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**BANVILLE & JONES WINE MERCHANTS, INC., Plaintiff, - v - LA CASA DEL RAY S.A., Defendant.**

**10 Civ. 01837 (LMM)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

*2010 U.S. Dist. LEXIS 64310*

**June 24, 2010, Decided**

**June 25, 2010, Filed**

**PRIOR HISTORY:** *Banville & Jones Wine Merchs., Inc. v. La Casa del Rey S.A., 2010 U.S. Dist. LEXIS 41184 (S.D.N.Y., Apr. 26, 2010)*

**COUNSEL:** [\*1] For Banville & Jones Wine Merchants, Inc., Plaintiff: Adam Brenner Gilbert, LEAD ATTORNEY, Nixon Peabody LLP (NYC), New York, NY.

For La Casa Del Rey S.A., Defendant: Peter Joseph Pizzi, LEAD ATTORNEY, Connell Foley LLP, New York City, NY; Rukhsanah Lighari, Connell Foley LLP (NJ), Roseland, NJ.

**JUDGES:** Lawrence M. McKenna, U.S.D.J.

**OPINION BY:** Lawrence M. McKenna

**OPINION**

**MEMORANDUM AND ORDER**

McKENNA, D.J.

Plaintiff Banville & Jones Wine Merchants, Inc. ("Banville") sues defendant La Casa Del Ray S.A. ("La Casa") for certain breach of contract claims.

Banville and La Casa entered into an Importation Agreement (the "Agreement") for the purchase and distribution of certain Alta-Vista trademarked wines. (Am. Compl. P 4.) Banville alleges that La Casa breached the Agreement by selling its products through other importers (id. PP 11, 17), failing to work with Banville in de-

vising a marketing plan (id. P 22), and wrongfully terminating the Agreement (id. P 27).

La Casa moves to dismiss "(1) any claim for alleged damages outside of the time period of January 2009 to May 31, 2010; and (2) [Banville's] claim[s] for . . . breach of the exclusivity provision . . . and breach of the joint marketing plan provision" of the Agreement. [\*2] (Def. Reply Mem. at 10.) The other grounds and arguments included in the motion have been mooted as stipulated by the parties. (See Pl.'s Mem. In Opp'n at 1 and Def. Reply Mem. at 1.) La Casa's motion is pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim.

For the reasons set forth below, defendant La Casa's motion to dismiss is DENIED.

**I. BACKGROUND**

**A. The Parties**

**1. Plaintiff**

Plaintiff Banville is an entity incorporated under the laws of Delaware, with its principal place of business in New York, New York. (Am. Compl. P 1.) Banville is an importer and distributor of wines in the United States. (See id. PP 4, 6.)

**2. Defendant**

Defendant La Casa is a business entity organized under the laws of the Republic of Argentina, with its

principal place of business in Argentina. (Id. P 2.) La Casa is owned by the Edonia Group. (Id. P 14.)

## B. Procedural Background

On or about April 23, 2010, La Casa filed a motion to dismiss all claims in the original complaint, except for the breach of contract claim for wrongful termination, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. On or about May 14, 2010, Banville filed an amended complaint claiming that La Casa breached [\*3] the Agreement by selling its products through other importers (Am. Compl. PP 11, 17), failing to work with Banville in devising a marketing plan (id. P 22), and wrongfully terminating the agreement (id. P 27). La Casa followed by filing its Reply Memorandum, noting that its motion to dismiss now applied to "(1) any claim for alleged damages outside of the time period of January 2009 to May 31, 2010; and (2) [Banville's] claim for . . . breach of the exclusivity provision . . . and breach of the joint marketing plan provision" of the Agreement. (Def. Reply Mem. at 10.)

## C. Factual Background

The factual allegations are detailed in the Amended Complaint, familiarity with which is presumed. For purposes of this motion, the Court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in plaintiff's favor. See *In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 572 (S.D.N.Y. 2007) (citing *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001)).

### 1. The Agreement

On June 1, 2006, Banville and La Casa signed the Agreement, which named "Banville 'as [La Casa's] exclusive importer to market, sell and distribute the Products<sup>1</sup> in the Territory.'" (Am. Compl. [\*4] P 6 (quoting Ex. A § 2(A)).) Under the Agreement, La Casa also was required to "use its best efforts to prevent the unauthorized sale of Products in the Territory<sup>2</sup> other than through [Banville]." (Am. Compl. P 7 (quoting Ex. A § 7 (G)).) The Agreement notes that "best efforts" means La Casa shall not sell or transfer Products outside the Territory to a party who La Casa "knows, or has reason to believe, will, either directly or indirectly, sell or otherwise transfer the Products into the Territory." (Am. Compl. Ex. A § 7(G).)

