IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CARY CHAPIN and BARBARA DOUMA, EMILY BRATTON, JOHN AND DEAN BALDWIN, TERRY R. WITHHAM, ANN MCCRAVE, JEFFREY MCCRAVE, CELSO PRINCIPAL, HARRY EISENER AND CYNTHIA SAUERS, ELISA ADAMS, DENISE AND TRUMAN BARBIER, NANCY AND JOSEPH NEMETH, IRENE PATTON, Plaintiffs, vs. **WHITECAP INVESTMENT CORPORATION d/b/a PARADISE LUMBER, MSI BUILDING SUPPLIES, XYZ CORPORATION, JOHN DOE, AND JANE DOE,** Defendants.	)	CASE NO. ST-12-CV-435 ACTION FOR DAMAGES JURY TRIAL DEMANDED
WHITECAP INVESTMENT CORP. d/b/a PARADISE LUMBER, and MSI BUILDING SUPPLIES, Third Party Plaintiffs, vs. **PUTNAM LUMBER and EXPORT COMPANY, PUTNAM FAMILY PROPERTIES INC. AND GREAT SOUTHERN WOOD PRESERVING, INCORPORATED,** Third Party Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on third-party defendant Great Southern Wood Preserving Company's Motion to Dismiss[1] Whitecap Lumber's third-party

[1] Filed on November 5, 2012.

complaint for lack of personal jurisdiction. For the reasons set forth herein the motion will be denied.

Introduction

This litigation concerns allegedly defective lumber used in the construction of homes on St. John, United States Virgin Islands.

Great Southern Wood Preserving Company ("Great Southern") is an Alabama corporation that treats wood products with chemicals to make it less susceptible to terminates and rot.

Putnam Lumber and Export Company and Putnam Family Properties, Inc. ("the Putnam Defendants") are Florida corporations[2] that sell and export wood products.

Whitecap Investment Corporation d/b/a Paradise Lumber operates a retail business on St. John that sells lumber. MSI Building Supplies is a St. Thomas lumber retailer.

Plaintiffs, owners of various properties on St. John, allege Great Southern treated wood products for Putnam, and Putnam sold the treated wood to Whitecap and MSI. Those entities then sold the lumber to Plaintiffs, who used the lumber in constructing their homes. They allege that the wood was improperly treated and was sold as wood treated for a particular use, but the wood was not actually treated for

[2] At all times relevant to this matter, Putnam Family Properties, Inc. was doing business as Putnam Lumber and Export Company.

that use. According to Plaintiffs, the wood prematurely rotted, causing damage to themselves and their properties.

I. Procedural History

Plaintiffs filed a Complaint against Whitecap Lumber and MSI[3] alleging that between 2004 and 2011, those entities sold defective wood to Plaintiffs. The Complaint asserts five causes of action: breach of contract (Count I), breach of warranty (Count II), negligence (Count III), strict liability (Count IV), and deceptive trade practices (Count V).

Whitecap and MSI each filed a third-party complaint against the Putnam Defendants and Great Southern alleging claims for indemnification and contribution, and the Putnam Defendants filed counterclaims and cross-claims seeking the same relief.

Great Southern filed a Motion to Dismiss[4] Whitecap Lumber's third-party complaint for lack of personal jurisdiction. Great Southern subsequently removed[5] the case to District Court. In an Order entered on February 20, 2014, the District Court concluded it lacked jurisdiction over the case because there was not complete diversity among the parties. The case was remanded back to Superior Court.

The Court now addresses Great Southern's Motion to Dismiss.

[3] Complaint filed on August 14, 2012.
[4] Filed on November 5, 2012.
[5] Notice of Removal filed on April 18, 2013.

II. Great Southern's Motion to Dismiss

Great Southern moves to dismiss Whitecap Lumber's Third Party Complaint based on lack of personal jurisdiction.[6] The Putnam Defendants[7] and Whitecap Lumber[8] oppose the motion. Great Southern filed a reply to both oppositions.[9]

Great Southern argues that the Court cannot exercise personal jurisdiction over it because it does not conduct any business operations in the Virgin Islands, and exercising jurisdiction over it would violate the Fourteenth Amendment's due process clause.

A. Evidentiary Burden

The evidentiary burden depends on whether the Court holds a hearing on the motion. *Molloy v. Independence Blue Cross*, 56 V.I. 155, 172 (V.I. 2012).

