James Lanter
State Bar No. 11940700
JAMES LANTER, P.C.
560 N. Walnut Creek
Suite 120
Mansfield, Texas 76063
(817) 453-4800
(817) 453-4801 FAX
jim.lanter@lanter-law.com

Paul O. Wickes
State Bar No. 00788663
WICKES LAW, PLLC
5600 Tennyson Parkway
Suite 205
Plano, Texas 75024
(972) 473-6900
(972) 767-3225 FAX
pwickes@wickeslaw.com

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**
	§	
	§	
Debtors	§	**Jointly Administered**
	§	
MAALT, LP,	§	
	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Adversary No. 20-04064-elm**
	§	
SEQUITUR PERMIAN, LLC,	§	**Removed from Cause No. CV19-003 in the 51st Judicial District Court, Irion County, Texas**
	§	
Defendant.	§	
	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO CERTIFY DIRECT APPEAL AND SUPPORTING BRIEF

2042002210517000000000005

Background

In 2018 and 2019, Maalt, LP ("Maalt") was in the business of operating rail transloading facilities that transloaded materials used in the oil and gas industry in Texas. During that time, Maalt operated a transloading facility in Barnhart, Texas (the "Barnhart Facility"). In approximately May 2018, Sequitur Permian, LLC ("Sequitur") contacted Maalt to discuss arrangements through which Maalt would transload Sequitur's crude oil at the Barnhart Facility because that facility was adjacent to land on which Sequitur had producing oil wells. At the time, the pipelines leading from the Permian Basin to various oil markets were at capacity and oil was in a state of oversupply. Because of that situation, the price of crude oil at Midland was far less in 2018 than it was for crude oil sold at the Gulf Coast. Sequitur believed that the spread in the prices created an arbitrage opportunity and it could cash in on that difference by shipping its oil to the Gulf Coast by rail. By doing so, it projected that it could make $10 million in extra profit in about a year.

In August 2018, Maalt entered into a Terminal Services Agreement (the "TSA") with Sequitur to provide crude oil transloading services at the Barnhart Facility for Sequitur, Sequitur with exclusive use of the facility, and a right of first offer and refusal to purchase the facility (the "ROFR"). Pursuant to the TSA, Sequitur was to provide and install the equipment needed to transload Sequitur's crude oil from trucks (and potentially a pipeline) to rail cars, and Maalt was to provide exclusive access to its Barnhart Facility, the labor required for the transloading process, and the ROFR. The TSA granted Sequitur the exclusive right to have crude oil transloaded at the Barnhart Facility to the exclusion of any other transloading operations, whether

crude oil, sand, or other goods. In exchange, Sequitur agreed to pay Maalt a Throughput Fee in the amount of $1.50 per barrel of crude oil transloaded with a Minimum Volume Commitment of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a Shortfall Payment equal to $1.50 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) less the total amount of Throughput Fee paid. In other words, the TSA was an alternative or throughput-or-pay contract (comparable to a take-or-pay contract) that allowed Sequitur to perform its obligations by either (i) providing the minimum throughput of crude oil at the Barnhart Facility for Maalt to transload and pay the Throughput Fee, (ii) pay for the actual amount of oil throughput if less than the Minimum Volume Commitment plus the Shortfall Payment, or (iii) paying the Shortfall Payment for the entire Minimum Volume Commitment if it did not throughput any oil. In exchange, Sequitur would receive transloading of its crude oil during the times specified in the TSA, the dedication of manpower for that transloading, the reservation of the Barnhart Facility for Sequitur's exclusive use, and the ROFR.

Pursuant to the TSA, Sequitur constructed the Phase I Project improvements at the Barnhart Facility consisting of equipment necessary to transload crude oil brought to the Barnhart Facility by trucks onto railcars. While the completion of the improvements was targeted for early September 2018, Sequitur's completion of those improvements was delayed and ultimately completed and became operational and/or "in service" on or about December 10, 2018 according

to Sequitur's business records. Under the terms of the TSA, Sequitur's obligation to commence transloading and pay Maalt the contractual amounts began.