<sup>1</sup> In the Agreement, the term "Products" refers to "all wines produced by [La Casa] under the trademark 'ALTA VISTA' exclusively." (Am. Compl. Ex. A § 1(D).) These wines were listed on Schedule A to the Agreement, which could be

modified from time to time by consent of both parties. (Id.)

<sup>2</sup> Territory is defined as the United States, other than Puerto Rico. (Am. Compl. Ex. A § 1(E).)

The Agreement also required that "the parties shall jointly devise a marketing plan which addresses the following matters, among others: (a) annual purchase and depletion targets; (b) brand and packaging matters; [and] (c) pricing, advertising and promotion strategies." (Am. Compl. P [\*5] 8 (quoting Ex. A § 3 (A)).) This plan was to be prepared and reviewed annually, with both parties approving a plan on or before November 30th for the following year when the plan would take effect. (Id.)

The initial term of the Agreement was for one year from June 1, 2006 to May 31, 2007. (Am. Compl. P 9.) If termination had not occurred during this term, the Agreement automatically renewed for a three year term ending May 31, 2010. (Id.) Either party could have terminated if one of the Agreement's established permissible grounds for termination occurred. (Id. P 10.) The terminating party was required to provide the non-terminating party with written notice at least thirty days prior to termination. (Id.)

## 2. Breach of Contract Claims

### a. The Exclusivity Provision

Banville claims that La Casa breached the exclusivity provision of the Agreement, first, in October of 2006 (Am. Compl. P 11), and then again in May of 2008 (id. P 17). As for the 2006 incident, Banville alleges that "contrary to the express language of the Agreement, [La Casa] was importing its product into the United States under a label called *Finca Monte Lindo* and selling the same directly to a distributor in Chicago." (Id. P 11.) [\*6] This particular wine was listed as a Product subject to the Agreement, and Banville confirmed the wine shipment occurred after the Agreement was in effect. (Id. PP 12-13.) This confirmation was based on Banville's inspection of the delivered bottles. (Id. P 13.) On October 18, 2006, Lia Tolaini-Banville, Banville's Director of Supplier Relations, wrote to Patrick d'Aulan, President of the Edonia Group, owner of La Casa, regarding this alleged breach. (Id. P 14.) Mr. d'Aulan responded, "indicating [to Ms. Tolaini-Banville] that he would ensure that no Alta Vista products were imported through channels other than through Banville." (Id. P 16.) However, Banville claims that in May of 2008, "[La Casa] again began to sell Alta Vista-labeled products through another importer." (Id. P 17.) On May 20, 2008, Ms. Tolaini-Banville wrote to Mr. d'Aulan, "demanding that [La Casa] cease and desist from selling Alta Vista-branded product through other importers." (Id. P 19.)

### b. Obligation to Devise a Joint Marketing Plan

In the Amended Complaint, Banville did not provide many facts to support its claimed breach for failure to devise a joint marketing plan. (See Am. Compl. PP 21-22.) Regardless, the [\*7] Agreement clearly spells out a duty on behalf of both parties to come together and create such a plan. (Am. Compl. P 21 (referencing Ex. A. § 3(A)).) Banville alleges that despite its efforts to engage La Casa in creating such a plan, La Casa did not work with Banville and, therefore was in breach of the Agreement. (Am. Compl, P 22.)

### c. Wrongful Termination of the Agreement

Banville's third claim for breach of contract is based on wrongful termination. The breach stemming from wrongful termination was not part of La Casa's motion to dismiss (see Notice of Mot. to Dismiss at 1), nor was this claim added to the motion after the filing of the Amended Complaint (see Def. Reply-Mem. at 1). Therefore, the Court shall not address this claim at this time.

## II. DISCUSSION

### A. Standard of Review

A complaint should be dismissed if it "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. When reviewing a complaint in light of a motion to dismiss, "the Court ordinarily accepts as true all well-pleaded factual allegations and draws all reasonable inferences in the plaintiff's favor." *In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 572 (S.D.N.Y. 2007) (citing *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001)). [\*8] However, "the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

When evaluating a motion "to dismiss a complaint for failure to state a claim upon which relief can be granted, the district court is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). However, in certain circumstances, a court may consider "documents that are attached to the complaint, . . . incorporated in it by reference, [or even] a document upon which the complaint *solely* relies and which is *integral to the complaint*." *Connolly v. Dresdner Bank AG*, No. 08 Civ. 5018, 2009 U.S. Dist. LEXIS 35385, 2009 WL 1138712, at \*3 (S.D.N.Y. Apr. 27, 2009) (paraphrasing *Roth*, 489 F.3d at 509).