No hearing was held on Great Southern's Motion. Where no hearing is held, parties opposing the motion need only "establish a prima facie case for personal jurisdiction." *Molloy*, 56 V.I. at 172. This means "the plaintiff must 'establish[ ] with reasonable particularity sufficient contacts between the defendant and the forum

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[6] Filed on November 5, 2012. *See also* Great Southern's Notice of Filing Corrected Exhibit to Motion to Dismiss filed on November 7, 2012.

[7] Opposition filed on December 19, 2012.

[8] Opposition filed on February 15, 2012.

[9] *See* Great Southern's Resp. in Supp. of Mot. to Dismiss Cross Claims of Putnam Defendants filed on February 1, 2013; Great Southern's Reply to Whitecap's Opp. to Mot. to Dismiss for Lack of Personal Jurisdiction filed on March 15, 2013.

state.'" *Unlimited Holdings, Inc. v. Bertram Yacht, Inc.*, 49 V.I. 1002, 1007 (D.V.I. 2008) (quoting *Mellon Bank (East) PSFS, Nat. Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992)). The Court must accept the opposing party's allegations as true (provided those allegations are supported by admissible evidence) and construe all factual disputes in the opposing party's favor. *Molloy*, 56 V.I. at 173; *see also Unlimited Holdings, Inc.*, 49 V.I. at 1007 (explaining that a plaintiff may not "rely on the bare pleadings alone"; "actual proofs, not mere allegations" are required).[10]

B. Personal Jurisdiction Analysis

To assess personal jurisdiction, the Court applies a two-step test. *Molloy*, 56 V.I. at 173 (citing *In re Najawicz*, 52 V.I. 311, 336 (V.I. 2009). The plaintiff must demonstrate that (1) jurisdiction is appropriate under the Virgin Islands Long Arm statute, § 4903 of Title 5 of the Virgin Islands Code, and (2) jurisdiction comports with the due process clause of the Fourteenth Amendment.

1. The Virgin Islands Long Arm Statute

The Virgin Islands Long Arm statute, 5 V.I.C. § 4903, provides several bases for jurisdiction. The parties focus their arguments[11] on § 4903(a)(4), which provides:

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[10] If the Court holds an evidentiary hearing on personal jurisdiction, the non-moving party must prove by a preponderance of the evidence that jurisdiction is proper. *Molloy*, 56 V.I. at 172.

[11] The Putnam Defendants also argue that Great Southern waived its right to assert a personal jurisdiction defense because Great Southern attempted to assert the same defense after filing an answer (in violation of Fed. R. Civ. P. 12) in a District Court case predicated on the same facts. The Putnam Defendants offer no authority to support the proposition that Great Southern's actions in District Court can be imputed to this litigation. Therefore, Defendants' waiver argument is unpersuasive.

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
>
> ....
>
> (4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory[.]

Section (a)(4) has two parts. First, it requires a prima facie showing that Great Southern caused tortious injury in this territory by an act or omission outside the territory. Second, Whitecap must present evidence that Great Southern regularly solicited business, engaged in any other persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in the territory. The course of conduct plaintiff relies on to establish jurisdiction need not relate to the alleged tort. *Hendrickson v. Reg O Co.*, 657 F.2d 9, 12 (3d Cir. 1981).

Injury in the Virgin Islands Caused by Act or Omission Outside the Territory

Plaintiffs allege they sustained tortious injury in the form of property damage and personal injury as a result of defectively treated wood used in constructing their homes. First Amended Compl. at ¶ 22, 23, 30, 31. Great Southern does not dispute that the Plaintiffs were injured.[12] However, it argues that there is no evidence showing that Great Southern caused the Plaintiffs' injuries.

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[12] Thus, Court accepts as true Plaintiffs' allegation that they suffered tortious injury in the Virgin Islands. *See Molloy*, 56 V.I. at 173 (court "must resolve all factual disputes in the plaintiff's favor").

Great Southern is an Alabama corporation with a principal place of business in Alabama. Aff. of Bill Freeman at ¶ 3, Ex. B to Great Southern's Mot. and Mem. of Law in Supp. of Mot. to Dismiss. It operates a wood treatment plant in Jesup, Georgia. *Id.* at ¶ 2.

