SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PBF I HOLDINGS LTD.,

Plaintiff,

- v -

VALERO (PERU) HOLDINGS LIMITED, VALERO (PERU) HOLDINGS GP LLC, VALERO ENERGY CORPORATION

Defendants.

INDEX NO. 657704/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 46

were read on this motion to DISMISS.

This case arises from the sale of a Peruvian fuels company, Pure Biofuels del Peru S.A.C. (the "Company"). Plaintiff PBF Holdings I Ltd. ("PBF") represents the sellers in the transaction. Defendants Valero (Peru) Holdings Ltd. ("Valero Ltd.") and Valero (Peru) Holdings GP LLC ("Valero LLC") – acquisition vehicles deployed by their parent, Defendant Valero Energy Corporation ("Valero") – served as Buyers. The sale closed, and the Company changed hands, in May 2018. Now, PBF alleges that Defendants are trying to "improperly re-trade their agreed-upon purchase price . . . through a variety of crooked tactics," including lodging baseless claims for indemnification (Am. Compl. ¶¶1-2, 8 [NYSCEF 26]).

Defendants move to dismiss the Amended Complaint on multiple grounds, including documentary evidence in the form of a forum selection clause requiring that litigation between the parties take place in federal court in Manhattan, lack of personal jurisdiction, and failure to state a cause of action. Although the Court finds that the forum selection is inapplicable

(because the action indisputably could not have been brought in federal court), Defendants' motion is granted on the ground that PBF fails to demonstrate personal jurisdiction over Defendants. Accordingly, the complaint is dismissed under CPLR 3211(a)(8).

BACKGROUND

Valero Acquires of the Company

PBF acts as the "Sellers' Representative" on behalf of the former shareholders (the "Sellers") of Pure Biofuels Holdings, L.P., the entity that directly owned the Company (Am. Compl. at 1). PBF is owned by affiliates of non-party Pegasus Capital Advisors, L.P. ("Pegasus"), a private asset management firm (*id.* ¶32). Those Pegasus affiliates, along with a number of minority shareholders, acquired the Company in 2012 (*id.* ¶33).

By 2017, the Company, the third largest fuels importer in Peru (*id.* ¶6), was drawing attention as a potentially lucrative acquisition target (*id.* ¶35). For one thing, fuel consumption is on the rise in South America in recent years, even as it decreases in North America, making the Company a particularly attractive asset to fuel companies in the U.S. looking to expand distribution (*id.* ¶34). In addition, under Pegasus the Company deleveraged its balance sheet, ramped up its operational capacity and utilization, and had over 500 customers, including retailers, miners, and airlines (*id.* ¶33). The Company also had refined product terminals in Callao, near Lima, and in Paita, near Piura in northern Peru (*id.*). Suitors soon came calling.

Valero approached Sellers about acquiring the Company in 2017 (*id.* ¶35). Valero is a Fortune 500 company that operates internationally and manufactures and markets transportation fuels, other petrochemical products, and power (*id.* ¶30). Sellers agreed to sell the Company to Valero – via two acquisition vehicles, Defendants Valero Ltd. and Valero LLC (*id.*) – after several months of negotiations (*id.*).

Valero's purchase price comprised an upfront payment along with a potential earnout payment that Sellers estimated could be worth tens of millions more (*id.*). According to PBF, Defendants have conjured up "bogus, bad-faith claims for indemnification" in a ploy to "offset" and divert the upcoming earnout payments due to Sellers (*id.* ¶¶2-4). Further, PBF alleges that Defendants have breached, and interfered with, Sellers' contractual right to direct certain litigation proceedings in Peru, weakening the Company to deflect attention from Valero's own tax compliance issues (*id.* ¶5). PBF traces much of this malfeasance to the ire of a mid-level Valero attorney, Les Caldwell, who previously "expressed antagonism towards Sellers, the deal for the Company, and the purchase price agreed-to by Valero at the time of the acquisition" (*id.* ¶6). Dissatisfied with the deal as written, and driven by "personal antipathy towards Sellers," Caldwell purportedly is now "pursuing a de facto purchase price adjustment through intentional interference with Sellers' right to receive monies from the indemnification escrow" (*id.* ¶¶6, 9).

