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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 –
NO ACTIONABLE MISREPRESENTATIONS WERE MADE TO DEFENDANT

Sequitur Permian, LLC's ("Sequitur") claims of negligent misrepresentation and fraudulent inducement are based on two assertions as reflected in its response to Maalt, LP's ("Maalt") summary judgment motion: (1) that after the LOI was signed on June 5, 2018, Maalt encouraged Sequitur to partner with Jupiter to move crude by rail because Jupiter was the "real

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deal"; and (2) that that on August 3, 2018, Chris Favors stated that it had another party that would enter into an agreement for the use of the Barnhart Facility. Neither constitute a false statement of material fact. Sequitur's pleadings do not contain a specific statement of the representations it claims are false, but merely make general allegations.

Fraud "requires 'a material misrepresentation, which was false, and which was either known to be false when made or asserted without knowledge of its truth, which was intended to be acted upon, which was justifiably relied upon, and which caused injury.'" *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc*., 960 S.W.2d 41, 47 (Tex. 1998). *See also JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018). "The reliance element has two requirements: the plaintiff must show that it actually relied on the defendant's representation and, also, that such reliance was justifiable." *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C., id*.; Grant *Thornton LLP v. Pac. Mut. Life Ins. Co*., 314 S.W.3d 913, 923 (Tex. 2010). "Fraudulent inducement . . . is a particular species of fraud that arises only in the context of a contract . . .." *Haase v. Glazner*, 62 S.W.3d 795 798 (Tex. 2001).

To support a fraudulent inducement claim, the representation "must concern a material fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation." *Harding Co. v. Sendero Res., Inc*., 365 S.W.3d 732, 747 (Tex. App.—Texarkana 2012, pet. denied); *see also Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995). Sequitur may not base its claim on "sales talk", "dealer talk", or "puffery." *Presidio Enters., Inc. v. Warner Bros. Distr. Corp*. 784 F.2d 674, 682 (5th Cir. 1986); *Prudential Ins. Co. of America v. Jefferson Assocs., Ltd*., 896 S.W.2d 156, 163 (Tex. 1995).

In *Dyer v. Caldcleugh and Powers*, 392 S.W.2d 523, 529-530 (Tex.Civ.App.—Corpus Christi 1965, writ ref'd n.r.e.), the court stated the longstanding law in Texas:

> We recognize the well-established rule of law that an affirmative false statement knowingly made as to a material fact believed and relied on by the other party to the extent of causing him to enter a contract to his detriment may justify recovery of proper damages in fraud, and the fact that the truth could have been discovered by the exercise of reasonable care and diligence would not be a defense. *Isenhower v. Bell*, Tex.Sup.Ct., 365 S.W.2d 354; *Schonrock v. Taylor*, Tex.Civ.App., 212 S.W.2d 260, writ ref. **We further realize that it is not unusual for a seller to 'puff' what he is selling, that general commendations, commonly known as dealers' talk, exaggerated statements of value, and expressions of opinion about the business, do not amount to actionable misrepresentations where the parties deal at arm's-length and have equal means of information and are equally well qualified to judge the true facts.** 25 Tex.Jur.2d, Fraud and Deceit, Sec. 47, pp. 689, et seq.; same volume, pp. 712, et seq.; *Hawkins v. Campbell*, Tex.Civ.App., 226 S.W.2d 891, writ ref., n. r. e.; *Frankfurt v. Wilson*, Tex.Civ.App., 353 S.W.2d 490, n. w. h.; *Texas Osage Co-op. Royalty Pool v. Brown*, Tex.Civ.App., 118 S.W.2d 944, writ ref.; *Moore & Moore Drilling Company v. White*, Tex.Civ.App., 345 S.W.2d 550, writ ref., n. r. e.
>
> We feel that any representations Dyer is shown to have made to Cousins concerning the good will and good customer relations of his agency comes under the head of dealers talk, puffing, and expressions of opinion, and not actionable fraud.

Further –

> 'In an arm's-length transaction the defrauded party must exercise ordinary care for the protection of his own interests and is charged with knowledge of all facts which would have been discovered by a reasonable prudent person similarly situated. And a failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party.' *Courseview Incorporated v. Phillips Petroleum Co.*, Tex.Sup.Ct., 312 S.W.2d 197, *quoted with approval in Thigpen v. Locke*, Tex.Sup.Ct. 363 S.W.2d 247, p. 251, in which case an instructed verdict against the party claiming fraud was upheld.

Id [emphasis added].[1] *See also CMS EnergyResource Management Co. v. Quicksilver Resources, Inc*., 2009 WL 1815776 *11 (Tex. App.— Fort Worth 2009, rev. denied).

[1] There is no question that Maalt and Sequitur were at arm's-length with respect to each other. There was no fiduciary or other special relationship between them, they had never done business together in the past, they each had separate attorneys and other professionals, and negotiated at arms-length throughout 2018.

