| **Curacao Oil N.V. v Trafigura Pte. Ltd.** |
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| 2020 NY Slip Op 30254(U) |
| February 3, 2020 |
| Supreme Court, New York County |
| Docket Number: 651746/2019 |
| Judge: Joel M. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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| CURACAO OIL N.V., Plaintiff, | **INDEX NO.** 651746/2019 |
| - v - | **MOTION DATE** N/A |
| TRAFIGURA PTE. LTD., Defendant. | **MOTION SEQ. NO.** 001 |
| | **DECISION + ORDER ON MOTION** |

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
were read on this motion to DISMISS.

This is a dispute about 150,000 barrels of marine fuel oil. Plaintiff Curacao Oil N.V. ("Curoil") contracted to receive that amount from Defendant Trafigura Pte. Ltd. ("Trafigura"). The contract required that the fuel oil meet a defined standard of quality, and provided that an independent inspector would make a "final and binding" determination as to whether the product complied. When the fuel oil was delivered, the independent inspector tested it and issued a report concluding that it complied with contract specifications for every parameter that was tested. Curoil accepted the quality determination and took delivery of the fuel oil. Only later did Curoil discover, through its own testing, that the fuel oil allegedly contained impermissible substances – a violation of the international guidelines referenced in the contract, but undetectable in the independent inspector's tests.

Curoil filed this action seeking over $9 million in damages resulting from these alleged non-conformities, asserting claims sounding in breach of contract and negligence. Notably, Curoil does not allege that the independent inspector's findings involved fraud or manifest error

(the standard specified in the contract for discarding the inspector's report) or that Trafigura knew the fuel oil was contaminated. Now, Trafigura moves to dismiss Curoil's complaint, both on the basis of documentary evidence and for failure to state a cause of action.

For the reasons set forth below, Trafigura's motion is granted.[1]

## FACTUAL BACKGROUND

### A. Curoil Enters Business Relationship with Trafigura

The island of Curaçao, with its facilities and deep natural harbors, is a popular destination for ships of all sizes to bunker when plying the waters of the Caribbean. Affirmation of Denise Gouw ("Gouw Aff."), ¶5 (NYSCEF Doc. No. 24). Curaçao is also the main base of operations for Curoil, an "oil products marketing and distribution company." Complaint ("Compl."), ¶3 (NYSCEF Doc. No. 1). A large part of Curoil's business is supplying marine fuel oil to commercial ocean-going vessels in the Caribbean region. *Id.*; Gouw Aff., ¶¶4-5. Curoil does not produce the fuel oil that it supplies – that was done, for many years, by a refinery in Venezuela. When the reliability of that source fell into doubt, Curoil sought out a new supplier. Gouw Aff., ¶6.[2]

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[1] Curoil purports to "reserve[] the right to amend" its allegations "to the extent discovery reveals that Trafigura had actual knowledge of the non-conforming nature of the product . . . amount[ing] to fraud and/or intentional misrepresentation," (Complaint, ¶32). But such allegations are not presently before the Court and Curoil has not suggested it is in position to assert them. "[T]he mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action." *Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 451 (1st Dep't 2009), *aff'd*, 16 N.Y.3d 173 (2011). The Court offers no view whether Curoil would be able to assert a viable claim in a new action if evidence of fraud or intentional misrepresentation comes to light in the future.

[2] This statement of the facts is based on the factual allegations in Curoil's Complaint and the Affirmation submitted in opposition to Trafigura's motion to dismiss, which are taken to be true solely for purposes of this motion. "In assessing a motion under CPLR 3211(a)(7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint

After a tendering process involving various major oil companies, Curoil decided to enter into business with Trafigura, an international commodity-trading company based in Singapore. Compl., ¶¶4-5; Gouw Aff., ¶7. Under Contract No. 1693458 (the "Sales Contract"), Trafigura agreed to supply Curoil with approximately 150,000 barrels of fuel oil. *Id.*, ¶9; *see* Affirmation of Francis C. Healy ("Healy Aff."), Ex. B (NYSCEF Doc. No. 13). In addition to the quantity, the Sales Contract also set forth the expected quality of the fuel oil Curoil was purchasing:

> **4. QUALITY**
>
> FO 3.0% AS PER ISO 8217:2012 WITH THE EXCEPTION OF THE FOLLOWING PARAMETERS; SULFUR 2.9% MAX, VANADIUM 345PPM MAX.
>
> THE SELLER'S OBLIGATIONS WITH RESPECT TO QUALITY ARE LIMITED TO THE WARRANTED SPECIFICATIONS OF THE PRODUCT SET OUT ABOVE AND ALL GUARANTEES, UNDERTAKINGS, REPRESENTATIONS, CONDITIONS, WARRANTIES OR OTHER TERMS, EXPRESS OR IMPLIED (WHETHER BY STATUTE, COMMON LAW OR OTHERWISE), INCLUDING WITHOUT LIMITATION THOSE RELATING TO THE QUALITY, MERCHANTABILITY, FITNESS OR SUITABILITY OF THE PRODUCT FOR ANY PARTICULAR PURPOSE OR OTHERWISE, ARE EXCLUDED FROM THIS CONTRACT TO THE FULLEST EXTENT PERMISSIBLE BY LAW.

Sales Contract, §4 (upper case text in original). "ISO 8217:2012" ("ISO 8217") refers to a set of specifications for marine fuel promulgated by the International Organization for Standardization, used routinely in contracts for the sale of marine fuel oil. *See* Affirmation of Gina M. Venezia ("Venezia Aff."), Ex. 4 (NYSCEF Doc. No. 26); Gouw Aff., ¶12. According to a Curoil representative, the ISO 8217 standard "is very familiar to Curoil." Gouw Aff., ¶12.

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and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); *Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 657 (1st Dep't 2016). "However, an affidavit – let alone an affirmation – is not documentary evidence." 135 A.D.3d at 657.

To ensure that the fuel oil met the defined contractual standards, the Sales Contract provided that an "internationally recognized independent inspector [would] determine the quantity and the quality of the product at the discharge port [in] accordance with the determination of quantity and quality clause." Sales Contract, §11. That clause, in turn, provided in relevant part:

> THE INDEPENDENT INSPECTOR SHALL DETERMINE . . . THE QUALITY OF THE PRODUCT AT THE DISCHARGE PORT BASED UPON FULLY REPRESENTATIVE COMPOSITE SAMPLES DRAWN FROM THE TANKS OF THE PERFORMING VESSEL BEFORE DISCHARGE . . . SUCH DETERMINATIONS SHALL BE REPORTED ON THE CERTIFICATES OF QUALITY . . . **WHICH SHALL BE FINAL AND BINDING ON THE PARTIES FOR ALL PURPOSES SAVE FOR FRAUD OR MANIFEST ERROR** WITH NO GUARANTEE, UNDERTAKING, REPRESENTATION, CONDITION, WARRANTY OR ANY OTHER COMMITMENT FROM THE SELLER THAT THE PRODUCT WILL REMAIN OF SUCH QUALITY AND/OR CONDITION THEREAFTER.

*Id.*, §12 (upper case text in original; emphasis added) (the "Quality Determination Clause"). Trafigura, as the seller, would "appoint and instruct" the independent inspector, so long as the appointed inspector was "acceptable to both parties." *Id.*, §11. Curoil and Trafigura agreed to share equally "all inspection costs." *Id.*[3]

### B. The Fuel Oil Arrives and Undergoes Initial Testing by Intertek

The fuel oil reached the harbors of Curaçao aboard the SCF Pearl on May 25, 2018. Gouw Aff., ¶14. Once the Pearl was safely berthed at port, the chosen independent inspector – a firm called Intertek – drew gallons of fuel oil from the ship for testing. *Id.* Such point-of-delivery testing reflects a standard industry practice, *id.*, and serves two critical, sometimes

