IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IronRock Energy Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N20C-06-121 EMD
	)	
Pointe LNG, LLC,	)	
	)	
Defendant.	)	

Submitted: April 12, 2021
Decided: July 19, 2021

Upon Plaintiff's Motion for Summary Judgment
GRANTED

Upon Plaintiff's Motion to Dismiss
GRANTED in part and DENIED in part

Christopher N. Kelly, Esquire, Callan R. Jackson, Esquire, Charles P. Wood, Esquire, Potter Anderson & Corroon LLP; *Attorneys for Plaintiff IronRock Energy Corporation.*

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DAVIS, J.

I. INTRODUCTION

This is a breach of contract and tortious interference case assigned to the Civil Division of the Court. Plaintiff IronRock Energy Corporation ("IronRock") filed a complaint, alleging that Defendant Pointe LNG, LLC ("Pointe LNG") defaulted on a convertible promissory note (the "Note"). Pointe LNG answered and counterclaimed that IronRock tortiously interfered with Pointe LNG's prospective business opportunity with a third party, CNOOC Gas and Power Trading & Marketing ("CNOOC"). Pointe LNG also claims that IronRock breached an oral agreement to acquire an offtake agreement with CNOOC for Pointe LNG. In response, IronRock

renewed a motion for summary judgment on its breach of contract claim (the "SJ Motion") and moved to dismiss Pointe LNG's counterclaims (the "Motion to Dismiss").

For the reasons set forth below, the Court will **GRANT** the SJ Motion and **DENY** in part and **GRANT** in part the Motion to Dismiss.

II. BACKGROUND

For allegations related to the Motion to Dismiss, all information is drawn from the Amended Counterclaim and its attached exhibits.[1]

A. PARTIES

Pointe LNG is a Delaware LLC with its principal place of business in Louisiana.[2] Pointe LNG was founded to develop and construct a 6 million tons per annum ("MPTA") liquified natural gas ("LNG") terminal project in Louisiana (the "Project").[3]

IronRock is a Texas corporation with its principal place of business in Texas.[4]

B. POINTE LNG ATTEMPTS TO SECURE AN OFFTAKE AGREEMENT TO FUND THE PROJECT.

Pointe LNG sought to obtain offtake agreements with creditworthy buyers of liquified natural gas.[5] Pointe LNG believed the offtake agreements would help Pointe LNG acquire financing to construct the Project.[6] Pointe LNG contends that financing the Project would be "exceedingly more difficult" without the offtake agreements.[7]

On September 18, 2017, Pointe LNG's founders Thomas Burgess and James Lindsay began conversations with representatives in charge of United States projects for CNOOC – a

[1] For purposes of the Motion to Dismiss, the Court must view all well-pled facts alleged in the Amended Counterclaim ("Amend. Countercl.") as true and in a light most favorable to Pointe LNG. *See, e.g.*, *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).
[2] Amend. Countercl. ¶ 1.
[3] *Id.* ¶ 3.
[4] *Id.* ¶ 2.
[5] *Id.* ¶ 4.
[6] *Id.*
[7] *Id.*

subsidiary of China National Offshore Oil Corporation.[8] On November 28, 2017, Mr. Burgess and Mr. Lindsay met with CNOOC President RongWang Zhang, CNOOC Trading Executive Jing Ran, and other CNOOC representatives to discuss an offtake agreement.[9] CNOOC's executives seemed excited about the project and expressed an interest in purchasing the entire 6 MPTA of LNG the Project would produce.[10]

On November 30, 2017, Mr. Burgess and Mr. Lindsay spoke with Mr. Zhang and Mr. Ran to discuss U.S. shale operators and available pipeline transportation to the proposed Pointe LNG facility's site.[11] At this meeting, Mr. Zhang and Mr. Ran verbally committed CNOOC to offtake agreements with Pointe LNG.[12] A few days later, Mr. Ran emailed Mr. Burgess and Mr. Lindsay that CNOOC was "planning to arrange long term LNG procurement in the near future, but still subject to internal approval."[13]