Accordingly, the Court bases its decision on the Amended Complaint and the Agreement, which is attached to the Amended Complaint as Exhibit A. The

correspondence attached by La Casa to its Declaration in Support of its Motion to Dismiss ("Declaration") [\*9] will not be considered at this time. Banville does mention dates of correspondence in the Amended Complaint (see Am. Compl. PP 14, 16, 19, 23, 27), however, it is not clear whether the emails in La Casa's Declaration are what Banville refers to in the Amended Complaint. Also, the Amended Complaint does not "solely rel [y on these emails nor are they] integral to the complaint." *Connolly*, 2009 U.S. Dist. LEXIS 35385, 2009 WL 1138712, at \*3 (emphasis omitted). Taking the allegations in the Amended Complaint as true, the Court is not sufficiently convinced that the emails rebut the Amended Complaint in such a way that would warrant dismissal as La Casa contends. (Def. Reply Mem. at 6.)

## B. Breach of Contract Claims

### 1. The Exclusivity Provision

Banville's claim for breach of the exclusivity provision of the Agreement survives the 12(b)(6) motion to dismiss. Banville does not simply give a conclusory statement alleging breach -- Banville provides dates when it believes breach of this provision occurred. (See Am. Compl. PP 11, 17.) With regard to the first alleged breach of the exclusivity provision, Banville even claims that it confirmed the shipment of Alta Vista Products to another importer, when the Agreement was in [\*10] effect, by inspection of the bottles that were delivered. (Am. Compl. P 13.) La Casa details a contradictory account, namely, that the wine sold to another importer was not part of the Agreement and that the shipment occurred prior to the execution of the Agreement. (Def. Reply Mem. at 7.) However, at this stage in the pleadings, the Court will accept the plaintiff's well-pleaded account as true. See *In re Parmalat*, 501 F. Supp. 2d at 572 (citation omitted). Banville's allegations, when accepted as true, do state a claim for which relief can be granted.

### 2. Obligation to Devise a Joint Marketing Plan

Banville's claim for breach of the Agreement stemming from failure to devise a joint marketing plan also survives the motion. The language of the Agreement states that "the parties shall jointly devise a marketing plan." (Am. Compl. Ex. A § 3(A) (emphasis added).) La Casa contends that since Banville admits the existence of a volume target for 2008 in the Amended Complaint, the companies therefore created a joint marketing plan. (Def. Reply Mem. at 8.) However, the Agreement notes that the joint plan will "address [] the following matters, among others: (a) annual purchase and depletion targets; [\*11] (b) brand and packaging matters; [and] (c) pricing, advertising and promotion strategies." (Am. Compl. Ex. A. § 3(A) (emphasis added).) The Amended Complaint

only shows that one of these three listed matters was attended to, rather than the contractual provision being met. Based on these well-pleaded facts, this claim also survives the motion for dismissal.

The Court agrees with Banville's assertion that La Casa's breach of contract arguments "turn on factual issues that are not appropriate for resolution on a pre-answer motion." (Pl.'s Mem. In Opp'n at 4.)

### **C. The Issue of Damages Raised in the Motion to Dismiss**

Banville seeks a judgment "for all direct and consequential Damages . . . suffered, in an amount to be determined by a jury but believed not to be less than One Million Dollars" and for "interest at the statutory rate." (Am. Compl. P 34.) From this statement, La Casa contends that Banville seeks damages beyond the limited time frame from January 2009, when La Casa terminated the Agreement, and May 31, 2010, when the Agreement

would have terminated on its own accord. (Def. Reply Mem. at 5-6.) However, nowhere in the Amended Complaint does Banville specifically request damages for [\*12] a time period beyond the Agreement's duration. (See Am. Compl.) If La Casa's motion is in regard to Banville's claim for consequential damages, this issue is not yet ripe for consideration by the Court.

### **III. CONCLUSION**

For the reasons stated above, defendant La Casa's motion to dismiss is denied.

SO ORDERED.

Dated: June 24, 2010

/s/ Lawrence M. McKenna

Lawrence M. McKenna

U.S.D.J.



