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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **In re:** | § | **Chapter 11** |
| | § | |
| **VISTA PROPPANTS AND LOGISTICS, LLC, ET AL.,**[1] | § | **Case No. 20-42002-ELM-11** |
| | § | **(Jointly Administered)** |
| ***Debtors.*** | § | |
| | § | |
| | § | |
| **MAALT, LP,** | § | |
| | § | |
| ***Plaintiff,*** | § | |
| | § | **ADV. PROC. NO. 20-04064-ELM** |
| **v.** | § | |
| | § | |
| **SEQUITUR PERMIAN, LLC,** | § | |
| | § | |
| ***Defendant.*** | § | |
| | § | |

**DEFENDANT'S OPPOSED MOTION TO CERTIFY DIRECT APPEAL**
**UNDER 28 U.S.C. § 158(d)(2)(A)(i)-(iii)**

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); VPROP Operating, LLC (0269) ("VPROP"); Lonestar Prospects Management, L.L.C. (8451) ("Lonestar Management"); MAALT Specialized Bulk, LLC (2001) ("Bulk"); Denetz Logistics, LLC (8177) ("Denetz"); Lonestar Prospects, Ltd. (4483) ("Lonestar Ltd."); and MAALT, LP (5198) ("MAALT"). The location of the Debtors' service address is 4413 Carey Street, Fort Worth, TX 76119-4219.


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SEQUITUR PERMIAN, LLC ("Sequitur" or "Defendant") files this *Defendant's Opposed Motion to Certify Direct Appeal Under U.S.C. § 158(d)(2)(A)(i)-(iii)* and would respectfully show until the Court the following:

1. Sequitur respectfully moves that this Court enter an order certifying a direct appeal to the Fifth Circuit, pursuant to U.S.C. § 158(d)(2)(A)(i)-(iii), regarding the Court's summary-judgment orders relating to the issue of Sequitur's condition precedent defense and Sequitur's contract-construction argument that the Plaintiff is not entitled to any Shortfall Payment under the parties' Terminal Services Agreement because there was never any Throughput of Product into the Terminal.

2. Sequitur's *Brief in Support of Its Opposed Motion to Certify Direct Appeal Under U.S.C. § 158(d)(2)(A)(i)-(iii)* sets for the grounds for the relief sought.

3. Sequitur will seek an expedited hearing by separate motion.

Respectfully Submitted,

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## CERTIFICATE OF CONFERENCE

In accordance with LBR 7007-1, counsel for Sequitur Permian LLC, Dylan B. Russell, conferred with counsel for Maalt, LP, James Lanter on April 30, 2021 by e-mail, and Maalt, LP opposed to this motion.

*/s/ Dylan B. Russell*
Dylan B. Russell

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2021 a copy of the foregoing Motion was served through the Court's ECF system on those parties receiving ECF notice, and as indicated below on the parties reflected below.

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**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.,**[1] | § | **Case No. 20-42002-ELM-11** |
| | § | **(Jointly Administered)** |
| ***Debtors.*** | § | |
| **MAALT, LP,** | § | |
| ***Plaintiff,*** | § | |
| | § | |
| **v.** | § | |
| | § | |
| **SEQUITUR PERMIAN, LLC,** | § | **ADV. PROC. NO. 20-04064** |
| ***Defendant.*** | § | |
| | § | |
| ***v.*** | § | |
| | § | |
| **VISTA PROPPANTS AND LOGISTICS, LLC** | § | |
| | § | |
| ***Third Party Defendant*** | § | |

**SEQUITUR PERMIAN, LLC'S**
**BRIEF IN SUPPORT OF**
**OPPOSED MOTION TO CERTIFY DIRECT APPEAL**
**UNDER 28 U.S.C. § 158(d)(2)(A)(i)-(iii)**

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); VPROP Operating, LLC (0269) ("VPROP"); Lonestar Prospects Management, L.L.C. (8451) ("Lonestar Management"); MAALT Specialized Bulk, LLC (2001) ("Bulk"); Denetz Logistics, LLC (8177) ("Denetz"); Lonestar Prospects, Ltd. (4483) ("Lonestar Ltd."); and MAALT, LP (5198) ("MAALT"). The location of the Debtors' service address is 4413 Carey Street, Fort Worth, TX 76119-4219.