Three days before the date Sequitur's business records show that the improvements were completed and before Sequitur would have to begin paying Maalt under the TSA, Sequitur pretextually claimed that a force majeure event occurred in order to avoid paying Maalt. It sent Maalt a second letter on February 8, 2019 stating it was terminating the TSA based on its force majeure claim. Not coincidentally, Sequitur's second letter coincided with the collapse of the arbitrage opportunity.

Maalt then brought suit based on Sequitur's repudiation and breach of the TSA. As one of its many affirmative defenses, Sequitur claims that a condition precedent did not occur because it did not send Maalt a written notice that it had completed the Phase One Project improvements despite the fact that Sequitur's manager in charge of the improvements noted in Sequitur's internal documents, including status reports to Sequitur's senior management, that the improvements were 100% complete and "in service." It does not contend that the improvements were not complete, but relies on its contention that it could unilaterally withhold performance of its contractual obligations unless and until it sent a letter. Judge Morris disagreed, and held on April 13, 2021 that (i) the provision in the TSA imposed a covenant on Sequitur to notify Maalt when the improvements were completed, or (ii) alternatively it could not be enforced as a condition precedent based on well-established Texas law, including at least one opinion issued by the Fifth Circuit Court of Appeals.

The Orders

A. Order Granting in Part, and Denying in Part, Plaintiff's Second Amended Motion for Summary Judgment, dated April 13, 2021 (the "April 13, 2021 Order") (Doc. 122).

By its Second Amended Motion for Summary Judgment, Maalt sought, among other things, a summary determination that written notice provision of relating to the Phase I Project improvements completion was (i) a covenant rather than a condition precedent, or (ii) in the alternative, if it is a condition precedent then it is not enforceable against Maalt. For the purpose of this section of the response addressing the April 13, 2021 Order, Maalt's motion and supporting documents are incorporated herein by reference. Docs. 48, 48-1, 49, and 68. In the April 13, 2021 Order, the Court determined that the provision was a covenant rather than a condition precedent, but alternatively if it is a condition precedent it is not enforceable by Sequitur under well-established Texas law.

1. The April 13, 2021 Order does not involve a question of law as to which there is no controlling decisions, does not require resolution of conflicting decisions, and does not involve a matter of public importance.

The issues presented by Sequitur's affirmative defense and Maalt's motion for summary judgment do not involve questions of first impression. Nor do they involve any conflict between the holdings in the *Bradberry* and *Donaldson* cases. In fact, there is no "Bradberry Rule" or "Donaldson Rule" recognized by the courts, and Sequitur merely created those monikers in order to try to instill some sense of importance to those cases that just does not exist. When one reads both opinions, it is easy to see that they do not conflict in any way. It is also easy to see that the this Court properly applied well-established Texas law when deciding the motion. Finally,

Sequitur does not contend that an appeal of this Order (or any of the other Orders) would have any public importance as this is purely a business dispute between private litigants.

2. There is no question of law presented by Maalt's motion for summary judgment for which there is no controlling decision or that requires resolution of conflicting appellate precedent.

a. The Court's ruling was based on the construction of the notice provision as a covenant under well-established rules of contract construction.

Maalt's motion for summary judgment was based on the well-settled law that:

> 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.
>
> * * *
>
> Conditions are not favored in the law; thus, when another reasonable reading that would avoid a forfeiture is available, we must construe the contract language as a covenant rather than a condition.

