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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
	§
Debtors	§ Jointly Administered

MAALT, LP,
Plaintiff,

vs.

SEQUITUR PERMIAN, LLC,
Defendant.

§
§
§
§
§
§ **Adversary No. _____**
§
§ **Removed from Cause No. CV19-003 in**
§ **the 51st Judicial District Court, Irion**
§ **County, Texas**
§

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Plaintiff, Maalt, LP (“Maalt” or “Plaintiff”), by its undersigned counsel, submits this Notice of Removal in accordance with Rule 9027 of the Federal

¹The 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.



Rules of Bankruptcy Procedure and 28 U.S.C. §§ 157, 1334, and 1452(a), and respectfully represents as follows:

1. On June 9, 2020 (the “Petition Date”), Maalt and certain affiliates (“collectively with Maalt the “Debtors”) filed voluntary petitions (the “Bankruptcy Cases”) for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. The Bankruptcy Cases are being jointly administered under case number 20-42002-ELM-11, the Honorable Edward L. Morris presiding. The Debtors are currently operating as debtors-in-possession.

2. On February 13, 2019, the Plaintiff filed its Plaintiff’s Original Petition against Sequitur Permian, LLC (“Sequitur” or the “Defendant”) in the 51st Judicial District Court, Irion County, Texas (the “State Court”) bearing the caption *Maalt, LP, Plaintiff vs. Sequitur Permian, LLC, Defendant*, Cause No. CV19-003 (the “Civil Action”). The Defendant answered in the Civil Action and filed a counterclaim against Maalt. Until the filing of this Notice of Removal, the Civil Action was pending before the State Court.

3. Pursuant to Bankruptcy Rule 9027(a)(1), the parties to the Civil Action and their respective attorneys are as follows:

A. Plaintiff:

Maalt, LP

Attorneys:

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Samuel S. Allen
State Bar No. 01057000
JACKSON WALKER LLP
135 W. Twohig Avenue
Suite C
San Angelo, Texas 76093
sallen@jw.com

B. Third Party Defendant

Vista Proppants and Logistics, Inc.

Attorneys:

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JACKSON WALKER LLP
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San Angelo, Texas 76093
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C. Defendant:

Sequitur Permian, LLC

Attorneys:

Matthew A. Kornhauser
Dylan B. Russell
HOOVER SLOVACEK LLP
Galleria Tower II
5051 Westheimer, Ste. 1200
Houston, Texas 77056

Paul B. Stipanovic
GOSSETT HARRISON MILLICAN & STIPANOVIC, P.C.
2 S. Koenigheim Steet
San Angelo, Texas 76902

4. Pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(2)(N), (A) and (O), and 1334(b) and the August 3, 1984 Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc (Miscellaneous Rule 33) entered by the United States District Court for the Northern District of Texas, this Court has jurisdiction over the Debtors' chapter 11 cases and any civil proceedings arising under, arising in or related to the Debtors' chapter 11 cases.

5. The Civil Action, including each and every separate claim and cause of action asserted therein, is a civil action other than a proceeding before the United States Tax Court, and is not a civil action by a governmental unit to enforce such governmental unit's police or regulatory power.

6. Each and all of the claims raised by the Plaintiff and Defendant in its counterclaim are "core" proceedings arising under or arising in the Bankruptcy Cases, or – at a minimum – are "related to" the Bankruptcy Cases. In summary, Maalt alleged in the Original Petition and subsequent amendments that Defendant breached a Terminal Services Agreement, and that breach caused Maalt significant damages, among other things. The Defendant alleges in its counterclaim that Maalt fraudulently or negligently induced it to take certain actions and that it relied on such to its detriment. Maalt denied those allegations. The claims asserted by Defendant in its

counterclaim form the basis of the claims filed in this case by Defendant as claims numbered 142 and 143.

7. The entire Civil Action and each and every separate claim or cause of action therein is a “core” proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (N) and (O). Resolution of each of the claims in the Civil Action will also materially affect the administration and reorganization of the Debtors’ estates. To the extent that any of the Plaintiff’s claims include any “non-core” proceedings, the Plaintiff consents to entry of final orders and judgment by this Court.

8. In the event that it is determined that this Court, absent consent of the parties, cannot enter a final order or judgment consistent with Article III of the United States Constitution, Plaintiff consents to the entry of final orders and judgment by this Court.

9. In accordance with Bankruptcy Rule 9027(a)(3), the Plaintiff is filing this Notice of Removal within 90 days of the filing of the Bankruptcy Cases. This Notice of Removal is accompanied by an Appendix containing copies of the process and all pleadings filed in the Civil Action prior to its removal from the State Court.

10. Removal to this Court of the Civil Action and each and every separate claim or cause of action asserted in the Civil Action is authorized and appropriate under 28 U.S.C. §§ 157, 1334, and 1452 and Bankruptcy Rule 9027.

NOW THEREFORE, all parties to the Civil Action pending in the State Court as Cause No. CV19-003 are HEREBY NOTIFIED, pursuant to Bankruptcy Rule 9027, as follows: Removal of the Civil Action and each and every claim and cause of action therein is effective upon the filing of a copy of this Notice of Removal with the Clerk of the State Court pursuant to Bankruptcy Rule 9027(c). The parties to the Civil Action shall proceed no further in the State Court unless and until the action is remanded to the State Court.

DATED: September 4, 2020

Respectfully submitted,

By: /s/ James Lanter

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ATTORNEYS FOR PLAINTIFF, MAALT, LP
and THIRD PARTY DEFENDANT VISTA
PROPPANTS AND LOGISTICS, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 4, 2020, a true and correct copy of the foregoing document was served (i) by electronic mail (where indicated) or by first class mail, postage prepaid, on the parties listed below, and (ii) by electronic mail to the parties registered or otherwise entitled to receive electronic notices in these cases pursuant to the Electronic Filing Procedures in this District:

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/s/ James Lanter
James Lanter

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In re:	§ Chapter 11
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Debtors	§ Jointly Administered

MAALT, LP,
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vs.

SEQUITUR PERMIAN, LLC,
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§ **Adversary No. _____**
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§ **Removed from Cause No. CV19-003 in**
§ **the 51st Judicial District Court, Irion**
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APPENDIX TO NOTICE OF REMOVAL

Plaintiff, Maalt, LP (“Maalt” or “Plaintiff”), submits this Appendix to Notice of Removal filed contemporaneously herewith, pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure. This Appendix contains copies of all the pleadings and

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process that were filed in the above-styled and numbered action prior to its removal from the 51st Judicial District Court, Irion County, Texas.

TAB	PAGE	Date Filed	DOCUMENT
A	0005		Docket Sheet
B	0006	02/13/2019	Plaintiff's Original Petition
C	0011	03/08/2019	Defendant's Answer and Counterclaim
D	0029	03/29/2019	Rule 11 Agreement
E	0031	06/26/2019	Plaintiff's Answer to Counterclaim
F	0034	06/19/2019	Defendant's Amended Counterclaim and Third Party Claim
G	0052	10/01/2019	Rule 11 Agreement
H	0054	10/22/2019	Third Party Defendant's Answer
I	0057	12/20/2019	Defendant's Second Amended Counterclaim and Original Third Party Claim
J	0077	12/20/2019	Defendant's Second Amended Counterclaim and First Amended Third Party Claim
K	0096	12/20/2019	Plaintiff's First Amended Original Petition
L	0105	01/10/2020	Plaintiff's First Amended Answer to Counterclaims
M	0109	01/10/2020	First Amended Answer to Third Party Claims
N	0114	02/13/2020	Plaintiff and Third Party Defendant's Partial Motion for Summary Judgment
O	0204	03/03/2020	Defendant's Notice of Partial Nonsuit
P	0207	03/03/2020	Defendant's Response to Plaintiff and Third Party Defendant's Partial Motion for Summary Judgment
Q	0224	03/03/2020	Defendant's Amended Response to Plaintiff and Third Party Defendant's Partial Motion for Summary Judgment
R	0325	03/06/2020	Plaintiff and Third Party Defendant's Objections to Summary Judgment Evidence
S	0330	03/06/2020	Plaintiff and Third Party Defendant's Reply in Support of Their Motion for Partial Summary Judgment

T	0341	03/11/2020	Partial Summary Judgment (dismissing promissory estoppel claim)
U	0342	04/09/2020	Defendant's Special Exceptions
V	0347	04/15/2020	Plaintiff's Second Amended Original Petition
W	0359	04/15/2020	Defendant's Third Amended Counterclaims and Second Amended Third-Party Claims
X	0377	04/30/2020	Plaintiff's Second Amended Answer to Counterclaims
Y	0381	04/30/2020	Plaintiff's Third Amended Answer to Counterclaims
Z	0385	04/30/2020	Defendant's Original Answer, Verified Denial and Affirmative Defenses to Plaintiff's Second Amended Petition
AA	0393	05/15/2020	Plaintiff's Second Motion for Partial Summary Judgment
BB	0675	06/01/2020	Defendant's Motion for Summary Judgment on its Affirmative Defenses of Failure of Condition Precedent, Penalty and Waiver

DATED: September 4, 2020

Respectfully submitted,

By: /s/ James Lanter

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ATTORNEYS FOR PLAINTIFF, MAALT, LP
and THIRD PARTY DEFENDANT VISTA
PROPPANTS AND LOGISTICS, INC.

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/s/ James Lanter
James Lanter

CIVIL DOCKET

BEAR GRAPHICS, INC.

371

Removal Appendix 0005

No. of Case	NAME OF PARTIES	ATTORNEYS	Kind of Action and Party Demand
CY19-003	MAALT, LP	James Lanter Paul O. Wickes	Contract-Other
<div>Fee Book</div> <div>Vol. Page</div>	<div>vs.</div> <div>Sequitur Permian, LLC</div>	<div>Ptff.</div> <div>Def.</div>	
Date of Orders	ORDERS OF COURT		MINUTE BOOK
<div>Month Day Year</div>			<div>Vol. Page</div>

3/10/2020 May 5. Lanter for T.S. P. Stipanovich, Chancery with M. Kanda ready on MST & no continuance. Continuance granted. Tues. 5/12 11:00 Status. B/T May 24 or Sept 28. May 29 new mediation deadline. Parties to submit deadlines. MST taken under advisement.

CAUSE NUMBER CV19-003

MAALT, LP, Plaintiff	§	IN THE DISTRICT COURT
	§	
VS.	§	51st JUDICIAL DISTRICT
	§	
SEQUITUR PERMIAN, LLC, Defendant	§	IRION COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Maalt, LP ("Maalt"), Plaintiff, and files this its Original Petition, and in support thereof, respectfully shows this Court as follows:

DISCOVERY CONTROL PLAN

I.

Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

RULE 47 STATEMENT OF RELIEF REQUESTED

II.

Plaintiff seeks monetary relief over \$1,000,000.00.

PARTIES

III.

Plaintiff, Maalt, LP, is a Texas limited partnership with its principal place of business in Tarrant County, Texas.

Defendant, Sequitur Permian, LLC, ("Sequitur") is limited liability company with its principal place of business in Harris County, Texas. It may be served by serving its registered agent, Capitol Corporate Services, Inc. at 206 East 9th Street, Suite 1300, Austin, Travis County, Texas 78701. The Clerk is requested to serve the citation on Defendant by Certified Mail.

VENUE

IV.

Venue is proper in Irion County, Texas, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(1) because that is the county in which all or a substantial part of the events giving rise to Maalt's claims and causes of action occurred.

FACTS

V.

Maalt is in the business of operating transloading facilities that transload materials used in the oil and gas industry in Texas. Its transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operates a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacifico Transportation, Ltd. (the "Railroad").

VI.

In August 2018, Maalt entered into a Terminal Services Agreement (the "Contract") with Sequitur to develop and operate a crude oil transloading business at the Barnhart Facility. The Contract granted Sequitur the exclusive right to operate a crude oil transloading facility at the Barnhart Facility. In exchange, Sequitur agreed to pay Maalt \$1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30 day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $\$1.50 \times 11,424 \times 30 = \$514,080.00$).

VII.

Pursuant to the Contract, Sequitur constructed the Phase I Project improvements at the Barnhart Facility, including equipment and facilities necessary for loading railcars with crude oil brought to the Barnhart Facility in trucks, and those improvements became operational in about October, 2018. Under the terms of the Contract, Sequitur's obligations to pay Maalt the minimum payment began once the improvements were operational.

VIII.

Despite the completion of the Phase 1 Project improvements, Sequitur did not begin transloading crude oil as required by the Contract. It has also refused to pay Maalt the minimum transloading fees it is obligated to pay. Based on information and belief, Sequitur refused and failed to do so because the economics of sending crude oil to the Barnhart Facility changed to the point that it was no longer a "good deal" for Sequitur.

IX.

On December 7, 2018, Sequitur sent Maalt a letter claiming that it was experiencing a force majeure event because of the "unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services. . . ." On February 8, 2019, Sequitur then sent Maalt a letter claiming to terminate the Contract pursuant to the force majeure provisions of the Contract. However, in reality there was never a force majeure event as rail service to the Barnhart Facility was never unavailable, interrupted, delayed or curtailed. Rather, Sequitur was asserting its force majeure claim as a pretext in an effort to terminate the Contract simply because the financial benefits it sought to reap from the deal were no longer realistic.

X.

Sequitur's conduct indicates that it is absolutely and unconditionally refusing to perform the Contract. It has therefore repudiated the Contract, and has therefore materially breached the Contract. Moreover, by sending its February 8, 2019 letter attempting to terminate the Contract, Sequitur has improperly attempted to terminate the Contract in order to avoid its contractual obligations.

BREACH OF CONTRACT

XI.

Paragraphs IV through X are incorporated herein by reference. Sequitur's repudiation of the Contract constitutes a material breach of the Contract. As a result, Vista has sustained damage within the jurisdictional limits of the Court, for which Maalt now sues.

DECLARATORY JUDGMENT

XII.

Paragraphs V through XI are incorporated herein by reference. Maalt seeks a declaration pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37, that:

- a. The Termination Operations Commencement Date under the Contract occurred and the date of its occurrence;
- b. The "force majeure event" alleged by Sequitur did not occur and is a mere pretext;
- c. The date the payment obligations created by Article 3 of the Contract began; and
- d. Sequitur breached the Contract by refusing to perform its obligations under the Contract.

ATTORNEYS' FEES

XIII.

Pursuant to Texas Civil Practice and Remedies Code Chapters 37 and 38 and the terms of the Contract, Maalt is entitled to recover its reasonable and necessary attorneys' fees and associated litigation and expert costs from Sequitur.

WHEREFORE, PREMISES CONSIDERED, Maalt, LP, Plaintiff, prays that Defendant be cited to appear and answer herein, and that Plaintiff recover the following:

1. All damages to which it may be entitled;
2. Its reasonable and necessary attorney's fees, litigation costs, and expert costs;
3. Pre and post judgment interest allowed by law;
4. All costs of Court; and
5. Such other and further such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ James Lanter

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ATTORNEYS FOR PLAINTIFF

Ashley Masters

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

**DEFENDANT’S ORIGINAL ANSWER &
DEFENDANT/COUNTER-PLAINTIFF’S ORIGINAL COUNTERCLAIMS
& VERIFIED APPLICATION FOR TEMPORARY MANDATORY INJUNCTION**

COMES NOW, Defendant/Counter-Plaintiff, SEQUITUR PERMIAN, LLC (“Sequitur”), in the above styled and numbered cause and file this its Original Answer & Defendant/Counter-Plaintiff’s Original Counterclaims & Verified¹ Application for Temporary Mandatory Injunction and in support thereof would show unto the Court, as follows:

GENERAL DENIAL

1. Subject to any stipulations, admissions, special exceptions, special and affirmative defenses which may be alleged, Defendant asserts a general denial, in accordance with Rule 92 of the Texas Rules of Civil Procedure, and demands strict proof of the Plaintiff’s suit, by a preponderance of the evidence, as required by the Constitution and the laws of the State of Texas.

¹ See the Unsworn Declaration of Nicholas “Nick” Eldridge, which is attached hereto and incorporated herein by reference. See also the Unsworn Declaration of Braden Merrill, which is attached hereto and incorporated herein by reference.

AFFIRMATIVE DEFENSES

2. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of consideration.

3. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of waiver, including express contractual waiver and/or implied waiver.

4. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of statute of frauds.

5. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of contractual force majeure.

6. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of excuse and/or justification.

7. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to mitigate damages.

8. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to perform conditions precedent.

9. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of impossibility.

10. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of prior material breach of contract and/or repudiation.

FACTS IN SUPPORT OF COUNTERCLAIMS

11. On the effective date of August 6, 2018, Sequitur entered into a Terminal Services Agreement (the “Agreement”) with Plaintiff Maalt, LP (“Maalt”). Per the Agreement, Maalt (described as “Terminal Owner”) was the owner and operator of a rail terminal (the “Terminal”)² located in Barnhart, Texas on land owned by Maalt, and Sequitur (described as “Customer”) was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter “oil”). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

12. The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, upon receipt, Maalt would then transload the oil into railcars to Sequitur or Sequitur’s third-party customers. In order to facilitate

² The Terminal’s address is located at 44485 W. Hwy 67, Barnhart, Irion County, Texas 76930 and is more specifically described in the Agreement in Exhibit A-1 thereto.

the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and expense, would install equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the “Phase II Project.”

13. Significantly, as to the equipment and facilities installed by Sequitur (collectively “Customer Terminal Modifications”) in connection with either the Phase I Project or the Phase II Project, Maalt agreed in the Agreement that **“title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur].”** *See* Agreement, § 2.7. The only exception to Sequitur’s title and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was “any additional rail tracks that may [have been] installed,” which additional tracks’ ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement’s term, subject to certain rights of Sequitur. *See* Agreement, § 2.7.

14. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. *See* Agreement, § 3.2.

15. Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” *See* Agreement, §

3.1. The Agreement could not have been clearer when it provided, as follows: “**There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure** or due to such Terminal Owner [Maalt] breach.” *See* Agreement, § 3.2(a).

16. Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” *See* Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] **and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].**” *See* Agreement, § 1.

17. Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” *See* Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” *See* Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. *See* Agreement, §4.1. “Product Throughput” was the metered quantity of oil actually delivered into the Terminal and transloaded by Maalt into railcars. *See* Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

18. The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a

lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” *See* Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. *See* Agreement, § 14.3.

19. At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had occurred.

20. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

21. On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

22. On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

23. On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

24. On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to procure such services. Accordingly, Sequitur notified Maalt of Sequitur’s right to terminate the Agreement. Specifically, Sequitur relied on the “Termination for Extended Force Majeure” provision in the Agreement, which provides, in pertinent part, that “[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days.” *See* Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur’s equipment and facilities installed at the Terminal (Customer Terminal Modifications). *See* Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur’s “right of access over, on, and across” the lands upon which the Terminal was located for “purposes of enforcing” Sequitur’s “rights under this Agreement” to remove the Customer Terminal

Modifications, and also acknowledging Sequitur's undisputed "title to and ownership of" such Customer Terminal Modifications).

25. Notably, as to Sequitur's notice of Termination for Extended Force Majeure, the Agreement further provided that "[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment)," which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. *See* Agreement, §§ 8.4, 3.1, and 3.2.

26. On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. Significantly, the letter also stated that "Maalt will not allow your company access to the Barnhart property [Terminal] to remove equipment or otherwise" and that "[a]ny attempt to access the property will be considered a trespass." Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur access to the property to retrieve Sequitur's equipment and facilities or that suggested Sequitur's undisputed "right of access over, on, and across" the property or Terminal for "purposes of enforcing" Sequitur's "rights under this Agreement," including removing and retrieving Sequitur's equipment and facilities, had been terminated. *See* Agreement, § 2.5.

27. On February 22, 2019, Sequitur's attorney sent a letter to Maalt's attorney, responding to the February 14, 2019 letter noted above. In the letter, Sequitur's attorney reiterated

that Sequitur had properly terminated the Agreement. Most significantly, however, the letter explained that earlier on February 22, 2019, Sequitur had learned that its equipment had wrongfully been removed, stolen, and misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. The letter also demanded that Sequitur's equipment and facilities be returned to Sequitur by no later than February 25, 2019, at 5:00 p.m. Despite Sequitur's letter and demand, Maalt never responded nor returned Sequitur's equipment. And Maalt has otherwise failed and refused to honor its obligations under the Agreement with respect to Sequitur's rights and access to its equipment and facilities and all other rights that Sequitur has under the Agreement.

28. Sequitur's equipment and facilities, wrongfully removed, stolen, and misappropriated by Maalt, is valued at approximately \$2,576,505.21 in the aggregate, if not more, and includes numerous devices, components, and items. Because Sequitur does not have legal access to the property where Maalt has currently relocated Sequitur's equipment and facilities, Sequitur cannot properly secure and protect such equipment and facilities from damage, corrosion, vandalism, or a subsequent theft by persons other than Maalt. Additionally, without immediate access to its equipment and facilities, Sequitur cannot retrieve the equipment and facilities and use it for other business opportunities, should they arise. Simply put, the harm being suffered by Maalt's wrongfully removing, stealing, and misappropriating Sequitur's equipment is irreparable and immeasurable.

ORIGINAL COUNTERCLAIMS

29. Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

30. Sequitur incorporates herein the facts set forth above.

Breach of Contract

31. Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt's breach has caused Sequitur injury.

Declaratory Judgment

32. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter "UDJA"), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;
- (3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;
- (4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;
- (5) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;

(6) Sequitur has the exclusive right and title to the equipment and facilities it installed at the Terminal, and that Maalt wrongfully removed, stolen, and misappropriated such equipment and facilities; and

(7) Sequitur has the right to retrieve its equipment and facilities from any location where Maalt has placed such equipment and facilities.

Conversion

33. Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt wrongfully exercised dominion and control of such property by refusing to allow Sequitur to retrieve such property from the Terminal, by wrongfully removing, stealing, and misappropriating Sequitur's property and placing it at a location approximately 25 miles from the Terminal, and by refusing to return Sequitur's property to the Terminal upon remand or otherwise continuing to refuse Sequitur's access to its property. As a result of Maalt's acts and/or omissions, Sequitur has suffered injury.

Civil Theft – CPRC 134.001 et seq.

34. Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt unlawfully appropriated, secured, and/or stole Sequitur's property. Maalt's unlawful taking was made with the intent to deprive Sequitur to its property and/or to engage in an unlawful attempt to circumvent the law and the parties' Agreement by effectively conducting an unauthorized pre-trial sequestration of Sequitur's property, despite Maalt lacking any right, title, or interest in such property, as a matter of law. As a result of Maalt's theft, Sequitur has suffered injury.

APPLICATION FOR TEMPORARY MANDATORY INJUNCTION

35. Sequitur incorporates herein the verified facts, claims, and allegations set forth herein.

36. Section 65.011 of the Texas Civil Practice and Remedies Code lists the circumstances under which this Court can grant temporary injunctive relief, in pertinent part, as follows:

A writ of injunction may be granted if:

...

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

... or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

TEX. CIV. PRAC. & REM. CODE ANN. § 65.011.

37. Under common law, “[t]o obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru*, 84 S.W.3d 198, 204 (Tex. 2002). “An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.” *Id.*

38. It should also be noted that to prove probable right of relief, Sequitur “need not establish the correctness of [its] claim to obtain temporary relief, but must show only a likelihood of success on the merits.” *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990).

To be clear, however, “[a]t the hearing for a temporary writ of injunction, the applicant is not required to establish that [it] will prevail on final trial.” *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). Thus, although Sequitur believes the evidence to be presented at the temporary injunction hearing and ultimately at trial will clearly show it will prevail at trial, this Court need not reach that conclusion in order to issue the relief sought herein.

39. In addition to the statutory and common law right to injunctive relief, the Agreement provides, in pertinent part, that “each Party, in addition to and without limiting any other remedy or right it may have, . . . will have the right to an injunction or other equitable relief in any court of competent jurisdiction . . . enforcing specifically the terms and provisions hereof, and each of the Parties hereto hereby waives any and all defenses it may have on the ground of lack of jurisdiction or competence of the court to grant such an injunction or other equitable relief.” *See* Agreement, § 8.6.

40. Based on the facts set forth above, and as verified herein, as well as the evidence that will be presented as the temporary injunction hearing, this Court should grant the mandatory temporary injunctive sought, as set forth below. In summary, (1) Sequitur has causes of action against Maalt, noted above, that relate to, among other things, Sequitur’s undisputed right in, access to, and title in Sequitur’s equipment and facilities; (2) Sequitur’s ability to recover under its claims, including its right in, access to, and title in such equipment and facilities, is probable; and (3) without the mandatory temporary injunctive relief sought by Sequitur, the injury to Sequitur and its equipment and facilities is probable, imminent, and irreparable in the interim. Additionally, since Maalt wrongfully moved and removed Sequitur’s equipment and facilities,

returning such equipment and facilities to Sequitur will preserve the status quo, which has been disrupted and disturbed by Maalt's wrongful acts.

41. Sequitur hereby requests at least the following mandatory temporary injunctive relief: (1) that Maalt be mandatorily ordered to immediately take steps secure and protect Sequitur's equipment and facilities from damage in general and damage, corrosion, vandalism, or a subsequent theft by any third-persons; (2) that Maalt, at its own cost and expense, return as soon as possible Sequitur's equipment and facilities to the Terminal or at a location nearby, at Sequitur's direction; (3) that Maalt, upon delivery of the equipment and facilities to the Terminal, immediately notify Sequitur of its right to retrieve the equipment and facilities from the Terminal; and (4) that Maalt immediately coordinate with Sequitur or any contractor or agent of Sequitur's choice to permanently retrieve and remove the equipment and facilities from the Terminal, with the aid and cooperation of Maalt, and without any interference or delay whatsoever by Maalt.

42. Sequitur is willing to post a bond (or cash in lieu of a bond) for the mandatory temporary injunctive sought above. Sequitur asserts that \$500.00 for a bond (or cash in lieu of a bond) is more than sufficient considering that Maalt will suffer no harm from permitting Sequitur to retrieve the equipment, consistent with the Agreement and Texas law.

43. Sequitur request a hearing on its Application for Temporary Mandatory Injunction, as soon as practicable, and that such hearing be given preference over certain other matters pending in the trial court, per Texas law. *See* TEX. GOV'T CODE § 23.101(a)(1) (stating "[t]he trial courts of this state shall regularly and frequently set hearings . . . of pending matters, giving preference to hearings . . . of the following . . . (1) temporary injunctions").

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Defendant, SEQUITUR PERMIAN, LLC, further requests that Plaintiff recover nothing by its suit; that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC, recover and obtain from Plaintiff Maalt all injunctive relief requested herein above, including ancillary, mandatory, and prohibitive injunctive relief, the declaratory relief sought above, all damages, and its court costs, expenses, and reasonable and necessary (and equitable and just per UDJA) attorney's fees against the Plaintiff, as noted above, pursuant to the prevailing party clause in the subject Agreement and Chapter 37 of the UDJA; and that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

By: /s/ Matthew A. Kornhauser

Matthew A. Kornhauser

State Bar No. 11684500

Dylan B. Russell

State Bar No. 24041839

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**ATTORNEYS FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

and

**GOSSETT, HARRISON,
MILLICAN & STIPANOVIC, P.C.**

By: /s/ Paul D. Stipanovic

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pauls@ghtxlaw.com

**CO-COUNSEL FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 8th day of March 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

James Lanter
JAMES LANTER, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Paul O. Wickes
WICKES LAW, PLLC
5600 Tennyson Parkway, Suite 205
Plano, Texas 75024

/s/ Dylan B. Russell
Dylan B. Russell

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

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IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

UNSWORN DECLARATION OF BRADEN MERRILL

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

1. "My name is Braden Merrill. I am the CFO of Sequitur Permian, LLC ("Sequitur"). I am above the age of twenty-one (21). I have personal knowledge of all the facts stated in this declaration and am in all respects qualified to make the same. My date of birth is February 6, 1981. My business address with Sequitur is at 2050 W. Sam Houston Parkway S., Suite 2050, Houston, Texas 77042. Further, I declare under penalty of perjury that the contents of this declaration are true and correct.
2. I have reviewed Sequitur's Original Answer & Defendant/Counter-Plaintiff's Original Counterclaims & Verified Application for Temporary Mandatory Injunction. The facts set forth in paragraphs 11-28, 39, and 42 are true and correct within my personal knowledge, with the only exception being the statement set forth in paragraph 27 that Sequitur's equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access.

EXECUTED this 8th day of March, 2019



Braden Merrill

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

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IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS


51ST JUDICIAL DISTRICT

UNSWORN DECLARATION OF NICHOLAS "NICK" ELDRIDGE

THE STATE OF TEXAS §
§
COUNTY OF TOM GREEN §

1. "My name is Nicholas "Nick" Eldridge. I am the Facilities Superintendent of Sequitur Sequitur Permian, LLC ("Sequitur"). I am above the age of twenty-one (21). I have personal knowledge of all the facts stated in this declaration and am in all respects qualified to make the same. My date of birth is December 25, 1979. My business address with Sequitur is at 24 Smith Road, Suite 600, Midland, Texas 79705. Further, I declare under penalty of perjury that the contents of this declaration are true and correct.
2. I have reviewed Sequitur's Original Answer & Defendant/Counter-Plaintiff's Original Counterclaims & Verified Application for Temporary Mandatory Injunction. The statement set forth in paragraph 27 in that document that Sequitur's equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, is true and correct within my personal knowledge.

EXECUTED this 8th day of March, 2019.



Nicholas "Nick" Eldridge

Ashley Masters

HOOVER SLOVACEK LLP

A REGISTERED LIMITED LIABILITY PARTNERSHIP

MATTHEW A. KORNHAUSER
PARTNER
kornhauser@hooverslovacek.comATTORNEYS AT LAW
GALLERIA TOWER II
5051 WESTHEIMER, SUITE 1200
HOUSTON, TEXAS 77056(713) 977-8686
FAX (713) 977-5395REPLY TO:
P.O. BOX 4547
HOUSTON, TEXAS 77210

March 29, 2019

Via Email pwickes@wickeslaw.comMr. Paul Wickes
Attorney at Law
5600 Tennyson Pkwy
Suite 2015
Plano, Texas 75024Re: *Maalt L.P.* ("Maalt") v. *Sequitur Permian, LLC* ("Sequitur"); Cause No. 19-003,
In the 51st Judicial District Court for Irion County, Texas.

Dear Mr. Wickes:

I am writing in response to your March 25, 2019 letter to my law partner, Dylan Russell, and to propose an agreement between the parties, per Rule 11.

As you are likely aware, on February 22, 2019, I wrote to your co-counsel, James L. Lanter, demanding that Sequitur's property and equipment, including the transloaders, be returned by February 25, 2019. That letter was ignored, necessitating Sequitur's preparation and filing of the application for a temporary mandatory injunction. Needless to say, had Mr. Lanter responded to my demand and offered to have the property and equipment returned, or had Maalt not unlawfully converted the same to begin with, Sequitur would not have had to incur the related expenses and wasted time.

With respect to the hearing on April 8, 2019, and in light of the foregoing, Sequitur will agree to pass that hearing on the following terms:

(1) Maalt hereby gives Sequitur access and permission to retrieve¹ next week the transloaders and related equipment from Maalt's Big Lake Transload facility, initially at Sequitur's cost, but Sequitur reserves the right to seek reimbursement of such costs from Maalt since the equipment was removed from Maalt's Irion County terminal; and

(2) Maalt hereby gives Sequitur access and permission to retrieve from Maalt's Irion County terminal the following equipment and related materials, at Sequitur's cost per Section 2.7 of the Terminal Services Agreement: 1 trailer

¹ Sequitur will contact David Goodwin, as proposed by Maalt, to coordinate the retrieval of the transloaders and related equipment.
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March 29, 2019

Page 2

mounted generator, 1 flare assembly, 1 300 bbl tank, 1 separator, 2 storage containers, API Valves & BV's on risers (over 90 sets), as well as fire extinguishers, gaskets, and hoses.

If Maalt agrees to these terms, sign below, per Rule 11.

If you have any questions, please contact the undersigned.

Very truly yours,

HOOVER SLOVACEK LLP



Matthew A. Kornhauser

AGREED TO AND ACCEPTED:


Attorney for Maalt

*with respect to the provisions of
Paragraph 3:*

cc:

Via Email

James L. Lanter
Dylan B. Russell
Paul Stipanovic

Ashley Masters

No. 19-003**MAALT, LP****Plaintiff,****vs.****SEQUITUR PERMIAN, LLC****Defendant.**§
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§**IN THE DISTRICT COURT****IRION COUNTY, TEXAS****51ST JUDICIAL DISTRICT****ANSWER TO COUNTERCLAIM**

Plaintiff, Maalt, LP ("Maalt"), files this Answer to Counterclaim, and shows the Court:

I.**General Denial**

Maalt enters a general denial of the allegations and claims asserted against it in Defendant's Original Counterclaim.

II.**Affirmative Defenses**

1. Prior Breach. The Defendant breached the Agreement at issue first, thus excusing any further performance or subsequent breach by Maalt.

III.**Prayer**

For the reasons stated above, Maalt prays that it be awarded judgment against Defendant that it take nothing by its counterclaim, and that Maalt has such further relief to which it is entitled.

Respectfully submitted,

By: /s/ James Lanter

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**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the date of filing, upon:

HOOVER SLOVACEK LLP
Matthew A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
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Facsimile: 325-655-683

/s/ James Lanter

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

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IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

SEQUITUR PERMIAN, LLC'S
FIRST AMENDED COUNTERCLAIMS
AND ORIGINAL THIRD-PARTY CLAIMS

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC (“Sequitur”), in the above styled and numbered cause and file this its First Amended Counterclaims¹ and Third-Party Claims and in support thereof would show unto the Court, as follows:

PARTIES

1. Sequitur has appeared herein and can be served through its counsel of record.
2. Vista Proppants and Logistics Inc. (“Vista”) is a Delaware corporation with its principal place of business located at 4413 Carey St. Fort Worth, Texas 76119. Vista can be served with process through its CEO, Gary Humphreys, or its President, Marty Robertson, as 4413 Carey St. Fort Worth, Texas 76119, or wherever else they may be found. Alternatively, Vista can be served with process through its registered agent in Delaware, which is Corporation Service Company, 251 Little Falls Drive, Wilmington, New Castle County, Delaware, 19808. Alternatively, Vista can be served with process through the Texas Secretary of State since Vista

¹ This First Amended Counterclaims amended the Original Counterclaims filed on March 8, 2019.

has not designated an agent for service of process in Texas. The Texas Secretary of State may be served with process, at Service of Process, P.O. Box 12079, Austin, Texas 78711-2079, to forward citation and this pleading to CEO, Gary Humphreys, Vista Proppants and Logistics Inc., 4413 Carey St. Fort Worth, Texas 76119.

FACTS IN SUPPORT OF COUNTERCLAIMS/THIRD-PARTY CLAIMS

3. Sequitur is in the crude oil production business, with a primary focus of approximately 88,000 net acres including Irion County, Texas as part of the Wolfcamp Shale. In about May of 2018, in furtherance of its effort to most efficiently and cost-effectively transport the crude oil produced by Sequitur to refineries in southeast Texas and Louisiana, Sequitur was looking to obtain access to a transloading facility or rail terminal in or around Irion County, Texas. The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Louisiana Gulf Coast.

4. On May 4, 2018, Sequitur had initial discussions with an employee of Vista, of which the Plaintiff Maalt, LP (“Maalt”) is an affiliate, regarding a rail depot that Maalt owned in Barnhart, Texas that could be converted into the crude-by-rail transloading facility (the “Terminal”) to which Sequitur sought access. Vista had experience elsewhere in the Permian Basin for transporting frac sand (a proppant) via railcar at similar facilities. Vista told Sequitur that they were receiving inquiries from other companies, but that they were more interested in doing business with Sequitur because they could offer future additional revenue streams.

5. During the May 2018 discussions, Sequitur made it clear that it wanted only a 15-month term on the Terminal services contract, as opposed to the two-year term that Vista indicated

was more typical. In addition to a shorter-term contract, Sequitur made clear that it was fundamental to the viability of its use of the proposed Terminal that both industry-approved railcars and locomotives (train engines) be available at the right time and at the right price, in light of the fluctuating price of crude oil. Additionally, crude oil barrels sold in the Midland Basin were selling at a steep discount to those sold on the Louisiana Gulf Coast. Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Louisiana Gulf Coast less transport costs than they could sell barrels of oil for in Midland, additional earnings would be achieved.

6. In light of Sequitur's specific requirements for the proposal, on May 9, 2018, Jon Ince, then-Senior Manager of Logistics with Vista, introduced Sequitur to Jonas Struthers of FeNIX FSL, a rail car lease broker with whom Sequitur initially discussed renting rail cars through. Ince described Jonas Struthers as "the railcar guy" who had "been a great partner for me in the past with our sand cars." Ince stated that Struthers would "be able to get you cars that you need for your fleet" and "at a really good rate." Ince also noted that Struthers would "be more in the know on regulations and exact timing on when [CP-1232 railcars] are being phased out for the [DOT-117R railcars]."

7. On May 10 and 11, 2018, in an internal email among Vista employees, Ince outlined the terms sought by Sequitur, including to transload crude oil from [November 1,] 2018 to December 31, 2019, for about 20-30 railcars loaded per day with a minimum of approximately 15 railcars. Ince also noted that Sequitur was also "[l]ooking to place tankage on our property for [a] pipeline connection with [a] long-term lease." Chris Favors, Business Development officer with Vista ("Favors"), also indicated that JupiterMLP, LLC (the parent of affiliate, Jupiter Marketing

& Trading, LLC) (collectively, “Jupiter”) was also “interested in” the Terminal but that Vista had decided it was “moving forward” with the proposed Terminal services contract with Sequitur.

8. On May 16, 2018, in another internal email among Vista employees, Ince compared the proposals of both Sequitur and Jupiter for use of the Barnhart Terminal. Ince noted in the email that Sequitur had “no rail experience” and also that Sequitur was willing “to entertain” Vista as the manager of its fleet of railcars. Significantly, Ince opened the email noting that Union Pacific Railroad is “requiring DOT 117 crude cars on all new freight quotes” and that such cars “are not available until Q3-Q4 of this year.”

9. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal. The initial term of the LOI was through June 26, 2018 and was extended by written amendments to July 23, 2018. The LOI reflected the parties’ intent to enter into a Terminal Services Agreement for a term of September 2018 to December 2019.

10. On June 1, 2018, Sequitur emailed Favors regarding progress being made on a draft of the proposed Terminal Services Agreement between Sequitur and Vista (ultimately Maalt), as well as Sequitur’s purchase of eight new transloaders for installation at the Terminal, at a cost of over \$2,200,000, and its efforts to address regulatory and surface use issues.

11. On June 5, 2018, Struthers emailed Ince, Morris, and others at Vista explaining that the “market for 117s right now is upwards of \$1100 on a 3 year lease.” Struthers indicated that the older 1232 railcars might be able to be retrofitted to meet the DOT-117 standards and at a lower price, but there were still “unanswered questions” from the American Association of Railroads and the Federal Railroad Administration regarding the proposed attempted at retrofitting.

12. Realizing that the train business was one that Sequitur was inexperienced with and could not learn overnight, Sequitur decided to seek a business venture with a large oil trader with access to leased rail cars. Sequitur reached out to several companies, including, but not limited to Shell and BP.

13. On June 5, 2018, Favors emailed Braden Merrill, VP & CFO of Sequitur, and Travis Morris, the Chief Commercial Officer of Jupiter, regarding Vista working with both Sequitur and Jupiter regarding “Vista’s Barnhart terminal.” Favors introduced Jupiter to Sequitur, and Favors’ colleague, Ince described Jupiter as the “real deal and a partner who could get it done.” Favors went on to inquire as to whether a conference call should be scheduled among Vista, Sequitur, and Jupiter that day or the following day. A conference call took place that day, and Sequitur was informed that Jupiter had trucking capabilities and also relationships with railroad companies, which, as noted above, were requirements for the proposed Terminal to be viable. Braden Merrill of Sequitur thanked Favors and Ince for the introduction to Jupiter.

14. On June 6, 2018, Favors emailed Travis Morris regarding changes to a draft terminal services agreement between Vista and Jupiter. Favors stated that “[w]e can easily amend the contract to include Barnhart volume if the Sequit[u]r opportunity doesn’t pan out.”

15. Sequitur initially selected Shell as a business venture partner and proceeded in ordering the equipment that was needed to build out the Terminal, including the transloaders contemplated under the original LOI. Sequitur had committed approximately \$4 million to the Terminal project. However, neither Shell nor BP were able to secure rates from BNSF or UP.

16. On June 20, 2018, Travis Morris with Jupiter emailed Ince and Favors of Vista attaching an executed agreement between Vista and Jupiter. Morris also stated that “I am getting

on the phone with Sequitur today so we can try to close the Barnhart deal.” Morris also noted that “I do not have firm railcars yet, but we are working several sets with Jonas Struthers.”

17. From late June, and during July, and the first week of August 2018, Vista and Sequitur continued negotiations and exchanged drafts of the Terminal Services Agreement for the exclusive use of the Terminal in Barnhart. Then, on August 3, 2018, Favors emailed Braden Merrill of Sequitur and Sequitur’s President, Mike van den Bold, pressuring Sequitur to execute the Terminal Services Agreement. Favors stated that “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today.” At this time, Favors told Merrill that Jupiter was offering to pay \$8 million up front to Vista and Maalt for exclusive use of the Terminal, cutting out Sequitur. Merrill told Favors that Sequitur had already purchased the necessary equipment for the Terminal project and was in the hole for millions of dollars due to Sequitur’s reliance on the LOI. Favors again mentioned that Sequitur should do a business venture with Jupiter because Jupiter was already able to ship on the railroads.

18. On August 6, 2018, Merrill of Sequitur had a conference call with Vista and Jupiter representatives regarding the availability of railcars and locomotives. Sequitur was told that Jupiter had access to 1600 railcars and could manage 10 to 12 locomotives a month. Also, as a result of that call, later that same day, Sequitur’s President forwarded via email to Favors of Vista and Maalt, the Terminal Services Agreement (also hereinafter called the “Agreement”), dated effective August 6, 2018, which was executed the following day.

19. On August 9, 2018, Morris emailed Sequitur regarding a prior meeting in which Jupiter offered to purchase the crude oil transloaded at the Terminal from Sequitur instead of

Sequitur's initial plan to sell the oil to Shell. Morris noted that in "order to meet a September [2018] start date I need to begin directing trains toward Barnhart quickly."

20. In reliance on the promises and commitments made by Vista and Maalt, and their agents and representatives, regarding the availability of rail cars and trains to pick up the crude oil at the Terminal and deliver it via rail to the desired destinations, Sequitur entered into the Agreement with Maalt, with an effective date of August 6, 2018. Consistent with the entire premise and purpose of the Agreement—that Sequitur would be able to cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be delivered to the Louisiana Gulf Coast refineries—throughout the Agreement references are made to "railcars" as well as a reference to the "train loading area." Thus, it was expressly made clear to both parties that without access to trains and railcars, the essential purpose of the Agreement was for naught.

21. Per the Agreement, Maalt (also described as "Terminal Owner") was the owner and operator of the Terminal² located in Barnhart, Texas on land leased or controlled by Maalt, and Sequitur (described as "Customer") was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter "oil"). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter "transload") the oil to Sequitur or to Sequitur's third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

² The Terminal's address is located at 44485 W. Hwy 67, Barnhart, Irion County, Texas 76930 and is more specifically described in the Agreement in Exhibit A-1 thereto.

22. The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, Maalt would then transload the oil into railcars to Sequitur or Sequitur's third-party customers. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the "Phase I Project." Sequitur made this investment and incurred these costs in reliance on Vista's and Maalt's promises that there would be have sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement. Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the "Phase II Project."

23. Significantly, as to the equipment and facilities installed by Sequitur (collectively "Customer Terminal Modifications") in connection with the either the Phase I Project or the Phase II Project, Maalt agreed in the Agreement that "title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur]." *See* Agreement, § 2.7. The only exception to Sequitur's title and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was "any additional rail tracks that may [have been] installed," which additional tracks' ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement's term, subject to certain rights of Sequitur. *See* Agreement, § 2.7.

24. In very general terms and subject to numerous terms and conditions, in exchange for Maalt's operation of the Terminal and its transloading of oil exclusively for Sequitur, further

conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. *See* Agreement, § 3.2.

25. Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” *See* Agreement, § 3.1. The Agreement could not have been clearer when it provided, as follows: “There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner [Maalt] breach.” *See* Agreement, § 3.2(a).

26. Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” *See* Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].” *See* Agreement, § 1.

27. Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” *See* Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” *See* Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. *See* Agreement, §4.1. “Product Throughput” was the metered quantity of oil actually

delivered into the Terminal and transloaded by Maalt into railcars. *See* Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

28. The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” *See* Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. *See* Agreement, § 14.3.

29. At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had occurred.

30. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

31. Despite Vista and Maalt’s promises to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and at a really good rate, and Vista’s and Maalt’s introduction to Sequitur of Vista’s and Maalt’s agents, who were self-professed “railcar guys”, it became obvious that said promises were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In fact, there became an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond

the control of Sequitur. These circumstances were not foreseeable to Sequitur and amounted to a Force Majeure event as described in the Terminal Services Agreement.

32. On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

33. On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

34. On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

35. On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to

procure such services. Accordingly, Sequitur notified Maalt of Sequitur's right to terminate the Agreement. Specifically, Sequitur relied on the "Termination for Extended Force Majeure" provision in the Agreement, which provides, in pertinent part, that "[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days." *See* Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur's equipment and facilities installed at the Terminal (Customer Terminal Modifications). *See* Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur's "right of access over, on, and across" the lands upon which the Terminal was located for "purposes of enforcing" Sequitur's "rights under this Agreement" to remove the Customer Terminal Modifications, and also acknowledging Sequitur's undisputed "title to and ownership of" such Customer Terminal Modifications).

36. Notably, as to Sequitur's notice of Termination for Extended Force Majeure, the Agreement further provided that "[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment)," which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. *See* Agreement, §§ 8.4, 3.1, and 3.2.

37. On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The

letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. Significantly, the letter also stated that “Maalt will not allow your company access to the Barnhart property [Terminal] to remove equipment or otherwise” and that “[a]ny attempt to access the property will be considered a trespass.” Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur access to the property to retrieve Sequitur’s equipment and facilities or that suggested Sequitur’s undisputed “right of access over, on, and across” the property or Terminal for “purposes of enforcing” Sequitur’s “rights under this Agreement,” including removing and retrieving Sequitur’s equipment and facilities, had been terminated. *See* Agreement, § 2.5.

38. On February 22, 2019, Sequitur’s attorney sent a letter to Maalt’s attorney, responding to the February 14, 2019 letter noted above. In the letter, Sequitur’s attorney reiterated that Sequitur had properly terminated the Agreement. Most significantly, however, the letter explained that earlier on February 22, 2019, Sequitur had learned that its equipment had wrongfully been removed, stolen, and misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. The letter also demanded that Sequitur’s equipment and facilities be returned to Sequitur by no later than February 25, 2019, at 5:00 p.m. Despite Sequitur’s letter and demand, Maalt never responded nor returned Sequitur’s equipment. And Maalt has otherwise failed and refused to honor its obligations under the Agreement with respect to Sequitur’s rights and access to its equipment and facilities and all other rights that Sequitur has under the Agreement.

39. Sequitur's equipment and facilities, wrongfully removed, stolen, and misappropriated by Maalt, is valued at approximately \$2,576,505.21 in the aggregate, if not more, and includes numerous devices, components, and items. Because Sequitur does not have legal access to the property where Maalt has currently relocated Sequitur's equipment and facilities, Sequitur cannot properly secure and protect such equipment and facilities from damage, corrosion, vandalism, or a subsequent theft by persons other than Maalt. Additionally, without immediate access to its equipment and facilities, Sequitur cannot retrieve the equipment and facilities and use it for other business opportunities, should they arise. Simply put, the harm being suffered by Maalt's wrongfully removing, stealing, and misappropriating Sequitur's equipment is irreparable and immeasurable.

FIRST AMENDED COUNTERCLAIMS

40. Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

41. Sequitur incorporates herein the facts set forth above.

Promissory Estoppel

42. Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance

damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Breach of Contract

43. Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt's breach has caused Sequitur injury.

Declaratory Judgment

44. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter "UDJA"), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;
- (3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;
- (4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;
- (5) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;
- (6) Sequitur has the exclusive right and title to the equipment and facilities it installed at the Terminal, and that Maalt wrongfully removed, stolen, and misappropriated such equipment and facilities; and

(7) Sequitur has the right to retrieve its equipment and facilities from any location where Maalt has placed such equipment and facilities.

Conversion

45. Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt wrongfully exercised dominion and control of such property by refusing to allow Sequitur to retrieve such property from the Terminal, by wrongfully removing, stealing, and misappropriating Sequitur's property and placing it at a location approximately 25 miles from the Terminal, and by refusing to return Sequitur's property to the Terminal upon remand or otherwise continuing to refuse Sequitur's access to its property. As a result of Maalt's acts and/or omissions, Sequitur has suffered injury.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Defendant/Counter-Plaintiff/Third-Party Plaintiffs, SEQUITUR PERMIAN, LLC, further requests that Plaintiff Maalt recover nothing by its suit; that SEQUITUR PERMIAN, LLC, recover and obtain from Maalt the declaratory relief sought above, that SEQUITUR PERMIAN, LLC recover and obtain from Maalt and Vista, jointly and severally, all damages, court costs, expenses, and reasonable and necessary (and/or equitable and just per UDJA) attorney's fees against Maalt and Vista, as noted above, pursuant to the prevailing party clause in the subject Agreement, Chapters 37 and 38 of the Texas Civil Practice and Remedies Code,; and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

By: /s/ Matthew A. Kornhauser

Matthew A. Kornhauser

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**CO-COUNSEL FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 16th day of September 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

James Lanter
JAMES LANTER, PC
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Paul O. Wickes
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James Lanter

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September 23, 2019

Mr. Matthew A. Kornhauser
Mr. Dylan B. Russell
Hoover Slovacek LLP
5051 Westheimer Road, Ste. 1200
Houston, TX 77056

Re: *Maalt L.P. v. Sequitur Permian, LLC*; Cause No. 19-003, In the 51st Judicial District
Court for Irion County, Texas.

Gentlemen:

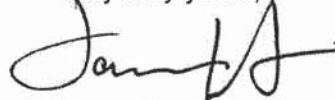
Per my email correspondence with Dylan today, this letter shall serve to confirm our agreement under Rule 11 regarding the following matters:

1. I am authorized to accept service of process on Vista Proppants and Logistics, LLC ("Vista"), and will consider the service through the e-file system sufficient without formal service of citation. Vista will serve its answer to this suit no later than October 23, 2019.

2. Pursuant to your Motion for Rule 2004 Examination of Designated Documents filed in the matter of In re Jupiter Marketing & Trading, LLC, Case No. 19-32329-BHJ in the U.S. Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Case"), you have informed us that the purpose of the motion, as filed, is solely to obtain documents and not conduct any oral or written examination of any witness. In light of that, we will not object to the motion on the condition that you provide us a copy of any documents obtained upon their receipt. We will, of course, reimburse you for the reasonable cost of reproducing the documents. Both Sequitur, on the one hand, and Maalt and Vista, on the other hand, reserve the right to seek oral and/or written examinations of Jupiter Marketing & Trading, LLC witnesses in the Bankruptcy Case upon proper motion or pursuant to other proper legal means available under applicable law.

If the foregoing is acceptable to you, please sign in the place provided below and return to me via email.

Very truly yours,



James Lanter

Agreed:



Attorney for Sequitur Permian, LLC

Mr. Matthew A. Kornhauser
September 23, 2019
Page 2

Cc: Mr. Samuel S. Allen
Mr. Paul O. Wickes

Removal Appendix 0054

RULE 193.7 NOTICE

4. Third Party Defendant Vista gives notice pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that any documents produced by Sequitur in response to written discovery may be used by Third Party Defendant Vista as evidence in pre-trial and trial of this case.

PRAYER

WHEREFORE, Third Party Defendant Vista Proppants and Logistics, Inc. respectfully prays that Sequitur take nothing by reason of this suit, that it be dismissed with its costs, and that it have such other and further relief, both general and special, to which he is entitled.

Respectfully submitted,

By: /s/ Paul O. Wickes

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**ATTORNEYS FOR
PLAINTIFF MAALT, LP AND
THIRD PARTY DEFENDANT
VISTA PROPPANTS AND LOGISTICS INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the October 22, 2019, upon:

Matthew A. Kornhauser
Dylan B. Russell
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Houston, TX 77056

Paul D. Stipanovic
GOSSETT, HARRISON, MILLICAN & STIPANOVIC
2 S. Koenigheim Street
San Angelo, Texas 76903

/s/ Paul O. Wickes

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

SEQUITUR PERMIAN, LLC'S
SECOND AMENDED COUNTERCLAIMS
AND ORIGINAL THIRD-PARTY CLAIMS

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this its Second Amended Counterclaims and Third-Party Claims and in support thereof would show unto the Court, as follows:

PARTIES

1. Sequitur has appeared herein and can be served through its counsel of record.
2. Vista Proppants and Logistics Inc. ("Vista") is a Delaware corporation with its principal place of business located at 4413 Carey St. Fort Worth, Texas 76119. Vista can be served with process through its CEO, Gary Humphreys, or its President, Marty Robertson, as 4413 Carey St. Fort Worth, Texas 76119, or wherever else they may be found. Alternatively, Vista can be served with process through its registered agent in Delaware, which is Corporation Service Company, 251 Little Falls Drive, Wilmington, New Castle County, Delaware, 19808. Alternatively, Vista can be served with process through the Texas Secretary of State since Vista has not designated an agent for service of process in Texas. The Texas Secretary of State may be

served with process, at Service of Process, P.O. Box 12079, Austin, Texas 78711-2079, to forward citation and this pleading to CEO, Gary Humphreys, Vista Proppants and Logistics Inc., 4413 Carey St. Fort Worth, Texas 76119.

FACTS IN SUPPORT OF COUNTERCLAIMS/THIRD-PARTY CLAIMS

3. Sequitur is in the crude oil production business, with a primary focus of approximately 88,000 net acres including Irion County, Texas as part of the Wolfcamp Shale. In about May of 2018, in furtherance of its effort to most efficiently and cost-effectively transport the crude oil produced by Sequitur to refineries in southeast Texas and Louisiana, Sequitur was looking to obtain access to a transloading facility or rail terminal in or around Irion County, Texas. The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Louisiana Gulf Coast.

4. On May 4, 2018, Sequitur had initial discussions with an employee of Vista, of which the Plaintiff Maalt, LP (“Maalt”) is an affiliate, regarding a rail depot that Maalt owned in Barnhart, Texas that could be converted into the crude-by-rail transloading facility (the “Terminal”) to which Sequitur sought access. Vista had experience elsewhere in the Permian Basin for transporting frac sand (a proppant) via railcar at similar facilities. Vista told Sequitur that they were receiving inquiries from other companies, but that they were more interested in doing business with Sequitur because they could offer future additional revenue streams.

5. During the May 2018 discussions, Sequitur made it clear that it wanted only a 15-month term on the Terminal services contract, as opposed to the two-year term that Vista indicated was more typical. In addition to a shorter-term contract, Sequitur made clear that it was

fundamental to the viability of its use of the proposed Terminal that both industry-approved railcars and locomotives (train engines) be available at the right time and at the right price, in light of the fluctuating price of crude oil. Additionally, crude oil barrels sold in the Midland Basin were selling at a steep discount to those sold on the Louisiana Gulf Coast. Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Louisiana Gulf Coast less transport costs than they could sell barrels of oil for in Midland, additional earnings would be achieved.

6. In light of Sequitur's specific requirements for the proposal, on May 9, 2018, Jon Ince, then-Senior Manager of Logistics with Vista, introduced Sequitur to Jonas Struthers of FeNIX FSL, a rail car lease broker with whom Sequitur initially discussed renting rail cars through. Ince described Jonas Struthers as "the railcar guy" who had "been a great partner for me in the past with our sand cars." Ince stated that Struthers would "be able to get you cars that you need for your fleet" and "at a really good rate." Ince also noted that Struthers would "be more in the know on regulations and exact timing on when [CP-1232 railcars] are being phased out for the [DOT-117R railcars]."

7. On May 10 and 11, 2018, in an internal email among Vista employees, Ince outlined the terms sought by Sequitur, including to transload crude oil from [November 1,] 2018 to December 31, 2019, for about 20-30 railcars loaded per day with a minimum of approximately 15 railcars. Ince also noted that Sequitur was also "[l]ooking to place tankage on our property for [a] pipeline connection with [a] long-term lease." Chris Favors, Business Development officer with Vista ("Favors"), also indicated that JupiterMLP, LLC (the parent of affiliate, Jupiter Marketing & Trading, LLC) (collectively, "Jupiter") was also "interested in" the Terminal but that Vista had decided it was "moving forward" with the proposed Terminal services contract with Sequitur.

8. On May 16, 2018, in another internal email among Vista employees, Ince compared the proposals of both Sequitur and Jupiter for use of the Barnhart Terminal. Ince noted in the email that Sequitur had “no rail experience” and also that Sequitur was willing “to entertain” Vista as the manager of its fleet of railcars. Significantly, Ince opened the email noting that Union Pacific Railroad is “requiring DOT 117 crude cars on all new freight quotes” and that such cars “are not available until Q3-Q4 of this year.”

9. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal. The initial term of the LOI was through June 26, 2018 and was extended by written amendments to July 23, 2018. The LOI reflected the parties’ intent to enter into a Terminal Services Agreement for a term of September 2018 to December 2019.

10. On June 1, 2018, Sequitur emailed Favors regarding progress being made on a draft of the proposed Terminal Services Agreement between Sequitur and Vista (ultimately Maalt), as well as Sequitur’s purchase of eight new transloaders for installation at the Terminal, at a cost of over \$2,200,000, and its efforts to address regulatory and surface use issues.

11. On June 5, 2018, Struthers emailed Ince, Morris, and others at Vista explaining that the “market for 117s right now is upwards of \$1100 on a 3 year lease.” Struthers indicated that the older 1232 railcars might be able to be retrofitted to meet the DOT-117 standards and at a lower price, but there were still “unanswered questions” from the American Association of Railroads and the Federal Railroad Administration regarding the proposed attempted at retrofitting.

12. Realizing that the train business was one that Sequitur was inexperienced with and could not learn overnight, Sequitur decided to seek a business venture with a large oil trader with

access to leased rail cars. Sequitur reached out to several companies, including, but not limited to Shell and BP.

13. On June 5, 2018, Favors emailed Braden Merrill, VP & CFO of Sequitur, and Travis Morris, the Chief Commercial Officer of Jupiter, regarding Vista working with both Sequitur and Jupiter regarding “Vista’s Barnhart terminal.” Favors introduced Jupiter to Sequitur, and Favors’ colleague, Ince described Jupiter as the “real deal and a partner who could get it done.” Favors went on to inquire as to whether a conference call should be scheduled among Vista, Sequitur, and Jupiter that day or the following day. A conference call took place that day, and Sequitur was informed that Jupiter had trucking capabilities and also relationships with railroad companies, which, as noted above, were requirements for the proposed Terminal to be viable. Braden Merrill of Sequitur thanked Favors and Ince for the introduction to Jupiter.

14. On June 6, 2018, Favors emailed Travis Morris regarding changes to a draft terminal services agreement between Vista and Jupiter. Favors stated that “[w]e can easily amend the contract to include Barnhart volume if the Sequit[u]r opportunity doesn’t pan out.”

15. Sequitur initially selected Shell as a business venture partner and proceeded in ordering the equipment that was needed to build out the Terminal, including the transloaders contemplated under the original LOI. Sequitur had committed approximately \$4 million to the Terminal project. However, neither Shell nor BP were able to secure rates from BNSF or UP.

16. On June 20, 2018, Travis Morris with Jupiter emailed Ince and Favors of Vista attaching an executed agreement between Vista and Jupiter. Morris also stated that “I am getting on the phone with Sequitur today so we can try to close the Barnhart deal.” Morris also noted that “I do not have firm railcars yet, but we are working several sets with Jonas Struthers.”

17. From late June, and during July, and the first week of August 2018, Vista and Sequitur continued negotiations and exchanged drafts of the Terminal Services Agreement for the exclusive use of the Terminal in Barnhart. Then, on August 3, 2018, Favors emailed Braden Merrill of Sequitur and Sequitur's President, Mike van den Bold, pressuring Sequitur to execute the Terminal Services Agreement. Favors stated that "I am receiving heavy pressure to get the agreement fully executed" and that "[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today." At this time, Favors told Merrill that Jupiter was offering to pay \$8 million up front to Vista and Maalt for exclusive use of the Terminal, cutting out Sequitur. Favor's statements to Merrill were knowingly false when made, were made with conscience indifference to the truth of the statements, or were negligently made, and were intended to induce, and in fact did induce, Sequitur to sign the Terminal Services Agreement, and Sequitur reasonably relied on such false statements. Merrill told Favors that Sequitur had already purchased the necessary equipment for the Terminal project and was in the hole for millions of dollars due to Sequitur's reliance on the LOI. Favors again mentioned that Sequitur should do a business venture with Jupiter because Jupiter was already able to ship on the railroads.

18. On August 6, 2018, Merrill of Sequitur had a conference call with Vista and Jupiter representatives regarding the availability of railcars and locomotives. Sequitur was told that Jupiter had access to 1600 railcars and could manage 10 to 12 locomotives a month. Also, as a result of that call, later that same day, Sequitur's President forwarded via email to Favors of Vista and Maalt, the Terminal Services Agreement (also hereinafter called the "Agreement"), dated effective August 6, 2018, which was executed the following day.

19. On August 9, 2018, Morris emailed Sequitur regarding a prior meeting in which Jupiter offered to purchase the crude oil transloaded at the Terminal from Sequitur instead of Sequitur's initial plan to sell the oil to Shell. Morris noted that in "order to meet a September [2018] start date I need to begin directing trains toward Barnhart quickly."

20. In reliance on the promises, commitments, false statements, and inducements made by Vista and Maalt, and their agents and representatives, regarding the availability of rail cars and trains to pick up the crude oil at the Terminal and deliver it via rail to the desired destinations, Sequitur entered into the Agreement with Maalt, with an effective date of August 6, 2018. Consistent with the entire premise and purpose of the Agreement—that Sequitur would be able to cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be delivered to the Louisiana Gulf Coast refineries—throughout the Agreement references are made to "railcars" as well as a reference to the "train loading area." Thus, it was expressly made clear to both parties that without access to trains and railcars, the essential purpose of the Agreement was for naught.

21. Per the Agreement, Maalt (also described as "Terminal Owner") was the owner and operator of the Terminal¹ located in Barnhart, Texas on land leased or controlled by Maalt, and Sequitur (described as "Customer") was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter "oil"). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter

¹ The Terminal's address is located at 44485 W. Hwy 67, Barnhart, Irion County, Texas 76930 and is more specifically described in the Agreement in Exhibit A-1 thereto.

“transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

22. Section 11.2 of the Agreement required Maalt to procure and maintain, at its own expense, a pollution legal liability (“PPL”) insurance policy reasonably acceptable to Sequitur and naming Sequitur and Its Group as an additional insured, but this policy was never procured by Maalt and provided to Sequitur as required by the Agreement.

23. The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, upon receipt, Maalt would then transload the oil into railcars to Sequitur or Sequitur’s third-party customers. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Sequitur made this investment and incurred these costs in reliance on Vista’s and Maalt’s promises that there would be have sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement. Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the “Phase II Project.”

24. Significantly, as to the equipment and facilities installed by Sequitur (collectively “Customer Terminal Modifications”) in connection with the either the Phase I Project or the Phase II Project, Maalt agreed in the Agreement that “title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur].” *See* Agreement, § 2.7. The only exception to Sequitur’s title

and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was “any additional rail tracks that may [have been] installed,” which additional tracks’ ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement’s term, subject to certain rights of Sequitur. *See* Agreement, § 2.7.

25. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. *See* Agreement, § 3.2.

26. Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” *See* Agreement, § 3.1. The Agreement could not have been clearer when it provided, as follows: “There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner [Maalt] breach.” *See* Agreement, § 3.2(a).

27. Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” *See* Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].” *See* Agreement, § 1.

28. Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” *See* Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” *See* Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. *See* Agreement, §4.1. “Product Throughput” was the metered quantity of oil actually delivered into the Terminal and transloaded by Maalt into railcars. *See* Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

29. The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” *See* Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. *See* Agreement, § 14.3.

30. At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had occurred.

31. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

32. Despite Vista and Maalt’s promises to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and at a really good rate, and Vista’s and Maalt’s introduction to Sequitur of Vista’s and Maalt’s agents, who were self-professed “railcar guys”, it became obvious that said promises were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In fact, there became an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond the control of Sequitur. These circumstances were not foreseeable to Sequitur and amounted to a Force Majeure event as described in the Terminal Services Agreement.

33. On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

34. On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

35. On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

36. On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to procure such services. Accordingly, Sequitur notified Maalt of Sequitur’s right to terminate the Agreement. Specifically, Sequitur relied on the “Termination for Extended Force Majeure” provision in the Agreement, which provides, in pertinent part, that “[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days.” *See* Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur’s equipment and facilities installed at the Terminal (Customer Terminal Modifications). *See* Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur’s “right of access over, on, and across” the lands upon which the Terminal was located for “purposes of enforcing” Sequitur’s “rights under this Agreement” to remove the Customer Terminal Modifications, and also acknowledging Sequitur’s undisputed “title to and ownership of” such Customer Terminal Modifications).

37. Notably, as to Sequitur's notice of Termination for Extended Force Majeure, the Agreement further provided that "[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment)," which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. *See* Agreement, §§ 8.4, 3.1, and 3.2.

38. On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. Significantly, the letter also stated that "Maalt will not allow your company access to the Barnhart property [Terminal] to remove equipment or otherwise" and that "[a]ny attempt to access the property will be considered a trespass." Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur access to the property to retrieve Sequitur's equipment and facilities or that suggested Sequitur's undisputed "right of access over, on, and across" the property or Terminal for "purposes of enforcing" Sequitur's "rights under this Agreement," including removing and retrieving Sequitur's equipment and facilities, had been terminated. *See* Agreement, § 2.5.

39. On February 22, 2019, Sequitur's attorney sent a letter to Maalt's attorney, responding to the February 14, 2019 letter noted above. In the letter, Sequitur's attorney reiterated that Sequitur had properly terminated the Agreement. Most significantly, however, the letter explained that earlier on February 22, 2019, Sequitur had learned that its equipment had

wrongfully been removed, stolen, and misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. The letter also demanded that Sequitur's equipment and facilities be returned to Sequitur by no later than February 25, 2019, at 5:00 p.m. Despite Sequitur's letter and demand, Maalt never responded nor returned Sequitur's equipment. And Maalt has otherwise failed and refused to honor its obligations under the Agreement with respect to Sequitur's rights and access to its equipment and facilities and all other rights that Sequitur has under the Agreement.

40. Sequitur's equipment and facilities, wrongfully removed, stolen, and misappropriated by Maalt, is valued at approximately \$2,576,505.21 in the aggregate, if not more, and includes numerous devices, components, and items. Because Sequitur does not have legal access to the property where Maalt has currently relocated Sequitur's equipment and facilities, Sequitur cannot properly secure and protect such equipment and facilities from damage, corrosion, vandalism, or a subsequent theft by persons other than Maalt. Additionally, without immediate access to its equipment and facilities, Sequitur cannot retrieve the equipment and facilities and use it for other business opportunities, should they arise. Simply put, the harm being suffered by Maalt's wrongfully removing, stealing, and misappropriating Sequitur's equipment is irreparable and immeasurable.

SECOND AMENDED COUNTERCLAIMS

41. Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

42. Sequitur incorporates herein the facts set forth above.

Promissory Estoppel

43. Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Negative misrepresentations

44. Vista's and Maalt's representations to Sequitur were in connection with the above-referenced transaction in which Vista and Maalt had a pecuniary interest. Vista and Maalt supplied false information to guide Sequitur into and in the transaction. Neither Vista nor Maalt used reasonable care in obtaining or communicating the representations and information. Sequitur justifiably relied on the representations and information. Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Common law fraudulent inducement

45. Vista and Maalt made material representations to Sequitur in the above-referenced transaction that were false. When Vista and Maalt made the representations to Sequitur, Vista and Maalt knew the representations were false or made the representations recklessly, as positive assertions, and without knowledge of the truth, if any. Vista and Maalt made the representations with the intent that Sequitur act on them, including Sequitur entering into the Agreement. Sequitur relied on the representations. As a result, Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Breach of Contract

46. Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt's breach has caused Sequitur injury.

Declaratory Judgment

47. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter "UDJA"), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;

- (3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;
- (4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;
- (5) Sequitur was not obligated to remedy the cause of the Force Majeure occurrence because Sequitur, as the affected party, did not deem it reasonable and economic to do so.
- (6) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;
- (7) Sequitur has the exclusive right and title to the equipment and facilities it installed at the Terminal, and that Maalt wrongfully removed, stolen, and misappropriated such equipment and facilities; and
- (8) Sequitur has the right to retrieve its equipment and facilities from any location where Maalt has placed such equipment and facilities.

Conversion

48. Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt wrongfully exercised dominion and control of such property by refusing to allow Sequitur to retrieve such property from the Terminal, by wrongfully removing, stealing, and misappropriating Sequitur's property and placing it at a location approximately 25 miles from the Terminal, and by refusing to return Sequitur's property to the Terminal upon remand or otherwise continuing to refuse Sequitur's access to its property. As a result of Maalt's acts and/or omissions, Sequitur has suffered injury.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Defendant/Counter-Plaintiff/Third-Party Plaintiffs, SEQUITUR PERMIAN, LLC, further requests that Plaintiff Maalt recover nothing by its suit; that SEQUITUR PERMIAN, LLC, recover and obtain from Maalt the declaratory relief sought above, that SEQUITUR PERMIAN, LLC recover and obtain from Maalt and Vista, jointly and severally, all damages, including actual, special, and exemplary damages, court costs, expenses, and reasonable and necessary (and/or equitable and just per UDJA) attorney's fees against Maalt and Vista, as noted above, pursuant to the prevailing party clause in the subject Agreement, Chapters 37 and 38 of the Texas Civil Practice and Remedies Code,; and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

By: /s/ Matthew A. Kornhauser

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**CO-COUNSEL FOR
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SEQUITUR PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 20thday of December 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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/s/ Matthew A. Kornhauser
Matthew A. Kornhauser

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

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IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

SEQUITUR PERMIAN, LLC'S
SECOND AMENDED COUNTERCLAIMS
AND FIRST AMENDED THIRD-PARTY CLAIMS

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this its Second Amended Counterclaims and First Amended Third-Party Claims and in support thereof would show unto the Court, as follows:

PARTIES

1. Sequitur has appeared herein and can be served through its counsel of record.
2. Vista Proppants and Logistics Inc. ("Vista") has appeared herein and can be served through its counsel of record.

FACTS IN SUPPORT OF COUNTERCLAIMS/THIRD-PARTY CLAIMS

3. Sequitur is in the crude oil production business, with a primary focus of approximately 88,000 net acres including Irion County, Texas as part of the Wolfcamp Shale. In about May of 2018, in furtherance of its effort to most efficiently and cost-effectively transport the crude oil produced by Sequitur to refineries in southeast Texas and Louisiana, Sequitur was looking to obtain access to a transloading facility or rail terminal in or around Irion County, Texas.

The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Louisiana Gulf Coast.

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5. During the May 2018 discussions, Sequitur made it clear that it wanted only a 15-month term on the Terminal services contract, as opposed to the two-year term that Vista indicated was more typical. In addition to a shorter-term contract, Sequitur made clear that it was fundamental to the viability of its use of the proposed Terminal that both industry-approved railcars and locomotives (train engines) be available at the right time and at the right price, in light of the fluctuating price of crude oil. Additionally, crude oil barrels sold in the Midland Basin were selling at a steep discount to those sold on the Louisiana Gulf Coast. Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Louisiana Gulf Coast less transport costs than they could sell barrels of oil for in Midland, additional earnings would be achieved.

6. In light of Sequitur’s specific requirements for the proposal, on May 9, 2018, Jon Ince, then-Senior Manager of Logistics with Vista, introduced Sequitur to Jonas Struthers of FeNIX FSL, a rail car lease broker with whom Sequitur initially discussed renting rail cars through.

Ince described Jonas Struthers as “the railcar guy” who had “been a great partner for me in the past with our sand cars.” Ince stated that Struthers would “be able to get you cars that you need for your fleet” and “at a really good rate.” Ince also noted that Struthers would “be more in the know on regulations and exact timing on when [CP-1232 railcars] are being phased out for the [DOT-117R railcars].”

7. On May 10 and 11, 2018, in an internal email among Vista employees, Ince outlined the terms sought by Sequitur, including to transload crude oil from [November 1,] 2018 to December 31, 2019, for about 20-30 railcars loaded per day with a minimum of approximately 15 railcars. Ince also noted that Sequitur was also “[l]ooking to place tankage on our property for [a] pipeline connection with [a] long-term lease.” Chris Favors, Business Development officer with Vista (“Favors”), also indicated that JupiterMLP, LLC (the parent of affiliate, Jupiter Marketing & Trading, LLC) (collectively, “Jupiter”) was also “interested in” the Terminal but that Vista had decided it was “moving forward” with the proposed Terminal services contract with Sequitur.

8. On May 16, 2018, in another internal email among Vista employees, Ince compared the proposals of both Sequitur and Jupiter for use of the Barnhart Terminal. Ince noted in the email that Sequitur had “no rail experience” and also that Sequitur was willing “to entertain” Vista as the manager of its fleet of railcars. Significantly, Ince opened the email noting that Union Pacific Railroad is “requiring DOT 117 crude cars on all new freight quotes” and that such cars “are not available until Q3-Q4 of this year.”

9. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal. The initial term of the LOI was through June 26, 2018 and was

extended by written amendments to July 23, 2018. The LOI reflected the parties' intent to enter into a Terminal Services Agreement for a term of September 2018 to December 2019.

10. On June 1, 2018, Sequitur emailed Favors regarding progress being made on a draft of the proposed Terminal Services Agreement between Sequitur and Vista (ultimately Maalt), as well as Sequitur's purchase of eight new transloaders for installation at the Terminal, at a cost of over \$2,200,000, and its efforts to address regulatory and surface use issues.

11. On June 5, 2018, Struthers emailed Ince, Morris, and others at Vista explaining that the "market for 117s right now is upwards of \$1100 on a 3 year lease." Struthers indicated that the older 1232 railcars might be able to be retrofitted to meet the DOT-117 standards and at a lower price, but there were still "unanswered questions" from the American Association of Railroads and the Federal Railroad Administration regarding the proposed attempted at retrofitting.

12. Realizing that the train business was one that Sequitur was inexperienced with and could not learn overnight, Sequitur decided to seek a business venture with a large oil trader with access to leased rail cars. Sequitur reached out to several companies, including, but not limited to Shell and BP.

13. On June 5, 2018, Favors emailed Braden Merrill, VP & CFO of Sequitur, and Travis Morris, the Chief Commercial Officer of Jupiter, regarding Vista working with both Sequitur and Jupiter regarding "Vista's Barnhart terminal." Favors introduced Jupiter to Sequitur, and Favors' colleague, Ince described Jupiter as the "real deal and a partner who could get it done." Favors went on to inquire as to whether a conference call should be scheduled among Vista, Sequitur, and Jupiter that day or the following day. A conference call took place that day, and

Sequitur was informed that Jupiter had trucking capabilities and also relationships with railroad companies, which, as noted above, were requirements for the proposed Terminal to be viable. Braden Merrill of Sequitur thanked Favors and Ince for the introduction to Jupiter.

14. On June 6, 2018, Favors emailed Travis Morris regarding changes to a draft terminal services agreement between Vista and Jupiter. Favors stated that “[w]e can easily amend the contract to include Barnhart volume if the Sequit[u]r opportunity doesn’t pan out.”

15. Sequitur initially selected Shell as a business venture partner and proceeded in ordering the equipment that was needed to build out the Terminal, including the transloaders contemplated under the original LOI. Sequitur had committed approximately \$4 million to the Terminal project. However, neither Shell nor BP were able to secure rates from BNSF or UP.

16. On June 20, 2018, Travis Morris with Jupiter emailed Ince and Favors of Vista attaching an executed agreement between Vista and Jupiter. Morris also stated that “I am getting on the phone with Sequitur today so we can try to close the Barnhart deal.” Morris also noted that “I do not have firm railcars yet, but we are working several sets with Jonas Struthers.”

17. From late June, and during July, and the first week of August 2018, Vista and Sequitur continued negotiations and exchanged drafts of the Terminal Services Agreement for the exclusive use of the Terminal in Barnhart. Then, on August 3, 2018, Favors emailed Braden Merrill of Sequitur and Sequitur’s President, Mike van den Bold, pressuring Sequitur to execute the Terminal Services Agreement. Favors stated that “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today.” At this time, Favors told Merrill that Jupiter was offering to pay \$8 million up front to Vista and Maalt for exclusive use of the Terminal, cutting

out Sequitur. Favor's statements to Merrill were knowingly false when made, were made with conscience indifference to the truth of the statements, or were negligently made, and were intended to induce, and in fact did induce, Sequitur to sign the Terminal Services Agreement, and Sequitur reasonably relied on such false statements. Merrill told Favors that Sequitur had already purchased the necessary equipment for the Terminal project and was in the hole for millions of dollars due to Sequitur's reliance on the LOI. Favors again mentioned that Sequitur should do a business venture with Jupiter because Jupiter was already able to ship on the railroads.

18. On August 6, 2018, Merrill of Sequitur had a conference call with Vista and Jupiter representatives regarding the availability of railcars and locomotives. Sequitur was told that Jupiter had access to 1600 railcars and could manage 10 to 12 locomotives a month. Also, as a result of that call, later that same day, Sequitur's President forwarded via email to Favors of Vista and Maalt, the Terminal Services Agreement (also hereinafter called the "Agreement"), dated effective August 6, 2018, which was executed the following day.

19. On August 9, 2018, Morris emailed Sequitur regarding a prior meeting in which Jupiter offered to purchase the crude oil transloaded at the Terminal from Sequitur instead of Sequitur's initial plan to sell the oil to Shell. Morris noted that in "order to meet a September [2018] start date I need to begin directing trains toward Barnhart quickly."

20. In reliance on the promises, commitments, false statements, and inducements made by Vista and Maalt, and their agents and representatives, regarding the availability of rail cars and trains to pick up the crude oil at the Terminal and deliver it via rail to the desired destinations, Sequitur entered into the Agreement with Maalt, with an effective date of August 6, 2018. Consistent with the entire premise and purpose of the Agreement—that Sequitur would be able to

cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be delivered to the Louisiana Gulf Coast refineries—throughout the Agreement references are made to “railcars” as well as a reference to the “train loading area.” Thus, it was expressly made clear to both parties that without access to trains and railcars, the essential purpose of the Agreement was for naught.

21. Per the Agreement, Maalt (also described as “Terminal Owner”) was the owner and operator of the Terminal¹ located in Barnhart, Texas on land leased or controlled by Maalt, and Sequitur (described as “Customer”) was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter “oil”). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

22. Section 11.2 of the Agreement required Maalt to procure and maintain, at its own expense, a pollution legal liability (“PPL”) insurance policy reasonably acceptable to Sequitur and naming Sequitur and its Group as an additional insured, but this policy was never procured by Maalt and provided to Sequitur as required by the Agreement.

23. The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, upon receipt, Maalt would then transload the oil into railcars to Sequitur or Sequitur’s third-party customers. In order to facilitate

¹ The Terminal’s address is located at 44485 W. Hwy 67, Barnhart, Irion County, Texas 76930 and is more specifically described in the Agreement in Exhibit A-1 thereto.

the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Sequitur made this investment and incurred these costs in reliance on Vista’s and Maalt’s promises that there would be have sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement. Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the “Phase II Project.”

24. Significantly, as to the equipment and facilities installed by Sequitur (collectively “Customer Terminal Modifications”) in connection with the either the Phase I Project or the Phase II Project, Maalt agreed in the Agreement that “title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur].” *See* Agreement, § 2.7. The only exception to Sequitur’s title and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was “any additional rail tracks that may [have been] installed,” which additional tracks’ ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement’s term, subject to certain rights of Sequitur. *See* Agreement, § 2.7.

25. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. *See* Agreement, § 3.2.

26. Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” *See* Agreement, § 3.1. The Agreement could not have been clearer when it provided, as follows: “There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner [Maalt] breach.” *See* Agreement, § 3.2(a).

27. Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” *See* Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].” *See* Agreement, § 1.

28. Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” *See* Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” *See* Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. *See* Agreement, §4.1. “Product Throughput” was the metered quantity of oil actually delivered into the Terminal and transloaded by Maalt into railcars. *See* Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

29. The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” *See* Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. *See* Agreement, § 14.3.

30. At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had occurred.

31. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

32. Despite Vista and Maalt’s promises to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and at a really good rate, and Vista’s and Maalt’s introduction to Sequitur of Vista’s and Maalt’s agents, who were self-professed “railcar guys”, it became obvious that said promises were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In fact, there became an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond the control of Sequitur. These circumstances were not foreseeable to Sequitur and amounted to a Force Majeure event as described in the Terminal Services Agreement.

33. On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

34. On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

35. On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

36. On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to procure such services. Accordingly, Sequitur notified Maalt of Sequitur’s right to terminate the Agreement. Specifically, Sequitur relied on the “Termination for Extended Force Majeure”

provision in the Agreement, which provides, in pertinent part, that “[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days.” *See* Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur’s equipment and facilities installed at the Terminal (Customer Terminal Modifications). *See* Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur’s “right of access over, on, and across” the lands upon which the Terminal was located for “purposes of enforcing” Sequitur’s “rights under this Agreement” to remove the Customer Terminal Modifications, and also acknowledging Sequitur’s undisputed “title to and ownership of” such Customer Terminal Modifications).

37. Notably, as to Sequitur’s notice of Termination for Extended Force Majeure, the Agreement further provided that “[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment),” which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. *See* Agreement, §§ 8.4, 3.1, and 3.2.

38. On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. Significantly, the letter also stated that “Maalt will not allow your company access to

the Barnhart property [Terminal] to remove equipment or otherwise” and that “[a]ny attempt to access the property will be considered a trespass.” Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur’s access to the property to retrieve Sequitur’s equipment and facilities or that suggested Sequitur’s undisputed “right of access over, on, and across” the property or Terminal for “purposes of enforcing” Sequitur’s “rights under this Agreement,” including removing and retrieving Sequitur’s equipment and facilities, had been terminated. *See* Agreement, § 2.5.

39. On February 22, 2019, Sequitur’s attorney sent a letter to Maalt’s attorney, responding to the February 14, 2019 letter noted above. In the letter, Sequitur’s attorney reiterated that Sequitur had properly terminated the Agreement. Most significantly, however, the letter explained that earlier on February 22, 2019, Sequitur had learned that its equipment had wrongfully been removed, stolen, and misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. The letter also demanded that Sequitur’s equipment and facilities be returned to Sequitur by no later than February 25, 2019, at 5:00 p.m. Despite Sequitur’s letter and demand, Maalt never responded nor returned Sequitur’s equipment. And Maalt has otherwise failed and refused to honor its obligations under the Agreement with respect to Sequitur’s rights and access to its equipment and facilities and all other rights that Sequitur has under the Agreement.

40. Sequitur’s equipment and facilities, wrongfully removed, stolen, and misappropriated by Maalt, is valued at approximately \$2,576,505.21 in the aggregate, if not more,

and includes numerous devices, components, and items. Because Sequitur does not have legal access to the property where Maalt has currently relocated Sequitur's equipment and facilities, Sequitur cannot properly secure and protect such equipment and facilities from damage, corrosion, vandalism, or a subsequent theft by persons other than Maalt. Additionally, without immediate access to its equipment and facilities, Sequitur cannot retrieve the equipment and facilities and use it for other business opportunities, should they arise. Simply put, the harm being suffered by Maalt's wrongfully removing, stealing, and misappropriating Sequitur's equipment is irreparable and immeasurable.

SECOND AMENDED COUNTERCLAIMS

41. Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

42. Sequitur incorporates herein the facts set forth above.

Promissory Estoppel

43. Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Negative misrepresentations

44. Vista's and Maalt's representations to Sequitur were in connection with the above-referenced transaction in which Vista and Maalt had a pecuniary interest. Vista and Maalt supplied false information to guide Sequitur into the transaction. Neither Vista nor Maalt used reasonable care in obtaining or communicating the representations and information. Sequitur justifiably relied on the representations and information. Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Common law fraudulent inducement

45. Vista and Maalt made material representations to Sequitur in the above-referenced transaction that were false. When Vista and Maalt made the representations to Sequitur, Vista and Maalt knew the representations were false or made the representations recklessly, as positive assertions, and without knowledge of the truth, if any. Vista and Maalt made the representations with the intent that Sequitur act on them, including Sequitur entering into the Agreement. Sequitur relied on the representations. As a result, Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

Breach of Contract

46. Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt's breach has caused Sequitur injury.

Declaratory Judgment

47. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter “UDJA”), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;
- (3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;
- (4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;
- (5) Sequitur was not obligated to remedy the cause of the Force Majeure occurrence because Sequitur, as the affected party, did not deem it reasonable and economic to do so.
- (6) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;
- (7) Sequitur has the exclusive right and title to the equipment and facilities it installed at the Terminal, and that Maalt wrongfully removed, stolen, and misappropriated such equipment and facilities; and
- (8) Sequitur has the right to retrieve its equipment and facilities from any location where Maalt has placed such equipment and facilities.

Conversion

48. Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt wrongfully exercised dominion and control of such property by refusing to allow Sequitur to

retrieve such property from the Terminal, by wrongfully removing, stealing, and misappropriating Sequitur's property and placing it at a location approximately 25 miles from the Terminal, and by refusing to return Sequitur's property to the Terminal upon remand or otherwise continuing to refuse Sequitur's access to its property. As a result of Maalt's acts and/or omissions, Sequitur has suffered injury.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Defendant/Counter-Plaintiff/Third-Party Plaintiffs, SEQUITUR PERMIAN, LLC, further requests that Plaintiff Maalt recover nothing by its suit; that SEQUITUR PERMIAN, LLC, recover and obtain from Maalt the declaratory relief sought above, that SEQUITUR PERMIAN, LLC recover and obtain from Maalt and Vista, jointly and severally, all damages, including actual, special, and exemplary damages, court costs, expenses, and reasonable and necessary (and/or equitable and just per UDJA) attorney's fees against Maalt and Vista, as noted above, pursuant to the prevailing party clause in the subject Agreement, Chapters 37 and 38 of the Texas Civil Practice and Remedies Code,; 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 this, the 20th day of December 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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Matthew A. Kornhauser

Ashley Masters

CAUSE NUMBER 19-003

MAALT, LP, Plaintiff	§	IN THE DISTRICT COURT
	§	
VS.	§	51st JUDICIAL DISTRICT
	§	
SEQUITUR PERMIAN, LLC, Defendant	§	IRION COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Maalt, LP ("Maalt"), Plaintiff, and files this its First Amended Original Petition, and in support thereof, respectfully shows this Court as follows:

DISCOVERY CONTROL PLAN

I.

Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

RULE 47 STATEMENT OF RELIEF REQUESTED

II.

Plaintiff seeks monetary relief over \$1,000,000.00.

PARTIES

III.

Plaintiff, Maalt, LP, is a Texas limited partnership with its principal place of business in Tarrant County, Texas.

Defendant, Sequitur Permian, LLC, ("Sequitur") has appeared and answered.

VENUE

IV.

Venue is proper in Irion County, Texas, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(1) because that is the county in which all or a substantial part of the events giving rise to Maalt's claims and causes of action occurred.

FACTS

V.

Maalt is in the business of operating transloading facilities that transload materials used in the oil and gas industry in Texas. Its transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operates a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacific Transportation, Ltd. ("TXPF"). TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the Union Pacific and Fort Worth and Western Railroad ("FWWR"). The FWWR in turn interchanges with track owned by BNSF and the Kansas City Southern Railway ("KCS"). Through those interchanges and railroads, goods can be shipped into and out of the Permian Basin area by rail. The Barnhart Facility can accept goods brought to it by truck or train from anywhere in the country, and then transloaded to either truck or train for delivery either within the Permian Basin or other areas throughout the country.

VI.

In approximately May, 2018, Sequitur contacted Maalt for the purpose of discussing arrangements through which Maalt would transload Sequitur's crude oil at Maalt's Barnhart Facility because that facility was adjacent to land on which Sequitur

had producing oil wells. At the time, the pipelines leading from the Permian Basin to various oil markets were at capacity and oil was in a state of oversupply. Because of that situation, the price of crude oil at Midland was far less in early to mid-2018 than it was for crude oil at the Gulf Coast. Sequitur believed that the spread in the prices made the cost of transporting crude oil by rail attractive and created an opportunity to transport crude oil from the Permian Basin to the Gulf Coast by train. Sequitur wanted to take advantage of that opportunity which promised to provide it with significant returns.

VII.

Eventually, in August 2018, Maalt entered into a Terminal Services Agreement (the “Contract”) with Sequitur to provide crude oil transloading services at the Barnhart Facility for Sequitur. Pursuant to the Contract, Sequitur was to provide and install the equipment needed to transload Sequitur’s crude oil from trucks (and potentially a pipeline) to rail cars, and Maalt was to provide the labor required for the transloading process. The Contract granted Sequitur the exclusive right to have crude oil transloaded at the Barnhart Facility to the exclusion of any other transloading operations, whether crude oil, sand, or other goods. In exchange, Sequitur agreed to pay Maalt \$1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $\$1.50 \times 11,424 \times 30 = \$514,080.00$).

VIII.

Pursuant to the Contract, Sequitur constructed the Phase I Project improvements at the Barnhart Facility consisting of equipment necessary to transload crude oil brought to the Barnhart Facility by trucks onto railcars. While the completion of the improvements was targeted for early September, 2018, those improvements were delayed and ultimately completed and became operational on or about December 8, 2018. Under the terms of the Contract, Sequitur's obligations to pay Maalt the minimum payment began once the improvements were complete.

IX.

By December, 2018, Sequitur had not procured the logistics necessary to have railcars delivered to the Barnhart Facility for the purpose of carrying crude oil. Rather than implement its own logistics to get crude oil and the necessary rail cars to the Barnhart Facility, Sequitur looked for a company that already had logistical services in place to serve as a joint venture partner. That way, Sequitur would not have to invest the time or manpower necessary to learn the logistical requirements of transporting crude oil by rail. It could simply rely on others to do that while enjoying the arbitrage; that is, the economic value of selling its crude at the Gulf Coast for a higher price than it could command in the Permian Basin. It was, however, unsuccessful in finding a suitable joint venture partner with the result that it never had crude oil transloaded at the Barnhart Facility. Despite the completion of the Phase 1 Project improvements, Sequitur did not begin transloading crude oil as required by the Contract. Instead, realizing that it did not have a joint venture partner who could provide the logistical services necessary to move its crude oil from the Permian Basin to the Gulf Coast by rail, Sequitur declared that a force majeure event occurred so it would not have to pay Maalt the minimum

payments required by the Contract. It has since refused to pay Maalt the minimum transloading fees it is obligated to pay.

X.

On December 7, 2018, Sequitur sent Maalt a letter claiming that it was experiencing a force majeure event because of the “unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services. . .” At the time, there was no “interruption, delay, or curtailment of rail transportation services.” Rather, Sequitur appears to contend that because it was unable to procure an oil company who would be an acceptable joint venture partner that could provide the necessary logistics services, or alternatively, rail transportation at a low enough cost, rail transportation services were “unavailable.” Sequitur has persisted in that contention even though it made no effort to develop the logistical services “in-house”, made no effort to investigate or retain a third party logistics provider, and made no effort to negotiate directly with the railroads or any supplier of rail cars to obtain the cars and services necessary to move its crude by rail. On the other hand, there was at least one company that was apparently willing and able to contract with Sequitur to move Sequitur’s crude oil by rail to the Gulf Coast, but the cost would be prohibitive.

XI.

On February 8, 2019, Sequitur sent Maalt a letter claiming to terminate the Contract pursuant to the force majeure provisions of the Contract. However, in reality there was never a force majeure event as rail service to the Barnhart Facility was never unavailable, interrupted, delayed or curtailed. Rather, Sequitur was apparently asserting its force majeure claim as a pretext in an effort to terminate the Contract simply because it was unable to find an oil buyer who was able to move crude oil by rail while providing

the arbitrage benefit to Sequitur, and because it did not want to invest resources into undertaking the logistics efforts itself.

XII.

Sequitur's conduct indicates that it absolutely and unconditionally refusing, and continues to refuse, to perform the Contract. It has therefore repudiated the Contract, and by doing so materially breached the Contract. Moreover, by sending its February 8, 2019 letter attempting to terminate the Contract, Sequitur has improperly attempted to terminate the Contract in order to avoid its contractual obligations.

BREACH OF CONTRACT

XIII.

Paragraphs IV through XII are incorporated herein by reference. Sequitur's repudiation of the Contract constitutes a material breach of the Contract. As a result and as of the time of trial, Maalt has sustained and will sustain damages in the approximate amount of \$6.6 million, for which Maalt now sues.

DECLARATORY JUDGMENT

XIV.

Paragraphs V through XIII are incorporated herein by reference. Maalt seeks a declaration pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37, of the following:

- a. The Termination Operations Commencement Date under the Contract occurred and the date of its occurrence;
- b. The "force majeure event" alleged by Sequitur did not occur;
- c. The date the payment obligations created by Article 3 of the Contract began;
- d. Sequitur did not have a right to terminate the Contract;

- e. Sequitur repudiated and breached the Contract by refusing to perform its obligations under the Contract.

CONDITIONS PRECEDENT

XV.

All conditions precedent to Maalt's right of recovery have occurred or been waived.

ATTORNEYS' FEES

XVI.

Pursuant to Texas Civil Practice and Remedies Code Chapters 37 and 38 and the terms of the Contract, Maalt is entitled to recover its reasonable and necessary attorneys' fees and associated litigation and expert costs from Sequitur. Presentment of Maalt's claim was made within the time required by Texas Civil Practice and Remedies Code Chapter 38.

WHEREFORE, PREMISES CONSIDERED, Maalt, LP, Plaintiff, prays that Defendant be cited to appear and answer herein, and that Plaintiff recover the following:

1. All damages to which it may be entitled;
2. Its reasonable and necessary attorney's fees, litigation costs, and expert costs;
3. Pre and post judgment interest allowed by law;
4. All costs of Court; and
5. Such other and further such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ James Lanter

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through
the Court's electronic filing service on the date of filing, upon:

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Plaintiff's First Amended Original Petition

Page 8

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/s/ James Lanter

Ashley Masters

No. 19-003**MAALT, LP****Plaintiff,****vs.****SEQUITUR PERMIAN, LLC****Defendant.**§
§
§
§
§
§
§
§**IN THE DISTRICT COURT****IRION COUNTY, TEXAS****51ST JUDICIAL DISTRICT****FIRST AMENDED ANSWER TO COUNTERCLAIMS**

Plaintiff, Maalt, LP ("Maalt"), files this First Amended Answer to Counterclaims, and shows the Court:

I.**GENERAL DENIAL**

Maalt enters a general denial of the allegations and claims asserted against it in Defendant's Second Amended Counterclaims.

II.**AFFIRMATIVE DEFENSES**

- 1. Prior Breach.** The Defendant breached the Terminal Services Agreement ("TSA") at issue first, thus excusing any further performance or subsequent breach by Maalt.
- 2. Contract Precludes Claim of Promissory Estoppel.** Defendant's claims fail because Defendant complains about a matter that involved a transaction governed by the terms of an express contract.
- 3. Statute of Frauds.** Defendant's claims are barred by the statute of frauds.

4. **Failure to Mitigate.** Defendant's claims fail in whole or in part because it failed to reasonably mitigate its damages.
5. **Defendant's responsibility for its alleged damages.** The acts and omissions of the Defendant caused or contributed to the damages it alleges. Maalt is entitled to a determination of the proportionate responsibility of the parties pursuant to Texas Civil Practice & Remedies Code Chapter 33.
6. **Contributory Negligence.** Defendant was negligent and its own negligence was the proximate cause of the damages it alleges.

III.

RULE 193.7 NOTICE

Maalt gives notice pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that any documents produced by Defendant in response to written discovery may be used by Maalt as evidence in pre-trial matters and the trial of this case.

PRAYER

For the reasons stated above, Maalt prays that it be awarded judgment against Defendant that it take nothing by its counterclaims, and that Maalt have such further relief to which it is entitled.

Respectfully submitted,

By: /s/ James Lanter

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MAALT, LP**

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I hereby certify that a true and correct copy of the foregoing was served through
the Court's electronic filing service on the date of filing, upon:

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/s/ James Lanter

Removal Appendix 0109

3. **Failure to Mitigate.** Defendant's claims fail in whole or in part because it failed to reasonably mitigate its damages.
4. **Not Liable in the Capacity Sued.** Vista has no employees, and has not engaged in any discussions, negotiations or other communications with Defendant. Therefore, Vista is not liable in the capacity sued and is not a proper party.
5. **Defendant's responsibility for its alleged damages.** The acts and omissions of the Defendant caused or contributed to the damages it alleges. Vista is entitled to a determination of the proportionate responsibility of the parties pursuant to Texas Civil Practice & Remedies Code Chapter 33.
6. **Contributory Negligence.** Defendant was negligent and its own negligence was the proximate cause of the damages it alleges.

III.

RULE 193.7 NOTICE

Vista gives notice pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that any documents produced by Defendant in response to written discovery may be used by Vista as evidence in pre-trial matters and the trial of this case.

PRAYER

For the reasons stated above, Vista prays that it be awarded judgment against Defendant that it take nothing by its third party claims, and that Vista have such further relief to which it is entitled.

Respectfully submitted,

By: /s/ James Lanter

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**ATTORNEYS FOR
THIRD PARTY DEFENDANT
VISTA PROPPANTS AND LOGISTICS INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the date of filing, upon:

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/s/ James Lanter

STATE OF TEXAS

§
§
§

COUNTY OF TARRANT

Declaration Pursuant to Texas Civil Practice & Remedies Code § 132.001

My name is Kristin Whitley, my date of birth is September 21,
1983, and my address is 4413 Carey, Fort Worth, Texas 76119, United States of
America. I declare under penalty of perjury that the statements made in Section II.4 are
true and correct.

Executed in Fort Worth, Tarrant County, Texas, on the 9 day of January,
2020.


Kristin Whitley

Removal Appendix 0114

pursuant to which Maalt would exclusively transload Sequitur's crude oil at a price of \$1.50 per barrel. The Contract required Sequitur to throughput a minimum of 11,424 barrels per day through the Barnhart Facility or pay Maalt a minimum fee equal to \$17,136.00 per day. Sequitur never throughput any crude oil through the Barnhart Facility and never paid Maalt the minimum payments required by the Contract.

Maalt sued Sequitur for breach of the Contract. Sequitur breached the contract by failing to throughput the crude oil needed to meet the minimum daily volume obligation under the Contract and did not pay the minimum compensation due to Maalt. Instead, Sequitur claimed that rail cars and rail service were completely unavailable *at any price* at the Barnhart Facility and that constituted a force majeure event under the Contract. In response to this suit, Sequitur also asserted a promissory estoppel and conversion counterclaims which are the subject of this motion.

Sequitur's promissory estoppel claim is based on the allegation that Maalt made "promises" regarding the availability in the market of rail cars and rail transportation needed for Sequitur to throughput crude oil at the Barnhart Facility. This claim fails as a matter of law because (i) there was no sufficiently specific promise made that was not a mere expression of opinion about future events, and (ii) Sequitur's reliance on any such promise was not reasonable given its sophistication and the two-month period it had to conduct due diligence prior to entering into the Contract.

Sequitur asserts a conversion claim alleging that Maalt wrongful withheld its transloading equipment for a period of one month. This claim fails as a matter of law because Sequitur can show no damage arising from the one month hold of its equipment after it wrongfully attempted to terminate the Contract.

SUMMARY JUDGMENT EVIDENCE

Maalt and VPL support this motion with the following evidence that is attached hereto and incorporated for all purposes:

- Exhibit 1: Excerpts from the Deposition of Braden Merrill ("Merrill Depo"). Merrill is Sequitur's Vice President and Chief Financial Officer.¹
- Exhibit 2: Excerpts from the Deposition of Tony Wroten ("Wroten Depo"). Wroten is Senior Financial Associate for Sequitur that reports to Merrill.²
- Exhibit 3: Excerpts from the Deposition of Mike Van Den Bold ("Van Den Bold Depo"). Van Den Bold is Sequitur's, founding partner, President and Chief Operations Officer.³
- Exhibit 4: Letter of Intent dated June 1, 2018 (Deposition Ex. 6).
- Exhibit 5: Defendant/Counter-Plaintiff's First Amended Response to Request for Disclosure dated June 6, 2019.

FACTUAL BACKGROUND

Facts Related to Promissory Estoppel Claim.

1. Maalt and Sequitur entered into a Terminal Services Agreement (the "Contract") on August 6, 2018. *See Sequitur's Second Amended Counterclaim and Original Third Party Claims* ("Sequitur's Counterclaims") at ¶18.

¹ *Merrill Depo.* pp. 7:22-25.

² *Wroten Depo.* pp. 7:19 – 8:7.

³ *Van Den Bold Depo.* pp. 4:14 – 5:12

2. Prior to that signing, Sequitur claims that Chris Favors and Jon Ince made promises on behalf of Maalt and VPL⁴ that rail cars and transportation services would be available to Sequitur at favorable rates.

3. Maalt was first introduced to Sequitur in May 2018 when Sequitur approached Maalt seeking to transload crude from a pipeline or trucks to rail cars through Maalt's Barnhart facility. *Sequitur's Counterclaims* at ¶¶ 3-4.

4. Sequitur relies on this May 2018 email from Jon Ince as the primary basis for its promissory estoppel claim, arguing that Maalt promised Sequitur that it could obtain railcars at a "really good rate":

On May 9, 2018, at 7:22 PM, Jon Ince <jince@vprop.com> wrote:

Braden/Tony,

It was great talking with you and I look forward to our talks progressing on shipping crude out of basin. Feel free to reach out to me if you need any help on fleet sizing or routing and I will do what I can step you through that process. VProp works on the belief that we succeed when our partners succeed. I will get you the info I promised to you in the coming days.

Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call. He has been a great partner for me in the past with our sand cars and I'm sure he will be able to get you cars that you need for your fleet. I'm sure he can get you cars that you need at a really good rate, he's done amazing work for me in the past. Jonas will be more in the know on regulations and exact timing on when 1232s are phased out for the 117s.

Regards,
Jon

⁴ VPL disputes that Messrs. Favors and Ince were employed by it or were otherwise acting on VPL's behalf, but that issue is not presented in this motion.

5. On June 1, 2018, Sequitur entered into a Letter of Intent with Vista Proppants and Logistics, LLC⁵ where the parties agreed to enter into a period of exclusive negotiations for the proposed transloading of crude to rail cars at the Barnhart Facility.

6. When it entered into the Letter of Intent, Sequitur agreed (i) that it intended to do its own due diligence to determine the viability of entering into a transload agreement for shipping crude by rail and (ii) that it was not relying upon any oral agreements by Maalt or Vista:

6. **Due Diligence.** Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.

8. **No Oral Agreements.** Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.

7. From the date of signing the Letter of Intent, June 1, 2018, until the effective date of the Contract, August 6, 2018, Sequitur had the opportunity to perform due diligence into the feasibility of the transaction that it promised to perform in the Letter of Intent.

Facts Related to Conversion Claim.

8. After Sequitur attempted to terminate the Contract due to the purported force majeure, Sequitur demanded that it be allowed to recover its equipment and facilities installed at the Barnhart facility for the transloading. The equipment had been moved from Barnhart to Maalt's Big Lake transload facility, where it could be maintained securely.

⁵ Vista Proppants and Logistics, LLC is a parent company under which Maalt is a downstream subsidiary. While it signed the letter of intent prepared by Sequitur, Maalt was to be the contracting party as it owned and operated the Barnhart Facility. VPL, the entity sued, does not employ any of the employees mentioned in Sequitur's Counterclaims.

9. Sequitur demanded access to the equipment by February 25, 2019. Although Maalt initially object to returning the equipment given Sequitur's debt to Maalt that is the subject of this lawsuit, by letter dated March 25, 2019, Maalt agreed to allow Sequitur to recover the equipment.

10. Sequitur recovered its equipment shortly thereafter.

11. Despite being denied access to the equipment for a period of only one month, Sequitur's pleadings (after two amendments) maintain the allegation that Maalt "stole and misappropriated" equipment and Sequitur has continued to be denied access to the property it recovered roughly one year ago. Further, by its own admission, Sequitur has not suffered any financial loss as a result of the equipment being in Maalt's possession for that one-month period of time.

ARGUMENTS AND AUTHORITIES

I. Promissory Estoppel Claim

A. Texas Law on a Promissory Estoppel Claim.

Promissory estoppel is an equitable doctrine that ordinarily is used defensively to prevent "a party from insisting upon [its] strict legal rights when it would be unjust to allow [it] to enforce them." *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1985). To establish its promissory estoppel claim, Sequitur must prove that (i) Maalt made a promise to Sequitur, (ii) Sequitur reasonably and substantially relied on the promise to its detriment, (iii) Sequitur's reliance was foreseeable by Maalt, (iv) injustice can be avoided only by enforcing the promise. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d, 675, 686 n.25 (Tex. 2002); *Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 635 (Tex. App.—Houston [14th Dist.], pet. denied 2012).

To support a finding of promissory estoppel, the asserted "promise" must be sufficiently specific and definite that it would be reasonable and justified for the promisee to rely upon it as a commitment to future action. *See Comiskey*, 373 S.W.3d at 635; *Alpha Vista, Inc. v. Holt*, 987 S.W.2d 138, 141-42 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). The "promise" also must be more than mere speculation concerning future events, a statement of hope, or an expression of opinion, expectation, or assumption. *Id.*; *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 305 (Tex. App.—Dallas 2009, no pet.). If an alleged promise is part of a valid contract, the promisee cannot disregard the contract and sue for reliance damages under the doctrine of promissory estoppel. *Stable Energy L.P. v. Kachina Oil & Gas, Inc.*, 52 S.W.3d 327, (Tex. App.—Austin 2001, no pet.); *Guaranty Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 434 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Lindale Auto Supply v. Ford Motor Co.*, 1998 Tex. App. LEXIS 1564, at *28 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998).

B. The Promissory Estoppel Claim Fails as a Matter of Law as There Was No Enforceable Promise.

Sequitur's promissory estoppel claim fails as a matter of law because there was no specific and definite promise or anything more than mere speculation about future events, statements of hope, or expressions of expectation. Sequitur claims that Maalt made promises to Sequitur that "trains and railcars would be available, including at a reasonable price, at the right time, and for the right term." However, that is not a promise that Maalt would do anything, and Sequitur cannot point to any specific and definite promise that it relied upon. Instead, can cite only to (i) representations that Maalt would offer help with contacts in the rail industry and (ii) statements by Maalt that it believed Sequitur could obtain rail cars and rail transportation.

Sequitur provides very limited specifics when pressed to explain the promise(s) that support its estoppel claim. For one, Sequitur cites to an email where Maalt introduced Sequitur to Jonas Struthers and indicated that Struthers had successfully obtained railcars for Vista in the past. However, Sequitur's Braden Merrill conceded at this deposition that there was no promise that Struthers could acquire rail cars for Sequitur.⁶ Even when questioned by his own counsel at the end of his deposition, Merrill confirmed that while Maalt attempted to help Sequitur, no promises to obtain rail cars or rail service were made:

Q. Did Mr. Ince or Mr. Favors promise or represent to Sequitur that trains and rail cars would be available?

Q. To your knowledge?

A. Yes.

Q. Okay. What do you recall specifically, as best you can, being told by Mr. Favors and Mr. Ince in that regards?

A. I remember with rail cars – this is just in regards to rail cars?

Q. Yes, sir.

A. That he represented that he could help us find railcars or put us in contact with people who could find railcars.

Q. Did you tell you that trains and railcars were available?

A. He said it would be difficult thing to do, but that we could – but that we could do it.

Q. Okay. Did he tell you from whom that trains or railcars would be available?

⁶ *Merrill Depo.* at 107:01 – 108:17.

A. I don't know that he specifically specified whom, but he did tell us in an e-mail, I believe, that – that Jonas Struthers would be able to help us out.⁷

Moreover, Merrill could not point to any promise made by Maalt or Vista that was not kept:

Q. [D]uring your conversations with Jon Ince and Chris Favors?

A. Uh-huh (positive response), yes.

Q. Did they ever make any promises to you that they did not keep?

A. I am not sure.

Q. You are not aware of any as you sit here today?

A. I'm – I'm – I'm trying to think of any. I can't think of any off the top of my head right now.

Q. Okay. You can't think of any examples of anything they promised to do and did not do, correct?

A. Individually?

Q. Individually or together?

A. I can't remember any off the top of my head right now.

Q. And if there was a promise made, you would know about that, wouldn't you?

A. Most likely unless they made it to someone else.

Q. If some – if something was like was said to somebody else your other people would have told you wouldn't they?

A. Most likely, yes.⁸

⁷ *Merrill Depo.* at 246:07 – 247:06.

⁸ *Merrill Depo.* at 17:18 – 18:16.

Sequitur's other witnesses that communicated directly with Maalt and Vista confirmed that no promises were made to secure rail cars or rail service. Instead, Maalt and Vista merely provided helpful contacts for rail cars and rail service and offered its opinion on the availability of rail cars and rail transportation in the future. Tony Wroten testified:

Q. Did Jon or anyone else with Vista or Maalt ever promise to acquire rail cars for you?

A. To acquire them for us?

Q. Right. To actually go out and get them and say here they, this is the price?

A. I – I don't recall that ever being a promise.

Q. Okay. Did they ever promise that they could go and get you a specific rate or any type of routes on the – the railroads?

A. They had made, you know, representations that they could assist in that regard.

Q. And I suspect they probably also gave you their assessment of what was available in the market?

A. Absolutely, yeah.

Q. Okay. But they never – I guess they never took on the role as agent to Sequitur to we are going to go and get this for you? Is that fair?

A. You mean, like contractually?

Q. Yes.

A. I – I am not aware of a contract stating that – they were going to be our agent.⁹

⁹ *Wroten Depo.* at 19:25 – 21:02.

Mike Van Den Bold, Sequitur's President and Chief Operating Officer likewise was unable to point to any specific and definite promise:

Q. Okay. Did they promise to do anything other than help?

A. The – the – I mean, the promises they made is that they – they were experts and know the business, the rail by – sand by rail, and had the relationships. And – yeah the would help get us – get this venture off the ground.¹⁰

Further, Van Den Bold testified:

Q. Okay. And during the – all the way up until the notice of force majeure, did personnel with Maalt and Vista provide assistance when they could on leads for rail cars, rail transportation, contacts within the railroad industry, that type of thing?

A. They made phone calls and introductions to assist.

Q. Okay. Is there anything during the period from after the terminal services agreement to the notice of force majeure that Sequitur specifically asked Maalt or Vista to do that it did not do?

A. Nothing comes to mind at this point.¹¹

To support a promissory estoppel claim, there must be evidence a sufficiently specific promise and not a mere expression of opinion regarding future events. For instance, in *Landmark Org., L.P. v. Tremco Inc.*, 2010 Tex. App. LEXIS 5052, at *22 (Tex. App.—Austin June 30, 2010), the court held as a matter of law that a manufacturer's representation that he saw no problems that would prevent issuance of a warranty (*i.e.*, "After walking the job site again on January 15, 2002, and reviewing the necessary details for this job, *I see no issues that would affect the warranty that Tremco will issue upon completion of the installation.*") were merely expression of opinion or an

¹⁰*Van Den Bold Depo.* at 11:1-7.

¹¹*Van Den Bold Depo.* at 15:13-24.

expectation. It was not sufficiently specific to support a claim for promissory estoppel. *Id.* In *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 142 (Tex. App.—Houston [14th Dist.] 1999), the court held as a matter of law that a promise to provide "whatever equipment" the plaintiff needed to start a recycling plant was not sufficiently definite as there was no promise to provide any specific items of equipment. Here, Sequitur reliance on Maalt's purported promise to help with contact and its belief or expectation that Sequitur could acquire rail service is not sufficiently definite to support its claim for promissory estoppel as a matter of law.

C. The Promissory Estoppel Claim Fails as There Was No Reasonable Reliance.

Sequitur's promissory estoppel claim also fails as a matter of law because there is no evidence that Sequitur's reliance on the purported promise(s) was reasonable. Specifically, at the time Sequitur signed the Letter of Intent, June 1, 2018, it agreed that (i) there were no oral agreements between the parties and (ii) Sequitur needed to perform and would perform due diligence "to analyze the feasibility of the contemplated Transaction." Sequitur admits that it is a sophisticated contracting party capable of conducting its own due diligence:

Q. And your company has in-house lawyers, right?

A. That's correct.

Q. And what's your – what's your education?

A. I've got a finance degree and an MBA.

Q. Okay. So you have people who are highly educated people, right?

A. Yes.

Q. You are used to doing due diligence?

A. Yes.

Q. You are used to making your decisions based on your own due diligence and research, aren't you?

A. We are.

Q. Earlier in your deposition I asked you about roughly 10 to 15 railcar manufacturers and leasing companies and you said you didn't call [*sic*] a single one of them; isn't that true?

A. That is true.

Q. But you certainly could have couldn't you?

A. I could have called them, yes.¹²

Sequitur acknowledged a need to conduct due diligence to analyze the transaction's feasibility and had two months to conduct its research. "A party to an arm's length transaction must exercise reasonable diligence in protecting his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party." *Comiskey*, 373 S.W3d at 635; *Ortiz v. Collins*, 203 S.W.3d 414, 422 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding that promissory estoppel claim failed as a matter of law where sophisticated party did not act with reasonable diligence in protecting its interests in an arm's length transaction). Given that Sequitur had two months to perform its own research, it could not have reasonably relied on Maalt's promise to assist with industry contacts and its generic projections about the availability of rail cars and rail service in the future.

In *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138 (Tex.App.-Houston [14th Dist.] 1999, pet. denied), the court reversed a jury verdict awarding damages for promissory estoppel because there

¹² *Merrill Depo.* at 248:17 – 249:22.

was no reasonable or justifiable reliance on the claimed promises. In that case, the plaintiff (Holt) sued claiming that the defendant did not honor its promises to provide his new business the equipment necessary to start a recycling plant. The defendant's president testified that he offered the plaintiff any surplus equipment his company might have, but no specific items of equipment were ever discussed. The defendant offered to supply a conveyor and baler, but the plaintiff contended that that was not sufficient to start the business. The plaintiff conceded he never provided the defendant with a list of needed equipment, but simply presumed the defendant would know what was needed. The appellate court found that a promise to supply surplus equipment was too vague to support detrimental reliance stating that, "We conclude that, in the absence of a definite promise of specific items of equipment, Holt's reliance was not reasonable or justified as a matter of law." *Id.* at 142.

In this case, the purported promises that Maalt would help it get rail cars and rail service are not specific or definite. They cannot be relied upon as a promise, and as a matter of law Sequitur's alleged reliance was neither reasonable or justified.

II. Conversion Claim.

To establish a claim for conversion, Sequitur must prove that it suffered injury from the alleged conversion. *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997). Here, Sequitur's conversion claim grows out of an alleged unlawful holding of its transload equipment for a period of one month. Sequitur's president testified that Sequitur did not find any damage to the property after Maalt returned it.¹³ He further testified that Sequitur did not lose any

¹³ *Van Den Bold Depo.* at 64:24 – 66:16.

business opportunities because the property was held by Maalt for the one-month period.¹⁴ Sequitur's vice president testified that he was aware of anyone interested in purchasing the equipment and did not have any other place they could use it before they picked it up from Maalt.¹⁵ In addition, Sequitur has not disclosed any conversion damages since it last responded to Maalt's request for disclosures on June 6, 2019.

Sequitur's conversion claim fails because there is no evidence that it suffered any material damage, and the testimony of Sequitur's officers disproves the essential element of damages as a matter of law.¹⁶

PRAYER

WHEREFORE, Plaintiff, Maalt, L.P., and Third Party Defendant, Vista Proppants and Logistics, Inc., pray that this motion for partial summary judgment be granted and that the Court award all other relief to which they are entitled.

¹⁴ *Id.*

¹⁵ *Merrill Depo.* at 240:13 – 241:20.

¹⁶ An adequate time for discovery has passed especially as it pertains to Sequitur's knowledge of and ability to determine whether it sustained any damage or not. Maalt's first written discovery was served on Sequitur on March 27, 2019; thus, discovery has been ongoing for almost a year.

Respectfully submitted,

By: /s/ Paul O. Wickes

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**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the February 13, 2020, upon:

Matthew A. Kornhauser
Dylan B. Russell
HOOVER SLOVACEK LLP
Galleria Tower II
5051 Westheimer, Ste. 1200
Houston, Texas 77056

Paul B. Stipanovic
GOSSETT HARRISON MILLICAN &
STIPANOVIC, P.C.
2 S. Koenigheim Steet
San Angelo, Texas 76902

/s/ Paul O. Wickes

EXHIBIT 1

CAUSE NO. 19-003

MAALT, LP, § IN THE DISTRICT COURT OF
§
Plaintiff, §
§
VS. § IRION COUNTY, TEXAS
§
SEQUITUR PERMIAN, LLC, §
§
Defendant. § 51st JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
BRADEN MERRILL
November 19, 2019
Volume 1

ORAL AND VIDEOTAPED DEPOSITION OF BRADEN MERRILL,
produced as a witness at the instance of the Plaintiff
and duly sworn, was taken in the above-styled and
numbered cause on the 19th day of November, 2019, from
9:32 a.m. to 5:25 p.m., before Patricia Palmer, CSR, in
and for the State of Texas, reported by machine
shorthand, at the offices of Mr. Matthew A. Kornhauser,
Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
Houston, Texas 77056, pursuant to the Texas Rules of
Civil Procedure and the provisions stated on the record
herein.

Page 1

Veritext Legal Solutions
800-336-4000

Maatl MSJ
Exhibit

1

exhibitstick.com

A P P E A R A N C E S

FOR THE PLAINTIFF:

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FOR DEFENDANT: Sequitur Permian, LLC

Mr. Matthew A. Kornhauser
Mr. Christopher J. Kronzer
HOOVER SLOVACEK, LLP
5051 Westheimer Road, Suite 1200
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713.977.8686
Kornhauser@hooverslovacek.com
Kronzer@hooverslovacek.com

ALSO PRESENT:

Mr. Daniel Alpizar, Videographer
Mr. Christopher Favors, Corporate Representative of
Sequitur Permian, LLC

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INDEX	
	PAGE
Appearances.....	2
Stipulations.....	4
BRADEN MERRILL	
Examination by Mr. Lanter.....	7
Examination by Mr. Kornhauser.....	244
Examination by Mr. Lanter.....	248
Correction Sheet.....	253
Signature Page.....	254
Reporter's Certificate.....	255

1 THE VIDEOGRAPHER: Today's date is
2 November 19th, 2019. This is the video deposition of
3 Braden Merrill. The time is 9:32. We are on the
4 record.

5 The court reporter may now swear in the
6 witness.

7 THE REPORTER: Are there any stipulations?

8 MR. KORNHAUSER: We are -- we are
9 proceeding by agreement and by notice.

10 MR. LANTER: And by notice, yeah.

11 MR. KORNHAUSER: Yeah. We would like to
12 have the opportunity to read and sign, please.

13 MR. LANTER: Sure.

14 BRADEN MERRILL,
15 having been first duly sworn, testified as follows:

16 EXAMINATION

17 BY MR. LANTER:

18 Q. Good morning.

19 A. Good morning.

20 Q. Would you state your name, please.

21 A. It's Braden Merrill.

22 Q. Okay. And what is your position with Sequitur
23 Permian?

24 A. I am vice president and senior -- I am vice
25 president and chief financial officer.

Page 7

1 Q. All right. When all of this first started in
2 early to mid 2018, you were the one who reached out to
3 Blake DeNoyer, weren't you?

4 A. Yes, I was.

5 Q. Okay. And you made the initial contact with
6 his company or with Maalt Service entities about running
7 transloading services, right?

8 A. I did.

9 Q. Okay. And after your initial conversation with
10 Blake DeNoyer -- or was it an e-mail or conversation?

11 A. I don't remember.

12 Q. Okay. After that first communication, did you
13 have anymore discussions or communications with -- with
14 Mr. DeNoyer?

15 A. No, I -- after -- after talking with him about
16 using the facility we -- he set me in touch with Jon
17 fairly quickly and then Chris fairly quickly after that.

18 Q. Okay. Now, I want to ask you this up front and
19 we will talk about it some more potentially. But during
20 your conversations with Jon Ince and Chris Favors?

21 A. Uh-huh (positive response), yes.

22 Q. Did they ever make any promises to you that
23 they did not keep?

24 A. I am not sure.

25 Q. You are not aware of any as you sit here today?

Page 17

1 A. I'm -- I'm -- I'm trying to think of any. I
2 can't think of any off the top of my head right now.

3 Q. Okay. You can't think of any examples of
4 anything they promised to do and did not do, correct?

5 A. Individually?

6 Q. Individually or together?

7 A. I can't remember any off the top of my head
8 right now.

9 Q. Okay. And if there was such a promise made,
10 you would know about that, wouldn't you?

11 A. Most likely unless they made it to someone
12 else.

13 Q. Okay. If some -- if something was like was
14 said to somebody else your other people would have told
15 you wouldn't they?

16 A. Most likely, yes.

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MR. LANTER: Here is Exhibit 36.

(Exhibit 36 marked.)

THE WITNESS: All right. Thank you.

Q. It looks like this is your first introduction to Jonas Struthers; does that look right?

A. It looks like it.

Q. Okay. And if you look at Page 2.

A. Okay.

Q. On May 9th we have what appears to be the introductory e-mail by Jon Ince where he is telling you about Jonas Struthers, right?

A. That's correct.

MR. LANTER: Excuse me.

Q. Now, on the second paragraph he says, "Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call." He said, "He has been a great partner for me in the past with our sand cars."

MR. LANTER: I'm sorry.

Q. "And I am sure he will be able to get you the cars that you need for your fleet. I'm sure he can get you cars that you need at a really good rate. He has done amazing work for me in the past."

Did you understand that Mr. Ince was just simply telling you about his experiences with Jonas

1 Struthers?

2 MR. KORNHAUSER: Objection form.

3 A. I understood that he said that Jonas could get
4 us cars if we needed it.

5 Q. Uh-huh (positive response). And there is
6 nothing in this e-mail that promises you that Jon would
7 be able to get Jonas to do that, is there?

8 A. It says, "I am sure he will be able to get you
9 cars that you need for your fleet."

10 Q. But it doesn't say that he promises that he
11 will be able to do so, does it?

12 MR. KORNHAUSER: Objection form.

13 A. He never articulates the word promise.

14 Q. Uh-huh (positive response). And then once you
15 had the introduction then you had your direct
16 communications with Mr. Struthers, correct?

17 A. Yes.
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Q. There was a complaint made in this lawsuit that Maalt did not allow you to pick up the transloaders when you wanted to. During the time that Maalt had possession of the transloaders after you attempted to terminate the contract, did you have any other use for those machines?

A. At that time?

Q. Yes.

A. No.

Q. Okay. Since then, what have you done with them?

A. We have been looking for somebody to buy them.

Q. All right. So they are just sitting in

1 storage?