Defendants' Alleged Ties to New York

The primary focus of this motion, however, is not on the merits of PBF's claims but on whether this Court can exercise personal jurisdiction over Defendants. None of the parties to this action are "at home" (for jurisdictional purposes) in New York. PBF is a Canadian company with its principal place of business in Connecticut (*id.* ¶27). All three Defendant Valero entities operate out of San Antonio, Texas (*id.* ¶¶28-30). Valero Ltd. is a company organized under the laws of British Columbia, Canada, while the parent company, Valero, is incorporated in Delaware (*id.* ¶30).[1] And the Company itself – the subject of the Transaction Agreement – is a

[1] The Amended Complaint does not state where Valero LLC is incorporated (*see id.* ¶29).

Peruvian corporation (a *sociedad anónima cerrada*) (Transaction Agreement ["TA"] at 1 [NYSCEF 14]).

PBF's arguments in favor of personal jurisdiction emphasize Defendants' actions in connection with the Transaction Agreement, starting with the negotiation of the contract. Defendants initiated the acquisition in October 2017 by contacting the Company's financial advisor, Morgan Stanley, located in New York (*id.* ¶14). The next month, an affiliate of Defendants, Valero Services, Inc., entered into a non-binding letter of intent (LOI) with certain affiliates of PBF (*id.* ¶15). The LOI was executed in New York by PBF's representatives, and it included a New York choice of law and forum selection clause (*id.*).

Subsequently, Defendants' representatives negotiated the terms of the acquisition with PBF's representatives, who were physically located in New York (*id.* ¶17). In addition to Morgan Stanley, PBF also engaged investment-bank advisors located in New York (*id.* ¶18). PBF's lead counsel, too, maintained offices in New York (*id.* ¶19). Defendants were "fully aware and accepted" the geographic location of PBF's various advisors (*id.* ¶¶17-19). As is typical for sophisticated commercial transactions today, the negotiations were primarily conducted by emails and phone calls between the two sides' lawyers. Defendants' counsel sent drafts of the Transaction Agreement to PBF's counsel in New York, and received drafts back from PBF's counsel in New York (*id.* ¶19). There were also phone calls between Defendants' counsel and PBF's counsel while PBF's counsel was in New York (*id.* ¶20). There is no allegation that Defendants conducted any business in New York or engaged New York-based advisors to negotiate the acquisition on their behalf.

The Transaction Agreement contained a New York choice of law provision (TA §9.6), as well as a forum selection clause that calls for exclusive jurisdiction in federal court in Manhattan

(TA §9.4). In performing the Transaction Agreement, Defendant Valero (Peru) Holdings Ltd. initiated at least five wire transfers to bank accounts in New York (*id.* ¶21). Moreover, Buyers initiated at least one wire payment from Valero's bank account in New York in connection with the Transaction Agreement (*id.*). And in breaching the Agreement, PBF says, Buyers have caused significant harm in New York, where Pegasus, the investment manager of the funds that owns Plaintiff, is located and principally conducts business (*id.* ¶22).

The Instant Action

PBF initially filed a Summons and Complaint on December 26, 2019 (NYSCEF 1), then filed an Amended Complaint on February 18, 2020 (NYSCEF 24). In the Amended Complaint, PBF asserts five causes of action against Defendants: (1) declaratory judgment against Buyers with respect to the Indemnity Escrow; (2) breach of the implied covenant of good faith and fair dealing against Buyers with respect to the Indemnity Escrow; (3) breach of contract against Buyers with respect to the Indemnity Escrow; (4) breach of contract against Buyers with respect to Tax Matters; and (5) tortious interference against Valero (*id.*).

DISCUSSION

A. Jurisdiction

1. The Forum Selection Clause

"[A] contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)" (*Landmark Ventures, Inc. v Birger*, 147 AD3d 497, 497 [1st Dept 2017]). But not here. As discussed below, (i) the forum selection clause in the Transaction Agreement is inapplicable and therefore does not warrant dismissal, (ii) nor does the Transaction Agreement require the parties to renegotiate the forum selection clause under the terms of the severability provision.