[3] The parties agreed to "submit to the exclusive jurisdiction of any federal court of competent jurisdiction situated in the borough of Manhattan, New York, or . . . in any New York state court in the borough of Manhattan[.]" Sales Contract, §20. The Sales Contract also specified that New York law would apply. *Id.*

competing, interests. On the one hand, having fuel oil tested immediately at port by a third party helps to foster, as one court observed, "certainty in oil transactions" by "avoid[ing] disputes that may arise from inspections separately conducted by parties." *Sempra Energy Trading Corp., v. BP Products North America*, No. 0600322/2007, 2007 WL 2175555 (Sup. Ct. N.Y. Cty. July 12, 2007), *aff'd*, 52 A.D.3d 350 (1st Dep't 2008). But there is a trade-off. In Curoil's own words, "it is not practical to test at the point of delivery for all potential fuel contaminants and compliance with all provisions of ISO 8217." Gouw Aff., ¶17. Ships do not dawdle at port awaiting test results for long, so the independent inspector's testing must be done as quickly as possible, which tends to limit the extent of testing that can be done prior to discharging the oil. *See id.*, ¶¶16-17. That is why inspectors like Intertek usually administer a limited battery of tests, with rapid turnaround times.

Case in point, on May 26, just one day after Intertek extracted samples from the Pearl, it issued a one-page Report of Analysis (the "Intertek Report"). *See* Healy Aff., Ex. C (NYSCEF Doc. No. 14). The Intertek Report showed the results of testing on 20 different parameters "before Discharge" – characteristics such as density, sulfur content, and flash point – that corresponded to parameters set out in Section 5.1 and Table 2 of ISO 8217. Gouw Aff., ¶15; *see* Venezia Aff., Ex. 4. For the parameters that were tested, the Intertek Report indicated that the fuel oil met contractual specifications.[4] Curoil did not dispute or reject the scope or substance of

[4] Curoil alleges the Intertek Report "initially revealed that the Fuel delivered by Trafigura was non-conforming in that the level of aluminum + silicon exceeded the maximum allowed"; "[t]he maximum allowed is 60 mg/KG whereas Intertek's test found 63 mg/KG." *Id.*, ¶21. But the Intertek Report filed in the record contradicts that statement, showing the "Aluminum + Silicon" test yielding a result of 51 mg/Kg, below the maximum allowed. Healy Aff., Ex. C. Trafigura raised this factual discrepancy in its motion to dismiss, but Curoil did not directly respond. In any event, the level of "Aluminum + Silicon" in the fuel oil is not the basis for Curoil's claims here.

the Intertek Report, nor did Curoil claim (then or now) that the Intertek Report exhibited "fraud or manifest error."

Following the issuance of the Intertek Report, fuel oil continued to be discharged from the Pearl, until completion on May 28. Compl., ¶16. In accordance with another industry custom, Curoil collected additional fuel oil samples to permit more extensive testing at a later date, if needed. Gouw Aff., ¶17.

### C. Problems with the Fuel Oil Arise

#### *1. The Houston Problem*

At around the same time Trafigura's fuel oil was making its way to Curaçao, reports began circulating in the marine industry about fuel oil tainted by dangerous contaminants that the standard initial testing could not detect. *Id.*, ¶19. These contaminants were said to cause serious problems, including the sticking and seizure of fuel-injection systems, engine failures, and blackouts. *Id.* Because this strain of fuel oil could be traced back to shipments out of Houston, Texas, the contagion became known as the "Houston problem." Compl., ¶35. In June 2018 – shortly after Trafigura's delivery to Curoil – the U.S. Coast Guard issued a "marine safety alert" warning of "potentially . . . catastrophic and wide ranging consequences" from the contaminated fuel oil. Gouw Aff., Ex. 5 (NYSCEF Doc. No. 27). The Coast Guard also warned that "[t]he standard fuel oil test methods found in the ISO 8217 specification will not detect these underlying problems." *Id.*

As news of these problems reached Curoil, the company grew suspicious about the fuel oil Trafigura had already delivered. By then, Curoil was receiving customer complaints concerning an earlier shipment of Trafigura's fuel oil, not at issue in this case, which allegedly caused sticking and seizure of fuel-injection system components and the blocking of fuel filters.

