Agreement is ambiguous, and the Court agrees.

1. Whether the Agreement Is Illusory

First, Starad argues that the Agreement is illusory because QVC's performance is discretionary.[6] When one party's obligations under a contract are discretionary, those obligations are "illusory and, therefore, lacking consideration and unenforceable."[7] As pointed out by QVC, the Agreement is not illusory because it sets out the parties' mutual promises regarding a license agreement. Furthermore, under an exclusive dealing arrangement such as the one here, the buyer has a duty to use its best efforts to promote the seller's product (and the seller has a duty to "use best efforts to supply the goods").[8] Therefore, Starad is not entitled to summary judgment on this claim.

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[4] Hullett v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 111 (3d Cir. 1994) (a contract provision is ambiguous if it is susceptible of two reasonable alternative interpretations).

[5] Id., 38 F.3d at 111.

[6] The Agreement at ¶¶ 2(c), 4(a) (QVC "makes no representations or warranties regarding (i) the number of Products that QVC will purchase, if any, (ii) the frequency, if at all, that the Products will be offered for sale by QVC, and (iii) the amount, if any, of revenues that will be generated from such sales," how frequently Radko would appear on QVC to promote the Products, and reserved the right to promote products competing with the sweaters).

[7] Starr v. O-I Broadway Glass, Inc., 637 A.2d 1371, 1373 (Pa. Super. Ct. 1994).

[8] See Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1125 (3d Cir. 1992) (citing U.C.C. § 2-306(2)). Tigg applied Michigan law corresponding to Article 2 of the Uniform Commercial Code (the "U.C.C."). Starad agrees that Article 2 of the U.C.C. applies to exclusive license agreements. See also 13 Pa. Cons. Stat. Ann. § 2306 (corresponding to U.C.C. § 2-306); Starr, 637 A.2d 1371, 1373 (purchaser's performance was not discretionary where it was contingent on his ability to procure property of a third party because the purchaser had a "duty to make reasonable efforts to bring about the transaction."). Starad argues that even if QVC had obligations under the Agreement, QVC failed to use its best efforts because it issued purchase orders for less than one-sixth of the amount contemplated by the Agreement, ten months after its execution, while doing nothing to promote the sale of sweaters. While the parties present conflicting affidavits on the issue of QVC's best efforts (Radko Aff. ¶¶ 20, 24; Becchelli

2. Consideration

Starad next argues that the Agreement is unenforceable because it lacks consideration. Under Pennsylvania's Uniform Obligations Act (the "UOA"), the absence of consideration does not render the contract unenforceable if it contains a provision expressing the parties' intent to be legally bound.[9] Here, the Agreement is signed by Starad, QVC, and Radko (in his personal capacity), and states that the parties "intend to be legally bound hereby."[10] QVC and Starad also acknowledged receipt of other valid consideration, including promises of present or future royalties.[11] Further, a corresponding benefit or a beneficial change in the status of the parties' relationship creates adequate additional consideration.[12] QVC presented affidavits of its employees which state that the Agreement was a result of QVC's decision in 2002 to work with Starad on an effort to expand the Radko brand name from ornaments into apparel, and that QVC expended substantial resources on marketing and promoting Starad's products, including working diligently on finalizing the sweaters'

Aff. ¶¶ 3-5), this dispute does not affect the Court's conclusion that the Agreement is not illusory.

[9] 33 Pa. Cons. Stat. Ann. § 6.

[10] See Paul Revere Protective Life Ins. v. Weis, 535 F. Supp. 379, 368 (E.D. Pa. 1981) (guarantees signed by defendants "intending to be bound" were legally enforceable even if consideration was not found).

[11] The Agreement at ¶ C ("In consideration of the royalty paid or to be paid by QVC to [Starad], *and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged*, and intending to be legally bound hereby, the parties hereto agree as follows. . ." [emphasis added]). Starad argues that there was a failure of consideration because QVC failed to pay any royalties to Starad. However, QVC's failure to pay any royalties is a defense available to Starad against QVC's attempt to enforce the Agreement. Here QVC affidavits raise an issue of fact with regard to whether any problems with the sweater production (and by extension, with the payment of royalties) were due to Starad's lack of cooperation. See Becchelli Aff. at ¶¶ 3-7; M.N.C Corp. v. Mount Lebanon Med. Center, 509 A.2d 1256, 1259 (Pa. 1986) (issue of failure of consideration is for the fact-finder).

[12] See Volunteer Firemen's Ins. Serv. Inc. v. CIGNA Property & Cas. Ins. Agency, 693 A.2d 1330, 1338 (Pa. Super. 1997) (adequate consideration for non-compete existed under a contract pursuant to which covenant insurer would act as exclusive underwriter of certain insurance policies developed by plaintiff insurance agency) .

design.[13]

Even assuming that the parties' expression of intent to be legally bound and acknowledgment of valid consideration does not render the Agreement enforceable, summary judgment is denied because QVC raises an issue of material fact regarding whether additional consideration was offered for the non-compete provision, in a form of beneficial change in the parties' relationship.

3. Termination of the Agreement

Starad first argues that the Agreement is indefinite in duration. The Initial Term of the Agreement does not expire until one year after any Starad sweater airs on any QVC program. However, the Agreement does not set any deadlines for QVC to actually put the sweaters on air. Starad is therefore correct that lack of such a deadline creates a contract of potentially infinite duration.