PAJ, Inc. v. The Hanover Insurance Co., 243 S.W.3d 630, 635-636 (Tex. 2008). The Supreme Court's statement of the law was based on the long-standing and well-established law of the State of Texas as expressed in another Supreme Court opinion:

> In order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and that can be done only by looking at the entire contract. *Hudson v. Wakefield,* 645 S.W.2d 427, 430 (Tex.1983); *Gallup v. St. Paul Ins. Co.,* 515 S.W.2d 249 (Tex.1974) (strongest indication of what a contract requires is determined by what its words plainly state). In order to make performance specifically conditional, a term such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included. *Landscape Design v. Harold Thomas Excavating,* 604 S.W.2d 374, 377 (Tex.Civ.App.—Dallas 1980, writ ref'd n.r.e.). If no such language is used, the terms will be construed as a covenant in order to prevent a forfeiture. While there is no requirement that such phrases be utilized, their absence is probative of the parties intention that a promise be made, rather than a condition

> imposed. *See Hohenberg Bros. Co. v. George E. Gibbons & Co.,* 537 S.W.2d 1, 3 (Tex.1976).
>
> In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. *Schwarz–Jordan, Inc. v. Delisle Construction Co.,* 569 S.W.2d 878 (Tex.1978); *Hohenberg Bros.,* 537 S.W.2d at 3. When the intent of the parties is doubtful or when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition. *Hohenberg Bros.,* 537 S.W.2d at 3. Because of their harshness in operation, conditions are not favorites of the law. *Sirtex Oil Industries, Inc. v. Erigan,* 403 S.W.2d 784, 787 (Tex.1966); *Hohenberg Bros.,* 537 S.W.2d at 3.

Criswell v. European Crossroads Shopping Center, Ltd., 792 S.W.2d 945, 948 (Tex. 1990).

Further, in *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 109 (Tex. 2010), the Texas Supreme Court wrote:

> "In order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and that can be done only by looking at the entire contract." *Criswel,* 792 S.W.2d at 948 (citing references omitted); *see also* RESTATEMENT(SECOND) OF CONTRACTS § 226. "In order to make performance specifically conditional, a term such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language must normally be included." *Criswell,* 792 S.W.2d at 948 (citing *Landscape Design v. Harold Thomas Excavating,* 604 S.W.2d 374, 377 (Tex.Civ.App.-Dallas 1980, writ ref'd n.r.e.)). "While there is no requirement that such phrases be utilized, **their absence is probative of the parties' intention that a promise be made, rather than a condition imposed**." *Id*. citing *Hohenberg Bros. Co. v. George E. Gibbons & Co.,* 537 S.W.2d 1, 3 (Tex.1976)). **When no conditional language 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.**"

Emphasis added. *See also Home Savings Ass'n v. Tappan Co*. 403 F.2d 201, 203 (5th Cir. 1968).

In this case, the Court found that the contract provision at issue constituted a covenant imposing on Sequitur an obligation that it provide notice to Maalt when the Phase I Project improvements were complete so that Maalt could then staff the Barnhart Facility and begin transloading operations. The provision does not contain any of the conditional language normally

associated with a condition precedent. The Court's construction of the contractual term was entirely consistent with the law as repeatedly announced by the Texas Supreme Court.

The Court's ruling on Maalt's motion clearly involved a construction of the TSA's notice provision as a covenant and not as a condition precedent: "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." (Doc. 122 at ¶ 36.) That ruling was based on well-established rules of contract construction. To that end, Sequitur's motion misses the mark and fails to explain how the Court misapplied the law regarding contract construction or how the law it did apply conflicts with any other law. *See*, *In re Essar Steel Minnesota LLC*, 607 B.R. 409, 417 (2019) ("The Court is not persuaded that the Court's identification or application of principles of contract interpretation was in any way contrary to well-established law. Mesabi merely seeks a different interpretation of the relevant agreements.") If Sequitur's request for an appeal were granted, the reviewing Court would apply the same law applied by the Court.

