

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 601048/2007
ICONOCLAST ADVISERS LLC
 vs.
PETRO-SUSSE LTD.,
 SEQUENCE NUMBER : 003
 SUMMARY JUDGEMENT

E-FILE PART *leo*

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

RECEIVED

MAY 14 2010

**MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL**

Dated: 5/14/2010



HON. BERNARD J. FRIED S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

WMC

-----X
ICONOCLAST ADVISERS LLC,

Plaintiff,

-against-

Index No.
601048/07

PETRO-SUISSE LTD., and JOHN WAMPLER,

Defendants.
-----X

APPEARANCES:

For Plaintiff:

Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(Joseph P. Moodhe)

For Defendants:

Eaton & Van Winkle LLP
3 Park Avenue
New York, New York 10016
(Robert S. Churchill,
Brendan R. Marx)

FRIED, J.:

Plaintiff Iconoclast Advisers LLC moves for partial summary judgment on its breach of contract claim, and seeks dismissal of defendants' affirmative defenses. Defendants Petro-Suisse Ltd. and John Wampler cross-move for summary judgment dismissing plaintiff's remaining causes of action (the first, fourth, and fifth causes of action).

Plaintiff, an investment banking boutique, is seeking recovery of fees it claims are due under an engagement agreement it entered into with defendant Petro-Suisse Ltd., claiming that Petro-Suisse Ltd. agreed to pay it a fee if a transaction involving the Laurus Family of Funds LLC closed, that such a transaction did close, and that Petro-Suisse refused to pay any fee. Plaintiff contends that right after entering into the engagement agreement

and being introduced to Laurus officials, Petro-Suisse Ltd. excluded plaintiff from the negotiations, and then terminated the engagement agreement. It asserts that the record now demonstrates that the transaction that closed with "Laurus" was within the literal terms of the engagement agreement, and was what the parties contemplated when they executed that agreement. Iconoclast also contends that defendants' defenses cannot defeat its entitlement to summary judgment on its contract claim.

Defendants contend that the undisputed facts and documents show that: the transaction that closed simply was not covered by the engagement agreement; Petro-Suisse Ltd. did not enter into a "transaction" as defined in the agreement with Laurus Family of Funds LLC; the parties expressly excluded Blast Energy Services Inc. as a target under the engagement agreement, and the acquisition of property belonging to Blast, or the facilitation of a loan transaction regarding Blast's property was not covered; and the engagement agreement did not cover a transaction with Laurus Master Fund, Ltd., or a transaction by Boom Drilling LLC instead of Petro-Suisse Ltd. Thus, defendants assert that summary judgment dismissing the breach of contract claim, as well as the declaratory judgment claim, is appropriate, and that the claim for tortious interference with contract should be dismissed because the contract was not breached.

Plaintiff Iconoclast Advisers LLC is an investment banking boutique, whose business involves advising its clients regarding the origination and structuring of transactions involving mergers, acquisitions, financing and private equity and debt investments (Complaint, ¶ 4). Howard Chalfin is the managing principal of Iconoclast (Plaintiff's Rule 19-a Statement, ¶ 1).

Petro-Suisse Ltd. is a Barbados company, and is engaged in the business of investing in and managing the operation of oil rigs and related oil production equipment and facilities outside the United States only (*id.*, ¶¶ 3-4, and Defendants' Response to Rule 19-a Statement, ¶ 4). Defendant John Wampler is the President and Chairman of Petro-Suisse Ltd., and he and/or his family members own, directly or indirectly, the controlling interest in Petro-Suisse Ltd. (*id.*, ¶¶ 2 and 5).