C. IRONROCK APPROACHES POINTE LNG ABOUT THE PROJECT.

In early February 2018, IronRock, through its principals Yi Su and Chuandong (Richard) Xu, approached Pointe LNG to invest in Pointe LNG and the Project.[14] During a meeting, Ms. Su told Mr. Burgess that IronRock works closely with CNOOC and promised to acquire an offtake contract from CNOOC for the Project.[15] When handed the business cards of CNOOC executives Mr. Zhang and Mr. Ran, Ms. Su purportedly scoffed and told Mr. Burgess that her contacts were much better.[16] Ms. Su insisted on handling communications with CNOOC.[17]

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[8] *Id.* ¶ 5.
[9] *Id.* ¶ 6.
[10] *Id.*
[11] *Id.* ¶ 7.
[12] *Id.*
[13] *Id.* ¶ 8.
[14] *Id.* ¶ 9.
[15] *Id.* ¶ 16.
[16] *Id.*
[17] *Id.*

Pointe LNG handed over CNOOC negotiations to IronRock based on Ms. Su's promise, insistence and representations about her CNOOC connections.[18] This arrangement between Ms. Su and Pointe LNG appeared to be mutually beneficial because Ms. Su would invest additional capital in Pointe LNG and Suchuang, an IronRock affiliate, would receive volumes of LNG under a throughput agreement between Suchuang and CNOOC.[19]

On March 27, 2018, Ms. Su wrote she had "[t]alked with someone with CNOOC. Well, good news of course! Still working on LOI. Will send you our DD plan later."[20] On March 28, 2018, Ms. Su sent another email to Mr. Burgess and Mr. Lindsay writing: "Richard and I will approach [CNOOC] for both purposes, to be an investor in Pointe LNG and to be an off-take customer or[sic] Pointe LNG. Richard [Xu] used to work for [CNOOC] before he moved to Canada."[21]

Pointe LNG alleges that IronRock never intended to assist Pointe LNG with acquiring an offtake agreement from CNOOC for the Project, but instead intended to acquire the Project and/or Pointe LNG cheaply.[22] Accordingly, Pointe LNG alleges that IronRock interfered with Pointe LNG's prospective business relationship with CNOOC.[23] Following the March 28, 2018 email, CNOOC no longer communicated with Pointe LNG and Ms. Su no longer relayed information to Pointe LNG about CNOOC.[24]

Without offtake agreements with CNOOC and other LNG purchasers, Pointe LNG contends that it has been "exceedingly difficult to raise money for the Project."[25] Pointe LNG is

[18] *Id.* ¶ 17.
[19] *Id.*
[20] *Id.* ¶ 19.
[21] *Id.* ¶ 20.
[22] *Id.* ¶ 21.
[23] *Id.*
[24] *Id.*
[25] *Id.* ¶ 27.

attempting to raise $50 million for a permit from the Federal Energy Regulatory Commission, which lenders would promptly loan if such an offtake agreement were in place.[26]

Pointe LNG further alleges that IronRock loaned money under the Note and interfered with Pointe LNG's CNOOC opportunity with the intent of obtaining Pointe LNG or the Project as cheaply as possible.[27] Pointe LNG contends that, after purporting to facilitate the CNOOC offtake agreement and loaning money under the Note, IronRock approached Pointe LNG about purchasing Pointe LNG.[28] Pointe LNG rejected IronRock's proposal because the offer was inconsistent with: (i) meeting the Project's financial needs and (ii) recent prior transactions for similar LNG projects.[29] In March 2019, Pointe LNG rejected another offer from IronRock for the same reasons.[30]

D. THE NOTE

IronRock purchased the Note from Pointe LNG on May 23, 2018.[31] The principal sum was $500,000.[32] The principal and interest on the Note was to be paid on the Maturity Date:

> Maturity. Subject to the provisions of Section 2 hereof relating to the conversion of this Note, the outstanding principal balance of this Note, together with interest accrued and unpaid to date, shall be due and payable following the earlier to occur of the (i) Maturity Date (as hereinafter defined), and (ii) the occurrence of an Event of Default.[33]

Maturity Date is defined:

> "Maturity Date" means the earlier of (a) the second anniversary of the issuance date of the Note; (b) the Company raising debt or equity financing (in each case, in an amount no less than $5,000,000 per financing); and (c) a Change in Control.[34]

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[26] *Id.*
[27] *Id.* ¶ 22.
[28] *Id.* ¶ 24.
[29] *Id.* ¶ 26.
[30] *Id.* ¶ 36.
[31] Amend. Answer ¶ 17; Decl. of Yi Su in Supp. of Pl.'s Renewed Mot. for Summ. J. Ex. A (hereinafter the "Note").
[32] Note Preamble.
[33] *Id.* § 1.1.
[34] *Id.* § 5.2.

