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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 – FORCE MAJEURE

A. Texas Force Majeure law.

Under Texas law, the purpose of a force majeure clause is to excuse the lessee from non-performance of a contractual obligation when the non-performance is caused by circumstances

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beyond the reasonable control of the nonperforming party or when non-performance is caused by an event which is unforeseeable at the time the parties entered the contract. *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc*., 861 S.W.2d 427, 435-436 (Tex.App.—Amarillo 1993, no writ).

The scope and application of a force majeure provision is dependent on the terms of the contract in which it appears. When the parties have defined the contours of a force majeure provision in their contract, those contours dictate the application, effect, and scope of force majeure. The courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended. *Sun Operating Ltd. Partnership v. Holt*, 984 S.W.2d 277, 282-283 (Tex. Civ. App.—Amarillo 1998, rev. denied); *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990) (applying Wyoming law). Contract terms are to be given their plain, ordinary, and generally accepted meanings unless the contract itself shows the terms were used in a technical or different sense. *TEC Olmos LLC v. ConocoPhillips Co*., 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, rev. denied).

A force majeure provision does not relieve the contracting party of the obligation to perform unless the disabling event was unforeseeable at the time the contract was entered. *Valero Transmission Co. v. Mitchell Energy Corp*., 743 S.W.2d 658, 663 (Tex. Civ. App.—Houston [1st Dist.] 1987, no writ). Force majeure does not protect against economic market downturns, and a contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated. *Id*. at 663. *See also TEC Olmos*, *supra* at 184; *Millers Cove Energy Co. v. Moore*, 62 F.3d 155, 158 (6th Cir. 1995) ("Courts and commentators

generally refuse to excuse lack of compliance with contractual provisions due to economic hardship, unless such a ground is specifically outlined in the contract. *** [T]he *force majeure* clause of a fixed-price contract does not excuse performance because of a dramatic drop in world oil prices.").

Since it is an excuse for non-performance, the burden of proof is on the party trying to avoid performance under the contract. *Hydrocarbon* at 435-436.

B. The TSA force majeure provision relied upon by Sequitur.

The Terminal Services Agreement ("TSA") provided in Section 14.2, "A 'Force Majeure Event' or 'Force Majeure' means any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party, and includes . . . the following events, . . . the unavailability, interruption, delay or curtailment of Product transportation services." [Emphasis added.]

Under the plain terms of the force majeure provision, Sequitur must prove that before declaring force majeure its failure to obtain rail transportation services for its crude oil (i) was not within its reasonable control and (ii) that its failure could not have been avoided or overcome by the exercise of due diligence. Under the facts of this case, Sequitur cannot carry that burden of proof. Rail transportation was available in 2018 and 2019 for Sequitur's crude oil. Sequitur just did not take the steps necessary to procure it.

C. The force majeure provision cannot be expanded beyond its plain meaning.

To succeed in its defense, it is incumbent on Sequitur to expand the TSA's force majeure beyond its plain meaning. In that respect, Sequitur will try to posit that it was unable to obtain

unit train service or unable to obtain unit train service of at least 90 cars, or some other similar argument to support its claim of force majeure.

Applying the intended meaning of the TSA's force majeure provision to this dispute, the only issue is whether rail transportation services were available in late 2018 to 2019. Since Sequitur never procured such service, its service was never interrupted, curtailed, or delayed. As will be demonstrated by the testimony of various railroad representatives, not only was service available in the marketplace, but the railroads were very interested in obtaining the crude oil business in the Permian Basis in 2018 and 2019. In fact, no railroad ever told Sequitur that it would not or would be unable to provide it with rail transportation services.

D. There was no force majeure event.

In *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236 (Tex. Civ. App.—Corpus Christi 1994, writ denied), the court noted that the purpose of a force majeure clause is to excuse the non-performance of contract obligations "only when caused by circumstances beyond the reasonable control of the lessee or by an event which is unforeseeable at the time the parties entered into the contract." *Id*. at 241. In that case, the party seeking to avoid performance was a mineral lease lessee who claimed that he was prevented from performing his lease obligations due to a well shut-in order issued by the Texas Railroad Commission. The court, however, stated that the force majeure clause in the lease was not triggered by that order because the lessee's failure to comply with the Railroad Commission's regulations were known at the time the lease was entered, and the lessee's failure to comply with the regulations (failure to timely file production reports) was within

its reasonable control. *Id*. at 241-242. *See also Hydrocarbon Management, Inc. v. Tracker Exploration, Inc*., *supra*, at 435-436.