In the fall of 2006, Chalfin had some meetings and phone calls with Wampler and Mark Gasarch, an officer and director of Petro-Suisse Ltd., proposing that Iconoclast work with Petro-Suisse Ltd. to help it obtain financing for a roll-up transaction, worth about \$150 million, in which it would purchase controlling interests in three companies, combining manufacturers of drilling rigs and rig components with drilling and operating companies (Plaintiff's Rule 19-a Statement, ¶¶ 13-14 and Defendants' Response thereto). Before any engagement agreement was signed, Chalfin of Iconoclast brought to Wampler's attention, on November 17, 2006, a group of five drilling rigs (the Blast Rigs) owned by Blast Energy Services, Inc. (Blast), giving Wampler all of the specifications for the rigs (Hackell Aff., Exhibits 17, 20; Marx Aff. Exhibit B, Wampler Dep. at 170-172, 191-192). Laurus Master Fund, Ltd., a Cayman Islands corporation, was a secured lender of Blast with an outstanding loan of \$40.6 million, secured by five Blast rigs, on which loan Blast had recently defaulted (Hackell Aff. Exhibit 12, Phelan Dep. at 16-17). Chalfin testified at his deposition that financing the roll-up transaction that Petro-Suisse was interested in doing "pre-dated [his] discovery that Laurus had a situation they wanted done as well, that I figured could be complimentary to the – to the project Petro-Suisse wanted to accomplish, which was the roll-

up” (Marx Aff. Exhibit C Chalfin Dep. at 335-336). Chalfin stated in an e-mail to his associate, Roger Kahn, that “even if nothing happens with Lorus [sic] I want to look good with Gasarch and Wampler as they want to do a \$150-200 mm role-up [sic] and they see me as a potential point man on the financial front” (Marx Aff. Exhibit D). Chalfin then was urging that Petro-Suisse Ltd. enter into an engagement contract with Iconoclast (Marx Aff. Exhibit A, Gasarch Dep. at 147; Marx Aff., Exhibit C, Chalfin Dep. at 149).

On November 28, 2006, the parties entered into the Engagement Agreement. In this agreement, Iconoclast was engaged to render financial advisory and investment banking services

to Petro-Suisse Ltd., a Barbados Company (the “Company”) solely in connection with: (a) the possible acquisition, merger, consolidation, asset purchase, reorganization or other business combination with Laurus Family of Funds LLC (the “Target”) involving all or a portion of the business, assets or stock of the Target, whether effected in one transaction or a series of transactions, on terms and conditions satisfactory to the Company or (b) the acquisition of effective control over the business affairs of any of the Target’s businesses through a management services agreement or similar arrangement (collectively, the “Transaction”)

(Hackell Aff. Exhibit 1A). In the event that such a Transaction with Laurus Family of Funds LLC and Petro-Suisse Ltd. closed, Iconoclast was to be paid a fee of 4% of the “Aggregate Consideration” received by Laurus Family of Funds LLC on the closing of the Transaction (*id.* at 1-2). The Engagement Agreement could be terminated at particular times, but the fee was to be paid to Iconoclast if a “Transaction shall occur within one year of the termination of this engagement with the Target” (*id.* at 3).

Roger Kahn, an experienced investment banker, prepared the first draft engagement letter on Iconoclast's behalf, which was delivered to Petro-Suisse Ltd. on November 22, 2006 (Marx Aff. Exhibit L, Kahn Dep. at 6-14, 51). This draft identified the "Target" company as "Blast Energy Services, Inc. and/or M.D. Cowan, Inc." (Hackell Aff. Exhibit 18). A subsequent draft, again generated by Iconoclast, dated November 28, 2006, crossed out M.D. Cowan, Inc. but left in Blast as the Target (Hackell Aff. Exhibit 19). Iconoclast's third version of the Engagement Agreement, which was actually signed by the parties on November 28, deleted both M.D. Cowan, Inc. and Blast as Targets, and, instead, identified the Target company as "Laurus Family of Funds LLC" (Hackell Aff. Exhibit 1A). Gasarch, who was negotiating the wording of the Engagement Agreement on Petro-Suisse Ltd.'s behalf, inserted in the drafts the words "Ltd., a Barbados company" after the name Petro-Suisse to "make it very clear that this was the party on our side of the transaction, Petro-Suisse Ltd., a Barbados Company" (Marx Aff. Exhibit A, Gasarch Dep. at 165-166). He also inserted the word "solely" in the third line before the definition of the qualifying "Transaction" (Marx Aff. Exhibit A, Gasarch Dep. at 165-166). Gasarch testified that he inserted this to make it clear "that [Chalfin] was being engaged for a singular specific purpose on behalf of a singular specific company" and that "this was not some broad, global engagement letter on behalf of all the Wampler interests to do all kinds of things" (*id.* at 167). Rather, it was "[s]olely Petro-Suisse Ltd., solely to do the job" (*id.*). Chalfin agreed at his deposition that the word "solely" was inserted by Gasarch because he wanted to "make it very clear from the outset that they were only interested in retaining us to work with Laurus," and that Petro-Suisse Ltd. was interested in a "targeted retention" (Marx Aff.

