Docket #0128 Date Filed: 4/26/2021

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 26, 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 That MAALT, LP is Not Entitled to a "Minimum Fee" or Any Fee Under the TSA* [Docket No. 74] (the "**Motion**")

filed by Defendant Sequitur Permian, LLC (the "**Defendant**") pursuant to which the Defendant requests partial summary judgment in its favor on the issue of whether the Defendant is liable to Plaintiff MAALT, LP (the "**Plaintiff**") for any "Minimum Fee," "Throughput Fee" or "Shortfall Payment" under the terms of the TSA (as defined below). Included as attachments to the Motion are the Defendant's supporting brief [Docket No. 74-1] (the "**Defendant's Brief**") and appendix [Docket No. 74-2] (the "**Defendant's Appx.**").

In response to the Motion, the Plaintiff has filed its *Response and Supporting Brief in Opposition to Defendant's Second Motion for Summary Judgment That MAALT, LP is Not Entitled to Any Fee Under the TSA* [Docket No. 83] (the "**Response**") as supported by Plaintiff's appendix [Docket No. 83-1] (the "**Plaintiff's Appx.**").

The Defendant has responded to the Plaintiff's Response with the filing of its *Reply to Plaintiff's Response and Supporting Brief in Opposition to Defendant's Motion for Summary Judgment That MAALT, LP is Not Entitled to a "Minimum Fee" or Any Fee Under the TSA* [Docket No. 84] (the "**Reply**").

The Court heard oral arguments on the Motion on February 22, 2021 (the "**MSJ Hearing**"). Following the MSJ Hearing, the Plaintiff filed a supplemental letter brief and the Defendant filed a supplement letter response thereto (collectively, the "**Post-Hearing Briefs**"). *See* Docket Nos. 89 and 90.

Having now reviewed the *Plaintiff's Second Amended Original Petition* [Docket No. 1-1 (Removal Appx. 347-358)] (the "**Complaint**") filed by the Plaintiff, the *Original Answer, Verified Denial and Affirmative Defenses* [Docket No. 1-1 (Removal Appx. 385-392)] (the "**Answer**") filed by the Defendant in response to the Complaint, the Motion, the Defendant's Brief, the Defendant's Appx., the Response, the Plaintiff's Appx., the Reply, and the Post-Hearing Briefs, 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[1] Throughput[2] 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

[1] "**Product**" is defined in the TSA as "crude oil and other liquid hydrocarbon products owned or Controlled by [the Defendant]." TSA, art. 1 (definitions).

[2] "**Throughput**" is defined in the TSA as "the delivery of Product from trucks or pipeline into the Terminal on behalf of [the Defendant] or [the Defendant's] third-party customers," the quantity of which is to measured in accordance with article 5 of the TSA. *See* TSA, art. 1 (definitions).

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 on account of the Defendant's exclusive right to use the Terminal, section 3.2 of the TSA provides for the following Shortfall Payment obligation

in the event of the Defendant's failure to Throughput an amount of Product sufficient to satisfy its Minimum Volume Commitment as required under the TSA:

> 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.). Section 3.1 of the TSA defines the "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.

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 Product 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 Causes of Action and Requested Summary Judgment Relief***

15. Pursuant to the Complaint, the Plaintiff has asserted both a claim for breach of contract and a claim for declaratory relief against the Defendant. *See* Complaint, ¶¶ XV and XVI.

16. Pursuant to the breach of contract count, the Plaintiff seeks, among other things, the recovery of "an amount equal to the total of the Minimum Fee amounts required by the TSA." Complaint, ¶ XV (p.8). The Complaint defines the "Minimum Fee" as follows:

> [The Defendant] agreed to pay [the Plaintiff] $1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If [the Defendant] failed to deliver the required volumes for transloading, it was obligated to pay [the Plaintiff] a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $1.50 X 11,424 X 30 = $514,080.00) (the "**Minimum Fee**").

Complaint, ¶ VII (p.3).