Event of Default is defined, in part:

> Event of Default. If there shall be any Event of Default hereunder, then… this Note shall accelerate and all principal and unpaid accrued interest shall become due and payable. Subject to the provisions hereof, the Lender shall have all rights and may exercise any remedies available to it under law, successively or concurrently. The occurrence of any one or more of the following shall constitute an Event of Default.
>
> …
>
> (a) The Issuer fails to pay timely any of the Principal or interest due under this Note on the date the same becomes due and payable, which has not been remedied within ten (10) days after notice of such default is delivered to Issuer;[35]

The Note called for a simple interest rate of 6% per year:

> Interest. This Note shall accrue simple interest, from the date hereof until such principal is paid or converted as provided in Section 2, on any unpaid principal balance at the rate of six percent (6.0%) per annum (the "Interest Rate"). Interest shall be calculated on the basis of the actual number of days elapsed based on a year of three hundred sixty (360) days…[36]

Therefore, under the terms of the Note, Pointe LNG would owe $560,000 to IronRock on the Maturity Date, May 23, 2020. IronRock delivered notice of Pointe LNG's default ("Notice of Default") to Pointe LNG and its counsel on May 29, 2020.[37] Pointe LNG paid no amount on the Note.[38]

E. PROCEDURAL HISTORY

IronRock filed the Complaint in this action seeking to recover for breach of contract on the Note on May 10, 2020.[39] Pointe LNG answered and counterclaimed on August 4, 2020.[40] IronRock moved to dismiss the counterclaims and for summary judgment on September 3,

[35] *Id.* § 4.1(a).
[36] *Id.* § 1.2.
[37] Amend. Answer ¶ 17.
[38] *Id.* ¶ 16.
[39] D.I. No. 1.
[40] D.I. No. 4.

2020.[41] Pointe LNG filed an Amended Answer to Complaint and Amended Counterclaims seeking recovery for (i) tortious interference with a prospective business relationship with CNOOC and (ii) breach of an oral agreement to act as Pointe LNG's agent to acquire an offtake agreement with CNOOC.

IronRock filed the SJ Motion and the Motion to Dismiss on December 14, 2020.[42] IronRock seeks summary judgment on the issue of Pointe LNG's liability and damages under the Note. IronRock also seeks to dismiss the counterclaims. Pointe LNG opposes the motions. The Court held a hearing on the SJ Motion and the Motion to Dismiss on April 12, 2021. At the end of the hearing, the Court took the matters under advisement.

III. PARTIES' CONTENTIONS

A. THE MOTION TO DISMISS

IronRock moves to dismiss Pointe LNG's tortious interference claim. IronRock argues that the claim cannot survive because there can be no improper or wrongful interference when the plaintiff alleges that it allowed the defendant to engage in discussions with a third party, or where the defendant is allegedly a party to the business opportunity. IronRock further claims that Pointe LNG's speculative and conclusory allegations about Pointe LNG's prospective business relationship with CNOOC does not state a claim for relief. In addition, IronRock argues that Pointe LNG fails to allege the essential elements of a contract, particularly consideration. Thus, any purported oral agreement would be barred by contractual integration clauses or barred by the statute of frauds.

Pointe LNG disagrees and contend that it pled sufficient facts to find that there was a reasonable probability of a business opportunity with CNOOC. Pointe LNG also argues that the

[41] D.I. Nos. 9, 12.
[42] D.I. Nos. 23, 26.

stranger doctrine is inapplicable to a tortious interference with a business opportunity claim, and only applies to a claim for tortious interference with a contract. Pointe LNG claims that it has pled a cognizable claim for breach of an oral agreement, that the integration clauses do not apply to the separate oral agreement. Finally, Pointe LNG argues that the Statute of Frauds does not apply because the contract could be performed within one year or because IronRock partly performed the agreement.

