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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 –
EXCLUSION OF UNDISCLOSED EVIDENCE OF DAMAGES

Despite Maalt, LP's ("Maalt") timely request, Sequitur Permian, LLC ("Sequitur") has not disclosed either the amount of damages it seeks under its counterclaim and third-party claim or the method by which it calculated any damages. As a result, under both the Federal and Texas rules,

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Sequitur is precluded from introducing any evidence at trial of damages with respect to its fraudulent inducement and negligent misrepresentation claims.

On March 27, 2019, Maalt sent its request for disclosures to Sequitur under Texas Rule of Civil Procedure 194.2 seeking among other things disclosure of "the amount and any method of calculating economic damages." Texas Rule of Civil Procedure 194.2(d).[1]

On May 10, 2019, Sequitur responded to Maalt's request with the following:

(d) The amount and any method of calculating economic damages:

RESPONSE:

This will be supplemented upon further discovery.

On June 6, 2019, Sequitur served its First Amended Response to Request for Disclosure on Maalt. Again, Sequitur responded to the damages disclosure requirement with the following:

(d) The amount and any method of calculating economic damages:

RESPONSE:

This will be supplemented upon further discovery.

On February 18, 2020, Sequitur again supplemented its disclosures by serving its Second Amended Response to Request for Disclosure on Maalt. Again, its disclosures stated:

[1] Wile the Court instructed the parties that disclosures made while the case was in the state court would not have to be repeated under Federal Rule of Civil Procedure 26, it should be noted that the Federal rules require essentially the same disclosure. Rule 26(a)(1)(A)(iii) requires a disclosure of the computation of each category of damages claimed by the disclosing party, and also requires production of documents on which such calculations are based.

(d) The amount and any method of calculating economic damages:

RESPONSE:

This will be supplemented upon further discovery.

On December 31, 2020, Sequitur served its Defendant, Sequitur Permian, LLC's Supplemental Rule 26(a)(2) Disclosures. That document did not provide any information satisfying either the Texas state court damages disclosure requirement or the Federal Rule 26(a)(1)(A)(iii) damages disclosure requirement.

For the first time on May 24, 2021, Sequitur provided documents that it appears will be used to support some type of damage claim and calculation – trial exhibits 130 through 134. Those exhibits are comprised of 624 pages of documents that have not been produced to Maalt even though requested in requests for production of documents. All of those documents were requested by Maalt through the following document requests:

> 28. Any contracts for the construction of improvements by SEQUITUR at the Terminal.[2]
>
> 30. Any documents related to contracts for the construction of improvements by SEQUITUR at the Terminal.[3]
>
> 16. All documents identifying the equipment, machinery and other property placed at the TERMINAL by SEQUITUR for the purpose of performing crude oil transloading and handling operations.[4]

[2] Plaintiff's First Request for Production served on March 27, 2019.

[3] Plaintiff's First Request for Production served on March 27, 2019.

[4] Plaintiff's Second Request for Production served on June 7, 2019.

Sequitur did not object to those requests, but responded in each instance that documents were being produced. However, Sequitur never produced the documents bearing Bates Nos. 2354 through 2974 which are now identified as its trial exhibits 130 through 134. Those documents relate to no issues other than Sequitur's claim for damages under its fraudulent inducement and negligent misrepresentation claims.

In sum, Sequitur has not produced either the amount of damages it seeks, the method of calculating those damages, or the documents that support its damage claim although requested by Maalt. For two years, Sequitur has laid behind the log.[5]

Under Federal Rule of Civil Procedure 37(c)(1), "if a party fails to disclose this information [damage calculations], 'the party is not allowed to use that information … at trial, unless the failure was substantially justified or is harmless.'" *Macro Niche Software, Inc. v. 4 Imaging Solutions, L.L.C.*, 2014 WL 12599512 *1 (S.D. Tex. 2014). In that case, the plaintiff failed to disclose its damage calculations under Rule 26(a)(1)(A)(iii). The court stated that in determining whether the failure was substantially justified or harmless, the courts should consider (i) the party's explanation for its failure to disclose, (ii) the importance of the evidence, (iii) the potential prejudice to the opposing party in allowing the evidence, and (iv) the availability of a continuance. The court determined that while evidence of damages is important, since trial was scheduled to start in about a week the defendants would have little time to review the plaintiff's damage evidence, plaintiff

[5] Notably, Sequitur's pleadings are also silent as to the amount and nature of damages it seeks through its counterclaim and third-party claims other than the general statement that its seeks "reliance damages" "in an amount over $4,000,000." Its pleadings do not state what those reliance damages consist of or the amount it actually seeks. Doc. 45.

did not justify its failure to disclose, and a trial continuance would delay resolution, disallowance of the evidence was warranted. *Id*.

