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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

In re:	§	**Chapter 11**
	§	
VISTA PROPPANTS AND LOGISTICS, LLC, ET AL.,[1]	§	**Case No. 20-42002-ELM-11**
	§	
Debtors	§	**Jointly Administered**
	§	
MAALT, LP,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Adversary No. 20-04064-elm**
	§	
SEQUITUR PERMIAN, LLC,	§	**Removed from Cause No. CV19-003 in the 51st Judicial District Court, Irion County, Texas**
Defendant.	§	
	§	

RESPONSE TO DEFENDANT'S AMENDED MOTION FOR CONTINUANCE AND SUPPORTING BRIEF

[1]The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); VPROP Operating, LLC (0269) ("VPROP"); Lonestar Prospects Management, L.L.C. (8451) ("Lonestar Management"); MAALT Specialized Bulk, LLC (2001) ("Bulk"); Denetz Logistics, LLC (8177) ("Denetz"); Lonestar Prospects, Ltd. (4483) ("Lonestar Ltd."); and MAALT, LP (5198) ("MAALT"). The location of the Debtors' service address is 4413 Carey Street, Fort Worth, TX 76119-4219.

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TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

Plaintiff, Maalt, LP ("Maalt") and Third Party Defendant, Vista Proppants and Logistics, LLC ("Vista") file this Response to Defendant's Amended Motion for Continuance (Doc. 95), and in support shows the Court as follows:

NO GROUNDS FOR A CONTINUANCE EXIST

(A) The current scheduling order was well thought out by the Court and provided ample time to prepare this case for trial.

This case is now over two years old. It was filed in February 2019 and continued unabated until the filing of the underlying Chapter 11 cases in June 2020. Three months later it was removed to this Court, and the parties have had since September 4, 2020 to complete preparation for trial. While the Covid-19 pandemic that began in March 2020 had certain impacts on pending court cases, by September 2020 litigants and courts had adapted to teleconferencing for depositions, hearings, and trials, and had implemented appropriate safety protocols. Thus, but for a brief period of March through August 2020, the parties have had ample time to prepare this case for trial.

When the Court held the scheduling conference in this case and implemented the current Scheduling Order (Doc. 36), it was advised that the parties had pending motions for summary judgment that were filed in the state court prior to removal.[2] The Court was also advised that Maalt intended to file an additional motion for summary judgment at the close of discovery. After giving thought to that, the Court instructed the parties to refile their state court motions on this Court's docket, granted each party leave to file one additional motion, and adequately provided for those filings in the Scheduling Order. The Court stated during the conference that requiring the additional motions for summary judgment to be filed by March 1, 2020 and heard by April 13,

[2] See Doc. 101 at p. 30.

2020 would allow the Court adequate time to rule on such motions before the May docket call set by the Court.

The Court also stated during the October 19, 2020 scheduling conference that in setting the case for docket call on May 3, 2021 that it was setting "a firm setting for trial":

> But, again, so I'll just caution everyone that I'm going further out to that date, really, I think, as an accommodation mostly to deal with the Jewish holiday season, but with the corresponding understanding I don't want anybody to believe that, you know, unless the parties are sort of collaboratively thinking that it needs to move, that that date would move. We would really be looking at taking care of business on that docket call date, and then getting a firm setting for trial set down at that point in time . . ..[3]

Fast forward to the hearing held by the Court on February 16, 2021 with respect to the Defendant's second motion for summary judgment. During that hearing, the Court informed the parties that it would have a ruling on the three pending motions within two to four weeks. A ruling within that time would be consistent with the Court's reasoning with respect to the deadlines and settings set forth in the Scheduling Order. A ruling within that time would also not impede the parties' preparation for trial in any manner, but would aid in that preparation.

(B) Maalt's third summary judgment motion does not require a continuance.

As mentioned above, Maalt informed the Court during the scheduling conference that it intended to file a final motion for summary judgment at the close of the discovery period. In light of that, the Court's Scheduling Order set a deadline for all fact discovery of February 28, 2021. It also set a deadline to file that additional motion by the next day, March 1, 2021. Maalt did so.

Maalt's final summary judgment motion is set for hearing on April 13, 2021, and addresses matters totally separate and distinct from those previously filed. It does not overlap the prior

[3] Doc. 101 at p. 38-39.

motions in any respect. The motion attacks one distinct element of Defendant's tort counterclaims as both claims potentially fall for the same reason[4]. It also addresses remaining affirmative defenses asserted by the Defendant that simply do not apply to this case (for example, the statute of frauds) or that do not have any factual support. None of the issues addressed by that motion are complicated, and are not dependent on any other pending motion. The pendency of that motion, does not warrant a continuation of the trial setting as it was timely filed and within the time the Court determined is should be filed in light of the current trial setting. This case is proceeding as scheduled, and there is no need for a continuance.

(C) Continuing the trial will not save money, but will increase the cost of this litigation.

Finally, the Defendant's claim that continuing the trial will save money is nothing more than a last gasp effort to avoid trial in this case. Delaying trial will do nothing but ***increase*** the cost of this litigation, especially if Defendant wants to engage in appealing this case on a piecemeal basis (see below). It also now appears that Defendant wants to continue engaging in fact discovery even though the fact discovery deadline has passed which will certainly increase the cost of this litigation. (See, Doc. 100 filed on March 10, 2021.) The billing records provided by Defendant in January, 2020 reflect that Defendant's attorneys billed their client $730,000 through that time. Now contending that it wants to save money is disingenuous at best when it wants to engage in activities that will continue to drive up the cost of this litigation. Defendant's argument does not support a continuance of the trial.

[4] The claims fail for other reasons as well, but those are not included in the motion.

(D) This Court can conduct a trial without an unwarranted risk of Covid-19 infection.

In the last year, courts of all types and levels have devised means of conducting their business in light of the pandemic. Orders have been implemented to accommodate the risks of Covid infection, and yet continue the court's business in an orderly and efficient manner. People have learned to distance themselves from others, and have adopted to mask use when in public. Courts have erected barriers and created space within courtrooms in order to avoid unnecessary risks.

The trial in this case will be a bench trial. The courtroom will thus be able to accommodate the people that need to be in the courtroom at any given time. Maalt will have two lawyers and a company representative during trial, and it should be sufficient for Defendant to similarly staff the courtroom. Bench conferences will not be required since no jury will be present. Witnesses will be able to maintain social distancing in the halls of the court house as *the rule* will likely be in place. Masks can be worn as directed by the Court.

Governor Greg Abbott lifted all Covid restrictions in the State of Texas effective March 1, 2021, and declared that the State of Texas is now open for business. While Maalt and its attorneys do not believe that the risks of Covid-19 can be ignored at any level, and recognize that this Court is not governed by the Governor's decision, they do believe that a bench trial in this case can be conducted safely and efficiently in May 2021. It also appears that the Northern District of Texas now believes that as well. Special Order No. 13-18 entitled *COURT OPERATIONS UNDER THE EXIGENT CIRCUMSTANCES CREATED BY THE COVID-19 PANDEMIC* required the continuance of all trials set in 2020 until a date after January 1, 2021. That Order has not been extended to the best of the undersigned's knowledge. General Order 2020-14 issued by the

Bankruptcy Court contemplates live trials in adversary proceedings, and allows the Court discretion in the manner of handling live trials in those cases.

There is no need to wait on further vaccine availability or an end to the pandemic to conduct a trial. A trial of this case can be conducted safely and with little risk to the participants if they follow appropriate procedures and observe safety protocols.

(E) 28 U.S.C. § 158(d)(2) does not provide Defendant with a right to appeal a decision on a summary judgment motion.

Defendant contends as a basis for its request for a continuance that it may wish to appeal one or more of the Court's rulings on the motions for summary judgment filed by the parties pursuant to 28 U.S.C. § 158(d)(2). No party, however, has a *right* to appeal a summary judgment decision under that statute. To the contrary, the circumstances giving rise to an appeal under that statute demonstrate that such appeals should be limited and only allowed in exceptional circumstances. None of those circumstances exist in this case.

In order to prosecute an appeal of an interlocutory order under Section 158(d)(2), the bankruptcy court must authorize the appeal either on its own motion, the motion of a party, or a joint motion, but only if the following circumstances exist:

- The order involves a question of law that is a matter of first impression or involves a matter of public importance;
- The order requires resolution of conflicting precedential decisions; or
- An appeal would materially advance the progress of the case.

The first and second circumstances do not exist in this case. Neither party has pointed to an issue raised by the summary judgment motions that involves a legal matter of first impression

or conflicting prior court decisions that are precedential. Nor is there a matter of public importance involved in this private business dispute.

The third circumstance does not exist either. Nothing raised by the motions for summary judgment requires an interlocutory appeal of a decision granting summary judgment, and the trial court's decision on every one of the motions can be addressed on an appeal of a final judgment. If the Defendant wishes to press for an appeal under the third circumstance, the current trial setting would not impede its right to do so. It can file a motion seeking an interlocutory appeal before trial, and if this Court is inclined to grant such a motion it can do so, and then stay this case pending the outcome of the appeal. In other words, it is premature to continue the current trial setting on the supposition that the Defendant may seek an interlocutory appeal and that the Bankruptcy Court would certify such an appeal.

It is also hard to see how an appeal of a partial summary judgment against the Defendant would advance the progress of this case. At best, it would impede the progress to allow a party to appeal every unfavorable interlocutory order. In fact, courts have held that appeal of such decisions as they are made does not materially advance the course of the litigation, but instead delays it. *Champion Intern. Corp. v. All American of Ashburn, Inc*., 45 B.R. 840, 842-843 (N.D. Ga. 1984). *See also, In re Conex Holdings, LLC*, 534 B.R. 606, 611-612 (D. Del. 2015) (even though grant of summary judgment in a preference action may impact 16 other preference claims, certification of an appeal would not materially advance the bankruptcy case); *In re Tetirick*, 84 B.R. 505, 507-508 (S.D. Ohio 1988).

The cases cited by Defendant do not support the proposition that it would be entitled to an interlocutory appeal if the Court rules against it on a motion for summary judgment. In *In re Paige*, 610 F.3d 865 (5th Cir. 2010), the motion seeking certification for an interlocutory appeal

was unopposed. Moreover, the motion was based on the fact that the appeal would advance the progress of the underlying bankruptcy case. In *In re Genon Energy, Inc*., 2018 WL 9708912 *3 (S.D. Tex. 2018), the appeal was certified in response to a joint motion. Further, it was an appeal from an order regarding claim objections, and the bankruptcy court agreed that a resolution of the appeal would materially advance the progress of the Chapter 11 cases. Neither case stands for the proposition that a party has a unilateral or automatic right to appeal a summary judgment order or that such would materially advance the progress of an adversary proceeding.

Insofar as there is no basis under 28 U.S.C. § 158(d)(2) for an interlocutory appeal of any ruling made by this Court on the pending motions for summary judgment, and because piecemeal appeals of the rulings would not materially advance this adversary or the underlying Chapter 11 cases, there is no reason to continue the trial of this case. Defendant's appellate rights are better served by an appeal of the final judgment of this Court rather that a series of appeals that would simply prolong the resolution of this adversary proceeding. Defendant's motion should therefore be denied.

(F) A September trial setting is likely no trial setting at all.

There is a good reason why Defendant chose September for its requested trial setting, and that is that a September trial setting, with docket call on September 13 will not likely result in a trial. During the last hearing in this case, the Court stated that it expects a rush of court business in the fall. Couple that with a setting in a month that is cut in half due to a holiday, and there is little likelihood that the Court would be able to conduct a trial in September. If not tried, the next likely setting would be in 2022 due to the November and December holidays. If the Court is otherwise inclined to postpone the trial setting for the reasons stated in Defendant's motion, then

a setting in July, with no extension of any deadlines other than those for the filing of pre-trial materials, should be sufficient.

Conclusion

Wherefore, Maalt prays that the Court deny Defendant's Motion for Continuance in its entirety.

DATED: March 17, 2021

Respectfully submitted,

By: */s/ James Lanter*
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ATTORNEYS FOR PLAINTIFF, MAALT, LP and THIRD-PARTY DEFENDANT VISTA PROPPANTS AND LOGISTICS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's electronic filing service on March 17, 2021.

/s/ *James Lanter*
James Lanter

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

In re:	§	**Chapter 11**
	§	
VISTA PROPPANTS AND LOGISTICS, LLC, ET AL.,	§	**Case No. 20-42002-ELM-11**
	§	
	§	
Debtors	§	**Jointly Administered**
	§	
MAALT, LP,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Adversary No. 20-04064-elm**
	§	
SEQUITUR PERMIAN, LLC,	§	**Removed from Cause No. CV19-003 in**
	§	**the 51st Judicial District Court, Irion**
Defendant.	§	**County, Texas**

ORDER ON SEQUITUR PERMIAN, LLC'S
MOTION FOR CONTINUANCE OF TRIAL SETTING

ON THIS DAY, the Court considered the Amended Motion for Continuance of Trial Setting filed by Sequitur Permian, LLC ("Sequitur") (Doc. 95), the response filed by Plaintiff, Maalt, LP and Vista Proppants and Logistics, LLC, and any reply. After giving consideration to the Motion and all related documents, the Court is of the opinion that the following orders should be entered.

IT IS THEREFORE ORDERED that Sequitur Permian, LLC's Amended Motion for Continuance of Trial Setting (Doc. 95) is denied.

END OF ORDER # #

Submitted by:

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