17. Pursuant to the declaratory judgment count, the Plaintiff seeks a determination that the Defendant "is obligated to pay [the Plaintiff] the minimum bill, or Shortfall Payments, equal to 11,424 barrels per day multiplied by $1.50 per barrel for each day of the term of the TSA." Complaint, ¶ XVI (p.10). While the Complaint does not define the term "Shortfall Payment," the TSA does in section 3.2(a), which is set out above. *See* TSA, § 3.2(a).

18. Finally, "Shortfall Payment," as defined in the TSA, includes reference to the term "Throughput Fee," and "Throughput Fee" is defined in section 4.1 of the TSA, which is also set out above. *See* TSA, § 4.1.

19. Pursuant to the Motion, the Defendant requests summary judgement in its favor on the issue of whether the Defendant is liable to the Plaintiff for any Minimum Fee, Throughput Fee or Shortfall Payment.

**Summary Judgment Standards**

20. 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.

21. 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).

22. 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.

23. 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**

24. As framed in the current Motion, the Defendant presents two different interpretational arguments to the Court. First, the Defendant argues that the Complaint's reference to a "Minimum Fee" is wholly extraneous to the terms of the TSA and that no such Minimum Fee, as defined in the Complaint, is provided for under the terms of the TSA, thereby entitling the Defendant to summary judgment on the Plaintiff's claim for recovery of such Minimum Fee. Second, based upon the fact that no Product was ever "actually Throughput" the Terminal, the Defendant argues that no basis exists under the TSA for a determination of liability for any Minimum Fee, Throughput Fee or Shortfall Payment, thereby entitling the Defendant to summary judgment on the Plaintiff's claim for recovery of any such fee or payment.

25. The TSA includes a Texas choice of law provision. *See* TSA, § 15.11. Controlling Texas law recognizes that "[t]he 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); *see also 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). 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 advancement of any alternative interpretations by the parties in litigation. *Plains Exploration & Prod. Co. v. Torch Energy Advisors Inc*., 473 S.W.3d 296, 305 (Tex. 2015); *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *see also Ergon-West Virginia, Inc. v. Dynegy Mktg. & Trade*, 706 F.3d 419, 424 (5th Cir. 2013).

26. In construing a contract, while it is fundamental that the court is not to rewrite the parties' agreement, it is equally true that the court is not to consider only the parts favoring one party and disregard the remainder. *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005). Instead, a court is to "construe the contract 'as a whole,' and 'evaluate the overall agreement to determine what purposes the parties had in mind at the time they signed' it." *Fischer v. CTMI, LLC*, 479 S.W.3d 231, 239 (Tex. 2016) (citation omitted) (quoting *Wilson*, 168 S.W.3d at 811 and *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829, 841 (Tex. 2010)). In other words, a court is to "consider the entire writing, harmonizing and giving effect to all the contract provisions so that none will be rendered meaningless." *Torch Energy Advisors*, 473 S.W.3d at 305 (citing *Moayedi v. Interstate 35/Chisam Rd., LP*, 438 S.W.3d 1, 7 (Tex. 2014)); *see also Pan Am Equities, Inc. v. Lexington Ins. Co*., 959 F.3d 671, 674 (5th Cir. 2020).

27. Moreover, a court is to "construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and '[ ] avoid when possible and proper

a construction which is unreasonable, inequitable, and oppressive.'" *Frost Nat'l Bank v. L&F Distribs., Ltd*., 165 S.W.3d 310, 312 (Tex. 2005) (quoting *Reilly v. Rangers Mgmt., Inc*., 727 S.W.2d 527, 530 (Tex. 1987)); *see also CERx Pharmacy Partners, LP v. Provider Meds, LP (In re ProvideRx of Grapevine, LLC)*, 507 B.R. 132, 153 (Bankr. N.D. Tex. 2014); *Endeavor Energy Res., LP v. Energen Res. Corp*., 615 S.W.3d 144, 148 (Tex. 2020).

