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COURT OF APPEALS
STATE OF NEW YORK

D&R GLOBAL SELECTIONS, S.L.,

Appellant,

-against-

NO. 63

BODEGA OLEGARIO FALCON PINEIRO,

Respondent.

20 Eagle Street
Albany, New York
May 2, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

ROBERT M. ZARA, ESQ.
ZARA LAW OFFICES
Attorney for Appellant
111 John Street
Suite 1810
New York, NY 10038

JOHN P. GLEASON, ESQ.
GLEASON & KOATZ, LLP
Attorney for Respondent
122 East 42nd Street
New York, NY 10168

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 63, D&R Global
3 Selections v. Bodega Olegario Falcon Pineiro.

4 MR. ZARA: Good afternoon. May it please the
5 court. My name is Robert Zara, and I represent the
6 appellant, Leonardo Olegario.

7 This case comes - - -

8 CHIEF JUDGE DIFIORE: Mr. Zara, would you like to
9 reserve any rebuttal time, sir?

10 MR. ZARA: I'm sorry, Judge DiFiore. Yes, I
11 would like to reserve two minutes for rebuttal.

12 CHIEF JUDGE DIFIORE: You may.

13 MR. ZARA: Thank you. Thank you for reminding
14 me.

15 So this case comes before the court after several
16 years of litigation on the issue of personal subject-matter
17 jurisdiction after the Honorable Diamond stated on - - - in
18 January 2010, that - - - I'm sorry, on - - - in - - - I'm
19 sorry, May 2010, May 25th, 2010, that the defendant has
20 conceded that it contracted to supply wine to New York, and
21 under the contracting anywhere to supply goods or services
22 to New York. That takes care of the first prong of the
23 Statute.

24 And then on the second prong of the Statute, she
25 used Lupton, you know, the Lupton case, and she basically

1 said, like Lupton, you have your commission agreement that
 2 the origin of which is that contract, in Spain, to supply
 3 goods or services in New York, so by definition, you have
 4 the - - - you have met the "arising from" requirement,
 5 which is the requirement that 302(a)(1) requires, you know,
 6 the drafters of 302(a)(1), you know, did not say it had to
 7 be cause, they just said it has to be a reason, and this
 8 court in - - -

9 JUDGE RIVERA: So - - - so - - -

10 MR. ZARA: - - - Licci - - -

11 JUDGE RIVERA: - - - how does the claim for the
 12 commissions arise from the fact that they came, and they
 13 had their representatives come to New York, to basically
 14 solicit business?

15 MR. ZARA: So, Judge Rivera, basically the
 16 affidavit of, you know, my client, Ms. Monica Duarte, that
 17 starts in the 500s, essentially states, and the same thing
 18 for the affidavit of Erica Lage, they both state that they
 19 came here to solicit, they came here to assist in promoting
 20 their wine, that assistance led to sales, and from that
 21 sales, you have the commissions. The respondent has
 22 admitted at page 24 of its brief - - -

23 JUDGE RIVERA: So - - - so is - - - is the
 24 argument that your client opened the door for this type of
 25 solicitation, made it possible for them to have these

1 meetings, and attend the Ritz Carlton launch, and all that?

2 MR. ZARA: Well, it's not - - - I wouldn't say
3 really that, you know, my client opened the door. This was
4 basically a situation where my client was going to come
5 here to New York to promote - - - and other wineries, you
6 know - - - wine, and the defendant got wind of this, and
7 called her to come and have a meeting at the winery. And
8 at the winery, back in March 2005, they agreed that, look,
9 if you also can, you know, sell, you know, our wine, if you
10 can find for us specifically - - -

11 JUDGE RIVERA: Um-hum.

12 MR. ZARA: - - - a distributor, and the defendant
13 has admitted to this at page 60, 62 of the record through
14 the affidavit of Maria Oubiña. That was - - - that was the
15 deal, that basically, you know, you will be entitled to a
16 commission.