In *In re Central Louisiana Grain Co-op, Inc*., 489 B.R. 403, 412 (W.D. La. 2013), the court stated:

> Relevant here, courts have found there is "substantial ground for difference of opinion," if "a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *In re Hallwood Energy, L.P.,* BR 09–31253–SGJ–11, 2013 WL 524418, at *3 (N.D.Tex.2013) (*citing Flowserve Corporation,* 444 F.Supp.2d at 723–24). "But simply because a court is the first to rule on a question *or counsel disagrees on the applicable precedent does not qualify the issue as one over which there is substantial disagreement.*" *Flowserve Corp.,* 444

> F.Supp.2d at 724. (*citing* 4 AM.JUR.2D *Appellate Review* § 128 (2005)) (emphasis added). Further, a substantial ground for difference of opinion does not exist "because a party simply claims the bankruptcy court ruled incorrectly." *Id.* (citing *Wausau Bus. Ins. Co. v. Turner Contr. Co.,* 151 F.Supp.2d 488, 491 (S.D.N.Y.2001)).

Sequitur has not shown that the Court made a legal ruling that is contrary to established precedent, that there is a dispute among the courts in Texas as to what the law is, or that a novel or difficult question of first impression was involved in ruling on the motion for summary judgment. Sequitur has not shown the required substantial ground for difference of opinion.

b. The Court's ruling on Maalt's motion was not based on forfeiture.

In a one paragraph follow up, the Court noted that if Sequitur's construction of the TSA notice provision were given effect, it could not be enforced as a condition precedent because (i) Sequitur maintained exclusive control over whether the written notice was ever sent (that is, controlled whether or not the condition would ever occur), and (ii) the withholding of notice would result in a forfeiture. The Court's conclusion, while not the basis of his ruling, was again correct.

It is likewise well settled that a party's non-performance of a condition precedent can be excused if a forfeiture would result:

> Texas courts 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." *Beard Family P'ship v. Commercial Indem. Ins. Co*., 116 S.W.3d 839, 853-54 (Tex.App.-Austin 2003, no pet.). Texas courts have focused on whether performing the condition precedent was the object of the contract or "merely incidental" to it. *Id*. In addition, if one party prevents the other from performing a condition precedent, then the condition is "considered as fulfilled." *Houston County v. Leo L. Landauer & Assocs., Inc.,* 424 S.W.2s 458, 464 (Tex.Civ.App.-Tyler 1968, writ ref'd n.r.e.) (citing *Miller v. Hodges*, 260 S.W. 168, 172 (Tex.Com.App. 1924, judgm't adopted)).

Donaldson v. Digital General System, 168 S.W.3d 909, 916 (Tex. App.—Dallas 2005, pet. denied). While the *Donaldson* court did not cite supreme court decisions in arriving at its holding, the *Donaldson* opinion is completely consistent with the supreme court's pronouncements in *PAJ*, *Criswell*, and *Solar* that the enforcement of a condition precedent cannot result in a forfeiture. *See also*, *Clear Lake City Water Authority v. Friendswood Development Co. Ltd*., 344 S.W.3d 514, 520 (Tex.App.-Houston [14th Dist.] 2011, pet. denied); *Kiewit Texas Mining Co. v. Inglish*, 865 S.W.2d 240, 245 (Tex.Civ.App.-Waco 1993, writ denied)

The Fifth Circuit has also recognized that *Donaldson* properly reflects Texas law. In *Sellers v. Minerals Technologies, Inc*., 753 Fed.Appx. 272 (5th Cir. 2018), the court of appeals considered an employment contract that required employment on a certain date in order to qualify for long-term incentive benefits. The defendant claimed that it terminated the plaintiff prior to the required date. The trial court granted summary judgment in the defendant's favor denying the plaintiff the benefits. On appeal, the court of appeals reversed the summary judgment holding:

> Even if the condition precedent was not technically met here, however, we find it appropriate under the circumstances of this case to deem the condition fulfilled or excuse its fulfillment. Under Texas jurisprudence, if one party prevents another from performing a condition precedent or renders its fulfillment impossible, then the condition may be considered fulfilled. Here, if Defendants effectively terminated Sellers's employment in December 2014 (as opposed to in February 2015), as they suggest, then they unilaterally prevented fulfillment of the condition at issue and cannot rely on nonfulfillment to deny the LTI benefits otherwise contractually due to Sellers.

