

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

**APINDO CORPORATION OF PUERTO  
RICO D/B/A CLASSIC MARKETING  
COMPANY,**

**Plaintiff,**

**v.**

**TOSCHI VIGNOLA S.R.L., ET AL.,**

**Defendants.**

**CIVIL NO. 17-1917 (PAD)**

**MEMORANDUM AND ORDER**

Delgado-Hernández, District Judge.

Plaintiff Apindo Corporation of Puerto Rico d/b/a Classic Marketing Company initiated this action against Toschi Vignola S.R.L., a limited liability company organized under the laws of Italy, essentially alleging breach of contract, tortious interference with a contractual relationship and infringement of the Puerto Rico Dealers Act, Law 75 of June 24, 1964, P.R. Laws Ann. tit. 10 §§278-278e (“Law 75”). Subsequently, it filed an Amended Complaint to join Vino.com, LLC, d/b/a Total Beverage Solution as a party (Docket No. 21).

Before the court are Toschi’s “Motion to Dismiss under Fed. R. Civ. P. 12 (b) or to Stay Proceedings and Dismiss Pending Arbitration under the Federal Arbitration Act” (Docket No. 5)(reiterated at Docket No. 23) and Vino’s “Motion to Dismiss under Rule 12(B)” (Docket No. 31). Apindo opposed both motions (Docket Nos. 8 and 34). Toschi replied (Docket No. 14); and Apindo sur-replied (Docket No. 18). For the reasons explained below, the motions are **GRANTED IN PART** and the case is **DISMISSED WITHOUT PREJUDICE**. Apindo and Toschi **MUST SUBMIT** to arbitration.

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.  
Civil No. 17-1917 (PAD)  
Memorandum and Order  
Page 2

## I. BACKGROUND

On May 26, 2017, Apindo sued Toschi in the San Juan Part of the Court of First Instance of Puerto Rico seeking injunctive relief and damages. (Docket No. 1-1 at ¶¶ 12-14 and 20-23). On July 5, 2017, Toschi removed the action to this court under the authority of 28 U.S.C. § 1332, pursuant to 28 U.S.C. §§ 1441 and 1446 (Docket No. 1). On July 12, 2017, it requested dismissal under Fed.R.Civ.P. 12(b), or in the alternative, to compel arbitration (Docket No. 5). On September 2, 2017, it amended the complaint to include Vino as the allegedly interfering party (Docket No. 21). On September 11, 2017, Toschi filed a “Motion to Renew Defendant’s Motion to Dismiss under Rule 12(b) or to Stay Proceedings and Dismiss Pending Arbitration under the Federal Arbitration Act” (Docket No. 23), reasserting all the arguments set forth in its motion at Docket No. 5. On December 18, 2017, Vino moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure.

## II. DISCUSSION

### A. **Personal Jurisdiction**

Toschi and Vino claim there is no general or specific personal jurisdiction over them (Docket No. 5 at p. 5; Docket No. 31 at p. 9). Personal jurisdiction implicates the power of the court over a defendant. See, Foster-Miller v. Babcock & Wilcox Canada, 46 F.3d 138, 143 (1st Cir. 1995)(so noting). In a federal court, both its source and its outer limits are defined exclusively by the Constitution. Id. There are two different avenues by which a court may arrive at personal jurisdiction: general jurisdiction and specific jurisdiction. Id. at 144.

General jurisdiction may be found when a defendant has continuous and systematic activity in the forum state even if the activity is unrelated to the claims at hand, so long as the exercise of jurisdiction would be reasonable. See, United Electrical, Radio and Machine Workers of America

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.

Civil No. 17-1917 (PAD)

Memorandum and Order

Page 3

v. 168 Pleasant Street Corporation, 960 F.2d 1080, 1088 (1st Cir. 1992)(citing Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414-416 & n.9 (1984)). There is no assertion of general jurisdiction in the present case (Docket No. 7 at p. 8). When general jurisdiction is lacking, the lens of judicial inquiry narrows to focus on specific jurisdiction. See, Foster-Miller, 46 F.3d at 144 (analyzing issue). In that case, plaintiff must satisfy both the forum state’s long-arm statute and the Due Process Clause of the United States Constitution. See, Adelson v. Hananel, 652 F. 3d 75, 80 (1st Cir. 2011)(pointing out requirement).