17 Now, the thing here is that there are two
18 agreements. You have - - -

19 JUDGE RIVERA: Yes, but isn't the transacting
20 business the fact that they came - - -

21 MR. ZARA: Yes.

22 JUDGE RIVERA: - - - to New York, not that - - -

23 MR. ZARA: Well, absolutely - - -

24 JUDGE RIVERA: - - - you came to New York.

25 MR. ZARA: They - - - they postpone - - - they

1 came with us. You know, they came with us. They came to
2 (indiscernible) - - -

3 JUDGE RIVERA: Okay. But that's what I'm saying.
4 Is your argument that they came with you - - -

5 MR. ZARA: Absolutely.

6 JUDGE RIVERA: - - - because your client - - -

7 MR. ZARA: Absolutely.

8 JUDGE RIVERA: - - - opened these doors - - -

9 MR. ZARA: Yes.

10 JUDGE RIVERA: - - - and made it possible.

11 MR. ZARA: Yes. Yes. I appreciate that
12 question, Judge Rivera.

13 So there are two things here. There is the order
14 of the Appellate Division back in 2001 that construes that
15 the transaction of business, the purposeful availment, you
16 know, the transaction of business, in terms of looking at
17 the conduct of the agent.

18 And then you have the reality. The reality is
19 that the defendant came here on several occasions. And
20 that is not - - - that - - - that is specifically averred
21 in the affidavit, sworn to in the affidavit of Monica
22 Duarte. It is also in the record in the inquest hearing.
23 They came here for Great Match in March 2005. They came
24 here for the kickoff at the Ritz Carlton; that's the big
25 event that Kobrand organizes in January 2006. They may

1 have participated in the event - - - I'm sorry. They did
2 participate at the event, you know, Solera Restaurant,
3 which was one day before the kickoff.

4 JUDGE STEIN: So - - - so can you - - - can you
5 help me out here? They move for summary judgment.

6 MR. ZARA: Yes, Your Honor.

7 JUDGE STEIN: You did not cross-move for summary
8 judgment, correct?

9 MR. ZARA: We actually cross-moved for
10 jurisdictional discovery.

11 JUDGE STEIN: Um-hum.

12 MR. ZARA: But the Honorable Mendez denied that.

13 JUDGE STEIN: Okay.

14 MR. ZARA: Except that he dismissed the personal
15 jurisdiction.

16 JUDGE STEIN: But - - - but you haven't - - - you
17 haven't asserted that you're entitled to judgment as a
18 matter of law.

19 MR. ZARA: No, no. I did not cross-move.

20 JUDGE STEIN: Okay.

21 MR. ZARA: Yes, Your Honor.

22 JUDGE STEIN: All right. So my question is, you
23 repeatedly refer, in your brief, to the numerous triable
24 issues of fact.

25 MR. ZARA: Right.

1 JUDGE STEIN: What are they?

2 MR. ZARA: Okay. So basically, there are the
3 issues of fact that will - - - that are open in the event
4 the court determines that the affidavit of Monica Duarte,
5 pertaining to their visits in New York, are not, you know,
6 enough to confer jurisdiction on the transaction of
7 business. And she mentions several things in her
8 affidavit.

9 JUDGE STEIN: But isn't - - - isn't - - - are - -
10 - are they disputing the acts that you alleged that they
11 did while in New York?

12 MR. ZARA: In the deposition, which is at R767,
13 Judge Stein, they basically admit that Roberto Falcon came
14 to New York and, you know, was there with my client, D&R's
15 Monica Duarte, and that she did what, you know, whatever
16 people do at fairs, which is promote and sell, basically.

17 JUDGE STEIN: So besides the legal conclusion of
18 whether that is enough here - - -

19 MR. ZARA: Right.

20 JUDGE STEIN: What are the factual disputes?

21 MR. ZARA: Okay. So the factual disputes. So
22 for example, you have in the record, several versions of a
23 draft distribution agreement. So that draft distribution
24 agreement goes back and forth. There's an Article 11 there
25 about the jurisdictional clause, and first, you know, it

1 refers - - - it - - - it includes the jurisdictional clause
2 for the ICC chamber in Paris, which was apparently put by,
3 you know, the defendant. They - - - they changed the New
4 York jurisdictional clause that, you know, Kobrand had sent
5 to them. Kobrand being here the, you know, importer.

6 So they put, you know, Paris, and then they - - -
7 there was a meeting in, you know, in - - - in Bordeaux,
8 France, and basically, they - - - there was, you know,
9 evidence in the record that they were going to discu - - -
10 discuss this contract, and then all of a sudden, okay, we
11 see that it goes back to New York, and then it goes to New
12 York Chamber.

