Matt A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
State Bar No. 24041839
Christopher J. Kronzer
State Bar No. 24060120
HOOVERSLOVACEK, LLP
5051 Westheimer, Suite 1200
Houston, Texas 77056
Telephone: (713) 977-8686
Facsimile: (713) 977-5395
kornhauser@hooverslovacek.com
russell@hooverslovacek.com
kronzer@hooverslovacek.com

Attorneys for Sequitur Permian, LLC

Jeff P. Prostok
State Bar No. 16352500
J. Robert Forshey
State Bar No. 07264200
Suzanne K. Rosen
State Bar No. 00798518
FORSHEY & PROSTOK LLP
777 Main St., Suite 1550
Ft. Worth, TX 76102
(817) 877-8855 Telephone
(817) 877-4151 Facsimile
jprostok@forsheyprostok.com
bforshey@forsheyprostok.com
srosen@forsheyprostok.com

Local Counsel for Sequitur Permian, LLC

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,	§	
	§	
v.	§	
	§	
SEQUITUR PERMIAN, LLC,	§	**ADV. PROC. NO. 20-04064**
Defendant.	§	

BRIEF IN SUPPORT OF SEQUITUR PERMIAN, LLC'S MOTION FOR EXPEDITED CONSIDERATION OF ITS *MOTION FOR LEAVE TO APPEAL INTERLOCUTORY ORDERS*

[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.

2042002210506000000000013

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant, Counter-Plaintiff, and Third-Party Plaintiff, Sequitur Permian, LLC ("Sequitur"), appellant herein, and files this brief in support of its request for expedited consideration of its *Motion for Leave to Appeal* under 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8004(b) (the "Motion for Leave to Appeal")[2] [Docket No. 134], and would respectfully show the Court the following:

1. In the Motion for Leave to Appeal, Sequitur requests that the Court grant it leave to appeal three interlocutory orders [Adv. Docket Nos. 122, 126 and 128] entered by the Bankruptcy Court granting in part and denying in part the competing motions for partial summary judgment filed by Sequitur and Maalt, LP ("Maalt") pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8004(b)(2). The interlocutory orders, and Sequitur's appeal of same, involve the following purely legal issues:

- Does the "*Bradberry*[3] rule" that "parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy" control over the "*Donaldson*[4] rule" that a court "may excuse nonperformance 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'"?

- If the *Donaldson* rule overrides the *Bradberry* rule—despite the lack of any authority from the Supreme Court of Texas on that proposition or any such authority stating it is against law or public policy for parties to agree on such a condition precedent—when does any harm that would otherwise flow

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion for Leave to Appeal.

[3] *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) (holding that "[a]bsent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered" and that "[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.'").

[4] *Donaldson v. Digital Gen. Sys.*, 168 S.W.3d 909, 916 (Tex. App.—Dallas 2005, pet. denied) (holding that a court "may excuse nonperformance 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'").

from the enforcement of the condition precedent rise to the level of an "extreme forfeiture or penalty"?

- Is the existence of an "extreme forfeiture or penalty" a question of law?
- Under Texas contract-construction principles, is Maalt entitled to a Shortfall Payment even when there was never any Throughput of Product into the Terminal?

2. Sequitur maintains that leave to appeal should be granted because the standard applied by the courts in granting leave to appeal interlocutory orders is satisfied in this case. Specifically, leave to appeal should be granted because: (i) the appeal involves a controlling issue of law; (ii) the questions are one where there is a substantial ground for difference of opinion, and (iii) an immediate appeal would materially advance the termination of the litigation. *See Ichinose v. Homer Nat'l Bank (In re Ichinose)*, 946 F.2d 1169, 1177 (5th Cir. 1991) (applying the review process from 28 U.S.C. § 1292(b) to appeals of interlocutory orders from the bankruptcy court); *Panda Energy, Int'l, Inc. v. Factory Mut. Ins.*, Civil Action No. 3:11-CV-003-K, 2011 U.S. Dist. LEXIS 17396, *9 (N.D. Tex. Feb. 14, 2011).