Gouw Aff., ¶18. Curoil raised these concerns with Trafigura, and asked Trafigura whether its fuel oil supply originated from the U.S. Gulf – the threshold question to determining whether Trafigura's fuel oil suffered from the Houston problem. *Id.*, ¶22. Although Trafigura initially told Curoil it would "retest the samples . . . to determine if there [was] any harmful component," *id.*, Ex. 6, Trafigura never provided this feedback to Curoil, nor did Trafigura identify its supplier, *id.*, ¶23. Increasingly alarmed, Curoil then decided to conduct its own testing on Trafigura's product, including the fuel oil at issue in this case.

***2. Curoil's Additional Testing***

Curoil used its previously collected samples to perform further testing on Trafigura's fuel oil. Those tests – conducted in the weeks after Curoil accepted the Intertek Report and unloaded the fuel oil – revealed that the fuel oil contained "compounds which are not hydrocarbons derived from petroleum refining, including, for instance, fatty acids and fatty acid derivatives, acrylic acid derivatives, and phenolic compounds." Gouw Aff., ¶24. The offending compounds, which allegedly rendered the product unacceptable for marine use, were not detectable by Intertek's standard limited testing. Compl., ¶20.

The compounds Curoil identified in its additional testing are not permitted under the ISO 8217 specifications. Under Section 5 of ISO 8217, "fuel oil shall be a homogenous blend of hydrocarbons derived from petroleum refining . . . free from inorganic acids and used lubricating oils," and "shall be free from any material that renders the fuel unacceptable for use in marine applications." Venezia Aff., Ex. 4. In addition, ISO 8217 calls for fuel oil to "be free from bio-derived materials," and "shall not contain any additive . . . or any added substance or chemical waste that a) jeopardizes the safety of the ship or adversely affects the performance of the machinery." *Id.* In the Sales Contract, "Quality" was defined, in part, "as per ISO 8217." In

Curoil's view, the faulty fuel oil sold by Trafigura violated the ISO terms and therefore violated the terms of the Sales Contract, including the express warranties contained therein.

On June 28, about a month after it accepted the fuel oil, Curoil rejected the fuel oil based on these alleged defects and tendered the product back to Trafigura. Gouw Aff., ¶25. Curoil also demanded that Trafigura take steps to remove the product from Curoil's storage tanks. Trafigura refused to take responsibility for the allegedly non-conforming fuel oil, and did not assist in Curoil's disposing the product. *Id.*, ¶¶25-26; Compl., ¶21. Although Curoil had already paid Trafigura $9,015,884.70 for the fuel oil, out of a total of $9,972,863.40 due under the Sales Contract, Curoil withheld the balance of payment since it had rejected the product. *Id.*, ¶¶22-24. In the end, the fuel oil was sold off for "slops." Compl., ¶25.

### *3. The Instant Action*

Curoil initiated this action, by filing a Summons and Complaint, on March 26, 2019. The Complaint alleges four causes of action against Trafigura: (1) breach of contract, (2) breach of express warranty, (3) negligence, and (4) negligent misrepresentation. Curoil asserts that as a result of Trafigura's actions, it has suffered damages in excess of $9 million as well as additional lost profits. *Id.*, ¶¶33-34. Trafigura moved to dismiss Curoil's Complaint in its entirety, on the grounds that the Sales Contract and the Intertek Report constitute documentary evidence refuting Curoil's claims (CPLR 3211(a)(1)), and that Curoil has failed to state a cause of action (CPLR 3211(a)(7)).

## LEGAL ANALYSIS

"On a motion to dismiss pursuant to CPLR 3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't

2003). "While a complaint is to be liberally construed in favor of plaintiff on a [CPLR] 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." *Id.*

In assessing a motion to dismiss under CPLR 3211(a)(7), the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017). But "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996).