Defendant, Counter-Plaintiff, and Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), files this Brief in Support of Opposed Motion to Certify Direct Appeal Under 28 U.S.C. § 158(d)(2)(A)(i)-(iii), and in support thereof would show unto the Court, as follows:

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## I. SUMMARY

1. Sequitur moves that the Court certify a direct appeal to the Fifth Circuit under 28 U.S.C. § 158(d)(2)(A)(i)-(iii) because the orders on Sequitur's key summary judgment grounds—*i.e.*, that no Shortfall Payment is owed to Maalt because (a) the condition precedent event, the Terminal Operations Commencement Date, did not occur, and (b) there was no Throughput (or delivery of Product) into the Terminal—trigger one or more of the four grounds for direct appeal listed in Section 158(d)(2)(A). The orders are attached as **Exhibit 1**, **Exhibit 2**, and **Exhibit 3**.

2. First, as to both summary-judgment grounds, "an immediate appeal from" the Court's orders "may materially advance the progress of the case." *Id.* § 158(d)(2)(A)(iii). Whether the Court's rulings were legally correct or not, the certainty of a decision by the Fifth Circuit on these legal issues will advance the progress of the case by potentially disposing of the need for a trial altogether, whether as a legal reality or as a practical decision.

3. Second, the order regarding the condition precedent defense involves questions of law for which there "is no controlling decision of the court of appeals" and matters "of public importance," and the order requires "resolution of conflicting decisions." *Id.* § 158(d)(2)(A)(i)-(ii).

4. Specifically, such order reflects a conflict between fundamental principles of Texas contract law that are of public importance, as follows:

- Will clear conditions precedent provisions be enforced when the unambiguous contract language is the result of arm's-length negotiations between sophisticated business entities; or
- Can courts disregard such provisions when doing so might result in a perceived "extreme forfeiture"?

The Supreme Court of Texas has held the former is the law in Texas, but it has never held the latter.

5. Additionally, there "is no controlling decision of" the Fifth Circuit[2] that answers the following questions about the "extreme forfeiture" rule to excuse otherwise enforceable condition precedent provisions:

- What qualifies as an "extreme forfeiture"?
- Is the existence of an ""extreme forfeiture" a question of law, reviewed de novo on appeal?

6. In sum, because at least one of the grounds under 28 U.S.C. § 158(d)(2)(A) has been met, the Court must certify a direct appeal to the Fifth Circuit. Sequitur's motion should be granted.

## II. ARGUMENT

### A. Direct appeals to the Fifth Circuit must be certified if any of the four grounds under 28 U.S.C. § 158(d)(2)(A)(i)-(iii) are met.

7. The Fifth Circuit has listed the grounds on which a bankruptcy court's interlocutory order must be certified as an appeal directly to that court under 28 U.S.C. § 158(d)(2). *See Crosby v. OrthAlliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 418 (5th Cir. 2008). "This statute was enacted to provide for direct review of bankruptcy court judgments, orders, or decrees by the applicable court of appeals in cases where the bankruptcy court or the district court certify that there is no controlling decision from the Supreme Court or circuit court, the case involves a matter of public importance, there are conflicting precedents, or an immediate appeal may materially advance the progress of the bankruptcy proceeding." *Id.* at 418 (listing grounds in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)).

[2] The Supreme Court of Texas also has not answered these questions because it has never adopted the "extreme forfeiture" rule for excusing the non-occurrence of a condition precedent.

8. "If the bankruptcy court . . . on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; . . . then the bankruptcy court . . . *shall* make the certification described in subparagraph (A)." *See* 28 U.S.C. § 158(d)(2)(B)(i)-(ii) (emphasis added); *accord In re Adkins*, 517 B.R. 698, 699 (Bankr. N.D. Tex. Sept. 8, 2014) (stating "[i]f any of the four conditions precedent are met, the bankruptcy court *shall* make the certification per § 158(d)(2)(B)(ii)") (emphasis in original).