i. The Forum Selection Clause is Inapplicable

Despite its mandatory language, the forum selection clause in the Transaction Agreement cannot be applied here. That is because "[f]ederal courts are courts of limited jurisdiction and may not entertain matters over which they do not have subject-matter jurisdiction" (*e.g.*, *Hovensa, L.L.C. v Technip Italy S.P.A.*, 08CIV.1221(NRB), 2009 WL 690993, at *5 [SD NY Mar. 16, 2009], citing *Wynn v AC Rochester*, 273 F3d 153, 157 [2d Cir 2001]). As constituted, this action fails to meet the requirements of federal subject-matter jurisdiction – the claims raise no federal question and the parties lack diversity of citizenship.[2] When subject-matter jurisdiction does not exist independently, "no action of the parties can confer subject-matter jurisdiction upon a federal court" (*Ins. Corp. of Ireland, Ltd. v Cie. des Bauxites de Guinee*, 456 US 694, 702 [1982]; *Hovensa, L.L.C.*, 2009 WL 690993, at *5 ["Subject-matter jurisdiction cannot be waived by the parties, nor can it be created by the consent of the parties."]). Consequently, the forum selection clause cannot create the federal subject matter jurisdiction necessary to enforce it.

While Defendants insist that the forum selection clause is "enforceable," they sidestep the practical matter of enforcing it. Dismissing this case does not "enforce" the forum selection clause; that would require litigating the case in federal court. And Defendants identify no

[2] Defendants do not contend that this action, as constituted, could be brought in (or removed to) federal court. In Defendants' view, PBF orchestrated this result by joining parties in a way that strategically avoids federal court jurisdiction (NYSCEF 46 at 2 [Defs.' Reply Br.]). The vague accusations of gamesmanship do not change the Court's analysis. To be sure, "[a] plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy" (*Whitaker v Am. Telecasting, Inc.*, 261 F3d 196, 207 [2d Cir 2001]). But Defendants stop well short of alleging fraudulent joinder and do not seriously question the named Defendants' connection to the controversy.

possible basis for doing so.[3] Defendants wave away these concerns, urging that "jurisdictional issues arising from the forum-selection clause should be left for the federal court to resolve" (NYSCEF 33 at 10 [Defs.' Br.]). That position is unreasonable when the "jurisdictional issue[ ]" is that the federal court plainly lacks jurisdiction. Plaintiffs' counsel could not in good faith have brought this action in federal court (*see* Fed Rules Civ Pro rule 11 [b]).

The sole case on which Defendants rely, *Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454 [1st Dept 2011], is distinguishable. *Spirits of St. Louis* arose in a unique set of circumstances. The court analyzed a forum selection clause in a settlement agreement reached by the parties in a pending federal action, in which the federal court retained jurisdiction over matters related to the settlement agreement (*id.* at 456, citing *Purcell v Town of Cape Vincent*, 281 F Supp 2d 469, 474 [ND NY 2003] [discussing "[t]he context of the retention of jurisdiction . . . for future enforcement of a settlement order"]). No such tether to federal jurisdiction is involved in this case. The forum selection clause, as drafted, simply cannot be applied under these circumstances. And because it cannot be applied, "the forum selection clause is properly viewed as non-mandatory and alternative fora can be considered" (*Hovensa, L.L.C.*, 2009 WL 690993, at *5; *see also Inetianbor v Cashcall, Inc.*, 13-60066-CIV, 2016 WL 4702370, at *6 [SD Fla Aug. 18, 2016] [holding that "forum-selection clause in Plaintiffs' loan agreements is not enforceable because the selected forum" – a tribal court, in that case – "lacks subject matter jurisdiction"]).

[3] Also as a practical matter, if Defendants could enforce the forum selection clause, they presumably *would* enforce the forum selection clause by removing this action to federal court.

ii. Section 9.9 is Inapplicable

As a fallback position, Defendants argue that even if the forum selection clause cannot be enforced here, PBF must try to renegotiate the provision before bringing suit against Defendants. This argument originates from Section 9.9 of the Transaction Agreement (emphasis supplied):

> If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any Law or public policy, all other terms or provisions of this Agreement will nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any Party. **Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the Parties will negotiate in good faith to modify this Agreement** so as to effect the original intent of the parties as closely as possible . . . .

Defendants contend that "[n]o such negotiations occurred here, and therefore, PBF should not have unilaterally resorted to filing suit in a different forum" (Defs.' Br. at 10).