3. For example, Sequitur's appeal involves a controlling question of law as to which there is no controlling decision of the Fifth Circuit or Supreme Court regarding a conflict between (ii) a line of Texas Supreme Court cases holding that unambiguous contracts should be enforced as written (the *Bradberry* rule), and (ii) certain Texas appellate court cases that rely on the Restatement (First) of Contracts, which has not been approved by the Texas Supreme Court, to find that the failure of a condition precedent may be waived if its requirement will involve an extreme forfeiture or penalty (the *Donaldson* rule). In addition, there are substantial grounds for difference of opinion in that these conflicting lines of cases have not been considered and resolved by the Fifth Circuit or the Texas Supreme Court. Finally, the resolution of an immediate appeal from the orders would materially advance the progress of the case because

resolving the purely legal issues raised in Sequitur's appeal pertaining to the failure of a condition precedent and the lack of any payment obligation under the Terminal Services Agreement would dispose of Maalt's claims entirely, thereby avoiding the a waste of judicial and the parties' resources associated with conducting a full blown trial on a matter where any judgment would have to be reversed if the Bankruptcy Court's rulings on these legal questions are found to be erroneous on appeal.

4. Pursuant to Fed. R. Bankr. P. 8004(b)(2), Maalt has a fourteen (14) day period to respond to Sequitur's Motion for Leave to Appeal, making its response due on May 14, 2021. Sequitur *is not* seeking to shorten Maalt's response period. However, Sequitur is asking that the Court expedite its consideration of the Motion for Leave to Appeal because the current trial docket call in the adversary proceeding is scheduled for June 7, 2021 [Adv. Docket No. 118], at which time the matter will be set for trial The parties should not be forced to incur the expense and time associated with preparing for a trial when the resolution of Sequitur's appeal of the purely legal issues described above may render a trial completely (or at least partially) unnecessary. In order to more quickly obtain the resolution of the purely legal issues made the subject of Sequitur's appeal, Sequitur has also filed a motion seeking certification for a direct appeal to the United States Court of Appeals for the Fifth Circuit in the Bankruptcy Court.

5. As indicated in the Certificate of Conference below, counsel for plaintiff, Maalt, LP, opposes expedited consideration of the Motion for Leave to Appeal.

Dated: May 5, 2021.

Respectfully Submitted,

/s/ Matthew A. Kornhauser
Matthew A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
State Bar No. 24041839
Christopher J. Kronzer
State Bar No. 24060120

HOOVERSLOVACEK, LLP
5051 Westheimer, Suite 1200
Houston, Texas 77056
Telephone: (713) 977-8686
Facsimile: (713) 977-5395
kornhauser@hooverslovacek.com
russell@hooverslovacek.com
kronzer@hooverslovacek.com

ATTORNEYS FOR DEFENDANT, SEQUITUR PERMIAN, LLC

-and-

Jeff P. Prostok
State Bar No. 16352500
J. Robert Forshey
State Bar No. 07264200
Suzanne K. Rosen
State Bar No. 00798518
FORSHEY & PROSTOK LLP
777 Main St., Suite 1550
Ft. Worth, TX 76102
(817) 877-8855 Telephone
(817) 877-4151 Facsimile
jprostok@forsheyprostok.com
bforshey@forsheyprostok.com
srosen@forsheyprostok.com

LOCAL COUNSEL FOR DEFENDANT, SEQUITUR PERMIAN, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2021 a copy of the foregoing document was served through the Court's ECF system on those parties receiving ECF notice, and as indicated below on the parties reflected below.

Via Email:
Stephen M. Pezanosky (stephen.pezanosky@haynesboone.com)
Matthew T. Ferris (matt.ferris@haynesboone.com)
David L. Staab (david.staab@haynesboone.com)
Alexandra Kirincic (alex.kirincic@haynesboone.com)

Via Email:
Jim Lanter (jim.lanter@lanter-law.com)

Via Email:
Paul O. Wickes (pwickes@wickeslaw.com)

/s/ Matthew A. Kornhauser
Matthew A. Kornhauser