***1. The Fifth Circuit has accepted direct appeals involving uncertain Texas law.***

9. In *Crosby*, the legal question at issue was whether "Business Services Agreements or Management Agreements . . . that OCA entered with a number of orthodontists and their professional corporations . . . were illegal under Texas law," and specifically under a provision of the Texas Occupations Code. *Id.* at 416 (footnote omitted). There, "the bankruptcy court certified that th[e] case met the requirements for direct appeal because it involved a question of law on which there was no controlling decision by the Fifth Circuit or the Texas Supreme Court, it involved a matter of public importance, and a direct appeal would materially advance the progress of the case." *Id.* at 418.

10. Consistent with *Crosby*, the Fifth Circuit very recently accepted a Section 158(d) direct appeal of a bankruptcy court partial summary judgment ruling based on an unsettled and purely Texas-law issue. *E.g., Deutsche Bank Trust Co. Ams. v. U.S. Energy Dev. Corp. (In re First River Energy, L.L.C.)*, 986 F.3d 914, 917 (5th Cir. 2021) (stating "[t]his court earlier granted an interlocutory appeal from the bankruptcy court's decision," citing to 28 U.S.C. § 158(d), and noting that "[t]he bankruptcy court adroitly untangled a thorny conflicts of law issue, the result of which, unfortunately, undermines the efficacy of a non-standard UCC provision intended to

protect Texas oil and gas producers"). Thus, Section 158(d) appeals are appropriate for unsettled or conflicting questions of Texas contract law.

***2. Under Bankruptcy Rules 8004(e) and 8006 and 28 U.S.C. §158(a)(3), this Court can certify a direct appeal, without a district court granting separate leave.***

11. Rule 8004(a) of the Federal Rules of Bankruptcy Procedure provides that "[t]o appeal from an interlocutory order or decree of a bankruptcy court under 28 U.S.C. §158(a)(3), a party must file with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a)." *See* Fed. R. Bankr. P. 8004(a). Contemporaneously with this motion, Sequitur will file a notice of appeal. Additionally, the notice of appeals must "(1) be filed within the time allowed by Rule 8002; (2) be accompanied by a motion for leave to appeal prepared in accordance with subdivision (b); and (3) unless served electronically using the court's transmission equipment, include proof of service in accordance with Rule 8011(d). *See id.*

12. Contemporaneously with its notice of appeal, Sequitur will the motion for leave to appeal, as is required under 28 U.S.C. §158(a)(3). *See* Fed. R. Bankr. P. 8004(b). The notice of appeal and motion for leave must be transferred to the district court and docketing with the district. *See* Fed. R. Bankr. P. 8004(c). But even if a motion for leave were not filed (but Sequitur will), the district court can consider the notice of appeal as the motion for leave, and grant or deny the implied motion. *See* Fed. R. Bankr. P. 8004(c)-(d).

13. Finally, Rule 8004(e) provides that "[i]f leave to appeal an interlocutory order . . . is required under 28 U.S.C. §158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C. §158(d)(2) satisfies the requirement." *See id.* 8004(d).

14. For example, in a recent order from a bankruptcy court on a Section 158(d)(2) motion for direct appeal, the court certified a direct appeal even though the separate motion for leave to the district was still pending and not yet decided. *See, e.g., Duetsche Bank Trust Co.*

*Americas, Agent v. First River Energy, LLC (First River Energy, LLC)*, No. 18-05015-CAG, 2019 Bankr. LEXIS 1284, at *12-17 (Bankr. W.D. Tex. Apr. 22, 2019) (hereinafter "*Duetsche Bank*") (certifying direct appeal on lien priority issue under Texas UCC article 9 after summary judgment orders granting and denying in part motions). In that case, the bankruptcy court noted that "[i]f the bankruptcy court certifies a direct appeal of an interlocutory order entered by that court, and the circuit court of appeals authorizes the direct appeal, then the requirement to receive leave to appeal an interlocutory order provided under § 158(a)(3) is satisfied." *Id.* at *9.

