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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)**

SEQUITUR PERMIAN, LLC'S LIMITED OBJECTION TO DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

Sequitur Permian, LLC files this limited objection to the Second Amended Joint Plan of Reorganization of Vista Proppants and Logistics, LLC, *et al.*, pursuant to Chapter 11 of the Bankruptcy Code, and in support therefor, respectfully represents as follows:

BACKGROUND

A. Background on Sequitur's Claim

1. Sequitur is in the crude oil production business. In or about May of 2018, Sequitur was looking to obtain access to a transloading facility or rail terminal in or around Irion County, Texas to efficiently transfer crude oil to refineries near the U.S. Gulf Coast.

2. Around this time, Sequitur reached out to Vista Proppants and Logistics, LLC ("**Vista**"), the parent of Maalt, L.P. ("**Maalt**"), regarding the rail depot Maalt owns in Barnhart, Texas (the "**Terminal**"). Because Vista had experience transloading frac sand, and the Terminal had previously been utilized by a prior owner for oil transloading, it was thought to be an ideal candidate to transload crude oil for Sequitur.

3. On June 1, 2018, after several weeks discussing the prospect, Sequitur and Vista entered into a letter of intent to enter into an agreement which would grant Sequitur the exclusive right to use Maalt's terminal for oil transloading.

4. On August 6, 2018, Maalt and Sequitur signed a Terminal Services Agreement (the "**TSA**") that governed the business relationship between the parties. The term of the TSA became effective upon Sequitur's written declaration that operations at the Terminal were commenced and, regardless of the commencement date, was to be effective through January 1, 2020 unless the term was extended in writing, which it was not. Before transloading operations could begin, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal valued at over $4 million. While construction was underway, Sequitur, with Vista and Maalt's assistance, tried to secure trains and railcars certified to transport crude oil.

5. Generally, and subject to numerous terms and conditions, the TSA provided that Maalt would be compensated for transloading crude oil exclusively for Sequitur. Under the TSA,

Sequitur's requirement to begin paying Maalt was conditioned on the Terminal being fully capable of transloading Sequitur's crude oil, e.g., after the commencement date had been declared. Assuming the Terminal became capable of transloading crude oil, the TSA could also be terminated early due to, among other things, an event of "Force Majeure," including without limitation the unavailability of transportation services to transload the crude oil.

6. Unfortunately, because of Vista's and Maalt's misrepresentations to Sequitur, the Terminal never became capable of transloading Sequitur's crude oil. Specifically, Sequitur was unable to secure rail capacity, certified trains and railcars to effectively transload and transport its crude oil despite Vista's and Maalt's misleading assurances otherwise. Due to these circumstances, operations to transload oil at the Terminal never commenced. In addition, these circumstances led to an unavailability, interruption, delay, and curtailment of oil transportation services beyond Sequitur's control, which was a "Force Majeure" event under the TSA.

7. On December 7, 2018, Sequitur sent written notice to Maalt declaring that an existing "Force Majeure" event had occurred under the TSA. On February 8, 2019, Sequitur sent written notice to Maalt that such Force Majeure event had continued for sixty (60) days despite Sequitur's continued efforts to overcome it. As a result, Sequitur terminated the TSA without liability in accordance with Sequitur's express rights under the TSA to terminate the TSA early. As of the date of termination, the commencement date of operations at the Terminal had still not been declared.

8. On February 13, 2019, Maalt sued Sequitur in Irion County for breach of contract. Sequitur has since filed counterclaims against Maalt and Vista for promissory estoppel, negligent misrepresentation, common law fraudulent inducement, and breach of contract. The suit was

pending as *Maalt, LP v. Sequitur Permian, LLC*, in the 51st Judicial District Court of Irion County, Texas (the "**Lawsuit**").

9. A Notice of Bankruptcy was filed in the Lawsuit shortly after the Petition Date (as hereinafter defined) and stayed the proceedings in such state court.

10. On September 4, 2020, the Lawsuit was removed to this Court and is currently pending as Adversary No. 20-4064, *Maalt, LP v. Sequitur Permian, LLC*.

B. General Background

11. On June 9, 2020 (the "**Petition Date**"), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code commencing the above captioned cases (the "**Chapter 11 Cases**"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of chapter 11 of title 11 of the Bankruptcy Code.

12. On August 17, 2020, Sequitur filed proofs of claim against Vista and Maalt, respectively, and holds Class 6 General Unsecured Claims against each debtor. These claims are for damages and arise from the business transactions between Sequitur, Maalt and Vista and are more fully set out in the counterclaims Sequitur filed against Vista and Maalt, respectively, in the Lawsuit.