The case of *Moore v. Jet Stream Investments, Ltd*., 261 S.W.3d 412 (Tex. App.—Texarkana 2008, rev. denied), also refutes Sequitur's force majeure claim. Moore was the lessee under a 1943 mineral lease with Jet Stream and others that continued as long as there was production. Prior to 2002, the Railroad Commission allowed small operators such as Moore to pay a $1,000 fine in lieu of providing the financial assurance required under the Commission's rules to assure that wells will be properly capped when production ceases. In 2002, the Commission changed its rule to require the financial assurance from all operators. Moore sought the required financial assurance coverage from three insurance companies, but was denied because, as Moore stated, he was too small of an operator and could not post the required liquid collateral. In August 2004, the Commission ordered Moore to cease production. Moore then sought a letter of credit from several banks to satisfy the financial assurance requirement, and ultimately did in May 2005 when he resumed production. The lessor claimed that the lease terminated since production ceased, and Moore contended that the Railroad Commission order was a force majeure event.[1]

The lessor in *Moore* sought summary judgment holding that the Commission regulation and order did not constitute force majeure, and the trial court granted that motion. In the opinion

[1] The force majeure provision at issue provided, "All terms . . . of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules and Regulations, and this lease shall not be terminated, in whole or in part, . . . for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such Law, Order, Rule or Regulation."

affirming the trial court's summary judgment, the *Moore* court noted that the lessor presented evidence that other similarly sized operators in the area were able to comply with the financial assurance regulation. The fact that Moore was unable to get a bond was not evidence that bonds were not available. Moreover, there were other forms of financial assurance available to operators that gave them the means to comply with the regulations such as letters of credit. Since forms of financial assurance were available to operators such as Moore, the court held that the Railroad Commission's regulation did not preclude Moore's performance under the lease. Reaching that holding, the court said,

> As noted by the Fifth Circuit: "[i]f a contractor were able to escape his responsibilities merely by causing an excusing event to occur, he would have no effective 'obligation to perform.' *Nissho-Iwai Co. v. Occidental Crude Sales, Inc*., 729 F.2d 1530, 1540 (5th Cir. 1984) (whether force-majeure clause in contract to deliver oil applied due to restrictions imposed by Libya)."

Moore v. Jet Stream Investments, Ltd., id. at 420-422.

At the time the Barnhart Facility improvements were completed and knowing that its obligation to pay the Shortfall Payment was upon it, Sequitur sent a letter claiming, without any support, that product transportation services were unavailable, interrupted, delayed, or curtailed, and that it was declaring force majeure. Sequitur claims that because it was unable to find an offtaker to buy its oil, ship it to the Gulf Coast, and split the arbitrage in a manner acceptable to it, that it was unable to obtain transportation services. However, there were other means available to Sequitur to obtain rail transportation service including:

- Contracting with a third-party logistics service to handle the logistics of rail transportation on Sequitur's behalf;

- Hiring experienced people and consultants to handle the transportation logistics in-house; or

- "Learning the system" and contracting directly with the railroads and rail car suppliers using the resources available to it.

Sequitur made no effort to do any of those things. It only sought a crude buyer that would give it half the arbitrage. Failing to do those things and take other similar action to obtain service results in speculation as to whether Sequitur would have been able to obtain rail transportation services according to Sequitur's retained expert.

It is undisputed that the railroads, including the TXPF, FWWR, KCS, and UP were providing rail transportation to shippers of crude oil in 2018 and 2019, but Sequitur did not pursue transportation agreements with them. The evidence will also show that railcars were available during that time through brokers, sellers, and leasing companies, but Sequitur chose not pursue those opportunities. As in *Moore*, there were a number of options available, and it was within Sequitur's control to choose to pursue one, the other, or several. Sequitur chose one path but not any of the others. The fact that it was unsuccessful in finding an acceptable offtaker, does not mean that transportation services were *unavailable*. It simply means that Sequitur was unsuccessful in obtaining transportation services that were available to it if it took the right action. Moore was unsuccessful in finding a bond that satisfied the financial assurance requirement that he faced, but his lack of success in pursuing a bond and his decision to not pursue other available means of complying did not excuse his performance under his force majeure clause. Similarly, Sequitur's *failure* to contract with an offtaker and decision to ignore other methods of obtaining available transportation services does not excuse its performance under the force majeure clause.

The trial evidence will show that no railroad ever refused to provide transportation service to Sequitur. Sequitur just never made the effort to obtain that service or obtain rail cars. There is no evidence that any railroad ever told Sequitur that it would not ship crude originating at the Barnhart Facility. While the railroads had requirements that had to be met by all shippers in order to ship by rail (whether crude or other commodities), none ever refused to ship crude for Sequitur. From that, the conclusion is inevitable – there was no unavailability, interruption, delay or curtailment of the product transportation services available to Sequitur in December 2018. Sequitur's self-serving conclusion that a force majeure event occurred was at best speculation since it had never been refused service. *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d at 1249. As stated by the 5th Circuit:

> From the evidence it is clear that no actual hindrance resulted from the regulations or the regulators in Wyoming because Perlman made no effort whatsoever to obtain the appropriate permits or to begin drilling the wells. Consequently, Perlman's self-serving conclusion that a force majeure condition existed was at best merely speculation as to what might have happened had he attempted to drill the wells as planned.
>
> * * * We require more than the mere possibility or unsupported conclusion of the existence of hinderance by government regulations to relieve Perlman of his obligations under the contract – an actual, material hindrance must occur before performance is excused.

Id. at 1249.

In *Perlman*, the lessor claimed force majeure because it had regulatory challenges due to its use of the "Perlman Process" to drill, which produced a substantial amount of water when Perlman drilled a well on a separate lease. *Id.* at 1246-47. The state regulators wanted Perlman

to obtain a hydrology study prior to drilling with the Perlman Process on the subject lease, and Perlman then claimed that it was excused from drilling due to force majeure. *Id.* First, the Fifth Circuit held that these regulatory hurdles could not be a force majeure because Perlman never attempted to get the necessary permits because it determined it would be difficult to obtain them. *Id.* at 1249. However, speculation as to whether it would be difficult to get the permits is not a force majeure. *Id.* Second, because the language of the force majeure clause did not address any particular drilling method, the Fifth Circuit noted that there could be no force majeure because Perlman could have attempted other drilling methods than the Perlman Process. *Id.*

Similar to *Perlman*, Sequitur claim of force majeure is based on speculation and a rewriting of the force majeure clause. That is, Sequitur never told a provider of rail services or rail cars "Yes" only to be refused or turned away. Murex gave it a contractual offer to provide rail cars and rail services, but Sequitur never said "yes." It was provided freight rates from KCSR, but never said "yes." It did not begin the process of acquiring rail cars in June but relied on potential partners to get them. As Sequitur's experts have testified, it would be speculation to opine on whether Sequitur could have obtained rail cars and service if it had acted diligently. Second, Sequitur wants to add terms to the force majeure clause. For instance, it will argue that if it could not get 90-car unit trains (instead of 75-car unit trains or manifest service) then it could not obtain Product transportation services. Just as the lessor in *Perlman* needed to have the flexibility to use alternate drilling methods, Sequitur needed to seek rail services in any manner possible and turned away before claiming an event of force majeure. There is no provision in the TSA that provides Sequitur

with an out merely because it was unable to find a joint venture partner who would move its crude on its terms.

The evidence at trial will also show that Sequitur had opportunities to sell to offtakers that would ship the oil to the Gulf Coast for it. Sequitur received a proposal from British Petroleum that it did not pursue because it would not have been as profitable as it would have liked. Sequitur also met with Robert Wright, the Vice President – Crude Oil for Murex, LLC ("Murex"), who provided Sequitur with proposals for shipping its crude from the Barnhart Facility to the Gulf Coast and serving as an offtaker, but Sequitur did not follow up, apparently because the proposal was not as rich as Sequitur would have liked. Rail transportation services were available through both, but apparently not on terms sought by Sequitur. The refusal of offers that were not financially attractive to Sequitur does not result in a force majeure event.

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