Starad then argues that its July 14, 2003 letter was a sufficient notice of termination.[14] "'Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but *unless otherwise agreed* may be terminated at any time by either party [emphasis added].' Thus the plain language of the statute provides that such contracts will endure for a reasonable amount of time unless one party wishes to terminate sooner."[15]

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[13] Campbell Decl. at ¶ 9; Becchelli Aff. at ¶¶ 3-7.

[14] Starad cites to cases where courts found that contracts were properly terminated by letters stating "we intend to cancel" or "we do not wish to continue this agreement in the future." See EFCO Importers v. Halsobrunn, 500 F. Supp. 152, 155-56 (E.D. Pa. 1980); Maloney v. Madrid Motor Corp., 122 A.2d 694, 696 (Pa. 1956). QVC contends that Starad referred to the Agreement as "void" and "non-binding" in its July 14, 2003 letter and not as "terminated" specifically to circumvent triggering the non-compete.

[15] Norris Sales v. Target Div. of Diamant Boart, No. Civ. A. 01-6793, 2002 WL 31771169 at *3 (E.D. Pa. Dec. 11, 2002) (citing Pa. Cons. Stat. Ann. § 2309(b)).

The Agreement has specific provisions regarding termination by Starad. Even if Starad's July 14, 2003 letter were a valid notice of termination, the Agreement gives QVC a right to cure by ordering sweaters in the amount that would generate three million dollars in revenue "if sold during such period" (i.e., during the then-current Term). Starad points out - and QVC admits - that QVC's June 2003 sweater orders could not generate sales of more than one hundred thousand dollars.[16] Starad argues that this amount is "far less than the annual minimum sales volume of three million dollars required for renewal of the Sweater Agreement," indirectly saying that QVC failed to cure.

However, in a situation such as here, if QVC has not aired any sweaters on any of its programs, the Agreement creates a potentially infinite cure period because it allows QVC to cure by issuing purchase orders for the sweaters but fails to provide an actual deadline for achieving the three million dollar requirement. Contrary to Starad's interpretation of the three million dollar requirement, it is not an "annual minimum" but has to be achieved during the then-current term, which under present circumstances can run indefinitely unless QVC puts any sweaters on air.

QVC replies only that it would be nonsensical for QVC to behave in such a manner because it would violate covenants of good faith and dealing under Pennsylvania's law. While it might be nonsensical for QVC to stock three million dollars worth of sweaters, the Agreement itself does not preclude such a possibility. Because the cure period is indefinite in duration, it should be valid for a reasonable time.[17] Affidavits of QVC employees represent that QVC's delay in ordering the sweaters was due to lack of Radko's cooperation, and the initial sweater orders were small for

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[16] Radko Aff. at ¶ 24.

[17] See Norris Sales, 2002 WL 31771169, *3.

business and marketing reasons. Since the termination provision does not render the Agreement per se invalid and genuine issues of fact exist as to whether Starad's July 14, 2003 letter validly terminated the Agreement, summary judgment is denied.[18]

Starad alternatively seeks a declaration that the Agreement was valid for a reasonable time of one year, and terminated one year after its execution, on August 14, 2003 at the latest. Starad alleges that one year is a reasonable time in view of the one year Initial and Renewal Terms contemplated by the Agreement. While Starad is correct that the Agreement provides for one year Renewal Terms, the Initial Term, as described above, is potentially indefinite. Starad fails to provide any other evidence to support a finding that one year was a valid duration for the Agreement, precluding summary judgment on this claim.

B. Validity of the Non-Compete Clause

Under Pennsylvania law, a restrictive covenant is valid if it is "(1) ancillary to the main purpose of a lawful transaction; (2) necessary to protect a party's legitimate interest; (3) supported by consideration; and (4) appropriately limited as to time and territory."[19] Starad argues that the non-compete in the Agreement fails to satisfy any of these four prongs.[20]

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[18] See King of Prussia Equip. Corp. v. Power Curbers, Inc., 158 F.Supp.2d 463, 465 (E.D. Pa. 2001) (genuine issues of material fact existed as to whether agreement granting exclusive distributorship for manufacturer's products had prescribed conditions, which if satisfied, set definite term of continuing duration, precluded summary judgment on breach of contract claim).

[19] Volunteer Firemen's, 693 A.2d at 1337 (holding that a non-compete covenant between an independent insurance agency and an insurer prohibiting insurer from selling certain policies nationwide for three years after termination of the parties' agreement was valid and enforceable).

[20] "The determination of reasonableness is a factual one, requiring consideration of all the facts and circumstances, with the party claiming unreasonableness as a defense against enforcement of the covenant bearing the burden of proof." Wellspan Health v. Bayliss, No. 405 MDA 2004, - - A.2d - -, 2005 WL 407523 (Pa. Super. Ct. Feb. 22, 2005) (court must engage in an analysis of reasonableness if the threshold requirement of a protectable business interest is met).

1. Ancillary

QVC contends that the non-compete provision is ancillary to the main purpose of the Agreement because of the interrelationship between the sweaters and the ornaments.[21] The main purpose of the Agreement was to provide QVC with a license to use Starad's intellectual property and Radko's name and likeness, and to design and promote sweaters based on Radko's ornament designs. QVC's success in marketing the sweaters depended upon continued marketing of the ornaments, and Starad's sales of ornaments on competitors' direct television programming would adversely affect - - and already has affected - - QVC's ability to market the sweaters by diverting viewers from QVC.[22] QVC also contends that the non-compete is necessary to protect QVC's substantial investments in creation of Radko's public persona and expansion of Starad's brand.[23]

Starad argues that the non-compete is not ancillary to the main purpose of a lawful transaction because it far exceeds and/or is unrelated to the main purpose of the Agreement, which is a license to promote sweaters, while the non-compete purports to prohibit Starad from promoting "any goods, services, or products, including without limitation the Products, anywhere in the United States by means of Direct Response Television."