Section 9.9 does not bar PBF's claims. That section applies only "[i]f any term or other provision of th[e] Agreement is invalid, illegal or incapable of being enforced by any Law or public policy." That is not the case here. While the forum selection clause cannot be applied to this particular lawsuit, it is not "invalid, illegal or incapable of being enforced by any Law or public policy." It can be enforced in cases where federal jurisdiction independently exists – if, for example, litigation related to the contract arises between citizens of different states.[4]

[4] Moreover, imposing a "good faith negotiation" requirement likely would have no practical effect. If the parties were (or are now, based on this Court's decision) inclined to mutually agree to litigate in a different forum having jurisdiction over the dispute, they remain free to do so. (Indeed, based on the Court's finding below that it lacks personal jurisdiction over the Defendants, that may be the next step.) Neither party bound itself to agree to a particular alternative forum, and thus Plaintiffs (absent such agreement) would have been free to sue in a court of their choosing.

2. Personal Jurisdiction

PBF argues that exercising personal jurisdiction over Defendants is proper for four main reasons: (1) the business transaction was negotiated, in part, through communications with Plaintiff's New York-based attorneys and financial advisors; (2) the Transaction Agreement contains a New York choice of law provision; (3) Defendant Valero Ltd. made payments to bank accounts in New York and Buyers also initiated at least one wire payment from Valero's bank account in New York in connection with the Transaction Agreement; and (4) the harm resulting from Defendants' conduct was felt by one of Defendants' investors in New York.

"On a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017] [granting motion to dismiss], citing *Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007]). To sustain that burden, Plaintiffs must show not only that Defendants are within the reach of New York's long-arm statute, but also that exercising jurisdiction "comport[s] with federal constitutional due process requirements" (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016]).

i. Personal Jurisdiction Under New York's Long-Arm Statute

Under CPLR 302(a)(1), this Court "may exercise personal jurisdiction over a non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." Section 302(a)(1) is a "single act statute," which means that "proof of one transaction in New York is sufficient to invoke jurisdiction" (*Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 [2006]). But "our precedents establish that it is the ***quality*** of the defendants' New York contacts that is

the primary consideration" (*Fischbarg*, 9 NY3d at 380 [emphasis added]). In that vein, CPLR 302(a)(1) supports exercising personal jurisdiction over a nondomiciliary "if the nondomiciliary conducts 'purposeful activities' within the state and the claim against the nondomiciliary involves a transaction bearing a 'substantial relationship' to those activities" (*Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 21 AD3d 90, 93-94 [1st Dept 2005], affd, 7 NY3d 65 [2006]).

Here, PBF fails to carry its burden of showing that Defendants purposefully "transacted business" in New York. *First*, the communications to and from New York, directed to PBF's advisors located in the state, are insufficient. "Telephone calls and written communications . . . generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute," unless it is "shown to have been used by the defendant to actively participate in business transactions in New York" (*Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002]; *Deutsche Bank*, 21 AD3d at 94 ["electronic communications, telephone calls or letters . . . may be sufficient [to confer personal jurisdiction] if used by the defendant deliberately to project itself into business transactions occurring within New York State"]; *see C. Mahendra (N.Y.), LLC v Natl. Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015] ["[C]ourts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction."]).

While Defendants communicated with individuals located in New York, their purpose was not "to actively participate in business transactions in New York" (*Liberatore*, 293 AD2d at 220). As the First Department has observed, "negotiating a contract from outside New York is insufficient to constitute the transaction of business in New York" (*ABKCO Music, Inc. v*

McMahon as Tr. of Andrea Marless Cooke Family Tr., 175 AD3d 1201 [1st Dept 2019]). New York happened to be the location of PBF's advisors, a fact of geography completely determined by PBF in choosing them (*see Al Rushaid*, 28 NY3d at 325 [explaining that activity "cannot serve as a basis for personal jurisdiction" where "the sole potential basis for personal jurisdiction, was essentially adventitious – i.e., it was not even [defendant's] doing"]; *SunLight Gen. Capital LLC v CJS Investments Inc.*, 114 AD3d 521, 522 [1st Dept 2014] [noting "[p]laintiff's actions within New York . . . cannot be imputed to [defendant] for jurisdictional purposes"] [dismissing complaint]). The Amended Complaint does not suggest that the presence of PBF's advisors in New York was integral to the business being transacted. Nor does PBF cite to authority holding that New York lawyers and bankers, in dispensing advice on transactions taking place outside the state, become carriers of personal jurisdiction to their clients or others.[5]