Exhibit C, Chalfin Dep. at 173). He stated that this insertion was “to make it very clear that this was just for the transaction we were about to introduce them to” (*id.* at 196). Chalfin also attested that Blast was taken out of the draft engagement agreement, “because they were not going to be involved in the transaction” (*id.* at 181-182), and because “[w]e weren’t introducing Petro-Suisse to Blast” (*id.* at 191).

After the parties entered into the Engagement Agreement, Chalfin prepared a Powerpoint presentation as a visual presentation for the conference call in which Iconoclast was to introduce Wampler to Brendan Phelan and David Grin, both of Laurus Capital Management (*id.* at 344). Petro-Suisse Ltd.’s goal was to obtain \$150 million or more in financing for its roll-up transaction involving M.D. Cowan, Inc., Burnsco and Premium (*id.* at 248-250, 334-336, 393; Marx Aff. Exhibit A, Gasarch Dep. at 75). Chalfin was aware that Blast had defaulted on its loan from Laurus Master Fund, Ltd. regarding the Blast rigs, and that “Laurus’s” goal was to find someone to take the rigs, allowing Laurus Master Fund, Ltd. to keep the same note terms, and just replacing Blast with another entity on the debt (Marx Aff. Exhibit C, Chalfin Dep. at 142-143, 261-262). Thus, the Powerpoint presentation included both the roll-up financing sought by Petro-Suisse Ltd., and a disposition of the Blast loan (Marx Aff. Exhibit G). According to Chalfin, the unloading of the Blast loan was going to be like a “horse trade” that Petro-Suisse might have to take on to get the financing for the roll-up transaction (Marx Aff. Exhibit C, Chalfin Dep. at 385-386, 450). Brendan Phelan of Laurus Capital Management attested that he communicated with Wampler and Gasarch that Laurus would consider the Petro-Suisse roll-up only after it took care of the Blast rigs (Marx Aff. Exhibit M, Phelan Dep. at 214-215).

Chalfin and Kahn were not included in the conference call between Wampler and Grin (Hackell Aff. Exhibit 14, Chalfin Dep. at 366). Iconoclast asserts that thereafter it was frozen out of any additional negotiations between Petro-Suisse Ltd. and Laurus Capital Management.

On February 9, 2007, Gasarch sent a letter to Iconoclast terminating the Engagement Agreement (Hackell Aff. Exhibit 1C).

On March 29, 2007, Iconoclast brought this action against Petro-Suisse Ltd. for breach of contract, anticipatory breach, seeking a declaratory judgment on the contract, and for fraudulent inducement, and against Wampler for fraudulent inducement and tortious interference with contract.

A transaction closed regarding the Blast rigs in two stages. First, on April 16, 2007, Laurus Master Fund, Ltd. loaned \$36.5 million to Boom Drilling LLC (Boom), secured by existing Boom-owned oil rigs. On May 11, 2007, Laurus Master Fund, Ltd. obtained the right to the Blast rigs under an asset purchase agreement, filed in bankruptcy court in the Southern District of Texas (Hackell Aff. Exhibit 42), because Blast was in bankruptcy, and Laurus Master Fund, Ltd. was the secured lender for the \$40.6 million loan. Laurus Master Fund, Ltd. then appointed Boom as its designee (Hackell Aff. Exhibit 43). On May 14, 2007, Blast and Eagle Domestic Drilling Operations LLC executed a bill of sale for the Blast rigs to Boom (Marx Aff. Exhibit H). Boom then executed a secured note in favor of Laurus Master Fund, Ltd. for \$40.6 million to purchase the Blast rigs (Hackell Aff. Exhibits 36-39, 42-44, Transaction Documents). Boom was 80% owned by High Plains Drilling Company, Inc. (High Plains), and 20% owned by Boom management. High Plains was 100% owned