In this litigation, the two modes of analysis merge into one because “the reach of Puerto Rico’s long-arm statute is coextensive with the reach of the Due Process Clause.” Carreras v. PMG Collins, LLC, 660 F.3d 549, 552 (1st Cir. 2011). To that end, Puerto Rico’s long-arm statute permits Puerto Rico to exert jurisdiction over a non-domiciliary, out-of-state defendant with any contact with Puerto Rico that would make the exercise of jurisdiction compatible with the Constitution of Puerto Rico and the Constitution of the United States. See, Rule 3.1(a)(2) of the Rules of Civil Procedure of Puerto Rico, P.R. Laws Ann. tit. 32 App. V (2010). R. 3.1(a)(2). The record supports a finding of specific jurisdiction.

*(1) Toschi*

While Toschi’s relationship began with Classic Marketing Company, a legal entity organized under the laws of New York (“Classic-NY”), Classic-NY later assigned the distribution agreement to Apindo, organized under the laws of Puerto Rico, with Toschi’s approval (Docket No. 8 at pp. 2, 4; Docket No. 8-1 at pp. 2, 7 (Exhibit 1, ¶ 8 and Exhibit 2)). Subsequently, Toschi executed a distribution agreement directly with Apindo, doing business as Classic Marketing Company of Puerto Rico (“Classic-PR”) (Docket No. 8 at pp. 2, 4; Docket No. 8-1 at pp. 2, 10-21

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.

Civil No. 17-1917 (PAD)

Memorandum and Order

Page 4

(Exhibit 1, ¶ 11, Exhibit 4).<sup>1</sup> In consequence, Toschi has minimum contacts with Puerto Rico. Its products are distributed, marketed and sold in Puerto Rico, by a company domiciled in Puerto Rico, with whom Toschi directly contracted (Docket No. 8 at p. 7). And this litigation is related to those contacts in the forum. See, Brock Supply Co. v. Moulding Associates, Inc., 81 F.Supp.2d 338, 344 (D.P.R. 2000)(finding that the parties' dispute regarding the exclusive distributorship agreement were related to the sale and distribution of defendant's products in Puerto Rico).

Similarly, Toschi purposefully availed itself of the privilege of conducting activities in Puerto Rico. Its dealings with Apindo were deliberate and voluntary, as it expressly authorized the assignment of its agreement with Classic-NY to Apindo, and later contracted with Apindo directly for the selling, marketing, and distribution of its products in Puerto Rico (Docket No. 8 at p. 7). Considering Toschi's ongoing business relationship with Apindo, and its intentional use of the forum for the selling of its products to Puerto Rico's residents, it was foreseeable that Toschi could be haled into court in Puerto Rico. See, Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 717 (1st Cir. 1996)(finding purposeful availment prong satisfied and stating that "exercising jurisdiction is appropriate where the defendant purposefully derives economic benefits from its forum-state activities").

Finally, "gestalt factors" demonstrate that the exercise of jurisdiction would be reasonable. These factors include: the defendant's burden of appearing, the forum state's interest in adjudicating the dispute, plaintiff's interest in obtaining convenient and effective relief, the judicial system's interest in efficient resolution of the matter, and the common interests of all states in promoting substantive social policies. See, Bluetarp Financial, Inc. v. Matrix Construction, Inc.,

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<sup>1</sup> Moreover, purchase orders were submitted by Apindo from Dorado, Puerto Rico; payments to Toschi were made from Apindo's account in a bank in Puerto Rico; and notices were sent to Apindo's mailing address in Dorado, Puerto Rico (Docket No. 8 at p. 2; Docket No. 8-1 at p. 2).

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.

Civil No. 17-1917 (PAD)

Memorandum and Order

Page 5

709 F.3d 72, 83 (1st Cir. 2013). Toschi has not shown any special or unique burden for appearing in this forum; Puerto Rico has an interest in addressing the possible harms committed against its companies by out of state companies; plaintiff's documents and potential witnesses are in Puerto Rico, which favor efficient resolution of the matter; and the court does not see any contradiction with or attack on substantive social policies by assuming jurisdiction here. Id. (similarly analyzing gestalt factors and finding the reasonableness factor met).

