Docket #0126 Date Filed: 4/19/2021

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

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

Signed April 17, 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 GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court for determination is the *Motion for Summary Judgment on Its Affirmative Defenses of Failure of Condition Precedent and Express Waiver of Lost Profits and Consequential*

Damages [Docket No. 52] (the "**Motion**") filed by Defendant Sequitur Permian, LLC (the "**Defendant**") pursuant to which the Defendant requests summary judgment on its affirmative defenses of failure to perform conditions precedent and waiver pled 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**") filed by Plaintiff MAALT, LP (the "**Plaintiff**"). Included as attachments to the Motion are the Defendant's supporting brief [Docket No. 52-1] (the "**Defendant's Brief**") and appendix [Docket No. 52-2] (the "**Defendant's Appx.**").

In response to the Motion, the Plaintiff has filed its *Response to Defendant's Motion for Summary Judgment* [Docket No. 63] (the "**Response**") as supported by Plaintiff's supporting brief [Docket No. 64] (the "**Plaintiff's Brief**") and appendix [Docket No. 63-1] (the "**Plaintiff's Appx.**").

The Defendant has responded to the Plaintiff's Response with the filing of its *Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment and Brief in Support Thereof* [Docket No. 70] (the "**Reply**").

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 Defendant's Brief, the Defendant's Appx., the Response, the Plaintiff's Brief, the Plaintiff's Appx., and the Reply, and having considered the arguments of counsel from the MSJ Hearing, the Court finds and concludes as follows:

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, 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* Defendant's Appx., Exh. 1 (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. Returning to relevant payment provisions of the TSA, the starting point is section 4.1 of the TSA which provides that "[s]ubject to the terms of this Agreement, [the Defendant] shall pay [the Plaintiff] a throughput fee equal to One Dollar and Fifty Cents ($1.50) per Barrel of Product Throughput through the Terminal (the 'Throughput Fee')." TSA, § 4.1. Then, to provide a baseline guaranteed level of income to the Plaintiff given the Defendant's exclusive right to use the Terminal, section 3.1 of the TSA provides for a Minimum Volume Commitment as follows:

> Subject to the terms of this Agreement, including Section 3.3 [mechanics for dealing with a partial Calendar Quarter] and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, [the Defendant] agrees to Throughput (either directly or via volumes delivered to the Terminal by [the Defendant's] third-party customers) an amount of Product through the Terminal on a Monthly basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the 'Minimum Volume Commitment') during each Calendar Quarter during the Term after the Termination [sic] Operations Commencement Date, or otherwise pay the Shortfall Payment applicable to such Calendar Quarter.

TSA, § 3.1. And section 3.2 of the TSA provides in relation to the Minimum Volume Commitment and Shortfall Payment:

> If, for any Calendar Quarter after the Terminal Operations Commencement Date, the volume of Product actually Throughput during such Calendar Quarter (for the avoidance of doubt, calculated on a Calendar Quarterly, not a Monthly or Daily,

> basis) is less than the Minimum Volume Commitment (such deficiency, if any, the 'Shortfall'), [the Defendant] shall pay [the Plaintiff] an amount equal to the volume of the Shortfall (expressed in Barrels) to the extent not caused or contributed to by Force Majeure, maintenance outages at the Terminal, or [the Plaintiff's] breach of its obligations under this Agreement, *multiplied by* the Throughput Fee in effect for such Calendar Quarter (collectively, the 'Shortfall Payment'). There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such [Plaintiff] breach.

TSA, § 3.2(a) (emphasis in orig.).

9. Finally, 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.

10. 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

11. On or about December 10, 2018, the Defendant completed the Phase I Project. Notwithstanding same, the Defendant never throughput any crude oil through the Terminal.

12. 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* Defendant's Appx., Exh. 5. 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).

13. 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* Defendant's Appx., Exh. 8.