**A. Breach of Contract**

The contract mechanism at work here – where a third party makes a "final and binding" determination about some aspect of a transaction – is commonly enforced by New York courts. Indeed, these types of provisions are seen as a way "to prevent the very type of litigation that [Curoil] has initiated." *Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp.*, 208 A.D.2d 63, 65-66 (2d Dep't 1995) (dismissing complaint where contract specified that engineer's determinations "shall be conclusive, final and binding"), *aff'd*, 87 N.Y.2d 927 (1996); *see also, e.g., Structured Credit Partners, LLC v. Painewebber Inc.*, 306 A.D.2d 132, 132 (1st Dep't 2003) (affirming dismissal pursuant to CPLR 3211(a)(1) and (7) where parties' agreement provided that certain profit calculations "shall be binding and final absent manifest error") (citation omitted); *Duferco, S.A. v. Tube City IMS, LLC*, No. 10 CIV. 7377 JSR, 2011 WL 666365, at *5 (S.D.N.Y. Feb. 4, 2011) (upholding arbitrator's interpretation of New York law

"law as requiring the enforcement of a 'final and binding' contractual clause . . . unless the objecting party can demonstrate bad faith or fraud on the part of the inspector"), *aff'd sub nom.*, 464 F. App'x 28 (2d Cir. 2012); *Chas. S. Wood & Co. v. Alvord & Swift*, 232 A.D. 603, 605 (1st Dep't 1931) (finding "no triable issue because by the contract the defendant submitted the determination of this very question to the architects and their conclusion on that subject is final"), *aff'd sub nom.*, 258 N.Y. 611 (1932).

Curoil's contract claim challenges the quality of the fuel oil it purchased, insofar as the fuel oil allegedly failed to comply with ISO 8217 specifications that were incorporated by reference into the definition of fuel oil quality set out in Section 4 of the Sales Contract. The ISO 8217 specifications, like the rest of Section 4, were subject to the Quality Determination Clause in Section 12. Under the plain terms of the Quality Determination Clause, Intertek "shall determine . . . the quality of the product," and Intertek's determination "shall be final and binding on the parties for all purposes save for fraud or manifest error." Healy Aff., Ex. B, §12. As noted, Curoil has not alleged fraud or manifest error. As a result, Intertek's determination is "final and binding" as to fuel oil quality, full stop.

The First Department's decision in *Sempra Energy Trading Corp. v. BP Prod. N. Am., Inc.*, 52 A.D.3d 350 (1st Dep't 2008) ("*Sempra*"), which also centered on a disputed fuel oil transaction, is directly on point. There, the court held that a pre-discharge report showing compliance with agreed-on parameters barred, as a matter of law, the plaintiff's breach of contract claim based on the results of its own subsequent testing. As in this case, the parties in *Sempra* "agreed that the quality and quantity of the fuel would be determined and certified prior to discharge by a mutually acceptable inspector, and that the predischarge report was binding on the parties except in the event of fraud or manifest error." 52 A.D.3d at 350. And as in this case,

the pre-discharge report showed the fuel oil to be in compliance with the parties' agreement, while *post*-discharge testing allegedly revealed the opposite. *Id.* The First Department affirmed the trial court's dismissal of the plaintiff's contract claim, concluding that it "was refuted by . . . the predischarge inspection report showing that the delivered fuel oil was in compliance with contract specifications." *Id.* The post-discharge report was, in the First Department's estimation, "not material under the parties' agreement." *Id.* The holding in *Sempra* applies here: the Intertek Report constituted a final and binding determination about the fuel oil's quality under the Sales Contract, and the results of Curoil's own subsequent testing are "not material under the parties' agreement." *Id.*

Curoil seeks to distinguish *Sempra* on the ground that the inspection in that case, unlike this one, measured the specific characteristic of the fuel oil that was at issue in the litigation.[5] Seizing on that factual difference, Curoil argues that while the Intertek Report "may be 'final and binding' for 'all purposes' of the requirements that were actually tested," "[i]t would be illogical to conclude that the [Intertek] Report was also 'final and binding' with respect to requirements that were not actually tested." Curoil Mem. of Law. in Opp. to MTD ("Curoil Opp."), at 13 (NYSCEF Doc. No. 21). While there is some logical appeal to that argument, it simply cannot be squared with the unambiguous terms of the Sales Contract.