Between 2004 and 2009, Great Southern treated certain wood products for Putnam. *Id.* at ¶ 4. Of the lumber Putnam sold to Whitecap, some, but not all, of the lumber was treated by Great Southern. Noble Dep., Ex. A to Great Southern's Reply to Whitecap's Opp. at 79, 96-97 (indicating Whitecap was one of Putnam's biggest customers). Mike Noble, President and CEO of Putnam, indicated Putnam is Whitecap's "primary supplier." *Id.* at 133. He further explained that Putnam ships lumber to Paradise on "flat racks,"[13] all of which was treated by Great Southern. *Id.* However, Noble conceded it is possible that some of the wood Putnam shipped to Paradise was not treated by Great Southern. Id. at 213-14. Finally, Noble stated that Putnam purchased a specific type of wood from Great Southern described as 5/4 x 6 x 16' RED,[14] and Putnam sold "every piece" of that product to Putnam's only client in St. John, U.S.V.I. (Whitecap d/b/a Paradise Lumber).[15] Ex. L to Whitecap's Opp. at 8, 10, 130.

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[13] Noble explained "[a] flat rack is a tractor trailer more or less" that provides a base for stacking bundles of lumber. Noble Dep. at 220. Ten to twelve bundles of wood are stacked on each flat rack. Id.
[14] RED is an acronym for radius edge decking. Noble Dep. at 130.
[15] Email message from Mike Noble, President and CEO of Putnam Lumber and Export Company, to Mike Simerly, sales agent for Great Southern.

In response to complaints made by Whitecap's customers regarding rotten wood, Noble traveled to St. John to inspect the wood. During his inspection, he observed some white tags indicating the wood had been treated by Great Southern. Noble Dep. at 216-18. The tags were not attached to the wood however; they were "scattered about" because "most people . . . take the tag off because it's unsightly." *Id.* at 217. Noble conceded that he could not conclusively determine whether Great Southern or another treatment services provider had treated the wood he inspected in St. John. *Id.* at 218-19.

Taking Whitecap's allegations as true, and construing the facts in its favor, Whitecap has alleged that Plaintiffs suffered tortious injuries in the Virgin Islands as a result of an act committed outside the Virgin Islands by Great Southern.

Substantial Revenue

To meet the second part of 4903(a)(4), Whitecap and the Putnam Defendants must show that Great Southern derived substantial revenue from goods used or consumed in this territory. Because "this is a jurisdiction with a small population more than 1,000 miles away from any continent . . .'substantial' must be interpreted by local Virgin Islands standards." *Hendrickson v. Reg. O. Co.*, 17 V.I. 463-64 (D.V.I. 1980), *aff'd* 657 F.2d 9, 12-13 (3d Cir. 1981). Accordingly, whether the revenue is "substantial" "does not depend upon a comparison with the defendant's total sales." *Hendrickson*, 657 F.2d at 12-13. Such a test would "favor multibillion dollar corporations over those with smaller sales volumes." *Id.* at 13. Instead, "the substantiality of the revenues must be measured by objective factors." *Id.*

Putnam alleges between 2003 and 2009 it paid Great Southern over $2 million for lumber treatment services. Ex. E to Whitecap's Opp. to GSWP's Mot. to Dismiss for Lack of Personal Jurisdiction (copy of Putnam's "Check History Report"). Of that $2 million, $442,689.24 was for treatment of lumber and treated lumber that was shipped to the Virgin Islands. Putnam's Verified Ans. to Plts. First Set of Interrogs., Ex. F to Whitecap's Opp. That amount would certainly qualify as "substantial." *See, e.g., Molloy*, 56 V.I. at 181 ($50,000-$100,000 in licensing fees per year satisfy § 4903(a)(4)'s "substantial revenue" requirement). Therefore, the second component of the Long Arm statute is satisfied.[16]

2. Due Process Analysis

Even if the long arm statute is satisfied, the Court's exercise of jurisdiction over a party must be in accord with due process. There are two types of jurisdiction: general and specific. *Molloy*, 56 V.I. at 181. General jurisdiction exists when the

