James Lanter
State Bar No. 11940700
JAMES LANTER, P.C.
560 N. Walnut Creek
Suite 120
Mansfield, Texas 76063
(817) 453-4800
(817) 453-4801 FAX
jim.lanter@lanter-law.com

Paul O. Wickes
State Bar No. 00788663
WICKES LAW, PLLC
5600 Tennyson Parkway
Suite 205
Plano, Texas 75024
(972) 473-6900
(972) 767-3225 FAX
pwickes@wickeslaw.com

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 ON THE LEGAL STANDARD FOR "REASONABLY DETERMINED BY CUSTOMER"

The Terminal Services Agreement ("TSA") has a defined term for the "Terminal Operations Commencement Date," which is the date that Sequitur must either meet its obligation

20420022106070000000000006

to throughput a Minimum Volume Commitment of crude or pay a Shortfall Payment. The TSA provides the following definition:

> "Terminal Operations Commencement Date" means the date that the Terminal is fully operational to enable the performance and receipt of the Services and any and all Regulatory Approvals for the Services have been obtained, in each case, ***as reasonably determined by Customer*** and as such date is evidenced by a written notice sent by Customer to Terminal Owner.

[Emphasis Added].

It is anticipated that Sequitur will take the position that it can subjectively determine that the Terminal is not fully operational and, thereby, declare that the Terminal Operations Commencement Date has yet to arrive. However, under Texas law, this type of provision is a condition of satisfaction and the test is "objective reasonableness," not "subjective satisfaction." *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80, 88-89 (Tex. 1976), *overruled in part on other grounds*, *Sterner v. Marathon Oil Co*., 767 S.W.2d 686, 690 (Tex. 1989).

Black Lake Pipe Line v. Union Construction involved a construction dispute where the construction work had to be "satisfactorily performed" as determined by the Owner. The Texas Supreme Court held that with contracts providing that performance is to be to the satisfaction of one party, most courts have applied an objective test in determining whether that party acted in good faith. *Id. citing* 5 WILLISTON ON CONTRACTS § 675B, at 210; 3A CORBIN ON CONTRACTS § 645, at 85; Annot., 44 A.L.R. 2d, *supra*; 17A C.J.S. Contracts § 495(2), at 722. Because a contract conditioned on satisfying a party's "whim" or "caprice" could be illusory, the

Court concluded that the party's decision about whether performance is satisfactory must be objectively reasonable. *Black Lake*, 538 S.W.2d at 88.[1]

Put simply, "The standard is whether the performance would satisfy a reasonable person." *Comm'ns Transmission, Inc. v. TriStar Comm'ns, Inc.*, 798 F.Supp. 406 (W.D. Tex.1992). "This is an objective standard which does not seek to find the mental state of satisfaction of that party, but rather whether the performance would satisfy a reasonable person." *Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.*, 760 S.W.2d 298 (Tex.App.--Texarkana, 1988 writ denied).

Under Texas law, a contract with a satisfaction clause relating to "matters of commercial value" requires that the party must "act in good faith and must be honestly dissatisfied." *Comm'ns Transmission*, 798 F.Supp. at 409 *citing Anahuac, Inc. v. Wilkes*, 622 S.W.2d 634, 637 (Tex. App.—Austin 1981, no writ). Whether a party acted in good faith and was honestly dissatisfied--that is, was objectively reasonable--is generally a question of fact. *Comm'ns Transmission*, 798 F.Supp. at 409; *Clover Staffing, LLC v. Johnson Controls World Servs., Inc.*, 465 F. Supp. 2d 670, 684 (S.D. Tex. 2006); see also *See also Nissan N. Am., Inc. v. Tex. DMV*, 592 S.W.3d 480, 495 n.16 (Tex. App.—Texarkana 2019) (follows *Black Lake's* objective good faith and objective reasonableness test). *Lynx Expl. & Prod. Co. v. 4-Sight Operating Co.*, 891 S.W.2d 785, 787 (Tex. App.—Texarkana 1995) ("The Texas Supreme Court adopted a reasonableness test for a "satisfaction" provision of contract in deciding whether a party acted in good faith. This is an

[1] The court distinguished this situation from that were a third party agreed to by the parties had final authority on satisfaction of performance. In those instances, the third party's decision of satisfaction would be final and conclusive in the absence of fraud, misconduct, or gross mistake. *Id.* at 88.

objective standard which does not seek to find the mental state of satisfaction of that party, but rather whether the performance would satisfy a reasonable person.").

Here, the fact question of whether the Terminal was operational will rest not on Sequitur's purported belief or satisfaction, but on an objective assessment of fact. Here the objective evidence will show that Sequitur completed the Terminal improvements, and the Terminal was completed and became operational and/or "in service" on or about December 10, 2018 according to Sequitur's records and the testimony of its officers.[2] Under Texas law, any protestations from Sequitur that it did not subjectively deem the Terminal operational have no relevance.

Respectfully submitted,

By: */s/ James Lanter*

James Lanter
State Bar No. 11940700
JAMES LANTER, P.C.
560 N. Walnut Creek, Ste. 120
Mansfield, Texas 76063
(817) 453-4800
(817) 453-4801 FAX
jim.lanter@lanter-law.com

Paul O. Wickes
State Bar No. 00788663
WICKES LAW, PLLC
5600 Tennyson Parkway, Ste. 205
Plano, Texas 75024
(972) 473-6900
(972) 767-3225 FAX
pwickes@wickeslaw.com

[2] Merrill dep. 183:16 – 184:8; Van den Bold dep. 54:5 – 14; Johansen dep. 19:6 – 22, 22:7 – 23, 24:14 – 25:24, 26:5 – 14, 29: 7 – 11; Exhibits 76 and 89.

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