As a "bedrock principle," it is the Court's "task to enforce a clear and complete written agreement according to the plain meaning of its terms," *150 Broadway N.Y. Assoc.*, 14 A.D.3d at 6, especially when that "contract is the negotiated product of sophisticated parties who . . . entered into a complex multimillion dollar business transaction," *Yonkers Contracting Co.*, 208

[5] The initial testing in *Sempra* showed that the fuel oil exhibited a proper "API gravity," while the post-discharge testing "revealed the API gravity to be below the specified minimum." 52 A.D.3d at 350.

A.D.2d at 65. The Sales Contract does not limit Intertek's quality determination to the parameters listed in the Intertek Report. It provides, instead, that Intertek would make a determination about "the quality of the product" as a whole. *See* Healy Aff., Ex. B, §12. While Intertek's *testing* was limited to the parameters in the Intertek Report, a fact that was plain to both parties on the face of the Report, the quality determination under Section 12 was not. To be sure, the contractual definition of "quality" references all of ISO 8217. *Id.*, §4 ("FO 3.0% as per ISO 8217:2012"). But that entire definition is, in turn, subject to the Quality Determination Clause, which is final and binding "for all purposes." Where the parties wished to carve out an exception to the Clause, they knew how to do so in clear terms: Section 12 states that the Certificate of Quality would *not* be final and binding in cases of "fraud or manifest error," which is not alleged here. No exception was made for situations, like this one, where the final and binding pre-discharge quality determination is later challenged on the basis of ISO parameters not initially tested by the independent inspector. In context, Curoil's argument impermissibly would read "final and binding" out of the agreement. *See Chleck v. Gen. Elec. Co.*, No. 03 CIV. 2278 (JSR), 2004 WL 2375803, at *1 (S.D.N.Y. Oct. 22, 2004) (confirming accounting referee's determination because, "if it were otherwise, 'final and binding' would in practice mean transient and litigable, and the contractual language and intent would be rendered nugatory").

That reading of the agreement is not, as Curoil complains, "illogical." It simply reflects commercial reality and common practice in the industry and, more importantly, the clear language of the agreement. Curoil acknowledges that "it is not practical to test at the point of delivery for all potential fuel contaminants and compliance with all provisions of ISO 8217," Gouw Aff., ¶17; that "[s]tandard industry practice is not to engage in this more detailed analysis when fuel is delivered," Curoil Opp., at 4; and that the company is "very familiar" with ISO

8217, *id.*, ¶12, which states that "[d]etermining the harmful level of a material or substance is not straightforward," and "[i]t is, therefore, not practical to require detailed chemical analysis for each delivery of fuels beyond the requirements listed in this International Standard." Venezia Aff., Ex. 4, Annex B. And the Intertek Report did test those "requirements listed" in the ISO – specifically, the characteristics listed in Table 2, such as kinematic viscosity, density, and so on. *See id.*, §5.1 ("The fuel shall conform to the characteristics and limits given in Table 1 or Table 2, as appropriate, when tested in accordance with the methods specified.").

Of course, Curoil could have tried to negotiate different terms. The parties could have agreed that Intertek's quality determination was subject to Curoil's post-discharge testing, or that the quality determination confirmed only the parameters initially tested, or that the pre-discharge testing must be more comprehensive and time-consuming than the industry standard. These protections presumably would have come at some cost to Curoil, or would have been rejected outright, since they would add risk and cost to Trafigura's operations. In any event, that is not what the parties agreed.

Under the existing Sales Contract, once Intertek issued its positive report, the Pearl could sail away with assurance to all parties that the quality of the product had been confirmed. Now consider the Sales Contract as Curoil would have it: the Pearl puts out to sea from Curaçao laden with additional risk, because Curoil can set aside Intertek's quality determination days, weeks, or months later on the basis of contaminants undetected – indeed, *undetectable* – by initial testing. Enlarging the scope of Trafigura's liability in that way requires a rewriting of the Sales Contract; as a *post hoc* interpretation, it is untenable.