2 A. I don't know where they are.

3 Q. When you received them back from Maalt, was
4 there any damage to them?

5 A. I am not aware.

6 Q. Okay. Do you know who would have that
7 information?

8 A. Mike Van den Bold would know. If he wouldn't
9 know then he would know who would know.

10 Q. Okay. Your company has not suffered any kind
11 of loss as a result of the delay in getting the
12 transloading machines back, has it?

13 A. The only loss that I would be aware of is any
14 loss that we had by not being able to sell at that --
15 during that time frame.

16 Q. Did you have any buyers during that time frame?

17 A. I am not aware.

18 Q. Okay. You didn't have any place else you could
19 use them, did you?

20 A. No.

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7 Q. Did Mr. Ince or did Mr. Favors promise or
8 represent to Sequitur that trains and railcars would be
9 available?

10 MR. LANTER: Objection, form.

11 Q. To your knowledge?

12 A. Yes.

13 Q. Okay. What do you recall specifically, as best
14 you can, being told by Mr. Favors and Mr. Ince in that
15 regards?

16 A. I remember with railcars -- this is just in
17 regards to railcars?

18 Q. Yes, sir.

19 A. That he represented that he could help us find
20 railcars or put us in contact with people who could find
21 railcars.

22 Q. And did he tell you that trains and railcars
23 were available?

24 MR. LANTER: Objection, form.

25 A. He said it would be a difficult thing to do,

Page 246

1 but that we could -- but that we could do it.

2 Q. Okay. Did he tell you from whom that trains or
3 railcars would be available?

4 A. I don't know that he specifically specified
5 whom, but he did tell us in an e-mail, I believe, that
6 -- that Jonas Struthers would be able to help us.

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Page 247

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BY MR. LANTER:

Q. Did your company purchase the transloaders before you signed the TSA?

A. We signed purchase orders for the, I believe, but I can't verify that.

Q. Before the TSA?

A. Yes.

Q. And your company has in-house lawyers, right?

A. That's correct.

Q. And what's your -- what's your education?

A. I've got a finance degree and an MBA.

Q. Okay. So you have people who are highly educated people, right?

A. Yes.

Q. You are used to doing due diligence?

A. Yes.

Page 248

1 Q. You are used to making your decisions based on
2 your own due diligence and research, aren't you?

3 A. We are.

4 Q. Okay. And you had every capability of
5 determining whether or not there were railcars available
6 on your own, didn't you?

7 MR. KORNHAUSER: Objection, form.

8 A. We would have had to relied on somebody at some
9 point.

10 MR. LANTER: Objection nonresponsive.

11 Q. You had the capability of making phone calls
12 and asking people if railcars were available, didn't
13 you?

14 MR. KORNHAUSER: Objection, form.

15 A. Asking people on the -- yes.

16 Q. Yes. Earlier in your deposition I asked you
17 about roughly about 10 to 15 railcar manufacturers and
18 leasing companies and you said you didn't recall a
19 single one of them; that's true isn't it?

20 A. That is true.

21 Q. But you certainly could have couldn't you?

22 A. I could have called them, yes.

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Q. Okay. And do you have the letter of intent in that stack?

A. I sure do. I'm sorry, let me --

MR. LANTER: Pull it out and let me see that.

THE WITNESS: Oh, wait no letter of intent.

MR. KORNHAUSER: Did you remark it, I've got it.

MR. LANTER: Yeah I believe it is. And I can find it in my --

THE WITNESS: You gave me too many papers.

MR. LANTER: -- briefcase, but it might take longer.

THE WITNESS: Do you think what exhibit it is by chance?

MR. LANTER: Yeah not offhand I don't. There it is. Exhibit 6.

THE WITNESS: Okay. Well, you gave it to me later though, right?

MR. LANTER: Here, let's do this, why don't we remark it. I will just pull it out of this. Let's go back. We will talk about it as being Exhibit 6 today.

Page 250

1 THE WITNESS: Okay. Perfect. Thank you.

2 Q. And your letter of intent, I mean, let's kind
3 of shuffle that, it is dated June 1?

4 A. Yes.

5 Q. 2018, right?

6 A. That's -- I am -- I am not sure, yes.

7 Q. And when you signed this letter of intent, you
8 agreed with Paragraph 8, did you not?

9 A. We -- we signed it.

10 Q. In fact, you wrote it, didn't you? Your --
11 your company wrote it, didn't it?

12 A. I don't remember.

13 Q. Okay. It's not on Maalt or Vista letterhead is
14 it?

15 A. I -- I can I see the --

16 MR. LANTER: Sure.

17 A. No, it is not.

18 Q. Okay. And you signed it first asking Maalt or
19 Vista to execute it as well, didn't you?

20 A. I did.

21 Q. Once you had the introduction made to Jupiter,
22 you guys took it from there and had all of your
23 negotiations just between Sequitur and Jupiter, correct?

24 A. On terms of commercial terms, yes.

25 Q. And you conducted your own due diligence of --

Page 251

1 of Jupiter didn't you?

2 A. We did some, yes.

3 Q. But then less despite your own due diligence
4 and the research you did in that company you decided to
5 make the business decision to move forward with whoever
6 dealings you had with it, right?

7 A. Say that again, I am sorry.

8 Q. Yes. Despite your own due diligence and the
9 research you did into Jupiter, your company made the
10 decision to move forward and do business with it?

11 A. We -- we did make the decision to move forward
12 with the agreement.

13 MR. LANTER: Okay. Pass the witness.

14 MR. KORNHAUSER: We will pass the witness.

15 THE VIDEOGRAPHER: The time is 5:25. We
16 are off the record.

17 [Proceedings concluded at 5:25 p.m.]

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Page 252

June 1, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: **Letter of Intent**

Ladies and Gentlemen:



Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista") intend to enter into a transaction pursuant to a service agreement covering Vista's (or an affiliate's) provision of the Service (as defined in Attachment "A" hereto) to Sequitur. Pending the preparation and execution of a Definitive Agreement (as hereinafter defined), this letter will confirm the intent of such parties ("Parties") to enter into the contemplated transaction ("Transaction") to be governed by the Definitive Agreement in accordance with the terms and conditions set forth in this letter. The Parties agree as follows:

1. **Term Sheet.** The Parties intend to negotiate in good faith a mutually acceptable agreement governing the Service. To the extent there is any conflict between the Term Sheet and this letter, this letter shall control.
2. **Definitive Agreement.** The Parties shall endeavor to incorporate the terms and conditions expressed herein in a mutually acceptable definitive agreement (the "Definitive Agreement," whether one or more) no later than June 26, 2018 ("LOI Term"), unless extended by the Parties in writing, which the Parties would expect to do if the negotiations toward a Definitive Agreement and other relevant agreements and activities have sufficiently progressed. In the event the Parties do not agree upon and execute the Definitive Agreement by the end of the LOI Term, this letter (and the understandings set forth herein) shall be deemed terminated, and neither Party shall have any further obligation to the other Party, provided, however, that the provisions of Section 3 shall survive the termination of this letter for a period of one (1) year.
3. **Confidentiality.** The existence of this letter (and its contents) are intended to be confidential and are not to be discussed with or disclosed to any third party, except (i) with the express prior written consent of the other Party hereto, (ii) as may be required or appropriate in response to any summons, subpoena or discovery order or to comply with any applicable law, order, regulation or ruling or (iii) as the Parties or their representatives (who shall also be bound by the confidentiality hereof) reasonably deem appropriate in order to conduct due diligence and other investigations relating to the contemplated Transaction.
4. **Exclusive Dealing Period.** The Parties agree that from the date of this letter through the end of the LOI Term, neither Party nor any of its controlled affiliates shall, directly or indirectly, enter into any agreements with any other person or entity regarding any transaction similar to the Service or the Transaction or any other transaction related, in whole or in part, to the Service, except as

Vista Proppants and Logistics, LLC
 June 1, 2018
 Page 2

approved in writing by the other Party. Additionally, neither Vista nor any of its controlled affiliates shall, directly or indirectly, enter into any negotiations, discussions or agreements with BP, Valero, Sunoco, NuStar or Shell, or any of their respective affiliates, for provision of the Service to them, or any other transaction similar to the Service, within 75 miles of Vista's rail facility in Barnhart, Texas, except as approved in writing by the Sequitur. Nothing in this section shall prohibit Vista from selling any service or product more than 75 miles from its rail facility in Barnhart, Texas.

5. Expenses. Each Party shall bear its own costs associated with negotiating and performing under this letter.
6. Due Diligence. Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.
7. Approval. No Party shall be bound by any Definitive Agreement relating to the Transaction until (a) each Party has completed its due diligence to its satisfaction, (b) such Party's senior management, or other governing body or authorized person, shall have approved the Definitive Agreement, (c) such Party shall have executed the Definitive Agreement, and (d) all conditions precedent to the effectiveness of any such Definitive Agreement shall have been satisfied, including obtaining any and all requisite government or third party approvals, licenses and permits (which are satisfactory in form and substance to each Party in its sole discretion), if such approvals, licenses and permits are required.
8. No Oral Agreements. Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.
9. Governing Law. THIS LETTER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES.
10. Assignment. Neither Party shall assign its rights or obligations under this letter without the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed. Any attempted assignment in contravention of this paragraph shall be null and void.
11. Binding Status. Except as to Sections 3 through 10 (which are intended to be binding upon execution and delivery of this letter by both Parties), the Parties understand and agree that this letter (a) is not binding and sets forth the Parties' current understanding of agreements that may be set out in a binding fashion in the Definitive Agreement to be executed at a later date and (b) may not be relied upon by either Party as the basis for a contract by estoppel or otherwise, but rather evidences a non-binding expression of good faith understanding to endeavor, subject to completion of due diligence to the Parties' satisfaction, to negotiate a mutually agreeable Definitive Agreement.

Vista Proppants and Logistics, LLC
June 1, 2018
Page 3

If the terms and conditions of this letter are in accord with your understandings, please sign, and return the enclosed counterpart of this letter to the undersigned, by no later than close of business on June 4, 2018, after which date, if not signed and returned, this letter shall be null and void.

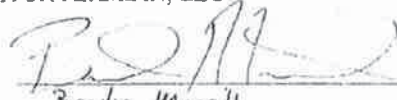
Very truly yours,

SEQUITUR PERMIAN, LLC

By:

Name:

Title:


Braden Merrill
VP & CEO

AGREED

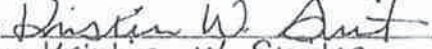
this 5 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By:

Name:

Title:


Kristin W. Smith
CEO

ATTACHMENT "A"
to
Letter of Intent
(Term Sheet)

Party A: Vista Proppants and Logistics, LLC (and any designated affiliates)

Party B: Sequitur Permian, LLC (and any designated affiliates)

Facility: Barnhart Railyard

Location: Barnhart Loading Facility
44485 W. Hwy 67
Barnhart, TX 76930

Term: September 2018 through December 2019.

Renewal: Subject to the Survival clause below, the Term may be renewed and extended by Party B for successive 12-month periods by written notice to Party A at least 60 days prior to the end of the then Term, as it may have been previously renewed and extended.

Products: Crude oil or other hydrocarbons products owned or controlled by Party B or which Party B is obligated to market or deliver.

Commitment: For the Term, as it may be extended, Party A will limit use of its Barnhart Railyard property and Facility to the sole purpose of loading Party B's Products. Party A will load Products provided by Party B at the Facility, whether from pipeline or trucks.

Service: Party A's loading of Party B's Products at Location/Facility and related services, including maintenance.

Rate: \$1.50/barrel of Products loaded into railcars at the Location/Facility.

Volume: Party B agrees to provide Products sufficient to fill an average of no fewer than sixteen railcars per day (11,424 barrels) during each calendar month. If Party B does not meet its minimum volume obligation for a calendar month, Party A will be compensated in such month, as that month's total settlement, in an amount equal to at least the Rate times 11,424 barrels, or \$17,136, times the number of days in that month so that Party A will be paid as if the minimum volume had been provided by Party B. Should Party B provide more Products than its minimum volume obligation, Party A shall be compensated at the Rate times the excess volume.

Capital Investment: In no event shall Party A be obligated to provide any capital investment necessary to perform Service. To the extent more capital investment is needed to satisfy incremental Volume, the financial burden required to equip the facility shall be borne by Party B.

Phase I: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from trucks such that loading will commence September 1, 2018.

Phase II: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from pipeline.

- Assignability: The Definitive Agreement would be assignable on sale or disposition, and as otherwise negotiated. Any sale of the Facility property would be subject to the Definitive Agreement.
- Survival: If the Term is not extended, then when Party A is not utilizing the Barnhart Railyard for the general course of its sand business and desires to use for loading of oil, the terms of the Definitive Agreement may be reinstated by Party B at its option.
- Other Terms: The Definitive Agreement will contain customary provisions for transactions similar to the Service or the Transaction, such as mutual representations, warranties, and covenants, conditions precedent, termination, remedies, force majeure, indemnification, and risk of loss.

THIS SUMMARY OF TERMS AND CONDITIONS IS ATTACHMENT "A" TO A LETTER OF INTENT DATED JUNE 1, 2018, AND IS NOT TO BE CONSIDERED SEPARATELY FROM THE LETTER OF INTENT. EXCEPT AS MAY BE SET OUT IN THE LETTER OF INTENT, THE LETTER OF INTENT AND THIS ATTACHMENT "A" ARE NOT INTENDED TO BE COMPLETE AND ALL-INCLUSIVE OF THE TERMS OF THE PROPOSED TRANSACTION, NOR DOES THE LETTER OF INTENT OR THIS ATTACHMENT "A" CREATE A BINDING AND ENFORCEABLE CONTRACT BETWEEN OR COMMITMENT OR OFFER TO ANY PARTY OR PARTIES, EXCEPT TO THE EXTENT PROVIDED IN SECTION 11 OF THE LETTER OF INTENT.

June 22, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn: Jon Ince

Re: Letter of Intent Amendment

Ladies and Gentlemen:

Reference is made to that certain letter of intent ("LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "June 26, 2018" to "July 6, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

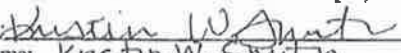
SEQUITUR PERMIAN, LLC

By: 
Braden Merrill
Vice President and Chief Financial Officer

AGREED

this 22 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin W. Smith
Title: CFO

Sequitur_001761

July 9, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment No. 2

Ladies and Gentlemen:

Reference is made to that certain letter of intent (as previously amended, "LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "July 6, 2018" to "July 23, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

SEQUITUR PERMIAN, LLC

By: 

Name: Braden Merrill

Title: VP & CFO

BSK

AGREED

this 12 day of July 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 

Name: Kristin Smith

Title: CFO

Sequitur_001762

EXHIBIT 2

1 CAUSE NO. 19-003

2 MAALT, LP, § IN THE DISTRICT COURT OF
3 §
4 Plaintiff, §
5 VS. § IRION COUNTY, TEXAS
6 §
7 SEQUITUR PERMIAN, LLC, §
8 §
9 Defendant. § 51st JUDICIAL DISTRICT

10 ORAL AND VIDEOTAPED DEPOSITION OF

11 TONY WROTEN

12 November 20, 2019

13 Volume 1

14
15 ORAL AND VIDEOTAPED DEPOSITION OF TONY WROTEN,
16 produced as a witness at the instance of the Plaintiff
17 and duly sworn, was taken in the above-styled and
18 numbered cause on the 20th day of November, 2019, from
19 9:35 a.m. to 2:29 p.m., before Patricia Palmer, CSR, in
20 and for the State of Texas, reported by machine
21 shorthand, at the offices of Mr. Matthew A. Kornhauser,
22 Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
23 Houston, Texas 77056, pursuant to the Texas Rules of
24 Civil Procedure and the provisions stated on the record
25 herein.

Page 1

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Maatl MSJ
Exhibit

2

exhibitstickers.com

1 THE VIDEOGRAPHER: Today's date is
2 November 20th, 2019. This is the video deposition of
3 Tony Wroten. The time is 9:35. We are on the record.
4 The court reporter may now swear in the witness.

5 THE REPORTER: Are there any stipulations?

6 MR. KORNHAUSER: By agreement, by notice
7 and we would like to read and sign.

8 MR. WICKES: Agreed.

9 TONY WROTEN,
10 having been first duly sworn, testified as follows:

11 EXAMINATION

12 BY MR. WICKES:

13 Q. Mr. Wroten, could you state your name for the
14 record?

15 A. Tony Wroten.
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Q. Okay. All right. Most of the questions today, pretty much all of them are going to center around the Barnhart transload facility, and the terminal services agreement, and the deal basically to move crude by rail out of Barnhart; you understand that?

A. Yes, sir.

Q. In that process from Sequitur's standpoint,

Page 7

1 what role did you play?

2 A. Primarily I was just there to support Braden
3 and Sequitur in whatever capacity that I could.

4 Q. Okay. And what is your title?

5 A. Senior finance associate.

6 Q. And you report to Braden?

7 A. Yes, sir.

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MR. WICKES: Okay. If you could, go to Exhibit 2, and this is dated May 9, 2018. It is from Jon Ince. It says to Braden and Tony.

Q. I assume that Tony is you, correct?

A. Yes.

Q. Okay. And it says, "It was great talking to you and I look forward to our talks progressing on

Page 17

1 shipping crude out of the basin. Feel reach out to me
2 if you have any" -- "if you need any help on fleet
3 sizing and routing and I will be happy to see you
4 through that process."

5 Did I read that correct?

6 A. Yes, sir.

7 Q. And would this have been, I guess, shortly
8 after that initial phone call?

9 A. Yes, sir.

10 Q. Okay. And when he says he was going to help
11 you with fleet sizing and routing, what did you
12 understand that to mean?

13 A. I think it was more just understanding the
14 dynamics, and the logistics, and the process of what
15 needed to be done from a logistic side.

16 Q. Okay. And then in the next paragraph of that
17 e-mail it says, "Let me introduce you to Jonas
18 Struthers." Do you see that?

19 A. Yes.

20 Q. And did he make the introduction to you and
21 Braden to Jonas Struthers?

22 A. Yes, he did.

23 Q. Okay. And then it looks like he talks about
24 that he's -- "Mr. Jonas has been a great partner and
25 that he can likely help you out with your fleet;" is

Page 18

1 that right?

2 A. Yeah. Yeah.

3 Q. Okay. And he says that essentially that what
4 his experience has been with -- with Jonas in the past?

5 A. Yeah he mentions that, yes.

6 Q. Okay. Was that helpful to you?

7 A. What, the introduction?

8 Q. Just the introduction, providing that
9 information?

10 A. Yes. I mean, at the time we were considering,
11 you know, getting a fleet of rail cars ourselves and at
12 least exploring the opportunity of what it -- what it
13 would cost and what it would entail.

14 Q. Okay. So making an introduction at least gave
15 you one vehicle to go of many, I suppose?

16 A. Repeat that. I kind of --

17 Q. Sure. I used the word vehicle, which probably
18 was a bad word. So introducing you to Jonas gave you
19 one avenue to pursue, as far as freight cars go, of
20 others that may exist in the market?

21 A. Yes. He, you know, he was -- it was a -- you
22 know, there was a clear learning curve and this was
23 another way of getting more information about the
24 opportunity.

25 Q. Okay. Did Jon or anyone else with Vista or

Page 19

1 Maalt ever promise to acquire rail cars for you?

2 A. To acquire them for us?

3 Q. Right. To actually go out and get them and say
4 here they are, this is the price?

5 MR. KORNHAUSER: Objection, form.

6 A. I -- I don't recall that ever being a promise.

7 Q. Okay. Did they ever promise that they could go
8 and get you a specific rates or any type of specific
9 routes on the -- the railroads?

10 A. They had made, you know, representations that
11 they could assist in that regard.

12 Q. Okay. And I suspect they probably also gave
13 you their assessment of what was available in the
14 market?

15 A. Absolutely, yeah.

16 Q. Okay. But they never -- I guess they never
17 took on the role as agent to Sequitur to we are going to
18 go and get this for you?

19 MR. KORNHAUSER: Objection.

20 Q. Is that fair?

21 MR. KORNHAUSER: Objection, form.

22 A. You mean, like, contractually?

23 Q. Yes.

24 A. I -- I am not aware of a contract stating that

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Q. Okay.

A. -- they were going to be our agent.

Jonas Struthers
647.989.3552
jonas@fenixfsl.com

On May 9, 2018, at 7:22 PM, Jon Ince <jince@vprop.com> wrote:

Braden/Tony,

It was great talking with you and I look forward to our talks progressing on shipping crude out of basin. Feel free to reach out to me if you need any help on fleet sizing or routing and I will do what I can step you through that process. VProp works on the belief that we succeed when our partners succeed. I will get you the info I promised to you in the coming days.

Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call. He has been a great partner for me in the past with our sand cars and I'm sure he will be able to get you cars that you need for your fleet. I'm sure he can get you cars that you need at a really good rate, he's done amazing work for me in the past. Jonas will be more in the know on regulations and exact timing on when 1232s are phased out for the 117s.

Regards,
Jon

On May 9, 2018, at 4:20 PM, Braden Merrill <bmerrill@sequiturnenergy.com> wrote:

Tony Wroten <twroten@sequiturnenergy.com>

Best,
Braden Merrill

O: 713-395-3008
C: 434-466-4294
bmerrill@sequiturnenergy.com

Two Briarlake Plaza, 2050 West Sam Houston Pkwy South
Suite 1850, Houston, TX 77042



Maalt_000299

EXHIBIT 3

CAUSE NO. 19-003

MAALT, LP, § IN THE DISTRICT COURT OF
Plaintiff, §
VS. § IRION COUNTY, TEXAS
SEQUITUR PERMIAN, LLC, §
Defendant. § 51st JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

MICHAEL VAN DEN BOLD

November 21, 2019

Volume 1

ORAL AND VIDEOTAPED DEPOSITION OF MICHAEL VAN DEN BOLD, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 21st day of November, 2019, from 9:31 a.m. to 11:29 a.m., before Patricia Palmer, CSR, in and for the State of Texas, reported by machine shorthand, at the offices of Mr. Matthew A. Kornhauser, Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200, Houston, Texas Houston, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record herein.

Page 1

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Exhibit

3

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1 THE VIDEOGRAPHER: Today's date is
2 November 21st, 2019. This is the video deposition of
3 Michael Van Den Bold. The time is 9:32. We are on the
4 record. The court reporter may now swear in the
5 witness.

6 THE REPORTER: Are there any stipulations?

7 MR. KORNHAUSER: By agreement and we would
8 like to read and sign, please.

9 MR. WICKES: Agreed.

10 MICHAEL VAN DEN BOLD,
11 having been first duly sworn, testified as follows:

12 EXAMINATION

13 BY MR. WICKES:

14 Q. All right sir, could you state your name for
15 the record?

16 A. Michael Van Den Bold.

17 Q. Okay, Mr. Van Den Bold. My name is Paul Wickes
18 and I represent Maalt, LP in this case, you understand
19 that, correct?

20 A. Correct.

21 Q. And you understand you are here for a
22 deposition related to a dispute about a terminal service
23 agreement in Barnhart, Texas?

24 A. I do.

25 Q. All right. If you could, go ahead and just

Page 4

1 state your -- your position with Sequitur and what you
2 do.

3 A. I am the chief operations officer and
4 president.

5 Q. Okay. And is there anyone that you report to?

6 A. I report to the CEO Scott Josey.

7 Q. Scott Josey?

8 A. Correct.

9 Q. Okay. And how long have you been with
10 Sequitur?

11 A. We -- I am a founding partner and we founded it
12 in 2011.

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Q. Okay. From a factual standpoint, what do you contend that Vista or Maalt did that should cause it to have to pay Sequitur damages for electing to go forward with the contract?

A. Well, long before we even signed the TSA in our discussions with Maalt, you know, they made representations that they were rail experts, their employees had worked for the railroads, that they could help get a deal done, that they had relationships, they had the expertise, that they could help, you know, help coordinate and collaborate to get these contracts in place, to help get the deal done, and they weren't able to do things that they promised.

Q. Okay. I just want to get -- first off, from a time standpoint that all of the representations or statements that you are referencing were all -- they all preceded the signing of the terminal services agreement, correct?

A. Right, yes.

Q. Okay. All right.

A. And -- and even during the negotiations and even afterwards.

1 Q. Okay. Did they promise to do anything other
2 than help?

3 A. The -- the -- I mean, the promises they made is
4 that they -- they were experts and knew the business,
5 the rail by -- sand by rail, and had the relationships.
6 And -- yeah they would help get us -- get this venture
7 off the ground.

8 Q. Okay. And I guess the distinction I am trying
9 to make is sometimes you hire a third-party and you
10 enter into a contractual relationship, for like a
11 third-merit logistics provider, and that third-party
12 logistic provider contracts to provide you certain
13 services regarding -- in this case, rail cars, rail
14 transportation, that type of thing. Did Sequitur enter
15 into any type of third-party logistics contractual
16 arrangement with Maalt or Vista?

17 A. No, these were just verbal representations that
18 they could do that.

19 Q. Okay. Was there ever any contractual
20 arrangement made, verbal or oral even, that in return
21 for X Vista and Maalt will get you rail cars, will get
22 you rail transportation?

23 A. No it was always a collaborative effort that we
24 would all work together to try to make this a successful
25 JV.

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Q. Okay. And -- and I want to go back and make
sure I've got everything of the -- the general
representations that are the basis for the counterclaim.
One was that they are rail experts and that some of

Page 14

1 their employees are former rail and worked for
2 railroads?

3 A. Correct.

4 Q. Okay. The other was that they would assist in
5 getting a deal done?

6 A. Correct.

7 Q. Okay. And getting a deal done, what all does
8 that include?

9 A. Well, the getting the deal done, Sequitur
10 needed an arrangement where somebody that had rail cars,
11 that had rates and volumes and contracts with the
12 railroads to get from Barnhart to the Gulf Coast.

13 Q. Okay. And during the -- all the way up until
14 the notice of force majeure, did personnel with Maalt
15 and Vista provide assistance when they could on leads
16 for rail cars, rail transportation, contacts within the
17 railroad industry, that type of thing?

18 A. They made phone calls and introductions to
19 assist.

20 Q. Okay. Is there anything during the period from
21 after the terminal services agreement to the notice of
22 force majeure that Sequitur specifically asked Maalt or
23 Vista to do that it did not do?

24 A. Nothing comes to mind at this point.

25 Q. Okay and I just want to -- I think for

Page 15

1 replowing ground that I apologize. As I try to do this
2 as little as possible, just so we're on the same page.
3 You are not contending that Maalt or Vista promised to
4 get rail cars, but they offered to help Sequitur or its
5 agents in getting rail cars?

6 A. Yeah. My view is that this was a collaborative
7 effort --

8 Q. Okay.

9 A. -- between Jupiter, Maalt and Sequitur to make
10 this a profitable venture for everybody.
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Q. Okay. There was a claim that dealt with the
holding over of property of Sequitur's afterwards, are

Page 64

1 you familiar with that?

2 A. I am familiar with that.

3 Q. Okay. What property, as best as you can
4 describe, was held over?

5 A. Maalt moved our transloaders without our
6 permission off the location and didn't advise us of
7 that.

8 Q. Okay. And then ultimately Sequitur was able to
9 come and pick up that equipment?

10 A. That is correct, we were.

11 Q. All right. Do you know how long of a period of
12 time after it was moved before Sequitur was able to pick
13 it up?

14 A. I recall it being more than a month.

15 Q. Okay. Are you aware of any damage to the
16 equipment when Sequitur picked it up?

17 A. I am not aware of any damage.

18 Q. Okay. Are you aware of any lost business
19 opportunities for that equipment during that period of
20 time?

21 A. No.

22 Q. What damages, if any, are you aware of that
23 Sequitur incurred because of the delay in obtaining that
24 equipment?

25 A. Well, it is just the -- to me it was the -- it

1 felt like our property was stolen from us and we weren't
2 sure we were going to get it back. And we had to decide
3 whether to take legal action or call the authorities.
4 So it became a, you know, a time sync for our people to
5 deal with this problem.

6 Q. Okay.

7 A. And yeah.

8 Q. Are you making an emotional distress claim?

9 A. I am not.

10 Q. Okay. So the damage would be the time Sequitur
11 that employees had to focus on that as opposed to doing
12 other business things?

13 A. Correct.

14 Q. Okay. Have you been able to quantify that
15 amount in any way?

16 A. I am not.

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EXHIBIT 4

June 1, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: **Letter of Intent**

Ladies and Gentlemen:

Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista") intend to enter into a transaction pursuant to a service agreement covering Vista's (or an affiliate's) provision of the Service (as defined in Attachment "A" hereto) to Sequitur. Pending the preparation and execution of a Definitive Agreement (as hereinafter defined), this letter will confirm the intent of such parties ("Parties") to enter into the contemplated transaction ("Transaction") to be governed by the Definitive Agreement in accordance with the terms and conditions set forth in this letter. The Parties agree as follows:

1. **Term Sheet.** The Parties intend to negotiate in good faith a mutually acceptable agreement governing the Service. To the extent there is any conflict between the Term Sheet and this letter, this letter shall control.
2. **Definitive Agreement.** The Parties shall endeavor to incorporate the terms and conditions expressed herein in a mutually acceptable definitive agreement (the "Definitive Agreement," whether one or more) no later than June 26, 2018 ("LOI Term"), unless extended by the Parties in writing, which the Parties would expect to do if the negotiations toward a Definitive Agreement and other relevant agreements and activities have sufficiently progressed. In the event the Parties do not agree upon and execute the Definitive Agreement by the end of the LOI Term, this letter (and the understandings set forth herein) shall be deemed terminated, and neither Party shall have any further obligation to the other Party, provided, however, that the provisions of Section 3 shall survive the termination of this letter for a period of one (1) year.
3. **Confidentiality.** The existence of this letter (and its contents) are intended to be confidential and are not to be discussed with or disclosed to any third party, except (i) with the express prior written consent of the other Party hereto, (ii) as may be required or appropriate in response to any summons, subpoena or discovery order or to comply with any applicable law, order, regulation or ruling or (iii) as the Parties or their representatives (who shall also be bound by the confidentiality hereof) reasonably deem appropriate in order to conduct due diligence and other investigations relating to the contemplated Transaction.
4. **Exclusive Dealing Period.** The Parties agree that from the date of this letter through the end of the LOI Term, neither Party nor any of its controlled affiliates shall, directly or indirectly, enter into any agreements with any other person or entity regarding any transaction similar to the Service or the Transaction or any other transaction related, in whole or in part, to the Service, except as



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Exhibit

4

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Sequitur_001756

Vista Proppants and Logistics, LLC
 June 1, 2018
 Page 2

approved in writing by the other Party. Additionally, neither Vista nor any of its controlled affiliates shall, directly or indirectly, enter into any negotiations, discussions or agreements with BP, Valero, Sunoco, NuStar or Shell, or any of their respective affiliates, for provision of the Service to them, or any other transaction similar to the Service, within 75 miles of Vista's rail facility in Barnhart, Texas, except as approved in writing by the Sequitur. Nothing in this section shall prohibit Vista from selling any service or product more than 75 miles from its rail facility in Barnhart, Texas.

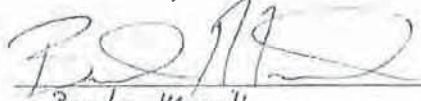
5. Expenses. Each Party shall bear its own costs associated with negotiating and performing under this letter.
6. Due Diligence. Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.
7. Approval. No Party shall be bound by any Definitive Agreement relating to the Transaction until (a) each Party has completed its due diligence to its satisfaction, (b) such Party's senior management, or other governing body or authorized person, shall have approved the Definitive Agreement, (c) such Party shall have executed the Definitive Agreement, and (d) all conditions precedent to the effectiveness of any such Definitive Agreement shall have been satisfied, including obtaining any and all requisite government or third party approvals, licenses and permits (which are satisfactory in form and substance to each Party in its sole discretion), if such approvals, licenses and permits are required.
8. No Oral Agreements. Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.
9. Governing Law. THIS LETTER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES.
10. Assignment. Neither Party shall assign its rights or obligations under this letter without the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed. Any attempted assignment in contravention of this paragraph shall be null and void.
11. Binding Status. Except as to Sections 3 through 10 (which are intended to be binding upon execution and delivery of this letter by both Parties), the Parties understand and agree that this letter (a) is not binding and sets forth the Parties' current understanding of agreements that may be set out in a binding fashion in the Definitive Agreement to be executed at a later date and (b) may not be relied upon by either Party as the basis for a contract by estoppel or otherwise, but rather evidences a non-binding expression of good faith understanding to endeavor, subject to completion of due diligence to the Parties' satisfaction, to negotiate a mutually agreeable Definitive Agreement.

Vista Proppants and Logistics, LLC
June 1, 2018
Page 3

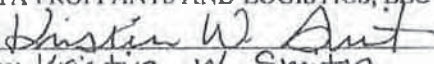
If the terms and conditions of this letter are in accord with your understandings, please sign, and return the enclosed counterpart of this letter to the undersigned, by no later than close of business on June 4, 2018, after which date, if not signed and returned, this letter shall be null and void.

Very truly yours,

SEQUITUR PERMIAN, LLC

By: 
Name: Braden Merrill
Title: VP & CFO

AGREED
this 5 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC
By: 
Name: Kristin W. Smith
Title: CFO

ATTACHMENT "A"
to
Letter of Intent
(Term Sheet)

Party A: Vista Proppants and Logistics, LLC (and any designated affiliates)

Party B: Sequitur Permian, LLC (and any designated affiliates)

Facility: Barnhart Railyard

Location: Barnhart Loading Facility
44485 W. Hwy 67
Barnhart, TX 76930

Term: September 2018 through December 2019.

Renewal: Subject to the Survival clause below, the Term may be renewed and extended by Party B for successive 12-month periods by written notice to Party A at least 60 days prior to the end of the then Term, as it may have been previously renewed and extended.

Products: Crude oil or other hydrocarbons products owned or controlled by Party B or which Party B is obligated to market or deliver.

Commitment: For the Term, as it may be extended, Party A will limit use of its Barnhart Railyard property and Facility to the sole purpose of loading Party B's Products. Party A will load Products provided by Party B at the Facility, whether from pipeline or trucks.

Service: Party A's loading of Party B's Products at Location/Facility and related services, including maintenance.

Rate: \$1.50/barrel of Products loaded into railcars at the Location/Facility.

Volume: Party B agrees to provide Products sufficient to fill an average of no fewer than sixteen railcars per day (11,424 barrels) during each calendar month. If Party B does not meet its minimum volume obligation for a calendar month, Party A will be compensated in such month, as that month's total settlement, in an amount equal to at least the Rate times 11,424 barrels, or \$17,136, times the number of days in that month so that Party A will be paid as if the minimum volume had been provided by Party B. Should Party B provide more Products than its minimum volume obligation, Party A shall be compensated at the Rate times the excess volume.

Capital Investment: In no event shall Party A be obligated to provide any capital investment necessary to perform Service. To the extent more capital investment is needed to satisfy incremental Volume, the financial burden required to equip the facility shall be borne by Party B.

Phase I: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from trucks such that loading will commence September 1, 2018.

Phase II: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from pipeline.

Assignability: The Definitive Agreement would be assignable on sale or disposition, and as otherwise negotiated. Any sale of the Facility property would be subject to the Definitive Agreement.

Survival: If the Term is not extended, then when Party A is not utilizing the Barnhart Railyard for the general course of its sand business and desires to use for loading of oil, the terms of the Definitive Agreement may be reinstated by Party B at its option.

Other Terms: The Definitive Agreement will contain customary provisions for transactions similar to the Service or the Transaction, such as mutual representations, warranties, and covenants, conditions precedent, termination, remedies, force majeure, indemnification, and risk of loss.

THIS SUMMARY OF TERMS AND CONDITIONS IS ATTACHMENT "A" TO A LETTER OF INTENT DATED JUNE 1, 2018, AND IS NOT TO BE CONSIDERED SEPARATELY FROM THE LETTER OF INTENT. EXCEPT AS MAY BE SET OUT IN THE LETTER OF INTENT, THE LETTER OF INTENT AND THIS ATTACHMENT "A" ARE NOT INTENDED TO BE COMPLETE AND ALL-INCLUSIVE OF THE TERMS OF THE PROPOSED TRANSACTION, NOR DOES THE LETTER OF INTENT OR THIS ATTACHMENT "A" CREATE A BINDING AND ENFORCEABLE CONTRACT BETWEEN OR COMMITMENT OR OFFER TO ANY PARTY OR PARTIES, EXCEPT TO THE EXTENT PROVIDED IN SECTION 11 OF THE LETTER OF INTENT.

June 22, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment

Ladies and Gentlemen:

Reference is made to that certain letter of intent ("LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "June 26, 2018" to "July 6, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

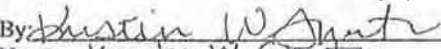
SEQUITUR PERMIAN, LLC

By: 
Braden Merrill
Vice President and Chief Financial Officer

AGREED

this 21 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin W. Smith
Title: CEO

July 9, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment No. 2

Ladies and Gentlemen:

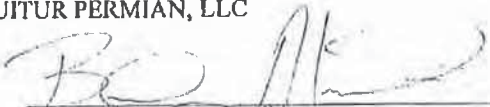
Reference is made to that certain letter of intent (as previously amended, "LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "July 6, 2018" to "July 23, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

SEQUITUR PERMIAN, LLC

By: 
Name: Braden Merrill
Title: VP & CFO

MSK

AGREED

this 12 day of July 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

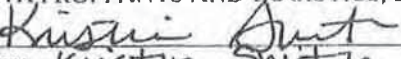
By: 
Name: Kristin Smith
Title: CFO

EXHIBIT 5

CAUSE NO. CV19-003

MAALT, LP,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
V.	§	IRION COUNTY, TEXAS
	§	
SEQUITUR PERMIAN, LLC,	§	
Defendant.	§	51 ST JUDICIAL DISTRICT

**DEFENDANT/COUNTER-PLAINTIFF'S
FIRST AMENDED RESPONSE TO REQUEST FOR DISCLOSURE**

TO: Plaintiff, MAALT, LP, by and through its attorneys of record, James Lanter, James Lanter, PC, 560 N. Walnut Creek, Suite 120, Mansfield, Texas 76063 and Paul O. Wickes, Wickes Law, PLLC, 5600 Tennyson Parkway, Suite 205, Plano, Texas 75024.

Pursuant to the Texas Rules of Civil Procedure, Defendant/Counter-Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), serves upon Plaintiff MAALT, LP, the foregoing First Amended Response to Request for Disclosure. Pursuant to Rule 194 of the Texas Rules of Civil Procedure:

- (a) The correct names of the parties to the lawsuit;

RESPONSE:

The names above are correct.

- (b) The name, address and telephone number of any potential party;

RESPONSE:

This will be supplemented upon further discovery.

- (c) The legal theories and, in general, the factual basis of the responding party's claims or defenses;

RESPONSE:

Subject to any stipulations, admissions, special exceptions, special and affirmative defenses which may be alleged, Defendant asserts a general denial, in accordance with Rule 92 of the Texas Rules of Civil Procedure, and demands strict proof of the Plaintiff's suit, by a preponderance of the evidence, as required by the Constitution and the laws of the State of Texas.



By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defenses of failure of consideration, waiver, including express contractual waiver and/or implied waiver, statute of frauds, contractual force majeure, excuse and/or justification, failure to mitigate damages, failure to perform conditions precedent, impossibility, prior material breach of contract and/or repudiation.

On the effective date of August 6, 2018, Sequitur entered into a Terminal Services Agreement (the “Agreement”) with Plaintiff Maalt, LP (“Maalt”). Per the Agreement, Maalt (described as “Terminal Owner”) was the owner and operator of a rail terminal (the “Terminal”) located in Barnhart, Texas on land owned by Maalt, and Sequitur (described as “Customer”) was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter “oil”). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, upon receipt, Maalt would then transload the oil into railcars to Sequitur or Sequitur’s third-party customers. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and expense, would install equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the “Phase II Project.”

Significantly, as to the equipment and facilities installed by Sequitur (collectively “Customer Terminal Modifications”) in connection with the either the Phase I Project or the Phase II Project, Maalt agreed in the Agreement that “title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur].” See Agreement, § 2.7. The only exception to Sequitur’s title and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was “any additional rail tracks that may [have been] installed,” which additional tracks’ ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement’s term, subject to certain rights of Sequitur. See Agreement, § 2.7.

In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. See Agreement, § 3.2.

Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” See Agreement, § 3.1. The Agreement could not have been clearer when it provided, as follows: “There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner [Maalt] breach.” See Agreement, § 3.2(a).

Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” See Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].” See Agreement, § 1.

Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” See Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” See Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. See Agreement, § 4.1. “Product Throughput” was the metered quantity of oil actually delivered into the Terminal and transloaded by Maalt into railcars. See Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” See Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. See Agreement, § 14.3.

At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had occurred. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such

event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to procure such services. Accordingly, Sequitur notified Maalt of Sequitur’s right to terminate the Agreement. Specifically, Sequitur relied on the “Termination for Extended Force Majeure” provision in the Agreement, which provides, in pertinent part, that “[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days.” See Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur’s equipment and facilities installed at the Terminal (Customer Terminal Modifications). See Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur’s “right of access over, on, and across” the lands upon which the Terminal was located for “purposes of enforcing” Sequitur’s “rights under this Agreement” to remove the Customer Terminal Modifications, and also acknowledging Sequitur’s undisputed “title to and ownership of” such Customer Terminal Modifications).

Notably, as to Sequitur’s notice of Termination for Extended Force Majeure, the Agreement further provided that “[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment),” which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. See Agreement, §§ 8.4, 3.1, and 3.2.

On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. Significantly, the letter also stated that “Maalt will not allow your company access to the Barnhart property [Terminal] to remove equipment or otherwise” and that “[a]ny attempt to access the property will be considered a trespass.” Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur access to the property to retrieve Sequitur’s equipment and facilities or that suggested Sequitur’s undisputed

“right of access over, on, and across” the property or Terminal for “purposes of enforcing” Sequitur’s “rights under this Agreement,” including removing and retrieving Sequitur’s equipment and facilities, had been terminated. See Agreement, § 2.5.

On February 22, 2019, Sequitur’s attorney sent a letter to Maalt’s attorney, responding to the February 14, 2019 letter noted above. In the letter, Sequitur’s attorney reiterated that Sequitur had properly terminated the Agreement. Most significantly, however, the letter explained that earlier on February 22, 2019, Sequitur had learned that its equipment had wrongfully been removed, stolen, and misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. The letter also demanded that Sequitur’s equipment and facilities be returned to Sequitur by no later than February 25, 2019, at 5:00 p.m. Despite Sequitur’s letter and demand, Maalt never responded nor returned Sequitur’s equipment. And Maalt has otherwise failed and refused to honor its obligations under the Agreement with respect to Sequitur’s rights and access to its equipment and facilities and all other rights that Sequitur has under the Agreement.

Sequitur’s equipment and facilities, wrongfully removed, stolen, and misappropriated by Maalt, is valued at approximately \$2,576,505.21 in the aggregate, if not more, and includes numerous devices, components, and items. Because Sequitur does not have legal access to the property where Maalt has currently relocated Sequitur’s equipment and facilities, Sequitur cannot properly secure and protect such equipment and facilities from damage, corrosion, vandalism, or a subsequent theft by persons other than Maalt. Additionally, without immediate access to its equipment and facilities, Sequitur cannot retrieve the equipment and facilities and use it for other business opportunities, should they arise. Simply put, the harm being suffered by Maalt’s wrongfully removing, stealing, and misappropriating Sequitur’s equipment is irreparable and immeasurable.

Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt’s breach has caused Sequitur injury.

Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter “UDJA”), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;

(3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;

(4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;

(5) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;

(6) Sequitur has the exclusive right and title to the equipment and facilities it installed at the Terminal, and that Maalt wrongfully removed, stolen, and misappropriated such equipment and facilities; and

(7) Sequitur has the right to retrieve its equipment and facilities from any location where Maalt has placed such equipment and facilities.

Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt wrongfully exercised dominion and control of such property by refusing to allow Sequitur to retrieve such property from the Terminal, by wrongfully removing, stealing, and misappropriating Sequitur's property and placing it at a location approximately 25 miles from the Terminal, and by refusing to return Sequitur's property to the Terminal upon remand or otherwise continuing to refuse Sequitur's access to its property. As a result of Maalt's acts and/or omissions, Sequitur has suffered injury.

Sequitur owns and has the right to immediate possession of the equipment and facilities that it installed at the Terminal. The equipment and facilities are personal property. Maalt unlawfully appropriated, secured, and/or stole Sequitur's property. Maalt's unlawful taking was made with the intent to deprive Sequitur to its property and/or to engage in an unlawful attempt to circumvent the law and the parties' Agreement by effectively conducting an unauthorized pre-trial sequestration of Sequitur's property, despite Maalt lacking any right, title, or interest in such property, as a matter of law. As a result of Maalt's theft, Sequitur has suffered injury.

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

RESPONSE:

This will be supplemented upon further discovery.

(e) The name, address and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified persons connection with the case;

BP Energy Company
Michael Porter
Off: (713) 323-4997
Cell: (832) 350-1646

BP Energy Company and its employees and representatives may have knowledge of whether rail services were available.

EnMark Services, Inc.
Spencer Falls, President

Derek Jones
1700 Pacific Ave, Ste. 2660
Dallas, TX 75201
Off: (214) 965-9581
Fax: (214) 965-9593

Fusion Industries, LLC
Rick Sosa, Principal
P.O. Box 16340
Oklahoma City, OK 73113
Off: (405) 772-7100
Fax: (405) 730-8086

JET Specialty, Inc.
Chad Darter, VP
211 Market Ave.
Boerne, TX 78006

Jupiter MLP, LLC
Paul Ashy (713) 530-5616
Noah L. Carson
Ken Douglas, CFO
Nathan Ford, Operations Manager (281) 220-9319
Alishia Harris, Settlements (281) 782-7106
Mark Kohutek (972) 741-7806
Caleb Miller (806) 202-2174
Travis Morris, CCO (409) 771-6697
Pedro Ortega (832) 562-8896
Marlen Ozuna, Master Data Analyst
Joey Sullivan, Customer Service Manager/Crude Oil Scheduler (832) 221-63
Dallas office:
15851 Dallas Parkway, Suite 650
Addison, TX 75001
Houston office:
440 Louisiana St., Suite 700
Houston, TX 77002
(713) 600-1600
Odessa office:
2970 South US Hwy. 385
Odessa, TX 79766

Jupiter MLP, LLC and its employees and representatives have knowledge of the subject project, including whether rail services were available.

Macquarie Energy North America Trading, Inc.

Lee Gaunt, Associate Director
Nathan Morris
Mauricio Ramirez
500 Dallas St., Suite 3300
Houston, Texas 77002
Off: (713) 275-6100
Fax: (713) 275-6369

Macquarie Energy North America Trading, Inc. and its employees and representatives may have knowledge of Jupiter MLP, LLC and its efforts to secure rail services.

Murex, Ltd.
Robert Wright
7160 N. Dallas Pkwy., Ste 300
Plano, TX 75024
Off: (972) 735-3382
Cell: (214) 883-0208

Murex, Ltd. and its employees and representatives may have knowledge of whether rail services were available.

R & N Trenching, Inc.
Richard Baumann, President
P.O. Box 85
7416 E. US Hwy. 67
Mertzon, TX 76941-0085
Off: (325) 835-7098

Ridetite VSP Technologies
James E. B Frew, Director Transportation Strategic Accounts
Kingsport Office:
3905 Hemlock Park Dr.
Kingsport, TN 37663
Off: (423) 765-9171
Cell: (423) 360-2979
Fax: (804) 452-1251

SafeRack LLC
Curtis Bollinger
John Edwards
Cody Harris
Michele Thompson, Contract Manager
Dan Wiegand
219 Safety Avenue
Andrews, SC 29510
Off: (803) 883-0796

Fax: (803) 774-7233

SEM Operating Company, LLC
Steve McVay (713) 395-3007
Charlie Odom, Sr. VP (713) 395-3003
10375 Richmond Ave., Ste. 292
Houston, TX 77042
Fax: (713) 395-3099
Two Briarlake Plaza
2050 W. Sam Houston Pkwy. S., Suite 1850
Houston, TX 77042
and
218 N. College Ave.
Tyler, TX 75702
Attn: MSA Department
(903) 526-5800

Sequitur Energy
Alan Aronowitz, Legal Consultant
Off: (713) 395-3000
Mike van den Bold
Blake Cantley
Scott Josey
Braden Merrill, VP & CFO
Off: (713) 395-3008
Rudy Ortiz, Oil Measurement Foremen (Barnhart), Off: (325) 876-5902
Russ Perry, Health Safety & Environmental Manager, Off: (713) 395-3014
David Pharaoh
Sammy Reed
Katy Silva, Financial Reporting Manager
Tony Wroten
Michael Ybarra
Rocky Boggs
Derek Davis
Nicholas Eldridge
Collin Johansen
Neil Wheat
Two Briarlake Plaza
2050 W. Sam Houston Pkwy. S., Suite 1850
Houston, TX 77042

Defendant/Counter-Plaintiff Sequitur Energy and its employees and representatives have knowledge of the subject contract and project, including whether rail services were available.

Shell
Charles Daigle
Glenn Gray
Javier Hinojosa
Cody Rich
Benjamin Thompson

Shell its employees and representatives may have knowledge of whether rail services were available.

Surber Holdings, LLC
Jason Surber, President
P.O. Box 70
Sonora, TX 76950
Off: (325) 387-3506
Fax: (325) 387-3535

Texas-Pacifico Transportation, Ltd.
Jorge Gonzalez
Stan Meador, VP of Sales & Marketing
Denise Melling
Chad Walter
106 S. Chadbourne Street
San Angelo, TX 76903
Off: (325) 942-8164

Texas-Pacifico Transportation, Ltd. and its employees and representatives may have knowledge of whether rail services were available.

Tom Thorp Transports, Inc.
Esther P. Thorp, President
P.O. Box 523
Mertzon, TX 76941
Off: (325) 835-4091
Fax: (325) 835-2147

Tom Thorp Transports, Inc. and its employees and representatives may have knowledge of whether rail services were available.

Vista Proppants and Logistics
Maalt, LP
Chris Favors
(682) 251-5538
David Goodwin

B. Hecht
Jon Ince
Ben Keith
Brandon McFall
Audra Massey
Marty Robertson
4413 Carey Street
Fort Worth, TX 76119
(682) 252-1716

Vista Proppants and Logistics and Defendant Maalt, LP and their employees and representatives have knowledge of the subject contract and project, including whether rail services were available.

Valero
Daniel Willmann
Valero and its employees and representatives may have knowledge of whether rail services were available.

Federal Energy Regulatory Commission
Kimberly D. Bose, Secretary
Washington, DC 20426

Federal Energy Regulatory Commission and its employees and representatives may have knowledge of whether Sequitur met all regulatory requirements.

RESPONSE:

- (f) For any testifying experts:
 - (1) The expert's name, address and telephone number;
 - (2) The subject matter on which the expert will testify;
 - (3) The general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) If the expert is retained by, employed by or otherwise subject to the control of the responding party:

- (A) All documents, tangible things, reports, models or data compilations that have been provided to, reviewed by or prepared by or for the expert in anticipation of the experts' testimony; and
- (B) The experts current resume or bibliography;

RESPONSE:

Matthew A. Kornhauser
Dylan B. Russell
Hoover Slovacek LLP
5051 Westheimer Rd., Suite 1200
Houston, Texas 77056
713-977-8686

Without waiving the attorney-client privileges and attorney work-product privileges, either Mr. Kornhauser or Mr. Russell, or both, will testify in their expert capacity to the reasonable and necessary attorneys' fees incurred in this proceeding by all parties. Their opinions as to the reasonableness and necessity of attorneys' fees incurred by the Defendant/Counter-Plaintiff from Hoover Slovacek LLP to date, and that are to be incurred through the trial before the 51st Judicial District of Irion County and on any appeal or original proceeding, if any, will be based on considering the factors below, as well as the work done by Hoover Slovacek LLP, the redacted bills of Hoover Slovacek LLP, which will be produced, and their knowledge of this case and their education, training, and experience:

the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
the likelihood that the acceptance of the particular employment would preclude other employment by the respective firm or attorney;
the fee customarily charged in the locality for similar legal services;
the dollar amount involved and the results obtained;
the time limitations imposed by the client or the circumstances;
the nature and length of the professional relationship that respective firm or attorney has had with the client; and
the experience, reputation and ability of respective firm or attorney.

At this time, neither Mr. Kornhauser nor Mr. Russell have reached any opinions yet regarding the reasonableness or necessity of either parties' trial attorney's fees. As to appellate fees, in the event of any petitions for writ of mandamus to the court of appeals, Mr. Russell anticipates and opines that Defendant will incur \$30,400 in attorney's fees (for 80 hours at a rate of \$380/hour) for briefing on such a petition for each such petition, which is a reasonable and necessary amount. In the event of an interlocutory appeal or an appeal to the court of appeals after a trial, Mr. Russell anticipates and opines that Defendant will incur \$45,600 in attorney's fees (for 120 hours at a rate of \$380/hour) for briefing on such an appeal, which is a reasonable and necessary amount. In the event oral arguments are made to the court of appeals in either a petition for writ of mandamus or an any appeal, Mr. Russell anticipates and opines that Defendant will

incur \$22,800 in attorney's fees (for 60 hours at a rate of \$380/hour) for each such oral argument, which is a reasonable and necessary amount. In the event any motion for rehearing or motion for rehearing en banc to the court of appeals, Mr. Russell anticipates and opines that Defendant will incur an additional \$15,200 fees (for 40 hours at a rate of \$380/hour) in attorney's fees for each such motion or any response if one is filed by the Plaintiff, which is a reasonable and necessary amount. In the event of a petition for review to the Texas Supreme Court, Mr. Russell anticipates and opines that Defendant will incur an additional \$22,800 in attorney's fees (for 60 hours at a rate of \$380/hour) for a petition for review or response and an additional \$30,400 in attorney's fees (for 80 hours at a rate of \$380/hour) for a brief on the merits or a response, which are reasonable and necessary amounts. In the event oral arguments are made to the Texas Supreme Court, Mr. Russell anticipates and opines that Defendant will incur an additional \$30,400 (for 80 hours at a rate of \$380/hour) in attorney's fees, which is a reasonable and necessary amount. In the event any motion for rehearing to the Texas Supreme Court, whether at the petition stage or on a cause, Mr. Russell anticipates and opines that Defendant will incur an additional \$15,200 fees (for 40 hours at a rate of \$380/hour) in attorney's fees for each such motion or response, which is a reasonable and necessary amount.

The opinion as to the reasonableness and necessity, if such be the case, of attorneys' fees incurred by Plaintiff, through their attorneys, if any, will also be based on the above factors a. through g., and potentially the work done by Plaintiff's attorneys, the bills of Plaintiff's attorneys, and their knowledge of this case and their education, training, and experience. At this time, neither Mr. Kornhauser nor Mr. Russell have an opinion as to Plaintiff's attorney's fees since documents (including invoices) showing what fees have been incurred by Plaintiff, if any, have not yet been produced by Plaintiff. Mr. Kornhauser and Mr. Russell reserve the right to provide such an opinion upon review of such documents (including invoices) and other relevant discovery.

Defendant incorporates herein by reference the experts' current résumés, which are found at the following webpages:

<https://hooverslovacek.com/attorneys/matthew-a-kornhauser/>
<https://hooverslovacek.com/attorneys/dylan-b-russell/>

- (g) Produce copies of any discoverable indemnity and insurance agreements;

RESPONSE:

None.

- (h) Produce copies of any discoverable settlement agreements;

RESPONSE:

None.

- (i) Produce copies of any discoverable witness statement;

RESPONSE:

See documents produced in response to Request for Production.

- (j) In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

RESPONSE:

Not applicable.

- (k) In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

RESPONSE:

Not applicable.

- (l) The name, address, and telephone number of any person who may be designated as a responsible third party.

RESPONSE:

None known at this time.

Respectfully submitted,

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By: /s/ Dylan B. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 6th day of June 2019, a true and correct copy of the foregoing document was served via e-service, to all counsel of record as follows:

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Ashley Masters

CAUSE NO. CV19-003**MAALT, LP,
Plaintiff,****V.****SEQUITUR PERMIAN, LLC,
Defendant.**§
§
§
§
§
§
§**IN THE DISTRICT COURT****IRION COUNTY, TEXAS****51ST JUDICIAL DISTRICT**

SEQUITUR PERMIAN, LLC'S NOTICE OF PARTIAL NONSUIT

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above-numbered and styled cause of action, files this its Notice of Partial Nonsuit Without Prejudice pursuant to Texas Rule of Civil Procedure 162, with respect to only its claim of conversion against Plaintiff, Maalt, LP ("Maalt") and Third-Party Defendant, Vista Proppants and Logistics, Inc. ("Vista").

Respectfully submitted,

HOOVER SLOVACEK LLP

/s/ Matthew A. Kornhauser

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 3rd day of March 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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Matthew A. Kornhauser

Ashley Masters

CAUSE NO. CV19-003**MAALT, LP,
Plaintiff,****V.****SEQUITUR PERMIAN, LLC,
Defendant.**§
§
§
§
§
§
§**IN THE DISTRICT COURT****IRION COUNTY, TEXAS****51ST JUDICIAL DISTRICT**

**SEQUITUR PERMIAN, LLC'S
RESPONSE TO PLAINTIFF MAALT L.P. AND
THIRD-PARTY DEFENDANT VISTA PROPPANTS AND LOGISTICS INC.'S
PARTIAL MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this Response to Plaintiff Maalt, LP and Third-Party Defendant Vista Proppants and Logistics, Inc.'s Partial Motion for Summary Judgment and in support thereof would show unto the Court, as follows:

INTRODUCTION

1. Sequitur will show herein that it was reasonable for Sequitur to rely on Maalt/Vista's promise that it would connect Sequitur with parties who could provide the railcars and trains necessary to fulfill the Terminal Service Agreement between the Parties.

BACKGROUND

2. Sequitur is in the crude oil production business, with a couple hundred wells over an approximately 500 acres in and around Barnhart, Texas.¹ In May 2018, a differential existed in the price of crude oil in the Midland Basin versus the Gulf Coast that presented an arbitrage opportunity.² Sequitur contacted Vista Proppants and Logistics, Inc. ("Vista"), of which the

¹ Exhibit A, Deposition of Braden Merrill, pg., 53, ln. 13 – pg. 54, ln. 16.

² *Id.* at pg. 26, ln. 14 – pg. 27, ln. 21., pg. 31, lns. 2-14.

Plaintiff Maalt, LP (“Maalt”)(“Maalt/Vista” collectively) is an affiliate about utilizing their transloading facility in Barnhart, Texas to ship crude oil to the Gulf Coast by rail. The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Louisiana Gulf Coast.

3. In May 2018, Sequitur had initial discussions with an employee of Vista regarding a rail depot that Maalt owned in Barnhart, Texas that could be converted into the crude-by-rail transloading facility (the “Terminal”) to which Sequitur sought access.³ During the May 2018 discussions, Sequitur made it clear that it was seeking to procure the services of Maalt’s terminal on an exclusive basis for the shipment of Sequitur’s crude oil to take advantage of a steep discount as to the barrels sold in the Midland Basin as compared to those sold on the Louisiana Gulf Coast.⁴ Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Louisiana Gulf Coast (less transport costs) than they could sell barrels of oil for in Midland, Texas, additional earnings would be achieved.⁵

4. Sequitur made it clear to Maalt that it was inexperienced with rail transportation and securing rail cars to transport crude from the Barnhart Terminal to the Gulf Coast.⁶ To alleviate the inexperience factor, Maalt, through its representatives, Chris Favors and Jon Ince, promised Sequitur during discussions with Braden Merrill, VP & CFO of Sequitur, and Mike van den Bold, President of Sequitur⁷, that Maalt would be able to connect Sequitur with parties who could provide the necessary rail cars and rail service at the Terminal:

³ **Exhibit A**, pg. 17, lns. 5-17, pg. 26, ln. 13 – pg. 27, ln. 6 & **Exhibit D**, *Deposition of John Ince*, pg. 15, ln. 3 – 15

⁴ **Exhibit A & Exhibit D**, pg. 18, lns. 10 – 17.

⁵ **Exhibit A**, pg. 26, ln. 13 – pg. 27, ln. 6

⁶ **Exhibit C**, *Deposition of Chris Favors*, pg. 68, ln. 20 – pg. 69, ln. 5.

⁷ Mr. Favors admitted to negotiating with Mr. Merrill and Mr. van den Bold initially prior to the execution of any agreement or letter of intent. *Id.* at pg. 71, lns. 10 – 16.

Q. (Mr. Wickes)

Okay. From a factual standpoint, what do you contend that Vista or Maalt did that should cause it to have to pay Sequitur damages for electing to go forward with the contract?

A. (Mr. Van Den Bold)

Well. Long before we even signed the TSA in our discussions with Maalt, you know, they made representations that they were rail experts, their employees had worked for the railroads, that they could help us get a deal done, that they had relationships, they had the expertise, that they could help, you know, help coordinate and collaborate to get these contracts in place, to help get the deal done, and they weren't able to do things they promised.⁸

Q.

Okay. Did they promise to do anything other than help?

A.

The – the – I mean, the promises they made is that they – they were experts and knew the business, the rail by – sand by rail, and had relationship. And – yeah they would help us – get this venture off the ground.⁹

Q.

Okay. And – and I want to go back and make sure I've got everything of the – the general representations that are the basis for the counterclaim. One was that they are rail experts and that some of their employees are former rail and worked for railroad?

A.

Correct.

Q.

Okay. The other was that they would assist in getting a deal done?

A.

Correct.

Q.

Okay And getting a deal done, what all does that include?

⁸ **Exhibit B**, *Deposition of Mike Van den Bold*, pg. 10, lns. 4 – 16.

⁹ *Id.*, pg. 11, lns. 1-7.

A. **Well, the getting the deal done, Sequitur needed an arrangement where somebody that had rail cars, that had rates and volumes and contract with the railroads to get from Barnhart to the Gulf Coast.¹⁰**

5. Shortly after the first contacts were made, on May 9, 2018, Jon Ince reached out to Sequitur to inform them of an individual name Jonas Struthers who could “get [Sequitur] cars that you need:”

Q. (Mr. Lanter) Now on the second paragraph he says, “Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call.” He said, He has been a great partner for me in the past with our sand cars... **and I am sure** he will be able to get you the cars that you need for your fleet. I’m sure he can get you cars that you need at a really good rate. He has done amazing work for me in the past.” Did you understand that Mr. Ince was just simply telling you about his experience with Jonas Struthers?

Mr. Kornhauser: *Objection form.*

A. (Mr. Merrill) **I understood that he said that Jonas could get us cars if we needed it.¹¹**

Mr. Favors confirmed that these connections were made because Maalt knew that Sequitur was inexperienced in the rail industry:

Q. (Mr. Kornhauser) But this – then why is Mr. Ince introducing his rail guy to Braden Merrill and Tony early on?

A. (Mr. Favors) **Yeah, because Sequitur, you know, made it clear that they had no rail experience. Right? So that was an introduction to a guy who could help them acquire those railcars.¹²**

¹⁰ *Id.* at pg. 14, ln. 22 – pg. 15, ln. 12.

¹¹ **Exhibit A**, pg. 107, ln. 15 – pg. 108, ln. 4 & **Exhibit D-1**.

¹² **Exhibit C**, pg. 69, lns. 17 -22.

6. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal to continue with their investigation into the feasibility of an agreement to lease the terminal to transport crude by rail.¹³ The LOI reflected the parties’ intent, but not obligation, to enter into a Terminal Services Agreement (“TSA”) for a term of September 2018 to December 2019 for Sequitur to utilize the Barnhart Terminal to ship crude by rail.¹⁴

7. After the execution of the LOI, Mr. Favors emailed Mr. Merrill and Travis Morris, the Chief Commercial Officer of Jupiter Marketing & Trading LLC (“Jupiter”), concerning Vista working with both Sequitur and Jupiter regarding the Terminal.¹⁵ Mr. Favors testified this introduction was just another connection because “Sequitur had no rail experience... so the introduction was there to Jupiter to facilitate the logistics side of it” meaning “acquiring railcars, getting rates, moving railcars, making sure service was there.”¹⁶

8. After an initial meeting between Sequitur and Jupiter, Mr. Ince confirmed to Mr. Merrill that Jupiter could get them the necessary railcars:

Q. (Mr. Lanter)

Okay. And so I take it by that that you verified that they were a company that you would be willing to do business with independently of anything that Chris Favors or John Ince may have told you?

A. (Mr. Merrill)

Not exactly. Actually, Jon told me that – that he had called around to his railroad contacts and that Jupiter was a – the real deal in terms of being able to get it done. They had the rates. They were able to get cars and that we should go with those guys.¹⁷

¹³ Exhibit A, pg. 251, lns. 2-6 & Exhibit A-1.

¹⁴ *Id.*

¹⁵ Exhibit B-1.

¹⁶ Exhibit C, pg. 84, ln. 25 – pg. 85, ln. 12.

¹⁷ Exhibit A, pg. 46, lns. 9 – 18.

Mr. Wroten, Senior Finance Associate of Sequitur, confirmed that during Maalt/Vista -Sequitur negotiations Mr. Ince promised that Jupiter would deliver the trains:

Q. (Mr. Wickes)

What specifically do you recall that was said by John Ince regarding Jupiter's capability?

A. (Mr. Wroten)

We had – you know, I guess this was back in July, August, time frame, it was our preference to work with Shell at the time. We had been introduced to Jupiter by, you know, the Vista guys, Jon and Chris, and you know, we had initial conversations with them. It just seems like there were promising the world and you know, we were kind of distrustful of them. So we, you know, in our conversations with Jon, we wanted to get their take on – on their ability and their – their – their capabilities, you know, and he was fully endorsing their ability to do it. And that – you know, we kind of relied on that and you know, that – that helped us feel, you know, get some comfort around potentially doing something with Jupiter if things with Shell didn't – didn't pan out.¹⁸

9. From late June, and during July, and the first week of August 2018, Maalt/Vista and Sequitur continued to discuss the TSA for the exclusive use of the Terminal in Barnhart. During these negotiations, Mr. Merrill testified that Maalt/Vista continued to promise that Jupiter could provide the contact to get Sequitur rail:

Q. (Mr. Lanter)

Okay. During the whole course of events you have never came [sic] across anything in this contract otherwise that obligated Maalt to procure trains or rail services or rates for your company?

Mr. Kornhauser: Objection form.

A. (Mr. Merrill)

I don't remember it in this contract. I remember never discussing them getting us rates, but that they offered to help us get – or help us with the logistics and understanding the railroad and with connection to people inside the railroads.¹⁹

¹⁸ Exhibit E, pg. 34, ln. 12 – pg. 35, ln. 3.

¹⁹ Exhibit A, pg. 25, lns. 13 – 22.

Q. (Mr. Kornhauser)

Okay. What do you recall specifically, as best you can, being told by Mr. Favors or Mr. Ince in that regards?

A. (Mr. Merrill)

I remember with railcars -- this is just in regards to railcars?

Q.

Yes, sir.

A.

That he represented the he could help us find railcars or put us in contact with people who could find railcars.

Q.

And did he tell you that trains and railcars were available?

Mr. Lanter: Objection, form.

A.

*He said it would be a difficult thing to do but that we could -- but that we could do it.*²⁰

Q.

Okay. And you said the -- when did those representations that your lawyers asked you about take place, was that May and June?

A.

*That was May and June through -- through the signing of the TSA.*²¹

10. Then, on August 3, 2018, Mr. Favors emailed Mr. Merrill and Mr. Mike van den Bold, pressuring Sequitur to execute the TSA.²² Favors stated “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today.”²³ At the time, Mr. Merrill

²⁰ *Id.* at pg. 246, ln. 13 – pg. 247, ln. 1.

²¹ **Exhibit A**, pg. 249, ln. 23 – pg. 150, ln. 2.

²² **Exhibit C-2**.

²³ *Id.* Mr. Favors admitted that this email was sent just to pressure Sequitur as there was in fact no other purchaser as represented. **Exhibit C**, pg. 127, ln. 25 – pg. 128, ln. 13.

informed Mr. Favors that he had not yet had a commitment from any joint venture partner to provide rail cars to the Terminal.²⁴ Mr. Favors recalls telling Mr. Merrill that if Sequitur needs a partner to provide the railcars that Jupiter was a “prospect ... [for] helping with logistics.”²⁵ Mr. Merrill informed Sequitur that he was in talks with Shell as a joint venture partner and if that did not go through then Sequitur would turn to Jupiter.²⁶ Mr. Merrill was relying on Mr. Ince in making this decision because without the promises of Mr. Ince, Mr. Merrill would not have believed that Jupiter could get the railcars and the transportation rates:

Q. (Mr. Lanter) Sure. The – the thrust of your decision to go ahead and move forward with Jupiter was based on your own due diligence and research into that company, wasn’t it?

Mr. Kornhauser: Objection form.

A. (Mr. Merrill) **Well it was that and what Jon had said about his due diligence.**

Q. Okay. Now, if Jon hadn’t told you that would you have done business with Jupiter based on what you found about them doing your own research and diligence?

A. **Probably not.**²⁷

11. In reliance on the promises that Maalt’s logistics would help facilitate the needed trains and railcars, Sequitur entered into the TSA with Maalt, with an effective date of August 6, 2018.²⁸ Consistent with the entire premise and purpose of the TSA—that Sequitur would be able to cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be

²⁴ Exhibit A, pg. 37, lns. 14 – 24.

²⁵ Exhibit C, pg. 134, lns. 5-10.

²⁶ Exhibit A, pg. 37, lns. 14 – 24.

²⁷ *Id.*, pg. 49, lns. 12 – 23.

²⁸ Sequitur’s intent was not to sign the TSA until they had a contract in place for rail. Exhibit B, pg. 34, lns. 2-5. But for the promises made by Maalt/Vista about railcars and train, Sequitur would not have entered in the contract. Exhibit A, gg. 248, lns. 3 – 7.

delivered to the Louisiana Gulf Coast refineries—throughout the TSA references are made to “railcars” as well as a reference to the “train loading area.”²⁹ Thus, it was expressly made clear to and understood by both parties that without access to trains and railcars on a viable basis, the essential purpose of the TSA was for naught.

12. The TSA provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Sequitur made this investment and incurred these costs in reliance on Vista/Maalt’s promises that Sequitur would be able to have access to sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement.³⁰

13. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal.³¹ Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . .

²⁹ **Exhibit B-1.**

³⁰ **Exhibit A**, pg. 247, ln. 23 – pg. 248, ln. 1.

³¹ **Exhibit B-1** at § 3.2.

Force Majeure.”³² Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.”³³

14. Despite Vista/Maalt’s promises to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and at a really good rate, and Vista/Maalt’s introduction to Sequitur of Vista/Maalt’s agents, who were self-professed “railcar guys”, it became obvious that said promises were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In fact, there became an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond the control of Sequitur. Therefore, on December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.”³⁴ More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur.³⁵ The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.” On February 8, 2019, Sequitur sent Maalt/Vista further notice that the Force Majeure event could not be remedied, and the TSA was terminated per its terms.³⁶

³² *Id.* at § 3.1.

³³ *Id.* at § 14.1.

³⁴ **Exhibit C-2.**

³⁵ **Exhibit A**, pg. 9, lns 1 – 11, pg. 10, lns. 4-20.

³⁶ **Exhibit A-2.**

15. Maalt initiated this lawsuit seeking payment despite the Force Majeure event. Sequitur has counterclaims for promissory estoppel seeking recoupment of those monies spent on the Terminal that would not have been expended had Vista/Maalt not promised that train service was available on viable basis.

SUMMARY JUDGMENT EVIDENCE

EXHIBITS	DESCRIPTION
A	Deposition of Braden Merrill
A-1	Letter of Intent Exhibit No. 6
A-2	Notice of Termination of TSA Exhibit No. 32
B	Deposition of Mike Van Den Bold
B-1	Terminal Services Agreement Exhibit No. 13
C	Deposition of Chris Favors
C-1	Email from Favors to Merrill and Morris Exhibit No. 7
C-2	Email from Favors to Merrill and Van den Bold Exhibit No. 15
C-3	Notice of Force Majeure Exhibit No. 27
D	Deposition of John Ince
D-1	Email from Ince to Merrill regarding Struthers Exhibit No. 2
E	Deposition of Tony Wroten

SUMMARY JUDGMENT STANDARD

16. Pursuant to Rule 166a(b), a movant must show no genuine issue of material fact exists in order to be entitled to a summary judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). The movant has the burden of establishing

that no material fact issue exists. *M.D. Anderson Hosp. and Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Trial courts must not weigh the evidence at the summary judgment stage. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 422 (Tex. 2000). A trial court's only duty at the summary judgment stage is to determine if a fact issue exists. *Id.*

17. When the defendant asserts a counterclaim, for the plaintiff to be entitled to a summary judgment, the plaintiff must disprove only one element of the cause of actions asserted by defendant. *Stanfield v. Neubam*, 494 S.W.3d 90, 96 (Tex. 2016). If the defendant disproves as a matter of law one or more essential element of the plaintiff's cause of action, the defendant is entitled to a summary judgment unless the plaintiff can either (1) identify a fact issue in the elements the defendant negated or (2) create a fact issue by producing controverting evidence that raises a fact issue on one of the elements the defendant negated. *Id.*, 494 S.W.3d at 97.

ARGUMENTS & AUTHORITIES

18. Sequitur's live pleading states the following counterclaim and/or third-party claim for promissory estoppel:

“Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.”³⁷

As stated in its claims, Vista/Maalt promised that if Sequitur entered the TSA that railcars would be available at the Terminal. As expounded upon in the testimony supra, Vista/Maalt

³⁷ See Sequitur's *Second Amended Counterclaims and First Amended Third-Party Claims*.

promised that Sequitur would be connected to parties that could get railcars and rail service to the Terminal to fulfill the TSA.

19. Promissory estoppel may be asserted by a plaintiff as an affirmative ground for relief when a promisee has acted to his detriment in reasonable reliance on an otherwise unenforceable promise. *Wheeler v. White*, 398 S.W.2d 93, 96-97 (Tex. 1965)). A claim for promissory estoppel entails (1) a promise; (2) foreseeability of reliance by the promisor; and (3) substantial reliance by the promisee to his detriment. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). In its Motion, Maalt argues that (1) there was no promise and (2) there was no reasonable reliance by Plaintiff.

A. A QUESTION OF FACT EXISTS AS TO WHETHER MAALT/VISTA PROMISED SEQUITUR THAT ITS CONNECTIONS WOULD BE ABLE TO GET TRAINS TO SHIP SEQUITUR'S CRUDE OIL FROM THE TERMINAL TO THE GULF COAST.

20. A promise is a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing. *Traco, Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 190 (Tex. App. – San Antonio 1991, writ denied) *citing* BLACK'S LAW DICTIONARY 1092 (5th ed. 1979). A promise may be inferred in whole or in part from expressions other than words on a party of a promisor. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 610 (Tex, 1972). In addition, a person's silence may constitute a binding promise if, under the circumstances, the person had a duty to speak and did not. "One, who by speech or conduct induces another to act in a particular manner should not be permitted to adopt an inconsistent position, attitude, or course of conduct which causes loss or injury to another." *Donaldson v. Lake Community Improvement Ass'n*, 718 S.W.2d 815, 818 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.).

21. As stated supra, Vista/Maalt promised that Sequitur would be connected to parties that could get railcars and rail service to the Terminal to fulfill the TSA. This promise has specific terms: If Sequitur enters the TSA, Maalt/Vista's connection will have railcars and train transportation rates to provide to Sequitur. Maalt's argues that the promise is too vague but doesn't specifically state what information is missing that should be part of the promise.

22. In making this argument, Vista/Maalt relies on *Allied Vista, Inc v. Holt*, 987 S.W.2d 138, 142 (Tex. App. – Houston [14th Dist.] 1999, pete. Denied) In *Allied Vista*, the court determined that a promise to provide “surplus equipment” was not definitive because it did not identify the specific equipment needed. That is not the case here. The goods needed i.e. “railcars” and/or “rail service” was definite and known by all parties.

23. Further, the Third Court of Appeals has held that in a promise for performance by a third party that the third party need not be specifically identified. In *Evers v. Arnold* 210 S.W.2d 270, 271 (Tex. Civ. App. – Austin 1948, no writ) a couple was approached by a real estate broker to entice them to purchase of land. Relying on the promises of the broker that he could obtain them a loan, the couple entered into a contract with the broker to purchase a parcel of land and deposited earnest money. The loaner was never identified but nonetheless, the court held that the brokers' promise to obtain performance, a loan, from a third party was a sufficient enforceable promise.

24. Therefore, in this situation, the promises of Maalt/Vista that it could connect Sequitur with a supplier of railcars and train transportation rates was sufficiently definitive for Sequitur to know what action Maalt/Vista would be taking.

B. A QUESTION OF FACT EXISTS AS TO WHETHER SEQUITUR'S RELIANCE ON MAALT/VISTA WAS REASONABLE.

25. Whether a reliance was reasonable is generally a question of fact. *Hall v. Harris County Water Control & Improvement Dist. No. 50*, 683 S.W.2d 863, 868 (Tex. App.-Houston

[14th Dist.] 1985, no writ). As shown in the testimony supra, Sequitur relied on the promises made by Maalt/Vista in entering the TSA and expending money on the Terminal. Maalt/Vista asserts that Sequitur's reliance on its promises were unreasonable due to a "due diligence" and a "no oral agreement" clause in the LOI. This argument fails because the representations of Maalt/Vista continued after the execution of the LOI. In addition, there was no "entire agreement/merger clause" in the TSA itself that would bar any reliance on promises made by Maalt/Vista prior to and up to and including when Sequitur entered the TSA.

26. In addition, considering the relationship between the parties, it was reasonable for Sequitur to rely on Maalt/Vista. As opposed to the cases cited by Plaintiff, this was not an adversarial relationship.³⁸ The Parties were working together in a "mutual pursuit" to ship crude oil by rail out of the Terminal.³⁹ Maalt/Vista knew that Sequitur was relying on their expertise in entering the TSA because they lacked knowledge of transporting crude by rail.⁴⁰ In addition, Maalt/Vista actually worked with Sequitur to explain the financials of utilizing railcars. Mr. Ince testified that he had multiple phone calls with Sequitur where he would "walk [Sequitur] through" the process of shipping crude to the Gulf Coast by rail.⁴¹ These are not the actions of adversaries. Under these circumstances, e.g. a business partner, it was reasonable for Sequitur to have relied upon the clear promises of Maalt/Vista.

³⁸ See *Ortiz v. Collins*, 203 S.W.3d 414, 422 (Tex. App.--Houston [14th Dist.] 2006, no pet.)(stating that reliance was unjustified in an adversarial context during litigation); see also *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843 (Tex. App. - Houston [1st Dist.] 2004, no pet.)(stating that reliance in a business transaction is not justified in an *adversarial* context.)

³⁹ **Exhibit D**, pg. 24, lns. 15- 20.

⁴⁰ *Id.*, pg. 20, lns. 13 – 19.

⁴¹ *Id.*, pg. 20, lns. 2 – 12, ln. 20 – pg. 22, ln. 2.

PRAYER

WHEREFORE, Sequitur Permian, LLC respectfully requests that the Court deny the Partial Motion for Summary Judgment as to Sequitur's claim of promissory estoppel and for all other relief to which Sequitur shall show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 3rd day of March 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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CAUSE NO. CV19-003

MAALT, LP,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
V.	§	IRION COUNTY, TEXAS
	§	
SEQUITUR PERMIAN, LLC,	§	
Defendant.	§	51ST JUDICIAL DISTRICT

**DEFENDANT, SEQUITUR PERMIAN, LLC'S AMENDED
RESPONSE TO PLAINTIFF MAALT L.P. AND
THIRD-PARTY DEFENDANT VISTA PROPPANTS AND LOGISTICS INC.'S
PARTIAL MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this Amended Response to Plaintiff Maalt, LP and Third-Party Defendant Vista Proppants and Logistics, Inc.'s Partial Motion for Summary Judgment and in support thereof would show unto the Court, as follows:

INTRODUCTION

1. Sequitur will show herein that it was reasonable for Sequitur to rely on Maalt/Vista's promise that it would connect Sequitur with parties who could provide the railcars and trains necessary to fulfill the Terminal Service Agreement between the Parties.

BACKGROUND

2. Sequitur is in the crude oil production business, with a couple hundred wells over an approximately 500 acres in and around Barnhart, Texas.¹ In May 2018, a differential existed in the price of crude oil in the Midland Basin versus the Gulf Coast that presented an arbitrage

¹ **Exhibit A**, Deposition of Braden Merrill, pg., 53, ln. 13 – pg. 54, ln. 16.

opportunity.² Sequitur contacted Vista Proppants and Logistics, Inc. (“Vista”), of which the Plaintiff Maalt, LP (“Maalt”)(“Maalt/Vista” collectively) is an affiliate about utilizing their transloading facility in Barnhart, Texas to ship crude oil to the Gulf Coast by rail. The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Louisiana Gulf Coast.

3. In May 2018, Sequitur had initial discussions with an employee of Vista regarding a rail depot that Maalt owned in Barnhart, Texas that could be converted into the crude-by-rail transloading facility (the “Terminal”) to which Sequitur sought access.³ During the May 2018 discussions, Sequitur made it clear that it was seeking to procure the services of Maalt’s terminal on an exclusive basis for the shipment of Sequitur’s crude oil to take advantage of a steep discount as to the barrels sold in the Midland Basin as compared to those sold on the Louisiana Gulf Coast.⁴ Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Louisiana Gulf Coast (less transport costs) than they could sell barrels of oil for in Midland, Texas, additional earnings would be achieved.⁵

4. Sequitur made it clear to Maalt that it was inexperienced with rail transportation and securing rail cars to transport crude from the Barnhart Terminal to the Gulf Coast.⁶ To alleviate the inexperience factor, Maalt, through its representatives, Chris Favors and Jon Ince, promised Sequitur during discussions with Braden Merrill, VP & CFO of Sequitur, and Mike van den Bold,

² *Id.* at pg. 26, ln. 14 – pg. 27, ln. 21., pg. 31, lns. 2-14.

³ **Exhibit A**, pg. 17, lns. 5-17, pg. 26, ln. 13 – pg. 27, ln. 6 & **Exhibit D**, *Deposition of John Ince*, pg. 15, ln. 3 – 15

⁴ **Exhibit A & Exhibit D**, pg. 18, lns. 10 – 17.

⁵ **Exhibit A**, pg. 26, ln. 13 – pg. 27, ln. 6

⁶ **Exhibit C**, *Deposition of Chris Favors*, pg. 68, ln. 20 – pg. 69, ln. 5.

President of Sequitur⁷, that Maalt would be able to connect Sequitur with parties who could provide the necessary rail cars and rail service at the Terminal:

Q. (Mr. Wickes)

Okay. From a factual standpoint, what do you contend that Vista or Maalt did that should cause it to have to pay Sequitur damages for electing to go forward with the contract?

A. (Mr. Van Den Bold)

Well. Long before we even signed the TSA in our discussions with Maalt, you know, they made representations that they were rail experts, their employees had worked for the railroads, that they could help us get a deal done, that they had relationships, they had the expertise, that they could help, you know, help coordinate and collaborate to get these contracts in place, to help get the deal done, and they weren't able to do things they promised.⁸

Q.

Okay. Did they promise to do anything other than help?

A.

The – the – I mean, the promises they made is that they – they were experts and knew the business, the rail by – sand by rail, and had relationship. And – yeah they would help us – get this venture off the ground.⁹

Q.

Okay. And – and I want to go back and make sure I've got everything of the – the general representations that are the basis for the counterclaim. One was that they are rail experts and that some of their employees are former rail and worked for railroad?

A.

Correct.

Q.

Okay. The other was that they would assist in getting a deal done?

⁷ Mr. Favors admitted to negotiating with Mr. Merrill and Mr. van den Bold initially prior to the execution of any agreement or letter of intent. *Id.* at pg. 71, lns. 10 – 16.

⁸ **Exhibit B**, *Deposition of Mike Van den Bold*, pg. 10, lns. 4 – 16.

⁹ *Id.*, pg. 11, lns. 1-7.

A. **Correct.**

Q. Okay And getting a deal done, what all does that include?

A. **Well, the getting the deal done, Sequitur needed an arrangement where somebody that had rail cars, that had rates and volumes and contract with the railroads to get from Barnhart to the Gulf Coast.¹⁰**

5. Shortly after the first contacts were made, on May 9, 2018, Jon Ince reached out to Sequitur to inform them of an individual name Jonas Struthers who could “get [Sequitur] cars that you need:”

Q. (Mr. Lanter) Now on the second paragraph he says, “Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call.” He said, He has been a great partner for me in the past with our sand cars... **and I am sure** he will be able to get you the cars that you need for your fleet. I’m sure he can get you cars that you need at a really good rate. He has done amazing work for me in the past.” Did you understand that Mr. Ince was just simply telling you about his experience with Jonas Struthers?

Mr. Kornhauser: Objection form.

A. (Mr. Merrill) **I understood that he said that Jonas could get us cars if we needed it.¹¹**

Mr. Favors confirmed that these connections were made because Maalt knew that Sequitur was inexperienced in the rail industry:

Q. (Mr. Kornhauser) But this – then why is Mr. Ince introducing his rail guy to Braden Merrill and Tony early on?

A. (Mr. Favors) **Yeah, because Sequitur, you know, made it clear that they had no rail experience. Right? So that**

¹⁰ *Id.* at pg. 14, ln. 22 – pg. 15, ln. 12.

¹¹ **Exhibit A**, pg. 107, ln. 15 – pg. 108, ln. 4 & **Exhibit D-1**.

was an introduction to a guy who could help them acquire those railcars.¹²

6. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal to continue with their investigation into the feasibility of an agreement to lease the terminal to transport crude by rail.¹³ The LOI reflected the parties’ intent, but not obligation, to enter into a Terminal Services Agreement (“TSA”) for a term of September 2018 to December 2019 for Sequitur to utilize the Barnhart Terminal to ship crude by rail.¹⁴

7. After the execution of the LOI, Mr. Favors emailed Mr. Merrill and Travis Morris, the Chief Commercial Officer of Jupiter Marketing & Trading LLC (“Jupiter”), concerning Vista working with both Sequitur and Jupiter regarding the Terminal.¹⁵ Mr. Favors testified this introduction was just another connection because “Sequitur had no rail experience... so the introduction was there to Jupiter to facilitate the logistics side of it” meaning “acquiring railcars, getting rates, moving railcars, making sure service was there.”¹⁶

8. After an initial meeting between Sequitur and Jupiter, Mr. Ince confirmed to Mr. Merrill that Jupiter could get them the necessary railcars:

Q. (Mr. Lanter) Okay. And so I take it by that that you verified that they were a company that you would be willing to do business with independently of anything that Chris Favors or John Ince may have told you?

A. (Mr. Merrill) **Not exactly. Actually, Jon told me that – that he had called around to his railroad contacts and that Jupiter was a – the real deal in terms of being able to get it done. They had the rates. They were able to get cars and that we should go with those guys.¹⁷**

¹² Exhibit C, pg. 69, lns. 17 -22.

¹³ Exhibit A, pg. 251, lns. 2-6 & Exhibit A-1.

¹⁴ *Id.*

¹⁵ Exhibit B-1.

¹⁶ Exhibit C, pg. 84, ln. 25 – pg. 85, ln. 12.

¹⁷ Exhibit A, pg. 46, lns. 9 – 18.

Mr. Wroten, Senior Finance Associate of Sequitur, confirmed that during Maalt/Vista -Sequitur negotiations Mr. Ince promised that Jupiter would deliver the trains:

Q. (Mr. Wickes) What specifically do you recall that was said by John Ince regarding Jupiter's capability?

A. (Mr. Wroten) **We had – you know, I guess this was back in July, August, time frame, it was our preference to work with Shell at the time. We had been introduced to Jupiter by, you know, the Vista guys, Jon and Chris, and you know, we had initial conversations with them. It just seems like there were promising the world and you know, we were kind of distrustful of them. So we, you know, in our conversations with Jon, we wanted to get their take on – on their ability and their – their – their capabilities, you know, and he was fully endorsing their ability to do it. And that – you know, we kind of relied on that and you know, that – that helped us feel, you know, get some comfort around potentially doing something with Jupiter if things with Shell didn't – didn't pan out.**¹⁸

9. From late June, and during July, and the first week of August 2018, Maalt/Vista and Sequitur continued to discuss the TSA for the exclusive use of the Terminal in Barnhart. During these negotiations, Mr. Merrill testified that Maalt/Vista continued to promise that Jupiter could provide the contact to get Sequitur rail:

Q. (Mr. Lanter) Okay. During the whole course of events you have never came [sic] across anything in this contract otherwise that obligated Maalt to procure trains or rail services or rates for your company?

Mr. Kornhauser: Objection form.

A. (Mr. Merrill) **I don't remember it in this contract. I remember never discussing them getting us rates, but that they offered to help us get – or help us with the**

¹⁸ Exhibit E, pg. 34, ln. 12 – pg. 35, ln. 3.

logistics and understanding the railroad and with connection to people inside the railroads.¹⁹

Q. (Mr. Kornhauser)

Okay. What do you recall specifically, as best you can, being told by Mr. Favors or Mr. Ince in that regards?

A. (Mr. Merrill)

I remember with railcars -- this is just in regards to railcars?

Q.

Yes, sir.

A.

That he represented the he could help us find railcars or put us in contact with people who could find railcars.

Q.

And did he tell you that trains and railcars were available?

Mr. Lanter: Objection, form.

A.

He said it would be a difficult thing to do but that we could – but that we could do it.²⁰

Q.

Okay. And you said the – when did those representations that your lawyers asked you about take place, was that May and June?

A.

That was May and June through – through the signing of the TSA.²¹

10. Then, on August 3, 2018, Mr. Favors emailed Mr. Merrill and Mr. Mike van den Bold, pressuring Sequitur to execute the TSA.²² Favors stated “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from

¹⁹ Exhibit A, pg. 25, lns. 13 – 22.

²⁰ *Id.* at pg. 246, ln. 13 – pg. 247, ln. 1.

²¹ Exhibit A, pg. 249, ln. 23 – pg. 150, ln. 2.

²² Exhibit C-2.

[an]other party that said they will execute an agreement today.”²³ At the time, Mr. Merrill informed Mr. Favors that he had not yet had a commitment from any joint venture partner to provide rail cars to the Terminal.²⁴ Mr. Favors recalls telling Mr. Merrill that if Sequitur needs a partner to provide the railcars that Jupiter was a “prospect ... [for] helping with logistics.”²⁵ Mr. Merrill informed Sequitur that he was in talks with Shell as a joint venture partner and if that did not go through then Sequitur would turn to Jupiter.²⁶ Mr. Merrill was relying on Mr. Ince in making this decision because without the promises of Mr. Ince, Mr. Merrill would not have believed that Jupiter could get the railcars and the transportation rates:

Q. (Mr. Lanter) Sure. The – the thrust of your decision to go ahead and move forward with Jupiter was based on your own due diligence and research into that company, wasn’t it?

Mr. Kornhauser: Objection form.

A. (Mr. Merrill) **Well it was that and what Jon had said about his due diligence.**

Q. Okay. Now, if Jon hadn’t told you that would you have done business with Jupiter based on what you found about them doing your own research and diligence?

A. **Probably not.**²⁷

11. In reliance on the promises that Maalt’s logistics would help facilitate the needed trains and railcars, Sequitur entered into the TSA with Maalt, with an effective date of August 6,

²³ *Id.* Mr. Favors admitted that this email was sent just to pressure Sequitur as there was in fact no other purchaser as represented. **Exhibit C**, pg. 127, ln. 25 – pg. 128, ln. 13.

²⁴ **Exhibit A**, pg. 37, lns. 14 – 24.

²⁵ **Exhibit C**, pg. 134, lns. 5-10.

²⁶ **Exhibit A**, pg. 37, lns. 14 – 24.

²⁷ *Id.*, pg. 49, lns. 12 – 23.

2018.²⁸ Consistent with the entire premise and purpose of the TSA—that Sequitur would be able to cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be delivered to the Louisiana Gulf Coast refineries—throughout the TSA references are made to “railcars” as well as a reference to the “train loading area.”²⁹ Thus, it was expressly made clear to and understood by both parties that without access to trains and railcars on a viable basis, the essential purpose of the TSA was for naught.

12. The TSA provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Sequitur made this investment and incurred these costs in reliance on Vista/Maalt’s promises that Sequitur would be able to have access to sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement.³⁰

13. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal.³¹ Any obligation for Sequitur to pay the Shortfall

²⁸ Sequitur’s intent was not to sign the TSA until they had a contract in place for rail. **Exhibit B**, pg. 34, lns. 2-5. But for the promises made by Maalt/Vista about railcars and train, Sequitur would not have entered in the contract. **Exhibit A**, gg. 248, lns. 3 – 7.

²⁹ **Exhibit B-1**.

³⁰ **Exhibit A**, pg. 247, ln. 23 – pg. 248, ln. 1.

³¹ **Exhibit B-1** at § 3.2.

Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.”³² Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.”³³

14. Despite Vista/Maalt’s promises to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and at a really good rate, and Vista/Maalt’s introduction to Sequitur of Vista/Maalt’s agents, who were self-professed “railcar guys”, it became obvious that said promises were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In fact, there became an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond the control of Sequitur. Therefore, on December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.”³⁴ More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur.³⁵ The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.” On February 8, 2019, Sequitur sent Maalt/Vista further notice that the Force Majeure event could not be remedied, and the TSA was terminated per its terms.³⁶

³² *Id.* at § 3.1.

³³ *Id.* at § 14.1.

³⁴ **Exhibit C-2.**

³⁵ **Exhibit A**, pg. 9, lns 1 – 11, pg. 10, lns. 4-20.

³⁶ **Exhibit A-2.**

15. Maalt initiated this lawsuit seeking payment despite the Force Majeure event. Sequitur has counterclaims for promissory estoppel seeking recoupment of those monies spent on the Terminal that would not have been expended had Vista/Maalt not promised that train service was available on viable basis.

SUMMARY JUDGMENT EVIDENCE

EXHIBITS	DESCRIPTION
A	Deposition of Braden Merrill
A-1	Letter of Intent Exhibit No. 6
A-2	Notice of Termination of TSA Exhibit No. 32
B	Deposition of Mike Van Den Bold
B-1	Terminal Services Agreement Exhibit No. 13
C	Deposition of Chris Favors
C-1	Email from Favors to Merrill and Morris Exhibit No. 7
C-2	Email between Merrill, Favors and Van den Bold Exhibit No. 15
C-3	Notice of Force Majeure Exhibit No. 27
D	Deposition of John Ince
D-1	Email from Ince to Merrill regarding Struthers Exhibit No. 2
E	Deposition of Tony Wroten

SUMMARY JUDGMENT STANDARD

16. Pursuant to Rule 166a(b), a movant must show no genuine issue of material fact exists in order to be entitled to a summary judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). The movant has the burden of establishing

that no material fact issue exists. *M.D. Anderson Hosp. and Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Trial courts must not weigh the evidence at the summary judgment stage. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 422 (Tex. 2000). A trial court's only duty at the summary judgment stage is to determine if a fact issue exists. *Id.*

17. When the defendant asserts a counterclaim, for the plaintiff to be entitled to a summary judgment, the plaintiff must disprove only one element of the cause of actions asserted by defendant. *Stanfield v. Neubam*, 494 S.W.3d 90, 96 (Tex. 2016). If the defendant disproves as a matter of law one or more essential element of the plaintiff's cause of action, the defendant is entitled to a summary judgment unless the plaintiff can either (1) identify a fact issue in the elements the defendant negated or (2) create a fact issue by producing controverting evidence that raises a fact issue on one of the elements the defendant negated. *Id.*, 494 S.W.3d at 97.

ARGUMENTS & AUTHORITIES

18. Sequitur's live pleading states the following counterclaim and/or third-party claim for promissory estoppel:

"Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees."³⁷

As stated in its claims, Vista/Maalt promised that if Sequitur entered the TSA that railcars would be available at the Terminal. As expounded upon in the testimony supra, Vista/Maalt

³⁷ See Sequitur's *Second Amended Counterclaims and First Amended Third-Party Claims*.

promised that Sequitur would be connected to parties that could get railcars and rail service to the Terminal to fulfill the TSA.

19. Promissory estoppel may be asserted by a plaintiff as an affirmative ground for relief when a promisee has acted to his detriment in reasonable reliance on an otherwise unenforceable promise. *Wheeler v. White*, 398 S.W.2d 93, 96-97 (Tex. 1965)). A claim for promissory estoppel entails (1) a promise; (2) foreseeability of reliance by the promisor; and (3) substantial reliance by the promisee to his detriment. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983). In its Motion, Maalt argues that (1) there was no promise and (2) there was no reasonable reliance by Plaintiff.

A. **A QUESTION OF FACT EXISTS AS TO WHETHER MAALT/VISTA PROMISED SEQUITUR THAT ITS CONNECTIONS WOULD BE ABLE TO GET TRAINS TO SHIP SEQUITUR'S CRUDE OIL FROM THE TERMINAL TO THE GULF COAST.**

20. A promise is a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing. *Traco, Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 190 (Tex. App. – San Antonio 1991, writ denied) *citing* BLACK'S LAW DICTIONARY 1092 (5th ed. 1979). A promise may be inferred in whole or in part from expressions other than words on a party of a promisor. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 610 (Tex. 1972). In addition, a person's silence may constitute a binding promise if, under the circumstances, the person had a duty to speak and did not. "One, who by speech or conduct induces another to act in a particular manner should not be permitted to adopt an inconsistent position, attitude, or course of conduct which causes loss or injury to another." *Donaldson v. Lake Community Improvement Ass'n*, 718 S.W.2d 815, 818 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.).

21. As stated supra, Vista/Maalt promised that Sequitur would be connected to parties that could get railcars and rail service to the Terminal to fulfill the TSA. This promise has specific terms: If Sequitur enters the TSA, Maalt/Vista's connection will have railcars and train transportation rates to provide to Sequitur. Maalt's argues that the promise is too vague but doesn't specifically state what information is missing that should be part of the promise.

22. In making this argument, Vista/Maalt relies on *Allied Vista, Inc v. Holt*, 987 S.W.2d 138, 142 (Tex. App. – Houston [14th Dist.] 1999, pete. Denied) In *Allied Vista*, the court determined that a promise to provide “surplus equipment” was not definitive because it did not identify the specific equipment needed. That is not the case here. The goods needed i.e. “railcars” and/or “rail service” was definite and known by all parties.

23. Further, the Third Court of Appeals has held that in a promise for performance by a third party that the third party need not be specifically identified. In *Evers v. Arnold* 210 S.W.2d 270, 271 (Tex. Civ. App. – Austin 1948, no writ) a couple was approached by a real estate broker to entice them to purchase of land. Relying on the promises of the broker that he could obtain them a loan, the couple entered into a contract with the broker to purchase a parcel of land and deposited earnest money. The loaner was never identified but nonetheless, the court held that the brokers' promise to obtain performance, a loan, from a third party was a sufficient enforceable promise.

24. Therefore, in this situation, the promises of Maalt/Vista that it could connect Sequitur with a supplier of railcars and train transportation rates was sufficiently definitive for Sequitur to know what action Maalt/Vista would be taking.

B. A QUESTION OF FACT EXISTS AS TO WHETHER SEQUITUR'S RELIANCE ON MAALT/VISTA WAS REASONABLE.

25. Whether a reliance was reasonable is generally a question of fact. *Hall v. Harris County Water Control & Improvement Dist. No. 50*, 683 S.W.2d 863, 868 (Tex. App.-Houston

[14th Dist.] 1985, no writ). As shown in the testimony *supra*, Sequitur relied on the promises made by Maalt/Vista in entering the TSA and expending money on the Terminal. Maalt/Vista asserts that Sequitur's reliance on its promises were unreasonable due to a "due diligence" and a "no oral agreement" clause in the LOI. This argument fails because the representations of Maalt/Vista continued after the execution of the LOI. In addition, there was no "entire agreement/merger clause" in the TSA itself that would bar any reliance on promises made by Maalt/Vista prior to and up to and including when Sequitur entered the TSA.

26. In addition, considering the relationship between the parties, it was reasonable for Sequitur to rely on Maalt/Vista. As opposed to the cases cited by Plaintiff, this was not an adversarial relationship.³⁸ The Parties were working together in a "mutual pursuit" to ship crude oil by rail out of the Terminal.³⁹ Maalt/Vista knew that Sequitur was relying on their expertise in entering the TSA because they lacked knowledge of transporting crude by rail.⁴⁰ In addition, Maalt/Vista actually worked with Sequitur to explain the financials of utilizing railcars. Mr. Ince testified that he had multiple phone calls with Sequitur where he would "walk [Sequitur] through" the process of shipping crude to the Gulf Coast by rail.⁴¹ These are not the actions of adversaries. Under these circumstances, e.g. a business partner, it was reasonable for Sequitur to have relied upon the clear promises of Maalt/Vista.

³⁸ See *Ortiz v. Collins*, 203 S.W.3d 414, 422 (Tex. App.--Houston [14th Dist.] 2006, no pet.)(stating that reliance was unjustified in an adversarial context during litigation); see also *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843 (Tex. App. - Houston [1st Dist.] 2004, no pet.)(stating that reliance in a business transaction is not justified in an *adversarial* context.)

³⁹ **Exhibit D**, pg. 24, lns. 15- 20.

⁴⁰ *Id.*, pg. 20, lns. 13 – 19.

⁴¹ *Id.*, pg. 20, lns. 2 – 12, ln. 20 – pg. 22, ln. 2.

PRAYER

WHEREFORE, Sequitur Permian, LLC respectfully requests that the Court deny the Partial Motion for Summary Judgment as to Sequitur's claim of promissory estoppel and for all other relief to which Sequitur shall show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 3rd day of March 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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CAUSE NO. 19-003

MAALT, LP,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	IRION COUNTY, TEXAS
	§	
SEQUITUR PERMIAN, LLC,	§	
	§	
Defendant.	§	51st JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
BRADEN MERRILL
November 19, 2019
Volume 1

ORAL AND VIDEOTAPED DEPOSITION OF BRADEN MERRILL,
produced as a witness at the instance of the Plaintiff
and duly sworn, was taken in the above-styled and
numbered cause on the 19th day of November, 2019, from
9:32 a.m. to 5:25 p.m., before Patricia Palmer, CSR, in
and for the State of Texas, reported by machine
shorthand, at the offices of Mr. Matthew A. Kornhauser,
Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
Houston, Texas 77056, pursuant to the Texas Rules of
Civil Procedure and the provisions stated on the record
herein.

Page 1



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1	EXHIBITS	
2	NO.	DESCRIPTION PAGE
3	Exhibit 80.....	238
4	Corporate Update	
5	Exhibit 81.....	244
6	First Amended Counterclaim and Original	
7	Third-party Claims	
8		
9		
10		
11		
12		
13		
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Page 6

1 THE VIDEOGRAPHER: Today's date is
2 November 19th, 2019. This is the video deposition of
3 Braden Merrill. The time is 9:32. We are on the
4 record.
5 The court reporter may now swear in the
6 witness.
7 THE REPORTER: Are there any stipulations?
8 MR. KORNHAUSER: We are -- we are
9 proceeding by agreement and by notice.
10 MR. LANTER: And by notice, yeah.
11 MR. KORNHAUSER: Yeah. We would like to
12 have the opportunity to read and sign, please.
13 MR. LANTER: Sure.
14 BRADEN MERRILL,
15 having been first duly sworn, testified as follows:
16 EXAMINATION
17 BY MR. LANTER:
18 Q. Good morning.
19 A. Good morning.
20 Q. Would you state your name, please.
21 A. It's Braden Merrill.
22 Q. Okay. And what is your position with Sequitur
23 Permian?
24 A. I am vice president and senior -- I am vice
25 president and chief financial officer.

Page 7

1 Q. Okay. Now, you were -- you understand why we
2 are here, don't you?
3 A. I do.
4 Q. A deposition in a case brought by Maalt; and is
5 that a yes?
6 A. I do, yes. I'm sorry.
7 Q. Okay. You were the person who signed the
8 letter declaring force majeure under the terminal
9 services agreement that your company held at Maalt; is
10 that right?
11 A. I'm not sure if it was either me or Mike Van
12 den Bold, but it would have been one of us.
13 Q. Okay. You don't remember that -- that you were
14 the one who signed it?
15 A. I don't remember that.
16 MR. LANTER: I am going to hand you what
17 was previously marked as Exhibit 32 in earlier
18 depositions.
19 THE WITNESS: All right.
20 Q. And that is the February 8th of 2019 letter
21 that was sent by Sequitur Permian reportedly to
22 terminate the terminal services agreement, correct?
23 A. Yes, sir.
24 Q. And that was signed by you, right?
25 A. That was signed by me.

Page 8

1 Q. Okay. Would you tell me all of the reasons why
2 you determined that a force majeure event occurred?
3 MR. KORNHAUSER: I am going to object to
4 the form of the question. You can answer.
5 MR. LANTER: Go ahead.
6 THE WITNESS: Okay.
7 A. We -- we invoked the force majeure or we -- we
8 sent the letter because we were unable to get trains to
9 the facility, we -- and I guess, it was -- the primary
10 is the trains to the facility and also we never got our
11 pollution liability -- or legal liability.
12 Q. Never got what?
13 A. The pollution legal liability.
14 Q. Okay. All right. So make sure I understand
15 you, the first reason was you were unable to get trains
16 to the facility and -- is that yes?
17 A. Yes. And -- and trains out of the facility,
18 yes.
19 MR. LANTER: Okay. She can't take down
20 shakes of the head.
21 THE WITNESS: No, I get you. I am sorry
22 about that.
23 MR. LANTER: It looks -- uh-huh (positive
24 response) and uh-uh (negative response) look exactly the
25 same, okay.

Page 9

3 (Pages 6 - 9)

1 THE WITNESS: Got it.
 2 MR. LANTER: -- on paper, so I may prompt
 3 you.
 4 Q. So you're unable to get trains in and out of
 5 the facility?
 6 A. Yes, sir.
 7 Q. And then your second reason for declaring for
 8 force majeure was you never got a pollution legal
 9 liability policy?
 10 A. That's correct.
 11 Q. All right. Anything else?
 12 A. That's it.
 13 Q. Okay. When you say you were unable to get
 14 trainings in or out of the facility, what do you mean by
 15 that?
 16 A. We had spoken with multiple logistics companies
 17 about service in and out of the Barnhart facility and
 18 all -- all that we talked to. Well -- so let me go back
 19 here. So we were unable to get in and out of the
 20 facility.
 21 Q. Okay. And specifically, what was the problem?
 22 A. The -- the -- my understanding is that the
 23 carriers, it is a convoluted system of -- of class ones
 24 and smaller carriers, but -- and logistics companies,
 25 but my understanding is the class one carriers were not

Page 10

1 interested in providing crude oil rail service in and
 2 out of the Permian Basin.
 3 Q. Okay. So you when you -- when you say that you
 4 couldn't get trains in or out of the facility, who made
 5 that determination within your company?
 6 A. It was Mike Van den Bold and I.
 7 Q. Okay. Anybody else involved in that decision?
 8 A. No.
 9 Q. Okay. So you are not testifying that there is
 10 any curtailment of rail services or product
 11 transportation services, are you?
 12 MR. KORNHAUSER: Objection form.
 13 A. What -- what do you mean by curtailment? I am
 14 sorry.
 15 Q. What do you understand that word to mean?
 16 A. I mean, ceasing of --
 17 Q. Okay.
 18 A. Is that what you are asking?
 19 Q. That's what I am asking.
 20 A. I -- I would say that there was ceasing of rail
 21 services, my understanding, to the Permian Basin.
 22 Q. Did you ever get rail service to this facility
 23 at all?
 24 A. No.
 25 Q. So no rail service that you obtained had ever

Page 11

1 ceased for any reason?
 2 A. No rail services would have been obtained --
 3 no.
 4 Q. Okay. And no rail service that you ever
 5 obtained had been delayed for any reason, correct?
 6 A. Well, we had -- had two trains sent to the
 7 facility, which were not able to get there and then
 8 therefore, had to be rerouted to another facility.
 9 Q. Okay. When you say "we had two trains at the
 10 facility," who is we?
 11 A. We as in Jupiter was coordinating the trains.
 12 Q. Okay. So you and Jupiter?
 13 A. Jupiter was coordinating on our behalf, yes.
 14 Q. And -- so when you say "we," are you talking
 15 about you and your company?
 16 A. Yes.
 17 Q. -- Jupiter?
 18 A. Yes, I am. When I said we that's what I meant.
 19 Q. Okay. So Jupiter and Sequitur is we?
 20 A. Yes.
 21 Q. Okay. Was any rail transportation that you
 22 were able to procure ever interrupted?
 23 A. No.
 24 Q. Okay. And was there any rail service
 25 unavailable?

Page 12

1 MR. KORNHAUSER: Objection form.
 2 A. Yes.
 3 Q. And how did you determine that rail service was
 4 unavailable?
 5 A. We reached out to every logistics provider and
 6 every purchaser that we knew of. We went through our
 7 personal relationships. We talked to Vista about it,
 8 asking them for help. And we also asked our third-party
 9 marketing consultant.
 10 Q. Okay. So every -- you mentioned that you
 11 reached out to purchasers and you reached out to
 12 logistics providers?
 13 A. Uh-huh (positive response).
 14 Q. Tell me who the purchasers were that you
 15 reached out to.
 16 A. From the beginning, we reached out to BP,
 17 Valero, Shell, Sunoco, Arm, Jupiter. I don't remember
 18 who I said at this point, but Shell.
 19 Q. Okay.
 20 A. Murex, Nustar. I may have said some multiple
 21 times.
 22 Q. What was the last one you said?
 23 A. Nustar.
 24 Q. Nustar. Any other purchasers?
 25 A. Those are the ones that I remember.

Page 13

4 (Pages 10 - 13)

1 Q. Okay. And how about logistic providers?
 2 A. Well, all of those were logistic providers
 3 slash purchasers.
 4 Q. Okay. Which ones -- I want to separate the
 5 two. Which ones were purchasers, BP, Valero, Shell,
 6 Sunoco?
 7 A. All of them would have purchased our oil.
 8 Q. Okay. So they would have all had purchased and
 9 then they would have provided logistics after the point
 10 of purchase I take it?
 11 A. Yes, that's correct.
 12 Q. All right. Did you ever reach out to any
 13 companies who were just pure logistic providers to pick
 14 your oil up at the Barnhart facility and transport it to
 15 a purchasers location somewhere else?
 16 A. Not that I know of.
 17 Q. Okay. So the only thing you did was reach out
 18 to purchasers?
 19 A. That's my recollection.
 20 Q. Okay. And what was your role in doing so?
 21 A. I -- I facilitated most of the -- or I was the
 22 one who called on most of the companies.
 23 Q. Okay. So you were personally involved in the
 24 day-to-day activities of that?
 25 A. Yes, I was.

Page 14

1 Q. Was Mr. Wroten working with you on that?
 2 A. Yes, he was.
 3 Q. What was his role?
 4 A. Mr. Wroten works for me. He did a lot of the
 5 day-to-day as well.
 6 Q. Uh-huh (affirmative response).
 7 A. So he and I both would call these companies at
 8 the beginning.
 9 Q. Okay. In your dealings with Maalt, who were
 10 the individuals that you primarily dealt with?
 11 A. Primarily at the beginning it was Jon Ince and
 12 then it switched to Chris Favors pretty quickly, but Jon
 13 Ince stayed in the picture somewhat.
 14 Q. Okay. So just those two individuals?
 15 A. That's correct.
 16 Q. Now, you never had any contact with any officer
 17 of director of Sequitur -- excuse me, of Vista Proppants
 18 and Logistics, Incorporated, did you?
 19 A. I -- honestly I don't know the difference
 20 between Vista and Maalt, so I'm not -- I'm kind of...
 21 Q. Okay. I'm you very specifically, did you have
 22 any contact with anybody who is an officer, director of
 23 Vista Proppants and Logistics, Inc.?
 24 A. I -- I am not sure.
 25 Q. Okay. But other than Jon Ince and Chris Favors

Page 15

1 you never had any contact with anybody, right?
 2 A. No, I -- Steve McCarley, I believe --
 3 Q. Okay.
 4 A. -- was on site. And I'm not sure which -- what
 5 the name of -- it was either the president or the CEO
 6 came to one of our meetings. I don't remember his name,
 7 I remember he has a deer -- deer breeding facility.
 8 That's what I remember.
 9 Q. Okay. Did you ever go to that deer facility?
 10 A. No, I did not.
 11 Q. Anybody else that you ever talked to with
 12 Maalt?
 13 A. I was introduced to Blake DeNoyer at the
 14 beginning.
 15 Q. Okay. And how do you know Blake DeNoyer?
 16 A. He tried to sell sand to our company.
 17 Q. Okay.
 18 A. And we had contact through that so I received
 19 his information from our operations team.
 20 Q. All right. And that was SIM that was talking
 21 to Vista about purchasing sand, correct?
 22 A. That's correct.
 23 Q. Okay. Do you have any involvement in that at
 24 all?
 25 A. No, I did not.

Page 16

1 Q. All right. When all of this first started in
 2 early to mid 2018, you were the one who reached out to
 3 Blake DeNoyer, weren't you?
 4 A. Yes, I was.
 5 Q. Okay. And you made the initial contact with
 6 his company or with Maalt Service entities about running
 7 transloading services, right?
 8 A. I did.
 9 Q. Okay. And after your initial conversation with
 10 Blake DeNoyer -- or was it an e-mail or conversation?
 11 A. I don't remember.
 12 Q. Okay. After that first communication, did you
 13 have anymore discussions or communications with -- with
 14 Mr. DeNoyer?
 15 A. No, I -- after -- after talking with him about
 16 using the facility we -- he set me in touch with Jon
 17 fairly quickly and then Chris fairly quickly after that.
 18 Q. Okay. Now, I want to ask you this up front and
 19 we will talk about it some more potentially. But during
 20 your conversations with Jon Ince and Chris Favors?
 21 A. Uh-huh (positive response), yes.
 22 Q. Did they ever make any promises to you that
 23 they did not keep?
 24 A. I am not sure.
 25 Q. You are not aware of any as you sit here today?

Page 17

5 (Pages 14 - 17)

1 A. I'm -- I'm -- I'm trying to think of any. I
 2 can't think of any off the top of my head right now.
 3 Q. Okay. You can't think of any examples of
 4 anything they promised to do and did not do, correct?
 5 A. Individually?
 6 Q. Individually or together?
 7 A. I can't remember any off the top of my head
 8 right now.
 9 Q. Okay. And if there was such a promise made,
 10 you would know about that, wouldn't you?
 11 A. Most likely unless they made it to someone
 12 else.
 13 Q. Okay. If some -- if something was like was
 14 said to somebody else your other people would have told
 15 you wouldn't they?
 16 A. Most likely, yes.
 17 Q. Yes. Now, the pollution liability policy that
 18 you mentioned earlier.
 19 A. Yes.
 20 Q. That has nothing to do with force majeure, does
 21 it?
 22 MR. KORNHAUSER: Objection form.
 23 A. I do not believe that that -- I am sure if that
 24 has to do with force majeure, I am -- I am not a lawyer.
 25 But I do -- yeah I am not sure.

Page 18

1 Q. Okay. You were involved in the preparation --
 2 the drafting and writing of the terminal services
 3 agreement in this case weren't you?
 4 A. Yes, I was.
 5 MR. LANTER: Okay. Is it 13? Ma'am, I am
 6 just going to mark this. It's a copy, I am going to
 7 mark it as 13 just for him to use right now. Do you
 8 want a copy?
 9 MR. KORNHAUSER: No, I've got it.
 10 MR. LANTER: Okay. Why don't you go ahead
 11 and take a look at that and turn to Article 14.
 12 THE WITNESS: Okay.
 13 Q. All right. Would you look at -- look at that
 14 Article 14 and tell me if insurance appears anywhere in
 15 there as a force majeure event?
 16 MR. KORNHAUSER: Wait a second. What page
 17 are you on?
 18 MR. LANTER: Article 14. It is on 22.
 19 MR. KORNHAUSER: And what's your question?
 20 MR. LANTER: Would you read back the
 21 question.
 22 (Requested portion read back.)
 23 MR. KORNHAUSER: Object to form.
 24 A. The only thing I can see is in 14-1, Breach of
 25 this agreement.

Page 19

1 Q. Where are you referring to?
 2 A. It says, "It is further agreed that the
 3 obligations of the parties that are effected by such
 4 force majeure, except as provided above, shall be
 5 suspended without liability for breach of this agreement
 6 during the continuation of continuance of force
 7 majeure."
 8 Q. Okay. So nothing in this Article 14 that you
 9 were involved in writing has any mention of failure to
 10 provide an insurance policy is a force majeure event,
 11 does it?
 12 A. Well, it refers to the agreement, the breach of
 13 the agreement, but I mean, nothing specifically calls
 14 out the insurance.
 15 Q. Okay. If you read 14.2.
 16 A. Okay.
 17 Q. It defines what a force majeure event is,
 18 correct?
 19 A. That's correct.
 20 Q. And there is no mention in here anywhere of
 21 failure to write an insurance policy?
 22 MR. KORNHAUSER: Objection form.
 23 A. Not that I -- I saw, no.
 24 Q. Okay. And with respect to the pollution
 25 policy, your company's goal was to get \$5 million of

Page 20

1 pollution coverage in place, wasn't it?
 2 A. I believe that's the case, yes.
 3 Q. Okay. Did you go back through the documents
 4 that were submitted through your INS system to determine
 5 whether \$5 million worth of pollution coverage was
 6 obtained by Maalt?
 7 A. My -- our lawyer checked on that, so I -- I was
 8 told that it was not in place.
 9 Q. Okay. My -- did you look?
 10 A. I personally did not.
 11 Q. Okay. Tell me what the INS system is?
 12 A. I'm -- honestly, I was not involved in the INS
 13 system.
 14 Q. Okay so you don't know what that is?
 15 A. No.
 16 Q. Okay. Did you ever have any involvement in
 17 reviewing the insurance certificate -- the insurance
 18 certificates that were uploaded through the INS system
 19 by Maalt?
 20 A. No, that would have been our HSC group and our
 21 legal team.
 22 Q. Okay. And was that Russ?
 23 A. Russ, yes.
 24 Q. Okay. Did Russ ever come to you and tell you
 25 that all of the policies that were required under the

Page 21

6 (Pages 18 - 21)

1 contract were not in place?

2 A. I don't remember.

3 Q. Okay. Did you -- did your company ever send
4 out a notice of default to Maalt claiming that they were
5 in default because they had not provided the required
6 insurance certificates?

7 A. Not that I remember.

8 Q. And certainly, I haven't seen a default notice
9 from your company to Maalt anywhere in the documents
10 produced. If there had been one it would be in those
11 documents, correct?

12 A. I believe so.

13 Q. Okay. With respect to the terminal service
14 agreement that is Exhibit 13, what was your role in
15 preparing that document?

16 A. So our outside legal counsel drafted most of
17 the document. Most -- most of my role is involved in
18 the commercial aspect of the contract.

19 Q. Who is that outside counsel?

20 A. Vinson and Elkins.

21 Q. Okay. So they drafted this document?

22 A. That's my understanding, yes.

23 Q. Okay. And then once it was drafted it came to
24 you and what did you do with it?

25 A. So most of the efforts that we put into it were

Page 22

1 involved in kind of writing the commercial terms and
2 making sure that they stuck with what we had agreed to
3 with Vista.

4 Q. Okay. This contract was not contingent upon
5 Sequitur obtaining any type of favorable rail rates, was
6 it?

7 MR. KORNHAUSER: Objection form.

8 A. I am -- I am not sure what -- I'm not sure. I
9 would have to go back and read the document.

10 MR. LANTER: Okay. Well, why don't we take
11 a minute and look through there and tell me --

12 MR. KORNHAUSER: Well, what's -- what's --
13 what's your question specifically?

14 MR. LANTER: Did you understand my
15 question?

16 THE WITNESS: It is my understanding that
17 the question is that this document doesn't have any word
18 in it that says that there's -- that we have to secure
19 reasonable rail rates. Is that --

20 Q. My question to you was, is there any provision
21 in this contract that makes this contract contingent
22 upon Sequitur Permian obtaining any type of favorable
23 rail rates?

24 MR. KORNHAUSER: Object to form.

25 A. I -- I --

Page 23

1 MR. KORNHAUSER: You need to define these
2 term, Jim. I mean, favorable rail rates. I mean, your
3 question is vague and ambiguous.

4 MR. LANTER: No. I can ask him what I want
5 and you can say objection form. And if there is a
6 problem he can tell me. I think he understood my
7 question.

8 MR. KORNHAUSER: Do you want to go off the
9 record and have him take a look at it?

10 MR. LANTER: Sure.

11 THE VIDEOGRAPHER: The time is 9:55. Off
12 the record.

13 (Break taken.)

14 THE VIDEOGRAPHER: The time is 10:03. We
15 are back on the record.

16 Q. Okay Mr. Merrill, we took a break off the
17 record and gave you time to go through the terminal
18 services agreement. Now, we are going to go back to my
19 question. Is there any provision in that contract that
20 makes it contingent on Sequitur Permian obtaining
21 favorable rail rates?

22 MR. KORNHAUSER: We object to form.

23 A. I didn't read that in the agreement.

24 Q. Okay. Is there anything in that contract that
25 makes it contingent on Sequitur Permian obtaining a JV

Page 24

1 partner?

2 MR. KORNHAUSER: Objection form.

3 A. Not that I read, no.

4 Q. So you know what JV partner means, don't you?

5 A. Joint ventures.

6 Q. Yes. And in that contract, the terminal
7 services agreement, Maalt, was not hired by your company
8 to provide any logistic services other than the
9 transloading itself, correct?

10 MR. KORNHAUSER: Objection form. A.

11 A. I -- I don't remember seeing that in the
12 contract.

13 Q. Okay. During this whole course of events you
14 have never come across anything in this contract
15 otherwise that obligated Maalt to procure trains or rail
16 service or rates for your company?

17 MR. KORNHAUSER: Objection form.

18 A. I don't remember it in this contract. I
19 remember never discussing them getting us rates, but
20 that they offered to help us get -- or help us with the
21 logistics and understanding the railroads and with
22 connections to people inside the railroads.

23 Q. Okay. And they did that on a gratuitous basis,
24 right?

25 A. What do you mean by that?

Page 25

7 (Pages 22 - 25)

1 Q. Just because they were trying to be a good
2 provider of services to you.

3 A. I mean, I think they -- I mean, they were
4 trying -- I think they were trying to do it to get the
5 rail terminal up and operational so they can start
6 making money faster.

7 Q. Okay. So they are trying to help you get
8 started so you can make money faster, too, correct?

9 A. Yeah for both -- both of us.

10 Q. But they didn't have a contractual obligation
11 to do any of that, did they?

12 MR. KORNHAUSER: Objection form.

13 A. I mean, written contract, I don't believe so.

14 Q. Okay. Now, when we go back a little bit in
15 time you mentioned that your first contact with Maalt
16 was through Blake DeNoyer?

17 A. Yes.

18 Q. What prompted you to call him?

19 A. The -- what prompted me to call them was
20 differentials and the Midland Basin for the price of oil
21 was -- was becoming a lot higher or so -- more of a
22 discount to our -- the price that we would receive for a
23 barrel of a well. And I knew that EOG who was the
24 company that we bought our assets from, our oil and gas
25 assets from, owned a rail facility. I had been out

Page 26

1 there when they still owned it. They -- I knew that it
2 was set up initially for -- for oil service. And so I
3 -- I asked kind of what was the status of that facility.
4 And so I was told by somebody in the organization, I
5 don't remember who at this point, that it was now owned
6 by Vista Maalt.

