IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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GERALD H. HILLS and MARTHA L. HILLS, Plaintiffs, v. **WHITECAP INVESTMENT CORP d/b/a PARADISE LUMBER, PUTNAM LUMBER AND EXPORT COMPANY, PUTNAM FAMILY PROPERTIES INC., and GREAT SOUTHERN WOOD PRESERVING, INCORPORATED,** Defendants.	CIVIL NO. ST-12-CV-395 ACTION FOR DAMAGES JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Great Southern Wood Preserving, Incorporated's Motion to Dismiss for Lack of Personal Jurisdiction, filed August 15, 2012, and Motion to Dismiss Cross Claims, filed September 5, 2012.[1] The Court held oral argument on the Motions on May 17, 2013. The premises being duly considered, the Court will deny the Motions.

FACTS

Gerald Hills and Martha Hills are owners of a home located in St. John. The Hills bring this action alleging defective manufacture, production, treatment, and distribution of wood products used in their home. Great Southern Wood Preserving, Inc. is a lumber wholesale with its principal place of business in Alabama. Great Southern does not operate a storefront or have offices in the Virgin Islands. Great Southern was responsible for the treatment of the lumber at issue in this case, which it sold to Putnam Family Properties between 2006 and 2012.

Around July 2008, Great Southern gained the knowledge that a portion of the lumber provided to Putnam would be resold to the Virgin Islands. Great Southern also advertised in the Virgin Islands and offered limited customer support there. Great Southern received as much as $442,000.00 for the treatment of wood products to be used in the Virgin Islands. The lumber was used to build homes in St. John; however, the lumber was allegedly not treated properly and it eventually rotted, substantially impairing the value of the homes.

[1] Nancy D'Anna, Esq., represents Plaintiffs Gerald H. Hills and Martha L. Hills. Alex M. Moskowitz, Esq., of Dudley, Topper and Feuerzeig, LLP, represents Defendant Whitecap Investment Corp. d/b/a Paradise Lumber. Lisa M. Kömives, Esq., of BoltNagi PC, represents Defendants Putnam Lumber & Export Company and Putnam Family Properties, Inc. Daryl Barnes, Esq., of Bryant Barnes & Blair, LLP, represents Defendant Great Southern Wood Preserving, Inc.

ANALYSIS

After being served with the Complaint, Great Southern entered a limited appearance and moved to dismiss for lack of personal jurisdiction. The other parties allege, and Great Southern denies, that this Court has jurisdiction under V.I. Code Ann. tit. 4, § 76(a) (1997). When determining whether this Court has personal jurisdiction over Defendant Great Southern Wood Preserving, the Court must engage in a two-part analysis. First, the Court must determine whether it has personal jurisdiction over Great Southern pursuant to the Virgin Islands Long-Arm Statute.[2] Next, the Court must determine whether Great Southern has minimum contacts with the Virgin Islands sufficient for constitutional due process.

A. Virgin Islands Long-Arm Statute

To evaluate whether there is personal jurisdiction under the Virgin Islands Long-Arm Statute, the Court must "determine (1) whether the defendant's contacts meet one of the categories under section 4903(a) and then (2) whether the plaintiff's claim 'arises from' that contact."[3] Here, there is no dispute that Great Southern's treatment and sale of lumber destined for the Virgin Islands is the requisite contact that gives rise to the present action.

