Docket #0121 Date Filed: 4/13/2021

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

**The following constitutes the ruling of the court and has the force and effect therein described.**

**Signed April 13, 2021**

**United States Bankruptcy Judge**

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 |
| | § | |
| | § | Jointly Administered |
| Debtors. | § | |
| | § | |
| MAALT, LP, | § | |
| | § | |
| Plaintiff, | § | |
| v. | § | Adversary No. 20-04064 |
| | § | |
| SEQUITUR PERMIAN, LLC, | § | |
| | § | |
| Defendant/Third-Party Plaintiff, | § | |
| v. | § | |
| | § | |
| VISTA PROPPANTS AND LOGISTICS, LLC, | § | |
| | § | |
| | § | |
| Third-Party Defendant. | § | |

**ORDER SUSTAINING IN PART, AND OVERRULING IN PART, PLAINTIFF'S OBJECTIONS TO DEFENDANT'S SUMMARY JUDGMENT EVIDENCE**

Before the Court for determination are the *Objections to Defendant's Summary Judgment Evidence* [Docket No. 69] (the "**Objections**") filed by Plaintiff MAALT, LP (the "**Plaintiff**").

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Pursuant to the Objections, the Plaintiff objects to certain portions of the following documents submitted by Defendant Sequitur Permian, LLC (the "**Defendant**") as summary judgment evidence in support of its *Response in Opposition to Plaintiff's Amended Second Motion for Partial Summary Judgment* [Docket No. 65] (the "**Defendant's Response**"): (a) the deposition of Braden Merrill [Docket No. 65-1, Exh. A (RAPX 1-23)] (the "**Merrill Deposition**"); (b) the Declarations of Graham Brisben (the "**Brisben Declaration**") and Roger H. Nelson (the "**Nelson Declaration**") and the expert report attached to each (the "**PLG Report**") [Docket No. 65-1, Exh. B (RAPX 24-64)]; and (c) the depositions of Travis R. Morris [Docket No. 65-1, Exh. F (RAPX 123-151)] (the "**Morris Deposition**"). Defendant has filed its *Response to Plaintiff, MAALT, LP's Objections to Defendant's Summary Judgment Evidence* [Docket No. 75] (the "**Response**") in opposition to the Objections.

Having now reviewed and considered the Objections and the Response; and the Court having jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157; and venue of the proceeding in the Northern District of Texas being proper pursuant to 28 U.S.C. § 1409; and the proceeding constituting a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (O) inasmuch as the causes of action asserted in the proceeding are intertwined with the claims asserted by the Defendant against the Plaintiff and Third-Party Defendant Vista Proppants and Logistics, LLC (the "**Third-Party Defendant**") in connection with their bankruptcy cases (and the Plaintiff's and the Third-Party Defendant's objections thereto, which have been consolidated with this adversary proceeding for trial, *see* Docket No. 41); and even if partially non-core in nature, the Plaintiff and the Defendant having consented to the Court's entry of a final order or judgment in the proceeding pursuant to 28 U.S.C. § 157(c)(2), *see* Docket Nos. 50 and 53; and for good and sufficient cause shown, it is hereby:

**ORDERED, ADJDUGED AND DECREED** that the Objections be and are hereby sustained in part, and overruled in part, as follows:

1. Plaintiff's objection to 35:20 – 36:9[1] of the Merrill Deposition is SUSTAINED with respect to 35:23 (beginning with "when they were") – 36:9, but otherwise OVERRULED.

2. Plaintiff's objection to 37:14 – 37:24 of the Merrill Deposition is OVERRULED.

3. Plaintiff's objection to 204:20 – 205:1 of the Merrill Deposition is SUSTAINED.

4. With respect to Plaintiff's objections to the Brisben Declaration, the Nelson Declaration and the PLG Report (collectively, the "**Expert Evidence**"), while the objections are somewhat scattershot, they can effectively be boiled down to the following three objections: (1) an objection to the use of an expert to interpret and summarize other evidence obtained in connection with the case or the parties' pleadings; (2) an objection to the opinions expressed on the last page of the PLG Report with respect to legal or mixed legal/factual issues; and (3) the lack of reliability of the opinions reached.

