Docket #0178 Date Filed: 6/1/2021

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

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed June 1, 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 DENYING MOTION TO CERTIFY DIRECT APPEAL

Before the Court for determination is the *Defendant's Opposed Motion to Certify Direct Appeal Under 28 U.S.C. § 158(d)(2)(A)(i)-(iii)* [Docket No. 133] (the "**Certification Motion**")

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filed by Defendant Sequitur Permian, LLC (the "**Defendant**"). The Certification Motion relates to the three tentative appeals commenced by the Defendant in the United States District Court for the Northern District of Texas (the "**District Court**") from the following three interlocutory summary judgment orders entered by this Court (collectively, the "**Interlocutory Orders**"): (1) the *Order Granting in Part, and Denying in Part, Plaintiff's Second Amended Second Motion for Summary Judgment* [Docket No. 122] (the "**First MSJ Order**"); (2) the *Order Granting in Part, and Denying in Part, Defendant's Motion for Summary Judgment* [Docket No. 126] (the "**Second MSJ Order**"); and (3) the *Order Granting in Part, and Denying in Part, Defendant's Motion for Summary Judgment* [Docket No. 128] (the "**Third MSJ Order**"). Pursuant to the Certification Motion, the Defendant requests the Court's certification to the United States Court of Appeals for the Fifth Circuit (the "**Fifth Circuit**") that one or more of the circumstances described in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists in relation to each of the Interlocutory Orders, thereby warranting the Fifth Circuit's consideration of a direct appeal.

In opposition to the Certification Motion, Plaintiff MAALT, LP (the "**Plaintiff**") has filed its *Response to Defendant's Motion to Certify Direct Appeal and Supporting Brief* [Docket No. 169] (the "**Response**").

The Court heard oral arguments on the Certification Motion on May 19, 2021 (the "**Certification Hearing**").

Having now considered the Certification Motion, the Response and the arguments of counsel from the Certification Hearing, the Court will deny the Certification Motion for the reasons set forth below.

Procedural Background

1. The First Order, which resolved the *Plaintiff's Second Amended Second Motion for Partial Summary Judgment* [Docket No. 60] (the "**Plaintiff's MSJ**"), was entered on April 13,

2021. On April 30, 2021, the Defendant filed its *Notice of Appeal* [Docket No. 130] from the First Order. The tentative appeal initiated thereby has been docketed in the District Court as Civil Action No. 4:21-CV-00625-O (the "**First Tentative Appeal**"). *See* Docket No. 148.

2. The Second Order, which resolved the Defendant's *Motion for Summary Judgment on its Affirmative Defenses of Failure of Condition Precedent and Express Waiver of Lost Profits and Consequential Damages* [Docket No. 52] (the "**Defendant's First MSJ**"), was entered on April 19, 2021. On April 30, 2021, the Defendant filed its *Notice of Appeal* [Docket No. 131] from the Second Order. The tentative appeal initiated thereby has been docketed in the District Court as Civil Action No. 4:21-CV-00628-P (the "**Second Tentative Appeal**"). *See* Docket No. 154.

3. The Third Order, which resolved the Defendant's *Motion for Summary Judgment That MAALT, LP is Not Entitled to a "Minimum Fee" or Any Fee Under the TSA* [Docket No. 74] (the "**Defendant's Second MSJ**"), was entered on April 26, 2021. On April 30, 2021, the Defendant filed its *Notice of Appeal* [Docket No. 132] from the Third Order. The tentative appeal initiated thereby has been docketed in the District Court as Civil Action No. 4:21-CV-00629-O (the "**Third Tentative Appeal**" and together with the First Tentative Appeal and Second Tentative Appeal, the "**Tentative Appeals**"). *See* Docket No. 159.