7 Q. Okay. And that prompted you to call Blake
8 then?

9 A. After I got his contact information from our
10 operations team.

11 Q. Okay. What was the differential between what
12 you were receiving for your oil at Midland and the other
13 place that you were looking at?

14 A. It -- it depended on the month, but it got as
15 high as \$20 a month.

16 Q. Okay. And?

17 MR. KORNHAUSER: \$20 a barrel.

18 A. \$20 a barrel, yes.

19 Q. Do you remember what time frame this was when
20 was you first reached out to Blake DeNoyer?

21 A. I believe it was early May.

22 Q. Okay. So in the May time frame what was the
23 difference between the Midland price for oil in the
24 other locations you were looking at?

25 A. I -- I can't remember exactly what it was, but

Page 27

1 I -- I mean, I sent in the discovery I had, an economics
2 folder, I had an Excel file that had from May -- I
3 believe from May through December --

4 Q. Okay.

5 A. -- of what the differentials were.

6 Q. All right. Now, the December was look forward,
7 right?

8 A. Yes.

9 Q. And so was that your projections?

10 A. Yes.

11 Q. Or was it based on futures?

12 A. That was based on the CME, so Chicago
13 Mercantile Exchange futures.

14 Q. Okay. And what other selling point locations
15 were you comparing to Midland at the time?

16 A. LLS, Louisiana Light Sweet.

17 Q. Okay. So that would be Gulf Coast?

18 A. That would be Saint James, Louisiana.

19 Q. Saint James, Louisiana, okay. And that is on
20 the Gulf Coast, right?

21 A. It is on the Gulf Coast.

22 Q. All right. Were you looking at the spread
23 between Midland and any other selling points, such as
24 Houston, Beaumont, Port Arthur?

25 A. We -- we looked at -- we looked at Houston, but

Page 28

1 Houston was becoming a -- kind of a narrower spread, so
2 we focused on Louisiana Light Sweet.

3 Q. Okay. And where did you go to determine what
4 the Saint James prices were at the time, was that CME as
5 well?

6 A. Yes.

7 Q. And when you go to CME, tell me as if you are
8 -- you are telling your mom or your aunt, somebody who
9 is not in the oil industry what you would go on their
10 website and what data you would pull up and look at?

11 A. Okay. So the CME has the settlements, so the
12 market closing price, the last price that a contract
13 settled on its website from the day before. And so
14 those are the -- the values that I would pull up. So
15 there is two differentials that I would pull up every
16 night. One would be the difference between Midland and
17 WTI and the other one would be the differential between
18 WTI and LLS, because WTI is the standard cost of a
19 barrel in Cushing, Oklahoma with a grade of west -- what
20 is called a west Texas grade barrel. There may be
21 something a little bit more scientific than that, but
22 that's just kind of how it is vernacular of the
23 industry.

24 Q. Yeah.

25 A. And so I would take what was in essence the

Page 29

8 (Pages 26 - 29)

1 difference between the Midland to WTI differential or
 2 what was the differential and then I would -- which was
 3 a negative number. And I would then have the LLS
 4 differential, which was a positive number, which is the
 5 -- the benefit between getting it from Cushing to -- to
 6 an LLS market. So let's say, for -- for -- for example,
 7 that there was a \$5 differential between WTI and LLS and
 8 then there was a negative \$10 differential between WTI
 9 and Midland then I would take LLS, which was \$5 and I
 10 would subtract out the \$10 -- the negative \$10, which
 11 would then give me a \$15 benefit between the two.
 12 Q. And then from that I guess you would reduce out
 13 your transportation cost?
 14 A. That's correct.
 15 Q. And then the difference is what you guys call
 16 the arbitrage?
 17 A. Yes.
 18 Q. Okay. Now, when you first contacted Mr.
 19 DeNoyer in May, I'm not going to hold you to an exact
 20 number right now, but it would be on your spreadsheet,
 21 right?
 22 A. Yes, it will.
 23 Q. The spread difference will be on there?
 24 A. It will.
 25 Q. Okay. What is your recollection of what that

Page 30

1 was in the ballpark?
 2 A. My recollection at that time -- so the hard
 3 part is it changed month by month. But at that point I
 4 would say it was probably around a \$15 differential.
 5 Q. Okay. And did that make moving crude by rail
 6 to Saint James attractive?
 7 A. It did.
 8 Q. Okay. And how attractive?
 9 A. At that point it was -- it would have been a
 10 very lucrative venture. It was -- I think our initial
 11 forecast, it is in that spreadsheet. I -- I can't
 12 remember exactly how much the benefit to us would have
 13 been. But it would have been probably in the
 14 \$10 million range.
 15 Q. Okay. Over what period of time?
 16 A. Over the period from September to -- September
 17 of 2018 through December of 2019.
 18 Q. Okay. And that would be extra profit over and
 19 above what you would typically expect on your oil sales?
 20 A. Yes.
 21 Q. Okay. And was that \$10 million then also after
 22 taking into consideration your -- your build-out cost on
 23 a transloading facility?
 24 A. I am not sure if that would be after that or
 25 not. I -- I can't remember.

Page 31

1 Q. Would that be in your spreadsheet?
 2 A. It would be in my spreadsheet.
 3 Q. Okay.
 4 A. Well, actually it is not in my spreadsheet. So
 5 you would then have to deduct out the -- the -- the cost
 6 of seeking the build-out.
 7 MR. LANTER: Okay. I am going to pull that
 8 spreadsheet out in a little bit.
 9 THE WITNESS; okay.
 10 MR. LANTER: And then we'll talk about it.
 11 It was too big to print.
 12 THE WITNESS: I completely understand. It
 13 is a lot of data.
 14 MR. LANTER: But I will get the computer
 15 out and you can walk me through it --
 16 THE WITNESS: That'd be great.
 17 MR. LANTER: -- in a little bit, okay?
 18 THE WITNESS: Yeah.
 19 Q. So then in May you are looking at, you know,
 20 hey, we've got this potential \$10 million --
 21 A. Uh-huh (positive response).
 22 Q. -- you know, bonanza.
 23 A. Yep.
 24 Q. You know, minus out build-out cost on a
 25 terminal.

Page 32

1 A. That's right.
 2 Q. And so you contacted Mr. DeNoyer. Before that
 3 had you talked to any of your customers or your
 4 potential JV partners about doing this?
 5 A. I -- I don't remember.
 6 Q. Okay. When did you first start talking to
 7 Shell about it?
 8 A. It -- it would have been in May.
 9 Q. Okay. And who were your discussions with at
 10 Shell?
 11 A. Ben Thompson.
 12 Q. What were you talking to him about?
 13 A. About the possibility of them being -- or -- or
 14 entering into a joint venture with us whereby they would
 15 pick up the -- or they would send trains to the Barnhart
 16 facility, Vista would load them. We would -- or we
 17 would provide the oil and Shell would take them to Saint
 18 James to market.
 19 Q. Okay. When -- when you are talking to him, was
 20 Shell already a customer for your oil?
 21 A. No.
 22 Q. So this was a new?
 23 A. This was a new relationship.
 24 Q. New relationship, okay. And how long did you
 25 continue to have those discussions with him?

Page 33

9 (Pages 30 - 33)

1 A. Through January of 2019.
 2 Q. And all of those discussions in that period of
 3 May through January '18 to '19 involved rail
 4 transportation of -- of oil?
 5 A. Not all of them, but -- be we continued the
 6 rail conversation, but they also became a purchaser of
 7 our oil.
 8 Q. Okay.
 9 A. Through that stretch and we thought that they
 10 were going to be the purchaser of our -- or the train.
 11 We had to switch over our -- our purchasers so that they
 12 would be able to take our oil when the train showed up.
 13 Q. Okay. So you are talking to Shell and
 14 initially you are talking to them about buying your oil
 15 and moving it to Saint James or wherever within the
 16 Shell organization?
 17 A. Yes.
 18 Q. So that logistics would be out of your hands
 19 and then basically transferred over to Shell?
 20 A. Yes.
 21 Q. And what were -- what were you going to gain
 22 and your company going to gain from doing that?
 23 A. We would receive half the arbitrage that you
 24 spoke of earlier.
 25 Q. Okay. So Shell would buy your oil at, I guess

Page 34

1 whatever the WTI, was the spot price that you were
 2 looking at the time?
 3 A. No, the WTI was Mid-Cush differential.
 4 Q. Okay. At that price and then they would ship
 5 it down to Saint James?
 6 A. Uh-huh (positive response).
 7 Q. And then whatever the difference was you would
 8 split that 50/50?
 9 A. That's correct.
 10 Q. And you then would be able to receive that
 11 arbitrage without having any logistics cost; is that
 12 correct?
 13 A. That's correct.
 14 Q. Okay. Were you going to have to build out a
 15 transload facility in order to do that deal, that type
 16 of deal with Shell?
 17 A. Yes.
 18 Q. And was that going to be the Barnhart one?
 19 A. Yes.
 20 Q. Okay. What happened to those talks?
 21 A. So they were our primary desire partner because
 22 they had such a large rail presence initially. But
 23 those -- those talks ended in August when they were
 24 unable to get trains or get a rate from the -- the
 25 railroad.

Page 35

1 Q. And how did you learn that they were unable to
 2 get a rate from the railroad?
 3 A. I talked to Ben.
 4 Q. So Ben Thompson told you that?
 5 A. Yes.
 6 Q. And he told you that he was unable to get a
 7 rate from what railroad?
 8 A. I believe it was the Union Pacific, but I am
 9 not positive on that.
 10 Q. Okay. Any others besides UP?
 11 A. I believe he also talked to the BNSF.
 12 Q. Okay. So maybe BNSF, but for sure based on
 13 your memory, the UP?
 14 A. Yes.
 15 Q. Did he ever mention talking to KCS?
 16 A. I do not remember.
 17 Q. Okay. Were you ever involved in any of the
 18 talks that he had with either the UP or the BNSF?
 19 A. No, he actually didn't handle the talks
 20 himself. He -- he -- they have a rail logistic group
 21 that handled those talks to my understanding.
 22 Q. Okay. Were you involved in any of those
 23 conversations between Shell and the railroads?
 24 A. No.
 25 Q. Like, a party on a phone call or?

Page 36

1 A. No.
 2 Q. So no involvement whatsoever?
 3 A. Nope.
 4 Q. You were just going to turn it over to Shell
 5 and let them figure it out and then reap the arbitrage
 6 advantage?
 7 A. Yes.
 8 Q. Was anybody else in your company involved in
 9 those Shell railroad conversations?
 10 A. Not that I know of.
 11 Q. So then Shell couldn't get it worked out, I
 12 guess, in what month?
 13 A. August.
 14 Q. August. And then what did you do?
 15 A. I kept talking to them. But -- so basically, I
 16 -- when we signed our TSA with Vista, I told -- or Vista
 17 Maalt. I told Vista Maalt that I needed would Shell --
 18 that I needed to give one -- Shell one more week in
 19 order to -- because I owed them that, before signing on
 20 with Jupiter and then I told Jupiter that and we all
 21 went to lunch that day. And then -- so when I got done
 22 with the meeting I called Shell and told them that you
 23 had one week, otherwise we told Vista Maalt and Jupiter
 24 that we are going to go with Jupiter.
 25 Q. Okay. Now, your terminal services agreement,

Page 37

10 (Pages 34 - 37)

1 MR. KORNHAUSER: Objection form.
 2 A. I -- I would agree with that.
 3 Q. Okay. And after that meeting or before that
 4 meeting, did y'all do due diligence into that company to
 5 see what they were all about?
 6 A. We did. We -- we -- went on and searched the
 7 internet and -- to see what they were and looked at
 8 their financials.
 9 Q. Okay. And so I take it by that that you
 10 verified that they were a company that you would be
 11 willing to do business with independently of anything
 12 that Chris Favors or Jon Ince may have told you?
 13 A. Not exactly. Actually, Jon told me that --
 14 that he had called around to his railroad contacts and
 15 that Jupiter was a -- the real deal in terms of being
 16 able to get it done. They had the rates. They were
 17 able to get the cars and that we should go with those
 18 guys.
 19 Q. Okay. Did you confirm that on your own?
 20 A. I don't have railroad contacts, so I don't know
 21 who to --
 22 Q. Did you confirm it through your discussions
 23 with Jupiter?
 24 A. Yeah I asked Jupiter about it.
 25 Q. Uh-huh (positive response).

Page 46

1 A. And Jupiter also confirmed it, but --
 2 Q. Okay.
 3 A. -- I was relying a lot on Jon as, you know, we
 4 were -- Jon gave them the -- kind of the bill of good
 5 health.
 6 Q. Are you telling us that you relied on Jon Ince,
 7 who you never met until this deal, more so than your own
 8 internal due diligence and research into Jupiter?
 9 A. Well, Jon -- Jon is an expert in logistics and
 10 I am -- I am not an expert in rail logistics.
 11 MR. LANTER: Objection nonresponsive.
 12 Q. Let's answer my question. Are you telling is
 13 that you are relying more on what Jon Ince told you,
 14 somebody who had never done business with before versus
 15 your own due diligence and research into Jupiter?
 16 MR. KORNHAUSER: I am going to object. The
 17 question has been asked and answered.
 18 MR. LANTER: Go ahead answer that question.
 19 A. I say that it was a mix between the two.
 20 Q. Okay. If you were relying on Jon Ince so much
 21 why did you do your own research and due diligence?
 22 A. That's a good question. I -- I would say that
 23 it is just a standard form to -- to -- to do my own due
 24 diligence. A lot of mine due diligence was kind of more
 25 on the financial side and their -- and their sizing.

Page 47

1 Q. Yeah.
 2 A. Like, if we could trust them from a credit
 3 perspective.
 4 Q. And Jon Ince didn't provide you with any
 5 Jupiter financials, did he?
 6 A. No, he did not.
 7 Q. Didn't provide you any internal information
 8 about that company, did he?
 9 A. No.
 10 Q. The only thing he gave you was in the e-mail
 11 that you were referring to when you said they are the
 12 real deal, right?
 13 A. No, it was phone call.
 14 Q. A phone call?
 15 A. Yes.
 16 Q. Okay. So other than that phone call and
 17 perhaps that e-mail, that's all that you got from Jon
 18 Ince, right?
 19 A. I mean, I think I talked with Jon twice about
 20 Jupiter.
 21 Q. Okay. But other than that that's all you got about
 22 Jupiter from Jon Ince, right?
 23 A. I believe so.
 24 Q. Okay. And all the rest of your information
 25 that you obtained in order to decide whether or not to

Page 48

1 do business with it came from your own work and your own
 2 due diligence?
 3 A. I would say that Chris also was very
 4 encouraging to do business with Jupiter.
 5 Q. Putting aside encouraging, I am talking about
 6 specific information.
 7 A. Oh, okay. Then -- then yes.
 8 Q. Okay.
 9 A. I -- well, what was your answer again -- or
 10 your question again? I'm sorry. I want to make sure
 11 I'm answering.
 12 Q. Sure. The -- the thrust of your decision to go
 13 ahead and move forward with Jupiter was based on your
 14 own due diligence and research into that company, wasn't
 15 it?
 16 MR. KORNHAUSER: Objection form.
 17 A. Well, it was that and what Jon had said about
 18 his due diligence.
 19 Q. Okay. Now, if Jon hadn't told you that would
 20 you have done business with Jupiter based on what you
 21 found out about them doing your own research and
 22 diligence?
 23 A. Probably not.
 24 Q. Probably not. Why not?
 25 A. Because they didn't have a strong balance sheet

Page 49

13 (Pages 46 - 49)

1 and so --
 2 Q. Uh-huh (positive response).
 3 A. I mean, it really -- at the end of the we knew
 4 that it was going to take a lot more hurdles of getting
 5 through, of finding some way to do credit and -- and we
 6 hadn't heard of Jupiter before. So it was not kind of
 7 an optimal situation for us having a Shell or somebody
 8 else or a BP, or a Sunoco or somebody that has a lot of
 9 railcars and -- and kind of their own logistic group
 10 would have been a preferred.
 11 Q. Uh-huh (positive response). Before all of this
 12 came up how were you moving your oil?
 13 A. Via truck.
 14 Q. Truck. And where were you taking it to sell?
 15 A. That was based on whoever was purchasing our --
 16 our oil at the time. They -- they took it to their own
 17 spot, it was point of sale. That bought it at our tank
 18 battery.
 19 Q. Okay. So you truck from the well site to
 20 wherever your customers point of sale was?
 21 A. No. They would pick it up at our -- our well
 22 site. So we -- they had no visibility beyond our -- our
 23 well site.
 24 Q. Okay. So you didn't have any trucking
 25 either --

Page 50

1 A. No.
 2 Q. -- that you did?
 3 A. No.
 4 Q. It was your customer who would bring their
 5 trucks in --
 6 A. That's correct.
 7 Q. -- to pick up the oil? Okay.
 8 Once you had -- I'm sorry, do you need a
 9 drink?
 10 Once you had the meeting with the people at
 11 Jupiter at your offices?
 12 A. Yes.
 13 Q. I understand you had a series of additional
 14 meetings and phone calls and things of that nature --
 15 A. Uh-huh (positive response).
 16 Q. -- going into time, correct?
 17 A. That's correct.
 18 Q. Was anybody from Maalt ever involved in any of
 19 those meetings or conversations that you had with
 20 Jupiter?
 21 A. I don't remember them being involved.
 22 Q. Okay. If they were there you would probably
 23 remember that wouldn't you?
 24 A. I am not sure.
 25 Q. Okay. Who do you recall being involved in

Page 51

1 those meetings and conversations?
 2 MR. KORNHAUSER: Objection form.
 3 A. Mainly it's Travis Morris, Albert, I can't
 4 remember his last name at -- at Jupiter, who I met a
 5 fewer times than Travis, but -- and then Tony Wroten
 6 would have also been in those discussions as well.
 7 Q. Okay. Did you ever end up entering into any
 8 kind of contract with Jupiter?
 9 A. We did for the purchase of our oil by truck.
 10 Q. Okay. Was that it?
 11 A. That I remember, yes.
 12 Q. All right. And which oil did you end up
 13 selling them under that contract?
 14 A. We sold them -- I don't know how many barrels.
 15 We sold all of our barrels through on Barnhart. And
 16 most of our barrels on Texon through -- through, I
 17 believe January.
 18 Q. What did you say last after January?
 19 A. I believe -- I believe through January.
 20 Q. Through January, okay. So when did you start
 21 selling it to them?
 22 A. I am not sure. My recollection -- it was after
 23 -- I am not sure.
 24 Q. Okay. So at some point in 2018 you entered
 25 into a contract to sell Jupiter oil?

Page 52

1 A. Yes.
 2 Q. And that contract ran or the activities under
 3 that contract ran so sometime in January of 2019?
 4 A. That's correct.
 5 Q. All right. And you sold them all of your
 6 production at Barnhart?
 7 A. Yes.
 8 Q. And some of your production at Texon?
 9 A. Yes.
 10 Q. Okay. And when you talk about all of your
 11 production at Barnhart, how many wells do you have there
 12 and how wide is the geographic area?
 13 A. It's -- the geographic area, it is a -- pretty
 14 expansive. It's -- it's -- I would estimate it's
 15 probably 25 to 30 miles across. And it is probably
 16 25 miles across, 25 to 30 miles across.
 17 Q. Okay.
 18 A. And it's probably 20 miles north south.
 19 Q. So about what, 400, 500 square miles?
 20 A. Well, it is not all our acreage, so it's --
 21 Q. Sure.
 22 A. Some of it's -- but yeah, I mean, in terms of
 23 kind of the geographical area that it covers.
 24 Q. And it probably goes up just a little bit
 25 doesn't it with your wells?

Page 53

14 (Pages 50 - 53)

1 A. It is -- it is very -- it is like an oval
 2 basically.
 3 Q. Yeah.
 4 A. But then with some gaps in the middle.
 5 Q. Okay.
 6 A. So it looks like an -- an oblong donut.
 7 Q. All right. So if you are looking at the
 8 picture you are probably at 4 or 500 acres?
 9 A. I would -- I would imagine.
 10 Q. Or square miles rather?
 11 A. Yeah, I would imagine so, yeah.
 12 Q. Yeah. And then with the wells dotted
 13 throughout?
 14 A. Yes.
 15 Q. Okay. How many wells are in that area?
 16 A. A couple of hundred.
 17 Q. Okay. So Jupiter is buying all of the oil from
 18 a couple hundred wells in the Barnhart region that you
 19 had there?
 20 A. Yes.
 21 Q. Did they pay you for all that?
 22 A. We actually didn't have an agreement with
 23 Jupiter -- so we had a credit sleeve with Jupiter, so
 24 actually our contract was with Macquarie who then had a
 25 contract with -- with Jupiter.

Page 54

1 Q. Explain to us how that worked.
 2 A. It's a back-to-back to contract is what they
 3 call it. So basically we would sign a contract with
 4 Macquarie who has a investment grade balance sheet. So
 5 we know -- we felt very comfortable that they would pay
 6 us. So put a back-to-back with Jupiter and they -- or
 7 with -- excuse me, with Macquarie. So we did a contract
 8 with Macquarie who immediately then signed the same
 9 contract in essence with -- with Jupiter. So we sold to
 10 Macquarie and instantaneously it would flip to -- to
 11 Jupiter.
 12 Q. Jupiter. Under that scenario, how is Macquarie
 13 making money?
 14 A. They made \$0.25 in credit, I believe. I -- I
 15 am not privy to that, but that's my understanding, is
 16 probably about that. That's kind of the market rate, I
 17 believe.
 18 Q. All right. So there is a little bit of a
 19 markup from Macquarie to Jupiter?
 20 A. That's right.
 21 Q. All right. And how did you end up entering
 22 into that arrangement?
 23 A. Through Macquarie or through Jupiter?
 24 Q. With Macquarie then the Jupiter.
 25 A. So the deal was with Jupiter. So in order to

Page 55

1 sell our oil via train we had to for -- let go our
 2 commitments with -- with Plains, who was then -- well,
 3 Plains then Shell. Excuse me. So Shell who is
 4 purchasing our oil at that time and Barnhart. And then
 5 in order to do that, we had to have a purchaser. So we
 6 had to go with -- we didn't know when the trains was
 7 going to -- the trains would eventually show up.
 8 Q. Uh-huh (positive response).
 9 A. So we had to have a contract in place with
 10 Jupiter because if it came in the middle of the month
 11 you can't -- you can't cease service with somebody else.
 12 Q. Right.
 13 A. So we -- we talked to Jupiter and initially
 14 Shell was going to be that credit sleeve. And so
 15 keeping them in the contract somewhat, Shell decided not
 16 to do that. And so Jupiter found Macquarie who then
 17 came in as the -- the intermediate in that contract.
 18 Q. Okay. So then you would sell to Macquarie,
 19 Macquarie would sell to Jupiter and if the train came in
 20 the oil would go on the railcars and then Jupiter would
 21 transport it to where?
 22 A. They would transport it to the Nustar -- the
 23 Nustar facility in Saint James.
 24 Q. Nustar, okay. And was there a -- a part of
 25 that agreement that provided for your company to share

Page 56

1 in the arbitrage with Jupiter?
 2 A. Yes.
 3 Q. Okay. So you would sell --
 4 A. If we signed that agreement, you are talking
 5 about the rail -- I'm sorry, the rail facility agreement
 6 that we did?
 7 Q. Yes.
 8 A. We never executed.
 9 Q. Okay you never got to that.
 10 A. Okay.
 11 Q. On the credit sleeve?
 12 A. The credit sleeve?
 13 Q. Yeah. Was there any --
 14 A. So that -- that was -- that was a similar
 15 trucking situation where they pick up at the wellhead.
 16 And it was -- there was -- there was items built into
 17 the contract whereby we could -- we could switch to a
 18 rail contract. But it was -- at that point it was just
 19 a pickup at our wellhead and -- and purchase at that
 20 point.
 21 Q. Okay. So Macquarie bought at the wellhead?
 22 A. Yes.
 23 Q. I take it Jupiter bought at the wellhead from
 24 Macquarie?
 25 A. Yes.

Page 57

15 (Pages 54 - 57)

1 Q. Do you know who was in charge of doing that?
 2 A. I don't.
 3 Q. Do you know if Tony ever did it?
 4 A. I am not sure.
 5 Q. And then Mr. Falls asked if the terminal owner
 6 was Vista San, you -- Tony said yes, sir. Did you ever
 7 have discussion with Spencer Falls about Vista San or
 8 Maalt or any of those companies that were involved?
 9 A. I don't remember.
 10 Q. So in this context, what were you trying to get
 11 from Enmark?
 12 MR. KORNHAUSER: Objection, form.
 13 A. We were trying to receive help on finding a
 14 market and logistics for our oil.
 15 Q. Okay. And was it in your mind something that
 16 they had to go hand in hand, the market and logistics
 17 had to be from the same provider?
 18 A. Not necessarily.
 19 Q. So at that point you were willing to entertain
 20 a third-party logistics company?
 21 A. I -- I can't speak to my -- what I was thinking
 22 at the time on that.
 23 Q. But I take it after that you never pursued the
 24 third-party logistics --
 25 A. Not that I can recall.

Page 106

1 Q. -- avenues did you?
 2 MR. LANTER: Here is Exhibit 36.
 3 (Exhibit 36 marked.)
 4 THE WITNESS: All right. Thank you.
 5 Q. It looks like this is your first introduction
 6 to Jonas Struthers; does that look right?
 7 A. It looks like it.
 8 Q. Okay. And if you look at Page 2.
 9 A. Okay.
 10 Q. On May 9th we have what appears to be the
 11 introductory e-mail by Jon Ince where he is telling you
 12 about Jonas Struthers, right?
 13 A. That's correct.
 14 MR. LANTER: Excuse me.
 15 Q. Now, on the second paragraph he says, "Let me
 16 introduce Jonas Struthers, the railcar guy I mentioned
 17 to you on our call." He said, "He has been a great
 18 partner for me in the past with our sand cars."
 19 MR. LANTER: I'm sorry.
 20 Q. "And I am sure he will be able to get you the
 21 cars that you need for your fleet. I'm sure he can get
 22 you cars that you need at a really good rate. He has
 23 done amazing work for me in the past."
 24 Did you understand that Mr. Ince was just
 25 simply telling you about his experiences with Jonas

Page 107

1 Struthers?
 2 MR. KORNHAUSER: Objection form.
 3 A. I understood that he said that Jonas could get
 4 us cars if we needed it.
 5 Q. Uh-huh (positive response). And there is
 6 nothing in this e-mail that promises you that Jon would
 7 be able to get Jonas to do that, is there?
 8 A. It says, "I am sure he will be able to get you
 9 cars that you need for your fleet."
 10 Q. But it doesn't say that he promises that he
 11 will be able to do so, does it?
 12 MR. KORNHAUSER: Objection form.
 13 A. He never articulates the word promise.
 14 Q. Uh-huh (positive response). And then once you
 15 had the introduction then you had your direct
 16 communications with Mr. Struthers, correct?
 17 A. Yes.
 18 Q. Now, it says that you are going to have -- or
 19 that you offered to have a phone call that same day on
 20 May 10th or after 10:30 a.m. on the 11th, did you have
 21 such a call?
 22 A. I'm not sure if it was that time frame, but I
 23 -- we did speak with Jonas.
 24 Q. Okay. And when you talked to Jonas, tell us
 25 what your discussion was.

Page 108

1 A. Basically we tried to articulate the need as we
 2 understood at that time, it was very early.
 3 Q. Uh-huh (positive response).
 4 A. For railcars, timing and volume and he -- he
 5 said that it would be -- he had some more questions for
 6 us about what railcars we would need for it, which we
 7 didn't really have that information at the time. And he
 8 had -- and -- but he said well -- I don't know. I am
 9 trying to think exactly. But basically for this
 10 conversation it was let's keep the conversation going.
 11 Q. Okay. Did he ever tell you that he would not
 12 be able to get railcars for you?
 13 MR. KORNHAUSER: Objection form. At this
 14 point in time?
 15 MR. LANTER: No, I said did he ever.
 16 MR. KORNHAUSER: Okay.
 17 A. I -- I do not remember him saying that, no.
 18 MR. LANTER: Okay. Since I am having a
 19 little bit of a coughing fit, why don't we go ahead and
 20 take our lunch break.
 21 MR. KORNHAUSER: Sounds good to me.
 22 THE VIDEOGRAPHER: The time is
 23 12:00 o'clock. Off the record.
 24 (Break taken.)
 25 THE VIDEOGRAPHER: The time is 1:11. Back

Page 109

28 (Pages 106 - 109)

1 needed to do, they had the experience and they access to
 2 cars, and so we were relying upon that when we made our
 3 final decision to sign the TSA.
 4 Q. Okay.
 5 A. And to actually spend the remainder of the cap
 6 X at that point.
 7 Q. Did Mr. Ince or did Mr. Favors promise or
 8 represent to Sequitur that trains and railcars would be
 9 available?
 10 MR. LANTER: Objection, form.
 11 Q. To your knowledge?
 12 A. Yes.
 13 Q. Okay. What do you recall specifically, as best
 14 you can, being told by Mr. Favors and Mr. Ince in that
 15 regards?
 16 A. I remember with railcars -- this is just in
 17 regards to railcars?
 18 Q. Yes, sir.
 19 A. That he represented that he could help us find
 20 railcars or put us in contact with people who could find
 21 railcars.
 22 Q. And did he tell you that trains and railcars
 23 were available?
 24 MR. LANTER: Objection, form.
 25 A. He said it would be a difficult thing to do,

Page 246

1 but that we could -- but that we could do it.
 2 Q. Okay. Did he tell you from whom that trains or
 3 railcars would be available?
 4 A. I don't know that he specifically specified
 5 whom, but he did tell us in an e-mail, I believe, that
 6 -- that Jonas Struthers would be able to help us.
 7 Q. Okay. And did you rely upon these promises and
 8 representations?
 9 MR. LANTER: Objection, form.
 10 A. Yes we did.
 11 Q. Okay. Did these promises and representations
 12 prove to be true?
 13 A. For the railcars?
 14 Q. Yes and trains?
 15 A. And what do you mean by trains?
 16 Q. Well, the power?
 17 A. The power? Oh, no they did not turn out to be
 18 true.
 19 Q. Okay. Has Sequitur suffered damages as a
 20 result of the promises and representations that you just
 21 stated not being true?
 22 MR. LANTER: Objection, form.
 23 A. Yes, we have spent a lot of money. We have
 24 spent millions and millions of dollars in cap X on these
 25 -- upgrading the faculties, which is the sub-cost and

Page 247

1 transloaders that are no longer in market.
 2 MR. LANTER: Objection nonresponsive.
 3 Q. But for the representations and promises that
 4 were made by Mr. Ince and Mr. Favors to Sequitur about
 5 the availability trains and railcars, would Sequitur
 6 have signed the TSA?
 7 A. No.
 8 MR. KORNHAUSER: We pass the witness.
 9 EXAMINATION
 10 BY MR. LANTER:
 11 Q. Did your company purchase the transloaders
 12 before you signed the TSA?
 13 A. We signed purchase orders for the, I believe,
 14 but I can't verify that.
 15 Q. Before the TSA?
 16 A. Yes.
 17 Q. And your company has in-house lawyers, right?
 18 A. That's correct.
 19 Q. And what's your -- what's your education?
 20 A. I've got a finance degree and an MBA.
 21 Q. Okay. So you have people who are highly
 22 educated people, right?
 23 A. Yes.
 24 Q. You are used to doing due diligence?
 25 A. Yes.

Page 248

1 Q. You are used to making your decisions based on
 2 your own due diligence and research, aren't you?
 3 A. We are.
 4 Q. Okay. And you had every capability of
 5 determining whether or not there were railcars available
 6 on your own, didn't you?
 7 MR. KORNHAUSER: Objection, form.
 8 A. We would have had to relied on somebody at some
 9 point.
 10 MR. LANTER: Objection nonresponsive.
 11 Q. You had the capability of making phone calls
 12 and asking people if railcars were available, didn't
 13 you?
 14 MR. KORNHAUSER: Objection, form.
 15 A. Asking people on the -- yes.
 16 Q. Yes. Earlier in your deposition I asked you
 17 about roughly about 10 to 15 railcar manufacturers and
 18 leasing companies and you said you didn't recall a
 19 single one of them; that's true isn't it?
 20 A. That is true.
 21 Q. But you certainly could have couldn't you?
 22 A. I could have called them, yes.
 23 Q. Okay. And you said the -- when did those
 24 representations that your lawyers asked you about take
 25 place, was that May and June?

Page 249

63 (Pages 246 - 249)

1 A. That was May and June through -- through the
2 signing of the TSA.
3 Q. Okay. And do you have the letter of intent in
4 that stack?
5 A. I sure do. I'm sorry, let me --
6 MR. LANTER: Pull it out and let me see
7 that.
8 THE WITNESS: Oh, wait no letter of intent.
9 MR. KORNHAUSER: Did you remark it, I've
10 got it.
11 MR. LANTER: Yeah I believe it is. And I
12 can find it in my --
13 THE WITNESS: You gave me too many papers.
14 MR. LANTER: -- briefcase, but it might
15 take longer.
16 THE WITNESS: Do you think what exhibit it
17 is by chance?
18 MR. LANTER: Yeah not offhand I don't.
19 There it is. Exhibit 6.
20 THE WITNESS: Okay. Well, you gave it to
21 me later though, right?
22 MR. LANTER: Here, let's do this, why don't
23 we remark it. I will just pull it out of this. Let's
24 go back. We will talk about it as being Exhibit 6
25 today.

Page 250

1 THE WITNESS: Okay. Perfect. Thank you.
2 Q. And your letter of intent, I mean, let's kind
3 of shuffle that, it is dated June 1?
4 A. Yes.
5 Q. 2018, right?
6 A. That's -- I am -- I am not sure, yes.
7 Q. And when you signed this letter of intent, you
8 agreed with Paragraph 8, did you not?
9 A. We -- we signed it.
10 Q. In fact, you wrote it, didn't you? Your --
11 your company wrote it, didn't it?
12 A. I don't remember.
13 Q. Okay. It's not on Maalt or Vista letterhead is
14 it?
15 A. I -- I can I see the --
16 MR. LANTER: Sure.
17 A. No, it is not.
18 Q. Okay. And you signed it first asking Maalt or
19 Vista to execute it as well, didn't you?
20 A. I did.
21 Q. Once you had the introduction made to Jupiter,
22 you guys took it from there and had all of your
23 negotiations just between Sequitur and Jupiter, correct?
24 A. On terms of commercial terms, yes.
25 Q. And you conducted your own due diligence of --

Page 251

1 of Jupiter didn't you?
2 A. We did some, yes.
3 Q. But then less despite your own due diligence
4 and the research you did in that company you decided to
5 make the business decision to move forward with whoever
6 dealings you had with it, right?
7 A. Say that again, I am sorry.
8 Q. Yes. Despite your own due diligence and the
9 research you did into Jupiter, your company made the
10 decision to move forward and do business with it?
11 A. We -- we did make the decision to move forward
12 with the agreement.
13 MR. LANTER: Okay. Pass the witness.
14 MR. KORNHAUSER: We will pass the witness.
15 THE VIDEOGRAPHER: The time is 5:25. We
16 are off the record.
17 [Proceedings concluded at 5:25 p.m.]
18
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Page 252

1 CORRECTION SHEET
2 WITNESS NAME: BRADEN MERRILL DATE: 11/19/2019
3 PAGE/LINE CHANGE REASON
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Page 253

June 1, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent

Ladies and Gentlemen:

Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista") intend to enter into a transaction pursuant to a service agreement covering Vista's (or an affiliate's) provision of the Service (as defined in Attachment "A" hereto) to Sequitur. Pending the preparation and execution of a Definitive Agreement (as hereinafter defined), this letter will confirm the intent of such parties ("Parties") to enter into the contemplated transaction ("Transaction") to be governed by the Definitive Agreement in accordance with the terms and conditions set forth in this letter. The Parties agree as follows:

1. **Term Sheet.** The Parties intend to negotiate in good faith a mutually acceptable agreement governing the Service. To the extent there is any conflict between the Term Sheet and this letter, this letter shall control.
2. **Definitive Agreement.** The Parties shall endeavor to incorporate the terms and conditions expressed herein in a mutually acceptable definitive agreement (the "Definitive Agreement," whether one or more) no later than June 26, 2018 ("LOI Term"), unless extended by the Parties in writing, which the Parties would expect to do if the negotiations toward a Definitive Agreement and other relevant agreements and activities have sufficiently progressed. In the event the Parties do not agree upon and execute the Definitive Agreement by the end of the LOI Term, this letter (and the understandings set forth herein) shall be deemed terminated, and neither Party shall have any further obligation to the other Party, provided, however, that the provisions of Section 3 shall survive the termination of this letter for a period of one (1) year.
3. **Confidentiality.** The existence of this letter (and its contents) are intended to be confidential and are not to be discussed with or disclosed to any third party, except (i) with the express prior written consent of the other Party hereto, (ii) as may be required or appropriate in response to any summons, subpoena or discovery order or to comply with any applicable law, order, regulation or ruling or (iii) as the Parties or their representatives (who shall also be bound by the confidentiality hereof) reasonably deem appropriate in order to conduct due diligence and other investigations relating to the contemplated Transaction.
4. **Exclusive Dealing Period.** The Parties agree that from the date of this letter through the end of the LOI Term, neither Party nor any of its controlled affiliates shall, directly or indirectly, enter into any agreements with any other person or entity regarding any transaction similar to the Service or the Transaction or any other transaction related, in whole or in part, to the Service, except as



Vista Proppants and Logistics, LLC
 June 1, 2018
 Page 2

approved in writing by the other Party. Additionally, neither Vista nor any of its controlled affiliates shall, directly or indirectly, enter into any negotiations, discussions or agreements with BP, Valero, Sunoco, NuStar or Shell, or any of their respective affiliates, for provision of the Service to them, or any other transaction similar to the Service, within 75 miles of Vista's rail facility in Barnhart, Texas, except as approved in writing by the Sequitur. Nothing in this section shall prohibit Vista from selling any service or product more than 75 miles from its rail facility in Barnhart, Texas.


5. Expenses. Each Party shall bear its own costs associated with negotiating and performing under this letter.
6. Due Diligence. Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.
7. Approval. No Party shall be bound by any Definitive Agreement relating to the Transaction until (a) each Party has completed its due diligence to its satisfaction, (b) such Party's senior management, or other governing body or authorized person, shall have approved the Definitive Agreement, (c) such Party shall have executed the Definitive Agreement, and (d) all conditions precedent to the effectiveness of any such Definitive Agreement shall have been satisfied, including obtaining any and all requisite government or third party approvals, licenses and permits (which are satisfactory in form and substance to each Party in its sole discretion), if such approvals, licenses and permits are required.
8. No Oral Agreements. Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.
9. Governing Law. THIS LETTER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES.
10. Assignment. Neither Party shall assign its rights or obligations under this letter without the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed. Any attempted assignment in contravention of this paragraph shall be null and void.
11. Binding Status. Except as to Sections 3 through 10 (which are intended to be binding upon execution and delivery of this letter by both Parties), the Parties understand and agree that this letter (a) is not binding and sets forth the Parties' current understanding of agreements that may be set out in a binding fashion in the Definitive Agreement to be executed at a later date and (b) may not be relied upon by either Party as the basis for a contract by estoppel or otherwise, but rather evidences a non-binding expression of good faith understanding to endeavor, subject to completion of due diligence to the Parties' satisfaction, to negotiate a mutually agreeable Definitive Agreement.

Vista Proppants and Logistics, LLC
June 1, 2018
Page 3

If the terms and conditions of this letter are in accord with your understandings, please sign, and return the enclosed counterpart of this letter to the undersigned, by no later than close of business on June 4, 2018, after which date, if not signed and returned, this letter shall be null and void.

Very truly yours,

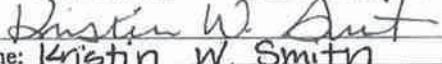
SEQUITUR PERMIAN, LLC

By: 
Name: Braden Merrill
Title: VPE CFO

AGREED

this 5 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin W. Smith
Title: CFO

ATTACHMENT "A"
to
Letter of Intent
(Term Sheet)

Party A:	Vista Proppants and Logistics, LLC (and any designated affiliates)
Party B:	Sequitur Permian, LLC (and any designated affiliates)
Facility:	Barnhart Railyard
Location:	Barnhart Loading Facility 44485 W. Hwy 67 Barnhart, TX 76930
Term:	September 2018 through December 2019.
Renewal:	Subject to the Survival clause below, the Term may be renewed and extended by Party B for successive 12-month periods by written notice to Party A at least 60 days prior to the end of the then Term, as it may have been previously renewed and extended.
Products:	Crude oil or other hydrocarbons products owned or controlled by Party B or which Party B is obligated to market or deliver.
Commitment:	For the Term, as it may be extended, Party A will limit use of its Barnhart Railyard property and Facility to the sole purpose of loading Party B's Products. Party A will load Products provided by Party B at the Facility, whether from pipeline or trucks.
Service:	Party A's loading of Party B's Products at Location/Facility and related services, including maintenance.
Rate:	\$1.50/barrel of Products loaded into railcars at the Location/Facility.
Volume:	Party B agrees to provide Products sufficient to fill an average of no fewer than sixteen railcars per day (11,424 barrels) during each calendar month. If Party B does not meet its minimum volume obligation for a calendar month, Party A will be compensated in such month, as that month's total settlement, in an amount equal to at least the Rate times 11,424 barrels, or \$17,136, times the number of days in that month so that Party A will be paid as if the minimum volume had been provided by Party B. Should Party B provide more Products than its minimum volume obligation, Party A shall be compensated at the Rate times the excess volume.
Capital Investment:	In no event shall Party A be obligated to provide any capital investment necessary to perform Service. To the extent more capital investment is needed to satisfy incremental Volume, the financial burden required to equip the facility shall be borne by Party B.

Phase I: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from trucks such that loading will commence September 1, 2018.

Phase II: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from pipeline.

Assignability: The Definitive Agreement would be assignable on sale or disposition, and as otherwise negotiated. Any sale of the Facility property would be subject to the Definitive Agreement.

Survival: If the Term is not extended, then when Party A is not utilizing the Barnhart Railyard for the general course of its sand business and desires to use for loading of oil, the terms of the Definitive Agreement may be reinstated by Party B at its option.

Other Terms: The Definitive Agreement will contain customary provisions for transactions similar to the Service or the Transaction, such as mutual representations, warranties, and covenants, conditions precedent, termination, remedies, force majeure, indemnification, and risk of loss.

THIS SUMMARY OF TERMS AND CONDITIONS IS ATTACHMENT "A" TO A LETTER OF INTENT DATED JUNE 1, 2018, AND IS NOT TO BE CONSIDERED SEPARATELY FROM THE LETTER OF INTENT. EXCEPT AS MAY BE SET OUT IN THE LETTER OF INTENT, THE LETTER OF INTENT AND THIS ATTACHMENT "A" ARE NOT INTENDED TO BE COMPLETE AND ALL-INCLUSIVE OF THE TERMS OF THE PROPOSED TRANSACTION, NOR DOES THE LETTER OF INTENT OR THIS ATTACHMENT "A" CREATE A BINDING AND ENFORCEABLE CONTRACT BETWEEN OR COMMITMENT OR OFFER TO ANY PARTY OR PARTIES, EXCEPT TO THE EXTENT PROVIDED IN SECTION 11 OF THE LETTER OF INTENT.

June 22, 2018

Vista Proppants and Logistics, LLC
4413 Carey St
Ft. Worth, Texas 76119

Attn: Jon Ince

Re: Letter of Intent Amendment

Ladies and Gentlemen:

Reference is made to that certain letter of intent ("LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "June 26, 2018" to "July 6, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

SEQUITUR PERMIAN, LLC

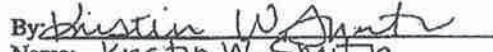


By: Braden Merrill
Vice President and Chief Financial Officer

AGREED

this 21 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin W. Smith
Title: CFO

July 9, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment No. 2

Ladies and Gentlemen:

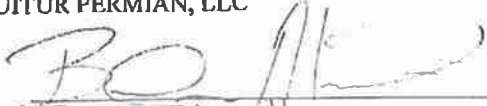
Reference is made to that certain letter of intent (as previously amended, "LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "July 6, 2018" to "July 23, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

SEQUITUR PERMIAN, LLC


By: 
Name: Braden Merrill
Title: VP & CFO

ASK

AGREED

this 12 day of July 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin Smith
Title: CFO

Sequitur Permian, LLC
2050 W. Sam Houston Parkway S., Suite 2050
Houston, Texas 77042

February 8, 2019

Via email to mrobertson@vprop.com & FedEx
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Marty Robertson

Via email to cfavors@vprop.com & FedEx
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Chris Favors

Re: Termination of Terminal Services Agreement

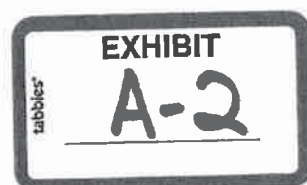
Gentlemen:

Reference is made to (i) that certain Terminal Services Agreement ("Agreement") dated August 6, 2018 between Sequitur Permian, LLC ("Customer") and Maalt, L.P. ("Terminal Owner") relating to the use of Terminal Owner's rail terminal facility located in Barnhart, Texas ("Terminal") and (ii) Customer's letter to Terminal Owner dated December 7, 2018, declaring an existing Force Majeure Event ("Notice of Force Majeure Event"). All capitalized terms not otherwise defined herein have the same meanings as in the Agreement.

The Force Majeure Event described in the Notice of Force Majeure Event has continued for a period of sixty (60) consecutive Days. Accordingly, pursuant to Section 8.4 of the Agreement, Customer hereby notifies Terminal Owner that Customer has elected to terminate the Agreement effective as of the date of this letter. As provided in Section 8.4, Customer shall have no further obligations to Terminal Owner under the Agreement (including, but not limited to, with respect to any Minimum Volume Commitment).

Additionally, pursuant to Section 2.7 of the Agreement, upon termination of the Agreement, Customer, at its sole cost and expense, is permitted to remove any equipment and facilities constituting the Customer Terminal Modifications. As required under the Agreement, Terminal Owner shall provide Customer access to the Terminal to commence and complete the removal of the Customer Terminal Modifications. Customer will be contacting Terminal Owner after the date hereof to (i) discuss the potential acquisition of the Terminal Owner's rights to the surface area and any other appurtenances or (ii) coordinate the removal process.

This notice is without prejudice to Customer's rights and remedies under the Agreement or otherwise, all of which are hereby reserved.



Sequitur_001111

Letter to Maalt, LP
February 8, 2019
Page 2

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Braden Merrill', written over a horizontal line.

Braden Merrill
CFO

Cc:

Via FedEx
James Lantner
James Lantner, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Sequitur_001112

1 CAUSE NO. 19-003

2 MAALT, LP, § IN THE DISTRICT COURT OF
3 §
4 Plaintiff, §
5 VS. § IRION COUNTY, TEXAS
6 SEQUITUR PERMIAN, LLC, §
7 Defendant. § 51st JUDICIAL DISTRICT
8

9 ORAL AND VIDEOTAPED DEPOSITION OF

10 MICHAEL VAN DEN BOLD

11 November 21, 2019

12 Volume 1
13

14 ORAL AND VIDEOTAPED DEPOSITION OF MICHAEL VAN DEN
15 BOLD, produced as a witness at the instance of the
16 Plaintiff and duly sworn, was taken in the above-styled
17 and numbered cause on the 21st day of November, 2019,
18 from 9:31 a.m. to 11:29 a.m., before Patricia Palmer,
19 CSR, in and for the State of Texas, reported by machine
20 shorthand, at the offices of Mr. Matthew A. Kornhauser,
21 Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
22 Houston, Texas Houston, pursuant to the Texas Rules of
23 Civil Procedure and the provisions stated on the record
24 herein.
25

Page 1



Veritext Legal Solutions
800-336-4000

1 essentially saying that it shouldn't have entered into
2 the relationship for this transaction?

3 A. I am aware we made a counterclaim.

4 Q. Okay. From a factual standpoint, what do you
5 contend that Vista or Maalt did that should cause it to
6 have to pay Sequitur damages for electing to go forward
7 with the contract?

8 A. Well, long before we even signed the TSA in our
9 discussions with Maalt, you know, they made
10 representations that they were rail experts, their
11 employees had worked for the railroads, that they could
12 help get a deal done, that they had relationships, they
13 had the expertise, that they could help, you know, help
14 coordinate and collaborate to get these contracts in
15 place, to help get the deal done, and they weren't able
16 to do things that they promised.

17 Q. Okay. I just want to get -- first off, from a
18 time standpoint that all of the representations or
19 statements that you are referencing were all -- they all
20 preceded the signing of the terminal services agreement,
21 correct?

22 A. Right, yes.

23 Q. Okay. All right.

24 A. And -- and even during the negotiations and
25 even afterwards.

Page 10

1 Q. Okay. Did they promise to do anything other
2 than help?

3 A. The -- the -- I mean, the promises they made is
4 that they -- they were experts and knew the business,
5 the rail by -- sand by rail, and had the relationships.
6 And -- yeah they would help get us -- get this venture
7 off the ground.

8 Q. Okay. And I guess the distinction I am trying
9 to make is sometimes you hire a third-party and you
10 enter into a contractual relationship, for like a
11 third-merit logistics provider, and that third-party
12 logistic provider contracts to provide you certain
13 services regarding -- in this case, rail cars, rail
14 transportation, that type of thing. Did Sequitur enter
15 into any type of third-party logistics contractual
16 arrangement with Maalt or Vista?

17 A. No, these were just verbal representations that
18 they could do that.

19 Q. Okay. Was there ever any contractual
20 arrangement made, verbal or oral even, that in return
21 for X Vista and Maalt will get you rail cars, will get
22 you rail transportation?

23 A. No it was always a collaborative effort that we
24 would all work together to try to make this a successful
25 JV.

Page 11

1 Q. Okay. And I've heard that they -- well, I
2 shouldn't say I heard that. There has -- there has been
3 some testimony that Maalt would make some introductions
4 or Vista would make some introductions to folks within
5 the industry to assist with -- assist Sequitur in
6 obtaining transportation.

7 A. Is that a question?

8 Q. Yeah. Did they do that or do you know?

9 A. Yeah. No, they -- I mean, all throughout, I
10 can remember even through November, December, they were
11 making calls on our behalf trying to help facilitate
12 getting a contract in place that we could rail that.

13 Q. Okay. When Vista or Maalt were making these
14 statements or representations to you or to Sequitur, do
15 you have a belief one way or the other if they were
16 generally believed?

17 A. By us or them?

18 Q. By you -- or by them?

19 A. Yeah. I mean, they were making those
20 statements. I genuinely believed that they -- they
21 thought they could do that and we believed them.

22 Q. Okay. And that's what I was trying to get at.
23 You know, because sometimes you will have a situation
24 where somebody knows they are selling a bill of goods
25 and some -- on the other situation you have someone who

Page 12

1 says something, I think we can do this and it just turns
2 out to be false in the end, and I think what you are
3 saying it is the second?

4 A. Well, in this case it turned out to be false,
5 they weren't able to help us get the deal done.

6 Q. Okay. But you don't have any real reason to
7 believe that when folks at Maalt or Vista were saying,
8 you know, to the extent we can help you we will, that
9 they believed that they could help you?

10 A. Well, in hindsight I do believe there was some
11 deception in some cases.

12 Q. In looking at the -- according to the time they
13 made the statements, do you have any reason to believe
14 at the time they made the statements they didn't believe
15 the statements that what were saying was a fair
16 representation?

17 MR. KORNHAUSER: Objection form.

18 THE WITNESS: Say again.

19 MR. WICKES: Sure. And I probably
20 should've explained this to you earlier, he has a right
21 to say objection form. Unless he instructs you not to
22 answer then you answer it as best you can.

23 THE WITNESS: Okay. Repeat the question.

24 MR. WICKES: Yeah I am going to ask her to
25 read it back if that's all right. And if when she reads

Page 13

4 (Pages 10 - 13)

1 it back and it sounds terrible, I will ask it again.
2 which is always a possibility.

3 (Requested portion read back.)

4 MR. KORNHAUSER: My form of objection is
5 noted.

6 A. So the -- the example I will refer to is when
7 Travis said a couple of days before we signed the TSA
8 that they had somebody imminent.

9 MR. KORNHAUSER: You said Travis said,
10 correct, Travis.

11 THE WITNESS: Travis, oh sorry. I stand
12 correct.

13 A. Chris Favors said that they had somebody ready
14 to sign the agreement and then, you know, out of
15 discovery phase, we never seen any evidence that they
16 had somebody.

17 Q. Any other instances where you felt like that at
18 the time someone with Vista or Maalt was making a
19 statement to Sequitur that they didn't believe that what
20 they were saying was accurate?

21 A. Nothing comes to mind at this point.

22 Q. Okay. And -- and I want to go back and make
23 sure I've got everything of the -- the general
24 representations that are the basis for the counterclaim.
25 One was that they are rail experts and that some of

Page 14

1 their employees are former rail and worked for
2 railroads?

3 A. Correct.

4 Q. Okay. The other was that they would assist in
5 getting a deal done?

6 A. Correct.

7 Q. Okay. And getting a deal done, what all does
8 that include?

9 A. Well, the getting the deal done, Sequitur
10 needed an arrangement where somebody that had rail cars,
11 that had rates and volumes and contracts with the
12 railroads to get from Barnhart to the Gulf Coast.

13 Q. Okay. And during the -- all the way up until
14 the notice of force majeure, did personnel with Maalt
15 and Vista provide assistance when they could on leads
16 for rail cars, rail transportation, contacts within the
17 railroad industry, that type of thing?

18 A. They made phone calls and introductions to
19 assist.

20 Q. Okay. Is there anything during the period from
21 after the terminal services agreement to the notice of
22 force majeure that Sequitur specifically asked Maalt or
23 Vista to do that it did not do?

24 A. Nothing comes to mind at this point.

25 Q. Okay and I just want to -- I think for

Page 15

1 replying ground that I apologize. As I try to do this
2 as little as possible, just so we're on the same page.

3 You are not contending that Maalt or Vista promised to
4 get rail cars, but they offered to help Sequitur or its
5 agents in getting rail cars?

6 A. Yeah. My view is that this was a collaborative
7 effort --

8 Q. Okay.

9 A. -- between Jupiter, Maalt and Sequitur to make
10 this a profitable venture for everybody.

11 Q. Okay.

12 A. And...

13 MR. KORNHAUSER: You done.

14 MR. WICKES: Do you got more to say?

15 MR. KORNHAUSER: I just want to make sure.
16 Yeah I just want to make sure the record is clear so, as
17 lawyers it is sometimes hard to anticipate when a
18 witness finish answering. So I just want to make sure
19 you have an opportunity to give your answer and when
20 you're done he'll ask another question.

21 MR. WICKES: Okay. Not a problem. I
22 appreciate you stepping in. Sometimes my questions just
23 stop mid sentence. And sometimes answers do that to us,
24 it's just we are human.

25 Q. Okay. And by saying collaborative effort, is

Page 16

1 it fair to say that what you mean is that if a deal got
2 done for rail transportation and cars Maalt stood to
3 benefit, Jupiter stood to benefit and Sequitur stood to
4 benefit?

5 A. Right.

6 Q. And all of them to the extent they were to work
7 towards that goal, they are all moving in the same
8 direction?

9 A. I mean, we all had our responsibility to try
10 and get a deal done. And unfortunately, it didn't
11 happen.

12 Q. Okay. And from a contractual standpoint, what
13 Maalt's responsibility was to provide the transporting
14 service, correct?

15 A. Contractually, but I mean, verbally they also
16 made representations that they would help get the other
17 parts put together.

18 MR. WICKES: Yeah I am going to object as
19 nonresponsive. And I am just doing that because my
20 question was limited to contractually so.

21 THE WITNESS: Okay.

22 Q. And contractually Sequitur had an obligation to
23 do the capital improvements there on the ground and then
24 to provide or locate rail transportation and rail cars?

25 MR. KORNHAUSER: Objection, form.

Page 17

5 (Pages 14 - 17)

1 Q. Why not?
 2 A. Because we didn't have the contract in place
 3 with a buyer, and a rail secured rates and an off
 4 loading capacity to do such. Our intent was not to sign
 5 the TSA until we had all those pieces locked up.
 6 Q. Okay. And when you signed the TSA, what risk
 7 was Sequitur aware of that it knew it was assuming?
 8 A. That we wouldn't be able to find that partner.
 9 And so we signed it under the threat of Maalt signing up
 10 with Jupiter for that \$8 million up front payment and
 11 thus kind of derailing the prospect, if you pardon the
 12 pun.
 13 Q. Okay. And Sequitur doesn't sound like a
 14 company that gets threatened, I mean, y'all are pretty
 15 big boys aren't you?
 16 A. No. We are actually very small, less than 100
 17 employees.
 18 Q. What is your revenue in a year?
 19 A. I don't -- actually, revenue, I don't know.
 20 But our EBITDA, would be over 100 million this year.
 21 Q. Okay. Ultimately you signed the TSA, correct?
 22 A. Correct.
 23 Q. You did not put any conditions in the TSA on
 24 finding rail cars at any particular price, did you?
 25 MR. KORNHAUSER: Objection, form.

Page 34

1 A. There were no contractual obligations on
 2 anybody's part to do that.
 3 Q. Okay. And the same with rail rates for moving
 4 rail cars, there was no contingencies in the TSA about
 5 finding rail transportation rates at any given level; is
 6 that right?
 7 MR. KORNHAUSER: Objection form.
 8 A. Yeah. Other than the force majeure provision.
 9 Q. Okay. And the force majeure provision and
 10 that's Exhibit 13, I believe, the TSA; is that right?
 11 If you could turn to Exhibit 13. And you mentioned the
 12 force majeure provision, which on Page 23 the force
 13 majeure provision is defined; is that right?
 14 A. Correct.
 15 Q. Okay. And take your time. Is there anything
 16 in 14.2 that has anything related to the rates for rail
 17 transportation?
 18 MR. KORNHAUSER: Objection, form.
 19 A. No, it relates to the ability to get trains.
 20 Q. Okay. Not how much it cost, but ability or
 21 availability or not?
 22 MR. WICKES: Objection, form.
 23 A. Right.
 24 Q. Okay. So Sequitur is not taking the position
 25 that it couldn't get with -- well, let me rephrase it.

Page 35

1 Is Sequitur taking the position that it
 2 could not get rails to move crude out of Barnhart at any
 3 price?
 4 A. It's taking the position we couldn't get a
 5 train into Barnhart into the Gulf at all.
 6 Q. At any price?
 7 A. Correct.
 8 Q. Okay. So it is not saying that rail
 9 transportation was available, but if it did it, it was
 10 going to take a loss?
 11 A. No.
 12 Q. Okay. So if we go and take a deposition of a
 13 railroad employee that says they were familiar with the
 14 deal and they were ready, willing and able to move crude
 15 out of Barnhart and communicated that to Jupiter or to
 16 Murex or to other agents of Sequitur, you would agree
 17 then that there is no force majeure?
 18 MR. KORNHAUSER: Objection, form.
 19 A. No, I disagree with that.
 20 Q. Okay. So if a railroad is ready, willing and
 21 able to move out of Barnhart --
 22 MR. KORNHAUSER: Hold on. Hold on. Were
 23 you done with your answer?
 24 MR. LANTER: I think he was.
 25 MR. KORNHAUSER: Well, I just want to make

Page 36

1 sure he was because he paused and you immediately asked
 2 another question and I wasn't sure if you were done. I
 3 just want to make sure that you are finished with your
 4 answer before the next question.
 5 MR. WICKES: Well, I asked if he agreed or
 6 not and he said it, he said I don't agree. So that's --
 7 that's a finished answer.
 8 MR. KORNHAUSER: Well, but I don't know if
 9 he was or not. He paused and looked like he was going
 10 to say something. I just want to make sure that we --
 11 we don't step on his answer.
 12 A. Right. So I don't agree because it is not just
 13 moving rail car along one little segment of the
 14 railroad. It takes having all segments of the railroad
 15 to get from Barnhart to a final destination that that's
 16 required.
 17 MR. WICKES: Okay. And I appreciate that
 18 clarification.
 19 Q. So you would agree that if a railroad was able
 20 to say that we were able in combination with other
 21 railroads that we had worked with to move from the
 22 Barnhart terminal to the Gulf that no force majeure
 23 event would have occurred?
 24 A. If they were able to move it from Barnhart to
 25 the Gulf Coast to an offloading place that had capacity,

Page 37

10 (Pages 34 - 37)

TERMINAL SERVICES AGREEMENT

This TERMINAL SERVICES AGREEMENT (this "Agreement") is made, entered into and effective as of August 6, 2018 (the "Effective Date"), by and between Maalt, LP, a Texas limited partnership ("Terminal Owner"), and Sequitur Permian, LLC, a Delaware limited liability company ("Customer"). Terminal Owner and Customer shall be referred to herein individually as a "Party" and collectively as the "Parties".

RECITALS

WHEREAS, Terminal Owner owns and operates a rail terminal facility located in Barnhart, Texas as more specifically described on Exhibit A-1 hereto on the land more specifically described on Exhibit A-2 hereto (collectively, the "Terminal"), and Customer is engaged in the transportation and marketing of Product; and

WHEREAS, Terminal Owner desires to make available the Terminal to Customer and perform the services set forth in this Agreement, and, on an exclusive basis, Customer desires to utilize the Terminal for the throughput of Product and related services.

AGREEMENT

NOW, THEREFORE, in and for consideration of the premises and mutual covenants contained in this Agreement, Terminal Owner and Customer hereby agree as follows:

ARTICLE 1 DEFINITIONS

For the purposes of this Agreement, capitalized terms used herein will have the meaning assigned to such terms below:

"Actual Quarterly Aggregate Volume" means the sum of the volumes of Product tendered by Customer (or by Customer's third-party customers) for Throughput at the Terminal during the applicable Calendar Quarter.

"Affiliate" means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, Controls, or is Controlled by, or is under common Control with, such Person.

"Agreement" has the meaning given to such term in the Preamble hereto.

"Alternate Service" has the meaning given to such term in Section 8.8. "Alternative Service Notice" has the meaning given to such term in Section 8.8.

"Applicable Law" means any applicable statute, law, regulation, ordinance, rule, judgment, rule of law, order, decree, permit, approval, concession, grant, franchise, license, agreement, requirement, or other governmental restriction or any similar form of decision of, or any provision or condition of any permit, license or other operating authorization issued under any of the foregoing by, or any determination by, any Governmental Authority having or asserting



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jurisdiction over the matter or matters in question, whether now or hereafter in effect and in each case as amended (including without limitation, all of the terms and provisions of the common law of such Governmental Authority), as interpreted and enforced at the time in question.

"Barrel" means 42 United States gallons of 231 cubic inches per gallon at sixty degrees Fahrenheit (60° F) and normal atmospheric pressure.

"Business Day" means a Day (other than a Saturday or Sunday) on which banks are open for business in Houston, Texas.

"Calendar Quarter" means a period of 3 consecutive Months beginning on the first day of each January, April, July and October (except for 2018 of the Initial Term, September will be included with October-December 2018). "Calendar Quarterly" shall be construed accordingly.

"Control" means (a) with respect to any Person, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting shares, by contract, or otherwise and (b) with respect to any Product, such Product produced by Customer and owned by it or produced and owned by a Third Party or an Affiliate and with respect to which (i) Customer has the contractual right or obligation (pursuant to a marketing, agency, operating, unit, or similar agreement) to dispose of such Product and (ii) Customer elects or is obligated to dispose of such Product on behalf of the applicable Third Party or Affiliate. "Controlled" shall be construed accordingly.

"Cure Period" has the meaning given to such term in Section 8.3.

"Customer" has the meaning given to such term in the Preamble to this Agreement.

"Customer Parties" means, collectively, Customer, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, customers, and their respective successors and permitted assigns (excluding any Terminal Owner Parties), and individually, a "Customer Party".

"Customer Terminal Modifications" has the meaning given to such term in Section 2.7.

"Day" means a period commencing at 7:00 a.m. Central Standard Time and extending until 7:00 a.m. Central Standard Time on the following calendar day. "Daily" shall be construed accordingly.

"Default Notice" has the meaning given to such term in Section 8.3.

"Defaulting Party" has the meaning given to such term in Section 8.3.

"Delivery Point" means the inlet flange of the applicable railcar.

"Effective Date" has the meaning given to such term in the Preamble to this Agreement.

"Extended Term" has the meaning given to such term in Section 8.1.

"Forecast" has the meaning given to such term in Section 2.6.

“Force Majeure” or “Force Majeure Event” has the meaning given to such term in Section 14.2.

“Governmental Authority” means any federal, state, or local government or any provincial, departmental or other political subdivision thereof, or any entity, body or authority exercising executive, legislative, judicial, regulatory, administrative, legislative, regulatory, taxing or other governmental functions, and any court, department, commission, board, bureau, agency, instrumentality or administrative body of any of the foregoing.

“Group” means either Terminal Owner Parties or Customer Parties, as applicable.

“HSE” has the meaning given to such term in Section 15.4(a).

“HSE Program” has the meaning given to such term in Section 15.4(a).

“Income Taxes” means any income, franchise and similar Taxes.

“Initial Term” has the meaning given to such term in Section 8.1.

“Interest Rate” means an annual rate (based on a three-hundred-sixty (360) Day year) equal to the lesser of (a) two percent (2%) over the prime rate as published under “Money Rates” in the *Wall Street Journal* in effect at the close of the Business Day on which payment was due and (b) the maximum rate permitted by Applicable Law.

“Liabilities” means actions, claims, causes of action, costs, demands, damages, expenses, fines, lawsuits, liabilities, losses, obligations and penalties (including court costs and reasonable attorneys’ fees).

“Loss Credit” has the meaning given to such term in Section 7.2(b).

“Loss Allowance” has the meaning given to such term in Section 7.2(a).

“Meter” has the meaning given to such term in Section 5.1.

“Minimum Volume Commitment” has the meaning given to such term in Section 3.1.

“Month” means the period beginning on the first Day of a calendar Month and ending immediately prior to the start of the first Day of the following calendar Month. “Monthly” shall be construed accordingly.

“Non-Defaulting Party” has the meaning given to such term in Section 8.3.

“Party” and “Parties” have the meanings given to such terms in the Preamble to this Agreement.

“Permits” means permits, licenses, consents, clearances, certificates, approvals, authorizations or similar documents or authorities required by any Governmental Authority or pursuant to any Applicable Law and that apply to the Terminal, the Services or a Party.

"Person" means any individual, corporation, limited liability company, partnership, joint venture, unincorporated organization or any other legal entity.

"Phase I Project" has the meaning given to such term in Section 2.7.

"Phase II Project" has the meaning given to such term in Section 2.7.

"PLL" has the meaning given to such term in Section 11.2.

"Product" means crude oil and other liquid hydrocarbon products owned or Controlled by Customer.

"Receipt Point" has the meaning given to such term in Section 7.1.

"Receiving Party" has the meaning given to such term in Section 15.20.

"Regulatory Approval" means any Permit from a Governmental Authority necessary for performance of the Services or the installation of equipment at or operations of the Terminal in connection with the Services, including the following Permits: Spill Prevention, Control, and Countermeasure (SPCC) plan is in place, Storm Water Permit (as it may be required to be amended or updated) issued by the Texas Commission on Environmental Quality (TCEQ) and Permit by Rule (PBR) Air Permit (as it may be required to be amended or updated) issued by TCEQ.

"Representatives" has the meaning given to such term in Section 15.20.

"ROFR Notice" has the meaning given to such term in Section 9.2(b).

"ROFR Offer" has the meaning given to such term in Section 9.2(b).

"ROFR Period" has the meaning given to such term in Section 9.2(a).

"Services" has the meaning given to such term in Section 2.12.

"Shortfall" has the meaning given to such term in Section 3.2(a).

"Shortfall Payment" has the meaning given to such term in Section 3.2(a).

"SPCC" has the meaning given to such term in Section 15.4(a).

"Subsequent Transfer" has the meaning given to such term in Section 9.2(a).

"Subsequently Transferred Interest" has the meaning given to such term in Section 9.2(b).

"Target Terminal Operations Commencement Date" means September 1, 2018, as such date may be extended as mutually agreed in writing by the Parties and subject to Article 14.

"Taxes" means any taxes, assessments, fees, duties or other similar charges imposed by any Governmental Authority, including income, franchise, ad valorem, property, sales, use, excise,

employment, transfer or other charge in the nature of a tax, and any interest, fine, penalty or addition thereto.

“Term” has the meaning given to such term in Section 8.1.

“Terminal” has the meaning given to such term in the Recitals to this Agreement.

“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.

“Terminal Owner” has the meaning given to such term in the Preamble to this Agreement.

“Terminal Owner Parties” means, collectively, Terminal Owner, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, subcontractors, invitees, successors and permitted assigns (excluding any Customer Parties), and individually, a “Terminal Owner Party”.

“Third Party” means any Person other than a Terminal Owner Party and Customer Party.

“Throughput” means the delivery of Product from trucks or pipeline into the Terminal on behalf of Customer or Customer’s third-party customers. The quantity of Product Throughput at the Terminal shall be measured in accordance with Article 5.

“Throughput Fee” has the meaning given to such term in Section 4.1.

“Week” means the period beginning on Sunday at midnight and ending on Saturday at 11:59 p.m. “Weekly” shall be construed accordingly.

ARTICLE 2

SERVICES; FACILITIES AND OPERATIONS

2.1 Regulatory Approval Filings. After the Effective Date, the Parties shall work (at their own cost and expense) together in good faith to obtain prior to the Target Terminal Operations Commencement Date the Regulatory Approvals as provided in this Agreement. Each Party shall promptly, but in no event later than ten (10) Days of receipt of all information from the other Party necessary to be included as part of such Regulatory Approval applications, file or cause to be filed applications for all Regulatory Approvals required to be obtained by it in connection with the transactions contemplated hereby. Such applying Party shall use its commercially reasonable efforts to obtain such Regulatory Approvals at the earliest practicable time. The Parties shall cooperate with each other and communicate regularly regarding their efforts to obtain such Regulatory Approvals. Each Party will provide the other Party with copies of all non-confidential portions of any application, statements or correspondence submitted to or received from any Governmental Authorities in connection with the transactions contemplated by this Agreement.

2.2 Services. Terminal Owner shall receive, load, unload, handle, measure, and

redeliver Product at the Terminal in accordance with Customer's Forecasts and reasonable requirements and will tender such Product to Customer or its or its third-party customers' carriers as directed by Customer, in each case, in accordance with the terms and conditions of this Agreement. Terminal Owner shall furnish and be responsible for all labor, supervision, and materials necessary for its timely and efficient performance of the receipt, loading, unloading, transloading, handling, measuring, redelivery, and related operations and services pursuant to this Agreement and contemplated under this Agreement in order to provide the Services, which in all cases shall be conducted in accordance with generally accepted oil terminalling practices, in a good and workmanlike manner and in compliance with all Applicable Law and the obligations of Terminal Owner to its surface lessors. Terminal Owner shall operate and maintain the Terminal and any other related equipment and property in good and safe condition at all times (all of the foregoing in this Section 2.2, is herein collectively, the "Services").

2.3 Exclusivity. During the Term, (a) Customer shall have exclusive rights to use the Terminal for Product transloading; (b) Customer shall be entitled to utilize 100% of the capacity of the Terminal if required for the transloading of Product, (c) without Customer's prior written consent, Terminal Owner shall not contract with any other Person (including any Affiliates of Terminal Owner) for capacity at the Terminal, provide services at the Terminal to any other Person or develop any additional terminal facilities on the Terminal's land for the transloading of Product, (d) Terminal Owner shall limit the use of the areas of the Terminal designated for the transloading of Product to the sole and exclusive purpose of loading and unloading of Product, and (e) Terminal Owner shall not enter into any agreement with any Third Party for the transloading of oil or other hydrocarbon products at the Terminal. Notwithstanding anything herein to the contrary, after the Effective Date, Terminal Owner may use those areas of the land on which the Terminal is located that are not used for the performance of the Services, including but not limited to the staging and transloading of Product, for another business purpose so long as such purpose does not interfere with or adversely impacts the operations and use of the Terminal for performance of the Services.

2.4 Delivery; Redelivery. Customer may deliver Product to the Terminal by truck or pipeline delivery for receipt by Terminal Owner during the Terminal's operating hours which shall be no less than twenty-four (24) hours per Day, seven (7) Days per week, holidays included. Customer will retain responsibility for all dispatch services associated with the staging and logistics of trucks and railcars, and delivery of Product to and from the Terminal. Customer and Terminal Owner will cooperate with each other in scheduling deliveries, receipts and redeliveries. Receipts shall be issued by Terminal Owner to Customer or Customer's third-party customers for all Product delivered to the Terminal by truck or pipeline by Customer or Customer's third-party customers for unloading, handling, and loading into railcars. Terminal Owner shall redeliver Product to Customer or Customer's third-party customers from the Terminal into railcars. The Terminal will be made available for redelivery twenty-four (24) hours per Day, seven (7) Days per week, holidays included.

2.5 Access. In connection with Terminal Owner's and Customer's obligations under this Agreement, including Customer's exclusive use of the Terminal, Customer's rights with respect to Customer's Terminal Modifications, and the Services provided hereunder with respect to the Product, Terminal Owner does hereby GRANT and CONVEY to Customer and the other Customer Parties, its and their successors and assigns, for the purposes of enforcing and otherwise

realizing the benefits of Customer's rights under this Agreement a non-exclusive right of access over, on, and across the surface of the lands on which the Terminal is located for the duration of the Term and any extensions thereof. Further, from and after the Effective Date, Customer will seek from the owner of the land, and Terminal Owner shall cooperate with Customer in seeking, a non-exclusive easement providing a right of access over, on, across and under the surface of the land on which the Terminal is located. Any access by Customer with respect to Customer Terminal Modifications shall be coordinated in advance with Terminal Owner, and Terminal Owner agrees to permit routine access to a pre-approved list of Customer personnel and representatives. Terminal Owner represents and warrants that it has obtained all the necessary and required consents, if any, of any applicable lessor(s) or other holders of property rights with respect to such grant of easement and right of access. Terminal Owner shall have a duty to maintain in force and effect any underlying agreements that the grant of such non-exclusive easement and right of access by Terminal Owner is based upon. Without limiting the foregoing, Terminal Owner grants Customer's third-party customers access to the Terminal, including the loading racks and railcar areas, at all reasonable times for the purpose of the staging and logistics of trucks and railcars, and delivering and receiving Product, as applicable.

2.6 Monthly Forecasts. Customer will provide Terminal Owner, by email or facsimile, or by other means mutually agreed by Terminal Owner and Customer from time to time, no later than the fifteenth (15th) Day of each Month throughout the Term, a good faith Monthly forecast (a "Forecast") of the volume of each Product that Customer projects it (and its third-party customers, as applicable) will deliver to the Terminal during the following Month. Terminal Owner and Customer will work together cooperatively to schedule deliveries of the Products to the Terminal based on Customer's Forecasts. Customer's Forecasts may exceed the Minimum Volume Commitment, but shall not exceed the maximum design transloading capacity of the Terminal.

2.7 Terminal Modifications. In order to facilitate the Services, Customer will perform (with the full cooperation of Terminal Owner) certain expansions or alterations to the Terminal at Customer's sole cost and expense (collectively, the "Customer Terminal Modifications") as follows: (a) Customer will install equipment and facilities at the Terminal necessary for loading railcars with Product from trucks, such that the loading will commence on the Target Terminal Operations Commencement Date, and as may be described in further detail on Exhibit B hereto ("Phase I Project"), and (b) Customer may, at its sole option, install equipment and facilities necessary for loading railcars from pipelines, and as may be described in further detail on Exhibit C hereto ("Phase II Project"). If Customer elects to perform the Customer Terminal Modification described in (b), it shall provide Terminal Owner with notice of such election. Terminal Owner shall allow Customer (and the Customer Parties) to perform all Customer Terminal Modifications, and shall provide Customer and Customer Parties with such access (including any necessary easements and rights-of-way into, over, under and across the Terminal and associated land to locate equipment and facilities) and full assistance as reasonably required; provided that Terminal Owner shall be permitted to have a representative present at the Terminal for observation when work on a Customer Terminal Modification is being performed. Terminal Owner acknowledges and agrees that title to the equipment and facilities installed by or at the direction of Customer in connection with a Customer Terminal Modification shall remain with and be vested in the Customer; *provided* that ownership of any additional rail tracks that may be installed will be transferred to Terminal Owner upon the expiration of the Term, subject to

Customer's rights under Section 8.8 and Section 9.2. Other than the rail tracks described in the preceding sentence, upon the expiration of the Term, Customer shall be permitted, at its sole cost and expense, to remove any equipment or facilities constituting Customer Terminal Modifications. During the Term, Terminal Owner (i) shall not be required to make any capital investment to facilitate the Services (other than in connection with any maintenance or repair necessary for the Terminal Owner to comply with its obligations under this Agreement), and (ii) shall not be permitted to make any expansion, modification or other alteration (other than routine maintenance and repairs) to the Terminal that interferes with or adversely impacts the operations and use of the Terminal without the prior written consent of Customer.

ARTICLE 3 MINIMUM THROUGHPUT OBLIGATION

3.1 Minimum Volume Obligation. Subject to the terms of this Agreement, including Section 3.3 and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, Customer agrees to Throughput (either directly or via volumes delivered to the Terminal by Customer's third-party customers) an amount of Product through the Terminal on a Monthly basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the "Minimum Volume Commitment") during each Calendar Quarter during the Term after the Termination Operations Commencement Date, or otherwise pay the Shortfall Payment applicable to such Calendar Quarter.

3.2 Shortfall Payment.

(a) Quarterly Shortfall. If, for any Calendar Quarter after the Terminal Operations Commencement Date, the volume of Product actually Throughput during such Calendar Quarter (for the avoidance of doubt, calculated on a Calendar Quarterly, not a Monthly or Daily, basis) is less than the Minimum Volume Commitment (such deficiency, if any, the "Shortfall"), Customer shall pay Terminal Owner an amount equal to the volume of the Shortfall (expressed in Barrels) to the extent not caused or contributed to by Force Majeure, maintenance outages at the Terminal, or Terminal Owner's breach of its obligations under this Agreement, *multiplied by* the Throughput Fee in effect for such Calendar Quarter (collectively, the "Shortfall Payment"). There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner breach.

(b) Quarterly True-Up. Promptly following each Calendar Quarter, Terminal Owner will provide to Customer a written statement showing the Minimum Volume Commitment versus the Actual Quarterly Aggregate Volume. If the Actual Quarterly Aggregate Volume exceeds the Minimum Volume Commitment for such Calendar Quarter, Customer shall not owe and shall be relieved from payment to Terminal Owner of any Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter. However, if the Actual Quarterly Aggregate Volume is less than the Minimum Volume Commitment for such Calendar Quarter, Customer shall owe to Terminal Owner a Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter.

3.3 Adjusted Minimum Volume Commitment. For any partial Calendar Quarter within the Term, the Minimum Volume Commitment shall be prorated accordingly. The

Minimum Volume Commitment for the applicable Calendar Quarter shall also be adjusted downward on a per Barrel basis for any volumes of Product that Customer was not able to Throughput through the Terminal due to Terminal Owner's failure to receive Product within the capacity of the Terminal, Terminal Owner breach of this Agreement, or any other act or an omission of a Terminal Owner Party that prevents or curtails Throughput.

ARTICLE 4 FEES; INVOICES

4.1 Throughput Fee. Subject to the terms of this Agreement, Customer shall pay Terminal Owner a throughput fee equal to One Dollar and Fifty Cents (\$1.50) per Barrel of Product Throughput through the Terminal (the "Throughput Fee").

4.2 Invoices; Payment of Fees. Within twenty-four (24) hours following the end of each Month, Terminal Owner shall issue to Customer an estimate of any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any); *provided* that the Parties agree and acknowledge that Customer shall have no obligation to pay the amounts set forth in such estimate until Terminal Owner delivers to Customer an invoice as described in the remaining portion of this Section 4.2. Terminal Owner shall invoice Customer Weekly for any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any) within ten (10) Business Days after the end of each Week for Services that occurred during the preceding Week, including a detailed statement setting forth the amounts included in such invoice. Customer agrees to pay Terminal Owner all undisputed amounts set forth in such invoice within thirty (30) Days of receipt of Terminal Owner's invoice, which shall be the due date for such invoice. If Customer disputes one or more items in an invoice, Customer must notify Terminal Owner promptly (and in any event by the due date therefor) in writing of the item or items under dispute and the reasons therefor. Customer may withhold payment of the disputed portion of such invoice, without the payment of the Interest Rate as described below, until the dispute is resolved. Any portion of a disputed invoice which is later paid will be paid with accrued interest thereon calculated using the Interest Rate from the due date of such invoice until paid. All invoices issued by Terminal Owner under this Agreement shall be issued in United States dollars, and all such invoices and any other amounts due hereunder shall be paid in United States dollars.

4.3 Past Due Interest. Any amount payable by Customer under this Agreement shall, if not paid when due, bear interest from the payment due date until, but excluding the date payment is received by Terminal Owner, at the Interest Rate.

ARTICLE 5 MEASUREMENT

5.1 Measurement Procedures. Measurement shall be in accordance with Terminal Owner's standard measurement procedures, which shall be in accordance with applicable API standards. Terminal Owner shall transload the Product from trucks or pipeline into railcars using, as applicable, a rack, pump and custody transfer meter at the Receipt Point to be provided by Customer and a rack, pump and custody transfer meter at the Delivery Point to be provided by Customer (each meter at the Receipt Point and Delivery Point, a "Meter"). Each Meter shall be provided in accordance with industry standards and in accordance with all Applicable Law. The

quantities of the Products transloaded by Terminal Owner at the Terminal will be determined by the Meters. In the event of a failure of a Meter, the Parties will use railcar waybills and truck bills of lading, as applicable, until the applicable Meter is repaired. Terminal Owner shall be responsible for the maintenance of the Meters, and repair any malfunctioning Meter as soon as commercially practicable. All tests, calibrations, and adjustments of a Meter, to be performed by Terminal Owner at least once per Calendar Quarter, may be witnessed by Customer (or its designated representative) and shall be preceded by reasonable notice to Customer. Upon request of either Party for a special test of any meter or auxiliary equipment, Terminal Owner shall promptly verify the accuracy of same; provided, however, that the cost of such special test shall be borne by the requesting Party, unless the percentage of inaccuracy found is more than one percent (1) % of a recording corresponding to the average hourly rate of Product flow, in which case the cost of such test shall be borne by Terminal Owner.

5.2 Measurement Records. Terminal Owner shall keep accurate records of the receipt and delivery of Product under this Agreement and, subject to the Loss Allowance, shall account for Product receipts and redeliveries at such time and in such manner as shall be reasonably requested by Customer. Terminal Owner will provide Daily updates to Customer as to the metered volumes of the Product Throughput into the Terminal, trucks delivered to the Terminal, and volumes of Product transloaded into railcars at the Terminal.

ARTICLE 6

TERMINAL OWNER OBLIGATIONS

6.1 Warranty. Terminal Owner warrants to Customer that: (a) all Services shall be in accordance with Section 2.2 hereof; (b) all Services will be performed and completed in a safe and environmentally conscientious manner, with Terminal Owner taking all reasonable and necessary actions, including, but not limited to, those in accordance with all Applicable Law, regulations, ordinances and codes, any applicable policies of Customer and prudent industry practices to protect persons, property and the environment; (c) all Services shall be performed professionally, and in accordance with sound engineering practices; (d) all Services will be free from defects in design, workmanship, and materials, and that all Terminal Owner personnel and employees have been trained to work in a safe and competent manner to assure the safety of other persons; and (e) all equipment or property provided or supplied by Terminal Owner in performing the Services has been thoroughly tested and inspected and is safe, sufficient and free of any defects, latent or otherwise, is in good operating condition and is appropriate for the carrying out of the Services.

6.2 Non-Conforming Services. Any Services found defective, unsuitable, or in any way nonconforming with the terms of this Agreement shall be promptly replaced or corrected by Terminal Owner without additional charge to Customer, whether or not the Services have been accepted. Customer may, at its sole discretion and with full reservation of its other rights and remedies, direct Terminal Owner to replace or correct, as applicable, the non-compliant Services. The warranty obligations of Terminal Owner under this Agreement shall not be limited, restricted, or otherwise modified by the indemnity obligations contained elsewhere in this Agreement.

6.3 Observation and Testing of Services. All Services will be subject to Customer's observation and testing. Terminal Owner shall be responsible for inspecting and testing the

components of the Services. Customer Parties shall (subject to Section 15.2) have the right at any time to review and test the Services at all places and stages of performance, without such action being treated as either discharging Terminal Owner's responsibility or constituting Customer's acceptance of the Services. Notwithstanding any prior test and observation at the Terminal, all Services will be subject to final acceptance at the Terminal. Neither payment for, nor the inspection at the Terminal of any Services shall in any way impair Customer's right to observation, imply acceptance or rejection of non-conforming Services, or reduce or waive any other remedies or warranties to which Customer is entitled.

6.4 Warranty Default. If, after written request by Customer, Terminal Owner fails to replace or correct any non-conforming Services within the shortest time reasonably practicable, but in any event not later than three (3) Days after being notified of the defect, without prejudice to Customer's other rights and remedies under this Agreement or by Applicable Law, Customer (a) may replace or correct such Services itself or through another contractor in any manner that Customer determines in its sole discretion, and charge to Terminal Owner the cost incurred by Customer thereby, which Terminal Owner will pay promptly upon invoice therefor, (b) deduct or withhold the costs and expenses incurred from amounts otherwise due and owing by Customer to Terminal Owner and/or (c) may, without further notice, exercise its remedies under this Agreement for default, in accordance with Article 8 hereof.

6.5 Permits. Terminal Owner shall obtain and maintain in force, and ensure that each Terminal Owner Party obtains and maintains in force (as necessary), all Permits including the Regulatory Approvals. If Customer is required to obtain any Permit that Applicable Law requires to be issued in the name of Terminal Owner or another Terminal Owner Party, Terminal Owner shall provide all reasonable assistance to Customer in connection with Customer's efforts to obtain and maintain such Permit, including by signing and submitting any applications or other documentation required to be in Terminal Owner's or another Terminal Owner Party's name.

ARTICLE 7

TITLE AND RISK OF LOSS; PRODUCT LOSS; DEMURRAGE

7.1 Title; Custody and Control. Customer (or its customer, as the case may be) shall retain title to all Product delivered by it to the Terminal, and Terminal Owner acknowledges that it has no title to or interest in the Product. Care, custody and control of (and risk of loss for) all such Product shall pass to Terminal Owner at the time that such Product passes through the Meter at the outlet flange of the applicable truck or pipeline delivering such Product into the Terminal (the "Receipt Point") and shall remain with Terminal Owner until the railcar receiving such Product from the Terminal is no longer located at the Terminal and such railcar is removed from the Terminal by the applicable rail carrier. Title to Product shall not transfer to Terminal Owner by reason of the performance of the Services. For the avoidance of doubt, Customer Terminal Modifications are considered part of the Terminal for purposes of determining the Receipt Point and other purposes of this Agreement, subject to Section 2.7.

7.2 Loss Allowance; Product Degradation. Customer acknowledges that minor losses (shrinkage) in the handling of crude oil is a normal part of the transloading process and, as a result, minor losses of crude oil related to the unloading and loading of such commodity shall be considered negligible if within the Loss Allowance (as hereinafter defined).

(a) Loss Allowance. If Customer Parties and/or Terminal Owner observe Product spillage or loss while transloading from trucks to railcars or from the pipeline to railcars, Customer Parties and Terminal Owner shall determine the volume of lost Product (as reported on the relevant spill report). Terminal Owner shall not be responsible for any loss of Product provided that such loss does not exceed one barrel per railcar (each a "Loss Allowance"). Terminal Owner shall be responsible for loss of Product that exceeds the Loss Allowance.

(b) Loss Credit. Customer shall not owe Terminal Owner any transloading fees for lost Product in excess of the Loss Allowance. In the event of losses in excess of the Loss Allowance, the loss above the Loss Allowance shall be settled and reflected as a credit (the "Loss Credit") to Customer on Terminal Owner's invoice for such Month in an amount equal to the lost barrels in excess of the Loss Allowance multiplied by the then crude oil barrel price of WTI Midland (ARGUS). While Terminal Owner has care, custody and control of the Product pursuant to Section 7.1, Terminal Owner shall be responsible for securing the Product and protecting the Product against loss (above any Loss Allowance) or theft, and any such loss or theft shall not be the basis of a Force Majeure claim by Terminal Owner under this Agreement. Terminal Owner shall indemnify and hold harmless the Customer Parties from and against any Liabilities arising out of, incident to, or in connection with (a) the loss of Product in excess of the Loss Allowance at the Terminal or otherwise due to the acts or omissions of Terminal Owner, or (b) any contamination, damage, degradation or improper transloading of Product at the Terminal; provided, however, that the limit of the indemnification shall be the Loss Credit given to Customer as provided in this Section.

7.3 Demurrage. Terminal Owner shall be responsible for demurrage, standby, delay and similar charges related to the Services incurred by Customer Parties provided under this Agreement for railcars and trucks if the applicable delay resulted from the acts or omissions of any of the Terminal Owner Parties.

7.4 No Security Interest. Unless Customer has defaulted in its payment obligations under this Agreement and such default is not cured, Terminal Owner, for itself and all Terminal Owner Parties, shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon any of the Product delivered to the Terminal or upon the Customer Terminal Modifications. If Terminal Owner does, it shall indemnify, defend and hold harmless the Customer Parties from and against any such pledge, security interest, lien, levy or other encumbrance. Unless Terminal Owner has defaulted in its obligations under this Agreement and such default is not cured, Customer shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon the Terminal (other than with respect to the Customer Terminal Modifications) in connection with this Agreement. If Customer does, it shall indemnify, defend and hold harmless the Terminal Owner from and against any such pledge, security interest, lien, levy or other encumbrance.

ARTICLE 8 TERM; REMEDIES

8.1 Term. Subject to early termination pursuant to this Article 8, the term of this Agreement shall commence on the Effective Date and shall continue until January 1, 2020 (the "Initial Term"). At Customer's election, the term may be renewed and extended for successive

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three (3) month periods (each such period, an "Extended Term") by written notice from Customer to Terminal Owner at least sixty (60) Days prior to the expiration of the Initial Term or any Extended Term, as applicable (such Initial Term and any Extended Term(s) are herein collectively, the "Term").

8.2 Termination Due to Failure of Conditions. This Agreement may be terminated at any time prior to the Target Terminal Operations Commencement Date by either Customer or Terminal Owner, by the terminating Party's written notice of termination to the other Party, if all conditions set forth below in this Section 8.2 to such terminating Party's obligations have not been fulfilled by the Target Terminal Operations Commencement Date (as it may be extended by the Parties in writing), unless the failure to so fulfill by such time is due to an uncured breach of this Agreement by the Party seeking to terminate.

(a) **Conditions to Customer's Obligations.** All obligations of Customer under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Customer:

(i) **Compliance with Representations, Warranties and Agreements.** The representations and warranties made by Terminal Owner in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Terminal Owner shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Terminal Owner prior to or at the Target Terminal Operations Commencement Date, including Terminal Owner's full cooperation with Customer during the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) **Necessary Company Actions.** Terminal Owner shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) **Regulatory Approvals.** The Regulatory Approvals shall have been obtained and are effective.

(iv) **No Litigation.** No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

10/13

(v) SPCC & HSE Compliance. Terminal Owner shall have in place an SPCC plan for the Terminal that is reasonably satisfactory to Customer Parties, and shall, upon request, provide to Customer and Customer Parties all HSE and related documentation and maintain practices necessary for Customer to obtain Customer Parties' approval of use of the Terminal.

(vi) Easement. The easement described in Section 2.5 hereof for Customer's benefit shall have been obtained by Target Terminal Operations Commencement Date.

(b) Conditions to Terminal Owner's Obligations. All obligations of Terminal Owner under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Terminal Owner:

(i) Compliance with Representations, Warranties and Agreements. The representations and warranties made by Customer in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Customer shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Customer prior to or at the Target Terminal Operations Commencement Date, including the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) Necessary Company Actions. Customer shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) Regulatory Approvals. The Regulatory Approvals shall have been obtained and are effective.

(iv) No Litigation. No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

8.3 Remedies for Default. Except as otherwise specifically provided for under the terms of this Agreement, if either Party fails to perform any of the representations, warranties, covenants or other obligations imposed on it by this Agreement in any material respect (the "Defaulting Party"), then the Party to whom the covenant or obligation was owed (the "Non-Defaulting Party") may (without waiving any other remedy for breach hereof, each of which is

hereby reserved), notify in writing the Defaulting Party, stating specifically the nature of the default (the "Default Notice"). The Defaulting Party will have thirty (30) Days after receipt of the Default Notice (the "Cure Period") in which to (i) remedy the cause or causes stated in the Default Notice, (ii) provide adequate security satisfactory to Non-Defaulting Party to fully indemnify the Non-Defaulting Party for any and all consequences of the breach, or (iii) to dispute the claim of breach in good faith. If the Defaulting Party either cures the default or provides such adequate security within the Cure Period, then this Agreement shall remain in full force and effect. If the Defaulting Party fails to timely cure such default or to timely provide such adequate security, then, without prejudice to its other remedies under this Agreement, at law or in equity, the Non-Defaulting Party may suspend the performance of its obligations under this Agreement or terminate this Agreement immediately upon giving written notice of such suspension or termination to the Defaulting Party. In the event of any Terminal Owner uncured default, Customer (or its designee) may, at its option, without prejudice to its other remedies under this Agreement, at law or in equity, perform the Services by whatever method Customer reasonably deems expedient, and in such case, Terminal Owner shall be liable to Customer for Customer's reasonable direct damages and costs of cover and performing the Services, if applicable. The effective date of any termination of this Agreement under this Section 8.3 shall be the date established in the notice of such termination delivered by the Non-Defaulting Party exercising its termination right hereunder.

8.4 Termination for Extended Force Majeure. By written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days or (b) sixty (60) Days in any one hundred and twenty (120) consecutive Day period. Following the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment).

8.5 Effect of Termination. In the event of the termination of this Agreement pursuant to the provisions of Section 8.1, Section 8.2, Section 8.3 or Section 8.4, and except as provided in Section 8.3, no Party to this Agreement shall have any further liability or obligation under or in respect of this Agreement, except that the provisions of this Agreement that by their nature survive its termination (including property rights, indemnities, damage limitations, waivers, releases, warranties, Permits, confidentiality and governing law provisions) shall remain applicable and survive such termination and remain in force and effect; provided, however, that the termination of this Agreement shall not (a) relieve any Party from any expense, liability or obligation or remedy therefor that has accrued or attached prior to the date of such termination, nor (b) defeat or impair the right of any Party to pursue such relief as may otherwise be available to it on account of any breach of this Agreement or any of the representations, warranties, covenants or agreements contained in this Agreement by the other Party.

8.6 Specific Performance and Declaratory Judgments. Damages in the event of breach of this Agreement by a Party hereto may be difficult, if not impossible, to ascertain. Therefore, each Party, in addition to and without limiting any other remedy or right it may have, will have the right to seek a declaratory judgment and will have the right to an injunction or other equitable relief in any court of competent jurisdiction, enjoining any such breach, and enforcing specifically the terms and provisions hereof, and each of the Parties hereto hereby waives any and all defenses

it may have on the ground of lack of jurisdiction or competence of the court to grant such an injunction or other equitable relief. The existence of this right will not preclude any Party from pursuing any other rights and remedies at law or in equity that such Party may have.

8.7 Cumulative Remedies. Except as otherwise expressly stated in this Agreement, the remedies provided under this Agreement are cumulative and in addition to any other rights or remedies either Party may have now or that may subsequently be available at Applicable Law, in equity, by statute, in any other agreement between the Parties, or otherwise. Subject to the express limitations in Section 10.6 hereof, nothing contained in the Agreement shall preclude either Party, in its sole discretion, from (i) enforcing any or all of its rights or remedies against the other Party for any breach of this Agreement by that other Party or (ii) seeking any injunctive relief necessary to prevent the other Party from breaching its obligations under the Agreement or to compel the other Party to perform its obligations. No election of remedies shall be required or implied as a result of a Party's decision to avail itself of a remedy.

8.8 Reinstatement after Termination. If this Agreement is terminated (other than due to Customer's breach), and Terminal Owner plans to utilize or utilizes the Terminal for the purpose of providing services similar to the Services under this Agreement, then, Terminal Owner shall notify Customer in writing prior to the commencement of such services (an "Alternative Service Notice"), detailing the anticipated arrangement or contract ("Alternative Service"). Any such arrangement or contract for Alternative Service by Terminal Owner shall only be permitted if made expressly subject to Customer's rights under this Section 8.8. Customer shall have thirty (30) Days following receipt of an Alternative Service Notice to elect whether to reinstate this Agreement under an Extended Term to commence on the date set forth in such Customer election (to be a date no later than sixty (60) Days following the date of such election). Failure by Customer to respond within such time period shall be deemed an election not to reinstate this Agreement; provided, however that at the expiration of such Alternative Service, Customer shall have the right to reinstate this Agreement. If Customer elects to reinstate this Agreement, the arrangement that is the subject of the Alternative Service Notice shall not be permitted and shall be cancelled promptly, and this Agreement shall be reinstated in accordance with its terms. Any reinstatement of this Agreement would be subject to the Customer's rights under this Section 8.8.

ARTICLE 9 ASSIGNMENT AND TRANSFER

9.1 Assignment.

(a) Except as specifically otherwise provided in this Agreement, and subject to Section 9.2 and Section 9.3, no Party shall have the right to assign its rights and obligations under this Agreement (in whole or in part) to another Person except with the prior consent of the other Party, which consent may not be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, a Party may assign its rights and obligations under this Agreement to an Affiliate of such Party without the consent of the other Party; *provided* that (i) such Person assumes in writing the obligations of the assigning Party under this Agreement reasonably acceptable to the non-assigning Party, (ii) such assignment is made subject to this Agreement, and (iii) the assigning Party shall not be released from any of its obligations under this Agreement without the consent of the non-assigning Party. Any assignment in violation of this Section 9.1 shall be void *ab initio*.

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(b) Except as provided in (a) above, nothing in this Section 9.1 shall prevent or restrict Customer's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Customer without Terminal Owner's prior consent, and nothing in this Section 9.1 shall prevent or restrict Terminal Owner's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Terminal Owner without Customer's prior consent. However, if a change of Control of a Party gives rise to a reasonable basis for insecurity on the part of the other Party, such change of Control may be the basis for a request of adequate assurance of performance. Each Party shall have the right without the prior consent of the other Party to (i) mortgage, pledge, encumber or otherwise impress a lien or security interest upon its rights and interest in and to this Agreement, and (ii) make a transfer pursuant to any security interest arrangement described in (i) above, including any judicial or non-judicial foreclosure and any assignment from the holder of such security interest to another Person; provided, in each case, such arrangement or action shall only be permitted if it is expressly subject to and subordinated to the terms of this Agreement.

9.2 Right of First Offer (ROFR).

(a) This Section 9.2 shall apply to any sale, assignment, transfer or disposition of the Terminal or any of the Terminal assets in (i) a singular transaction separate and apart from other non-Terminal assets or interests or (ii) a transaction where the Terminal or such Terminal assets comprise more than fifty percent (50%) of the aggregate value of such transaction (each, a "Subsequent Transfer") by Terminal Owner to any Person that is not an Affiliate of Terminal Owner from the Effective Date until the date that is five (5) years following the end of the Term (such period, the "ROFR Period"); *provided* that any sale, assignment, transfer or disposition to an Affiliate of Terminal Owner shall only be made expressly subject to the restriction in this Section 9.2 with such Affiliate agreeing in writing to be bound by such restriction and *provided further* that a Subsequent Transfer includes those sales, assignments, transfers or dispositions for which a contractual agreement was executed within the ROFR Period, even if such transfer is not consummated until after the ROFR Period.

(b) Once the final terms and conditions of a Subsequent Transfer have been fully negotiated, Terminal Owner shall give the Customer a written notice (the "ROFR Notice") stating the assets to be transferred (the "Subsequently Transferred Interest"), and all such final terms and conditions as are relevant to such Subsequent Transfer, together with a copy of all instruments or relevant portions of instruments establishing such terms and conditions. Customer shall have the right, but not the obligation, to elect, in its sole discretion, to acquire such Subsequently Transferred Interest on the terms and conditions set forth in the ROFR Notice. The ROFR Notice shall constitute a binding offer (the "ROFR Offer") by Terminal Owner to sell, assign, transfer and dispose to Customer the Subsequently Transferred Interest at the price and upon the terms specified in the ROFR Notice and such offer shall be irrevocable for thirty (30) Days following receipt of the ROFR Offer by Customer. In the event that the sale price to be paid for the Subsequently Transferred Interest by a proposed bona fide third-party purchaser consists of or includes properties or assets other than cash, the target price to be paid by Customer shall be equal to the fair market value of such non-cash consideration, as reasonably determined by the Parties, plus the amount of any cash consideration. If the Parties are unable to agree on the fair market value of such non-cash consideration, then the fair market value thereof shall be determined by an independent third-party appraisal, the cost of which will be shared equally by the Parties

10/12

challenging the proposed fair market value. The independent third-party appraiser who conducts such appraisal shall be selected by the mutual agreement of the Parties. Customer (or its designated Affiliate) may accept such ROFR Offer and acquire all of the Subsequently Transferred Interest by giving written notice of the same to Terminal Owner within such thirty (30) Day period. The failure by Customer to so notify Terminal Owner within such thirty (30) Day period shall be deemed an election by Customer not to accept such ROFR Offer.

(c) If Customer accepts the ROFR Offer, then Terminal Owner and Customer shall cooperate to consummate the Subsequent Transfer to Customer (or its designated Affiliate) as promptly as practicable following such acceptance.

(d) If Customer does not accept the ROFR Offer, then Terminal Owner may transfer all, but not less than all, of the Subsequently Transferred Interest at any time within one hundred eighty (180) Days following the end of the thirty (30) Day period that Customer had to accept the ROFR Offer. Any such Subsequent Transfer shall be (i) at a price not less than the price set forth in the ROFR Notice and (ii) upon such other terms and conditions not, in the aggregate, more favorable to the acquiring party than those specified in the ROFR Notice. If Terminal Owner does not consummate such Subsequent Transfer on such terms within such one hundred eighty (180) Day period, the Subsequent Transfer shall again become subject to the right of first offer set forth in this Section 9.2.

(e) If Terminal Owner structures a Subsequent Transfer as a merger or sale of equity interests, such Subsequent Transfer shall be subject to the restrictions in this Section 9.2; *provided* that the restrictions contained in this Section 9.2 shall not apply to any such indirect transfer that is (i) a transaction involving a merger or other business consolidation of Terminal Owner's ultimate parent entity with a Third Party or a public securities offering; or (ii) an acquisition with a Third Party in which the assets subject to such Subsequent Transfer were included in a divestiture package and the allocated value of such assets does not constitute more than twenty-five percent (25%) of the aggregate value of the acquisition.

9.3 Covenant Running with the Land. Any transfer of Terminal Owner's interests in the Terminal or any of the land on which the Terminal is located shall be subject to Customer's rights under this Agreement. This Agreement is (a) a covenant running with the Terminal and the land described on Exhibit A-2 hereto to the extent Terminal Owner is able to grant such a covenant with respect to the land, it being recognized that Terminal Owner is a lessee of the land and owns no fee interest in the land; and (b) binding on and enforceable by Customer against Terminal Owner and its successors and assigns and their respective right, title and interest in and to the Terminal and the land described on Exhibit A-2 hereto, and as a benefit to Customer, its successors and assigns. If Terminal Owner sells, transfers, conveys, assigns, grants or otherwise disposes of all or any interest in such Terminal or land, then any such sale, transfer, conveyance, assignment, or other disposition shall be expressly subject to this Agreement and expressly state as such in any instrument of conveyance. Terminal Owner hereby authorizes Customer to record a memorandum of this Agreement in the real property records of the relevant county where the Terminal is to be located. The Parties agree that until Customer provides notice to the contrary, all payment terms and pricing information shall remain confidential and be redacted from any filings in the real property records.

**ARTICLE 10
INDEMNIFICATION; DAMAGES LIMITATION**

10.1 Duty to Indemnify Customer Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.12 and except as otherwise provided in this Agreement, TERMINAL OWNER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS CUSTOMER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property, and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Terminal Owner's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF CUSTOMER PARTIES.**

10.2 Duty to Indemnify Terminal Owner Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.1 and except as otherwise provided in this Agreement, CUSTOMER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS TERMINAL OWNER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property (excluding Product loss or damage), and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Customer's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF TERMINAL OWNER PARTIES.**

10.3 Term of Indemnity. The provisions of this Article 10 and any other indemnification provisions set forth in this Agreement shall survive the termination or expiration of this Agreement.

10.4 Express Negligence. **THE RELEASE, PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS OBLIGATIONS PROVIDED FOR IN THIS AGREEMENT SHALL BE APPLICABLE WHETHER OR NOT THE LIABILITIES, LOSSES, COSTS, EXPENSES AND DAMAGES IN QUESTION AROSE OR RESULTED SOLELY OR IN PART FROM THE GROSS, SOLE, ACTIVE, PASSIVE, CONCURRENT OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT OR VIOLATION OF LAW OF OR BY ANY INDEMNIFIED PARTY. CUSTOMER AND TERMINAL OWNER ACKNOWLEDGE THAT THIS STATEMENT COMPLIES WITH THE EXPRESS NEGLIGENCE RULE AND IS "CONSPICUOUS."**

10.5 Notice and Defense. A party indemnified hereunder shall, as soon as practicable after receiving notice of any suit brought against it within this indemnity, furnish to the indemnifying party the full particulars within its knowledge thereof and shall render all reasonable assistance requested by the indemnifying party in the defense of any Liabilities. Each indemnified party shall have the right but not the duty to participate, at its own expense, with counsel of its

own selection, in the defense and/or settlement thereof without relieving the indemnifying party of any obligations hereunder; provided, however, the indemnifying party shall have control over the defense and settlement as long as the settlement does not impose any obligations on the indemnified party. Any claim for indemnification by a member of Customer or Terminal Owner's respective Group may only be brought by Customer or Terminal Owner, as applicable, on behalf of such member seeking indemnification.

10.6 No Consequential Damages. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NEITHER TERMINAL OWNER NOR CUSTOMER SHALL BE LIABLE TO THE OTHER OR ANY MEMBER OF THE OTHER'S GROUP, AND EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND THE OTHER PARTY'S GROUP), FOR ANY INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES, SPECIAL OR PUNITIVE DAMAGES, OR FOR LOST PROFITS, WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF WHETHER IN CONTRACT, TORT OR OTHERWISE; PROVIDED, HOWEVER, THAT THE LIMITATION ON LIABILITY SET FORTH IN THIS SECTION 10.6 SHALL NOT LIMIT EITHER PARTY'S RESPECTIVE INDEMNITY OBLIGATIONS HEREUNDER THIS AGREEMENT FOR ANY LIABILITIES OCCASIONED BY THIRD PARTY CLAIMS, AS EXPRESSLY PROVIDED IN THIS AGREEMENT. FOR THE AVOIDANCE OF DOUBT, THE PARTIES AGREE THAT RECOVERY OF THE ACTUAL DIRECT DAMAGES DESCRIBED IN SECTION 6.4 OR SECTION 8.3 SHALL NOT BE PRECLUDED BY THIS SECTION 10.6.

ARTICLE 11 INSURANCE

11.1 Each Party shall procure and maintain, at its sole expense, policies of insurance (with solvent insurers rated by A.M. Best Company A-VI or higher) set forth in Exhibit D. The insurance provisions of this Agreement, including the minimum required limits of Exhibit D are intended to assure that certain minimum standards of insurance protection are afforded and the specifications herein of any amount or amounts shall be construed to support but not in any way to limit Parties' liabilities and indemnity obligations as specified elsewhere in this Agreement. All required insurance policies shall be endorsed to cover contractual liabilities insuring the indemnifications contained in this Agreement.

11.2 In addition to the insurance required under Section 11.1, Terminal Owner shall procure and maintain at its sole expense a pollution legal liability ("PLL") policy providing coverage for remediation of environmental contamination at the Terminal, for the costs of responding to a spill or release of oil or hazardous materials at or from the Terminal, and for personal injury and property damage claims arising from environmental conditions associated with Terminal operations. The PLL policy shall be in a form reasonably acceptable to Customer, shall name the Customer and its Group as an additional insured, and shall be extended and renewed as necessary to provide coverage that extends for a minimum of two (2) years following the Term, as it may be extended. The PLL policy shall provide for a self-insured retention of not more than \$250,000 and for policy limits of not less than \$5,000,000.

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11.3 All insurance carried by either Party (which insurance is in any way related to the Services), whether or not required by this Agreement, shall, but only to the extent of the risk and liabilities assumed by such Party under this Agreement:

(a) Name the other Party's Group as additional insured (except for worker's compensation/employer's liability or professional liability policies (with such additional insured coverage not being restricted to the sole or concurrent negligence of the additional insured and not being restricted to (i) "ongoing operations," (ii) coverage for vicarious liability, or (iii) circumstances in which the named insured is partially negligent);

(b) Waive subrogation as to the other Party's Group; and

(c) Be primary and non-contributory to any insurance of the other Party's Group.

11.4 Although the scope of each Party's insurance obligations is defined by reference to the risks and liabilities assumed under this Agreement, the insurance provisions of this Agreement are, to the extent required to maximize their effectiveness, (a) separately and independently enforceable, and (b) distinct and severable from, and shall not in any way limit any release, protect, defense, indemnity or hold harmless obligations in this Agreement.

11.5 The insolvency, liquidation, bankruptcy, or failure of any insurance company providing insurance for either Party, or failure of any such insurance company to pay claims accruing, shall not be considered a waiver of, nor shall it excuse such Party from complying with, any of the provisions of this Agreement.

11.6 Each Party will promptly provide oral and written notice to the other Party of any accidents or occurrences resulting in injuries to persons or property in any way arising out of or related to the Services and/or occurring on or near the Terminal. For the purpose of this subsection, "promptly" requires oral notification to the other Party within two (2) hours of when the incident occurred.

11.7 Unless specific, prior, written approval is obtained from the other Party, a Party may not self-insure any of its obligations under this Agreement. Where approved, neither Party's decision to self-insure shall in any way act as a prejudice against the other Party and its Group. All deductibles, self-insurance coverage or retentions shall be treated as coverage under an insurance policy, and each Party and its Group will have the same benefits and protection thereunder as though the self-insured Party had secured a policy from a separate insurer.

ARTICLE 12 AUDIT; INSPECTION

12.1 Audits. Customer will have the right, upon reasonable notice, to review for compliance with the terms of this Agreement, (a) the movement of Customer's or Customer's third party customers' Product into, through and out of the Terminal, (b) the relevant portion of all books, records, and information kept by or on behalf of Terminal Owner that reasonably relate to Customer's rights and obligations under this Agreement, and (c) any fees and/or costs charged by Terminal Owner pursuant to this Agreement, except for information subject to attorney-client privilege or confidential information associated with the Terminal's personnel. Terminal Owner

shall retain all such books and records for a period of four (4) years from the date the applicable Services are rendered hereunder, or such greater period as required by Applicable Law. Customer may audit such books and records at Terminal Owner's locations where such books and records are stored. Any such audit will be at Customer's expense and will take place on Business Days and during normal business hours. Any and all information, audits, inspections and observations made by Customer under this Section 12.1 shall: (i) be held in confidence, Customer exercising a degree of care not less than the care used by Customer to protect its own proprietary or confidential information that it does not wish to disclose; (ii) be restricted solely to those with a need to know and not to disclose it to any other person, those persons notified of their obligations with respect to the information; and (iii) be used only in connection with the operations that relate to this Agreement. Terminal Owner shall allow Customer's external auditors access to the Terminal, and shall provide any information or explanations requested by such external auditors that Customer would otherwise have access to pursuant to the terms and conditions of this Agreement.

ARTICLE 13 TAXES

13.1 Customer's Obligations. Customer shall pay, or cause to be paid, and shall indemnify and defend Terminal Owner from and against, all Taxes imposed by Applicable Law on Customer with respect to the Product Throughput under this Agreement. Notwithstanding anything in this Agreement to the contrary, Customer shall not be responsible for or be obligated to indemnify or defend Terminal Owner with respect to (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, or (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Customer shall be responsible for paying any sales, use or similar Taxes imposed on the performance of the Services under this Agreement whether collected by Terminal Owner or otherwise.

13.2 Terminal Owner's Obligations. Terminal Owner shall pay, or cause to be paid, and shall indemnify and defend Customer from and against, (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, and (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Notwithstanding anything in this Agreement to the contrary, Terminal Owner shall not be responsible for or be obligated to indemnify or defend Customer with respect to (i) any Income Taxes imposed on Customer, (ii) any employment, payroll or similar Taxes imposed with respect to Customer's employees, or (iii) any sales, use or similar Taxes imposed on the performance of the Services under this Agreement.

ARTICLE 14 FORCE MAJEURE

14.1 Declaration of Force Majeure Event. Except for Customer's obligation to pay Terminal Owner the monetary amounts provided for in Article 4 of this Agreement for Product actually Throughput at the Terminal, neither Party shall be liable to the other for any failure, delay, or omission in the performance of its obligations under this Agreement, or be liable for damages, for so long as and to the extent such failure, delay, omission, or damage arises directly or indirectly from a Force Majeure occurrence; however, the Term of this Agreement shall not be extended by

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such period of Force Majeure delay. It is further agreed that the obligations of the Parties that are affected by such Force Majeure (except as provided above), shall be suspended without liability for breach of this Agreement during the continuance of the Force Majeure but for no longer period. The Party affected by Force Majeure shall use commercially reasonable efforts to remedy the Force Majeure condition with all reasonable dispatch, shall give notice to the other Party of the termination of the Force Majeure, and shall resume performance of any suspended obligation promptly after termination of such Force Majeure.

14.2 Force Majeure. A “Force Majeure Event” or “Force Majeure” means any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party, and includes, but is not limited to, the following events to the extent consistent with the definition above: an act of God; fire; flood; hurricane; explosion; accident; act of the public enemy; riot; sabotage; epidemic; quarantine restriction; strike, lockout, or other industrial disturbance or dispute or difference with workers; labor shortage; civil disturbance; inability to secure or delays in obtaining labor, materials, supplies, easements, surface leases, or rights-of-way, including inability to secure materials by reason of allocations promulgated by an authorized Governmental Authority, so long as such Party has used commercially reasonable efforts to obtain the same; compliance with a request, recommendation, act, rule, regulation or order of a Governmental Authority having or purporting to have jurisdiction; delays or failures by a Governmental Authority to grant Permits applicable to the Terminal so long as the Party experiencing the occurrence has used its commercially reasonable efforts to make any required filings with such Governmental Authority relating to such Permits; unanticipated or emergency shutdowns or turnarounds for maintenance and repair; freezing of wells or delivery facilities, partial or entire failure of wells, and other events beyond the reasonable control of a Party claiming suspension that affect the timing of production or production levels; the plugging of equipment, lines of pipe or other facilities; destruction, breakage and/or accidents to facilities including machinery, lines of pipe, wells or storage caverns or facilities; the necessity for making repairs to or alterations of pipelines; the unavailability, interruption, delay or curtailment of Product transportation services; or, any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed. The settlement of strikes or differences with workers shall be entirely within the discretion of the Party claiming suspension.

14.3 Notice of Force Majeure Event. If either Party finds it necessary to declare Force Majeure under this Agreement, then as soon as reasonably possible after the occurrence of Force Majeure, such Party shall immediately notify the other Party, first by telephone or e-mail, and then promptly by mail or overnight express courier, giving reasonably full details of such occurrence and its estimated duration. The cause of such Force Majeure occurrence shall, only if the affected Party deems it reasonable and economic, be remedied with all reasonable dispatch and the other Party shall be notified either of the date so remedied or the decision not to remedy as soon as practicable.

ARTICLE 15 GENERAL PROVISIONS

15.1 Certain Representations and Warranties. Each Party represents and warrants, as of the Effective Date, that (a) it is duly organized and validly existing under the laws of the

jurisdiction in which it is incorporated or formed; (b) it has all necessary power and authority to enter into and perform its obligations under this Agreement; (c) other than the Regulatory Approvals, which are required to be pursued under this Agreement, such Party is duly qualified or licensed to do business in all jurisdictions wherein the nature of its business and operations or the character of the properties owned or leased by it make such qualification or licensing necessary and where failure to be so qualified or licensed would impair its ability to perform its obligations under this Agreement or would otherwise have a material adverse effect on the other Party; (d) its execution, delivery and performance of this Agreement has been duly authorized by all necessary action on its part and on the part of its Affiliates (as the case may require); (e) its execution, delivery and (provided the required Regulatory Approvals are obtained) performance of this Agreement and the consummation of the transactions contemplated hereby will not conflict with, or result, by itself or with the giving of notice or the passage of time, in any violation of or default under, any provision of the articles of incorporation or bylaws of such Party or any material mortgage, indenture, lease, agreement or other instrument or any permit, concession, grant, franchise, license, contract, authorization, judgment, order, decree, writ, injunction, statute, law, ordinance, rule or regulation applicable to such Party or its properties; and (f) no consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Authority or other Third Party is required in connection with the execution and delivery of this Agreement by such Party or the consummation by such Party of the transactions contemplated hereby, except for filings required in order to obtain the required Regulatory Approvals, as described in Section 2.1.

15.2 Independent Contractor. This Agreement shall not be construed as creating a partnership, joint venture or establish a principal and agent relationship or any other similar relationship between Customer and Terminal Owner with respect to the subject matter hereof. It is understood and agreed that the relationship created by this Agreement is that of principal and independent operator and not that of principal and agent, master and servant, or employer and employee; and Terminal Owner and its employees and contractors shall not be the employees of Customer for any purpose whatsoever. Customer shall designate the work and services it desires to be performed under this Agreement and the ultimate results to be obtained, but shall defer to Terminal Owner as to the methods and details of performance in accordance with the terms and conditions of this Agreement.

15.3 Notices. Any notice, request, demand or communication required to be given by either Party under this Agreement shall be in writing. It may be delivered or sent to the attention of the contact name and address specified in this Agreement by courier service (which is deemed served when delivered) or fax (which is deemed served on the Business Day it was received with written confirmation made thereof) or by certified mail or its equivalent, postage prepaid, return receipt requested or postage prepaid United States Express Mail or its equivalent (which is deemed served the second Business Day after posting). Unless otherwise provided in this Agreement, Email notice is not sufficient. A Party may change the individual and/or address for notices by giving the other Party notice of such change in the manner set forth above.

If to Terminal Owner:

Maalt, LP
4413 Carey Street

Fort Worth, Texas 76119
Attention: Marty Robertson

With a copy to:

James Lanter
James Lanter, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

If to Customer:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: CFO

With a copy to:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: General Counsel

15.4 Compliance with Policies and Laws.

(a) HSE Policies. Terminal Owner shall establish, maintain and implement written health, safety and environmental ("HSE") policies, programs and protection and compliance systems covering operations conducted at the Terminal that conform in all material respects with generally accepted industry best practices (as amended from time to time, an "HSE Program"). Terminal Owner shall (a) monitor on a periodic basis its HSE performance and record performance data, (b) conduct an annual review of its HSE Program, and (c) correct any performance deficiencies identified and update the HSE Program as appropriate. Terminal Owner shall notify Customer as soon as reasonably practicable upon becoming aware of any HSE incident or any other material incidents, conditions or HSE matters that could reasonably be expected to adversely affect Terminal operations or Customer. Without limiting the foregoing, Terminal Owner shall maintain currently effective Spill Prevention, Control and Countermeasure ("SPCC") plans and programs, and shall promptly respond to any spill at the Terminal in a manner that (x) is consistent with the SPCC plans, (y) complies with Applicable Law, and (z) seeks to minimize, correct and eliminate any harm to the environment or human health and safety. Terminal Owner shall also comply with and shall cause its subcontractors and their respective employees and consultants to comply with all applicable Customer rules and regulations (as revised from time to time) known to Terminal Owner that relate to the safety and security of persons and property, protection of the environment, housekeeping and work hours.

(b) Compliance with Laws. Terminal Owner agrees that it will comply with, and shall cause its subcontractors and their respective employees, to comply with, all federal, state, and local employment laws and regulations having jurisdiction over the Services, and all other Applicable Law governing the employment relationship and practices and/or protection of the environment. Terminal Owner represents that each of its employees, agents, contractors, subcontractors involved on Terminal Owner's behalf in carrying out the Services is qualified to work pursuant to written documentation from the appropriate regulatory authorities of the United States.

15.5 Applicable Law. This Agreement is subject to all Applicable Law. If this Agreement or any provision of it is found contrary to or in conflict with any such Applicable Law, this Agreement shall be deemed modified to the extent necessary to comply with same.

15.6 Successors. The provisions of this entire Agreement shall be binding upon the respective successors and permitted assigns of the Parties.

15.7 No Third-Party Beneficiaries. This Agreement is entered into for the benefit of the Parties only, and except as may be specifically set forth herein, including the indemnity provisions, no other Person shall be entitled to enforce any provision hereof or otherwise be a third-party beneficiary hereunder.

15.8 Rebates Prohibited. Neither Party will pay any commission, fee, or rebate to an employee of the other Party or favor an employee of the other Party with any gift or entertainment of significant value.

15.9 No Brokers' Fee. Neither Party has incurred any liability to any financial advisor, broker or finder for any financial advisory, brokerage, finder's or similar fee or commission in connection with the transactions contemplated by this Agreement for which either Party or any of its Affiliates could be liable.

15.10 Waivers; Cumulative Rights. No term, covenant, condition, benefit or right accruing to a Party under this Agreement (or any amendment) shall be deemed to be waived unless the waiver is reduced to writing, expressly refers to this Agreement, and is signed by a duly authorized representative of such Party waiving compliance. No failure or delay in exercising any right hereunder, and no course of conduct or dealing, shall operate as a waiver of any provision of this Agreement or affect in any way the right of such Party at a later time to enforce the performance of such provision. No waiver by any Party of any condition, or any breach of any term or covenant contained in this Agreement, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of any breach of any other term or covenant. The rights of Parties under this Agreement shall be cumulative, and the exercise or partial exercise of any such right shall not preclude the exercise of any other right.

15.11 Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO ITS CHOICE OF LAW PROVISIONS THAT WOULD REQUIRE APPLICATION OF THE SUBSTANTIVE LAWS OF ANOTHER JURISDICTION. TO THE EXTENT PERMITTED BY APPLICABLE LAW,

THE PARTIES WAIVE ALL RIGHTS TO A TRIAL BY JURY IN CONNECTION WITH ANY ACTION OR LITIGATION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY DISPUTE CONCERNING OR INTERPRETATION OF THE AGREEMENT, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE. THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT THIS WAIVER IS MADE KNOWINGLY AND VOLUNTARILY AFTER AN ADEQUATE OPPORTUNITY TO NEGOTIATE THE TERMS.

15.12 Captions. The captions used in this Agreement are for convenience only and shall in no way define, limit or describe the scope or intent of this Agreement or any part thereof.