15. In response to the argument by a party opposing the direct appeal "that there is 'no appealable order to certify for direct appeal because the district court has not yet ruled on the motion for leave to appeal,'" the court noted that the movant "complied with Rule 8004, timely filing their Notice of Appeal and Motion for Leave to Appeal with the bankruptcy court on March 21, 2019," and, that "[a]s such, this Court finds that if the Fifth Circuit authorizes this Court's certification for direct appeal, then the leave requirement for appeal of an interlocutory order described under 28 U.S.C. § 158(a)(3) is satisfied." *Id.*

16. Based on the foregoing, this Court can certify a direct appeal, irrespective of whether the district court rules on the separate motion for leave under Rule 8004(b), so long as at least one of the grounds under Section 158(d)(2)(A) exist.

17. Under Rule 8006, however, the bankruptcy court only has 30 days after the notice of appeal is filed to certify the direct appeal, or otherwise thereafter, the motion for direct appeal is pending before the district court. *See* Fed. R. Bankr. P. 8006(b). In *Duetsche Bank*, for example, the bankruptcy court noted that the notice of appeal and motion for leave were filed in March 21, 2019, the 30th day fell on a weekend, making the next Monday after the 30th day April 22, 2019, which was the date of the court's order certifiying the direct appeal. *See Duetsche Bank*, 2019

Bankr. LEXIS 1284, at *6-8 (finding under Rule 8006(b) that "this matter is 'pending' in the bankruptcy court through Monday, April 22, 2019"). As such, the court concluded it had jurisdiction to certify the direct appeal.

18. In summary, this Court can certify Sequitur's direct appeal, including without a ruling from a district court on the separate motion for leave, within 30 days after Sequitur files its notice of appeal. *See id.; see also* Fed. R. Bankr. P. 8006(b),(f). As discussed further below, this Court must certify a direct appeal because at least one of the grounds in 158(d)(2)(A) has been met.

**B. Having the Fifth Circuit decide whether the condition precedent to payment under the TSA is enforceable as written and whether a Shortfall Payment is due without Throughput would "materially advance the progress of the bankruptcy proceeding."**

19. As explained in further below, the "materially advance the progress of the bankruptcy proceeding" ground in 28 U.S.C. § 158(d)(2)(A)(iii) applies here. As to that ground, the Second Circuit is one of the few courts that has given any guidance on its meaning because it is mostly self-explanatory. But, that court explained the ground as follows:

> Legislative history also confirms that direct appeal may be appropriate where a judgment of this court would "materially advance the progress of the case." For instance, where a bankruptcy court has made a ruling which, if correct, will essentially determine the result of future litigation, the parties adversely affected by the ruling might very well fold up their tents if convinced that the ruling has the approval of the court of appeals, but will not give up until that becomes clear. Where that ruling is manifestly correct or manifestly erroneous, the parties would profit from its immediate review in this court.

*See Weber v. United States Tr.*, 484 F.3d 154, 158 (2d Cir. 2007).

20. Stated another way, *Weber* held that "[w]e will be most likely to exercise our discretion to permit a direct appeal where there is uncertainty in the bankruptcy courts (either due to the absence of a controlling legal decision or because conflicting decisions have created confusion) or where we find it patently obvious that the bankruptcy court's decision is either

manifestly correct or incorrect, as in such cases we benefit less from the case's prior consideration in the district and we are more likely to render a decision expeditiously, thereby advancing the progress of the case." *Id.* at 161.

21. Here, Sequitur moved for summary judgment on two purely legal grounds, either of which would have effectively disposed of Maalt's breach of contract claim had the Court agreed with Sequitur's legal arguments. Specifically, if the Court agreed that, because Sequitur undisputedly did not send the written notice of the Terminal Operations Commencement Date ("Written Commencement Date Notice") , the Terminal Operations Commencement Date did not occur, then Maalt would not be entitled to any Shortfall Payment. Similarly, if the Court agreed that there is no Shortfall Payment due without actual Throughput, then Maalt would not be entitled to any Shortfall Payment because is it undisputed that no Product was delivered into the Terminal, which is the definition of Throughput.

22. Like suggested in *Weber*, until the Fifth Circuit agrees with this Court's rulings on those two legal grounds, Sequitur "will not give up until [it] becomes clear" that those rulings were correct under fundamental Texas contract-law principles. Similarly, Sequitur may be willing to fold up its tent if this Court's rulings have "the approval of the court of appeals." *See id.* at 158.