***A. The Plaintiff's Request for Recovery of the So-Called Minimum Fee***

28. In relation to the Defendant's first argument with respect to the so-called "Minimum Fee," while the Plaintiff does not directly address the Defendant's nomenclature argument head on, the Plaintiff nevertheless makes clear in its Response that the "Minimum Fee" referenced in the Complaint is predicated upon the Shortfall Payment provisions of section 3.2(a) of the TSA which, in turn, are dependent upon the Minimum Volume Commitment provisions of section 3.1 of the TSA. Therefore, the Plaintiff asserts that summary judgment is not warranted.

29. In reviewing the Complaint, while the Court concurs with the view that certain assertions therein with respect to the Plaintiff's request for relief are less than a model of clarity, it nevertheless appears clear from the entirety of the Complaint that the so-called requested "Minimum Fee" is, in fact, predicated on the provisions of sections 3.1 and 3.2(a) of the TSA. Most notably, paragraph VII of the Complaint (the paragraph in which "Minimum Fee" is defined) both (1) specifically references a "minimum daily volume obligation of 11,424 barrels," an obvious reference to the 11,424 barrels per day Minimum Volume Commitment language of section 3.1 of the TSA, and (2) specifically references a backstop payment obligation on the part of the Defendant if the Defendant "fail[s] to deliver the required volumes [of Product] for transloading," an obvious reference to the Shortfall Payment provisions of section 3.2(a) of the TSA. *See* Complaint, ¶ VII.

30. That said, it is also fair to say that in attempting to utilize the new "Minimum Fee" terminology as a substitute shorthand reference to the Shortfall Payment obligation contemplated by the TSA, the Plaintiff has set forth an incomplete version of the actual provisions of the TSA applicable to the recovery of a Shortfall Payment – namely, sections 3.2(a) and 3.1 of the TSA. For example, while "Minimum Fee" is defined in the Complaint as effectively being a daily fee to be calculated on a monthly basis, thereby partially paralleling the language of the TSA, section 3.2(a) of the TSA provides that the determination of the existence of a "Shortfall" for purposes of calculating the Shortfall Payment is to be determined on a quarterly basis for each applicable "Calendar Quarter."[3] *See* TSA, § 3.2(a); *see also id*. § 3.2(b) (providing for quarterly "true up" calculations for purposes of § 3.2(a)). In fact, an entire provision of the TSA is dedicated to how to determine the Minimum Volume Commitment where only a partial Calendar Quarter is at issue. *See* TSA, § 3.3.

31. Moreover, by their terms, both sections 3.2(a) and 3.1 of the TSA apply only "after the Terminal Operations Commencement Date," and in calculating the Shortfall that is used to determine the amount of the Shortfall Payment, any deficiency in the volume of Throughput Product caused or contributed to by, among other things, Force Majeure is to be excluded from the calculation. *See* TSA, §§ 3.1, 3.2(a). Obviously, as the parties are well aware, two of the issues in contention in the litigation are whether the conditions applicable to the triggering of the Terminal Operations Commencement Date occurred and whether the Defendant's performance was suspended by Force Majeure.

32. Thus, to the extent the Plaintiff's request for the award of a so-called Minimum Fee, as defined in the Complaint, is for anything other than a Shortfall Payment(s) under the terms

[3] "Calendar Quarter" is defined in article 1 of the TSA.

of the TSA, the Court will grant the Motion, noting that even the Plaintiff, itself, has effectively acknowledged that it did not intend to request any form of extracontractual recovery in pursuing the Minimum Fee. To the extent the Plaintiff's request for the award of the Minimum Fee is properly limited to a request for the award of a Shortfall Payment(s) under the terms of the TSA, however, the Motion will be denied.

***B. The Defendant's Argument that No Throughput Product Equates to No Liability***

33. In relation to the Defendant's second argument, the Defendant targets the following three categories of potential payment obligations: a Minimum Fee, a Throughput Fee and a Shortfall Payment.

34. In relation to any Minimum Fee obligation, for reasons already explained, the Court has determined to grant the Defendant's request for summary judgment to the extent the Minimum Fee is referring to anything other than a Shortfall Payment(s) under the terms of the TSA. Therefore, the Defendant's second argument, insofar as involving the Minimum Fee, need only be considered in relation to Shortfall Payment liability and thus, correspondingly, will only be addressed in such context.

