

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

3 **AIR-CON, INC.,**

4 **Plaintiff,**

5 **v.**

CIVIL NO. 15-2683 (GAG)

6 **DAIKIN APPLIED LATIN AMERICA**
7 **LLC, et al.,**

8 **Defendant.**

9 **OPINION AND ORDER**

10 Presently before the Court is Plaintiff Air-Con, Inc.’s (“Air-Con”) motion to remand (Docket
11 No. 10), Daikin Applied Latin America, LLC’s (“Daikin Applied”) and Technical Distributors,
12 Inc.’s (“Technical”) (collectively “Defendants”) oppositions thereto (Docket Nos. 13, 15 & 35), and
13 Air-Con’s reply (Docket No. 26).¹ After reviewing the filings and the applicable law, Air-Con’s
14 motion to remand is **GRANTED**.

15 **I. Relevant Factual and Procedural Background**

16 On October 21, 2015, Air-Con brought this action against Daikin Applied and Daikin North
17 America, LLC (“Daikin NA”) before the Puerto Rico Court of First Instance, seeking damages and
18 injunctive relief for the alleged impairment of an exclusive distribution agreement in violation of the
19 Puerto Rico Dealers’ Contract Act (“Law 75), P.R. Laws Ann. tit. 10, § 278 *et seq.*, and for breach
20 of contract under the Puerto Rico Civil Code. (Docket No. 1-2.) Plaintiff also alleges that Technical
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24 ¹ Because both defendants opposed the motion to remand, the Court will treat all arguments advanced by them collectively.

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1 Distributor, Inc. (“Technical”) tortuously interfered with its contractual relations with Daikin
2 Applied. Id.

3 On October 30, 2015, Defendants removed the case to this Court on the basis of diversity
4 jurisdiction.² (Docket No. 1.) They argue that removal is proper under 28 U.S.C. § 1441(a) because
5 Technical, the only non-diverse defendant, was “fraudulently joined to destroy complete diversity
6 jurisdiction in this case.” (Docket No. 24, p. 3.) Defendants specifically argue that there is no valid
7 tortious interference claim because (1) Air-Con has failed to plead that Technical had knowledge
8 of the distribution agreement between Air-Con and Daikin Applied, a necessary element of a tortious
9 interference claim (Docket No. 13, p. 2-3), (2) Daikin Applied has no commercial relationship with
10 Technical (Docket No. 24, p. 4-5); and (3) Daikin Applied’s agreement with Air-Con is governed
11 by a written contract that only confers *non-exclusive* distribution rights of Daikin branded products
12 in Puerto Rico and the Caribbean. Id. In the alternative, they contend that the case is removable on
13 the basis of federal question jurisdiction. (Docket No. 24, p. 5-8.)

14 Air-Con opposed the removal and filed a motion to remand arguing that Defendants have
15 failed to overcome the extremely heavy burden of showing that Air-Con acted fraudulently when it
16 joined Technical as a party to the case. (Docket No. 10.) According to Air-Con, the allegations in
17 the complaint, read together and in the proper context, are sufficient to establish a tortious
18 interference claim against Technical. (Id. at p. 6-7; Docket No. 26, p. 3.) Furthermore, Air-Con
19 argues that the alleged written agreement “is not a binding agreement or contract since the same was
20 never executed by one of its alleged signatories . . . [and that] in the year 2000 Air-Con began its
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23 ² The notice of removal was amended on November 20, 2015, that is, within the 30-day period for removal
24 provided in 28 U.S.C. § 1446(b). See Charles Alan Wright, et al., Federal Practice and Procedure: Jurisdiction and
Related Matters § 3733 (4th ed.). Plaintiff did not oppose.

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1 exclusive distribution relationship with Daikin Applied, not with Daikin Industries.” (Docket No.
2 10, p. 8-9.)