14. 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 Affirmative Defenses and Requested Summary Judgment Relief

15. 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. For damages, the Plaintiff seeks to recover either (a) "an amount equal to the total of the Minimum Fee amounts required by the TSA" (referring to the Minimum Volume Commitment and Shortfall Payment provisions of the TSA, *see* Complaint, ¶ VII), or, alternatively, (b) "its lost profits." *See* Complaint, at p.8 (Removal Appx. 354). Pursuant to its Answer, the Defendant has included the following affirmative defenses: (1) failure to perform conditions precedent, and (2) "waiver, including express contractual waiver and/or implied waiver." *See* Answer, ¶¶ 4 and 9.

16. Pursuant to the Motion, the Defendant requests summary judgement in its favor on each of the two above-referenced affirmative defenses.

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 Failure to Perform Condition Precedent Defense

21. Beginning with the Defendant's defense of failure to perform condition precedent, because the defense serves as an affirmative defense to a claim of contractual nonperformance, the Defendant bears the burden of proving that the alleged condition precedent did not occur.

22. 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. 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. And because the Defendant never provided such notice, the Defendant asserts that it is entitled to judgment as a matter of law on the affirmative defense.

23. For reasons set forth in the Court's separately entered *Order Granting in Part, and Denying in Part, Plaintiff's Second Amended Second Motion for Summary Judgment* [Docket No. 122], which is incorporated herein by reference, the Court disagrees, having determined that the Written Commencement Date Notice Clause constitutes a covenant as opposed to a freestanding condition precedent, or alternatively that, as a condition precedent, its performance is excused. Accordingly, the Defendant's Motion in relation to its affirmative defense of failure to perform condition precedent will be denied.

B. The Waiver Defense

24. Next, with respect to the Defendant's affirmative defense of waiver, the Defendant challenges the right of the Plaintiff to pursue its alternative damages request for lost profits, asserting that the Plaintiff contractually waived the right to recover lost profits under the terms of the TSA. In particular, the Defendant points to the language of section 10.6 of the TSA which provides in pertinent part:

> NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NEITHER [THE PLAINTIFF] NOR [THE DEFENDANT] SHALL BE LIABLE TO THE OTHER … FOR ANY INDIRECT OR CONSEQUENTIAL DAMAGES, SPECIAL OR PUNITIVE DAMAGES, OR FOR LOST PROFITS, WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF….

TSA, § 10.6.

25. In response, the Plaintiff argues that section 10.6 precludes only the recovery of "indirect" or "consequential" lost profits, not "direct" lost profits, and that its alternative request for the recovery of lost profits is only for "direct" lost profits. Anticipating this argument, in its opening brief the Defendant argues that lost profits constitute only consequential damages under controlling Texas law.[1] While the Court disagrees with the Defendant's characterization of lost profits damages as being only consequential in nature, the Court nevertheless agrees with the Defendant's assertion that the parties contractually agreed to waive the right to recover lost profits *qua* lost profits.

26. As a predicate matter, the TSA recognizes a variety of *contractual* remedies in the event of a breach. Pursuant to section 8.3 of the TSA, for example, the non-breaching party may suspend its own performance under the agreement and/or terminate the agreement, in each case without prejudice to its other remedies under the agreement. *See* TSA, ¶ 8.3. Pursuant to section 8.6 of the TSA, without limiting any other remedy or right that the non-breaching party may have, the non-breaching party is granted the right to an injunction or other equitable relief enforcing specifically the terms and provisions of the agreement. *See* TSA, § 8.6. And sections 8.7 and 15.10 of the TSA provide that, except as otherwise expressly stated in the TSA, the contractual remedies provided under the agreement are cumulative and in addition to any other rights and remedies that are available under applicable law, in equity, by statute, in any other agreement between the parties, and otherwise, and that the exercise or partial exercise of any right by a party will not preclude the exercise of any other right. *See* TSA, §§ 8.7, 15.11. Thus, the TSA both provides contractually based remedies and recognizes the parties' reservation of extracontractual

[1] The TSA provides for the agreement to be governed by Texas law. *See* TSA, § 15.11.

remedies, in each case, however, subject to any express limitations set forth within the agreement. Section 10.6 of the TSA is such an express limitation. However, before returning to the language of section 10.6, it is helpful to consider the nature of lost profits damages.

27. Under Texas common law, the measure of damages generally recoverable for breach of contract is that which restores the injured party to the economic position that it would have enjoyed if the contract had been performed. *See Mood v. Kronos Prods., Inc*., 245 S.W.3d 8, 12 (Tex. App. – Dallas 2007, pet. denied). Such actual damages may be "direct" or "consequential" in nature. "Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong [and] compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from the wrongful act." *Arthur Anderson & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 816 (Tex. 1997) (citations omitted). "Consequential damages, on the other hand, result naturally, but not necessarily, from the defendant's wrongful acts. Under the common law, consequential damages need not be the usual result of the wrong, but must be foreseeable and must be directly traceable to the wrongful act and result from it." *Id.* (citations omitted).

28. Actual damages for breach of contract may include reasonably certain lost profits. *See Mood*, 245 S.W.3d at 12. "Lost profits are damages for the loss of net income to a business measured by reasonable certainty." *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). "Lost profits may be in the form of direct damages, that is, profits lost on the contract itself, or in the form of consequential damages, such as profits lost on other contracts or relationships resulting from the breach." *Mood*, 245 S.W.3d at 12; *see also Cherokee County Cogeneration Partners, LP v. Dynegy Mktg. & Trade*, 305 S.W.3d 309, 314 (Tex. App. – Houston [14th Dist.] 2009, no pet.);

Continental Holdings, Ltd. v. Leahy, 132 S.W.3d 471, 475 (Tex. App. – Eastland 2003, no pet.).[2] The amount that a plaintiff would have received on the breached contract, minus its saved expenses, constitutes direct damages lost profits. *Cherokee County Cogeneration Partners*, 305 S.W.3d at 314.

29. Thus, having determined under controlling Texas law that lost profits is a form of actual damages that may be recovered in a breach of contract action, and that lost profits may constitute either direct damages or consequential damages depending upon the nature of the lost profits at issue, the Court now turns to the question of whether the Plaintiff contractually waived the right to recover lost profits damages.

30. Initially, there does not appear to be any dispute between the parties with respect to the enforceability of the liability limiting provisions of section 10.6 of the TSA. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230-31 (Tex. 2019) (recognizing under freedom of contract principles that limitation-of-liability causes are generally valid and enforceable under Texas law); *see also Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 482 (Tex. 2017) (generally recognizing the validity of a contractual provision absent its violation of law or public policy). Instead, the dispute between the parties is focused on the interpretation of section 10.6.

31. "The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017). If the language of the contract lends itself to a clear and definite legal meaning, the contract is unambiguous and will be construed by the court as a matter of law irrespective of the

[2] For substantially the same reasons as outlined in the Plaintiff's Response, the Defendant's reliance on *Engelman Irrigation Dist. v. Shields Bros., Inc*., 514 S.W.3d 746 (Tex. 2017) and *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) to the contrary is misplaced. Neither of the cases stands for the proposition that, under the Texas common law, lost profits damages can only constitute consequential damages.

advancement of any alternative interpretations by the parties in litigation. *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010); *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *DaimlerChrysler Motors Co., LLC v. Manuel*, 362 S.W.3d 160, 178 (Tex. App. – Fort Worth 2012, no pet.). In interpreting an unambiguous agreement, "[l]anguage should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." *Reilly v. Rangers Mngt., Inc*., 727 S.W.2d 527, 529 (Tex. 1987); *see also Primo*, 512 S.W.3d at 893.