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[16] Whitecap also contends that Great Southern is subject to jurisdiction under the Long Arm Statute because it engaged in a persistent course of conduct. First, it contends that Great Southern sought a business relationship with a lumber exporter, and specifically with Putnam, to expand its business. Second, Whitecap asserts that Great Southern sold lumber to Home Depot, which operates a chain of retail stores with locations across the United States, including one in St. Thomas. Finally, Whitecap argues that Great Southern continued to place its YellaWood brand lumber in the stream of commerce, and continued to treat lumber for Putnam, even after Great Southern learned that Putnam was selling the treated lumber in the Virgin Islands and at least one homeowner in the Virgin Islands had reported a problem with rotten wood to Putnam. However, because Whitecap has satisfied § 4903(a)(4) by showing that Great Southern has derived substantial revenue from goods used or consumed in the Virgin Islands, the Court need not evaluate Whitecap's persistent course of conduct argument.

defendant has contacts with the forum unrelated to the pending action. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (listing domicile as an example of an unrelated forum contact). Specific jurisdiction, by contrast, "depends on an affiliation between the forum and the underlying controversy." *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

A. General Jurisdiction

The test for general jurisdiction under *Daimler v. Bauman*, 134 S. Ct. 746 (2014) is whether a defendant is "essentially at home" in the forum state.[17]

Great Southern is an Alabama corporation with its principal place of business in Alabama. Bill Freeman, the General Manager of Great Southern's Jesup plant, executed an affidavit stating that Great Southern has never (1) maintained offices, a telephone number, or been licensed to do business in the U.S. Virgin Islands, (2) employed any Virgin Islands residents, (3) advertised in the Virgin Islands, (4) owned any assets or bank accounts located in the Virgin Islands, (5) transacted any business in the Virgin Islands, or (6) rendered services in the Virgin Islands. Aff. of Bill Freeman at ¶ 5.

[17] *See Daimler*, 134 S. Ct. at 760 (citing *Goodyear*, 564 U. S., at ___, 131 S. Ct. 2846, 2854) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home"). "[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U. S., at ___, 131 S. Ct. at 2851).

Great Southern argues there is no evidence it has conducted any activity within the Virgin Islands. Neither Putnam nor Whitecap controverted those assertions or submitted evidence to support that Great Southern is "at home" in the Virgin Islands. Therefore, Great Southern is not subject to general jurisdiction.

B. Specific Jurisdiction via Stream of Commerce

Specific jurisdiction exists on a claim-by-claim basis. *Molloy*, 56 V.I. at 181. Accordingly, for each claim, the Court must determine whether "the defendant has the requisite minimum contacts with the forum and the claim arises from those contacts." *Molloy*, 56 V.I. at 181. Whitecap asserts an indemnity and contribution claim against Putnam and Great Southern in relation to any judgment Plaintiffs obtain against Whitecap.

To determine whether specific jurisdiction exists, the Court applies a three-part test. *Molloy*, 56 V.I. at 183.

First, the defendant must have 'purposefully directed' its activities at the forum. Second, the litigation must arise out of or relate to at least one of those activities. If the first two requirements have been met, a court may consider whether the exercise of jurisdiction otherwise comports with fair play and substantial justice.

Molloy, 56 V.I. at 183 (citations omitted). "The purpose of this test is to ensure that the defendant has the requisite minimum contacts with a forum to receive 'fair warning' that the defendant may be haled into court in that forum to answer for its actions in relation to those contacts." *Id.* at 183-184 (citing *Burger King Corp.*, 471 U.S. at 472).

At the outset, the evidence demonstrates that this litigation arises out of Great Southern's sale of its lumber products: both treated lumber from its inventory and treatment services provided to Putnam on wood purchased by Putnam. Plaintiffs allege that the treatment process was defective in that it caused the lumber to rot prematurely. The relation between Plaintiffs' claims (and Whitecap's resultant claims for indemnity) and Great Southern's business is sufficiently clear for jurisdictional purposes.

Purposefully Directed Activities

Great Southern argues that it did not purposefully direct any activities at the Virgin Islands. It asserts it did not sell, market, or distribute the wood within the Virgin Islands, or to its residents.

Whitecap Lumber counters that Great Southern purposefully directed its activities towards the Virgin Islands by placing good into the "stream of commerce."