B. THE SJ MOTION

IronRock makes a straightforward argument as to why it is entitled to summary judgment on its breach of contract claims. IronRock argues that it is undisputed that: (i) the parties entered into the Note; (ii) Pointe LNG did not pay any amount on the Note; (iii) IronRock provided a Notice of Default; and (iv) more than ten days have passed since Pointe LNG received the Notice of Default without Pointe LNG paying the amount owed under the Note. IronRock then contends that, under the Note's terms, Pointe LNG owes $560,000 to IronRock as of the Maturity Date of May 23, 2020. IronRock further argues that Pointe LNG cannot set-off its obligations under the note with its unliquidated disputed damages from its counterclaims.

Pointe LNG counters and contends that it asserted a cognizable set-off defense. Pointe LNG acknowledges that it defaulted on the Note but asserts that IronRock: (i) improperly interfered with Pointe LNG's prospective offtake agreement with CNOOC and (ii) breached an oral agreement to help Pointe LNG obtain that offtake agreement. Point LNG claims that damages flowing from IronRock's conduct with respect to CNOOC should set off any of IronRock's damages under the Note. Point LNG asserts that the Court should either deny summary judgment or grant summary judgment only on the issue of liability.

IV. STANDARD OF REVIEW

A. MOTION TO DISMISS

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[43] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[44]

In considering a motion to dismiss under Rule 12(b)(6), the court generally may not consider matters outside the complaint.[45] However, documents that are integral to or incorporated by reference in the complaint may be considered.[46] "If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[47]

B. MOTION FOR SUMMARY JUDGMENT

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[48] Summary judgment will be granted if, after viewing the record in a light most favorable to a

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[43] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825353, at *3 (Del. Super. Oct. 27, 2010).
[44] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[45] Super. Ct. Civ. R. 12(b).
[46] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[47] Super. Ct. Civ. R. 12(b).
[48] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon& Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[49] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[50] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[51] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[52]

V. DISCUSSION

A. POINTE LNG ADEQUATELY PLEADS A CLAIM FOR TORTIOUS INTERFERENCE WITH A PROSPECTIVE BUSINESS OPPORTUNITY.

The tort of interference with probable future contractual relationships is "closely related" but not identical to the tort of interference with an existing contract.[53] "To establish a tortious interference with a business opportunity claim, a plaintiff must prove each of the following elements: (1) the reasonable probability of a business opportunity; (2) the intentional interference by the defendant with that business opportunity; (3) proximate causation; and (4) damages."[54] "All of these factors must be considered in light of a defendant's privilege to compete or protect his business interest in a fair and lawful manner."[55]

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[49] *Id.*
[50] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[51] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[52] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[53] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980).
[54] *Orthopaedic Assocs. of S. Del., P.A. v. Pfaff*, 2018 WL 822020, at *2 (Del. Super. Feb 9, 2018).
[55] *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *5 (Del. Ch. Jan. 20, 2009).

i. Pointe LNG pleads that CNOOC was prepared to enter a business relationship with Pointe LNG.

"A plaintiff 'must identify a specific party who was prepared to enter into a business relationship [with the plaintiff] but was dissuaded from doing so by the defendant and cannot rely on generalized allegations of harm.'"[56] The plaintiff does not need to name the specific party but must be descriptive enough "to support a claim that specific prospective business relations existed."[57] Furthermore, that business relationship must be reasonably probable.[58] "To be reasonably probable, a business opportunity must be something more than a mere hope or the innate optimism of the salesman or a mere perception of a prospective business relationship."[59] Generally, "the existence of such a business expectancy is a question of fact not suitable for resolution [on a motion to dismiss]."[60]

Pointe LNG alleges that CNOOC's executives "indicated that they were very excited about the Project and expressed that CNOOC was interested in purchasing the entire 6 MPTA capable of being produced by the Project."[61] Pointe LNG also avers that "CNOOC expressed its desire to invest in Pointe LNG directly."[62] Pointe LNG claims that CNOOC's President and Trading Executive verbally committed CNOOC to offtake agreements at a meeting in Lisbon.[63] Pointe LNG alleges that CNOOC's Trading Executive sent an email to Pointe LNG stating that CNOOC was planning to arrange long term LNG procurement in the near future.[64] The Court

