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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.,[1]	§	**Case No. 20-42002-ELM-11**
	§	**(Jointly Administered)**
Debtors.	§	
MAALT, LP,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
SEQUITUR PERMIAN, LLC,	§	**ADV. PROC. NO. 20-04064**
Defendant.	§	
	§	
v.	§	
	§	
VISTA PROPPANTS AND LOGISTICS, LLC	§	
	§	
Third Party Defendant	§	

SEQUITUR PERMIAN, LLC'S
TRIAL BRIEF

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); VPROP Operating, LLC (0269) ("VPROP"); Lonestar Prospects Management, L.L.C. (8451) ("Lonestar Management"); MAALT Specialized Bulk, LLC (2001) ("Bulk"); Denetz Logistics, LLC (8177) ("Denetz"); Lonestar Prospects, Ltd. (4483) ("Lonestar Ltd."); and MAALT, LP (5198) ("MAALT"). The location of the Debtors' service address is 4413 Carey Street, Fort Worth, TX 76119-4219.

Defendant, Counter-Plaintiff, and Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), files this Trial Brief, and in support thereof would show unto the Court, as follows:

I. ARGUMENTS & AUTHORITIES

A. Assuming, *arguendo*, that Restatement (First) of Contracts, § 302, is valid Texas law, even though it has not been adopted by the Texas Supreme Court, Maalt would have the burden to prove both that the Written Commencement Date Notice causes an extreme forfeiture to Maalt and that Written Commencement Date Notice Clause forms no essential part of the TSA, which it cannot do.

1. In the Order Granting in Part, and Denying in Part, Plaintiff's Second Amended Second Motion For Summary Judgment, dated April 13, 2021 ("First MSJ Order"), the Court appeared to dispose of Sequitur's condition precedent defense regarding the Terminal Operations Commencement Date on two alternative grounds. (Dkt. 122, pp. 15-16). Specifically, on the first ground, the Court concluded that the "Written Commencement Date Notice Clause constitutes a covenant as opposed to an independent condition precedent." On the second ground, the Court concluded that "even if the Written Commencement Date Notice Clause did constitute a freestanding condition precedent, because the Defendant at all times maintained exclusive control over whether to provide written notice to the Plaintiff irrespective of satisfaction of the Triggering Conditions, and because the withholding of notice without any basis would have the effect of working a forfeiture to" Maalt, "the performance of such condition is excused."

2. During the hearing on Sequitur's motion for a direct appeal, however, Sequitur explained that concluding that the Written Commencement Date Notice Clause was a covenant did not, by itself, permit the Court to judicially excuse the non-occurrence of the Terminal Operations Commencement Date in light of the TSA's definition and the undisputed facts, because, as the First MSJ Order also noted, "[b]reach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the

contract unless the breach is a material or total breach." (Dkt. 122, p. 13, ¶ 31) (quoting *Solar Applications Eng'g, Inc. v. T.A. Operating Corp*., 327 S.W.3d 104, 108 (Tex. 2010)). In other words, Sequitur explained that the decision not to send the Written Commencement Date Notice was not a material or total breach, nor did Maalt ever assert such an argument, let alone prove it as a matter of law, in its motion for summary judgment. Instead, Sequitur explained that, even if failing to send the Written Commencement Date Notice were a technical breach of the TSA (albeit a minor one), the TSA provided remedies for such a breach including sending a notice of default and ultimately terminating the TSA (and Sequitur's exclusive use of the Terminal) and then seeking recovery any out-of-pocket or other common-law damages.

3. In response to Sequitur's point on this issue, the Court's Order Denying Motion to Certify Direct Appeal provided, for the first time, an explanation on how the first alternative basis in First MSJ Order (called the "Primary Condition Precedent Ruling") could excuse the non-occurrence of the Terminal Operations Commencement Date based on Sequitur's decision not to send the Written Commencement Date Notice. Specifically, the Court stated that "part and parcel of the Court's determination that the Written Commencement Date Notice Clause constitutes a notice covenant instead of freestanding condition precedent was the **implicit determination** that the existence or occurrence of written notice under the Written Commencement Date Notice Clause **forms no essential part of the exchange** for the Defendant's promise to perform given the existence of the Triggering Conditions – the two actual, operative conditions precedent to the Defendant's obligation to perform." (Dkt. 178, p. 10) (emphasis added).

4. To reach this implicit determination, the Court relied on *Varel v. Banc One Capital Partners, Inc.*, which noted that "Texas courts excuse non-performance of a condition precedent if the condition's requirement (a) will involve extreme forfeiture or penalty, and (b) its existence

or occurrence forms no essential part of the exchange for the promisor's performance." 55 F.3d 1016, 1108 (5th Cir. 1994) (cleaned up and quoting *Lesikar Constr. Co. v. Acoustex, Inc*., 509 S.W.2d 877, 881 (Tex. App.—Fort Worth 1974, writ ref'd n.r.e.), which cited to Restatement (First) of Contracts, § 302). In sum, according to the Court's Order Denying Motion to Certify Direct Appeal, the Court has now explained that the Primary Condition Precedent Ruling is an independent, and alternative, basis for its conclusion that the Terminal Operations Commencement Date is judicially excused if the Written Commencement Date Notice was not sent.