by Petro-Suisse Energy Services Ltd. In addition, in the transaction that closed, Laurus Master Fund, Ltd. received warrants to purchase up to 667 shares (25%) of stock of High Plains.

While this transaction was going forward, Iconoclast sought an attachment, and the defendants cross-moved to dismiss the complaint. The attachment motion was denied by me on the ground that Iconoclast failed to demonstrate a probability of success on the merits of its claim that the Engagement Agreement would be applicable to the transaction that finally came to fruition (Hackell Aff. Exhibit 5, Sept 21, 2007 Decision at 12). On defendants' pre-answer, pre-discovery motion to dismiss, the claims for anticipatory breach (second claim), fraudulent inducement (third claim), and punitive damages (sixth claim), were dismissed, leaving three surviving claims for breach of contract, a declaratory judgment and tortious interference (*id.* at 17-18).

Both parties now seek summary judgment on the claim for breach of contract, and defendants also seek dismissal of the declaratory judgment and tortious interference claims.

The plaintiff's motion is denied, the defendants' cross motion is granted and the complaint is dismissed.

The central issue in this action is whether the Engagement Agreement applies to the transaction which came to fruition on May 14, 2007 between Laurus Master Fund, Ltd. and Boom with regard to the Blast rigs, that is, whether a "Transaction or a series of related Transactions" as defined therein occurred between Petro-Suisse Ltd. and Laurus Family of Funds LLC, as the Engagement Agreement required.

Summary judgment is appropriate where an action turns on the construction of a contract, and the contract language is unambiguous (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004][construction of unambiguous contract is matter of law for disposition by court]; *Namad v Salomon Inc.*, 74 NY2d 751 [1989]). “When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document . . .” (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003] [citations omitted]). The writing should be enforced according to its terms, without recourse to extrinsic evidence to create ambiguities not present on the face of the document (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). “Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement” (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 409 [1st Dept 2009], quoting *American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]). In determining whether an agreement is ambiguous, the inquiry is “whether the agreement on its face is reasonably susceptible of more than one interpretation” (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The language of a contract is not ambiguous simply because the parties urge different interpretations (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]; see *Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]; *Moore v Kopel*, 237 AD2d 124, 125 [1st Dept 1997]).

The Engagement Agreement is clear and unambiguous, and may be interpreted as a matter of law. It has a definite and precise meaning that cannot reasonably be misunderstood. This agreement entitles Iconoclast to a 4% investment banking fee “solely

in connection with” a “Transaction,” which may be effected in one transaction or a series of transactions. The term “Transaction” is specifically defined as “the possible acquisition, merger, consolidation, asset purchase, reorganization or other business combination” between “Petro Suisse Ltd., a Barbados Company (the ‘Company’)” and “Laurus Family of Funds LLC (the ‘Target’)” on terms and conditions satisfactory to Petro Suisse Ltd., or the “acquisition of effective control over the business affairs of any of [Laurus Family of Funds LLC’s] businesses through a management services agreement or similar arrangement” (Hackell Exhibit 1A). Thus, to entitle Iconoclast to a fee, the “Transaction” that closes must involve a transaction between Petro Suisse Ltd., as the “Company,” and Laurus Family of Funds LLC, as the “Target.” In addition, the fee is earned “solely in connection with,” an acquisition, merger, consolidation, asset purchase, reorganization or other business combination with Laurus Family of Funds LLC. The Engagement Agreement also provided that it was the entire agreement between the parties, and that no modification or waiver of its terms would be binding unless approved in writing by both parties.