II. Standard of Review

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4 A civil action filed in state court over which the federal courts would have had original
5 jurisdiction based on diversity of citizenship, may be removed to federal court provided that no
6 defendant is a citizen of the State in which such action is brought. Universal Truck & Equip. Co.,
7 Inc. v. Southworth-Milton, Inc., 765 F.3d 103, 108 (1st Cir. 2014) (quoting 28 U.S.C. § 1441(b)(2)).
8 Federal courts are courts of limited jurisdiction and, thus, removal statutes are to be narrowly
9 construed. López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1 (1st Cir. 2014). Accordingly, the
10 removing defendant generally bears the burden of demonstrating the federal court’s jurisdiction. Id.
11 “Because removal statutes are narrowly construed against removal, and because of the crucial
12 federalism concerns at play, any ambiguities ‘as to the source of law relied upon by the . . . plaintiffs
13 ought to be resolved against removal.’” Bonilla-Pérez v. Citibank NA, Inc., 892 F. Supp. 2d 361,
14 636-64 (D.P.R. 2012) (citations omitted). Therefore, when plaintiff and defendant clash about
15 federal jurisdiction, all doubts should be resolved in favor of remand to state court. Id. (quoting Junk
16 v. Terminix Int’l Co., 628 F.3d 439, 446 (8th Cir. 2010)); Asoc. de Detallistas de Gasolina de P.R.
17 v. Shell Chem. Yabucoa, Inc., 380 F. Supp. 2d 40, 43 (D.P.R. 2005) (citing Burns v. Windsor Ins.
18 Co., 31 F.3d 1092, 1097 (11th Cir. 1994)).

III. Applicable Law and Analysis

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20 Generally, fraudulent joinder “occurs when a nondiverse party is added solely to deprive the
21 federal courts of diversity jurisdiction.” 16 James W. Moore et al., Moore’s Federal Practice §
22 107.52[4][a]. “A party fraudulently joined to defeat removal need not join in a removal petition,
23 and is disregarded in determining diversity of citizenship.” Polyplastics, Inc. v. Transconex, Inc.,

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1 713 F.2d 875, 877 (1st Cir. 1983). With regard to the analysis that governs claims of fraudulent
2 joinder, the First Circuit recently stated that “it is generally recognized that, under the doctrine of
3 fraudulent joinder, removal is not defeated by the joinder of a non-diverse defendant where there is
4 no reasonable possibility that the state’s highest court would find that the complaint states a cause
5 of action upon which relief may be granted against the non-diverse defendant.” Universal Truck,
6 765 F.3d at 108 (citing Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992) (“[T]he federal
7 court must engage in an act of prediction: is there any reasonable possibility that a state court would
8 rule against the non-diverse defendant?”); McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th
9 Cir. 1987) (“If the plaintiff fails to state a cause of action against a resident defendant and the failure
10 is obvious according to the settled rules of the state, the joinder of the resident defendant is
11 fraudulent.”)).³

12 In Universal Truck, however, the First Circuit did not define the term “reasonable
13 possibility[.]” See Rosbeck v. Corin Group, PLC, 140 F. Supp. 3d 197, 202 (D. Mass. 2015). But,
14 as explained in Rosbeck, it is clear that “if existing state law squarely precludes a plaintiff’s claim
15 against a non-diverse defendant, and such deficiency is ‘apparent from the face of the original
16 complaint,’ the nondiverse defendant is fraudulently joined. Rosbeck, 140 F. Supp. 3d at 202
17 (quoting Universal Truck, 765 F. 3d at 108 (“finding fraudulent joinder when existing state law
18 barred the claim”)). “The difficulty arises when no state apex court decision answers the question,
19 notwithstanding indications (opinions in related areas, other jurisdictions’ answers to the particular
20 question, etc.) pointing in certain directions.” Id.

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23 ³ Due to variations on the standards among the circuit courts, distinctions have been made between “the
24 possibility of recovery” and “the possibility of stating a claim”. See Walter Simons, Choice of Law in Fraudulent Joinder
Litigation, 163 U. Pa. L. Rev. 603, 614-5 (2015). In Universal Truck, the First Circuit made no distinction on this regard.
See Universal Truck, 765 F.3d at 108.