35. Next, in relation to any Throughput Fee obligation, which the Court construes as referring to liability under the provisions of section 4.1 of the TSA, the Plaintiff has conceded that no such liability exists because no Product was actually Throughput the Terminal by or on behalf of the Defendant. In fact, there do not appear to be any allegations or requests for relief within the Complaint seeking to recover any amount pursuant to section 4.1. Even so, to the extent use of the term "Minimum Fee" in the Complaint is in any way intended to refer to liability under section 4.1 of the Complaint, the Court has already determined to grant the Defendant's request for summary judgment to the extent the Minimum Fee is referring to anything other than a Shortfall Payment(s), thereby also resolving the assertion of any liability under section 4.1 of the TSA.

36. This, then, leaves only the question of whether the Defendant may be found liable for any Shortfall Payment(s) under the terms of the TSA. As previously indicated, the Defendant takes the position that there can be no liability because no Product was ever actually Throughput the Terminal. The Plaintiff disagrees with the Plaintiff's construction of the TSA, arguing that the TSA is akin to a take-or-pay production contract whereby the Defendant committed to either Throughput *or pay for* a Minimum Volume Commitment of 11,424 barrels of Product per day. As a result, the Plaintiff asserts that the Defendant has failed to establish a right to summary judgment predicated solely upon the absence of any Throughput Product by or on behalf of the Defendant.

37. While the Defendant's argument is somewhat difficult to follow, there appear to be three angles to the Defendant's argument. First, focusing on the introductory clause of section 3.2(a) of the TSA – specifically, "*If … the volume of Product actually Throughput … is less than the Minimum Volume Commitment*" – the Defendant claims that use of the language "volume of Product actually Throughput" was intended by the parties to mean that "unless and until Product is 'actually Throughput,' or delivered into and transloaded through the Terminal, there cannot be any Shortfall Payment…." Defendant's Brief, ¶ 20 (p.10). In other words, the Defendant appears to claim that the "volume of Product actually Throughput" can never equal 0 Barrels and, as a result, there must be some amount of actually Throughput Product in order for section 3.2(a) to apply.

38. The Court disagrees. If during a Calendar Quarter the Defendant fails to Throughput *any* Barrels of Product through the Terminal, then applying a natural reading of the above introductory clause, "the volume of Product actually Throughput" will necessarily equal zero Barrels. And where the volume of Product actually Throughput is zero Barrels, the Shortfall Payment provisions of section 3.2(a) of the TSA are unquestionably triggered, inasmuch as the

Minimum Volume Commitment will always be greater than zero. The foregoing is a self-evident proposition.

39. Perhaps anticipating as much, the Defendant turns to the second angle of its argument which focuses on the meaning of "deficiency" in section 3.2(a). To put the argument in context, section 3.2(a) defines the term "Shortfall" (which is used to calculate the amount of the Shortfall Payment) as the "deficiency" in reference to the introductory clause referenced above. *See* TSA, § 3.2(a) ("If … the volume of Product actually Throughput … is less than the Minimum Volume Commitment (***such deficiency***, if any, the 'Shortfall'), [the Defendant] shall pay [the calculated Shortfall Payment]") (emphasis added). According to the Defendant, the "deficiency" referenced in section 3.2(a) is to the volume of Product actually Throughput the Terminal during the Calendar Quarter, not the difference between the Minimum Volume Commitment and the volume of Product actually Throughput, as advocated by the Plaintiff. As such, the Defendant posits that "reading the text of Section 3.2(a) as a whole, two things are true: (1) that if there is no 'Product actually Throughput' then there cannot be 'any' deficiency (because the amount of Product actually Throughput would be zero); and (2) that, as a pure mathematical calculation, 'If … the volume of Product actually Throughput' is zero, then zero '*multiplied by* the Throughput Fee' is zero." Defendant's Brief, ¶ 22 (pp. 10-11).