Therefore, Curoil's breach of contract claim is dismissed.

**B. Breach of Express Warranty**

For similar reasons, Curoil's claim for breach of express warranty fails under CPLR 3211(a)(1) because of limiting language in the Sales Contract. While Trafigura expressly warrants in Section 4 that the fuel oil's quality will be "FO 3.0% as per ISO 8217:2012," that warranty is limited by the Quality Determination Clause in Section 12. There, Trafigura expressly disclaims all warranties as to the quality of the fuel oil once the independent inspector issues its "final and binding" determination:

> [THE INDEPENDENT INSPECTOR'S] DETERMINATIONS SHALL BE REPORTED ON THE CERTIFICATES OF QUALITY AND QUANTITY RESPECTIVELY, WHICH SHALL BE FINAL AND BINDING ON THE PARTIES FOR ALL PURPOSES SAVE FOR FRAUD OR MANIFEST ERROR **WITH NO GUARANTEE, UNDERTAKING, REPRESENTATION, CONDITION, WARRANTY OR ANY OTHER COMMITMENT FROM THE SELLER THAT THE PRODUCT WILL REMAIN OF SUCH QUALITY AND/OR CONDITION THEREAFTER.**

Trafigura's limited warranty thus was satisfied when Curoil accepted Intertek's "final and binding" quality determination (which was explicitly based on samples taken "before Discharge"), except in cases of fraud or manifest error (which is not alleged). Because Curoil's breach of warranty claim is based entirely on the results of subsequent testing, performed weeks after Curoil accepted Intertek's quality determination, the claim cannot survive. *See Caribbean Atl. Airlines, Inc. v. Rolls-Royce Ltd.*, 39 A.D.2d 673 (1st Dep't 1972) (reversing lower court and dismissing complaint where contracts "limited the warranties relied on by the plaintiff in its complaint, precluding recovery thereon").

**C. Negligence and Negligent Misrepresentation**

Curoil's causes of action sounding in tort – negligence and negligent misrepresentation – are also dismissed.

First, it is "a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (1987) (affirming dismissal of claims for negligence and gross negligence). Curoil has not alleged any extracontractual duty here. Rather, Curoil's tort allegations try to "transform a simple breach of contract into a tort claim" by recasting identical allegations in its claims for breach of warranty and breach of contract. *Id.* To illustrate, Curoil alleges as part of its negligence claim that Trafigura "failed to use reasonable and ordinary degree of skill and care to ensure the fuel oil it was supplying did not contain additives or contaminants which rendered it unusable and/or unsafe for marine applications." Compl., ¶63. The substance of that allegation echoes the contract-based claims, which are tied to Trafigura's "tendering fuel oil which was non-conforming." *Id.*, ¶¶53, 58. And tellingly, all four of Curoil's claims seek the same $9+ million in damages. *Id.*, ¶¶55, 60, 66, 73. *See Wildenstein v. 5H & Co, Inc.*, 97 A.D.3d 488, 491-92 (1st Dep't 2012) (finding that negligence claim should have been dismissed where alleged "extracontractual" services "duplicate the allegations concerning breach of contract" and "[e]ven the alleged damages are identical in both causes of action"); *Megaris Furs, Inc. v. Gimbel Bros.*, 172 A.D.2d 209, 211 (1st Dep't 1991) ("The remainder of plaintiff's respective complaints, which both assert the same causes of action and rely on the same theories to support them, represent an attempt to recast the breach of contract allegations as tort claims.").