To be sure, courts can exercise personal jurisdiction over defendants who never step foot in New York and transact business in the state remotely (*see Deutsche Bank*, 7 NY3d 65 [2006]; *Liberatore v Calvino*, 293 AD2d 217 [1st Dept 2002]; *Agency Rent A Car Sys., Inc. v Grand Rent A Car Corp.*, 98 F3d 25, 30 [2d Cir 1996]). "[T]he growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it" (*Deutsche Bank*, 7 NY3d at 71). The difference here is the quality of Defendants' contact with the state, as alleged in the Amended Complaint: they were not participating in a business transaction in New York,

[5] Separately, the actions of Valero Services, which is a non-party affiliate of Valero, are insufficient because "the existence of an agency upon which a finding of jurisdiction may be predicated may not be inferred from the mere existence of a parent-subsidiary relationship" (*Ins. Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004] [no personal jurisdiction over subsidiary where contract negotiations were conducted by parent]).

nor engaging with a New York counterparty, nor creating a long-term commercial relationship in New York, nor requiring the performance of an obligation in New York.

The cases cited by PBF illustrate the contrast. In *Deutsche Bank*, for example, Bloomberg terminal messages to New York securities traders were sufficient to confer personal jurisdiction because defendant was using the communications to "very purposefully . . . negotiate a bond deal with this New York plaintiff without having actually to set foot in New York" (21 AD3d at 95-96; *see also Liberatore v Calvino*, 293 AD2d 217 [1st Dept 2002] [defendant attorney "projected himself into the state to perform services. . . and transacted business in New York by purposefully pursuing redress for plaintiff over a three-year period from various New York entities"]; *Agency Rent A Car Sys., Inc. v Grand Rent A Car Corp.*, 98 F3d 25, 30 [2d Cir 1996] [out-of-state licensees' "businesses arise out of an ongoing contractual relationship with AVIS, which is headquartered in New York" and "licensees submit monthly reports and fees to the New York headquarters and are in contact with individuals [there] on an almost daily basis"]).

Second, "[t]he fact that the contract chooses New York law does not constitute a voluntary submission to personal jurisdiction in New York" (*ABKCO Music, Inc.*, 175 AD3d at 1201; *see Navaera Sciences, LLC v Acuity Forensic Inc.*, 667 F Supp 2d 369, 375 [SD NY 2009] ["[a choice-of-law] clause alone . . . is insufficient to confer personal jurisdiction over a non-domiciliary"]; *see also Favourite Ltd. v Cico*, 181 AD3d 426, 426 [1st Dept 2020] ["[C]hoice of law and choice of forum are altogether separate matters"]).

PBF points out that Defendants also consented to a New York forum, albeit one in federal court. But consenting to the jurisdiction of a federal court sitting in New York does not waive

objections to personal jurisdiction in New York state court (*Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 5 [1st Dept 1998] ["[D]efendants have not consented 'to submit to the jurisdiction of the courts of this state' but have submitted only to the jurisdiction of the courts of the United States sitting in New York."]; *cf. Braspetro Oil Services Co. v UK Guar. & Bonding Corp., Ltd.*, 18 AD3d 291, 291 [1st Dept 2005] [declining to read "an ineffective federal court forum selection clause that does not mention the State courts" as a waiver of forum non conveniens defense]).

Third, the alleged wire transfers do not support personal jurisdiction in New York. One Defendant – Valero Ltd. – is alleged to have made "at least five wire transfers to bank accounts in New York" (Am. Compl. ¶21). But "the mere payment into a New York account does not alone provide a basis for New York jurisdiction, especially when all aspects of the transaction occur out of state, absent more extensive New York banking relating to the transaction in issue" (*Pramer S.C.A. v Abaplus Intern. Corp.*, 76 AD3d 89, 96 [1st Dept 2010]). The additional allegation that Buyers made "at least one wire payment" *from* New York is similarly insufficient (*id.*). To be sure, wire transfers to and from New York may support jurisdiction when combined with other factors evincing a substantial nexus with the state and the controversy at hand. For example, in *FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492 [1st Dept 2017], on which PBF relies, "receiv[ing] payment . . . via a transfer to a New York bank" carried significance because four causes of action in the complaint related to the transfer itself (*id.* at 493-94). The defendant, moreover, sent emails into New York "discussing how to structure" the transfer (*id.* at 493). The wire transfers in this case, on the other hand, are not alleged to relate to

the issues underpinning the lawsuit. Therefore, the wire transfers cannot be accorded substantial weight in the jurisdiction analysis.[6]