The controlling question is whether QVC "has a protectable interest such that a reasonable covenant not to compete, effective upon termination of the agreement, would be enforceable against [Starad]. . . It is only where the sole object of both parties in making the contract

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[21] Campbell Decl. at ¶ 11.

[22] Id. at ¶ 11; see also Piercing Pagoda, Inc. v. Hoffner, 351 A.2d 207, 212 (Pa. 1976) (under a franchise agreement for sale of earrings, a non-compete covenant faced "the economic reality that continued operation of [franchisee's] stores subsequent to the termination of the agreement would adversely affect the ability of the franchisor to secure another franchisee in the same territory.").

[23] Campbell Decl. at ¶¶ 4-10; Morley Decl. at ¶¶ 4-9.

is to restrain trade or control prices that the covenant will be declared void."[24]

QVC's affidavits raise issues of material fact regarding the interrelated marketing of the ornaments and the sweaters and QVC's interest in protecting its investments, precluding summary judgment for Starad on this issue.

2. Consideration

Starad next argues that because the sales of ornaments were never governed by non-compete covenants, new consideration would have been required to make the non-compete valid as to them. QVC responds that the new consideration was a beneficial change in Starad and Radko's relationship with QVC. While Starad disputes that it received any benefits as a result of the Agreement, QVC's affidavits describing its dedication of resources to the expansion of the Starad brand raise a genuine issue of material fact as to the existence of additional consideration. Summary judgment is therefore denied on this issue.

3. Scope of the Non-Compete

Starad contends that the non-compete is overly broad in both time and geographic scope. The non-compete lasts for the duration of the Agreement and for one year after termination of the Agreement. Its first subsection prohibits Starad from promoting the sweaters anywhere in the United States through any media. The second subsection of the non-compete prohibits Starad from appearing on any direct response television program anywhere in the United States, to promote "any goods, services, or products, including without limitation the Products."

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[24] Volunteer Firemen's, 693 A.2d at 1337, n.7; see also Hess v. Gebhard & Co., 808 A.2d 912, 920-21 (Pa. 2002) ("If the covenant is inserted into the agreement for some other purpose, as for example, eliminating or repressing competition or to keep the employee from competing so that the employer can gain an economic advantage, the covenant will not be enforced.").

Since, as discussed *infra*, the Agreement is potentially infinite in duration, the non-compete is potentially infinite as well. This kind of duration is patently unreasonable and overly broad, and QVC fails to present any arguments to the contrary. Where the court finds that the restrictive covenant is overly broad but the party seeking its enforcement is clearly entitled to some protection, "the trial court has the power to grant only partial enforcement of the restrictive covenant."[25] However, duration of the non-compete is directly related to the duration of the Agreement. As discussed previously, a genuine issue of material fact exists as to whether Starad's July 14, 2003 letter validly terminated the Agreement. If the Court finds that the July 14, 2003 letter was a valid notice of termination, the non-compete would run for one year from the termination. Starad does not argue that a one year post-termination non-compete is unreasonable. Accordingly, summary judgment is denied on this issue.

QVC also presents affidavits of its employees stating that a nationwide restriction on Starad's direct response television programming is reasonable because that is the only geographic scope that could adequately protect QVC, and that Starad remains free to market its products in stores or on the internet without any restrictions.[26] QVC's evidence creates issues of material fact, preventing the Court from granting summary judgment on this issue.

4. Legitimate Need

Starad contends that QVC has no legitimate business need for the non-compete with respect to any Starad and/or Radko products. As admitted by QVC, it bought Starad ornaments for

[25] QVC, Inc. v. Tauman, No. 98-1144, 1998 WL 156982 at *6 (E.D. Pa. Apr. 3, 1998).

[26] Campbell Decl. at ¶ 10; see also Tauman, 1998 WL 156982 at *3 (restrictive covenant valid where it did not wholly prevent defendant from pursuing his new business venture, or from marketing his new products).

years via purchase orders that contained no non-compete language, and was able to generate sales of such ornaments between $6 million and $14 million. If sole ownership of Starad or Radko's image and products were genuinely necessary to protect QVC's business interests, it would have required such an agreement a long time ago, and it would not have been able to generate millions of dollars of sales of Starad merchandise. Relying on the reasoning in Tauman, QVC replies that the non-compete is necessary to protect QVC's investment into the creation of Radko's on-air personality and promotion of Starad's products.[27] QVC did not insist on including non-compete clauses in its purchase orders for Starad ornaments. However, the Pennsylvania Supreme Court pointed out that requiring a restrictive covenant as part of an original employment agreement to be valid may be unreasonable under the circumstances, since a novice employee might not have any expertise worth protecting.[28] Therefore, the parties' conflicting affidavits prevent summary judgment for Starad on this issue as well.