The Virgin Islands Long-Arm Statute provides, in part, that:

> 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 (1) transacting any business in this territory . . . [or] (4) causing tortious injury in 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, this this territory . . . .[4]

The Court must determine whether Great Southern's conduct falls into the category of "transacting any business in this territory." Participation in some business activity in the Virgin Islands, coupled with the receipt of substantial revenue from the activity, is sufficient to satisfy the "transacting business" requirement.[5] Further, the Supreme Court of the Virgin Islands has made clear that the Court must determine whether the Defendant's conduct showed "an intent to transact business within the Virgin Islands."[6] Even when the defendant does not directly engage in any business with any person in the Virgin Islands, but acts as an agent for a Virgin Islands entity and receives substantial revenues from that entity, it has been held to have transacted business.[7]

In the present case, evidence tends to show that since July 2008, Great Southern provided lumber or the treatment of lumber to Putnam, with the knowledge that a portion of this lumber

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[2] V.I. Code Ann. tit. 5, § 4903 (1997).
[3] *Molloy v. Indep. Blue Cross*, 56 V.I. 155 (2012).
[4] V.I. Code Ann. tit. 5, § 4903(a).
[5] *Paradise Motors, Inc. v. Toyota de P.R., Corp.*, 314 F. Supp. 2d 495, 498 n.4 (D.V.I. 2004).
[6] *Molloy*, 56 V.I. at 176.
[7] *Bertrand v. Cordiner Enterprises, Inc.*, 53 V.I. 280, 298 (2010).

would be resold to the Virgin Islands. Further, Great Southern received substantial compensation, as much as $442,000.00, for the treatment of wood products to be used in the Virgin Islands. In determining whether compensation is "substantial," the Court does not look at the compensation relative to a company's total income; instead the Court looks to whether the Virgin Islands sales were ``isolated or exceptional occurrences" or whether they ``were part of a regular course of dealing."[8] Here, the business transactions that accumulated $442,000 were not an isolated or exceptional occurrence. As the Court will discuss further, Great Southern sold wood that it knew was destined for the Virgin Islands as a regular course of dealing. As such, the Court finds that the "transacting business" section of the Long-Arm statute is met.

Additionally, the Plaintiff and non-moving Defendants allege that Great Southern caused tortious injury in this Territory by its failure to treat the wood, and subsequent actions with respect to the labeling of the wood, amount to negligence and fraud, respectively. The Court does not take a position on whether this argument is compelling as transacting businesses in the territory is enough for the Court to exercise personal jurisdiction over Great Southern.

B. Due Process Considerations

Having found Section 4903(a) satisfied, the Court must now determine whether exercising personal jurisdiction over Great Southern violates Great Southern's constitutional due process. In order for the assertion of personal jurisdiction to comport with Due Process Clause of the Fifth Amendment, as a threshold matter, the defendant must have taken "action . . . purposefully directed toward the forum State."[9] A court may exercise general jurisdiction over a defendant where he or she has continuous and systematic contacts with the forum, whether or not those contacts are related to the plaintiff's cause of action.[10]

Here, Great Southern sold hundreds of thousands of dollars' worth of lumber to Putnam for several years. Additionally, the evidence shows that Great Southern continued to do this for at least a year after learning that Putnam was selling this lumber in the Virgin Islands. However, Great Southern did not contract directly with anyone in the Virgin Islands. Instead, it contracted with Putnam Lumber, which in turn had an ongoing relationship with Paradise Lumber, in the Virgin Islands.

In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court addressed when a defendant could be subjected to personal jurisdiction for merely placing a good in the stream of commerce.[11] The Supreme Court noted that "if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the [defendants] to serve, directly or indirectly, the market for its product . . . , it is not unreasonable to subject them to suit."[12]

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[8] Hendrickson, 657 F.2d 9, 12, 13 (3d Cir. 1981).
[9] *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987); Revised Organic Act of 1954, 48 U.S.C. § 1561 (2006) (making the Fifth Amendment to the United State Constitution applicable in the Virgin Islands).
[10] *Id.*
[11] 444 U.S. 286 (1980).
[12] *Id.* at 297.