In relation to the first objection, pursuant to Federal Rule of Evidence ("**FRE**") 702, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if [among other things] the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). With this in mind, while the Court finds helpful Expert Evidence involving the logistics of transloading and shipping crude oil by rail and involving the particular rail lines and carriers relevant to the shipment of crude oil from the Permian Basin to the Gulf Coast, *see Kona Tech. Corp. v. Southern Pac. Transp. Co*., 225 F.3d 595, 611 (5th Cir. 2000) (supportive of reliance on experts for industry expertise helpful to resolution of issues in dispute), the Court does not find helpful any Expert Evidence that purports to provide an interpretation and/or summarization of other evidence obtained in connection with the case or the parties' pleadings. *See Highland Capital Mgmt., LP v. Bank of Am., N.A*., Civil Action No. 3:10-CV-1632-L, 2013 WL 4502789, at *5-8 (N.D. Tex. Aug. 23, 2013), *aff'd*, 574 Fed. Appx. 486 (5th Cir. 2014). The Court is capable of discerning the parties' positions from the pleadings and evaluating the other submitted summary judgment evidence without the need of an expert. Accordingly, the Court will sustain the first area of objection to the extent the Expert Evidence amounts to an interpretation and/or summarization of other evidence obtained in connection with the case or the parties' pleadings, with the implementation of such ruling specified below.

In relation to the second objection, to the extent the Expert Evidence advances legal conclusions, or mixed legal and factual conclusions, FRE 704 makes it clear that an opinion is not objectionable just because it embraces an ultimate issue in the case. *See* Fed. R. Evid. 704(a). Here, however, the Brisben Declaration and Nelson Declaration fail to include any evidence of Messrs. Brisben's and Nelson's skill, training or education in the field of law. Thus, putting aside the fact that the legal issues at stake in the litigation do not rise to such a level of complexity that the Court requires or desires expert evidence on such issues, *see* Fed. R. Evid. 702(a), given the lack of foundational support for the rendering of any opinions by Messrs. Brisben and Nelson that

[1] All references herein to particular page and line numbers of a deposition will following the format "{page}:{line}".

are wholly or partially legal in nature, the Court will also sustain the second area of objection, with the implementation of such ruling specified below. *See* Fed. R. Evid. 702 (introductory clause with respect to gatekeeping requirement of witness's qualification to testify as an expert by skill, training and education); *Highland Capital Mgmt. v. Bank of Am*., 574 Fed. Appx. 486, 491 (5th Cir. 2014) (affirming the district court's conclusion that "the [expert] report is excludable because it makes several legal conclusions reserved for the court").

Finally, in relation to the third objection focused on the reliability of the Expert Evidence, because resolution of the first and second objections results in the exclusion of the very types of opinions complained of by the Plaintiff, the third objection is largely, if not entirely, moot. That said, with respect to general historical and industry specific information within the PLG Report relating to the logistics of transloading and shipping crude oil by rail and involving the particular rail lines and carriers relevant to the shipment of crude oil from the Permian Basin to the Gulf Coast, the Court finds sufficient predicate foundational support within the Expert Evidence to satisfy the requirements of FRE 702 and 703. Therefore, to the extent the third area of objection is not rendered moot by the Court's determinations with respect to the first and second areas of objection, the Court overrules the third area of objection.

Based upon the foregoing, the Plaintiff's objections are addressed as follows:

(a) With respect to the PLG Report, Plaintiff's objections are SUSTAINED as to the following portions of the report: (i) the following clause of the last sentence of the first paragraph: "after neither Sequitur nor its business partners were able to secure product transportation services, including railcars, rail transportation, destination terminal capacity, and other necessary elements for the planned operations" (pp. RAPX 26, RAPX 46); (ii) the entirety of the Dispute Summary (pp. RAPX 27 – RAPX 28, RAPX 47 – RAPX 48); (iii) the last two sentences of the section titled "Required Elements of Crude-by-Rail Operations" (pp. RAPX 30 – RAPX 31, RAPX 50 – RAPX 51); (iv) in regards to the section titled "Unique Challenges" after "OBERSERVATIONS REGARDING SEQUITUR'S CONTEMPLATED CRUDE-BY-RAIL OPERATIONS FROM BARNHART", the introductory paragraph, paragraphs 1, 3, 4 and 5, and the remainder of such section following paragraph 5 (pp. RAPX 35 – RAPX 36, RAPX 55 – RAPX 56); and (v) all remaining sections of the report (*i.e*. the sections titled "Reasonableness of Sequitur's Approach", "Comments Regarding the Specific Efforts and Actions of Jupiter and Sequitur" and "Observations Regarding the TSA and Force Majeure Claim") with the exception of the first two sentences of the final paragraph (pp. RAPX 36 – RAPX 40, RAPX 56 – RAPX 60). Except as provided above, Plaintiff's objections to the PLG Report are OVERRULED.

(b) With respect to the Brisben Declaration and Nelson Declaration, Plaintiff's objections are SUSTAINED to the extent that the declarations purport to incorporate by reference any of the portions of the PLG Report to which the Court has sustained the Plaintiff's objections above. In all other respects, Plaintiff's objections to the Brisben Declaration and Nelson Declaration are OVERRULED.

5. Plaintiff's objection to 112:22 – 113:12 of the Morris Deposition is (a) SUSTAINED as to 113:10 – 113:12, and (b) OVERRULED in all other respects.

6. Plaintiff's objection to 127:16 – 128:17 of the Morris Deposition is OVERRULED.

7. Plaintiff's objection to 133:23 – 135:14 of the Morris Deposition is (a) SUSTAINED as to 134:14 (after "outlet as an option") – 134:15 and 134:25 – 136:3, and (b) OVERRULED in all other respects.

8. Plaintiff's objection to 149:2 – 150:3 of the Morris Deposition is (a) SUSTAINED as to 150:2 – 150:3, and (b) OVERRULED in all other respects.

9. Plaintiff's objection to 156:20 – 157:8 of the Morris Deposition is (a) SUSTAINED as to 156:25 – 157:4 and 157:7 – 157:8, and (b) OVERRULED in all other respects.

10. Plaintiff's objection to 159:21 – 160:5 of the Morris Deposition is OVERRULED.

11. Plaintiff's objection to 171:11 – 172:9 of the Morris Deposition is OVERRULED.

12. Plaintiff's objection to 175:21 – 175:24 of the Morris Deposition is OVERRULED.

13. Plaintiff's objection to 176:13 – 176:17 of the Morris Deposition is OVERRULED.

14. Plaintiff's objection to 182:10 – 183:10 of the Morris Deposition is OVERRULED.

15. Plaintiff's objection to 183:21 – 185:15 of the Morris Deposition is OVERRULED.

16. Plaintiff's objection to 233:1 – 234:22 of the Morris Deposition is (a) SUSTAINED as to 233:5 – 233:10, 233:13 (following "retrofits") – 233:16, 233:18 (after "iterations of that") – 234:1, and 234:9 – 234:12, and (b) OVERRULED in all other respects.

17. Plaintiff's objection to 237:14 – 237:20 of the Morris Deposition is (a) SUSTAINED as to 237:19 (after "information") – 237:20, and (b) OVERRULED in all other respects.

18. Plaintiff's objection to 331:14 – 331:16 of the Morris Deposition is OVERRULED.

19. Plaintiff's objection to 335:21 – 336:16 of the Morris Deposition is OVERRULED.

20. Plaintiff's objection to 352:4 – 352:15 of the Morris Deposition is (a) SUSTAINED as to 352:12 – 352:15, and (b) OVERRULED in all other respects.

21. Plaintiff's objection to 364:6 – 364:19 of the Morris Deposition is (a) SUSTAINED as to 364:14 (after "I don't remember") – 364:19, and (b) OVERRULED in all other respects.

22. Plaintiff's objection to 383:22 – 384:15 of the Morris Deposition is OVERRULED.

# # # END OF ORDER # # #