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1 Generally, “so long as [federal courts] have jurisdiction, [they] must ‘decide questions of
2 state law whenever necessary to the rendition of a judgment,’ even when ‘the answers to the
3 questions of state law are difficult or uncertain or have not yet been given by the highest court of the
4 state.’” Id. (quoting Meredith v. City of Winter Haven, 320 U.S. 228, 234-35 (1943)). When
5 reviewing a fraudulent joinder claim, however, “the district court’s task is limited to determining
6 whether there is arguably a reasonable basis for predicting that the state law might impose liability
7 based upon the facts involved. . . . [but] in its review of a fraudulent-joinder claim, the court has no
8 responsibility to definitively settle the ambiguous question of state law.” Filla v. Norfolk S. Ry. Co.,
9 336 F.3d 806, 809 (8th Cir. 2003) (emphasis added); see also Rosbeck, 140 F. Supp. 3d at 203;
10 Badon v. RJR Nabisco, Inc., 236 F.3d 282, 285 (5th Cir. 2000).⁴

11 In determining whether there is no reasonable possibility that the state’s highest court would
12 find that the complaint states a cause of action upon which relief may be granted against the non-
13 diverse defendant, Universal Truck, 765 F.3d at 108, the Court must apply a Rule 12(b)(6)-type
14 analysis. See Sea World, LLC v. Seafarers, Inc., Civ. No. 16-1382, 2016 WL 3258360, *4, ___ F.
15 Supp. 3d ___ (D.P.R. 2016); Alpha Biomedical & Diagnostic Corp. v. Philips Med. Sys. Netherland
16 BV, 828 F. Supp. 2d 425, 433 (D.P.R. 2011) (stating that “it seems simplest to treat the inquiry as a
17 modified version of a motion to dismiss, asking whether the state complaint states a plausible claim
18 under [Federal Rule Civil Procedure] 8(a)(2)”; see also Gray ex rel. Rudd v. Beverly Enters.-
19 Mississippi, Inc., 390 F.3d 400, 405 (5th Cir. 2004). Under this standard, all factual and legal issues
20 must be resolved in favor of the plaintiff and a defendant seeking removal bears a “heavy burden”
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23 ⁴ Chiasson v. Honeywell Intern, Inc., Civ. No. 05-5221, 2008 WL 4146692, *9 (E.D. La., Aug. 29, 2008)
24 (stating that the Eight Circuit “has cited with approval the Fifth Circuit’s holding that the Erie doctrine has a limited role to play in improper joinder analysis”).

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1 to demonstrate that the joinder is fraudulent. Rosbeck, 140 F. Supp. 3d at 203 (quoting Philips v.
2 Medtronic, Inc., 754 F. Supp. 2d 211, 217 (D. Mass. 2010); Renaissance Mktg. v. Monitronics Int'l,
3 Inc., 606 F. Supp.2d 201, 208 (D.P.R. 2009); 6 Moore's Federal Practice- Civil, supra, § 107.52
4 [4][c]; see also 14B Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction and
5 Related Matters § 3723 (4th ed).⁵ The court must also resolve “legal ambiguities in the controlling
6 state law in favor of the non-moving party.” Rosbeck, 140 F. Supp. 3d at 203; Bonilla-Pérez, 892
7 F. Supp. 2d at 365. “All doubts are to be resolved in favor of remand to state court.” 6 Moore's
8 Federal Practice- Civil, supra, § 107.52 [4][c].

9 *A. The tortious interference claim*

10 Relying on Sterling Merch., Inc. v. Nestle, S.A., 546 F. Supp. 2d 1, 3 (D.P.R. 2008),
11 Defendants contend that there is no valid tortious interference claim because Daikin Applied has no
12 commercial relationship with Technical. According to Defendants, Technical allegedly obtains its
13 products from a fourth party (not privy to the contract), Goodman Distributors, Inc. (Docket No.
14 24, p. 4.; see also Sterling Merch., Inc., 546 F. Supp. 2d at 3.) Thus, they argue that, since Technical
15 acquired the Daikin products for eventual resale in Puerto Rico from a party other than Daikin
16 Applied, Technical did not interfere with the contract between Daikin Applied and Air-Con.⁶ The
17 Court has reviewed Sterling Merchandising and the applicable law, and concludes that there is a
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19 ⁵ “It is important that courts impose a heavy burden on defendants who remove on the basis of alleged fraudulent
20 joinder because the practice of routinely removing cases to federal court by making borderline arguments of fraudulent
21 joinder imposes tremendous costs on plaintiffs and the court system.” 16 Moore's Federal Practice-Civil, supra, § 107-
52[4][c].