Stream of Commerce Theory

Stream of commerce "refers to the movement of goods from manufacturers through distributors to consumers." *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011). The stream of commerce theory is a specific application of a general principle: a defendant may be subject to jurisdiction without entering the forum, where it "seek[s] to serve" the jurisdiction's market. *Id.* The ultimate inquiry is whether the defendant "purposefully avai[led] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *In re Najawicz*, 52 V.I. 311, 337 (V.I. 2009) (quoting *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 260 (3d Cir. 2000)); *Nicastro*, 131 S. Ct. at 2788. Generally, "it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* Jurisdiction comports with due process "only where the defendant can be said to have targeted the forum." *Id.*

Two decisions of the United States Supreme Court are significant to the Court's jurisdictional analysis: *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102 (1987) and *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

Asahi Metals and *Nicastro*

The United States Supreme Court's seminal stream of commerce case is *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102 (1987). In *Asahi*, the Court held that California could not exercise personal jurisdiction over a Japanese component manufacturer. *Asahi* consists of two opinions – one by Justice O'Connor and the other by Justice Brennan – with two different tests for specific personal jurisdiction.

Justice Brennan described the stream of commerce as referring

> not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as the participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise.

Ahasi, 480 U.S. at 117. Justice Brennan found jurisdiction is proper when "[a] defendant who has placed goods in the steam of commerce benefits economically from the retail sale of the final product in the forum state, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Ahasi,* 480 U.S. at 117.

Under Justice O'Connor's test, however, placing product in stream of commerce is not sufficient to show a defendant purposefully directed its conduct to the forum state. *Asahi,* 480 U.S. at 112. Her test requires evidence of "additional conduct." *Id.* Examples of additional conduct include "designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." *Id.*

The Court attempted to clarify its *Asahi* opinions in *J. McIntyre Machinery, Ltd. v. Nicastro,* 131 S. Ct. 2780 (2011). Unfortunately, the Court was once again divided on how lower courts should test for specific personal jurisdiction. *Nicastro* consists of three opinions: a plurality opinion by Justice Kennedy, a concurring opinion by Justice Breyer, and a dissent by Justice Ginsberg.

The plurality rejected Justice Brennan's more lenient jurisdictional test in *Ahasi*, describing it as based on foreseeability. *Nicastro*, 131 S. Ct. at 2789. The principal inquiry, according to the plurality, is "whether the defendant's activities manifest an intention to submit to the power of a sovereign." *Id.* at 2788. Justice Breyer concurred that the Court's precedents led to this conclusion, and that the plurality's attempt to establish a new test or redefine the contours of personal jurisdiction was unnecessary. *Id.* at 2791 (Breyer, J., concurring).

The Virgin Islands District Court and Superior Court have applied the above principles to litigation involving almost identical claims and parties to those now before the Court. Following the Third Circuit Court of Appeals, the District Court and Superior Court have applied Justice Brennan's test *and* Justice O'Connor's test.[18] In each case, the courts found at least one instance of the "additional conduct" Justice O'Connor requires, and therefore found jurisdiction to be proper.

Minimum Contacts Evidence

As explained above, Putnam began purchasing pressure treatment services from Great Southern in 2003, and on a few occasions, Putnam also purchased some pre-treated lumber from Great Southern. Putnam purchased over $2 million in

[18] *See Whitecap Investment Corp. v. Putnam Lumber & Export Co.*, No. 2010-139, 2013 U.S. Dist. LEXIS 39413, at *31 (D.V.I. Mar. 21, 2013); *Stewart v. Whitecap Investment Corp.*, No. 2012-28, 2013 U.S. Dist. LEXIS 39410, at *23 (D.V.I. Mar. 21, 2013); *Hills v. Whitecap Investment Corp.*, No. ST-12-CV-395, 2013 V.I. LEXIS 41, at *8-9 (Super. Ct. June 14, 2013); *MRL Dev. I, LLC v. Whitecap Investment Corp.*, No. 2013-48, 2014 U.S. Dist. LEXIS 4533, at *22-23 (D.V.I. Jan. 14, 2014); *Belizaire v. Whitecap Investment Corp.*, No. 2013-66, 2014 U.S. Dist. LEXIS 24321, at *24 (D.V.I. Feb. 26, 2014) (citing *Pennzoil Prods. Co. v. Colelli & Associates, Inc.*, 149 F.3d 197 (3d Cir. 1998 and explaining that the Third Circuit "encourages courts to consider both tests and then render a decision 'based on the facts in the record'").

treatment services and lumber from Great Southern of which nearly a quarter ($442,689.24) was spent on lumber that was shipped to the Virgin Islands.

