Docket #0122 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

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|---|---|---|
| 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 GRANTING IN PART, AND DENYING IN PART, PLAINTIFF'S SECOND AMENDED SECOND MOTION FOR SUMMARY JUDGMENT**

Before the Court for determination is the *Plaintiff's Second Amended Second Motion for Partial Summary Judgment* [Docket No. 60] (the "**Motion**") filed by Plaintiff MAALT, LP (the

"**Plaintiff**") pursuant to which the Plaintiff requests summary judgment on the affirmative defenses of contractual force majeure and failure to perform conditions precedent pled by Defendant Sequitur Permian, LLC (the "**Defendant**") in its *Original Answer, Verified Denial and Affirmative Defenses* [Docket No. 1-1 (Removal Appx. 385-392)] (the "**Answer**") to *Plaintiff's Second Amended Original Petition* [Docket No. 1-1 (Removal Appx. 347-358)] (the "**Complaint**").[1] In conjunction with the Motion, the Plaintiff has filed its supporting brief [Docket No. 49] ("**Plaintiff's Brief**") and appendices [Docket Nos. 48-1 and 60-1] ("**Plaintiff's Appx.**").

In response to the Motion, the Defendant has filed its *Response in Opposition to Plaintiff's Amended Second Motion for Partial Summary Judgment* [Docket No. 65] (the "**Response**"), which includes the Defendant's supporting brief [Docket No. 65-2] ("**Defendant's Brief**") and appendix [Docket No. 65-1] ("**Defendant's Appx.**").

The Plaintiff has responded to Defendant's Response with the filing of its *Reply in Support of Plaintiff's Amended Second Motion for Partial Summary Judgment* [Docket No. 68] (the "**Reply**"), which includes the Plaintiff's supplemental appendix [Docket No. 68-1] ("**Plaintiff's Supp. Appx.**").

The Court heard oral arguments on the Motion on January 14, 2021 (the "**MSJ Hearing**").

Having now reviewed the Complaint, the Answer, the Motion, the Plaintiff's Brief, the Plaintiff's Appx., the Response, the Defendant's Brief, the Defendant's Appx., the Reply, and the Plaintiff's Supp. Appx., and having considered the arguments of counsel from the MSJ Hearing, the Court finds and concludes as follows:[2]

[1] The Plaintiff also requested summary judgment on additional defenses of the Defendant and on one of the Defendant's counterclaims. As explained further herein, however, the Defendant has abandoned those other defenses and the counterclaim.

[2] The Court notes that certain portions of the parties' submitted summary judgment evidence have been excluded from consideration pursuant to the Court's separately entered (a) *Order Granting in Part, and Denying in Part, Defendant's*

## Jurisdiction

1. On June 9, 2020 (the "**Petition Date**"), the Plaintiff and Third-Party Defendant Vista Proppants and Logistics, LLC (the "**Third-Party Defendant**") filed their respective voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code with this Court, thereby initiating their respective bankruptcy cases. The Court previously ordered the joint administration of the bankruptcy cases under Case No. 20-42002.

2. The Court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157 and the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc (Miscellaneous Rule No. 33)* of the United States District Court for the Northern District of Texas. Venue of the proceeding in the Northern District of Texas is proper under 28 U.S.C. § 1409. The proceeding constitutes 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 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 have 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.

## Background

### *A. The Terminal Services Agreement*

3. The Defendant is in the crude oil production business, having a couple of hundred wells within an area of land spanning 400 to 500 square miles within the Permian Basin. In 2018,

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*Opposed Motion to Strike Portions of Plaintiff's Summary-Judgment Evidence*, and (b) *Order Sustaining in Part, and Overruling in Part, Plaintiff's Objections to Defendant's Summary Judgment Evidence*.

during a period of oil oversupply within the Permian Basin which had a negative impact on the pricing of oil taken in and around the area, the Defendant explored the idea of shipping certain of its crude oil to the Gulf Coast in order to sell at the higher pricing being realized there.

4. In connection therewith, in May 2018, the Defendant commenced discussions with the Plaintiff (directly or through its affiliate, the Third-Party Defendant) with respect to the possibility of utilizing the Plaintiff's personnel and rail terminal facility in Barnhart, Texas (the "**Terminal**") to transload its crude oil onto railcars for shipment by rail to the Gulf Coast.

