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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 TRIAL BRIEF – MEASURE OF RECOVERY

Maalt is entitled to the contractual Shortfall Payment as a result of Sequitur's repudiation and breach of the TSA.

Under the Terminal Services Agreement ("TSA"), Sequitur agreed to pay Maalt $1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels averaged

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on a quarterly basis (for example, 1,028,160 barrels in a 90-day quarter). It offered Sequitur several methods of performing under the TSA: (i) throughput and pay the transloading fee for a minimum of 11,424 barrels of crude oil for each day in the term; (ii) throughput and pay the transloading fee for less than the minimum required amount, and pay the transload fee for crude actually transloaded plus the Shortfall Payment; or (iii) pay the Shortfall Payment equal to $1.50 times 11,424 barrels per day if it chose to bring no oil to the facility.

If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a shortfall payment equal to the price per barrel times the minimum daily volume requirement times the number of days in the quarter, less the amount paid for actual transloading (for example, in the case of a 90-day quarter, $1.50 X 11,424 X 90 = $1,542,240.00, less the amount paid for actual transloading) (the "Shortfall Payment"). If Sequitur delivered more than the minimum number of barrels, then Sequitur was required to pay Maalt the amount actual throughput times $1.50 per barrel. In quarters where no oil was provided for transloading, the Shortfall Payment would equal the daily amount of $17,136.00 times the number of days in the calendar quarter. Those payment obligations began on the Terminal Operations Commencement Date, December 10, 2018, and continued through the end of the term, January 1, 2020.

Sequitur's Chief Operating Officer and President testified in his deposition that the construction of the terminal improvements were done approximately December 8, 2018. He also testified that he was not aware of anything that Maalt did to breach its obligations under the TSA. However, Sequitur never brought crude to the Barnhart Facility to be transloaded. It is therefore liable to Maalt for the Shortfall Payment for each day of the term of the TSA, that being December

8, 2018 to January 1, 2020. As has been previously said, the TSA is an alternative performance contract comparable in nature to a take or pay contract. As such, Maalt was entitled to be paid the minimum daily amount of $17,136.00 during the term or the higher amount resulting from actual transloading fees.

In *Valero Transmission Co. v. Wagner & Brown II*, 787 S.W.2d 611 (Tex. Civ. App. – El Paso 1990, writ dismissed), the plaintiff sued Valero because Valero did not take the natural gas it was required to take under the parties' take-or pay-contract. Under the contract, if Valero did not take the natural gas, it was obligated to pay for the amounts it did not take as well as those it did take. The trial court found that Valero did not take, or did not pay for if not taken, the contractually required quantity of natural gas for the term at issue. The trial court applied the contractual formula under the take-or-pay clause and found damages of $13,875,401.00 plus interest at the contract rate totaling $2,896,727.55. The court of appeals found no error in the trial court's judgment and affirmed. *Id*. at 615. *See also, Perlman v. Pioneer Ltd. Partnership*, 918 F.2d 1244, 1250 (5th Cir. 1990) (contract amount awarded under alternative performance contract); *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co*., 813 F.2d 77, 78 (5th Cir. 1987) (Judge Buchmeyer awarded the deficiency amounts under a gas take-or-pay contract, and the court of appeals affirmed).

Other states treat take-or-pay damage claims the same as *Valero*. In *Prenalta Corp. v. Colorado Interstate Gas Co*., 944 F.2d 677 (10th Cir. 1991), a case frequently cited in take-or-pay litigation, the court of appeals held that the proper measure of damages in a take-or-pay contract

is the contractually required quantity less the amount actually taken and paid. In explaining the policy, the court said:

> In return for the producer's exclusive dedication of the gas from its wells to the pipeline over a long term, take-or-pay clauses were drafted to assure the producer a continuous cash flow and to shift the risk of market demand to the pipeline:
>
> > The purpose of the take-or-pay clause is to apportion the risks of natural gas production and sales between the buyer and seller. The sellers bears the risk of production. To compensate seller for that risk, buyer agrees to take, or pay for if not taken, a minimum quantity of gas. The buyer bears the risk of market demand. The take-or-pay clause insures that if the demand for gas goes down, the seller will still received the price for the Contract Quantity delivered each year.

Id. at 688.

The rationale here is essentially the same. Maalt devoted the exclusive use of the Barnhart Facility to Sequitur for the contract term. In exchange, Sequitur agreed to provide Maalt with a minimum amount of cash flow when it would not be able to use the facility for any other purpose. Sequitur undertook the risk that the market for crude-by-rail would go down while Maalt undertook the risk of staffing the facility, paying its operational expenses, taxes and other costs, even if little to no oil was brought to the facility by Sequitur.

In *Colorado Interstate Gas Co., v. Chemco, Inc*., 833 P.2d 786 (1991), the Colorado court of appeals held that the proper measure of damages is the "pay" amount in the absence of a "take." The court found that the only way to put the plaintiff in the same position as if the contract had been performed is for the defendant to pay what is required by the contract terms.

The Florida courts are also in accord. In *World Fuel Services, Inc. v. John E. Retzner Oil Company, Inc*., 234 F.Supp.3d 1234 (S.D. Fla. 2017), the court found the take-or-pay obligations to be clear and unambiguous as they are in this case:

> Moreover, the language confirms that the parties' agreement is an alternative performance contract. Defendant's option to pay for and take the fuel, or pay the value of the fuel without taking it, as well as Plaintiff's obligations to supply a guaranteed amount of fuel at a fixed price, are clearly stated in the PRISM Agreement. Read together, Defendant's bargained-for obligation to pay whether or not it takes the fuel is clear and unambiguous.

Id. at 1240. Further, finding no ambiguity in the payment obligation, it held:

> **Breach of a take or pay agreement entitles the non-breaching party to payments it would have received under the contract with no duty to mitigate damages.** *See Prenalta*, 944 F.2d at 690 (calculating seller's damages at the value of the contract less any amounts already paid). Defendant was obligated to pay for 630,000 gallons of fuel each month at a fixed price of $2.0073 per gallon. [DE 41 ¶ 4.] Defendant pai for the entire fuel requirement for the month of January as well as 375,041 gallons of fuel for the month of February. *Id*. ¶¶ 10-11. Defendant has not paid for the remaining 6,554,959 gallons of fuel. At the contracted price per gallon, Plaintiff is thus entitled to $13,157,769.20 in damages.

Id. at 1241 [emphasis added].

PRAYER

WHEREFORE, Plaintiff, Maalt, L.P., prays that it obtains judgment against the Defendant, 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 June 4, 2021.

/s/ *James Lanter*
James Lanter