4. On April 30, 2021, the Defendant filed its *Opposed Motion for Leave to Appeal Under Fed. R. Bankr. P. 8004 & 28 U.S.C. § 158(a)(3)* [Docket No. 134] (the "**Leave Motion**") to request the District Court's granting of leave to take an immediate appeal from each of the Interlocutory Orders. The Leave Motion was transmitted to the District Court in connection with each of the Tentative Appeals. *See* First Tentative Appeal, Docket No. 1; Second Tentative Appeal, Docket No. 1; Third Tentative Appeal, Docket No. 1.

5. On May 13, 2021, the District Court entered an order in each of the Tentative Appeals consolidating the Second Tentative Appeal and Third Tentative Appeal with the First Tentative Appeal for all further proceedings. *See* Docket No. 165. As of the date hereof, the District Court has not yet ruled on the Leave Motion.

Factual Background

6. Each of the Interlocutory Orders includes a recitation of facts relevant to the parties' dispute and the particular requests for summary judgment at issue. Therefore, for brevity, the Court simply incorporates by reference herein the recitation of facts from each of the Interlocutory Orders and will utilize herein the same defined terms that are defined in the Interlocutory Orders.

A. Summary Judgment on Condition Precedent Issue

7. Pursuant to the Plaintiff's MSJ and the Defendant's First MSJ, both the Plaintiff and the Defendant requested summary judgment on, among other things, the Defendant's affirmative defense of failure to perform condition precedent to the extent predicated on the Written Commencement Date Notice Clause.

8. In the First MSJ Order, after discussing relevant Texas Supreme Court authority on the analysis of whether contractual language constitutes a covenant or condition precedent, the Court found "the Written Commencement Date Notice Clause [to] constitute[ ] a notice covenant, not an additional triggering condition to the occurrence of the Terminal Operations Commencement Date." First MSJ Order, ¶ 34. Based upon such determination, the Court held that "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 MSJ] in relation to such affirmative defense to such extent." First MSJ Order, ¶ 36.

9. In the Second MSJ Order, the Court incorporated such determination in resolving the same condition precedent argument under the Defendant's First MSJ. Specifically, the Court stated the following: "For reasons set forth in the Court's separately entered [First MSJ Order], which is incorporated herein by reference, the Court disagrees [with the Defendant's characterization of the Written Commencement Date Notice Clause as a condition precedent], having determined that the Written Commencement Date Notice Clause constitutes a covenant as opposed to a freestanding condition precedent…." Second MSJ Order, ¶ 23. Accordingly, the Court denied the Defendant's request for summary judgment on such point.

10. For purposes of discussion herein, the Court will refer to these rulings on the condition precedent issue in the First MSJ Order and the Second MSJ Order as the "**Primary Condition Precedent Ruling**."

11. Notably, in both the First MSJ Order and the Second MSJ Order, the Court *alternatively* added in the event of a determination on appeal that the Written Commencement Date Notice Clause constitutes a freestanding condition precedent instead of a notice covenant, that "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." First MSJ Order, ¶ 37; *see also* Second MSJ Order, ¶ 23. In support of this alternative conclusion, the Court, among other things, cited *Donaldson v. Digital Gen. Sys*.,

168 S.W.3d 909, 916 (Tex. App. – Dallas 2005, pet. denied) and *Sellers v. Minerals Techs., Inc*., 753 Fed. Appx. 272, 278 & n.7 (5th Cir. 2018).

12. For purposes of discussion herein, the Court will refer to this alternative ruling on the condition precedent issue in the First MSJ Order and Second MSJ Order as the "**Alternative Condition Precedent Ruling**."

B. Summary Judgment on Shortfall Payment Liability Issue

13. Pursuant to the Defendant's Second MSJ, the Defendant requested partial summary judgment on, among other things, the Plaintiff's breach of contract claim to the extent predicated on the Shortfall Payment provisions of the TSA. In this regard, the Defendant argued that it could not be found contractually liable to the Plaintiff for any Shortfall Payment(s) under the TSA because it never Throughput any Product through the Terminal.

14. In the Third MSJ Order, applying established contractual interpretation principles as recognized in the Texas Supreme Court cases cited therein, the Court disagreed with the Defendant's interpretation of the TSA, determining that the TSA unambiguously provided for the possibility of Shortfall Payment liability in the event that no Product is ever Throughput the Terminal. *See* Third MSJ Order, ¶¶ 46-47. Accordingly, pursuant to the Third MSJ Order, the Court denied the Defendant's request for summary judgment on this point.

15. For purposes of discussion herein, the Court will refer to this ruling on the Shortfall Payment liability issue in the Third MSJ Order as the "**Shortfall Payment Liability Ruling**."

Discussion

A. Standards Applicable to Certification

16. Pursuant to 28 U.S.C. § 158(d)(2), upon the request of a party for certification, the bankruptcy court (provided the action remains pending with the bankruptcy court at the time of

determination) "shall" make the requested certification if the court determines that any of the following four circumstances specified in the clauses of 28 U.S.C. § 158(d)(2)(A) exists:

(1) The judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States.

(2) The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

(3) The judgment, order, or decree involves a matter of public importance.

(4) An immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

See 28 U.S.C. § 158(d)(2)(A)(i)-(iii), (d)(2)(B)(i); *see also OCA, Inc. v. Orthalliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 418 (5th Cir. 2008); *In re Adkins*, 517 B.R. 698, 699 (Bankr. N.D. Tex. 2014).

17. Procedurally, the bankruptcy court may only determine the certification motion while the matter remains pending in the bankruptcy court. Fed. R. Bankr. P. 8006(d). For purposes of certification, "a matter remains pending in the bankruptcy court for 30 days after the effective date under [Bankruptcy] Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought." Fed. R. Bankr. P. 8006(b).

18. Under the provisions of Bankruptcy Rule 8002, the effective date of each of the notices of appeal initiating the Tentative Appeals was April 30, 2021. Therefore, the deadline for this Court to determine the Certification Motion is June 1, 2021.[1]

19. Additionally, while the District Court has not yet determined the Leave Motion, it is unnecessary for the Court to await determination of the Leave Motion before considering the Certification Motion. *See* Fed. R. Bankr. P. 8004(e) ("If leave to appeal an interlocutory order or

[1] Such deadline has been computed in accordance with the provisions of Bankruptcy Rule 9006. *See* Fed. R. Bankr. P. 9006(a)(1)(C).

decree 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").

B. Evaluation of the Existence of Circumstances for Certification

20. The Defendant asserts that the Court must certify to the Fifth Circuit the existence of one or more of the circumstances described in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) in relation to the Alternative Condition Precedent Ruling and the Shortfall Payment Liability Ruling of the Interlocutory Orders. The Plaintiff disagrees.

1. Question of Law for Which There is No Controlling Decision

21. Focusing on the Alternative Condition Precedent Ruling, the Defendant claims that the Court erred in alternatively excusing the requirement of written notice under the Written Commencement Date Notice Clause as part of the First MSJ Order and Second MSJ Order. In so ruling, the Defendant claims that the Court relied upon the so-called "extreme-forfeiture excuse rule"[2] articulated by the Texas Court of Appeal of Dallas in the *Donaldson* case[3] and that, for purposes of certification, "[a]lthough the Fifth Circuit has applied the extreme-forfeiture excuse rule for disregarding unambiguous conditions precedent in contract, … 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." Certification Motion, ¶ 40; *see also id*., ¶ 43.

22. The Plaintiff presents two arguments in opposition. First, the Plaintiff highlights the fact that the Alternative Condition Precedent Ruling is not the Court's primary ruling on the condition precent issue – it is the Court's *alternative* ruling – and the Defendant has not argued a

[2] Such terminology self-created by the Defendant in connection with the Tentative Appeals and Certification Motion.

[3] *See Donaldson*, 168 S.W.3d at 916 (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'").

basis for certification with respect to the Primary Condition Precedent Ruling. Second, the Plaintiff asserts that the Defendant has failed to give due credit to the Fifth Circuit's decision in *Sellers*, which constitutes controlling authority on the enforceability of a condition precedent under Texas law. The Court agrees with both arguments.

23. First, the Defendant neither articulates a basis for error in relation to the Primary Condition Precedent Ruling nor does the Defendant attempt to demonstrate the lack of any controlling authority by the Fifth Circuit or Supreme Court on a question of law in relation thereto. Thus, having failed to substantiate a basis for certification in relation to the Primary Condition Precedent Ruling, it is premature to consider, and there is no basis for independent consideration of, certification in relation to the Alternative Condition Precedent Ruling. Accordingly, on this basis alone, the Court finds cause to deny the request for certification.

24. That said, even if consideration of certification of the Alternative Condition Precedent Ruling were ripe, the Defendant has failed to convincingly substantiate the lack of any controlling Fifth Circuit decision with respect to the legal standards applicable to excusing performance of a condition precedent. In *Sellers*, for example, the Fifth Circuit expressly recognized that "[u]nder Texas jurisprudence, if one party prevents another from performing a condition precedent or renders its fulfillment impossible, then the condition may be considered fulfilled."[4] As part of the Alternative Condition Precedent Ruling, the Court expressly emphasized, among other things, that the "Defendant at all times maintained exclusive control over whether to provide written notice to the Plaintiff irrespective of satisfaction of the Triggering Conditions." First MSJ Order, ¶ 37. In other words, pursuant to the Alternative Condition

[4] *See Sellers*, 753 Fed. App. at 278 (citing *Donaldson*, 168 S.W.3d at 916; *D&M Specialties, Inc. v. Apache Creek Props., L.C.*, 2014 WL 12493290, at *5 (W.D. Tex. Aug. 24, 2014) (citing *Houston Cty. v. Leo L. Landauer & Assocs., Inc.*, 424 S.W.2d 458, 464 (Tex. Civ. App. – Tyler 1968, writ ref'd n.r.e)); and *Clear Lake City Water Auth. v. Friendswood Dev. Co., Ltd.*, 344 S.W.3d 514, 519 (Tex. App. – Houston [14th Dist.] 2011, pet. denied)).

Precedent Ruling, the Court alternatively excused performance of the condition precedent of written notice under the Written Commencement Date Notice Clause (if construed as a freestanding condition precedent on appeal) because the Defendant could render the fulfillment of such condition impossible by simply unilaterally refusing to provide such written notice even if the Triggering Conditions had been satisfied.

25. Moreover, the Defendant itself has identified additional Fifth Circuit authority in *Varel v. Banc One Capital Partners, Inc*., 55 F.3d 1016 (5th Cir. 1994). In *Varel*, the Fifth Circuit recognized that "Texas courts excuse non-performance of a condition precedent if the condition's 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."'" *Id*. at 1018 (quoting *Lesikar Constr. Co. v. Acoustex, Inc*., 509 S.W.2d 877, 881 (Tex. Civ. App. – Fort Worth 1974, writ ref'd n.r.e.) (quoting Restatement (First) of Contracts, § 302)). With this in mind, as part of the Alternative Condition Precedent Ruling, the Court additionally emphasized that "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." First MSJ Order, ¶ 37. Moreover, part and parcel of the Court's determination that the Written Commencement Date Notice Clause constitutes a notice covenant instead of freestanding condition precedent was the implicit determination that the existence or occurrence of written notice under the Written Commencement Date Notice Clause forms no essential part of the exchange for the Defendant's promise to perform given the existence of the Triggering Conditions – the two actual, operative conditions precedent to the Defendant's obligation to perform. *See* First MSJ Order, ¶¶ 34-35.

26. In any event, because the Alternative Condition Precedent Ruling of the First MSJ Order and Second MSJ Order does not involve a question of law as to which there is no controlling decision of the Fifth Circuit or Supreme Court, the Court will deny the request for certification on this basis.

2. Question of Law Requiring Resolution of Conflicting Decisions

27. Again focusing on the Alternative Condition Precedent Ruling, the Defendant claims that the First MSJ Order and Second MSJ Order also involve a question of law requiring the resolution of conflicting decisions. In this regard, the Defendant identifies the conflicting decisions as the previously referenced Dallas Court of Appeals' decision of *Donaldson* and the Texas Supreme Court's decision of *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471 (Tex. 2017). *See* Certification Motion, ¶ 38.

28. The Plaintiff again presents two arguments in opposition. First, the Plaintiff again emphasizes that the Alternative Condition Precedent Ruling is not the Court's primary ruling on the condition precent issue – it is the Court's *alternative* ruling – and that the Defendant has not argued a basis for certification with respect to the Primary Condition Precedent Ruling. Second, the Plaintiff asserts that no true conflict exists between *Bradberry* and *Donaldson*. The Court agrees with both arguments.

29. First, the Defendant neither articulates a basis for error in relation to the Primary Condition Precedent Ruling nor does the Defendant attempt to demonstrate the existence of any conflicting decisions with respect to any question of law involving the Primary Condition Precedent Ruling. Thus, having failed to substantiate a basis for certification in relation to the Primary Condition Precedent Ruling, it is premature to consider, and there is no basis for independent consideration of, certification in relation to the Alternative Condition Precedent Ruling. Accordingly, on this basis alone, the Court finds cause to deny the request for certification.

30. That said, even if consideration of certification of the Alternative Condition Precedent Ruling were ripe, the Defendant has failed to convincingly substantiate the existence of an actual conflict in any decisions with respect to the legal standards applicable to excusing performance of a condition precedent. While the Defendant strains to articulate the existence of an *implicit* conflict between *Donaldson* and *Bradberry* based upon isolated freedom of contract language lifted from *Bradberry*, the Court finds no direct conflict between the decisions. Both decisions articulate basic principles of contract interpretation and enforcement under Texas law. Indeed, *Bradberry* did not even address the enforceability of a condition precedent.[5] Instead, it addressed the enforceability of a contractual nonwaiver provision of a lease. *See Bradberry*, 526 S.W.3d at 473-74.

31. Additionally, in *Donaldson* (as well as the other Texas appellate decisions relied upon by the Fifth Circuit in *Sellers* and *Varel – Friendswood Development* and *Lesikar Construction*), the Texas Supreme Court was given the opportunity to accept review of the decision and declined. While the declination of review is not tantamount to a definitive stamp of approval,[6] it is at least indicative of the lack of substantial conflict. Moreover, it is questionable whether a conflict between *Bradberry* and *Donaldson* could even theoretically exist. As steadfastly advocated by the Defendant at the Certification Hearing, a Texas appellate decision has no legal weight in the face of conflicting Texas Supreme Court authority. Therefore, if *Donaldson* did, in

[5] In an apparent effort to bolster the significance of *Bradberry*, the Defendant also directs the Court's attention to the recent Texas Supreme Court opinion of *Energy Transfer Partners, LP v. Enterprise Prods. Partners, LP*, 593 S.W.3d 732 (Tex. 2020). Like *Bradberry*, however, *Energy Transfer Partners* does not involve the enforceability of a condition precedent *to performance* under an *existing* contract. Instead, *Energy Transfer Partners* involves the question of the enforceability of a condition precedent to *contract formation* itself. *See id*. at 739-40 (finding that "parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152" of the Texas Business Organizations Code). Of note, none of *Donaldson*, *Friendswood Development* or *Lesikar Construction* are even mentioned in *Energy Transfer Partners*, much less called into question.

[6] In *Lesikar Construction*, however, it is noteworthy that the Texas Supreme Court denied the petitioner's writ for review on the basis of no reversible error.

fact, conflict with *Bradberry*, then as a matter of appellate authority the conflict would be resolved in favor of *Bradberry* – the Texas Supreme Court decision. Hence, there would be no conflict to resolve.

32. Thus, because the Alternative Condition Precedent Ruling of the First MSJ Order and Second MSJ Order does not involve a question of law as to which there are conflicting decisions, the Court will deny the request for certification on this basis as well.

3. Matter of Public Importance

33. Next, continuing to focus on the Alternative Condition Precedent Ruling, the Defendant further claims that the First MSJ Order and Second MSJ Order also involve a matter of public importance. In this regard, the Defendant asserts that the following "conflicting contract rules of public importance" are at issue: "(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." *See* Certification Motion, ¶ 27.

34. Once again, the Plaintiff presents two arguments in opposition. First, the Plaintiff emphasizes that the Alternative Condition Precedent Ruling is not the Court's primary ruling on the condition precent issue – it is the Court's *alternative* ruling – and that the Defendant has not argued a basis for certification with respect to the Primary Condition Precedent Ruling. Second, the Plaintiff asserts that there is no matter of public importance at issue – this is purely a business dispute between private litigants. The Court again agrees.

35. First, the Defendant neither articulates a basis for error in relation to the Primary Condition Precedent Ruling nor does the Defendant attempt to articulate a matter of public

importance with respect to the Primary Condition Precedent Ruling. Thus, having failed to substantiate a basis for certification in relation to the Primary Condition Precedent Ruling, it is premature to consider, and there is no basis for independent consideration of, certification in relation to the Alternative Condition Precedent Ruling. Accordingly, on this basis alone, the Court finds cause to deny the request for certification.

36. That said, even if consideration of certification of the Alternative Condition Precedent Ruling were ripe, the Defendant has failed to convincingly articulate why the Alternative Condition Precedent Ruling involves a matter of public importance. First, while the Defendant inappropriately attempts to characterize the Alternative Condition Precedent Ruling as setting up a supposed conflict between "contract rules of public importance" – more specifically, an attack upon general freedom of contract principles articulated by the Texas Supreme Court – in reality, no such conflict has been created. For reasons already explained, the Defendant has failed to both substantiate the lack of any controlling decision and the existence of conflicting decisions in relation to the legal principles applied by the Court in making the Alternative Condition Precedent Ruling. This is important to the question of *public* importance. While virtually every appeal has importance (if for no other reason, because of its potential precedential effect), not every appeal is of *public* importance. What makes an appeal important from a public standpoint is if the outcome is likely to transcend the parties' dispute. Here, the Defendant has failed to demonstrate any such likelihood given the existence of controlling Fifth Circuit authority, and the lack of any conflicting decisions, on the legal principles involved. In other words, the outcome of the appeal is only likely to affect the private litigant parties themselves.

37. Accordingly, because the Alternative Condition Precedent Ruling of the First MSJ Order and Second MSJ Order does not involve a matter of public importance, the Court will deny the request for certification on this basis as well.

4. Material Advancement of the Progress of the Case

38. Finally, the Defendant argues that an immediate appeal to the Fifth Circuit of both the Alternative Condition Precedent Ruling and the Shortfall Payment Liability Ruling will materially advance the progress of this adversary proceeding. In particular, the Defendant emphasizes that if it is successful on appeal, then the outcome will result in the denial of all material relief to the Plaintiff.

39. As before, the Plaintiff presents two arguments in opposition. First, in relation to the Alternative Condition Precedent Ruling, the Plaintiff highlights the alternative nature of the ruling, noting the lack of any mention of the Primary Condition Precedent Ruling which would continue to control in the proceeding. Second, in relation to both the rulings, Plaintiff argues that the Defendant has failed to substantiate any clear error and, thus, that an immediate appeal of the Interlocutory Orders will only serve to delay the resolution of an already two-year old case and increase the costs of litigation as opposed to materially advance the progress of the case. For the reasons set out below, the Court agrees.

40. First, because the Defendant has failed to articulate any basis for error in relation to the Primary Condition Precedent Ruling, as well as failed to even attempt to substantiate any basis for certification in relation to the Primary Condition Precedent Ruling, it is premature to consider, and there is no basis for independent consideration of, certification in relation to the Alternative Condition Precedent Ruling. Accordingly, on this basis alone, the Court finds cause to deny the request for certification in relation to the Alternative Condition Precedent Ruling.