23. Additionally, from a practical perspective, it makes no sense for the parties to proceed to trial, in a matter of months, on numerous complex and fact-intensive issues (*e.g.*, force majeure and whether the Terminal was fully operational and whether the regulatory approvals were obtained, etc.) that would never need to be addressed at trial if Sequitur is correct on either of its two summary-judgment grounds. Stated simply, if Sequitur is correct on either legal ground, any appeal of a final judgment after a trial in this case would have been after a trial conducted for

naught, after considerable—but unnecessary—use of time, expense, and precious judicial resources.

24. Based on the foregoing, Sequitur submits that an "immediate appeal from the" Court's summary-judgment orders on the condition precedent and no-Throughput/no-Shortfall Payment issues "may materially advance the progress of the case." *See* id. § 158(d)(2)(a)(iii). Therefore, a direct appeal is mandatorily required on these particular summary-judgment orders. Sequitur's motion should be granted and the questions certified to the Fifth Circuit for a direct appeal.

**C. It is matter of public importance and conflicting precedents exist under Texas contract law regarding which rule controls: (1) the *Bradberry* rule that "contracts when entered into freely and voluntarily shall be sacred and shall be enforced by" courts as long as the contract "does not violate the law or public policy"; or (2) the Restatement rule excusing an agreed-to condition precedent when it will involve "extreme forfeiture or penalty."**

25. As explained in further detail below, the public importance and conflicting precedents grounds in 28 U.S.C. § 158(d)(2)(A)(i)-(ii) apply here. Additionally, because the Fifth Circuit has not confronted whether the conflicting precedents can be harmonized, the "no controlling decision of the court of appeals" ground in 28 U.S.C. § 158(d)(2)(A)(i) also applies.

26. Here, the Court agreed that Maalt's right to any Shortfall Payment fee is conditioned upon the Terminal Operations Commencement Date occurring. Pursuant to the TSA's unambiguous definition, the Terminal Operations Commencement Date would not occur until, as the Court defined it, Sequitur sent the Written Commencement Date Notice. The Court ruled, however, that the non-occurrence of the Written Commencement Date Notice should be excused due to "extreme forfeiture." But the Supreme Court of Texas has not adopted the "extreme forfeiture" rule, and the lower Texas appellate courts' reliance on the Restatement is not the adopted law of Texas. Lower Texas appellate courts cannot make law, including adopting a

Restatement of law. *See State Dep't of Highways & Public Transp. v. Bacon*, 754 S.W.2d 279, 281 (Tex. App.—Texarkana 1998, no pet.).

27. Because it is undisputed that Sequitur did not send the Written Commencement Date Notice, the conflicting contract rules of public importance here are the following: (1) whether Texas law will honor the express text of the parties' agreement, or (2) whether Texas law will permit courts to judicially excuse the non-occurrence of a condition-precedent event (*i.e.*, rewrite the parties' contract), which is a condition precedent for the potential right to payment, because to do so—would **not** violate law or public policy—but instead would result in an "extreme forfeiture" to one of the parties, as determined by a court. As explained below, neither the Supreme Court of Texas nor the Texas Legislature has adopted the "extreme forfeiture" rule that allows courts to judicially excuse the non-occurrence of a condition-precedent.

28. In a case argued by Sequitur's counsel in this proceeding, the Supreme Court of Texas reaffirmed that "competent parties shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be sacred and shall be enforced by the Courts of Justice." *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017). Most significantly, the Court announced the fundamental rule of contract law in Texas: "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 482. Although this Court's order acknowledged the rule in *Bradberry*, no analysis or discussion was provided that explains why that rule does not control in this case.

29. Although the Supreme Court of Texas has noted that "forfeitures are not favored in the law," *see, e.g., PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636 (Tex. 2008), it has **not** held that it is against public policy or contrary to law for parties to agree that one party has control over a condition precedent event. Nor has the Texas Supreme Court held that conditions precedent may

be judicially excused when their enforcement would result in an "extreme forfeiture." Mere disfavored status does not equal a violation of law or public policy.

30. For example, the Supreme Court of Texas has recently held that "Texas courts regularly enforce conditions precedent to contract formation and reject legal claims that are artfully pleaded to skirt unambiguous contract language, especially when that language is the result of arm's-length negotiations between sophisticated business entities." *Energy Transfer Partners, L.P. v. Enter. Products Partners, L.P.*, 593 S.W.3d 732, 738 (Tex. 2020).