There is no dispute that the transaction that closed on May 14, 2007, was a transaction or series of transaction between Laurus Master Fund, Ltd., as the secured lender, and Boom, as the borrower, with regard to the Blast oil rigs, as well as an additional loan transaction in which Laurus Master Fund, Ltd. loaned Boom \$36.5 million secured by Boom’s own oil rigs. Petro Suisse Ltd. was not a party to the transaction, and Laurus Family of Funds LLC was not a party to it. The Engagement Agreement clearly defined the parties as “Petro Suisse Ltd., a Barbados Company, (the ‘Company’)” and “Laurus Family of Funds LLC (the ‘Target’),” and did not provide that it would include any affiliates of either of those

specifically named parties. “[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d at 475, quoting *Reiss v Financial Performance Corp.*, 97 NY2d at 199]). To read this provision, as Iconoclast argues, as covering a transaction with any of the Laurus entities, and with any entity related to Petro Suisse Ltd., would require adding terms that would distort the meaning of the words used. This would make a new engagement agreement between the parties, one would be much broader than that to which the parties agreed. In Chalfin’s own words, this was a “targeted retention” for a specific transaction between the parties named. If the parties had intended to make the engagement apply to any entities related to the specifically names parties, they could have negotiated and included such a provision, but they did not do so (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d at 476). These parties were sophisticated business persons, negotiating at arm’s length, and are bound by the unambiguous agreement that they entered into (*see 200 Genesee St. Corp. v City of Uica*, 6 NY3d 761, 762 [2006]; *Namad v Salomon Inc.*, 74 NY2d at 753).

The drafts of the agreement reinforces this interpretation. In the third version of the agreement, Iconoclast deleted Blast’s name as the Target, instead identifying the Target company as “Laurus Family of Funds LLC” (*compare* Hackell Exhibits 1A and 19). Chalfin himself testified that Blast was taken out of the draft agreement, “because they were not going to be involved in the transaction” (Marx Aff. Exhibit C, Chalfin Dep. at 181-182). In addition, Gasarch’s insertions in the drafts further reinforce that the engagement was “for a singular specific purpose on behalf of a singular specific company” (Marx Aff. Exhibit A,

Gasarch Dep. at 176). He inserted the words “Ltd., a Barbados Company” after Petro Suisse to make it very clear which was the party on Petro Suisse’s side of the transaction (*id.* at 165-166). Gasarch also inserted the word “solely,” which clearly limited the agreement to the transactions defined in the next clause. He testified that this was to make it clear that it was not a broad engagement on behalf of all Wampler interests, but “[s]olely Petro-Suisse Ltd., solely to do the job” (*id.* at 167). Chalfin confirmed this by testifying that it was a “targeted retention” (Marx Aff. Exhibit C, Chalfin Dep. at 173). Thus, the undisputed surrounding circumstances and apparent purpose for which the provision was drafted, as well as a reasonable reading of the plain language of the agreement, lead to the conclusion that the parties to the “Transaction” must be Petro-Suisse Ltd. and Laurus Family of Funds LLC, and that it must be solely in connection with an acquisition, merger, or asset purchase, etc. of Laurus Family of Funds LLC (*see Gruppo, Levey & Co. v ICOM Info. & Communications, Inc.* 2003 WL 21511943, *6 [SD NY 2003], *affd* 126 Fed Appx 45 [2d Cir 2005] [court must take note of circumstances surrounding drafting of contract and purpose for which drafted]; *see also Crowley v VisionMaker, LLC*, 512 F Supp 2d 144, 152-153 [SD NY 2007] [court will not ignore contract term which clearly limits scope, holding plaintiff not entitled to fee for helping to close transaction that did not fall within transaction definition]).