5. Undue Hardship

Starad argues that even if QVC could establish a legitimate business interest protected by the non-compete, the undue hardship on Starad justifies denying its enforcement. The ornaments are Starad's major product line but represent less than two percent of QVC's sales, and preventing Starad and Radko from selling their ornaments on direct response television would "decimate Starad's sales, cause massive employee layoffs and likely force Starad into bankruptcy."[29]

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[27] Campbell Decl. at ¶¶ 4-10; Morley Decl. at ¶¶ 4-9; seealso Tauman, 1998 WL 156982 at *3 (finding a legitimate protectable interest where QVC invested significant resources in creation and promotion of certain products advertised by defendant and in creation of his on-screen persona).

[28] Jacobson & Co. v. Int'l Corp., 235 A.2d 612, 618 (Pa. 1967).

[29] Radko Aff. at ¶ 28.

QVC argues that this type of argument has been rejected as specious by courts in the context of non-compete cases.[30] Further, the only support for Starad's argument comes from Radko's Affidavit, which was drafted in opposition to QVC's application for a temporary restraining order in September of 2003. Radko stated that Starad's ability to sell ornaments in the "Fall holiday season" was "critical to Starad's business" and accounted for approximately one-third of Starad's annual sales.[31] Since the end of the 2003 Christmas season, Starad has not submitted any additional pleadings or affidavits addressing the issue of undue hardship up to and including the present. It is undisputed that the non-compete here does not prohibit Starad from marketing or selling any of its products other than the sweaters in venues other than direct response television programming, such as via stores and the internet. A genuine issue of material fact with respect to the adverse impact of the non-compete on Starad's sales prevents entry of summary judgment.

Therefore, because contested issues of material fact exist, summary judgment on Starad's Motion for Partial Summary Judgment on its declaratory judgment claims and on QVC's claim seeking a permanent injunction enforcing a restrictive non-compete covenant is not appropriate.

III. QVC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON STARAD'S FRAUD CLAIM

QVC moves for partial summary judgment on Starad's sixth cause of action for fraud,

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[30] See Merrill Lynch v. Stidham, 658 F.2d 1098, 1102 n.8 (5th Cir. 1980) ("more specious is defendants' argument that because Merrill Lynch is a large concern, the injury is minuscule. One cannot be certain, but the success of Merrill Lynch may well be attributable to its diligence over the years in holding parties to the contracts that they freely executed.").

[31] Radko Aff. at ¶ 28.

arguing that it is a claim of fraud in the inducement barred by the parol evidence rule.[32] QVC argues that Starad relies on inadmissible parol evidence, mere allegations and inadmissible hearsay.

Under Pennsylvania law, "the parol evidence rule bar[s] consideration of prior representations concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently *omitted from the contract*."[33] This rule permits admission of prior representations where a party alleges fraud in the execution, such as where "the parties agreed that those representations would be included in the written agreement but were omitted by fraud, accident or mistake."[34] Fraud in the inducement "does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement."[35]

Starad responds that the parol evidence rule does not apply to its fraud claim because (1) Starad's claim is based on QVC's allegedly fraudulent representations about matters *not covered* by the Agreement, and (2) Starad alleged fraud in the execution as opposed to fraud in the inducement, an exception to the parol evidence rule.[36]

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[32] See Starad's Compl. at ¶¶ 57, 58 ("QVC deliberately and actively misrepresented to [Starad] the status of the parties' relationship and other facts material to the decision of [Starad] to enter into the Sweater Agreement and grant to QVC an exclusive license thereunder. [Starad] reasonably relied on this false information to its detriment, and [was] thereby induced to enter into the Sweater Agreement and grant to QVC an exclusive license thereunder.")

[33] Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996).

[34] 1726 Cherry St. P'ship v. Bell Atlantic Prop.'s, 653 A.2d 663, 666 (Pa. Super. 1995).

[35] Dayhoff, 86 F.3d at 1300.

[36] Starad also argues that summary judgment is inappropriate because it needs to conduct depositions of QVC employees who submitted declarations to this Court, to explore the "factual dispute" regarding QVC's employees' representations to Starad about QVC's devotion to Starad's brand and the Agreement. Starad's Reply in Opp. to QVC's Mot. at 11; see also Starad's Sur-Reply in Opp. to QVC's Mot., at 9-10. Discovery is now completed, and neither party has moved this Court for leave to conduct additional discovery or to file supplemental

A. Whether QVC's Alleged Misrepresentations Concern Matters Covered by the Agreement

Radko's Affidavit represents that Radko signed the Agreement in reliance on, "among other things, [QVC's President, Darlene] Daggett's representations regarding QVC's dedication to the Christopher Radko brand, the [QVC] buyer [Joelle West]'s representation that a show would air in November 2002, and the representation that the relationship with QVC with regard to glass ornaments would remain unaffected."[37]

QVC argues that all of the allegedly false representations by QVC that induced Starad to enter into the Agreement are exactly the type of pre-execution discussions barred by the parol evidence rule because they concern matters covered by the Agreement, an integrated written contract. Specifically, the Agreement addresses the issue of expanding Starad's brand into apparel,[38] the scheduling of shows to promote sweaters,[39] and the second clause of the non-compete on its face applies to "any [Starad] goods, services, or products" and not just sweater-related products.[40]

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pleadings addressing issues explored during discovery.