The Fifth Circuit then remanded the case to the trial court for the limited purpose of determining the amount of long-term incentive benefits due to the plaintiff. *Id*. at 278-279.

It has long been the rule in Texas that a party who prevents or renders impossible a condition precedent cannot claim nonperformance in order to escape liability under the contract:

> However, the record does not show that the non-occurrence of those conditions precedent was due to anything other than Sharifi's choice not to perform. "It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance." II Deerfield Ltd. P'ship v. Henry Bldg., Inc., 41 S.W.3d *259, 265 (Tex. App.—San Antonio 2001, pet. denied)* (citing *Rich v. McMullan, 506 S.W.2d 745, 747 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.))*; *see also Case Corp. v. Hi-Class Bus. Sys. of Am., Inc., 184 S.W.3d 760, 770 (Tex. App.—Dallas 2005, pet. denied)* ("A duty to cooperate is implied in every contract in which cooperation is necessary for performance of the contract."). We cannot agree with Sharifi that his nonperformance as to the provisions in question precluded summary judgment.

Sharifi v. Steen, LLC, 370 S.W.3d 126, 146 (Tex.App.-Dallas 2012, no pet.). No case cited by Sequitur changes or abrogates that rule.

c. *Bradberry* does not conflict with or overturn *PAJ*, *Criswell*, *Solar* or *Donaldson*.

Sequitur's entire motion is based on its contention that *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471 (Tex. 2017) conflicts with *Donaldson*, *supra*. Notably, Sequitur ignores the fact that the Court's holding was based on its construction of the TSA's notice provision as a covenant and rejection of Sequitur's construction of the TSA's notice provision as a condition precedent. It is also notable that Sequitur does not cite a single case supporting its position that the contract provision is a condition precedent. Moreover, despite overwhelming authority cited by Maalt in is motion for summary judgment that a party cannot control a condition precedent and then claim that it did not occur, Sequitur has not cited a single case either in that proceeding or this that holds differently.

Sequitur essentially argues that *Bradberry* stands for the proposition that courts should uphold the terms of a contract regardless of the consequences. Its entire argument is dependent on

its position that the TSA's notice provision is a condition precedent rather than a covenant. It requires this Court to ignore the basis of the Court's construction of the TSA.

Bradberry arose from a forcible-detainer action between a landlord and tenant. It did not involve any issue regarding whether a contract provision should be considered a covenant or condition precedent. It merely involved the question of whether a contractual non-waiver provision could be waived. The court did not mention, much less overturn, *PAJ*, *Criswell*, *Solar, Donaldson,* or *Sellers.* Other than general pronouncements that contracts will be generally honored by the courts, which has been the law as long as Texas has been a state, the *Bradberry* court did not address any issue involved in the present case.

The *Bradberry* court did, however, make this statement: "'[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***.'" (Emphasis added.) In this case, the Court secondarily found that enforcing the TSA notice provision as a condition precedent would result in a forfeiture since the occurrence of the "condition precedent" was exclusively within the control of Sequitur. As expressed by the Texas Supreme Court and Fifth Circuit, such forfeitures cannot be allowed to occur. *PAJ, supra; Criswell, supra; Solar, supra; Donaldson, supra;* and *Sellers, supra.*

Courts have long held that even though parties are free to contract, and the courts will strive to enforce those contracts, there are a number of situations where they will not enforce the parties' contract. The refusal to enforce a condition precedent when it would result in a forfeiture is just one. Courts also refuse to enforce contracts that require the payment of usurious interest despite the parties' rights to freely contract. *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751

S.W.2d 473 (Tex. 1988); *C&K Investments v. Fiesta Group, Inc*., 248 S.W.3d 234 (Tex.App.-Houston [1st Dist.] 2007, no pet.). They refuse to enforce contractual non-compete agreements when they are not reasonable or are overbroad even if the restrained party contractually agrees the terms are reasonable. *Forum US, Inc. v. Musselwhite*, 2020 WL 4331442 (Tex.App.-Houston [14th Dist.], no pet.). Courts refuse to enforce freely contracted liquidated damages provisions that result in a penalty. *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991).