13. On August 19, 2020, the Court approved the solicitation of the *Second Amended Joint Plan of Reorganization of Vista Proppants and Logistics, LLC, et al., pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 401]. On September 14, 2020, as part of a resolution with the Official Committee of Unsecured Creditors, the Debtors submitted a *Third Amended Joint Plan of Reorganization of Vista Proppants and Logistics, LLC, et al., pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 518] (the "**Plan**"). The Plan Supplement, filed on September 19,

2020, identifies the Lawsuit as a Retained Cause of Action that the Reorganized Debtors will maintain post-Effective Date, as defined in the Plan [Docket No. 549].

14. The Plan includes an injunction provision that limits all parties from taking specific actions against the Debtors and the Reorganized Debtors. Specifically, the injunction provision in Art. VII.F provides the following:

> Except as otherwise expressly provided in the Plan or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims or Interests that have been released, discharged, or are subject to exculpation are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties: (a) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (b) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (c) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (d) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such holder has filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a Claim or Interest or otherwise that such holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (e) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan.

15. Confirmation of the Plan constitutes a full and final release and discharge of all Class 6 General Unsecured Claims regardless of whether Class 6 accepts or rejects the Plan. *See* Plan Art. III.D.6.b. The Plan defines "Cause of Action" to include "all rights of setoff, counterclaim, recoupment and claims under contracts or for breaches of duties imposed by law."

With some limitations, the Reorganized Debtors have each preserved its rights to offset debts it might owe to its creditors. Plan Art. VI.L.

16. "Historically, recoupment is the progenitor of the compulsory counterclaim, while setoff is the progenitor of the permissive counterclaim." Collier on Bankruptcy ¶ 553.11 (Richard Levin & Henry J. Sommer eds., 16th ed.). The Bankruptcy Code does not create a right to setoff, but rather, preserves a creditor's existing right to setoff under non-bankruptcy law. *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995). Plan confirmation does not extinguish a creditor's rights to setoff when those rights are timely asserted. *United States v. Cont'l Airlines (In re Cont'l Airlines)*, 134 F.3d 536, 542 (3d Cir. 1998).

17. On the other hand, recoupment is "an equitable doctrine designed to determine a just liability on the plaintiff's claim." *In re Holford*, 896 F.2d 176, 179 (5th Cir. 1990). It allows a defendant to assert a counterclaim against a plaintiff arising out of the same transaction to reduce the defendant's liability to the plaintiff. *Id.* at 178. The right to recoupment cannot be discharged through a bankruptcy plan. *See In re Ditech Holding Corp.*, 606 B.R. 544, 596 (Bankr. S.D.N.Y. 2019) (*citing Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 261 (3d Cir. 2000); *SAIF Corp. v. Harmon (In re Harmon)*, 188 B.R. 421, 425 (1995))

18. To the extent the Court finds that the Plan's Injunction provision can be approved despite the requirements of 1129(a), by this Objection, Sequitur makes clear its intention to preserve and exercise its setoff and recoupment rights as set out in the Lawsuit.

19. In addition, Section 1129(a)(1) prohibits confirmation of a plan that fails to comply with the provisions of the Bankruptcy Code. Because setoff and recoupment rights are preserved in bankruptcy, the Plan cannot be confirmed if the Plan eliminates Sequitur's defenses and setoff and recoupment rights. Thus, Sequitur requests that the Plan and confirmation order clearly

preserve Sequitur's defenses and setoff and recoupment rights. Otherwise, the Plan cannot be confirmed.

20. Similarly, the Plan's elimination of setoff and recoupment rights violates Section 1129(a)(7) of the Bankruptcy Code. Section 1129(a)(7) requires the debtor to prove that holders of impaired claims will receive as much through the Plan as it would receive in a hypothetical chapter 7 case. If the Plan eliminates setoff and recoupment rights, Sequitur will not receive equal or better recovery under the Plan than they would receive in a Chapter 7 liquidation.

WHEREFORE, Sequitur Permian, LLC respectfully requests that the Court condition confirmation of the Plan on it preserving Sequitur's defenses and rights for setoff and/or recoupment against Vista Proppants and Logistics, LLC and Maalt, L.P., respectively, and for such other and further relief to which it may be entitled in law or equity.

DATED: September 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 23, 2020 a copy of the *Sequitur Permian, LLC's Limited Objection to Debtors' Second Amended Joint Plan of Reorganization* was served through the Court's ECF system on those parties receiving ECF notice and on the parties identified in the Notice of Cure Procedures.

/s/ Melissa A. Haselden
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