13 JUDGE STEIN: So the issues of fact aren't so
14 much about jurisdiction as they are about the merits of
15 your claim - - -

16 MR. ZARA: No.

17 JUDGE STEIN: - - - is that - - -

18 MR. ZARA: No, no.

19 JUDGE STEIN: No? Okay.

20 MR. ZARA: The - - -

21 JUDGE STEIN: I'm misunderstanding it.

22 MR. ZARA: Okay. So - - - so basically, our
23 contention, your Honor, is that jurisdiction here, under
24 either of the basis established in 302(a)(1), which is the
25 transacting business and the contracting anywhere to

1 supply, and with each case, the claim arising from, you
2 know, that, because that requirement pertains to both basic
3 jurisdiction, to us, clearly, there is jurisdiction. And -
4 - -

5 CHIEF JUDGE DIFIORE: Mr. Zara, getting back to
6 the - - - your argument on the contract to supply goods.
7 So the defendant is not a resident of New York State,
8 correct? And the cause of action doesn't arise out of the
9 contract to supply the wine - - -

10 MR. ZARA: Right.

11 JUDGE STEIN: - - - correct?

12 MR. ZARA: Well, actually - - -

13 JUDGE STEIN: So what my question to you, sir,
14 is, what is the authority you cite to that we can rely on
15 that extends personal jurisdiction under those
16 circumstances?

17 MR. ZARA: That is Lupton, Your Honor. The
18 Lupton case, which is a case by the Fourth Department,
19 which is the same case that the Honorable Diamond used in
20 her order, which is at 129-30, essentially states that
21 private contract is not required. That - - -

22 JUDGE FAHEY: You're talking about Alan Lupton v.
23 Northeast Plastics or plumbing - - -

24 MR. ZARA: Yes, Your Honor.

25 JUDGE FAHEY: - - - I can't remember. Yeah.

1 MR. ZARA: They basically say that privative
2 contract is not required here. The claim - - - the claim
3 for permission arises, okay, out of defendant's contract in
4 Spain to supply wine in New York. Therefore, that is
5 enough to meet the "arising from" requirement.

6 And under this court's relaxed "arising from"
7 requirement in Licci, we believe that the claim for
8 commissions is not unmoored; this is the - - - the word
9 that the court used.

10 JUDGE FAHEY: No, I agree with you. I think that
11 the Lupton case was written by my friend, Judge Green,
12 years ago, and it - - - it's a well-written decision, and -
13 - - and it does seem to support your point of view, but of
14 course, it's an Appellate Division case, and it's - - -
15 it's not binding on this court.

16 Here, I think we're looking at Licci and - - -
17 and then comparing Licci, which is the - - - a Lebanese
18 Canadian - - - Licci, you're familiar with that case, and
19 to some of our commercial cases, like Talbot as the SPCA
20 cases - - -

21 MR. ZARA: Right.

22 JUDGE FAHEY: - - - assuming you're familiar with
23 those, and there seems to be a distinction between Licci,
24 which is sort of - - - it's a terrorist correspondent
25 account case. That seems to be a broader standard, versus

1 Talbot and - - - and SPCA, the defamation cases - - -

2 MR. ZARA: Right.

3 JUDGE FAHEY: - - - and that seems to be a
4 somewhat narrower standard. Where do you fall on that
5 spectrum?

6 MR. ZARA: So looking at Talbot, for example.

7 JUDGE FAHEY: Okay.

8 MR. ZARA: Right. You have the Talbot defamation
9 case.

10 JUDGE FAHEY: Um-hum.

11 MR. ZARA: So you have the court that essentially
12 says, look, the transaction here, you know, is, you know,
13 which is attendance at the school, is too removed in time,
14 two years, okay, from the cause of action, which is the
15 defamation. And that means that the link, the rope, is
16 just not holding; it will break. That - - - that is too
17 attenuated.

18 JUDGE FAHEY: Uh-huh.

19 MR. ZARA: The link is just too attenuated.

20 Here, the link is clear. It's super clear on the
21 302(a)(1), contracting anywhere to supply goods or
22 services, because they themselves admitted that they are
23 entitled to a commission if you, you know, provide an
24 importer which will buy the wine. The link could not be
25 clearer. And even on the transaction of business, the link

1 also is clear here, because it's clear that they - - -
2 participation at various industry fairs, shows here,
3 basically drove up, you know, the sales, and that, in turn,
4 generated the commissions. So again, the link is not so
5 attenuated. It's not - - -

6 JUDGE FAHEY: I see.

7 MR. ZARA: - - - as strong as the link in the
8 302(a)(1) contracting anywhere, but it's not as attenuated
9 such that there shouldn't be an "arising from" such that
10 the court would find that the "arising from" requirement is
11 not met in that circumstance.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. ZARA: Thank you, Your Honor.

14 CHIEF JUDGE DIFIORE: Counsel.

15 MR. GLEASON: Good afternoon, Your Honors.

16 CHIEF JUDGE DIFIORE: Good afternoon.

17 MR. GLEASON: John Gleason, on behalf of the
18 defendant-respondent.

19 The second decision by the Appellate Division, a
20 unanimous decision, should be affirmed. It was plaintiff
21 alone who brought the wine from Spain into New York.

22 JUDGE RIVERA: Well, isn't the essence of their
23 claim that they entered in agreement to find a distributor,
24 and they claimed Kobrand is that distributor, but that
25 distributor is only the - - - your only in a relationship

1 with that distributor based on their efforts, and
2 therefore, they're entitled to commissions of - - -
3 plaintiff is entitled to commissions for each of those
4 bottles of wine that's sold through that distributor.

5 And if that's their claim, why isn't that, as we
6 said in Licci, at a minimum, related - - - shows
7 relatedness between the transaction and the claim? How is
8 that not, at a minimum, related?

9 MR. GLEASON: Because it was the plaintiff alone
10 that made that arrangement. It was an arrange - - -
11 arrangement between Kobrand and the plaintiff. Kobrand
12 brought the wine in because plaintiff asked it to.

13 JUDGE STEIN: But on - - -

14 MR. GLEASON: Plain - - - I'm sorry.

15 JUDGE STEIN: - - - on behalf of your client,
16 correct?

17 JUDGE RIVERA: But - - - but that's his claim.

18 MR. GLEASON: It benefited. I don't - - - I
19 don't think it was on the half. It benefited the winery,
20 but the winery was paid in Spain, in euros.

21 JUDGE STEIN: So what would - - - so what would
22 have had to have happened for it to have been related then?
23 You're saying that - - - that your client would have had to
24 directly ask Kobrand to - - - she - - -

25 MR. GLEASON: Or do it herself.

1 JUDGE STEIN: Or do it herself.

2 MR. GLEASON: I - - - I - - -

3 JUDGE STEIN: Okay. Okay.

4 MR. GLEASON: It's two women (indiscernible).

5 JUDGE STEIN: Well - - - well, is it - - - aren't
6 they arguing - - - that - - - that that is exactly what
7 happened?

8 MR. GLEASON: No. Some wineries, in fact, do do
9 that. They directly import their own wine into the United
10 States.

11 JUDGE STEIN: No, no, no.

12 MR. GLEASON: Here - - -

13 JUDGE STEIN: But didn't your client make an
14 arrangement with Kobrand?

15 MR. GLEASON: No. The arrangement - - -

16 JUDGE STEIN: How - - - how did - - - after - - -
17 after the year was up, how did the wine get here? You
18 don't - - - you don't - - -

19 MR. GLEASON: There's an important - - -

20 JUDGE STEIN: You don't disagree that it - - -
21 that it - - - it has gotten here.

22 MR. GLEASON: Yes.

23 JUDGE STEIN: Okay.

24 MR. GLEASON: But there is - - - there is
25 something we're losing sight of. The agreement between D&R

1 and the winery was oral. They came from the same town in
2 Spain.