15.13 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be partially or completely unenforceable, this Agreement shall be deemed to be amended partially or completely to the extent necessary to make such provision enforceable, and the remaining provisions shall remain in full force and effect.

15.14 Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed an original and part of one and the same document.

15.15 Entire Agreement; Amendment. This Agreement constitutes the entire agreement between the Parties regarding the subject matters set forth herein. No variation, modification or change of the Agreement shall be binding upon either Party unless contained in a written instrument executed by a duly authorized representative of each of the Parties.

15.16 Survival. After termination or expiration of this Agreement, the provisions hereof that by their sense and context are intended to survive the expiration or other termination of the Agreement because they reasonably require some action or forbearance after termination or expiration (including, without limitation, the reinstatement, indemnity, hold harmless and similar obligations under this Agreement) shall so survive.

15.17 Publicity. Neither Party may make a press release or other public announcement concerning this Agreement, except to the extent that such press release or other public announcement is required by Applicable Law or rules and regulation of any governmental agency or any stock exchange, in which case, the disclosing Party shall prior to such disclosure (a) notify the other Party of the reasons or basis for such disclosure, (b) make the proposed disclosure available to other Party and (c) obtain the written consent of other Party with respect to the form of such proposed disclosure, which consent shall not be unreasonably withheld.

15.18 Construction. The following rules of construction will govern the interpretation of this Agreement: (a) "years" will mean calendar years unless otherwise defined; (b) "including" does not limit the preceding word or phrase; (c) section titles or headings do not affect interpretation; (d) "hereof," "herein," and "hereunder" and words of similar meaning refer to this Agreement as a whole and not to any particular provision of this Agreement; (e) reference to any agreement (including this Agreement), document or instrument means such agreement, document, or instrument as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms of this Agreement; (f) no rule of construction interpreting this Agreement against the drafter will apply; (g) references to Sections and Exhibits refer to Sections

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and Exhibits of this Agreement unless otherwise indicated; (h) references to laws refer to such laws as they may be amended from time to time, and references to particular provisions of a law include any corresponding provisions of any succeeding law; (i) references to money refer to legal currency of the United States, unless otherwise specified; (j) the word "or" is not exclusive; (k) references to any Person includes references to such Persons successors and permitted assigns; and (l) the Exhibits attached hereto are hereby incorporated by reference and included as part of this Agreement.

15.19 Attorneys' Fees. In the event that any suit or action is instituted under or in relation to this Agreement, including without limitation, to enforce any provision in this Agreement, the prevailing Party in such dispute shall be entitled to recover from the losing Party all fees, costs and expenses of enforcing any right of such prevailing Party under or with respect to this Agreement, including without limitation, such reasonable fees and expenses of attorneys and accountants, which shall include, without limitation, all fees, costs and expenses of appeals.

15.20 Confidentiality. All non-public, confidential data and information exchanged by the Parties in connection with or under this Agreement and all pricing terms shall be maintained in strict and absolute confidence, and no Party receiving such data, information or terms ("Receiving Party") shall disclose, without the prior consent of the other Party, any such non-public, confidential data, information or pricing terms unless the release thereof is to Receiving Party's Affiliates, and the employees, owners, officers, directors, consultants, attorneys, agents, or representatives of Receiving Party and its Affiliates (collectively, "Representatives") on a clear need-to-know basis and subject to the confidentiality restrictions hereof, required by Applicable Law (including any requirement associated with an elective filing with a Governmental Authority) or the rules or regulations of any stock exchange on which any securities of the Parties or any Affiliates thereof are traded. Nothing in this Agreement shall prohibit the Parties from disclosing whatever information in such manner as may be required by Applicable Law; nor shall any Party be prohibited by the terms hereof from disclosing information acquired under this Agreement to any Representative or any financial institution or investors providing or proposing financing to a Party or to any Person proposing to purchase the equity in any Party or the assets owned by any Party. Notwithstanding the foregoing, the restrictions in this Section will not apply to data or information that (a) is in the possession of the Person receiving such information prior to disclosure by the other Party, (b) is or becomes known to the public other than as a result of a breach of this Agreement or (c) becomes available to a Party a non-confidential basis from a source other than the other Party, provided that such source is not bound by a confidentiality agreement with, or other fiduciary obligations of confidentiality to, the other Party. This Section will survive any termination of this Agreement for a period of twenty (24) Months from the end of the year in which the date of such termination occurred.


[Signature Page Follows]

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their respective authorized officers effective for all purposes as of the Effective Date.

Terminal Owner:


Maalt, LP

By: 
Name: *Marty Robertson*
Title: *President + COO*

ATB

Customer:

Sequitur Permian, LLC

By: 
Name: *Michael C. vd Bold*
Title: *President + COO*

Signature Page to Terminal Services Agreement

vdB

Exhibit A-1

Rail Terminal Facility

Terminal Facility Address:
Barnhart Loading Facility
44485 W. Hwy 67
Barnhart TX, 76930

Facility description:

Approximately 10,065 ft. of track within a leased (University Lands) site being approximately 2.8 Miles West of the town of Barnhart, being in Irion County, Texas. Rail facility includes #11 (115#) switches (2-mainline & 3-facility) to allow rail extension/access to an existing Texas Pacifico mainline track. Hardwood ties 8' x 6' with #115 lb. new rail with 3 flop over derails and concrete Xing panels. The facility accommodates 6,913 feet of track accessible for crude transloading operations, and includes access roadway from State Highway 67 and all associated drainage/dirt work required on the site. The site has 24/7 capability with all-weather roads and lighting.

Road Access:

Common use, Multi-Tenant Road to the Crude oil off load Terminal.
Hwy 67 access- turn-lanes/ acceleration lanes.

Exhibit A-1

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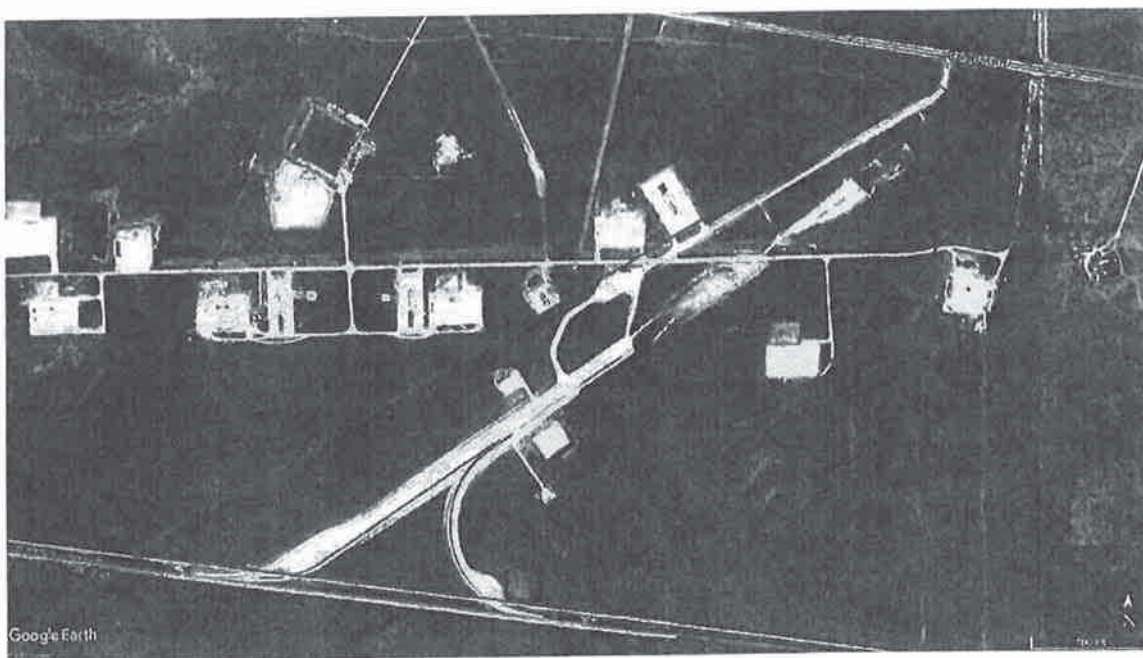


Exhibit A-1

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Exhibit A-2

Land

Land description:

269.610 acres of land, more or less, lying in Sections 9, 10, 11, & 12, Block 43, University Lands, Irion County, Texas, as more fully shown below:

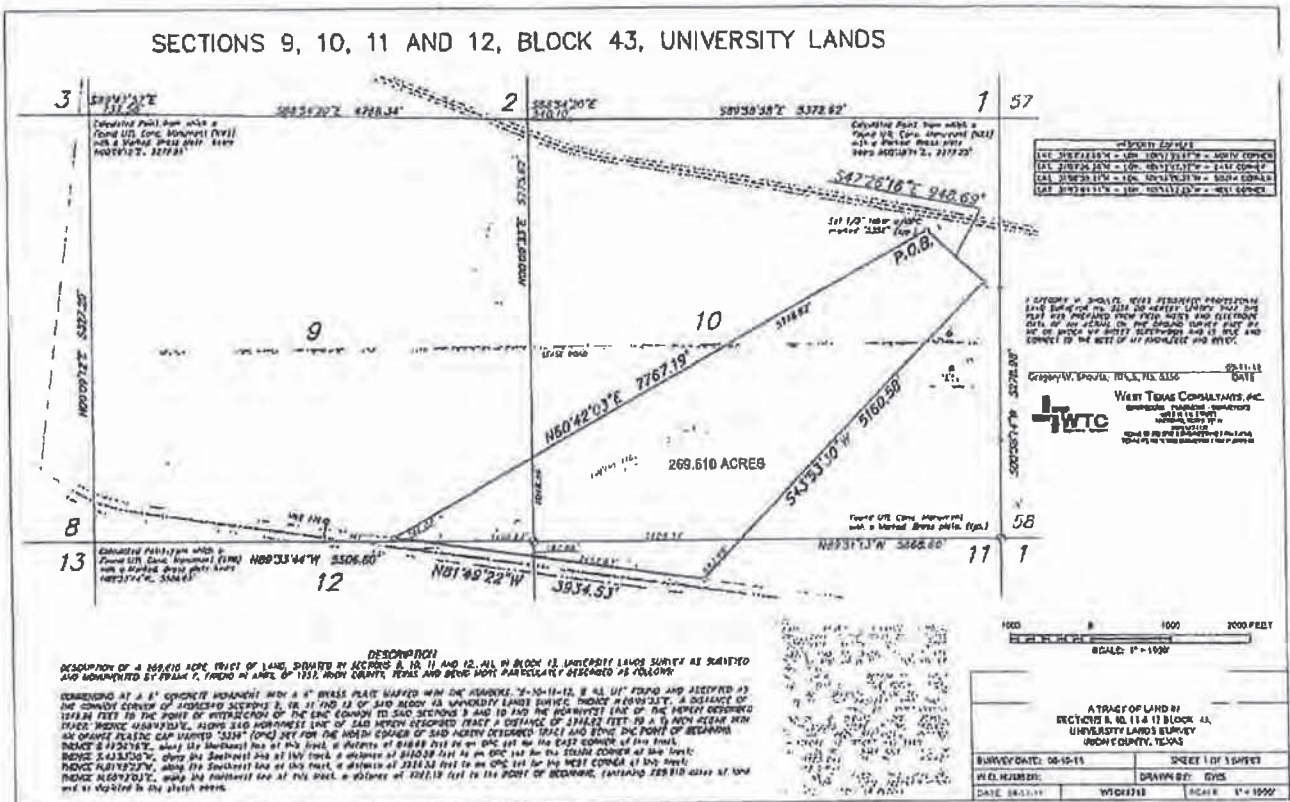


Exhibit A-1

Exhibit B

Phase I Project

Customer will outfit the Terminal with the following items:

- Vent line for connection to trucks and railcars
- Obtain easement from University Lands for the vent lines
- Flare facility (including a flare, separator and a tank) connected to vent lines for gaseous hydrocarbon byproduct
- Transloaders sufficient to transfer Product from trucks (or pipeline in the event Phase II is implemented) onto railcars
- Hoses, valves and fittings to connect vent lines to trucks, railcars, and flare
- Fire extinguishers at manifolds

Exhibit B

US 5687245

vdb

Exhibit C

Phase II Project

Customer will outfit the Terminal and land near the Terminal with the following items:

- Oil gathering pad with secondary containment, truck racks, charge pumps, electrification, vapor recovery unit, flare, scrubber and automation
- Obtain easements from University Lands for pipelines to the transloading area from nearby land
- Storage tanks with capacity of at least 20,000 barrels sufficient to store oil near the train loading area
- Pipelines connecting the storage tanks to the transloading area
- Fill manifolds tying in the pipelines to the transloaders will be made for transloaders

Exhibit C

US 5687245

colB

Exhibit D**Minimum Insurance Requirements****A. Workers Compensation and Employers Liability (with Alternate Employer):**

Statutory requirements in states where operating, to include all areas involved in Services, but a minimum of.

Employers Liability	\$1,000,000 Each Accident
	\$1,000,000 Disease Each Employee
	\$1,000,000 Disease Policy Limit

B. Commercial General Liability (CGL):

Occurrence Form

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Products-Completed operation aggregate	\$2,000,000
Personal and injury	\$1,000,000

Coverage to include: Bodily injury and property damage, including broad form property damage, products-completed operations, sudden and accidental pollution, blanket contractual specifically covering the indemnity obligations in this Agreement, severability of interests, actions over, independent contractor(s), personal injury (with contractual exclusion deleted where required by contract), XCU.

C. Automobile Liability

Bodily injury and property damage	\$1,000,000 combined single limits
Owned, non-owned, and hired autos	per accident
With broadened pollution coverage,	
and MCS-90 endorsement (if carrying cargo)	

D. Umbrella/Excess Liability (over EL, CGL, and Auto)

Each Occurrence	\$10,000,000
-----------------	--------------

Exhibit A-1

vdb

Aggregate

\$10,000,000

F. Property

Terminal Owner shall provide first party/property insurance covering its own property in the amount of the replacement cost of the property.

Additional Requirements:

1. All insurance policies of Terminal Owner, in any way related to the Services and whether or not required by this Agreement, shall, but only to the extent of the risks and liabilities assumed hereunder: (i) name Customer Parties as additional insured (except for worker's compensation, employer's liability, OEE/COW, or professional liability policies) (with such additional insured coverage including coverage for the sole or concurrent negligence of the additional insured and not being restricted (a) to "ongoing operations," (b) to coverage for vicarious liability, or (c) to circumstances in which the named insured is partially negligent), (ii) waive subrogation against Customer Parties, and (iii) be primary and non-contributory to any insurance of Customer Parties.
2. Each Party shall have its policies endorsed to provide not less than thirty (30) Days prior notification in the event of non-renewal, cancellation or material change in the policies. Each Party shall be responsible for any deductibles or self-insured retentions stated in its policies.
3. Terminal Owner shall require the same minimum insurance requirements as listed above of all of its subcontractors will include the same indemnity requirements from each subcontractor. Terminal Owner shall be and responsible for any deficiencies in coverage or limits,
4. Each Party shall provide a certificate of insurance on a form satisfactory to the other Party (attaching appropriate copies of endorsements) and all carriers must have an A.M. Best rating of at least A-VI. Copies of certified policies shall be provided upon written request of a Party.
5. Completed operations coverage shall be maintained by Terminal Owner in favor of indemnitee(s) for a period of two (2) years after final payment to Terminal Owner; Customer Parties shall continue to be named as additional insured(s) during this time frame.
6. Insurance limits required above may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an excess or umbrella policy. Coverage provided under any excess or umbrella policy must be at least as broad as the coverage provided by the primary policy(s).
7. Nothing in this section shall be deemed to limit any Party's liability under this Agreement, and a Party's decision to self-insure shall work no prejudice on the other Party.
8. Neither the minimum policy limits of insurance required of the Parties nor the actual amounts of insurance maintained by the Parties under their insurance program shall operate to modify the Parties' liability or indemnity obligations in this Agreement.

Exhibit A-1

vdB

Chris Favors

Page 1..4

Page 1		Page 3	
CAUSE NO. CV19-003		I N D E X	
MAALT, LP,		PAGE	
* IN THE DISTRICT COURT			
Plaintiff,		Appearances. 2	
V.		Witness: CHRIS FAVORS	
* TRION COUNTY, TEXAS		Examination by Mr. Kornhauser. 5	
SEQUITUR PERMIAN, LLC,		Signature and Changes. 255	
Defendant.		Reporter's Certification. 256	
* 51ST JUDICIAL DISTRICT		EXHIBIT INDEX	
VIDEOTAPED		PAGE	
ORAL DEPOSITION OF			
CHRIS FAVORS			
TAKEN ON			
NOVEMBER 14, 2019			
VOLUME 1			
VIDEOTAPED ORAL DEPOSITION OF CHRIS FAVORS, produced as a witness at the instance of the Defendant and duly sworn, was taken in the above-styled and -numbered cause on November 14, 2019, from 9:33 a.m. to 5:00 p.m., before Sonya Britt-Davis, CSR, in and for the State of Texas, reported by machine shorthand, at the law office of James Lanter, PC, located at 560 North Walnut Creek, Suite 120, Mansfield, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record.			
A P P E A R A N C E S		Page 4	
FOR THE PLAINTIFF:		EXHIBIT INDEX (CONT'D)	
Mr. Paul O. Wickes		PAGE	
WICKES LAW, PLLC			
5600 Tennyson Parkway, Suite 205		Exhibit 12. 99	
Plano, Texas 75024		Maalt_00289 and Maalt_000290	
Phone: 972.473.6900		Exhibit 13. 102	
E-mail: pwickes@wickeslaw.com		Terminal Services Agreement	
AND		Exhibit 14. 119	
Mr. James Lanter		Sequitur_000319 and Sequitur_000320	
JAMES LANTER, PC		Exhibit 15. 123	
560 North Walnut Creek, Suite 120		Maalt_000240	
Mansfield, Texas 76063		Exhibit 16. 162	
Phone: 817.453.4600		Sequitur_000825, Sequitur_000826, Sequitur_000913 and Sequitur_000914	
E-mail: jim.lanter@lanter-law.com		Exhibit 17. 164	
FOR THE DEFENDANT:		Jupiter000219	
Mr. Matthew A. Kornhauser		Exhibit 18. 164	
Mr. Christopher J. Kronzer		Jupiter000220 and Jupiter000221	
HOOVER SLOVACEK, LLP		Exhibit 19. 172	
Galleria Tower II		Sequitur_000958	
5051 Westheimer, Suite 1200		Exhibit 20. 176	
Houston, Texas 77056		Sequitur_000931	
Phone: 713.977.8686		Exhibit 21. 177	
E-mail: kornhauser@hooverslovacek.com		Jupiter000222	
kronzer@hooverslovacek.com		Exhibit 22. 182	
Also Present:		Maalt_000095 through Maalt_000098	
Mr. Luis Acevedo - Videographer		Exhibit 23. 187	
Mr. Jon Ince		Sequitur_000626	
		Exhibit 24. 190	
		Sequitur_000359 and Sequitur_000812	
		Exhibit 25. 192	
		Sequitur_000815	
		Exhibit 26. 208	
		Plaintiff Maalt, LP's First Amended Answers and Objections to Defendant's First Interrogatories	

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LEXITAS

Chris Favors

Page 65..68

Page 65

1 concerns. They were requiring the DOT 117 new cars and
 2 went back and -- and were -- if I remember correctly,
 3 cancelled their tariff rates and were issuing new rates
 4 opportunity by opportunity.
 5 Q. Okay. He -- then Mr. Ince says: I reached
 6 out to multiple car manufacturers, brokers, and these
 7 car -- these cars are not available until Q3-Q4 of this
 8 year. (As read.)
 9 That was information that Mr. Ince
 10 secured?
 11 A. It would appear so.
 12 Q. Do you know where he got that information
 13 from?
 14 A. I do not.
 15 Q. What specific car manufacturers and brokers?
 16 A. I do not.
 17 Q. Okay. Did that concern you regarding --
 18 A. No.
 19 Q. -- or relative to this opportunity of
 20 transloading crude by rail at the Barnhart or other
 21 facilities?
 22 A. No.
 23 Q. Why not?
 24 A. The -- the opportunity at hand was going to
 25 fall in the third quarter of 2018 for a start date.

Page 66

1 And the cars, according to this e-mail, would have been
 2 available at that time.
 3 Q. Well, actually it says until Q3 or Q4.
 4 A. Uh-huh.
 5 Q. Right?
 6 A. Correct. Correct.
 7 Q. Okay. So did it concern you that these --
 8 that according to these car manufacturers and brokers,
 9 the cars would not be available until Q3-Q4 of '18?
 10 A. It did not.
 11 Q. Okay. Did you share that information or, to
 12 your knowledge, did Maalt/Vista ever share that
 13 information with the prospective cus-- prospective
 14 customer, which would be Jupiter and/or Sequitur?
 15 A. I don't know that we did.
 16 Q. Okay. Do you think that would be something
 17 that Sequitur would want to know?
 18 A. Yes.
 19 Q. Okay. But you don't know if it was shared?
 20 A. Correct.
 21 Q. You didn't personally?
 22 A. No.
 23 Q. And then this e-mail kind of lays out, I
 24 guess, the comparison of Jupiter and that opportunity
 25 versus Sequitur and that opportunity, correct?

Page 67

1 A. Yes.
 2 Q. And would it be fair to say that in May of
 3 2018, you were considering a couple of different
 4 horses, if you will, one being Jupiter, one being
 5 Sequitur, as far as the Barnhart facility is concerned;
 6 is that correct?
 7 A. Correct.
 8 Q. On this transloading of crude by rail?
 9 A. Yes.
 10 Q. Again, the Jupiter opportunity is represented
 11 from -- as being the Pecos and Barnhart, transloading
 12 truck to railcar with a certain amount -- certain
 13 number of barrels, certain number of railcars required.
 14 And then the Sequitur opportunity is laid
 15 out as well. So it's kind of comparing and
 16 contrasting, correct?
 17 A. Correct.
 18 Q. Now, in the Sequitur portion, it says:
 19 Sequitur wants to transload from Barnhart September 1
 20 (As read.)
 21 Do you see that?
 22 A. I do.
 23 Q. How does that reconcile with Mr. Ince's
 24 statement earlier where he says that, according to the
 25 multiple car manufacturers and brokers, the cars won't

Page 68

1 be available until Q3 or Q4 of the year?
 2 A. I think it -- it falls in line with September
 3 1st if it's Q3, and Q4 would be a little after that.
 4 Q. Okay. And I guess one meaningful difference
 5 is that Sequitur is thinking about transloading from
 6 storage tanks to railcar, I guess, by way of
 7 pipeline --
 8 A. Correct.
 9 Q. -- at some point in the future?
 10 A. Yes.
 11 Q. And that was deemed to be more desirable from
 12 Maalt/Vista's point of view?
 13 A. It was.
 14 Q. All right. So in there Mr. Ince acknowledges
 15 that Sequitur has no rail experience; is that true?
 16 A. That is true.
 17 Q. Whereas Jupiter had some rail experience; is
 18 that true?
 19 A. They represented that they did, yes.
 20 Q. Okay. To your knowledge, did the people at
 21 Sequitur, when you were courting them in May of 2018,
 22 make clear that they had no rail experience relative to
 23 this transloading of crude by rail and that they would
 24 be looking to Maalt/Vista for assistance in acquiring
 25 the necessary trains and cars to make any opportunity

Chris Favors

Page 69..72

Page 69

1 happen?

2 **A. The -- the first part of that, that they had**

3 **no rail experience, yes. The second part, that they**

4 **would lean on Maalt/Vista to acquire railcars, rail**

5 **rates, et cetera, no.**

6 Q. And what is that understanding based on? Why

7 do you say that?

8 **A. What do you mean?**

9 Q. Why do you think that Sequitur wasn't going to

10 try to lean on Maalt/Vista and their resources in order

11 to source trains and railcars to transload crude by

12 rail to market?

13 **A. Any -- any initial conversations that I would**

14 **have had with them wouldn't have said, We'll get you**

15 **railcars, we'll get you rates, we'll get you this and**

16 **that and the other. We were offering the labor only.**

17 Q. But this -- then why is Mr. Ince introducing

18 his rail guy to Braden Merrill and Tony early on?

19 **A. Yeah, because Sequitur, you know, made it**

20 **clear that they had no rail experience. Right? So**

21 **that was an introduction to a guy who could help them**

22 **acquire those railcars.**

23 Q. Would it be fair to say that at this

24 particular point in time, May of -- May 16, 2018, that

25 Maalt/Vista viewed the opportunity with Sequitur to be

1 that?

2 **A. I don't.**

3 Q. Okay. What do you recall regarding the

4 negotiations that led to the formation of the LOI? Are

5 those phone calls that you may have had, or what is

6 your recollection? Because you don't recall meeting.

7 **A. Correct.**

8 Q. So what -- what do you recall taking place

9 prior to the execution of the LOI?

10 **A. Yeah. So I had multiple phone calls with**

11 **Braden and Mike van den Bold at Sequitur, and I do -- I**

12 **can't remember the exact month or day, but -- but I was**

13 **also, you know, in meetings down in Houston at their**

14 **office. The -- the -- the meeting that I recall in**

15 **Fort Worth would have been later on, when we were**

16 **finalizing the actual agreement.**

17 Q. Okay. And so I'm talking about a specific

18 point in time, though, before the LOI was signed.

19 **A. Right.**

20 Q. Do you recall any specific meetings or phone

21 calls regarding the negotiations that led to the

22 formation of the LOI?

23 **A. Specifics of those, no.**

24 Q. Okay. Now, at the time that you were

25 negotiating the LOI with Sequitur, you were also

Page 70

1 more desirable than the Jupiter proposal?

2 **A. That's correct.**

3 Q. I think at some point in time there was a

4 meeting in Fort Worth after this e-mail, Exhibit Number

5 4, was created, which was May 16, 2018. Do you recall

6 a meeting in Fort Worth with the representatives of

7 Sequitur?

8 **A. I -- I believe there was one. I can't recall**

9 **that -- the specifics of that meeting whatsoever.**

10 Q. Okay. Where I think Braden and Tony flew up

11 to Fort Worth to meet --

12 **A. I don't know.**

13 Q. -- with Maalt/Vista. Do you recall that?

14 **A. I don't remember meeting Tony ever.**

15 Q. Okay. All right. You're aware that an LOI

16 was created?

17 **A. Yes.**

18 Q. And that was on or about June of 2016; you're

19 aware of that?

20 **A. Correct.**

21 Q. So prior to the LOI being signed, do you

22 recall having a meeting with any representative of --

23 of Sequitur?

24 **A. I don't.**

25 Q. Okay. You wouldn't have any recollection of

Page 72

1 negotiating and having discussions with Jupiter; fair

2 to say?

3 **A. Yes.**

4 Q. Did you ever advise Sequitur that you were

5 negotiating with Jupiter prior to the execution of the

6 LOI?

7 **A. Yes.**

8 Q. Okay. So you were advising them that there

9 was another horse in the race, so to speak?

10 **A. Correct.**

11 Q. All right.

12 (Exhibit 5 marked.)

13 Q. (BY MR. KORNHAUSER) Okay. Have you seen

14 Exhibit Number 5 before, sir?

15 **A. I have.**

16 Q. This was an e-mail that Mr. Merrill sent to

17 you on June 1st, 2018, correct?

18 **A. Correct.**

19 Q. And this is prior to the signature or the

20 signing of the LOI; is that correct?

21 **A. Correct.**

22 Q. Okay. It says: Chris, I apologize that it

23 took the entirety of the day to respond. I completely

24 understand the desire to keep communication open with

25 other parties in case Sequitur is unable to perform.

1 Q. Okay. And you personally had relationships
2 with the people at Jupiter?
3 **A. Correct.**
4 Q. And what was -- what were those -- what was
5 that relationship based on, in other words,
6 historically?
7 **A. It was a very -- the relationship was in its**
8 **infancy. Right? Because they had come out of the same**
9 **kind of time, April, May time frame, that they wanted**
10 **to find rail facilities in the Permian Basin to move**
11 **crude oil.**
12 Q. Okay. Had Jupiter -- prior to, say, June 6th,
13 2018, had Jupiter ever assisted Maalt/Vista moving
14 their frac sand by rail?
15 **A. No.**
16 Q. Prior to June 6th, 2018, who did
17 Vista/Maalt -- or Maalt/Vista use to help them move
18 their frac sand by rail?
19 **A. We have our own logistics department.**
20 Q. Okay. Did you rely on brokers to get cars --
21 **A. I wasn't --**
22 Q. -- and trains?
23 **A. I wasn't involved in getting railcars --**
24 Q. That would be --
25 **A. -- or anything like that.**

1 Q. -- Mr. Ince's responsibility?
2 **A. Correct.**
3 Q. Jonas Struthers certainly was involved with
4 Maalt/Vista in helping them procure trains and railcars
5 to move frac sand; is that true?
6 **A. It appears so, yeah.**
7 Q. Anybody else that you're aware of?
8 **A. No.**
9 Q. Okay. So would it be fair to say that as of
10 June -- June 6th, 2018, you had no real experience
11 regarding what specifically Jupiter could do to
12 facilitate Sequitur in regard to acquiring trains and
13 railcars to move crude by rail, because you had no
14 personal experience with them?
15 **A. The only --**
16 Q. Is that true?
17 **A. Yeah. The only thing that we had from them**
18 **was communication that they had railcars available to**
19 **them, that they could get rail rates, that they could**
20 **move the crude oil. Right?**
21 Q. And who told you that?
22 **A. Travis Morris at --**
23 Q. Okay. When did he first tell you that?
24 **A. That would have been in initial conversations.**
25 Q. Back in April?

1 **A. Correct.**
2 Q. Of 2018?
3 **A. Yeah, approximately.**
4 Q. Do you recall what he told you?
5 **A. Specifically, no.**
6 Q. Generally?
7 **A. Generally, that, yeah, Jupiter is in the**
8 **business of marketing and -- and moving crude oil from**
9 **the Permian to the Gulf Coast, whether it be long-haul**
10 **trucking or rail or otherwise. Right? So it was**
11 **represented to Vista/Maalt that that is -- that was**
12 **Jupiter's core competency as a company.**
13 Q. Okay. And you -- and you viewed those
14 comments to be helpful from the standpoint of what
15 Sequitur was going to be doing at the Barnhart
16 facility?
17 **A. Correct.**
18 Q. Okay. And did you share that information with
19 Sequitur?
20 **A. I did.**
21 Q. When did you first do that?
22 **A. I -- I think that would have been during the**
23 **introduction phase, but exact date, I don't --**
24 Q. Okay.
25 **A. -- I don't remember.**

1 Q. All right. Let's go ahead and show you
2 Exhibit Number 7.
3 **A. Okay.**
4 (Exhibit 7 marked.)
5 Q. (BY MR. KORNHAUSER) Okay. You've seen
6 Exhibit Number 7 before, sir, haven't you?
7 **A. I have.**
8 Q. All right. This an e-mail that you authored
9 to Mr. Merrill and Mr. Morris back on June 5th, 2018?
10 **A. Correct.**
11 Q. And in this e-mail you were putting together
12 Sequitur and Jupiter as it relates to the Barnhart
13 facility, correct?
14 **A. Correct.**
15 Q. And what was your purpose in doing that?
16 **A. The -- the introduction was made based on what**
17 **I've previously stated, that Jupiter had represented**
18 **themselves as a company that could get the logistics**
19 **side of it done. Right? And so simply an introduction**
20 **from me to Sequitur on a -- a company that had**
21 **represented that they could help in the -- in the**
22 **agreement.**
23 Q. Okay. What specifically did you think Jupiter
24 could bring to the table that would help Sequitur?
25 **A. Yeah. I mean, the representation from Jupiter**

Chris Favors

Page 85..88

Page 85

1 to Maalt/Vista was that they could essentially get all
 2 the logistics side of moving crude oil done. Right?
 3 So whether it be rail, trucking, or otherwise. And as
 4 we've previously stated, that Sequitur had no rail
 5 experience or, really, in my mind, logistics experience
 6 other than pipeline. So the -- the introduction there
 7 to Jupiter was to facilitate the logistics side of it.
 8 Q. And logistics meaning what?
 9 A. Whether it be acquiring railcars, getting
 10 rates, moving railcars, making sure service was there.
 11 Jupiter had represented that they could get all of
 12 those things done.
 13 Q. Right.
 14 Did you try to vet the information that
 15 Jupiter was giving before you told Sequitur those
 16 things, or did you just tell Sequitur what you
 17 understood Jupiter's capacity to be?
 18 A. That was just my understanding based on
 19 conversations that I had had with Travis.
 20 Q. Right. And so Travis was telling you all
 21 this. But did you vet any of that before you told
 22 Sequitur?
 23 A. To the extent of -- of going to the -- the
 24 website that they had and -- and whatever else, nothing
 25 beyond that.

Page 86

1 Q. Okay. Do you recall telling Sequitur that
 2 Jupiter was the real deal in a partner who could get it
 3 done?
 4 A. I do not.
 5 Q. You don't recall using words to that effect?
 6 A. No.
 7 Q. Do you recall making any representations
 8 regarding Jupiter's capabilities to see through this
 9 logistical requirement, if you will, that Sequitur was
 10 going to need in order to move forward on the
 11 transloading of crude by rail out of Barnhart?
 12 A. Not definitive comments. I think at the time
 13 that it was represented to us that Jupiter could get it
 14 done. Through the introduction, you know, I think
 15 those were probably the comments that were made, is,
 16 you know, it seems like these guys are somebody you
 17 should talk to.
 18 Q. Right.
 19 A. Right?
 20 Q. So -- so prior to making this introduction,
 21 had Jupiter, to your knowledge, ever handled logistics
 22 for crude by rail out of the Permian Basin?
 23 A. Yes.
 24 Q. Okay. And -- and what was your understanding
 25 of that experience that Jupiter had?

Page 87

1 A. I don't know that it was specific to rail. I
 2 know that they had a truck fleet. I know that they had
 3 moved it on pipe. Right?
 4 Q. But I'm talking about crude by rail --
 5 A. Okay.
 6 Q. -- at Permian.
 7 A. No, I -- I don't know that they did or didn't
 8 prior to this.
 9 Q. Okay. Because, after all, that's what
 10 Sequitur was looking for, correct --
 11 A. Correct.
 12 Q. -- in this transaction? True?
 13 A. In the agreement between Vista and Sequitur?
 14 Q. Yes, sir.
 15 A. Yes.
 16 Q. So it looks as though you were on a phone call
 17 in the morning of -- of June 5th, or maybe the day
 18 before, I'm not sure.
 19 Well, let me back up and ask the
 20 question.
 21 You say here in this Exhibit Number 7: I
 22 spoke to each of you this morning -- (As read.)
 23 Which would be June 5th, 2018.
 24 -- and wanted to share contact
 25 information. (As read.)

Page 88

1 What do you recall about that phone call?
 2 A. I don't recall specific details to those phone
 3 calls.
 4 Q. Okay.
 5 A. The -- the intent was just to connect the two
 6 parties.
 7 Q. What do you recall Mr. Merrill or -- Merrill's
 8 reaction to be from this introduction?
 9 A. I -- I recall him being appreciative of the
 10 introduction.
 11 Q. Uh-huh.
 12 A. Beyond that, I can't answer that.
 13 Q. All right. Would it be fair to say that
 14 Sequitur had no prior experience with Jupiter prior in
 15 time?
 16 A. Not to my knowledge.
 17 Q. And would it be also be fair to say they were
 18 relying upon your introduction to have access to a
 19 logistical opportunity such as this?
 20 MR. WICKES: Objection, form.
 21 A. I -- I don't know that that's the case, I
 22 guess.
 23 Q. (BY MR. KORNHAUSER) Well, you had said that
 24 Sequitur had no other prior experience with logistics
 25 on crude by rail, correct?

Page 125

1 Jupiter, but that wouldn't have made sense.

2 Q. Why?

3 A. At the time we -- our -- our preference was to

4 work with Sequitur. So I read what -- what is here.

5 Right? I just can't recall exactly who it was.

6 Q. Well, why would it have been made sense for it

7 to be Jupiter?

8 A. Why would it not have made sense?

9 Q. Right.

10 A. The -- the only -- the only thing there is,

11 right, we had the two companies interconnected. Right?

12 We already had them introduced to one another.

13 Now, where it would have made sense to do

14 it with Jupiter is if they, you know, were going to

15 offer prepayment, better terms, stuff like that.

16 Right?

17 At the same time, our preference was to

18 work with Sequitur.

19 Q. Well, I get that. But I'm just trying to

20 figure out why would it haven't made sense for that

21 other party to be Jupiter?

22 A. Okay. Let me back up. Maybe it's not that it

23 wouldn't have made sense. It would have made more

24 sense to do the deal with Sequitur.

25 Q. Okay. Well, I understand that. But you

Page 126

1 didn't seem to recall if it was Jupiter or not that was

2 the other party, and then you said it would haven't

3 sense for it to be Jupiter. And I want to know why.

4 A. And I explained that. And now I'm saying it

5 would make sense, not as much sense. Right?

6 Q. Okay. You don't know who the other party was?

7 A. No. It's not listed on here.

8 Q. But you don't know who else was in the running

9 other than Jupiter?

10 A. Correct.

11 Q. So it had to have been Jupiter --

12 A. I don't know.

13 Q. -- by default?

14 MR. WICKES: Objection, form.

15 Q. (BY MR. KORNHAUSER) Wouldn't it?

16 A. I don't know.

17 Q. Okay. They said that they would execute an

18 agreement today.

19 Did you have another agreement in your

20 hand around this time from another party?

21 A. We did, yeah.

22 Q. From whom?

23 A. Jupiter. Right?

24 Q. As it related to Barnhart?

25 A. No.

Page 127

1 Q. Okay. Well, I'm trying to figure out who said

2 that they would execute an agreement today if you

3 don't. Who was it?

4 A. The -- I can't remember exactly who it was,

5 and so I don't know --

6 Q. The truth is --

7 A. -- like, I don't -- I don't know how.

8 Q. So, I mean, were you -- were you just trying

9 to use salesmanship here? I mean, what's going on? I

10 mean, do you have another party? And, if so, who --

11 who was it? And did you have another agreement in your

12 hand? That's what I need to know.

13 A. I didn't have another agreement in my hand for

14 Barnhart.

15 Q. Okay.

16 A. Right? What I had was an agreement with

17 Jupiter, though, that could have been easily amended to

18 include Barnhart. Right?

19 Q. Okay. So the truth is you had no other

20 agreement. We know that, right?

21 A. Correct.

22 Q. And you don't even know who the other party

23 was?

24 A. Correct.

25 Q. But yet you're pressuring Sequitur to believe

Page 128

1 that you have another party that's going to execute an

2 agreement today, but you didn't have any of that?

3 A. It's not my job.

4 Q. To what?

5 A. To sell and to get deals done. Right?

6 Q. Well, I understand that. I don't mean any

7 disrespect. But you were using salesmanship here,

8 weren't you?

9 A. Yeah.

10 Q. Let's cut through the --

11 A. Yeah.

12 Q. -- the nonsense.

13 A. Absolutely.

14 Q. All right. You didn't have an agreement, and

15 you didn't really have another party. You had Jupiter

16 that may have converted from just doing Pecos to doing

17 Barnhart as well, right?

18 A. Correct.

19 Q. Okay. Do you recall telling Braden Merrill

20 that someone was -- or this other party was going to

21 pay \$8 million up front on execution?

22 A. I recall 5 million.

23 Q. Is that what you told Mr. Merrill?

24 A. I believe so.

25 Q. And so who offered you \$5 million right on the

Chris Favors

Page 133..136

Page 133

1 though, if they ever tell told you that they were
 2 having trouble with Shell, and that if things didn't
 3 improve, that they were going to pivot to go to Jupiter
 4 to handle their oil purchase rail and logistics
 5 partnership?
 6 **A. No, not that I recall.**
 7 Q. Okay. And prior to signing the agreement, do
 8 you recall recommending to Sequitur a joint venture
 9 with Jupiter because they had access to the trains and
 10 the railcars?
 11 **A. Not a joint venture.**
 12 Q. A relationship, logistics relationship?
 13 **A. Sure.**
 14 Q. And would that have been discussed during your
 15 visit at or around the time the contract was signed,
 16 the TSA was signed?
 17 **A. It could have been.**
 18 Q. Okay.
 19 **A. Yeah.**
 20 Q. In other words, they came up to sign --
 21 **A. Uh-huh.**
 22 Q. -- I think you said it was about an hour.
 23 **A. Correct.**
 24 Q. And during that conversation, do you recall
 25 discussions about Jupiter and what role they were going

Page 134

1 to play, things such as that?
 2 **A. Hypothetically, yes.**
 3 Q. Okay. What do you recall specifically about
 4 that discussion? Do you recall anything?
 5 **A. I don't. I know the -- like I said, at the**
 6 **time they were still focused on -- on Shell. Right?**
 7 **So if anything, it would have been the -- the prospect**
 8 **of Jupiter helping with logistics, and nothing in**
 9 **regards to a joint venture or a partnership or anything**
 10 **like that.**
 11 Q. Okay. Did you take any notes regarding that
 12 meeting that occurred at the time the contract was
 13 signed, the TSA?
 14 **A. I haven't dug through notebooks, but I**
 15 **could -- I could.**
 16 Q. Okay.
 17 **A. I mean, not that I know of.**
 18 Q. Did Maalt/Vista understand that acquiring
 19 access to railcars and trains were essential for the
 20 performance of the TSA?
 21 **A. Yes.**
 22 Q. Okay. And without access to trains and
 23 railcars, I mean, the TSA was really for naught; would
 24 you agree with that?
 25 **A. Yes.**

Page 135

1 Q. And did you understand that Sequitur's intent
 2 and purpose as it related to the facility, the Barnhart
 3 facility, was to transport crude by rail to markets in
 4 the Louisiana Gulf Coast and take advantage of an
 5 arbitrage?
 6 **A. Yes.**
 7 Q. Okay. What did you understand about that, and
 8 who told you?
 9 **A. As far as their intent?**
 10 Q. Yes.
 11 **A. That was at the time there was a spread, which**
 12 **is not our core business. Right? We're in frac sand.**
 13 **So to the extent my understanding was only what they**
 14 **had told me. Right? We can sell it for a spread**
 15 **that's higher in Louisiana, or the LLS spread versus**
 16 **WTI. It right now makes sense because the spread is**
 17 **high enough that you can make more money selling it in**
 18 **the Gulf Coast than you can in the Permian.**
 19 Q. Okay. And that what's you understood their
 20 intended business purpose to be, to take advantage of
 21 that?
 22 **A. Correct.**
 23 Q. And as a result, the -- the cost involved for
 24 the rates, if you will, associated with transportation
 25 by rail was an important factor in that analysis; would

Page 136

1 you agree?
 2 **A. Yes.**
 3 Q. All right. And so getting the right rate was
 4 important from Sequitur's point of view; would you
 5 agree?
 6 **A. Yes.**
 7 Q. Okay. And you under- -- and Maalt/Vista
 8 understood that?
 9 **A. Yes.**
 10 Q. Okay. Would the same be true with Jupiter and
 11 their proposals to you as it related to the Barnhart
 12 facility?
 13 **A. The Pecos facility?**
 14 Q. Both.
 15 **A. Yeah. The same --**
 16 Q. Because they were transloading --
 17 **A. The same business.**
 18 Q. The same deal, right?
 19 **A. Correct.**
 20 Q. And they were transloading crude by rail --
 21 **A. Right.**
 22 Q. -- hypothetically both?
 23 **A. Right.**
 24 Q. And so they were doing that, I assume, for the
 25 same purpose as Sequitur was going to do it, which is

From: Chris Favors <cfavors@vprop.com>
Sent time: 06/05/2018 10:08:30 AM
To: Braden Merrill; Travis Morris <tmorris@jupiternlp.com>
Subject: Sequitir/Jupiter Introduction

Gentlemen,

I spoke to each of you this morning and wanted to share contact information. Vista is excited for the opportunity to work with each of your companies. Specifically related to Vista's Barnhart terminal, I mentioned that Sequitir has a Phase 1 (truck to railcar) and Phase 2 (tanks, etc) plan. I will let you guys connect, and please let me know if we should scheduled a conference call either this afternoon or tomorrow between the three parties. As always, let me know if I can help with anything.

Travis Morris

Chief Commercial Officer

440 Louisiana Street

Suite 700

Houston, TX 77002

(409)-771-6697

ICE Messenger – Tmorris10 **please note that my ICE ID has changed**

Email – tmorris@jupiternlp.com

Braden Merrill

O: 713-395-3008

C: 434-466-4294

bmerrill@sequitirenergy.com

Two Briarlake Plaza, 2050 West Sam Houston Pkwy South
Suite 1850, Houston, TX 77042

Regards,



Chris Favors

Business Development

☐ (682)-251-5538

✉ cfavors@vprop.com

4413 Carey Street, Ft Worth, TX 76119

www.vprop.com



Sequitur_000995

From: Braden Merrill
To: Chris Favors; Mike van den Bold
Subject: RE: Barnhart Agreement Discussion
Date: Friday, August 3, 2018 11:12:38 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Good Morning Chris,

Sorry for the slow response. Mike and I were in a long meeting this morning. I appreciate where you are and coming to us. We will discuss and get back with you shortly.

Best,
Braden

From: Chris Favors <cfavors@vprop.com>
Sent: Friday, August 03, 2018 9:09 AM
To: Mike van den Bold <mcvdb@sequiturerenergy.com>; Braden Merrill <bmerrill@sequiturerenergy.com>
Subject: Barnhart Agreement Discussion
Importance: High

Happy Friday, Gentlemen! Do y'all have time for a discussion regarding the Barnhart agreement this morning?

Here is what I would like to discuss:

- I am receiving heavy pressure to get the agreement fully executed.
- We have been offered slightly better terms from other party that said they will execute an agreement today. My preference is to work with Sequitur and I am politicking internally for that.
- How can I assure our CEO and President that we will get the agreement signed in the next couple of business days? If there is not a high level of confidence that it will be signed in the next couple of business days, is there a monetary "reservation fee" that Sequitur is willing to put up that would either be applied to the first "x" number of barrels transloaded or forfeited in the event an agreement is not executed?

I am in the office all day today. Please let me know what time works best to talk and I will make myself available.

Regards,



Chris Favors
Business Development
☎ (682)-251-5538
✉ cfavors@vprop.com
4413 Carey Street, Ft Worth, TX 76119
www.vprop.com



Maalt_000240

From: Braden Merrill
To: mrobertson@vprop.com; Chris Favors
Cc: Mike van den Bold
Subject: Notice of Force Majeure
Date: Friday, December 7, 2018 7:16:26 PM
Attachments: image001.png
Notice of Force Majeure - Sequitur Permian - Maalt.pdf

Gentlemen,

Pursuant to Mike's and my conversations with Chris, please find the attached notice of Force Majeure. We have also sent physical copies to Marty and James Lantner via Fedex.

Please don't hesitate to reach out.

Best,
Braden Merrill
Vice President & Chief Financial Officer



Sequitur
ENERGY RESOURCES LLC

O: 713-395-3008
F: 713-395-3099
C: 434-466-4294
bmerrill@sequiturerenergy.com

Two Briarlake Plaza; 2050 West Sam Houston Pkwy South
Suite 1850; Houston, TX 77042



Maalt_000157



December 7, 2018

Via email to mrobertson@vprop.com & FedEx
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Marty Robertson

Via email to cfavors@vprop.com
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Chris Favors

Re: Notice of Force Majeure

Gentlemen:

Reference is made to that certain Terminal Services Agreement ("Agreement") dated August 6, 2018 between Sequitur Permian, LLC ("Customer") and Maalt, L.P. ("Terminal Owner") relating to the use of Terminal Owner's rail terminal facility located in Barnhart, Texas ("Terminal"). All capitalized terms not otherwise defined herein have the same meanings as in the Agreement.

Consistent with the ongoing discussions between our companies, and as you are already aware, there presently exists the following situation that is not within the Customer's reasonable control: the unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services ("Existing Force Majeure") to allow for the use of the Terminal for the intended purposes of the Agreement.

Therefore, Customer hereby notifies Terminal Owner of the Existing Force Majeure and hereby finds it necessary to declare Force Majeure under the Agreement. Customer currently anticipates that the Existing Force Majeure will continue for the foreseeable future.

Accordingly, pursuant to the Agreement, Customer is not liable for any failure, delay, or omission of performance arising directly or indirectly from the Force Majeure, and Customer's obligations affected by the Force Majeure, including but not limited to, the obligation to utilize the Terminal for the throughput of Product via rail, are hereby suspended.

Customer will keep Terminal Owner informed of any changes or developments in the status of the existing Force Majeure.

This notice is without prejudice to Customer's rights and remedies, all of which are hereby reserved.

Thank you for your attention to this matter.

Sequitur Permian, LLC
24 Smith Road, Suite 600 · Midland, Texas 79705
P.O. Box 50608 · Midland, Texas 79710
432-218-2001 · f) 888-400-4170

Two BriarLake Plaza · 2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042 · SequiturEnergy.com
713-395-3000 · f) 713-395-3099

Maalt_000002



Letter to Maalt, LP
December 7, 2018
Page 2

Sincerely,

A handwritten signature in dark ink, appearing to read "Braden Merrill". The signature is fluid and cursive, with a long horizontal stroke at the end.

Braden Merrill
CFO

Cc:

Via FedEx
James Lantner
James Lantner, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Sequitur Permian, LLC
24 Smith Road, Suite 600 • Midland, Texas 79705
P.O. Box 50608 • Midland, Texas 79710
432-218-2001 • f) 888-400-4170

Two BriarLake Plaza • 2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042 • SequiturEnergy.com
713-395-3000 • f) 713-395-3099

Maalt_000003

Jon Ince

Page 1..4

Page 1		Page 3	
1	CAUSE NO. CV19-003	1	I N D E X
2	MAALT, LP, * IN THE DISTRICT COURT	2	PAGE
3	Plaintiff, *	Appearances, **	2
4	V. * IRION COUNTY, TEXAS	Witness: JON INCE	
5	SEQUITUR PERMIAN, LLC, *	Examination by Mr. Kornhauser, **	4
6	Defendant, * 51ST JUDICIAL DISTRICT	Signature and Changes, ****	142
7		Reporter's Certification, ****	143
8		Reporter's Note: No exhibits marked. All exhibits	
9	VIDEOTAPED	were previously marked in Mr. Chris Favors' deposition.	
10	ORAL DEPOSITION OF		
11	JON INCE		
12	TAKEN ON		
13	NOVEMBER 15, 2019		
14	VOLUME 1		
15			
16	VIDEOTAPED ORAL DEPOSITION OF JON INCE,		
17	produced as a witness at the instance of the Defendant		
18	and duly sworn, was taken in the above-styled and		
19	-numbered cause on November 15, 2019, from		
20	9:32 a.m. to 1:06 p.m., before Sonya Britt-Davis, CSR,		
21	in and for the State of Texas, reported by machine		
22	shorthand, at the law office of James Lanter, PC,		
23	located at 560 North Walnut Creek, Suite 120,		
24	Mansfield, Texas, pursuant to the Texas Rules of Civil		
25	Procedure and the provisions stated on the record.		
Page 2		Page 4	
1	A P P E A R A N C E S	1	P R O C E E D I N G S:
2	FOR THE PLAINTIFF:	2	THE VIDEOGRAPHER: We're on the record
3	Mr. Paul O. Wickes	3	for the deposition of Jon Ince. The time is 9:32 a.m.
4	WICKES LAW, PLLC	4	on November 15th, 2019.
5	5600 Tennyson Parkway, Suite 205	5	If the court reporter can administer the
6	Plano, Texas 75024	6	oath.
7	Phone: 972.473.6900	7	(Witness sworn.)
8	E-mail: pwickes@wickeslaw.com	8	JON INCE,
9	AND	9	having been first duly sworn, testified as follows:
10	Mr. James Lanter	10	EXAMINATION
11	JAMES LANTER, PC	11	BY MR. KORNHAUSER:
12	560 North Walnut Creek, Suite 120	12	Q. Can you please state your name for the record,
13	Mansfield, Texas 76063	13	sir?
14	Phone: 817.453.4800	14	A. Jon Ince.
15	E-mail: jim.lanter@lanter-law.com	15	Q. Mr. Ince, my name is Matthew Kornhauser, and
16		16	I'm a lawyer for Sequitur, the Defendant in this case.
17	FOR THE DEFENDANT:	17	You're aware of that?
18	Mr. Matthew A. Kornhauser	18	A. Yes.
19	Mr. Christopher J. Kronzer	19	Q. Okay. Are you here represented by counsel?
20	HOOVER SLOVACEK, LLP	20	A. Yes.
21	Galleria Tower II	21	Q. Okay. And who's your counsel?
22	5051 Westheimer, Suite 1200	22	A. I've got Jim Lanter --
23	Houston, Texas 77056	23	MR. WICKES: Paul Wickes.
24	Phone: 713.977.8686	24	A. -- and Paul Wickes.
25	E-mail: kornhauser@hooverslovacek.com	25	Q. (BY MR. KORNHAUSER) Okay. Great.
	kronzer@hooverslovacek.com		
	Also Present:		
	Mr. Luis Acevedo - Videographer		

888-893-3767
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LEXITAS

Jon Ince

Page 13..16

Page 13

1 **A. No, I did not.**
 2 Q. Okay. They did that on their own?
 3 **A. Yes.**
 4 Q. Okay. Did -- did they use Jonas Struthers to
 5 secure their crude by rail?
 6 **A. They talked with Jonas Struthers about**
 7 **obtaining railcars, but they ultimately did not use**
 8 **him.**
 9 Q. Okay. Do you know who provided the rates and
 10 who provided the cars as it relates to the transloading
 11 activities to the Pecos facility of crude by rail?
 12 **A. I believe they used cars provided by Equinor.**
 13 Q. Okay.
 14 **A. Outside of who provided the rates, I -- I do**
 15 **not know that. I know that we did not provide any**
 16 **rates. And then to move trains, you have to submit**
 17 **billing for the -- for the origin and destination to**
 18 **the railroads. We did not do that.**
 19 Q. Okay.
 20 **A. That's -- that's usually the stuff that a**
 21 **logistics or a third-party logistics would handle.**
 22 Q. Okay. Are there any other instances where you
 23 were involved in the logistics of moving crude by rail?
 24 **A. I -- not that I can recall. The -- the -- I**
 25 **handle the normal stuff of, you know, what you**

Page 14

1 **consider --**
 2 Q. Right.
 3 **A. -- logistics or the supply chain.**
 4 Q. Right. So most --
 5 **A. Yeah.**
 6 Q. -- of your efforts relate to logistics as it
 7 relates to transloading frac sand?
 8 **A. By most, if you talk about a percentage, yes,**
 9 **but it's definitely -- we'll -- we'll transload**
 10 **anything. I mean, one of the key core competencies of**
 11 **Maalt, LP, is -- is transloading. So internally, you**
 12 **know, whatever business opportunity presents itself,**
 13 **we'll definitely take a look at it because that's what**
 14 **that business is expert at.**
 15 Q. All right. But mostly frac sand?
 16 **A. Right now, yeah, mostly frac sand.**
 17 Q. Right.
 18 And the instance that you described for
 19 us relating to the Pecos facility with Jupiter, that
 20 was the only instance that you were involved in the
 21 logistics of in transloading crude by rail?
 22 **A. Yes, sir.**
 23 Q. Okay. When did you first hear about Sequitur?
 24 **A. I believe that was in the May -- April, May,**
 25 **June time frame --**

Page 15

1 Q. Okay.
 2 **A. -- of 2018.**
 3 Q. Okay. How did you come to learn of Sequitur?
 4 **A. Blake DeNoyer had an e-mail that -- that he**
 5 **forwarded to Chris Favors and myself, and that was the**
 6 **first introduction of Sequitur.**
 7 Q. Okay. What was Sequitur's purpose for
 8 interacting with Maalt/Vista back in May 2018 that you
 9 understood?
 10 **A. With that introduction it was that they were**
 11 **looking for an opportunity to remove crude by rail out**
 12 **of West Texas. I do -- I do know that prior to that**
 13 **there were some opportunities we were pursuing as a**
 14 **company to provide them with frac sand, but I don't**
 15 **think that ever came to fruition.**
 16 Q. Okay. Were you involved in those efforts?
 17 **A. No.**
 18 Q. Okay. So Blake DeNoyer got the first contact
 19 from Sequitur? Is that what you understand?
 20 **A. I believe so based off of the documents that**
 21 **were produced.**
 22 Q. Okay. And -- and Blake passed on that
 23 information to you and Chris Favors?
 24 **A. Yes, I believe so.**
 25 Q. Okay. And what did you do with that

Page 16

1 information?
 2 **A. I reached out -- I can't remember if it was**
 3 **Braden Merrill or Tony Wroten, but I reached out to one**
 4 **of those two individuals, maybe both, just to set up a**
 5 **initial contact to find out what they were interested**
 6 **there and see if there was any possibility for us to**
 7 **provide services.**
 8 Q. Okay. Let's take a look at Exhibit Number 2.
 9 You've seen that e-mail before; is that correct, sir?
 10 **A. Yes.**
 11 Q. All right. This is an e-mail that you sent to
 12 Bra- -- Braden Merrill and -- and Tony over at Sequitur
 13 on May 9th, 2018; is that correct?
 14 **A. Yes.**
 15 Q. You sent this e-mail?
 16 **A. Oh, yes. I'm sorry. Yes.**
 17 Q. All right. And it reflects a conversation
 18 that you had with the both of them. What do you recall
 19 about that conversation?
 20 **A. Nothing really stands out. It -- it -- you**
 21 **know, it was an initial conversation.**
 22 Q. Okay. Do you recall anything in particular
 23 about the conversation?
 24 **A. Nothing -- no, I mean -- nothing really in**
 25 **particular. Like I said, it's -- it's just an**

Jon Ince

Page 17..20

Page 17

Page 19

1 introductory conversation and...

2 Q. Okay. It says: Great -- it was great talking
3 with you, and I look forward to our talks progressing
4 on shipping crude at the basin. Feel free to reach out
5 to me if you need any help on fleet sizing or routing,
6 and I'll do what I can step you through the process.

7 (As read.)

8 And then in the -- it says: VProp works
9 on the belief that we succeed when our partners
10 succeed. I will get you the info I promised you in the
11 coming days. (As read.)

12 What information did you promise to
13 provide Tony and Braden on May 9th, 2018?

14 A. What information I promised from that
15 conversation, I -- I don't recall. But within many of
16 these initial conversations that we have, it's -- it
17 usually revolves around, you know, how -- how many, in
18 this case, barrels can you transload in a day? Do you
19 have the facility? What's the timing if the facility
20 is available? How many railcars could it hold? A --
21 a -- again, a lot of basic fact-finding information
22 just that usually comes from an initial phone call like
23 that.

24 Q. Okay. In this phone call did Sequitur explain
25 the term that they desired?

Page 18

Page 20

1 A. I don't recall if it was in that phone call or
2 not. There was -- there was quite a few phone calls
3 about this time, so I -- I don't know if it was in that
4 initial one or not.

5 Q. Okay. Did Sequitur ever share with you,
6 during any of these phone calls, the term they were
7 looking for?

8 A. Oh, yeah. Yeah.

9 Q. Well, what do you understand that term to be?

10 A. That term -- while I can't remember the -- you
11 know, the specific if it was eighteen to twenty-four
12 months, it really revolved around a time frame of about
13 eighteen to twenty-four months that -- that coincided
14 with the pipeline coming on, and -- and they were just
15 trying to take advantage of the price differential
16 which was going to be reduced once the pipeline came on
17 and allowed inventory to move out of West Texas.

18 Q. Okay. And so that was shared with you in
19 these phone calls. Now, did they talk with you about
20 the volume of -- of -- of crude oil that they were
21 looking to transload in these conversations?

22 A. Yes. Throughout the -- the conversations that
23 we had, that definitely did come up.

24 Q. Okay. And what did you understand that volume
25 to be?

1 A. It -- it -- it fluctuated to where maybe it

2 was going to start off 10-, 11-, 12,000 barrels a day
3 or -- yeah, I believe a day and ramping up at the end
4 of twenty nine- -- 2018 and into the early part of 2019

5 and be pretty steady. But those -- those numbers
6 definitely fluctuated. Sequitur's -- Sequitur's
7 ability to produce -- they had so many different

8 variables just like every --

9 Q. Okay.

10 A. -- every business does. So I know that number
11 did fluctuate.

12 Q. So did you explain -- or did you explain to
13 Sequitur the number of trains and railcars that would
14 be needed to handle that type of volume?

15 A. Yeah, within those conversations definitely.
16 They -- they seemed to struggle with understanding what
17 did they need from a train and a railroad perspective,
18 and -- and I would give them some -- some -- some help
19 as far as understanding, Here's -- here's how you would
20 need to go in the process of finding out how many
21 railcars you need.

22 Q. Okay. You said they struggled in
23 understanding.

24 A. Yeah.

25 Q. What -- what -- what is it that specifically

1 causes you to reach that conclusion?

2 A. I had a phone call with -- with Tony, and
3 the -- I had multiple phone calls with Tony where he
4 was asking about how many railcars do we need, and that
5 same ke- -- question came up, and I would walk him
6 through the process of it really just depends on how --
7 how fast are you going to be able to get it down to the
8 destination and then how fast are they going to get it
9 back, you know, and that really determines how many
10 railcars you need. And they -- they seemed to -- Tony
11 seemed to struggle grasping that because every time we
12 talked, that would come up pretty often.

13 Q. Would it be fair to say that Sequitur was
14 fairly inexperienced with the concept of transporting
15 crude by rail?

16 A. I can't speak to their -- their -- their
17 experience as far as what they've done in the past.
18 But the way that they were presenting themselves, they
19 seemed to -- to lack a knowledge.

20 Q. Okay. So did you tell him how many trains and
21 railcars you thought they would need given the term
22 that they were looking at, given the volume they were
23 looking at, things such as that?

24 A. I produced a spreadsheet in Excel, and -- and
25 I walked Tony through it, and I -- just how some --

Jon Ince

Page 21..24

Page 21

Page 23

1 some things stick out better than others, I
 2 specifically remember talking to Tony for quite a while
 3 on this conversation and walking him through
 4 everything. Because at this point they were -- they
 5 were still asking quite a bit about how many railcars.
 6 So, again, I told him, Here's a -- here's
 7 kind of the formula that you need. And I -- I broke it
 8 out verbally, and he was like, Okay, you know, that
 9 would be great. And I said, you know, If it'll help
 10 you, I can put it in a spreadsheet and you can plug in
 11 the numbers, and -- and, you know, ultimately you're --
 12 you're the one that's going to know what you need. But
 13 here's the formula that you can use to at least get you
 14 in the ballpark and get you close to it.
 15 Q. Okay. Would it be fair to say that Sequitur's
 16 understanding of those dynamics was elementary?
 17 A. I would think so.
 18 Q. Okay. And you were trying to help, trying to
 19 explain to them and give them the information they
 20 would need to understand, you know, the -- the -- the
 21 number of trains, number of railcars that would be
 22 needed to handle this volume?
 23 A. That's correct. And -- and to be clear, the
 24 number of railcars is -- is probably more important
 25 than the number of trains because at this time we were

1 introduction, understanding what they wanted, providing
 2 information on -- on what transloading capabilities we
 3 would have and setting a time to move forward with --
 4 with the conversation.
 5 Q. Okay. But you were also speaking to Jupiter
 6 about the Pecos facility in addition to the Barnhart
 7 facility?
 8 A. Correct.
 9 Q. Okay. Did you disclose to Sequitur the fact
 10 that you were having conversations with Jupiter about
 11 the same business opportunity at the Barnhart facility?
 12 A. I really don't recall. It -- it could have
 13 been a possibility that we did.
 14 Q. Mr. Favors, you were present during his
 15 deposition, correct?
 16 A. Correct.
 17 Q. And you heard Mr. Favors talk about the fact
 18 that there were market conditions around this time of
 19 May 2018 that caused them to pursue opportunities
 20 regarding the transloading of crude by rail at the
 21 Barnhart facility? You heard that testimony, correct?
 22 A. Yes.
 23 Q. Do you share -- do you agree with that
 24 testimony as far as the market conditions being
 25 conducive to pursue these opportunities --

Page 22

Page 24

1 talking about maybe not unit train service, maybe just
 2 shipping out five cars a day or ten cars a day, not --
 3 Q. Uh-huh.
 4 A. -- having to wait until a unit train was made.
 5 Q. All right. During these con- -- this -- these
 6 conversations with Sequitur in May of 2018, you were
 7 also talking with Jupiter about the opportunity of
 8 maybe transloading crude by rail at the Barnhart
 9 facility, correct?
 10 A. Yes.
 11 Q. And you -- at the time you first spoke with
 12 Sequitur, you had already spoken with Jupiter about
 13 that prospect, correct?
 14 A. I -- I believe so. The timing of the
 15 conversations, we -- we -- we had -- we had quite a few
 16 inquiries. I can't remember which one came first, but
 17 I'm -- I -- I'm fairly certain it was Jupiter.
 18 Q. Okay. Did you speak to people at Jupiter
 19 personally?
 20 A. Yes, I did.
 21 Q. All right. And what do you recall about those
 22 conversations? Who did you speak to? Was it Travis
 23 Morris?
 24 A. Travis Morris and Christian Carranza, pretty
 25 much the same and basic conversation structure, just an

1 A. Yes.
 2 Q. -- for crude by rail?
 3 Do you care to add anything about that in
 4 regard to the conditions and what precipitated
 5 Maalt/Vista to pursue the transloading of crude-by-rail
 6 opportunities at the Barnhart facility?
 7 A. No, nothing to add.
 8 Q. Okay. In other words, I think it would be
 9 fair to say that there was a -- there was a window of
 10 opportunity to pursue crude by rail at the terminal
 11 because transloading frac sand at that particular point
 12 in time was not desirable economically; is that true?
 13 A. That is true. It was becoming less -- less
 14 economical.
 15 Q. Right. So that's the reason why y'all pursued
 16 these opportunities with -- with Jupiter and with
 17 Sequitur as -- as it relates to the Barnhart facility,
 18 correct?
 19 A. We pursued these opportunities. It was
 20 definitely a mutual -- mutual pursuit.
 21 Q. Right. But there were -- there were -- there
 22 were market conditions that provoked Vista to pursue
 23 them; we know that, and Maalt?
 24 A. At the very initial contact, it's my
 25 understanding we didn't pursue these opportunities to

Jonas Struthers
647.989.3552
jonas@fenixfsl.com

On May 9, 2018, at 7:22 PM, Jon Ince <jince@vprop.com> wrote:

Braden/Tony,

It was great talking with you and I look forward to our talks progressing on shipping crude out of basin. Feel free to reach out to me if you need any help on fleet sizing or routing and I will do what I can step you through that process. VProp works on the belief that we succeed when our partners succeed. I will get you the info I promised to you in the coming days.

Let me introduce Jonas Struthers, the railcar guy I mentioned to you on our call. He has been a great partner for me in the past with our sand cars and I'm sure he will be able to get you cars that you need for your fleet. I'm sure he can get you cars that you need at a really good rate, he's done amazing work for me in the past. Jonas will be more in the know on regulations and exact timing on when 1232s are phased out for the 117s.

Regards,
Jon

On May 9, 2018, at 4:20 PM, Braden Merrill <bmerrill@sequiturnenergy.com> wrote:

Tony Wroten <twroten@sequiturnenergy.com>

Best,
Braden Merrill

O: 713-395-3008
C: 434-466-4294
bmerrill@sequiturnenergy.com

Two Briarlake Plaza; 2050 West Sam Houston Pkwy South
Suite 1850; Houston, TX 77042



Maalt_000299

1 CAUSE NO. 19-003

2 MAALT, LP, § IN THE DISTRICT COURT OF
3 §
4 Plaintiff, §
5 VS. § IRION COUNTY, TEXAS
6 §
7 SEQUITUR PERMIAN, LLC, §
8 §
9 Defendant. § 51st JUDICIAL DISTRICT

10 ORAL AND VIDEOTAPED DEPOSITION OF

11 TONY WROTEN

12 November 20, 2019

13 Volume 1

14
15 ORAL AND VIDEOTAPED DEPOSITION OF TONY WROTEN,
16 produced as a witness at the instance of the Plaintiff
17 and duly sworn, was taken in the above-styled and
18 numbered cause on the 20th day of November, 2019, from
19 9:35 a.m. to 2:29 p.m., before Patricia Palmer, CSR, in
20 and for the State of Texas, reported by machine
21 shorthand, at the offices of Mr. Matthew A. Kornhauser,
22 Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
23 Houston, Texas 77056, pursuant to the Texas Rules of
24 Civil Procedure and the provisions stated on the record
25 herein.

Page 1



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1 helpful, how about that?
 2 A. Was there ever a time that Jon was not helpful?
 3 I would -- you know, from throughout the process he was
 4 very helpful. I think one thing that was not helpful
 5 was kind of his endorsement of -- of Jupiter as someone
 6 that was capable of getting this all done.
 7 Q. Okay.
 8 A. Because as we learned through experience, they
 9 couldn't and we wasted a ton of time --
 10 Q. Okay.
 11 A. -- having to deal with them.
 12 Q. What specifically do you recall that was said
 13 by Jon Ince regarding Jupiter's capability?
 14 A. We had -- you know, I guess this was back in
 15 July, August, time frame. It was our preference to work
 16 with Shell at the time. We had been introduced to
 17 Jupiter by, you know, the Vista guys, Jon and Chris, and
 18 you know, we had initial conversations with them. It
 19 just seemed like they were promising the world and you
 20 know, we were kind of distrustful of them. So we, you
 21 know, in our conversations with Jon, we wanted to get
 22 their take on -- on their ability and their -- their --
 23 their capabilities, you know, and he was fully endorsing
 24 their ability to do it. And that -- you know, we kind
 25 of relied on that and you know, that -- that helped us

Page 34

1 feel, you know, get some comfort around potentially
 2 doing something with Jupiter if things with Shell didn't
 3 -- didn't pan out.
 4 Q. Okay. We will get to that time frame a little
 5 bit more, but let me just kind of break that down a
 6 little bit. You said they were promising the world, I
 7 assume that you mean Travis with Jupiter was promising
 8 the world?
 9 A. Travis.
 10 Q. Okay. And I think what you mentioned with
 11 regard to Jon and Chris, was what that they -- was the
 12 word you used endorsed?
 13 A. Yeah. They -- I believe they had a deal
 14 already done or they did have a deal already in place
 15 for another terminal. So --
 16 Q. Okay. So they told you --
 17 A. They themselves got into business with them and
 18 you know, were endorsing them as a -- as a potential
 19 business partner for us at that facility as well.
 20 Q. Okay. And I just -- I don't mean to mince
 21 words or anything, I just want to have a full
 22 understanding.
 23 A. Yeah.
 24 Q. I think you are correct that there is evidence
 25 that Maalt and Jupiter did a deal to move crude out of a

Page 35

1 Pecos transload facility that had already been entered
 2 into? Is that what you're talking about, the --
 3 A. Yeah the Pecos terminal is what I'm --
 4 Q. Okay. And so -- and I'm using the term Jon and
 5 Chris, was it one or the other, was it both?
 6 A. For what?
 7 Q. For endorsing Jupiter because they had done a
 8 deal with them to move crude out of Pecos?
 9 A. It was both at, you know, separate times.
 10 Q. Okay. How did they endorse Jupiter other than
 11 letting you know that they had put their trust in
 12 Jupiter enough to do a deal for transloading crude by
 13 rail out of Pecos?
 14 A. A conversation -- a phone conversation with
 15 Jon, you know, where he -- you know, he said that they
 16 were the real deal, and with Chris it was more of the
 17 meeting when we signed the TSA and prior to that, too.
 18 You know, they had -- they had mentioned earlier that,
 19 you know, they were, you know, talking with Jupiter.
 20 You know, we had -- when we signed the LOI,
 21 it was, you know, stipulated that, you know, they
 22 couldn't talk to any other parties that we were talking
 23 to. We weren't already talking to Jupiter. But you
 24 know, through this meeting, right, like, it was, you
 25 know, we had already met. They had -- we had already

Page 36

1 had that introduction with, you know, to Jupiter prior
 2 to that, but it was during that, you know, Chris was
 3 pretty, you know, supportive of Jupiter being able to
 4 help us and, you know, he had know -- he had knew at
 5 that point that Shell was having a hard time. But I
 6 think it was in their interest that they wanted to get a
 7 deal done, so you know, and Shell wasn't going to be
 8 able to do it. They indicated Jupiter would.
 9 MR. WICKES: Okay. Look at Exhibit 5.
 10 That's going to be in the notebook.
 11 THE WITNESS: Okay. Got it.
 12 Q. Okay. You were not on this e-mail, so I may
 13 ask you something you don't know the answer to and
 14 that's fine, just tell me if that's the case. At the
 15 bottom e-mail it is from Braden, your boss, to Chris
 16 Favors; is that right?
 17 A. Yeah. Yes, sir.
 18 Q. And I am curious on that, the last sentence
 19 down there. If you want to read the whole thing for
 20 context, just let -- let me know. But it says, "So you
 21 know, we are going full steam ahead on our side. We
 22 have," and then there is a colon, and the last thing is
 23 "Made good progress regarding the transportation and
 24 sell of oil via rail."
 25 Do you know what Sequitur had done to make

Page 37

10 (Pages 34 - 37)

Removal Appendix 0325

3. Maalt objects all of the testimony in the attached transcripts that is not cited in Sequitur's briefing or Maalt's briefing because it is not relevant to the summary judgment issues before the Court and because it does not comply with the requirements of Rule 166a(d). Rule 166a(d) requires that discovery products not on file with the Court may be used when a notice containing specific references to the discovery is filed with the non-movant's response. Simply attaching entire depositions does not provide that specific notice.

4. This Court should not be required to wade through the hundreds of pages of deposition testimony in search of a fact issue or in search of the underlying facts that support its claims. *See Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 81 (Tex.1989); *BP America Production Co. v. Zaffirini*, 419 S.W.3d 485, 508-09 (Tex. App.—San Antonio 2013, pet. denied); *Gonzales v. Shing Wai Brass*, 190 S.W.3d 742, 746 (Tex. App.—San Antonio 2005, no pet.)

5. In *Upchurch v. Albear*, 5 S.W.3d 274, 284-28 (Tex. App.—Amarillo 1999, pet. denied), the court held that the trial court erred as a matter of law in not sustaining an objection to voluminous summary judgment evidence that was not specifically cited to. The court explained:

By their objection to the summary judgment evidence, among other things, the clients asserted that the summary judgment evidence consisting of almost 3000 pages was not properly before the court because it was not indexed, nor did it reference or cite to the motion. We agree. The clients, as nonmovants, were entitled to "fair notice" of the movants' contentions. Also, before granting a summary judgment, the trial court has a duty to determine if there are any material fact questions. However, a general reference to a voluminous record which does not direct the court or the parties to the evidence on which the movant relies is not sufficient. Because the summary judgment did not direct the court and the clients to the voluminous evidence the basis of the motion, the trial court erred in not sustaining the clients' objections and in granting the summary judgment.

Id. (internal citations omitted).

6. For the foregoing reason, Maalt requests that its objection to the entirety of the depositions be sustained and the portions of the depositions that have not been specifically cited or referenced by the parties be stricken.

Objections to specific deposition excerpts

7. Maalt objects to the question and answer appearing in the deposition of Braden Merrill at page 247 line 19 through page 248, line 1 for the following reasons:

- a. The question is a leading question by counsel for the Defendant of an employee of the Defendant;
- b. The question asks for a legal conclusion in that it asks if the Defendant “has suffered damages”;
- c. The question asks for an impermissible conclusion regarding causation; and
- d. The answer was not responsive to the question.

8. Maalt objects to the question and answer appearing in the deposition of Braden Merrill at page 248 line 3 through page 248, line 7 for the following reasons:

- a. The question is a leading question by counsel for the Defendant of an employee of the Defendant;
- b. The question asks for a conclusion.

9. The testimony elicited from Defendant’s counsel of his own witness constitute inadmissible conclusions that are not admissible as summary judgment evidence. The answers to the questions are not accompanied by any statement of facts or other predicate that permit such conclusions to be made and are unsubstantiated. *Denco CS Corp. v. Body Bar, LLC*, 445 S.W.3d

863, 873 (Tex.App.-Texarkana 2014, no pet.); *Harley-Davidson Motor Co. v. Young*, 720 S.W.2d 211, 213 (Tex.App.-Houston [14th Dist.] 1986, no writ).

10. Summary judgment evidence must be admissible under the rules of evidence. *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1977). The foregoing testimony would not be admissible under the rules of evidence for the reasons stated.

Wherefore, Maalt prays that its objection be sustained, that its motion be granted, and that it have such other relief to which it is entitled.

Respectfully submitted,

By: /s/ Paul O. Wickes

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**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the March 6, 2020, upon:

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/s/ Paul O. Wickes

No. 19-003

51ST JUDICIAL DISTRICT

Removal Appendix 0330

Sequitur to Jupiter was not a promise or guarantee that Jupiter could provide Sequitur with rail service or the terms of any such service. It was merely a referral. Maalt never promised Sequitur that if it signed the Terminal Services Agreement it would connect Sequitur with parties who could achieve Sequitur's goals in realizing the arbitrage opportunity.

Defendant even goes further by stating that "Maalt/Vista promised Sequitur that its connections would be able to get trains to ship Sequitur's crude oil from the terminal to the Gulf Coast." There is no evidence that such a promise was ever made. None of Defendant's officers and employees involved in this transaction testified in their depositions that such a grand promise was made, nor has Defendant filed an affidavit claiming that such a promise was made. There is no written document containing such a promise. Defendant's spin and characterizations find no support in any of the summary judgment evidence. Its response does not create a fact question of any type.

Maalt's evidence and the law demonstrates that it is entitled to summary judgment on the promissory estoppel claim. In *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), the defendant did more than what Maalt did, but was found not liable on a promissory estoppel. In that case, the defendant agreed to provide surplus equipment to assist the plaintiff in starting a new business. But, the court of appeals found that statement to be too vague to constitute a "promise", and reversed the jury verdict finding for the plaintiff on the promissory estoppel claim. *Id.* at 141-142.

Simulis, L.L.C. v. General Electric Capital Corporation, 2008 WL 1747483 (Tex.App.—Houston [14th Dist.] 2008, no pet.), is especially on point. The court of appeals summarized the plaintiff's claims:

GE provides commercial financial services for clients in forty-seven countries. Simulis is a software simulation company that provides virtual simulations for purposes such as industrial training. In the summer of 2000, GE approached Simulis about forming a strategic alliance. Several months later, after GE investigated Simulis and other similar companies, GE invested \$5 million in Simulis in exchange for an ownership interest in the company. According to Simulis, GE had assured Simulis that its software could be used across GE's industrial divisions and that this strategic alliance would be a “company maker” for Simulis. Simulis then began marketing itself to GE's divisions. Simulis claims that various GE officials promised that it would “receive business” from these industrial divisions, and Simulis continued to develop software models, hire new employees, and expand its office space “in anticipation of the large volume of work that was promised.”

In late 2002, GE provided Simulis with a \$100,000 promissory note as bridge financing, and the note required Simulis to start making interest payments in January 2003. GE never provided any business to Simulis, and Simulis stopped making its interest payments in April 2005.

Id. at *1. GE sued to recover on the promissory note, and Simulis filed counterclaims including a counterclaim seeking damages on a promissory estoppel theory based on the claim that GE promised to provide it with business.

GE moved for summary judgment on the promissory estoppel claim asserting that a promise to supply future business is too indefinite to support a promissory estoppel claim. The trial court granted the summary judgment in favor of GE, and the court of appeals affirmed. In affirming the summary judgment, the court stated:

Here, Simulis presented evidence that GE promised that Simulis would “receive business” and that the volume of business would be a “company maker” for Simulis. The parties never discussed or negotiated the specific pieces of business, the price, when and for how long such transactions would occur, or any other terms. Relying on such promises is unreasonable as a matter of law and cannot be the basis for a promissory estoppel claim.

Id. at *2.

Gillum v. Republic Health Corp., 778 S.W.2d 558 (Tex. App.—Dallas 1989, no writ), further negates Defendant’s contention that actionable promises were made. There, the plaintiff contended that:

[P]rior to Republic's acquisition of the hospital in 1984, Republic's representatives had a series of conversations with Gillum and that, in those conversations, Republic's representatives made promises to Gillum regarding the future of the hospital after Republic became the owner. Gillum states that he was told that the hospital's principal objective was to provide a service of outstanding patient care to the Mesquite community. Gillum contends that Van Devender made representations to Gillum that Republic would have sufficient funding to upgrade the hospital's equipment care; that the hospital would remain primarily a “D.O.” hospital; that Gillum could continue to make the changes to upgrade the level of health care at the hospital; and that a new hospital facility was to be constructed. Gillum contends that he reasonably relied on those statements made by Van Devender, as well as similar statements made by Buncher and various hospital administrators and staff members, and that based on those assurances, Gillum continued to perform surgeries at the hospital. Further, Gillum asserts that his reliance was foreseeable based upon his twenty-six year association with the hospital and that his reliance on Republic's promises detrimentally affected his reputation and career.

The trial court granted summary judgment dismissing the promissory estoppel claims. The court of appeals affirmed holding that the promises alleged were too vague and indefinite to be actionable. *Id.* at 569-570.

Defendant’s reliance on *Evers v. Arnold*, 210 S.W.2d 270 (Tex.Civ.App.—Austin 1948, no writ), is misplaced. *Evers* was not a promissory estoppel case, but was a case regarding an oral contract found by the jury. Promissory estoppel is not even mentioned in the opinion. Likewise, *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966), provides no support for Defendant’s position. There the trial court sustained special exceptions holding that a promissory estoppel claim was not properly pled. The supreme court merely reversed the ruling stating that a cause of action had

been pled, but did not determine that the claimed promises were actionable. There was no ruling made on the merits of that plaintiff's claims, and *Wheeler* provides no guidance to this Court.

Traco, Inc. v. Arrow Glass Co., Inc., 814 S.W.2d 186 (Tex.App.—San Antonio 1991, writ denied), is likewise distinguishable from the present case and not controlling. In that case, Arrow was preparing a bid to provide work for a large construction project. On bid day, Arrow received a telephone call from Traco stating that Traco wanted to submit a bid to Arrow for sliding glass doors. Arrow declined to use Traco's bid because the doors did not meet the project specifications. The same day, Traco called back to tell Arrow that it would modify the doors to meet the specifications and gave Arrow a firm and unconditional bid. Arrow informed Traco that its bid was low and asked it to recheck the figures, but Traco confirmed the amount. Arrow then used Traco's bid in its own bid. Traco then confirmed the bid in writing. When it was later determined that the Traco doors would not withstand the project architect's wind deflection requirements, Traco proposed a significantly more expensive product, and refused to provide a complying product for its bid price. The court found that Traco's bid, which was submitted in response to solicitations that *detailed* project specifications, and that identified *specific* products and *specific* prices was something that Arrow could rely upon in submitting its own bid. There are no facts like that involved in the present case.

Donaldson v. Lake Vista Community Improvement Ass'n., 718 S.W.2d 815 (Tex.Civ.App.—Corpus Christi 1986, writ ref'd n.r.e.) is also distinguishable on its facts. There, the plaintiff claimed that he was told that an airstrip could be used for commercial purposes and, based on that, he purchased adjacent land for his business. The plans for his improvements were approved in writing by the defendant before he began construction. He built substantial

improvements including a hanger, classrooms, lounge and aviation gas pumps for a flight school. He operated the flight school for 7 years until the defendant took action to prevent him from doing so. Those types of facts are not present in this case.

Haws & Garret General Contractors, Inc. v. Gorbett Brothers Welding Co. Inc., 480 S.W.2d 607 (Tex. 1972), provides no support for Defendant's argument. *Haws & Garret* was not a promissory estoppel case. The issue in the case was whether the contractor, Haws & Garret, agreed to an indemnity agreement that was printed on work orders for the rental of cranes from Gorbett. The supreme court discussed the differences between express and implied contracts, stating that there was insufficient evidence that Haws & Garret agreed to the indemnity obligations simply printed on a work order. There was no discussion of promissory estoppel, nor was such a claim at issue.

Defendant's statement that "Vista/Maalt promised that Sequitur would be connected to parties that could get railcars and rail services to the Terminal to fulfill the TSA" is not supported by the evidence. When pressed, Braden Merrill testified that Jon Ince and Chris Favors told him that they would introduce him to a person who could help with railcars. *Merrill Depo.* 246:7-247:6. Maalt introduced Defendant to a rail car broker, but did not promise that that broker would deliver cars to Sequitur. The fact that Jon Ince told Defendant that that broker had done amazing work for him in the past is not a promise that Defendant could make a deal with the broker. Number of cars, types of cars, delivery times, terms of lease or purchase, price for cars, and many other terms are all missing making the statements too indefinite to be construed as an actionable promise. *Wroten Depo.* 19:25-21:02. After the introduction, Defendant had direct discussions with the broker that did not include Maalt. *Merrill Depo.* 108:10-17. Maalt cannot be responsible

for Defendant's failure to make a deal for rail cars with that broker, someone over whom Maalt had absolutely no control. Similarly, Chris Favors' conveyance of Jupiter's representations to Defendant and introduction of Jupiter does not amount to a specific and definite promise that Maalt will do something. *Favors Depo.* 84:25 – 85:12. Again, there was no promise of deal terms, pricing, and the like. In fact, once the introduction was made, Defendant took it from there, did its own due diligence into Jupiter, and conducted all of its negotiations directly with Jupiter, and made the decision to move forward with it. *Merrill Depo.* 250:3-252:12. There simply was no "promise" made by Maalt that supports a promissory estoppel claim.

Defendant has not cited a single case that supports its position that the alleged promises are actionable and not just expressions of opinion, expectation or assumption. The court in *Lamb v. CNG Producing Co.*, 9 F.3d 104, 1993 U.S. App. LEXIS 39476 at *4 (5th Cir. 1993) said it best: "Texas law frowns upon using an insubstantial promise as the root of a promissory estoppel claim. A promissory estoppel claim first requires the existence of a promise. We cannot create such a promise where none exists."

2. Defendant admits that there was no promise made by Maalt that it did not keep.

In its response, Defendant does not even address the fact that Braden Merrill, its Vice President and person in charge of the crude by rail effort, testified that there was not a single promise made by Maalt that was not kept. *Merrill Depo.* 17:18-18:16. Defendant's President, Mike Van Den Bold, likewise testified that there was nothing Maalt was asked to do that it did not do. *Van Den Bold Depo.* 15:13-24. If for no other reason, that testimony requires that summary judgment be granted on the promissory estoppel claim.

3. The alleged promises could not be reasonably relied upon as a matter of law.

As shown above, the alleged promises were too vague to be reasonably relied upon. As demonstrated by the cases cited, relying on the type of promises alleged is unreasonable as a matter of law. *Simulis, L.L.C. v. General Electric Capital Corporation*, *supra* at * 1; *Allied Vista, Inc. v. Holt*, *supra* at 141-142; *Gillum v. Republic Health Corp.*, *supra* at 569-570.

There is also a second reason why Defendant could not have reasonably relied upon the alleged representations as “promises” that Maalt would undertake some definite and specific action. Initially, it should be noted that the TSA does not contain any obligation on the part of Maalt to acquire rail cars, rail transportation for Defendant, or find a “partner” for Defendant to purchase its oil and provide the desired rail transportation.

Next, the Letter of Intent contains a provision that clearly states that there were no other written or oral agreements or understandings among the parties. Defendant’s Exhibit A-1 at paragraph 8. Thus, the Letter of Intent that was prepared by and signed by Defendant negates any reliance on the May 9, 2018 email from Jon Ince, among other things, as a matter of law. Merrill dep. 251:10-20.

At the same time, paragraph 7 of the Letter of Intent clearly provides that no party would be bound by any “Definitive Agreement” until each party has completed its due diligence “to its satisfaction.” By that provision, Defendant acknowledged and agreed that it was responsible for performing its own due diligence on all parts of the transaction. It was responsible for performing its own due diligence on whether it would be able to obtain necessary rail cars, rail transportation, and anything else it deemed important. The fact that Defendant insisted upon and agreed to pursue

its own due diligence before signing the TSA negates any reasonable reliance on the promises it alleges were made by Maalt.

Braden Merrill testified that once the introduction to Jupiter was made by Chris Favors, Defendant took it from there and had all of their negotiations between just Jupiter and Defendant. Maalt was not involved and did not participate. Defendant also did its own due diligence of Jupiter and its capabilities and, based on its due diligence and research, made the business decision to move forward with Jupiter. *Merrill Depo.* 251:21-252:12. The fact that Defendant conducted its own due diligence into Jupiter's capabilities negates any reliance on Chris Favor's alleged statements as a matter of law.

Mr. Merrill testified that his company is a sophisticated business entity that employs highly educated people including in-house attorneys. Mr. Merrill has a finance degree and an MBA. He testified that he and his company are used to performing due diligence, and making business decisions based on their own due diligence and research. He testified that Defendant had the capability of determining whether or not there were railcars available on its own, and could have called railcar manufactures and leasing companies to see if railcars were available, but did not do so. *Merrill Depo.* 248:11-249:22. Defendant performed its own due diligence and research on Jupiter before deciding to do business with it. *Merrill Depo.* 251:21-252:12.

As a company that is sophisticated and employs knowledgeable, skilled and experienced people who are capable of conducting due diligence and negotiating and executing sophisticated contracts such as the TSA, Defendant could not blindly rely on the alleged promises. Defendant is required to protect its own interests through the exercise of diligence, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party. *JPMorgan Chase*

Bank, N.A. v. Orca Assets G.P., L.L.C., 546 S.W.3d 648, 657 (Tex. 2018); *National Property Holdings, L.P. v. Westergreen*, 453 S.W.3d 419, 424-425 (Tex. 2015). The *JPMorgan* court aptly stated:

Orca, composed of experienced and knowledgeable businesspeople, negotiated an arm's-length transaction and then placed millions of dollars in jeopardy—all while operating under circumstances that similarly situated parties would have regarded as imminently risky. Orca needed to protect its own interests through the exercise of ordinary care and reasonable diligence rather than blindly relying upon another party's vague assurances. Its failure to do so precludes its claim of justifiable reliance as a matter of law.

546 S.W.3d at 660. For the same reasons, Defendant's claim of reliance fails.¹

PRAYER

WHEREFORE, Plaintiff, Maalt, L.P., and Third-Party Defendant, Vista Proppants and Logistics, Inc., pray that their motion for partial summary judgment be granted, and that the Court award all other relief to which they are entitled.

Respectfully submitted,

By: /s/ James Lanter

James Lanter
State Bar No. 11940700
JAMES LANTER, P.C.
560 N. Walnut Creek, Ste. 120

¹ Defendant's assertion that the TSA does not include a merger clause and therefore does not bar reliance on oral promises misstates Texas law. Under Texas contract law, **the execution of a written contract, with or without a merger clause, presumes that all prior negotiations and agreements relating to the transaction have been merged into the written contract.** *Yasuda Fire and Marine Ins. Co. v. Criaco*, 225 S.W.3d 894, 899 (Tex.App.-Houston [14th Dist.] 2007, (no pet.)). A contract is fully integrated if the parties intended a writing to be a final and complete expression of agreed terms regardless of whether it includes a merger clause. *Adams v. McFadden*, 296 S.W.3d 743, 752 (Tex.App.-El Paso 2009, no pet.); *Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 197 (Tex.App.-Houston [1st Dist.] 2008, pet. denied). The TSA was intended by the parties to be the final and complete expression of the agreed terms between them. That is clear from the Letter of Intent which contemplated the execution of a "Definitive Agreement." Thus, the TSA cannot be added to, varied, or contradicted by parol evidence.

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**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the March 6, 2020, upon:

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/s/ James Lanter

No. 19-003

MAALT, LP

Plaintiff,

vs.

SEQUITUR PERMIAN, LLC

Defendant.

§
§
§
§
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§
§
§
§

IN THE DISTRICT COURT

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

ORDER

On March 10, 2020, the Plaintiff's and Third Party Defendant's Motion for Partial Summary Judgment was heard by the Court. At the hearing the Court considered the motion, the response filed by the Defendant, the movants' reply in support of the motion, the movants' objections to Defendant's summary judgment evidence, and arguments of counsel. The Court having considered the foregoing is of the opinion that the motion should be granted and the following orders entered.

IT IS THEREFORE ORDERED that Plaintiff's and Third Party Defendant's objections are sustained/overruled as follows:

Inclusion of entire depositions:

~~Sustained/overruled~~

Objections to Merrill deposition pp. 247:19 – 248:1:

~~Sustained/overruled~~

Objections to Merrill deposition pp. 243:3-7:

~~Sustained/overruled~~

IT IS FURTHER ORDERED that Plaintiff's and Third Party Defendant's Motion for Partial Summary Judgment is granted, and that Defendant take nothing by its promissory estoppel cause of action.

SIGNED this 11th day of March 2020.


JUDGE PRESIDING

Ashley Masters

CAUSE NO. CV19-003

MAALT, LP,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	IRION COUNTY, TEXAS
	§	
SEQTUITUR PERMIAN, LLC	§	
	§	
Defendant	§	51st JUDICIAL DISTRICT

**DEFENDANT'S SPECIAL EXCEPTIONS TO
PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, SEQUITUR PERMIAN, LLC ("Defendant"), in the above styled and numbered cause and file these Special Exceptions to Plaintiff's Original Petition, attached hereto as Exhibit A, and in support thereof would show unto the Court as follows:

SPECIAL EXCEPTIONS.

A. The "maximum amount claimed" must be pleaded.

1. Plaintiff asserts a claim of breach of contract against the Defendant, requesting damages. Plaintiff has stated that it "seeks monetary relief over \$1,000,000." Pursuant to Rule 47 of the Texas Rules of Civil Procedure, Defendant specially excepts to Section II, page 1 and request that Plaintiff state the maximum amount of damages she seeks with respect to each cause of action asserted against each of the Defendants. *See* TEX. R. CIV. P. 47 (stating "upon special exception the court shall require pleader to amend to as to specify the maximum amount claimed").

B. The "type of damages" sought.

2. Plaintiff has asserted a sole claim for breach of contract. Defendant specially excepts to Section XI, page 4 as Plaintiff claims it "has sustained damages" but fails to state how

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it has been damaged due to Defendant's alleged breach. For a breach of contract claim, a Plaintiff can recover expectation, reliance and/or restitution damages. *Norhill Energy, LLC v. McDaniel*, 517 S.W.3d 910 917 (Tex. App. – Fort Worth 2017, pet. denied). Plaintiff's general statement regarding damages fails to put Defendant on fair notice of how the alleged breach has harmed Plaintiff and/or the type of damages sought. The failure of Plaintiff to specify what type of damages are sought or how it has been harmed prejudices Defendant in its defense of the claim in this case because it leaves the Defendant guessing. In example, in Section VI, page, 2, Plaintiff makes a point to identify the minimum throughput charge and a rough calculation of the monthly minimum obligation but fails to state if it is actually seeking the minimum throughput as damages. It appears as if Plaintiff is limiting its claims to expectation damages but that is not clear.

3. While Plaintiff may argue details of damages may be sought through discovery, the prejudice to Defendant arises due to Plaintiff's ability to amend or supplement its damage model up to thirty (30) days before trial. Due to Plaintiff's vague pleading, Plaintiff theoretically could assert additional theories of recovery with a new damage model on the eve of trial. This would prejudice Defendant as (1) the pleading deadline would have passed, preventing Defendants from asserting any pertinent affirmative defenses, (2) the discovery deadline would have passed preventing Defendants from proffering additional discovery requests to understand the extent of damage; and/or (3) expert deadlines would have passed, preventing Defendant from designating necessary experts to combat the new damage claims. Therefore, Defendant seeks an order of the Court requiring Plaintiff to identify the type of damages being sought by their claim, e.g. if Plaintiff is seeking the minimum throughput charge it should state as much. *See Cruz v. Morris*, 877 S.W.2d 45, 47 (Tex. App. – Houston [14th Dist.] 1994, no writ.) (stating that it is a trial court's discretion to require to plead damages with additional specificity.)

C. Conclusion.

4. Defendant recognizes that the two special exceptions work hand and hand. If Plaintiff states the maximum amount sought, then Defendant will be able to ascertain if the claimed damages are limited to minimum throughput calculation. If the maximum amount sought exceeds, minimum throughput calculation then there would be additional damages sought that cannot be ascertained from the pleading. Therefore, Defendant seeks the Court to sustain both special exceptions so that Defendant has fair notice of Plaintiff's positions and claims.¹

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, SEQUITUR PERMIAN, LLC request that the Court sustain Defendant's special exceptions, that the Court make an order requiring the Plaintiff to amend its pleadings to address the issues stated herein, and providing that, if the Plaintiff fails or refuses to amend, the claims will be dismissed, that the Plaintiff recover nothing by way of its Petition and that the Defendant be granted such other and further relief to which it is entitled, whether at law or in equity.

¹ Defendant reserves the right to raise additional special exceptions as necessary based on any additional issues that may arise including ongoing discovery and any amendments to the petition.
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Respectfully submitted,

HOOVER SLOVACEK LLP

/s/ Christopher J. Kronzer

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***CO-COUNSEL FOR DEFENDANT/COUNTER-
PLAINTIFF, SEQUITUR PERMIAN, LLC***

CERTIFICATE OF CONFERENCE

This motion and the relief requested herein was discussed with opposing counsel prior to filing. Opposing counsel indicated that it may agree to amend the petition prior to hearing and prior to deadline but wanted special exception on file.

/s/ Christopher J. Kronzer
Christopher J. Kronzer

CERTIFICATE OF SERVICE

I hereby certify that on this, the 9th day of April 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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/s/ Christopher J. Kronzer
Christopher J. Kronzer

Ashley Masters

CAUSE NUMBER 19-003

MAALT, LP, Plaintiff	§	IN THE DISTRICT COURT
	§	
VS.	§	51st JUDICIAL DISTRICT
	§	
SEQUITUR PERMIAN, LLC, Defendant	§	IRION COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Maalt, LP ("Maalt"), Plaintiff, and files this its Second Amended Original Petition, and in support thereof, respectfully shows this Court as follows:

DISCOVERY CONTROL PLAN

I.

Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

RULE 47 STATEMENT OF RELIEF REQUESTED

II.

Plaintiff seeks monetary relief over \$1,000,000.00.

PARTIES

III.

Plaintiff, Maalt, LP, is a Texas limited partnership with its principal place of business in Tarrant County, Texas.

Defendant, Sequitur Permian, LLC, ("Sequitur") has appeared and answered.

VENUE

IV.

Venue is proper in Irion County, Texas, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(1) because that is the county in which all or a substantial part of the events giving rise to Maalt's claims and causes of action occurred.

FACTS

V.

Maalt is in the business of operating transloading facilities that transload materials used in the oil and gas industry in Texas. Its transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operates a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacific Transportation, Ltd. ("TXPF"). TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the Union Pacific and Fort Worth and Western Railroad ("FWWR"). The FWWR in turn interchanges with track owned by BNSF and The Kansas City Southern Railway ("KCS"). Through those interchanges and railroads, goods can be shipped into and out of the Permian Basin area by rail. The Barnhart Facility can accept goods brought to it by truck or train from anywhere in the country, and then transloaded to either truck or train for delivery either within the Permian Basin or other areas throughout the country.

VI.

In approximately May, 2018, Sequitur contacted Maalt to discuss arrangements through which Maalt would transload Sequitur's crude oil at Maalt's Barnhart Facility because that facility was adjacent to land on which Sequitur had producing oil wells. At

the time, the pipelines leading from the Permian Basin to various oil markets were at capacity and oil was in a state of oversupply. Because of that situation, the price of crude oil at Midland was far less in early to mid-2018 than it was for crude oil sold at the Gulf Coast. Sequitur believed that the spread in the prices made the cost of transporting crude oil by rail attractive and created an opportunity to transport crude oil from the Permian Basin to the Gulf Coast by train. Sequitur wanted to take advantage of that opportunity which promised to provide it with significant returns.

VII.

Eventually, in August 2018, Maalt entered into a Terminal Services Agreement (the “TSA”) with Sequitur to provide crude oil transloading services at the Barnhart Facility for Sequitur, Sequitur with exclusive use of the facility, and a right of first offer and refusal to purchase the facility (the “ROFR”). Pursuant to the TSA, Sequitur was to provide and install the equipment needed to transload Sequitur’s crude oil from trucks (and potentially a pipeline) to rail cars, and Maalt was to provide exclusive access to its Barnhart Facility, the labor required for the transloading process, and the ROFR. The TSA granted Sequitur the exclusive right to have crude oil transloaded at the Barnhart Facility to the exclusion of any other transloading operations, whether crude oil, sand, or other goods. In exchange, Sequitur agreed to pay Maalt \$1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $\$1.50 \times 11,424 \times 30 = \$514,080.00$)(the “Minimum Fee”). In other words, the TSA was an alternative or

throughput-or-pay contract (comparable to a take-or-pay contract) that allowed Sequitur to perform its obligations by either (i) providing the minimum throughput of crude oil at the Barnhart Facility for Maalt to transload, or (ii) paying the Minimum Fee. In exchange, Sequitur would receive transloading of its crude oil during the times specified in the TSA, the dedication of manpower for that transloading, the reservation of the Barnhart Facility for Sequitur's exclusive use, and the ROFR.

VIII.

Pursuant to the TSA, Sequitur constructed the Phase I Project improvements at the Barnhart Facility consisting of equipment necessary to transload crude oil brought to the Barnhart Facility by trucks onto railcars. While the completion of the improvements was targeted for early September, 2018, Sequitur's completion of those improvements was delayed and ultimately completed and became operational and/or in service on or about December 10, 2018 according to Sequitur's records. Under the terms of the TSA, Sequitur's obligation to pay Maalt the Minimum Fee began at that time.

IX.

By December, 2018, Sequitur had not procured the logistics necessary to have railcars delivered to the Barnhart Facility for the purpose of carrying crude oil. Rather than implement its own logistics to get crude oil and the necessary rail cars to the Barnhart Facility, Sequitur looked for a crude oil purchaser that already had logistical services in place to purchase its crude oil and serve as a joint venture partner to share the arbitrage. That way, Sequitur would not have to invest the time or manpower necessary to learn the logistical requirements of transporting crude oil by rail. It could simply rely on others to do that while enjoying the arbitrage; that is, the economic value of selling its crude oil at the Gulf Coast for a higher price than it could command in the

Permian Basin. It was, however, unsuccessful in finding such a joint venture partner with the result that it never had crude oil transloaded at the Barnhart Facility.

X.

According to Sequitur's internal records, the Phase 1 Project improvements were completed and the Barnhart Facility was "in service" on December 10, 2018. Despite the completion of the Phase 1 Project improvements, Sequitur did not begin transloading crude oil as required by the TSA. Instead, realizing that it did not have a joint venture partner who could provide the logistical services necessary to move its crude oil from the Permian Basin to the Gulf Coast by rail and did not otherwise take the actions required to get rail cars and service to the Barnhart Facility even though there was no curtailment of rail transportation services, Sequitur declared that a force majeure event occurred so it would not have to pay Maalt the Minimum Fee. It has since refused to pay Maalt the Minimum Fee it is obligated to pay under the TSA.

XI.

On December 7, 2018, knowing that it owed Maalt the Minimum Fee starting on December 10, 2018, Sequitur sent Maalt a letter claiming that it was experiencing a force majeure event because of the "unavailability, interruption, delay, or curtailment of rail transportation services for the Product. . . ." At the time, there was no "interruption, delay, or curtailment of rail transportation services." Rather, Sequitur appears to contend that because it was unable to procure an oil company to purchase its oil and that would be an acceptable joint venture partner that could provide the necessary logistics services, or alternatively, rail transportation at a low enough cost, rail transportation services were "unavailable." Sequitur has persisted in that contention even though it made no effort to develop the logistical services "in-house", made no effort to investigate or retain a third

party logistics provider, and made no effort to negotiate directly with the railroads or any supplier of rail cars to obtain the cars and services necessary to move its crude by rail. On the other hand, there was at least one company that was apparently willing and able to contract with Sequitur to move Sequitur's crude oil by rail from the Barnhart Facility, but the cost to Sequitur would eliminate the arbitrage opportunity it sought.

XII.

Moreover, In October 2018, Equinor, a buyer of crude, was in discussions with the Kansas City Southern Railway Company ("KCS") for the purpose of obtaining rail service to move crude oil out of the Barnhart Facility. At the time, Jupiter Marketing and Trading ("Jupiter") was working with Sequitur as joint venture partners for the purpose of pursuing the arbitrage opportunity through the Barnhart Facility. Equinor had a commercial relationship with Jupiter providing for the purchase of crude oil and the transportation of that oil by rail from the Permian Basin, including the Barnhart Facility. The records obtained by Sequitur from KCS in this case indicate that the KCS was willing and able to provide that rail transportation service, and in fact provided Equinor with rates for that service in October 2018. Jupiter, acting as Sequitur's joint venture partner, also retained a rail logistics consultant to negotiate rail rates with the KCS in November 2018, and was able to do so. However, the rates quoted by the KCS were not low enough to provide an arbitrage advantage. Thus, rail transportation for Sequitur's crude was available, just not at a price that provided Sequitur an economic advantage. In other words, Sequitur could move its oil by rail, but it was not a good deal for it.

XIII.

On February 8, 2019, Sequitur sent Maalt a letter stating it was terminating the TSA pursuant to the force majeure provisions of the TSA. However, in reality there was

never a force majeure event as rail service to the Barnhart Facility was never unavailable, interrupted, delayed or curtailed. Rather, Sequitur was asserting its force majeure claim as a pretext to terminate the TSA simply because it was unable to find an oil buyer who was able to move crude oil by rail while providing the arbitrage benefit to Sequitur, and because it did not want to invest resources into undertaking the logistics efforts itself. In the months before its February 8, 2019 letter, it is believed that Sequitur realized that the spread in crude oil prices, and thus the potential arbitrage it sought, was shrinking while the cost of rail serve was higher than it expected or increasing during that time frame. Based on the information available to Maalt, it is believed that Sequitur made the decision to terminate the TSA in order to avoid an unfavorable economic situation.

XIV.

Sequitur's conduct indicates that at the time of Sequitur's February 8, 2019 letter it was absolutely and unconditionally refusing, and continues to refuse, to perform its obligations under the TSA, including the obligation to pay the minimum payments or fees. It has therefore repudiated the TSA, and by doing so materially breached the TSA. Moreover, by sending its February 8, 2019 letter attempting to terminate the TSA, Sequitur has improperly attempted to terminate the TSA in order to avoid its contractual obligations.

BREACH OF CONTRACT

XV.

Paragraphs IV through XIV are incorporated herein by reference. Sequitur's repudiation of the TSA constitutes a material breach of the TSA. Under the terms of the TSA, Sequitur was able to perform in one of two ways – it could purchase or take the

transloading services at a rate of \$1.50 per barrel with minimum quantity requirements or it could simply perform its obligations by paying the Minimum Fee. Sequitur did neither. Maalt fully performed its obligations under the TSA, which performance was accepted by Sequitur until it repudiated the TSA. As a result, Maalt has sustained actual damages within the Court's jurisdictional limits for which Maalt now sues. In that respect, Maalt seeks an amount equal to the total of the Minimum Fee amounts required by the TSA, as its expectancy/benefit of the bargain, as that amount represents the price Sequitur agreed to pay for the exclusive dedication of the Barnhart Facility to Sequitur's use for the time specified in the TSA and the ROFR, among other things. The minimum payments/fee for the term of the TSA beginning with Sequitur's "in service" date of December 10, 2018 is \$6,614,496.00. Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to recover \$7,068,443.00 which includes interest through August 31, 2020 and additional interest as it accrues after that date.

Alternatively, Maalt is entitled to recover its lost profits as its expectancy/benefit of the bargain damages. Maalt is also entitled to recover interest on its contract damages at the rate of the lessor of 2% over the prime rate as published under "Money Rates" in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA).

Maalt seeks a maximum amount of actual damages of \$6,614,496.00, plus interest as set forth above, attorneys' fees, accountant fees, costs, and expenses which amounts are continuing to accrue.

In addition and further in the alternative, Maalt is entitled to specific performance of the TSA by Sequitur. As mentioned, Sequitur had alternative performance obligations under the TSA – either pay for the transloading services and any shortfall amounts, or pay the Minimum Fee for Maalt’s reservation of and exclusive dedication of the Barnhart Facility to Sequitur’s exclusive use during the term of the TSA, the ROFR, and other benefits. Pursuant to Section 8.6 of the TSA, Maalt is entitled to specific performance of Sequitur’s obligation to pay the Minimum Fee pursuant to Article 3 of the TSA, which in this case is 11,424 barrels per day times \$1.50 for each quarter of the TSA term since Sequitur did not make any payments to Maalt prior to repudiation. The total of the Minimum Fee for the term is \$6,614,496.00. Maalt is also entitled to recover interest on the total Minimum Fee at the rate of the lessor of 2% over the prime rate as published under “Money Rates” in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA). Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to judgment specifically enforcing the TSA and ordering Sequitur to pay Maalt \$7,068,443.00, which includes interest through August 31, 2020 and additional interest as it accrues after that date.

Maalt is also entitled to recover its attorneys’ fees, accountants’ fees, costs and expenses pursuant to Section 15.19 of the TSA.

DECLARATORY JUDGMENT

XVI.

Paragraphs V through XIII are incorporated herein by reference. Maalt seeks a declaration pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37, of the following:

- a. The Termination Operations Commencement Date under the TSA occurred and the date of its occurrence;
- b. The “force majeure event” alleged by Sequitur did not occur;
- c. The date the payment obligations created by Article 3 of the TSA began;
- d. Sequitur did not have a right to terminate the TSA;
- e. Sequitur repudiated and breached the TSA by refusing to perform its obligations under the TSA; and
- f. Sequitur is obligated to pay Maalt the minimum bill, or Shortfall Payments, equal to 11,424 barrels per day multiplied by \$1.50 per barrel for each day of the term of the TSA

CONDITIONS PRECEDENT

XVII.

All conditions precedent to Maalt’s right of recovery have occurred or been waived.

ATTORNEYS’ FEES

XVIII.

Pursuant to Texas Civil Practice and Remedies Code Chapters 37 and 38 and the terms of the TSA, Maalt is entitled to recover its reasonable and necessary attorneys’ fees, accountant fees, and associated litigation and expert costs from Sequitur. Presentment of Maalt’s claim was made within the time required by Texas Civil Practice and Remedies Code Chapter 38.

WHEREFORE, PREMISES CONSIDERED, Maalt, LP, Plaintiff, prays that Defendant be cited to appear and answer herein, and that Plaintiff recover the following:

1. All damages to which it may be entitled;
2. Specific performance of Sequitur's payment obligations under the TSA as plead herein;
3. Its reasonable and necessary attorney's fees, litigation costs, and expert costs;
4. Pre and post judgment interest allowed by law and at the rates provided by the TSA;
5. All costs of Court; and
6. Such other and further such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through
the Court's electronic filing service on the date of filing, upon:

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/s/ James Lanter

Ashley Masters

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

SEQUITUR PERMIAN, LLC'S
THIRD AMENDED COUNTERCLAIMS
AND SECOND AMENDED THIRD-PARTY CLAIMS

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this its Third Amended Counterclaims and Second Amended Third-Party Claims and in support thereof would show unto the Court, as follows:

PARTIES

1. Sequitur has appeared herein and can be served through its counsel of record.
2. Maalt, LP ("Maalt") has appeared herein and can be served through its counsel of record.
3. Vista Proppants and Logistics Inc. ("Vista") has appeared herein and can be served through its counsel of record.

FACTS IN SUPPORT OF COUNTERCLAIMS/THIRD-PARTY CLAIMS

4. Sequitur is in the crude oil production business, with a primary focus of approximately 88,000 net acres including Irion County, Texas as part of the Wolfcamp Shale. In about May of 2018, in furtherance of its effort to most efficiently and cost-effectively transport the crude oil produced by Sequitur to refineries in southeast Texas and Louisiana, Sequitur was

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looking to obtain access to a transloading facility or rail terminal in or around Irion County, Texas. The purpose of obtaining a transloading facility would be to transfer crude oil that is delivered to the facility by trucks or via pipeline into train railcars, which is an efficient, cost-effective, and safe way to transport crude oil to refineries near the Gulf Coast.

5. On May 4, 2018, Sequitur had initial discussions with an employee of Vista, of which the Maalt is an affiliate, regarding a rail depot that Maalt owned in Barnhart, Texas that could be converted into the crude-by-rail transloading facility (the “Terminal”) to which Sequitur sought access. Vista had experience elsewhere in the Permian Basin for transporting frac sand (a proppant) via railcar at similar facilities. Vista told Sequitur that they were receiving inquiries from other companies, but that they were more interested in doing business with Sequitur because they could offer future additional revenue streams.

6. During the May 2018 discussions, Sequitur made it clear that it wanted only a 15-month term on the Terminal services contract, as opposed to the two-year term that Vista indicated was more typical. In addition to a shorter-term contract, Sequitur made clear that it was fundamental to the viability of its use of the proposed Terminal that both industry-approved railcars and locomotives (train engines) be available at the right time and at the right price, in light of the fluctuating price of crude oil. At the time, crude oil barrels were selling in the Midland Basin at a steep discount to those sold on the Gulf Coast. Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Gulf Coast, less transport costs, than they could sell barrels of oil for in Midland, additional earnings would be achieved.

7. In light of Sequitur’s specific requirements for the proposal, on May 9, 2018, Jon Ince, then-Senior Manager of Logistics with Vista, introduced Sequitur to Jonas Struthers of FeNIX FSL, a rail car lease broker with whom Sequitur initially discussed renting rail cars through.

Ince described Jonas Struthers as “the railcar guy” who had “been a great partner for me in the past with our sand cars.” Ince stated that Struthers would “be able to get you cars that you need for your fleet” and “at a really good rate.” Ince also noted that Struthers would “be more in the know on regulations and exact timing on when [CP-1232 railcars] are being phased out for the [DOT-117R railcars].”

8. On May 10 and 11, 2018, in an internal email among Vista employees, Ince outlined the terms sought by Sequitur, including to transload crude oil from [November 1,] 2018 to December 31, 2019, for about 20-30 railcars loaded per day with a minimum of approximately 15 railcars. Ince also noted that Sequitur was also “[l]ooking to place tankage on our property for [a] pipeline connection with [a] long-term lease.” Chris Favors (“Favors”), Business Development officer with Vista, also indicated that JupiterMLP, LLC (the parent of affiliate, Jupiter Marketing & Trading, LLC) (collectively “Jupiter”) was also “interested in” the Terminal but that Vista had decided it was “moving forward” with the proposed Terminal services contract with Sequitur.

9. On May 16, 2018, in another internal email among Vista employees, Ince compared the proposals of both Sequitur and Jupiter for use of the Barnhart Terminal. Ince noted in the email that Sequitur had “no rail experience” and also that Sequitur was willing “to entertain” Vista as the manager of its fleet of railcars. Significantly, Ince opened the email noting that Union Pacific Railroad is “requiring DOT 117 crude cars on all new freight quotes” and that such cars “are not available until Q3-Q4 of this year.”

10. On June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal. The initial term of the LOI was through June 26, 2018 and was extended by written amendments to July 23, 2018. The LOI reflected the parties’ intent to enter into a Terminal Services Agreement for a term of September 2018 to December 2019.

11. On June 1, 2018, Sequitur emailed Favors regarding progress being made on a draft of the proposed Terminal Services Agreement between Sequitur and Vista (ultimately Maalt), as well as Sequitur's purchase of eight new transloaders for installation at the Terminal, at a cost of over \$2,200,000, and its efforts to address regulatory and surface use issues.

12. On June 5, 2018, Struthers emailed Ince, Morris, and others at Vista explaining that the "market for 117s right now is upwards of \$1100 on a 3 year lease." Struthers indicated that the older 1232 model railcars might be able to be retrofitted to meet the DOT-117 standards and at a lower price, but there were still "unanswered questions" from the American Association of Railroads and the Federal Railroad Administration regarding the proposed attempted at retrofitting.

13. Realizing that the train business was one that Sequitur was inexperienced with and could not learn overnight, Sequitur decided to seek a business venture with a large oil trader with access to leased rail cars. Sequitur reached out to several companies, including, but not limited to Shell and BP.

14. On June 5, 2018, Favors emailed Braden Merrill, VP & CFO of Sequitur, and Travis Morris, the Chief Commercial Officer of Jupiter, regarding Vista working with both Sequitur and Jupiter regarding "Vista's Barnhart terminal." Favors introduced Jupiter to Sequitur, and Favors's colleague, Ince described Jupiter as the "real deal and a partner who could get it done." Favors went on to inquire as to whether a conference call should be scheduled among Vista, Sequitur, and Jupiter that day or the following day. A conference call took place that day, and Sequitur was informed that Jupiter had trucking capabilities and also had relationships with railroad companies, which, as noted above, were requirements for the proposed Terminal to be viable. Braden Merrill of Sequitur thanked Favors and Ince for the introduction to Jupiter.

15. On June 6, 2018, Favors emailed Travis Morris regarding changes to a draft terminal services agreement between Vista and Jupiter. Favors stated that “[w]e can easily amend the contract to include Barnhart volume if the Sequit[u]r opportunity doesn’t pan out.”

16. Sequitur initially selected Shell as a business venture partner and proceeded in ordering the equipment that was needed to build out the Terminal, including the transloaders contemplated under the original LOI. Sequitur had committed approximately \$4 million to the Terminal project. However, neither Shell nor BP were able to secure rates from BNSF or UP.

17. On June 20, 2018, Travis Morris with Jupiter emailed Ince and Favors of Vista attaching an executed agreement between Vista and Jupiter. Morris also stated that “I am getting on the phone with Sequitur today so we can try to close the Barnhart deal.” Morris also noted that “I do not have firm railcars yet, but we are working several sets with Jonas Struthers.”

18. From late June, and during July, and the first week of August 2018, Vista and Sequitur continued negotiations and exchanged drafts of the Terminal Services Agreement for the exclusive use of the Terminal in Barnhart. Then, on August 3, 2018, Favors emailed Braden Merrill of Sequitur and Sequitur’s President, Mike van den Bold, pressuring Sequitur to execute the Terminal Services Agreement. Favors stated that “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today.” At this time, Favors told Merrill that Jupiter was offering to pay \$8 million up front to Vista and Maalt for exclusive use of the Terminal, cutting out Sequitur. Favor’s statements to Merrill were knowingly false when made, were made with conscience indifference to the truth of the statements, or were negligently made, and were intended to induce, and in fact did induce, Sequitur to sign the Terminal Services Agreement, and Sequitur reasonably relied on such false, reckless, or negligent statements. Merrill told Favors that Sequitur

had already purchased the necessary equipment for the Terminal project and was in the hole for millions of dollars due to Sequitur's reliance on the LOI. Favors again mentioned that Sequitur should do a business venture with Jupiter because Jupiter was already able to ship on the railroads.

19. On August 6, 2018, Merrill of Sequitur had a conference call with Vista and Jupiter representatives regarding the availability of railcars and locomotives. Sequitur was told that Jupiter had access to 1600 railcars and could manage 10 to 12 locomotives a month. Also, as a result of that call, later that same day, Sequitur's President forwarded via email to Favors of Vista and Maalt, the Terminal Services Agreement (also hereinafter called the "Agreement"), dated effective August 6, 2018, which was executed the following day.

20. On August 9, 2018, Morris emailed Sequitur regarding a prior meeting in which Jupiter offered to purchase the crude oil transloaded at the Terminal from Sequitur instead of Sequitur's initial plan to sell the oil to Shell. Morris noted that in "order to meet a September [2018] start date I need to begin directing trains toward Barnhart quickly."

21. In reliance on the promises, commitments, false statements, and inducements made by Vista and Maalt, and their agents and representatives, regarding the availability of rail cars and trains to pick up the crude oil at the Terminal and deliver it via rail to the desired destinations, Sequitur entered into the Agreement with Maalt, with an effective date of August 6, 2018. Consistent with the entire premise and purpose of the Agreement—that Sequitur would be able to cost-effectively deliver oil to the Terminal to be transloaded onto railcars that would be delivered to Gulf Coast refineries—throughout the Agreement references are made to "railcars" as well as a reference to the "train loading area." Thus, it was expressly made clear to both parties that without viable or sufficient access to trains and railcars, the essential purpose of the Agreement was for naught.

22. Per the Agreement, Maalt (also described as “Terminal Owner”) was the owner and operator of the Terminal¹ located in Barnhart, Texas on land leased or controlled by Maalt, and Sequitur (described as “Customer”) was engaged in the business of transportation and marketing of crude oil and other liquid hydrocarbon products owned or controlled by Sequitur (hereinafter “oil”). Among other contractual duties, the Agreement provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers. Sequitur would have the exclusive rights to use the Terminal for transloading oil.

23. The Agreement contemplated two methods of delivery of oil to the Terminal, by either truck or pipeline. Regardless of the method of delivery, upon receipt, Maalt would then transload the oil into railcars to Sequitur or Sequitur’s third-party customers. In order to facilitate the transloading into railcars of oil that was delivered by truck, Sequitur, at its sole cost and significant expense, installed equipment and facilities at the Terminal, which was described in the Agreement as the “Phase I Project.” Sequitur made this investment and incurred these costs in reliance on Vista’s and Maalt’s promises that there would be have sufficient trains, rail cars and other means to transport the crude oil via rail as referenced in the Agreement. Additionally, if Sequitur elected to do so, it could also install at its sole cost and expense, equipment and facilities at the Terminal for transloading oil into railcars from pipelines (versus trucks), which was described in the Agreement as the “Phase II Project.”

24. Significantly, as to the equipment and facilities installed by Sequitur (collectively “Customer Terminal Modifications”) in connection with the either the Phase I Project or the Phase

¹ The Terminal’s address is located at 44485 W. Hwy 67, Barnhart, Irion County, Texas 76930 and is more specifically described in the Agreement .

II Project, Maalt agreed in the Agreement that “title to the equipment and facilities installed by or at the direction of [Sequitur] in connection with a Customer Terminal Modification shall remain with and be vested in [Sequitur].” *See* Agreement, § 2.7. The only exception to Sequitur’s title and ownership to the Customer Terminal Modifications that it may have installed or directed, at its own cost and expense, was “any additional rail tracks that may [have been] installed,” which additional tracks’ ownership, if so installed, would be transferred to Maalt after the expiration of the Agreement’s term, subject to certain rights of Sequitur. *See* Agreement, § 2.7.

25. In very general terms and subject to numerous terms and conditions, in exchange for Maalt’s operation of the Terminal and its transloading of oil exclusively for Sequitur, further conditioned upon the occurrence of the Terminal Operations Commencement Date, Maalt would be paid at least a minimum payment (the “Shortfall Payment”) depending on the amount of oil actually transloaded through the Terminal. *See* Agreement, § 3.2.

26. Any obligation for Sequitur to pay the Shortfall Payment, however, was expressly made subject to “the terms of this Agreement, including . . . Force Majeure.” *See* Agreement, § 3.1. The Agreement could not have been clearer when it provided, as follows: “There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner [Maalt] breach.” *See* Agreement, § 3.2(a).

27. Additionally, no payment would be due under the Agreement, including any Shortfall Payment, until “after the Terminal Operations Commencement Date.” *See* Agreement, § 3.1. The Terminal Operations Commencement Date was defined as “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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].” *See* Agreement, § 1.