31. Here, in its summary-judgment ruling on the condition precedent defense, the Court excused the express Written Commencement Date Notice requirement without any finding that the agreement violated the law or public policy, as would be required under *Bradberry*. Instead, the express condition precedent was deemed excused merely because Sequitur "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 the notice without any basis would have the effect of working a forfeiture to the Plaintiff."

32. But, in judicially excusing the parties' unambiguous condition-precedent trigger for Maalt's potential right to a Shortfall Payment, the Court applied a legal principle that originates from a Restatement of Contracts provision that has not been adopted by the Supreme Court of Texas and that conflicts with "Texas's strong public policy favoring freedom of contract," as noted in *Bradberry*. 526 S.W.3d at 482. As such, the Court's order involves a question of law requiring resolution of conflicting decisions **and** a matter of public importance. *See* 28 U.S.C. § 158(d)(2)(a)(i)-(ii).

33. The Court's application of the "extreme forfeiture" rule hinged on the court of appeals decision in *Donaldson v. Digital General System*, 168 S.W.3d 909, 916 (Tex. App.–Dallas

2005, pet. denied). But the rule in *Donaldson* originated with Restatement provisions that have not been applied or adopted by the Supreme Court of Texas. In fact, the *Donaldson* court found the "extreme forfeiture" rule from a dissenting opinion from a sister court of appeals. *See id.* at 916 (citing *Beard Family Partnership. v. Commercial Indemnity Insurance Co.*, 116 S.W.3d 839, 853 (Tex. App.—Austin 2003, no pet.) (Puryear, J., dissenting), which stated that courts may "excuse non-performance of a condition precedent without any 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'"). The dissenting opinion in *Beard* relied on two cases that applied the Restatement provisions that, again, have not been adopted by the Supreme Court of Texas and that contradict Bradberry. *See id.* (citing *Lesikar Construction Co. v. Acoustex, Inc.,* 509 S.W.2d 877 (Tex. App.—Fort Worth 1974, writ ref'd n.r.e.) and *Varel v. Banc One Capital Partners, Inc.*, 55 F.3d 1016 (5th Cir. 1995)).

34. In *Lesikar Construction*, the court of appeals relied on Section 302 of the RESTATEMENT (FIRST) OF CONTRACTS for the proposition that "[a] condition may be excused without other reason if its requirement (a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance." 509 S.W.2d at 881 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 302). The court supported its application of the Restatement rule by citing to *Hill v. Still,* 19 Tex. 76, 84 (Tex. 1857) and providing that the Restatement rule "is the law in Texas." *Id.* But, the Supreme Court in *Hill* did not reference, apply, or adopt the Restatement; instead, it simply reaffirmed the general rule that a court "will not construe a contract so as to produce a forfeiture of a legal or equitable estate, unless that intention is plainly indicated." *Hill*, 19 Tex. at 84. Similarly, in *Varel*, the Fifth Circuit relied on *Lesikar Construction* and on comment b of Section 229 of the RESTATEMENT (SECOND) OF

CONTRACTS, which replaced Section 302 of the RESTATEMENT (FIRST) OF CONTRACTS. 55 F.3d 1016, 1017 (5th Cir. 1995). But, again, the rule in comment b of Section 229 of the Restatement has also not been adopted by the Texas Supreme Court.

35. Here, the meaning of the Written Commencement Date Notice is clear and cannot be construed out of the definition of Terminal Operations Commencement Date. Thus, the only way to avoid the effect of the undisputed facts as to the express text of the TSA is to excuse non-occurrence of the notice (i.e., re-write the TSA) and deem the condition precedent event to have occurred. That is not the law in Texas according to the Supreme Court of Texas in *Bradberry* and *Energy Transfer Partners*, both of which provide that the terms of unambiguous contracts shall be enforced as written.