22 ⁶ Defendants also submitted an unsworn declaration under penalty of perjury subscribed by Emiliano Santiago
23 López, president of Technical Distributors, Inc., stating that “Technical Distributor is not selling any of the products
24 sold by Air-Con, Inc.” (Docket No. 13-1, ¶ 4.) Air-Con replied by filing an unsworn declaration under penalty of
perjury signed by its president, Jaime Maldonado, stating with evidence attached that it “bought . . . from Technical
Distributor, Inc. through a third party a piece of Daikin branded equipment.” (Docket No. 26-1; see also Docket No.
26-2). The court may consider documents outside the pleadings when ruling on a fraudulent joinder claim. See 16
Moore's Federal Practice- Civil, supra, § 107-52[4][c].

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1 reasonable possibility that the Puerto Rico Supreme Court could find that Air-Con's complaint states
2 a cause of action for tortious interference claim against Technical.

3 In Gen. Office Prod. Corp. v. A.M. Capen's Sons, Inc., 115 P.R. Dec. 553, 15 P.R. Offic.
4 Trans. 727 (1984), the Puerto Rico Supreme Court held that a cause of action for tortious interference
5 with a contractual relationship arises under Article 1802 of the Puerto Rico Civil Code. Gen. Office
6 Prod., 115 P.R. Dec. at 558. The Puerto Rico Supreme Court further held that the constitutive
7 elements of a tortious interference claim are: (1) there must be a contract with which a third person
8 interferes; (2) there must be "fault"; that is, that the prejudiced party need only show or present facts
9 allowing the court to infer that the third person has acted tortuously, with knowledge of the contract's
10 existence; (3) there must be a damage to the plaintiff; and (4) that the damage caused must be a
11 consequence of the tortious acts of the third person (it suffices that the third person has provoked or
12 contributed to the breach). Id. at 558-9.

13 The court in Sterling Merchandising considered facts similar to the allegations in the present
14 case, but in the context of a motion to dismiss. Sterling Merch., 546 F. Supp. 2d at 2. There, Sterling
15 Merchandising Inc. ("Sterling") filed a complaint against Payco Foods Corp. ("Payco") for the
16 alleged violation of federal and local antitrust laws. Payco counterclaimed "alleging that [Sterling
17 had] intentionally interfered with an exclusive distribution contract between Payco and Masterfoods
18 Interamerica ("MFI") by laterally buying MFI's products and selling them in Puerto Rico." Id.
19 Sterling responded that the counterclaim was meritless because the elements of a cause of action for
20 tortious interference were not present. Id. at 2-3. Specifically, Sterling argued that "it did not
21 interfere with the Payco-MFI's contract because it did not purchase directly from MFI, and therefore,
22 did not cause MFI to breach its contract with Payco." Id. at 2. But Payco replied that "the cause of
23 action for tortious interference with a contract does not require that Sterling's purchases of MFI
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1 products be made directly from MFI.” Id. The court agreed with Sterling and dismissed Payco’s
2 counterclaim. In so ruling, the court gave great weight to the fact that Sterling purchased the MFI
3 products from a fourth party and *outside* of Puerto Rico. The court was particularly persuaded by
4 the argument that “an exclusive distribution contract made in Puerto Rico between two parties
5 cannot prevent purchases made outside of [Puerto Rico] by third parties even if it results in a resale
6 in Puerto Rico later on.” Id. at 3. The court thus held that it was “reluctant to extend the P.R.
7 Supreme Court’s holding in General Office Products” to such situations. Id. at 3.