41. Second, in support of its argument for the material advancement of progress in relation to both the Alternative Condition Precedent Ruling and the Shortfall Payment Liability Ruling, the Defendant, among other things, recites the Second Circuit's observation in *Weber v. Untied States Trustee*, 484 F.3d 154 (2nd Cir. 2007) that "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." *Id*. at 158 (emphasis added); *see also* Certification Motion, ¶ 19. Parroting such observation, the Defendant claims that until the Fifth Circuit affirms the Court's rulings it will never give up, but that it "may be willing to fold up its tent if this Court's rulings have 'the approval of the court of appeals.'" *See* Certification Motion, ¶ 22. While the Court finds the foregoing passage from *Weber* to be unduly narrow in approach, it conceptually highlights the proper focus of any certification inquiry under this prong – namely, whether such an immediate appeal has the reasonable prospect of finally determining one or more critical aspects of the litigation.

42. With such framework in mind, then, the question is whether an immediate appeal of either of the Alternative Condition Precedent Ruling or the Shortfall Payment Liability Ruling has the reasonable prospect of finally determining one or more critical aspects of the adversary proceeding. The Court finds that the Defendant has failed to demonstrate such reasonable prospect.

43. First, in the case of an affirmance of both rulings, while the Defendant suggests in the Certification Motion that it might be inclined to "fold up its tent" in the event of such affirmance, at the Certification Hearing the Defendant markedly backed away from such suggestion, indicating that it would be its intention to move forward in the litigation. Thus, it is clear to the Court that an affirmance of the two rulings would not materially advance the progress of the case.

44. Second, in considering the possibility of a reversal of the Alternative Condition Precedent Ruling, putting aside the prospect of any such reversal, the outcome of such an appeal would be of no bearing to the future progress of the case given the alternative nature of the ruling

and the existence of the Court's Primary Condition Precedent Ruling, which has been completely ignored by the Defendant. Thus, it is equally clear that a reversal of the Alternative Condition Precedent Ruling would also not materially advance the progress of the case.

45. Third, in considering the possibility of a reversal of the Shortfall Payment Liability Ruling, the Defendant has failed to demonstrate any prospect for success on appeal. For example, the Defendant does not attack the legal principles applied by the Court in making such ruling. Nor does the Defendant substantiate the lack of any controlling authority on such principles or a conflict of decisions involving such principles. Instead, the Defendant simply disagrees with the Court's conclusion. Thus, having failed to viably present the prospect of a successful appeal, the Defendant has likewise failed to sufficiently substantiate that an immediate appeal of the Shortfall Payment Liability Ruling may materially advance the progress of the case.

46. Thus, because the Defendant has failed to sufficiently substantiate that an immediate appeal of the Alternative Condition Precedent Ruling of the First MSJ Order and Second MSJ Order and/or an immediate appeal of the Shortfall Payment Liability Ruling of the Third MSJ Order may materially advance the progress of this adversary proceeding, the Court will deny the request for certification on this basis as well.

C. Ruling Without Prejudice in the Event Leave to Appeal is Granted

47. Finally, as previously noted, the District Court has not yet ruled on the Leave Motion. Should the District Court hereafter grant leave for an immediate appeal, then depending upon the scope of the leave granted and the effect that the appeal authorized thereby may have on the ability of this Court to proceed with the adversary proceeding, either or both of the parties may wish to request certification for an immediate appeal to the Fifth Circuit – a matter that, at that point in time, would be properly presentable to the District Court.

48. Therefore, the Court's denial of the Certification Motion will be without prejudice to the right of the parties to request the District Court's certification under 28 U.S.C. § 158(d)(2) in the event the District Court grants, in whole or in part, the Leave Motion.

ORDER

Based upon the foregoing, it is hereby:

ORDERED that the Certification Motion be and is hereby DENIED; *provided, however*, that such denial shall be without prejudice to the right of the parties, or either of them, to make a subsequent request for certification under 28 U.S.C. § 158(d)(2) to the District Court in the event the District Court hereafter grants, in whole or in part, the Leave Motion.

END OF ORDER # #