(2) *Vino*

The jurisdictional case against *Vino* is more tenuous. Apindo alleges *Vino* is distributing Toschi's products in Puerto Rico and tortuously interfered with Apindo's agreement with Toschi, causing Apindo injury in Puerto Rico (Docket No. 21, pp. 2-3). *Vino* contests the allegation with an Unsworn Declaration under Penalty of Perjury from its General Manager, who states that *Vino*: is a Missouri limited liability company with principal place of business in South Carolina; is not registered to do business in Puerto Rico; has never directly shipped products to Puerto Rico; does not conduct business in Puerto Rico; and has no agents, employees, office spaces, warehouses or other assets in Puerto Rico (Docket No. 31-1). Moreover, it asserts that the distribution agreement that it executed with Toschi expressly excludes Puerto Rico. Id.

Apindo counters that its agreement with Toschi was not limited to Puerto Rico but covered the Continental United States, Hawaii, Guam, Puerto Rico, the United States Virgin Islands, and the U.S. duty free market (Docket No. 34 at p. 2). Furthermore, it states that the Toschi-*Vino* agreement covers the territory of the United States, inclusive of all United States of America territories and possessions, all duty free shops and military bases located therein, albeit not Puerto Rico. Id. It adds that *Vino*'s interference with the Apindo-Toschi agreement has caused injury in Puerto Rico. And in the same way, it represents that since 1994, it has spent resources to develop

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.  
Civil No. 17-1917 (PAD)  
Memorandum and Order  
Page 6

a market for Toschi products. Id. at p. 8. There are no allegations that Vino used the local forum in any way. But Apindo's cause of action stems from Vino's alleged tortious interference with an entity in Puerto Rico, to the point where the Toschi-Vino contract was allegedly signed the day after it was terminated, excluding Puerto Rico. When a cause of action arises from the defendant's contacts with the forum, less is required to support jurisdiction than when the cause of action is unrelated to those contacts. See, Miranda-Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993)(so observing).

As used in Puerto Rico's long-arm statute, the term "contact" includes acts or omissions that take place outside of Puerto Rico with effects in Puerto Rico. See, Comments to Puerto Rico's long-arm statute, Rule 3.1(a)(2) of the Rules of Civil Procedure of Puerto Rico, P.R. Laws Ann. tit. 32 App. V (2010). R. 3.1(a)(2). Some courts have held that where the origin of a deliberate, non-fortuitous tort is in one state and the injury to a recognized victim is in another state, the tortfeasor has affirmatively established minimum contacts with the state in which the injury occurred, if the tortfeasor knew at that time it committed the alleged tort that the victim would be injured in that state. See, Miranda-Rivera, 145 F.R.D. at 624 (quoting Coblentz GMC/Freightliner, Inc. v. General Motors Corporation, 724 F.Supp. 1364, 1369 (M.D. Ala. 1989)). But at the end of the day, considering the ultimate disposition of the case, the court will not resolve this question in the present litigation.

#### **B. Service of Process**

Toschi argues that service was faulty under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, for it did not consent to being served by mail and the service documents that it received were not in Italian (Docket No. 5, pp. 12-13; Docket No. 14 at pp. 2-4). As support, it mainly relies on Borschow Hospital & Medical Supplies, Inc. v. Burdick-

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.  
Civil No. 17-1917 (PAD)  
Memorandum and Order  
Page 7

Siemens Corp., 143 F.R.D. 472 (D.P.R. 1992), and Lobo v. Celebrity Cruises, Inc., 667 F.Supp.2d 1324 (S.D. Fla. 2009), aff'd on other grounds, 704 F.3d 882 (11th Cir. 2013)(Docket No. 5, p. 13; Docket No. 14, p. 4 & n.4).

In connection with service, Borschow held that the Hague Convention permitted service of process by mail to a nonresident, foreign defendant so long as the receiving state has not objected to such practice by the filing of an appropriate objection as provided by the Convention, 143 F.R.D. at 480, whereas Lobo did not reach a decision on the issue. Lobo, 667 F.Supp.2d at 1339. Yet Toschi offers no reasoned discussion predicated on caselaw on why service by FedEx under the circumstances of this case was inappropriate.