36. Texas trial courts and lower appellate courts do not make law, such as, adopting any Restatement provision as the law in Texas. *See State Dep't of Highways & Public Transp. v. Bacon*, 754 S.W.2d 279, 281 (Tex. App.—Texarkana 1998, no pet.) (stating that "[w]hile, in our opinion, the Restatement position would be the better standard for both the licensor and licensee, we are bound by precedent to abide by the actual knowledge standard until such time as the Texas Supreme Court or the Texas Legislature sees fit to adopt the standard set forth in the Restatement"); *see also Long v. Cibolo Livery Stables, Inc.*, No. 07-09-0243-CV, 2010 Tex. App. LEXIS 6306, at *10 (Tex. App.—Amarillo Aug. 4, 2010, no pet.) (stating that "[a]s judges, it is our duty to interpret, not create, law for the State of Texas" and that until the Legislature adopts the law "we, like the litigants at bar, will continue to recognize that § 359 of the Restatement is inapplicable"); *accord Durham v. Zarcades*, 270 S.W.3d 708, 713 n.5 (Tex. App.—Fort Worth 2008, no pet.) (stating that "[t]he Texas Supreme Court has expressly stated that it has not adopted Section 353

as the law of Texas even though several courts of appeals have cited and relied upon it" and that "we express no opinion as to whether it has been adopted as the law of Texas").

37. Instead, when the Supreme Court of Texas decides to adopt, or declines to adopt, a Restatement of Laws, that court unequivocally says so. *Compare Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 337 (Tex. 1998) (stating that "[f]or these reasons we refuse to adopt the approach of Comment j of the superseded Restatement (Second) of Torts section 402A") *with Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 17 (Tex. 1974) (stating that "[w]hile the broader definition of joint enterprise has been previously embraced by this Court, . . . we have determined that the definition set forth in the RESTATEMENT § 491, comment c is better reasoned and is adopted"). Ultimately, the Court's decision to waive the condition precedent of a Written Commencement Date Notice ultimately relied on Restatement provisions that have only been applied by lower appellate courts and have not been adopted as Texas law.

38. Based on the foregoing, a conflict exists between the rule set out by the Texas Supreme Court in *Bradberry* and the rule adopted by the Dallas Court of Appeals in *Donaldson*. *See* 28 U.S.C. § 158(d)(2)(a)(ii). Additionally, because the obvious contradiction between the rules in *Bradberry* and *Donaldson* have not been analyzed or decided by the Fifth Circuit or the Supreme Court of Texas,[3] Sequitur submits that there is "a question of law as to which there is no controlling decision of the court of appeals for the circuit" *See* id. § 158(d)(2)(a)(i).

39. Furthermore, because these conflicting contract-law principles involve fundamental questions about "Texas's strong public policy favoring freedom of contract," as noted in *Bradberry*, 526 S.W.3d at 482, Sequitur submits that resolving these issues "involves a matter

[3] *See McMillan v. Amazon.com*, 983 F.3d 194, 202 (5th Cir. 2020) (stating "'[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent'").

of public importance." *See id.* § 158(d)(2)(a)(i). Therefore, a direct appeal is mandatorily required to resolve the conflicting decisions on the question of law in these particular summary-judgment orders. Sequitur's motion should be granted and the questions certified to the Fifth Circuit for a direct appeal.

**D. Neither the Fifth Circuit nor any Texas state appellate court has defined what constitutes an "extreme forfeiture" and whether its existence is a question of law, reviewed de novo.**

40. Although the Fifth Circuit has applied the extreme-forfeiture excuse rule for disregarding unambiguous conditions precedent in contract, based on Texas lower court of appeals opinions (but not the Supreme Court of Texas), none of those Fifth Circuit decisions have provided a bright-line rule regarding what qualifies as an "extreme forfeiture" and whether such a finding is a question of law, reviewed de novo.

41. Here, the Court concluded that if Sequitur could prevent the occurrence of the Terminal Operations Commencement Date by not sending the Written Commencement Date Notice then Maalt would suffer "a forfeiture" by "having granted" Sequitur "the exclusive right to use the Terminal during the term of the agreement and the right of first offer and refusal." Accordingly, the Court held "that the performance of such condition is excused." The Court, however, did not find that the forfeiture was "extreme." Furthermore, the Court's order does not include any analysis or cite to any authority explaining why Maalt's consideration (exclusivity right and right of first offer and refusal) would become "extreme" forfeitures if the Terminal Operations Commencement Date was not triggered.