Several pieces of evidence demonstrate that Great Southern, through its employees, was aware that Putnam was selling lumber treated by Great Southern in the Virgin Islands.

Justin Wright, a sales employee of Great Southern, searched for lumber exporters and identified Putnam as a possible new account. Dep. of Justin Wright, Ex. A to Whitecap's Opp at 8, 71.

When Chad Blizzard started in his position as Great Southern's sales manager in June 2004, he understood Putnam's main business was exporting treated lumber outside the continental United States, and that "Putnam exported all over the world and a lot into the Caribbean." Dep. of Chad Blizzard , Ex. C to Whitecap's Opp. at 115-116; Ex. K to Whitecap's Opp. Blizzard explained he did not know specifically where Putnam exported its lumber to, but knew from viewing Putnam's website that "a lot of it went to the Caribbean." *Id.* at 117-18.

In a July 2006 email to Great Southern's employees from Mike Simerly, a member of Great Southern's sales team explained "Putnam Lumber and Wood Market are <u>fierce</u> competitors in the export lumber market going into the Caribbean." Ex. D to Whitecap's Opp.

In a July 22, 2008 email exchange from Mike Noble of Putnam to Blizzard and Mike Simerly of Great Southern, Noble specifically mentioned Putnam's customer in the Virgin Islands. Simerly wrote Noble:

> I talked with Chad and any material that goes over seas does not carry a warranty, BUT we can help you out some with this issue. How many pieces is your customer talking about?

Noble responded:

> I'm not sure that the U.S. Virgin Islands is considered overseas. are [sic] you saying that the .15 treatment we bought on 5/4' decking which is approved in the United States is not covered in the United States Virgin Islands? would [sic] there be any reason it would disintegrate there and not here? Per our conversation, every piece of 5/4 x 6 x 16' RED treated was purchased from Great Southern and sold to our only client in St. John, U.S.V.I. what [sic] exactly are you saying before I ask these questions elsewhere?

Ex. L to Whitecap's Opp.

Great Southern's corporate representative, as well as two Great Southern sales employees, concede that as of July 22, 2008, they knew that some of the lumber it treated for Putnam was being sold in the U.S. Virgin Islands. William Freeman Dep., Ex. N to Whitecap's Opp. at 692; Chad Blizzard Dep., Ex. C to Whitecap's Opp. at 122; Mike Simerly Dep., Vol. II,, Ex. P. to Whitecap's Opp. at 139-140. Great Southern continued to do business with Putnam through August 2009. See Ex. O to Whitecap's Opp. (consisting of 92 purchase orders, ranging from July 23, 2008 through August 3, 2009).

The above evidence demonstrates that Great Southern was aware, at least after 2008, that its products were being sold in the U.S. Virgin Islands. Under Justice O'Connor's jurisdictional test, knowledge alone is not sufficient; there must be evidence of "additional conduct" to show that the defendant purposefully directed its conduct to a forum state. *Asahi*, 480 U.S. at 112.

After the July 22, 2008 email exchange discussing the deteriorating wood in the Virgin Islands, Great Southern continued to provide treatment services to Putnam. See Ex. O to Whitecap's Opp. (copies of 92 purchase orders Putnam sent to Great Southern dated after July 22, 2008).

After July 2008, Great Southern contacted Putnam twice in an attempt to solicit business. Simerly, of Great Southern, emailed Noble at Putnam in October 2009: "Do you have any TSO[19] items in the works coming to Jesup or any stock items we can quote into Jax? Have you been loading any flat racks lately out of Jax, or are the islands still slow?" Ex. V to Whitecap's Opp. Simerly emailed Noble again in 2010 "Do you have any items we can quote for you today?" Ex. W. to Whitecap's Opp.

Whitecap has submitted evidence demonstrating Great Southern's products are sold in the Virgin Islands through another retailer: Home Depot. To support its claim, Whitecap attached an image from Home Depot's website of an advertisement for WeatherShield, a Great Southern lumber product, indicating WeatherShield lumber is available for purchase in the St. Thomas Home Depot. Ex. Q; R to

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[19] "TSO" means "treating service only." Dep. of Chad Blizzard at 14, Ex. C to Whitecap's Opp.; Noble Dep. at 39-40; Ex. A to Great Southern's Reply to Whitecap.