40. The Court again disagrees. "Deficiency" is commonly defined as "an amount that is lacking or inadequate: shortage." *See* "deficiency", Merriam-Webster Online Dictionary (2021). Thus, applying this common meaning to the language of section 3.2(a), if the Defendant fails to Throughput any Product during a Calendar Quarter, the amount lacking/the shortage (*i.e*. the "deficiency") in comparison to the Minimum Volume Commitment is *not* zero; it is the amount of the Minimum Volume Commitment. Moreover, having considered all relevant provisions of the TSA, the only way to harmonize all such provisions from a utilitarian standpoint, bearing in mind

the business objectives of the parties evidenced thereby, is to interpret "deficiency" in section 3.2(a) as meaning the shortage in the volume of Product actually Throughput the Terminal during a Calendar Quarter in comparison to the Minimum Volume Commitment applicable to the same Calendar Quarter – in other words, the difference between the Minimum Volume Commitment and the volume of Product actually Throughput the Terminal. If, instead, the Defendant's interpretation were adopted, not only would the interpretation neuter the effectiveness of the Minimum Volume Commitment imposed by section 3.1, but it would lead to the very type of unreasonable, inequitable and oppressive outcomes indicative of a lack of intent on the part of the parties to have adopted such a meaning, as demonstrated by the following hypothetical scenarios:

**Scenario 1**: For the Calendar Quarter (assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs no Product through the Terminal.

Application of the Defendant's interpretation: Under the provisions of § 4.1, because no Product was Throughput the Terminal during the Calendar Quarter, then **the amount due pursuant to § 4.1 is $0** (*i.e.* 0 Barrels of Throughput Product x $1.50 per Barrel = $0). Under the provisions of §§ 3.1 and 3.2(a), while the amount of the actually Throughput Product was less than the applicable Minimum Volume Commitment of 1,028,160 Barrels (*i.e.* 11,424 Barrels/day x 30 days x 3 months = 1,028,160 Barrels), the "deficiency" is 0 (referring to the number of "actually Throughput" Barrels). As a result, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $0** (*i.e.* 0 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $0). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $0**.

Application of the Plaintiff's interpretation: Under the provisions of § 4.1, because no Product was Throughput the Terminal during the Calendar Quarter, then **the amount due pursuant to § 4.1 is $0** (*i.e.* 0 Barrels of Throughput Product x $1.50 per Barrel = $0). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 1,028,160 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 0 (actually Throughput Barrels) = 1,028,160). As a result, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $1,542,240** (*i.e.* 1,028,160 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $1,542,240). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $1,542,240**.

**Scenario 2**: For the Calendar Quarter (again, assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs the Terminal a total of 1,028,070 Barrels of Product, equating to 342,690 Barrels per month and 11,423 Barrels per day per day.

Application of the Defendant's interpretation: Under the provisions of § 4.1, based upon the actually Throughput Product of 1,028,070 Barrels of Product, **the amount due pursuant to § 4.1 is $1,542,105** (*i.e*. 1,028,070 Barrels of Throughput Product x $1.50 per Barrel = $1,542,105). Under the provisions of §§ 3.1 and 3.2(a), while the amount of the actually Throughput Product was less than the applicable Minimum Volume Commitment of 1,028,160 Barrels (*i.e*. 11,424 Barrels/day x 30 days x 3 months = 1,028,160 Barrels) by only 90 Barrels, the "deficiency" (according to the Defendant) is 1,028,070 (referring to the number of Barrels of "actually Throughput" Product). As a result, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $1,542,105** (*i.e*. 1,028,070 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $1,542,105). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $3,084,210**.

Application of the Plaintiff's interpretation: Under the provisions of § 4.1, based upon the actually Throughput Product of 1,028,070 Barrels of Product, **the amount due pursuant to § 4.1 is $1,542,105** (*i.e*. 1,028,070 Barrels of Throughput Product x $1.50 per Barrel = $1,542,105). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 90 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 1,028,070 (actually Throughput Barrels) = 90). As a result, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $135** (*i.e*. 90 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $135). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $1,542,240**.