5. Contrary to the Court's Order Denying Motion to Certify Direct Appeal, however, the Restatement rule cited in *Lesikar*, which *Varel* relied on, requires that **both** of the elements be met, not one or the other. As noted, *Varel* provided that "Texas courts excuse non-performance of a condition precedent if the condition's requirement (a) will involve extreme forfeiture or penalty, **and** (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance." 55 F.3d at 1108 (emphasis added). To be sure, in *Lesikar*, the court of appeals explained that "[b]ecause **both of the elements** referred to above that are necessary for the application of the above rule **are present** in this case, **the non-performance of the condition involved here by plaintiff is excused**." 509 S.W.2d at 882 (emphasis added). Simply put, both elements must be proved for a condition precedent to be judicially excused.

6. For example, the Fifth Circuit recently noted that "Texas courts may excuse the performance of a condition precedent, however, only if 'the condition's requirement '(a) will involve extreme forfeiture or penalty, **and** (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance.'" *Conn Credit I, L.P. v. TF LoanCo, III, LLC*,

903 F.3d 493, 502 (5th Cir. 2018) (emphasis added).[2] There, the Court held that "[t]here has been no showing here that Section 10.2 creates an extreme forfeiture or penalty, and the Sale Agreement makes clear that it was a material condition of performance." *Id.* Based on that conclusion, among others, the Court reversed the district court's conclusion, after a bench trial, "that, even if Conn's failure to issue pro-rata RSA refunds rendered Section 10.2's condition precedent unfulfilled, TF Loan could not show prejudice or that the representations and warranties in Section 10.2 were 'an essential part of the bargained-for exchange.'" 497, 499.

7. Based on the foregoing, Sequitur submits that the Restatement rule cited in *Lesikar* requires that both elements be met before a court can judicially excuse the non-occurrence of a condition precedent.[3] That said, Sequitur further submits that the Terminal Operations Commencement Date did not occur, including because Sequitur never sent the Written Commencement Date Notice, irrespective of Sequitur's basis for not sending it.

8. Additionally, Sequitur submits that its decision not to send the Written Commencement Date Notice does not involve an "extreme forfeiture" to Maalt because, at worst, Maalt only suffered a temporary loss of use of the Terminal due to its exclusivity promise, which was consideration that Maalt willing agreed to provide in exchange to Sequitur's agreement to pay for the Terminal's construction at its sole cost and expense.

9. Finally, Sequitur submits that the parties' decision to include in definition of Terminal Operations Commencement Date the text, "**and** as such date is evidenced by a written

[2] Albeit on a different issue, the Fifth Circuit noted that then "two prongs are separated by an 'and,' not an 'or,'" the "conditions are worded in the conjunctive; in other words, all [two] prongs of the test must be met." *See Conn Credit I, L.P.*, 903 F.3d at 502-03.

[3] Sequitur still asserts, and does not waive, its arguments that this Restatement rule is not Texas law for the reasons already argued: (1) the *Bradberry* rule is Texas law, which provides that all contract terms are enforceable unless they violate law or public policy; and (2) the Texas Supreme Court has not approved or adopted the Restatement rule, something only that Court or the Texas Legislature can do.

notice sent by" Sequitur to Maalt, rendered the Written Commencement Date Notice an "**essential part of**" of the TSA. Maalt provided no evidence to the contrary in its motion for summary judgment. None of the Court's rulings provide any factual or legal explanation why that text was not essential. To be sure, if it were not essential to the parties, that additional text, preceded by the word "and," would not have been included in the definition to begin with. Thus, Sequitur asserts that, as a matter of law, the Terminal Operations Commencement Date did not occur, including because Sequitur did not send the Written Commencement Date Notice, irrespective of whether it was based on its reasonable determination that the Terminal was not operational or did not have the required approvals.

10. At a minimum, at trial, Maalt has the burden to prove both that Sequitur's decision not to send the Written Commencement Date Notice will cause an "extreme forfeiture" to Maalt and that the Written Commencement Date Notice forms no essential part of the TSA. *See Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 142 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (stating "Arbor had the burden to prove that it was excused from sending a notice of default to Weekley as a condition precedent to its right to invoke contractual remedies for default," and therefore, "Arbor also had the burden to obtain a jury finding that it was excused"); *see also Note Inv. Grp., Inc. v. Assocs. First Capital Corp.*, 83 F. Supp. 3d 707, 729 (E.D. Tex. 2015) (explaining that the burden to prove a condition precedent has been met or excused is on the plaintiff).

B. To the extent that Maalt is ever found to be entitled to a Shortfall Payment, such amount must be reduced by the costs Maalt saved for non-performance of the transloading services.