28. Importantly, in the event of a Force Majeure, any obligation of Sequitur to make payments to Maalt only existed for oil “actually Throughput at the Terminal.” *See* Agreement, § 14.1. The term “Throughput” was defined as “the delivery of Product [oil] from trucks or pipeline into the Terminal on behalf of Customer [Sequitur] or Customer’s [Sequitur’s] third-party customers.” *See* Agreement, § 1. Subject to the terms of the Agreement, Sequitur was only obligated to pay Maalt a throughput fee of \$1.50 per Barrel for Product Throughput through the Terminal. *See* Agreement, §4.1. “Product Throughput” was the metered quantity of oil actually delivered into the Terminal and transloaded by Maalt into railcars. *See* Agreement, Art. 5. No oil was ever actually Throughput at the Terminal.

29. The Agreement defined both “Force Majeure Event” and “Force Majeure” to mean “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party,” which included a lengthy list of various events and occurrences. Included in the list of events and occurrences was “the unavailability, interruption, delay or curtailment of Product transportation services” and a catch-all for “any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed.” *See* Agreement, § 14.2. If either party determined it was necessary to declare a Force Majeure Event, notice was required first by phone or email and then by mail or overnight carrier. *See* Agreement, § 14.3.

30. At no point in time, including between August 6, 2018 and December 7, 2018, did Sequitur ever send written notice to Maalt that the Terminal Operations Commencement Date had

occurred. At no point in time, including between August 6, 2018 and December 7, 2018, was oil “actually Throughput at the” Terminal.

31. In addition, Section 11.2 of the Agreement required Maalt to procure and maintain, at its own expense, a pollution legal liability (“PPL”) insurance policy reasonably acceptable to Sequitur and naming Sequitur and its Group as an additional insured. The Agreement required that this policy be procured and in place prior to commencement of operations at the Terminal. This policy was never procured by Maalt and/or provided to Sequitur as required by the Agreement.

32. Despite Vista and Maalt’s promises and/or representations to Sequitur that Sequitur would be able to secure sufficient numbers of trains and rail cars and rail rates, and Vista’s and Maalt’s introduction to Sequitur of Vista’s and Maalt’s agents, who were self-professed “railcar guys,” it became obvious that said promises and/or representations were false. Specifically, sufficient trains, rail cars, and other means of transporting crude oil via rail were not readily available to Sequitur. In addition, the Class I carriers were putting restrictions, regulations and/or impediments in place to prevent sufficient access to their respective tracks. These circumstances led to an unavailability, interruption, delay, or curtailment of oil transportation services that were beyond the control of Sequitur. These circumstances were not foreseeable to Sequitur and amounted to a Force Majeure event as described in the Terminal Services Agreement.

33. On December 7, 2018, in accordance with the terms of the Agreement, Sequitur sent written notice to Maalt by email and FedEx that Sequitur had declared an existing “Force Majeure” under the Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.” More specifically, a Force Majeure event occurred because crude oil transportation service (e.g., rail service and capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of

the Agreement was not available despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur. The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

34. On January 28, 2019, Sequitur received an invoice from Maalt dated January 25, 2019 for \$531,216.00, which was presumably for an alleged Shortfall Payment.

35. On January 31, 2019, Sequitur sent written notice to Maalt responding to the January 25, 2019 invoice disputing that such amount was owed because both the Force Majeure event had occurred and remained continuing, and also because, as noted above, the Terminal Operations Commencement Date had not been reached per the terms of the Agreement. Sequitur also indicated that it would inform Maalt of “any changes or developments in the status of the Existing Force Majeure.”

36. On February 8, 2019, Sequitur sent written notice to Maalt by email and FedEx that the declared Force Majeure had continued for sixty days, despite Sequitur’s continued efforts to procure such services. Accordingly, Sequitur notified Maalt of Sequitur’s right to terminate the Agreement. Specifically, Sequitur relied on the “Termination for Extended Force Majeure” provision in the Agreement, which provides, in pertinent part, that “[b]y written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days.” *See* Agreement, § 8.4. The February 8, 2019 notice also noted that Sequitur would be contacting Maalt to discuss and coordinate the removal of Sequitur’s equipment and facilities installed at the Terminal (Customer Terminal Modifications).

See Agreement, §§ 2.5 and 2.7 (describing, upon termination of the Agreement, Sequitur’s “right

of access over, on, and across” the lands upon which the Terminal was located for “purposes of enforcing” Sequitur’s “rights under this Agreement” to remove the Customer Terminal Modifications, and also acknowledging Sequitur’s undisputed “title to and ownership of” such Customer Terminal Modifications).

37. Notably, as to Sequitur’s notice of Termination for Extended Force Majeure, the Agreement further provided that “[f]ollowing the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment),” which included any obligation to pay any Shortfall Payment, Throughput Fee, or any other fee or payment. *See* Agreement, §§ 8.4, 3.1, and 3.2.

38. On or about February 14, 2019, an attorney for Maalt sent a letter dated February 14, 2019 to Sequitur, which disputed that the Force Majeure event had occurred but without any reference to evidence to the contrary and only a conclusory unfounded assertion of pretext. The letter also included a copy of the Original Petition filed in this case by Maalt on February 13, 2019, at 5:00 p.m. In addition, the letter also stated that “Maalt will not allow your company access to the Barnhart property [Terminal] to remove equipment or otherwise” and that “[a]ny attempt to access the property will be considered a trespass.” Notably absent from the letter was any reference to any terms in the Agreement or legal authority that permitted Maalt to refuse Sequitur access to the property to retrieve Sequitur’s equipment and facilities or that suggested Sequitur’s undisputed “right of access over, on, and across” the property or Terminal for “purposes of enforcing” Sequitur’s “rights under this Agreement,” including removing and retrieving Sequitur’s equipment and facilities, had been terminated. *See* Agreement, § 2.5. On or about February 22, 2019, Sequitur learned that its equipment had wrongfully been removed, stolen, and

misappropriated from the Terminal by Maalt, without notice or warning. Sequitur learned that its equipment and facilities were removed to a location approximately 25 miles away from the Terminal and on real property that Sequitur does not have an express right of access, like it does with respect to the Terminal per the terms of the Agreement. On or about February 22, 2019, Sequitur demanded that its equipment, valued at approximately \$2,576,505.21 in the aggregate, if not more, be returned to Sequitur. Through the course of the litigation and after claims were brought by Sequitur, Maalt ultimately acquiesced and released the equipment to Sequitur. However, the following claims remain for which Sequitur now brings forth:

THIRD AMENDED COUNTERCLAIMS/SECOND AMENDED THIRD-PARTY CLAIMS

39. Per Rule 37, Sequitur seeks nonmonetary relief, including declaratory, ancillary, and injunctive (including prohibitive and mandatory) relief, and additionally, or in the alternative, to such relief, monetary relief of over \$1,000,000.00.

40. Sequitur incorporates herein the facts set forth above.

I. Promissory Estoppel.

41. Vista and Maalt made promises to Sequitur, expressly, either orally or in writing, and/or or impliedly through Vista's and Maalt's conduct, which included the promises that trains and railcars would be available, including at a reasonable price, at the right time, and for the right term. Sequitur reasonably relied on Vista's and Maalt's promises to Sequitur's detriment. Sequitur's reliance was foreseeable by Vista and Maalt. Injustice can be avoided only by enforcing Vista's and Maalt's promises. In addition, or in the alternative, Sequitur has incurred reliance

damages due to Vista's and Maalt's promises, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

II. Negligent misrepresentations.

42. Vista's and Maalt's representations to Sequitur were in connection with the above-referenced transaction in which Vista and Maalt had a pecuniary interest. Vista and Maalt supplied false information to guide Sequitur into the transaction. Neither Vista nor Maalt used reasonable care in obtaining or communicating the representations and information. Sequitur justifiably relied on the representations and information. Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

III. Common law fraudulent inducement.

43. Vista and Maalt made material representations to Sequitur in the above-referenced transaction that were false. When Vista and Maalt made the representations to Sequitur, Vista and Maalt knew the representations were false or made the representations recklessly, as positive assertions, and without knowledge of the truth, if any. Vista and Maalt made the representations with the intent that Sequitur act on them, including Sequitur entering into the Agreement. Sequitur relied on the representations. As a result, Sequitur has incurred reliance damages due to Vista's and Maalt's false representations, in an amount over \$4,000,000. Sequitur seeks recovery of its damages, interest, court costs, and attorney's fees.

IV. Breach of Contract.

44. Sequitur and Maalt entered into the Agreement. Sequitur properly terminated the Agreement, while retaining certain rights under the Agreement. Despite the foregoing, Maalt breached the Agreement. Maalt's breach has caused Sequitur injury.

V. Declaratory Judgment.

45. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, known as the Texas Uniform Declaratory Judgments Act (hereafter “UDJA”), the parties have a dispute about their rights and obligations under the Agreement. Sequitur seeks a declaratory judgment from this Court, as follows:

- (1) No Terminal Operations Commencement Date ever occurred;
- (2) On December 7, 2018, Sequitur properly sent notice of a Force Majeure, and such Force Majeure existed;
- (3) On February 8, 2019, Sequitur properly sent notice terminating the Agreement because a Force Majeure existed for at least sixty days;
- (4) Effective February 8, 2019, the Agreement was terminated by Force Majeure;
- (5) Sequitur was not obligated to remedy the cause of the Force Majeure occurrence because Sequitur, as the affected party, did not deem it reasonable and economic to do so, consistent with the terms of the Agreement.
- (6) Sequitur neither owes nor owed a payment of any kind to Maalt under the Agreement;
- (7) That enforcement of any Shortfall Payment for any month or for the duration of the Term of the Agreement violates public policy, is unconscionable, and/or is an unlawful and unenforceable penalty, such as an improper liquidated damages provision, under Texas law; and,
- (8) Sequitur’s performance under the Agreement was made commercially impracticable without its fault by the occurrence of an event(s) the non-occurrence of which was a basic assumption on which the Agreement was made.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Defendant/Counter-Plaintiff/Third-Party Plaintiffs, SEQUITUR PERMIAN, LLC, further requests that Plaintiff Maalt recover nothing by its suit; that SEQUITUR PERMIAN, LLC, recover and obtain from Maalt and Vista the declaratory relief sought above, that SEQUITUR PERMIAN, LLC recover and obtain from Maalt and Vista, jointly and severally, all damages, including actual, special, and exemplary damages, court costs, expenses, and reasonable and necessary (and equitable and just per the UDJA) attorney's fees against Maalt and Vista, as noted above, pursuant to the prevailing party clause in the subject Agreement, Chapters 37 and 38 of the Texas Civil Practice and Remedies Code; and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

By: /s/ Matthew A. Kornhauser

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**CO-COUNSEL FOR
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CERTIFICATE OF SERVICE

I hereby certify that on this, the 15th day of April 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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/s/ Matthew A. Kornhauser
Matthew A. Kornhauser

Ashley Masters

No. 19-003**MAALT, LP****Plaintiff,****vs.****SEQUITUR PERMIAN, LLC****Defendant.**§
§
§
§
§
§
§
§**IN THE DISTRICT COURT****IRION COUNTY, TEXAS****51ST JUDICIAL DISTRICT****SECOND AMENDED ANSWER TO COUNTERCLAIMS**

Plaintiff, Maalt, LP ("Maalt"), files this Second Amended Answer to Counterclaims, and shows the Court:

I.**GENERAL DENIAL**

Maalt enters a general denial of the allegations and claims asserted against it in Defendant's Third Amended Counterclaims.

II.**AFFIRMATIVE DEFENSES**

- 1. Prior Breach.** The Defendant breached the Terminal Services Agreement ("TSA") at issue first, thus excusing any further performance or subsequent breach by Maalt.
- 2. Contract Precludes Claim of Promissory Estoppel.** Defendant's claims fail because Defendant complains about a matter that involved a transaction governed by the terms of an express contract.
- 3. Statute of Frauds.** Defendant's claims are barred by the statute of frauds.

4. **Failure to Mitigate.** Defendant's claims fail in whole or in part because it failed to reasonably mitigate its damages.
5. **Defendant's Responsibility for its Alleged Damages.** The acts and omissions of the Defendant caused or contributed to the damages it alleges. Maalt is entitled to a determination of the proportionate responsibility of the parties pursuant to Texas Civil Practice & Remedies Code Chapter 33.
6. **Contributory Negligence.** Defendant was negligent and its own negligence was the proximate cause of the damages it alleges.
7. **Conditions Precedent have not been Satisfied.** Conditions precedent to Defendant's right to assert or recover for breach of contract have not occurred or been satisfied in that Sequitur did not provide Maalt with notice of any claim of breach and opportunity to cure as required by Section 8.3 of the TSA.

III.

RULE 193.7 NOTICE

Maalt gives notice pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that any documents produced by Defendant in response to written discovery may be used by Maalt as evidence in pre-trial matters and the trial of this case.

PRAYER

For the reasons stated above, Maalt prays that it be awarded judgment against Defendant that it take nothing by its counterclaims, and that Maalt have such further relief to which it is entitled.

Respectfully submitted,

By: /s/ James Lanter

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MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the date of filing, upon:

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/s/ James Lanter

Ashley Masters

No. 19-003

MAALT, LP	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	IRION COUNTY, TEXAS
	§	
SEQUITUR PERMIAN, LLC	§	
	§	
Defendant.	§	51ST JUDICIAL DISTRICT

THIRD AMENDED ANSWER TO COUNTERCLAIMS

Plaintiff, Maalt, LP (“Maalt”), files this Third Amended Answer to Counterclaims, and shows the Court:

I.

GENERAL DENIAL

Maalt enters a general denial of the allegations and claims asserted against it in Defendant’s Third Amended Counterclaims.

II.

AFFIRMATIVE DEFENSES

- 1. Prior Breach.** The Defendant breached the Terminal Services Agreement (“TSA”) at issue first, thus excusing any further performance or subsequent breach by Maalt.
- 2. Contract Precludes Claim of Promissory Estoppel.** Defendant’s claims fail because Defendant complains about a matter that involved a transaction governed by the terms of an express contract.
- 3. Statute of Frauds.** Defendant’s claims are barred by the statute of frauds.

4. **Failure to Mitigate.** Defendant's claims fail in whole or in part because it failed to reasonably mitigate its damages.
5. **Defendant's Responsibility for its Alleged Damages.** The acts and omissions of the Defendant caused or contributed to the damages it alleges. Maalt is entitled to a determination of the proportionate responsibility of the parties pursuant to Texas Civil Practice & Remedies Code Chapter 33.
6. **Contributory Negligence.** Defendant was negligent and its own negligence was the proximate cause of the damages it alleges.
7. **Conditions Precedent have not been Satisfied.** Conditions precedent to Defendant's right to assert or recover for breach of contract have not occurred or been satisfied in that Sequitur did not provide Maalt with notice of any claim of breach and opportunity to cure as required by Section 8.3 of the TSA.
8. **Lack of Justifiable Reliance and Disclaimer.** With respect to Defendant's negligent misrepresentation and fraudulent inducement claims, and without admitting any of the allegations made by Defendant, Defendant's reliance on any alleged misrepresentation was not justified or reasonable, and Defendant disclaimed any reliance on such alleged misrepresentations.

III.

RULE 193.7 NOTICE

Maalt gives notice pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that any documents produced by Defendant in response to written discovery may be used by Maalt as evidence in pre-trial matters and the trial of this case.

PRAYER

For the reasons stated above, Maalt prays that it be awarded judgment against Defendant that it take nothing by its counterclaims, and that Maalt have such further relief to which it is entitled.

Respectfully submitted,

By: /s/ James Lanter

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**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the date of filing, upon:

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/s/ James Lanter

CAUSE NO. CV19-003

MAALT, LP,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
v.	§	
	§	IRION COUNTY, TEXAS
SEQUITUR PERMIAN, LLC,	§	
Defendants.	§	
	§	51ST JUDICIAL DISTRICT

**DEFENDANT'S ORIGINAL ANSWER, VERIFIED DENIAL AND AFFIRMATIVE
DEFENSES TO
PLAINTIFF'S SECOND AMENDED PETITION**

COMES NOW, Defendant/Counter-Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this its Original Answer, Verified Denial and Affirmative Defenses to Plaintiff's Second Amended Petition and in support thereof would show unto the Court, as follows:

GENERAL DENIAL

1. Subject to any stipulations, admissions, special exceptions, special and affirmative defenses which may be alleged, Defendant asserts a general denial, in accordance with Rule 92 of the Texas Rules of Civil Procedure, and demands strict proof of the Plaintiff's suit, by a preponderance of the evidence, as required by the Constitution and the laws of the State of Texas.

VERIFIED DENIAL

2. In addition to, or in the alternative, by way of further answer, if such be necessary, and without waiving any of the foregoing, Defendant denies plaintiff's allegation that all conditions precedent have been performed or have occurred. Specifically, Defendants states that the following conditions precedent have not been performed or have not occurred (as applicable):

- a. Occurrence of the Terminal Operations Commencement Date (as defined in the Terminal Services Agreement (“TSA”), Article 1).
- b. Notice of the Terminal Operations Commencement Date as required by the TSA, Article 1.
- c. Procurement and maintenance of pollution legal liability (PLL) insurance policy as required by and in compliance with Section 11.2 of the TSA.
- d. Availability of Product transportation services, which includes but is not limited to, the availability of rail cars and/or rates to transport Product from the Barnhart Terminal to a specific destination(s) of Sequitur/Sequitur’s customer(s).

AFFIRMATIVE DEFENSES

3. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of consideration.

4. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of waiver, including express contractual waiver and/or implied waiver.

5. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of statute of frauds.

6. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of contractual force majeure.

7. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of excuse and/or justification.

8. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to mitigate damages.

9. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to perform conditions precedent.

10. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of impossibility.

11. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of prior material breach of contract and/or repudiation.

12. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of commercial impracticability.

13. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of implied condition(s) of the contract, including but not limited to the availability of Product transportation services or the availability of rail cars and/or rates to

transport Product from the Barnhart Terminal to a specific destination(s) of Sequitur/Sequitur's customer(s).

14. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense that the contractual damages provision for which Plaintiff seeks to enforce is a liquidated damages provision that is an unenforceable penalty.

15. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of mutual mistake.

16. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, that consistent with the terms and/or conditions of the TSA, Sequitur had no obligation to remedy the Force Majeure occurrence because Sequitur, as the affected party, did not deem it reasonable and economic to do so.

ADOPTION BY REFERENCE

17. Pursuant to Rule 58, Defendant adopts by reference as if asserted herein its Third Amended Counterclaims and Second Amended Third-Party Claims in defense of all claims by Plaintiff.

NOTICE OF INTENT TO USE DISCOVERY

18. Pursuant to Rule 193.7, please be advised that Sequitur intends to utilize at trial any and all materials produced by Plaintiff or Third-Party Defendant during the discovery process.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, SEQUITUR PERMIAN, LLC, further requests that Plaintiff recover nothing by its suit; that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC, recover and obtain from Plaintiff/Counter-Defendant, Maalt, LP and Third-Party Defendant, Vista Proppants and Logistics, Inc., all relief requested, including declaratory relief, all damages, and its court costs, expenses, and reasonable and necessary (and equitable and just per UDJA) attorney's fees against the Plaintiff, pursuant to the prevailing party clause in the subject Terminal Services Agreement and Chapter 37 of the UDJA; and that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC, has such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

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**CO-COUNSEL FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 30th day of April 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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/s/ Matthew A. Kornhauser
Matthew A. Kornhauser

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

VERIFICATION

STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

"My name is BRADEN MERRILL. I am the CFO of Sequitur Permian, LLC. I am over the age of eighteen (18) years, and I am duly authorized, qualified and competent in all respects to make this Verification.

I have reviewed the Defendant's Original Answer, Verified Denial, and Affirmative Defenses to Plaintiff's Second Amended Petition, and I have personal knowledge of the facts contained in **Paragraph 2** of the foregoing pleading, and said facts are true and correct."

My name is BRADEN GERRITT MERRILL, my date of birth is February 6, 1981 and my business address is 2050 W. Sam Houston Parkway S., Suite 1850, Houston, Texas 77042.

I declare under penalty of perjury that the contents of this verification are true and correct.

Executed in Harris County, State of TX, on the 30th day of

April, 2020.



Removal Appendix 0393

to the Gulf Coast. Sequitur's purpose was to take advantage of the crude oil price spread between the Midland market and the Gulf Coast market. On or about June 1, 2018, Maalt and Sequitur entered into a letter of intent, and ultimately a Terminal Services Agreement (the "TSA") pursuant to which Maalt gave Sequitur the exclusive right to use the Barnhart Facility and a right of first refusal in the event of a sale, and obligated Maalt to exclusively transload Sequitur's crude oil at a price of \$1.50 per barrel. The Contract required Sequitur to throughput a minimum of 11,424 barrels per day through the Barnhart Facility or pay Maalt a minimum fee equal to \$17,136.00 per day. Sequitur never throughput any crude oil through the Barnhart Facility and never paid Maalt the minimum fee required by the Contract.

Maalt sued Sequitur for breach of the Contract. Sequitur breached the contract by failing to throughput the crude oil needed to meet the minimum daily volume obligation under the Contract and by failing to pay the minimum fee to Maalt. Instead, Sequitur claimed that rail cars and rail service were completely unavailable *at any price* at the Barnhart Facility and that constituted a force majeure event under the Contract.

In response to this suit, Sequitur plead in the most general terms that Maalt breached the TSA and that its breach caused Sequitur damages. *See Sequitur's Third Amended Counterclaims and Second Amended Third-Party Claims* filed April 15, 2020 at ¶ 44 ("Sequitur's Counterclaims"). Elsewhere in its pleading, Sequitur claims that (a) Maalt did not provide pollution liability policy as required by the TSA, and (b) that Maalt did not immediately allow Sequitur to retrieve equipment from Maalt's property although it did retrieve its equipment shortly after its request. Sequitur also relies on its breach of contract claim as an affirmative defense. *See Defendant's Original Answer, Verified Denial and Affirmative Defenses to Plaintiff's Second*

Amended Petition filed on April 30, 2020 at ¶ 11 and 17. Those are the only two claims that could possibly form a basis for Sequitur's breach of contract claim. As shown by this motion, neither claim has merit and Sequitur's breach of contract should be dismissed.

Sequitur also seeks a declaratory judgment that the minimum fee required by the TSA is a penalty, is unconscionable, and violates public policy. Since the law is settled that a minimum fee provision such as that included in the TSA and those historically used in oil and gas industry take or pay type contracts is merely a means of performance and not a liquidated damages provision, it does not create a penalty, is not unconscionable, and is not against public policy as a matter of law.

SUMMARY JUDGMENT EVIDENCE

Maalt and VPL support this motion with the following evidence that is attached hereto and incorporated for all purposes:

- Exhibit 1: Excerpts from the Deposition of Braden Merrill ("Merrill Depo"). Merrill is Sequitur's Vice President and Chief Financial Officer.¹
- Exhibit 2: Excerpts from the Deposition of Mike Van Den Bold ("Van Den Bold Depo"). Van Den Bold is Sequitur's, founding partner, President and Chief Operations Officer.²
- Exhibit 3: Declaration of Brian Hecht
- Exhibit 4: Declaration of Matt Morris
- Exhibit 5: Terminal Services Agreement (Deposition Ex. 13)
- Exhibit 6: Letter of Intent dated June 1, 2018 (Deposition Ex. 6)

¹ *Merrill Depo.* pp. 7:22-25.

² *Van Den Bold Depo.* pp. 4:14 – 5:12

ARGUMENT AND AUTHORITIES

I. Maalt did not breach the TSA.

In order to prevail on its breach of contract claim and affirmative defense, Sequitur must prove that Maalt materially breached the TSA and that the breach caused Sequitur injury, among other things. *Snyder v. Eanes Independent School Dist.*, 860 S.W.2d 692, 695 (Tex.App.-Austin 1993, writ denied). The summary judgment evidence conclusively establishes that Maalt did not breach the TSA.

Maalt and Sequitur entered into the Terminal Services Agreement attached as Exhibit 5 (the "Contract") on August 6, 2018. *See Sequitur's Counterclaims* at ¶19.

In its pleadings, Sequitur claims that (a) Maalt did not provide pollution liability policy as required by the TSA, and (b) that Maalt did not immediately allow Sequitur to retrieve equipment from Maalt's property although it did retrieve its equipment shortly after its request. *See Sequitur's Counterclaims* at ¶¶ 31 and 38. No other factual basis for Sequitur's breach of contract claim has been plead or disclosed.

Contrary to Sequitur's contention regarding the pollution liability policy, Maalt procured the necessary insurance, and provided Sequitur with a copy of the certificate of insurance reflecting that coverage. The insurance information was submitted to Sequitur through ISNetworld as required by Sequitur. While the TSA required \$5 million of pollution liability coverage, Maalt actually had \$11 million of pollution liability coverage in place through coverages of \$1 million in primary coverage and \$10 million in excess coverage. The report issued by ISNetworld showed the coverages as "Accepted." Moreover, Sequitur never provided Maalt with notice of any claimed

deficiency in complying with the insurance requirements. Under Section 8.3 the TSA, Sequitur had an obligation to provide Maalt with 30 days' written notice and opportunity to cure for any claimed default. No such notice was ever given to Maalt by Sequitur.

After Sequitur attempted to terminate the Contract due to the purported force majeure and after Maalt filed this lawsuit, Sequitur demanded that it be allowed to recover its equipment and facilities installed at the Barnhart facility for the transloading. The equipment had been moved from Barnhart to Maalt's Big Lake transload facility, where it could be maintained securely. Although Maalt initially object to returning the equipment given Sequitur's debt to Maalt that is the subject of this lawsuit, Maalt allowed Sequitur to pick up the equipment. By its own admission, Sequitur has not suffered any financial loss as a result of the equipment being in Maalt's possession for that short period of time.

A. The pollution insurance coverage claim.

(a) *The required coverage was obtained.* Sequitur claims that Maalt did not procure and maintain pollution liability insurance coverage of at least \$5 million at its own expense as required by section 11.2 of the TSA. That claim is not true as Maalt had in place, for the policy year June 1, 2018 through June 1, 2019 pollution legal liability coverage in the primary amount of \$1,000,000 and excess coverage of at least \$10,000,000. The insurance covered both pollution events that might occur on Maalt owned or operated locations (pollution legal liability coverage) and events that might occur on non-owned property (contractors pollution liability coverage).

As evidenced by the Declaration of Brian Hecht, a certificate of insurance reflecting insurance coverage over and above the required coverage was obtained from Maalt's insurer.³ The certificate was uploaded by Maalt for submission to Sequitur through the ISNetwork system⁴ utilized by Sequitur. The coverage was approved through the ISNetwork system on November 12, 2018, a date before Sequitur put the Barnhart Facility in service.⁵

(b) *Sequitur did not give Maalt notice of a claimed default or breach and an opportunity to cure.* Section 8.3 of the TSA specifically required Sequitur to give Maalt notice of any alleged default or breach of the TSA and an opportunity to cure before Sequitur could pursue any remedy for default. Sequitur did not send Maalt any notice that a required insurance policy was in not place or giving Maalt the opportunity to cure.⁶ Therefore, under Section 8.3, Sequitur cannot assert a claim that Maalt materially defaulted or breached the agreement.

(c) *There is no evidence that Sequitur was injured by any failure of Maalt to procure insurance.* Assuming that Maalt did not have the required insurance in place, there is no evidence that Sequitur suffered any damages as a result.

B. The return of the equipment. To establish a claim for breach based on Maalt's failure to relinquish the equipment for a short time, Sequitur must prove that it suffered financial injury from that action. *McAllen Hospitals, L.P. v. Lopez, id.* Assuming Sequitur's breach of

³ See Declaration of Brian Hecht, Exhibit A.

⁴ ISNetwork is a contractor management service. The service collects information from contractors and suppliers based on ISNetwork's client (in this case Sequitur) requirements, and then reviews and verifies that the contractor or supplier meets the client's requirements. See <https://www.isnetwork.com/en/contractor-management-solution>.

⁵ See also the Declaration of Matt Morris.

⁶ *Merrill Depo.* pp. 20-22 and 222-223.

contract claim grows out of an alleged holding of its transload equipment for a period of one month, it has suffered no damage. Sequitur's president testified that Sequitur did not find any damage to the property after Maalt returned it.⁷ He further testified that Sequitur did not lose any business opportunities because the property was held by Maalt for the one-month period.⁸ Sequitur's vice president testified that he was not aware of anyone interested in purchasing the equipment and Sequitur did not have any other place it could be used it before it was picked it up from Maalt.⁹ Sequitur previously alleged a conversation claim based on the same facts, but nonsuited that claim after Maalt sought summary judgment on it because Sequitur suffered no damages.

II. The "pay" option of the throughput-or-pay clause in the TSA is an alternate performance term and is not a liquidated damages clause, a penalty, unconscionable, or against public policy.

The TSA required Sequitur to deliver a minimum volume of crude to the Barnhart Facility for transloading (the "Throughput") or else pay a required shortfall payment (the "Minimum Fee"). Akin to a take-or-pay provision in a contract where a mineral owner provides an exclusive dedication of reserves for a period of time, Maalt provided an exclusive dedication of its Barnhart Facility to Sequitur's use in return for the throughput-or-pay obligation. The provision provides Sequitur with two alternative options of performance: (i) provide the crude for throughput or (ii) pay the Minimum Fee.

⁷ *Van Den Bold Depo.* at 64:24 – 66:16.

⁸ *Id.*

⁹ *Merrill Depo.* at 240:13 – 241:20.

The TSA provision that established Sequitur's throughput-or-pay obligation is:

ARTICLE 3
MINIMUM THROUGHPUT OBLIGATION

3.1 Minimum Volume Obligation. Subject to the terms of this Agreement, including Section 3.3 and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, Customer agrees to **Throughput** (either directly or via volumes delivered to the Terminal by Customer's third-party customers) an amount of Product through the Terminal on a Monthly basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the "Minimum Volume Commitment") during each Calendar Quarter during the Term after the Termination Operations Commencement Date, **or otherwise pay** the Shortfall Payment applicable to such Calendar Quarter.

Sequitur argues that the Shortall Payment (*i.e.*, the "pay" option of the throughput-or-pay obligation) is unconscionable, an unlawful and unenforceable penalty, or an improper liquidated damages provision. Sequitur's argument fails under Texas law.

Sequitur's argument misconstrues the nature of the throughput-or-pay provision. That is, in return for Maalt providing exclusive use of its transload facility, Sequitur agreed to throughput a minimum amount of crude or, alternatively, pay the transload fee for that minimum amount of crude. This throughput-or-pay term is not a damage provision (liquidated or otherwise) but is instead an alternative for how Sequitur may perform the contract. *See Univeral Res. Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 80 n.4 (5th Cir. 1987) ("The take-or-pay clause is a promise in the Agreement, not a measure of damages after a breach; therefore it is not unenforceable as a penalty under Tex. Bus. & Com. Code Ann. § 2.718(a) (Vernon 1968) or unreasonable liquidated damages provision."); *Prenalta Corp. v. Colorado Interstate Gas Co.*, 944 F.2d 677, 689 (10th Cir. 1991) (discussed below); *World Fuel Services, Inc. v. John E. Retzner Oil Company*, 234 F.Supp. 3d 1234, 1241 (S. D. Fla. 2017) ("Breach of a take or pay agreement entitles the non-breaching party to payments it would have received under the contract with no duty to mitigate damages."); *Benson Mineral Grp., Inc. v. N. Nat. Gas Co.*, 1988 U.S. Dist. LEXIS 17581,

at *22 (D. Kan. 1988) (holding that take-or-pay is not a liquidated damages provision but is a provision of alternate performance that could not be considered a damage penalty under UCC §2.718); *Colo. Interstate Gas Co. v. Chemco, Inc.*, 854 P.2d 1232, 1237 (Colo. 1993) ("Because the alternative is a performance obligation, it is distinguishable from the payment provisions of a liquidated damages remedy."); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1184 (W.D. Okla. 1989) ("Whether or not ONG will be able to recoup take-or-pay payments is not material. An assumption that ONG cannot recoup such payments does not render the take-or-pay provisions or the payment obligation under the contract a penalty or a liquidated damages provision.").

In *Prenalta v. Colorado Interstate*, the Tenth Circuit explained the distinction between a damage provision and a provision providing for alternative performance:

CIG argues that § 4.2 of the contracts provides for alternative performance under the contracts and as such cannot be a remedy for breach of performance. CIG further contends that if § 4.2 is interpreted as a remedy, it is necessarily an unenforceable liquidated damages or penalty provision.

We have previously recognized in *International Minerals and Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 (10th Cir. 1985), *cert. denied*, 475 U.S. 1015, 89 L. Ed. 2d 310, 106 S. Ct. 1196 (1986), that a take-or-pay contract provides for performance in the alternative: "Since this is a 'take or pay' contract, the buyer can perform in either of two ways. It can either (1) take the minimum purchase obligation of natural gas (and pay) or (2) pay the minimum bill." Because one of the alternative performances in a take-or-pay contract is the payment of money, courts have distinguished the "pay" provision from a liquidated damages provision. This distinction is particularly necessary because the payments made pursuant to the take-or-pay provision, the "pay" alternative of Contracts 422 and 516, are not payments for the sale of gas.

Prenalta 944 F.2d at 688-89 (internal citations omitted). *Prenalta* relied upon *Corbin on Contracts* §1082 which "lucidly explained ... the difference between alternative performance and liquidated damages:

It is evident that some alternative contracts giving the power of choice between the alternatives to the promisor can easily be confused with contracts that provide for the payment of liquidated damages in case of breach, provided that one of the alternatives is the payment of a sum of money. . . . If, upon a proper interpretation of the contract, it is found that the parties have agreed that either one of the two alternative performances is to be given by the promisor and received by the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee, the contract is a true alternative contract. This is true even though one of the alternative performances is the payment of a liquidated sum of money; that fact does not make the contract one for the rendering of a single performance with a provision for liquidated damages in case of breach.

Id. at 689.

This case law holding that a take-or-pay clause is a contract for alternative performance applies equally to other alternative performance clauses such as the throughput-or-pay clause at issue here. *See e.g. United State v. Panhandle Eastern Corp.*, 693 F.Supp.88 (D. Del. 1988) (enforcing "ship-or-pay" provision where defendant agreed to ship a minimum amount of LNG or pay costs of shipping that amount despite claims of economic hardship causing a force majeure); *Destec Energy, Inc. v. Southern California Gas Company*, 5 F.Supp. 2d 433 (S. D. Tex. 1997) ("transport-or-pay" clause for the transmission of natural gas); *Lake Charles Harbor & Terminal Dist. v. IFG Port Holdings, LLC*, 2019 U.S. Dist. LEXIS 8227 *5-6 (W.D. La. 2019) (court enforced "pay" option for throughput-or-pay agreement after there was no throughput of materials through the Port.).

This is not a situation in which Sequitur received nothing for the promise to pay. Sequitur received something of great value to it – the exclusive dedication of the Barnhart Facility to

Sequitur for its use in shipping crude by rail so that it could capture the arbitrage opportunity for itself and to the exclusion of all others and the right of first refusal in the event of a sale.¹⁰ Sequitur sought and obtained the exclusive right to control the tracks at the Barnhart Facility during the term of the TSA. Maalt gave up something of significant value in exchange for Sequitur's promise to pay the Minimum Fee – all other opportunities to use the Barnhart Facility during the term of the TSA.

As a matter of law, Article 3.1 of the TSA (the throughput-or-pay term) is not a liquidated damages provision, is not a penalty or unconscionable, and does not violate public policy. It is an enforceable term of alternate performance.

PRAYER

WHEREFORE, Plaintiff, Maalt, L.P., and Third Party Defendant, Vista Proppants and Logistics, Inc., pray that this motion for partial summary judgment be granted and that the Court award all other relief to which they are entitled.

Respectfully submitted,

By: /s/ James Lanter

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¹⁰ *Merrill Depo.* pp. 40-43.

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DEFENDANT, VISTA PROPPANTS AND
LOGISTICS, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on the May 15, 2020, upon:

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/s/ James Lanter

EXHIBIT 1

1 CAUSE NO. 19-003

2
3 MAALT, LP, § IN THE DISTRICT COURT OF
4 Plaintiff, §
5 VS. § IRION COUNTY, TEXAS
6 SEQUITUR PERMIAN, LLC, §
7 Defendant. § 51st JUDICIAL DISTRICT

8 -----
9 ORAL AND VIDEOTAPED DEPOSITION OF
10 BRADEN MERRILL
11 November 19, 2019
12 Volume 1
13 -----

14
15 ORAL AND VIDEOTAPED DEPOSITION OF BRADEN MERRILL,
16 produced as a witness at the instance of the Plaintiff
17 and duly sworn, was taken in the above-styled and
18 numbered cause on the 19th day of November, 2019, from
19 9:32 a.m. to 5:25 p.m., before Patricia Palmer, CSR, in
20 and for the State of Texas, reported by machine
21 shorthand, at the offices of Mr. Matthew A. Kornhauser,
22 Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
23 Houston, Texas 77056, pursuant to the Texas Rules of
24 Civil Procedure and the provisions stated on the record
25 herein.

Page 1

Veritext Legal Solutions
800-336-4000

Maatl MSJ
Exhibit

1

exhibitsicker.com

A P P E A R A N C E S

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ALSO PRESENT:

Mr. Daniel Alpizar, Videographer
Mr. Christopher Favors, Corporate Representative of
Sequitur Permian, LLC

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22
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INDEX

PAGE

Appearances 2

Stipulations 4

BRADEN MERRILL

Examination by Mr. Lanter 7

Examination by Mr. Kornhauser 244

Examination by Mr. Lanter 248

Correction Sheet 253

Signature Page 254

Reporter's Certificate 255

Page 3

1 THE VIDEOGRAPHER: Today's date is
2 November 19th, 2019. This is the video deposition of
3 Braden Merrill. The time is 9:32. We are on the
4 record.

5 The court reporter may now swear in the
6 witness.

7 THE REPORTER: Are there any stipulations?

8 MR. KORNHAUSER: We are -- we are
9 proceeding by agreement and by notice.

10 MR. LANTER: And by notice, yeah.

11 MR. KORNHAUSER: Yeah. We would like to
12 have the opportunity to read and sign, please.

13 MR. LANTER: Sure.

14 BRADEN MERRILL,
15 having been first duly sworn, testified as follows:

16 EXAMINATION

17 BY MR. LANTER:

18 Q. Good morning.

19 A. Good morning.

20 Q. Would you state your name, please.

21 A. It's Braden Merrill.

22 Q. Okay. And what is your position with Sequitur
23 Permian?

24 A. I am vice president and senior -- I am vice
25 president and chief financial officer.

Page 7

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24 Q. Okay. And with respect to the pollution

25 policy, your company's goal was to get \$5 million of

Page 20

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1 pollution coverage in place, wasn't it?

2 A. I believe that's the case, yes.

3 Q. Okay. Did you go back through the documents
4 that were submitted through your INS system to determine
5 whether \$5 million worth of pollution coverage was
6 obtained by Maalt?

7 A. My -- our lawyer checked on that, so I -- I was
8 told that it was not in place.

9 Q. Okay. My -- did you look?

10 A. I personally did not.

11 Q. Okay. Tell me what the INS system is?

12 A. I'm -- honestly, I was not involved in the INS
13 system.

14 Q. Okay so you don't know what that is?

15 A. No.

16 Q. Okay. Did you ever have any involvement in
17 reviewing the insurance certificate -- the insurance
18 certificates that were uploaded through the INS system
19 by Maalt?

20 A. No, that would have been our HSC group and our
21 legal team.

22 Q. Okay. And was that Russ?

23 A. Russ, yes.

24 Q. Okay. Did Russ ever come to you and tell you
25 that all of the policies that were required under the

Page 21

1 contract were not in place?

2 A. I don't remember.

3 Q. Okay. Did you -- did your company ever send
4 out a notice of default to Maalt claiming that they were
5 in default because they had not provided the required
6 insurance certificates?

7 A. Not that I remember.

8 Q. And certainly, I haven't seen a default notice
9 from your company to Maalt anywhere in the documents
10 produced. If there had been one it would be in those
11 documents, correct?

12 A. I believe so.

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Q. Okay. So as you sit here today, you don't recall doing any research or due diligence into Maalt and its affiliated companies before you went down this road to doing a terminal service agreement?

A. Well, not -- not at the beginning. I mean, I thought the question was about when I contacted Blake.

Q. Okay. Fair enough. It was. So my question to that then you didn't do any due diligence or research into the company at that point?

A. Oh, I did research.

Q. That you recall?

A. I did. I did follow. I didn't do research on the company at that point.

Q. Okay. And what research did you do?

A. I tried to figure out who their main purchasers were.

Q. Uh-huh (positive response).

A. Because my understanding -- my understanding was the EOG was one of their main purchaser and we had a lot of faith in EOG and trust Maalt. So we put a lot of stock in the fact that they had -- they trusted Vista as a -- Vista Maalt is a large cluster, is one of their little main service providers in the area that they must

1 be standup guys and follow through on what they said.

2 Q. How did you learn that information?

3 A. I learned that information, I think initially
4 in talking with one of the Vista Maalt folks and I kind
5 of researched it afterwards.

6 Q. And what research did you do afterwards?

7 A. I Go ogle searched.

8 Q. Okay. Did you talk to anybody at the EOG?

9 A. I don't believe that I did. Some of our
10 operations team might have.

11 Q. Okay. Who would those people be?

12 A. That would have been Steve McVay our head of
13 procurement and Blake Cantley our vice president of
14 completion and production, I believe.

15 Q. Okay. Did you obtain any information from them
16 about their research or their due diligence into Maalt
17 or the Vista entities?

18 A. I had -- I heard positive things about -- about
19 Vista Maalt.

20 Q. Okay. And so that whatever you learned gave
21 you enough confidence that you could move forward with
22 negotiating and talking about this type of deal?

23 A. It did.

24 Q. When you did it you wanted exclusivity on this
25 facility, didn't you?

1 A. Yes, we did.

2 Q. Why was that?

3 A. Because if we were putting money in the
4 facility, we wanted to make sure that that money was
5 going to be able to be used. We felt like we were
6 operating in a collaborative effort and so it was a team
7 kind of thing. And so if we were going to move forward
8 and trust in them to -- to have -- or to work with us,
9 then they would trust in us that we are doing what we
10 said we would do.

11 Q. Okay. How important was the exclusivity to
12 you?

13 A. It was fairly important because it was -- we
14 wanted to make sure our money was secure.

15 Q. Okay. Important enough to you to insist that
16 those provisions be in the terminal services agreement,
17 right?

18 A. The -- I -- I don't remember that being in the
19 terminal services agreement.

20 Q. Okay.

21 A. Is there exclusivity in the terminal services
22 agreement?

23 Q. Well, we will come back and we will look at
24 that. Yeah look at 2.3.

25 A. Okay.

Page 42

1 Q. Does that provide for exclusivity for your
2 company?

3 A. Yes, I thought you were referring to it in a
4 different manner. I'm sorry. Yes, that does.

5 Q. Okay.

6 A. Okay.

7 Q. All right. So this exclusivity was important
8 to you, you didn't want them bringing other business
9 into the facility, correct?

10 A. Absolutely.

11 Q. Whether that was oil, sand or anything else,
12 you wanted to have the complete right to control the
13 tracks and what took place out there?

14 A. Yes.

15 Q. Okay. And you also insisted upon having thing
16 right of first refusal to purchase the facility if
17 somebody else came along and wanted to buy it, right?

18 A. We asked for it, yes.

19 Q. And you got that in your contract, didn't you?

20 A. We did.
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5 MR. LANTER: Okay. I am going to hand you
6 Exhibit 75.

7 (Exhibit 75 marked.)

8 Q. Do you recognize that document?

9 A. I do.

10 Q. And what is it?

11 A. It's our notice of force majeure.

12 Q. Signed by you?

13 A. It was.

14 Q. Does it mention anything about not having a
15 pollution liability policy?

16 A. No, it does not.

17 Q. All right. Do you still have the terminal
18 services agreement in front of you, which is Exhibit 13?

19 A. I do.

20 Q. If you look at Section 8.3, starting on Page 14
21 going over to 15, you see that provision down there,
22 remedies for default?

23 A. Yes.

24 Q. Did your company ever send Maalt a default
25 notice as it is used in this paragraph stating that you

Page 222

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1 don't have a pollution liability policy in place and
2 have 30 days from your receipt of the default notice to
3 cure that?

4 MR. KORNHAUSER: Are you asking if he
5 personally?

6 MR. LANTER: Mr. Merrill, did you
7 understand my question?

8 THE WITNESS: Honestly, I don't remember
9 your question fully, sir.

10 MR. LANTER: Would you read it back,
11 please.

12 (Requested portion read back.)

13 A. Okay. We are just talking about 8.3?

14 Q. Yeah the default notice as required by that
15 section.

16 A. Okay.

17 MR. KORNHAUSER: Objection form.

18 Q. Did your company -- did your company ever send
19 one to Maalt?

20 A. Not that I am aware of.

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Q. There was a complaint made in this lawsuit that Maalt did not allow you to pick up the transloaders when you wanted to. During the time that Maalt had possession of the transloaders after you attempted to terminate the contract, did you have any other use for those machines?

A. At that time?

Q. Yes.

A. No.

Q. Okay. Since then, what have you done with them?

A. We have been looking for somebody to buy them.

Q. All right. So they are just sitting in

1 storage?

2 A. I don't know where they are.

3 Q. When you received them back from Maalt, was
4 there any damage to them?

5 A. I am not aware.

6 Q. Okay. Do you know who would have that
7 information?

8 A. Mike Van den Bold would know. If he wouldn't
9 know then he would know who would know.

10 Q. Okay. Your company has not suffered any kind
11 of loss as a result of the delay in getting the
12 transloading machines back, has it?

13 A. The only loss that I would be aware of is any
14 loss that we had by not being able to sell at that --
15 during that time frame.

16 Q. Did you have any buyers during that time frame?

17 A. I am not aware.

18 Q. Okay. You didn't have any place else you could
19 use them, did you?

20 A. No.

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EXHIBIT 2

1 CAUSE NO. 19-003

2 MAALT, LP, § IN THE DISTRICT COURT OF
3 §
4 Plaintiff, §
5 §
6 VS. § IRION COUNTY, TEXAS
7 §
8 SEQUITUR PERMIAN, LLC, §
9 §
10 Defendant. § 51st JUDICIAL DISTRICT
11

12 ORAL AND VIDEOTAPED DEPOSITION OF

13 MICHAEL VAN DEN BOLD

14 November 21, 2019

15 Volume 1

16 ORAL AND VIDEOTAPED DEPOSITION OF MICHAEL VAN DEN
17 BOLD, produced as a witness at the instance of the
18 Plaintiff and duly sworn, was taken in the above-styled
19 and numbered cause on the 21st day of November, 2019,
20 from 9:31 a.m. to 11:29 a.m., before Patricia Palmer,
21 CSR, in and for the State of Texas, reported by machine
22 shorthand, at the offices of Mr. Matthew A. Kornhauser,
23 Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
24 Houston, Texas Houston, pursuant to the Texas Rules of
25 Civil Procedure and the provisions stated on the record
herein.

Page 1

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Maatl MSJ
Exhibit

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exhibitsticker.com

1 THE VIDEOGRAPHER: Today's date is
2 November 21st, 2019. This is the video deposition of
3 Michael Van Den Bold. The time is 9:32. We are on the
4 record. The court reporter may now swear in the
5 witness.

6 THE REPORTER: Are there any stipulations?

7 MR. KORNHAUSER: By agreement and we would
8 like to read and sign, please.

9 MR. WICKES: Agreed.

10 MICHAEL VAN DEN BOLD,
11 having been first duly sworn, testified as follows:

12 EXAMINATION

13 BY MR. WICKES:

14 Q. All right sir, could you state your name for
15 the record?

16 A. Michael Van Den Bold.

17 Q. Okay, Mr. Van Den Bold. My name is Paul Wickes
18 and I represent Maalt, LP in this case, you understand
19 that, correct?

20 A. Correct.

21 Q. And you understand you are here for a
22 deposition related to a dispute about a terminal service
23 agreement in Barnhart, Texas?

24 A. I do.

25 Q. All right. If you could, go ahead and just

Page 4

1 state your -- your position with Sequitur and what you
2 do.

3 A. I am the chief operations officer and
4 president.

5 Q. Okay. And is there anyone that you report to?

6 A. I report to the CEO Scott Josey.

7 Q. Scott Josey?

8 A. Correct.

9 Q. Okay. And how long have you been with
10 Sequitur?

11 A. We -- I am a founding partner and we founded it
12 in 2011.

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Q. Okay. There was a claim that dealt with the
holding over of property of Sequitur's afterwards, are

Page 64

1 you familiar with that?

2 A. I am familiar with that.

3 Q. Okay. What property, as best as you can
4 describe, was held over?

5 A. Maalt moved our transloaders without our
6 permission off the location and didn't advise us of
7 that.

8 Q. Okay. And then ultimately Sequitur was able to
9 come and pick up that equipment?

10 A. That is correct, we were.

11 Q. All right. Do you know how long of a period of
12 time after it was moved before Sequitur was able to pick
13 it up?

14 A. I recall it being more than a month.

15 Q. Okay. Are you aware of any damage to the
16 equipment when Sequitur picked it up?

17 A. I am not aware of any damage.

18 Q. Okay. Are you aware of any lost business
19 opportunities for that equipment during that period of
20 time?

21 A. No.

22 Q. What damages, if any, are you aware of that
23 Sequitur incurred because of the delay in obtaining that
24 equipment?

25 A. Well, it is just the -- to me it was the -- it

1 felt like our property was stolen from us and we weren't
2 sure we were going to get it back. And we had to decide
3 whether to take legal action or call the authorities.
4 So it became a, you know, a time sync for our people to
5 deal with this problem.

6 Q. Okay.

7 A. And yeah.

8 Q. Are you making an emotional distress claim?

9 A. I am not.

10 Q. Okay. So the damage would be the time Sequitur
11 that employees had to focus on that as opposed to doing
12 other business things?

13 A. Correct.

14 Q. Okay. Have you been able to quantify that
15 amount in any way?

16 A. I am not.

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Page 66

EXHIBIT 3

No. 19-003

MAALT, LP

Plaintiff,

vs.

SEQUITUR PERMIAN, LLC

Defendant.

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§

IN THE DISTRICT COURT

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

DECLARATION OF BRIAN HECHT

On this day Brian J. Hecht states under penalty of perjury as follows:

1. "My name is Brian J. Hecht. I am over the age of 18 years, have never been convicted of a crime, and I am fully competent to make this declaration. I have personal knowledge of the facts stated in this declaration and they are true and correct."

2. "I am Maalt, LP's ("Maalt") certified safety and health official, and hold that certification issued by the Texas A&M Engineering Extension Service. My job responsibilities involve the operation of Maalt's transloading facilities including the one located at 44485 W. Highway 67, Barnhart, Texas (the "Barnhart Facility"). The Barnhart Facility is the one made the subject of the Terminal Services Agreement ("TSA") between Maalt and Sequitur Permian, LLC ("Sequitur"). My responsibilities included submittal of certificates of insurance to Sequitur to evidence that Maalt had the insurance in place that was required by the TSA. Among the insurance required was coverage for pollution legal liability with a limit of at least \$5 million."

3. "After the TSA was signed, Sequitur instructed Maalt to submit its certificates of insurance to it through the ISNetworld system that it was using to qualify its contractors. Maalt was instructed that the name of the ISNetworld client was "Sequitur Energy

Resources, LLC” and that all certificates were to be submitted under that name.”

4. “At the time of the TSA, Maalt had insurance providing pollution legal liability coverage with coverage amounts greater than \$5 million. The coverage was through a general liability policy issued by Ironshore Specialty Insurance Company (“Ironshore”) with policy limits of \$1 million that covered pollution liability for the rail facility located at Barnhart Facility. The coverage provided by that policy included coverage for pollution events that occurred on the Barnhart Facility site. The policy also included other types of pollution coverage. The Ironshore general liability insurance policy bore number 002357403.”

5. “Maalt also had umbrella liability insurance through Ironshore that provided \$25 million of umbrella or excess coverage for the Barnhart Facility, including coverage for pollution events that occurred on site and other pollution events. The Ironshore umbrella liability insurance policy bore number 002357503.”

6. “Maalt was a named insured under both the Ironshore general liability and umbrella liability policies for the policy year June 1, 2018 through June 1, 2019. The Barnhart Facility was a covered site under both policies.”

7. “I requested that Maalt’s insurance broker provide me with a certificate of liability insurance showing that Maalt’s coverage met the TSA requirements and showing Sequitur Energy Resources, LLC as an additional insured following the instructions received from Sequitur. The Certificate of Liability Insurance (the “Certificate”) was issued by Gus Bates Insurance & Investments. Attached as Exhibit A is a true and correct copy of the Certificate. The Certificate reflects that both policy numbers 002357403 and 002357503 were issued, that Maalt was a named insured under both policies, and that

there was combined pollution legal liability coverage in place in the amount of \$11 million. Under the terms of the coverage, Sequitur Energy Resources, LLC and its affiliates were additional insureds under all of the policies required by the TSA including the general liability policy and the umbrella policy.”

8. “As required by Sequitur, the Certificate was uploaded to Sequitur through the ISNetworld portal on November 9, 2018. On November 12, 2018, I received notice through the ISNetworld system that the insurance reflected in the Certificate was ‘accepted.’ Attached hereto as Exhibit B, and incorporated by reference, is a copy of the document obtained through ISNetworld indicating that the insurance submitted was accepted. I have never received any notice from Sequitur, either through ISNetworld or otherwise, that the insurance policy information uploaded to it was rejected due to lack of proper policies or for any other reason.”

9. “Maalt did not receive any notice from Sequitur pursuant to the terms of the TSA giving Maalt notice that it did not have the proper insurance policies in place.”

10. “Since this lawsuit was filed, I have attempted to log in to the ISNetworld system to retrieve documents that I uploaded pursuant to the TSA and retrieve any other documents indicating acceptance or rejection with respect to Maalt’s insurance coverage. When attempting to do so, I discovered that my ability to log in has been blocked by Sequitur.”

11. “Further, Affiant sayeth not.”

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

DECLARATION PURSUANT TO TEXAS CIVIL PRACTICE & REMEDIES CODE § 132.001

My name is Brian J. Hecht, my date of birth is 12-11-1955, and my address is 4413 Carey Street, Fort Worth, Texas 76119, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Fort Worth, Tarrant County, Texas, on the 15 day of May, 2020.



Brian J. Hecht

EXHIBIT A



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

10/05/2018

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Gus Bates Insurance & Investments 3221 Collinsworth St Fort Worth, TX 76107	CONTACT NAME: Michael Moore PHONE (A/C, No, Ext): (817) 529-5320 FAX (A/C, No): (817) 984-7630 E-MAIL ADDRESS: michael@gusbates.com	
	INSURER(S) AFFORDING COVERAGE	
INSURED Vista Proppants and Logistics, LLC 4413 Carey Street Fort Worth, TX 76119	INSURER A: Ironshore	
	INSURER B: Acadia Insurance Company	
	INSURER C: AXIS Surplus Insurance Company	
	INSURER D:	
	INSURER E:	
INSURER F:		NAIC # 31325

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC OTHER:			002357403	06/01/2018	06/01/2019	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 500,000 MED EXP (Any one person) \$ 25,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000 POLLUTION LIAB \$ 1,000,000
B	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS ONLY <input checked="" type="checkbox"/> NON-OWNED AUTOS ONLY			CAA 4690837-14	06/01/2018	06/01/2019	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
C	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> DED <input type="checkbox"/> RETENTION \$			002357503	06/01/2018	06/01/2019	EACH OCCURRENCE \$ 10,000,000 AGGREGATE \$ 10,000,000 \$ PER STATUTE <input type="checkbox"/> OTH-ER <input type="checkbox"/> E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) <input type="checkbox"/> Y / N If yes, describe under DESCRIPTION OF OPERATIONS below		N / A				
A	General Liability			002357403	06/01/2018	06/01/2019	Pollution/ A, B, C 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

General Liability-Insured Site Schedule Pollution IE END EPIC 003 04/09

Business Auto-Business Auto Ultra Plus Endorsement CL CA-20 14

General Liability-Form IE.COV.EPIC.001

Blanket Additional Insured, Blanket Waiver of Subrogation, Blanket Primary & Non-Contributory as required by written contract.

Occurrence coverage trigger

Defense outside the limits and deductible

Products Pollution and exposure as a specific insuring agreement

SEE ATTACHED ACORD 101

CERTIFICATE HOLDER

CANCELLATION

Sequitur Energy Resources LLC 2050 W. Sam Houston Parkway South Suite 1850 Houston, TX 77042	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE



ADDITIONAL REMARKS SCHEDULE

Page 1 of 1

AGENCY Gus Bates Insurance & Investments		NAMED INSURED Vista Proppants and Logistics, LLC 4413 Carey Street Fort Worth, TX 76119 Tarrant	
POLICY NUMBER SEE PAGE 1		EFFECTIVE DATE: SEE PAGE 1	
CARRIER SEE PAGE 1	NAIC CODE SEE P 1		

ADDITIONAL REMARKS

THIS ADDITIONAL REMARKS FORM IS A SCHEDULE TO ACORD FORM,
 FORM NUMBER: ACORD 25 FORM TITLE: Certificate of Liability Insurance

Description of Operations/Locations/Vehicles:

World-Wide Products and Products Pollution coverage

Blanket Time Element Pollution Event (10 day discovery / 30 day reporting) coverage for bodily injury and property damage at owned or operated locations

Blanket Non-Owned Location Site Pollution – Bodily Injury and Property Damage. Non-Owned Locations include both storage and disposal facilities

Pollution Liability during transportation including all loading, unloading and misdelivery

Contractor's Pollution Liability – Occurrence based coverage trigger with defense outside the limit. No pollutant limitations on mold matter, lead or asbestos

Per Project Aggregate including Contractors Pollution Liability

Per Location Aggregate applicable to both General Liability and Pollution Liability

Named Insured also includes the following:

Lonestar Prospects Ltd, dba Vista Sand

MAALT, L.P.

GHMR Operations, LLC

EPIC Coverage Map

INSURING AGREEMENTS

General Bodily Injury and Property Damage Liability (GL)	Defined Insuring Agreement - Coverage Part I; Coverage A
Hostile Fire and Building Equipment Liability	Defined Insuring Agreement - Coverage Part I; Coverage B
Products Pollution and Exposure Liability	Defined Insuring Agreement - Coverage Part I; Coverage C
Time-Element Pollution Bodily Injury and Property Damage Liability	Defined Insuring Agreement - Coverage Part I; Coverage D
Non-Owned Site Pollution Bodily Injury and Property Damage Liability	Defined Insuring Agreement - Coverage Part I; Coverage E
Pollution Liability During Transportation	Defined Insuring Agreement - Coverage Part I; Coverage F
Contractors Pollution Liability Coverage	Defined Insuring Agreement - Coverage Part I; Coverage G
Site Pollution Incident Legal Liability Coverage	Defined Insuring Agreement - Coverage Part III
Professional Liability Coverage (environmental consultants only)	Defined Insuring Agreement - Coverage Part IV
Emergency Response Expense (No Legal Liability Required)	Defined Insuring Agreement: Pollution Incident during Transportation, Contractors Pollution and Site Pollution Incident Legal Liability (no Legal Liability required)

POLICY FEATURES

Occurrence Coverage Trigger	Coverage Parts I & II
Claims Made Coverage Trigger	Coverage Parts III & IV
Pay on Behalf	Included
Right and Duty to Defend	Included
Defense Costs in addition to the Limit of Insurance	Yes except for Coverage Parts III & IV
Defense Costs Outside of the Deductible	Yes except for Coverage Parts III & IV
Audit Provision	None

POLICY ENHANCEMENTS

Broad Form Named Insured	Included in Section II - Who is an Insured
Blanket Additional Insured - including completed operations (when required by written contract)	Included in Section II - Who is an Insured
Blanket Additional Insured – Primary & Non-Contributory (when required by written contract)	Section IV – Conditions; Condition #17. Other Insurance - a. Primary Insurance
Additional Insureds: Lessors of Equipment & Premises (when required by written contract)	Included in Section II - Who is an Insured
Additional Insureds: Vendors (when required by written contract)	Included in Section II - Who is an Insured
Newly Acquired or Formed Organizations (except partnerships, JV's and LLC's) – 180 days	Included in Section II - Who is an Insured

Employees & Volunteers as Insureds	Included in Section II - Who is an Insured
Leased Workers as Employees and Insureds	Included in the Definition of Employee
Misdelivery of Liquid during Transportation	Included in Coverage F - Pollution Liability During Transportation
Blanket Non-Owned Disposal Sites Coverage	Coverage Part I - Coverage E
Host Liquor Liability	Exception to Liquor Liability Exclusion - Coverage Part I; Coverage A Exclusions
Incidental Medical Malpractice	Included in Section II - Who is an Insured
Non-owned Watercraft (Under 75 ft.)	No limitation on the length of non owned watercraft in the exception to Exclusion a. Aircraft, Auto or Watercraft
Contractual Liability in connection with work done near a Railroad	Definition of Insured Contract - no limitations regarding work near a railroad
Knowledge of Occurrence (Who is deemed to know of prior occurrences)	Knowledge is limited to Responsible Executive as defined in the policy (including the named insured, managers of insured sites, managers of environmental, health and safety and other authorized employees)
Notice of Occurrence	Section IV - Condition 8. Duties in the Event of Occurrence - Named insured must notify as soon as practicable
Blanket Waiver of Subrogation (when required by written contract)	Section IV – Condition 22. Transfer of Rights of Recovery Against Others To Us
Unintentional Errors & Omissions	Section IV – Condition 19. Representations - No policy restrictions as respects failure to disclose
Coverage Territory - General Liability	US, Puerto Rico, Canada and the Gulf of Mexico. Worldwide Coverage for Products (including Products Pollution). Suit can be brought anywhere.
Coverage Territory - Pollution	Worldwide Coverage for Transportation, Contractors Pollution and Non-owned sites. Insured sites are per the address of the site
Gulf of Mexico Extension	Included in the Definition of Coverage Territory
Fellow Employee Exclusion	The exception to Who is an Insured for BI to a Co-Employee found in the ISO GL Coverage form does not exist in the EPIC Coverage Form
Lead	No Exclusion as respects Products Pollution and Contractors Pollution
Silica	No Silica Exclusion
Professional Liability Exclusion	No Exclusion in Coverage Part I
New York - Third Party Action Exclusion	No Third Party Action Over Exclusion
Per Location and Per Project Aggregate	Section III – Limits of Insurance and Deductible
Bodily Injury to include mental anguish, shock or emotional distress	Included in the Definition of Bodily Injury
Natural Resource Damage	Included in the Definition of Property Damage
Restoration Costs	Included in the Definition of Clean-Up Costs
Mold Matter	Included in the Definition of Pollutants
90 Days Notice of Cancellation (10 days for non-payment of premium) or Non-Renewal	Section IV - Conditions: Condition 3. Cancellation; Condition 24. When We Do Not Renew

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please call 1-877-IRON411, visit www.ironshore.com or email: info@ironshore.com



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IRONSHORE SPECIALTY INSURANCE COMPANY

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5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Insured Name: Lonestar Prospects, Ltd.
Policy Number: 002357400

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

TABLE OF CONTENTS

SECTION I – COVERAGES.....	PAGE
COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY.....	2
COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions.....	2
Coverage A: General Bodily Injury and Property Damage Liability.....	2
Coverage B: Hostile Fire and Building Equipment Liability.....	4
Coverage C: Products Pollution and Exposure Liability.....	5
Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability.....	5
Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability.....	6
Coverage F: Pollution Liability during Transportation.....	7
Coverage G: Contractors Pollution Liability.....	8
COVERAGE PART I – Common Insuring Agreement.....	9
COVERAGE PART I – Supplementary Payments.....	10
COVERAGE PART I – Common Exclusions.....	11
COVERAGE PART II: MISCELLANEOUS COVERAGES.....	14
Coverage A: Personal and Advertising Injury Liability.....	14
Coverage B: Employee Benefits Administration Liability.....	16
Coverage C: Medical Payments.....	17
COVERAGE PART II – Supplementary Payments.....	18
COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY.....	18
Coverage A: Bodily Injury and Property Damage Liability.....	18
Coverage B: First and Third Party On-Site Clean-Up Costs.....	19
Coverage C: Off-Site Clean-Up Costs.....	20
COVERAGE PART III – Common Exclusions.....	21
COVERAGE PART IV – PROFESSIONAL LIABILITY.....	23
SECTION II – WHO IS AN INSURED.....	26
SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE.....	28
SECTION IV – CONDITIONS.....	30
SECTION V – DEFINITIONS.....	36

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

COVERAGE FORM

Various provisions in this policy restrict coverage. Please read the entire policy carefully to determine rights, duties and what is and is not covered.

COVERAGE PART III – SITE POLLUTION INCIDENT LEGAL LIABILITY and **COVERAGE PART IV – PROFESSIONAL LIABILITY** of this policy provide claims-made coverage.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this Policy. The words “we”, “us” and “our” refer to the Company providing this insurance.

The word “insured” means any person or organization qualifying as such under **SECTION II – WHO IS AN INSURED**.

Defined terms, other than headings, appear in bold face type. Refer to **SECTION V - DEFINITIONS**.

SECTION I – COVERAGES

COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY

COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions

Coverage A: General Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **loading or unloading**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is not being used to carry persons or property for a charge;
- (3) An aircraft hired or chartered by or loaned to an insured with a paid crew;
- (4) Parking an **auto** on, or on the ways next to, premises you own or rent, provided the **auto** is not owned by or rented or loaned to you or the insured;

- (5) Liability assumed under any **insured contract** for the ownership, maintenance or use of aircraft or watercraft; or
- (6) **Bodily injury** or **property damage** arising out of the operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of **mobile equipment** if it were not subject to a compulsory or financial responsibility law where it is licensed or principally garaged or the operation of any of the machinery or equipment listed in Paragraph **f. (2)** or **f. (3)** of the definition of **mobile equipment**.

b. Asbestos and Lead

- (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or
- (2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

c. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does to apply to liability for damages because of **bodily injury**.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

d. Employment - Related Practices

Bodily injury to:

- (1) A person arising out of any refusal to employ that person, termination of that person's employment or employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of the person as a consequence of **bodily injury** to that person at whom any of the employment-related practices described in Paragraphs **(1)** above is directed.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

e. Liquor Liability

Bodily injury or **property damage** for which any insured may be held liable by reason of causing or contributing to the intoxication of any person, the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured or providing or failing to provide transportation with respect to any person that may be under the influence of alcohol if the **occurrence** which caused the **bodily injury** or **property damage**, involved that which is described in the Paragraph above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

f. Mobile Equipment

Bodily injury or **property damage** arising out of the transportation of **mobile equipment** by an **auto** owned or operated by or rented or loaned to any insured or the use of **mobile equipment** in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition or stunting activity.

g. Personal And Advertising Injury

Bodily injury arising out of **personal and advertising injury**.

h. Pollution

(1) **Bodily injury** or **property damage** caused by a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur **clean-up costs**; or

(b) **Claim** or **suit** by or on behalf of a governmental authority for damages because of **clean-up costs**.

i. Recording And Distribution Of Material Or Information In Violation Of Law

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Coverage B: Hostile Fire and Building Equipment Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

a. **Bodily injury** sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; and

b. **Bodily injury** or **property damage** arising out of heat, smoke or fumes from a **hostile fire**

But only if:

(1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and

(2) The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

b. Asbestos and Lead

(1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or

(2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

Coverage C: Products Pollution and Exposure Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

- a. **Bodily injury, property damage or environmental damage** arising out of a **pollution incident** caused by **your product**, and included in the **products-completed operations hazard**; or
- b. **Bodily injury or property damage** arising out of the ingestion, inhalation or absorption of, contact with, or exposure to, any fumes, dust, particles, vapors, liquids or other substances that are or originate from **your product**, and included in the **products-completed operations hazard**.

But only if:

- (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

- a. **Asbestos**
 - (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos in any form; or
 - (2) **Property damage** arising out of the presence of, or exposure to, asbestos in any form.
 - (3) **Environmental damage** arising from asbestos or asbestos containing materials in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.
- b. **Product Disposal**
Bodily injury, property damage or environmental damage arising out of the disposal of **your product**.
- c. **Products as Waste**
Environmental damage arising out of **your product** which is **waste**.
- d. **Transportation**
Bodily injury, property damage or environmental damage arising during **transportation**.

Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies arising out of a **time-element pollution incident** on, at, under or migrating from any **location** which is owned or occupied by you and which is not specifically scheduled as an **insured site** but only if:

- a. The **bodily injury or property damage** is caused by an **occurrence** that takes place in the **coverage territory**;
- b. The **bodily injury or property damage** takes place during the **policy period**;
- c. The insured discovers the **pollution incident** within ten (10) days of commencement of the **pollution incident**; and
- d. The **pollution incident** is reported to us in writing within thirty (30) days of commencement of the **pollution incident**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury or **property damage** that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest non-compliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Transportation

Bodily injury or **property damage** arising during **transportation**.

Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from any **non-owned site** but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury, **property damage** or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such non-compliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Prior Pollutants or Pollution Incident

Bodily injury or **property damage** arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury** or **property damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury** or **property damage** during the policy period of a policy previously issued by us.

d. **Transportation**

Bodily injury or **property damage** arising during **transportation**.

Coverage F: Pollution Liability during Transportation

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:
 - (1) **Bodily injury, property damage** or **environmental damage** arising out of a **pollution incident** during **transportation**; or
 - (2) **Bodily injury, property damage** or **environmental damage** arising out of **misdelivery** during **transportation**;
 But only if:
 - (a) The **bodily injury, property damage** or **environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (b) The **bodily injury, property damage** or **environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** during **transportation** or **misdelivery** during **transportation** but only if:
 - (1) The **pollution incident** or **misdelivery** first commenced during the **policy period**;
 - (2) The **pollution incident** or **misdelivery** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident** or **misdelivery**; and
 - (4) The **pollution incident** or **misdelivery** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident** or **misdelivery**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. **Criminal Fines, Penalties and Assessments**

Any criminal fines, criminal penalties or criminal assessments.

b. **Damage to Conveyance**

Property damage to any **conveyance** utilized during **transportation**. This exclusion does not apply to **claims** made by third-party carriers for such **property damage** arising from the insured's negligence.

c. **Insured Site Transportation**

Environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

d. **Noncompliance**

Bodily injury, property damage or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint,

notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement..

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

e. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

Coverage G: Contractors Pollution Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury, property damage or environmental damage** to which this insurance applies arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **pollution incident** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (4) The **pollution incident** and related **emergency response expenses** are reported to us within fourteen (14) days of commencement of the **pollution incident**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Disposal Site

Bodily injury, property damage or environmental damage arising out of a **pollution incident** on, at, under or migrating from any transfer, storage, disposal, landfill, treatment or consolidation **location** beyond the boundary of a job site where **your work** is performed.

c. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

d. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** resulting from **your work**, known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Amendment Endorsement attached to this policy;
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

e. Transportation

Bodily injury, property damage or environmental damage arising during **transportation**.

COVERAGE PART I – Common Insuring Agreement

The following insuring agreements apply to **Coverages A** through **G** inclusive:

1. We will have the right and duty to defend the insured against any **suit** seeking damages for **bodily injury, property damage or environmental damage** to which any of **Coverages A** through **G** applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which any of those coverages do not apply. We may, at our discretion, investigate any **occurrence** and settle any **claim** or **suit** that may result. But:
 - a. The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**;
 - b. Our right and duty to defend ends when we have used up the applicable limits of insurance in the payment of judgments, settlements, **clean-up costs** or **emergency response expense** under the applicable coverage found in **Coverage Part I**; and
 - c. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART I – Supplementary Payments**.
2. **Bodily injury, property damage or environmental damage** will be deemed to have been known to have occurred at the earliest time when any **responsible executive**:
 - a. Reports all, or any part, of the **bodily injury, property damage or environmental damage** to us or any other insurer;
 - b. Receives a written or verbal demand or **claim** for damages because of the **bodily injury, property damage or environmental damage**; or
 - c. Becomes aware by any other means that **bodily injury, property damage or environmental damage** has occurred or has begun to occur.
3. The following applies to progressive or indivisible **bodily injury, property damage or environmental damage**, including any continuation, change or resumption of such **bodily injury, property damage or environmental damage**, which

takes place over a period of days, weeks, months or longer caused by continuous or repeated exposure to the same, related or continuous: **(i) pollution incident**; or **(ii) general harmful conditions or substances**:

- a. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place only on the date of first exposure to such **pollution incident** or general harmful conditions or substances; or
 - b. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place during the policy period of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period** but only if:
 - (1) The date of first exposure cannot be determined or is before the effective date of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**; and
 - (2) Such **bodily injury, property damage or environmental damage** continues, in fact, to take place during this **policy period**.
4. If the same, related or continuous **pollution incident** or general harmful conditions or substances results in **bodily injury, property damage or environmental damage** that takes place during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**:
- a. All such **bodily injury, property damage and environmental damage** shall be deemed to have taken place only during the first policy period of such policies in which any of the **bodily injury, property damage or environmental damage** took place; and
 - b. All damages arising from all such **bodily injury, property damage or environmental damage** shall be deemed to have arisen from one **occurrence** and shall be subject to the Each Occurrence Limit applicable to the policy for such first policy period.
5. Damages because of **bodily injury** include damages claimed by any person or organization for care, loss of services or death resulting at any time from the **bodily injury**.

COVERAGE PART I – Supplementary Payments

1. We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART I**:
 - a. All expenses we incur.
 - b. Up to \$1,000 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which **bodily injury** in **COVERAGE PART I** applies. We do not have to furnish these bonds.
 - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
 - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
 - e. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
 - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
 - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a **suit** and an indemnitee of the insured is also named as a party to the **suit**, we will defend that indemnitee if all of the following conditions are met:

- a. The **suit** against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an **insured contract**;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same **insured contract**;
- d. The allegations in the **suit** and the information we know about the **occurrence** are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of the indemnitee against such **suit** and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the **suit**;
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **suit**;
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the **suit**; and
 - (b) Conduct and control the defense of the indemnitee in such **suit**.

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as **COVERAGE PART I – Supplementary Payments**. Notwithstanding the provisions of **COVERAGE PART I – Common Exclusions**, Exclusion **a. Contractual Liability**, Paragraph (2), such payments will not be deemed to be damages for **bodily injury, property damage and environmental damage** and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as **COVERAGE PART I – Supplementary Payments** ends when we have used up the applicable limit of insurance in the payment of judgments or settlements; or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

COVERAGE PART I – Common Exclusions:

The insurance provided in **COVERAGE PART I** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Damage to Impaired Property or Property Not Physically Injured

Property damage or **environmental damage** to **impaired property** or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in **your product** or **your work**; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to **your product** or **your work** after it has been put to its intended use.

c. Damage to Property

Property damage or **environmental damage** to:

- (1) Property you own or occupy including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the **property damage** or **environmental damage** arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured; or
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the **property damage** or **environmental damage** arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because **your work** was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to **property damage** (other than damage by fire, lightning or explosion) to premises, including the contents of such premises, rented to you for a period of 30 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**.

Paragraph (2) of this exclusion does not apply if the premises are **your work** and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to **property damage** or **environmental damage** included in the **products-completed operations hazard**.

d. Damage to Your Product

Property damage to **your product** arising out of it or any part of it.

e. Damage to Your Work

Property damage or **environmental damage** to **your work** arising out of it or any part of it. and included in the **products completed operations hazard**.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor or for liability assumed under a sidetrack agreement.

f. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured, arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an **insured contract**.

g. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured. This exclusion does not apply to **bodily injury or property damage** resulting from the use of reasonable force to protect persons or property.

h. Known Injury or Damage

Bodily injury, property damage or environmental damage that occurred in whole or in part prior to the **policy period** and was known prior to the **policy period** by a **responsible executive**. Any continuation, change or resumption of such **bodily injury, property damage or environmental damage** will be deemed to have been known by a **responsible executive** prior to the **policy period**.

This exclusion does not apply to any continuation, change or resumption of **environmental damage** caused by **your work** performed after the effective date of the **policy period**.

i. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **environmental damage or property damage** occurs.

However, this exclusion does not apply:

- (1) To **clean-up costs** required by **environmental laws** governing the liability or responsibilities of an insured to respond to a **pollution incident**; or
- (2) If such damage is a result of an unexpected or unintended **pollution incident** arising from **your work**.

j. Nuclear Material

Bodily injury, property damage or environmental damage based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

k. Recall of Products, Work or Impaired property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of, **your product, your work or impaired property** if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

l. War

Bodily injury, property damage or environmental damage, however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

m. Workers Compensation and Similar Laws

Any obligation of the insured under workers' compensation, disability benefits or unemployment compensation law or any similar law.

COVERAGE PART I – Coverage A., Paragraph 2., Exclusions a., f. and g. and COVERAGE PART I – Common Exclusions, Exclusion b., through f. inclusive and k. through m. inclusive do not apply to damage by fire, lightning or explosion to premises while rented to or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE, Paragraph 5..**

COVERAGE PART II: MISCELLANEOUS COVERAGES

Coverage A: Personal and Advertising Injury Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal and advertising injury** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages for **personal and advertising injury** to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any **claim** or **suit** that may result. But:
 - (1) The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE;**
 - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage A;** and
 - (3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments.**
- b. This insurance applies to **personal and advertising injury** caused by an offense arising out of your business but only if the offense was committed in the **coverage territory** during the **policy period.**
- c. If the same, related or continuous offense is committed during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II – Coverage A: Personal and Advertising Injury Liability** for offenses committed during the policy period, all such offenses shall be deemed to have taken place only during the first policy period of such policies in which any of the offenses were committed.

2. Exclusions

This insurance does not apply to:

a. Breach of Contract

Personal and advertising injury arising out of a breach of contract, except an implied contract to use another's advertising idea in your **advertisement.**

b. Criminal Acts

Personal and advertising injury arising out of a criminal act committed by or at the direction of the insured.

c. Contractual Liability

Personal and advertising injury for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Distribution Of Material In Violation Of Statutes

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate the Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law, the CAN-SPAM Act of 2003, including any amendment of or addition to such law or any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003 that prohibits or limits the sending, transmitting, communication or distribution of material or information.

e. Electronic Chatrooms or Bulletin Boards

Personal and advertising injury arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

f. Infringement of Copyright, Patent, Trademark or Trade Secret

Personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your **advertisement**.

However, this exclusion does not apply to infringement, in your **advertisement**, of copyright, trade dress or slogan.

g. Insureds in Media and Internet Type Businesses

Personal and advertising injury committed by an insured whose business is advertising, broadcasting, publishing or telecasting, designing or determining content of websites for others or an Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **32 a., b. and c.** of **personal and advertising injury** under **SECTION V – DEFINITIONS**.

For the purpose of this exclusion, the placing of frames, borders, or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

h. Knowing Violation of Rights of Another

Personal and advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict **personal and advertising injury**.

i. Material Published Prior to Policy Period

Personal and advertising injury arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the **policy period**.

j. Material Published with Knowledge of Falsity

Personal and advertising injury arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

k. Pollution

(1) Personal and advertising injury arising out of a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur clean-up costs; or

(b) **Claim or suit** by or on behalf of a governmental authority for damages because of **clean-up costs**.

l. Quality of Performance of Goods – Failure to Conform to Statements

Personal and advertising injury arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your **advertisement**.

m. Unauthorized Use of Another's Name or Product

Personal and advertising injury arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

n. War

Bodily injury or property damage, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

o. Wrong Description of Prices

Personal and advertising injury arising out of the wrong description of the price of goods, products or services stated in your **advertisement**.

Coverage B: Employee Benefits Administration Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a negligent act, error or omission of the insured, or of any other person for whose acts the insured is legally liable, in the **administration** of your **employee benefits program** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any **claim** or **suit** that may result. But:

(1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**;

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage B**; and

(3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments**.

b. This insurance applies to damages only if the negligent act, error or omission takes place in the **coverage territory**.

2. Exclusions

This insurance does not apply to:

a. Available Benefits

Any **claim** for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

b. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

c. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

d. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

e. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

f. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the **employee benefit program**.

g. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any claim based upon failure of any investment to perform, errors in providing information on past performance of investment vehicles or advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the **employee benefit program**.

h. Prior Act, Error or Omission

Any **claim** arising from any act, error or omission known, prior to the effective date of the **policy period**, to a **responsible executive** if such **responsible executive** knew or could have reasonably foreseen that such an act, error or omission could give rise to a **claim** under this policy.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Workers' Compensation And Similar Laws

Any **claim** arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

Coverage C: Medical Payments**1. Insuring Agreement**

- a. We will pay medical expenses as described below for **bodily injury** caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (1) The accident takes place in the **coverage territory** and during the **policy period**;
- (2) The expenses are incurred and reported to us within one year of the date of the accident; and
- (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral service.

2. Exclusions

We will not pay expenses for **bodily injury**:

a. Any Insured

To any insured, except **volunteer workers**.

b. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletics contests.

c. COVERAGE PART I Exclusions

Excluded under **Coverage A** of **COVERAGE PART I** and **COVERAGE PART I - Common Exclusions**

d. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

e. Injury on Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

f. Products-completed operations hazard

Included within the **products-completed operations hazard**.

g. Workers Compensation and Similar Laws

To a person, whether or not an **employee** of any insured, if benefits for the **bodily injury** are payable or must be provided under workers compensation or disability benefits law or a similar law.

COVERAGE PART II – Supplementary Payments:

We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART II – Coverage A and B**:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
4. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY

Coverage A – Bodily Injury and Property Damage Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from an **insured site**. We will have the right and the duty to defend the insured against any **suit** seeking damages for **bodily injury** or **property damage** to which this coverage part applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which this coverage part does not apply. We may, at our discretion, investigate any **pollution incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **Section III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART III** in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- b. This insurance applies to **bodily injury** and **property damage** only if:

- (1) The **bodily injury** or **property damage** is caused by a **pollution incident** that commenced on or after the retroactive date applicable to the **insured site** and before the end of the **policy period**; and
- (2) A **claim** for damages because of the **bodily injury** or **property damage** is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us

during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

Coverage B – First and Third Party On-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for **clean-up costs** on, at or under an **insured site** or **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:
 - (1) The **environmental damage** is caused by a **pollution incident** on, at or under:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided that the **pollution incident** commenced before the end of the **policy period**; and
 - (2) The insured:
 - (a) First discovers the **pollution incident** during the **policy period**. Discovery of a **pollution incident** happens when a **responsible executive** (i) first becomes aware of the **pollution incident**, (ii) reports the **pollution incident** to us in writing during the **policy period**, and (iii) promptly reports the **pollution incident** to the appropriate governmental authority as required by **environmental law**; or
 - (b) Becomes legally liable to pay **clean-up costs** as a result of a **claim**, the **claim** for which is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**. A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** on, at or under an **insured site** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.
- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:
 - (1) the amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
 - (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. Asbestos and Lead

Environmental damage arising from asbestos, asbestos containing materials or lead-based paint in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.

b. Off-Site Clean-Up Costs and Emergency Response Expense

Clean-up costs and **emergency response expense** other than those on, at or under a **non-owned site** or an **insured site**.

Coverage C – Off-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for off-site **clean-up costs** beyond the boundary of an **insured site** or a **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:

- (1) The **environmental damage** is caused by a **pollution incident** migrating from:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and the **pollution incident** commenced before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided the **pollution incident** commenced prior to the end of the **policy period**; and
- (2) As respects **clean-up costs**, a **claim** for **clean-up costs** is first made against any insured and reported to us in writing during the **policy period** or any extended reporting period we provide under **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** beyond the boundary of an **insured site** but only if:

- (1) The **pollution incident** first commenced during the **policy period**;
- (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
- (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.

- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:

- (1) The amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and

- (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense** payments.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;

- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and

- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. On-Site Clean-Up Costs

Clean-up costs on at or under a **non-owned site** or an **insured site**.

COVERAGE PART III - Common Exclusions

The insurance provided in **COVERAGE PART III** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or

- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and

- (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessment.

c. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

d. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured.

e. Material Change in Use

Clean-up costs resulting from a material change in use or operation at any **insured site** from the use or operations at such **insured site** at the effective date of the **policy period**

f. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **property damage or environmental damage** occurs.

However, this exclusion does not apply to **clean-up costs** required by **environmental laws** governing the liability or responsibility of an insured to respond to a **pollution incident**.

g. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

(1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or

(2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

g. Nuclear Material

Any **bodily injury, property damage or environmental damage** based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

(1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;

(2) Entitled to indemnity from the United States of America or any agency thereof; or

(3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

h. Previously Reported Claim

Any **claim or suit** first made and reported to us during the **policy period** arising from the same, related or continuous **pollution incident** for which a **claim or suit** was reported under any policy of which this policy is a renewal or replacement or succeeds in time, whether or not such prior policy affords coverage for such **claim or suit**.

i. Prior Pollutants or Pollution Incident

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

(1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage** or **environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or

(2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage** or **environmental damage** during the policy period of a policy previously issued by us.

j. **Transportation**

Bodily injury, property damage, environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation**.

However this exclusion does not apply as respects **environmental damage** or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

k. **Underground Storage Tanks**

Bodily injury, property damage or **environmental damage** based upon or arising out of any **underground storage tank** which is: (i) known to a **responsible executive** as of the effective date of the **policy period**; (ii) Known to a **responsible executive** as of the date an **insured site** is added by Endorsement during the **policy period**; or (iii) installed during the **policy period**.

This exclusion does not apply to any **underground storage tank** which has been:

(1) Closed or abandoned in place in accordance with all applicable **environmental laws** prior to the effective date of the **policy period**;

(2) Removed prior to the effective date of the **policy period**; or

(3) Scheduled to this policy by Endorsement.

l. **Upgrades, improvements or installations**

Any costs, charges or expenses for upgrade, improvement of, or installation of any control to, any property or processes on, at, within or under an **insured site** even if such upgrade, improvement or installation is required by **environmental laws**.

m. **War**

Bodily injury, property damage or **environmental damage**, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

n. **Workers' Compensation and Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

o. **Your Product**

Bodily injury, property damage or **environmental damage** based upon or arising out of **your product** and occurring away from a **location** you own or occupy or a **non-owned site**.

However, this exclusion does not apply to **bodily injury, property damage** or **environmental damage** arising out of **your product** migrating from an **insured site**.

COVERAGE PART IV – PROFESSIONAL LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a **professional incident** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may at our discretion investigate any **professional incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART IV** in the payment of judgments, settlements and **legal and claims expense payments**.

- b. This insurance applies only if:

- (1) The **professional incident** takes place in the **coverage territory**;
- (2) The **professional incident** did not occur before the Retroactive Date shown in the Declarations or after the end of the **policy period**;
- (3) A **claim** for damages is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **professional incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART IV** for **claims** first made against the insured and reported to us during the **policy period**, than all such claims shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART IV** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the times such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

2. Exclusions

This insurance does not apply to damages, **claims** or **suits**:

a. Aircraft, Auto or Watercraft

Based upon or arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

b. Bankruptcy

Based upon or arising out of the bankruptcy or insolvency of an insured or of any other person, firm or organization.

c. Contractual Liability

Based upon or arising out of damages for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Construction and Demolition

Based upon or arising out of construction or demolition done by you or on your behalf.

e. Damage to Your Work

Based upon or arising out of damage to **your work** or any part of **your work**.

f. Dishonest or Fraudulent Act

Arising out of a dishonest, fraudulent, criminal or malicious act, error or omission, provided that the act, error or omission is committed by or at the direction of a **responsible executive**.

g. Discrimination

Based upon or arising out of discrimination by an insured on the basis of race, creed, national origin, disability, age, marital status, sex, or sexual orientation.

h. Disputed Fees

Arising from disputes over the insured's fees or charges or claims for the return of fees or charges.

i. Employer's Liability

Arising from **bodily injury** to:

(1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

j. Failure to Maintain

Arising out of the insured's requiring, obtaining, maintaining, advising or failing to require, obtain, maintain or advise of any bond, suretyship or any form of insurance.

k. Failure To Comply

Which results from or is directly or indirectly attributable to failure to comply with any applicable statute, regulation, ordinance, municipal code, administrative complaint, notice of violation, notice letter, administrative order, or instruction of any governmental agency or body, provided that failure to comply is a willful or deliberate act or omission of a **responsible executive**.

l. Fiduciary Liability

Based upon or arising out of:

(1) Any insured's involvement as a partner, officer, director, stockholder, employer or **employee** of an entity that is not a named insured; or

(2) Any insured's involvement as a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments, or any regulation or order issued pursuant thereto, or any other employee benefit plan.

m. Fines, Penalties and Assessments

Based upon or arising out of any fines, penalties or assessments or punitive, exemplary or multiplied damages imposed directly against any insured.

n. Insured versus Insured

Brought by or on behalf of one insured against any other insured.

o. Internal Expense

For costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured.

p. Nuclear Material

Based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

q. Owned Facilities

Arising from or in connection with any **location** which is or was at any time owned, operated, rented, or occupied by you or by any entity that:

- (1) Wholly or partly owns, operates, manages, or otherwise controls you; or
- (2) Is wholly or partly owned, operated, managed, or otherwise controlled by you.

r. Personal and Advertising Injury

Arising out of **personal and advertising injury**.

s. Previously Reported Claim

Arising from the same, related or continuous **professional incident** that was the subject of a **claim** reported under any policy of which this policy is a renewal or replacement or which it may succeed in time, whether or not such prior policy affords coverage for such **claim**.

t. Prior Professional Incident

Arising from any **professional incident** known to a **responsible executive** prior to the effective date of the **policy period**, if such **responsible executive** knew or could have reasonably foreseen that such **professional incident** could give rise to damages, **claims** or **suits** under this policy.

This exclusion does not apply if we have been notified, in writing, of such **professional incident** giving rise to such damages, **claims**, or **suits** during the policy period of a policy previously issued by us.

u. Your Product

Based upon or arising out of **your product**.

v. Warranties

Based upon or arising out of express warranties or guarantees. This exclusion shall not apply if liability would have resulted in the absence of such express warranties or guarantees.

w. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

SECTION II – WHO IS AN INSURED**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **executive officers** and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Any subsidiary, associated, affiliated, allied or limited liability company or corporation, including subsidiaries thereof, of which you have more than 50% ownership interest at the effective date of the **policy period** qualify as a Named Insured.
 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the **policy period**, whichever is earlier;
 - b. Coverage under this policy does not apply to **bodily injury, property damage or environmental damage** that occurred before you acquired or formed the organization;
 - c. Coverage under this policy does not apply to **personal and advertising injury** arising out of an offense committed before you acquired or formed the organization; and
 - d. Coverage under this policy does not apply to damages arising out of any act, error or omission or **professional incident** that took place before you acquired or formed the organization.
 4. Each of the following is also an insured:
 - a. Your **volunteer workers** only while performing duties related to the conduct of your business, or your **employees**, other than either your **executive officers** (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these **employees** or **volunteer workers** are insureds for:
 - (1) **Bodily injury or personal and advertising injury:**
 - (a) To you, to your partners or members (if you are a partnership or joint venture) or to your members (if you are a limited liability company);
 - (b) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) above; or
 - (c) Arising out of the providing or failure to provide professional health care services except incidental health care services provided by any physician, dentist, nurse, emergency medical technician or paramedic who is employed by you to provide such services and provided you are not engaged in the business of providing such services.
 - (2) **Property damage or environmental damage** to property owned, occupied or used by, rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your **employees, volunteer workers**, any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
 - b. Any person (other than your **employee**), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only with respect to liability arising out of the maintenance or use of that property and until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.
 - e. Any person or organization you agree to include as an insured in a written contract, written agreement or permit, but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of your operations, **your work**, equipment or premises leased or rented by you, or **your products** which are distributed or sold in the regular course of a vendor's business, however:

- (1) A vendor is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) For which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement except that which the vendor would have in the absence of the contract or agreement;
 - (b) Arising out of any express warranty unauthorized by you;
 - (c) Arising out of any physical or chemical change in the product made intentionally by the vendor;
 - (d) Arising out of repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from you, and then repackaged in the original container;
 - (e) Arising out of any failure to make inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - (f) Arising out of demonstration, installation servicing or repair operations, except such operations performed at the vendor's location in connection with the sale of the product; or
 - (g) Arising out of products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
- (2) A manager or lessor of premises, a lessor of leased equipment, or a mortgagee, assignee, or receiver is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) Arising out of any **occurrence** that takes place after the equipment lease expires or you cease to be a tenant; or
 - (b) Arising out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor of premises, or mortgagee, assignee, or receiver.
- f. Any person or organization that has at least a 50% controlling interest in you but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of their financial control of you.

SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. **Claims** made or **suits** brought;
 - c. Persons or organizations making **claims** or bringing **suits**;
 - d. **Pollution incidents**;
 - e. Acts, errors or omissions; or
 - f. Benefits included in your **employee benefit program**.
- 2. The General Aggregate Limit:
 - a. Is the most we will pay for the sum of:
 - (1) Damages and **emergency response expense** under **COVERAGE PART I**, except damages because of **bodily injury, property damage or environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**;
 - (2) Damages under **COVERAGE PART II**;
 - (3) Medical expense under **COVERAGE PART II**;

- (4) Damages, **clean-up costs**, **emergency response expense** and **legal and claims expense payments** under **COVERAGE PART III**; and
- (5) Damages and **legal and claims expense payments** under **COVERAGE PART IV**.
- b. Shall apply separately as respects all damages caused by:
 - (1) **Occurrences** covered under **COVERAGE PART I**, **Coverages A, B or D** arising out of operations at a **location** owned or occupied by you;
 - (2) **Occurrences** covered under **COVERAGE PART I**, **Coverage A or G** arising out of ongoing operations at a project where you are performing **your work**; or
 - (3) **Pollution incidents** covered under **COVERAGE PART III** arising out of operations at an **insured site**.
- 3. The Products-Completed Operations Aggregate Limit is the most we will pay for damages because of **bodily injury**, **property damage** or **environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**.
- 4. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit – COVERAGE PART I: Coverage A, B, C inclusive is the most we will pay for the sum of:
 - a. Damages under **COVERAGE PART I – Coverage A: General Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage B: Hostile Fire and Building Equipment Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage C: Products Pollution and Exposure Liability**
 because of all **bodily injury**, **property damage** and **environmental damage** arising out of any one **occurrence**.
- 5. Subject to Paragraph 4. above, the Damage To Premises Rented To You Limit is the most we will pay under **COVERAGE PART I - Coverage A** for damages because of **property damage** to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
- 6. Subject to Paragraph 2. above, the Each Occurrence Limit – COVERAGE PART I: Coverage D, E, F inclusive is the most we will pay for the sum of:
 - a. Damages under **COVERAGE PART I – Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage F: Pollution Liability during Transportation**
 because of all **bodily injury**, **property damage** and **environmental damage** arising out of any one **occurrence**.
- 7. Subject to Paragraph 2. above, the Each Occurrence Limit - Contractors Pollution Liability: Coverage G is the most we will pay for the sum of all damages under **COVERAGE PART I – Coverage G: Contractors Pollution Liability** because of **bodily injury**, **property damage** or **environmental damage** arising out of any one **occurrence**.
- 8. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay for the sum of all damages because of all **personal and advertising injury** sustained by any one person or organization.
- 9. Subject to Paragraph 2. above, the Employee Benefits Administration Liability Limit is the most we will pay for the sum of all damages sustained by any one **employee**, including damages sustained by such **employee's** dependents and beneficiaries. However, the amount paid shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the **employee benefit program**.
- 10. Subject to Paragraph 2. above, the Medical Expense Limit is the most we will pay under **COVERAGE PART II - Coverage C** for all medical expenses because of **bodily injury** sustained by any one person.
- 11. Subject to Paragraph 2. above, the Each Incident Limit – COVERAGE PART III: Site Pollution Legal Liability is the most we will pay for the sum of:
 - a. Damages and **legal and claims expense payments** under **COVERAGE PART III – Coverage A: Bodily Injury and Property Damage**;

- b. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage B: First and Third Party On-Site Clean-Up Costs**; and
- c. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage C: Off-Site Clean-Up Costs**

because of all **bodily injury, property damage and environmental damage** arising out of the same, related or continuous **pollution incident**.

12. Subject to Paragraph 2. above, the Each Incident Limit – **COVERAGE PART IV: Professional Liability** is the most we will pay under **COVERAGE PART IV** for damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
13. The Limits of Insurance apply in excess of the Deductible amounts shown in the Declarations. The deductible amount applies as follows:
 - a. As respects the Each Incident Limit: (i) to the sum of all damages, **clean-up costs, emergency response expense and legal and claims expense payments** because of **bodily injury, property damage or environmental damage** arising out of the same, related or continuous **pollution incident**; (ii) to the sum of all damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
 - b. As respects the Each Occurrence Limit, to the sum of all damages because of **bodily injury, property damage or environmental damage** as a result of one **occurrence** regardless of the number of persons or organizations who sustain damages because of that **occurrence**.

We may pay any part or the entire deductible amount to effect settlement of any **claim or suit** or to pay **clean-up costs or emergency response expense** which may be covered under this policy and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

Subject to **SECTION IV – Conditions**, Condition 16. **Multiple Coverage Sections**, if the same or related **occurrence, pollution incident or professional incident** results in coverage under more than one coverage part, only the highest deductible under all coverage parts will apply.

14. The Limits of Insurance apply to the entire **policy period**. If the **policy period** is extended after policy issuance for an additional period, the additional period will be deemed part of the last preceding period for the purposes of determining the Limits of Insurance.

SECTION IV – CONDITIONS

1. Assignment

This policy may not be assigned without our prior written consent. Assignment of interest under this policy shall not bind us until our consent is endorsed thereon.

2. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations.

3. Cancellation

- a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
- b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - (1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - (2) 90 days before the effective date of cancellation if we cancel for any other reason.
- c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
- d. Notice of cancellation will state the effective date of cancellation. The **policy period** will end on that date.
- e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund will be less than pro rata and will be subject to the minimum premium stated in the Declarations. The cancellation will be effective even if we have not made or offered a refund.

f. If notice is mailed, proof of mailing will be sufficient proof of notice.

4. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. Choice of Forum

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that any such litigation shall take place in the appropriate federal or state courts located in New York, New York and any arbitration or other form of dispute resolution shall take place in New York, New York.

6. Choice of Law

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of the State of New York shall apply without giving effect to any conflicts or choice of law principles. The terms and conditions of this policy shall not be deemed to constitute a contract of adhesion and shall not be construed in favor of or against any party hereto by reason of authorship or otherwise.

7. Currency

All reimbursement shall be made in United States currency at the rate of exchange prevailing on:

- a. The date of judgment if judgment is rendered;
- b. The date of settlement if settlement is agreed upon with our written consent;
- c. The date of payment of **clean-up costs** and **emergency response expense**; or
- d. The date **legal and claims expense payments** are paid.

Whichever is applicable.

8. Duties In The Event Of Occurrence, Offense, Pollution Incident, Professional Incident, Act, Error or Omission, Claim Or Suit

- a. Without limiting the requirements of any insuring agreement in this policy, you must see to it that we are notified as soon as practicable of an **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission which may result in a **claim**. To the extent possible, notice should include:

- (1) How, when and where the **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the **occurrence**, offense, **pollution incident**, **professional incident** or act error or omission.

- b. If a **claim** is made or **suit** is brought against any insured, you must:

- (1) Immediately record the specifics of the **claim** or **suit** and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the **claim** or **suit** as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **claim** or **suit**;

- (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the **claim** or defense against the **suit**; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. In the event **emergency response expenses** are incurred, you must provide, in writing, all available information relating to such **emergency response expenses** and the **pollution incident** giving rise thereto to us within fourteen (14) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- e. In the event of a **time-element pollution incident**, you must provide, in writing, all available information relating to the **pollution incident** giving rise thereto to us within thirty (30) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- f. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid and **emergency response expense**, without our consent.
- g. When any insured becomes legally obligated to pay **clean-up costs** to which this insurance applies, the insured must:
- (1) Submit, for our approval, all proposed work plans prior to submittal to any regulatory agency.
 - (2) Submit, for our approval, all bids and contracts for **clean-up costs** prior to execution or issuance.
 - (3) Forward progress submittals regarding **clean-up costs** at reasonable intervals and always prior to submittal to any regulatory agency that is authorized to review and approve such submittals.
- We shall have the right, but not the duty, to assume direct control of such **clean-up costs**. Any **clean-up costs** incurred by us shall be applied against the applicable Limit of Insurance and deductible.
- h. If we are prohibited under applicable law from investigating, defending or settling any such **claim** or **suit**, the insured shall, under our supervision, arrange for such investigation and defense thereof as is reasonably necessary, and subject to our prior authorization, shall effect such settlement thereof.

9. Economic and Trade Sanctions

In accordance with laws and regulation of the United States concerning economic and trade sanctions administered and enforced by The Office Of Foreign Assets Control (OFAC), this policy is void ab initio solely with respect to any term or condition of this policy that violates any laws or regulations of the United States concerning economic and trade sanctions.

10. Enforceability

If any part of this policy is deemed invalid or unenforceable, it shall not affect the validity or enforceability of any other part of this policy, which shall be enforced to the full extent permitted by law.

11. Extended Reporting Period

This condition applies only as respects **COVERAGE PART III - SITE POLLUTION INCIDENT LEGAL LIABILITY** and **COVERAGE PART IV – PROFESSIONAL LIABILITY**.

a. This condition applies only if:

- (1) The policy is cancelled or non-renewed for any reason except non-payment of the premium; or
- (2) We renew or replace this policy with **COVERAGE PART III - SITE POLLUTION LIABILITY** or **COVERAGE PART IV – PROFESSIONAL LIABILITY** that provides claims-made coverage for **bodily injury, property damage, environmental damage** or **professional incident** and that has a Retroactive Date later than the one shown in the Declarations or for an **insured site**; and
- (3) You do not purchase coverage to replace the coverage described in Paragraph **a.(2)**.

b. Automatic **Extended Reporting Period**

You shall automatically have a period of ninety (90) days following the effective date of such termination of coverage in which to provide written notice to us of **claims** first made and reported within the automatic extended reporting period.

A **claim** first made and reported within the automatic **extended reporting period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

No part of the automatic **extended reporting period** shall apply if the optional **extended reporting period** is purchased.

c. Extended Reporting Period Option:

(1) A **claim** first made and reported within forty eight (48) months after the end of the **policy period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

(2) The Extended Reporting Period Endorsement will not reinstate or increase the Limits of Insurance or extend the **policy period**.

d. We will issue the Endorsement indicating the **Extended Reporting Period Option has been accepted if the first Named Insured shown in the Declarations:**

(1) Makes a written request for it which we receive within 30 days after the end of the **policy period**; and

(2) Promptly pays the additional premium, which will not exceed 200% of the annual premium for the policy, when due.

The Extended Reporting Period Endorsement will not take effect unless the additional premium is paid when due. If that premium is paid when due, the Endorsement may not be cancelled. The additional premium will be fully earned when the Endorsement takes effect.

d. The Extended Reporting Period Endorsement will also amend **SECTION IV – CONDITIONS, Condition **17. Other Insurance** so the insurance provided will be excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis, whose policy period begins or continues after the Endorsement takes effect.**

12. Headings

The descriptions in the headings and sub-headings of this policy are inserted solely for convenience and do not constitute any part of the terms or conditions on this policy.

13. Independent Counsel

In the event the insured is entitled by law to select independent counsel to oversee our defense of a **claim** or **suit** at our expense, the attorney fees and all other litigation expenses we must pay to that counsel are limited to the rates we actually pay to counsel we retain in the ordinary course of business in the defense of similar **claims** or **suits** in the community where the **claim** or **suit** arose or is being defended.

Additionally, we may exercise the right to require that such counsel have certain minimum qualifications with respect to their competency including experience in defending **claims** or **suits** similar to the one pending against the insured and to require such counsel have errors and omissions insurance coverage. As respects any such counsel, the insured agrees that counsel will timely respond to our request for information regarding the **claims** or **suit**.

Furthermore, the insured may at any time, by the insured's written consent, freely and fully waive these rights to select independent counsel.

14. Inspections and Surveys

- a. We have the right to:
 - (1) Make inspections and surveys at any time;
 - (2) Give you reports on the conditions we find; and
 - (3) Recommend changes.
- b. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - (1) Are safe or healthful; or
 - (2) Comply with laws, regulations, codes or standards.

This applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

15. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a **suit** asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

16. Multiple Coverage Sections

No **claim** or **suit**, or part thereof, for which we have accepted coverage or coverage has been held to apply under one or more Coverages in this policy shall be covered under any other Coverages in this policy.

17. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this policy, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below. However, regardless of whether **b.** below applies, in the event that a written contract or agreement or permit requires this insurance to be primary for any person or organization you agreed to insure and such person or organization is an insured under this policy, we will not seek contributions from any such other insurance issued to such person or organization

b. Excess Insurance

- (1) This insurance is excess over:
 - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for **your work**;
 - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (iii) That is insurance purchased by you to cover your liability as a tenant for **property damage** to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, **autos** or watercraft to the extent not subject to Exclusion a. of **COVERAGE PART I – Coverage A – General Bodily Injury And Property Damage Liability**.

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.
 - (c) Any project specific primary insurance available to you covering liability for damages arising out of **your work**, for which you are an insured
- (2) When this insurance is excess, we will have no duty to defend the insured against any **suit** if any other insurer has a duty to defend the insured against that **suit**. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance;
 - (b) The total of all deductible and self-insured amounts under all that other insurance; and
 - (c) The deductible and self-insured amounts under this insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this policy.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts, excess of applicable deductible and self-insured amounts under all such insurance, until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

18. Premiums and Deductible

The first Named Insured shown in the Declarations:

- a. Is responsible for the payment of all premiums;
- b. Will be the payee for any return premiums we pay; and
- c. Is responsible for the payment of all deductibles.

19. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

20. Separation Of Insureds

Except with respect to the Limits of Insurance, any insured versus insured exclusions, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom **claim** is made or **suit** is brought.

21. Service of Suit

Subject to **SECTION IV – CONDITIONS**, Condition **5. Choice of Forum**, it is agreed that in the event of failure of us to pay any amount claimed to be due hereunder, we, at the request of the insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon us and that in any suit instituted against us upon this contract, we will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefore, we hereby designate the Superintendent, Commissioner, Director of Insurance, or other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

22. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. At our request, the insured will bring **suit** or transfer those rights to us and help us enforce them. However, if the insured has waived rights of recovery against any person or organization prior to a loss, we waive any right of recovery we may have under this policy against such person or organization.

23. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

24. When We Do Not Renew

If we decide not to renew, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than ninety (90) days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS**1. Administration** means:

- a. Providing information to **employees**, including their dependents and beneficiaries, with respect to eligibility for or the scope of **employee benefit programs**;
- b. Handling records in connection with the **employee benefit program**; or
- c. Effecting, continuing or terminating any **employee's** participation in any benefit included in the **employee benefit program**.

However, **administration** does not include handling payroll deductions.

2. Advertisement means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

3. Auto means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law where it is licensed or principally garaged.

However, **auto** does not include **mobile equipment**.

- 4. **Bodily injury** means physical injury, sickness, disease, building-related illness, mental anguish, shock or emotional distress, sustained by any person, including death resulting therefrom. **Bodily injury** shall also include medical monitoring costs.
- 5. **Claim** means a demand, notice or assertion of a legal right alleging liability or responsibility on the part of the insured.
- 6. **Clean-up costs** means reasonable and necessary costs, charges and expenses, including associated **legal and claims expense payments** incurred with our prior written consent, incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media but only:
 - a. To the extent required by **environmental laws** governing the liability or responsibilities of the insured to respond to a **pollution incident**;
 - b. In the absence of a. above, to the extent recommended in writing by an **environmental professional**; or
 - c. To the extent incurred by the government or any political subdivision within Definition 8.a. of **coverage territory**; or
 - d. To the extent incurred by parties other than you.

Clean-up costs also includes **restoration costs**

Clean-up costs does not include costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured unless such costs, charges or expenses are incurred with our prior written approval.

- 7. **Conveyance** means any **auto**, railcar, rolling stock, train, watercraft or aircraft. **Conveyance** does not include pipelines.
- 8. **Coverage territory** means:
 - a. The United States of America (including its territories and possessions), Puerto Rico, Canada and the Gulf of Mexico;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above;
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - (2) **Personal and advertising injury** offenses that take place through the Internet or similar electronic means of communication;
 provided the insured's responsibility to pay damages is determined in a **suit** on the merits, in the territory described in Paragraph a. above or in a settlement we agree to; or
 - d. All other parts of the world if the injury or damage arises out of **your product**, a **pollution incident** caused by **your work**, a **pollution incident** during **transportation** or a **pollution incident** on, at, under or migrating from a **non-owned site**, however:
 - (1) We assume no responsibility for furnishing certificates or evidence of insurance or bonds; and
 - (2) We will not be liable for any fine or penalty imposed on you for failing to comply with insurance laws.

- 9. **Emergency response expense** means reasonable and necessary costs, charges and expenses including **legal and claims expense payments** incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media.
- 10. **Employee** includes a **leased worker** and a **temporary worker**. As respects Employee Benefits Administration Liability, **employee** also means a person actively employed, formerly employed, on leave of absence or disabled, or retired.

11. **Employee benefits program** means a program providing some or all of the following benefits to **employees**, whether provided through a plan authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars or otherwise:
 - a. Group life insurance, group accident or health insurance, dental, vision and hearing plans, and flexible spending accounts, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to those **employees** who satisfy the plan's eligibility requirements;
 - b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to all **employees** who are eligible under the plan for such benefits;
 - c. Unemployment insurance, social security benefits, workers' compensation and disability benefits; and
 - d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies
12. **Environmental damage** means physical damage to land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater, giving rise to **clean-up costs** or **emergency response expense**.
13. **Environmental laws** means any federal, state, provincial, municipal or other local laws, including, but not limited to, statutes, rules, ordinances, guidance documents, regulations and all amendments thereto, including state voluntary cleanup or risk based corrective action guidance, and governmental, judicial or administrative orders and directives, that are applicable to a **pollution incident**.
14. **Environmental professional** means an individual approved and designated by us in writing who is duly certified or licensed in a recognized field of environmental science as required by a state board, a professional association, or both, who meet certain minimum qualifications and who maintain specified levels of errors and omissions insurance coverage acceptable to us. We shall consult with the insured in conjunction with the selection of the **environmental professional**.
15. **Executive officer** means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
16. **Extended reporting period** means the claims reporting provision described in **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**.
17. **Hostile fire** means one which becomes uncontrollable or breaks out from where it was intended to be.
18. **Impaired property** means tangible property, other than **your product** or **your work**, that cannot be used or is less useful because:
 - a. It incorporates **your product** or **your work** that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of **your product** or **your work** or your fulfilling the terms of the contract or agreement.
19. **Insured contract** means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises in excess of 30 consecutive days that indemnifies any person or organization for damage by fire, lightning or explosion to premises while rented to you or temporarily occupied by you with permission of the owner is not an **insured contract**;
 - b. A sidetrack agreement;
 - c. Any easement or license agreement;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for **bodily injury, property damage or environmental damage** to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement that indemnifies an architect, engineer or surveyor for injury or damage arising out of:

- (1) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
- (2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

- 20. Insured site** means a **location** listed on the Insured Site Schedule Endorsement, if any, attached to this policy.
- 21. Leased worker** means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. **Leased worker** does not include a **temporary worker**.
- 22. Legal and Claims Expense Payments** means:
- a. All expenses we incur that are directly allocated to a particular **claim or suit**.
 - b. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim or suit**, including actual loss of earnings up to \$500 a day because of time off from work.
 - c. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
 - d. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
 - e. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
 - f. Expenses incurred by the insured for first aid administered to others at the time of any accident, for **bodily injury** to which this insurance applies.
- 23. Loading or unloading** means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or **auto**;
 - b. While it is in or on an aircraft, watercraft or **auto**; or
 - c. While it is being moved from an aircraft, watercraft or **auto** to the place where it is finally delivered;
- But **loading or unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or **auto**.
- 24. Location** means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.
- 25. Misdelivery** means the delivery of any liquid product into a wrong receptacle or to a wrong address or the erroneous delivery of one liquid product for another.
- 26. Mobile equipment** means any of the following types of land vehicles, including any attached machinery or equipment:
- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b. Vehicles maintained for use solely on or next to premises you own or rent;
 - c. Vehicles that travel on crawler treads;
 - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted power cranes, shovels, loaders, diggers or drills or road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

- (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

- (2) Cherry pickers and similar devices used to raise or lower workers;

- f. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not **mobile equipment** but will be considered **autos**:

- (1) Equipment designed primarily for snow removal, road maintenance (but not construction or resurfacing) or street cleaning;

- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressor, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However **mobile equipment** does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered **autos**.

27. Mold matter means mold, mildew and fungi, whether or not such **mold matter** is living.

28. Natural resource damage means physical injury to or destruction of, as well as the assessment of such injury or destruction, including the resulting loss of value of land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)), any state, local or provincial government, any foreign government, any Native American tribe, or, if such resources are subject to a trust restriction on alienation, any member of a Native American tribe.

29. Non-owned site:

- a. Means any **location** which:

- (1) Was not at any time owned or occupied by any insured; and

- (2) Which is not specifically scheduled as an **insured site**.

- b. Does not include:

- (1) Any **location** which is not licensed by the appropriate federal, state or local authority to perform storage, disposal, processing or treatment of waste from your operations or **your work** in compliance with **environmental law**.

- (2) Any **location** or any part thereof that has been subject to a consent order or corrective action under **environmental law** or is listed or proposed to be listed on the Federal National Priorities list (NPL) prior to waste from your operations or **your work** being legally consigned for delivery or delivered for storage, disposal, processing or treatment at such **location**.

- (3) Any **location** of a purchaser or user of **your product**.

30. Nuclear material means source material, special nuclear material or byproduct material which have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

31. Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- 32. Personal and advertising injury** means injury, including consequential **bodily injury**, arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your **advertisement**;
 - g. Infringing upon another's copyright, trade dress or slogan in your **advertisement**.
- 33. Policy period** means the period of time stated in the Declarations. However, if the policy is cancelled in accordance with **SECTION IV – CONDITIONS**, Condition **3. Cancellation**, the **policy period** ends on the effective date of such cancellation.
- 34. Pollutants** means any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapor, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes. **Pollutants** includes electromagnetic fields, **mold matter** and legionella pneumophila.
- 35. Pollution incident** means:
- a. The discharge, dispersal, release, escape, migration, or seepage of **pollutants** on, in, into, or upon land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater; or
 - b. The presence of **mold matter**.
- Pollution incident** includes the illicit abandonment of **pollutants** at any **location** which is owned or occupied by you provided that such abandonment was committed by parties other than an insured and without the knowledge of a **responsible executive**.
- 36. Products - completed operations hazard:**
- a. Includes all **bodily injury**, **property damage** or **environmental damage** occurring away from a **location** you own or occupy and arising out of **your product** or **your work** except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, **your work** will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
 - b. Does not include **bodily injury**, **property damage** or **environmental damage** arising out of the transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the **loading or unloading** of that vehicle by any insured or the existence of tools, uninstalled equipment or abandoned or unused materials.

37. Professional incident means any act, error or omission in the providing or failure to provide **professional services** by or on behalf of the insured.

38. Professional services means those services performed for a fee by you or those acting on your behalf, including but not limited to, architect, engineer, consultant, inspector, technician and surveyor that you or those acting on your behalf are qualified to perform for others and are consistent with your corporate statements of professional qualifications.

39. Property damage means:

- a. Physical injury to or destruction of tangible property, including all resulting loss of use and diminished value of that property. All such loss of use and diminished value shall be deemed to occur at the time of the physical injury that caused it;
- b. Loss of use of tangible property that is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the **occurrence** or **pollution incident** that caused it; or
- c. **Natural resource damage.**

Property damage does not include **environmental damage**.

For the purpose of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CDROMS, tapes drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

40. Responsible executive means any officer, director, risk manager, partner, your manager of an **insured site**, your manager or supervisor responsible for environmental affairs, health and safety affairs, control or compliance or any other **employee** authorized by you to give or receive notice of an **occurrence** or **claim**.

41. Restoration costs means reasonable and necessary costs incurred by the insured with our prior written consent, to repair, restore or replace damaged real or personal property damaged during work performed in the course of incurring **clean-up costs** in order to restore the property to the condition it was in prior to being damaged during such work. **Restoration costs** shall not exceed the lesser of actual cash value of such real or personal property or the cost of repairing, restoring or replacing the damaged property with other property of like kind and quality. An adjustment for depreciation and physical condition shall be made in determining actual cash value. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment, except to the extent such betterments of the damaged property entail the use of materials which are environmentally preferable to those materials which comprised the damaged property. Such environmentally preferable material must be certified as such by an applicable independent certifying body, where such certification is available, or, in the absence of such certification, based on our judgment in our sole discretion.

42. Suit means a civil proceeding in which damages to which this insurance applies are alleged. **Suit** includes an arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent or any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

43. Temporary worker means a person who is furnished to you to substitute for a permanent worker on leave or to meet seasonal or short-term workload conditions.

44. Time-Element pollution incident means a **pollution incident** demonstrable as having first commenced at an identified time and place during the **policy period** provided:

- a. Such **pollution incident** does not originate or arise from, or relate to an **underground storage tank**; and
- b. Such **pollution incident** is not (i) heat, smoke or fumes from a **hostile fire** or (ii) solely with respect to **bodily injury**, smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests.

45. Transportation means the movement of goods, product, merchandise, supplies or waste in a **conveyance** by the insured or a third party carrier from the time of movement from the point of origin until delivery to the final destination. **Transportation** includes the movement of goods, products, merchandise, supplies or waste into, onto or from a **conveyance**.

46. Underground storage tank means any tank, including any piping and appurtenances connected to the tank, located on or under an owned or occupied **location** or an **insured site** that has at least ten (10) percent of its combined volume underground. **Underground storage tank** does not include:

- a. Septic tanks, sump pumps, or oil/water separators;
- b. A tank that is enclosed within a basement or cellar, if the tank is upon or above the surface of the floor; or
- c. Storm-water or wastewater collection systems.

47. Volunteer worker means a person who is not your **employee**, and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

48. Waste means all waste and includes materials to be recycled, reconditioned or reclaimed.

49. Your product:

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- a) You;
- b) Others trading under your name; or
- c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your product**; and

(2) The providing of or failure to provide warnings or instructions.

50. Your work:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your work**; and

(2) The providing of or failure to provide warnings or instructions.

IN WITNESS WHEREOF, the Insurer has caused this Policy to be executed and attested, but this Policy will not be valid unless countersigned by a duly authorized representative of the Insurer, to the extent required by applicable law.

Ironshore Specialty Insurance Company by:

A handwritten signature in blue ink, appearing to be "J.H.R.", written over a light blue rectangular background.

Secretary

A handwritten signature in blue ink, appearing to be "Shawn Kelly", written over a light blue rectangular background.

President

EXHIBIT B

General Information

Client::	Sequitur Energy Resources, LLC	Submitted By:	Paula Mercurio
Insurance Profile:	SEM Operating Company LLC	Date Submitted:	11/09/2018 4:59 PM
Contractor:	Vista Proppants and Logistics 3549 Monroe Hwy Granbury, TX 76049 United States	Owner Client Status:	Accepted
Review ID:	REV11918863843570	Review Date:	11/12/2018 10:40 AM

Insurance Requirements

Insured Name
Required
Status: **Accepted**

Insurance Type Description:

The Company Name listed as the insured party on the Certificate of Insurance must match one of the following:

- 1) The name of your company as registered in ISNetwork
- 2) Your Company's Legal Name as identified in question 1:2 of the General Management System Questionnaire (MSQ)
- 3) Your company's alternative trade name as identified in question 1:18 of the General Management System Questionnaire (MSQ)

Commercial General Liability: Per Occurrence

Required
Required Limit: 1,000,000
Verified Limit: 1,000,000
Expiration Date: 06/01/2019
Effective Date: 06/01/2018
Status: **Accepted**

Insurance Type Description:

A sufficient "Per Occurrence" limit must be evidenced under the Commercial General Liability policy, which provides coverage for third-party bodily injury and property damage claims that arise from an organization's operations.

The Commercial General Liability policy must be scheduled on an "Occurrence Basis" (vs. Claims-Made) and include coverage for Contractual Liability, Independent Contractors, Broad Form Property Damage, Separation of Insureds (Cross Liability), and Action Over Indemnity Claims.

Commercial General Liability: Personal & Advertising Injury

Required
Required Limit: 1,000,000
Verified Limit: 1,000,000
Expiration Date: 06/01/2019
Effective Date: 06/01/2018
Status: **Accepted**

Insurance Type Description:

A sufficient "Personal & Advertising Injury" limit must be evidenced under the Commercial General Liability policy, which provides coverage for third-party personal injury offenses that produce non-bodily injury harm (slander, libel, invasion of privacy, etc.) and advertising injury offenses related to the marketing of goods or services.

Coverage must be evidenced for both "personal" and "advertising" injury.

Commercial General Liability: General Aggregate

Required

Required Limit: 2,000,000

Verified Limit: 2,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted****Insurance Type Description:**

A sufficient "Aggregate" limit must be evidenced under the Commercial General Liability policy, which is the maximum amount the policy will pay during the listed policy period for claims that arise out of the organization's operations.

Commercial General Liability: Products/Completed Operations Aggregate

Required

Required Limit: 1,000,000

Verified Limit: 2,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted****Insurance Type Description:**

A sufficient "Products/Completed Operations Aggregate" limit must be evidenced under the Commercial General Liability policy, which provides coverage for third-party bodily injury and property damage claims that arise from an organization's products and completed operations.

Commercial General Liability: Sudden & Accidental Pollution

Required - PreQuestionnaire

Required Limit: 1,000,000

Verified Limit: 1,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted****Insurance Type Description:**

A sufficient "Sudden & Accidental Pollution" limit must be evidenced under the Commercial General Liability policy, which provides pollution coverage for third-party bodily injury and property damage claims deemed "Sudden & Accidental".

In lieu of evidencing pollution coverage under the Commercial General Liability policy, a stand-alone onshore (non-marine) pollution policy is acceptable.

Automobile Liability: Combined Single Limit (Each Accident)

Required

Required Limit: 1,000,000

Verified Limit: 2,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted****Insurance Type Description:**

A sufficient "Combined Single Limit" limit must be evidenced under the Automobile Liability policy, which provides coverage for third-party bodily injury and property damage claims that arise from the use of automobiles.

Covered Vehicles: Owned

Required - PreQuestionnaire

Status: **Accepted****Insurance Type Description:**

The Automobile Liability policy must evidence coverage for company owned vehicles.

In lieu of "Owned" vehicle coverage, "Any Auto" or "Scheduled" vehicle coverage are acceptable substitutes.

Automobile Liability: MCS-90 Endorsement
Required - PreQuestionnaire
Status: **Accepted**

Insurance Type Description:

The Automobile Liability policy must notate that an MCS-90 endorsement has been added, which is a surety bond showing that certain regulated motor carriers have the appropriate federally mandated coverage for any accidents where they become legally liable.

A stand-alone Transportation Pollution Liability policy or a broadened pollution endorsement to the automobile policy (i.e. CA 99 48) are not acceptable substitute coverages.

Automobile Liability: CA 99 48 Endorsement
Required - PreQuestionnaire
Status: **Accepted**

Insurance Type Description:

The Automobile Liability policy must notate that a CA 99 48 endorsement has been added, which broadens the scope of pollution coverage under the policy.