5. Ultimately, the Plaintiff and the Defendant entered into a Terminal Services Agreement, effective as of August 6, 2018 (the "**TSA**"). *See* Plaintiff's Appx., Exh. 7 (copy of TSA). Pursuant to the TSA, the Plaintiff, the owner and operator of the Terminal, agreed to provide the Defendant exclusive use of, and certain crude oil and other liquid hydrocarbon product transloading services at, the Terminal for a fixed period of time in exchange for a fee based upon the volume of product throughput at the Terminal, subject to a minimum throughput volume obligation. The Plaintiff also agreed to provide the Defendant with a right of first offer and refusal to purchase the Terminal during the term of the agreement should the Plaintiff determine to sell the facility. *See generally* TSA, §§ 2.2, 2.3, 3.1-3.3, 4.1, 8.1 and 9.2.

6. While, per its terms, the TSA was effective as of August 6, 2018, the commencement of transloading operations under the agreement and the payment of fees in relation thereto was subject to the making of certain expansions or alterations to the Terminal to enable the transloading of the Defendant's product – referred to as the Phase I Project – and the obtaining of all necessary regulatory approvals for the transloading services. *See* TSA, §§ 2.1, 2.7. In recognition of the same, the TSA refers to the "Terminal Operations Commencement Date" in a number of its provisions. For example, the Defendant's minimum throughput and payment obligations under the TSA only apply "after the Terminal Operations Commencement Date." *See*

TSA, §§ 3.1, 3.2(a). And the conditions applicable to each party's continuing obligation to perform under the TSA only apply "after the Terminal Operations Commencement Date." *See* TSA, § 8.2(a) (conditions to the Defendant's continuing obligation to perform), § 8.2(b) (conditions to the Plaintiff's continuing obligation to perform). The TSA defines "Terminal Operations Commencement Date" as follows:

> [T]he date that the Terminal is fully operational to enable the performance and receipt of the Services and any and all Regulatory Approvals for the Services have been obtained, in each case, as reasonably determined by [the Defendant] and as such date is evidenced by a written notice sent by [the Defendant] to [the Plaintiff].

TSA, art. I (definition of "Terminal Operations Commencement Date").

7. With the foregoing in mind, the Defendant agreed to be responsible for making the Phase I Project expansions/alterations at its own cost and expense. *See* TSA, § 2.7 and Exh. B. And in relation to Regulatory Approvals for the Services, the parties agreed to work together in good faith to obtain all necessary Regulatory Approvals prior to September 1, 2018, the Target Terminal Operations Commencement Date. *See* TSA, § 2.1.

8. That said, pursuant to article 14 of the TSA, the parties also agreed that "neither Party shall be liable to the other for any failure, delay, or omission in the performance of its obligations under this Agreement, or be liable for damages, for so long as and to the extent such failure, delay, omission, or damage arises directly or indirectly from a Force Majeure occurrence…." TSA, § 14.1. The TSA defines a "Force Majeure Event" or "Force Majeure," in pertinent part, as follows:

> [A]ny cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party, and includes, but is not limited to, the following events to the extent consistent with the definition above: … the unavailability, interruption, delay or curtailment of Product transportation services….

TSA, § 14.2.

9. In the event of a Force Majeure occurrence, "[t]he Party affected by Force Majeure shall use commercially reasonable efforts to remedy the Force Majeure condition with all reasonable dispatch," but "only if the affected Party deems it reasonable and economic" to do so. TSA, §§ 14.1, 14.3. If the parties are "unable to fulfill the purposes of the [TSA]" due to the existence of the Force Majeure condition for a period of 60 consecutive days, then either party has the right to terminate the TSA upon written notice to the other party. *See* TSA, § 8.4.

***B. The Defendant Declares Force Majeure and Thereafter Provides Notice of Termination; The Plaintiff Commences Litigation for Breach of the TSA***

10. On or about December 10, 2018, the Defendant completed the Phase I Project. Notwithstanding same, the Defendant never throughput a single drop of crude oil through the Terminal.

11. Instead, by letter dated December 7, 2018, the Defendant provided written notice to the Plaintiff of an alleged Force Majeure occurrence suspending the Defendant's obligation to perform under the TSA. *See* Plaintiff's Appx., Exh. 9. In particular, the Defendant invoked the Force Majeure provisions of the TSA based upon the alleged "unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services." *See id*. (second paragraph).