Fourth, and finally, PBF contends "[t]his matter concerns a dispute . . . involving New York parties harmed by Defendants' conduct" (NYSCEF 38 at 10; Am. Compl. ¶13). More precisely, PBF alleges that "Buyers' breach of the Transaction Agreement has caused significant harm in New York, where Pegasus" – not a party here – "is located and principally conducts business" (Am. Compl. ¶22). This argument, which suffers from a lack of detail in the Amended Complaint and PBF's motion papers, is also unavailing. PBF does not explain why the location of a non-party should factor into, much less control, the jurisdictional analysis, and does not cite case law backing that proposition. While CPLR 302 [a] [3] permits jurisdiction over "any non-domiciliary . . . [who] commits a ***tortious act*** without the state causing injury to person or property within the state," the location of injury is not clearly relevant to jurisdiction pursuant to CPLR 302 [a] [1], the provision PBF relies on here. And even for PBF's tort claims, since "the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (*CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471-72 [1st Dept 2011]).

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[6] The *FIA* court went on to note that, "**[i]n light of [the party's] numerous other contacts with New York** . . . it does not violate due process to exercise jurisdiction over [the party]" (*id.* [emphasis added]). Here, although it is not necessary to reach the issue (*see* Part [ii], *infra*), the Court notes that basing personal jurisdiction solely on wire transfers to or from a New York bank – hardly a rare occurrence in international business transactions – could raise significant due process concerns.

ii. Federal Constitutional Due Process

Because PBF fails to carry its burden of demonstrating personal jurisdiction under the long-arm statute, the Court need not consider whether the "[e]xercise of personal jurisdiction under the long-arm statute" also "comport[s] with federal constitutional due process requirements" (*Al Rushaid*, 28 NY3d at 330).

In sum, under the circumstances alleged here, PBF fails to demonstrate personal jurisdiction over Defendants. Therefore, Defendants' motion is granted and the Amended Complaint dismissed in its entirety.

B. Failure to State a Cause of Action

For the sake of completeness and efficiency (in the event of an appeal), the Court will briefly address Defendants' other arguments in support of dismissal. When reviewing a motion to dismiss under CPLR §3211(a)(7) for failure to state a cause of action, a court ordinarily should "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014], quoting *Godfrey v Spano*, 13 NY3d 358, 373 [2009])

1. Tortious Interference with Contract

First, PBF's tortious interference with contract claim against Valero is barred by Sections 7.3 [a] and 9.11 of the Transaction Agreement. "A limitation on liability provision in a contract represents the parties' agreement on the allocation of risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor" (*Metropolitan*

Life Ins. Co. v Noble Lowndes Int'l, Inc., 84 NY2d 430, 436 [1994]). Here, the two provisions drastically limit who the parties can sue in litigation arising from the Transaction Agreement. Section 9.11 states that "any Legal Proceeding based upon, arising out of or related to this Agreement or the transactions contemplated hereby may only be brought against, the Persons that are expressly Parties. . . "

Under the contract's definition, Valero Ltd. and Valero LLC are "Parties," but not Valero. Similarly, Section 7.3(a) provides that no "Affiliate of a Securityholder or a Buyer . . . will have any Liability of any nature to any Buyer Indemnitee or Seller Indemnitee, as the case may be, with respect to any breach of or inaccuracy in any representation, warranty or covenant in this Agreement." Valero, as an Affiliate of the Buyers, is once again immunized (*see* TA §10.1). PBF's tortious interference claim contradicts the plain meaning of those provisions, and must be dismissed.

The broad language of these provisions distinguishes them from non-recourse provisions in other cases, such as *Antaeus Enters. Inc. v SD-Barn Real Estate, L.L.C.*, 480 F Supp 2d 734, 740 [SD NY 2007], on which PBF relies. In *Antaeus*, the non-recourse provision governed only the note holder's "rights under the [assignment agreement]," which did not limit tort liability against a non-party. By contrast here, §9.11 covers "any Legal Proceeding based upon, arising out of or related to this Agreement or the transactions contemplated hereby." In the other case relied on by PBF, *York Grp., Inc. v Horizon Casket Grp., Inc.*, Nos. H-06-0262, H-05-2181, 2007 WL 2120419 [SD Tex Jul. 10, 2007], the non-recourse provision addressed only "damages . . . under this Agreement," which the Texas federal court read to mean only contract-based theories of damages. Section 7.3(a) of the Transaction Agreement, meanwhile, encompasses "any Liability of any nature."