A stand-alone Transportation Pollution Liability policy or a similar endorsement that broadens the scope of pollution coverage under the automobile policy are acceptable substitute coverages. An MCS-90 endorsement is not an acceptable substitute coverage.

Umbrella / Excess Commercial General Liability: Per Occurrence

Required

Required Limit: 10,000,000

Verified Limit: 10,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient "Per Occurrence" limit must be evidenced for Umbrella / Excess Commercial General Liability, which will be applied towards satisfying the total amount of coverage required between the primary "Commercial General Liability: Per Occurrence" and Umbrella / Excess Liability policies.

If Umbrella / Excess Liability is not required, any policy limit evidenced will be applied towards satisfying the primary Commercial General Liability: Per Occurrence limit requirement.

Please note that if the insurance agent or broker procuring the Umbrella / Excess Liability policy is different than the one procuring the primary Commercial General Liability policy, the Certificate of Insurance displaying the Umbrella / Excess Liability policy must specifically notate that coverage is extended to the primary Commercial General Liability policy.

Umbrella / Excess Commercial General Liability: General Aggregate

Required

Required Limit: 10,000,000

Verified Limit: 10,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient "Aggregate" limit must be evidenced for Umbrella / Excess Commercial General Liability, which will be applied

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towards satisfying the total amount of coverage required between the primary Commercial General Liability: General Aggregate and Umbrella / Excess Liability policies.

If Umbrella / Excess Liability is not required, any policy limit evidenced will be applied towards satisfying the primary Commercial General Liability: Aggregate limit requirement.

Please note that if the insurance agent or broker procuring the Umbrella / Excess Liability policy is different than the one procuring the primary Commercial General Liability policy, the Certificate of Insurance displaying the Umbrella / Excess Liability policy must specifically notate that coverage is extended to the primary Commercial General Liability policy.

Umbrella / Excess Automobile Liability: Per Occurrence

Required

Required Limit: 10,000,000

Verified Limit: 14,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient "Per Occurrence" limit must be evidenced for Umbrella / Excess Automobile Liability, which will be applied towards satisfying the total amount of coverage required between the primary Automobile Liability: Combined Single Limit (Each Accident) and Umbrella / Excess Liability policies.

If Umbrella / Excess Liability is not required, any policy limit evidenced will be applied towards satisfying the primary Automobile Liability: Combined Single Limit (Each Accident) requirement.

Please note that if the insurance agent or broker procuring the Umbrella / Excess Liability policy is different than the one procuring the primary Automobile Liability policy, the Certificate of Insurance displaying the Umbrella / Excess Liability policy must specifically notate that coverage is extended to the primary Automobile Liability policy.

Umbrella / Excess Employer's Liability: Per Occurrence

Required - PreQuestionnaire

Required Limit: 10,000,000

Verified Limit: 14,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient "Per Occurrence" limit must be evidenced for Umbrella / Excess Employer's Liability, which will be applied towards satisfying the total amount of coverage required between the primary Employer's Liability and Umbrella / Excess Liability policies.

If Umbrella / Excess Liability is not required, any policy limit evidenced will be applied towards satisfying the primary Employer's Liability requirements.

Please note that if the insurance agent or broker procuring the Umbrella / Excess Liability policy is different than the one procuring the primary Employer's Liability policy, the Certificate of Insurance displaying the Umbrella / Excess Liability policy must specifically notate that coverage is extended to the primary Employer's Liability policy.

Workers' Compensation: Statutory

Required - PreQuestionnaire

Required Limit: Statutory

Verified Limit: Statutory

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

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Insurance Type Description:

A Statutory Workers' Compensation policy must be evidenced, which provides coverage for work-related injuries and deaths as outlined by state laws.

Employer's Liability: Each Accident

Required - PreQuestionnaire

Required Limit: 1,000,000

Verified Limit: 1,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient Employer's Liability: "Each Accident" limit must be evidenced under the Workers' Compensation policy, which provides coverage for work-related accidents and diseases not covered under a State's Workers' Compensation guidelines.

Employer's Liability - Disease: Each Employee

Required - PreQuestionnaire

Required Limit: 1,000,000

Verified Limit: 1,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient Employer's Liability - Disease: "Each Employee" limit must be evidenced under the Workers' Compensation policy, which provides coverage for work-related accidents and diseases not covered under a State's Workers' Compensation guidelines.

Employer's Liability - Disease: Policy Limit

Required - PreQuestionnaire

Required Limit: 1,000,000

Verified Limit: 1,000,000

Expiration Date: 06/01/2019

Effective Date: 06/01/2018

Status: **Accepted**

Insurance Type Description:

A sufficient Employer's Liability - Disease: "Policy Limit" must be evidenced under the Workers' Compensation policy, which provides coverage for work-related accidents and diseases not covered under a State's Workers' Compensation guidelines.

Additional Insured: Commercial General Liability

Required

Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Additional Insured coverage provision for the Commercial General Liability policy.

If coverage is not maintained on a Blanket basis, "SEM Operating Company LLC" must be named as the Additional Insured.

Please note the coverage cannot exclude the Additional Insured's "partial" or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole" negligence.

Additional Insured: Automobile Liability
Required
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Additional Insured coverage provision for the Automobile Liability policy.

If coverage is not maintained on a Blanket basis, "SEM Operating Company LLC" must be named as the Additional Insured.

Please note the coverage cannot exclude the Additional Insured's "partial" or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole" negligence.

Additional Insured: Umbrella / Excess Liability
Required
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Additional Insured coverage provision for the Umbrella / Excess Liability policy, or notate that the Umbrella / Excess Liability policy follows the Additional Insured provisions of the underlying primary policies (Follow Form).

If coverage is not maintained on a Blanket basis, "SEM Operating Company LLC" must be named as the Additional Insured.

Please note the coverage cannot exclude the Additional Insured's "partial" or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole" negligence.

Primary/Non-Contributory Clause

Insurance Type Description:

The Certificate of Insurance must evidence a Primary Non-Contributory coverage clause on the Commercial General Liability policy, which stipulates that your company's policy will respond to a claim before the Additional Insured's policy and will not seek contribution for any monetary amount paid out.

Please note this coverage must be specifically evidenced on the Certificate of Insurance. In addition, the coverage cannot exclude the Additional Insured's "partial" or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole" negligence.

Waiver of Subrogation: Commercial General Liability
Required
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Waiver of Subrogation coverage provision for the Commercial General Liability policy.

If coverage is not maintained on a Blanket basis, the Waiver of Subrogation must be listed in favor of "SEM Operating Company LLC".

Please note the coverage cannot exclude the Waiver of Subrogation recipient's "sole", "partial", or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole", "partial", or "contributory" negligence.

Waiver of Subrogation: Automobile Liability
Required
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Waiver of Subrogation coverage provision for the Automobile Liability policy.

If coverage is not maintained on a Blanket basis, the Waiver of Subrogation must be listed in favor of "SEM Operating Company LLC".

Please note the coverage cannot exclude the Waiver of Subrogation recipient's "sole", "partial", or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole", "partial", or "contributory" negligence.

Waiver of Subrogation: Umbrella / Excess Liability
Required
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Waiver of Subrogation coverage provision for the Umbrella / Excess Liability policy, or notate that the Umbrella / Excess Liability policy follows the Waiver of Subrogation provisions of the underlying primary policies (Follow Form).

If coverage is not maintained on a Blanket basis, the Waiver of Subrogation must be listed in favor of "SEM Operating Company LLC".

Please note the coverage cannot exclude the Waiver of Subrogation recipient's "sole", "partial", or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole", "partial", or "contributory" negligence.

Waiver of Subrogation: Workers' Compensation
Required - PreQuestionnaire
Status: **Accepted**

Insurance Type Description:

The Certificate of Insurance must evidence a Blanket Waiver of Subrogation coverage provision for the Workers' Compensation policy.

If coverage is not maintained on a Blanket basis, the Waiver of Subrogation must be listed in favor of "SEM Operating Company LLC".

Please note the coverage cannot exclude the Waiver of Subrogation recipient's "sole", "partial", or "contributory" negligence, nor can the coverage be restricted to the Insured's "sole", "partial", or "contributory" negligence.

Certificate Holder
Required
Status: **Accepted**

Insurance Type Description:
The Certificate Holder must cite:

SEM Operating Company LLC

Attn: MSA Department

Two Briarlake Plaza

2050 W. Sam Houston Pkwy. S., Suite 1850

Houston, TX 77042

Insurance Company Financial Size Rating
Required
Status: **Accepted**

Insurance Type Description:

The insurance companies providing the required policies must maintain a minimum financial size rating of VI with AM Best

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(<http://www.ambest.com>), which measures the maximum amount of liability that an insurance company is willing to assume (i.e. capacity).

Insurance Company Financial Strength Rating

Required

Status: **Accepted**

Insurance Type Description:

The insurance companies providing the required policies must maintain a minimum financial strength rating of A- with AM Best (<http://www.ambest.com>), which evaluates the company's ability to pay a claim.

Notice of Cancellation

Required

Status: **Accepted**

Insurance Type Description:

All required insurance policies must evidence that "SEM Operating Company LLC" will be sent a 30-day written notice of cancellation if the policies are cancelled or materially altered.

Policy Number

Required

Status: **Accepted**

Insurance Type Description:

A valid policy number must be listed for each required policy evidenced on the Certificate of Insurance. If a policy endorsement form is submitted, it must also list a corresponding policy number.

Binder policies will be accepted provided that the policy effective date was within the past 30 days.

Signature

Required

Status: **Accepted**

Insurance Type Description:

The submitted Certificate of Insurance must be signed by an empowered representative of the insurance agency that placed the coverage.

EXHIBIT 4

No. 19-003

MAALT, LP

Plaintiff,

vs.

SEQUITUR PERMIAN, LLC

Defendant.

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§
§

IN THE DISTRICT COURT

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

DECLARATION OF MATT MORRIS

On this day Matt Morris states under penalty of perjury as follows:

1. "My name is Matt Morris. I am over the age of 18 years, have never been convicted of a crime, and I am fully competent to make this declaration. I have personal knowledge of the facts stated in this declaration and they are true and correct."
2. "I am the President of Gus Bates Insurance and Investments ("Gus Bates"). I have been the President since May 2015. Before becoming President, I was employed by Gus Bates for over 13 years since graduating from college. I received a Bachelor of Business Administration degree in Finance and Leadership from Hardin-Simmons University in 2002, and a MBA from Texas Christian University in 2006. I have been involved in the placement and brokerage of insurance products the entire time."
3. "During the year 2018, Gus Bates served as an insurance broker for Vista Proppants and Logistics, LLC and its subsidiaries, including Maalt, LP ("Maalt")."
4. "Gus Bates placed insurance for Vista Proppants and Logistics, LLC for the policy year June 1, 2018 through June 1, 2019. The insurance placed for that policy year included:
 - General liability insurance through Ironshore Specialty Insurance Company

(“Ironshore”) that included policy limits of \$1 million for pollution liability that covered the rail facility located at 44485 W. Highway 67, Barnhart, Texas (the “Barnhart Facility”). The coverage provided for the Barnhart Facility included coverage for pollution events that occurred on site, which is known as pollution legal liability insurance. The policy included other types of pollution coverage as well. The Ironshore general liability insurance policy bore number 002357403. Attached as Exhibit A and incorporated are policy documents evidencing the policy number 002357403 and its coverage.

- Umbrella liability insurance through Ironshore that provided \$25 million of umbrella or excess coverage for the Barnhart Facility, including coverage for pollution events that occurred on site (pollution legal liability insurance coverage) and other pollution events. The Ironshore umbrella liability insurance policy bore number 002357503. Attached as Exhibit B and incorporated herein are policy documents evidencing the policy number 002357503 and its coverage.”

5. “Maalt was a named insured under both the Ironshore general liability and umbrella liability policies for the policy year June 1, 2018 through June 1, 2019. The Barnhart Facility was a covered site under both policies.”

6. “Attached as Exhibit C and incorporated herein is a copy of a Certificate of Liability Insurance (the “Certificate”) issued by Gus Bates to Sequitur Energy Resources LLC, an affiliate of Sequitur Permian, LLC. The Certificate reflects that both policy numbers 002357403 and 002357503 were issued, that Maalt was a named insured under both policies, and that there was combined pollution legal liability coverage in place in the

amount of \$11 million. The Certificate also reflected that Sequitur Energy Resources, LLC was an additional insured, if required by written contract, under all of the policies listed including the general liability policy and the umbrella policy. Since the Terminal Services Agreement dated August 6, 2018 between Maalt and Sequitur Permian, LLC required that, then Sequitur Permian, LLC was an additional insured."

7. "While the umbrella coverage actually in place was greater than that reflected in the Certificate, it is common in the insurance industry to prepare certificates of liability insurance reflecting lower amounts of coverage than is actually in place when the insured's contract with the certificate holder does not require the amount of coverage actually in place."

"Further, Affiant sayeth not."

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

DECLARATION PURSUANT TO TEXAS CIVIL PRACTICE & REMEDIES CODE § 132.001

My name is Matt Morris, my date of birth is October 09, 1979 and my address is 3221 Collinsworth Street, Fort Worth, Texas 76107, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Fort Worth, Tarrant County, Texas, on the 14 day of May, 2020.


Matt Morris

EXHIBIT A



AmWINS Brokerage of Texas, Inc.
 5910 North Central Expressway
 Suite 500
 Dallas, TX 75206
 amwins.com

POLICY PREMIUM AND SURPLUS LINES TAX SUMMARY

Attached to and forming part of Policy Number: 002357403

Named Insured:	Vista Proppants and Logistics LLC	Policy Number:	002357403
Coverage:	General Liability	Carrier:	Ironshore Specialty Insurance Co
Agency:	The Gus Bates Company	Policy Period:	06/01/2018 - 06/01/2019

Policy Premium:	\$661,121.00
Fees:	\$0.00
Surplus Lines Taxes:	\$33,056.05
Total:	\$694,177.05

SURPLUS LINES TAX CALCULATION:

Description	Taxable Premium	Taxable Fee	Tax Basis	Rate	Tax
Texas					
Surplus Lines Tax	\$661,121.00	\$0.00	\$661,121.00	4.85%	\$32,064.37
Stamping Fee	\$661,121.00	\$0.00	\$661,121.00	0.15%	\$991.68
Total					\$33,056.05
Total Surplus Lines Taxes and Fees					\$33,056.05

SURPLUS LINES DISCLOSURE

Texas

This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as surplus line coverage under the Texas insurance statutes. The Texas Department of Insurance does not audit the finances or review the solvency of the surplus lines insurer providing this coverage, and the insurer is not a member of the property and casualty insurance guaranty association created under Chapter 462 Insurance Code. Chapter 225, Insurance Code, requires payment of a 4.85 percent tax on gross premium.

Surplus Lines Licensee Name: AmWINS Brokerage of Texas, Inc.

IMPORTANT NOTICE

To obtain information or make a complaint:

You may contact the Texas Department of Insurance to obtain information on companies, coverages, rights or complaints at

1-800-252-3439

You may write the Texas Department of Insurance:

Post Office Box 149104

Austin, Texas 78714-9104

Fax: 512-490-1007

Web: <http://www.tdi.texas.gov>

E-mail: ConsumerProtection@tdi.state.tx.us

PREMIUM OR CLAIM DISPUTES:

Should you have a dispute concerning your premium or about a claim you should contact the agent first. If the dispute is not resolved, you may contact the Texas Department of Insurance.

ATTACH THIS NOTICE TO YOUR POLICY:

This notice is for information only and does not become a part or condition of the attached document.

AVISO IMPORTANTE

Para obtener informacion o para someter una queja:

Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca de companias, coberturas, derechos o quejas al:

1-800-252-3439

Puede escribir al Departamento de Seguros de Texas:

Post Office Box 149104

Austin, Texas 78714-9104

Fax: 512-490-1007

Web: <http://www.tdi.texas.gov>

E-mail: ConsumerProtection@tdi.state.tx.us

DISPUTAS SOBRE PRIMAS O RECLAMOS:

Si tiene una disputa concerniente a su prima o a un reclamo, debe comunicarse con el agente primero. Si no se resuelve la disputa, puede entonces comunicarse con el departamento (TDI).

UNA ESTA AVISO A SU POLIZA:

Este aviso es solo para proposito de informacion y no se convierte en parte o condicion del documento adjunto.



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as surplus line coverage under the Texas insurance statutes. The Texas Department of Insurance does not audit the finances or review the solvency of the surplus lines insurer providing this coverage, and the insurer is not a member of the property and casualty insurance guaranty association created under Chapter 462, Insurance Code. Chapter 225, Insurance Code, requires payment of a 4.85 percent tax on gross premium.

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC) DECLARATIONS

Policy Number:		002357403		Renewal of Policy Number:		002357402	
Item 1.	Named Insured & Mailing Address:		Vista Proppants and Logistics, LLC 4413 Carey Street Fort Worth, TX 76119				
Item 2.	Broker & Mailing Address:		AmWins Brokerage of Texas, Inc. (Dallas) 5910 North Central Expressway SUITE NO 500 Dallas, TX 75206				
Item 3.	Policy Period:	Effective:	June 01, 2018		Expiration:	June 01, 2019	
	12:01 a.m. time at your mailing address shown above.						
Item 4.	Limits Of Insurance And Deductible:					LIMIT	DEDUCTIBLE
	Each Occurrence Limit – COVERAGE PART I: Coverage A, B, C Inclusive					\$1,000,000	\$0
	Coverage A: General Bodily Injury and Property Damage Liability						
	Coverage B: Hostile Fire and Building Equipment Liability						
	Coverage C: Products Pollution and Exposure Liability						
	Each Occurrence Limit – COVERAGE PART I: Coverage D, E, F Inclusive					\$1,000,000	\$25,000
	Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability						
	Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability						
	Coverage F: Pollution Liability during Transportation						
	Each Occurrence Limit - Contractors Pollution Liability: Coverage G					\$1,000,000	\$25,000
	Damage to Premises Rented to You Limit: Any one premises					\$500,000	N/A
	Personal and Advertising Injury Limit: Any one person or organization					\$1,000,000	N/A

Employee Benefits Administration Liability Limit: Any one employee	\$1,000,000	N/A
Medical Expense Limit: Any one person	\$25,000	N/A
Each Incident Limit - COVERAGE PART III: Site Pollution Incident Legal Liability	\$1,000,000	\$25,000
Each Incident Limit - COVERAGE PART IV: Professional Liability	Not Purchased	N/A
GENERAL AGGREGATE LIMIT	\$2,000,000	N/A
PRODUCTS COMPLETED OPERATIONS AGGREGATE LIMIT	\$2,000,000	N/A

Item 5. Form of Business:

☐ Individual
 ☐ Partnership
 ☐ Joint Venture
 ☐ Trust
 ☒ Limited Liability Company
☐ Organization, Including a Corporation (But not including a Partnership, Joint Venture, or Limited Liability Company)

Item 6.

Policy Premium: \$661,121.00

Premium for Acts of Terrorism (TRIA): Not Purchased

Total Premium (Including TRIA): \$661,121.00

Compliance with all surplus lines placement requirements, including stamping the Policy and collection and payment of surplus lines taxes, is the responsibility of the broker.

Item 7. Minimum Earned Premium: \$165,280.25

Item 8. Site Pollution Incident Legal Liability Retroactive Date: See INSURED SITE SCHEDULE (If Applicable)

Item 9. Professional Liability Retroactive Date: N/A

Item 10. Policy Coverage Form: IE.COV.EPIC.001 (0513) Environmental Protection Insurance Coverage Package
Endorsements: See SCHEDULE OF ENDORSEMENTS

Date: June 14, 2018
 MO/DAY/YR.



Authorized Representative

Named Insured: Vista Proppants and Logistics, LLC
Policy Number: 002357403
Effective 12:01 AM: June 01, 2018

SCHEDULE OF ENDORSEMENTS

Endorsement number - Form Number – Edition Date – Form Name

1. IE.PN.ALL.002 (0316) Notice of Claim
2. IE.END.ALL.002 (0409) Terrorism Exclusion
3. IE.END.ALL.001 (0216) Named Insured
4. IE.END.EPIC.003 (0409) Insured Site Schedule
5. IE.END.EPIC.010 (0812) Designated Entity Exclusion
6. IE.END.EPIC.012 (1014) Specified Additional Insured
7. IE.END.EPIC.019 (0709) Notice of Cancellation Designated Entity
8. MANUSCRIPT: Premium Reconciliation Condition Endorsement

TEXAS NOTICE

IMPORTANT NOTICE	AVISO IMPORTANTE
<p>To obtain information or make a complaint: You may call Liberty Mutual Group's toll-free telephone number for information or to make a complaint at:</p>	<p>Para obtener informacion o para someter una queja: Usted puede llamar al numero de telefono gratis de Liberty Mutual Group's para informacion o para someter una queja al:</p>
<p>1-800-344-0197</p>	<p>1-800-344-0197</p>
<p>You may also write to Liberty Mutual Group at: Presidential Service Team Liberty Mutual Group 175 Berkeley St. MS 10B Boston, MA 02116 PresidentialSvcTeam@LibertyMutual.com</p>	<p>Usted tambien puede escribir a Liberty Mutual Group: Presidential Service Team Liberty Mutual Group 175 Berkeley St. MS 10B Boston, MA 02116 PresidentialSvcTeam@LibertyMutual.com</p>
<p>You may contact the Texas Department of Insurance to obtain information on companies, coverages, rights or complaints at: 1-800-252-3439</p>	<p>Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca de companias, coberturas, derechos o quejas al: 1-800-252-3439</p>
<p>You may write the Texas Department of Insurance: Mail: PO Box 149091 (mail code 111-1A) Austin, TX 78714-9091 FAX # (512) 490-1007 Web: http://www.tdi.texas.gov/consumer/complfrm.html E-mail: consumerprotection@tdi.texas.gov In person: 333 Guadalupe, Austin, Texas 78701</p>	<p>Puede escribir al Departamento de Seguros de Texas: Mail: PO Box 149091 (mail code 111-1A) Austin, TX 78714-9091 FAX # (512) 490-1007 Web: http://www.tdi.texas.gov/consumer/complfrm.html E-mail: consumerprotection@tdi.texas.gov In person: 333 Guadalupe, Austin, Texas 78701</p>
<p>PREMIUM OR CLAIM DISPUTES: Should you have a dispute concerning your premium or about a claim you should contact the (agent) (company) (agent or the company) first. If the dispute is not resolved, you may contact the Texas Department of Insurance.</p>	<p>DISPUTAS SOBRE PRIMAS O RECLAMOS: Si tiene una disputa concerniente a su prima o a un reclamo, debe comunicarse con el (agente) (la compania) (agente o la compania) primero. Si no se resuelve la disputa, puede entonces comunicarse con el Departamento de Seguros de Texas.</p>
<p>ATTACH THIS NOTICE TO YOUR POLICY: This notice is for information only and does not become a part or condition of the attached document.</p>	<p>UNA ESTE AVISO A SU POLIZA: Este aviso es solo para proposito de informacion y no se convierte en parte o condicion del documento adjunto.</p>



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 1

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CLAIM AND NOTICE REPORTING

Subject to the claims and notice reporting provisions within the policy, claim and notice reports may be given in writing via:

POSTAL SERVICE to:

Ironshore Environmental Claims CSO
28 Liberty Street, 5th Floor
New York, NY 10005

E-MAIL to:

Ironenviroclaims@ironshore.com

or

USClaims@ironshore.com

FAX to:

646-826-6601

By phone via:

24 Hour Claims Phone Number:

(888) 292-0249

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.

Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 2

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TERRORISM EXCLUSION

This endorsement modifies insurance provided under the following:

SITE POLLUTION INCIDENT LEGAL LIABILITY SELECT (SPILLS)
CONTRACTORS ENVIRONMENTAL LEGAL LIABILITY (CELL)
ENVIRONMENTAL PROTECTIVE INSURANCE COVERAGE PACKAGE (EPIC PAC)
ENVIRONMENTAL EXCESS LIABILITY

It is hereby agreed that the policy is amended as follows

1. The following Exclusion is added:

This insurance does not apply to:

TERRORISM

Any injury or damage arising, directly or indirectly, out of **terrorism**

2. For the purposes of this endorsement, the following definitions are added:

Any injury or damage means any injury or damage covered under the policy and includes but is not limited to **bodily injury, property damage, environmental damage, remediation expense, emergency response expense, personal and advertising injury**, negligent acts, errors or omissions or **professional incident** as may be defined in the policy.

Terrorism means a violent act or an act that is dangerous to human life, property or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion. Terrorism includes an act certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018
Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 3

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NAMED INSURED

This endorsement modifies insurance provided under the following:

SITE POLLUTION INCIDENT LEGAL LIABILITY SELECT (SPILLS)
CONTRACTORS ENVIRONMENTAL LEGAL LIABILITY (CELL)
ENVIRONMENTAL PROTECTIVE INSURANCE COVERAGE PACKAGE (EPIC PAC)
ENVIRONMENTAL EXCESS LIABILITY (EEL)

It is hereby agreed that the policy to which this Endorsement is attached is amended as follows:

The following are added to **Item 1.** of the Declarations as Named Insureds:

1. Lonestar Prospects Holding Company LLC
2. GHMR LLC

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.

Authorized Representative

June 14, 2018
Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 4

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INSURED SITE SCHEDULE

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

SECTION I – COVERAGES, COVERAGE PART III: SITE POLLUTION, Coverage A - Bodily Injury and Property Damage Liability, Coverage B - First and Third Party On-Site Clean-Up Costs and Coverage C – Off-Site Clean-Up Costs apply when identified by an “X” in the applicable Coverage section subject to the corresponding retroactive date:

<u>INSURED SITE(S)</u>	<u>COVERAGE A</u>	<u>COVERAGE B</u>	<u>COVERAGE C</u>	<u>RETROACTIVE DATE</u>
1. 2700 Monroe Highway, Cresson, TX	X	X	X	4/8/2015
2. 3549 Monroe Highway, Granbury, TX	X	X	X	4/8/2015
3. 6401 Monroe Hwy, Cresson, TX	X	X	X	5/9/2017
4. 6415 Monroe Hwy, Cresson, TX	X	X	X	5/9/2017
5. 7200 Friendship Rd, Tolar, TX	X	X	X	4/12/2017
6. 10422 County Road 404, Kermit, TX	X	X	X	4/19/2017
7. 1415 South business IH 35, Dilley, TX	X	X	X	6/1/2017
8. 1569 N Urlas, Ft. Stockton, TX	X	X	X	6/1/2017
9. 2000 South Main Street, Ft. Worth, TX	X	X	X	6/1/2017
10. 2301 Terminal Road, Ft. Worth, TX	X	X	X	6/1/2017

11. 2903 Highway 17, Pecos, TX	X	X	X	6/1/2017
12. 3703 CR 1018, Cleburne, TX	X	X	X	6/1/2017
13. 4413 Carey Street, Ft. Worth, TX	X	X	X	6/1/2017
14. 44485 W. Hwy 67, Barnhart, TX	X	X	X	6/1/2017
15. 4800 Christoval Road, San Angelo, TX	X	X	X	6/1/2017
16. 48359 S. CR 182, Gage, OK	X	X	X	6/1/2017
17. 814 S. Railroad St, Big Lake, TX	X	X	X	6/1/2017
18. 869 CR 108, Sweetwater, TX	X	X	X	6/1/2017
19. 900 W. Sutherland, Altus, OK	X	X	X	6/1/2017
20. Rt. 1, 1801 N 16 th , Enid, OK	X	X	X	6/1/2017
21. 1045 CR 284, Gonzales, TX	X	X	X	6/1/2018
22. 18 CR 408, Pecos, TX	X	X	X	6/1/2017

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 5

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED ENTITY EXCLUSION

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

It is hereby agreed that the policy to which this Endorsement is attached is amended as follows:

SCHEDULE

Designated Entity:	Maalt Specialized Bulk, LLC
---------------------------	-----------------------------

This insurance does not apply as respects the designated entity in the Schedule of this endorsement as an insured.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.

Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 6

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SPECIFIED ADDITIONAL INSURED(S) PRIMARY AND NON-CONTRIBUTORY

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

It is hereby agreed that the policy to which this Endorsement is attached is amended as follows:

SCHEDULE

Name of Additional Insured Person(s) Or Organization(s)
Ares Capital Corporation 245 Park Avenue, 44 th Floor New York, NY 10167

A. **SECTION II – WHO IS AN INSURED**, Paragraph **4.e.** is amended to specify the entity indicated in the Schedule above as:

- e. Any person or organization you agree to include as an insured in a written contract, written agreement or permit, but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of your operations, **your work**, equipment or premises leased or rented by you, or **your products** which are distributed or sold in the regular course of a vendor's business, however:

- (1) A vendor is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
- (a) For which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement except that which the vendor would have in the absence of the contract or agreement;
 - (b) Arising out of any express warranty unauthorized by you;
 - (c) Arising out of any physical or chemical change in the product made intentionally by the vendor;
 - (d) Arising out of repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from you, and then repackaged in the original container;

- (e) Arising out of any failure to make inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - (f) Arising out of demonstration, installation servicing or repair operations, except such operations performed at the vendor's location in connection with the sale of the product; or
 - (g) Arising out of products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
- (2) A manager or lessor of premises, a lessor of leased equipment, or a mortgagee, assignee, or receiver is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
- (a) Arising out of any **occurrence** that takes place after the equipment lease expires or you cease to be a tenant; or
 - (b) Arising out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor of premises, or mortgagee, assignee, or receiver.
- B. **SECTION IV – CONDITIONS, Condition 17. Other Insurance**, Paragraph a. is amended to specify the entity indicated in the Schedule above as a person or organization you agreed to insure and we will not seek contributions from any such other insurance issued to such person or organization.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 7

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NOTICE OF CANCELLATION – DESIGNATED ENTITY

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

It is hereby agreed that the policy to which this endorsement is attached is amended as follows:

SCHEDULE

Name of Designated Person(s) or Organization(s)
Trinity Industries Leasing Company, its subsidiaries and assignees 2525 North Stemmons Freeway Dallas, TX 75207
Element Rail, LLC, its Subsidiaries and assignees PO Box 621 Toronto, ON M5J 2S1 CANADA
Ares Capital Corporation 245 Park Avenue, 44thFloor New York, NY 10167

SECTION IV – CONDITIONS, Paragraph 3. Cancellation is amended to include the following:

If this policy is cancelled by us for any reason other than nonpayment of premium or at the request of the first Named Insured, we will mail or deliver written notice of cancellation at least 30 days before the effective date of the cancellation to the designated person(s) or organization(s) shown in the schedule above.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 8

Policy Number: 002357403

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PREMIUM RECONCILIATION CONDITION ENDORSEMENT

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

It is hereby agreed that the policy to which this Endorsement is attached is amended as follows:

SECTION IV – CONDITIONS is amended to include the following:

Premium Reconciliation

- a. The Policy Premium shown in the Declarations is a minimum and deposit premium.
- b. If at the end of the premium reconciliation period of 5/1/2018 to 4/30/2019 (or any lesser period of time due to policy cancellation), the gross revenue for the reconciliation period shows gross revenue in excess of 430,000,000 (or any prorated amount due to policy cancellation), we will compute additional earned premium for the reconciliation period as follows:
 - \$1.65 per \$1,000 in revenue in excess of \$430,000,000 and less than \$500,000,000 in revenue.
 - \$1.50 per \$1,000 in revenue for \$500,000,000 or more in revenue.
- c. The first Named Insured must keep records of the information we need for premium reconciliation, and send us copies at such times as we may request. The information utilized to calculate the additional earned premium will be Monthly Income Statement.

- d. We will endorse the policy using a Premium Reconciliation – Final endorsement if additional premium is due. The due date for the additional premium is the date shown as the due date on the bill.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Insured Name: Vista Proppants and Logistics, LLC
Policy Number: 002357403

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

TABLE OF CONTENTS

SECTION I – COVERAGES.....	PAGE
COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY.....	2
COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions.....	2
Coverage A: General Bodily Injury and Property Damage Liability.....	2
Coverage B: Hostile Fire and Building Equipment Liability.....	4
Coverage C: Products Pollution and Exposure Liability.....	5
Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability.....	5
Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability.....	6
Coverage F: Pollution Liability during Transportation.....	7
Coverage G: Contractors Pollution Liability.....	8
COVERAGE PART I – Common Insuring Agreement.....	9
COVERAGE PART I – Supplementary Payments.....	10
COVERAGE PART I – Common Exclusions.....	11
COVERAGE PART II: MISCELLANEOUS COVERAGES.....	14
Coverage A: Personal and Advertising Injury Liability.....	14
Coverage B: Employee Benefits Administration Liability.....	16
Coverage C: Medical Payments.....	17
COVERAGE PART II – Supplementary Payments.....	18
COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY.....	18
Coverage A: Bodily Injury and Property Damage Liability.....	18
Coverage B: First and Third Party On-Site Clean-Up Costs.....	19
Coverage C: Off-Site Clean-Up Costs.....	20
COVERAGE PART III – Common Exclusions.....	21
COVERAGE PART IV – PROFESSIONAL LIABILITY.....	23
SECTION II – WHO IS AN INSURED.....	26
SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE.....	28
SECTION IV – CONDITIONS.....	30
SECTION V – DEFINITIONS.....	36

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

COVERAGE FORM

Various provisions in this policy restrict coverage. Please read the entire policy carefully to determine rights, duties and what is and is not covered.

COVERAGE PART III – SITE POLLUTION INCIDENT LEGAL LIABILITY and **COVERAGE PART IV – PROFESSIONAL LIABILITY** of this policy provide claims-made coverage.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this Policy. The words “we”, “us” and “our” refer to the Company providing this insurance.

The word “insured” means any person or organization qualifying as such under **SECTION II – WHO IS AN INSURED**.

Defined terms, other than headings, appear in bold face type. Refer to **SECTION V - DEFINITIONS**.

SECTION I – COVERAGES

COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY

COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions

Coverage A: General Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **loading or unloading**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is not being used to carry persons or property for a charge;
- (3) An aircraft hired or chartered by or loaned to an insured with a paid crew;
- (4) Parking an **auto** on, or on the ways next to, premises you own or rent, provided the **auto** is not owned by or rented or loaned to you or the insured;

- (5) Liability assumed under any **insured contract** for the ownership, maintenance or use of aircraft or watercraft; or
- (6) **Bodily injury** or **property damage** arising out of the operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of **mobile equipment** if it were not subject to a compulsory or financial responsibility law where it is licensed or principally garaged or the operation of any of the machinery or equipment listed in Paragraph **f. (2)** or **f. (3)** of the definition of **mobile equipment**.

b. Asbestos and Lead

- (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or
- (2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

c. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does to apply to liability for damages because of **bodily injury**.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

d. Employment - Related Practices

Bodily injury to:

- (1) A person arising out of any refusal to employ that person, termination of that person's employment or employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of the person as a consequence of **bodily injury** to that person at whom any of the employment-related practices described in Paragraphs **(1)** above is directed.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

e. Liquor Liability

Bodily injury or **property damage** for which any insured may be held liable by reason of causing or contributing to the intoxication of any person, the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured or providing or failing to provide transportation with respect to any person that may be under the influence of alcohol if the **occurrence** which caused the **bodily injury** or **property damage**, involved that which is described in the Paragraph above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

f. Mobile Equipment

Bodily injury or **property damage** arising out of the transportation of **mobile equipment** by an **auto** owned or operated by or rented or loaned to any insured or the use of **mobile equipment** in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition or stunting activity.

g. Personal And Advertising Injury

Bodily injury arising out of **personal and advertising injury**.

h. Pollution

(1) **Bodily injury** or **property damage** caused by a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur **clean-up costs**; or

(b) **Claim** or **suit** by or on behalf of a governmental authority for damages because of **clean-up costs**.

i. Recording And Distribution Of Material Or Information In Violation Of Law

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Coverage B: Hostile Fire and Building Equipment Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

a. **Bodily injury** sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; and

b. **Bodily injury** or **property damage** arising out of heat, smoke or fumes from a **hostile fire**

But only if:

(1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and

(2) The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

b. Asbestos and Lead

(1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or

(2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

Coverage C: Products Pollution and Exposure Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

- a. **Bodily injury, property damage or environmental damage** arising out of a **pollution incident** caused by **your product**, and included in the **products-completed operations hazard**; or
- b. **Bodily injury or property damage** arising out of the ingestion, inhalation or absorption of, contact with, or exposure to, any fumes, dust, particles, vapors, liquids or other substances that are or originate from **your product**, and included in the **products-completed operations hazard**.

But only if:

- (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

- a. **Asbestos**
 - (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos in any form; or
 - (2) **Property damage** arising out of the presence of, or exposure to, asbestos in any form.
 - (3) **Environmental damage** arising from asbestos or asbestos containing materials in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.
- b. **Product Disposal**
Bodily injury, property damage or environmental damage arising out of the disposal of **your product**.
- c. **Products as Waste**
Environmental damage arising out of **your product** which is **waste**.
- d. **Transportation**
Bodily injury, property damage or environmental damage arising during **transportation**.

Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies arising out of a **time-element pollution incident** on, at, under or migrating from any **location** which is owned or occupied by you and which is not specifically scheduled as an **insured site** but only if:

- a. The **bodily injury or property damage** is caused by an **occurrence** that takes place in the **coverage territory**;
- b. The **bodily injury or property damage** takes place during the **policy period**;
- c. The insured discovers the **pollution incident** within ten (10) days of commencement of the **pollution incident**; and
- d. The **pollution incident** is reported to us in writing within thirty (30) days of commencement of the **pollution incident**.

2. Exclusions

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Page 5 of 44

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury or **property damage** that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest non-compliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Transportation

Bodily injury or **property damage** arising during **transportation**.

Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from any **non-owned site** but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury, **property damage** or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such non-compliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Prior Pollutants or Pollution Incident

Bodily injury or **property damage** arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury** or **property damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury** or **property damage** during the policy period of a policy previously issued by us.

d. Transportation

Bodily injury or **property damage** arising during **transportation**.

Coverage F: Pollution Liability during Transportation

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:
 - (1) **Bodily injury, property damage** or **environmental damage** arising out of a **pollution incident** during **transportation**; or
 - (2) **Bodily injury, property damage** or **environmental damage** arising out of **misdelivery** during **transportation**;
 But only if:
 - (a) The **bodily injury, property damage** or **environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (b) The **bodily injury, property damage** or **environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** during **transportation** or **misdelivery** during **transportation** but only if:
 - (1) The **pollution incident** or **misdelivery** first commenced during the **policy period**;
 - (2) The **pollution incident** or **misdelivery** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident** or **misdelivery**; and
 - (4) The **pollution incident** or **misdelivery** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident** or **misdelivery**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Damage to Conveyance

Property damage to any **conveyance** utilized during **transportation**. This exclusion does not apply to **claims** made by third-party carriers for such **property damage** arising from the insured's negligence.

c. Insured Site Transportation

Environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

d. Noncompliance

Bodily injury, property damage or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint,

notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement..

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

e. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

Coverage G: Contractors Pollution Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury, property damage or environmental damage** to which this insurance applies arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **pollution incident** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (4) The **pollution incident** and related **emergency response expenses** are reported to us within fourteen (14) days of commencement of the **pollution incident**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Disposal Site

Bodily injury, property damage or environmental damage arising out of a **pollution incident** on, at, under or migrating from any transfer, storage, disposal, landfill, treatment or consolidation **location** beyond the boundary of a job site where **your work** is performed.

c. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

d. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** resulting from **your work**, known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Amendment Endorsement attached to this policy;
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

e. Transportation

Bodily injury, property damage or environmental damage arising during **transportation**.

COVERAGE PART I – Common Insuring Agreement

The following insuring agreements apply to **Coverages A** through **G** inclusive:

1. We will have the right and duty to defend the insured against any **suit** seeking damages for **bodily injury, property damage or environmental damage** to which any of **Coverages A** through **G** applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which any of those coverages do not apply. We may, at our discretion, investigate any **occurrence** and settle any **claim** or **suit** that may result. But:
 - a. The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**;
 - b. Our right and duty to defend ends when we have used up the applicable limits of insurance in the payment of judgments, settlements, **clean-up costs** or **emergency response expense** under the applicable coverage found in **Coverage Part I**; and
 - c. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART I – Supplementary Payments**.
2. **Bodily injury, property damage or environmental damage** will be deemed to have been known to have occurred at the earliest time when any **responsible executive**:
 - a. Reports all, or any part, of the **bodily injury, property damage or environmental damage** to us or any other insurer;
 - b. Receives a written or verbal demand or **claim** for damages because of the **bodily injury, property damage or environmental damage**; or
 - c. Becomes aware by any other means that **bodily injury, property damage or environmental damage** has occurred or has begun to occur.
3. The following applies to progressive or indivisible **bodily injury, property damage or environmental damage**, including any continuation, change or resumption of such **bodily injury, property damage or environmental damage**, which

takes place over a period of days, weeks, months or longer caused by continuous or repeated exposure to the same, related or continuous: **(i) pollution incident**; or **(ii) general harmful conditions or substances**:

- a. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place only on the date of first exposure to such **pollution incident** or general harmful conditions or substances; or
 - b. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place during the policy period of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period** but only if:
 - (1) The date of first exposure cannot be determined or is before the effective date of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**; and
 - (2) Such **bodily injury, property damage or environmental damage** continues, in fact, to take place during this **policy period**.
4. If the same, related or continuous **pollution incident** or general harmful conditions or substances results in **bodily injury, property damage or environmental damage** that takes place during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**:
- a. All such **bodily injury, property damage and environmental damage** shall be deemed to have taken place only during the first policy period of such policies in which any of the **bodily injury, property damage or environmental damage** took place; and
 - b. All damages arising from all such **bodily injury, property damage or environmental damage** shall be deemed to have arisen from one **occurrence** and shall be subject to the Each Occurrence Limit applicable to the policy for such first policy period.
5. Damages because of **bodily injury** include damages claimed by any person or organization for care, loss of services or death resulting at any time from the **bodily injury**.

COVERAGE PART I – Supplementary Payments

1. We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART I**:
 - a. All expenses we incur.
 - b. Up to \$1,000 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which **bodily injury** in **COVERAGE PART I** applies. We do not have to furnish these bonds.
 - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
 - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
 - e. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
 - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
 - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a **suit** and an indemnitee of the insured is also named as a party to the **suit**, we will defend that indemnitee if all of the following conditions are met:

- a. The **suit** against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an **insured contract**;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same **insured contract**;
- d. The allegations in the **suit** and the information we know about the **occurrence** are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of the indemnitee against such **suit** and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the **suit**;
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **suit**;
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the **suit**; and
 - (b) Conduct and control the defense of the indemnitee in such **suit**.

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as **COVERAGE PART I – Supplementary Payments**. Notwithstanding the provisions of **COVERAGE PART I – Common Exclusions**, Exclusion **a. Contractual Liability**, Paragraph (2), such payments will not be deemed to be damages for **bodily injury, property damage and environmental damage** and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as **COVERAGE PART I – Supplementary Payments** ends when we have used up the applicable limit of insurance in the payment of judgments or settlements; or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

COVERAGE PART I – Common Exclusions:

The insurance provided in **COVERAGE PART I** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Damage to Impaired Property or Property Not Physically Injured

Property damage or **environmental damage** to **impaired property** or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in **your product** or **your work**; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to **your product** or **your work** after it has been put to its intended use.

c. Damage to Property

Property damage or **environmental damage** to:

- (1) Property you own or occupy including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the **property damage** or **environmental damage** arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured; or
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the **property damage** or **environmental damage** arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because **your work** was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to **property damage** (other than damage by fire, lightning or explosion) to premises, including the contents of such premises, rented to you for a period of 30 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**.

Paragraph (2) of this exclusion does not apply if the premises are **your work** and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to **property damage** or **environmental damage** included in the **products-completed operations hazard**.

d. Damage to Your Product

Property damage to **your product** arising out of it or any part of it.

e. Damage to Your Work

Property damage or **environmental damage** to **your work** arising out of it or any part of it. and included in the **products completed operations hazard**.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor or for liability assumed under a sidetrack agreement.

f. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured, arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an **insured contract**.

g. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured. This exclusion does not apply to **bodily injury or property damage** resulting from the use of reasonable force to protect persons or property.

h. Known Injury or Damage

Bodily injury, property damage or environmental damage that occurred in whole or in part prior to the **policy period** and was known prior to the **policy period** by a **responsible executive**. Any continuation, change or resumption of such **bodily injury, property damage or environmental damage** will be deemed to have been known by a **responsible executive** prior to the **policy period**.

This exclusion does not apply to any continuation, change or resumption of **environmental damage** caused by **your work** performed after the effective date of the **policy period**.

i. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **environmental damage or property damage** occurs.

However, this exclusion does not apply:

- (1) To **clean-up costs** required by **environmental laws** governing the liability or responsibilities of an insured to respond to a **pollution incident**; or
- (2) If such damage is a result of an unexpected or unintended **pollution incident** arising from **your work**.

j. Nuclear Material

Bodily injury, property damage or environmental damage based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

k. Recall of Products, Work or Impaired property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of, **your product, your work or impaired property** if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

l. War

Bodily injury, property damage or environmental damage, however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

m. Workers Compensation and Similar Laws

Any obligation of the insured under workers' compensation, disability benefits or unemployment compensation law or any similar law.

COVERAGE PART I – Coverage A., Paragraph 2., Exclusions a., f. and g. and COVERAGE PART I – Common Exclusions, Exclusion b., through f. inclusive and k. through m. inclusive do not apply to damage by fire, lightning or explosion to premises while rented to or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE, Paragraph 5..**

COVERAGE PART II: MISCELLANEOUS COVERAGES

Coverage A: Personal and Advertising Injury Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal and advertising injury** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages for **personal and advertising injury** to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any **claim** or **suit** that may result. But:
 - (1) The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE;**
 - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage A;** and
 - (3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments.**
- b. This insurance applies to **personal and advertising injury** caused by an offense arising out of your business but only if the offense was committed in the **coverage territory** during the **policy period.**
- c. If the same, related or continuous offense is committed during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II – Coverage A: Personal and Advertising Injury Liability** for offenses committed during the policy period, all such offenses shall be deemed to have taken place only during the first policy period of such policies in which any of the offenses were committed.

2. Exclusions

This insurance does not apply to:

a. Breach of Contract

Personal and advertising injury arising out of a breach of contract, except an implied contract to use another's advertising idea in your **advertisement.**

b. Criminal Acts

Personal and advertising injury arising out of a criminal act committed by or at the direction of the insured.

c. Contractual Liability

Personal and advertising injury for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Distribution Of Material In Violation Of Statutes

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate the Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law, the CAN-SPAM Act of 2003, including any amendment of or addition to such law or any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003 that prohibits or limits the sending, transmitting, communication or distribution of material or information.

e. Electronic Chatrooms or Bulletin Boards

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Page 14 of 44

Personal and advertising injury arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

f. Infringement of Copyright, Patent, Trademark or Trade Secret

Personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your **advertisement**.

However, this exclusion does not apply to infringement, in your **advertisement**, of copyright, trade dress or slogan.

g. Insureds in Media and Internet Type Businesses

Personal and advertising injury committed by an insured whose business is advertising, broadcasting, publishing or telecasting, designing or determining content of websites for others or an Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **32 a., b. and c.** of **personal and advertising injury** under **SECTION V – DEFINITIONS**.

For the purpose of this exclusion, the placing of frames, borders, or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

h. Knowing Violation of Rights of Another

Personal and advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict **personal and advertising injury**.

i. Material Published Prior to Policy Period

Personal and advertising injury arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the **policy period**.

j. Material Published with Knowledge of Falsity

Personal and advertising injury arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

k. Pollution

(1) Personal and advertising injury arising out of a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur clean-up costs; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of **clean-up costs**.

l. Quality of Performance of Goods – Failure to Conform to Statements

Personal and advertising injury arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your **advertisement**.

m. Unauthorized Use of Another's Name or Product

Personal and advertising injury arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

n. War

Bodily injury or **property damage**, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

o. Wrong Description of Prices

Personal and advertising injury arising out of the wrong description of the price of goods, products or services stated in your **advertisement**.

Coverage B: Employee Benefits Administration Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a negligent act, error or omission of the insured, or of any other person for whose acts the insured is legally liable, in the **administration** of your **employee benefits program** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any **claim** or **suit** that may result. But:

(1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**;

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage B**; and

(3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments**.

b. This insurance applies to damages only if the negligent act, error or omission takes place in the **coverage territory**.

2. Exclusions

This insurance does not apply to:

a. Available Benefits

Any **claim** for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

b. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

c. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

d. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

e. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

f. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the **employee benefit program**.

g. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any claim based upon failure of any investment to perform, errors in providing information on past performance of investment vehicles or advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the **employee benefit program**.

h. Prior Act, Error or Omission

Any **claim** arising from any act, error or omission known, prior to the effective date of the **policy period**, to a **responsible executive** if such **responsible executive** knew or could have reasonably foreseen that such an act, error or omission could give rise to a **claim** under this policy.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Workers' Compensation And Similar Laws

Any **claim** arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

Coverage C: Medical Payments**1. Insuring Agreement**

- a. We will pay medical expenses as described below for **bodily injury** caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (1) The accident takes place in the **coverage territory** and during the **policy period**;
- (2) The expenses are incurred and reported to us within one year of the date of the accident; and
- (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral service.

2. Exclusions

We will not pay expenses for **bodily injury**:

a. Any Insured

To any insured, except **volunteer workers**.

b. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletics contests.

c. COVERAGE PART I Exclusions

Excluded under **Coverage A** of **COVERAGE PART I** and **COVERAGE PART I - Common Exclusions**

d. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

e. Injury on Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

f. Products-completed operations hazard

Included within the **products-completed operations hazard**.

g. Workers Compensation and Similar Laws

To a person, whether or not an **employee** of any insured, if benefits for the **bodily injury** are payable or must be provided under workers compensation or disability benefits law or a similar law.

COVERAGE PART II – Supplementary Payments:

We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART II – Coverage A and B**:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
4. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY

Coverage A – Bodily Injury and Property Damage Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from an **insured site**. We will have the right and the duty to defend the insured against any **suit** seeking damages for **bodily injury** or **property damage** to which this coverage part applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which this coverage part does not apply. We may, at our discretion, investigate any **pollution incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **Section III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART III** in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- b. This insurance applies to **bodily injury** and **property damage** only if:

- (1) The **bodily injury** or **property damage** is caused by a **pollution incident** that commenced on or after the retroactive date applicable to the **insured site** and before the end of the **policy period**; and
- (2) A **claim** for damages because of the **bodily injury** or **property damage** is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us

during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

Coverage B – First and Third Party On-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for **clean-up costs** on, at or under an **insured site** or **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:
 - (1) The **environmental damage** is caused by a **pollution incident** on, at or under:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided that the **pollution incident** commenced before the end of the **policy period**; and
 - (2) The insured:
 - (a) First discovers the **pollution incident** during the **policy period**. Discovery of a **pollution incident** happens when a **responsible executive** (i) first becomes aware of the **pollution incident**, (ii) reports the **pollution incident** to us in writing during the **policy period**, and (iii) promptly reports the **pollution incident** to the appropriate governmental authority as required by **environmental law**; or
 - (b) Becomes legally liable to pay **clean-up costs** as a result of a **claim**, the **claim** for which is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**. A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** on, at or under an **insured site** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.
- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:
 - (1) the amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
 - (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. Asbestos and Lead

Environmental damage arising from asbestos, asbestos containing materials or lead-based paint in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.

b. Off-Site Clean-Up Costs and Emergency Response Expense

Clean-up costs and **emergency response expense** other than those on, at or under a **non-owned site** or an **insured site**.

Coverage C – Off-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for off-site **clean-up costs** beyond the boundary of an **insured site** or a **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:

- (1) The **environmental damage** is caused by a **pollution incident** migrating from:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and the **pollution incident** commenced before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided the **pollution incident** commenced prior to the end of the **policy period**; and
- (2) As respects **clean-up costs**, a **claim** for **clean-up costs** is first made against any insured and reported to us in writing during the **policy period** or any extended reporting period we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** beyond the boundary of an **insured site** but only if:

- (1) The **pollution incident** first commenced during the **policy period**;
- (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
- (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.

- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:

- (1) The amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and

- (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense** payments.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;

- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and

- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. On-Site Clean-Up Costs

Clean-up costs on at or under a **non-owned site** or an **insured site**.

COVERAGE PART III - Common Exclusions

The insurance provided in **COVERAGE PART III** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or

- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and

- (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessment.

c. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

d. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured.

e. Material Change in Use

Clean-up costs resulting from a material change in use or operation at any **insured site** from the use or operations at such **insured site** at the effective date of the **policy period**

f. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **property damage or environmental damage** occurs.

However, this exclusion does not apply to **clean-up costs** required by **environmental laws** governing the liability or responsibility of an insured to respond to a **pollution incident**.

g. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

(1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or

(2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

g. Nuclear Material

Any **bodily injury, property damage or environmental damage** based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

(1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;

(2) Entitled to indemnity from the United States of America or any agency thereof; or

(3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

h. Previously Reported Claim

Any **claim or suit** first made and reported to us during the **policy period** arising from the same, related or continuous **pollution incident** for which a **claim or suit** was reported under any policy of which this policy is a renewal or replacement or succeeds in time, whether or not such prior policy affords coverage for such **claim or suit**.

i. Prior Pollutants or Pollution Incident

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

(1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage** or **environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or

(2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage** or **environmental damage** during the policy period of a policy previously issued by us.

j. Transportation

Bodily injury, property damage, environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation**.

However this exclusion does not apply as respects **environmental damage** or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

k. Underground Storage Tanks

Bodily injury, property damage or **environmental damage** based upon or arising out of any **underground storage tank** which is: (i) known to a **responsible executive** as of the effective date of the **policy period**; (ii) Known to a **responsible executive** as of the date an **insured site** is added by Endorsement during the **policy period**; or (iii) installed during the **policy period**.

This exclusion does not apply to any **underground storage tank** which has been:

(1) Closed or abandoned in place in accordance with all applicable **environmental laws** prior to the effective date of the **policy period**;

(2) Removed prior to the effective date of the **policy period**; or

(3) Scheduled to this policy by Endorsement.

l. Upgrades, improvements or installations

Any costs, charges or expenses for upgrade, improvement of, or installation of any control to, any property or processes on, at, within or under an **insured site** even if such upgrade, improvement or installation is required by **environmental laws**.

m. War

Bodily injury, property damage or **environmental damage**, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

n. Workers' Compensation and Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

o. Your Product

Bodily injury, property damage or **environmental damage** based upon or arising out of **your product** and occurring away from a **location** you own or occupy or a **non-owned site**.

However, this exclusion does not apply to **bodily injury, property damage** or **environmental damage** arising out of **your product** migrating from an **insured site**.

COVERAGE PART IV – PROFESSIONAL LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a **professional incident** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may at our discretion investigate any **professional incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART IV** in the payment of judgments, settlements and **legal and claims expense payments**.

- b. This insurance applies only if:

- (1) The **professional incident** takes place in the **coverage territory**;
- (2) The **professional incident** did not occur before the Retroactive Date shown in the Declarations or after the end of the **policy period**;
- (3) A **claim** for damages is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **professional incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART IV** for **claims** first made against the insured and reported to us during the **policy period**, than all such claims shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART IV** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the times such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

2. Exclusions

This insurance does not apply to damages, **claims** or **suits**:

a. Aircraft, Auto or Watercraft

Based upon or arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

b. Bankruptcy

Based upon or arising out of the bankruptcy or insolvency of an insured or of any other person, firm or organization.

c. Contractual Liability

Based upon or arising out of damages for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Construction and Demolition

Based upon or arising out of construction or demolition done by you or on your behalf.

e. Damage to Your Work

Based upon or arising out of damage to **your work** or any part of **your work**.

f. Dishonest or Fraudulent Act

Arising out of a dishonest, fraudulent, criminal or malicious act, error or omission, provided that the act, error or omission is committed by or at the direction of a **responsible executive**.

g. Discrimination

Based upon or arising out of discrimination by an insured on the basis of race, creed, national origin, disability, age, marital status, sex, or sexual orientation.

h. Disputed Fees

Arising from disputes over the insured's fees or charges or claims for the return of fees or charges.

i. Employer's Liability

Arising from **bodily injury** to:

(1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

j. Failure to Maintain

Arising out of the insured's requiring, obtaining, maintaining, advising or failing to require, obtain, maintain or advise of any bond, suretyship or any form of insurance.

k. Failure To Comply

Which results from or is directly or indirectly attributable to failure to comply with any applicable statute, regulation, ordinance, municipal code, administrative complaint, notice of violation, notice letter, administrative order, or instruction of any governmental agency or body, provided that failure to comply is a willful or deliberate act or omission of a **responsible executive**.

l. Fiduciary Liability

Based upon or arising out of:

(1) Any insured's involvement as a partner, officer, director, stockholder, employer or **employee** of an entity that is not a named insured; or

(2) Any insured's involvement as a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments, or any regulation or order issued pursuant thereto, or any other employee benefit plan.

m. Fines, Penalties and Assessments

Based upon or arising out of any fines, penalties or assessments or punitive, exemplary or multiplied damages imposed directly against any insured.

n. Insured versus Insured

Brought by or on behalf of one insured against any other insured.

o. Internal Expense

For costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured.

p. Nuclear Material

Based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

q. Owned Facilities

Arising from or in connection with any **location** which is or was at any time owned, operated, rented, or occupied by you or by any entity that:

- (1) Wholly or partly owns, operates, manages, or otherwise controls you; or
- (2) Is wholly or partly owned, operated, managed, or otherwise controlled by you.

r. Personal and Advertising Injury

Arising out of **personal and advertising injury**.

s. Previously Reported Claim

Arising from the same, related or continuous **professional incident** that was the subject of a **claim** reported under any policy of which this policy is a renewal or replacement or which it may succeed in time, whether or not such prior policy affords coverage for such **claim**.

t. Prior Professional Incident

Arising from any **professional incident** known to a **responsible executive** prior to the effective date of the **policy period**, if such **responsible executive** knew or could have reasonably foreseen that such **professional incident** could give rise to damages, **claims** or **suits** under this policy.

This exclusion does not apply if we have been notified, in writing, of such **professional incident** giving rise to such damages, **claims**, or **suits** during the policy period of a policy previously issued by us.

u. Your Product

Based upon or arising out of **your product**.

v. Warranties

Based upon or arising out of express warranties or guarantees. This exclusion shall not apply if liability would have resulted in the absence of such express warranties or guarantees.

w. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

SECTION II – WHO IS AN INSURED**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **executive officers** and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
- 2. Any subsidiary, associated, affiliated, allied or limited liability company or corporation, including subsidiaries thereof, of which you have more than 50% ownership interest at the effective date of the **policy period** qualify as a Named Insured.
- 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the **policy period**, whichever is earlier;
 - b. Coverage under this policy does not apply to **bodily injury, property damage or environmental damage** that occurred before you acquired or formed the organization;
 - c. Coverage under this policy does not apply to **personal and advertising injury** arising out of an offense committed before you acquired or formed the organization; and
 - d. Coverage under this policy does not apply to damages arising out of any act, error or omission or **professional incident** that took place before you acquired or formed the organization.
- 4. Each of the following is also an insured:
 - a. Your **volunteer workers** only while performing duties related to the conduct of your business, or your **employees**, other than either your **executive officers** (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these **employees** or **volunteer workers** are insureds for:
 - (1) **Bodily injury or personal and advertising injury:**
 - (a) To you, to your partners or members (if you are a partnership or joint venture) or to your members (if you are a limited liability company);
 - (b) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) above; or
 - (c) Arising out of the providing or failure to provide professional health care services except incidental health care services provided by any physician, dentist, nurse, emergency medical technician or paramedic who is employed by you to provide such services and provided you are not engaged in the business of providing such services.
 - (2) **Property damage or environmental damage** to property owned, occupied or used by, rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your **employees, volunteer workers**, any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
 - b. Any person (other than your **employee**), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only with respect to liability arising out of the maintenance or use of that property and until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.
 - e. Any person or organization you agree to include as an insured in a written contract, written agreement or permit, but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of your operations, **your work**, equipment or premises leased or rented by you, or **your products** which are distributed or sold in the regular course of a vendor's business, however:

- (1) A vendor is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) For which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement except that which the vendor would have in the absence of the contract or agreement;
 - (b) Arising out of any express warranty unauthorized by you;
 - (c) Arising out of any physical or chemical change in the product made intentionally by the vendor;
 - (d) Arising out of repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from you, and then repackaged in the original container;
 - (e) Arising out of any failure to make inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - (f) Arising out of demonstration, installation servicing or repair operations, except such operations performed at the vendor's location in connection with the sale of the product; or
 - (g) Arising out of products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
- (2) A manager or lessor of premises, a lessor of leased equipment, or a mortgagee, assignee, or receiver is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) Arising out of any **occurrence** that takes place after the equipment lease expires or you cease to be a tenant; or
 - (b) Arising out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor of premises, or mortgagee, assignee, or receiver.
- f. Any person or organization that has at least a 50% controlling interest in you but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of their financial control of you.

SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. **Claims** made or **suits** brought;
 - c. Persons or organizations making **claims** or bringing **suits**;
 - d. **Pollution incidents**;
 - e. Acts, errors or omissions; or
 - f. Benefits included in your **employee benefit program**.
- 2. The General Aggregate Limit:
 - a. Is the most we will pay for the sum of:
 - (1) Damages and **emergency response expense** under **COVERAGE PART I**, except damages because of **bodily injury, property damage or environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**;
 - (2) Damages under **COVERAGE PART II**;
 - (3) Medical expense under **COVERAGE PART II**;

- (4) Damages, **clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III**; and
 - (5) Damages and **legal and claims expense payments** under **COVERAGE PART IV**.
- b. Shall apply separately as respects all damages caused by:
- (1) **Occurrences** covered under **COVERAGE PART I, Coverages A, B or D** arising out of operations at a **location** owned or occupied by you;
 - (2) **Occurrences** covered under **COVERAGE PART I, Coverage A or G** arising out of ongoing operations at a project where you are performing **your work**; or
 - (3) **Pollution incidents** covered under **COVERAGE PART III** arising out of operations at an **insured site**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay for damages because of **bodily injury, property damage or environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**.
4. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit – COVERAGE PART I: Coverage A, B, C inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage A: General Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage B: Hostile Fire and Building Equipment Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage C: Products Pollution and Exposure Liability**
- because of all **bodily injury, property damage and environmental damage** arising out of any one **occurrence**.
5. Subject to Paragraph 4. above, the Damage To Premises Rented To You Limit is the most we will pay under **COVERAGE PART I – Coverage A** for damages because of **property damage** to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
6. Subject to Paragraph 2. above, the Each Occurrence Limit – COVERAGE PART I: Coverage D, E, F inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage F: Pollution Liability during Transportation**
- because of all **bodily injury, property damage and environmental damage** arising out of any one **occurrence**.
7. Subject to Paragraph 2. above, the Each Occurrence Limit - Contractors Pollution Liability: Coverage G is the most we will pay for the sum of all damages under **COVERAGE PART I – Coverage G: Contractors Pollution Liability** because of **bodily injury, property damage or environmental damage** arising out of any one **occurrence**.
8. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay for the sum of all damages because of all **personal and advertising injury** sustained by any one person or organization.
9. Subject to Paragraph 2. above, the Employee Benefits Administration Liability Limit is the most we will pay for the sum of all damages sustained by any one **employee**, including damages sustained by such **employee's** dependents and beneficiaries. However, the amount paid shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the **employee benefit program**.
10. Subject to Paragraph 2. above, the Medical Expense Limit is the most we will pay under **COVERAGE PART II - Coverage C** for all medical expenses because of **bodily injury** sustained by any one person.
11. Subject to Paragraph 2. above, the Each Incident Limit – COVERAGE PART III: Site Pollution Legal Liability is the most we will pay for the sum of:
- a. Damages and **legal and claims expense payments** under **COVERAGE PART III – Coverage A: Bodily Injury and Property Damage**;

- b. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage B: First and Third Party On-Site Clean-Up Costs**; and
- c. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage C: Off-Site Clean-Up Costs**

because of all **bodily injury, property damage and environmental damage** arising out of the same, related or continuous **pollution incident**.

12. Subject to Paragraph 2. above, the Each Incident Limit – **COVERAGE PART IV: Professional Liability** is the most we will pay under **COVERAGE PART IV** for damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
13. The Limits of Insurance apply in excess of the Deductible amounts shown in the Declarations. The deductible amount applies as follows:
 - a. As respects the Each Incident Limit: (i) to the sum of all damages, **clean-up costs, emergency response expense and legal and claims expense payments** because of **bodily injury, property damage or environmental damage** arising out of the same, related or continuous **pollution incident**; (ii) to the sum of all damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
 - b. As respects the Each Occurrence Limit, to the sum of all damages because of **bodily injury, property damage or environmental damage** as a result of one **occurrence** regardless of the number of persons or organizations who sustain damages because of that **occurrence**.

We may pay any part or the entire deductible amount to effect settlement of any **claim or suit** or to pay **clean-up costs or emergency response expense** which may be covered under this policy and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

Subject to **SECTION IV – Conditions**, Condition 16. **Multiple Coverage Sections**, if the same or related **occurrence, pollution incident or professional incident** results in coverage under more than one coverage part, only the highest deductible under all coverage parts will apply.

14. The Limits of Insurance apply to the entire **policy period**. If the **policy period** is extended after policy issuance for an additional period, the additional period will be deemed part of the last preceding period for the purposes of determining the Limits of Insurance.

SECTION IV – CONDITIONS

1. Assignment

This policy may not be assigned without our prior written consent. Assignment of interest under this policy shall not bind us until our consent is endorsed thereon.

2. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations.

3. Cancellation

- a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
- b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - (1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - (2) 90 days before the effective date of cancellation if we cancel for any other reason.
- c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
- d. Notice of cancellation will state the effective date of cancellation. The **policy period** will end on that date.
- e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund will be less than pro rata and will be subject to the minimum premium stated in the Declarations. The cancellation will be effective even if we have not made or offered a refund.

f. If notice is mailed, proof of mailing will be sufficient proof of notice.

4. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. Choice of Forum

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that any such litigation shall take place in the appropriate federal or state courts located in New York, New York and any arbitration or other form of dispute resolution shall take place in New York, New York.

6. Choice of Law

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of the State of New York shall apply without giving effect to any conflicts or choice of law principles. The terms and conditions of this policy shall not be deemed to constitute a contract of adhesion and shall not be construed in favor of or against any party hereto by reason of authorship or otherwise.

7. Currency

All reimbursement shall be made in United States currency at the rate of exchange prevailing on:

- a. The date of judgment if judgment is rendered;
- b. The date of settlement if settlement is agreed upon with our written consent;
- c. The date of payment of **clean-up costs** and **emergency response expense**; or
- d. The date **legal and claims expense payments** are paid.

Whichever is applicable.

8. Duties In The Event Of Occurrence, Offense, Pollution Incident, Professional Incident, Act, Error or Omission, Claim Or Suit

- a. Without limiting the requirements of any insuring agreement in this policy, you must see to it that we are notified as soon as practicable of an **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission which may result in a **claim**. To the extent possible, notice should include:

- (1) How, when and where the **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the **occurrence**, offense, **pollution incident**, **professional incident** or act error or omission.

- b. If a **claim** is made or **suit** is brought against any insured, you must:

- (1) Immediately record the specifics of the **claim** or **suit** and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the **claim** or **suit** as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **claim** or **suit**;

- (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the **claim** or defense against the **suit**; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. In the event **emergency response expenses** are incurred, you must provide, in writing, all available information relating to such **emergency response expenses** and the **pollution incident** giving rise thereto to us within fourteen (14) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- e. In the event of a **time-element pollution incident**, you must provide, in writing, all available information relating to the **pollution incident** giving rise thereto to us within thirty (30) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
- f. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid and **emergency response expense**, without our consent.
- g. When any insured becomes legally obligated to pay **clean-up costs** to which this insurance applies, the insured must:
- (1) Submit, for our approval, all proposed work plans prior to submittal to any regulatory agency.
 - (2) Submit, for our approval, all bids and contracts for **clean-up costs** prior to execution or issuance.
 - (3) Forward progress submittals regarding **clean-up costs** at reasonable intervals and always prior to submittal to any regulatory agency that is authorized to review and approve such submittals.
- We shall have the right, but not the duty, to assume direct control of such **clean-up costs**. Any **clean-up costs** incurred by us shall be applied against the applicable Limit of Insurance and deductible.
- h. If we are prohibited under applicable law from investigating, defending or settling any such **claim** or **suit**, the insured shall, under our supervision, arrange for such investigation and defense thereof as is reasonably necessary, and subject to our prior authorization, shall effect such settlement thereof.

9. Economic and Trade Sanctions

In accordance with laws and regulation of the United States concerning economic and trade sanctions administered and enforced by The Office Of Foreign Assets Control (OFAC), this policy is void ab initio solely with respect to any term or condition of this policy that violates any laws or regulations of the United States concerning economic and trade sanctions.

10. Enforceability

If any part of this policy is deemed invalid or unenforceable, it shall not affect the validity or enforceability of any other part of this policy, which shall be enforced to the full extent permitted by law.

11. Extended Reporting Period

This condition applies only as respects **COVERAGE PART III - SITE POLLUTION INCIDENT LEGAL LIABILITY** and **COVERAGE PART IV – PROFESSIONAL LIABILITY**.

- a. This condition applies only if:
- (1) The policy is cancelled or non-renewed for any reason except non-payment of the premium; or
 - (2) We renew or replace this policy with **COVERAGE PART III - SITE POLLUTION LIABILITY** or **COVERAGE PART IV – PROFESSIONAL LIABILITY** that provides claims-made coverage for **bodily injury, property damage, environmental damage** or **professional incident** and that has a Retroactive Date later than the one shown in the Declarations or for an **insured site**; and
 - (3) You do not purchase coverage to replace the coverage described in Paragraph **a.(2)**.
- b. Automatic **Extended Reporting Period**

You shall automatically have a period of ninety (90) days following the effective date of such termination of coverage in which to provide written notice to us of **claims** first made and reported within the automatic extended reporting period.

A **claim** first made and reported within the automatic **extended reporting period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

No part of the automatic **extended reporting period** shall apply if the optional **extended reporting period** is purchased.

c. Extended Reporting Period Option:

(1) A **claim** first made and reported within forty eight (48) months after the end of the **policy period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

(2) The Extended Reporting Period Endorsement will not reinstate or increase the Limits of Insurance or extend the **policy period**.

d. We will issue the Endorsement indicating the **Extended Reporting Period Option has been accepted if the first Named Insured shown in the Declarations:**

(1) Makes a written request for it which we receive within 30 days after the end of the **policy period**; and

(2) Promptly pays the additional premium, which will not exceed 200% of the annual premium for the policy, when due.

The Extended Reporting Period Endorsement will not take effect unless the additional premium is paid when due. If that premium is paid when due, the Endorsement may not be cancelled. The additional premium will be fully earned when the Endorsement takes effect.

d. The Extended Reporting Period Endorsement will also amend **SECTION IV – CONDITIONS, Condition **17. Other Insurance** so the insurance provided will be excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis, whose policy period begins or continues after the Endorsement takes effect.**

12. Headings

The descriptions in the headings and sub-headings of this policy are inserted solely for convenience and do not constitute any part of the terms or conditions on this policy.

13. Independent Counsel

In the event the insured is entitled by law to select independent counsel to oversee our defense of a **claim** or **suit** at our expense, the attorney fees and all other litigation expenses we must pay to that counsel are limited to the rates we actually pay to counsel we retain in the ordinary course of business in the defense of similar **claims** or **suits** in the community where the **claim** or **suit** arose or is being defended.

Additionally, we may exercise the right to require that such counsel have certain minimum qualifications with respect to their competency including experience in defending **claims** or **suits** similar to the one pending against the insured and to require such counsel have errors and omissions insurance coverage. As respects any such counsel, the insured agrees that counsel will timely respond to our request for information regarding the **claims** or **suit**.

Furthermore, the insured may at any time, by the insured's written consent, freely and fully waive these rights to select independent counsel.

14. Inspections and Surveys

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Page 33 of 44

- a. We have the right to:
 - (1) Make inspections and surveys at any time;
 - (2) Give you reports on the conditions we find; and
 - (3) Recommend changes.
- b. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - (1) Are safe or healthful; or
 - (2) Comply with laws, regulations, codes or standards.

This applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

15. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a **suit** asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

16. Multiple Coverage Sections

No **claim** or **suit**, or part thereof, for which we have accepted coverage or coverage has been held to apply under one or more Coverages in this policy shall be covered under any other Coverages in this policy.

17. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this policy, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below. However, regardless of whether **b.** below applies, in the event that a written contract or agreement or permit requires this insurance to be primary for any person or organization you agreed to insure and such person or organization is an insured under this policy, we will not seek contributions from any such other insurance issued to such person or organization

b. Excess Insurance

- (1) This insurance is excess over:
 - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for **your work**;
 - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (iii) That is insurance purchased by you to cover your liability as a tenant for **property damage** to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, **autos** or watercraft to the extent not subject to Exclusion a. of **COVERAGE PART I – Coverage A – General Bodily Injury And Property Damage Liability**.

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.
 - (c) Any project specific primary insurance available to you covering liability for damages arising out of **your work**, for which you are an insured
- (2) When this insurance is excess, we will have no duty to defend the insured against any **suit** if any other insurer has a duty to defend the insured against that **suit**. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance;
 - (b) The total of all deductible and self-insured amounts under all that other insurance; and
 - (c) The deductible and self-insured amounts under this insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this policy.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts, excess of applicable deductible and self-insured amounts under all such insurance, until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

18. Premiums and Deductible

The first Named Insured shown in the Declarations:

- a. Is responsible for the payment of all premiums;
- b. Will be the payee for any return premiums we pay; and
- c. Is responsible for the payment of all deductibles.

19. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

20. Separation Of Insureds

Except with respect to the Limits of Insurance, any insured versus insured exclusions, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom **claim** is made or **suit** is brought.

21. Service of Suit

Subject to **SECTION IV – CONDITIONS**, Condition **5. Choice of Forum**, it is agreed that in the event of failure of us to pay any amount claimed to be due hereunder, we, at the request of the insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon us and that in any suit instituted against us upon this contract, we will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefore, we hereby designate the Superintendent, Commissioner, Director of Insurance, or other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

22. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. At our request, the insured will bring **suit** or transfer those rights to us and help us enforce them. However, if the insured has waived rights of recovery against any person or organization prior to a loss, we waive any right of recovery we may have under this policy against such person or organization.

23. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

24. When We Do Not Renew

If we decide not to renew, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than ninety (90) days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS**1. Administration** means:

- a. Providing information to **employees**, including their dependents and beneficiaries, with respect to eligibility for or the scope of **employee benefit programs**;
- b. Handling records in connection with the **employee benefit program**; or
- c. Effecting, continuing or terminating any **employee's** participation in any benefit included in the **employee benefit program**.

However, **administration** does not include handling payroll deductions.

2. Advertisement means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

3. Auto means:

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- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law where it is licensed or principally garaged.

However, **auto** does not include **mobile equipment**.

- 4. **Bodily injury** means physical injury, sickness, disease, building-related illness, mental anguish, shock or emotional distress, sustained by any person, including death resulting therefrom. **Bodily injury** shall also include medical monitoring costs.
- 5. **Claim** means a demand, notice or assertion of a legal right alleging liability or responsibility on the part of the insured.
- 6. **Clean-up costs** means reasonable and necessary costs, charges and expenses, including associated **legal and claims expense payments** incurred with our prior written consent, incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media but only:
 - a. To the extent required by **environmental laws** governing the liability or responsibilities of the insured to respond to a **pollution incident**;
 - b. In the absence of a. above, to the extent recommended in writing by an **environmental professional**; or
 - c. To the extent incurred by the government or any political subdivision within Definition 8.a. of **coverage territory**; or
 - d. To the extent incurred by parties other than you.

Clean-up costs also includes **restoration costs**

Clean-up costs does not include costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured unless such costs, charges or expenses are incurred with our prior written approval.

- 7. **Conveyance** means any **auto**, railcar, rolling stock, train, watercraft or aircraft. **Conveyance** does not include pipelines.
- 8. **Coverage territory** means:
 - a. The United States of America (including its territories and possessions), Puerto Rico, Canada and the Gulf of Mexico;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above;
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - (2) **Personal and advertising injury** offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a **suit** on the merits, in the territory described in Paragraph a. above or in a settlement we agree to; or
 - d. All other parts of the world if the injury or damage arises out of **your product**, a **pollution incident** caused by **your work**, a **pollution incident** during **transportation** or a **pollution incident** on, at, under or migrating from a **non-owned site**, however:
 - (1) We assume no responsibility for furnishing certificates or evidence of insurance or bonds; and
 - (2) We will not be liable for any fine or penalty imposed on you for failing to comply with insurance laws.

- 9. **Emergency response expense** means reasonable and necessary costs, charges and expenses including **legal and claims expense payments** incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media.

- 10. **Employee** includes a **leased worker** and a **temporary worker**. As respects Employee Benefits Administration Liability, **employee** also means a person actively employed, formerly employed, on leave of absence or disabled, or retired.

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Page 37 of 44

11. **Employee benefits program** means a program providing some or all of the following benefits to **employees**, whether provided through a plan authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars or otherwise:
 - a. Group life insurance, group accident or health insurance, dental, vision and hearing plans, and flexible spending accounts, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to those **employees** who satisfy the plan's eligibility requirements;
 - b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to all **employees** who are eligible under the plan for such benefits;
 - c. Unemployment insurance, social security benefits, workers' compensation and disability benefits; and
 - d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies
12. **Environmental damage** means physical damage to land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater, giving rise to **clean-up costs** or **emergency response expense**.
13. **Environmental laws** means any federal, state, provincial, municipal or other local laws, including, but not limited to, statutes, rules, ordinances, guidance documents, regulations and all amendments thereto, including state voluntary cleanup or risk based corrective action guidance, and governmental, judicial or administrative orders and directives, that are applicable to a **pollution incident**.
14. **Environmental professional** means an individual approved and designated by us in writing who is duly certified or licensed in a recognized field of environmental science as required by a state board, a professional association, or both, who meet certain minimum qualifications and who maintain specified levels of errors and omissions insurance coverage acceptable to us. We shall consult with the insured in conjunction with the selection of the **environmental professional**.
15. **Executive officer** means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
16. **Extended reporting period** means the claims reporting provision described in **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**.
17. **Hostile fire** means one which becomes uncontrollable or breaks out from where it was intended to be.
18. **Impaired property** means tangible property, other than **your product** or **your work**, that cannot be used or is less useful because:
 - a. It incorporates **your product** or **your work** that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
 if such property can be restored to use by the repair, replacement, adjustment or removal of **your product** or **your work** or your fulfilling the terms of the contract or agreement.
19. **Insured contract** means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises in excess of 30 consecutive days that indemnifies any person or organization for damage by fire, lightning or explosion of premises while rented to you or temporarily occupied by you with permission of the owner is not an **insured contract**;
 - b. A sidetrack agreement;
 - c. Any easement or license agreement;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for **bodily injury, property damage or environmental damage** to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement that indemnifies an architect, engineer or surveyor for injury or damage arising out of:

- (1) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
- (2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

- 20. Insured site** means a **location** listed on the Insured Site Schedule Endorsement, if any, attached to this policy.
- 21. Leased worker** means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. **Leased worker** does not include a **temporary worker**.
- 22. Legal and Claims Expense Payments** means:
- a. All expenses we incur that are directly allocated to a particular **claim or suit**.
 - b. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim or suit**, including actual loss of earnings up to \$500 a day because of time off from work.
 - c. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
 - d. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
 - e. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
 - f. Expenses incurred by the insured for first aid administered to others at the time of any accident, for **bodily injury** to which this insurance applies.
- 23. Loading or unloading** means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or **auto**;
 - b. While it is in or on an aircraft, watercraft or **auto**; or
 - c. While it is being moved from an aircraft, watercraft or **auto** to the place where it is finally delivered;
- But **loading or unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or **auto**.
- 24. Location** means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.
- 25. Misdelivery** means the delivery of any liquid product into a wrong receptacle or to a wrong address or the erroneous delivery of one liquid product for another.
- 26. Mobile equipment** means any of the following types of land vehicles, including any attached machinery or equipment:
- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b. Vehicles maintained for use solely on or next to premises you own or rent;
 - c. Vehicles that travel on crawler treads;
 - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted power cranes, shovels, loaders, diggers or drills or road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

- (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

- (2) Cherry pickers and similar devices used to raise or lower workers;

- f. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not **mobile equipment** but will be considered **autos**:

- (1) Equipment designed primarily for snow removal, road maintenance (but not construction or resurfacing) or street cleaning;

- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressor, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However **mobile equipment** does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered **autos**.

27. Mold matter means mold, mildew and fungi, whether or not such **mold matter** is living.

28. Natural resource damage means physical injury to or destruction of, as well as the assessment of such injury or destruction, including the resulting loss of value of land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)), any state, local or provincial government, any foreign government, any Native American tribe, or, if such resources are subject to a trust restriction on alienation, any member of a Native American tribe.

29. Non-owned site:

- a. Means any **location** which:

- (1) Was not at any time owned or occupied by any insured; and

- (2) Which is not specifically scheduled as an **insured site**.

- b. Does not include:

- (1) Any **location** which is not licensed by the appropriate federal, state or local authority to perform storage, disposal, processing or treatment of waste from your operations or **your work** in compliance with **environmental law**.

- (2) Any **location** or any part thereof that has been subject to a consent order or corrective action under **environmental law** or is listed or proposed to be listed on the Federal National Priorities list (NPL) prior to waste from your operations or **your work** being legally consigned for delivery or delivered for storage, disposal, processing or treatment at such **location**.

- (3) Any **location** of a purchaser or user of **your product**.

30. Nuclear material means source material, special nuclear material or byproduct material which have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

31. Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

32. Personal and advertising injury means injury, including consequential **bodily injury**, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your **advertisement**;
- g. Infringing upon another's copyright, trade dress or slogan in your **advertisement**.

33. Policy period means the period of time stated in the Declarations. However, if the policy is cancelled in accordance with **SECTION IV – CONDITIONS**, Condition **3. Cancellation**, the **policy period** ends on the effective date of such cancellation.

34. Pollutants means any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapor, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes. **Pollutants** includes electromagnetic fields, **mold matter** and legionella pneumophila.

35. Pollution incident means:

- a. The discharge, dispersal, release, escape, migration, or seepage of **pollutants** on, in, into, or upon land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater; or
- b. The presence of **mold matter**.

Pollution incident includes the illicit abandonment of **pollutants** at any **location** which is owned or occupied by you provided that such abandonment was committed by parties other than an insured and without the knowledge of a **responsible executive**.

36. Products - completed operations hazard:

- a. Includes all **bodily injury**, **property damage** or **environmental damage** occurring away from a **location** you own or occupy and arising out of **your product** or **your work** except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, **your work** will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

- b. Does not include **bodily injury**, **property damage** or **environmental damage** arising out of the transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the **loading or unloading** of that vehicle by any insured or the existence of tools, uninstalled equipment or abandoned or unused materials.

37. Professional incident means any act, error or omission in the providing or failure to provide **professional services** by or on behalf of the insured.

38. Professional services means those services performed for a fee by you or those acting on your behalf, including but not limited to, architect, engineer, consultant, inspector, technician and surveyor that you or those acting on your behalf are qualified to perform for others and are consistent with your corporate statements of professional qualifications.

39. Property damage means:

- a. Physical injury to or destruction of tangible property, including all resulting loss of use and diminished value of that property. All such loss of use and diminished value shall be deemed to occur at the time of the physical injury that caused it;
- b. Loss of use of tangible property that is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the **occurrence** or **pollution incident** that caused it; or
- c. **Natural resource damage.**

Property damage does not include **environmental damage**.

For the purpose of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CDROMS, tapes drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

40. Responsible executive means any officer, director, risk manager, partner, your manager of an **insured site**, your manager or supervisor responsible for environmental affairs, health and safety affairs, control or compliance or any other **employee** authorized by you to give or receive notice of an **occurrence** or **claim**.

41. Restoration costs means reasonable and necessary costs incurred by the insured with our prior written consent, to repair, restore or replace damaged real or personal property damaged during work performed in the course of incurring **clean-up costs** in order to restore the property to the condition it was in prior to being damaged during such work. **Restoration costs** shall not exceed the lesser of actual cash value of such real or personal property or the cost of repairing, restoring or replacing the damaged property with other property of like kind and quality. An adjustment for depreciation and physical condition shall be made in determining actual cash value. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment, except to the extent such betterments of the damaged property entail the use of materials which are environmentally preferable to those materials which comprised the damaged property. Such environmentally preferable material must be certified as such by an applicable independent certifying body, where such certification is available, or, in the absence of such certification, based on our judgment in our sole discretion.

42. Suit means a civil proceeding in which damages to which this insurance applies are alleged. **Suit** includes an arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent or any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

43. Temporary worker means a person who is furnished to you to substitute for a permanent worker on leave or to meet seasonal or short-term workload conditions.

44. Time-Element pollution incident means a **pollution incident** demonstrable as having first commenced at an identified time and place during the **policy period** provided:

- a. Such **pollution incident** does not originate or arise from, or relate to an **underground storage tank**; and
- b. Such **pollution incident** is not (i) heat, smoke or fumes from a **hostile fire** or (ii) solely with respect to **bodily injury**, smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests.

45. Transportation means the movement of goods, product, merchandise, supplies or waste in a **conveyance** by the insured or a third party carrier from the time of movement from the point of origin until delivery to the final destination. **Transportation** includes the movement of goods, products, merchandise, supplies or waste into, onto or from a **conveyance**.

46. Underground storage tank means any tank, including any piping and appurtenances connected to the tank, located on or under an owned or occupied **location** or an **insured site** that has at least ten (10) percent of its combined volume underground. **Underground storage tank** does not include:

- a. Septic tanks, sump pumps, or oil/water separators;
- b. A tank that is enclosed within a basement or cellar, if the tank is upon or above the surface of the floor; or
- c. Storm-water or wastewater collection systems.

47. Volunteer worker means a person who is not your **employee**, and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

48. Waste means all waste and includes materials to be recycled, reconditioned or reclaimed.

49. Your product:

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- a) You;
- b) Others trading under your name; or
- c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your product**; and

(2) The providing of or failure to provide warnings or instructions.

50. Your work:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your work**; and

(2) The providing of or failure to provide warnings or instructions.

IN WITNESS WHEREOF, the Insurer has caused this Policy to be executed and attested, but this Policy will not be valid unless countersigned by a duly authorized representative of the Insurer, to the extent required by applicable law.

Ironshore Specialty Insurance Company by:

A handwritten signature in black ink, appearing to read "Amar G. Go", written over a horizontal line.

Secretary

A handwritten signature in black ink, appearing to read "Shane Kelly", written over a horizontal line.

President

**IRONSHORE SPECIALTY INSURANCE COMPANY**

Mailing Address:
 75 Federal Street
 5th Floor
 Boston, MA 02110
 Toll Free: (877) IRON411

Endorsement # 10**Policy Number:** 002357403**Effective Date of Endorsement:** June 01, 2018**Insured Name:** Vista Proppants and Logistics LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INSURED SITE SCHEDULE

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

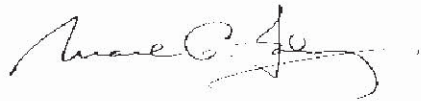
It is hereby agreed that **Endorsement #4, INSURED SITE SCHEDULE** is deleted in its entirety and replaced with the following:

SECTION I – COVERAGES, COVERAGE PART III: SITE POLLUTION, Coverage A - Bodily Injury and Property Damage Liability, Coverage B - First and Third Party On-Site Clean-Up Costs and Coverage C – Off-Site Clean-Up Costs apply when identified by an “x” in the applicable Coverage section subject to the corresponding retroactive date:

<u>INSURED SITE(S)</u>	<u>COVERAGE A</u>	<u>COVERAGE B</u>	<u>COVERAGE C</u>	<u>RETROACTIVE DATE</u>
1. 2700 Cresson Highway, Cresson, TX	X	X	X	4/8/2015
2. 3549 Monroe Highway, Granbury, TX	X	X	X	4/8/2015
3. 6401 Monroe Hwy, Cresson, TX	X	X	X	5/9/2017
4. 6415 Monroe Hwy, Cresson, TX	X	X	X	5/9/2017
5. 7200 Friendship Rd, Tolar, TX	X	X	X	4/12/2017
6. 10422 County Road 404, Kermit, TX	X	X	X	4/19/2017
7. 1415 South business IH 35, Dilley, TX	X	X	X	6/1/2017
8. 1569 N Urlas, Ft. Stockton, TX	X	X	X	6/1/2017
9. 2000 South Main Street, Ft. Worth, TX	X	X	X	6/1/2017

10. 2301 Terminal Road, Ft. Worth, TX	X	X	X	6/1/2017
11. 2903 Highway 17, Pecos, TX	X	X	X	6/1/2017
12. 3703 CR 1018, Cleburne, TX	X	X	X	6/1/2017
13. 4413 Carey Street, Ft. Worth, TX	X	X	X	6/1/2017
14. 44485 W. Hwy 67, Barnhart, TX	X	X	X	6/1/2017
15. 4800 Christoval Road, San Angelo, TX	X	X	X	6/1/2017
16. 48359 S. CR 182, Gage, OK	X	X	X	6/1/2017
17. 814 S. Railroad St, Big Lake, TX	X	X	X	6/1/2017
18. 869 CR 108, Sweetwater, TX	X	X	X	6/1/2017
19. 900 W. Sutherland, Altus, OK	X	X	X	6/1/2017
20. Rt. 1, 1801 N 16 th , Enid, OK	X	X	X	6/1/2017
21. 1045 CR 284, Gonzales, TX	X	X	X	6/1/2018
22. 18 CR 408, Pecos, TX	X	X	X	6/1/2017

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

September 20, 2018

Date

EXHIBIT B



AmWINS Brokerage of Texas, Inc.
 5910 North Central Expressway
 Suite 500
 Dallas, TX 75206
 amwins.com

POLICY PREMIUM AND SURPLUS LINES TAX SUMMARY

Attached to and forming part of Policy Number: 002357503

Named Insured:	Vista Proppants and Logistics LLC	Policy Number:	002357503
Coverage:	Excess Liability	Carrier:	Ironshore Specialty Insurance Co
Agency:	The Gus Bates Company	Policy Period:	06/01/2018 - 06/01/2019

Policy Premium:	\$536,877.00
Fees:	\$0.00
Surplus Lines Taxes:	\$26,843.85
Total:	\$563,720.85

SURPLUS LINES TAX CALCULATION:

Description	Taxable Premium	Taxable Fee	Tax Basis	Rate	Tax
Texas					
Surplus Lines Tax	\$536,877.00	\$0.00	\$536,877.00	4.85%	\$26,038.53
Stamping Fee	\$536,877.00	\$0.00	\$536,877.00	0.15%	\$805.32
Total					\$26,843.85
Total Surplus Lines Taxes and Fees					\$26,843.85

SURPLUS LINES DISCLOSURE

Texas

This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as surplus line coverage under the Texas insurance statutes. The Texas Department of Insurance does not audit the finances or review the solvency of the surplus lines insurer providing this coverage, and the insurer is not a member of the property and casualty insurance guaranty association created under Chapter 462 Insurance Code. Chapter 225, Insurance Code, requires payment of a 4.85 percent tax on gross premium.

Surplus Lines Licensee Name: AmWINS Brokerage of Texas, Inc.

IMPORTANT NOTICE

To obtain information or make a complaint:

You may contact the Texas Department of Insurance to obtain information on companies, coverages, rights or complaints at

1-800-252-3439

You may write the Texas Department of Insurance:

Post Office Box 149104

Austin, Texas 78714-9104

Fax: 512-490-1007

Web: <http://www.tdi.texas.gov>

E-mail: ConsumerProtection@tdi.state.tx.us

PREMIUM OR CLAIM DISPUTES:

Should you have a dispute concerning your premium or about a claim you should contact the agent first. If the dispute is not resolved, you may contact the Texas Department of Insurance.

ATTACH THIS NOTICE TO YOUR POLICY:

This notice is for information only and does not become a part or condition of the attached document.

AVISO IMPORTANTE

Para obtener informacion o para someter una queja:

Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca de companias, coberturas, derechos o quejas al:

1-800-252-3439

Puede escribir al Departamento de Seguros de Texas:

Post Office Box 149104

Austin, Texas 78714-9104

Fax: 512-490-1007

Web: <http://www.tdi.texas.gov>

E-mail: ConsumerProtection@tdi.state.tx.us

DISPUTAS SOBRE PRIMAS O RECLAMOS:

Si tiene una disputa concerniente a su prima o a un reclamo, debe comunicarse con el agente primero. Si no se resuelve la disputa, puede entonces comunicarse con el departamento (TDI).

UNA ESTA AVISO A SU POLIZA:

Este aviso es solo para proposito de informacion y no se convierte en parte o condicion del documento adjunto.



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

This insurance contract is with an insurer not licensed to transact insurance in this state and is issued and delivered as surplus line coverage under the Texas insurance statutes. The Texas Department of Insurance does not audit the finances or review the solvency of the surplus lines insurer providing this coverage, and the insurer is not a member of the property and casualty insurance guaranty association created under Chapter 462, Insurance Code. Chapter 225, Insurance Code, requires payment of a 4.85 percent tax on gross premium.

ENVIRONMENTAL EXCESS LIABILITY DECLARATIONS

Policy Number: 002357503

Renewal of Policy Number: 002357502

Item 1. **Named Insured & Mailing Address:** Vista Proppants and Logistics, LLC
4413 Carey Street
Fort Worth, TX 76119

Item 2. **Policy Period:** **Effective:** June 01, 2018 **Expiration:** June 01, 2019
12:01 a.m. time at your mailing address shown above

Item 3: **LIMITS OF INSURANCE**

a. Each Event Limit \$25,000,000
b. Aggregate Limit (See Section II.A.) \$25,000,000

Item 4: **LIMITS OF UNDERLYING INSURANCE**

a. Each Event Limit \$1,000,000
b. Aggregate Limit \$2,000,000

Item 5: **CONTROLLING UNDERLYING INSURANCE**

Coverage See Schedule of Underlying Insurance
Policy Number See Schedule of Underlying Insurance
Insurer See Schedule of Underlying Insurance
Policy Period See Schedule of Underlying Insurance
Limit of Insurance See Schedule of Underlying Insurance

Item 6.

Policy Premium: \$536,877.00

Premium for Acts of Terrorism (TRIA): Not Purchased

Total Premium (Including TRIA): \$536,877.00

Compliance with all surplus lines placement requirements, including stamping the Policy and collection and payment of surplus lines taxes, is the responsibility of the broker.

Minimum Earned Premium: \$134,219.25

Item 7. Broker & Mailing Address:

AmWins Brokerage of Texas, Inc. (Dallas)
5910 North Central Expressway
SUITE NO 500
Dallas, TX 75206

Item 8. Policy Coverage Form:

IE.COV.EEL.001 (0409) Excess Coverage Form

Endorsements:

See Schedule of Endorsements

Date: June 14, 2018

MO/DAY/YR.



Authorized Representative

Named Insured: Vista Proppants and Logistics, LLC
Policy Number: 002357503
Effective 12:01 AM: June 01, 2018

SCHEDULE OF ENDORSEMENTS

Endorsement Number – Edition Date – Form Name

1. IE.PN.ALL.002 (0316) Notice of Claim
2. IE.END.ALL.002 (0409) Terrorism Exclusion
3. IE.PN.EXCESS.001 (0409) Schedule of Underlying Insurance
4. IE.END.EXCESS.001 (0409) Non Followed Coverage Section or Clause Endorsement

TEXAS NOTICE

IMPORTANT NOTICE	AVISO IMPORTANTE
<p>To obtain information or make a complaint: You may call Liberty Mutual Group's toll-free telephone number for information or to make a complaint at:</p>	<p>Para obtener informacion o para someter una queja: Usted puede llamar al numero de telefono gratis de Liberty Mutual Group's para informacion o para someter una queja al:</p>
<p>1-800-344-0197</p>	<p>1-800-344-0197</p>
<p>You may also write to Liberty Mutual Group at: Presidential Service Team Liberty Mutual Group 175 Berkeley St. MS 10B Boston, MA 02116 PresidentialSvcTeam@LibertyMutual.com</p>	<p>Usted tambien puede escribir a Liberty Mutual Group: Presidential Service Team Liberty Mutual Group 175 Berkeley St. MS 10B Boston, MA 02116 PresidentialSvcTeam@LibertyMutual.com</p>
<p>You may contact the Texas Department of Insurance to obtain information on companies, coverages, rights or complaints at: 1-800-252-3439</p>	<p>Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca de companias, coberturas, derechos o quejas al: 1-800-252-3439</p>
<p>You may write the Texas Department of Insurance: Mail: PO Box 149091 (mail code 111-1A) Austin, TX 78714-9091 FAX # (512) 490-1007 Web: http://www.tdi.texas.gov/consumer/complfrm.html E-mail: consumerprotection@tdi.texas.gov In person: 333 Guadalupe, Austin, Texas 78701</p>	<p>Puede escribir al Departamento de Seguros de Texas: Mail: PO Box 149091 (mail code 111-1A) Austin, TX 78714-9091 FAX # (512) 490-1007 Web: http://www.tdi.texas.gov/consumer/complfrm.html E-mail: consumerprotection@tdi.texas.gov In person: 333 Guadalupe, Austin, Texas 78701</p>
<p>PREMIUM OR CLAIM DISPUTES: Should you have a dispute concerning your premium or about a claim you should contact the (agent) (company) (agent or the company) first. If the dispute is not resolved, you may contact the Texas Department of Insurance.</p>	<p>DISPUTAS SOBRE PRIMAS O RECLAMOS: Si tiene una disputa concerniente a su prima o a un reclamo, debe comunicarse con el (agente) (la compania) (agente o la compania) primero. Si no se resuelve la disputa, puede entonces comunicarse con el Departamento de Seguros de Texas.</p>
<p>ATTACH THIS NOTICE TO YOUR POLICY: This notice is for information only and does not become a part or condition of the attached document.</p>	<p>UNA ESTE AVISO A SU POLIZA: Este aviso es solo para proposito de informacion y no se convierte en parte o condicion del documento adjunto.</p>



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 1

Policy Number: 002357503

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CLAIM AND NOTICE REPORTING

Subject to the claims and notice reporting provisions within the policy, claim and notice reports may be given in writing via:

POSTAL SERVICE to:

Ironshore Environmental Claims CSO
28 Liberty Street, 5th Floor
New York, NY 10005

E-MAIL to:

Ironenviroclaims@ironshore.com

or

USClaims@ironshore.com

FAX to:

646-826-6601

By phone via:

24 Hour Claims Phone Number:

(888) 292-0249

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.

Authorized Representative

June 14, 2018

Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 2

Policy Number: 002357503

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TERRORISM EXCLUSION

This endorsement modifies insurance provided under the following:

SITE POLLUTION INCIDENT LEGAL LIABILITY SELECT (SPILLS)
CONTRACTORS ENVIRONMENTAL LEGAL LIABILITY (CELL)
ENVIRONMENTAL PROTECTIVE INSURANCE COVERAGE PACKAGE (EPIC PAC)
ENVIRONMENTAL EXCESS LIABILITY

It is hereby agreed that the policy is amended as follows

1. The following Exclusion is added:

This insurance does not apply to:

TERRORISM

Any injury or damage arising, directly or indirectly, out of **terrorism**

2. For the purposes of this endorsement, the following definitions are added:

Any injury or damage means any injury or damage covered under the policy and includes but is not limited to **bodily injury, property damage, environmental damage, remediation expense, emergency response expense, personal and advertising injury**, negligent acts, errors or omissions or **professional incident** as may be defined in the policy.

Terrorism means a violent act or an act that is dangerous to human life, property or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion. Terrorism includes an act certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018
Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 3

Policy Number: 002357503

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ENVIRONMENTAL EXCESS LIABILITY SCHEDULE OF UNDERLYING INSURANCE

CONTROLLING UNDERLYING INSURANCE

Coverage: GENERAL LIABILITY AND POLLUTION LIABILITY; ENVIRONMENTAL PROTECTION INSURANCE COVERGE PACKAGE (EPIC Pac)

Policy Number: 002357403

Insurer: Ironshore Specialty Insurance Company (ISIC)

Policy Period: 6/1/2018 to 6/1/2019

Limits of Insurance:

\$1,000,000 Each Occurrence Limit-COVERAGE PART I: Coverage A,B,C
\$1,000,000 Each Occurrence Limit-COVERAGE PART I: Coverage D,E,F
\$1,000,000 Contractors Pollution Liability Each Occurrence Limit
\$1,000,000 Personal and Advertising Injury Limit: Any one Person or Organization
\$1,000,000 Employee Benefits Administration Liability Limit: Each Employee
\$1,000,000 Site Pollution Each Incident Limit
\$2,000,000 Products Completed Operations Aggregate
\$2,000,000 General Aggregate

Coverage: AUTOMOBILE LIABILITY

Policy Number: CAA 4690837 - 14

Insurer: Acadia Insurance Company

Policy Period: 6/1/2018 to 6/1/2019

Limits of Insurance:

\$1,000,000 Combined Single Limit

OTHER UNDERLYING INSURANCE

None

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.



Authorized Representative

June 14, 2018
Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Endorsement # 4

Policy Number: 002357503

Effective Date of Endorsement: June 01, 2018

Insured Name: Vista Proppants and Logistics, LLC

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NON-FOLLOWED COVERAGE, SECTION OR CLAUSE

This endorsement modifies insurance provided under the following:

ENVIRONMENTAL EXCESS LIABILITY

It is hereby agreed that section I. COVERAGES, Paragraph A.2. is amended to include the following:

In no event shall this policy follow the terms, conditions, exclusions or limitations in the **controlling underlying insurance** or provide coverage under this with respect to or as a result of any of the following in the **controlling underlying insurance**:

f. Employers Liability Bodily Injury by Disease

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS OF THIS POLICY REMAIN UNCHANGED.

A handwritten signature in black ink, appearing to be "Marie G. De..." followed by a stylized flourish.

Authorized Representative

June 14, 2018
Date



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Insured Name: Vista Proppants and Logistics, LLC

Policy Number: 002357503

ENVIRONMENTAL EXCESS LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Please read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as such under the **controlling underlying insurance**. The words “we”, “us” and “our” refer to the company providing this insurance. The word “insured” means any person or organization qualifying as such under the **controlling underlying insurance**.

Defined terms, other than headings, appear in bold face type. Refer to **SECTION V – DEFINITIONS**. The headings do not constitute terms or conditions of this policy and are included solely for convenience. The headings shall not in any manner modify or otherwise affect any of the provisions of this policy

I. COVERAGES

A. INSURING AGREEMENT

1. We will provide the insured with Excess Liability coverage in accordance with the same terms, conditions, exclusions, limitations and warranties as are contained, as of the inception of this **policy period**, in the **controlling underlying insurance**.

However, coverage under this policy is subject to the premium, limits of liability, retention, **policy period**, warranties, exclusions, limitations and any other terms and conditions of this policy including any and all endorsements attached hereto, inconsistent with or supplementary to the **controlling underlying insurance**.

2. In no event shall this policy follow the terms, conditions, exclusions or limitations in the **controlling underlying insurance** or provide coverage under this policy with respect to or as a result of any of the following in the **controlling underlying insurance**:

- a. **Cancellation, non-renewal or change in policy period provisions.**

- b. **Kidnap, Ransom or Extortion coverage**

- c. **Liberalization Clause**

Any clause stipulating automatic expansion of coverage with or without an additional premium because of, but not limited to, legislative acts, acts of insurance regulatory authorities or an insurer's policy revision.

d. Medical Payments

Any medical payment coverage in which payments are not predicated on fault.

e. No Fault Coverage

Any automobile no-fault coverage, personal injury protection or uninsured or underinsured motorists coverage.

f. Sublimit of Insurance

Any sublimit of insurance unless coverage for such sublimit of insurance is specifically endorsed to this policy.

II. LIMITS OF LIABILITY

- A.** The Aggregate Limit of insurance stated in **Item 3.b.** of the Declarations of this policy is the most we will pay for all damages covered under this policy, except automobile liability if it is not subject to an aggregate limit of liability in the **controlling underlying insurance**.
- B.** Subject to **A.** above, the Each **Event** Limit of insurance stated in **Item 3.a.** of the Declarations of this policy is the most we will pay for all damages arising out of any one **event**.
- C.** Defense expenses and costs to which this policy applies shall not reduce the limits of insurance stated in **Item 3.** of the Declarations, except to the extent such defense expenses and costs reduce the limits of insurance of the **controlling underlying insurance**.

III. LIMITS OF UNDERLYING INSURANCE

- A.** The Limits of Insurance stated in **Item 3.** of the Declarations of this policy apply in excess of:
 - 1.** The total of the limits of insurance of **underlying insurance** applicable to any one **event** as stated in the Each **Event** Limit in **Item 4.a.** of the Declarations.
 - 2.** The total of the Aggregate Limits of insurance of **underlying insurance** as stated in the Aggregate Limit in **Item 4.b.** of the Declarations.
 - 3.** The self-insured retention, retained limit, or deductible (whether added to or deducted from the limits of insurance) of the **controlling underlying insurance**, if any, where the Aggregate Limit determined in **2.** above, has been exhausted.
- B.** This policy will not apply in excess of any reduced or exhausted limits of insurance of the **underlying insurance** to the extent that such reduction or exhaustion is caused by:
 - 1.** Payment of amounts that are not covered under this policy; and
 - 2.** Uncollectibility in whole or in part of the limits of insurance of **underlying insurance**.

IV. CONDITIONS

A. ASSISTANCE AND COOPERATION

- 1.** We shall have the right but not the duty to assume charge of the defense or settlement of any claim or suit against the insured to which this policy may apply upon exhaustion of the applicable limits of insurance of the **underlying insurance**. If we have exercised such right, we may withdraw from the defense and tender the defense to the insured upon exhaustion of the applicable limits of insurance under this policy. If we do not exercise the right to assume charge of such defense or settlement, or if the applicable limits of the **underlying**

insurance are not exhausted, we shall have the right and shall be given the opportunity to associate effectively with the insured or the **underlying insurer** or both, in the defense and control of any claim or suit likely to involve this policy. In such events, the insured, the **underlying insurer** and we shall cooperate in the defense of such claim or suit.

2. The insured shall not, except at its own expense, settle any claim or suit or incur any defense costs for an amount to which this policy applies without our written consent.

B. CANCELLATION AND NONRENEWAL

1. This policy may be canceled by the first Named Insured listed in **Item 1.** of the Declarations of this policy by mailing or delivering to us advance written notice of cancellation. This policy may be canceled by or on behalf of us by delivering to the first Named Insured or by mailing to the first Named Insured, by registered, certified, or other first class mail, at the first Named Insured's address set forth in **Item 1.** of the Declarations, written notice stating when thereafter, not less than ten (10) days in the event any premium is not paid when due, and not less than sixty (60) days in all other cases, cancellation shall be effective. If notice is mailed, proof of mailing will be sufficient proof of notice. It is agreed that the first Named Insured shall act on behalf of all insureds with respect to giving and receiving notice of cancellation. The **policy period** terminates at the date and hour specified in such notice, but in case of notice of cancellation by the first Named Insured, in no event prior to the date such notice is received by us.
2. If this policy shall be canceled by the first Named Insured, we shall return ninety percent (90%) of the unearned portion of the premium calculated on a pro rata basis unless there is a Minimum Earned Premium set forth in **Item 6.** of the Declarations, in which case, we will retain the Minimum Earned Premium and return the difference, if any, between the Minimum Earned Premium and the unearned portion of the premium calculated on a pro rata basis.
3. If this policy is canceled by us, we shall return to the first Named Insured the unearned portion of the premium calculated on a pro rata basis.
4. Payment or tender of any unearned premium by us shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable.
5. If we decide not to renew, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than sixty (60) days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

C. CHANGES IN FOLLOWED POLICIES

If during the **policy period** of this policy, the terms, conditions, exclusions or limitations of the **controlling underlying insurance** are changed in any manner from those in effect on the inception date of this policy, you shall as a condition precedent your rights under this policy give us, as soon as practicable, written notice of the full particulars thereof. This policy shall become subject to any such changes upon the effective date of the changes in the **controlling underlying insurance**, but only upon the condition that we agree to follow such changes in writing and you agree to any additional premium or amendment of the provisions of this policy required by us relating to such changes. Further, such change in coverage is conditioned upon payment when due of any such additional premium required by us relating to such changes.

D. CHOICE OF FORUM

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that any such litigation shall take place in the appropriate federal or state court located in New York, New York and any arbitration or other form of dispute resolution shall take place in New York, New York.

E. CHOICE OF LAW

In the event that the insured and we have any dispute concerning or relating to this policy including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of the State of New York shall apply without giving effect to any conflicts or choice of law principles. The terms and conditions of this policy shall not be deemed to constitute a contract of adhesion and shall not be construed in favor of or against any party hereto by reason of authorship or otherwise.

F. ECONOMIC AND TRADE SANCTIONS

In accordance with the laws and regulation of the United States concerning economic and trade sanctions administered and enforced by The Office Of Foreign Assets Control (OFAC), this policy is void ab initio solely with respect to any term or condition of this policy that violates any laws or regulations of the United States concerning economic and trade sanctions.

G. EXTENDED REPORTING PERIOD

1. In the event that (i) this policy is cancelled (other than for non-payment of premium or non-compliance with the policy terms and conditions) or non renewed, and (ii) you are entitled to and exercise your right to elect an extended reporting period under the **controlling underlying insurance** and all **underlying insurance**, you shall have the option of purchasing an extended reporting period applicable to this policy for an additional premium.
2. For the extended reporting period to apply, you must exercise your right to purchase the extended reporting period by providing us with written notification of such election prior to the end of the **policy period**. The extended reporting period then becomes operative upon payment of an additional premium not to exceed 200% of the policy premium for this policy.
3. The extended reporting period starts with the end of the **policy period** of this policy and ends thirty six (36) months after the end of the **policy period** of this policy. However, in no event shall the extended reporting period under this policy be longer than the shortest extended reporting period under the **controlling underlying insurance** or any **underlying insurance**.

H. MAINTENANCE OF UNDERLYING INSURANCE

While this policy is in effect, you agree to maintain the **underlying insurance** in full force. Your failure, or the failure of others, to comply with this condition will not invalidate this policy, but in the event of such failure, we will only be liable to the same extent as if there had been compliance.

I. PAYMENT OF PREMIUM

The first Named Insured listed in **Item 1.** of the Declarations of this policy shall be responsible for and act on behalf of all insureds with respect to the payment of any premiums due under this policy.

J. REQUIRED NOTICE TO US**1. Notice of Event**

- a) You shall, as a condition precedent to the obligations of us under this policy, give written notice as soon as practicable to us of any **event** reasonably likely to involve this policy.
- b) Without limiting the requirements of paragraph **a.** above, you shall separately, and as soon as practicable, give written notice to us when a payment is made or reserve established for any **event** which has brought

the total of all payments and reserves to a level of twenty-five percent (25%) or more of the **underlying insurance**.

2. Notice Regarding Underlying Insurance

You shall, as a condition precedent to our obligations under this policy, give written notice to us of the following events as soon as practicable but no later than thirty (30) days after you have become aware of the event:

- a) Any **underlying insurance** being cancelled or non-renewed or otherwise ceasing to be in effect or being uncollectible in part or in whole; or
- b) Any **underlying insurer** being subject to a receivership, liquidation, dissolution, rehabilitation or any similar proceeding or being taken over by any regulatory authority.

Notice to an **underlying insurer** shall not constitute notice to us.

K. RESTRICTIVE AS UNDERLYING

Notwithstanding any provision to the contrary in this policy, if any **underlying insurance** with limits in excess of the **controlling underlying insurance** but underlying to this policy (the "intervening policy") contains warranties, terms, conditions, exclusions or limitations more restrictive than the **controlling underlying insurance**, whether on the effective date of this policy or at any time during the **policy period** of this policy, then this policy shall be deemed to follow those more restrictive warranties, terms, conditions, exclusions or limitations of the intervening policy.

L. SERVICE OF SUIT

Subject to paragraph **D.** above, it is agreed that in the event of failure of us to pay any amount claimed to be due hereunder, we, at the request of the insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon us and that in any suit instituted against us upon this contract, we will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provisions therefore, we hereby designate the Superintendent, Commissioner, Director of Insurance, or other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named counsel as the person to whom the said officer is authorized to mail such process or true copy thereof.

M. UNIMPAIRED UNDERLYING LIMITS

You warrant that the aggregate limits of the **underlying insurance**, as shown in the Schedule of Underlying Insurance, shall be unimpaired as of the effective date of this policy. In the event such underlying aggregate limits are impaired as of the effective date of this policy, this policy shall apply as if such aggregate limits were unimpaired. In the event of non-concurrent policy periods between this policy and **underlying insurance**, only that which must take place during the **policy period** of this policy in order for coverage to apply shall be considered in determining the extent of any erosion or exhaustion of the underlying aggregate limits, and the insured shall retain liability for any resulting gap in coverage.

V. DEFINITIONS

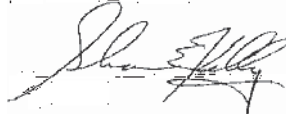
- A. Event** means occurrence, incident, claim, loss, offense, accident, person or organization, employee or any other term used in the **controlling underlying insurance** for the application of limits of insurance, including self-insured retentions, retained limits and deductibles (whether added to or deducted from limits of insurance).
- B. Controlling underlying insurance** means the policy listed in **Item 5.** of the Declarations of this policy.
- C. Policy period** means the period of time stated in **Item 2.** of the Declarations however, if the policy is cancelled in accordance with **SECTION V – CONDITIONS**, paragraph **2. Cancellation and Nonrenewal**, the **policy period** ends on the effective date of such cancellation.
- D. Underlying insurance** means those policies that are listed in the Schedule of Underlying Insurance attached to this policy, and any other applicable underlying insurance including any self-insured retentions, retained limits and deductibles (whether added to or deducted from the limits of insurance) under the foregoing.
- E. Underlying insurer** means any insurer who has issued any of the policies listed in **Items 4.** or **5.** of the Declarations.

IN WITNESS WHEREOF, the Insurer has caused this Policy to be executed and attested, but this Policy will not be valid unless countersigned by a duly authorized representative of the Insurer, to the extent required by applicable law.

Ironshore Specialty Insurance Company by:



Secretary



President

EXHIBIT C



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

10/05/2018

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Gus Bates Insurance & Investments 3221 Collinsworth St Fort Worth, TX 76107	CONTACT NAME: Michael Moore	
	PHONE (A/C, No, Ext): (817) 529-5320	FAX (A/C, No): (817) 984-7630
	E-MAIL ADDRESS: michael@gusbates.com	
	INSURER(S) AFFORDING COVERAGE	NAIC #
	INSURER A : Ironshore	
INSURED Vista Proppants and Logistics, LLC 4413 Carey Street Fort Worth, TX 76119	INSURER B : Acadia Insurance Company	31325
	INSURER C : AXIS Surplus Insurance Company	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS																																				
A	COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC OTHER:			002357403	06/01/2018	06/01/2019	<table border="1"> <tr><td>EACH OCCURRENCE</td><td>\$</td><td>1,000,000</td></tr> <tr><td>DAMAGE TO RENTED PREMISES (Ea occurrence)</td><td>\$</td><td>500,000</td></tr> <tr><td>MED EXP (Any one person)</td><td>\$</td><td>25,000</td></tr> <tr><td>PERSONAL & ADV INJURY</td><td>\$</td><td>1,000,000</td></tr> <tr><td>GENERAL AGGREGATE</td><td>\$</td><td>2,000,000</td></tr> <tr><td>PRODUCTS - COMP/OP AGG</td><td>\$</td><td>2,000,000</td></tr> <tr><td>POLLUTION LIAB</td><td>\$</td><td>1,000,000</td></tr> <tr><td>COMBINED SINGLE LIMIT (Ea accident)</td><td>\$</td><td>1,000,000</td></tr> <tr><td>BODILY INJURY (Per person)</td><td>\$</td><td></td></tr> <tr><td>BODILY INJURY (Per accident)</td><td>\$</td><td></td></tr> <tr><td>PROPERTY DAMAGE (Per accident)</td><td>\$</td><td></td></tr> <tr><td></td><td>\$</td><td></td></tr> </table>	EACH OCCURRENCE	\$	1,000,000	DAMAGE TO RENTED PREMISES (Ea occurrence)	\$	500,000	MED EXP (Any one person)	\$	25,000	PERSONAL & ADV INJURY	\$	1,000,000	GENERAL AGGREGATE	\$	2,000,000	PRODUCTS - COMP/OP AGG	\$	2,000,000	POLLUTION LIAB	\$	1,000,000	COMBINED SINGLE LIMIT (Ea accident)	\$	1,000,000	BODILY INJURY (Per person)	\$		BODILY INJURY (Per accident)	\$		PROPERTY DAMAGE (Per accident)	\$			\$	
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B	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS ONLY <input checked="" type="checkbox"/> NON-OWNED AUTOS ONLY			CAA 4690837-14	06/01/2018	06/01/2019	<table border="1"> <tr><td>COMBINED SINGLE LIMIT (Ea accident)</td><td>\$</td><td>1,000,000</td></tr> <tr><td>BODILY INJURY (Per person)</td><td>\$</td><td></td></tr> <tr><td>BODILY INJURY (Per accident)</td><td>\$</td><td></td></tr> <tr><td>PROPERTY DAMAGE (Per accident)</td><td>\$</td><td></td></tr> <tr><td></td><td>\$</td><td></td></tr> </table>	COMBINED SINGLE LIMIT (Ea accident)	\$	1,000,000	BODILY INJURY (Per person)	\$		BODILY INJURY (Per accident)	\$		PROPERTY DAMAGE (Per accident)	\$			\$																						
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	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? <input type="checkbox"/> Y / N (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below		N / A																																								
A	General Liability			002357403	06/01/2018	06/01/2019	Pollution/ A, B, C 1,000,000																																				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

General Liability-Insured Site Schedule Pollution IE END EPIC 003 04/09

Business Auto-Business Auto Ultra Plus Endorsement CL CA-20 14

General Liability-Form IE.COV.EPIC.001

Blanket Additional Insured, Blanket Waiver of Subrogation, Blanket Primary & Non-Contributory as required by written contract.

Occurrence coverage trigger

Defense outside the limits and deductible

Products Pollution and exposure as a specific insuring agreement

SEE ATTACHED ACORD 101

CERTIFICATE HOLDER

CANCELLATION

Sequitur Energy Resources LLC 2050 W. Sam Houston Parkway South Suite 1850 Houston, TX 77042	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE



ADDITIONAL REMARKS SCHEDULE

Page 1 of 1

AGENCY Gus Bates Insurance & Investments		NAMED INSURED Vista Proppants and Logistics, LLC 4413 Carey Street Fort Worth, TX 76119 Tarrant	
POLICY NUMBER SEE PAGE 1		EFFECTIVE DATE: SEE PAGE 1	
CARRIER SEE PAGE 1	NAIC CODE SEE P 1		

ADDITIONAL REMARKS

THIS ADDITIONAL REMARKS FORM IS A SCHEDULE TO ACORD FORM,
 FORM NUMBER: ACORD 25 FORM TITLE: Certificate of Liability Insurance

Description of Operations/Locations/Vehicles:

World-Wide Products and Products Pollution coverage

Blanket Time Element Pollution Event (10 day discovery / 30 day reporting) coverage for bodily injury and property damage at owned or operated locations

Blanket Non-Owned Location Site Pollution – Bodily Injury and Property Damage. Non-Owned Locations include both storage and disposal facilities

Pollution Liability during transportation including all loading, unloading and misdelivery

Contractor's Pollution Liability – Occurrence based coverage trigger with defense outside the limit. No pollutant limitations on mold matter, lead or asbestos

Per Project Aggregate including Contractors Pollution Liability

Per Location Aggregate applicable to both General Liability and Pollution Liability

Named Insured also includes the following:

Lonestar Prospects Ltd, dba Vista Sand

MAALT, L.P.

GHMR Operations, LLC

EPIC Coverage Map

INSURING AGREEMENTS

General Bodily Injury and Property Damage Liability (GL)	Defined Insuring Agreement - Coverage Part I; Coverage A
Hostile Fire and Building Equipment Liability	Defined Insuring Agreement - Coverage Part I; Coverage B
Products Pollution and Exposure Liability	Defined Insuring Agreement - Coverage Part I; Coverage C
Time-Element Pollution Bodily Injury and Property Damage Liability	Defined Insuring Agreement - Coverage Part I; Coverage D
Non-Owned Site Pollution Bodily Injury and Property Damage Liability	Defined Insuring Agreement - Coverage Part I; Coverage E
Pollution Liability During Transportation	Defined Insuring Agreement - Coverage Part I; Coverage F
Contractors Pollution Liability Coverage	Defined Insuring Agreement - Coverage Part I; Coverage G
Site Pollution Incident Legal Liability Coverage	Defined Insuring Agreement - Coverage Part III
Professional Liability Coverage (environmental consultants only)	Defined Insuring Agreement - Coverage Part IV
Emergency Response Expense (No Legal Liability Required)	Defined Insuring Agreement: Pollution Incident during Transportation, Contractors Pollution and Site Pollution Incident Legal Liability (no Legal Liability required)

POLICY FEATURES

Occurrence Coverage Trigger	Coverage Parts I & II
Claims Made Coverage Trigger	Coverage Parts III & IV
Pay on Behalf	Included
Right and Duty to Defend	Included
Defense Costs in addition to the Limit of Insurance	Yes except for Coverage Parts III & IV
Defense Costs Outside of the Deductible	Yes except for Coverage Parts III & IV
Audit Provision	None

POLICY ENHANCEMENTS

Broad Form Named Insured	Included in Section II - Who is an Insured
Blanket Additional Insured - including completed operations (when required by written contract)	Included in Section II - Who is an Insured
Blanket Additional Insured – Primary & Non-Contributory (when required by written contract)	Section IV – Conditions; Condition #17. Other Insurance - a. Primary Insurance
Additional Insureds: Lessors of Equipment & Premises (when required by written contract)	Included in Section II - Who is an Insured
Additional Insureds: Vendors (when required by written contract)	Included in Section II - Who is an Insured
Newly Acquired or Formed Organizations (except partnerships, JV's and LLC's) – 180 days	Included in Section II - Who is an Insured

Employees & Volunteers as Insureds	Included in Section II - Who is an Insured
Leased Workers as Employees and Insureds	Included in the Definition of Employee
Misdelivery of Liquid during Transportation	Included in Coverage F - Pollution Liability During Transportation
Blanket Non-Owned Disposal Sites Coverage	Coverage Part I - Coverage E
Host Liquor Liability	Exception to Liquor Liability Exclusion - Coverage Part I; Coverage A Exclusions
Incidental Medical Malpractice	Included in Section II - Who is an Insured
Non-owned Watercraft (Under 75 ft.)	No limitation on the length of non owned watercraft in the exception to Exclusion a. Aircraft, Auto or Watercraft
Contractual Liability in connection with work done near a Railroad	Definition of Insured Contract - no limitations regarding work near a railroad
Knowledge of Occurrence (Who is deemed to know of prior occurrences)	Knowledge is limited to Responsible Executive as defined in the policy (including the named insured, managers of insured sites, managers of environmental, health and safety and other authorized employees)
Notice of Occurrence	Section IV - Condition 8. Duties in the Event of Occurrence - Named insured must notify as soon as practicable
Blanket Waiver of Subrogation (when required by written contract)	Section IV – Condition 22. Transfer of Rights of Recovery Against Others To Us
Unintentional Errors & Omissions	Section IV – Condition 19. Representations - No policy restrictions as respects failure to disclose
Coverage Territory - General Liability	US, Puerto Rico, Canada and the Gulf of Mexico. Worldwide Coverage for Products (including Products Pollution). Suit can be brought anywhere.
Coverage Territory - Pollution	Worldwide Coverage for Transportation, Contractors Pollution and Non-owned sites. Insured sites are per the address of the site
Gulf of Mexico Extension	Included in the Definition of Coverage Territory
Fellow Employee Exclusion	The exception to Who is an Insured for BI to a Co-Employee found in the ISO GL Coverage form does not exist in the EPIC Coverage Form
Lead	No Exclusion as respects Products Pollution and Contractors Pollution
Silica	No Silica Exclusion
Professional Liability Exclusion	No Exclusion in Coverage Part I
New York - Third Party Action Exclusion	No Third Party Action Over Exclusion
Per Location and Per Project Aggregate	Section III – Limits of Insurance and Deductible
Bodily Injury to include mental anguish, shock or emotional distress	Included in the Definition of Bodily Injury
Natural Resource Damage	Included in the Definition of Property Damage
Restoration Costs	Included in the Definition of Clean-Up Costs
Mold Matter	Included in the Definition of Pollutants
90 Days Notice of Cancellation (10 days for non-payment of premium) or Non-Renewal	Section IV - Conditions: Condition 3. Cancellation; Condition 24. When We Do Not Renew

When considering a long-term insurance partner for your business,
please call 1-877-IRON411, visit www.ironshore.com or email: info@ironshore.com



About Ironshore

Ironshore provides broker-sourced specialty property and casualty insurance coverages for varying risks on a global basis through its multiple international platforms. The Ironshore group of companies is rated A (Excellent) by A.M. Best with a Financial Size Category of Class XIV. Ironshore's Pembroke Syndicate 4000 operates within Lloyd's where the market rating is A (Excellent) by A.M. Best and A+ (Strong) from both Standard & Poor's and Fitch. For more information, please visit: www.ironshore.com

The information contained herein is for general informational purposes only and does not constitute an offer to sell or a solicitation of an offer to buy any product or service. Any description set forth herein does not include all policy terms, conditions and exclusions. Bound insurance policies, rather than summaries thereof, govern. Not all insurance coverages or products are available in all states or regions and policy terms may vary based on individual state or region requirements. Some policies may be placed with a surplus lines insurer. Surplus lines insurers generally do not participate in state guaranty funds and coverage may only be obtained through direct placement with a surplus lines broker.