**Scenario 3**: For the Calendar Quarter (again, assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs the Terminal a total of 1,028,250 Barrels of Product, equating to 342,750 Barrels per month and 11,425 Barrels per day per day.

Application of the Defendant's *and* the Plaintiff's interpretation: Under the provisions of § 4.1, based upon the actually Throughput Product of 1,028,250 Barrels of Product, **the amount due pursuant to § 4.1 is $1,542,375** (*i.e*. 1,028,250 Barrels of Throughput Product x $1.50 per Barrel = $1,542,375). Under the provisions of §§ 3.1 and 3.2(a), because the amount of the actually Throughput Product is not less than the applicable Minimum Volume Commitment of 1,028,160 Barrels of Product, **no Shortfall Payment is owed under § 3.2(a)**. **Thus, the total**

**amount owing by the Defendant for the Calendar Quarter is $1,542,375**.

41. As illustrated by Scenarios 1 and 2 above, the Defendant's advocated interpretation of the term "deficiency" results in highly inequitable and oppressive outcomes. Under Scenario 1, if the Defendant were to unilaterally determine, for whatever reasons, to not Throughput any Product through the Terminal during a Calendar Quarter, then in exchange for the Plaintiff's grant to the Defendant of exclusive use of the Terminal for the entire Calendar Quarter, the Plaintiff would be entitled to receive nothing. In fact, the Defendant would be able to effectively neuter the effectiveness of the Minimum Volume Commitment provisions of section 3.1 of the TSA by simply refusing to Throughput any Product. Clearly this is not what the parties intended in entering into the agreement. Under Scenario 2, the outcome is equally extreme, in that by just narrowly missing the Minimum Volume Commitment, the Defendant would owe a Shortfall Payment of over $3 million. The absurdity of the outcome is only further highlighted by comparing it to Scenario 3 where, by adding a mere 180 Barrels of additional Product during the Calendar Quarter, the Defendant is able to avoid over $1.5 million of the payment obligation imposed under Scenario 2. These comparisons reflect the unreasonableness of the interpretation advanced by the Defendant.

42. Pivoting yet further in its Reply and Post-Hearing Brief, the Defendant advances the third angle of its argument – this time taking aim at the term "Throughput Fee" in section 4.1, which in turn is used to calculate the Shortfall Payment in section 3.2(a). Section 4.1 provides as follows: "Subject 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 '<u>Throughput Fee</u>')." TSA, § 4.1. In this instance, the interpretative question presented by the Defendant is whether the term "Throughput Fee" refers to the rate of

*$1.50 per Barrel* or to the resulting product of *$1.50 per Barrel multiplied by the number of Barrels actually Throughput through the Terminal for the Calendar Quarter at issue*. According to the Defendant, "Throughput Fee" means the latter. *See* Docket No. 90, at p.2. Thus, where no Product is Throughput the Terminal during the Calendar Quarter at issue, the Throughput Fee is equal to $0, according to the Defendant, and applying that result to the Shortfall Payment provisions of section 3.2(a), irrespective of the existence and amount of any Shortfall, the Shortfall Payment for the Calendar Quarter will always equal $0 – *i.e*. Shortfall x $0 (Throughput Fee) = $0.

43. According to the Plaintiff, "Throughput Fee" refers to the rate of $1.50 per Barrel. The Court agrees with the Plaintiff. Such interpretation is the only interpretation that not only harmonizes and gives effect to all applicable provisions of the TSA, but also avoids the extreme absurdity of the hypothetical outcomes that would otherwise occur under the Defendant's interpretation. For example, utilizing the same factual scenarios as set out above, the following outcomes would result:[4]

**Scenario 1**: For the Calendar Quarter (assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs no Product through the Terminal.