In *Jeffcoat v. Phillips*, 534 S.W.2d 168 (Tex.Civ.App. – Houston [14th Dist.] 1976, writ ref'd n.r.e.), the plaintiff brought a medical malpractice case against Dr. Phillips and others, and claimed that the Harris County Medical Society committed fraud by stating that Dr. Phillips was one of the finest surgeons in Harris County, you should not be afraid of him, that he had a real good reputation, and did not have any bad reports against him. The Society obtained summary judgment on the fraud claim. In affirming the summary judgment, the court noted that, "To be actionable fraud the misrepresentation complained of must concern a material fact as distinguished from a mere matter of opinion, judgment, probability or expectation." *Id*. at 171. The court held that the statements complained about were nothing more than matters of opinion, judgment or expectation.

Sequitur's allegation that Maalt encouraged it to do business with Jupiter because it was the "real deal" fails for the same reason as the claims against the Harris County Medical Society failed. First, no false statement of fact was made by Maalt with respect to Jupiter. Maalt had never done business with Jupiter before mid-2018, and had no prior business experience with it. Everything Sequitur alleges falls within its misrepresentation claims falls within the realm of opinion, probability or expectation. No exception to the general rule applies because Maalt did not know that anything its employees stated to Sequitur in the form of an opinion was false, it had no special knowledge about Jupiter or what might happen in the future, and expressed no opinion based on prior or present facts. It did not have any more knowledge about Jupiter than did Sequitur. In fact, in the summer of 2018, Sequitur may have had more knowledge about Jupiter's capabilities since Sequitur had engaged in a number of meetings and conversations with Jupiter as part of its due diligence, obtained information about Jupiter from its consultants, and undertook its own

investigation of Jupiter. *See, Paull v. Capital Resource Management, Inc*., 987 S.W.2d 214, 218-220 (Tex.App.–Austin 1999, pet. denied).

Favors' statement does not support a fraud or negligent misrepresentation claim since his "sales talk" or "dealers' talk" is not actionable under Texas law. In *Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp*., 784 F.2d 674 (5th Cir. 1986), the court examined fraudulent inducement and negligent misrepresentation claims in the context of the law regarding puffery and dealers' talk. Presidio entered into a blind bid for the screening of a movie produced by Warner Bros., "The Swarm." The movie was a bust, and, "Instead of accepting this result as an unsuccessful business venture, Presidio brought suit against Warner in federal district court, alleging common law fraud and negligent misrepresentation." *Id*. at 678. In reviewing the statements that were allegedly false, the court found that statements such as "this will be the most 'want-to-see' movie of the year" are not statements of fact because they turn on vague, indefinable terms, and are predictions. The court even found that statements such as "*The Swarm* will be far more profitable than your average summer of '78 film" do not support a fraud claim. *Id*. at 679. Favors' statement that some other party would sign a contract for the Barnhart Facility if Sequitur did not is nothing more than the type of "dealers' talk" involved in *Presidio*.[2]

The court in *Presidio* found that the statements complained of were salesman's "puffery" which reasonable people do not take seriously, and Presidio's executives were experienced professionals who could not have reasonably relied on the puffery. Therefore, the "special

[2] Travis Morris will testify that Jupiter wanted to contract with Maalt for the Barnhart Facility if Sequitur did not because it wanted to control the arbitrage opportunity in that area. Since Morris was in constant contact with Sequitur during that time, Sequitur could have simply asked Morris if Jupiter was planning to contract with Maalt for the Barnhart Facility.

knowledge" exception carved by the courts did not apply. In arriving at the conclusion that the "special knowledge" exception is inapplicable with respect to puffery, the court cited this comment to the *Restatement (Second) of Torts* §§ 539, 542 (1977):

> The habit of vendors to exaggerate the advantages of the bargain that they are offering to make is a well recognized fact. An intending purchaser may not be justified in relying upon his vendor's statement of the value, quality or other advantages of a thing that he is intending to sell as carrying with it any assurance that the thing is such as to justify a reasonable man in praising it so highly.

Id. at 682. The court went on to note:

> The "special knowledge" exception applies typically to the opinions of specialized experts—such as jewelers, lawyers, physicians, scientists, and dealers in antiques—where their opinions are based on concrete, specific information and objective, verifiable facts.

Id. See also, Millcreek Associates, L.P. v. Bear, Stearns & Co., 205 F.Supp.2d 664 (W.D. Tex. 2002); *Saunders v. Martin*, 390 S.W.2d 513, 514-515 (Tex.Civ.App.–Texarkana 1965, no writ).

At best, Favors' statement was nothing more than an opinion or prediction of future events – if you don't buy, someone else will – that constitutes "dealers' talk" and is not actionable as fraud or a negligent misrepresentation.

PRAYER

WHEREFORE, Plaintiff and Third-Party Defendant, pray that they obtain judgment against the Defendant, that Defendant take nothing by its counter and third-party claims, 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