12. Thereafter, by letter dated February 8, 2019, the Defendant provided written notice to the Plaintiff of its election to terminate the TSA under the provisions of section 8.4 of the TSA, claiming that the Force Majeure Event had continued for a period of 60 days. *See* Plaintiff's Appx., Exh. 10.

13. Disputing the Defendant's assertion of Force Majeure, on February 13, 2019, the Plaintiff commenced litigation against the Defendant in the 51st Judicial District Court of Irion County, Texas, Cause No. CV19-003 (the "**State Court Action**"). *See* Docket No. 1-1 (Removal

Appx. 6-10). Following the Petition Date, the Plaintiff removed the State Court Action to this Court, whereupon it was assigned the above-captioned adversary proceeding number.

### *C. Relevant Causes of Action and Affirmative Defenses and Requested Summary Judgment Relief*

14. Pursuant to the Complaint, the Plaintiff has asserted a claim of breach of contract against the Defendant for the Defendant's alleged breach of the TSA. *See* Complaint, § XV. Pursuant to its Answer, the Defendant has included the following affirmative defenses: (1) contractual force majeure, (2) failure to perform conditions precedent, (3) impossibility, (4) commercial impracticability, and (5) that the contractual damage provision that Plaintiff seeks to enforce is a liquidated damages provision constituting an unenforceable penalty (collectively, the "**Targeted Affirmative Defenses**"). *See* Answer, ¶¶ 6, 9, 10, 12 and 14.

15. The Defendant also separately filed its *Fourth Amended Counterclaims and Third Amended Third-Party Claims* [Docket No. 45] (the "**Counterclaim Pleading**") to assert certain counterclaims against the Plaintiff, including a breach of contract counterclaim for the Plaintiff's alleged failure to procure pollution legal liability insurance for the Terminal and alleged refusal to permit the Defendant to remove the equipment that it installed at the Terminal in connection with the Phase I Project (the "**Breach of Contract Counterclaim**"). *See* Counterclaim Pleading, ¶¶ 31, 38 and 44.

16. Pursuant to the Motion, the Plaintiff requests summary judgement in its favor on each of the Targeted Affirmative Defenses and the Breach of Contract Counterclaim. Pursuant to its Response to the Motion, the Defendant has abandoned the Targeted Affirmative Defenses listed as (3), (4) and (5) above, as well as the Breach of Contract Counterclaim, leaving in contention only the affirmative defenses of contractual force majeure and failure to perform conditions precedent. *See* Response, ¶ 2 n.2.

**Summary Judgment Standards**

17. Federal Rule of Civil Procedure 56, which is made applicable to adversary proceedings pursuant to Bankruptcy Rule 7056, provides that a court shall grant summary judgment on a claim or defense (or a part thereof) identified by the movant "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Fed. R. Bankr. P. 7056.

18. A fact is *material* to a claim or defense if its resolution can affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is *genuine* only if the evidence is such that a reasonable factfinder could return a verdict or ruling for the nonmoving party. *Id*. at 248. In asserting that a fact is genuinely disputed, or alternatively that the fact cannot be genuinely disputed, Federal Rule 56 mandates that the party making such assertion support it by citing particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, admissions, interrogatory answers, or other materials (or by showing that the materials cited do not establish the absence or presence, as applicable, of a genuine dispute, or that the adverse party cannot produce admissible evidence to support the fact). Fed. R. Civ. P. 56(c)(1). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

19. The party seeking summary judgment "bears the initial responsibility of informing the [ ] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the burden at trial on the claim or defense at issue rests on the

non-movant, "the movant must merely demonstrate an absence of evidentiary support in the record for the non-movant's case." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000); *see also Celotex Corp*., 477 U.S. at 322.

20. Once the moving party has satisfied the initial burden, the non-movant must show with "significant probative evidence" that a genuine issue of material fact exists. *Hamilton v. Segue Software Inc*., 232 F.3d 473, 477 (5th Cir. 2000). In doing so, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus*., 475 U.S. at 586. "Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992).

## Discussion

### *A. The Contractual Force Majeure Defense*

21. The TSA includes a Texas choice of law provision. *See* TSA, § 15.11. Under Texas law, "when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure" and a court is not at liberty to rewrite the terms of the parties' deal. *Allegiance Hillview, LP v. Range Tex. Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App. – Fort Worth 2011, no pet.) (quoting *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App. – Amarillo 1998, pet. denied)); *see also Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990).

22. Because Force Majeure, as defined in the TSA, serves as a defense to a claim of nonperformance under the TSA, the party asserting the existence of a Force Majeure Event or occurrence – here the Defendant – bears the burden of proof on the existence of such Force Majeure.

23. With the foregoing in mind, pursuant to the Motion the Plaintiff asserts that the Defendant's affirmative defense of contractual force majeure fails for two reasons: (1) the summary judgment evidence affirmatively establishes that rail transportation services were available and had not been delayed, interrupted or curtailed, and (2) the Defendant cannot meet its burden of presenting evidence that rail transportation services had, in fact, been delayed, interrupted or curtailed.

24. As a predicate to the Defendant's response, the Defendant first takes issue with the Plaintiff's interpretation of the phrase "Product transportation services," arguing that the Plaintiff's focus on rail service alone is too narrow and that such services encompass the following four critical elements:

(1) the availability of an origin loading facility with an agreement with a serving railroad;

(2) the availability of tank cars that comply with federal and individual railroad requirements;

(3) the availability of linehaul transportation with appropriate rail carriers to achieve delivery from origin to point of destination; and

(4) the availability of a destination terminal with both track and tank capacity to accept and unload the product.

*See, e.g.*, Defendant's Appx., Exh. B (pp. RAPX 24-25, ¶¶ 2 and 4, RAPX 29-30). The Court partially agrees. While the Court agrees that "Product transportation" in the overall context of the TSA is dependent upon the availability of the second and third elements outlined above (*i.e.* the availability of compliant tank cars and the availability of linehaul transportation from point of origin to point of destination), the Court does not find the first and fourth elements above to be relevant to "transportation." *See McLane Foodservice, Inc. v. Table Rock Rests., LLC*, 736 F.3d 375, 378 (5th Cir. 2013) ("Under Texas law, words not defined in a contract are to be given their 'plain and ordinary meaning'") (quoting *Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574, 577 (5th Cir. 2009)).

25. With the foregoing in mind, the Defendant asserts that it has presented summary judgment evidence establishing that it was never able to sufficiently and timely obtain suitable railcars and linehaul transportation from all railroads required to move the Product from the Terminal to the Gulf Coast.

26. Having considered the parties' respective summary judgment evidence, the Court finds that a genuine dispute exists with respect to, among other things, the material factual issues of (a) the unavailability of sufficient tank cars complying with federal and individual railroad requirements, (b) the unavailability of linehaul transportation with rail carriers to enable delivery from the Terminal to a destination terminal on the Gulf Coast, (c) whether such unavailability was within the reasonable control of the Defendant, (d) whether such unavailability could have been avoided or overcome by the exercise of due diligence by the Defendant, (e) whether the Defendant deemed the pursuit of commercially reasonable efforts to remedy the applicable unavailability to not be reasonable and/or economical, and (f) if not, whether the Defendant used commercially reasonable efforts to remedy the applicable unavailability. Therefore, the Court will deny the Plaintiff's request for summary judgment on the Defendant's contractual force majeure affirmative defense.

***B. The Failure to Perform Condition Precedent Defense***

27. Next, with respect to the defense of failure to perform condition precedent, because the defense serves as an affirmative defense to a claim of nonperformance by a contract party, the party asserting the defense – here the Defendant – bears the burden of proving that the alleged condition precedent did not occur.

28. Here, the Defendant ties the defense to the payment provisions of the TSA relevant to the litigation which, by their terms, only apply "after the Terminal Operations Commencement Date." *See* TSA, §§ 3.1, 3.2(a). Focusing on the definition of "Terminal Operations

Commencement Date" – in particular the final clause of the definition which states "as such date is evidenced by a written notice sent by [the Defendant] to [the Plaintiff]" (hereinafter referred to as the "**Written Commencement Date Notice Clause**") – the Defendant asserts that the condition precedent to payment – being the occurrence of the Terminal Operations Commencement Date – never occurred because the Defendant never provided written notice of the Terminal Operations Commencement Date to the Plaintiff.

29. In fact, according to the Defendant as acknowledged by its counsel in argument at the MSJ Hearing, the Defendant had total control over the occurrence of the Terminal Operations Commencement Date because only if and when the Defendant decided to provide written notice of such date to the Plaintiff would the date be triggered. While seemingly unreasonable and harsh in application, the Defendant claims that such discretion was agreed upon by the parties in the TSA and is fully effective and enforceable, quoting the Texas Supreme Court's decision in *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471 (Tex. 2017) for the proposition that "'[a]bsent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered,' and '[a]s a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.'" *Id.* at 481 (quoting *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016) and *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 (Tex. 2004) (orig. proceeding)).

30. Pursuant to the Motion, the Plaintiff, focusing on the Written Commencement Date Notice Clause of the Terminal Operations Commencement Date definition, argues that the condition precedent defense fails as a matter of law because the Written Commencement Date Notice Clause does not constitute a condition precedent to the Defendant's performance, but rather only a covenant requiring the Defendant's provision of notice to the Plaintiff once the Terminal had become fully operational for the transloading services contemplated by the definition.

Alternatively, the Plaintiff asserts that the condition should be excused based upon the satisfaction of the condition resting solely within the control of the Defendant, the condition's existence or occurrence not being an essential part of the exchange for the Defendant's performance, and the condition's non-performance resulting in an extreme forfeiture or penalty to the Plaintiff.

31. Focusing on Plaintiff's first argument (*i.e*. covenant instead of condition), "[a] condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). "A covenant, as distinguished from a condition precedent, is an agreement to act or refrain from acting in a certain way. Breach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach. Conversely, if an express condition is not satisfied, then the party whose performance is conditioned is excused from any obligation to perform." *Solar Applications Eng'g, Inc. v. T.A. Operating Corp*., 327 S.W.3d 104, 108 (Tex. 2010) (citations omitted).

32. In determining whether a condition precedent to performance has been agreed upon under the terms of a contract, a court should consider the entirety of the agreement to evaluate whether the language at issue is truly conditional in nature. *Criswell v. European Crossroads Shopping Ctr., Ltd*., 792 S.W.2d 945, 948 (Tex. 1990). "When no conditional language [such as 'if', 'provided that', 'on condition that', or a similar phrase] is used and another reasonable interpretation of the contract is possible, 'the terms will be construed as a covenant in order to prevent a forfeiture.'" *Solar Applications Eng'g*, 327 S.W.3d at 109 (quoting *Criswell*, 792 S.W.2d at 948); *see also PAJ, Inc. v. Hanover Ins. Co*., 243 S.W.3d 630, 636 ("We have said unequivocally that 'when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition'") (quoting *Criswell*, 792 S.W.2d at 948).

33. With the foregoing authorities in mind, based upon the plain and unambiguous language of the TSA, it is clear that the parties intended the Defendant's payment obligations under the TSA to arise only after the occurrence of the Terminal Operations Commencement Date. As such, it is fair to say that the occurrence of the Terminal Operations Commencement Date constituted a condition precedent to such payment obligations. That said, the parties' arguments with respect to the Terminal Operations Commencement Date are more finessed and pinpointed specifically on the Written Commencement Date Notice Clause of the definition. And on this point, the Defendant places too great of a value on the Written Commencement Date Notice Clause.

34. As defined in the TSA, the triggering of the Terminal Operations Commencement Date is, itself, dependent upon the satisfaction of two conditions (collectively, the "**Triggering Conditions**"): (1) "the Terminal [having become] fully operational to enable the performance and receipt of the Services", and (2) "any and all Regulatory Approvals for the Services [having] been obtained." *See* TSA, art I (definition of "Terminal Operations Commencement Date"). Where the Written Commencement Date Notice Clause fits into the equation is that because the assessment of whether the Triggering Conditions have been satisfied is to be "as reasonably determined" by the Defendant, the Defendant is required to provide written notice to the Plaintiff of the actual Terminal Operations Commencement Date once the Triggering Conditions have been satisfied. In other words, the Written Commencement Date Notice Clause constitutes a notice covenant, not an additional triggering condition to the occurrence of the Terminal Operations Commencement Date.

35. In fact, if the Defendant were correct in its assertion that it could prevent the triggering of the Terminal Operations Commencement Date by the mere withholding of written notice, then the inclusion of the two Triggering Conditions in the definition of Terminal Operations Commencement Date serves no purpose – irrespective of the satisfaction of the Triggering

Conditions, the Defendant is always free to prevent the occurrence of the Terminal Operations Commencement Date. Moreover, if written notice alone were the triggering event, then there would certainly be no purpose in overlaying the Defendant's assessment of whether the two Triggering Conditions have been satisfied with the reasonableness standard imposed by the definition. In short, application of the Defendant's interpretation of the definition of Terminal Operations Commencement Date so as to elevate the Written Commencement Date Notice Clause to the status of an independent condition precedent violates the principle that in construing a written contract, a court must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none are rendered meaningless. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). And under Texas law, contracts are to be construed "from a utilitarian standpoint bearing in mind the particular business activity sought to be served," avoiding "when possible and proper a construction which is unreasonable, inequitable, and oppressive." *Frost Nat'l Bank v. L&F Dist., Ltd*., 165 S.W.3d 310, 312 (Tex. 2005) (quoting *Reilly v. Rangers Mgmt, Inc*., 727 S.W.2d 527, 530 (Tex. 1987)).

36. Thus, to the extent the Defendant has hinged its affirmative defense of failure to perform condition precedent on the Written Commencement Date Notice Clause and the Defendant's lack of written notice to the Plaintiff of the occurrence of the Terminal Operations Commencement Date, because the Written Commencement Date Notice Clause constitutes a covenant as opposed to an independent condition precedent, the Court will grant the Plaintiff's Motion in relation to such affirmative defense to such extent.[3]

[3] For the avoidance of doubt, this is not to suggest that the occurrence of the Terminal Operations Commencement Date is not a condition precedent to the Defendant's payment obligations under the TSA, or that satisfaction of the two Triggering Conditions is not a condition precedent to the triggering of the Terminal Operations Commencement Date. Those conditions remain and their satisfaction must be proven at trial. Given the nature of the parties' arguments, however, this ruling is limited to consideration of the nature and enforceability of the Written Commencement Date Notice Clause alone.

37. Moreover, even if the Written Commencement Date Notice Clause did constitute a freestanding condition precedent, because the Defendant at all times maintained exclusive control over whether to provide written notice to the Plaintiff irrespective of satisfaction of the Triggering Conditions, and because the withholding of notice without any basis would have the effect of working a forfeiture to the Plaintiff under the TSA after having granted to the Defendant the exclusive right to use the Terminal during the term of the agreement and the right of first offer and refusal in the event of the Plaintiff's determination to sell the Terminal during the term of the agreement, the performance of such condition is excused. *See Donaldson v. Digital Gen. Sys*., 168 S.W.3d 909, 916 (Tex. App. – Dallas 2005, pet. denied) (holding that a court "may excuse non-performance of a condition precedent without other reason if the condition's requirement 'will involve extreme forfeiture or penalty' and 'its existence or occurrence forms no essential part of the exchange for the promisor's performance'") (quoting *Beard Family P'ship v. Commercial Indem. Ins. Co*., 116 S.W.3d 839, 853-54 (Tex. App. – Austin 2003, no pet.)); *see also Sellers v. Minerals Techs., Inc*., 753 Fed. Appx. 272, 278 & n.7 (5th Cir. 2018).

**ORDER**

Based upon the foregoing, it is hereby:

**ORDERED, ADJDUGED AND DECREED** that the Motion be and is hereby granted in part, and denied in part, as follows:

1. The Motion is DENIED with respect to the Plaintiff's request for summary judgment in its favor on the Defendant's affirmative defense of contractual force majeure.

2. To the extent the Defendant's affirmative defense of failure to perform condition precedent is predicated solely upon the Written Commencement Date Notice Clause and the Defendant's lack of written notice to the Plaintiff of the occurrence of the Terminal Operations Commencement Date, the Motion is GRANTED.

3. With respect to the Plaintiff's request for summary judgment on the remaining Targeted Affirmative Defenses and the Defendant's Breach of Contract Counterclaim, based upon the Defendant's acknowledged abandonment of such remaining Targeted Affirmative Defenses and the Breach of Contract Counterclaim, the Motion is DENIED AS MOOT.

# # # END OF ORDER # # #