[37] Radko Aff. ¶ 12; see also Radko Aff. ¶ 8 (in early 2002 Daggett met with Radko "to discuss the potential for expanding the Christopher Radko brand to the ready-to-wear market," and "repeatedly stressed the strength of the Christopher Radko brand and that QVC was devoted to assisting Starad in expanding the Christopher Radko brand"), ¶ 9 (QVC personnel pressured Starad to sign an allegedly standard licensing agreement for the sweaters so that QVC could complete its preparations for a show in November); ¶ 11 (Radko specifically told QVC's counsel that he did not want the Agreement to apply to Starad's ornament business and that he intended to negotiate a separate ornament agreement, whereupon he was reassured that the Agreement would not affect the parties' ornaments relationship; QVC's counsel told Radko that the second part of the non-compete clause was meant to be read within the context of the first, as prohibiting Starad from direct response television sales of any sweater-related goods, services, or products).

[38] The Agreement at 1 (Agreement applies to promotion of "novelty embellished sweaters based upon the ornament designs of Christopher Radko" and grants QVC a license to use Radko trademarks to promote the sweaters).

[39] The Agreement at ¶ 2(c) (QVC makes no representations or warranties regarding the frequency, if at all, that the sweaters will be offered for sale).

[40] The Agreement at ¶ 6.

Where the alleged misrepresentations concern a subject "specifically dealt with in the agreements," the parol evidence rule precludes admission of evidence of allegedly fraudulent misrepresentations made during negotiations leading to the integrated written agreement.[41] The decision in 1726 Cherry St. is of particular relevance here. That case stemmed from the plaintiffs' sale of two parcels of land to the defendant Bell Atlantic Properties, Inc. The plaintiffs alleged that they agreed to be the first ones to sell to the defendant only after it agreed to the inclusion of a "most favored nation" clause in their written agreements. This clause provided that the price paid to the plaintiffs would be adjusted upward retroactively if the defendant later acquired certain enumerated parcels at higher prices. The list in question omitted a parcel known as the CIGNA parcel, which the defendant did later acquire at a price higher than that paid to the plaintiffs. The plaintiffs brought suit, alleging that the CIGNA parcel was not included in their list only because Bell Atlantic orally misrepresented to them that it had no intention of buying it.[42]

After concluding that the parol evidence rule barred the plaintiffs' claims, the trial court entered judgment for the defendant. The Pennsylvania Superior Court subsequently affirmed, emphasizing that "although the parties disagree as to what was said on the subject of the CIGNA Parcel, all agree that the fate of that parcel specifically was discussed," however, the final integrated writing made no mention of the CIGNA parcel.[43] Under these circumstances the parol evidence rule barred the plaintiffs from introducing evidence of prior allegedly fraudulent representations by the

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[41] 1726 Cherry St., 653 A.2d at 664.

[42] Id. at 664-65.

[43] Id. at 670.

defendant.[44]

Since prior to the Agreement the parties' only relationship involved sales of Starad ornaments, the Agreement, by expanding the parties' relationship to include Starad apparel, clearly addresses the subject of expanding Starad's brand. It also specifically addresses the number and the timing of shows promised by QVC (i.e., none).[45] Finally, by prohibiting Starad from selling any of its products to QVC competitors for the duration of the Agreement, the non-compete directly affects Starad's ornaments relationship with QVC.[46] The broad holdings of Pennsylvania courts interpreting the parol evidence rule and the plain language of the Agreement prohibit Starad from introducing evidence of alleged oral misrepresentations by QVC regarding QVC's dedication to the Starad brand, a November 2002 show dedicated to the sweaters, and the Agreement not affecting the parties' ornaments relationship. As stated by the court in 1726 Cherry St., "if [Starad and Radko] intended to rely on what they now contend was a centrally important representation conveyed by [QVC] in the course of the negotiations over a multimillion dollar [] transaction, then [they] should have insisted that the representation be set forth in their integrated written agreement."[47]

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[44] Id. at 670; see also Bardwell v. Willis Co., 100 A.2d 102, 105 (Pa. 1956)("If plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract ..., they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely, and they should have omitted the provisions which they now desire to repudiate and nullify.")

[45] Starad's argument that "a promise to air a show in November does not necessarily conflict with the parties' agreement that shows would be scheduled according to no particular frequency" (Starad's Reply in Opp. at 5), does nothing to avoid the parole evidence rule and flies in the face of the Agreement, since QVC specifically disavowed *any* promises regarding future shows. See the Agreement at ¶ 2(c).

[46] Starad argues that the non-compete cannot affect the parties' ornaments relationship because it was carried out via separate purchase orders and QVC does not contend that the Agreement replaces the purchase orders. That is not the point. While the non-compete does not subsume the parties' ornaments relationship, it certainly does *affect* it by prohibiting Starad from selling its ornaments to QVC competitors.

[47] Id. at 670; see also Bardwell v. Willis Co., 100 A.2d 102, 105 (Pa. 1956)("If plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract ..., they

Starad attempts to avoid the parol evidence rule by arguing that it pleaded fraud with respect to QVC's misrepresentations of its overall devotion to the Starad brand and QVC's plans to expand the brand. Starad argues that these matters are not covered by the Agreement because it is "only an exclusive license by Starad to QVC of the right to manufacture apparel based on Starad designs," and therefore it does not (and cannot) address the status of the parties' entire relationship and QVC's plans for the Starad brand.[48]

However, Starad does not present any evidence supporting its claim that QVC's President misrepresented QVC's overall devotion to Starad's brand while simultaneously deciding to de-emphasize the brand.[49] Radko's Affidavit claims, in language identical to that of Starad's Complaint, that at the time QVC employees were expressing QVC's devotion to Starad's brand, a "process was put into motion that *would result in QVC deciding to 'de-emphasize' the Christopher Radko brand* [emphasis added]."[50] Radko also represents that after he signed the Agreement, "QVC's interest in marketing a Christopher Radko branded line of sweaters seemingly evaporated."[51] Specifically, in February 2003, QVC's new buyer Mary Becchelli informed Starad that "QVC had no intention of airing a show for the new sweater line" and "QVC was 'de-emphasizing' the Christopher Radko brand."[52] None of these assertions, even if taken as true, support an inference

should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely, and they should have omitted the provisions which they now desire to repudiate and nullify.")