Second, Curoil "has no cause of action in tort . . . for contractually based economic losses." *Bocre Leasing Corp. v. Gen. Motors Corp. (Allison Gas Turbine Div.)*, 84 N.Y.2d 685, 687 (1995). In *Bocre*, the Court of Appeals established that, in this state, "cogent policy considerations militate against allowing tort recovery for contractually based economic losses in

this kind of commercial dispute." *Id.*, at 688. Because "[t]he particular seller and purchaser are in the best position to allocate risk at the time of their sale and purchase, and this risk allocation is usually manifested in the selling price," "[a]llowing the purchaser to recover in tort for what is, in sum and substance, a commercial contract claim . . . would grant the purchaser more than the 'benefit of [the] bargain' to which the purchaser agreed." *Id.* Curoil's allegations here clearly run afoul of the economic loss doctrine, as it seeks to recover for purported economic losses in connection with a commercial contract. *See* Compl., ¶60 (describing damages resulting from "purchase price paid, storage costs, tank cleaning costs and all other costs and expenses"); *Cedar & Washington Assocs., LLC v. Bovis Lend Lease LMB, Inc.*, 95 A.D.3d 448, 449 (1st Dep't 2012) (dismissing negligence claim arising from contract because "plaintiff merely alleges economic loss, not personal injury or property damages"); *Rockefeller Univ. v. Tishman Const. Corp. of New York*, 232 A.D.2d 155, 155 (1st Dep't 1996) ("The motion court properly dismissed Tishman's contribution causes of action, since the complaint in the main action by the project owner sought damages for economic loss resulting from a breach of contract.").

Third, and finally, Curoil's negligent misrepresentation claim fails for the independent reason that Curoil does not adequately allege a "special relationship" with Trafigura, a precondition for finding liability under that theory. *See Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262 (1st Dep't 1994) (cause of action for negligent misrepresentation "properly dismissed on the ground that a 'special relationship' giving rise to a duty to impart correct information could not be discerned from the arm's length dealings between the parties alleged in the complaint"). "Generally, commercial parties dealing at arm's length in negotiating a business transaction are not in a special relationship." *Antipodean Domestic Partners, LP v. Clovis Oncology, Inc.*, No. 655908/16, 2018 WL 2045541, at *13 (Sup. Ct. N.Y. Cty. April 30,

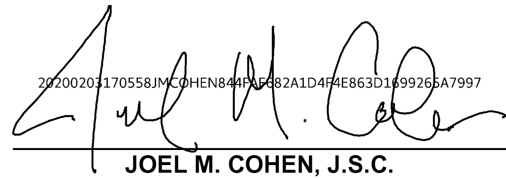
2018). The facts here do not justify breaking with that general rule. Curoil decided to enter into business with Trafigura after "a tendering process . . . where different major oil companies participated," Gouw Aff., ¶7, and then agreed to the terms of the Sales Contract. In short, "the sophisticated parties entered into an arm's length transaction which precludes a finding of a special relationship." *Basis Pac-Rim Opportunity Fund v. TCW Asset Mgmt. Co.*, 124 A.D.3d 538, 539 (1st Dep't 2015) (affirming dismissal of negligent misrepresentation claim).[6]

* * * *

Accordingly, it is

**ORDERED** that Trafigura's motion to dismiss the Complaint is **Granted**, and the Complaint is dismissed.

This constitutes the Decision and Order of the Court.




2/3/2020
DATE

JOEL M. COHEN, J.S.C.

| CHECK ONE: | [ ] | CASE DISPOSED | | | [X] | NON-FINAL DISPOSITION | | |
|---|---|---|---|---|---|---|---|---|
| APPLICATION: | [X] | GRANTED | [ ] | DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| | [ ] | SETTLE ORDER | | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |

[6] The cases cited by Curoil show the limited circumstances in which a negligent misrepresentation claim can be predicated on an arm's-length business relationship. "Courts have found a special relationship and duty, for example, where defendants sought to induce plaintiffs into a business transaction by making certain statements or providing specific information with the intent that plaintiffs rely on those statements or information." *Century Pac., Inc. v. Hilton Hotels Corp.*, No. 03 CIV. 8258 (SAS), 2004 WL 868211, at *8 (S.D.N.Y. Apr. 21, 2004). Curoil does not allege, however, that Trafigura made specific statements to Curoil concerning the fuel oil that were not in the Sales Contract, or that Trafigura provided specific information as part of the negotiations between the parties. Therefore, the exceptions upon which Curoil relies simply do not apply in this situation.