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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.,	§	**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 STAY PENDING DIRECT APPEAL AND SUPPORTING BRIEF

Plaintiff Maalt, L.P. ("Maalt") responds in opposition to the motion to stay proceedings filed by Defendant Sequitur Permian, LLC's ("Sequitur") as follows:

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1. Sequitur makes another attempt to delay the trial of this matter by seeking an interlocutory appeal without providing any form of bond to protect Maalt's interest in the litigation and without demonstrating that an interlocutory appeal is warranted.

2. Sequitur's efforts to delay trial have been ongoing throughout the course of this lawsuit as shown by this history:

- Irion County District Court sets an Initial Trial Setting of February 24, 2020.
- Parties agree to continuance with new trial setting of June 8, 2020.
- Sequitur files motion to continue the June 8, 2020 trial setting until November 2020. Irion County District Court continues the June 8 trial and resets trial for August 24, 2020.
- After this action is removed to this Bankruptcy Court, this Court held a status conference on September 28, 2020. At the hearing, Maalt stated it could be ready for trial in February 2021 while Sequitur requested a trial setting in June 2021. Ultimately, the Court set docket call for May 3, 2021, with trial to be completed during May 2021.
- On March 5, 2021, Sequitur again sought to delay trial by requesting a continuance until "at least September 2021." This Court granted a shorter continuance with Docket Call now set for June 7, 2021, when the Court will set the case for trial.

3. Sequitur acknowledges that to obtain a stay under Rule 8007 of the Federal Rules of Bankruptcy Procedure, it must establish that its interlocutory appeal has a likelihood of success on the merit. Sequitur has not done so. The purported significant legal issue that Sequitur claims justifies its appeal and requested stay is not even the basis of this Court's ruling.

4. By its Second Amended Motion for Summary Judgment, Maalt sought, among other things, a summary determination that written notice provision 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. 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. Thus, even if the Court agreed with Sequitur on the resolution of legal issue as framed by Sequitur, the ruling would remain the same because the notice requirement is not a condition precedent, but is a covenant.

5. Sequitur's frames the legal issue this way: "whether an agreed-to ***condition precedent*** event, potentially triggering Maalt's right to a Shortfall Payment, can be judicially excused when enforcement of the unambiguous terms of the TSA would otherwise preclude Maalt's right to a fee." (Doc. 136 at p. 4) (emphasis added). However, this completely ignores this Court's ruling that the TSA's notice provision is a covenant and not 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.). Sequitur does not contend, nor could it so contend, that the Court failed to apply appropriate tenets of Texas law for interpreting the TSA.

6. Even if the Court determined that the notice provision was a condition precedent (which it did not do), its alternate basis for the ruling to hold that it was not enforceable against Maalt is supported by well-established precedent. This Court did not make new law when it ruled 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).

7. 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.

Id. at 278-279.

8. 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.).

9. Glaringly absent from Sequitur's briefing is citation to a single case holding that a party can purposefully not perform its own contractual duty (condition precedent or not) to cause a forfeiture of the other party's contractual rights.

10. Sequitur's appeal of the Court's April 17, 2021 Order does not appeal a ruling made in that order, but instead relies on the Court's ruling in the April 13, 2021 Order. As a result, Sequitur does not effectively appeal that Order. Similarly, in the motions filed both in this Court and the District Court, Sequitur does not argue any grounds for appealing the April 26, 2021 Order. The reason for the omission of any argument as to why that Order was erroneous is simple and obvious – there is no basis for an appeal of that Order.

11. The requested Stay would prejudice Maalt as it would allow Sequitur to obtain a significant delay without having to post a bond that would secure the collection of a potential judgment and potentially delay the resolution of this case for a long time. Trial can be completed in June and Sequitur can then appeal the entire judgment at one time after posting a supersedeas bond.

12. In conclusion, Sequitur does not present a valid basis for staying this action as its appeal of the Court's legal interpretation of the TSA does not present a significant issue and there is no likelihood that Sequitur's appeal would succeed on the merits. The more just and efficient course for this case is to proceed to trial, and then, should any party wish to appeal, it can do so in a manner that provides the appellee the safeguards from frivolous and/or delaying appeals (posting of bonds, etc.).

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*

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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 18, 2021.

/s/ *James Lanter*
James Lanter