Application of the Defendant's interpretation: Under the provisions of § 4.1, because no Product was Throughput the Terminal during the Calendar Quarter, then **the amount due pursuant to § 4.1 (the "Throughput Fee" according to the Defendant) is $0** (*i.e*. 0 Barrels of Throughput Product x $1.50 per Barrel = $0 (Throughput Fee)). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 1,028,160 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 0 (actually Throughput Barrels) = 1,028,160). Thus, utilizing the Shortfall and Throughput Fee figures, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $0** (*i.e*.

[4] For illustrative purposes, the Defendant's arguments with respect to both (a) the inapplicability of section 3.2(a) if no Product is actually Throughput, and (b) the "deficiency" being equal to the volume of actually Throughput Product are disregarded so as to focus specifically on the outcomes that would result based upon the Defendant's advocated interpretation of "Throughput Fee."

1,028,160 (Shortfall) x $0 (Throughput Fee) = $0). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $0**.

Application of the Plaintiff's interpretation: Under the provisions of § 4.1, because no Product was Throughput the Terminal during the Calendar Quarter, then **the amount due pursuant to § 4.1 is $0** (*i.e*. 0 Barrels of Throughput Product x $1.50 per Barrel (the "Throughput Fee" according to the Plaintiff) = $0). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 1,028,160 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 0 (actually Throughput Barrels) = 1,028,160). Thus, utilizing the Shortfall figure and Throughput Fee of $1.50 per Barrel, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $1,542,240** (*i.e*. 1,028,160 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $1,542,240). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $1,542,240**.

**Scenario 2**: For the Calendar Quarter (again, assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs the Terminal a total of 1,028,070 Barrels of Product, equating to 342,690 Barrels per month and 11,423 Barrels per day per day.

Application of the Defendant's interpretation: Under the provisions of § 4.1, based upon the actually Throughput Product of 1,028,070 Barrels of Product, **the amount due pursuant to § 4.1 (the "Throughput Fee" according to the Defendant) is $1,542,105** (*i.e*. 1,028,070 Barrels of Throughput Product x $1.50 per Barrel = $1,542,105 (Throughput Fee)). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 90 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 1,028,070 (actually Throughput Barrels) = 90). Thus, utilizing the Shortfall and Throughput Fee figures, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $138,789,450** (*i.e*. 90 (Shortfall) x $1,542,105 (Throughput Fee) = $138,789,450). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $140,331,555**.

Application of the Plaintiff's interpretation: Under the provisions of § 4.1, based upon the actually Throughput Product of 1,028,070 Barrels of Product, **the amount due pursuant to § 4.1 is $1,542,105** (*i.e*. 1,028,070 Barrels of Throughput Product x $1.50 per Barrel (the "Throughput Fee" according to the Plaintiff) = $1,542,105). For purposes of §§ 3.1 and 3.2(a), the Shortfall is the difference between the Minimum Volume Commitment and the number of Barrels of Product actually Throughput the Terminal during the Calendar Quarter, or 90 (*i.e.* 1,028,160 (Minimum Volume Commitment) – 1,028,070 (actually Throughput Barrels) = 90). Thus,

utilizing the Shortfall figure and Throughput Fee of $1.50 per Barrel, **the Shortfall Payment for the Calendar Quarter under § 3.2(a) is equal to $135** (*i.e*. 90 (Shortfall) x $1.50 per Barrel (Throughput Fee) = $135). **Thus, the total amount owing by the Defendant for the Calendar Quarter is $1,542,240**.

**Scenario 3**: For the Calendar Quarter (again, assume for simplicity 3 months of 30 days each, for a total of 90 days), the Defendant Throughputs the Terminal a total of 1,028,250 Barrels of Product, equating to 342,750 Barrels per month and 11,425 Barrels per day per day.

Application of the Defendant's *and* the Plaintiff's interpretation: Under the provisions of § 4.1, based upon actually Throughput Product of 1,028,250 Barrels of Product, **the amount due pursuant to § 4.1 is $1,542,375** (*i.e*. 1,028,250 Barrels of Throughput Product x $1.50 per Barrel = $1,542,375). Under the provisions of §§ 3.1 and 3.2(a), because the amount of the actually Throughput Product is not less than the applicable Minimum Volume Commitment of 1,028,160 Barrels of Product, **no Shortfall Payment is owed under § 3.2(a)**. **Thus, the total amount owing by the Defendant for the Calendar Quarter is $1,542,375**.