[48] Starad's Reply in Opp. at 6-7.

[49] Starad's Sur-Reply in Opp. at 4.

[50] See Starad's Compl. ¶ 26 (same).

[51] Radko Aff. at ¶ 13.

[52] Radko Aff. at ¶ 16.

that QVC decided to de-emphasize Starad's brand in the beginning of 2002, when QVC's President Ms. Daggett allegedly stressed QVC's devotion to Starad's brand.[53]

When a motion for summary judgment is supported by affidavits, the party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."[54] Since Starad failed to show that there is a genuine issue as to any material fact, summary judgment on Starad's fraud claim is appropriate.

B. Fraud in the Execution

Starad argues that an exception to the parol evidence rule applies because it alleged fraud in the execution. Starad signed the Agreement unaware that the non-compete governed the parties' ornaments relationship, and that the Agreement imposed on Starad certain obligations related to the ornaments, despite the fact that such obligations are not found in the express language of the Agreement.

"Fraud in the execution applies to situations where parties agree to include certain terms in an agreement, but such terms are not included. Thus, the defrauded party is mistaken as to the contents of the physical document that it is signing. Parol evidence is admissible in such a case only to show that certain provisions were supposed to be in the agreement but were omitted because of fraud, accident, or mistake."[55] In Dayhoff, the plaintiff corporation claimed that its president,

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[53] See Anderson v. Lib. Lobby, Inc., 477 U.S. 242, 255, 249-50 (1986) (evidence of the non-moving party is to be considered as true, and justifiable inferences are to be drawn in its favor, but summary judgment may be granted if the evidence is "merely colorable" or is "not significantly probative").

[54] Fed. R. Civ. P. 56(e).

[55] Dayhoff, 86 F.3d at 1300; see also 1726 Cherry St., 653 A.2d at 666 (fraud in the execution is to be distinguished from fraud in the inducement, where the party does not contend that the parties agreed that the

unrepresented by counsel during negotiations with the defendant corporation, signed an agreement containing a termination clause in reliance on fraudulent misrepresentations about the meaning of the termination clause. When the plaintiff's president questioned the meaning of the termination clause, the defendant's counsel gave him an explanation that differed from the plain language of the contract.[56] The Third Circuit held that the parol evidence rule precluded the plaintiff from introducing evidence of the defendant's misrepresentations to alter the plain terms of the contract. In doing so, it also specifically rejected the plaintiff's claim that it alleged fraud in the execution: "[i]t is clear that Dayhoff alleges fraud in the inducement in this case, despite its protestations to the contrary."[57] QVC argues that in the present case it is clear that Starad alleged fraud in the inducement, and the exception to the parol evidence rule does not apply, because Starad's claim is premised on prior, pre-Agreement representations.

Starad does not allege that the parties agreed to include certain provisions in the Agreement and that such terms were omitted. Neither does Starad allege that Starad and Radko were mistaken as to the contents of the Agreement at the time they signed it. As described above, Starad's pleadings and Radko's affidavit allege misrepresentations by QVC employees regarding the effect of the Agreement on the parties' ornaments relationship, made during negotiations leading to the Agreement. As in Dayhoff, Starad claims that the other party misrepresented the meaning of a contractual provision, despite the plain language of the contract at issue. Starad's new argument that

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additional prior "representations would be in the written agreement, but claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement.").

[56] Dayhoff, 86 F.3d at 1299.

[57] Dayhoff, 86 F.3d at 1300.

QVC misled it regarding the nature and the scope of the Agreement as QVC *now seeks to enforce it* is misguided since it focuses not on the plain terms of the Agreement but on QVC's personal interpretation thereof. Starad clearly alleged fraud in the inducement and has failed to allege fraud in the execution, and therefore summary judgment on its fraud claim is appropriate for the reasons discussed above.

IV. STARAD & RADKO'S MOTION FOR SUMMARY JUDGMENT ON QVC'S FRAUD CLAIM

QVC has claimed that it purchased and/or refrained from returning ornaments in reliance on Starad's misrepresentations. Starad contends that this is a claim of fraud in the inducement which is barred by the parol evidence rule.[58] QVC also claimed that it purchased the sweaters in reliance on Starad's false representations regarding Radko's appearances on QVC to promote the sweaters. Starad argues that this claim is barred under the Pennsylvania "gist of the action" rule, which bars fraud claims that merely restate a claim for breach of contract.