IRONSHORE SPECIALTY INSURANCE COMPANY

Mailing Address:
75 Federal Street
5th Floor
Boston, MA 02110
Toll Free: (877) IRON411

Insured Name: Lonestar Prospects, Ltd.
Policy Number: 002357400

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

TABLE OF CONTENTS

SECTION I – COVERAGES.....	PAGE
COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY.....	2
COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions.....	2
Coverage A: General Bodily Injury and Property Damage Liability.....	2
Coverage B: Hostile Fire and Building Equipment Liability.....	4
Coverage C: Products Pollution and Exposure Liability.....	5
Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability.....	5
Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability.....	6
Coverage F: Pollution Liability during Transportation.....	7
Coverage G: Contractors Pollution Liability.....	8
COVERAGE PART I – Common Insuring Agreement.....	9
COVERAGE PART I – Supplementary Payments.....	10
COVERAGE PART I – Common Exclusions.....	11
COVERAGE PART II: MISCELLANEOUS COVERAGES.....	14
Coverage A: Personal and Advertising Injury Liability.....	14
Coverage B: Employee Benefits Administration Liability.....	16
Coverage C: Medical Payments.....	17
COVERAGE PART II – Supplementary Payments.....	18
COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY.....	18
Coverage A: Bodily Injury and Property Damage Liability.....	18
Coverage B: First and Third Party On-Site Clean-Up Costs.....	19
Coverage C: Off-Site Clean-Up Costs.....	20
COVERAGE PART III – Common Exclusions.....	21
COVERAGE PART IV – PROFESSIONAL LIABILITY.....	23
SECTION II – WHO IS AN INSURED.....	26
SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE.....	28
SECTION IV – CONDITIONS.....	30
SECTION V – DEFINITIONS.....	36

ENVIRONMENTAL PROTECTION INSURANCE COVERAGE PACKAGE (EPIC PAC)

COVERAGE FORM

Various provisions in this policy restrict coverage. Please read the entire policy carefully to determine rights, duties and what is and is not covered.

COVERAGE PART III – SITE POLLUTION INCIDENT LEGAL LIABILITY and **COVERAGE PART IV – PROFESSIONAL LIABILITY** of this policy provide claims-made coverage.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this Policy. The words “we”, “us” and “our” refer to the Company providing this insurance.

The word “insured” means any person or organization qualifying as such under **SECTION II – WHO IS AN INSURED**.

Defined terms, other than headings, appear in bold face type. Refer to **SECTION V - DEFINITIONS**.

SECTION I – COVERAGES

COVERAGE PART I: COMMERCIAL GENERAL LIABILITY AND POLLUTION LIABILITY

COVERAGE PART I – Coverage Specific Insuring Agreements and Exclusions

Coverage A: General Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **loading or unloading**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is not being used to carry persons or property for a charge;
- (3) An aircraft hired or chartered by or loaned to an insured with a paid crew;
- (4) Parking an **auto** on, or on the ways next to, premises you own or rent, provided the **auto** is not owned by or rented or loaned to you or the insured;

- (5) Liability assumed under any **insured contract** for the ownership, maintenance or use of aircraft or watercraft; or
- (6) **Bodily injury** or **property damage** arising out of the operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of **mobile equipment** if it were not subject to a compulsory or financial responsibility law where it is licensed or principally garaged or the operation of any of the machinery or equipment listed in Paragraph **f. (2)** or **f. (3)** of the definition of **mobile equipment**.

b. Asbestos and Lead

- (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or
- (2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

c. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does to apply to liability for damages because of **bodily injury**.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

d. Employment - Related Practices

Bodily injury to:

- (1) A person arising out of any refusal to employ that person, termination of that person's employment or employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of the person as a consequence of **bodily injury** to that person at whom any of the employment-related practices described in Paragraphs **(1)** above is directed.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

e. Liquor Liability

Bodily injury or **property damage** for which any insured may be held liable by reason of causing or contributing to the intoxication of any person, the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured or providing or failing to provide transportation with respect to any person that may be under the influence of alcohol if the **occurrence** which caused the **bodily injury** or **property damage**, involved that which is described in the Paragraph above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

f. Mobile Equipment

Bodily injury or **property damage** arising out of the transportation of **mobile equipment** by an **auto** owned or operated by or rented or loaned to any insured or the use of **mobile equipment** in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition or stunting activity.

g. Personal And Advertising Injury

Bodily injury arising out of **personal and advertising injury**.

h. Pollution

(1) **Bodily injury** or **property damage** caused by a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur **clean-up costs**; or

(b) **Claim** or **suit** by or on behalf of a governmental authority for damages because of **clean-up costs**.

i. Recording And Distribution Of Material Or Information In Violation Of Law

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Coverage B: Hostile Fire and Building Equipment Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

a. **Bodily injury** sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests; and

b. **Bodily injury** or **property damage** arising out of heat, smoke or fumes from a **hostile fire**

But only if:

(1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and

(2) The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Aircraft, Auto or Watercraft

Bodily injury or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the **occurrence** which caused the **bodily injury** or **property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by or rented or loaned to any insured.

b. Asbestos and Lead

(1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos or lead in any form; or

(2) **Property damage** arising out of the presence of, or exposure to, asbestos or lead in any form.

Coverage C: Products Pollution and Exposure Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:

- a. **Bodily injury, property damage or environmental damage** arising out of a **pollution incident** caused by **your product**, and included in the **products-completed operations hazard**; or
- b. **Bodily injury or property damage** arising out of the ingestion, inhalation or absorption of, contact with, or exposure to, any fumes, dust, particles, vapors, liquids or other substances that are or originate from **your product**, and included in the **products-completed operations hazard**.

But only if:

- (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

- a. **Asbestos**
 - (1) **Bodily injury** arising out of the presence, ingestion, inhalation or absorption of, or exposure to, asbestos in any form; or
 - (2) **Property damage** arising out of the presence of, or exposure to, asbestos in any form.
 - (3) **Environmental damage** arising from asbestos or asbestos containing materials in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.
- b. **Product Disposal**
Bodily injury, property damage or environmental damage arising out of the disposal of **your product**.
- c. **Products as Waste**
Environmental damage arising out of **your product** which is **waste**.
- d. **Transportation**
Bodily injury, property damage or environmental damage arising during **transportation**.

Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies arising out of a **time-element pollution incident** on, at, under or migrating from any **location** which is owned or occupied by you and which is not specifically scheduled as an **insured site** but only if:

- a. The **bodily injury or property damage** is caused by an **occurrence** that takes place in the **coverage territory**;
- b. The **bodily injury or property damage** takes place during the **policy period**;
- c. The insured discovers the **pollution incident** within ten (10) days of commencement of the **pollution incident**; and
- d. The **pollution incident** is reported to us in writing within thirty (30) days of commencement of the **pollution incident**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury or **property damage** that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest non-compliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Transportation

Bodily injury or **property damage** arising during **transportation**.

Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from any **non-owned site** but only if:

- a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
- b. The **bodily injury** or **property damage** takes place during the **policy period**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Noncompliance

Bodily injury, **property damage** or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such non-compliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

c. Prior Pollutants or Pollution Incident

Bodily injury or **property damage** arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury** or **property damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury** or **property damage** during the policy period of a policy previously issued by us.

d. **Transportation**

Bodily injury or **property damage** arising during **transportation**.

Coverage F: Pollution Liability during Transportation

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies because of:
 - (1) **Bodily injury, property damage** or **environmental damage** arising out of a **pollution incident** during **transportation**; or
 - (2) **Bodily injury, property damage** or **environmental damage** arising out of **misdelivery** during **transportation**;
 But only if:
 - (a) The **bodily injury, property damage** or **environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (b) The **bodily injury, property damage** or **environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** during **transportation** or **misdelivery** during **transportation** but only if:
 - (1) The **pollution incident** or **misdelivery** first commenced during the **policy period**;
 - (2) The **pollution incident** or **misdelivery** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident** or **misdelivery**; and
 - (4) The **pollution incident** or **misdelivery** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident** or **misdelivery**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. **Criminal Fines, Penalties and Assessments**

Any criminal fines, criminal penalties or criminal assessments.

b. **Damage to Conveyance**

Property damage to any **conveyance** utilized during **transportation**. This exclusion does not apply to **claims** made by third-party carriers for such **property damage** arising from the insured's negligence.

c. **Insured Site Transportation**

Environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

d. **Noncompliance**

Bodily injury, property damage or **environmental damage** that results from or is associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint,

notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement..

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

e. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

Coverage G: Contractors Pollution Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury, property damage or environmental damage** to which this insurance applies arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **bodily injury, property damage or environmental damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
 - (2) The **bodily injury, property damage or environmental damage** takes place during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** caused by **your work** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **pollution incident** takes place in the **coverage territory**;
 - (3) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (4) The **pollution incident** and related **emergency response expenses** are reported to us within fourteen (14) days of commencement of the **pollution incident**.

2. Exclusions

In addition to exclusions found in **COVERAGE PART I – Common Exclusions**, this insurance does not apply to:

a. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessments.

b. Disposal Site

Bodily injury, property damage or environmental damage arising out of a **pollution incident** on, at, under or migrating from any transfer, storage, disposal, landfill, treatment or consolidation **location** beyond the boundary of a job site where **your work** is performed.

c. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

- (1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or
- (2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

d. Prior Pollutants or Pollution Incidents

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** resulting from **your work**, known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

- (1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage or environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Amendment Endorsement attached to this policy;
- (2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage or environmental damage** during the policy period of a policy previously issued by us.

e. Transportation

Bodily injury, property damage or environmental damage arising during **transportation**.

COVERAGE PART I – Common Insuring Agreement

The following insuring agreements apply to **Coverages A** through **G** inclusive:

1. We will have the right and duty to defend the insured against any **suit** seeking damages for **bodily injury, property damage or environmental damage** to which any of **Coverages A** through **G** applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which any of those coverages do not apply. We may, at our discretion, investigate any **occurrence** and settle any **claim** or **suit** that may result. But:
 - a. The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**;
 - b. Our right and duty to defend ends when we have used up the applicable limits of insurance in the payment of judgments, settlements, **clean-up costs** or **emergency response expense** under the applicable coverage found in **Coverage Part I**; and
 - c. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART I – Supplementary Payments**.
2. **Bodily injury, property damage or environmental damage** will be deemed to have been known to have occurred at the earliest time when any **responsible executive**:
 - a. Reports all, or any part, of the **bodily injury, property damage or environmental damage** to us or any other insurer;
 - b. Receives a written or verbal demand or **claim** for damages because of the **bodily injury, property damage or environmental damage**; or
 - c. Becomes aware by any other means that **bodily injury, property damage or environmental damage** has occurred or has begun to occur.
3. The following applies to progressive or indivisible **bodily injury, property damage or environmental damage**, including any continuation, change or resumption of such **bodily injury, property damage or environmental damage**, which

takes place over a period of days, weeks, months or longer caused by continuous or repeated exposure to the same, related or continuous: **(i) pollution incident**; or **(ii) general harmful conditions or substances**:

- a. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place only on the date of first exposure to such **pollution incident** or general harmful conditions or substances; or
- b. Such **bodily injury, property damage or environmental damage** shall be deemed to have taken place during the policy period of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period** but only if:
 - (1) The date of first exposure cannot be determined or is before the effective date of the first policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**; and
 - (2) Such **bodily injury, property damage or environmental damage** continues, in fact, to take place during this **policy period**.
4. If the same, related or continuous **pollution incident** or general harmful conditions or substances results in **bodily injury, property damage or environmental damage** that takes place during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART I** of this policy for **bodily injury, property damage or environmental damage** that takes place during the **policy period**:
 - a. All such **bodily injury, property damage and environmental damage** shall be deemed to have taken place only during the first policy period of such policies in which any of the **bodily injury, property damage or environmental damage** took place; and
 - b. All damages arising from all such **bodily injury, property damage or environmental damage** shall be deemed to have arisen from one **occurrence** and shall be subject to the Each Occurrence Limit applicable to the policy for such first policy period.
5. Damages because of **bodily injury** include damages claimed by any person or organization for care, loss of services or death resulting at any time from the **bodily injury**.

COVERAGE PART I – Supplementary Payments

1. We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART I**:
 - a. All expenses we incur.
 - b. Up to \$1,000 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which **bodily injury** in **COVERAGE PART I** applies. We do not have to furnish these bonds.
 - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
 - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
 - e. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
 - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
 - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a **suit** and an indemnitee of the insured is also named as a party to the **suit**, we will defend that indemnitee if all of the following conditions are met:

- a. The **suit** against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an **insured contract**;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same **insured contract**;
- d. The allegations in the **suit** and the information we know about the **occurrence** are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of the indemnitee against such **suit** and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the **suit**;
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **suit**;
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the **suit**; and
 - (b) Conduct and control the defense of the indemnitee in such **suit**.

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as **COVERAGE PART I – Supplementary Payments**. Notwithstanding the provisions of **COVERAGE PART I – Common Exclusions**, Exclusion **a. Contractual Liability**, Paragraph (2), such payments will not be deemed to be damages for **bodily injury, property damage and environmental damage** and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as **COVERAGE PART I – Supplementary Payments** ends when we have used up the applicable limit of insurance in the payment of judgments or settlements; or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

COVERAGE PART I – Common Exclusions:

The insurance provided in **COVERAGE PART I** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Damage to Impaired Property or Property Not Physically Injured

Property damage or **environmental damage** to **impaired property** or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in **your product** or **your work**; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to **your product** or **your work** after it has been put to its intended use.

c. Damage to Property

Property damage or **environmental damage** to:

- (1) Property you own or occupy including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the **property damage** or **environmental damage** arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured; or
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the **property damage** or **environmental damage** arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because **your work** was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to **property damage** (other than damage by fire, lightning or explosion) to premises, including the contents of such premises, rented to you for a period of 30 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE**.

Paragraph (2) of this exclusion does not apply if the premises are **your work** and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to **property damage** or **environmental damage** included in the **products-completed operations hazard**.

d. Damage to Your Product

Property damage to **your product** arising out of it or any part of it.

e. Damage to Your Work

Property damage or **environmental damage** to **your work** arising out of it or any part of it. and included in the **products completed operations hazard**.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor or for liability assumed under a sidetrack agreement.

f. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured, arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an **insured contract**.

g. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured. This exclusion does not apply to **bodily injury or property damage** resulting from the use of reasonable force to protect persons or property.

h. Known Injury or Damage

Bodily injury, property damage or environmental damage that occurred in whole or in part prior to the **policy period** and was known prior to the **policy period** by a **responsible executive**. Any continuation, change or resumption of such **bodily injury, property damage or environmental damage** will be deemed to have been known by a **responsible executive** prior to the **policy period**.

This exclusion does not apply to any continuation, change or resumption of **environmental damage** caused by **your work** performed after the effective date of the **policy period**.

i. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **environmental damage or property damage** occurs.

However, this exclusion does not apply:

- (1) To **clean-up costs** required by **environmental laws** governing the liability or responsibilities of an insured to respond to a **pollution incident**; or
- (2) If such damage is a result of an unexpected or unintended **pollution incident** arising from **your work**.

j. Nuclear Material

Bodily injury, property damage or environmental damage based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

k. Recall of Products, Work or Impaired property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of, **your product, your work or impaired property** if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

l. War

Bodily injury, property damage or environmental damage, however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

m. Workers Compensation and Similar Laws

Any obligation of the insured under workers' compensation, disability benefits or unemployment compensation law or any similar law.

COVERAGE PART I – Coverage A., Paragraph 2., Exclusions a., f. and g. and COVERAGE PART I – Common Exclusions, Exclusion b., through f. inclusive and k. through m. inclusive do not apply to damage by fire, lightning or explosion to premises while rented to or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE, Paragraph 5..**

COVERAGE PART II: MISCELLANEOUS COVERAGES

Coverage A: Personal and Advertising Injury Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal and advertising injury** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages for **personal and advertising injury** to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any **claim** or **suit** that may result. But:
 - (1) The amount we will pay for damages is limited as described in **SECTION III - LIMITS OF INSURANCE AND DEDUCTIBLE;**
 - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage A;** and
 - (3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments.**
- b. This insurance applies to **personal and advertising injury** caused by an offense arising out of your business but only if the offense was committed in the **coverage territory** during the **policy period.**
- c. If the same, related or continuous offense is committed during the policy periods of different policies issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II – Coverage A: Personal and Advertising Injury Liability** for offenses committed during the policy period, all such offenses shall be deemed to have taken place only during the first policy period of such policies in which any of the offenses were committed.

2. Exclusions

This insurance does not apply to:

a. Breach of Contract

Personal and advertising injury arising out of a breach of contract, except an implied contract to use another's advertising idea in your **advertisement.**

b. Criminal Acts

Personal and advertising injury arising out of a criminal act committed by or at the direction of the insured.

c. Contractual Liability

Personal and advertising injury for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Distribution Of Material In Violation Of Statutes

Bodily injury or **property damage** arising directly or indirectly out of any action or omission that violates or is alleged to violate the Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law, the CAN-SPAM Act of 2003, including any amendment of or addition to such law or any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003 that prohibits or limits the sending, transmitting, communication or distribution of material or information.

e. Electronic Chatrooms or Bulletin Boards

Personal and advertising injury arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

f. Infringement of Copyright, Patent, Trademark or Trade Secret

Personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your **advertisement**.

However, this exclusion does not apply to infringement, in your **advertisement**, of copyright, trade dress or slogan.

g. Insureds in Media and Internet Type Businesses

Personal and advertising injury committed by an insured whose business is advertising, broadcasting, publishing or telecasting, designing or determining content of websites for others or an Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **32 a., b. and c.** of **personal and advertising injury** under **SECTION V – DEFINITIONS**.

For the purpose of this exclusion, the placing of frames, borders, or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

h. Knowing Violation of Rights of Another

Personal and advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict **personal and advertising injury**.

i. Material Published Prior to Policy Period

Personal and advertising injury arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the **policy period**.

j. Material Published with Knowledge of Falsity

Personal and advertising injury arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

k. Pollution

(1) Personal and advertising injury arising out of a **pollution incident**.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others incur clean-up costs; or

(b) **Claim or suit** by or on behalf of a governmental authority for damages because of **clean-up costs**.

l. Quality of Performance of Goods – Failure to Conform to Statements

Personal and advertising injury arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your **advertisement**.

m. Unauthorized Use of Another's Name or Product

Personal and advertising injury arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

n. War

Bodily injury or property damage, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

o. Wrong Description of Prices

Personal and advertising injury arising out of the wrong description of the price of goods, products or services stated in your **advertisement**.

Coverage B: Employee Benefits Administration Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a negligent act, error or omission of the insured, or of any other person for whose acts the insured is legally liable, in the **administration** of your **employee benefits program** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any **claim** or **suit** that may result. But:

(1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**;

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under this **Coverage B**; and

(3) No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **COVERAGE PART II - Supplementary Payments**.

b. This insurance applies to damages only if the negligent act, error or omission takes place in the **coverage territory**.

2. Exclusions

This insurance does not apply to:

a. Available Benefits

Any **claim** for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

b. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

c. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

d. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

e. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

f. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the **employee benefit program**.

g. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any claim based upon failure of any investment to perform, errors in providing information on past performance of investment vehicles or advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the **employee benefit program**.

h. Prior Act, Error or Omission

Any **claim** arising from any act, error or omission known, prior to the effective date of the **policy period**, to a **responsible executive** if such **responsible executive** knew or could have reasonably foreseen that such an act, error or omission could give rise to a **claim** under this policy.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Workers' Compensation And Similar Laws

Any **claim** arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

Coverage C: Medical Payments**1. Insuring Agreement**

- a. We will pay medical expenses as described below for **bodily injury** caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (1) The accident takes place in the **coverage territory** and during the **policy period**;
- (2) The expenses are incurred and reported to us within one year of the date of the accident; and
- (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral service.

2. Exclusions

We will not pay expenses for **bodily injury**:

a. Any Insured

To any insured, except **volunteer workers**.

b. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletics contests.

c. COVERAGE PART I Exclusions

Excluded under **Coverage A** of **COVERAGE PART I** and **COVERAGE PART I - Common Exclusions**

d. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

e. Injury on Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

f. Products-completed operations hazard

Included within the **products-completed operations hazard**.

g. Workers Compensation and Similar Laws

To a person, whether or not an **employee** of any insured, if benefits for the **bodily injury** are payable or must be provided under workers compensation or disability benefits law or a similar law.

COVERAGE PART II – Supplementary Payments:

We will pay, with respect to any **claim** we investigate or settle, or any **suit** against an insured we defend under **COVERAGE PART II – Coverage A and B**:

1. All expenses we incur.
2. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
3. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim** or **suit**, including actual loss of earnings up to \$500 a day because of time off from work.
4. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

COVERAGE PART III: SITE POLLUTION INCIDENT LEGAL LIABILITY

Coverage A – Bodily Injury and Property Damage Liability

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies arising out of a **pollution incident** on, at, under or migrating from an **insured site**. We will have the right and the duty to defend the insured against any **suit** seeking damages for **bodily injury** or **property damage** to which this coverage part applies. However, we will have no duty to defend the insured against any **suit** seeking damages to which this coverage part does not apply. We may, at our discretion, investigate any **pollution incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **Section III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART III** in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- b. This insurance applies to **bodily injury** and **property damage** only if:

- (1) The **bodily injury** or **property damage** is caused by a **pollution incident** that commenced on or after the retroactive date applicable to the **insured site** and before the end of the **policy period**; and
- (2) A **claim** for damages because of the **bodily injury** or **property damage** is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us

during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

Coverage B – First and Third Party On-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for **clean-up costs** on, at or under an **insured site** or **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:
 - (1) The **environmental damage** is caused by a **pollution incident** on, at or under:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided that the **pollution incident** commenced before the end of the **policy period**; and
 - (2) The insured:
 - (a) First discovers the **pollution incident** during the **policy period**. Discovery of a **pollution incident** happens when a **responsible executive** (i) first becomes aware of the **pollution incident**, (ii) reports the **pollution incident** to us in writing during the **policy period**, and (iii) promptly reports the **pollution incident** to the appropriate governmental authority as required by **environmental law**; or
 - (b) Becomes legally liable to pay **clean-up costs** as a result of a **claim**, the **claim** for which is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition 11. **Extended Reporting Period**. A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported during the **policy period**.
- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** on, at or under an **insured site** but only if:
 - (1) The **pollution incident** first commenced during the **policy period**;
 - (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
 - (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.
- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:
 - (1) the amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and
 - (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense payments**.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART III** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. Asbestos and Lead

Environmental damage arising from asbestos, asbestos containing materials or lead-based paint in, on, or applied to any building or other structure. This exclusion does not apply to **clean-up costs** for the remediation of soil, surface water or groundwater.

b. Off-Site Clean-Up Costs and Emergency Response Expense

Clean-up costs and **emergency response expense** other than those on, at or under a **non-owned site** or an **insured site**.

Coverage C – Off-Site Clean-Up Costs

1. Insuring Agreement

- a. We will pay for off-site **clean-up costs** beyond the boundary of an **insured site** or a **non-owned site** that the insured becomes legally obligated to pay because of **environmental damage** to which this insurance applies but only if:

- (1) The **environmental damage** is caused by a **pollution incident** migrating from:
 - (a) An **insured site** provided the **pollution incident** commenced on or after the Retroactive Date applicable to the **insured site** and the **pollution incident** commenced before the end of the **policy period**; or
 - (b) A **non-owned site** in the **coverage territory** provided the **pollution incident** commenced prior to the end of the **policy period**; and
- (2) As respects **clean-up costs**, a **claim** for **clean-up costs** is first made against any insured and reported to us in writing during the **policy period** or any extended reporting period we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- b. We will pay **emergency response expense** incurred by or on behalf of any insured in response to an imminent and substantial threat to human health or the environment arising out of a **pollution incident** beyond the boundary of an **insured site** but only if:

- (1) The **pollution incident** first commenced during the **policy period**;
- (2) The **emergency response expenses** are incurred within seven (7) days of commencement of the **pollution incident**; and
- (3) The **pollution incident** and related **emergency response expenses** are reported to us in writing within fourteen (14) days of commencement of the **pollution incident**.

- c. We have the right and the duty to investigate, settle, contest or appeal any obligation asserted against an insured to pay **clean-up costs**. But:

- (1) The amount we will pay for such **clean-up costs** and **emergency response expense** is limited as described in **SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE**; and

- (2) Our right and duty to investigate, settle, contest or appeal ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, **clean-up costs**, **emergency response expense** and **legal and claims expense** payments.

- d. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **pollution incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART II** for **claims** first made against the insured and reported to us during the **policy period**, then all such **claims** shall be:

- (1) Deemed to be one **claim**;

- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and

- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART III** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the time such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured and reported to us.

2. Exclusions

In addition to exclusions found in **COVERAGE PART III – Common Exclusions**, the following exclusions apply:

a. On-Site Clean-Up Costs

Clean-up costs on at or under a **non-owned site** or an **insured site**.

COVERAGE PART III - Common Exclusions

The insurance provided in **COVERAGE PART III** does not apply to:

a. Contractual Liability

Bodily injury, property damage or environmental damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or

- (2) Assumed in a contract or agreement that is an **insured contract**, provided the **bodily injury, property damage or environmental damage** occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an **insured contract**, reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of **bodily injury, property damage or environmental damage**, provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same **insured contract**; and

- (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

b. Criminal Fines, Penalties and Assessments

Any criminal fines, criminal penalties or criminal assessment.

c. Employer's Liability

Bodily injury to:

- (1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

d. Expected or Intended Injury or Damage

Bodily injury, property damage or environmental damage expected or intended from the standpoint of the insured.

e. Material Change in Use

Clean-up costs resulting from a material change in use or operation at any **insured site** from the use or operations at such **insured site** at the effective date of the **policy period**

f. Naturally Present Pollutants

Property damage or environmental damage arising out of **pollutants** at levels naturally present where the **property damage or environmental damage** occurs.

However, this exclusion does not apply to **clean-up costs** required by **environmental laws** governing the liability or responsibility of an insured to respond to a **pollution incident**.

g. Noncompliance

Bodily injury, property damage or environmental damage that results from or are associated with a **responsible executives** intentional disregard of, or deliberate, knowing, willful or dishonest noncompliance with any **environmental law**, including but not limited to the failure to comply with any regulation applicable to air emissions or effluent discharges, or any other statute, regulation, ordinance, order, administrative complaint, notice of violation, notice letter, or instruction by or on behalf of any governmental agency or representative or other federal, state, local or other applicable legal requirement.

However this exclusion shall not apply to noncompliance based upon:

(1) Good faith reliance upon written advice of qualified counsel received in advance of such noncompliance; or

(2) Reasonable efforts to mitigate a **pollution incident** that necessitates immediate action provided that such **pollution incident** is reported to us in writing within fourteen (14) days of its commencement.

g. Nuclear Material

Any **bodily injury, property damage or environmental damage** based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

(1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;

(2) Entitled to indemnity from the United States of America or any agency thereof; or

(3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

h. Previously Reported Claim

Any **claim or suit** first made and reported to us during the **policy period** arising from the same, related or continuous **pollution incident** for which a **claim or suit** was reported under any policy of which this policy is a renewal or replacement or succeeds in time, whether or not such prior policy affords coverage for such **claim or suit**.

i. Prior Pollutants or Pollution Incident

Bodily injury, property damage or environmental damage arising out of **pollutants** or a **pollution incident** known to a **responsible executive** prior to the effective date of the **policy period**.

This exclusion does not apply if:

(1) The **pollutants** or **pollution incident** giving rise to the **bodily injury, property damage** or **environmental damage** is specifically referenced, or identified on a Prior Pollutants or Pollution Incident Exclusion Amendment Endorsement attached to this policy; or

(2) We have been notified in writing of such **pollution incident** giving rise to **bodily injury, property damage** or **environmental damage** during the policy period of a policy previously issued by us.

j. Transportation

Bodily injury, property damage, environmental damage or **emergency response expense** arising out of a **pollution incident** during **transportation**.

However this exclusion does not apply as respects **environmental damage** or **emergency response expense** arising out of a **pollution incident** during **transportation** within the boundaries of an **insured site**.

k. Underground Storage Tanks

Bodily injury, property damage or **environmental damage** based upon or arising out of any **underground storage tank** which is: (i) known to a **responsible executive** as of the effective date of the **policy period**; (ii) Known to a **responsible executive** as of the date an **insured site** is added by Endorsement during the **policy period**; or (iii) installed during the **policy period**.

This exclusion does not apply to any **underground storage tank** which has been:

(1) Closed or abandoned in place in accordance with all applicable **environmental laws** prior to the effective date of the **policy period**;

(2) Removed prior to the effective date of the **policy period**; or

(3) Scheduled to this policy by Endorsement.

l. Upgrades, improvements or installations

Any costs, charges or expenses for upgrade, improvement of, or installation of any control to, any property or processes on, at, within or under an **insured site** even if such upgrade, improvement or installation is required by **environmental laws**.

m. War

Bodily injury, property damage or **environmental damage**, however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

n. Workers' Compensation and Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

o. Your Product

Bodily injury, property damage or **environmental damage** based upon or arising out of **your product** and occurring away from a **location** you own or occupy or a **non-owned site**.

However, this exclusion does not apply to **bodily injury, property damage** or **environmental damage** arising out of **your product** migrating from an **insured site**.

COVERAGE PART IV – PROFESSIONAL LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of a **professional incident** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages. However, we will have no duty to defend the insured against any **suit** seeking damages to which this insurance does not apply. We may at our discretion investigate any **professional incident** and settle any **claim** or **suit** that may result. But:

- (1) The amount we will pay for damages is limited as described in **SECTION III – LIMITS OF INSURANCE**; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance under **COVERAGE PART IV** in the payment of judgments, settlements and **legal and claims expense payments**.

- b. This insurance applies only if:

- (1) The **professional incident** takes place in the **coverage territory**;
- (2) The **professional incident** did not occur before the Retroactive Date shown in the Declarations or after the end of the **policy period**;
- (3) A **claim** for damages is first made against any insured and reported to us in writing during the **policy period** or any **extended reporting period** we provide under **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.

A **claim** received by the insured during the **policy period** and reported to us within 30 days after the end of the **policy period** will be considered to have been reported within the **policy period**.

- c. If a **claim** is first made against an insured and reported to us during the **policy period**, additional **claims** arising from the same, related or continuous **professional incident** that are made against an insured and reported to us during the **policy period** or during the policy period of a subsequent policy issued by us to you providing coverage substantially the same as that provided by **COVERAGE PART IV** for **claims** first made against the insured and reported to us during the **policy period**, than all such claims shall be:

- (1) Deemed to be one **claim**;
- (2) Deemed to have been first made and reported during this **policy period** on the date the first of such **claims** was first made and reported; and
- (3) Subject to the Each Incident Limit applicable to **COVERAGE PART IV** stated in the Declarations.

Coverage under this policy for such **claims** shall not apply, however, unless at the times such subsequent **claims** are first made and reported, you have maintained with us coverage substantially the same as this coverage on a continuous, uninterrupted basis since the first such **claim** was made against an insured.

2. Exclusions

This insurance does not apply to damages, **claims** or **suits**:

a. Aircraft, Auto or Watercraft

Based upon or arising out of the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and **transportation**.

This exclusion applies even if the **claims** against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured.

b. Bankruptcy

Based upon or arising out of the bankruptcy or insolvency of an insured or of any other person, firm or organization.

c. Contractual Liability

Based upon or arising out of damages for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

d. Construction and Demolition

Based upon or arising out of construction or demolition done by you or on your behalf.

e. Damage to Your Work

Based upon or arising out of damage to **your work** or any part of **your work**.

f. Dishonest or Fraudulent Act

Arising out of a dishonest, fraudulent, criminal or malicious act, error or omission, provided that the act, error or omission is committed by or at the direction of a **responsible executive**.

g. Discrimination

Based upon or arising out of discrimination by an insured on the basis of race, creed, national origin, disability, age, marital status, sex, or sexual orientation.

h. Disputed Fees

Arising from disputes over the insured's fees or charges or claims for the return of fees or charges.

i. Employer's Liability

Arising from **bodily injury** to:

(1) An **employee** of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

j. Failure to Maintain

Arising out of the insured's requiring, obtaining, maintaining, advising or failing to require, obtain, maintain or advise of any bond, suretyship or any form of insurance.

k. Failure To Comply

Which results from or is directly or indirectly attributable to failure to comply with any applicable statute, regulation, ordinance, municipal code, administrative complaint, notice of violation, notice letter, administrative order, or instruction of any governmental agency or body, provided that failure to comply is a willful or deliberate act or omission of a **responsible executive**.

l. Fiduciary Liability

Based upon or arising out of:

(1) Any insured's involvement as a partner, officer, director, stockholder, employer or **employee** of an entity that is not a named insured; or

(2) Any insured's involvement as a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments, or any regulation or order issued pursuant thereto, or any other employee benefit plan.

m. Fines, Penalties and Assessments

Based upon or arising out of any fines, penalties or assessments or punitive, exemplary or multiplied damages imposed directly against any insured.

n. Insured versus Insured

Brought by or on behalf of one insured against any other insured.

o. Internal Expense

For costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured.

p. Nuclear Material

Based upon or arising out of the radioactive, toxic or explosive properties of **nuclear material** and with respect to which the insured is:

- (1) Required to maintain financial protection pursuant to the Atomic Energy Act of 1954;
- (2) Entitled to indemnity from the United States of America or any agency thereof; or
- (3) An insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of limits.

q. Owned Facilities

Arising from or in connection with any **location** which is or was at any time owned, operated, rented, or occupied by you or by any entity that:

- (1) Wholly or partly owns, operates, manages, or otherwise controls you; or
- (2) Is wholly or partly owned, operated, managed, or otherwise controlled by you.

r. Personal and Advertising Injury

Arising out of **personal and advertising injury**.

s. Previously Reported Claim

Arising from the same, related or continuous **professional incident** that was the subject of a **claim** reported under any policy of which this policy is a renewal or replacement or which it may succeed in time, whether or not such prior policy affords coverage for such **claim**.

t. Prior Professional Incident

Arising from any **professional incident** known to a **responsible executive** prior to the effective date of the **policy period**, if such **responsible executive** knew or could have reasonably foreseen that such **professional incident** could give rise to damages, **claims** or **suits** under this policy.

This exclusion does not apply if we have been notified, in writing, of such **professional incident** giving rise to such damages, **claims**, or **suits** during the policy period of a policy previously issued by us.

u. Your Product

Based upon or arising out of **your product**.

v. Warranties

Based upon or arising out of express warranties or guarantees. This exclusion shall not apply if liability would have resulted in the absence of such express warranties or guarantees.

w. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

SECTION II – WHO IS AN INSURED**1. If you are designated in the Declarations as:**

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **executive officers** and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Any subsidiary, associated, affiliated, allied or limited liability company or corporation, including subsidiaries thereof, of which you have more than 50% ownership interest at the effective date of the **policy period** qualify as a Named Insured.
 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the **policy period**, whichever is earlier;
 - b. Coverage under this policy does not apply to **bodily injury, property damage or environmental damage** that occurred before you acquired or formed the organization;
 - c. Coverage under this policy does not apply to **personal and advertising injury** arising out of an offense committed before you acquired or formed the organization; and
 - d. Coverage under this policy does not apply to damages arising out of any act, error or omission or **professional incident** that took place before you acquired or formed the organization.
 4. Each of the following is also an insured:
 - a. Your **volunteer workers** only while performing duties related to the conduct of your business, or your **employees**, other than either your **executive officers** (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these **employees** or **volunteer workers** are insureds for:
 - (1) **Bodily injury or personal and advertising injury:**
 - (a) To you, to your partners or members (if you are a partnership or joint venture) or to your members (if you are a limited liability company);
 - (b) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) above; or
 - (c) Arising out of the providing or failure to provide professional health care services except incidental health care services provided by any physician, dentist, nurse, emergency medical technician or paramedic who is employed by you to provide such services and provided you are not engaged in the business of providing such services.
 - (2) **Property damage or environmental damage** to property owned, occupied or used by, rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your **employees, volunteer workers**, any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
 - b. Any person (other than your **employee**), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only with respect to liability arising out of the maintenance or use of that property and until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.
 - e. Any person or organization you agree to include as an insured in a written contract, written agreement or permit, but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of your operations, **your work**, equipment or premises leased or rented by you, or **your products** which are distributed or sold in the regular course of a vendor's business, however:

- (1) A vendor is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) For which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement except that which the vendor would have in the absence of the contract or agreement;
 - (b) Arising out of any express warranty unauthorized by you;
 - (c) Arising out of any physical or chemical change in the product made intentionally by the vendor;
 - (d) Arising out of repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from you, and then repackaged in the original container;
 - (e) Arising out of any failure to make inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
 - (f) Arising out of demonstration, installation servicing or repair operations, except such operations performed at the vendor's location in connection with the sale of the product; or
 - (g) Arising out of products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor.
- (2) A manager or lessor of premises, a lessor of leased equipment, or a mortgagee, assignee, or receiver is not an insured as respects **bodily injury, property damage, environmental damage or personal and advertising injury**:
 - (a) Arising out of any **occurrence** that takes place after the equipment lease expires or you cease to be a tenant; or
 - (b) Arising out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor of premises, or mortgagee, assignee, or receiver.
- f. Any person or organization that has at least a 50% controlling interest in you but only with respect to **bodily injury, property damage, environmental damage or personal and advertising injury** arising out of their financial control of you.

SECTION III – LIMITS OF INSURANCE AND DEDUCTIBLE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. **Claims** made or **suits** brought;
 - c. Persons or organizations making **claims** or bringing **suits**;
 - d. **Pollution incidents**;
 - e. Acts, errors or omissions; or
 - f. Benefits included in your **employee benefit program**.
- 2. The General Aggregate Limit:
 - a. Is the most we will pay for the sum of:
 - (1) Damages and **emergency response expense** under **COVERAGE PART I**, except damages because of **bodily injury, property damage or environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**;
 - (2) Damages under **COVERAGE PART II**;
 - (3) Medical expense under **COVERAGE PART II**;

- (4) Damages, **clean-up costs**, **emergency response expense** and **legal and claims expense payments** under **COVERAGE PART III**; and
 - (5) Damages and **legal and claims expense payments** under **COVERAGE PART IV**.
- b. Shall apply separately as respects all damages caused by:
- (1) **Occurrences** covered under **COVERAGE PART I**, **Coverages A, B or D** arising out of operations at a **location** owned or occupied by you;
 - (2) **Occurrences** covered under **COVERAGE PART I**, **Coverage A or G** arising out of ongoing operations at a project where you are performing **your work**; or
 - (3) **Pollution incidents** covered under **COVERAGE PART III** arising out of operations at an **insured site**.
3. The Products-Completed Operations Aggregate Limit is the most we will pay for damages because of **bodily injury**, **property damage** or **environmental damage** included in the **products-completed operations hazard** other than damages covered under **COVERAGE PART I – Coverage G: Contractors Pollution Liability**.
4. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit – COVERAGE PART I: Coverage A, B, C inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage A: General Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage B: Hostile Fire and Building Equipment Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage C: Products Pollution and Exposure Liability**
- because of all **bodily injury**, **property damage** and **environmental damage** arising out of any one **occurrence**.
5. Subject to Paragraph 4. above, the Damage To Premises Rented To You Limit is the most we will pay under **COVERAGE PART I - Coverage A** for damages because of **property damage** to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
6. Subject to Paragraph 2. above, the Each Occurrence Limit – COVERAGE PART I: Coverage D, E, F inclusive is the most we will pay for the sum of:
- a. Damages under **COVERAGE PART I – Coverage D: Time-Element Pollution Bodily Injury and Property Damage Liability**;
 - b. Damages under **COVERAGE PART I – Coverage E: Non-Owned Site Pollution Bodily Injury and Property Damage Liability**; and
 - c. Damages under **COVERAGE PART I – Coverage F: Pollution Liability during Transportation**
- because of all **bodily injury**, **property damage** and **environmental damage** arising out of any one **occurrence**.
7. Subject to Paragraph 2. above, the Each Occurrence Limit - Contractors Pollution Liability: Coverage G is the most we will pay for the sum of all damages under **COVERAGE PART I – Coverage G: Contractors Pollution Liability** because of **bodily injury**, **property damage** or **environmental damage** arising out of any one **occurrence**.
8. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay for the sum of all damages because of all **personal and advertising injury** sustained by any one person or organization.
9. Subject to Paragraph 2. above, the Employee Benefits Administration Liability Limit is the most we will pay for the sum of all damages sustained by any one **employee**, including damages sustained by such **employee's** dependents and beneficiaries. However, the amount paid shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the **employee benefit program**.
10. Subject to Paragraph 2. above, the Medical Expense Limit is the most we will pay under **COVERAGE PART II - Coverage C** for all medical expenses because of **bodily injury** sustained by any one person.
11. Subject to Paragraph 2. above, the Each Incident Limit – COVERAGE PART III: Site Pollution Legal Liability is the most we will pay for the sum of:
- a. Damages and **legal and claims expense payments** under **COVERAGE PART III – Coverage A: Bodily Injury and Property Damage**;

- b. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage B: First and Third Party On-Site Clean-Up Costs**; and
- c. **Clean-up costs, emergency response expense and legal and claims expense payments** under **COVERAGE PART III – Coverage C: Off-Site Clean-Up Costs**

because of all **bodily injury, property damage and environmental damage** arising out of the same, related or continuous **pollution incident**.

12. Subject to Paragraph 2. above, the Each Incident Limit – **COVERAGE PART IV: Professional Liability** is the most we will pay under **COVERAGE PART IV** for damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
13. The Limits of Insurance apply in excess of the Deductible amounts shown in the Declarations. The deductible amount applies as follows:
 - a. As respects the Each Incident Limit: (i) to the sum of all damages, **clean-up costs, emergency response expense and legal and claims expense payments** because of **bodily injury, property damage or environmental damage** arising out of the same, related or continuous **pollution incident**; (ii) to the sum of all damages and **legal and claims expense payments** arising out of the same, related or continuous **professional incident**.
 - b. As respects the Each Occurrence Limit, to the sum of all damages because of **bodily injury, property damage or environmental damage** as a result of one **occurrence** regardless of the number of persons or organizations who sustain damages because of that **occurrence**.

We may pay any part or the entire deductible amount to effect settlement of any **claim or suit** or to pay **clean-up costs or emergency response expense** which may be covered under this policy and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.

Subject to **SECTION IV – Conditions**, Condition 16. **Multiple Coverage Sections**, if the same or related **occurrence, pollution incident or professional incident** results in coverage under more than one coverage part, only the highest deductible under all coverage parts will apply.

14. The Limits of Insurance apply to the entire **policy period**. If the **policy period** is extended after policy issuance for an additional period, the additional period will be deemed part of the last preceding period for the purposes of determining the Limits of Insurance.

SECTION IV – CONDITIONS

1. Assignment

This policy may not be assigned without our prior written consent. Assignment of interest under this policy shall not bind us until our consent is endorsed thereon.

2. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations.

3. Cancellation

- a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
- b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - (1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - (2) 90 days before the effective date of cancellation if we cancel for any other reason.
- c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
- d. Notice of cancellation will state the effective date of cancellation. The **policy period** will end on that date.
- e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund will be less than pro rata and will be subject to the minimum premium stated in the Declarations. The cancellation will be effective even if we have not made or offered a refund.

f. If notice is mailed, proof of mailing will be sufficient proof of notice.

4. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. Choice of Forum

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that any such litigation shall take place in the appropriate federal or state courts located in New York, New York and any arbitration or other form of dispute resolution shall take place in New York, New York.

6. Choice of Law

In the event that the insured and we have any dispute concerning or relating to this policy, including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of the State of New York shall apply without giving effect to any conflicts or choice of law principles. The terms and conditions of this policy shall not be deemed to constitute a contract of adhesion and shall not be construed in favor of or against any party hereto by reason of authorship or otherwise.

7. Currency

All reimbursement shall be made in United States currency at the rate of exchange prevailing on:

- a. The date of judgment if judgment is rendered;
- b. The date of settlement if settlement is agreed upon with our written consent;
- c. The date of payment of **clean-up costs** and **emergency response expense**; or
- d. The date **legal and claims expense payments** are paid.

Whichever is applicable.

8. Duties In The Event Of Occurrence, Offense, Pollution Incident, Professional Incident, Act, Error or Omission, Claim Or Suit

- a. Without limiting the requirements of any insuring agreement in this policy, you must see to it that we are notified as soon as practicable of an **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission which may result in a **claim**. To the extent possible, notice should include:

- (1) How, when and where the **occurrence**, offense, **pollution incident**, **professional incident** or act, error or omission took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the **occurrence**, offense, **pollution incident**, **professional incident** or act error or omission.

- b. If a **claim** is made or **suit** is brought against any insured, you must:

- (1) Immediately record the specifics of the **claim** or **suit** and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the **claim** or **suit** as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the **claim** or **suit**;

- (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the **claim** or defense against the **suit**; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. In the event **emergency response expenses** are incurred, you must provide, in writing, all available information relating to such **emergency response expenses** and the **pollution incident** giving rise thereto to us within fourteen (14) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
 - e. In the event of a **time-element pollution incident**, you must provide, in writing, all available information relating to the **pollution incident** giving rise thereto to us within thirty (30) days of commencement of the **pollution incident**. Such information shall include all applicable information detailed in Paragraph **a.** above.
 - f. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid and **emergency response expense**, without our consent.
 - g. When any insured becomes legally obligated to pay **clean-up costs** to which this insurance applies, the insured must:
 - (1) Submit, for our approval, all proposed work plans prior to submittal to any regulatory agency.
 - (2) Submit, for our approval, all bids and contracts for **clean-up costs** prior to execution or issuance.
 - (3) Forward progress submittals regarding **clean-up costs** at reasonable intervals and always prior to submittal to any regulatory agency that is authorized to review and approve such submittals.

We shall have the right, but not the duty, to assume direct control of such **clean-up costs**. Any **clean-up costs** incurred by us shall be applied against the applicable Limit of Insurance and deductible.
 - h. If we are prohibited under applicable law from investigating, defending or settling any such **claim** or **suit**, the insured shall, under our supervision, arrange for such investigation and defense thereof as is reasonably necessary, and subject to our prior authorization, shall effect such settlement thereof.

9. Economic and Trade Sanctions

In accordance with laws and regulation of the United States concerning economic and trade sanctions administered and enforced by The Office Of Foreign Assets Control (OFAC), this policy is void ab initio solely with respect to any term or condition of this policy that violates any laws or regulations of the United States concerning economic and trade sanctions.

10. Enforceability

If any part of this policy is deemed invalid or unenforceable, it shall not affect the validity or enforceability of any other part of this policy, which shall be enforced to the full extent permitted by law.

11. Extended Reporting Period

This condition applies only as respects **COVERAGE PART III - SITE POLLUTION INCIDENT LEGAL LIABILITY** and **COVERAGE PART IV – PROFESSIONAL LIABILITY**.

- a. This condition applies only if:
 - (1) The policy is cancelled or non-renewed for any reason except non-payment of the premium; or
 - (2) We renew or replace this policy with **COVERAGE PART III - SITE POLLUTION LIABILITY** or **COVERAGE PART IV – PROFESSIONAL LIABILITY** that provides claims-made coverage for **bodily injury, property damage, environmental damage** or **professional incident** and that has a Retroactive Date later than the one shown in the Declarations or for an **insured site**; and
 - (3) You do not purchase coverage to replace the coverage described in Paragraph **a.(2)**.
- b. Automatic **Extended Reporting Period**

You shall automatically have a period of ninety (90) days following the effective date of such termination of coverage in which to provide written notice to us of **claims** first made and reported within the automatic extended reporting period.

A **claim** first made and reported within the automatic **extended reporting period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

No part of the automatic **extended reporting period** shall apply if the optional **extended reporting period** is purchased.

c. Extended Reporting Period Option:

(1) A **claim** first made and reported within forty eight (48) months after the end of the **policy period** will be deemed to have been made on the last day of the **policy period**, provided that the **claim** is for damages, **clean-up costs** or **emergency response expense** arising from a **pollution incident** which commenced on or after the Retroactive Date, if applicable, and before the end of the **policy period** or the **claim** is for damages arising from a **professional incident** that occurred on or after the Retroactive Date and before the end of the **policy period** and is otherwise covered by this policy.

(2) The Extended Reporting Period Endorsement will not reinstate or increase the Limits of Insurance or extend the **policy period**.

d. We will issue the Endorsement indicating the **Extended Reporting Period Option has been accepted if the first Named Insured shown in the Declarations:**

(1) Makes a written request for it which we receive within 30 days after the end of the **policy period**; and

(2) Promptly pays the additional premium, which will not exceed 200% of the annual premium for the policy, when due.

The Extended Reporting Period Endorsement will not take effect unless the additional premium is paid when due. If that premium is paid when due, the Endorsement may not be cancelled. The additional premium will be fully earned when the Endorsement takes effect.

d. The Extended Reporting Period Endorsement will also amend **SECTION IV – CONDITIONS, Condition **17. Other Insurance** so the insurance provided will be excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis, whose policy period begins or continues after the Endorsement takes effect.**

12. Headings

The descriptions in the headings and sub-headings of this policy are inserted solely for convenience and do not constitute any part of the terms or conditions on this policy.

13. Independent Counsel

In the event the insured is entitled by law to select independent counsel to oversee our defense of a **claim** or **suit** at our expense, the attorney fees and all other litigation expenses we must pay to that counsel are limited to the rates we actually pay to counsel we retain in the ordinary course of business in the defense of similar **claims** or **suits** in the community where the **claim** or **suit** arose or is being defended.

Additionally, we may exercise the right to require that such counsel have certain minimum qualifications with respect to their competency including experience in defending **claims** or **suits** similar to the one pending against the insured and to require such counsel have errors and omissions insurance coverage. As respects any such counsel, the insured agrees that counsel will timely respond to our request for information regarding the **claims** or **suit**.

Furthermore, the insured may at any time, by the insured's written consent, freely and fully waive these rights to select independent counsel.

14. Inspections and Surveys

- a. We have the right to:
 - (1) Make inspections and surveys at any time;
 - (2) Give you reports on the conditions we find; and
 - (3) Recommend changes.
- b. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - (1) Are safe or healthful; or
 - (2) Comply with laws, regulations, codes or standards.

This applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

15. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a **suit** asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

16. Multiple Coverage Sections

No **claim** or **suit**, or part thereof, for which we have accepted coverage or coverage has been held to apply under one or more Coverages in this policy shall be covered under any other Coverages in this policy.

17. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this policy, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below. However, regardless of whether **b.** below applies, in the event that a written contract or agreement or permit requires this insurance to be primary for any person or organization you agreed to insure and such person or organization is an insured under this policy, we will not seek contributions from any such other insurance issued to such person or organization

b. Excess Insurance

- (1) This insurance is excess over:
 - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for **your work**;
 - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (iii) That is insurance purchased by you to cover your liability as a tenant for **property damage** to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, **autos** or watercraft to the extent not subject to Exclusion a. of **COVERAGE PART I – Coverage A – General Bodily Injury And Property Damage Liability**.

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.
 - (c) Any project specific primary insurance available to you covering liability for damages arising out of **your work**, for which you are an insured
- (2) When this insurance is excess, we will have no duty to defend the insured against any **suit** if any other insurer has a duty to defend the insured against that **suit**. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance;
 - (b) The total of all deductible and self-insured amounts under all that other insurance; and
 - (c) The deductible and self-insured amounts under this insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this policy.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts, excess of applicable deductible and self-insured amounts under all such insurance, until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

18. Premiums and Deductible

The first Named Insured shown in the Declarations:

- a. Is responsible for the payment of all premiums;
- b. Will be the payee for any return premiums we pay; and
- c. Is responsible for the payment of all deductibles.

19. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

20. Separation Of Insureds

Except with respect to the Limits of Insurance, any insured versus insured exclusions, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom **claim** is made or **suit** is brought.

21. Service of Suit

Subject to **SECTION IV – CONDITIONS**, Condition **5. Choice of Forum**, it is agreed that in the event of failure of us to pay any amount claimed to be due hereunder, we, at the request of the insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon us and that in any suit instituted against us upon this contract, we will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefore, we hereby designate the Superintendent, Commissioner, Director of Insurance, or other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

22. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. At our request, the insured will bring **suit** or transfer those rights to us and help us enforce them. However, if the insured has waived rights of recovery against any person or organization prior to a loss, we waive any right of recovery we may have under this policy against such person or organization.

23. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

24. When We Do Not Renew

If we decide not to renew, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than ninety (90) days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS**1. Administration** means:

- a. Providing information to **employees**, including their dependents and beneficiaries, with respect to eligibility for or the scope of **employee benefit programs**;
- b. Handling records in connection with the **employee benefit program**; or
- c. Effecting, continuing or terminating any **employee's** participation in any benefit included in the **employee benefit program**.

However, **administration** does not include handling payroll deductions.

2. Advertisement means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

3. Auto means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law where it is licensed or principally garaged.

However, **auto** does not include **mobile equipment**.

- 4. **Bodily injury** means physical injury, sickness, disease, building-related illness, mental anguish, shock or emotional distress, sustained by any person, including death resulting therefrom. **Bodily injury** shall also include medical monitoring costs.
- 5. **Claim** means a demand, notice or assertion of a legal right alleging liability or responsibility on the part of the insured.
- 6. **Clean-up costs** means reasonable and necessary costs, charges and expenses, including associated **legal and claims expense payments** incurred with our prior written consent, incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media but only:
 - a. To the extent required by **environmental laws** governing the liability or responsibilities of the insured to respond to a **pollution incident**;
 - b. In the absence of a. above, to the extent recommended in writing by an **environmental professional**; or
 - c. To the extent incurred by the government or any political subdivision within Definition 8.a. of **coverage territory**; or
 - d. To the extent incurred by parties other than you.

Clean-up costs also includes **restoration costs**

Clean-up costs does not include costs, charges or expenses incurred by the insured for materials supplied or services performed by the insured unless such costs, charges or expenses are incurred with our prior written approval.

- 7. **Conveyance** means any **auto**, railcar, rolling stock, train, watercraft or aircraft. **Conveyance** does not include pipelines.
- 8. **Coverage territory** means:
 - a. The United States of America (including its territories and possessions), Puerto Rico, Canada and the Gulf of Mexico;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above;
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - (2) **Personal and advertising injury** offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a **suit** on the merits, in the territory described in Paragraph a. above or in a settlement we agree to; or
 - d. All other parts of the world if the injury or damage arises out of **your product**, a **pollution incident** caused by **your work**, a **pollution incident** during **transportation** or a **pollution incident** on, at, under or migrating from a **non-owned site**, however:
 - (1) We assume no responsibility for furnishing certificates or evidence of insurance or bonds; and
 - (2) We will not be liable for any fine or penalty imposed on you for failing to comply with insurance laws.

- 9. **Emergency response expense** means reasonable and necessary costs, charges and expenses including **legal and claims expense payments** incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media.
- 10. **Employee** includes a **leased worker** and a **temporary worker**. As respects Employee Benefits Administration Liability, **employee** also means a person actively employed, formerly employed, on leave of absence or disabled, or retired.

- 11. Employee benefits program** means a program providing some or all of the following benefits to **employees**, whether provided through a plan authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars or otherwise:
- a. Group life insurance, group accident or health insurance, dental, vision and hearing plans, and flexible spending accounts, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to those **employees** who satisfy the plan's eligibility requirements;
 - b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an **employee** may subscribe to such benefits and such benefits are made generally available to all **employees** who are eligible under the plan for such benefits;
 - c. Unemployment insurance, social security benefits, workers' compensation and disability benefits; and
 - d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies
- 12. Environmental damage** means physical damage to land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater, giving rise to **clean-up costs** or **emergency response expense**.
- 13. Environmental laws** means any federal, state, provincial, municipal or other local laws, including, but not limited to, statutes, rules, ordinances, guidance documents, regulations and all amendments thereto, including state voluntary cleanup or risk based corrective action guidance, and governmental, judicial or administrative orders and directives, that are applicable to a **pollution incident**.
- 14. Environmental professional** means an individual approved and designated by us in writing who is duly certified or licensed in a recognized field of environmental science as required by a state board, a professional association, or both, who meet certain minimum qualifications and who maintain specified levels of errors and omissions insurance coverage acceptable to us. We shall consult with the insured in conjunction with the selection of the **environmental professional**.
- 15. Executive officer** means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
- 16. Extended reporting period** means the claims reporting provision described in **SECTION IV – CONDITIONS**, Condition **11. Extended Reporting Period**.
- 17. Hostile fire** means one which becomes uncontrollable or breaks out from where it was intended to be.
- 18. Impaired property** means tangible property, other than **your product** or **your work**, that cannot be used or is less useful because:
- a. It incorporates **your product** or **your work** that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by the repair, replacement, adjustment or removal of **your product** or **your work** or your fulfilling the terms of the contract or agreement.
- 19. Insured contract** means:
- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises in excess of 30 consecutive days that indemnifies any person or organization for damage by fire, lightning or explosion to premises while rented to you or temporarily occupied by you with permission of the owner is not an **insured contract**;
 - b. A sidetrack agreement;
 - c. Any easement or license agreement;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for **bodily injury, property damage or environmental damage** to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement that indemnifies an architect, engineer or surveyor for injury or damage arising out of:

- (1) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
- (2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

20. Insured site means a **location** listed on the Insured Site Schedule Endorsement, if any, attached to this policy.

21. Leased worker means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. **Leased worker** does not include a **temporary worker**.

22. Legal and Claims Expense Payments means:

- a. All expenses we incur that are directly allocated to a particular **claim or suit**.
- b. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the **claim or suit**, including actual loss of earnings up to \$500 a day because of time off from work.
- c. All court costs taxed against the insured in the **suit**. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
- d. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- e. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
- f. Expenses incurred by the insured for first aid administered to others at the time of any accident, for **bodily injury** to which this insurance applies.

23. Loading or unloading means the handling of property:

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or **auto**;
- b. While it is in or on an aircraft, watercraft or **auto**; or
- c. While it is being moved from an aircraft, watercraft or **auto** to the place where it is finally delivered;

But **loading or unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or **auto**.

24. Location means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

25. Misdelivery means the delivery of any liquid product into a wrong receptacle or to a wrong address or the erroneous delivery of one liquid product for another.

26. Mobile equipment means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted power cranes, shovels, loaders, diggers or drills or road construction or resurfacing equipment such as graders, scrapers or rollers;

- e. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

- (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

- (2) Cherry pickers and similar devices used to raise or lower workers;

- f. Vehicles not described in **a.**, **b.**, **c.**, or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not **mobile equipment** but will be considered **autos**:

- (1) Equipment designed primarily for snow removal, road maintenance (but not construction or resurfacing) or street cleaning;

- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- (3) Air compressor, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However **mobile equipment** does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered **autos**.

27. Mold matter means mold, mildew and fungi, whether or not such **mold matter** is living.

28. Natural resource damage means physical injury to or destruction of, as well as the assessment of such injury or destruction, including the resulting loss of value of land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)), any state, local or provincial government, any foreign government, any Native American tribe, or, if such resources are subject to a trust restriction on alienation, any member of a Native American tribe.

29. Non-owned site:

- a. Means any **location** which:

- (1) Was not at any time owned or occupied by any insured; and

- (2) Which is not specifically scheduled as an **insured site**.

- b. Does not include:

- (1) Any **location** which is not licensed by the appropriate federal, state or local authority to perform storage, disposal, processing or treatment of waste from your operations or **your work** in compliance with **environmental law**.

- (2) Any **location** or any part thereof that has been subject to a consent order or corrective action under **environmental law** or is listed or proposed to be listed on the Federal National Priorities list (NPL) prior to waste from your operations or **your work** being legally consigned for delivery or delivered for storage, disposal, processing or treatment at such **location**.

- (3) Any **location** of a purchaser or user of **your product**.

30. Nuclear material means source material, special nuclear material or byproduct material which have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

31. Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- 32. Personal and advertising injury** means injury, including consequential **bodily injury**, arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your **advertisement**;
 - g. Infringing upon another's copyright, trade dress or slogan in your **advertisement**.
- 33. Policy period** means the period of time stated in the Declarations. However, if the policy is cancelled in accordance with **SECTION IV – CONDITIONS**, Condition **3. Cancellation**, the **policy period** ends on the effective date of such cancellation.
- 34. Pollutants** means any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapor, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes. **Pollutants** includes electromagnetic fields, **mold matter** and legionella pneumophila.
- 35. Pollution incident** means:
- a. The discharge, dispersal, release, escape, migration, or seepage of **pollutants** on, in, into, or upon land, **conveyances**, structures on land or water, the atmosphere, any watercourse or body of water including surface water or groundwater; or
 - b. The presence of **mold matter**.
- Pollution incident** includes the illicit abandonment of **pollutants** at any **location** which is owned or occupied by you provided that such abandonment was committed by parties other than an insured and without the knowledge of a **responsible executive**.
- 36. Products - completed operations hazard:**
- a. Includes all **bodily injury**, **property damage** or **environmental damage** occurring away from a **location** you own or occupy and arising out of **your product** or **your work** except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, **your work** will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
 - b. Does not include **bodily injury**, **property damage** or **environmental damage** arising out of the transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the **loading or unloading** of that vehicle by any insured or the existence of tools, uninstalled equipment or abandoned or unused materials.

37. Professional incident means any act, error or omission in the providing or failure to provide **professional services** by or on behalf of the insured.

38. Professional services means those services performed for a fee by you or those acting on your behalf, including but not limited to, architect, engineer, consultant, inspector, technician and surveyor that you or those acting on your behalf are qualified to perform for others and are consistent with your corporate statements of professional qualifications.

39. Property damage means:

- a. Physical injury to or destruction of tangible property, including all resulting loss of use and diminished value of that property. All such loss of use and diminished value shall be deemed to occur at the time of the physical injury that caused it;
- b. Loss of use of tangible property that is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the **occurrence** or **pollution incident** that caused it; or
- c. **Natural resource damage.**

Property damage does not include **environmental damage**.

For the purpose of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CDROMS, tapes drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

40. Responsible executive means any officer, director, risk manager, partner, your manager of an **insured site**, your manager or supervisor responsible for environmental affairs, health and safety affairs, control or compliance or any other **employee** authorized by you to give or receive notice of an **occurrence** or **claim**.

41. Restoration costs means reasonable and necessary costs incurred by the insured with our prior written consent, to repair, restore or replace damaged real or personal property damaged during work performed in the course of incurring **clean-up costs** in order to restore the property to the condition it was in prior to being damaged during such work. **Restoration costs** shall not exceed the lesser of actual cash value of such real or personal property or the cost of repairing, restoring or replacing the damaged property with other property of like kind and quality. An adjustment for depreciation and physical condition shall be made in determining actual cash value. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment, except to the extent such betterments of the damaged property entail the use of materials which are environmentally preferable to those materials which comprised the damaged property. Such environmentally preferable material must be certified as such by an applicable independent certifying body, where such certification is available, or, in the absence of such certification, based on our judgment in our sole discretion.

42. Suit means a civil proceeding in which damages to which this insurance applies are alleged. **Suit** includes an arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent or any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

43. Temporary worker means a person who is furnished to you to substitute for a permanent worker on leave or to meet seasonal or short-term workload conditions.

44. Time-Element pollution incident means a **pollution incident** demonstrable as having first commenced at an identified time and place during the **policy period** provided:

- a. Such **pollution incident** does not originate or arise from, or relate to an **underground storage tank**; and
- b. Such **pollution incident** is not (i) heat, smoke or fumes from a **hostile fire** or (ii) solely with respect to **bodily injury**, smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests.

45. Transportation means the movement of goods, product, merchandise, supplies or waste in a **conveyance** by the insured or a third party carrier from the time of movement from the point of origin until delivery to the final destination. **Transportation** includes the movement of goods, products, merchandise, supplies or waste into, onto or from a **conveyance**.

46. Underground storage tank means any tank, including any piping and appurtenances connected to the tank, located on or under an owned or occupied **location** or an **insured site** that has at least ten (10) percent of its combined volume underground. **Underground storage tank** does not include:

- a. Septic tanks, sump pumps, or oil/water separators;
- b. A tank that is enclosed within a basement or cellar, if the tank is upon or above the surface of the floor; or
- c. Storm-water or wastewater collection systems.

47. Volunteer worker means a person who is not your **employee**, and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

48. Waste means all waste and includes materials to be recycled, reconditioned or reclaimed.

49. Your product:

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- a) You;
- b) Others trading under your name; or
- c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your product**; and

(2) The providing of or failure to provide warnings or instructions.

50. Your work:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your work**; and

(2) The providing of or failure to provide warnings or instructions.

IN WITNESS WHEREOF, the Insurer has caused this Policy to be executed and attested, but this Policy will not be valid unless countersigned by a duly authorized representative of the Insurer, to the extent required by applicable law.

Ironshore Specialty Insurance Company by:

A handwritten signature in blue ink, appearing to be "J.H.R.", written over a light blue rectangular background.

Secretary

A handwritten signature in blue ink, appearing to be "Shawn Kelly", written over a light blue rectangular background.

President

EXHIBIT 5



TERMINAL SERVICES AGREEMENT

This TERMINAL SERVICES AGREEMENT (this "Agreement") is made, entered into and effective as of August 6, 2018 (the "Effective Date"), by and between Maalt, LP, a Texas limited partnership ("Terminal Owner"), and Sequitur Permian, LLC, a Delaware limited liability company ("Customer"). Terminal Owner and Customer shall be referred to herein individually as a "Party" and collectively as the "Parties".

RECITALS

WHEREAS, Terminal Owner owns and operates a rail terminal facility located in Barnhart, Texas as more specifically described on Exhibit A-1 hereto on the land more specifically described on Exhibit A-2 hereto (collectively, the "Terminal"), and Customer is engaged in the transportation and marketing of Product; and

WHEREAS, Terminal Owner desires to make available the Terminal to Customer and perform the services set forth in this Agreement, and, on an exclusive basis, Customer desires to utilize the Terminal for the throughput of Product and related services.

AGREEMENT

NOW, THEREFORE, in and for consideration of the premises and mutual covenants contained in this Agreement, Terminal Owner and Customer hereby agree as follows:

ARTICLE 1 DEFINITIONS

For the purposes of this Agreement, capitalized terms used herein will have the meaning assigned to such terms below:

"Actual Quarterly Aggregate Volume" means the sum of the volumes of Product tendered by Customer (or by Customer's third-party customers) for Throughput at the Terminal during the applicable Calendar Quarter.

"Affiliate" means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, Controls, or is Controlled by, or is under common Control with, such Person.

"Agreement" has the meaning given to such term in the Preamble hereto.

"Alternate Service" has the meaning given to such term in Section 8.8. "Alternative Service Notice" has the meaning given to such term in Section 8.8.

"Applicable Law" means any applicable statute, law, regulation, ordinance, rule, judgment, rule of law, order, decree, permit, approval, concession, grant, franchise, license, agreement, requirement, or other governmental restriction or any similar form of decision of, or any provision or condition of any permit, license or other operating authorization issued under any of the foregoing by, or any determination by, any Governmental Authority having or asserting

jurisdiction over the matter or matters in question, whether now or hereafter in effect and in each case as amended (including without limitation, all of the terms and provisions of the common law of such Governmental Authority), as interpreted and enforced at the time in question.

"Barrel" means 42 United States gallons of 231 cubic inches per gallon at sixty degrees Fahrenheit (60° F) and normal atmospheric pressure.

"Business Day" means a Day (other than a Saturday or Sunday) on which banks are open for business in Houston, Texas.

"Calendar Quarter" means a period of 3 consecutive Months beginning on the first day of each January, April, July and October (except for 2018 of the Initial Term, September will be included with October-December 2018). "Calendar Quarterly" shall be construed accordingly.

"Control" means (a) with respect to any Person, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting shares, by contract, or otherwise and (b) with respect to any Product, such Product produced by Customer and owned by it or produced and owned by a Third Party or an Affiliate and with respect to which (i) Customer has the contractual right or obligation (pursuant to a marketing, agency, operating, unit, or similar agreement) to dispose of such Product and (ii) Customer elects or is obligated to dispose of such Product on behalf of the applicable Third Party or Affiliate. "Controlled" shall be construed accordingly.

"Cure Period" has the meaning given to such term in Section 8.3.

"Customer" has the meaning given to such term in the Preamble to this Agreement.

"Customer Parties" means, collectively, Customer, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, customers, and their respective successors and permitted assigns (excluding any Terminal Owner Parties), and individually, a "Customer Party".

"Customer Terminal Modifications" has the meaning given to such term in Section 2.7.

"Day" means a period commencing at 7:00 a.m. Central Standard Time and extending until 7:00 a.m. Central Standard Time on the following calendar day. "Daily" shall be construed accordingly.

"Default Notice" has the meaning given to such term in Section 8.3.

"Defaulting Party" has the meaning given to such term in Section 8.3.

"Delivery Point" means the inlet flange of the applicable railcar.

"Effective Date" has the meaning given to such term in the Preamble to this Agreement.

"Extended Term" has the meaning given to such term in Section 8.1.

"Forecast" has the meaning given to such term in Section 2.6.

"Force Majeure" or "Force Majeure Event" has the meaning given to such term in Section 14.2.

"Governmental Authority" means any federal, state, or local government or any provincial, departmental or other political subdivision thereof, or any entity, body or authority exercising executive, legislative, judicial, regulatory, administrative, legislative, regulatory, taxing or other governmental functions, and any court, department, commission, board, bureau, agency, instrumentality or administrative body of any of the foregoing.

"Group" means either Terminal Owner Parties or Customer Parties, as applicable.

"HSE" has the meaning given to such term in Section 15.4(a).

"HSE Program" has the meaning given to such term in Section 15.4(a).

"Income Taxes" means any income, franchise and similar Taxes.

"Initial Term" has the meaning given to such term in Section 8.1.

"Interest Rate" means an annual rate (based on a three-hundred-sixty (360) Day year) equal to the lesser of (a) two percent (2%) over the prime rate as published under "Money Rates" in the *Wall Street Journal* in effect at the close of the Business Day on which payment was due and (b) the maximum rate permitted by Applicable Law.

"Liabilities" means actions, claims, causes of action, costs, demands, damages, expenses, fines, lawsuits, liabilities, losses, obligations and penalties (including court costs and reasonable attorneys' fees).

"Loss Credit" has the meaning given to such term in Section 7.2(b).

"Loss Allowance" has the meaning given to such term in Section 7.2(a).

"Meter" has the meaning given to such term in Section 5.1.

"Minimum Volume Commitment" has the meaning given to such term in Section 3.1.

"Month" means the period beginning on the first Day of a calendar Month and ending immediately prior to the start of the first Day of the following calendar Month. "Monthly" shall be construed accordingly.

"Non-Defaulting Party" has the meaning given to such term in Section 8.3.

"Party" and "Parties" have the meanings given to such terms in the Preamble to this Agreement.

"Permits" means permits, licenses, consents, clearances, certificates, approvals, authorizations or similar documents or authorities required by any Governmental Authority or pursuant to any Applicable Law and that apply to the Terminal, the Services or a Party.

"Person" means any individual, corporation, limited liability company, partnership, joint venture, unincorporated organization or any other legal entity.

"Phase I Project" has the meaning given to such term in Section 2.7.

"Phase II Project" has the meaning given to such term in Section 2.7.

"PLL" has the meaning given to such term in Section 11.2.

"Product" means crude oil and other liquid hydrocarbon products owned or Controlled by Customer.

"Receipt Point" has the meaning given to such term in Section 7.1.

"Receiving Party" has the meaning given to such term in Section 15.20.

"Regulatory Approval" means any Permit from a Governmental Authority necessary for performance of the Services or the installation of equipment at or operations of the Terminal in connection with the Services, including the following Permits: Spill Prevention, Control, and Countermeasure (SPCC) plan is in place, Storm Water Permit (as it may be required to be amended or updated) issued by the Texas Commission on Environmental Quality (TCEQ) and Permit by Rule (PBR) Air Permit (as it may be required to be amended or updated) issued by TCEQ.

"Representatives" has the meaning given to such term in Section 15.20.

"ROFR Notice" has the meaning given to such term in Section 9.2(b).

"ROFR Offer" has the meaning given to such term in Section 9.2(b).

"ROFR Period" has the meaning given to such term in Section 9.2(a).

"Services" has the meaning given to such term in Section 2.12.

"Shortfall" has the meaning given to such term in Section 3.2(a).

"Shortfall Payment" has the meaning given to such term in Section 3.2(a).

"SPCC" has the meaning given to such term in Section 15.4(a).

"Subsequent Transfer" has the meaning given to such term in Section 9.2(a).

"Subsequently Transferred Interest" has the meaning given to such term in Section 9.2(b).

"Target Terminal Operations Commencement Date" means September 1, 2018, as such date may be extended as mutually agreed in writing by the Parties and subject to Article 14.

"Taxes" means any taxes, assessments, fees, duties or other similar charges imposed by any Governmental Authority, including income, franchise, ad valorem, property, sales, use, excise,

employment, transfer or other charge in the nature of a tax, and any interest, fine, penalty or addition thereto.

“Term” has the meaning given to such term in Section 8.1.

“Terminal” has the meaning given to such term in the Recitals to this Agreement.

“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.

“Terminal Owner” has the meaning given to such term in the Preamble to this Agreement.

“Terminal Owner Parties” means, collectively, Terminal Owner, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, subcontractors, invitees, successors and permitted assigns (excluding any Customer Parties), and individually, a “Terminal Owner Party”.

“Third Party” means any Person other than a Terminal Owner Party and Customer Party.

“Throughput” means the delivery of Product from trucks or pipeline into the Terminal on behalf of Customer or Customer’s third-party customers. The quantity of Product Throughput at the Terminal shall be measured in accordance with Article 5.

“Throughput Fee” has the meaning given to such term in Section 4.1.

“Week” means the period beginning on Sunday at midnight and ending on Saturday at 11:59 p.m. “Weekly” shall be construed accordingly.

ARTICLE 2 SERVICES; FACILITIES AND OPERATIONS

2.1 Regulatory Approval Filings. After the Effective Date, the Parties shall work (at their own cost and expense) together in good faith to obtain prior to the Target Terminal Operations Commencement Date the Regulatory Approvals as provided in this Agreement. Each Party shall promptly, but in no event later than ten (10) Days of receipt of all information from the other Party necessary to be included as part of such Regulatory Approval applications, file or cause to be filed applications for all Regulatory Approvals required to be obtained by it in connection with the transactions contemplated hereby. Such applying Party shall use its commercially reasonable efforts to obtain such Regulatory Approvals at the earliest practicable time. The Parties shall cooperate with each other and communicate regularly regarding their efforts to obtain such Regulatory Approvals. Each Party will provide the other Party with copies of all non-confidential portions of any application, statements or correspondence submitted to or received from any Governmental Authorities in connection with the transactions contemplated by this Agreement.

2.2 Services. Terminal Owner shall receive, load, unload, handle, measure, and

redeliver Product at the Terminal in accordance with Customer's Forecasts and reasonable requirements and will tender such Product to Customer or its or its third-party customers' carriers as directed by Customer, in each case, in accordance with the terms and conditions of this Agreement. Terminal Owner shall furnish and be responsible for all labor, supervision, and materials necessary for its timely and efficient performance of the receipt, loading, unloading, transloading, handling, measuring, redelivery, and related operations and services pursuant to this Agreement and contemplated under this Agreement in order to provide the Services, which in all cases shall be conducted in accordance with generally accepted oil terminalling practices, in a good and workmanlike manner and in compliance with all Applicable Law and the obligations of Terminal Owner to its surface lessors. Terminal Owner shall operate and maintain the Terminal and any other related equipment and property in good and safe condition at all times (all of the foregoing in this Section 2.2, is herein collectively, the "Services").

2.3 Exclusivity. During the Term, (a) Customer shall have exclusive rights to use the Terminal for Product transloading; (b) Customer shall be entitled to utilize 100% of the capacity of the Terminal if required for the transloading of Product, (c) without Customer's prior written consent, Terminal Owner shall not contract with any other Person (including any Affiliates of Terminal Owner) for capacity at the Terminal, provide services at the Terminal to any other Person or develop any additional terminal facilities on the Terminal's land for the transloading of Product, (d) Terminal Owner shall limit the use of the areas of the Terminal designated for the transloading of Product to the sole and exclusive purpose of loading and unloading of Product, and (e) Terminal Owner shall not enter into any agreement with any Third Party for the transloading of oil or other hydrocarbon products at the Terminal. Notwithstanding anything herein to the contrary, after the Effective Date, Terminal Owner may use those areas of the land on which the Terminal is located that are not used for the performance of the Services, including but not limited to the staging and transloading of Product, for another business purpose so long as such purpose does not interfere with or adversely impacts the operations and use of the Terminal for performance of the Services.

2.4 Delivery; Redelivery. Customer may deliver Product to the Terminal by truck or pipeline delivery for receipt by Terminal Owner during the Terminal's operating hours which shall be no less than twenty-four (24) hours per Day, seven (7) Days per week, holidays included. Customer will retain responsibility for all dispatch services associated with the staging and logistics of trucks and railcars, and delivery of Product to and from the Terminal. Customer and Terminal Owner will cooperate with each other in scheduling deliveries, receipts and redeliveries. Receipts shall be issued by Terminal Owner to Customer or Customer's third-party customers for all Product delivered to the Terminal by truck or pipeline by Customer or Customer's third-party customers for unloading, handling, and loading into railcars. Terminal Owner shall redeliver Product to Customer or Customer's third-party customers from the Terminal into railcars. The Terminal will be made available for redelivery twenty-four (24) hours per Day, seven (7) Days per week, holidays included.

2.5 Access. In connection with Terminal Owner's and Customer's obligations under this Agreement, including Customer's exclusive use of the Terminal, Customer's rights with respect to Customer's Terminal Modifications, and the Services provided hereunder with respect to the Product, Terminal Owner does hereby GRANT and CONVEY to Customer and the other Customer Parties, its and their successors and assigns, for the purposes of enforcing and otherwise

realizing the benefits of Customer's rights under this Agreement a non-exclusive right of access over, on, and across the surface of the lands on which the Terminal is located for the duration of the Term and any extensions thereof. Further, from and after the Effective Date, Customer will seek from the owner of the land, and Terminal Owner shall cooperate with Customer in seeking, a non-exclusive easement providing a right of access over, on, across and under the surface of the land on which the Terminal is located. Any access by Customer with respect to Customer Terminal Modifications shall be coordinated in advance with Terminal Owner, and Terminal Owner agrees to permit routine access to a pre-approved list of Customer personnel and representatives. Terminal Owner represents and warrants that it has obtained all the necessary and required consents, if any, of any applicable lessor(s) or other holders of property rights with respect to such grant of easement and right of access. Terminal Owner shall have a duty to maintain in force and effect any underlying agreements that the grant of such non-exclusive easement and right of access by Terminal Owner is based upon. Without limiting the foregoing, Terminal Owner grants Customer's third-party customers access to the Terminal, including the loading racks and railcar areas, at all reasonable times for the purpose of the staging and logistics of trucks and railcars, and delivering and receiving Product, as applicable.

2.6 Monthly Forecasts. Customer will provide Terminal Owner, by email or facsimile, or by other means mutually agreed by Terminal Owner and Customer from time to time, no later than the fifteenth (15th) Day of each Month throughout the Term, a good faith Monthly forecast (a "Forecast") of the volume of each Product that Customer projects it (and its third-party customers, as applicable) will deliver to the Terminal during the following Month. Terminal Owner and Customer will work together cooperatively to schedule deliveries of the Products to the Terminal based on Customer's Forecasts. Customer's Forecasts may exceed the Minimum Volume Commitment, but shall not exceed the maximum design transloading capacity of the Terminal.

2.7 Terminal Modifications. In order to facilitate the Services, Customer will perform (with the full cooperation of Terminal Owner) certain expansions or alterations to the Terminal at Customer's sole cost and expense (collectively, the "Customer Terminal Modifications") as follows: (a) Customer will install equipment and facilities at the Terminal necessary for loading railcars with Product from trucks, such that the loading will commence on the Target Terminal Operations Commencement Date, and as may be described in further detail on Exhibit B hereto ("Phase I Project"), and (b) Customer may, at its sole option, install equipment and facilities necessary for loading railcars from pipelines, and as may be described in further detail on Exhibit C hereto ("Phase II Project"). If Customer elects to perform the Customer Terminal Modification described in (b), it shall provide Terminal Owner with notice of such election. Terminal Owner shall allow Customer (and the Customer Parties) to perform all Customer Terminal Modifications, and shall provide Customer and Customer Parties with such access (including any necessary easements and rights-of-way into, over, under and across the Terminal and associated land to locate equipment and facilities) and full assistance as reasonably required; provided that Terminal Owner shall be permitted to have a representative present at the Terminal for observation when work on a Customer Terminal Modification is being performed. Terminal Owner acknowledges and agrees that title to the equipment and facilities installed by or at the direction of Customer in connection with a Customer Terminal Modification shall remain with and be vested in the Customer; *provided* that ownership of any additional rail tracks that may be installed will be transferred to Terminal Owner upon the expiration of the Term, subject to

Customer's rights under Section 8.8 and Section 9.2. Other than the rail tracks described in the preceding sentence, upon the expiration of the Term, Customer shall be permitted, at its sole cost and expense, to remove any equipment or facilities constituting Customer Terminal Modifications. During the Term, Terminal Owner (i) shall not be required to make any capital investment to facilitate the Services (other than in connection with any maintenance or repair necessary for the Terminal Owner to comply with its obligations under this Agreement), and (ii) shall not be permitted to make any expansion, modification or other alteration (other than routine maintenance and repairs) to the Terminal that interferes with or adversely impacts the operations and use of the Terminal without the prior written consent of Customer.

ARTICLE 3 MINIMUM THROUGHPUT OBLIGATION

3.1 Minimum Volume Obligation. Subject to the terms of this Agreement, including Section 3.3 and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, Customer agrees to Throughput (either directly or via volumes delivered to the Terminal by Customer's third-party customers) an amount of Product through the Terminal on a Monthly basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the "Minimum Volume Commitment") during each Calendar Quarter during the Term after the Termination Operations Commencement Date, or otherwise pay the Shortfall Payment applicable to such Calendar Quarter.

3.2 Shortfall Payment.

(a) Quarterly Shortfall. If, for any Calendar Quarter after the Terminal Operations Commencement Date, the volume of Product actually Throughput during such Calendar Quarter (for the avoidance of doubt, calculated on a Calendar Quarterly, not a Monthly or Daily, basis) is less than the Minimum Volume Commitment (such deficiency, if any, the "Shortfall"), Customer shall pay Terminal Owner an amount equal to the volume of the Shortfall (expressed in Barrels) to the extent not caused or contributed to by Force Majeure, maintenance outages at the Terminal, or Terminal Owner's breach of its obligations under this Agreement, *multiplied by* the Throughput Fee in effect for such Calendar Quarter (collectively, the "Shortfall Payment"). There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner breach.

(b) Quarterly True-Up. Promptly following each Calendar Quarter, Terminal Owner will provide to Customer a written statement showing the Minimum Volume Commitment versus the Actual Quarterly Aggregate Volume. If the Actual Quarterly Aggregate Volume exceeds the Minimum Volume Commitment for such Calendar Quarter, Customer shall not owe and shall be relieved from payment to Terminal Owner of any Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter. However, if the Actual Quarterly Aggregate Volume is less than the Minimum Volume Commitment for such Calendar Quarter, Customer shall owe to Terminal Owner a Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter.

3.3 Adjusted Minimum Volume Commitment. For any partial Calendar Quarter within the Term, the Minimum Volume Commitment shall be prorated accordingly. The

Minimum Volume Commitment for the applicable Calendar Quarter shall also be adjusted downward on a per Barrel basis for any volumes of Product that Customer was not able to Throughput through the Terminal due to Terminal Owner's failure to receive Product within the capacity of the Terminal, Terminal Owner breach of this Agreement, or any other act or an omission of a Terminal Owner Party that prevents or curtails Throughput.

ARTICLE 4 FEES; INVOICES

4.1 Throughput Fee. Subject to the terms of this Agreement, Customer shall pay Terminal Owner a throughput fee equal to One Dollar and Fifty Cents (\$1.50) per Barrel of Product Throughput through the Terminal (the "Throughput Fee").

4.2 Invoices; Payment of Fees. Within twenty-four (24) hours following the end of each Month, Terminal Owner shall issue to Customer an estimate of any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any); *provided* that the Parties agree and acknowledge that Customer shall have no obligation to pay the amounts set forth in such estimate until Terminal Owner delivers to Customer an invoice as described in the remaining portion of this Section 4.2. Terminal Owner shall invoice Customer Weekly for any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any) within ten (10) Business Days after the end of each Week for Services that occurred during the preceding Week, including a detailed statement setting forth the amounts included in such invoice. Customer agrees to pay Terminal Owner all undisputed amounts set forth in such invoice within thirty (30) Days of receipt of Terminal Owner's invoice, which shall be the due date for such invoice. If Customer disputes one or more items in an invoice, Customer must notify Terminal Owner promptly (and in any event by the due date therefor) in writing of the item or items under dispute and the reasons therefor. Customer may withhold payment of the disputed portion of such invoice, without the payment of the Interest Rate as described below, until the dispute is resolved. Any portion of a disputed invoice which is later paid will be paid with accrued interest thereon calculated using the Interest Rate from the due date of such invoice until paid. All invoices issued by Terminal Owner under this Agreement shall be issued in United States dollars, and all such invoices and any other amounts due hereunder shall be paid in United States dollars.

4.3 Past Due Interest. Any amount payable by Customer under this Agreement shall, if not paid when due, bear interest from the payment due date until, but excluding the date payment is received by Terminal Owner, at the Interest Rate.

ARTICLE 5 MEASUREMENT

5.1 Measurement Procedures. Measurement shall be in accordance with Terminal Owner's standard measurement procedures, which shall be in accordance with applicable API standards. Terminal Owner shall transload the Product from trucks or pipeline into railcars using, as applicable, a rack, pump and custody transfer meter at the Receipt Point to be provided by Customer and a rack, pump and custody transfer meter at the Delivery Point to be provided by Customer (each meter at the Receipt Point and Delivery Point, a "Meter"). Each Meter shall be provided in accordance with industry standards and in accordance with all Applicable Law. The

quantities of the Products transloaded by Terminal Owner at the Terminal will be determined by the Meters. In the event of a failure of a Meter, the Parties will use railcar waybills and truck bills of lading, as applicable, until the applicable Meter is repaired. Terminal Owner shall be responsible for the maintenance of the Meters, and repair any malfunctioning Meter as soon as commercially practicable. All tests, calibrations, and adjustments of a Meter, to be performed by Terminal Owner at least once per Calendar Quarter, may be witnessed by Customer (or its designated representative) and shall be preceded by reasonable notice to Customer. Upon request of either Party for a special test of any meter or auxiliary equipment, Terminal Owner shall promptly verify the accuracy of same; provided, however, that the cost of such special test shall be borne by the requesting Party, unless the percentage of inaccuracy found is more than one percent (1) % of a recording corresponding to the average hourly rate of Product flow, in which case the cost of such test shall be borne by Terminal Owner.

5.2 Measurement Records. Terminal Owner shall keep accurate records of the receipt and delivery of Product under this Agreement and, subject to the Loss Allowance, shall account for Product receipts and redeliveries at such time and in such manner as shall be reasonably requested by Customer. Terminal Owner will provide Daily updates to Customer as to the metered volumes of the Product Throughput into the Terminal, trucks delivered to the Terminal, and volumes of Product transloaded into railcars at the Terminal.

ARTICLE 6

TERMINAL OWNER OBLIGATIONS

6.1 Warranty. Terminal Owner warrants to Customer that: (a) all Services shall be in accordance with Section 2.2 hereof; (b) all Services will be performed and completed in a safe and environmentally conscientious manner, with Terminal Owner taking all reasonable and necessary actions, including, but not limited to, those in accordance with all Applicable Law, regulations, ordinances and codes, any applicable policies of Customer and prudent industry practices to protect persons, property and the environment; (c) all Services shall be performed professionally, and in accordance with sound engineering practices; (d) all Services will be free from defects in design, workmanship, and materials, and that all Terminal Owner personnel and employees have been trained to work in a safe and competent manner to assure the safety of other persons; and (e) all equipment or property provided or supplied by Terminal Owner in performing the Services has been thoroughly tested and inspected and is safe, sufficient and free of any defects, latent or otherwise, is in good operating condition and is appropriate for the carrying out of the Services.

6.2 Non-Conforming Services. Any Services found defective, unsuitable, or in any way nonconforming with the terms of this Agreement shall be promptly replaced or corrected by Terminal Owner without additional charge to Customer, whether or not the Services have been accepted. Customer may, at its sole discretion and with full reservation of its other rights and remedies, direct Terminal Owner to replace or correct, as applicable, the non-compliant Services. The warranty obligations of Terminal Owner under this Agreement shall not be limited, restricted, or otherwise modified by the indemnity obligations contained elsewhere in this Agreement.

6.3 Observation and Testing of Services. All Services will be subject to Customer's observation and testing. Terminal Owner shall be responsible for inspecting and testing the

components of the Services. Customer Parties shall (subject to Section 15.2) have the right at any time to review and test the Services at all places and stages of performance, without such action being treated as either discharging Terminal Owner's responsibility or constituting Customer's acceptance of the Services. Notwithstanding any prior test and observation at the Terminal, all Services will be subject to final acceptance at the Terminal. Neither payment for, nor the inspection at the Terminal of any Services shall in any way impair Customer's right to observation, imply acceptance or rejection of non-conforming Services, or reduce or waive any other remedies or warranties to which Customer is entitled.

6.4 Warranty Default. If, after written request by Customer, Terminal Owner fails to replace or correct any non-conforming Services within the shortest time reasonably practicable, but in any event not later than three (3) Days after being notified of the defect, without prejudice to Customer's other rights and remedies under this Agreement or by Applicable Law, Customer (a) may replace or correct such Services itself or through another contractor in any manner that Customer determines in its sole discretion, and charge to Terminal Owner the cost incurred by Customer thereby, which Terminal Owner will pay promptly upon invoice therefor, (b) deduct or withhold the costs and expenses incurred from amounts otherwise due and owing by Customer to Terminal Owner and/or (c) may, without further notice, exercise its remedies under this Agreement for default, in accordance with Article 8 hereof.

6.5 Permits. Terminal Owner shall obtain and maintain in force, and ensure that each Terminal Owner Party obtains and maintains in force (as necessary), all Permits including the Regulatory Approvals. If Customer is required to obtain any Permit that Applicable Law requires to be issued in the name of Terminal Owner or another Terminal Owner Party, Terminal Owner shall provide all reasonable assistance to Customer in connection with Customer's efforts to obtain and maintain such Permit, including by signing and submitting any applications or other documentation required to be in Terminal Owner's or another Terminal Owner Party's name.

ARTICLE 7 TITLE AND RISK OF LOSS; PRODUCT LOSS; DEMURRAGE

7.1 Title; Custody and Control. Customer (or its customer, as the case may be) shall retain title to all Product delivered by it to the Terminal, and Terminal Owner acknowledges that it has no title to or interest in the Product. Care, custody and control of (and risk of loss for) all such Product shall pass to Terminal Owner at the time that such Product passes through the Meter at the outlet flange of the applicable truck or pipeline delivering such Product into the Terminal (the "Receipt Point") and shall remain with Terminal Owner until the railcar receiving such Product from the Terminal is no longer located at the Terminal and such railcar is removed from the Terminal by the applicable rail carrier. Title to Product shall not transfer to Terminal Owner by reason of the performance of the Services. For the avoidance of doubt, Customer Terminal Modifications are considered part of the Terminal for purposes of determining the Receipt Point and other purposes of this Agreement, subject to Section 2.7.

7.2 Loss Allowance; Product Degradation. Customer acknowledges that minor losses (shrinkage) in the handling of crude oil is a normal part of the transloading process and, as a result, minor losses of crude oil related to the unloading and loading of such commodity shall be considered negligible if within the Loss Allowance (as hereinafter defined).

(a) Loss Allowance. If Customer Parties and/or Terminal Owner observe Product spillage or loss while transloading from trucks to railcars or from the pipeline to railcars, Customer Parties and Terminal Owner shall determine the volume of lost Product (as reported on the relevant spill report). Terminal Owner shall not be responsible for any loss of Product provided that such loss does not exceed one barrel per railcar (each a "Loss Allowance"). Terminal Owner shall be responsible for loss of Product that exceeds the Loss Allowance.

(b) Loss Credit. Customer shall not owe Terminal Owner any transloading fees for lost Product in excess of the Loss Allowance. In the event of losses in excess of the Loss Allowance, the loss above the Loss Allowance shall be settled and reflected as a credit (the "Loss Credit") to Customer on Terminal Owner's invoice for such Month in an amount equal to the lost barrels in excess of the Loss Allowance multiplied by the then crude oil barrel price of WTI Midland (ARGUS). While Terminal Owner has care, custody and control of the Product pursuant to Section 7.1, Terminal Owner shall be responsible for securing the Product and protecting the Product against loss (above any Loss Allowance) or theft, and any such loss or theft shall not be the basis of a Force Majeure claim by Terminal Owner under this Agreement. Terminal Owner shall indemnify and hold harmless the Customer Parties from and against any Liabilities arising out of, incident to, or in connection with (a) the loss of Product in excess of the Loss Allowance at the Terminal or otherwise due to the acts or omissions of Terminal Owner, or (b) any contamination, damage, degradation or improper transloading of Product at the Terminal; provided, however, that the limit of the indemnification shall be the Loss Credit given to Customer as provided in this Section.

7.3 Demurrage. Terminal Owner shall be responsible for demurrage, standby, delay and similar charges related to the Services incurred by Customer Parties provided under this Agreement for railcars and trucks if the applicable delay resulted from the acts or omissions of any of the Terminal Owner Parties.

7.4 No Security Interest. Unless Customer has defaulted in its payment obligations under this Agreement and such default is not cured, Terminal Owner, for itself and all Terminal Owner Parties, shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon any of the Product delivered to the Terminal or upon the Customer Terminal Modifications. If Terminal Owner does, it shall indemnify, defend and hold harmless the Customer Parties from and against any such pledge, security interest, lien, levy or other encumbrance. Unless Terminal Owner has defaulted in its obligations under this Agreement and such default is not cured, Customer shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon the Terminal (other than with respect to the Customer Terminal Modifications) in connection with this Agreement. If Customer does, it shall indemnify, defend and hold harmless the Terminal Owner from and against any such pledge, security interest, lien, levy or other encumbrance.

ARTICLE 8 TERM; REMEDIES

8.1 Term. Subject to early termination pursuant to this Article 8, the term of this Agreement shall commence on the Effective Date and shall continue until January 1, 2020 (the "Initial Term"). At Customer's election, the term may be renewed and extended for successive

three (3) month periods (each such period, an “Extended Term”) by written notice from Customer to Terminal Owner at least sixty (60) Days prior to the expiration of the Initial Term or any Extended Term, as applicable (such Initial Term and any Extended Term(s) are herein collectively, the “Term”).

8.2 Termination Due to Failure of Conditions. This Agreement may be terminated at any time prior to the Target Terminal Operations Commencement Date by either Customer or Terminal Owner, by the terminating Party’s written notice of termination to the other Party, if all conditions set forth below in this Section 8.2 to such terminating Party’s obligations have not been fulfilled by the Target Terminal Operations Commencement Date (as it may be extended by the Parties in writing), unless the failure to so fulfill by such time is due to an uncured breach of this Agreement by the Party seeking to terminate.

(a) Conditions to Customer’s Obligations. All obligations of Customer under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Customer:

(i) Compliance with Representations, Warranties and Agreements. The representations and warranties made by Terminal Owner in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Terminal Owner shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Terminal Owner prior to or at the Target Terminal Operations Commencement Date, including Terminal Owner’s full cooperation with Customer during the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) Necessary Company Actions. Terminal Owner shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) Regulatory Approvals. The Regulatory Approvals shall have been obtained and are effective.

(iv) No Litigation. No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

(v) SPCC & HSE Compliance. Terminal Owner shall have in place an SPCC plan for the Terminal that is reasonably satisfactory to Customer Parties, and shall, upon request, provide to Customer and Customer Parties all HSE and related documentation and maintain practices necessary for Customer to obtain Customer Parties' approval of use of the Terminal.

(vi) Easement. The easement described in Section 2.5 hereof for Customer's benefit shall have been obtained by Target Terminal Operations Commencement Date.

(b) Conditions to Terminal Owner's Obligations. All obligations of Terminal Owner under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Terminal Owner:

(i) Compliance with Representations, Warranties and Agreements. The representations and warranties made by Customer in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Customer shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Customer prior to or at the Target Terminal Operations Commencement Date, including the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) Necessary Company Actions. Customer shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) Regulatory Approvals. The Regulatory Approvals shall have been obtained and are effective.

(iv) No Litigation. No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

8.3 Remedies for Default. Except as otherwise specifically provided for under the terms of this Agreement, if either Party fails to perform any of the representations, warranties, covenants or other obligations imposed on it by this Agreement in any material respect (the "Defaulting Party"), then the Party to whom the covenant or obligation was owed (the "Non-Defaulting Party") may (without waiving any other remedy for breach hereof, each of which is

hereby reserved), notify in writing the Defaulting Party, stating specifically the nature of the default (the "Default Notice"). The Defaulting Party will have thirty (30) Days after receipt of the Default Notice (the "Cure Period") in which to (i) remedy the cause or causes stated in the Default Notice, (ii) provide adequate security satisfactory to Non-Defaulting Party to fully indemnify the Non-Defaulting Party for any and all consequences of the breach, or (iii) to dispute the claim of breach in good faith. If the Defaulting Party either cures the default or provides such adequate security within the Cure Period, then this Agreement shall remain in full force and effect. If the Defaulting Party fails to timely cure such default or to timely provide such adequate security, then, without prejudice to its other remedies under this Agreement, at law or in equity, the Non-Defaulting Party may suspend the performance of its obligations under this Agreement or terminate this Agreement immediately upon giving written notice of such suspension or termination to the Defaulting Party. In the event of any Terminal Owner uncured default, Customer (or its designee) may, at its option, without prejudice to its other remedies under this Agreement, at law or in equity, perform the Services by whatever method Customer reasonably deems expedient, and in such case, Terminal Owner shall be liable to Customer for Customer's reasonable direct damages and costs of cover and performing the Services, if applicable. The effective date of any termination of this Agreement under this Section 8.3 shall be the date established in the notice of such termination delivered by the Non-Defaulting Party exercising its termination right hereunder.

8.4 Termination for Extended Force Majeure. By written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days or (b) sixty (60) Days in any one hundred and twenty (120) consecutive Day period. Following the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment).

8.5 Effect of Termination. In the event of the termination of this Agreement pursuant to the provisions of Section 8.1, Section 8.2, Section 8.3 or Section 8.4, and except as provided in Section 8.3, no Party to this Agreement shall have any further liability or obligation under or in respect of this Agreement, except that the provisions of this Agreement that by their nature survive its termination (including property rights, indemnities, damage limitations, waivers, releases, warranties, Permits, confidentiality and governing law provisions) shall remain applicable and survive such termination and remain in force and effect; provided, however, that the termination of this Agreement shall not (a) relieve any Party from any expense, liability or obligation or remedy therefor that has accrued or attached prior to the date of such termination, nor (b) defeat or impair the right of any Party to pursue such relief as may otherwise be available to it on account of any breach of this Agreement or any of the representations, warranties, covenants or agreements contained in this Agreement by the other Party.

8.6 Specific Performance and Declaratory Judgments. Damages in the event of breach of this Agreement by a Party hereto may be difficult, if not impossible, to ascertain. Therefore, each Party, in addition to and without limiting any other remedy or right it may have, will have the right to seek a declaratory judgment and will have the right to an injunction or other equitable relief in any court of competent jurisdiction, enjoining any such breach, and enforcing specifically the terms and provisions hereof, and each of the Parties hereto hereby waives any and all defenses

it may have on the ground of lack of jurisdiction or competence of the court to grant such an injunction or other equitable relief. The existence of this right will not preclude any Party from pursuing any other rights and remedies at law or in equity that such Party may have.

8.7 Cumulative Remedies. Except as otherwise expressly stated in this Agreement, the remedies provided under this Agreement are cumulative and in addition to any other rights or remedies either Party may have now or that may subsequently be available at Applicable Law, in equity, by statute, in any other agreement between the Parties, or otherwise. Subject to the express limitations in Section 10.6 hereof, nothing contained in the Agreement shall preclude either Party, in its sole discretion, from (i) enforcing any or all of its rights or remedies against the other Party for any breach of this Agreement by that other Party or (ii) seeking any injunctive relief necessary to prevent the other Party from breaching its obligations under the Agreement or to compel the other Party to perform its obligations. No election of remedies shall be required or implied as a result of a Party's decision to avail itself of a remedy.

8.8 Reinstatement after Termination. If this Agreement is terminated (other than due to Customer's breach), and Terminal Owner plans to utilize or utilizes the Terminal for the purpose of providing services similar to the Services under this Agreement, then, Terminal Owner shall notify Customer in writing prior to the commencement of such services (an "Alternative Service Notice"), detailing the anticipated arrangement or contract ("Alternative Service"). Any such arrangement or contract for Alternative Service by Terminal Owner shall only be permitted if made expressly subject to Customer's rights under this Section 8.8. Customer shall have thirty (30) Days following receipt of an Alternative Service Notice to elect whether to reinstate this Agreement under an Extended Term to commence on the date set forth in such Customer election (to be a date no later than sixty (60) Days following the date of such election). Failure by Customer to respond within such time period shall be deemed an election not to reinstate this Agreement; provided, however that at the expiration of such Alternative Service, Customer shall have the right to reinstate this Agreement. If Customer elects to reinstate this Agreement, the arrangement that is the subject of the Alternative Service Notice shall not be permitted and shall be cancelled promptly, and this Agreement shall be reinstated in accordance with its terms. Any reinstatement of this Agreement would be subject to the Customer's rights under this Section 8.8.

ARTICLE 9 ASSIGNMENT AND TRANSFER

9.1 Assignment.

(a) Except as specifically otherwise provided in this Agreement, and subject to Section 9.2 and Section 9.3, no Party shall have the right to assign its rights and obligations under this Agreement (in whole or in part) to another Person except with the prior consent of the other Party, which consent may not be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, a Party may assign its rights and obligations under this Agreement to an Affiliate of such Party without the consent of the other Party; *provided* that (i) such Person assumes in writing the obligations of the assigning Party under this Agreement reasonably acceptable to the non-assigning Party, (ii) such assignment is made subject to this Agreement, and (iii) the assigning Party shall not be released from any of its obligations under this Agreement without the consent of the non-assigning Party. Any assignment in violation of this Section 9.1 shall be void *ab initio*.

(b) Except as provided in (a) above, nothing in this Section 9.1 shall prevent or restrict Customer's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Customer without Terminal Owner's prior consent, and nothing in this Section 9.1 shall prevent or restrict Terminal Owner's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Terminal Owner without Customer's prior consent. However, if a change of Control of a Party gives rise to a reasonable basis for insecurity on the part of the other Party, such change of Control may be the basis for a request of adequate assurance of performance. Each Party shall have the right without the prior consent of the other Party to (i) mortgage, pledge, encumber or otherwise impress a lien or security interest upon its rights and interest in and to this Agreement, and (ii) make a transfer pursuant to any security interest arrangement described in (i) above, including any judicial or non-judicial foreclosure and any assignment from the holder of such security interest to another Person; provided, in each case, such arrangement or action shall only be permitted if it is expressly subject to and subordinated to the terms of this Agreement.

9.2 Right of First Offer (ROFR).

(a) This Section 9.2 shall apply to any sale, assignment, transfer or disposition of the Terminal or any of the Terminal assets in (i) a singular transaction separate and apart from other non-Terminal assets or interests or (ii) a transaction where the Terminal or such Terminal assets comprise more than fifty percent (50%) of the aggregate value of such transaction (each, a "Subsequent Transfer") by Terminal Owner to any Person that is not an Affiliate of Terminal Owner from the Effective Date until the date that is five (5) years following the end of the Term (such period, the "ROFR Period"); *provided* that any sale, assignment, transfer or disposition to an Affiliate of Terminal Owner shall only be made expressly subject to the restriction in this Section 9.2 with such Affiliate agreeing in writing to be bound by such restriction and *provided further* that a Subsequent Transfer includes those sales, assignments, transfers or dispositions for which a contractual agreement was executed within the ROFR Period, even if such transfer is not consummated until after the ROFR Period.

(b) Once the final terms and conditions of a Subsequent Transfer have been fully negotiated, Terminal Owner shall give the Customer a written notice (the "ROFR Notice") stating the assets to be transferred (the "Subsequently Transferred Interest"), and all such final terms and conditions as are relevant to such Subsequent Transfer, together with a copy of all instruments or relevant portions of instruments establishing such terms and conditions. Customer shall have the right, but not the obligation, to elect, in its sole discretion, to acquire such Subsequently Transferred Interest on the terms and conditions set forth in the ROFR Notice. The ROFR Notice shall constitute a binding offer (the "ROFR Offer") by Terminal Owner to sell, assign, transfer and dispose to Customer the Subsequently Transferred Interest at the price and upon the terms specified in the ROFR Notice and such offer shall be irrevocable for thirty (30) Days following receipt of the ROFR Offer by Customer. In the event that the sale price to be paid for the Subsequently Transferred Interest by a proposed bona fide third-party purchaser consists of or includes properties or assets other than cash, the target price to be paid by Customer shall be equal to the fair market value of such non-cash consideration, as reasonably determined by the Parties, plus the amount of any cash consideration. If the Parties are unable to agree on the fair market value of such non-cash consideration, then the fair market value thereof shall be determined by an independent third-party appraisal, the cost of which will be shared equally by the Parties

challenging the proposed fair market value. The independent third-party appraiser who conducts such appraisal shall be selected by the mutual agreement of the Parties. Customer (or its designated Affiliate) may accept such ROFR Offer and acquire all of the Subsequently Transferred Interest by giving written notice of the same to Terminal Owner within such thirty (30) Day period. The failure by Customer to so notify Terminal Owner within such thirty (30) Day period shall be deemed an election by Customer not to accept such ROFR Offer.

(c) If Customer accepts the ROFR Offer, then Terminal Owner and Customer shall cooperate to consummate the Subsequent Transfer to Customer (or its designated Affiliate) as promptly as practicable following such acceptance.

(d) If Customer does not accept the ROFR Offer, then Terminal Owner may transfer all, but not less than all, of the Subsequently Transferred Interest at any time within one hundred eighty (180) Days following the end of the thirty (30) Day period that Customer had to accept the ROFR Offer. Any such Subsequent Transfer shall be (i) at a price not less than the price set forth in the ROFR Notice and (ii) upon such other terms and conditions not, in the aggregate, more favorable to the acquiring party than those specified in the ROFR Notice. If Terminal Owner does not consummate such Subsequent Transfer on such terms within such one hundred eighty (180) Day period, the Subsequent Transfer shall again become subject to the right of first offer set forth in this Section 9.2.

(e) If Terminal Owner structures a Subsequent Transfer as a merger or sale of equity interests, such Subsequent Transfer shall be subject to the restrictions in this Section 9.2; *provided* that the restrictions contained in this Section 9.2 shall not apply to any such indirect transfer that is (i) a transaction involving a merger or other business consolidation of Terminal Owner's ultimate parent entity with a Third Party or a public securities offering; or (ii) an acquisition with a Third Party in which the assets subject to such Subsequent Transfer were included in a divestiture package and the allocated value of such assets does not constitute more than twenty-five percent (25%) of the aggregate value of the acquisition.

9.3 Covenant Running with the Land. Any transfer of Terminal Owner's interests in the Terminal or any of the land on which the Terminal is located shall be subject to Customer's rights under this Agreement. This Agreement is (a) a covenant running with the Terminal and the land described on Exhibit A-2 hereto to the extent Terminal Owner is able to grant such a covenant with respect to the land, it being recognized that Terminal Owner is a lessee of the land and owns no fee interest in the land; and (b) binding on and enforceable by Customer against Terminal Owner and its successors and assigns and their respective right, title and interest in and to the Terminal and the land described on Exhibit A-2 hereto, and as a benefit to Customer, its successors and assigns. If Terminal Owner sells, transfers, conveys, assigns, grants or otherwise disposes of all or any interest in such Terminal or land, then any such sale, transfer, conveyance, assignment, or other disposition shall be expressly subject to this Agreement and expressly state as such in any instrument of conveyance. Terminal Owner hereby authorizes Customer to record a memorandum of this Agreement in the real property records of the relevant county where the Terminal is to be located. The Parties agree that until Customer provides notice to the contrary, all payment terms and pricing information shall remain confidential and be redacted from any filings in the real property records.

**ARTICLE 10
INDEMNIFICATION; DAMAGES LIMITATION**

10.1 Duty to Indemnify Customer Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.12 and except as otherwise provided in this Agreement, TERMINAL OWNER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS CUSTOMER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property, and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Terminal Owner's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF CUSTOMER PARTIES.**

10.2 Duty to Indemnify Terminal Owner Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.1 and except as otherwise provided in this Agreement, CUSTOMER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS TERMINAL OWNER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property (excluding Product loss or damage), and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Customer's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF TERMINAL OWNER PARTIES.**

10.3 Term of Indemnity. The provisions of this Article 10 and any other indemnification provisions set forth in this Agreement shall survive the termination or expiration of this Agreement.

10.4 Express Negligence. **THE RELEASE, PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS OBLIGATIONS PROVIDED FOR IN THIS AGREEMENT SHALL BE APPLICABLE WHETHER OR NOT THE LIABILITIES, LOSSES, COSTS, EXPENSES AND DAMAGES IN QUESTION AROSE OR RESULTED SOLELY OR IN PART FROM THE GROSS, SOLE, ACTIVE, PASSIVE, CONCURRENT OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT OR VIOLATION OF LAW OF OR BY ANY INDEMNIFIED PARTY. CUSTOMER AND TERMINAL OWNER ACKNOWLEDGE THAT THIS STATEMENT COMPLIES WITH THE EXPRESS NEGLIGENCE RULE AND IS "CONSPICUOUS."**

10.5 Notice and Defense. A party indemnified hereunder shall, as soon as practicable after receiving notice of any suit brought against it within this indemnity, furnish to the indemnifying party the full particulars within its knowledge thereof and shall render all reasonable assistance requested by the indemnifying party in the defense of any Liabilities. Each indemnified party shall have the right but not the duty to participate, at its own expense, with counsel of its

own selection, in the defense and/or settlement thereof without relieving the indemnifying party of any obligations hereunder; provided, however, the indemnifying party shall have control over the defense and settlement as long as the settlement does not impose any obligations on the indemnified party. Any claim for indemnification by a member of Customer or Terminal Owner's respective Group may only be brought by Customer or Terminal Owner, as applicable, on behalf of such member seeking indemnification.

10.6 No Consequential Damages. **NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NEITHER TERMINAL OWNER NOR CUSTOMER SHALL BE LIABLE TO THE OTHER OR ANY MEMBER OF THE OTHER'S GROUP, AND EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND THE OTHER PARTY'S GROUP), FOR ANY INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES, SPECIAL OR PUNITIVE DAMAGES, OR FOR LOST PROFITS, WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF WHETHER IN CONTRACT, TORT OR OTHERWISE; PROVIDED, HOWEVER, THAT THE LIMITATION ON LIABILITY SET FORTH IN THIS SECTION 10.6 SHALL NOT LIMIT EITHER PARTY'S RESPECTIVE INDEMNITY OBLIGATIONS HEREUNDER THIS AGREEMENT FOR ANY LIABILITIES OCCASIONED BY THIRD PARTY CLAIMS, AS EXPRESSLY PROVIDED IN THIS AGREEMENT. FOR THE AVOIDANCE OF DOUBT, THE PARTIES AGREE THAT RECOVERY OF THE ACTUAL DIRECT DAMAGES DESCRIBED IN SECTION 6.4 OR SECTION 8.3 SHALL NOT BE PRECLUDED BY THIS SECTION 10.6.**

ARTICLE 11 INSURANCE

11.1 Each Party shall procure and maintain, at its sole expense, policies of insurance (with solvent insurers rated by A.M. Best Company A-VI or higher) set forth in Exhibit D. The insurance provisions of this Agreement, including the minimum required limits of Exhibit D are intended to assure that certain minimum standards of insurance protection are afforded and the specifications herein of any amount or amounts shall be construed to support but not in any way to limit Parties' liabilities and indemnity obligations as specified elsewhere in this Agreement. All required insurance policies shall be endorsed to cover contractual liabilities insuring the indemnifications contained in this Agreement.

11.2 In addition to the insurance required under Section 11.1, Terminal Owner shall procure and maintain at its sole expense a pollution legal liability ("PLL") policy providing coverage for remediation of environmental contamination at the Terminal, for the costs of responding to a spill or release of oil or hazardous materials at or from the Terminal, and for personal injury and property damage claims arising from environmental conditions associated with Terminal operations. The PLL policy shall be in a form reasonably acceptable to Customer, shall name the Customer and its Group as an additional insured, and shall be extended and renewed as necessary to provide coverage that extends for a minimum of two (2) years following the Term, as it may be extended. The PLL policy shall provide for a self-insured retention of not more than \$250,000 and for policy limits of not less than \$5,000,000.

11.3 All insurance carried by either Party (which insurance is in any way related to the Services), whether or not required by this Agreement, shall, but only to the extent of the risk and liabilities assumed by such Party under this Agreement:

(a) Name the other Party's Group as additional insured (except for worker's compensation/employer's liability or professional liability policies (with such additional insured coverage not being restricted to the sole or concurrent negligence of the additional insured and not being restricted to (i) "ongoing operations," (ii) coverage for vicarious liability, or (iii) circumstances in which the named insured is partially negligent);

(b) Waive subrogation as to the other Party's Group; and

(c) Be primary and non-contributory to any insurance of the other Party's Group.

11.4 Although the scope of each Party's insurance obligations is defined by reference to the risks and liabilities assumed under this Agreement, the insurance provisions of this Agreement are, to the extent required to maximize their effectiveness, (a) separately and independently enforceable, and (b) distinct and severable from, and shall not in any way limit any release, protect, defense, indemnity or hold harmless obligations in this Agreement.

11.5 The insolvency, liquidation, bankruptcy, or failure of any insurance company providing insurance for either Party, or failure of any such insurance company to pay claims accruing, shall not be considered a waiver of, nor shall it excuse such Party from complying with, any of the provisions of this Agreement.

11.6 Each Party will promptly provide oral and written notice to the other Party of any accidents or occurrences resulting in injuries to persons or property in any way arising out of or related to the Services and/or occurring on or near the Terminal. For the purpose of this subsection, "promptly" requires oral notification to the other Party within two (2) hours of when the incident occurred.

11.7 Unless specific, prior, written approval is obtained from the other Party, a Party may not self-insure any of its obligations under this Agreement. Where approved, neither Party's decision to self-insure shall in any way act as a prejudice against the other Party and its Group. All deductibles, self-insurance coverage or retentions shall be treated as coverage under an insurance policy, and each Party and its Group will have the same benefits and protection thereunder as though the self-insured Party had secured a policy from a separate insurer.

ARTICLE 12 AUDIT; INSPECTION

12.1 Audits. Customer will have the right, upon reasonable notice, to review for compliance with the terms of this Agreement, (a) the movement of Customer's or Customer's third party customers' Product into, through and out of the Terminal, (b) the relevant portion of all books, records, and information kept by or on behalf of Terminal Owner that reasonably relate to Customer's rights and obligations under this Agreement, and (c) any fees and/or costs charged by Terminal Owner pursuant to this Agreement, except for information subject to attorney-client privilege or confidential information associated with the Terminal's personnel. Terminal Owner

shall retain all such books and records for a period of four (4) years from the date the applicable Services are rendered hereunder, or such greater period as required by Applicable Law. Customer may audit such books and records at Terminal Owner's locations where such books and records are stored. Any such audit will be at Customer's expense and will take place on Business Days and during normal business hours. Any and all information, audits, inspections and observations made by Customer under this Section 12.1 shall: (i) be held in confidence, Customer exercising a degree of care not less than the care used by Customer to protect its own proprietary or confidential information that it does not wish to disclose; (ii) be restricted solely to those with a need to know and not to disclose it to any other person, those persons notified of their obligations with respect to the information; and (iii) be used only in connection with the operations that relate to this Agreement. Terminal Owner shall allow Customer's external auditors access to the Terminal, and shall provide any information or explanations requested by such external auditors that Customer would otherwise have access to pursuant to the terms and conditions of this Agreement.

ARTICLE 13 TAXES

13.1 Customer's Obligations. Customer shall pay, or cause to be paid, and shall indemnify and defend Terminal Owner from and against, all Taxes imposed by Applicable Law on Customer with respect to the Product Throughput under this Agreement. Notwithstanding anything in this Agreement to the contrary, Customer shall not be responsible for or be obligated to indemnify or defend Terminal Owner with respect to (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, or (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Customer shall be responsible for paying any sales, use or similar Taxes imposed on the performance of the Services under this Agreement whether collected by Terminal Owner or otherwise.

13.2 Terminal Owner's Obligations. Terminal Owner shall pay, or cause to be paid, and shall indemnify and defend Customer from and against, (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, and (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Notwithstanding anything in this Agreement to the contrary, Terminal Owner shall not be responsible for or be obligated to indemnify or defend Customer with respect to (i) any Income Taxes imposed on Customer, (ii) any employment, payroll or similar Taxes imposed with respect to Customer's employees, or (iii) any sales, use or similar Taxes imposed on the performance of the Services under this Agreement.

ARTICLE 14 FORCE MAJEURE

14.1 Declaration of Force Majeure Event. Except for Customer's obligation to pay Terminal Owner the monetary amounts provided for in Article 4 of this Agreement for Product actually Throughput at the Terminal, neither Party shall be liable to the other for any failure, delay, or omission in the performance of its obligations under this Agreement, or be liable for damages, for so long as and to the extent such failure, delay, omission, or damage arises directly or indirectly from a Force Majeure occurrence; however, the Term of this Agreement shall not be extended by

such period of Force Majeure delay. It is further agreed that the obligations of the Parties that are affected by such Force Majeure (except as provided above), shall be suspended without liability for breach of this Agreement during the continuance of the Force Majeure but for no longer period. The Party affected by Force Majeure shall use commercially reasonable efforts to remedy the Force Majeure condition with all reasonable dispatch, shall give notice to the other Party of the termination of the Force Majeure, and shall resume performance of any suspended obligation promptly after termination of such Force Majeure.

14.2 Force Majeure. A “Force Majeure Event” or “Force Majeure” means any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party, and includes, but is not limited to, the following events to the extent consistent with the definition above: an act of God; fire; flood; hurricane; explosion; accident; act of the public enemy; riot; sabotage; epidemic; quarantine restriction; strike, lockout, or other industrial disturbance or dispute or difference with workers; labor shortage; civil disturbance; inability to secure or delays in obtaining labor, materials, supplies, easements, surface leases, or rights-of-way, including inability to secure materials by reason of allocations promulgated by an authorized Governmental Authority, so long as such Party has used commercially reasonable efforts to obtain the same; compliance with a request, recommendation, act, rule, regulation or order of a Governmental Authority having or purporting to have jurisdiction; delays or failures by a Governmental Authority to grant Permits applicable to the Terminal so long as the Party experiencing the occurrence has used its commercially reasonable efforts to make any required filings with such Governmental Authority relating to such Permits; unanticipated or emergency shutdowns or turnarounds for maintenance and repair; freezing of wells or delivery facilities, partial or entire failure of wells, and other events beyond the reasonable control of a Party claiming suspension that affect the timing of production or production levels; the plugging of equipment, lines of pipe or other facilities; destruction, breakage and/or accidents to facilities including machinery, lines of pipe, wells or storage caverns or facilities; the necessity for making repairs to or alterations of pipelines; the unavailability, interruption, delay or curtailment of Product transportation services; or, any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed. The settlement of strikes or differences with workers shall be entirely within the discretion of the Party claiming suspension.

14.3 Notice of Force Majeure Event. If either Party finds it necessary to declare Force Majeure under this Agreement, then as soon as reasonably possible after the occurrence of Force Majeure, such Party shall immediately notify the other Party, first by telephone or e-mail, and then promptly by mail or overnight express courier, giving reasonably full details of such occurrence and its estimated duration. The cause of such Force Majeure occurrence shall, only if the affected Party deems it reasonable and economic, be remedied with all reasonable dispatch and the other Party shall be notified either of the date so remedied or the decision not to remedy as soon as practicable.