Therefore, even if the Court were to exercise personal jurisdiction over Defendants, PBF's claim for tortious interference with contract still would be dismissed.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Next, Plaintiffs' implied covenant claim is dismissed as duplicative of their breach of contract claim. Both claims allege that Buyers breached their obligations by wrongfully making a claim against the Indemnity Escrow (*compare* PBF Opp., at p. 18 [alleging that Buyers breached the contract by failing to "release the escrow monies to Plaintiff"] *with id.* at p. 18-19 [alleging that Buyers breached the covenant of good faith "by submitting a baseless indemnification claim to block the release of the Indemnification Escrow"]). Both claims therefore arise from the same operative facts and seek identical damages, despite slightly different wording (*see Mill Fin., LLC v Gillett*, 122 AD3d 98, 104–05 [1st Dept 2014] ["Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed. . . . The conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts."]; *see also Salomon v Citigroup Inc.*, 123 AD3d 517, 518 [1st Dept 2014] ["Plaintiff's claim for breach of covenant of good faith and fair dealing . . . is essentially duplicative of the allegations in his breach of contract claim, and should be dismissed, particularly as it seeks the same damages as the breach of contract claim."]).

PBF argues that New York courts routinely allow implied covenant claims to proceed in tandem with contract claims at the pleading stage. To the extent that is true, implied covenant claims are kept alive in those cases because of lingering questions about the validity or applicability of the contractual obligations (*see, e.g.*, *Demetre v HMS Holdings Corp.*, 127 AD3d 493, 493-94 [1st Dept 2015] ["The dismissal of the claim for breach of the implied covenant of

good faith and fair dealing, at this juncture, is premature. The court's dismissal of the claim as duplicative of the breach of contract claim is inconsistent with its determination that the 'best efforts' clause, allegedly being breached, is ambiguous as to whether it applied to HMS's post-acquisition operation of AMG. **Because the issues are still undeveloped at this stage of the proceeding, both claims should be permitted to stand**."] [emphasis added]). No such questions cloud the contract claim here, rendering the implied covenant claim duplicative.

Therefore, even if the Court were to exercise personal jurisdiction over Defendants, PBF's claim for breach of the implied covenant of good faith and fair dealing would be dismissed.

3. Limitation on Remedies

Last, the Court rejects Defendants' argument that PBF is restricted, as a matter of law, to the remedies set forth in Article 7 of the Transaction Agreement. The limitations on damages set out in Article 7 specifically govern indemnification claims, not PBF's claims for breach of contract. Section 7.3(f) bars a party from *seeking indemnification* for (i) "punitive or exemplary damages, (ii) consequential damages that were not reasonably foreseeable, or (iii) any indirect damages, lost profits, opportunity costs or special damages or damages based on a multiple of earnings, revenue or any other financial metric." Plaintiff's claims concern the Indemnification Escrow – specifically, the validity of Defendants' indemnification claims – but they are not themselves indemnification claims governed by Article 7 of the Transaction Agreement. Therefore, Section 7.3(f) does not control here.

Similarly, under Section 7.4, "the Parties expressly agree that . . . the indemnities provided . . . together with the remedies set forth in Section 9.2, are the sole and exclusive remedies of ***the Buyer Indemnitees*** and ***the Seller Indemnitees*** in respect of the transactions

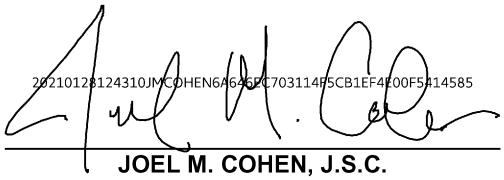
contemplated by this Agreement and for any breach or alleged breach of any provision hereof" (emphasis added). That provision limits remedies available to the "Seller Indemnitees" – a defined term relating to the scope of Buyer's indemnification obligations – not to Sellers. Therefore, Section 7.3(f) does not govern PBF's claims here.

* * * *

Accordingly, it is

ORDERED that Defendants' motion to dismiss is **GRANTED**, the Amended Complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



1/28/2021
DATE

JOEL M. COHEN, J.S.C.

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