[56] *Orthopaedic Assocs. Of S. Del., P.A.*, 2018 WL 822020, at *2 (Del. Super. Feb. 9, 2018) (citing *U.S. Bank Nat'l Assoc. v. Gunn*, 23 F.Supp.3d 426, 436 (D. Del. 2014)).
[57] *Agilent Techs., Inc.*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009).
[58] *See Chapter 7 Trustee Constantino Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *12 (Del. Ch. Sep. 22, 2016) ("[T]he plaintiff must ultimately prove the reasonable probability of a business opportunity").
[59] *Agilent Techs., Inc.*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009) (Internal citations omitted).
[60] *Chapter 7 Trustee Constantino Flores*, 2016 WL 5243950, at *12 (Del. Ch. Sep. 22, 2016) (citing *Gill v. Del. Park, LLC*, 294 F. Supp. 2d. 638, 646 (D. Del. 2003).
[61] Countercl. ¶ 6.
[62] *Id.*
[63] Countercl. ¶ 7.
[64] Countercl. ¶ 8.

may infer from these facts that there was a specific prospective business opportunity between Pointe LNG and CNOOC and that the business opportunity was reasonably probable.

ii. Pointe LNG pleads that IronRock wrongfully interfered with the CNOOC business opportunity.

"To meet the intentional interference prong, a plaintiff must prove that the defendant's interference with the plaintiff's business opportunity was intentional and wrongful or improper."[65] "An alleged interference in a prospective business relationship is only actionable if it is wrongful."[66] The defendant's conduct must be "wrongful independent of the interference" to defeat the defendant's privilege to compete.[67]

"Delaware follows the Restatement (Second) of Torts . . . regarding the privilege to compete."[68] Threatening physical violence, civil suits or criminal prosecutions is wrongful.[69] "Fraudulent misrepresentations are also ordinarily a wrongful means of interference and make an interference improper."[70] "A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient."[71] A fraudulent representation may subject a defendant to liability even when it "is not of such a character as to subject him to liability for . . . other torts."[72] "To prove fraudulent intent, 'a misrepresentation must be made either knowingly, intentionally, or with reckless indifference to the truth.'"[73]

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[65] *Orthopaedic Assocs. Of S. Del., P.A.*, 2018 WL 822020, at *2 (Del. Super. Feb. 9, 2018)
[66] *Id.* at *3.
[67] *KT4 Partners LLC v. Palantir Techs. Inc.*, 2021 WL 28223567, at *19 (Del. Super. Jun. 24, 2021).
[68] *Preston Hollow Capital LLC v. Nuveen LLC*, 2020 WL 1814756, at *17 (Del. Ch. Apr. 9, 2020).
[69] *See* Restatement (Second) of Torts § 767 cmt. c (Am. Law Inst. 1979).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Preston Hollow Capital LLC*, 2020 WL 1814756, at *17 (Del. Ch. Apr. 9, 2020).

Pointe LNG alleges that Ms. Su "promised to acquire an offtake contract from CNOOC for the Project."[74] The Court can infer that IronRock knew that representation was false because Ms. Su stopped relaying information about CNOOC to Pointe LNG after March 28, 2018.[75] The Court may also infer that IronRock intended to refrain from acting because Su "insisted on handling communications with CNOOC."[76] Essentially, Pointe LNG alleges that IronRock prevented Pointe LNG's CNOOC opportunity by fraudulently misrepresenting that IronRock would help Pointe LNG acquire an offtake contract from CNOOC. Therefore, the Court finds that Pointe LNG sufficiently pled that IronRock wrongfully interfered with Pointe LNG's business opportunity.

iii. Pointe LNG alleges that IronRock's intentional interference proximately caused Pointe LNG damages.

Pointe LNG alleges that it became "exceedingly difficult" to obtain financing for the project without the CNOOC offtake agreement.[77] For example, Pointe LNG states that it is currently attempting to raise $50 million to obtain a permit from the Federal Energy Regulatory Commission – an amount that lenders "would promptly loan" if offtake agreements were in place.[78] As such, the Court finds that Pointe LNG pled facts showing that IronRock's intentional interference with Pointe LNG's prospective offtake agreement with CNOOC proximately caused damages to Pointe LNG.