8 This Court, however, does not read the holding in General Office Products so narrowly. In
9 this Court’s view, the Puerto Rico Supreme Court’s holding does not preclude the possibility of
10 validly stating a tortious interference claim against a third party that interferes with a contract,
11 regardless of whether the interference was accomplished through its relationship with a fourth party
12 or with a party to the contract with which it interfered. Article 1802 of the Puerto Rico Civil Code
13 establishes a very broad and general rule which may adapt to varying conditions and social needs.
14 López v. Porrata Doria, 169 P.R. Dec. 135, 151 (2006). Moreover, in the case at hand the Court
15 cannot conclusively find that the purchases were made outside of Puerto Rico, as in Sterling
16 Merchandising. In any event, although General Office Products does not directly address a situation
17 like the one at issue here, the Court finds that its holding is broad enough to at least potentially
18 encompass such situations. And since in the context of determining whether there has been a
19 fraudulent joinder a court need not definitively settle an ambiguous question of state law, see Filla,
20 336 F.3d at 811, the Court finds that, given Article 1802 and General Office Product’s broad scope,
21 Defendants have failed to demonstrate that Air-Con has no reasonable possibility of success against
22 Technical under a tortious interference theory.

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1 As to whether Air-Con failed to plead the second element of the cause of action, the Court
2 disagrees with Defendants. According to the complaint, in the year 2000, Air-Con entered into an
3 exclusive distribution agreement with what is now Daikin Applied, (Docket No. 1-2, ¶ 10-11),
4 pursuant to which Daikin Applied granted Air-Con the exclusive right to sell and distribute “air
5 conditioners and related equipment marketed under the Daikin brand . . . [in] Puerto Rico and the
6 Caribbean. Id. Air-Con further alleges in the complaint that it “invested millions of dollars in
7 advertising campaigns, marketing, and sales efforts . . . to create the public recognition that the
8 Daikin brand now enjoys in Puerto Rico.” Id. ¶ 14.

9 Taking as true the allegations of the complaint and making all inferences in its favor, it is
10 plausible that Technical, a Puerto Rico corporation dedicated to the sale and distribution of air
11 conditioners (and a previous distributor of Goodman products), had knowledge of Air-Con’s
12 exclusive distribution rights to sell and distribute Daikin products. Moreover, the complaint
13 expressly states that “recently, Technical notified in writing another practice that is occurring which
14 shows the clear interest in affecting Air-Con’s distribution rights.” Id. ¶ 23. The complaint further
15 states that “Technical has taken undue advantage of the efforts that Air-Con has made during the
16 past 15 years to create a solid market for the Daikin brand . . .” Id. ¶ 27. Reading the complaint as
17 a whole, instead of demanding a one-to-one relationship between any single allegation and a
18 necessary element of the cause of action, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18
19 (1st Cir. 2016) (quoting Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 55 (1st Cir. 2013)),
20 the Court concludes that there is a reasonable possibility that the Puerto Rico Supreme Court could
21 find that Air-Con validly pleaded a tortious interference claim against Technical.⁷

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23 ⁷ In another attempt to prevent this Court to remand the case, Defendants argue that, in any event, the tortious
24 interference claim is time-barred. (See Docket No. 35.) The Court, however, will not entertain this argument because
the facts establishing this defense are not clear on the face of the plaintiff’s pleadings. Blackstone Realty LLC v. FDIC,

Civil No. 15-2683*B. The alleged written agreement*

1 Air-Con alleges that it has an exclusive distribution agreement with Daikin Applied. (Docket
2 Nos. 1-2, ¶ 10-11; 10, p. 8-9.) Defendants argue, however, that the distribution agreement between
3 Daikin Applied (and/or Daikin Industries) and Air-Con is a *non-exclusive* distribution agreement.
4 (Docket No. 24, p. 4-8.) According to Defendants, the written agreement confers Air-Con non-
5 exclusive distribution rights of certain products under the Daikin brand in Puerto Rico. (*Id.* at 4-5.)
6 Therefore, even if Daikin Applied had sold Daikin products to Technical for its distribution in Puerto
7 Rico, Technical could not have tortuously interfered with Air-Con’s non-exclusive distribution
8 rights. *Id.* at 5. They further argue that the written agreement contains an arbitration clause
9 “mandating that any and all disputes in relation to the commercial relationship be submitted to
10 arbitration in Osaka, Japan, [a signatory to the Convention on the Recognition and Enforcement of
11 Foreign Arbitral Awards].” (Docket No. 24, p. 6.)⁸ Accordingly, Defendants posit that, in the
12 alternative, removal is proper based on federal question jurisdiction pursuant to Section 205 of the
13 Federal Arbitration Act (FAA). (9 U.S.C. § 205; *see* Docket No. 24, p. 7.) The Court disagrees.
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15 As to the nature of the agreement between Air-Con and Daikin Applied (exclusive or non-
16 exclusive), it is unclear at this stage whether the document submitted by Daikin Applied (Docket
17 No. 2-1) is actually the contract agreed upon by the parties. The document submitted by Daikin
18 Applied is signed by only one party.⁹ *Id.* And, under Puerto Rico law, one of the three essential
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20 244 F.3d 193, 197 (1st Cir. 2001). Moreover, pursuant to Local Rule 7, any reply or sur-reply memorandum “shall be
21 strictly confined to replying to new matters raised in the objection or opposing memorandum.” L.Cv.R. 7. At this point,
22 it is not allowed to raise new arguments.

23 ⁸ The Convention is “an international agreement designed “to encourage the recognition and enforcement of
24 commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate
are observed and arbitral awards are enforced.” *InterGen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003). The United
States is a signatory to the Convention and, to implement it, Congress enacted Chapter 2 of the FAA. *Id.*

⁹ Air-Con also submitted an unsworn declaration under penalty of perjury from Air-Con’s President stating, in
pertinent part, that he “personally negotiated on or around March 2000, on behalf of Air-Con, the exclusive distribution

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1 conditions for the existence of a contract is the consent of the parties. See P.R. Laws Ann. tit. 31, §
2 3391; see also Citibank Glob. Mkts., Inc. v. Rodríguez-Santana, 573 F.3d 17, 24 (1st Cir. 2009).
3 Although Daikin Applied correctly argue that the fact that the written agreement was not signed by
4 both parties does not necessarily entail the inexistence of consent (and of the contract itself), the
5 Court finds that a ruling on this matter would require the consideration of competing factual theories
6 and evidence.¹⁰ In other words, this is an issue of fact that will require the parties to conduct
7 discovery. At this stage, and in the context of a motion to remand based on fraudulent joinder, this
8 issue must be resolved in plaintiff's favor. Accordingly, the Court finds that, at this stage,
9 Defendants were not able to show the existence of a non-exclusive agreement.

10 *C. Federal question jurisdiction pursuant to Section 205 of the FAA*

11 “It is well-established . . . that the FAA, standing alone, does not provide a basis for federal
12 jurisdiction.” Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 267 (2nd Cir. 1996) (citing
13 Southland Corp. v. Keating, 465 U.S. 1, 15 n. 9 (1984)); Moses H. Cone Mem’l Hosp. v. Mercury
14 Constr. Corp., 460 U.S. 1, 25 n. 32 (1983) (“The Arbitration Act is something of an anomaly in the
15 field of federal-court jurisdiction. It creates a body of federal substantive law establishing and
16 regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-
17 question jurisdiction.”)); see also Vaden v. Discovery Bank, 556 U.S. 49, 59 (2009). Chapter 2 of
18 the FAA, however, “expressly grant federal courts jurisdiction to hear actions seeking to enforce an
19 agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign

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23 rights [agreement] for Daikin branded products in Puerto Rico with Daikin Applied Latin America, LLC.” Docket No.
26-1.

24 ¹⁰ And the financial statements submitted by the Defendants are not conclusive as to this issue.

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1 Arbitral Awards (“Convention”)].” Vaden, 556 U.S. at 59 n. 9; see also 9 U.S.C. § 203.¹¹ Thus, an
2 action or proceeding falling under the Convention shall be deemed to arise under the laws and
3 treaties of the United States. Id.; see also 9 U.S.C. § 203; Ruiz v. Carnival Corp., 754 F. Supp. 2d
4 1328, 1330 (S.D. Fl. 2010).