In *Asahi Metal Industry Company, Ltd. v. Superior Court of California,*[13] the Supreme Court of the United States, in a plurality opinion, developed two separate views relating to the "stream of commerce" theory as a basis for personal jurisdiction. The Justice O'Connor plurality opinion held that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State" and that "additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State."[14] Justice O'Connor provided the following examples of such conduct: "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."[15]

Justice Brennan, joined by three other Justices, concurred in the Opinion, but disagreed with Justice O'Connor's position on the "stream of commerce" theory, stating that the mere act of a Defendant placing a product into the stream of commerce should be sufficient without any additional conduct because "[a]s long as a 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."[16]

The Supreme Court again addressed the stream of commerce theory in *J. McIntyre Machines, Ltd. v. Nicastro*. *McIntyre*, like *Asahi*, is a plurality decision by the Supreme Court that touches on the stream of commerce theory. In *McIntyre*, the four Justice plurality, led by Justice Kennedy, essentially adopted Justice O'Connor's stream of commerce position, while three additional Justices, led by Justice Ginsburg, dissented, and essentially adopted Justice Brennan's theory. The remaining two Justices, Breyer and Alito, concurred with the Kennedy plurality, but on narrower grounds, refusing "to announce a rule of broad applicability without full consideration of the modern-day consequences."[17] The Kennedy plurality specifically denounced Justice Brennan's test and stated that personal jurisdiction restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power.[18] The operable question then becomes whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.[19]

Although Great Southern made the contacts with the forum state at issue here through a third party, personal jurisdiction is properly asserted by this Court. Great Southern placed lumber in the stream of commerce, it benefited economically from the sale of the lumber that ultimately was sent to the Virgin Islands, it advertised in the Virgin Islands, and it offered some customer support in the Virgin Islands. These actions are clearly enough to satisfy Justice Brennan's theory, but Justice O'Connor's test requires an additional level of continuous contact.

[13] 480 U.S. 102 (1987).
[14] *Asahi*, 480 U.S. at 112.
[15] *Id.*
[16] *Id.* at 117.
[17] *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011).
[18] *Id.* at 2789 (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).
[19] *Id.*

Here, there is also evidence that Great Southern contracted for the sale of wood directed with MSI, a Virgin Islands corporation. Additionally, Great Southern continued to follow this course of conduct after becoming aware, by 2008 at the latest, of the fact that its lumber was being sold by third parties in the Virgin Islands. By engaging in sales directly with a Virgin Islands company and continuing to work with Putnam, Great Southern's intent and purpose to serve the Virgin Islands market is clear. Given this evidence, the Court finds that Great Southern followed a course of conduct directed at the society and the economy of the Virgin Islands and the tests of both Justice O'Connor and Justice Brennan are satisfied. Exercise of personal jurisdiction is appropriate.

Finally, the Court notes that, in related litigation dealing with the exact same underlying transactions, the District Court of the Virgin Islands found in two separate cases that due process is not violated by its exercise of jurisdiction over Great Southern.[20] Although the District Court's opinions are only persuasive precedent, this Court finds no compelling reason to adopt a different position than that of the District Court.

CONCLUSION

The exercise of personal jurisdiction over Great Southern Wood Preserving is proper under both the Virgin Islands Long-Arm Statute and the United States Constitution. As contemplated by the Long-Arm Statute, Great Southern transacted business in the Virgin Islands. Furthermore, even under the heightened standard laid out by Justice O'Connor in *Asahi* and adopted by the plurality in *McIntyre*, the facts show that Great Southern engaged in conduct directed at the Virgin Islands society and economy such that exercising jurisdiction over Great Southern does not violate the U.S. Constitution. Accordingly, the Motion to Dismiss for Lack of Personal Jurisdiction will be denied, and the Motion to Dismiss Cross-Claims, which alleges the same lack of personal jurisdiction, will also be denied.

DATED: June 14, 2013

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 6/17/2013

[20] *See, e.g.*, *Stewart v. Whitecap Inv. Corp.*, Civ. No. 2012-28, 2013 WL 1163510 (D.V.I. Mar. 21, 2013); *Whitecap Inv. Corp. v. Putnam Lumber & Export Co.*, Civ. No. 2010–139 (D.V.I. Mar. 21, 2013).