44. As illustrated by the above scenarios, application of the Defendant's interpretation of "Throughput Fee" results in wild swings of liability from $0 (Scenario 1) to over $140 million (Scenario 2) in instances where the Minimum Volume Commitment is not satisfied. Then, where the Minimum Volume Commitment is exceeded (Scenario 3) and the Defendant Throughputs a mere 180 additional Barrels in comparison to Scenario 2, the Defendant's liability is reduced by over $138 million in comparison to Scenario 2. It is obvious that the parties did not intend such irrational, extreme and absurd results as part of their agreement. Application of the Plaintiff's interpretation, on the other hand, provides stability and conforms to the purposes of the Minimum Volume Commitment. Under the Plaintiff's interpretation, the resulting liability to the Defendant under both scenarios where the Minimum Volume Commitment is not satisfied (Scenarios 1 and 2) is identical. Only where the Minimum Volume Commitment is exceeded does the Defendant's liability rise, and only by the same rate applied to all determinations - $1.50 per Barrel.

45. Finally, in an effort to avoid the absurdity of the comparisons highlighted by both sets of hypothetical scenarios set out above, the Defendant claims that the payment provisions of sections 3.2(a) and 4.1 are mutually exclusive – in that only one or the other may apply at one time. In other words, the Defendant asserts that where the volume of actually Throughput Product is less than the Minimum Volume Commitment, then only the Shortfall Payment provisions of section 3.2(a) will apply to the determination of the amount owed by the Defendant for the Calendar Quarter; and that only where the actually Throughput Product exceeds the Minimum Commitment Volume will section 4.1 of the TSA apply to the determination of the amount owed by the Defendant for the Calendar Quarter. The Court disagrees.

46. Read in its entirety, the TSA provides for section 4.1 to serve as the starting point in calculating the Defendant's liability based upon the volume of actually Throughput Product, but then imposes the Minimum Volume Commitment and Shortfall Payment obligations on the Defendant pursuant to sections 3.1 and 3.2(a) to guarantee a baseline level of quarterly revenue to the Plaintiff in exchange for the Plaintiff's provision of exclusive use of the Terminal to the Defendant and promise to provide all necessary transloading services during the Calendar Quarter. There are three possible ways in which the baseline guaranteed level of quarterly revenue may be satisfied: (1) where the volume of Product actually Throughput the Terminal is equal to or greater than the Minimum Volume Commitment, by paying the amount required by section 4.1 of the TSA; (2) where no Product is Throughput the Terminal, by paying a Shortfall Payment equal to the Minimum Volume Commitment multiplied by the Throughput Fee of $1.50 per Barrel as required by section 3.2(a); or (3) where some volume of Product is actually Throughput the Terminal but the volume of such Product is less than the Minimum Volume Commitment, by (a) paying the amount required by section 4.1 of the TSA for the volume of Product actually Throughput the Terminal and (b) paying the Shortfall Payment required by section 3.2(a) for the

Shortfall, being the Minimum Volume Commitment less the volume of Product actually Throughput the Terminal.

47. In short, there is no merit to the Defendant's argument that the Defendant can never be liable for any Shortfall Payment(s) under the TSA where no Product is ever actually Throughput the Terminal. As such, the Motion will be denied to the extent the Defendant requests summary judgment on the issue of its liability for any Shortfall Payment(s).

**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. To the extent the Plaintiff, in requesting the recovery of a so-called "Minimum Fee" pursuant to the Complaint, is pursuing a claim for anything other than a Shortfall Payment(s) under the terms of the TSA, the Motion be and is hereby GRANTED.

2. If and to the extent the Plaintiff is pursuing a claim for the recovery of any amounts under section 4.1 of the TSA pursuant to the Complaint, the Motion be and is hereby GRANTED.

3. In all other respects, the Motion be and is hereby DENIED.

# # # END OF ORDER # # #