The right of Laurus Master Fund, Ltd. to take possession of the Blast rigs from Blast in the event of a default was not an asset of Laurus Family of Funds LLC, as required to fit within the definition of “Transaction.” The Engagement Agreement does not cover a transaction by Boom, or any other alleged Wampler-affiliated entity besides Petro-Suisse Ltd. It also does not cover a transaction with Laurus Master Fund, Ltd. or other Laurus-

affiliated entity beside Laurus Family of Funds LLC. It does not cover the acquisition of Blast's rigs.

The Engagement Agreement is reasonably susceptible of only one interpretation, which can be determined from the face of the contract. Therefore, there is no basis to consider extrinsic evidence to create an ambiguity in the clear, complete agreement (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d at 163 [evidence outside four corners of contract as to what was really intended but misstated or unstated is inadmissible to add to or vary writing]; *Intercontinental Planning, Ltd. v Daystrom, Inc.*, 24 NY2d 372, 379-380 [1969] [finder's fee contract clear, transaction between different parties did not fall within its provisions, summary judgment to defendant]). The written and oral discussions and negotiations regarding the Blast rigs, which overlapped the larger roll-up transaction negotiations, are not evidence that the Engagement Agreement was ambiguous about the definition of "Transaction." Iconoclast's argument, I earlier found the Engagement Agreement ambiguous on the previous motion to dismiss, is wrong. The prior decision did not conclude that there was an ambiguity. Rather, the motion was denied on the ground that the documentary evidence submitted at that time, on a pre-answer, pre-discovery motion, did not establish that the contract bound only Petro-Suisse Ltd. The evidence submitted with this summary judgment motion, however, including the earlier drafts with changes by both parties, as well as their supporting deposition testimony, discussed above, warrants the conclusion that the agreement was unambiguous, and that the parties intended that it was only for a transaction between Petro-Suisse Ltd. and Laurus Family of Funds LLC, and not any related or affiliated companies of those entities.

Iconoclast's reliance upon Wampler e-mails, dated December 12, 2006 and January 4, 2007, to urge that defendants had reiterated to Iconoclast, while they were negotiating with "Laurus," that the proposal under discussion was covered by the agreement, is unpersuasive (Hackell Aff. Exhibit 1B). Again, there is no reason to refer to extrinsic evidence here. To the extent that Iconoclast is arguing some type of waiver by defendants of the requirement that the transaction be between the designated parties, this argument is unpersuasive. A waiver is the intentional abandonment of a known right or advantage, which, but for the waiver, the party would have enjoyed (*Gruppo, Levey & Co. v ICOM Information and Communications, Inc.* 2003 WL 21511943, *8). The waiver "must be unmistakably manifested and not simply inferred from a doubtful or equivocal act" (*id.*, citing *Orange Steel Erectors v Newburgh Steel Prods.*, 225 AD2d 1010, 1012 [3d Dept 1996]; *Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 AD3d 338, 340 [1st Dept 2006]). The statement "You are covered as to your agreement" does not rise to the level of an unmistakably manifested intention to waive the condition that the fee is only earned if the "Transaction" involved the specifically named parties, and the acquisition of assets of the specifically named "Target." Iconoclast fails to point to any undisputed evidence that suggests that Petro-Suisse Ltd. indicated that it would pay an engagement transaction fee for a deal that did not involve the parties, and did not involve the named Target's assets. Thus, there was no waiver.

I have considered the plaintiff's remaining arguments and find[✓] them to be without merit. Therefore, Iconoclast fails to demonstrate that Petro-Suisse Ltd. breached the Engagement Agreement, and the breach of contract and declaratory judgment claims are dismissed.

Iconoclast's claim for tortious interference with contract also is dismissed. A claim for tortious interference requires the existence of a valid contract, defendant's knowledge of that contract, intentional interference, a resulting breach, and damages (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]). Breach of contract is an essential element of this claim (*Murataj v Dream Dragon Prods., Inc.*, __ AD3d __, 2010 NY Slip Op 03162, 2010 WL 1541298 [1st Dept 2010]; *Marks v Smith*, 65 AD3d 911, 916 [1st Dept 2009]). As determined above, there is no breach of contract. Therefore, this claim fails as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied, and the defendants' cross motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: May 14, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED