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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.,	§	**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.	§	
	§	

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S THIRD
MOTION FOR PARTIAL SUMMARY JUDGMENT

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RESPONSE TO EVIDENTIARY OBJECTIONS

The articles linked in footnotes 21 and 22 are not inadmissible hearsay. First, they are in effect press releases made by Sequitur. The statements made and information provided by Sequitur in the articles are not hearsay as they are covered by Federal Rule of Evidence 801(d). Second, the articles objectively report market information and fall within the hearsay exception in Federal Rule of Evidence 803(17). Finally, the articles are admissible under Federal Rule of Evidence 807. The trustworthiness of the articles is evidenced by the fact that Sequitur links to one of them in its own website in order to tout the acquisition.[1]

ARGUMENT AND AUTHORITIES

Sequitur's Fraudulent Inducement and Negligent Misrepresentation Counterclaims

At the onset, it is important to note that Maalt, LP ("Maalt") does not agree with the narrative of the facts contained in Sequitur Permian, LLC's ("Sequitur") response or Sequitur's assertions that Maalt made any type of actionable false representations; however, since Maalt's motion only addresses the single element of justifiable reliance in the context of Sequitur's fraudulent inducement and negligent misrepresentation claims, this reply will be limited to a discussion of that element.

Sequitur's claims are based on two allegations: (i) that on August 3, 2018, Maalt stated that it had another party that would enter into an agreement for the use of the Barnhart Facility; and (ii) that after the LOI was signed on June 5, 2018, Maalt encouraged Sequitur to partner with Jupiter

[1] www.sequiturenergy.com/news/

to move crude by rail.[2] As a matter of law, Sequitur could not justifiably rely on such representations, even if true.

A. The Letter of Intent disavows reliance by Sequitur on any alleged representations.

The LOI specifically provided for the parties to conduct due diligence that "had not yet been conducted and completed." Under the LOI, neither party would be bound to any agreement until they did their own due diligence regarding the "feasibility of the contemplated Transaction" *to their satisfaction*.[3]

Sequitur actually conducted extensive due diligence with respect to deciding whether to do business with Jupiter. And, Maalt was not involved in that due diligence. According to Braden Merrill, Sequitur conducted at least the following due diligence:

- Maalt introduced Sequitur to Jupiter by an email and phone call;[4]
- Sequitur and Jupiter then had a meeting in Sequitur's office without Maalt;[5]
- During one of those meetings, Sequitur inquired into Jupiter's current business, its destination points for crude-by-rail, and its railroad relationships;[6]
- Sequitur conducted internet due diligence into Jupiter;[7]
- Braden Merrill conducted his own due diligence including obtaining financials from Jupiter;[8]

[2] Doc. 111-1 at ¶22.

[3] Maalt Appx. (Doc. 91-1) at 038, Section 6 (emphasis added).

[4]Maalt Appx. (Doc. 91-1) at 014 (Merrill dep. 44:2-14).

[5]Maalt Appx. (Doc. 91-1) at 014 (Merrill dep. 44:15 - 45:17).

[6] Maalt Appx. (Doc. 91-1) at 031 (Merrill dep. 154:13 – 155:12).

[7] Maalt Appx. (Doc. 91-1) at 014-15 (Merrill dep. 45:18 - 46:8).

[8] Maalt Appx. (Doc. 91-1) at 015 (Merrill dep. 47:20 - 49:7).

- Sequitur had a series of further meetings and phone calls with Jupiter that did not include Maalt;[9]

- Other than an introductory phone call, Sequitur did not obtain any information pertaining to Jupiter from either Jon Ince or Chris Favors;[10] and

- Sequitur enlisted its consultant, Mr. Falls at Enmark, to investigate Jupiter, and Mr. Falls told Sequitur that Jupiter did a lot of transportation, but did not have a good balance sheet or a reputation like Shell.[11]

When the TSA was signed by Sequitur, it was still working on a deal with Shell which demonstrates that it had not decided to do business with Jupiter and was not relying upon any Maalt representations regarding Jupiter:

> Q. August. And then what did you do?
>
> A. I kept talking to them [Shell]. But – so basically, I – when we signed our TSA with Vista, I told – or Vista Maalt. I told Vista Maalt that I needed would Shell – that I needed to give one – Shell one more week in order to – because I owed them that, before signing on with Jupiter and then I told Jupiter that and we all went to lunch that day [the day the TSA was signed]. And then – so when I got done with the meeting I called Shell and told them that you had one week, otherwise we told Vista Maalt and Jupiter that we are going to go with Jupiter.[12]

When it eventually decided to do business with Jupiter sometime after the TSA was signed, Braden Merrill admitted that Sequitur relied upon Jupiter's assurances that it could do what Sequitur desired, not Maalt's alleged representations:

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[9] Maalt Appx. (Doc. 91-1) at 016 (Merrill dep. 51:10 - 21).

[10] Maalt Appx. (Doc. 91-1) at 015 (Merrill dep. 47:20 - 49:7).

[11] Maalt Appx. (Doc. 91-1) at 029 (Merrill dep. 146:22 149:1).

[12] Maalt Appx. (Doc. 91-1) at 012 (Merrill dep. 37:11-24).

> Q. Okay. And so you went ahead and signed this agreement [the TSA] without having a JV partner, right?
>
> A. **We were assured *by Jupiter* that they – they would take Shell's shoes if – if they wanted to step out.**[13]

From that it is clear that Sequitur was relying on the possibility that Shell would come through or Jupiter's assurances if it did not. It was not relying on anything Maalt may have said.

Under the terms of the LOI, Sequitur not only disavowed any reliance on any discussions between the parties, but it actually conducted extensive due diligence into whether or not Jupiter would be a suitable business partner. It knew from its own diligence, and that of its consultant, that moving forward with Jupiter was risky, but chose to do so sometime after signing the TSA.

B. Lack of justifiable reliance under *JPMorgan Chase Bank, NA v. Orca Assets, GP, LLC*, 546 S.W.3d 648 (Tex. 2018).

In responding to Maalt's motion, Sequitur takes two approaches in an attempt to avoid taking responsibility for its own actions. First, it contends that Maalt did not identify any "red flags." Second, it contends that it is not a sophisticated business entity since it had not shipped crude-by-rail in the past. Neither of those assertions are supported by the Texas Supreme Court's opinion in *JPMorgan Chase Bank, NA v. Orca Assets, GP, LLC*, 546 S.W.3d 648 (Tex. 2018).

In *Orca*, the red flags noted in the opinion were not only flags relating to the admittedly false statement at issue, but were also flags that arise in the course of negotiating oil and gas leases.[14] The court pointed out that one of the red flags was the parties' letter of intent itself which noted that Orca would use diligence in assuring itself that the mineral leases it sought from

[13] Maalt Appx. (Doc. 91-1) at 013 (Merrill dep. 38:9-13) (emphasis added).

[14] *JPMorgan Chase Bank, NA v. Orca Assets, GP, LLC*, 546 S.W.3d at 655.

JPMorgan conveyed land that was open for lease. After the letter of intent was signed and during the due diligence period, Orca stopped checking the property records even though it had previously checked the records daily. Had it continued checking, it would have discovered newly filed leases for the same land it was seeking.

The Texas Supreme Court made it clear in *Orca* that no single flag is dispositive, but the courts must "view the circumstances in their entirety while accounting for the parties' relative levels of sophistication."[15] Thus, this Court must consider overall business sophistication, and not just one small part. Sequitur does not dispute that it is a sophisticated business entity, but merely claims that it had never shipped crude by rail in the past. By the same token, Maalt had never shipped crude by rail either, so they were both equally inexperienced in that particular part of the industry.[16] But, as in *Orca*, Sequitur is sophisticated based on the fact that it is composed of knowledgeable, skilled and experienced people, hired highly qualified professionals to advise it, has previously engaged in very sophisticated business transactions, and was engaging in a complicated and risky deal that could make it many millions of dollars. The summary judgment record shows without doubt that Sequitur is a "sophisticated business entity" of the type described in *Orca*.[17]

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[15] *Id*. at 656.

[16] Maalt did have experience through its sister companies shipping sand by rail and procuring rail cars, and offered to provide consulting services to Sequitur based on that experience. Sequitur, however, rejected the offer and never entered into a consulting agreement with Maalt. Maalt Appx. (Doc. 91-1) at 020-021 (Merrill dep. 77:14 – 78:19).

[17] *Id*. at 656.

The *Orca* court next discussed that the "red flags" arising in the context of the entire transaction determined that reliance on JPMorgan's admittedly false statement was not warranted. The court said that if Orca remained skeptical at the time of closing of the availability of the leases it sought, then it could not blindly rely on JPMorgan's representations since "[a] party must protect its own interests through the exercise of reasonable diligence, which 'is not excused by mere confidence in the honesty and integrity of the other party.'"[18]

Turning to the present case, Sequitur's reliance on representations such as Favor's dealer or sales talk and Ince's statement that Jupiter is the "real deal" is not reasonable or justified when the circumstances as a whole are examined. Before signing the TSA, Sequitur engaged in extensive due diligence including discussions with Jupiter (without Maalt's involvement) to determine whether it was a good fit for Sequitur's agenda. It acquired Jupiter's financial statements, and had them reviewed by its consultant, and arrived at the conclusion that its financial statements were not strong.[19] Sequitur's consultant warned it against doing business with Jupiter.[20] Sequitur knew that there would be a lot of hurdles if they decided to do business with Jupiter.[21] It knew Maalt had not done business with Jupiter previously. Sequitur was also told by Maalt that obtaining trains and railcars would be a difficult thing to do.[22] In light of Sequitur's apparent

[18] Id. at 657.

[19] Maalt Appx. (Doc. 91-1) at 015 - 016 (Merrill dep. 49:19 – 50:10).

[20] Maalt Appx. (Doc. 91-1) at 029 (Merrill dep. 146:22 – 149:1).

[21] Maalt Appx. (Doc. 91-1) at 015 - 016 (Merrill dep. 49:19 – 50:10).

[22] Sequitur Appx. (Doc. 111-2) at 15 (Merrill dep. 246:13 – 247:1).

skepticism as to whether it would move forward with Shell or Jupiter, it could not blindly rely on the type of vague and generic statements it says were made by Maalt.

Those things, among others, presented "red flags" with respect to whether Jupiter would be capable of providing the service Sequitur sought and whether Jupiter was the "real deal." If it did not do so, Sequitur certainly could have asked Jupiter if it had rail cars to move Sequitur's oil, if it had a contract with the railroads, and if everything was in place to move Sequitur's oil before signing the TSA. Or, it could have simply refused to sign the TSA if it had not contracted with the type of joint venture partner it sought. *CBH Equity, LLC v. Murphy Oil USA, Inc.*, 333 F.Supp. 664, 670 (S.D. Tex. 2018) ("Absent any other protective measure, [plaintiff's] recourse was to postpone or refuse to close the transaction unless and until Wal-Mart executed the easement"). Failing to do either, Sequitur was not protecting its own interests. Sequitur could not blindly rely on the vague and generalized statements allegedly made by Maalt when it had been engaged in its own due diligence as required by the LOI, had been shopping for a JV partner for months without success, and was certainly capable of looking out for its own interests.

The cases cited by Sequitur to support its claim that it could blindly rely on Favor's dealer or sales talk are not dispositive and are factually different from the case here. In *In re Arnette*, 454 B.R. 663, 668 (N.D. Tex. 2011), the representations at issue centered around the defendant's promise of his own future performance under an investment scheme. The court held that despite the sophistication of the plaintiff and any red flags, the plaintiff could not possibly have made any inquiry that would have enabled it to determine whether the defendant would perform in the future as he represented. Both the facts and the nature of the fraud claim are decidedly different in

Arnette. In *Nwankpa v. Obilom*, 2017 WL 3902605 (Tex.App.-Austin 2017, no pet.), the issue was whether the plaintiff was able to discover her business partner's representations regarding the business' accounts receivable and value. The issue was whether the plaintiff, who had no accounting experience, was justified in relying on her partner's representations when her partner directed and had complete control of the financial side of the business. The court affirmed the jury's finding of no fraud, and simply allowed the finding of reliance on the negligent misrepresentation claim to stand. In *McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Ins. Co*., 241 F.Supp.3d 737 (N.D. Tex. 2017), the court concluded simply that the facts in that case made summary judgment a close call, and based on the evidence *in that case* fact questions existed to be resolved at trial. None of those cases involved sales talk or matters of opinion such as those alleged by Sequitur. In addition, the facts underlying Maalt's motion on the justifiable reliance element are not in dispute; therefore, summary judgment is warranted.

C. Sequitur spent "millions of dollars" on the project *before* the representations were allegedly made.

Sequitur contends that it spent "millions of dollars" in equipment purchases and other costs in reliance on the representations allegedly made by Maalt.[23] What Sequitur does not say in its response, is that the "millions of dollars" spent for equipment was spent before the Letter of Intent was signed and well before the TSA was signed. It was also spent before the alleged representations were purportedly made.

[23] Doc. 111-1 at ¶17.

In its response, Sequitur states:

> *During the term of the LOI*, Maalt kept in contact with Jupiter and encouraged them to approach Sequitur regarding partnering with Sequitur to provide the necessary rail and other transportation logistics for the Terminal. Favors recalled telling Merrill that if Sequitur needed a partner to provide the railcars that Jupiter would be capable of handling the logistics.[24]

Further, Sequitur states that Favor's "pressuring" Sequitur to sign the TSA by telling it that another party was willing to sign a contract for the Barnhart Facility *occurred on August 3, 2018*.[25]

As shown by Maalt's summary judgment evidence and Sequitur's admission, Sequitur spent those millions of dollars before the time it alleges the representations were made. By its own admission, Sequitur could not have relied on those representations when it spent that money.[26]

Sequitur's Affirmative Defenses

Maalt refers the Court to original brief (Doc. 91-3) for its position on affirmative defenses addressed by its motion.

PRAYER

WHEREFORE, Plaintiff, Maalt, L.P., prays that its Third Motion for Partial Summary Judgment be granted and that the Court award all other relief to which they are entitled.

Respectfully submitted,

By: */s/ James Lanter*

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[24] Doc. 111-1 at ¶12 (emphasis added).

[25] Doc. 111-1 at ¶13.

[26] Maalt Appx. (Doc. 91-1) at 136 – 139.

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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 April 5, 2021.

/s/ *James Lanter*
James Lanter