3 JUDGE STEIN: No, no. You're - - - you're - - -

4 MR. GLEASON: They knew each other - - -

5 JUDGE RIVERA: It's not about the merits.

6 JUDGE STEIN: - - - not answering my question.

7 MR. GLEASON: I know. But I'm getting to it.

8 I'm sorry; I'm longwinded. I'm too used to being in front
9 of trial courts.

10 JUDGE RIVERA: You'll run out of time though that
11 way.

12 MR. GLEASON: I know.

13 JUDGE STEIN: Yeah, I - - - I'd like you to just
14 answer how that wine - - - after the one year, how that
15 wine has gotten to New York.

16 MR. GLEASON: Because the oral agreement was
17 terminated by the winery, and then the winery said to
18 Kobrand, if you still want to import our wine, we're
19 willing.

20 JUDGE RIVERA: You're saying that the agreement
21 was over.

22 MR. GLEASON: Right.

23 JUDGE RIVERA: You don't owe them anymore
24 commission, so then you, or your client, not you,
25 obviously, went about the business of entering their own

1 separate agreement with Kobrand.

2 MR. GLEASON: Right.

3 JUDGE RIVERA: So they dispute that. Right? So
4 that's on the merits. The question now is about
5 jurisdiction. That may be your argument on the merits,
6 that may be your defense, that's fine and dandy; that's not
7 what we're here for.

8 MR. GLEASON: But the appellant is saying that
9 those contacts that the winery had with Kobrand, after the
10 oral agreement was over, justified jurisdiction.

11 JUDGE RIVERA: You - - - you're saying your
12 client came to New York after the one-year - - -

13 MR. GLEASON: Yes.

14 JUDGE RIVERA: - - - period?

15 MR. GLEASON: Yup.

16 JUDGE RIVERA: So you had not paid, or your
17 client had already paid certain commissions - - -

18 MR. GLEASON: Yes.

19 JUDGE RIVERA: - - - before ever coming to New
20 York?

21 MR. GLEASON: Yes. Paid quite a bit of
22 commissions.

23 JUDGE WILSON: Bef - - -

24 MR. GLEASON: If you look at the record, it'll
25 show - - -

1 JUDGE WILSON: Before ever coming to New York - -

2 -

3 MR. GLEASON: - - - that - - -

4 JUDGE WILSON: - - - that is - - -

5 MR. GLEASON: I'm sorry, Your Honor.

6 JUDGE WILSON: Before ever coming to New York?

7 Your client didn't come during the first year or before

8 that?

9 MR. GLEASON: No. If you look at the record, the
10 inquest testimony given by Ms. Duarte, she says, I went to
11 the Great Match alone, I went to Miami alone, I went to
12 Paris alone, I paid for the trips. Excuse me. My company
13 paid for the expenses.

14 JUDGE RIVERA: So - - - so Kobrand was
15 distributing your client's wine before your client ever
16 came to New York for those visits.

17 MR. GLEASON: Yes.

18 JUDGE RIVERA: Before the launch at the Ritz
19 Carlton?

20 MR. GLEASON: That, I don't know. But Duarte did

21 - - -

22 JUDGE RIVERA: Well, that's one of the - - -
23 that's one of the trips.

24 MR. GLEASON: Duarte did make the arrangement
25 between Kobrand and the winery. There's no doubt about

1 that, and they were paid for the - - - commissions for that
2 time.

3 JUDGE RIVERA: Okay. So if you agree to that,
4 let's stay with that for one moment. If you agree to that,
5 and their argument is, that's the point. We found the
6 distributor, they were selling, they were getting the wine,
7 they were ensuring the wine was distributed, and therefore,
8 your client was profiting off of that, and they're entitled
9 to commissions for having created that opportunity and
10 getting the distributor.

11 MR. GLEASON: That would work if there had been
12 an agreement to that effect. But the agreement for it - -
13 -

14 JUDGE RIVERA: Okay. But that's on the merits.
15 We're - - -

16 MR. GLEASON: - - - was over.

17 JUDGE RIVERA: That's on the merits. We're
18 talking about jurisdiction.

19 MR. GLEASON: Right. The - - - I - - - the
20 Appellate Division said it perfectly. It was plaintiff
21 alone who brought the wine in.

22 Remember, the - - - if you look at the record, it
23 shows these contracts are Ex Works. That means Olegario
24 puts its wine at the back door or whatever.

25 JUDGE STEIN: How is that relevant - - - how is

1 that relevant to the jurisdictional - - -

2 MR. GLEASON: Because the sale was complete in
3 Spain.

4 JUDGE FAHEY: But that's comparable to F.O.B.
5 here, and I - - - I didn't think that that was the sole
6 basis for our decisions anymore.

7 MR. GLEASON: I'm sorry. I couldn't hear
8 (indiscernible).

9 JUDGE FAHEY: Ex - - - Ex Works in Europe is
10 comparable to F.O.B., free on board; the same analysis in
11 the States. And - - - and I didn't think that that was
12 dispositive anymore, particularly in this - - -

13 MR. GLEASON: I - - -

14 JUDGE FAHEY: - - - in New York.

15 MR. GLEASON: I think - - - I think - - - I don't
16 mean to argue with you, Your Honor, but I think - - -

17 JUDGE FAHEY: No, no, that's what you do mean to
18 do; that's what you're here for.

19 MR. GLEASON: Well, I - - -

20 JUDGE FAHEY: Don't - - - don't worry about that.
21 Tell me what you think.

22 MR. GLEASON: Okay.

23 JUDGE FAHEY: Yeah.

24 MR. GLEASON: I didn't mean to be rude.

25 What it means is that the purchaser, Kobrand,

1 picks it up at the winery and takes title and possession.

2 JUDGE STEIN: Well, we know that.

3 MR. GLEASON: Title passes.

4 JUDGE FAHEY: Right.

5 JUDGE STEIN: But isn't that based on our old
6 "mere shipment" rule, that the mere shipment wasn't enough?

7 MR. GLEASON: I ---

8 JUDGE STEIN: And - - - and hasn't that been
9 abrogated - - -

10 MR. GLEASON: I don't know the answer to that.

11 JUDGE STEIN: Hasn't that been abrogated pretty
12 clearly by the Statute? Haven't we said that?

13 MR. GLEASON: Well, it may be, but I think that's
14 irrelevant. What we're dealing with here is the - - - what
15 happened in Spain. The wine was presented to Kobrand in
16 Spain - - -

17 JUDGE STEIN: Well, I - - - I think that's what -
18 - - that's exactly what we used to rule, based on the
19 F.O.B. and the "mere shipment" rule, but we kind of moved
20 beyond that.

21 MR. GLEASON: I - - -

22 JUDGE STEIN: That's - - -

23 JUDGE RIVERA: The legislature specific - - -

24 MR. GLEASON: I didn't mean - - -

25 JUDGE RIVERA: Legislature specifically amended

1 the CPLR.

2 MR. GLEASON: I didn't mean to - - -

3 JUDGE RIVERA: But let me - - - let me - - - let
4 me ask you this.

5 MR. GLEASON: Sorry.

6 JUDGE RIVERA: Let me ask you this. If your
7 client had, indeed, come to New York during the year - - -

8 MR. GLEASON: Ah.

9 JUDGE RIVERA: - - - is there personal
10 jurisdiction leading to the subject-matter jurisdiction?

11 MR. GLEASON: That would be different. If - - -
12 if Kobrand, in the year after the D&R agreement had been
13 terminated, if Kobrand wanted to sue the winery - - -

14 JUDGE RIVERA: No, no, no. That was not my
15 question.

16 MR. GLEASON: - - - they could do it here.

17 JUDGE RIVERA: Well, yes, because you've got an
18 agreement.

19 MR. GLEASON: Yeah.

20 JUDGE RIVERA: But that's not the question. No,
21 no, no. During the year, during that one year that you
22 concede there is an agreement with the plaintiff, if your
23 client's representatives had come to New York, does that
24 then satisfy the requirement?

25 MR. GLEASON: It would depend. It would depend

1 if their coming to New York was purposeful, meaningful,
2 with the intention to do business.

3 JUDGE RIVERA: Well, let's assume that is the
4 case.

5 MR. GLEASON: Well, then I - - - I think that's a
6 hypothetical, but a hypothetical, probably - -

7 JUDGE RIVERA: Yeah, it's a hypothetical I'm
8 giving you. So I want to know what your answers to that
9 hypothetical.

10 MR. GLEASON: Hypothetically, probably, yes.

11 JUDGE STEIN: And then why - - -

12 MR. GLEASON: - - - but I don't think that - - -

13 JUDGE STEIN: - - - why is there not a question
14 of fact about that?

15 MR. GLEASON: I don't - - - well, I don't think
16 those - - - those facts came to pass in this case.

17 JUDGE STEIN: Well, you don't - - - I know you
18 don't, but the plaintiff says they did. Why - - -

19 MR. GLEASON: Not in the year of that agreement,
20 with - - -

21 JUDGE STEIN: I think that's - - -

22 MR. GLEASON: - - - between D&R and the winery.

23 JUDGE WILSON: There's a finding by the Appellate
24 Division, right, that - - - that your client did transact
25 business in New York, right? And as to the first prong - -

1 -

2 MR. GLEASON: Yes.

3 JUDGE WILSON: - - - of 302(a)(1), I - - - at
4 least reading your papers - - -

5 MR. GLEASON: Right.

6 JUDGE WILSON: - - - I concluded you were not
7 disputing transaction of business, this was just about
8 nexus; is that wrong?

9 MR. GLEASON: Right. We don't disagree with what
10 the Appellate Division said, but the Appellate Division
11 added in the next clause, there was no nexus between that
12 activity and the claim by D&R for commissions.

13 JUDGE WILSON: So we're not - - - we're not
14 really arguing about transaction of business; just about
15 nexus, right?

16 MR. GLEASON: Right.

17 JUDGE WILSON: Okay.

18 JUDGE FAHEY: So then to follow up on - - -

19 JUDGE RIVERA: But I took your argument is that
20 when - - - when you're transacting business is not when
21 their claim arises.

22 MR. GLEASON: Right.

23 JUDGE RIVERA: Isn't that your point?

24 MR. GLEASON: Right, exactly.

25 JUDGE RIVERA: That those - - - those events that

1 lead to the "transacting business", or your client's
2 representatives coming to New York - - -

3 MR. GLEASON: Right.

4 JUDGE RIVERA: - - - falls outside the one-year
5 period.

6 MR. GLEASON: Right. The one-year - - -

7 JUDGE RIVERA: This is your position?

8 MR. GLEASON: - - - to (indiscernible) purposeful
9 activity in New York.

10 JUDGE FAHEY: And my - - - would I - - - would I
11 be correct in saying that there's - - - there's three
12 events here. They've got, Falcon and Mosteiro attend a
13 Great Match event in Manhattan, May 19th, 2005; that's one.
14 Second is they - - - they attended - - - Falcon attended
15 the Kobrand dinner on January 2006, and then Falcon
16 attended the Kobrand kick-off event the next day at the
17 Manhattan Ritz Carlton.

18 Those three events, is - - - is the question
19 before us whether or not they constitute an articulable
20 nexus between defendant's promotional activities in New
21 York and plaintiff's claim for the commissions?

22 MR. GLEASON: Yes. And if I may add - - -

23 JUDGE FAHEY: Sure. Go ahead.

24 MR. GLEASON: - - - in 2006, the agreement with
25 D&R was over.

1 JUDGE FAHEY: Okay. Thanks.

2 JUDGE GARCIA: Counsel - - -

3 JUDGE RIVERA: Is it March 2006, because they - -
4 - he claims the agreement is from March 2005.

5 MR. GLEASON: Right.

6 JUDGE RIVERA: So coming into New York occurs,
7 those events occurred before March 2006.

8 MR. GLEASON: Okay. I agree though with Justice
9 Fahey that the - - - there's no nexus between those events
10 and the claim for commissions.

11 JUDGE GARCIA: Counsel, are you - - -

12 MR. GLEASON: That's exactly - - - I'm sorry - -
13 -

14 JUDGE GARCIA: - - - are you making solely a CPLR
15 302 claim, or are you also raising a Constitutional
16 due-process claim?

17 MR. GLEASON: Yes. We - - - we - - -

18 JUDGE GARCIA: Yes to which one?

19 MR. GLEASON: Well, I meant, our U.S. Supreme
20 Court has said that there has got to be some significant
21 contact with the United States in order for a united - - -
22 a court within the United States to exercise jurisdiction
23 over a foreign entity.

24 JUDGE GARCIA: Understood. Have you raised that
25 claim here?

1 MR. GLEASON: Yes, it's in our brief.

2 JUDGE GARCIA: And in - - - it was raised in the
3 Appellate Division also?

4 MR. GLEASON: I believe so. I don't think I made
5 it a major point, but I - - - I put it in there.

6 JUDGE FAHEY: You - - -

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. GLEASON: Thank you.

9 CHIEF JUDGE DIFIORE: Mr. Zara.

10 MR. ZARA: A few things, Your Honor.

11 Meetings here in New York, the Great Match, on or
12 about the meeting of May 2005 - - -

13 JUDGE FAHEY: Mr. Zara, I can't hear you. Just
14 pull - - - pull that mic down a little bit. Thank you.
15 Thank you, sir.

16 MR. ZARA: Thank you, Judge Fahey.

17 The meetings that we're talking about here, which
18 is the Great Match, on or about May 19, 2005, that starts
19 everything. Because that's the meeting where appellant's
20 Ms. Duarte, meets Constance Savage of Kobrand. That's
21 where Ms. Savage takes a few bottles. They do testings,
22 and pursuant to those testings, there are emails in the
23 record that say, your wine has risen to the top of the
24 list. Subsequently, it became one of - - - the world's
25 fourth best wine, according to the Wall Street Journal, and

1 then that - - - that's also the record, we want to be your
2 exclusive distributor.

3 And so there is a letter, that's also in the
4 record, Your Honor, that basically appoints, a letter by
5 Olegario, that appoints - - - I'm sorry, a letter by
6 Olegario that appoints Kobrand as their distributor in the
7 United States. Pursuant to the Federal Alcohol Act, they
8 are granted the right to being the primary source of this
9 product, Albariño, for the entire United States.

10 Then, you also have the meeting on or about
11 January 9, 2010, at the Solera Restaurant, that was a
12 kick-off dinner, where basically Kobrand invites all their
13 distributors to basically kick off there.

14 And then you also have, on or about - - - the
15 next day, you have the Ritz Cartlon kick off. Those
16 meetings, okay, happened before the defendant began
17 shipping its wine. What had been shipped before were just
18 samples. They were invoiced at the like one euro, two
19 euros; those were just samples. The business started in
20 earnest after, you know, the kickoff. Because that's where
21 the distributors came, liked the wine, were introduced to
22 it, and the orders started to flow. And how, you have
23 133,000 bottles or so, 720,000 euros.

24 So this Constitutional argument that, you know,
25 that yes, you could theoretically have a Constitutional

1 argument, because 302(a)(1) does not exhaust a full panoply
2 of the due process clause. So yes, you could have a
3 situation where, you know, the - - -

4 JUDGE RIVERA: Well, did he raise it below?

5 MR. ZARA: Yes, they did, Your Honor. But the
6 point is, they availed themselves. They knowingly availed
7 themselves of the benefits of doing business in New York.
8 They shipped, you know, hundreds of thousands of dollars'
9 worth of this. They dealt directly - - - this argument
10 that because it's Ex Works, you know, there was a case,
11 Cleopatra that clearly says, the F.O.B. Milan case, look,
12 you know, the - - - the drafters of the 1979 legislative
13 amendment to 302(a)(1) never intended, you know, that the
14 rule was going to be if you ship. That's why they say
15 "supply". Okay.

16 And so for, you know, that rule was based - - -
17 that amendment was basically designed to protect people
18 here to basically buy from overseas, so they would have - -
19 - be able to sue them here. So the idea that because it's
20 Ex Works we didn't do it, that's not - - -

21 But the main thing, Your Honor, is that you have
22 seventeen invoices from the Bodega Olegario to Kobrand.
23 You have a letter appointing them as their primary
24 exclusive, you know, primary source of wine for Albariño.

25 And so the idea that somehow they didn't do

1 business with them, that it's, you know, the defendant that
2 - - - I'm sorry, that is the plaintiff who brought the wine
3 here, that is - - - there's no support for it in the
4 record, Your Honor; there's absolutely none.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. ZARA: Thank you, Your Honor. Thank you very
7 much, the courts.

8 CHIEF JUDGE DIFIORE: You're welcome.

9 MR. GLEASON: Thank you, Your Honor.

10 CHIEF JUDGE DIFIORE: You're welcome.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: May 07, 2017