11. Sequitur submits that Maalt cannot recover any Shortfall Payment, as a matter of law for the reasons already argued and as noted herein, and also because, as a matter of fact to be

proven at trial, the Terminal Operations Commencement Date did not occur and a Force Majeure occurred, as defined by the TSA. If this Court finds, however, that Maalt is entitled to a Shortfall Payment for any reason, such amount must be reduced by the costs that Maalt saved in never having to fully perform under the TSA, including providing the transloading services, which was the primary consideration that Sequitur sought from Maalt. Specifically, according to Maalt's expert report, by Eric R. Krause, "Maalt's Avoided Costs" by not having to perform the transloading services equaled "operating costs from December 2018 through December 2019 equal approximately $2.35 million." (Dkt. 52-2, pp. 152-53). Therefore, any Shortfall Payment owed to Maalt would have to be reduced by at least $2.35 million, as explained below.

12. "The most common interest protected in breach of contract cases is the expectation, or benefit of the bargain, interest." *WPS, Inc. v. Expro Ams., LLC*, 369 S.W.3d 384, 409 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). "Protecting this interest seeks to restore the non-breaching party to the same economic position in which it would have been had the contract not been breached—thus giving the party the benefit of its bargain." *Id.* However, "[a]n expectancy measure of damages does not authorize recovery of expected revenues, or even some portion of expected revenues, without also accounting for costs saved." *Id.*. The Fifth Circuit has adopted this fundamental principle of Texas contract law. *See DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 429 (5th Cir. 2003) (stating "the gross amount the non-breaching party would have received if the contract had been fulfilled should normally be reduced by any unpaid costs the non-breaching party would have to incur to complete performance of the contract").

13. The reason why the benefit-of-the-bargain damages must be offset by the costs saved due to non-performance is because "[a]llowing recovery of payments due under the contract without accounting for costs saved as a result of the breach puts the non-breaching party 'in a

better position as a result of the [breach] than it would have been in had it completed [performance of the contract].'" *WPS, Inc.*, 369 S.W.3d at 410 (quoting *Sage Street Assocs. v. Northdale Constr. Co.*, 937 S.W.2d 425, 426 (Tex. 1996)).

14. Based on the foregoing, in the unlikely event that Maalt is deemed entitled to any Shortfall Payments under the TSA, such amounts must be offset by "Maalt's Avoided Costs" of at least $2.35 million. If such were not the case, as Maalt has urged to this Court, then Maalt will have been put in a better position than it would have been had it completed performance of the TSA. That the law will not allow.

C. Because Maalt never performed transloading services, there was a failure of consideration, rendering the TSA unenforceable with respect to Maalt's right to recover any Shortfall Payment.

15. Sequitur submits that there was a complete failure of consideration under the TSA as it relates to the exchange of promises between the parties relating to the Shortfall Payment or Throughput Fee, which was provided as consideration to Maalt's promise to provide transloading services at the Terminal. The defense of failure of consideration has been explained, as follows:

> The premise underlying a failure of consideration defense is that "there was a consideration . . . in the first instance, but that it later failed." *Bassett v. Am. Nat'l Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth Aug. 24, 2004, pet. ref'd). "Generally, failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails." *Suttles v. Thomas Bearden Co*., 152 S.W.3d 607, 614 (Tex. App.—Houston [1st Dist.] July 22, 2004, rehearing overruled); *In re Topco, Inc.*, 894 F.2d 727, 742 (5th Cir. 1990). "A complete failure of consideration constitutes a defense to an action for breach of contract." *Walden v. Affiliated Computer Sys., Inc.*, 97 S.W.3d 303, 320 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Addison Express, LLC v. Medway Air Ambulance, Inc., No. 3:04-CV-1954-H, 2005 U.S. Dist. LEXIS 5704, (N.D. Tex. Apr. 5, 2005).

16. Here, as noted on the first page of the TSA, the parties agreed that the fundamental purpose of the TSA was that Maalt desired "to make available the Terminal to [Sequitur] and

perform the services set forth in this Agreement, and, on an exclusive basis, [Sequitur] desire[d] to utilize the Terminal for the throughput of Product and related services." Although Maalt provided for the use of the Terminal, Sequitur's return promise for that exclusive-use consideration was for Sequitur to pay for all costs associated with the construction and retrofitting of the Terminal to allow for transloading services for crude oil. But the exchange promises of a fee for transloading services completely failed. Sequitur submits, therefore, that it has a complete defense to any fee that would have been owed to Maalt under the TSA had it provided transloading services.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, Counter-Plaintiff, and Third-Party Plaintiff, SEQUITUR PERMIAN, LLC, request that Maalt take nothing on its claims against SEQUITUR PERMIAN, LLC, or that , SEQUITUR PERMIAN, LLC obtain the relief otherwise requested herein, and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021 a copy of the foregoing Trial Brief was served through the Court's ECF system on those parties receiving ECF notice, and as indicated below on the parties reflected below.

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