A. QVC Purchases

QVC does not dispute that through and including 2003, it purchased Starad ornaments using QVC's purchase orders.[59] The purchase orders are integrated written documents which

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[58] See QVC's Answer and Counterclaims at ¶¶ 165-68 (alleging that Starad, in order to get QVC to purchase the sweaters and additional ornaments and to refrain from returning additional quantities of ornaments, knowingly made fraudulent omissions and material misrepresentations with regard to Radko's continued appearances on QVC to promote the ornaments. QVC relied upon such fraudulent misrepresentations and/or material omissions in purchasing the sweaters and in purchasing additional ornaments and/or refraining from returning additional quantities of ornaments); id. at ¶ 76 (Radko's appearance on QVC to promote Starad ornaments "was a critical factor in QVC's decision to purchase any and all" ornaments from Starad); id. at ¶ 119 (Starad "fraudulently and intentionally omitted to inform QVC that Radko would not appear as an 'on air' spokesperson" on QVC's programs to have QVC order the sweaters and additional ornaments, and to retain an additional inventory of ornaments.).

[59] See, e.g., QVC's Answer and Counterclaims at ¶ 80; Campbell's Second Decl. at ¶ 3.

disclaim any oral modification.[60] Starad argues that QVC's claim of reliance on Starad's alleged oral promises, as far as it concerns QVC's purchases of the ornaments, is precluded by the parol evidence rule. As discussed earlier, "the parol evidence rule bar[s] consideration of prior representations concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently omitted from the contract."[61] QVC does not claim that Starad's alleged misrepresentations were fraudulently omitted from the purchase orders.

QVC's response essentially concedes that the parol evidence rule bars its claims of fraudulent inducement to purchase merchandise under the purchase orders, stating that QVC does not claim that it was fraudulently induced to enter into the purchase orders.[62] Accordingly, QVC's claim that it was fraudulently induced to purchase Starad ornaments by Starad's oral misrepresentations is barred by the parol evidence rule, and summary judgment is appropriate.

B. QVC Returns

QVC now claims that Starad's alleged misrepresentations, made *after* the purchase orders were executed, induced QVC to waive certain rights. QVC specifically argues that Radko knew that QVC believed he would appear on its programming to promote the ornaments, and that he waited as long as possible to inform QVC otherwise in order to induce QVC to waive certain

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[60] See Paragraphs 18-19 of Ex. 3 to Campbell's Second Decl. (providing that the orders "constitute the full understanding of the parties hereto and a complete and exclusive statement of the parties' agreement concerning the Merchandise furnished hereunder," and that no modification shall be binding unless "made in writing and duly executed by the party to be bound"). The purchase orders are conditioned upon acceptance by Starad of their terms and conditions, by oral or written notice of acceptance, preparation to perform, and/or shipment of all or any merchandise specified by the order. Id.

[61] Dayhoff, 86 F.3d at 1300.

[62] However, as evidenced by QVC's Complaint and Counterclaims, QVC did initially make such a claim.

rights that it had under the purchase orders.

There are two specific transactions at issue. The first transaction involves $929,000.00 worth of ornaments which QVC bought and subsequently returned to Starad, exercising its right to return under Section Eight of its purchase orders. QVC alleges that Starad, strapped for cash, asked QVC to waive its right to a cash refund and instead accept a credit of $929,000.00 in ornaments to be provided for QVC shows in the fall of 2003.[63] QVC claims that it accepted Starad's offer of credit instead of a cash refund only because it believed that Radko would appear on QVC to promote the credited ornaments.[64] QVC believed so because Radko had appeared on its programming every year since the parties began doing business together, and because "until September of 2003, Radko's statements and conduct indicated that he understood QVC expected him to appear on QVC's programming to promote the [credited ornaments]."[65] QVC argues that Radko's conduct is a clear cut case of fraud, and that the parol evidence rule does not bar evidence of subsequent dealings between the parties.[66]

Pennsylvania law prohibits a party from modifying the terms of the parties' written, integrated contract for the sale of goods.[67] Section Eight of QVC purchase orders gives QVC the

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[63] See Starad's June 4, 2003 letter, Ex. 4 to Campbell Second Decl.

[64] Campbell Second Decl. at ¶¶ 6, 8.

[65] Id. at ¶ 7.

[66] QVC does not address applicability or construction of the U.C.C. in this situation, citing non-U.C.C. cases, even though Section Eight of QVC purchase orders specifically cites 13 Pa. Cons. Stat., Division 2, as governing sales and returns of merchandise under the orders. Pennsylvania codified the U.C.C. in 13 Pa. Cons. Stat. § 1101 *et seq.*

[67] The purchase orders provide (and the parties agree) that Pennsylvania law governs. As contracts for the sale of goods, the purchase orders are governed by the Pennsylvania version of Article 2 of the U.C.C., Division 2 of Title 13 of the Pennsylvania Consolidated Statutes. Specifically, 13 Pa. Cons. Stat. § 2202 prohibits evidence of oral

right to return the ornaments to Starad "for credit or cash, at [QVC's] option."[68] It is an unambiguous provision, and it does not require Starad to appear to promote the ornaments. As discussed above, QVC purchase orders are integrated agreements constituting "the full understanding of the parties" and disclaiming any oral modification. QVC's claim that it returned $929,000.00 of ornaments for credit instead of cash in reliance on Radko's false oral promises to appear to promote the credited ornaments is plainly barred under the Pennsylvania parol evidence rule. It attempts to modify the terms of an unambiguous provision without reducing the modification to writing, as required by the parties' contract and the statute of frauds.[69] Further, as pointed out by Starad, if promises for Radko to appear on QVC were critical to QVC's purchase and return decisions, QVC should have included them in its written agreements.[70] Therefore, summary judgment is appropriate for Starad on this issue.

The second transaction involves $884,684 worth of ornaments that QVC allegedly retained instead of returning to Starad based on the same belief that Radko would appear to promote the ornaments. QVC purchased these ornaments with "additional" purchase orders, presumably

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modification of a written contract intended by parties to be the final expression of their agreement.

[68] ¶ 8 of Exs. 2-3 to Campbell Second Decl.

[69] 13 Pa. Cons. Stat. § 2202 (evidence of subsequent dealings or course of performance may not be used to contradict the terms of a final writing, only to explain or supplement); see also 13 Pa. Cons. Stat. § 2209 (modification of a contract must satisfy the statute of frauds). QVC claims that it is not attempting to modify the terms of its purchase orders, but that it was induced to waive certain rights under them. However, QVC's right to return the ornaments for credit (or cash, at *QVC's option*) was a right specifically spelled out by QVC's purchase orders, which did not impose any conditions on QVC's choice of remedies. QVC's argument that in accepting credit instead of cash it relied on Radko's alleged misrepresentations does attempt to modify the terms of the purchase orders.

[70] 1726 Cherry St., 653 A.2d at 670. And in fact, QVC did include such a provision in the parties' Agreement.

issued from February 2003 through July 2003.[71] QVC represents that after September 8, 2003, when Radko informed QVC that he would not be appearing on its programming, it exercised its right to return $446,285 worth of ornaments, but it was too late to return $884,684 worth of ornaments.[72]

This claim also seeks to modify clear and unambiguous terms of QVC's purchase orders. QVC presents no evidence of a written modification of the purchase orders that would condition QVC's return rights on alleged oral promises by Starad. Accordingly, this claim is barred by the parol evidence rule.[73] Summary judgment for Starad is appropriate on this part of QVC's fraud claim as well.

3. Gist of the Action

Starad argues that under the Agreement Radko was contractually obligated to promote apparel, if requested to do so, and any claim that QVC purchased Starad sweaters in reliance on Radko's duty to promote is barred by Pennsylvania's "gist of the action" rule because it merely

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[71] While it is not completely clear from QVC's pleadings and affidavits as to when it purchased this merchandise, the "additional purchase orders" for $884,684 seem to be the same "additional purchase orders" referenced in QVC's Answer and Counterclaims, even though the amount claimed is slightly different ("no less than $778,958.00.").

[72] Campbell Second Decl. at ¶ 12.

[73] Additionally, QVC fails to provide any evidence as to the timing of its $884,684 ornaments purchase, or any explanation for why it could not exercise its return rights after September 8, 2003, relying on a conclusory statement by its employee that "if QVC had known at an earlier time that Radko did not intend to appear on QVC's programming to promote the Holiday Ornaments, QVC would have exercised its right to return additional quantities of the $884,864. . ." Campbell Second Decl. at ¶ 12. QVC also curiously states that QVC believed that Radko would appear on its programming because "his statements and conduct indicated that he understood QVC expected him to appear," yet represents that throughout the summer of 2003, when "QVC consistently tried to make arrangements for Radko to appear on QVC's programming in September to promote the Holiday Ornaments," "neither Radko nor anyone else at Starad returned [QVC's] calls." Id. at ¶¶ 7, 9. It is black letter law that in opposing summary judgment, the non-moving party may not rely on such mere allegations but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

duplicates QVC's contract claim.[74] QVC concedes as much but argues that it should be allowed to assert the fraud claim in the alternative to its breach of contract claim, in light of Starad's argument that the Agreement is void and non-binding. This argument is not persuasive since, as pointed out by Starad, if the Agreement is void, so are any promises contained in it, including any promises by Radko to promote the sweaters, and QVC's fraud claim would fail. Since QVC's fraud claim for purchase of the sweaters duplicates its breach of contract claim, it is barred under the gist of action rule, and summary judgment for Starad is appropriate on this issue.

An appropriate Order follows.

[74] See Montgomery County. v. Microvote Corp., Civ. A. No. 97-6331, 2000 WL 134708, at *3-4 (E.D. Pa. Feb. 3, 2000) (under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

QVC, INC., **Plaintiff and** **Counterclaim Defendant,** **v.** **STARAD, INC. and CHRISTOPHER RADKO,** **Defendants and** **Counterclaim Plaintiffs**	:	**CIVIL ACTION** **NO. 03-5298**

ORDER

AND NOW, this 31st day of March, 2005, upon consideration of Starad's Motion for Partial Summary Judgment on its declaratory judgment claims and on QVC's claim seeking a permanent injunction enforcing a restrictive non-compete covenant [Doc. # 26]; QVC's Motion for Partial Summary Judgment on Starad's Fraud Claim [Doc. # 38]; Starad's Motion for Partial Summary Judgment on QVC's Fraud Claim [Doc. ## 44, 47]; the parties' respective responses, replies, and sur-replies thereto; and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** as follows:

1. Starad's Motion for Partial Summary Judgment on its declaratory judgment claims and on QVC's claim seeking a permanent injunction enforcing a restrictive non-compete covenant is **DENIED**.

2. QVC's Motion for Partial Summary Judgment on Starad's Fraud Claim is **GRANTED** and **JUDGMENT IS ENTERED** in favor of QVC against Starad on Starad's sixth

cause of action for fraud.

3. Starad's Motion for Partial Summary Judgment on QVC's Fraud Claim is **GRANTED** and **JUDGMENT IS ENTERED** in favor of Starad against QVC on QVC's sixth counterclaim for fraud.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.