32. With the foregoing legal framework in mind, pursuant to section 10.6 of the TSA the parties expressly agreed that they will not be liable to one another for any "indirect or consequential losses or damages, special or punitive damages, or for lost profits" arising out of or related to the TSA or the performance or breach of the TSA. *See* TSA, ¶ 10.6. The Defendant argues that, pursuant to such language, the Plaintiff clearly and unambiguously waived its right to recover any form of lost profits from the Defendant. Reemphasizing the direct versus consequential lost profits distinction, the Plaintiff contends that the reference to lost profits in section 10.6 only means "indirect" or "consequential" lost profits, not "direct" lost profits, for three reasons. First, the Plaintiff argues that because indirect lost profits "very often" arise out of or relate to a contract's performance or breach, then the Court "cannot necessarily infer" that the reference to lost profits in section 10.6 includes both direct lost profits and consequential lost profits. Second, the Plaintiff points to the reservation of rights language of sections 8.7 and 15.10 of the TSA and asserts that because all rights are reserved unless "expressly" limited by other provisions of the TSA – namely, section 10.6 – and because section 10.6 does not "expressly" refer to "direct" lost profits, then the Plaintiff's right to pursue the recovery of direct lost profits has been preserved. Finally, focusing on the order of language within section 10.6 – namely, that the reference to "lost profits" comes after the reference to "indirect or consequential losses or

damages" – the Plaintiff argues that the parties' reference to lost profits in section 10.6 was to simply specify a particular form or type of indirect/consequential damages to be waived. None of these arguments is persuasive.

33. In the case of the Plaintiff's first argument, the frequency of the realization of consequential lost profits damages in contract cases is irrelevant to the question of interpretation before the Court. In fact, the argument is rather odd given the Plaintiff's painstaking effort to convince the Court that lost profits damages can constitute either direct or consequential damages and that the Plaintiff's request for the recovery of direct lost profits damages is what is at stake in this contract case. Irrespective, even if such contention about the frequency of consequential lost profits in contract cases were substantiated with summary judgment evidence (which it is not), such extracontractual evidence is wholly irrelevant to the interpretation of unambiguous contractual language such as section 10.6. *See Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743 (Tex. 2020) (parties' intent to be determined as expressed within the four corners of the parties' written agreement).

34. Turning to the Plaintiff's second argument, the Court finds no basis to conclude that the lack of a specific reference to "direct" lost profits in section 10.6 means that "direct" lost profits were necessarily excluded from the scope of the rights waived by section 10.6. In fact, the very lack of any distinction between direct and consequential lost profits coupled with the lack of an express carve-out of direct lost profits from the scope of the waiver provided by section 10.6 is indicative of the parties' intent to include all forms of lost profits within the scope of section 10.6. And, here, the parties evidenced their knowledge of how to except from the scope of the waiver certain types of rights and damages by including carve-out language within section 10.6 to expressly exclude certain specific types of "direct" damages from the waiver. *See* TSA, § 10.6

(provided clause specifying that the limitations of liability of section 10.6 shall not preclude the recovery of "actual direct damages" described in sections 6.4 or 8.3 of the TSA).

35. Finally, turning to the Plaintiff's grammatical argument, in reality the grammatical structure of section 10.6 favors the Defendant. Had the parties intended to refer to lost profits as a form of indirect or consequential damages only, then they would have used prefatory wording such as "including", "including, without limitation", "such as" or the like after the language "indirect or consequential losses or damages" and before "lost profits." Instead, the reference to "lost profits" is preceded by the disjunctive word "or", which leads to the conclusion that the parties intended "lost profits" to constitute a separate, independent category of damages to be waived under the provision. Moreover, in between the language "indirect or consequential losses or damages" and "lost profits" is also the language "punitive damages", and certainly the Plaintiff is not suggesting that punitive damages is also nothing more than a form or type of consequential damages.

36. In short, pursuant to the plain and unambiguous language of section 10.6 of the TSA, both of the parties agreed that neither of them would be liable to the other for any lost profits which arise out of or relate to the TSA or the breach thereof. As such, the Defendant has established as a matter of law that is entitled to judgment in its favor on its affirmative defense of waiver.

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 Defendant's request for summary judgment in its favor on its affirmative defense of failure to perform condition precedent.

2. The Motion is GRANTED with respect to the Defendant's request for summary judgment in its favor on its affirmative defense of waiver.

END OF ORDER # #