Likewise, in both Borschow 143 F.R.D. at 480, and Lobo, 667 F.Supp.2d at 1339, service by mail was considered improper because it lacked documents translated into the language of the recipient, Borschow, 143 F.R.D. at 480, and in the case of Lobo, Italian. Lobo, 667 F. at 1339. However, Toschi failed to address Apindo's contention that Italy does not require the service documents to be translated into Italian (Docket No. 8, pp. 8-9; Docket No. 18, pp. 3-5). It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. See, United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)(so stating).

### **C. Arbitration**

Toschi contends the case is subject to the arbitration clause of the Distribution Agreement (Docket No. 5 at pp. 14-19; Docket No. 14 at pp. 6). Vino asserts that in order for Apindo to prevail against it, Apindo must show that its contract with Toschi was terminated in violation of applicable law (Docket No. 31 at p. 12). As such, it reasons that Apindo's interference claim is

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.  
Civil No. 17-1917 (PAD)  
Memorandum and Order  
Page 8

contingent on the result of its claim against Toschi, and by extension, cannot go forward because that claim must be submitted to arbitration. Id.

Apindo concedes that the “arbitration clause in the contract is ample enough to cover all claims in this case” (Docket No. 8 at p. 11). Nevertheless, it points out that Article 3-A of Law 75 provides for the issuance of a preliminary injunction to maintain the relationship established in the agreement, and that this statutory injunction is exempt of all requisites of the traditional injunction. Id. at pp. 12-13. With that in mind, it argues that the court should grant an interim preliminary injunction ordering the parties to maintain the agreement in all its terms until the arbitrator is in a position to offer interim relief. Id. at p. 13. As support, it cites Next Step Med. Co., Inc. v. Johnson & Johnson International, 619 F.3d 67 (1st Cir. 2010)(Docket No. 8, pp. 12-13).

In Next Step, the First Circuit held that a district court could grant an interim preliminary injunctive relief for the interval needed to resort to arbitration, but “where otherwise justified,” and with “a showing of some short-term emergency that demands attention while the arbitration machinery is being set in motion.” See, 619 F.3d at 70 (1st Cir. 2010). In the end, it affirmed the district court’s decision to deny the interim relief, because, among other things, no such justification or showing was made. Id. Like in Next Step, Apindo has made no showing of an urgent need. Indeed, it could not, as the contract was terminated on June 30, 2017 (Docket No. 14 at p. 5, n.6.). Thus, any interim relief to “maintain” the relationship between the parties would be moot. Id.<sup>2</sup>

Toschi asks for a dismissal, or in the alternative, to stay proceedings pending arbitration (Docket No. 5 at pp. 14-19). Given that the issues raised in the Toschi Law 75-contractual action

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<sup>2</sup> As the entirety of Apindo-Toschi matters pending before this court will be submitted to arbitration, addressing Toschi’s and Vignola’s remaining arguments is unnecessary.

Apindo Corporation of Puerto Rico v. Toschi Vignola S.R.L., et al.

Civil No. 17-1917 (PAD)

Memorandum and Order

Page 9

are arbitrable, the parties must submit them to arbitration. VINO's action is contingent on the result of that proceeding and cannot move forward. As a practical matter, staying the actions and retaining jurisdiction would serve no purpose. In consequence, dismissal is appropriate. See, Caguas Satellite Corp. v. Echostar Satellite LLC, 824 F.Supp.2d 309, 316-317 (D.P.R. 2011)(so acknowledging). This conclusion does not preclude ultimate judicial review or enforcement of the arbitration award should the affected party consider it necessary.

### **III. CONCLUSION**

For the reasons stated, the motions at Docket Nos. 5, 14 and 31 are GRANTED IN PART. Apindo and Toschi MUST SUBMIT to arbitration. Considering the characteristics of the case *sub judice*, it is DISMISSED WITHOUT PREJUDICE. Judgment shall be entered accordingly.

**SO ORDERED.**

In San Juan, Puerto Rico, this 31st day of January, 2018.

s/Pedro A. Delgado-Hernández  
PEDRO A. DELGADO-HERNÁNDEZ  
United States District Judge