Whitecap's Opp. Whitecap also submitted photographs of lumber with tags identifying the wood as WeatherShield brand lumber, taken at Home Depot's St. Thomas store. Ex. S to Whitecap's Opp. Finally, Whitecap attached an email from a Home Depot employee to several people, including a Great Southern employee. Ex. U to Whitecap's Opp. (email listing Brain Shows bshows@yellawood.com as a recipient). The email relates information about a promotion to take place in Home Depot stores in the "U.S., P.R., and U.S.V.I."

Finally, Whitecap submitted an advertisement announcing that YellaWood is "NOW AVAILABLE IN THE CARIBBEAN!" Ex. H. to Whitecap's Opp. According to Whitecap, the ad is a result of an agreement between Great Southern and Conex Forest Products, Inc., a lumber exporter, to advertise and distribute Great Southern's YellaWood product in the Bahamas. Ex. G-H to Whitecap's Opp. An image from Great Southern's website also proclaims that YellaWood "is available in the Caribbean!" Ex. X to Whitecap's Opp.

Analysis of Great Southern's Contacts

The foregoing demonstrates Great Southern's knowledge and actions with respect to directing their activities to the Caribbean. Simerly's July 22, 2008 email message – "we can help you out some with this issue. How many pieces is your customer talking about?" – expresses a willingness to address the complaints of Whitecap, Putnam's St. John client, and possibly the complaints of Whitecap's customers who purchased the allegedly defective lumber. The message can be construed as an attempt by Great Southern to establish a channel for advising Virgin Islands customers. *See Stewart v. Whitecap Investment Corp.*, 2013 U.S. Dist. LEXIS 39410, at *26; *MRL Dev. I, LLC v. Whitecap Investment Corp.*, 2014 U.S. Dist. LEXIS 4533, at *26; *Belizaire v. Whitecap Investment Corp.*, 2014 U.S. Dist. LEXIS 24321, at *27 (all quoting the District Court's finding in *Whitecap Inv. Corp. v. Putnam Lumber & Export Co.*, 2013 U.S. Dist. LEXIS 39413 at *31-34, that the same email "was clearly offering some degree of ongoing assistance"); *see also Hills v. Whitecap Investment Corp.*, 2013 V.I. LEXIS 41, at *8-9 (finding Great Southern "offered some customer support in the Virgin Islands"). Whether this channel was used more than once, i.e., whether it was a regular channel for advice, is unclear.

The advertisement for YellaWood published in the Bahamas and the text on Great Southern's website indicated Great Southern's intent to sell its products in the Caribbean. This suggests Great Southern wanted to serve the Caribbean market. Great Southern did not merely place products into the general stream of commerce, but specifically marketed them to the Caribbean, which includes St. John, Virgin Islands. Great Southern purposefully directed its goods to the entire Caribbean, which includes St. John, Virgin Islands.

In addition, Great Southern had relationships with three retailers besides Putnam – Conex, Wood Market, and Home Depot – who did business in the Caribbean. Simerly Depo, Vol. II, at 140.

Construing the facts in the light most favorable to Whitecap and Putnam, there is evidence that Great Southern placed a product – chemically treated lumber – in the stream of commerce directed at the Caribbean and continued to do so after learning that some of the wood was destined for the U.S. Virgin Islands, and acted with an intent to serve at least one consumer in the Virgin Islands by offering to address complaints about allegedly defective wood.

Fair Play and Substantial Justice

After analyzing a defendant's contacts with the forum, "a court may consider whether the exercise of jurisdiction otherwise 'comports with fair play and substantial justice.'" *Molloy*, 56 V.I. at 183. Courts look to the following factors: "(1) the burden on the defendant, (2) the forum State's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 184 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (U.S. 1985)).

These factors may "establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp.*, 471 U.S. at 477. "On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.*

Whitecap and Putnam's Fair Play and Substantial Justice Arguments

Whitecap argues the burden on Great Southern is minimal because Great Southern can attend hearings telephonically, and/or hire competent local counsel.[20]

Whitecap and Putnam argue the Virgin Islands has a strong interest in adjudicating this matter because the rights and remedies of its citizens are at stake. They further urge that the parties have a strong interest in litigating this case in the Virgin Islands because the harm occurred here. Transporting all the evidence from the Virgin Islands to another forum would, in Whitecap's words, be a "herculean task." Regarding efficiency and furthering substantive social policies, Whitecap and Putnam both assert the case would be resolved most efficiently in the Virgin Islands.