5 With regard to removal, Section 205 of the FAA allows defendants to remove a state court
6 action at any time before trial when the subject matter of the lawsuit pending in a state court “*relates*
7 *to an arbitration agreement or award falling under the Convention.*” 9 U.S.C. § 205 (emphasis
8 provided); see also Menorah Ins. Co., Ltd. v. INX Reinsurance Corp., 72 F.3d 218, 223 (1st Cir.
9 1995). An arbitration provision “falls under” the Convention if it: “(1) involves an agreement in
10 writing to arbitrate a dispute; (2) arises out of a commercial legal relationship; (3) provides for
11 arbitration in the territory of a Convention signatory, and (4) involves at least one non-American
12 citizen or concerns property located abroad, involves performance or enforcement abroad, or has a
13 reasonable relationship with a foreign state.” Pioneer Nat. Res., U.S.A., Inc. v. Zurich Am. Ins. Co.,
14 Civ. 08-0227, 2009 WL 362030, at *2 (M.D. La. Feb. 10, 2009) (citing 9 U.S.C. § 202); see also 9
15 U.S.C. § 202; Marks 3 Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc., 455 F.3d 7, 16 n. 4 (1st
16 Cir. 2006) (citing Ledee v. Ceramiche-Ragno, 684 F.2d 184 (1st Cir. 1982). Finally, the arbitration
17 clause relates to the state cause of action “whenever the clause could conceivably have an effect on
18 the outcome of the case.” Beiser v. Weyler, 284 F. 3d 665, 671 (5th Cir. 2002); see also Acosta v.
19 Master Maint. & Const. Inc., 452 F.3d 373, 378 (5th Cir. 2006).

20 Here, Defendants’ argument fails at the first step of the inquiry. Although the Court has
21 found no First Circuit case-law interpreting the “agreement in writing” requirement, the Second
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23 ¹¹ According to Section 203, “[a]n action or proceeding falling under the Convention shall be deemed to arise
24 under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction
over such an action or proceeding, regardless of the amount in controversy.”

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1 Circuit has stated that it “require[s] ‘both ‘an arbitral clause in a contract’ and ‘an arbitration
2 agreement’ . . . ‘signed by the parties or contained in an exchange of letters or telegrams.’” Maroc
3 Fruit Bd. S.A. v. M/V VINSON, Civ. 10-10306, 2012 WL 2989195, at *2 (D. Mass. July 11, 2012)
4 (quoting Kahn Lucas Lancaster, Inc. v. Lark Int’l, Ltd., 186 F.3d 210, 218 (2d Cir.1999)). From the
5 amended notice of removal it is not clear that there is “an agreement in writing to arbitrate” as
6 required by the Convention. See 9 U.S.C. § 202; Convention, Articles II(1), II(2); see also AGP
7 Industries SA, (Perú) v. JPS Elastromerics Corp., 511 F. Supp.2d 212 (D. Mass. 2007). Removal
8 under the Convention is an exception to the general rule that a federal question ordinarily must
9 appear on the face of the complaint, and that a defense generally does not qualify a case for removal.
10 Pioneer Nat. Res., U.S.A., Inc. v. Zurich Am. Ins. Co., Civ. 08-0227, 2009 WL 362030, at *2 (M.D.
11 La. Feb. 10, 2009); see also Beiser, 284 F. 3d at 671; Vaden, 556 U.S. at 59 n. 9. The defense,
12 however, must arise under federal law *from the petition for removal alone, without taking evidence*
13 *and without a merits-like inquiry*. Beiser, 284 F.3d at 671-2; see also 9 U.S.C. § 205.¹² Since
14 Defendants have failed to meet their burden of establishing that removal is proper, their alternative
15 request for this Court to exercise federal question jurisdiction pursuant to 9 U.S.C. § 205 is hereby
16 **DENIED.**

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22 ¹² Furthermore, arbitration is a matter of contract and “a party cannot be required to submit to arbitration any
23 dispute which he has not agreed so to submit.” InterGen N.V., 344 F.3d at 142-3 (1st Cir. 2003) (quoting AT&T Techs.,
24 Inc., 475 U.S. at 643); United States v. Interface Construction Corp., 553 F.3d 1150 (8th Cir. 2009); see also First
Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 939 (1995) (“When deciding whether the parties agreed to arbitrate a
certain matter ... courts generally ... should apply ordinary state-law principles that govern the formation of contracts.”).

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IV. Conclusion

For the reasons stated above, Air-Con’s motion to remand is **GRANTED** and the case is **REMANDED** to state court.

SO ORDERED.

In San Juan, Puerto Rico this 19th day of September, 2016.

s/ Gustavo A. Gelpí
GUSTAVO A. GELPI
United States District Judge