The Court finds that Pointe LNG pled every element of a tortious interference claim. The Court will not dismiss Pointe LNG's tortious interference claim.

[74] Amend. Countercl. ¶ 16.
[75] *Id.* ¶ 21.
[76] *Id.* ¶ 16.
[77] *Id.* ¶¶ 4, 27.
[78] *Id.* ¶ 27.

B. POINTE LNG DOES NOT ADEQUATELY PLEAD A BREACH OF ORAL AGREEMENT CLAIM.

Pointe LNG alleges that IronRock agreed to act as Pointe LNG's agent to acquire an offtake agreement for the Project in exchange for IronRock receiving volumes of LNG via a through-put agreement that IronRock had with CNOOC.[79] The Court reviewed the evidence and finds that Pointe LNG did not plead sufficient facts to show that an enforceable contract under which IronRock agreed to act as Pointe LNG's agent to acquire an offtake agreement for the Project with CNOOC existed.

i. Pointe LNG did not plead facts supporting an inference that the parties created a principal-agent relationship.

"An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent."[80] "The elements of that relationship include (1) the agent having the power to act on behalf of the principal with respect to third parties; (2) the agent doing something at the behest of the principal and for his benefit; and (3) the principal having the right to control the agent's conduct."[81] To determine whether an agency relationship exists, the Court considers "'the extent of control, which, by the agreement, the master may exercise over the details of the work;' 'whether or not the one employed is engaged in a distinct occupation or business;' and 'whether or not the parties believe they are creating the relation of master and servant.'"[82]

Pointe LNG does not assert any facts showing that Pointe LNG controlled IronRock's acquisition of a CNOOC contract. Pointe LNG alleges that Ms. Su, an IronRock principal,

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[79] Amend. Countercl. ¶ 45.
[80] *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997) (citing RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW INST. 1958)).
[81] *Manniso v. Taylor*, 2020 WL 3259484, at *3 (Del. Super. Jun. 16, 2020)
[82] *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1177 (Del. 2012) (citing RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958)

"promised to acquire an offtake contract from CNOOC for the Project."[83] "[Ms.] Su insisted on handling discussions with CNOOC."[84] Ms. Su also represented that she had better contacts than Pointe LNG.[85] Pointe LNG contends it "handed over the CNOOC negotiations."[86] Ms. Su subsequently updated Pointe LNG about CNOOC negotiations.[87] These allegations indicate the IronRock acted independent of Pointe LNG's control. Pointe LNG, therefore, does not allege that IronRock acted as Pointe LNG's agent.

ii. Any agreement between IronRock and Pointe LNG is not an enforceable contract because it was not supported by consideration.

To survive the Motion to Dismiss, Pointe LNG must allege the essential elements of a contract.[88] "[A] valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration."[89] "Consideration is 'a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request."[90] Consideration flows from the promisee to either the promisor or a third party.[91] Although consideration is given and accepted to induce a promise, "[c]onsideration must not be confounded with motive."[92]

Pointe LNG only alleges that IronRock had motive to secure an off-take agreement with CNOOC for Pointe LNG. Pointe LNG alleges that the arrangement between Ms. Su and Pointe

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[83] Amend. Countercl. ¶ 16.
[84] *Id.*
[85] *See id.*
[86] *Id.* ¶ 17.
[87] *See id.* ¶¶ 19-20 ("Su stated: 'talked with someone with CNOOC. . . . Will send you our DD plan later") ("Su [stated]: 'Richard and I will approach [CNOOC] for both purposes, to be an investor in Pointe LNG and to be an off-take customer or Pointe LNG'").
[88] *See McCloskey v. McCloskey*, 2014 WL 1824712, at *8 (Del. Ch. Apr. 24, 2014).
[89] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).
[90] *Cigna Health and Life Ins. Co. v. Audax Health Sols., Inc.*, 107 A.3d 1082, 1088 (Del. Ch. 2014) (citing *James J. Gory Mech. Contracting, Inc. v. BPG Residential Partners V, LLC,* 2011 WL 6935279, at *2 (Del. Ch. Dec. 30, 2011)
[91] *See Hughes v. Frank*, 1995 WL 632018, at *3 (Del. Ch. Oct. 20, 1995) ("The essential elements to a contract . . . (3) some consideration flowing to the first party or to another . . .").
[92] *Affiliated Enters. V. Waller*, 5 A.2d. 257, 260 (Del. Super. 1939).