Putnam adds that for two years, Great Southern has been litigating other matters in the Virgin Islands based on claims similar to those asserted here. Finally, Putnam contends Great Southern has a major role in this litigation because it was the entity that allegedly failed to properly treat the wood.

Great Southern's Counter-Arguments

Great Southern counters that litigating in the Virgin Islands would impose a great burden because its only alleged connection with this case is treatment of wood

[20] Whitecap also argues that electronic filing will reduce the logistical difficultly for Great Southern in litigating in the Virgin Islands. However, the Superior Court of the Virgin Islands does not have an electronic filing system as of the date of this opinion.

in Jesup, Georgia. It further asserts that the considerable distance between Alabama (its principal place of business) would be a significant burden in terms of time and expense.

Regarding the efficiency and convenience factors, Great Southern avers that the only parties who have confirmed Virgin Islands residency are Whitecap and MSI. Plaintiffs own homes in St. John but have not asserted they reside there. Great Southern avers that the parties to this action could obtain effective relief even if Great Southern were dismissed. In sum, Great Southern asserts that the burden of litigating in the Virgin Islands outweighs the Virgin Islands' interest in adjudicating this suit.

Analysis of Fair Play and Substantial Justice

Litigating this matter in the Virgin Islands would certainly be less convenient for Great Southern than litigating in its home state of Alabama. However, "telephones, facsimile machines, and photocopiers" detract from logistical difficulties in litigating this case in the Virgin Islands. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 575-576 (Ariz. 1995) (observing that "[i]n 1958, the United States Supreme Court noted that as technology has drawn the world markets closer, "progress in communications and transportation has made defense of a suit in a foreign tribunal less burdensome") (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Obtaining competent local counsel does not represent an obstacle for Great Southern as it is currently represented by a reputable firm in the Virgin Islands.

The Virgin Islands has a strong interest in adjudicating this dispute. The harm was suffered here, and corresponding physical evidence is located here. While Plaintiffs have not provided proof relating to their respective residencies, they all own homes on St. John.

Regarding efficiency and convenience in obtaining relief, dismissing Great Southern from this action would undoubtedly require increased time and effort on the part of the parties trying to recover from Great Southern. In *Belizaire v. Whitecap Investment Corp.*, the District Court observed that because "[Great Southern] is not the only defendant in this action, dismissing [it] from this case might force the parties in this case to proceed against [Great Southern] in another forum while simultaneously litigating before this Court. This piecemeal litigation would assuredly be inefficient and a net drain on judicial resources." No. 2013-66, 2014 U.S. Dist. LEXIS 24321, at *29. The situation exists here, and the Court agrees with the District Court's observation.

Finally, the Court notes that Great Southern is currently litigating, or has litigated, at least six other similar suits in the Virgin Islands. Thus, requiring Great Southern to litigate one additional suit concerning similar claims and subject matter would not impose an undue burden on Great Southern in light of the other cases already pending and including similar if not identical claims.

III. Conclusion.

The Court finds that Whitecap and Putnam have established a prima facie case for this Court to exercise jurisdiction over Great Southern. Accepting as true all of Whitecap and Putnam's allegations that are supported by admissible evidence, the Court finds that jurisdiction is appropriate under the Virgin Islands Long Arm statute and jurisdiction comports with the due process clause of the Fourteenth Amendment. Great Southern derived substantial revenue from goods used or consumed in the U.S. Virgin Islands, there exists sufficient evidence that Great Southern marketed its goods to the Caribbean, knew its goods were being sold in the U.S. Virgin Islands, offered to assist at least one customer with problems in the U.S. Virgin Islands and continued to ship its good to the U.S. Virgin Islands. There is also sufficient evidence that this litigation arises out of one of those activities. Lastly, the exercise of jurisdiction over Great Southern comports with fair play and substantial justice.

The Court will enter an Order denying Great Southern's Motion To Dismiss.

DATED: October 22, 2015

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: ______________________
LORI BOYNES TYSON
Court Clerk Supervisor 10/22/15

____
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

A CERTIFIED TRUE COPY
DATE 10/22/2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY ______________________
COURT CLERK II