3. An immediate appeal will not materially advance the ultimate termination of the litigation, but will unnecessarily delay it.

Sequitur does not address this last element with respect to the April 13, 2021 Order other than to say that it would resolve Maalt's breach of contract claim. Even if so, there are other claims in the case that will have to be tried based on the Court's current rulings. At best, a direct interlocutory appeal would impede the progress to allow a party to appeal every unfavorable interlocutory order. In fact, courts have held that appeal of such decisions as they are made does not materially advance the course of the litigation, but instead delays it. *Champion Intern. Corp. v. All American of Ashburn, Inc*., 45 B.R. 840, 842-843 (N.D. Ga. 1984). *See also, In re Conex Holdings, LLC,* 534 B.R. 606, 611-612 (D. Del. 2015) (even though grant of summary judgment in a preference action may impact 16 other preference claims, certification of an appeal would not materially advance the bankruptcy case); *In re Tetirick*, 84 B.R. 505, 507-508 (S.D. Ohio 1988). *See also*, *In re Essar Steel Minnesota LLC*, 607 B.R. 409, 417 (2019) (court refused an appeal of a summary judgment saying, "The Court is not persuaded that the Court's identification or application of principles of contract interpretation was in any way contrary to well-established law. Mesabi merely seeks a different interpretation of the relevant agreements.")

Sequitur points to no real reason for seeking an appeal other than it is not happy with this Court's ruling on Maalt's motion, and wants a chance to reverse it. Because of that, an interlocutory appeal will not advance the ultimate termination of the litigation, but will only serve to delay the resolution of this now two-year old case, and increase the cost of the litigation through piecemeal appeals without the protections to the litigants afforded in appeals from final judgments. By delaying the ultimate resolution of this case with an interlocutory appeal and then again through subsequent appeals from a final judgment, the resolution of this case as well as the underlying bankruptcy case will be needlessly drawn out. The better course is have the parties appeal any issues they wish to appeal following a final judgment just like they would do in any other court. Sequitur has not met its burden of demonstrating a need for an appeal under 28 U.S.C. § 158(d)(2)(A)(iii).

B. Order Granting in Part, and Denying in Part, Defendant's Motion for Summary Judgment, dated April 17, 2021 (the "April 17, 2021 Order") (Doc. 126).

By its motion for summary judgment, Sequitur sought, among other things, a summary determination that written notice provision of relating to the Phase I Project improvements completion was a condition precedent enforceable against Maalt. For the purpose of this section of the response addressing the April 17, 2021 Order, Maalt's response and supporting documents are incorporated herein by reference. Docs. 63, 63-1 and 64. In the April 17, 2021 Order, the Court stated that it previously ruled on the issue and was therefore denying the motion:

> 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.

As the Court expressly stated, it was not adjudicating the issue with the April 17, 2021 Order having already done so through its earlier April 13, 2021 Order. Therefore, the April 17, 2021 Order does not present an appealable ruling.

1. The April 17, 2021 Order does not involve a question of law as to which there is no controlling decisions, does not require resolution of conflicting decisions, and does not involve a matter of public importance.

Maalt incorporates its response to the April 13, 2021 Order above herein.

2. There is no question of law Sequitur's motion for summary judgment for which there is no controlling decision or that requires resolution of conflicting appellate precedent.

Maalt incorporates its response to the April 13, 2021 Order above herein.

3. An immediate appeal will not materially advance the ultimate termination of the litigation.

Maalt incorporates its response to the April 13, 2021 Order above herein.

C. Order Granting in Part, and Denying in Part, Defendant's Motion for Summary Judgment, dated April 26, 2021 (the "April 26, 2021 Order") (Doc. 128).