LNG would be "mutually beneficial" because an IronRock affiliate, Suchuang, would receive volumes of LNG via a throughput agreement with CNOOC. Pointe LNG did not provide a benefit to IronRock in exchange for Ms. Su's promise. Neither did Point LNG incur a detriment through IronRock's request. No consideration flowed from Point LNG to IronRock to induce Ms. Su's promise to obtain a CNOOC agreement. Thus, Ms. Su's promise did not create an enforceable contract because no consideration was given to induce that promise.[93] Therefore, the Court will dismiss Pointe LNG's breach of contract claim.

C. IRONROCK IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM.

Pointe LNG admits that the Note exists and that its terms specify a principal amount of $500,000 accruing simple interest at 6% per annum.[94] Point LNG also admits that the Note matured on May 23, 2020.[95] Finally, Pointe LNG concedes that it paid no amount on the Note.[96] Nonetheless, Pointe LNG argues that it is not liable for breaching the Note's terms because it asserted a cognizable set-off defense and one that may exceed any amount owed under the Note.

i. Pointe LNG cannot set off its unliquidated tortious interference claim against IronRock's liquidated breach of contract claim.

"Set-off is a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a defense of his own against the plaintiff, to counterbalance it either in whole or in part."[97] Set-offs are "properly taken only as to judgments, not claims. A pre-existing judgment may be offset against a new judgment to reduce the amount that a party is

[93] *Hunter v. Diocese of Wilm.*, 1987 WL 15555, at *5 (Del. Ch. Aug. 4, 1987) ("That promise . . . did not . . . constitute an offer of a contract. It was not offered in exchange for anything; it did not purport to seek acceptance by seeking any performance by anyone. It was gratuitous. Promises of this kind, that lack consideration, are typically not enforceable").
[94] Amend. Answer ¶ 13; *see* Exs. A-D to Decl. of Yi Su in Supp. of Pl.'s Renewed Mot. for Summ. J. Ex. A (the "Note").
[95] Amend. Answer ¶ 14.
[96] *Id.* ¶ 16.
[97] *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450, 453 (Del. 2016).

to pay."[98] "A contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off."[99] "[T]here is no right to set off a possible unliquidated liability against a liquidated claim that is due and payable."[100] Liquidated debts are certain and already determined or can be ascertained "by mere calculation or computation."[101] Damages are unliquidated "when they have not been adjusted, or settled, or agreed on by the parties."[102] Thus, if the amount due is the subject of genuine controversy, the demand is unliquidated.[103]

Here, the parties do not contest that Pointe LNG breached the Note's terms. The amount Pointe LNG owes under the Note is easily ascertainable: $560,000. Therefore, IronRock's claim is liquidated. By contrast, Pointe LNG's tortious interference claim is still the subject of litigation. IronRock's liability for damages is still unascertained. Pointe LNG cannot set off its liquidated liability under the Note with its unliquidated tortious interference claim.[104] Pointe LNG asserts no other defense to its liability so the Court will grant the SJ Motion.

VI. CONCLUSION

The Court **GRANTS** the SJ Motion. The Court **GRANTS** the Motion to Dismiss with respect to Count II and **DENIES** the Motion to Dismiss with respect to Count I.

Dated: July 19, 2021
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

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[98] *Seibold v. Camulos Partners LP*, 2012 WL 4076182, at *24 n.233 (Del. Ch. Sept. 17, 2012).
[99] *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011) (citing 80 C.J.S. *Set-Off and Counterclaim* § 3 (2011)).
[100] *Id.* (citing 80 C.J.S. *Set-Off and Counterclaim* § 58 (2011)).
[101] C.J.S. *Set-Off and Counterclaim* § 56 (2021).
[102] C.J.S. *Set-Off and Counterclaim* § 61 (2021).
[103] *See id.*
[104] *See CanCan Dev., LLC*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011).