Similarly, in *Moore v. CITGO Refining and Chemical Co*., LP, 2012 WL 12894290 (S.D. Tex. 2012), the court noted that "after over a year of discovery, not one Plaintiff has yet to provide CITGO with any calculation or estimation of the damages he is seeking." *Id*. at *2. The court ordered that no evidence of damages would be admitted at trial despite the implications to the plaintiffs' claims finding that allowing the plaintiffs to develop their calculations and methodologies shortly before trial would "not only prejudice CITGO, it would reward Plaintiff's conduct of not complying with the discovery rules[.]"

The courts of the Northern District have applied the same standard in determining whether undisclosed damages evidence should be considered in the summary judgment context. In *Super Future Equities Inc. v. Wells Fargo Bank Minnesota NA*, 2007 WL 4410370 (N.D. Tex. 2007), Judge Boyle disallowed evidence of damages in a summary judgment proceeding finding that the defendants would be harmed by the damages evidence since they relied on the lack of damages evidence in preparing their motions for summary judgement. *Id*. at *7. In *Jacked Up LLC v. Sara Lee Corp.*, 2019 WL 1098992 (N.D. Tex. 2019), Judge Lindsay applied the Rule 37(c)(1) standard and refused to consider undisclosed damages evidence in ruling on a motion for summary judgment. Applying the four factors, Judge Lindsay found that while the damages evidence was important to the plaintiff's claim, there was no justification offered for the failure to disclose. He also found that if the plaintiff's failure to disclose was excused, the defendant would be harmed because discovery would have to be reopened thus delaying the resolution of the case. The court

concluded "it would be fundamentally unfair to subject Sara Lee to a continuance under these circumstances, especially given Jacked Up's failure to offer any explanation for its failure to disclose [its witness'] damage calculation years earlier in compliance with Rule 26." *Id*. at *9.

In this case, consideration of the four factors dictates that Sequitur's damages evidence be excluded under Rule 37(c)(1). First, Maalt does not dispute the importance of the evidence to Sequitur's claims; however, consideration of the other factors outweighs it. Under the second factor, Maalt will suffer significant prejudice if the evidence is allowed. Maalt has spent substantial time and money preparing for trial under the current scheduling order and based on the parties' disclosure and other discovery. It has spent significant time and money resisting Sequitur's repeated attempts to delay the resolution of this case. In fact, the trial of this case has already been continued multiple times, primarily due to Sequitur's motions for continuance:

- The Irion County District Court set an Initial Trial Setting of February 24, 2020.
- The parties agreed to a continuance with new trial setting of June 8, 2020.
- Sequitur filed its motion to continue the June 8, 2020 trial setting until November 2020, and the Irion County District Court continued the June 8 trial and reset trial for August 24, 2020 in response.
- After this action was removed to this Bankruptcy Court, this Court held a status conference on September 28, 2020. At the hearing, Maalt stated it could be ready for trial in February 2021 while Sequitur requested a trial setting in June 2021. Ultimately, the Court set docket call for May 3, 2021, with trial to be completed during the May 2021.
- Sequitur filed yet another motion for continuance (Doc. 95) seeking a continuance of the May 2021 trial setting. The Court granted a continuance and set docket call for June 7, 2021.
- Sequitur filed yet another motion trying to delay the trial of this case when it filed its Motion to Stay Pending Direct Appeal (Doc. 135) based on what

> was clearly a meritless motion to certify a direct appeal of this Court's summary judgment orders.

Trial should not be continued yet again.

Third, a trial continuance will not cure the prejudice to Maalt, it would only exacerbate it. Not only would Maalt be required to reprepare for trial with the new evidence, it would also have to engage in extensive discovery in order to prepare a defense with respect to the new damages evidence. It is important to this consideration to note that Sequitur did not plead its negligent misrepresentation and fraudulent inducement claims until December 20, 2019, a month after Maalt deposed the Sequitur employees who were primarily involved in the parties' dealings. At least three of those employees, Braden Merrill, Mike van den Bold, and Tony Wroten (who were all deposed before Sequitur plead the negligent misrepresentation and fraudulent inducement claims) would have to be re-deposed to ascertain the connection between the damages evidence and the alleged misrepresentation underlying Sequitur's claims. In addition, Maalt would be required to depose two Sequitur employees, Nicholas Ethridge and Russ Perry, both individuals involved in the construction of the terminal improvements. While Sequitur may not oppose reopening discovery for that purpose, it does not cure the prejudice to Maalt that (a) it would incur substantial costs in taking those depositions and (b) the resolution of this case would be delayed yet again by Sequitur. In other words, it would play right into Sequitur's game plan to drive up Maalt's costs and delay the trial as much as possible.

Fourth, Defendant has had two years to make what is now a basic, standard disclosure in every federal and state case, but did not do so despite supplementing or amending its disclosures

three times. There can be no legitimate reason for not making the required disclosures or timely producing the new documents.

Excusing Sequitur from its failure to disclose its damages amount and calculations, and produce the timely requested documents, would be harmful and fundamentally unfair to Maalt. Maalt's objections to Sequitur's trial Exhibits 130 through 134 should be sustained. Further, at the trial of this case, Maalt intends to object to any evidence of damages claimed by Sequitur, and those objections should be sustained as well under Rule 37(c)(1).

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