42. To be sure, if Sequitur's decision not to send the Written Commencement Date Notice was a breach of a notice covenant under the TSA, Maalt, as previously noted, had the right under Section 8.3 of the TSA to send a Default Notice. And if Sequitur did not cure after receipt

of that Default Notice, Maalt could "terminate this Agreement immediately upon giving written notice of such . . . termination to the Defaulting Party," which would have terminated Maalt's obligations to provide an exclusivity right and right of first offer and refusal. Additionally, for such a breach, Maalt could have sought recovery of any actual damages it suffered that were caused by such a breach.

43. Thus, there are significant unanswered legal questions about (a) what constitutes an "extreme forfeiture" and (b) whether some theoretical harm rises to such a level is a question of law, reviewed de novo. In other words, "there is no controlling decision of the" Fifth Circuit on these dispositive questions. *See* 28 U.S.C. § 158(d)(2)(A)(i). Sequitur's motion should be granted and the questions certified to the Fifth Circuit for a direct appeal.

44. These unanswered questions are extremely important, and in Sequitur's view, dispositive. Sequitur submits that an extreme forfeiture in this case would result if Maalt is permitted to recover the full amount of the Shortfall Payment, even though it performed only one small component of Maalt's obligations under the TSA: the granting of the exclusivity right. The right of first offer and refusal consideration was never triggered because Maalt never suggested it intended to sell the Terminal. And, as noted, Maalt never had to perform the key consideration under the TSA: the transloading services of crude oil through the Terminal, which saved Maalt over $2 million, according to its lost-profits expert.

45. On the other hand, Sequitur built out the improvements for the Terminal, at its sole expense. And because the Terminal never became fully operational, in that no oil was ever delivered into and transloaded through the Terminal, Sequitur never made any revenue from oil sales from which it would have otherwise paid Maalt a Throughput Fee or Shortfall Payment. Simply put, if Maalt's claims ultimately prevail, Maalt will have recovered the full benefit of the

TSA as though both parties had fully performed through the full term of the TSA, even though Maalt never actually performed transloading services required under the TSA and even though it never suffered any out-of-pocket losses or expenses from its temporary nonuse of the Terminal while Sequitur still had an exclusive possessory right to the Terminal. Under this scenario, if anyone will have suffered an "extreme forfeiture" it will be Sequitur, not Maalt.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, Counter-Plaintiff, and Third-Party Plaintiff, SEQUITUR PERMIAN, LLC, further requests that the Court grant the Opposed Motion to Certify Direct Appeal Under 28 U.S.C. § 158(d)(2)(A)(i)-(iii) and issue an order certifying a direct appeal, that Plaintiff Maalt recover nothing by its suit; that, upon a future application to this Court for the same, SEQUITUR PERMIAN, LLC recover from Maalt its fees, costs, and expenses, including but not limited to attorney's fees and expenses, pursuant to Article 15.19 of the TSA, and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2021 a copy of the foregoing Brief was served through the Court's ECF system on those parties receiving ECF notice, and as indicated below on the parties reflected below.

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

**ENTERED**

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

**Signed April 13, 2021**

**United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| In re: | § | Chapter 11 |
| | § | |
| VISTA PROPPANTS AND LOGISTICS, LLC, *et al*., | § | Case No. 20-42002-ELM-11 |
| | § | |
| | § | Jointly Administered |
| Debtors. | § | |
| | § | |
| MAALT, LP, | § | |
| | § | |
| Plaintiff, | § | |
| v. | § | Adversary No. 20-04064 |
| | § | |
| SEQUITUR PERMIAN, LLC, | § | |
| | § | |
| Defendant/Third-Party Plaintiff, | § | |
| v. | § | |
| | § | |
| VISTA PROPPANTS AND LOGISTICS, LLC, | § | |
| | § | |
| | § | |
| Third-Party Defendant. | § | |

**ORDER 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

**Exhibit 1**

"**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 # # #

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 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*

**Exhibit 2**

*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 ###

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**")

**Exhibit 3**

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 '<u>Shortfall</u>'), [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 '**<u>Shortfall Payment</u>**'). 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 '<u>Minimum Volume Commitment</u>') 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 'Throughput Fee')." 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 # # #