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**BANVILLE & JONES WINE MERCHANTS, INC., Plaintiff, - v - LA CASA DEL REY S.A. and BUENA CEPA WINES, LLC, Defendants.**

10 Civ. 1837 (LMM)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

2010 U.S. Dist. LEXIS 41184

**April 26, 2010, Decided**  
**April 26, 2010, Filed**

**SUBSEQUENT HISTORY:** Motion denied by *Banville & Jones Wine Merchs., Inc. v. La Casa Del Rey S.A.*, 2010 U.S. Dist. LEXIS 64310 (S.D.N.Y., June 24, 2010)

**COUNSEL:** [\*1] For Banville & Jones Wine Merchants, Inc., Plaintiff: Adam Brenner Gilbert, LEAD ATTORNEY, Nixon Peabody LLP (NYC), New York, NY.

For La Casa Del Rey S.A., Defendant: Peter Joseph Pizzi, LEAD ATTORNEY, Connell Foley LLP, New York City, NY; Rukhsanah Lighari, Connell Foley LLP (NJ), Roseland, NJ.

**JUDGES:** Lawrence M. McKenna, U.S.D.J.

**OPINION BY:** Lawrence M. McKenna

**OPINION**

*MEMORANDUM AND ORDER*

McKENNA, D.J.,

1.

This action was filed in the New York Supreme Court, New York County on or about October 27, 2009.

The summons and complaint were served on defendant Buena Cepa Wines, LLC ("Buena Cepa") on or about November 7, 2009. On or about March 1, 2010, plaintiff and defendant La Casa del Rey, S.A. ("La Casa") entered into a written stipulation pursuant to

which counsel for La Casa agreed to accept service of the summons and complaint on March 1, 2010.

On or about March 9, 2010, La Casa filed a notice of removal, pursuant to 28 U.S.C. § 1446, asserting that plaintiff is a citizen of Delaware and New York, Buena Cepa of Florida, and La Casa of Argentina. Buena Cepa has consented to removal.

On or about March 29, 2010, plaintiff moved for remand, claiming that the notice of removal was untimely because the 30-day period set [\*2] by 28 U.S.C. § 1446(b), within which a notice of removal must be filed, began to run with the November 7, 2009 service on Buena Cepa.<sup>1</sup>

1 See Notice of Removal, Ex. C. In its Reply Memorandum, plaintiff suggests that a rule that measures the 28 U.S.C. § 1446(b) 30-day period from the date upon which the first served defendant was served is preferable as "the only rule that is consistent with the unanimity requirement." (Pl. Reply Mem. at 7.) Plaintiff argues that Buena Cepa waived its right to remove because it consented to the jurisdiction of the state court by filing an answer in the state court. (*Id.*) Apart from the fact that this argument is made for the first time in a reply brief, no authority is given for the proposition that Buena Cepa consented to the state court's jurisdiction by filing an answer (in which, indeed, it alleged that the state court did not have in personam jurisdiction over Buena

Cepa.) (Answer P Fourth, Notice of Removal, Ex. D.) The argument is not persuasive.

2.

In the first place, it is clear that the 30-day period must be measured from service, "not by mere receipt of the complaint unattended by any formal service." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999).

The [\*3] parties, in an apparent absence of binding authority, have cited district court cases and decisions of circuits other than the Second, some of which support a rule which would run the 30-day period of 28 U.S.C. § 1446(b) for all defendants from the date of service of the first served defendant, *see, e.g., Yang v. ELRAC, Inc.*, No. 03 Civ. 9224, 2004 U.S. Dist. LEXIS 1668, 2004 WL 235208, at \*1 (S.D.N.Y. Feb. 6, 2004), and some of which support a rule which would run the 30-day period for each defendant from the date that defendant was served, *see, e.g., Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297, 300 (S.D.N.Y. 2001).

The Court finds the latter line of cases the most persuasive, for the reasons set forth in *Varela*, so that La Casa's March 9, 2010 Notice of Removal -- La Casa having been served on March 1, 2010 -- is timely. Accordingly, plaintiff's motion for remand is denied.<sup>2</sup>

2 The parties are to complete all discovery not later than December 31, 2010 (or such other date to which they may agree in writing or that may be granted for good cause shown). Any dispositive motions are to be filed not later than 30 days after the completion of discovery. The parties are to submit a joint proposed pretrial order [\*4] within 30 days of the completion of discovery or decision of any dispositive motion(s), whichever is later.

SO ORDERED.

Dated: April 26, 2010

/s/ Lawrence M. McKenna

Lawrence M. McKenna

U.S.D.J.