By its Motion for Summary Judgment, Sequitur sought, among other things, a summary determination holding that for some reason it did not have to perform its obligations under the TSA unless it brought oil to the Barnhart Facility for transloading. For the purpose of this section addressing the April 26, 2021 Order, Maalt's response to that motion and supporting documents are incorporated herein by reference. Docs. 83 and 83-1. As reflected in the Court's April 26, 2021 Order, Sequitur's position in that motion is absurd and does not merit appellate review. In

fact, Sequitur does not even attempt to explain in its motion how that Order qualifies for an interlocutory appeal.

1. The April 26, 2021 Order does not involve a question of law as to which there is no controlling decisions, does not require resolution of conflicting decisions, and does not involve a matter of public importance.

Sequitur's request for an appeal of the April 26, 2021 Order does not point to any law that was not followed by the Court. In its Order, the Court followed well-established Texas law regarding contract construction. It then applied that law to interpret an unambiguous contract. No determination of a question of law was involved. The only thing that was involved was the application of settled law to the construction of the contract. This element of the standard for appeal has not been shown by Sequitur. *Flowserve Corp*., *supra* at 722.

2. There is no question of law Sequitur's motion for summary judgment for which there is no controlling decision or that requires resolution of conflicting appellate precedent.

The motion for summary judgment filed by Sequitur involved nothing more than the construction of an admittedly unambiguous contract, and the Court's ruling involved only contract interpretation. Sequitur has made no effort to show that the Court failed to follow Texas law regarding contract construction, that the April 26, 2021 Order relied on an improper interpretation of Texas law, or that the Court relied on law that conflicts with other law. It has not shown that there is genuine doubt as to the legal standard that was followed by the Court. Sequitur has not shown that the Court's summary judgment is contrary to well-established law. Sequitur is merely unhappy with the result. It has not shown this element of the standard for an interlocutory appeal

of the April 26, 2021 Order. *Ryan v. Flowserve Corp*., *supra* at 722; *In re Essar Steel Minnesota LLC*, *supra* at 416-417.

3. An immediate appeal will not materially advance the ultimate termination of the litigation.

For the reasons stated with respect to the April 13, 2021 Order, an immediate appeal of the April 26, 2021 Order will not materially advance the ultimate termination of the litigation, but will simply delay it.

Conclusion

In conclusion, Sequitur does not present a timely or valid basis for an interlocutory appeal under 28 U.S.C. 158(d). Sequitur has not met the required legal standard to demonstrate entitlement to an appeal of any of the Orders by showing a conflict in the law that must be resolved by this Court, an issue that had to be decided in the absence of controlling law, or that has public importance. It is merely unhappy with this Court's ruling, but that does not justify an appeal at this stage of the case. The more just and efficient course for this case is to proceed to trial, and then, should any party wish to appeal, they can do so in a manner that provides the appellee the safeguards from frivolous and/or delaying appeals (posting of bonds, etc.).

Prayer

WHEREFORE, Plaintiff, Maalt, L.P., prays Defendant's motion be denied, and that the Court award all other relief to which it is entitled.

Respectfully submitted,

By: */s/ James Lanter*

James Lanter

State Bar No. 11940700
JAMES LANTER, P.C.
560 N. Walnut Creek, Ste. 120
Mansfield, Texas 76063
(817) 453-4800
(817) 453-4801 FAX
jim.lanter@lanter-law.com

Paul O. Wickes
State Bar No. 00788663
WICKES LAW, PLLC
5600 Tennyson Parkway, Ste. 205
Plano, Texas 75024
(972) 473-6900
(972) 767-3225 FAX
pwickes@wickeslaw.com

ATTORNEYS FOR PLAINTIFF, MAALT, LP and THIRD-PARTY DEFENDANT VISTA PROPPANTS AND LOGISTICS, LLC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's electronic filing service on May 14, 2021.

/s/ *James Lanter*
James Lanter