ARTICLE 15 GENERAL PROVISIONS

15.1 Certain Representations and Warranties. Each Party represents and warrants, as of the Effective Date, that (a) it is duly organized and validly existing under the laws of the

jurisdiction in which it is incorporated or formed; (b) it has all necessary power and authority to enter into and perform its obligations under this Agreement; (c) other than the Regulatory Approvals, which are required to be pursued under this Agreement, such Party is duly qualified or licensed to do business in all jurisdictions wherein the nature of its business and operations or the character of the properties owned or leased by it make such qualification or licensing necessary and where failure to be so qualified or licensed would impair its ability to perform its obligations under this Agreement or would otherwise have a material adverse effect on the other Party; (d) its execution, delivery and performance of this Agreement has been duly authorized by all necessary action on its part and on the part of its Affiliates (as the case may require); (e) its execution, delivery and (provided the required Regulatory Approvals are obtained) performance of this Agreement and the consummation of the transactions contemplated hereby will not conflict with, or result, by itself or with the giving of notice or the passage of time, in any violation of or default under, any provision of the articles of incorporation or bylaws of such Party or any material mortgage, indenture, lease, agreement or other instrument or any permit, concession, grant, franchise, license, contract, authorization, judgment, order, decree, writ, injunction, statute, law, ordinance, rule or regulation applicable to such Party or its properties; and (f) no consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Authority or other Third Party is required in connection with the execution and delivery of this Agreement by such Party or the consummation by such Party of the transactions contemplated hereby, except for filings required in order to obtain the required Regulatory Approvals, as described in Section 2.1.

15.2 Independent Contractor. This Agreement shall not be construed as creating a partnership, joint venture or establish a principal and agent relationship or any other similar relationship between Customer and Terminal Owner with respect to the subject matter hereof. It is understood and agreed that the relationship created by this Agreement is that of principal and independent operator and not that of principal and agent, master and servant, or employer and employee; and Terminal Owner and its employees and contractors shall not be the employees of Customer for any purpose whatsoever. Customer shall designate the work and services it desires to be performed under this Agreement and the ultimate results to be obtained, but shall defer to Terminal Owner as to the methods and details of performance in accordance with the terms and conditions of this Agreement.

15.3 Notices. Any notice, request, demand or communication required to be given by either Party under this Agreement shall be in writing. It may be delivered or sent to the attention of the contact name and address specified in this Agreement by courier service (which is deemed served when delivered) or fax (which is deemed served on the Business Day it was received with written confirmation made thereof) or by certified mail or its equivalent, postage prepaid, return receipt requested or postage prepaid United States Express Mail or its equivalent (which is deemed served the second Business Day after posting). Unless otherwise provided in this Agreement, Email notice is not sufficient. A Party may change the individual and/or address for notices by giving the other Party notice of such change in the manner set forth above.

If to Terminal Owner:

Maalt, LP
4413 Carey Street

Fort Worth, Texas 76119
Attention: Marty Robertson

With a copy to:

James Lanter
James Lanter, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

If to Customer:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: CFO

With a copy to:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: General Counsel

15.4 Compliance with Policies and Laws.

(a) HSE Policies. Terminal Owner shall establish, maintain and implement written health, safety and environmental ("HSE") policies, programs and protection and compliance systems covering operations conducted at the Terminal that conform in all material respects with generally accepted industry best practices (as amended from time to time, an "HSE Program"). Terminal Owner shall (a) monitor on a periodic basis its HSE performance and record performance data, (b) conduct an annual review of its HSE Program, and (c) correct any performance deficiencies identified and update the HSE Program as appropriate. Terminal Owner shall notify Customer as soon as reasonably practicable upon becoming aware of any HSE incident or any other material incidents, conditions or HSE matters that could reasonably be expected to adversely affect Terminal operations or Customer. Without limiting the foregoing, Terminal Owner shall maintain currently effective Spill Prevention, Control and Countermeasure ("SPCC") plans and programs, and shall promptly respond to any spill at the Terminal in a manner that (x) is consistent with the SPCC plans, (y) complies with Applicable Law, and (z) seeks to minimize, correct and eliminate any harm to the environment or human health and safety. Terminal Owner shall also comply with and shall cause its subcontractors and their respective employees and consultants to comply with all applicable Customer rules and regulations (as revised from time to time) known to Terminal Owner that relate to the safety and security of persons and property, protection of the environment, housekeeping and work hours.

(b) Compliance with Laws. Terminal Owner agrees that it will comply with, and shall cause its subcontractors and their respective employees, to comply with, all federal, state, and local employment laws and regulations having jurisdiction over the Services, and all other Applicable Law governing the employment relationship and practices and/or protection of the environment. Terminal Owner represents that each of its employees, agents, contractors, subcontractors involved on Terminal Owner's behalf in carrying out the Services is qualified to work pursuant to written documentation from the appropriate regulatory authorities of the United States.

15.5 Applicable Law. This Agreement is subject to all Applicable Law. If this Agreement or any provision of it is found contrary to or in conflict with any such Applicable Law, this Agreement shall be deemed modified to the extent necessary to comply with same.

15.6 Successors. The provisions of this entire Agreement shall be binding upon the respective successors and permitted assigns of the Parties.

15.7 No Third-Party Beneficiaries. This Agreement is entered into for the benefit of the Parties only, and except as may be specifically set forth herein, including the indemnity provisions, no other Person shall be entitled to enforce any provision hereof or otherwise be a third-party beneficiary hereunder.

15.8 Rebates Prohibited. Neither Party will pay any commission, fee, or rebate to an employee of the other Party or favor an employee of the other Party with any gift or entertainment of significant value.

15.9 No Brokers' Fee. Neither Party has incurred any liability to any financial advisor, broker or finder for any financial advisory, brokerage, finder's or similar fee or commission in connection with the transactions contemplated by this Agreement for which either Party or any of its Affiliates could be liable.

15.10 Waivers; Cumulative Rights. No term, covenant, condition, benefit or right accruing to a Party under this Agreement (or any amendment) shall be deemed to be waived unless the waiver is reduced to writing, expressly refers to this Agreement, and is signed by a duly authorized representative of such Party waiving compliance. No failure or delay in exercising any right hereunder, and no course of conduct or dealing, shall operate as a waiver of any provision of this Agreement or affect in any way the right of such Party at a later time to enforce the performance of such provision. No waiver by any Party of any condition, or any breach of any term or covenant contained in this Agreement, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of any breach of any other term or covenant. The rights of Parties under this Agreement shall be cumulative, and the exercise or partial exercise of any such right shall not preclude the exercise of any other right.

15.11 Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO ITS CHOICE OF LAW PROVISIONS THAT WOULD REQUIRE APPLICATION OF THE SUBSTANTIVE LAWS OF ANOTHER JURISDICTION. TO THE EXTENT PERMITTED BY APPLICABLE LAW,

THE PARTIES WAIVE ALL RIGHTS TO A TRIAL BY JURY IN CONNECTION WITH ANY ACTION OR LITIGATION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY DISPUTE CONCERNING OR INTERPRETATION OF THE AGREEMENT, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE. THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT THIS WAIVER IS MADE KNOWINGLY AND VOLUNTARILY AFTER AN ADEQUATE OPPORTUNITY TO NEGOTIATE THE TERMS.

15.12 Captions. The captions used in this Agreement are for convenience only and shall in no way define, limit or describe the scope or intent of this Agreement or any part thereof.

15.13 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be partially or completely unenforceable, this Agreement shall be deemed to be amended partially or completely to the extent necessary to make such provision enforceable, and the remaining provisions shall remain in full force and effect.

15.14 Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed an original and part of one and the same document.

15.15 Entire Agreement; Amendment. This Agreement constitutes the entire agreement between the Parties regarding the subject matters set forth herein. No variation, modification or change of the Agreement shall be binding upon either Party unless contained in a written instrument executed by a duly authorized representative of each of the Parties.

15.16 Survival. After termination or expiration of this Agreement, the provisions hereof that by their sense and context are intended to survive the expiration or other termination of the Agreement because they reasonably require some action or forbearance after termination or expiration (including, without limitation, the reinstatement, indemnity, hold harmless and similar obligations under this Agreement) shall so survive.

15.17 Publicity. Neither Party may make a press release or other public announcement concerning this Agreement, except to the extent that such press release or other public announcement is required by Applicable Law or rules and regulation of any governmental agency or any stock exchange, in which case, the disclosing Party shall prior to such disclosure (a) notify the other Party of the reasons or basis for such disclosure, (b) make the proposed disclosure available to other Party and (c) obtain the written consent of other Party with respect to the form of such proposed disclosure, which consent shall not be unreasonably withheld.

15.18 Construction. The following rules of construction will govern the interpretation of this Agreement: (a) "years" will mean calendar years unless otherwise defined; (b) "including" does not limit the preceding word or phrase; (c) section titles or headings do not affect interpretation; (d) "hereof," "herein," and "hereunder" and words of similar meaning refer to this Agreement as a whole and not to any particular provision of this Agreement; (e) reference to any agreement (including this Agreement), document or instrument means such agreement, document, or instrument as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms of this Agreement; (f) no rule of construction interpreting this Agreement against the drafter will apply; (g) references to Sections and Exhibits refer to Sections

and Exhibits of this Agreement unless otherwise indicated; (h) references to laws refer to such laws as they may be amended from time to time, and references to particular provisions of a law include any corresponding provisions of any succeeding law; (i) references to money refer to legal currency of the United States, unless otherwise specified; (j) the word "or" is not exclusive; (k) references to any Person includes references to such Persons successors and permitted assigns; and (l) the Exhibits attached hereto are hereby incorporated by reference and included as part of this Agreement.

15.19 Attorneys' Fees. In the event that any suit or action is instituted under or in relation to this Agreement, including without limitation, to enforce any provision in this Agreement, the prevailing Party in such dispute shall be entitled to recover from the losing Party all fees, costs and expenses of enforcing any right of such prevailing Party under or with respect to this Agreement, including without limitation, such reasonable fees and expenses of attorneys and accountants, which shall include, without limitation, all fees, costs and expenses of appeals.

15.20 Confidentiality. All non-public, confidential data and information exchanged by the Parties in connection with or under this Agreement and all pricing terms shall be maintained in strict and absolute confidence, and no Party receiving such data, information or terms ("Receiving Party") shall disclose, without the prior consent of the other Party, any such non-public, confidential data, information or pricing terms unless the release thereof is to Receiving Party's Affiliates, and the employees, owners, officers, directors, consultants, attorneys, agents, or representatives of Receiving Party and its Affiliates (collectively, "Representatives") on a clear need-to-know basis and subject to the confidentiality restrictions hereof, required by Applicable Law (including any requirement associated with an elective filing with a Governmental Authority) or the rules or regulations of any stock exchange on which any securities of the Parties or any Affiliates thereof are traded. Nothing in this Agreement shall prohibit the Parties from disclosing whatever information in such manner as may be required by Applicable Law; nor shall any Party be prohibited by the terms hereof from disclosing information acquired under this Agreement to any Representative or any financial institution or investors providing or proposing financing to a Party or to any Person proposing to purchase the equity in any Party or the assets owned by any Party. Notwithstanding the foregoing, the restrictions in this Section will not apply to data or information that (a) is in the possession of the Person receiving such information prior to disclosure by the other Party, (b) is or becomes known to the public other than as a result of a breach of this Agreement or (c) becomes available to a Party on a non-confidential basis from a source other than the other Party, provided that such source is not bound by a confidentiality agreement with, or other fiduciary obligations of confidentiality to, the other Party. This Section will survive any termination of this Agreement for a period of twenty (24) Months from the end of the year in which the date of such termination occurred.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their respective authorized officers effective for all purposes as of the Effective Date.

Terminal Owner:

Maalt, LP

By: 

Name:

Marty Robertson

Title:

President & COO

ASB

Customer:

Sequitur Permian, LLC

By: 

Name:

Michiel C. vd Bold

Title:

President & COO

Signature Page to Terminal Services Agreement

vdB

Exhibit A-1

Rail Terminal Facility

Terminal Facility Address:

Barnhart Loading Facility
44485 W. Hwy 67
Barnhart TX, 76930

Facility description:

Approximately 10,065 ft. of track within a leased (University Lands) site being approximately 2.8 Miles West of the town of Barnhart, being in Irion County, Texas. Rail facility includes #11 (115#) switches (2-mainline & 3-facility) to allow rail extension/access to an existing Texas Pacifico mainline track. Hardwood ties 8' x 6' with #115 lb. new rail with 3 flop over derails and concrete Xing panels. The facility accommodates 6,913 feet of track accessible for crude transloading operations, and includes access roadway from State Highway 67 and all associated drainage/dirt work required on the site. The site has 24/7 capability with all-weather roads and lighting.

Road Access:

Common use, Multi-Tenant Road to the Crude oil off load Terminal.
Hwy 67 access- turn-lanes/ acceleration lanes.

Exhibit A-1

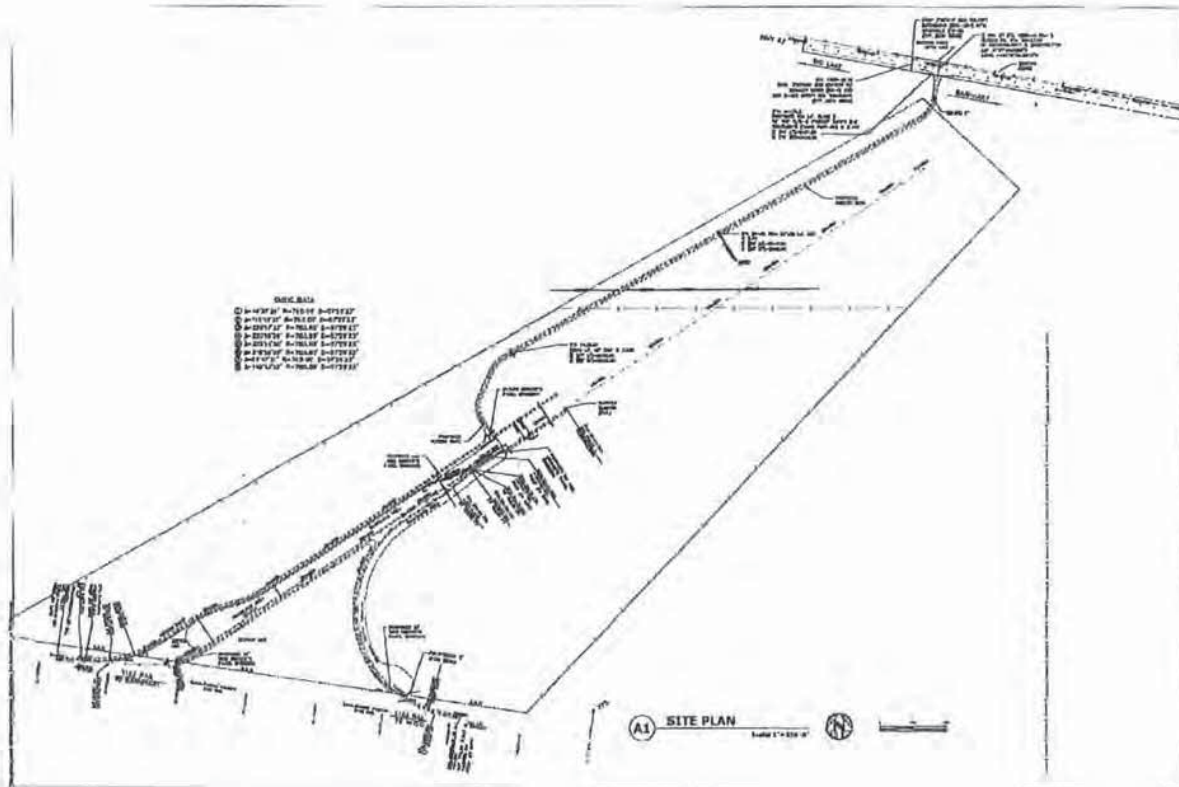


Exhibit A-1

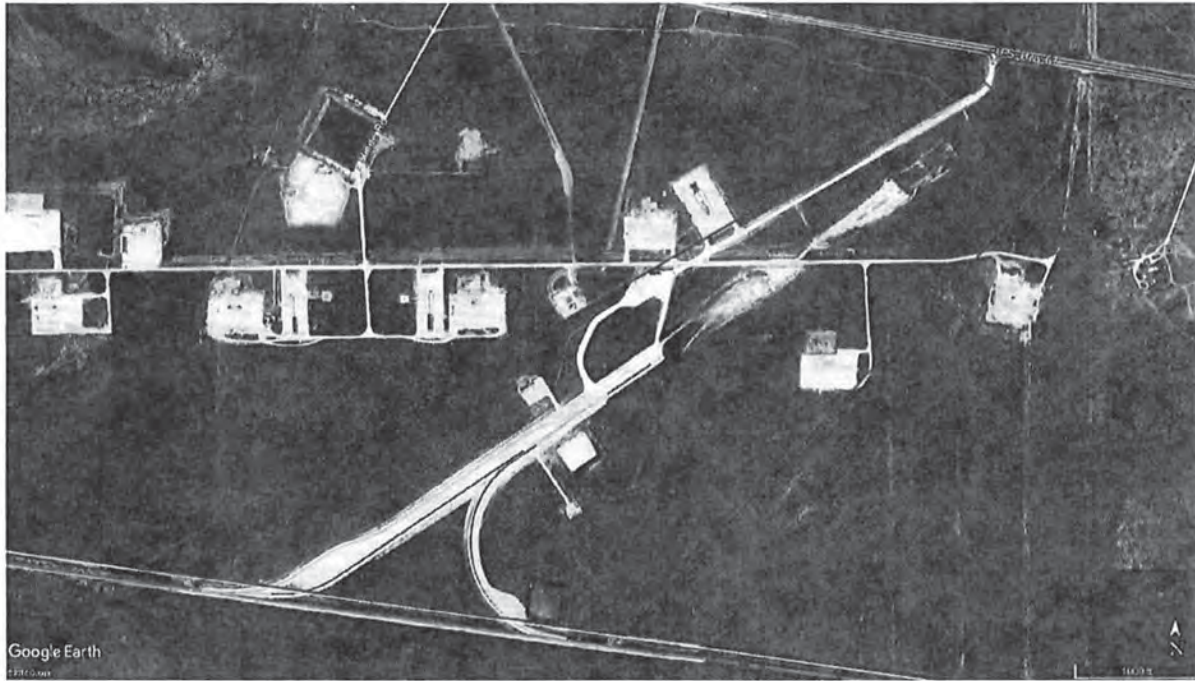


Exhibit A-1

Exhibit A-2

Land

Land description:

269.610 acres of land, more or less, lying in Sections 9, 10, 11, & 12, Block 43, University Lands, Irion County, Texas, as more fully shown below:

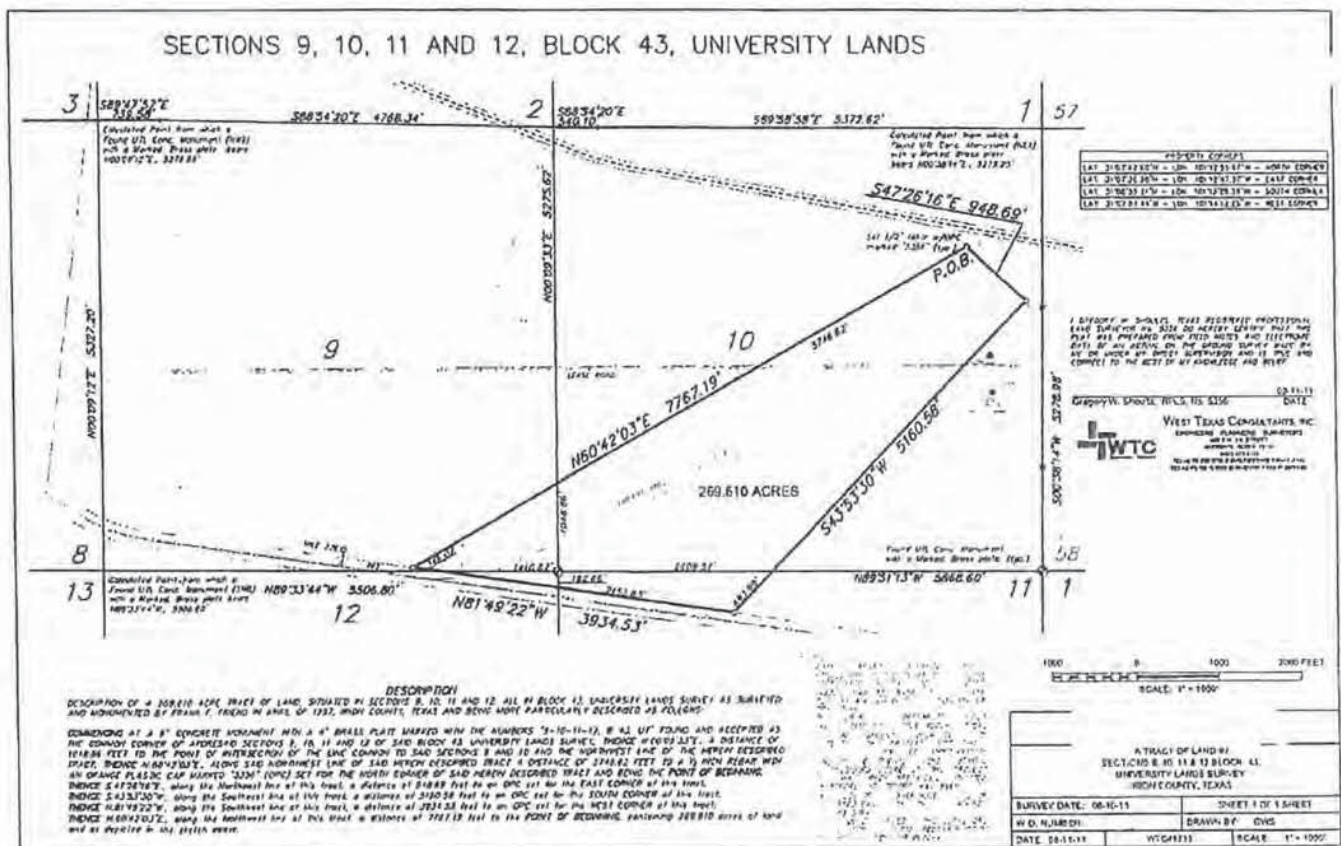


Exhibit A-1

Exhibit B

Phase I Project

Customer will outfit the Terminal with the following items:

- Vent line for connection to trucks and railcars
- Obtain easement from University Lands for the vent lines
- Flare facility (including a flare, separator and a tank) connected to vent lines for gaseous hydrocarbon byproduct
- Transloaders sufficient to transfer Product from trucks (or pipeline in the event Phase II is implemented) onto railcars
- Hoses, valves and fittings to connect vent lines to trucks, railcars, and flare
- Fire extinguishers at manifolds

Exhibit B

US 5687245

Exhibit C

Phase II Project

Customer will outfit the Terminal and land near the Terminal with the following items:

- Oil gathering pad with secondary containment, truck racks, charge pumps, electrification, vapor recovery unit, flare, scrubber and automation
- Obtain easements from University Lands for pipelines to the transloading area from nearby land
- Storage tanks with capacity of at least 20,000 barrels sufficient to store oil near the train loading area
- Pipelines connecting the storage tanks to the transloading area
- Fill manifolds tying in the pipelines to the transloaders will be made for transloaders

Exhibit C

US 5687245

Exhibit D**Minimum Insurance Requirements****A. Workers Compensation and Employers Liability (with Alternate Employer):**

Statutory requirements in states where operating, to include all areas involved in Services, but a minimum of.

Employers Liability	\$1,000,000 Each Accident
	\$1,000,000 Disease Each Employee
	\$1,000,000 Disease Policy Limit

B. Commercial General Liability (CGL):

Occurrence Form

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Products-Completed operation aggregate	\$2,000,000
Personal and injury	\$1,000,000

Coverage to include: Bodily injury and property damage, including broad form property damage, products-completed operations, sudden and accidental pollution, blanket contractual specifically covering the indemnity obligations in this Agreement, severability of interests, actions over, independent contractor(s), personal injury (with contractual exclusion deleted where required by contract), XCU.

C. Automobile Liability

Bodily injury and property damage	\$1,000,000 combined single limits
Owned, non-owned, and hired autos	per accident
With broadened pollution coverage, and MCS-90 endorsement (if carrying cargo)	

D. Umbrella/Excess Liability (over EL, CGL, and Auto)

Each Occurrence	\$10,000,000
-----------------	--------------

Exhibit A-1

Aggregate

\$10,000,000

F. Property

Terminal Owner shall provide first party/property insurance covering its own property in the amount of the replacement cost of the property.

Additional Requirements:

1. All insurance policies of Terminal Owner, in any way related to the Services and whether or not required by this Agreement, shall, but only to the extent of the risks and liabilities assumed hereunder: (i) name Customer Parties as additional insured (except for worker's compensation, employer's liability, OEE/COW, or professional liability policies) (with such additional insured coverage including coverage for the sole or concurrent negligence of the additional insured and not being restricted (a) to "ongoing operations," (b) to coverage for vicarious liability, or (c) to circumstances in which the named insured is partially negligent), (ii) waive subrogation against Customer Parties, and (iii) be primary and non-contributory to any insurance of Customer Parties.
2. Each Party shall have its policies endorsed to provide not less than thirty (30) Days prior notification in the event of non-renewal, cancellation or material change in the policies. Each Party shall be responsible for any deductibles or self-insured retentions stated in its policies.
3. Terminal Owner shall require the same minimum insurance requirements as listed above of all of its subcontractors will include the same indemnity requirements from each subcontractor. Terminal Owner shall be and responsible for any deficiencies in coverage or limits,
4. Each Party shall provide a certificate of insurance on a form satisfactory to the other Party (attaching appropriate copies of endorsements) and all carriers must have an A.M. Best rating of at least A-VI. Copies of certified policies shall be provided upon written request of a Party.
5. Completed operations coverage shall be maintained by Terminal Owner in favor of indemnitee(s) for a period of two (2) years after final payment to Terminal Owner; Customer Parties shall continue to be named as additional insured(s) during this time frame.
6. Insurance limits required above may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an excess or umbrella policy. Coverage provided under any excess or umbrella policy must be at least as broad as the coverage provided by the primary policy(s).
7. Nothing in this section shall be deemed to limit any Party's liability under this Agreement, and a Party's decision to self-insure shall work no prejudice on the other Party.
8. Neither the minimum policy limits of insurance required of the Parties nor the actual amounts of insurance maintained by the Parties under their insurance program shall operate to modify the Parties' liability or indemnity obligations in this Agreement.

Exhibit A-1

EXHIBIT 6

June 1, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: **Letter of Intent**

Ladies and Gentlemen:

Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista") intend to enter into a transaction pursuant to a service agreement covering Vista's (or an affiliate's) provision of the Service (as defined in Attachment "A" hereto) to Sequitur. Pending the preparation and execution of a Definitive Agreement (as hereinafter defined), this letter will confirm the intent of such parties ("Parties") to enter into the contemplated transaction ("Transaction") to be governed by the Definitive Agreement in accordance with the terms and conditions set forth in this letter. The Parties agree as follows:

1. **Term Sheet.** The Parties intend to negotiate in good faith a mutually acceptable agreement governing the Service. To the extent there is any conflict between the Term Sheet and this letter, this letter shall control.
2. **Definitive Agreement.** The Parties shall endeavor to incorporate the terms and conditions expressed herein in a mutually acceptable definitive agreement (the "Definitive Agreement," whether one or more) no later than June 26, 2018 ("LOI Term"), unless extended by the Parties in writing, which the Parties would expect to do if the negotiations toward a Definitive Agreement and other relevant agreements and activities have sufficiently progressed. In the event the Parties do not agree upon and execute the Definitive Agreement by the end of the LOI Term, this letter (and the understandings set forth herein) shall be deemed terminated, and neither Party shall have any further obligation to the other Party, provided, however, that the provisions of Section 3 shall survive the termination of this letter for a period of one (1) year.
3. **Confidentiality.** The existence of this letter (and its contents) are intended to be confidential and are not to be discussed with or disclosed to any third party, except (i) with the express prior written consent of the other Party hereto, (ii) as may be required or appropriate in response to any summons, subpoena or discovery order or to comply with any applicable law, order, regulation or ruling or (iii) as the Parties or their representatives (who shall also be bound by the confidentiality hereof) reasonably deem appropriate in order to conduct due diligence and other investigations relating to the contemplated Transaction.
4. **Exclusive Dealing Period.** The Parties agree that from the date of this letter through the end of the LOI Term, neither Party nor any of its controlled affiliates shall, directly or indirectly, enter into any agreements with any other person or entity regarding any transaction similar to the Service or the Transaction or any other transaction related, in whole or in part, to the Service, except as



Vista Proppants and Logistics, LLC
 June 1, 2018
 Page 2

approved in writing by the other Party. Additionally, neither Vista nor any of its controlled affiliates shall, directly or indirectly, enter into any negotiations, discussions or agreements with BP, Valero, Sunoco, NuStar or Shell, or any of their respective affiliates, for provision of the Service to them, or any other transaction similar to the Service, within 75 miles of Vista's rail facility in Barnhart, Texas, except as approved in writing by the Sequitur. Nothing in this section shall prohibit Vista from selling any service or product more than 75 miles from its rail facility in Barnhart, Texas.

5. Expenses. Each Party shall bear its own costs associated with negotiating and performing under this letter.
6. Due Diligence. Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.
7. Approval. No Party shall be bound by any Definitive Agreement relating to the Transaction until (a) each Party has completed its due diligence to its satisfaction, (b) such Party's senior management, or other governing body or authorized person, shall have approved the Definitive Agreement, (c) such Party shall have executed the Definitive Agreement, and (d) all conditions precedent to the effectiveness of any such Definitive Agreement shall have been satisfied, including obtaining any and all requisite government or third party approvals, licenses and permits (which are satisfactory in form and substance to each Party in its sole discretion), if such approvals, licenses and permits are required.
8. No Oral Agreements. Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.
9. Governing Law. THIS LETTER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES.
10. Assignment. Neither Party shall assign its rights or obligations under this letter without the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed. Any attempted assignment in contravention of this paragraph shall be null and void.
11. Binding Status. Except as to Sections 3 through 10 (which are intended to be binding upon execution and delivery of this letter by both Parties), the Parties understand and agree that this letter (a) is not binding and sets forth the Parties' current understanding of agreements that may be set out in a binding fashion in the Definitive Agreement to be executed at a later date and (b) may not be relied upon by either Party as the basis for a contract by estoppel or otherwise, but rather evidences a non-binding expression of good faith understanding to endeavor, subject to completion of due diligence to the Parties' satisfaction, to negotiate a mutually agreeable Definitive Agreement.

Vista Proppants and Logistics, LLC
June 1, 2018
Page 3

If the terms and conditions of this letter are in accord with your understandings, please sign, and return the enclosed counterpart of this letter to the undersigned, by no later than close of business on June 4, 2018, after which date, if not signed and returned, this letter shall be null and void.

Very truly yours,

SEQUITUR PERMIAN, LLC

By: 

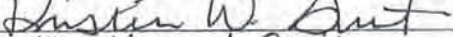
Name: Braden Merrill

Title: VP & CFO

AGREED

this 5 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 

Name: Kristin W. Smith

Title: CFO

ATTACHMENT "A"
to
Letter of Intent
(Term Sheet)

Party A: Vista Proppants and Logistics, LLC (and any designated affiliates)

Party B: Sequitur Permian, LLC (and any designated affiliates)

Facility: Barnhart Railyard

Location: Barnhart Loading Facility
44485 W. Hwy 67
Barnhart, TX 76930

Term: September 2018 through December 2019.

Renewal: Subject to the Survival clause below, the Term may be renewed and extended by Party B for successive 12-month periods by written notice to Party A at least 60 days prior to the end of the then Term, as it may have been previously renewed and extended.

Products: Crude oil or other hydrocarbons products owned or controlled by Party B or which Party B is obligated to market or deliver.

Commitment: For the Term, as it may be extended, Party A will limit use of its Barnhart Railyard property and Facility to the sole purpose of loading Party B's Products. Party A will load Products provided by Party B at the Facility, whether from pipeline or trucks.

Service: Party A's loading of Party B's Products at Location/Facility and related services, including maintenance.

Rate: \$1.50/barrel of Products loaded into railcars at the Location/Facility.

Volume: Party B agrees to provide Products sufficient to fill an average of no fewer than sixteen railcars per day (11,424 barrels) during each calendar month. If Party B does not meet its minimum volume obligation for a calendar month, Party A will be compensated in such month, as that month's total settlement, in an amount equal to at least the Rate times 11,424 barrels, or \$17,136, times the number of days in that month so that Party A will be paid as if the minimum volume had been provided by Party B. Should Party B provide more Products than its minimum volume obligation, Party A shall be compensated at the Rate times the excess volume.

Capital Investment: In no event shall Party A be obligated to provide any capital investment necessary to perform Service. To the extent more capital investment is needed to satisfy incremental Volume, the financial burden required to equip the facility shall be borne by Party B.

Phase I: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from trucks such that loading will commence September 1, 2018.

Phase II: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from pipeline.

- Assignability: The Definitive Agreement would be assignable on sale or disposition, and as otherwise negotiated. Any sale of the Facility property would be subject to the Definitive Agreement.
- Survival: If the Term is not extended, then when Party A is not utilizing the Barnhart Railyard for the general course of its sand business and desires to use for loading of oil, the terms of the Definitive Agreement may be reinstated by Party B at its option.
- Other Terms: The Definitive Agreement will contain customary provisions for transactions similar to the Service or the Transaction, such as mutual representations, warranties, and covenants, conditions precedent, termination, remedies, force majeure, indemnification, and risk of loss.

THIS SUMMARY OF TERMS AND CONDITIONS IS ATTACHMENT "A" TO A LETTER OF INTENT DATED JUNE 1, 2018, AND IS NOT TO BE CONSIDERED SEPARATELY FROM THE LETTER OF INTENT. EXCEPT AS MAY BE SET OUT IN THE LETTER OF INTENT, THE LETTER OF INTENT AND THIS ATTACHMENT "A" ARE NOT INTENDED TO BE COMPLETE AND ALL-INCLUSIVE OF THE TERMS OF THE PROPOSED TRANSACTION, NOR DOES THE LETTER OF INTENT OR THIS ATTACHMENT "A" CREATE A BINDING AND ENFORCEABLE CONTRACT BETWEEN OR COMMITMENT OR OFFER TO ANY PARTY OR PARTIES, EXCEPT TO THE EXTENT PROVIDED IN SECTION 11 OF THE LETTER OF INTENT.

June 22, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment

Ladies and Gentlemen:

Reference is made to that certain letter of intent ("LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "June 26, 2018" to "July 6, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

SEQUITUR PERMIAN, LLC

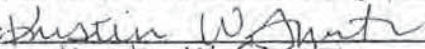


By: Braden Merrill
Braden Merrill
Vice President and Chief Financial Officer

AGREED

this 22 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin W. Smith
Title: CFO

July 9, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

Attn.: Jon Ince

Re: Letter of Intent Amendment No. 2

Ladies and Gentlemen:

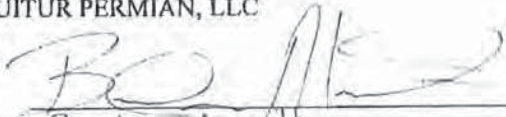
Reference is made to that certain letter of intent (as previously amended, "LOI") dated June 1, 2018 between Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista"). All capitalized terms used herein are as defined in the LOI.

The Parties agree to amend Section 2 of the LOI to change "July 6, 2018" to "July 23, 2018".

Except as amended hereby, all other terms of the LOI shall remain in full force and effect.

Very truly yours,

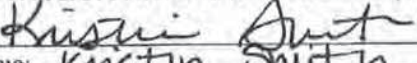
SEQUITUR PERMIAN, LLC

By: 
Name: Braden Merrill
Title: VP & CFO

ASK

AGREED
this 12 day of July 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC

By: 
Name: Kristin Smith
Title: CFO

CAUSE NO. CV19-003

MAALT, LP	§	IN THE DISTRICT COURT OF
	§	
<i>Plaintiff/Counter-Defendant,</i>	§	
	§	
v.	§	IRION COUNTY, TEXAS
	§	
SEQUITUR PERMIAN, LLC	§	
	§	
<i>Defendant/Counter-Plaintiff</i>	§	51 ST JUDICIAL DISTRICT

**SEQUITUR PERMIAN, LLC'S
MOTION FOR SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSES OF
FAILURE OF CONDITION PRECEDENT, PENALTY AND WAIVER**

COMES NOW, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), filed this Motion for Summary Judgment on its Affirmative Defenses of failure of conditions precedent, an unenforceable penalty and waiver, and in support thereof would show unto the Court, as follows:

TABLE OF CONTENTS

Introduction.....	3
Background	3
Summary Judgment Evidence.....	10
Arguments & Authorities.....	10
<u>I. Summary Judgment Standard.....</u>	10
<u>II. All Conditions Precedent to the Minimum Throughput Fees Becoming Due had Not Been Reached</u>	11
<u>III. Requiring Sequitur to Pay the Entire Shortfall Payment for December 2018 to January 2020 is an Unenforceable Penalty</u>	14
<i>A. The Harm Caused by the Alleged Breach is Capable of Estimation</i>	<i>15</i>
<i>B. The Total Shortfall Payment was Not a Reasonable Forecast of Just Compensation</i>	<i>16</i>
<i>C. An Unbridgeable Discrepancy Exists Between the Shortfall Payment Sought and the Application in Reality</i>	<i>17</i>
<u>IV. Maalt Waived Its Right for Lost Profits Under the Express Provisions in the TSA.....</u>	18
<i>A. The Waiver’s Inclusion of the Disjunctive Phrase “or for” Separates the Referenced “Lost Profits” from the Previously Mentioned “Indirect or Consequential Losses of Damages”</i>	<i>20</i>
<i>B. The Waiver Clause Expands on the Definition of the “Lost Profits” to Include Direct Lost Profits.....</i>	<i>21</i>
<i>C. The Waiver Does Not Include Lost Profits as the Direct Damages which Survive the Limitation</i>	<i>21</i>
<i>D. The Heading “No Consequential Damages” Should be Given No Consideration Per the Express Terms of the TSA.....</i>	<i>22</i>
Prayer.....	22

INTRODUCTION

1. Sequitur seeks a determination herein as to its affirmative defenses of failure of conditions precedent, unenforceable penalty and waiver. Specifically, Sequitur seeks the following determinations or declarations by the Court:

- (a) The conditions precedent for payment to become due to Maalt under the applicable contract (TSA) have not occurred;
- (b) The clause Maalt seeks to enforce as damages is an unenforceable penalty; and
- (c) Maalt waived its right to recovery of all lost profits.

BACKGROUND

2. Sequitur is in the crude oil production business, with a couple of hundred wells over approximately 500 acres in and around Barnhart, Texas.¹ In May 2018, a differential existed in the price of crude oil in the Midland Basin versus the Gulf Coast that presented an arbitrage opportunity.² In May 2018, Sequitur contacted Vista Proppants and Logistics, Inc. (“Vista”), of which the Plaintiff Maalt, LP (“Maalt”) (collectively, “Maalt/Vista”) is an affiliate, about utilizing their transloading facility in Barnhart, Texas (the “Terminal”) to ship crude oil to the Gulf Coast by rail.³ During the May 2018 discussions, Sequitur made it clear that it was seeking to procure the services of the Terminal for the shipment of Sequitur’s crude oil to take advantage of a steep discount as to the barrels sold in the Midland Basin as compared to those sold on the Gulf Coast.⁴ Therefore, if Sequitur or its downstream oil buyers could sell barrels of oil for more on the Gulf Coast (less transport costs) than they could sell barrels of oil for in Midland, Texas, additional

¹ **Exhibit A**, *Deposition of Braden Merrill*, pg., 53, ln. 13 – pg. 54, ln. 16.

² *Id.* at pg. 26, ln. 14 – pg. 27, ln. 21., pg. 31, lns. 2-14.

³ *Id.* at pg. 17, lns. 1-17, pg. 26, ln. 13 – pg. 27, ln. 6 & **Exhibit B**, *Deposition of John Ince*, pg. 15, ln. 3 – 15

⁴ *Id.* at pg. 18, lns. 10 – 17.

earnings would be achieved.⁵ Sequitur made it clear to Maalt/Vista that it was inexperienced with rail transportation and securing rail cars to transport crude from the Barnhart Terminal to the Gulf Coast.⁶

3. Therefore, on June 1, 2018, Sequitur and Vista entered into a Letter of Intent (“LOI”) regarding the use of the Terminal to continue with their investigation into the feasibility of an agreement to lease the terminal to transport crude by rail.⁷ The LOI reflected the parties’ intent, but not obligation, to enter into a Terminal Services Agreement (“TSA” or “Agreement”) for a term of September 2018 to December 2019 for Sequitur to utilize the services of Maalt at the Terminal to ship crude by rail.⁸ In addition, the LOI laid out the costs that would be incurred by each party in getting the TSA into effect. Specifically, the LOI stated that all costs were to be borne by Sequitur in getting the Terminal operational for crude by rail and that in no event would Maalt be obligated to provide any capital investment necessary to perform their services under any final definitive agreement.⁹

4. From late June, and during July, and the first week of August 2018, Maalt/Vista and Sequitur continued to discuss the TSA for the use of the Terminal in Barnhart. Then, on August 3, 2018, Mr. Favors of Maalt/Vista emailed Mr. Merrill and Mr. Mike van den Bold of Sequitur, pressuring Sequitur to execute the TSA.¹⁰ Favors stated “I am receiving heavy pressure to get the agreement fully executed” and that “[w]e have been offered slightly better terms from [an]other party that said they will execute an agreement today.”¹¹ At the time, Mr. Merrill informed Mr.

⁵ **Exhibit A** at pg. 26, ln. 13 – pg. 27, ln. 6

⁶ **Exhibit C**, *Deposition of Chris Favors*, pg. 68, ln. 20 – pg. 69, ln. 5.

⁷ **Exhibit A**, pg. 143, ln. 18 – pg. 146, ln. 21 & **Exhibit A-1**.

⁸ **Exhibit A-1**.

⁹ *Id.* at pg. 4, Attachment “A”, “Capital Investment”.

¹⁰ **Exhibit C**, pg. 123, lns. 15-25 & **Exhibit C-1**.

¹¹ *Id.*

Favors that he had not yet had a commitment from any joint venture partner to provide rail cars to the Terminal.¹² Mr. Favors recalls telling Mr. Merrill that if Sequitur needs a partner to provide the railcars that Jupiter was a “prospect ... [for] helping with logistics.”¹³ These representations by Mr. Favor were false as Maalt/Vista had no other offers from another party.¹⁴ Mr. Favors made these representations after receiving pressure from Maalt’s/Vista’s management to get an agreement signed because the Terminal was not in use at the time.¹⁵

5. In reliance on the representations of Maalt/Vista concerning logistics partners to facilitate the needed trains and railcars, Sequitur entered into the TSA with Maalt (Vista had designated its subsidiary, Maalt, to enter the TSA), with an effective date of August 6, 2018.¹⁶ The TSA provided that Maalt would provide the labor, supervision, and materials necessary to deliver, handle, measure, and redeliver (hereinafter “transload”) the oil to Sequitur or to Sequitur’s third-party customers once the Terminal was operational (the “Services”).¹⁷ In order to facilitate the transloading crude oil delivered by truck through the Terminal into railcars for delivery to the Gulf Coast, Sequitur, at its sole cost and at significant expense, installed equipment and facilities at the Terminal, which was described in the TSA as the “Phase I Project.”¹⁸

6. The TSA contained two defined benchmark dates. The first date was the Target Terminal Operations Commencement Date (the “Target Date”), which was defined in the TSA as September 1, 2018.¹⁹ While the TSA makes clear that this was a target date for the parties to begin

¹² Exhibit A, pg. 37, lns. 14 – 24.

¹³ Exhibit C, pg. 134, lns. 5-10.

¹⁴ *Id.* at 127, ln. 25 – pg. 128, ln. 13.

¹⁵ *Id.* at pg. 124, lns. 5-14.

¹⁶ Exhibit A, pg. 37, ln. 25 – pg. 38, ln. 4, pg. 248, lns. 3 – 7 & Exhibit A-2.

¹⁷ Exhibit A-2, § 2.2

¹⁸ Exhibit A, pg. 247, ln. 23 – pg. 248, ln. 1 & Exhibit A-2, § 2.7

¹⁹ *Id.* at pg. 4.

operations at the Terminal, and this date (September 1, 2018) was not the effective date for the operations at the Terminal to be commenced for the transloading of crude oil.

7. The second date, the Terminal Operations Commencement Date (the “Commencement Date”), is the date in the TSA on which Maalt’s performance was to begin and the date the Terminal was to become fully operational for the transloading of the crude oil on to trains. The Commencement Date is defined in the TSA as follows:

“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 [Sequitur] and as such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt]”²⁰

8. Only once commencement of the operations was to begin at the Terminal, would Sequitur be obligated to pay Maalt at least a minimum payment (the “Shortfall Payment”) for each Calendar Quarter left on the term of the TSA.²¹ Specifically, Sequitur’s Minimum Volume Obligation and the Shortfall Payment are defined, respectively, in Article 3 as follows:

3.1 Minimum Volume Obligation. Subject to the terms of this Agreement [TSA], including Section 3.3 and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, Customer agrees to Throughput (either directly or via volumes delivered to the Terminal by Customer’s [Sequitur’s] third-party customers) an amount of Product through the Terminal on a Monthly Basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the “Minimum Volume Commitment”) during each Calendar Quarter during the Term after the Terminal Operations Commencement Date, or otherwise pay the Shortfall Payment applicable to such Calendar Quarter.

3.2 Shortfall Payment.

(a) Quarterly Shortfall. If, for any Calendar Quarter after the Terminal Operations Commencement Date, the volume of Product actually Throughput during such Calendar Quarter (for the avoidance of doubt, calculated on a Calendar Quarterly, not a Monthly or Daily, basis) is less than the Minimum Volume

²⁰ *Id.* at pg. 5.

²¹ *Id.*, § 3.2.

Commitment (such deficiency, if any, the "Shortfall"), Customer [Sequitur] shall pay Terminal Owner [Maalt] an amount equal to the volume of the Shortfall (expressed in Barrels) to the extent not caused or contributed to by Force Majeure, maintenance outages at the Terminal, or Terminal Owner's breach of its obligations under this Agreement, multiplied by the Throughput Fee in effect for such Calendar Quarter (collectively, the "Shortfall Payment"). There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner breach.

(*emphasis added*). As shown, any obligation for Sequitur to pay the Shortfall Payment, however, was expressly conditioned on the occurrence of the Commencement Date and that there be no Force Majeure.²²

9. Due to multiple reasons, including, but not limited to, the delay in construction because of adverse weather, the Terminal did not become operational on the Target Date of September 1, 2018.²³ When the Target Date was reached and all obligations owed under the TSA had not been completed, Maalt could have declared the TSA in default yet Maalt continued to let Sequitur spend millions of dollars in construction-related costs to improve the Terminal and attempt to get it ready for transloading crude by rail.²⁴ Despite Vista/Maalt's representations to Sequitur that Sequitur would be able to secure sufficient product transportation services, it became obvious as time passed after the Target Date, that said representations were false and that sufficient trains, rail cars, and other means of transporting crude oil via rail to oil purchasers would not become available to Sequitur in order for the Terminal to become operational to enable the performance and receipt of the Services under the TSA.²⁵

10. Therefore, on December 7, 2018, in accordance with the terms of the TSA, Sequitur sent written notice to Maalt that Sequitur had declared an existing "Force Majeure" under the

²² *Id.* at § 3.1, 3.2.

²³ **Exhibit A**, pg. 183, ln. 16 – pg. 184, ln. 8.

²⁴ **Exhibit A-2** §§ 8.2(b)(i) & 8.3

²⁵ **Exhibit A**, pg. 67, ln. 20 – pg. 68, ln. 4.

Agreement because of the “unavailability, interruption, delay or curtailment of rail transportation services” for the oil, “despite continued efforts to procure such services.”²⁶ More specifically, a Force Majeure event occurred because crude oil transportation services (e.g., rail service, railcars, destination and/or capacity) to allow for Sequitur’s use of the Terminal for the intended purposes of the Agreement could not commence despite diligent efforts to procure such service and capacity, and such event of Force Majeure was not within the reasonable control of Sequitur.²⁷ The written notice also noted that Sequitur anticipated that the Force Majeure event would “continue for the foreseeable future.”

11. Importantly, at the time the Force Majeure was declared, Sequitur ***had not*** notified Maalt that operations at the Terminal had commenced.²⁸ As made clear by Sequitur’s Force Majeure notice, as of the date of the notice, Sequitur did not view the Terminal as able to accommodate the Services as there was no rail and train service, which was necessary for Maalt to provide the Services to Sequitur and for Sequitur to receive the Services.

12. Despite the Commencement Date not occurring, on January 25, 2019, Maalt acted in direct contradiction to the terms of the TSA and sent an invoice to Sequitur for a Shortfall Payment.²⁹ In response, Sequitur sent a notice to Maalt on January 31, 2019 disputing that such Shortfall Payment was owed as “the Terminal Operations Commencement Date has not occurred as per the terms of the [TSA].”³⁰

13. On February 8, 2019, Sequitur sent Maalt further notice that the Force Majeure event could not be remedied, and the TSA was then terminated by Sequitur in accordance the terms

²⁶ *Id.* at pg. 222, lns. 8-13 & **Exhibit A-3**.

²⁷ **Exhibit A**, pg. 9, lns 1 – 11, pg. 10, lns. 4-20.

²⁸ **Exhibit B**, pg. 92, lns. 17 -22 & **Exhibit C**; pg. 153, lns. 8-10.

²⁹ **Exhibit C-2**.

³⁰ **Exhibit C**, pg. 232, lns. 21 – pg. 233, lns. 12 & **C-3**.

of the TSA.³¹ At the time of such Force Majeure termination notice, no operations had been commenced and performed at the Terminal and no written notice of commencement of operations at the Terminal had been sent by Sequitur.³²

14. By letter dated February 14, 2019, Maalt informed Sequitur that it viewed the Agreement in breach and immediately terminated the Agreement for what it viewed as an anticipatory repudiation.³³ That same day Plaintiff filed this suit alleging breach of contract and seeking an acceleration of all amounts due for Shortfall Payments despite that all conditions precedent to the commencement of operations at the Terminal never occurred.

15. As shown herein, Maalt's claims fail as a matter of law because:

- (1) The condition precedent that the Commencement Date be reached had not occurred;
- (2) Maalt specifically waived and released its rights against Sequitur for any damages for lost profits, whether direct or consequential, through the limitation of liability clause in the TSA (Section 10.6 of the TSA); and
- (3) Maalt's attempt to enforce the Shortfall Payments (or Minimum Throughput Fees) as its damages amounts to an unenforceable penalty.

³¹ **Exhibit A**, pg. 8, lns. 16 – 25 & **Exhibit A-4**.

³² **Exhibit C**, pg. 145, ln. 23 – pg. 146, ln. 12 (stating that Maalt has made not capital expenditures on under the nor any investments.)

³³ **Exhibit D**.

SUMMARY JUDGMENT EVIDENCE

Exhibit	Description
A	Deposition of Braden Merrill
A-1	Letter of Intent
A-2	Terminal Services Agreement
A-3	Sequitur's Force Majeure Notice of 12/07/18
A-4	Sequitur's Force Majeure Letter of 02/08/19
B	Deposition of John Ince
C	Deposition of Chris Favors
C-1	Email from Chris Favors
C-2	Favors Email attaching Maalt's Invoice of 01/25/19
C-3	Sequitur Letter of 01/31/19 re: Maalt's Invoice
D	Maalt's Termination Notice of 02/14/19
E	Plaintiff's Second Amended Petition
F	Defendant's Original Answer to Plaintiff's Second Amended Petition
G	Plaintiff's Disclosures
H	Plaintiff's Expert Report on Lost Profits

ARGUMENTS & AUTHORITIES**I. SUMMARY JUDGMENT STANDARD.**

16. The standard for a summary judgment is well established: (i) the movant for summary judgment has the burden of showing there is no genuine issue of material fact and is entitled to summary judgment as a matter of law; (ii) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (iii) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Property Mgt. Co.*, 690 S.W.2d 546, 548-49,

(Tex. 1985). For a defendant to prevail on summary judgment, it must show there is no genuine issue of material fact concerning one or more essential elements of the plaintiff's cause of action or establish each element of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). If the defendant disproves an element of the plaintiff's cause of action as a matter of law, summary judgment is appropriate. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

II. ALL CONDITIONS PRECEDENT TO THE MINIMUM THROUGHPUT FEES BECOMING DUE HAD NOT BEEN REACHED.

17. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010). Conditions precedent occur after the execution of a contract but must occur before there is a right to immediate performance. *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 356 S.W.3d 54, 64 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 144 (Tex. App.—Dallas 2012, no pet.). In order to make performance specifically conditional, a term such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language must normally be included." *Criswell v. European Crossrds. Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). A plaintiff seeking to recover under a contract bears the burden of proving that a condition precedent has been satisfied if that condition has been specifically denied by the defendant. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 200 (Tex. App. – Houston [1st Dist.] 2003, pet. denied); *see also* TEX. R. CIV. P. 54.

18. Sequitur has specifically denied that the following conditions precedent have occurred under the TSA:

- (a) Occurrence of the Terminal Operations Commencement Date (as defined in the Terminal Services Agreement ("TSA"), Article 1) [it has in fact not occurred]; and.

- (b) Notice of the Terminal Operations Commencement Date as required by the TSA, Article 1 being sent by Sequitur [it has in fact not been sent].³⁴

As stated supra, any Shortfall Payment and /or Minimum Volume Obligation are conditioned on the Commencement Date occurring. This is made clear in the TSA by the use of the conditional precedent language “from and after.”

19. When construing a contract, a Court’s primary goal is to determine the parties’ intent as expressed in the terms of the contract. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297S.W.3d 248, 252 (Tex. 2009). If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law. *Id.* To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). The Court must presume that the parties intended each word to have meaning. *Fish v. Tex. Legislative Serv.*, No. 03-10-00358-cv, 2012 WL 254613, 2012 Tex. App. LEXIS 749 at *54 (Tex. App. – Austin Jan. 27, 2012, no pet.) *citing Gulf Metal Indus., Inc. v. Chicago Ins. Co.*, 993 S.W. 2d 800, 805 (Tex. App. - Austin 1999, pet. denied)(emphasis added).

20. The TSA states that Sequitur is the sole party who can determine whether the Commencement Date has occurred. Further, to establish this determination, the date must also be “evidenced by written notice sent by Sequitur.” There is no alternative for sending this written notice. To hold otherwise, would contradict established case law that each word in a contract must be given meaning and in effect hold the following phrase in the definition of Terminal Operations Commencement Date meaningless: “as reasonably determined by Customer [Sequitur] and as

³⁴ **Exhibit F.**
Sequitur’s Motion for Summary Judgment
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such date is evidenced by a written notice sent by Customer [Sequitur] to Terminal Owner [Maalt].”

21. It is undisputed that Sequitur did not send written notice that the Commencement Date had occurred. Further, Sequitur’s notice of Force Majeure clearly states that Sequitur did not view the operations at the Terminal as possible as of December 7, 2018. The lack of such written notice that the Commencement Date had occurred being sent is fatal to Maalt’s claim that any Shortfall Payment or Minimum Throughput Fee is now due from Sequitur.

22. Maalt appears to argue that if Maalt determines that the written notice is being withheld then Maalt can declare the Commencement Date has occurred.³⁵ However, there is no term or language in the TSA that gives Maalt this power.

23. The TSA did provide a remedy if Maalt had declared that the Commencement Date has not been properly determined or such determination was being withheld by Sequitur. Per the express language of the TSA, if Sequitur’s failure to determine the Commencement Date had occurred as of the Target Date was improper, the TSA permitted Maalt to declare that Sequitur was in default under the TSA.³⁶ The express remedies available to Maalt for Sequitur’s default after the Target Date and prior to the Commencement Date would have been to terminate or suspend the TSA.³⁷ Maalt chose neither of these options until it declared that TSA was terminated in its February 14, 2019 letter, which letter was sent after Maalt’s receipt of Sequitur’s notice terminating the TSA due to the prolonged Force Majeure. When Maalt declared that the TSA was terminated, the Commencement Date had not been determined or occurred and thus an express condition precedent for any payments being owed by Sequitur to Maalt had not been reached.

³⁵ Exhibit E.

³⁶ Exhibit A-2, §§ 8.2 & 8.3.

³⁷ *Id.* at § 8.3.

Sequitur’s Motion for Summary Judgment
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24. This interpretation is reasonable in light of the risk apportioned to each party under the TSA. Maalt has stated through its pleadings, disclosures and expert report that no costs and damages were actually incurred by Maalt as of the date Sequitur declared a Force Majeure event.³⁸ That means that Maalt's termination resulted in them suffering no actual damages. Sequitur, on the other hand, has incurred significant costs for the capital improvements made at the Terminal.

25. Therefore, the Court should declare that the Commencement Date never occurred, thus precluding Maalt's right to any Shortfall Payment or Minimum Throughput Fee.

III. REQUIRING SEQUITUR TO PAY THE ENTIRE SHORTFALL PAYMENT FOR DECEMBER 2018 TO JANUARY 2020 IS AN UNENFORCEABLE PENALTY.

26. The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. *Atrium Med. Ctr., LP v. Houston Red C, LLC*, 595 S.W.3d 188, 192 (Tex. 2020). By the operation of that rule, a party generally should be awarded neither less nor more than his actual damages. *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952). A party has no right to have a court enforce a stipulation that violates the principle underlying that rule. *Id.* In those cases in which courts enforce stipulations of the parties as a measure of damages for the breach of covenants, the principle of just compensation is not abandoned, and another principle substituted therefor. *Id.* What courts really do in those cases is to permit the parties to estimate in advance the amount of damages, provided they adhere to the principle of just compensation. *Id.*

27. The term "liquidated damages" ordinarily refers to the measure of damages that the parties have stipulated to in advance that will be assessed in the event of a contract breach. *Valence v. Dorsett Operating Co.*, 164 S.W.3d 656, 664 (Tex. 2005). The common law and the Uniform

³⁸ **Exhibits E, G & H.**
Sequitur's Motion for Summary Judgment
{171480/00002/01414857.DOCX 1 }

Commercial Code have long recognized a distinction between liquidated damages and penalties. *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 431 (Tex. 2005). In order to enforce a stipulation for liquidated damages, the court must find: (1) that the harm caused by the breach is incapable or difficult of estimation, and (2) that the amount of liquidated damages called for is a reasonable forecast of just compensation. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). In addition, when a liquidated damages provision proves inaccurate, and a significant difference exists between actual damages and the liquidated damages sought to be enforced, a court must not enforce this liquidated damage provision. *Atrium*, 595 S.W.3d at 193. Whether a contractual provision is an enforceable liquidated damage provision or an unenforceable penalty is a question of law for the court to decide. *Phillips*, 820 S.W.2d at 788. Sometimes, however, factual issues, such as what the actual damages were, must be resolved before the legal question can be decided. *Id.*

28. In Plaintiff's Second Amended Petition, Plaintiff states that it seeks as damages "an amount equal to the total of the Minimum Fee amounts [Shortfall Payment] required by the TSA, as its expectancy/benefit of the bargain of \$514,080.00 per month for each month from December 8, 2018 until the expiration of the term of TSA on January 1, 2020."³⁹ Plaintiff states that this amount totals \$6,614,496.00.

A. THE HARM CAUSED BY THE ALLEGED BREACH IS CAPABLE OF ESTIMATION.

29. Maalt's attempt to recover 100% of the monthly fees under the TSA amounts to a penalizing liquidated damages provision because the harm was capable of estimation. In fact, Maalt disclosed that it estimated its lost profits as \$4,105,378 after accounting for an estimated

³⁹ *Id.*

\$2,500,000 in costs it would have allegedly incurred under the TSA from December 2018 through December 2019.⁴⁰ To allow Maalt, to recover the amounts sought as the Shortfall Payments without accounting for the costs that Maalt would have incurred for its future performance, would permit Maalt to recover an additional \$2,500,000 for which it would not have recovered for its performance under the TSA had it not been terminated early. As such, the Shortfall Payment amount and Minimum Throughput Fees do not accurately reflect the estimated avoided costs of Maalt.

B. THE TOTAL SHORTFALL PAYMENT WAS NOT A REASONABLE FORECAST OF JUST COMPENSATION.

30. The Shortfall Payment (or Minimum Throughput Fee) amount does not reflect the benefit of the bargain or the expectation damages because there is no consideration given for the costs that would be incurred by Maalt for its performance under the TSA for the remainder of the term of the TSA once or if operations had actually commenced had the contract not been terminated early. *See Orange Hotel Co. v. Townsend*, 130 S.W. 701, 702 (Tex. Civ. App. 1910, no writ) (“The law allows to the aggrieved party such an amount as damages as will compensate him for the injury sustained. In no case can the damages be greater than the net profits of the business for the unexpired portion of the contract.”). Any provision that would even arguably allow Maalt to recover 100% of the Shortfall Payments(or Minimum Throughput Fees), without deducting Maalt’s expenses that would have been incurred, is unenforceable because, rather than attempt to reasonably forecast Maalt’s damages in the event of a breach, the clause would act as a penalty to secure Sequitur’s performance through the full term of the TSA. A damages clause is a penalty if its purpose is to secure performance of the contract rather than constitute a measure of recovery in

⁴⁰ **Exhibit G.**
Sequitur’s Motion for Summary Judgment
{171480/00002/01414857.DOCX 1 }

the event of non-performance. *Roberts v. Dehn*, 416 S.W.2d 851, 853 (Tex. App.—Dallas, 1967, no writ); *see also S. Union Co. v. CSG Systems, Inc.*, No. 03-04-00172-CV, 2005 WL 171349, 2005 Tex. App. LEXIS 564 at *17 (Tex. App.—Austin Jan. 27, 2005, no pet.) (stating a liquidated damages provision will be considered an unenforceable penalty, if the amount awarded is so disproportionate to the actual anticipated damages that it in effect punishes the breach, thereby coercing performance of the contract by making it too costly to not adhere to its terms.) *Trafalgar House Oil & Gas, Inc. v. De Hinojosa*, 773 S.W.2d 797, 799 (Tex. App.—San Antonio 1989, no writ) (stating “if a clause for liquidated damages is merely a penalty to induce performance of the contract, it is unenforceable.”).

C. AN UNBRIDGEABLE DISCREPANCY EXISTS BETWEEN THE SHORTFALL PAYMENT SOUGHT AND THE APPLICATION IN REALITY.

31. When an "unbridgeable discrepancy" exists between "liquidated damages provisions as written and the unfortunate reality in application," the provisions are not enforceable. *Atrium*, 595 S.W.3d at 193. An unbridgeable discrepancy exists when the forecast of damages relies on events that did not occur, thus rendering liquidated provision unreasonable. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 72 (Tex. 2014). To avail itself of this defense, the breaching party challenging a provision must demonstrate this unbridgeable discrepancy. *Atrium*, 595 S.W.3d at 193.

32. At the time of the alleged breach, there was an unbridgeable discrepancy between the Shortfall Payment (or Minimum Throughput Fee) amounts and the reality in application. The Shortfall Payment amount, in theory, was to cover Maalt for any month in which it had been performing its services under the TSA and incurring costs. In actuality, this never happened as the

TSA was terminated prior to Maalt rendering any services or incurring any costs. Therefore, Maalt is seeking damages to cover costs for events that never occurred.

33. As such, Maalt cannot meet the three-part test as expressed in *Atrium* for enforcement of a liquidated damages provision. This Court must declare that the Shortfall Payment (or Minimum Throughput Fee) amount is an unenforceable provision and/or stipulation of recoverable damages under the TSA.

IV. MAALT WAIVED ITS RIGHT FOR LOST PROFITS UNDER THE EXPRESS PROVISIONS IN THE TSA.

34. The TSA includes a contractual waiver and release of specific damages, including lost profits. The specific waiver/release or limitation of damages clause states as follows:

10.6 No Consequential Damages. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NEITHER TERMINAL OWNER NOR CUSTOMER SHALL BE LIABLE TO THE OTHER OR ANY MEMBER OF THE OTHER'S GROUP, AND EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND THE OTHER PARTY'S GROUP), FOR ANY INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES, SPECIAL OR PUNITIVE DAMAGES, OR FOR LOST PROFITS, WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF WHETHER IN CONTRACT, TORT OR OTHERWISE; PROVIDED, HOWEVER, THAT THE LIMITATION ON LIABILITY SET FORTH IN THIS SECTION 10.6 SHALL NOT LIMIT EITHER PARTY'S RESPECTIVE INDEMNITY OBLIGATIONS HEREUNDER THIS AGREEMENT FOR ANY LIABILITIES OCCASIONED BY THIRD PARTY CLAIMS, AS EXPRESSLY PROVIDED IN THIS AGREEMENT. FOR THE AVOIDANCE OF DOUBT, THE PARTIES AGREE THAT RECOVERY OF THE ACTUAL DIRECT DAMAGES DESCRIBED IN SECTION 6.4 OR SECTION 8.3 SHALL NOT BE PRECLUDED BY THIS SECTION 10.6.⁴¹

35. The express language of the TSA states the both parties hereby waive and release its right to lost profits which “arise out of or related to the [TSA] or the performance or breach

⁴¹ **Exhibit A-2.**

Sequitur's Motion for Summary Judgment
{171480/00002/01414857.DOCX 1 }

thereof. This language is an express waiver/release by Maalt of all claims for lost profits, whether direct or consequential.

36. "Lost profits" consist of damages for the loss of net income to a business. *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). Lost profits may be classified as either direct or consequential damages, depending on their nature. *Mood v. Kronos Prods.*, 245 S.W.3d 8, 12 (Tex. App. – Dallas 2007, pet. denied) Direct damages, which flow naturally and necessarily from a defendant's wrongful act, compensate the plaintiff for a loss that is conclusively presumed to have been foreseen by the defendant as a usual and necessary consequence of its wrongdoing. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Specifically, profits lost on the contract itself -- such as the amount a party would have received on the contract minus its saved expenses -- are direct damages. *Mood*, 245 S.W.3d at 12. By contrast, consequential damages "result naturally, but not necessarily, from the defendant's wrongful acts." *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998) *quoting Arthur Andersen*, 945 S.W.2d at 816).

37. The waiver or release of damages clause in the TSA waived and released all lost profits, whether direct or consequential. There are three key parts of the waiver that clarify this interpretation:

- (a) the use of the words "or for";
- (b) the expansion of the term "lost profits"; and,
- (c) the express clarification of which direct damages (e.g., actual direct damages) survive the waiver/release.

A. THE WAIVER'S INCLUSION OF THE DISJUNCTIVE PHRASE "OR FOR" SEPARATES THE REFERENCED "LOST PROFITS" FROM THE PREVIOUSLY MENTIONED "INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES."

38. This use of the phrase "or for" following a comma separates the term "lost profits" from the previously listed types of damages. The use of the word "for" after "or" mirrors the previously listed types of damages, e.g. "for any indirect or consequential losses of damages." The use of the word "or for" is a disjunctive phrase, which informs the reader that the words following should be differentiated from those prior and they are not intended to expand upon the previously identified damages.

39. In *Cont'l Holdings, Ltd. v. Leahy*, the Eastland Court of Appeals analyzed a waiver clause that waived damages "for loss of production, loss of profits, loss of business or any other indirect or consequential damages." *Cont'l Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex. App. – Eastland 2003, no pet.). The *Leahy* Court held that the use of the term "indirect or consequential damages" did not alter the plain meaning of loss of profits and thus the waiver included both direct and consequential lost profits. *Id.* at 477. The court reasoned that if the parties intended to preclude only the recovery of "indirect" lost profits, they did not need to include the phrase "loss of profits" in the provision because a general prohibition of recovery of "indirect" damages would include "indirect" lost profits and to hold otherwise would render the term "loss of profits" meaningless. *Id.*

40. The waiver at issue in the TSA is similar to that in *Leahy* in which the terms "indirect or consequential damages" and "lost profits" are separated by the word "or." If the TSA was interpreted as waiving only consequential lost profits, then it would render the use of the words

“lost profits” meaningless. Therefore, a clear reading of the phrase establishes that lost profits as a second distinct type of damages has been waived.

B. THE WAIVER CLAUSE EXPANDS ON THE DEFINITION OF “LOST PROFITS” TO INCLUDE DIRECT LOST PROFITS.

41. The second important phrase in the waiver/limitation of damages clause in the TSA is that the definition of lost profits is expanded upon to state that the waiver of lost profits includes those “which arise out of or relate to this Agreement or the performance or breach thereof whether in contract, tort or otherwise.” Per the clear meaning of this text, lost profits “which arise out of ... [the] breach ... in contract” would include direct lost profits, e.g. profits lost for or due to the breach of the TSA.

C. THE WAIVER DOES NOT INCLUDE LOST PROFITS AS THE DIRECT DAMAGES WHICH SURVIVE THE LIMITATION.

42. Finally, this waiver/limitation of liability clause specifically clarifies what direct damages survive the waiver: Sections 6.4 and Sections 8.3. There is no reference to lost profits, or Shortfall Payments (or Minimum Throughput Fees) in the waiver/limitation of liability. Further, there is no mention of lost profits or the Shortfall Payment (or Minimum Throughput Fee) in the two sections referenced. Section 6.4 is inapplicable as it pertains to breach of warranty which neither party has alleged. Section 8.3 would arguably apply to this dispute as it explains the relief available to each party upon default.

43. Section 8.3 provides that Sequitur may recover direct damages for Maalt’s default but does not afford the same relief to Maalt. Section 8.3 limits Maalt’s recovery to suspension or termination of the TSA upon Sequitur’s failure to cure. Importantly, neither the waiver/limitation of liability provision, nor either referenced Sections 6.4 and 8.3, state that Article 3 or the payments required therein are recoverable as direct actual damages for a default.

D. THE HEADING “NO CONSEQUENTIAL DAMAGES” SHOULD BE GIVEN NO CONSIDERATION PER THE EXPRESS TERMS OF THE TSA.

44. To the extent that Maalt argues that the lost profits waiver is limited to the consequential lost profits because the heading states “no consequential damages,” the TSA states that the “section titles or headings do not affect interpretation.”⁴² Therefore, the Court may not consider the title of the section in interpreting the waiver or to contradict the section’s clear language.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant/Counter-Plaintiff/Third-Party Plaintiff, SEQUITUR PERMIAN, LLC, further requests that the Court grant this Motion for Summary Judgment, that Plaintiff Maalt recover nothing by its suit; that SEQUITUR PERMIAN, LLC, recover and obtain from Maalt the declaratory relief sought above, and that SEQUITUR PERMIAN, LLC have such other and further relief to which it is entitled, whether at law or in equity.

⁴² **Exhibit A-2**, § 15.18.
Sequitur’s Motion for Summary Judgment
{171480/00002/01414857.DOCX 1 }

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 1st day of June 2020, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

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CAUSE NO. 19-003

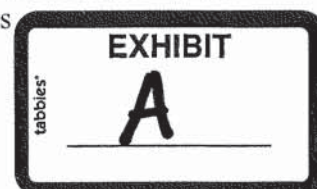
MAALT, LP, § IN THE DISTRICT COURT OF
§
Plaintiff, §
§
VS. § IRION COUNTY, TEXAS
§
SEQUITUR PERMIAN, LLC, §
§
Defendant. § 51st JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
BRADEN MERRILL
November 19, 2019
Volume 1

ORAL AND VIDEOTAPED DEPOSITION OF BRADEN MERRILL,
produced as a witness at the instance of the Plaintiff
and duly sworn, was taken in the above-styled and
numbered cause on the 19th day of November, 2019, from
9:32 a.m. to 5:25 p.m., before Patricia Palmer, CSR, in
and for the State of Texas, reported by machine
shorthand, at the offices of Mr. Matthew A. Kornhauser,
Hoover Slovacek LLP, 5051 Westheimer Road, Suite 1200,
Houston, Texas 77056, pursuant to the Texas Rules of
Civil Procedure and the provisions stated on the record
herein.

Page 1

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<p>1 INDEX</p> <p>2 PAGE</p> <p>3 Appearances..... 2</p> <p>4 Stipulations..... 4</p> <p>5 BRADEN MERRILL</p> <p>6 Examination by Mr. Lanter.....7</p> <p>7 Examination by Mr. Kornhauser.....244</p> <p>8 Examination by Mr. Lanter.....248</p> <p>9 Correction Sheet..... 253</p> <p>10 Signature Page..... 254</p> <p>11 Reporter's Certificate..... 255</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>Page 3</p>	<p>1 EXHIBITS</p> <p>2 NO. DESCRIPTION PAGE</p> <p>3 Exhibit 57..... 176</p> <p>4 E-mail</p> <p>5 Exhibit 58..... 178</p> <p>6 E-mails</p> <p>7 Exhibit 59..... 179</p> <p>8 E-mails</p> <p>9 Exhibit 60..... 184</p> <p>10 E-mails</p> <p>11 Exhibit 61..... 187</p> <p>12 Handwritten Notes/Dated: 10/18/18</p> <p>13 Exhibit 62..... 188</p> <p>14 Handwritten Notes</p> <p>15 Exhibit 63..... 192</p> <p>16 E-mail/Dated: 11/06/18</p> <p>17 Exhibit 64..... 193</p> <p>18 Handwritten Notes/Dated: 11/06/18</p> <p>19 Exhibit 65..... 197</p> <p>20 Handwritten Notes/Dated: 11/06/18</p> <p>21 Exhibit 66..... 199</p> <p>22 E-mail/Dated: 11/12/18</p> <p>23 Exhibit 67..... 201</p> <p>24 E-mail/Dated: 11/28/18</p> <p>25 Exhibit 68..... 206</p> <p>26 Handwritten Notes/Dated: 11/08/18</p> <p>27 Exhibit 69..... 207</p> <p>28 Handwritten Notes/Dated: 11/18/18</p> <p>29 Exhibit 70..... 209</p> <p>30 Price List</p> <p>31 Exhibit 71..... 211</p> <p>32 Handwritten Notes/Dated: 11/29/18</p> <p>33 Exhibit 72..... 212</p> <p>34 Handwritten Notes</p> <p>35 Exhibit 73..... 215</p> <p>36 Memorandum</p> <p>37 Exhibit 74..... 217</p> <p>38 Memorandum</p> <p>39 Exhibit 75..... 222</p> <p>40 Letter/Dated: 12/07/18</p> <p>41 Exhibit 76..... 227</p> <p>42 Memorandum</p> <p>43 Exhibit 77..... 228</p> <p>44 E-mail</p> <p>45 Exhibit 78..... 232</p> <p>46 Handwritten Notes/Dated: 01/15/19</p> <p>47 Exhibit 79..... 233</p> <p>48 Deal Economics and Pricing Overview</p> <p>Page 5</p>

1	EXHIBITS	
2	NO. DESCRIPTION PAGE	
3	Exhibit 80..... 238	
4	Corporate Update	
5	Exhibit 81..... 244	
6	First Amended Counterclaim and Original	
7	Third-party Claims	
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
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22		
23		
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	Page 6	
1	Q. Okay. Now, you were -- you understand why we	1
2	are here, don't you?	2
3	A. I do.	3
4	Q. A deposition in a case brought by Maalt; and is	4
5	that a yes?	5
6	A. I do, yes. I'm sorry.	6
7	Q. Okay. You were the person who signed the	7
8	letter declaring force majeure under the terminal	8
9	services agreement that your company held at Maalt; is	9
10	that right?	10
11	A. I'm not sure if it was either me or Mike Van	11
12	den Bold, but it would have been one of us.	12
13	Q. Okay. You don't remember that -- that you were	13
14	the one who signed it?	14
15	A. I don't remember that.	15
16	MR. LANTER: I am going to hand you what	16
17	was previously marked as Exhibit 32 in earlier	17
18	depositions.	18
19	THE WITNESS: All right.	19
20	Q. And that is the February 8th of 2019 letter	20
21	that was sent by Sequitur Permian reportedly to	21
22	terminate the terminal services agreement, correct?	22
23	A. Yes, sir.	23
24	Q. And that was signed by you, right?	24
25	A. That was signed by me.	25
	Page 8	
1	THE VIDEOGRAPHER: Today's date is	1
2	November 19th, 2019. This is the video deposition of	2
3	Braden Merrill. The time is 9:32. We are on the	3
4	record.	4
5	The court reporter may now swear in the	5
6	witness.	6
7	THE REPORTER: Are there any stipulations?	7
8	MR. KORNHAUSER: We are -- we are	8
9	proceeding by agreement and by notice.	9
10	MR. LANTER: And by notice, yeah.	10
11	MR. KORNHAUSER: Yeah. We would like to	11
12	have the opportunity to read and sign, please.	12
13	MR. LANTER: Sure.	13
14	BRADEN MERRILL,	14
15	having been first duly sworn, testified as follows:	15
16	EXAMINATION	16
17	BY MR. LANTER:	17
18	Q. Good morning.	18
19	A. Good morning.	19
20	Q. Would you state your name, please.	20
21	A. It's Braden Merrill.	21
22	Q. Okay. And what is your position with Sequitur	22
23	Permian?	23
24	A. I am vice president and senior -- I am vice	24
25	president and chief financial officer.	25
	Page 7	
1	Q. Okay. Would you tell me all of the reasons why	1
2	you determined that a force majeure event occurred?	2
3	MR. KORNHAUSER: I am going to object to	3
4	the form of the question. You can answer.	4
5	MR. LANTER: Go ahead.	5
6	THE WITNESS: Okay.	6
7	A. We -- we invoked the force majeure or we -- we	7
8	sent the letter because we were unable to get trains to	8
9	the facility, we -- and I guess, it was -- the primary	9
10	is the trains to the facility and also we never got our	10
11	pollution liability -- or legal liability.	11
12	Q. Never got what?	12
13	A. The pollution legal liability.	13
14	Q. Okay. All right. So make sure I understand	14
15	you, the first reason was you were unable to get trains	15
16	to the facility and -- is that yes?	16
17	A. Yes. And -- and trains out of the facility,	17
18	yes.	18
19	MR. LANTER: Okay. She can't take down	19
20	shakes of the head.	20
21	THE WITNESS: No, I get you. I am sorry	21
22	about that.	22
23	MR. LANTER: It looks -- uh-huh (positive	23
24	response) and uh-huh (negative response) look exactly the	24
25	same, okay.	25
	Page 9	

3 (Pages 6 - 9)

<p>1 THE WITNESS: Got it.</p> <p>2 MR. LANTER: -- on paper, so I may prompt</p> <p>3 you.</p> <p>4 Q. So you're unable to get trains in and out of</p> <p>5 the facility?</p> <p>6 A. Yes, sir.</p> <p>7 Q. And then your second reason for declaring for</p> <p>8 force majeure was you never got a pollution legal</p> <p>9 liability policy?</p> <p>10 A. That's correct.</p> <p>11 Q. All right. Anything else?</p> <p>12 A. That's it.</p> <p>13 Q. Okay. When you say you were unable to get</p> <p>14 trainings in or out of the facility, what do you mean by</p> <p>15 that?</p> <p>16 A. We had spoken with multiple logistics companies</p> <p>17 about service in and out of the Barnhart facility and</p> <p>18 all -- all that we talked to. Well -- so let me go back</p> <p>19 here. So we were unable to get in and out of the</p> <p>20 facility.</p> <p>21 Q. Okay. And specifically, what was the problem?</p> <p>22 A. The -- the -- my understanding is that the</p> <p>23 carriers, it is a convoluted system of -- of class ones</p> <p>24 and smaller carriers, but -- and logistics companies,</p> <p>25 but my understanding is the class one carriers were not</p> <p style="text-align: right;">Page 10</p>	<p>1 ceased for any reason?</p> <p>2 A. No rail services would have been obtained --</p> <p>3 no.</p> <p>4 Q. Okay. And no rail service that you ever</p> <p>5 obtained had been delayed for any reason, correct?</p> <p>6 A. Well, we had -- had two trains sent to the</p> <p>7 facility, which were not able to get there and then</p> <p>8 therefore, had to be rerouted to another facility.</p> <p>9 Q. Okay. When you say "we had two trains at the</p> <p>10 facility," who is we?</p> <p>11 A. We as in Jupiter was coordinating the trains.</p> <p>12 Q. Okay. So you and Jupiter?</p> <p>13 A. Jupiter was coordinating on our behalf, yes.</p> <p>14 Q. And -- so when you say "we," are you talking</p> <p>15 about you and your company?</p> <p>16 A. Yes.</p> <p>17 Q. -- Jupiter?</p> <p>18 A. Yes, I am. When I said we that's what I meant.</p> <p>19 Q. Okay. So Jupiter and Sequitur is we?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Was any rail transportation that you</p> <p>22 were able to procure ever interrupted?</p> <p>23 A. No.</p> <p>24 Q. Okay. And was there any rail service</p> <p>25 unavailable?</p> <p style="text-align: right;">Page 12</p>
<p>1 interested in providing crude oil rail service in and</p> <p>2 out of the Permian Basin.</p> <p>3 Q. Okay. So you when you -- when you say that you</p> <p>4 couldn't get trains in or out of the facility, who made</p> <p>5 that determination within your company?</p> <p>6 A. It was Mike Van den Bold and I.</p> <p>7 Q. Okay. Anybody else involved in that decision?</p> <p>8 A. No.</p> <p>9 Q. Okay. So you are not testifying that there is</p> <p>10 any curtailment of rail services or product</p> <p>11 transportation services, are you?</p> <p>12 MR. KORNHAUSER: Objection form.</p> <p>13 A. What -- what do you mean by curtailment? I am</p> <p>14 sorry.</p> <p>15 Q. What do you understand that word to mean?</p> <p>16 A. I mean, ceasing of --</p> <p>17 Q. Okay.</p> <p>18 A. Is that what you are asking?</p> <p>19 Q. That's what I am asking.</p> <p>20 A. I -- I would say that there was ceasing of rail</p> <p>21 services, my understanding, to the Permian Basin.</p> <p>22 Q. Did you ever get rail service to this facility</p> <p>23 at all?</p> <p>24 A. No.</p> <p>25 Q. So no rail service that you obtained had ever</p> <p style="text-align: right;">Page 11</p>	<p>1 MR. KORNHAUSER: Objection form.</p> <p>2 A. Yes.</p> <p>3 Q. And how did you determine that rail service was</p> <p>4 unavailable?</p> <p>5 A. We reached out to every logistics provider and</p> <p>6 every purchaser that we knew of. We went through our</p> <p>7 personal relationships. We talked to Vista about it,</p> <p>8 asking them for help. And we also asked our third-party</p> <p>9 marketing consultant.</p> <p>10 Q. Okay. So every -- you mentioned that you</p> <p>11 reached out to purchasers and you reached out to</p> <p>12 logistics providers?</p> <p>13 A. Uh-huh (positive response).</p> <p>14 Q. Tell me who the purchasers were that you</p> <p>15 reached out to.</p> <p>16 A. From the beginning, we reached out to BP,</p> <p>17 Valero, Shell, Sunoco, Arm, Jupiter. I don't remember</p> <p>18 who I said at this point, but Shell.</p> <p>19 Q. Okay.</p> <p>20 A. Murex, Nustar. I may have said some multiple</p> <p>21 times.</p> <p>22 Q. What was the last one you said?</p> <p>23 A. Nustar.</p> <p>24 Q. Nustar. Any other purchasers?</p> <p>25 A. Those are the ones that I remember.</p> <p style="text-align: right;">Page 13</p>

1 Q. Okay. And how about logistic providers?
2 A. Well, all of those were logistic providers
3 slash purchasers.
4 Q. Okay. Which ones -- I want to separate the
5 two. Which ones were purchasers, BP, Valero, Shell,
6 Sunoco?
7 A. All of them would have purchased our oil.
8 Q. Okay. So they would have all had purchased and
9 then they would have provided logistics after the point
10 of purchase I take it?
11 A. Yes, that's correct.
12 Q. All right. Did you ever reach out to any
13 companies who were just pure logistic providers to pick
14 your oil up at the Barnhart facility and transport it to
15 a purchasers location somewhere else?
16 A. Not that I know of.
17 Q. Okay. So the only thing you did was reach out
18 to purchasers?
19 A. That's my recollection.
20 Q. Okay. And what was your role in doing so?
21 A. I -- I facilitated most of the -- or I was the
22 one who called on most of the companies.
23 Q. Okay. So you were personally involved in the
24 day-to-day activities of that?
25 A. Yes, I was.

Page 14

1 Q. Was Mr. Wroten working with you on that?
2 A. Yes, he was.
3 Q. What was his role?
4 A. Mr. Wroten works for me. He did a lot of the
5 day-to-day as well.
6 Q. Uh-huh (affirmative response).
7 A. So he and I both would call these companies at
8 the beginning.
9 Q. Okay. In your dealings with Maalt, who were
10 the individuals that you primarily dealt with?
11 A. Primarily at the beginning it was Jon Ince and
12 then it switched to Chris Favors pretty quickly, but Jon
13 Ince stayed in the picture somewhat.
14 Q. Okay. So just those two individuals?
15 A. That's correct.
16 Q. Now, you never had any contact with any officer
17 of director of Sequitur -- excuse me, of Vista Proppants
18 and Logistics, Incorporated, did you?
19 A. I -- honestly I don't know the difference
20 between Vista and Maalt, so I'm not -- I'm kind of...
21 Q. Okay. I'm you very specifically, did you have
22 any contact with anybody who is an officer, director of
23 Vista Proppants and Logistics, Inc.?
24 A. I -- I am not sure.
25 Q. Okay. But other than Jon Ince and Chris Favors

Page 15

1 you never had any contact with anybody, right?
2 A. No, I -- Steve McCarley, I believe --
3 Q. Okay.
4 A. -- was on site. And I'm not sure which -- what
5 the name of -- it was either the president or the CEO
6 came to one of our meetings. I don't remember his name.
7 I remember he has a deer -- deer breeding facility.
8 That's what I remember.
9 Q. Okay. Did you ever go to that deer facility?
10 A. No, I did not.
11 Q. Anybody else that you ever talked to with
12 Maalt?
13 A. I was introduced to Blake DeNoyer at the
14 beginning.
15 Q. Okay. And how do you know Blake DeNoyer?
16 A. He tried to sell sand to our company.
17 Q. Okay.
18 A. And we had contact through that so I received
19 his information from our operations team.
20 Q. All right. And that was SIM that was talking
21 to Vista about purchasing sand, correct?
22 A. That's correct.
23 Q. Okay. Do you have any involvement in that at
24 all?
25 A. No, I did not.

Page 16

1 Q. All right. When all of this first started in
2 early to mid 2018, you were the one who reached out to
3 Blake DeNoyer, weren't you?
4 A. Yes, I was.
5 Q. Okay. And you made the initial contact with
6 his company or with Maalt Service entities about running
7 transloading services, right?
8 A. I did.
9 Q. Okay. And after your initial conversation with
10 Blake DeNoyer -- or was it an e-mail or conversation?
11 A. I don't remember.
12 Q. Okay. After that first communication, did you
13 have anymore discussions or communications with -- with
14 Mr. DeNoyer?
15 A. No, I -- after -- after talking with him about
16 using the facility we -- he set me in touch with Jon
17 fairly quickly and then Chris fairly quickly after that.
18 Q. Okay. Now, I want to ask you this up front and
19 we will talk about it some more potentially. But during
20 your conversations with Jon Ince and Chris Favors?
21 A. Uh-huh (positive response), yes.
22 Q. Did they ever make any promises to you that
23 they did not keep?
24 A. I am not sure.
25 Q. You are not aware of any as you sit here today?

Page 17

<p>1 A. I'm -- I'm -- I'm trying to think of any. I 2 can't think of any off he top of my head right now. 3 Q. Okay. You can't think of any examples of 4 anything they promised to do and did not do, correct? 5 A. Individually? 6 Q. Individually or together? 7 A. I can't remember any off the top of my head 8 right now. 9 Q. Okay. And if there was such a promise made, 10 you would know about that, wouldn't you? 11 A. Most likely unless they made it to someone 12 else. 13 Q. Okay. If some -- if something was like was 14 said to somebody else your other people would have told 15 you wouldn't they? 16 A. Most likely, yes. 17 Q. Yes. Now, the pollution liability policy that 18 you mentioned earlier. 19 A. Yes. 20 Q. That has nothing to do with force majeure, does 21 it? 22 MR. KORNHAUSER: Objection form. 23 A. I do not believe that that -- I am sure if that 24 has to do with force majeure, I am -- I am not a lawyer. 25 But I do -- yeah I am not sure.</p> <p style="text-align: right;">Page 18</p>	<p>1 Q. Where are you referring to? 2 A. It says, "It is further agreed that the 3 obligations of the parties that are effected by such 4 force majeure, except as provided above, shall be 5 suspended without liability for breach of this agreement 6 during the continuation of continuance of force 7 majeure." 8 Q. Okay. So nothing in this Article 14 that you 9 were involved in writing has any mention of failure to 10 provide an insurance policy is a force majeure event, 11 does it? 12 A. Well, it refers to the agreement, the breach of 13 the agreement, but I mean, nothing specifically calls 14 out the insurance. 15 Q. Okay. If you read 14.2. 16 A. Okay. 17 Q. It defines what a force majeure event is, 18 correct? 19 A. That's correct. 20 Q. And there is no mention in here anywhere of 21 failure to write an insurance policy? 22 MR. KORNHAUSER: Objection form. 23 A. Not that I -- I saw, no. 24 Q. Okay. And with respect to the pollution 25 policy, your company's goal was to get \$5 million of</p> <p style="text-align: right;">Page 20</p>
<p>1 Q. Okay. You were involved in the preparation -- 2 the drafting and writing of the terminal services 3 agreement in this case weren't you? 4 A. Yes, I was. 5 MR. LANTER: Okay. Is it 13? Ma'am, I am 6 just going to mark this. It's a copy, I am going to 7 mark it as 13 just for him to use right now. Do you 8 want a copy? 9 MR. KORNHAUSER: No, I've got it. 10 MR. LANTER: Okay. Why don't you go ahead 11 and take a look at that and turn to Article 14. 12 THE WITNESS: Okay. 13 Q. All right. Would you look at -- look at that 14 Article 14 and tell me if insurance appears anywhere in 15 there as a force majeure event? 16 MR. KORNHAUSER: Wait a second. What page 17 are you on? 18 MR. LANTER: Article 14. It is on 22. 19 MR. KORNHAUSER: And what's your question? 20 MR. LANTER: Would you read back the 21 question. 22 (Requested portion read back.) 23 MR. KORNHAUSER: Object to form. 24 A. The only thing I can see is in 14-1, Breach of 25 this agreement.</p> <p style="text-align: right;">Page 19</p>	<p>1 pollution coverage in place, wasn't it? 2 A. I believe that's the case, yes. 3 Q. Okay. Did you go back through the documents 4 that were submitted through your INS system to determine 5 whether \$5 million worth of pollution coverage was 6 obtained by Maalt? 7 A. My -- our lawyer checked on that, so I -- I was 8 told that it was not in place. 9 Q. Okay. My -- did you look? 10 A. I personally did not. 11 Q. Okay. Tell me what the INS system is? 12 A. I'm -- honestly, I was not involved in the INS 13 system. 14 Q. Okay so you don't know what that is? 15 A. No. 16 Q. Okay. Did you ever have any involvement in 17 reviewing the insurance certificate -- the insurance 18 certificates that were uploaded through the INS system 19 by Maalt? 20 A. No, that would have been our HSC group and our 21 legal team. 22 Q. Okay. And was that Russ? 23 A. Russ, yes. 24 Q. Okay. Did Russ ever come to you and tell you 25 that all of the policies that were required under the</p> <p style="text-align: right;">Page 21</p>

<p>1 contract were not in place?</p> <p>2 A. I don't remember.</p> <p>3 Q. Okay. Did you -- did your company ever send</p> <p>4 out a notice of default to Maalt claiming that they were</p> <p>5 in default because they had not provided the required</p> <p>6 insurance certificates?</p> <p>7 A. Not that I remember.</p> <p>8 Q. And certainly, I haven't seen a default notice</p> <p>9 from your company to Maalt anywhere in the documents</p> <p>10 produced. If there had been one it would be in those</p> <p>11 documents, correct?</p> <p>12 A. I believe so.</p> <p>13 Q. Okay. With respect to the terminal service</p> <p>14 agreement that is Exhibit 13, what was your role in</p> <p>15 preparing that document?</p> <p>16 A. So our outside legal counsel drafted most of</p> <p>17 the document. Most -- most of my role is involved in</p> <p>18 the commercial aspect of the contract.</p> <p>19 Q. Who is that outside counsel?</p> <p>20 A. Vinson and Elkins.</p> <p>21 Q. Okay. So they drafted this document?</p> <p>22 A. That's my understanding, yes.</p> <p>23 Q. Okay. And then once it was drafted it came to</p> <p>24 you and what did you do with it?</p> <p>25 A. So most of the efforts that we put into it were</p> <p style="text-align: right;">Page 22</p>	<p>1 MR. KORNHAUSER: You need to define these</p> <p>2 term, Jim. I mean, favorable rail rates. I mean, your</p> <p>3 question is vague and ambiguous.</p> <p>4 MR. LANTER: No. I can ask him what I want</p> <p>5 and you can say objection form. And if there is a</p> <p>6 problem he can tell me. I think he understood my</p> <p>7 question.</p> <p>8 MR. KORNHAUSER: Do you want to go off the</p> <p>9 record and have him take a look at it?</p> <p>10 MR. LANTER: Sure.</p> <p>11 THE VIDEOGRAPHER: The time is 9:55. Off</p> <p>12 the record.</p> <p>13 (Break taken.)</p> <p>14 THE VIDEOGRAPHER: The time is 10:03. We</p> <p>15 are back on the record.</p> <p>16 Q. Okay Mr. Merrill, we took a break off the</p> <p>17 record and gave you time to go through the terminal</p> <p>18 services agreement. Now, we are going to go back to my</p> <p>19 question. Is there any provision in that contract that</p> <p>20 makes it contingent on Sequitur Permian obtaining</p> <p>21 favorable rail rates?</p> <p>22 MR. KORNHAUSER: We object to form.</p> <p>23 A. I didn't read that in the agreement.</p> <p>24 Q. Okay. Is there anything in that contract that</p> <p>25 makes it contingent on Sequitur Permian obtaining a JV</p> <p style="text-align: right;">Page 24</p>
<p>1 involved in kind of writing the commercial terms and</p> <p>2 making sure that they stuck with what we had agreed to</p> <p>3 with Vista.</p> <p>4 Q. Okay. This contract was not contingent upon</p> <p>5 Sequitur obtaining any type of favorable rail rates, was</p> <p>6 it?</p> <p>7 MR. KORNHAUSER: Objection form.</p> <p>8 A. I am -- I am not sure what -- I'm not sure. I</p> <p>9 would have to go back and read the document.</p> <p>10 MR. LANTER: Okay. Well, why don't we take</p> <p>11 a minute and look through there and tell me --</p> <p>12 MR. KORNHAUSER: Well, what's -- what's --</p> <p>13 what's your question specifically?</p> <p>14 MR. LANTER: Did you understand my</p> <p>15 question?</p> <p>16 THE WITNESS: It is my understanding that</p> <p>17 the question is that this document doesn't have any word</p> <p>18 in it that says that there's -- that we have to secure</p> <p>19 reasonable rail rates. Is that --</p> <p>20 Q. My question to you was, is there any provision</p> <p>21 in this contract that makes this contract contingent</p> <p>22 upon Sequitur Permian obtaining any type of favorable</p> <p>23 rail rates?</p> <p>24 MR. KORNHAUSER: Object to form.</p> <p>25 A. I -- I --</p> <p style="text-align: right;">Page 23</p>	<p>1 partner?</p> <p>2 MR. KORNHAUSER: Objection form.</p> <p>3 A. Not that I read, no.</p> <p>4 Q. So you know what JV partner means, don't you?</p> <p>5 A. Joint ventures.</p> <p>6 Q. Yes. And in that contract, the terminal</p> <p>7 services agreement, Maalt, was not hired by your company</p> <p>8 to provide any logistic services other than the</p> <p>9 transloading itself, correct?</p> <p>10 MR. KORNHAUSER: Objection form. A.</p> <p>11 A. I -- I don't remember seeing that in the</p> <p>12 contract.</p> <p>13 Q. Okay. During this whole course of events you</p> <p>14 have never come across anything in this contract</p> <p>15 otherwise that obligated Maalt to procure trains or rail</p> <p>16 service or rates for your company?</p> <p>17 MR. KORNHAUSER: Objection form.</p> <p>18 A. I don't remember it in this contract. I</p> <p>19 remember never discussing them getting us rates, but</p> <p>20 that they offered to help us get -- or help us with the</p> <p>21 logistics and understanding the railroads and with</p> <p>22 connections to people inside the railroads.</p> <p>23 Q. Okay. And they did that on a gratuitous basis,</p> <p>24 right?</p> <p>25 A. What do you mean by that?</p> <p style="text-align: right;">Page 25</p>

<p>1 Q. Just because they were trying to be a good 2 provider of services to you.</p> <p>3 A. I mean, I think they -- I mean, they were 4 trying -- I think they were trying to do it to get the 5 rail terminal up and operational so they can start 6 making money faster.</p> <p>7 Q. Okay. So they are trying to help you get 8 started so you can make money faster, too, correct?</p> <p>9 A. Yeah for both -- both of us.</p> <p>10 Q. But they didn't have a contractual obligation 11 to do any of that, did they?</p> <p>12 MR. KORNHAUSER: Objection form.</p> <p>13 A. I mean, written contract, I don't believe so.</p> <p>14 Q. Okay. Now, when we go back a little bit in 15 time you mentioned that your first contact with Maalt 16 was through Blake DeNoyer?</p> <p>17 A. Yes.</p> <p>18 Q. What prompted you to call him?</p> <p>19 A. The -- what prompted me to call them was 20 differentials and the Midland Basin for the price of oil 21 was -- was becoming a lot higher or so -- more of a 22 discount to our -- the price that we would receive for a 23 barrel of a well. And I knew that EOG who was the 24 company that we bought our assets from, our oil and gas 25 assets from, owned a rail facility. I had been out</p> <p style="text-align: right;">Page 26</p>	<p>1 I -- I mean, I sent in the discovery I had, an economics 2 folder, I had an Excel file that had from May -- I 3 believe from May through December --</p> <p>4 Q. Okay.</p> <p>5 A. -- of what the differentials were.</p> <p>6 Q. All right. Now, the December was look forward, 7 right?</p> <p>8 A. Yes.</p> <p>9 Q. And so was that your projections?</p> <p>10 A. Yes.</p> <p>11 Q. Or was it based on futures?</p> <p>12 A. That was based on the CME, so Chicago 13 Mercantile Exchange futures.</p> <p>14 Q. Okay. And what other selling point locations 15 were you comparing to Midland at the time?</p> <p>16 A. LLS, Louisiana Light Sweet.</p> <p>17 Q. Okay. So that would be Gulf Coast?</p> <p>18 A. That would be Saint James, Louisiana.</p> <p>19 Q. Saint James, Louisiana, okay. And that is on 20 the Gulf Coast, right?</p> <p>21 A. It is on the Gulf Coast.</p> <p>22 Q. All right. Were you looking at the spread 23 between Midland and any other selling points, such as 24 Houston, Beaumont, Port Arthur?</p> <p>25 A. We -- we looked at -- we looked at Houston, but</p> <p style="text-align: right;">Page 28</p>
<p>1 there when they still owned it. They -- I knew that it 2 was set up initially for -- for oil service. And so I 3 -- I asked kind of what was the status of that facility. 4 And so I was told by somebody in the organization, I 5 don't remember who at this point, that it was now owned 6 by Vista Maalt.</p> <p>7 Q. Okay. And that prompted you to call Blake 8 then?</p> <p>9 A. After I got his contact information from our 10 operations team.</p> <p>11 Q. Okay. What was the differential between what 12 you were receiving for your oil at Midland and the other 13 place that you were looking at?</p> <p>14 A. It -- it depended on the month, but it got as 15 high as \$20 a month.</p> <p>16 Q. Okay. And?</p> <p>17 MR. KORNHAUSER: \$20 a barrel.</p> <p>18 A. \$20 a barrel, yes.</p> <p>19 Q. Do you remember what time frame this was when 20 was you first reached out to Blake DeNoyer?</p> <p>21 A. I believe it was early May.</p> <p>22 Q. Okay. So in the May time frame what was the 23 difference between the Midland price for oil in the 24 other locations you were looking at?</p> <p>25 A. I -- I can't remember exactly what it was, but</p> <p style="text-align: right;">Page 27</p>	<p>1 Houston was becoming a -- kind of a narrower spread, so 2 we focused on Louisiana Light Sweet.</p> <p>3 Q. Okay. And where did you go to determine what 4 the Saint James prices were at the time, was that CME as 5 well?</p> <p>6 A. Yes.</p> <p>7 Q. And when you go to CME, tell me as if you are 8 -- you are telling your mom or your aunt, somebody who 9 is not in the oil industry what you would go on their 10 website and what data you would pull up and look at?</p> <p>11 A. Okay. So the CME has the settlements, so the 12 market closing price, the last price that a contract 13 settled on its website from the day before. And so 14 those are the -- the values that I would pull up. So 15 there is two differentials that I would pull up every 16 night. One would be the difference between Midland and 17 WTI and the other one would be the differential between 18 WTI and LLS, because WTI is the standard cost of a 19 barrel in Cushing, Oklahoma with a grade of west -- what 20 is called a west Texas grade barrel. There may be 21 something a little bit more scientific than that, but 22 that's just kind of how it is vernacular of the 23 industry.</p> <p>24 Q. Yeah.</p> <p>25 A. And so I would take what was in essence the</p> <p style="text-align: right;">Page 29</p>

<p>1 A. Through January of 2019.</p> <p>2 Q. And all of those discussions in that period of</p> <p>3 May through January '18 to '19 involved rail</p> <p>4 transportation of -- of oil?</p> <p>5 A. Not all of them, but -- be we continued the</p> <p>6 rail conversation, but they also became a purchaser of</p> <p>7 our oil.</p> <p>8 Q. Okay.</p> <p>9 A. Through that stretch and we thought that they</p> <p>10 were going to be the purchaser of our -- or the train.</p> <p>11 We had to switch over our -- our purchasers so that they</p> <p>12 would be able to take our oil when the train showed up.</p> <p>13 Q. Okay. So you are talking to Shell and</p> <p>14 initially you are talking to them about buying your oil</p> <p>15 and moving it to Saint James or wherever within the</p> <p>16 Shell organization?</p> <p>17 A. Yes.</p> <p>18 Q. So that logistics would be out of your hands</p> <p>19 and then basically transferred over to Shell?</p> <p>20 A. Yes.</p> <p>21 Q. And what were -- what were you going to gain</p> <p>22 and your company going to gain from doing that?</p> <p>23 A. We would receive half the arbitrage that you</p> <p>24 spoke of earlier.</p> <p>25 Q. Okay. So Shell would buy your oil at, I guess</p> <p style="text-align: right;">Page 34</p>	<p>1 Q. And how did you learn that they were unable to</p> <p>2 get a rate from the railroad?</p> <p>3 A. I talked to Ben.</p> <p>4 Q. So Ben Thompson told you that?</p> <p>5 A. Yes.</p> <p>6 Q. And he told you that he was unable to get a</p> <p>7 rate from what railroad?</p> <p>8 A. I believe it was the Union Pacific, but I am</p> <p>9 not positive on that.</p> <p>10 Q. Okay. Any others besides UP?</p> <p>11 A. I believe he also talked to the BNSF.</p> <p>12 Q. Okay. So maybe BNSF, but for sure based on</p> <p>13 your memory, the UP?</p> <p>14 A. Yes.</p> <p>15 Q. Did he ever mention talking to KCS?</p> <p>16 A. I do not remember.</p> <p>17 Q. Okay. Were you ever involved in any of the</p> <p>18 talks that he had with either the UP or the BNSF?</p> <p>19 A. No, he actually didn't handle the talks</p> <p>20 himself. He -- he -- they have a rail logistic group</p> <p>21 that handled those talks to my understanding.</p> <p>22 Q. Okay. Were you involved in any of those</p> <p>23 conversations between Shell and the railroads?</p> <p>24 A. No.</p> <p>25 Q. Like, a party on a phone call or?</p> <p style="text-align: right;">Page 36</p>
<p>1 whatever the WTI, was the spot price that you were</p> <p>2 looking at the time?</p> <p>3 A. No, the WTI was Mid-Cush differential.</p> <p>4 Q. Okay. At that price and then they would ship</p> <p>5 it down to Saint James?</p> <p>6 A. Uh-huh (positive response).</p> <p>7 Q. And then whatever the difference was you would</p> <p>8 split that 50/50?</p> <p>9 A. That's correct.</p> <p>10 Q. And you then would be able to receive that</p> <p>11 arbitrage without having any logistics cost; is that</p> <p>12 correct?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. Were you going to have to build out a</p> <p>15 transload facility in order to do that deal, that type</p> <p>16 of deal with Shell?</p> <p>17 A. Yes.</p> <p>18 Q. And was that going to be the Barnhart one?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. What happened to those talks?</p> <p>21 A. So they were our primary desire partner because</p> <p>22 they had such a large rail presence initially. But</p> <p>23 those -- those talks ended in August when they were</p> <p>24 unable to get trains or get a rate from the -- the</p> <p>25 railroad.</p> <p style="text-align: right;">Page 35</p>	<p>1 A. No.</p> <p>2 Q. So no involvement whatsoever?</p> <p>3 A. Nope.</p> <p>4 Q. You were just going to turn it over to Shell</p> <p>5 and let them figure it out and then reap the arbitrage</p> <p>6 advantage?</p> <p>7 A. Yes.</p> <p>8 Q. Was anybody else in your company involved in</p> <p>9 those Shell railroad conversations?</p> <p>10 A. Not that I know of.</p> <p>11 Q. So then Shell couldn't get it worked out, I</p> <p>12 guess, in what month?</p> <p>13 A. August.</p> <p>14 Q. August. And then what did you do?</p> <p>15 A. I kept talking to them. But -- so basically, I</p> <p>16 -- when we signed our TSA with Vista, I told -- or Vista</p> <p>17 Maalt. I told Vista Maalt that I needed would Shell --</p> <p>18 that I needed to give one -- Shell one more week in</p> <p>19 order to -- because I owed them that, before signing on</p> <p>20 with Jupiter and then I told Jupiter that and we all</p> <p>21 went to lunch that day. And then -- so when I got done</p> <p>22 with the meeting I called Shell and told them that you</p> <p>23 had one week, otherwise we told Vista Maalt and Jupiter</p> <p>24 that we are going to go with Jupiter.</p> <p>25 Q. Okay. Now, your terminal services agreement,</p> <p style="text-align: right;">Page 37</p>

<p>1 which is in front of you as Exhibit 13.</p> <p>2 A. Yes.</p> <p>3 Q. That's dated effective August 6th, 2018, right?</p> <p>4 A. That's correct.</p> <p>5 Q. So by that time were your talks with Shell</p> <p>6 still alive?</p> <p>7 A. They were still alive. We told them we would</p> <p>8 give them one week.</p> <p>9 Q. Okay. And so you went ahead and signed this</p> <p>10 agreement without having a JV partner, right?</p> <p>11 A. We were assured by Jupiter that they -- they</p> <p>12 would take Shell's shoes if -- if they wanted to step</p> <p>13 out.</p> <p>14 Q. Okay. You -- you had -- your company had never</p> <p>15 done any business with Maalt, had it?</p> <p>16 A. I don't know. I don't believe so, but I don't</p> <p>17 know.</p> <p>18 Q. You hadn't?</p> <p>19 A. I had not, no.</p> <p>20 Q. Never been involved?</p> <p>21 A. No, I had not.</p> <p>22 Q. Okay. When -- when you were told or it was</p> <p>23 suggested to you that you call Maalt about the transload</p> <p>24 facility?</p> <p>25 A. Uh-huh (positive response).</p> <p style="text-align: right;">Page 38</p>	<p>1 them on potential sand purchases?</p> <p>2 A. I don't remember that.</p> <p>3 Q. Okay. So as you sit here today, you don't</p> <p>4 recall doing any research or due diligence into Maalt</p> <p>5 and its affiliated companies before you went down this</p> <p>6 road to doing a terminal service agreement?</p> <p>7 A. Well, not -- not at the beginning. I mean, I</p> <p>8 thought the question was about when I contacted Blake.</p> <p>9 Q. Okay. Fair enough. It was. So my question to</p> <p>10 that then you didn't do any due diligence or research</p> <p>11 into the company at that point?</p> <p>12 A. Oh, I did research.</p> <p>13 Q. That you recall?</p> <p>14 A. I did. I did follow. I didn't do research on</p> <p>15 the company at that point.</p> <p>16 Q. Okay. And what research did you do?</p> <p>17 A. I tried to figure out who their main purchasers</p> <p>18 were.</p> <p>19 Q. Uh-huh (positive response).</p> <p>20 A. Because my understanding -- my understanding</p> <p>21 was the EOG was one of their main purchaser and we had a</p> <p>22 lot of faith in EOG and trust Maalt. So we put a lot of</p> <p>23 stock in the fact that they had -- they trusted Vista as</p> <p>24 a -- Vista Maalt is a large cluster, is one of their</p> <p>25 little main service providers in the area that they must</p> <p style="text-align: right;">Page 40</p>
<p>1 Q. What research did you do into the company?</p> <p>2 A. Honestly, I don't remember.</p> <p>3 Q. Okay. Did you look at the website?</p> <p>4 A. I -- I'm -- I -- I'm sure I did. I -- I don't</p> <p>5 remember.</p> <p>6 Q. What would have been -- what would be your</p> <p>7 normal practice back then?</p> <p>8 A. My normal practice would have been to ask the</p> <p>9 operations team their understanding of Maalt's and what</p> <p>10 their representation is. And that was -- I mean, when</p> <p>11 we initially contacted Maalt the first time, we didn't</p> <p>12 know if they were going to want to sell it to us or what</p> <p>13 the structure of the agreement would have been. So I</p> <p>14 mean, there was -- the initial lob in or the initial</p> <p>15 call in or e-mail would have been just kind of a</p> <p>16 discovery.</p> <p>17 Q. Uh-huh (positive response). When you called</p> <p>18 Blake?</p> <p>19 A. Yes.</p> <p>20 Q. Okay.</p> <p>21 A. Or e-mailed them. I'm not sure which one.</p> <p>22 Q. All right. Did you talk to any of the people</p> <p>23 over at SEM Operating; is that the right name?</p> <p>24 A. It's one of our names, yes.</p> <p>25 Q. Okay. About their experiences, working with</p> <p style="text-align: right;">Page 39</p>	<p>1 be standup guys and follow through on what they said.</p> <p>2 Q. How did you learn that information?</p> <p>3 A. I learned that information, I think initially</p> <p>4 in talking with one of the Vista Maalt folks and I kind</p> <p>5 of researched it afterwards.</p> <p>6 Q. And what research did you do afterwards?</p> <p>7 A. I Go ogle searched.</p> <p>8 Q. Okay. Did you talk to anybody at the EOG?</p> <p>9 A. I don't believe that I did. Some of our</p> <p>10 operations team might have.</p> <p>11 Q. Okay. Who would those people be?</p> <p>12 A. That would have been Steve McVay our head of</p> <p>13 procurement and Blake Cantley our vice president of</p> <p>14 completion and production, I believe.</p> <p>15 Q. Okay. Did you obtain any information from them</p> <p>16 about their research or their due diligence into Maalt</p> <p>17 or the Vista entities?</p> <p>18 A. I had -- I heard positive things about -- about</p> <p>19 Vista Maalt.</p> <p>20 Q. Okay. And so that whatever you learned gave</p> <p>21 you enough confidence that you could move forward with</p> <p>22 negotiating and talking about this type of deal?</p> <p>23 A. It did.</p> <p>24 Q. When you did it you wanted exclusivity on this</p> <p>25 facility, didn't you?</p> <p style="text-align: right;">Page 41</p>

<p>1 and so --</p> <p>2 Q. Uh-huh (positive response).</p> <p>3 A. I mean, it really -- at the end of the we knew</p> <p>4 that it was going to take a lot more hurdles of getting</p> <p>5 through, of finding some way to do credit and -- and we</p> <p>6 hadn't heard of Jupiter before. So it was not kind of</p> <p>7 an optimal situation for us having a Shell or somebody</p> <p>8 else or a BP, or a Sunoco or somebody that has a lot of</p> <p>9 railcars and -- and kind of their own logistic group</p> <p>10 would have been a preferred.</p> <p>11 Q. Uh-huh (positive response). Before all of this</p> <p>12 came up how were you moving your oil?</p> <p>13 A. Via truck.</p> <p>14 Q. Truck. And where were you taking it to sell?</p> <p>15 A. That was based on whoever was purchasing our --</p> <p>16 our oil at the time. They -- they took it to their own</p> <p>17 spot, it was point of sale. That bought it at our tank</p> <p>18 battery.</p> <p>19 Q. Okay. So you truck from the well site to</p> <p>20 wherever your customers point of sale was?</p> <p>21 A. No. They would pick it up at our -- our well</p> <p>22 site. So we -- they had no visibility beyond our -- our</p> <p>23 well site.</p> <p>24 Q. Okay. So you didn't have any trucking</p> <p>25 either --</p> <p style="text-align: right;">Page 50</p>	<p>1 those meetings and conversations?</p> <p>2 MR. KORNHAUSER: Objection form.</p> <p>3 A. Mainly it's Travis Morris, Albert, I can't</p> <p>4 remember his last name at -- at Jupiter, who I met a</p> <p>5 fewer times than Travis, but -- and then Tony Wroten</p> <p>6 would have also been in those discussions as well.</p> <p>7 Q. Okay. Did you ever end up entering into any</p> <p>8 kind of contract with Jupiter?</p> <p>9 A. We did for the purchase of our oil by truck.</p> <p>10 Q. Okay. Was that it?</p> <p>11 A. That I remember, yes.</p> <p>12 Q. All right. And which oil did you end up</p> <p>13 selling them under that contract?</p> <p>14 A. We sold them -- I don't know how many barrels.</p> <p>15 We sold all of our barrels through on Barnhart. And</p> <p>16 most of our barrels on Texon through -- through, I</p> <p>17 believe January.</p> <p>18 Q. What did you say last after January?</p> <p>19 A. I believe -- I believe through January.</p> <p>20 Q. Through January, okay. So when did you start</p> <p>21 selling it to them?</p> <p>22 A. I am not sure. My recollection -- it was after</p> <p>23 -- I am not sure.</p> <p>24 Q. Okay. So at some point in 2018 you entered</p> <p>25 into a contract to sell Jupiter oil?</p> <p style="text-align: right;">Page 52</p>
<p>1 A. No.</p> <p>2 Q. -- that you did?</p> <p>3 A. No.</p> <p>4 Q. It was your customer who would bring their</p> <p>5 trucks in --</p> <p>6 A. That's correct.</p> <p>7 Q. -- to pick up the oil? Okay.</p> <p>8 Once you had -- I'm sorry, do you need a</p> <p>9 drink?</p> <p>10 Once you had the meeting with the people at</p> <p>11 Jupiter at your offices?</p> <p>12 A. Yes.</p> <p>13 Q. I understand you had a series of additional</p> <p>14 meetings and phone calls and things of that nature --</p> <p>15 A. Uh-huh (positive response).</p> <p>16 Q. -- going into time, correct?</p> <p>17 A. That's correct.</p> <p>18 Q. Was anybody from Maalt ever involved in any of</p> <p>19 those meetings or conversations that you had with</p> <p>20 Jupiter?</p> <p>21 A. I don't remember them being involved.</p> <p>22 Q. Okay. If they were there you would probably</p> <p>23 remember that wouldn't you?</p> <p>24 A. I am not sure.</p> <p>25 Q. Okay. Who do you recall being involved in</p> <p style="text-align: right;">Page 51</p>	<p>1 A. Yes.</p> <p>2 Q. And that contract ran or the activities under</p> <p>3 that contract ran so sometime in January of 2019?</p> <p>4 A. That's correct.</p> <p>5 Q. All right. And you sold them all of your</p> <p>6 production at Barnhart?</p> <p>7 A. Yes.</p> <p>8 Q. And some of your production at Texon?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And when you talk about all of your</p> <p>11 production at Barnhart, how many wells do you have there</p> <p>12 and how wide is the geographic area?</p> <p>13 A. It's -- the geographic area, it is a -- pretty</p> <p>14 expansive. It's -- it's -- I would estimate it's</p> <p>15 probably 25 to 30 miles across. And it is probably</p> <p>16 25 miles across, 25 to 30 miles across.</p> <p>17 Q. Okay.</p> <p>18 A. And it's probably 20 miles north south.</p> <p>19 Q. So about what, 400, 500 square miles?</p> <p>20 A. Well, it is not all our acreage, so it's --</p> <p>21 Q. Sure.</p> <p>22 A. Some of it's -- but yeah, I mean, in terms of</p> <p>23 kind of the geographical area that it covers.</p> <p>24 Q. And it probably goes up just a little bit</p> <p>25 doesn't it with your wells?</p> <p style="text-align: right;">Page 53</p>

14 (Pages 50 - 53)

<p>1 A. It is -- it is very -- it is like an oval 2 basically. 3 Q. Yeah. 4 A. But then with some gaps in the middle. 5 Q. Okay. 6 A. So it looks like an -- an oblong donut. 7 Q. All right. So if you are looking at the 8 picture you are probably at 4 or 500 acres? 9 A. I would -- I would imagine. 10 Q. Or square miles rather? 11 A. Yeah, I would imagine so, yeah. 12 Q. Yeah. And then with the wells dotted 13 throughout? 14 A. Yes. 15 Q. Okay. How many wells are in that area? 16 A. A couple of hundred. 17 Q. Okay. So Jupiter is buying all of the oil from 18 a couple hundred wells in the Barnhart region that you 19 had there? 20 A. Yes. 21 Q. Did they pay you for all that? 22 A. We actually didn't have an agreement with 23 Jupiter -- so we had a credit sleeve with Jupiter, so 24 actually our contract was with Macquarie who then had a 25 contract with -- with Jupiter.</p> <p style="text-align: right;">Page 54</p>	<p>1 sell our oil via train we had to for -- let go our 2 commitments with -- with Plains, who was then -- well, 3 Plains then Shell. Excuse me. So Shell who is 4 purchasing our oil at that time and Barnhart. And then 5 in order to do that, we had to have a purchaser. So we 6 had to go with -- we didn't know when the trains was 7 going to -- the trains would eventually show up. 8 Q. Uh-huh (positive response). 9 A. So we had to have a contract in place with 10 Jupiter because if it came in the middle of the month 11 you can't -- you can't cease service with somebody else. 12 Q. Right. 13 A. So we -- we talked to Jupiter and initially 14 Shell was going to be that credit sleeve. And so 15 keeping them in the contract somewhat, Shell decided not 16 to do that. And so Jupiter found Macquarie who then 17 came in as the -- the intermediate in that contract. 18 Q. Okay. So then you would sell to Macquarie, 19 Macquarie would sell to Jupiter and if the train came in 20 the oil would go on the railcars and then Jupiter would 21 transport it to where? 22 A. They would transport it to the Nustar -- the 23 Nustar facility in Saint James. 24 Q. Nustar, okay. And was there a -- a part of 25 that agreement that provided for your company to share</p> <p style="text-align: right;">Page 56</p>
<p>1 Q. Explain to us how that worked. 2 A. It's a back-to-back to contract is what they 3 call it. So basically we would sign a contract with 4 Macquarie who has a investment grade balance sheet. So 5 we know -- we felt very comfortable that they would pay 6 us. So put a back-to-back with Jupiter and they -- or 7 with -- excuse me, with Macquarie. So we did a contract 8 with Macquarie who immediately then signed the same 9 contract in essence with -- with Jupiter. So we sold to 10 Macquarie and instantaneously it would flip to -- to 11 Jupiter. 12 Q. Jupiter. Under that scenario, how is Macquarie 13 making money? 14 A. They made \$0.25 in credit, I believe. I -- I 15 am not privy to that, but that's my understanding, is 16 probably about that. That's kind of the market rate, I 17 believe. 18 Q. All right. So there is a little bit of a 19 markup from Macquarie to Jupiter? 20 A. That's right. 21 Q. All right. And how did you end up entering 22 into that arrangement? 23 A. Through Macquarie or through Jupiter? 24 Q. With Macquarie then the Jupiter. 25 A. So the deal was with Jupiter. So in order to</p> <p style="text-align: right;">Page 55</p>	<p>1 in the arbitrage with Jupiter? 2 A. Yes. 3 Q. Okay. So you would sell -- 4 A. If we signed that agreement, you are talking 5 about the rail -- I'm sorry, the rail facility agreement 6 that we did? 7 Q. Yes. 8 A. We never executed. 9 Q. Okay you never got to that. 10 A. Okay. 11 Q. On the credit sleeve? 12 A. The credit sleeve? 13 Q. Yeah. Was there any -- 14 A. So that -- that was -- that was a similar 15 trucking situation where they pick up at the wellhead. 16 And it was -- there was -- there was items built into 17 the contract whereby we could -- we could switch to a 18 rail contract. But it was -- at that point it was just 19 a pickup at our wellhead and -- and purchase at that 20 point. 21 Q. Okay. So Macquarie bought at the wellhead? 22 A. Yes. 23 Q. I take it Jupiter bought at the wellhead from 24 Macquarie? 25 A. Yes.</p> <p style="text-align: right;">Page 57</p>

15 (Pages 54 - 57)

<p>1 why it was whatever it was. I don't remember exactly 2 what it was and the financials that brought that 3 question up. But that was kind of what spurred the 4 thought was that hey, you know, EOG when they did this 5 crisis -- or when entered -- when they had this issue 6 several years ago this is how they handled it and that 7 facility is still there, so I wonder if we could do the 8 same thing. 9 Q. Okay. So basically EOG had been shipping it 10 out to take advantage of the arbitrage? 11 A. That's right. 12 Q. Did you have any conversations with anybody at 13 EOG about that? 14 A. Yes, when we were doing our financial due 15 diligence. 16 Q. Yeah. And who was that person? 17 A. I honestly -- I don't remember. 18 Q. Okay. When you -- when you got to 2018, did 19 you recognize -- just recognize the difference in the 20 markets and decide to do what EOG had previously done or 21 did somebody come to you and say hey, you know, the 22 market spread is pretty favorable right now, you need to 23 be looking at this? 24 MR. KORNHAUSER: Objection form. 25 A. I -- I -- I -- I honestly -- I am not positive,</p> <p style="text-align: right;">Page 66</p>	<p>1 they don't want to be shipping crude out of that 2 facility unless -- or out of that facility except for 3 the KCS. But they couldn't get us to our downstream 4 markets. 5 Q. Okay. Well, you had those conversations 6 earlier in the year as well hadn't you? 7 A. Yes. 8 Q. So what was the precipitating event that 9 occurred in late November, early December of 2018 that 10 led you to send out the letter claiming force majeure? 11 A. We wanted to know or we felt that the -- the 12 facility was going to be through construction fairly 13 soon or it was nearing the end of construction and felt 14 like it was only fair to notify Vista Maalt at that time 15 that hey, we are trying. I mean, Chris and I had 16 several conversations about our unavailability to -- or 17 our inability to find trains and he had tried vetting at 18 least one, if not more, on our behalf. 19 Q. Okay. So you get to December facilities 20 nearing or at completion, right? 21 A. Yes, nearing. I -- I -- I don't remember 22 exactly when it was, but it was nearing completion. 23 Q. And so then you decided to declare force 24 majeure? 25 A. Yes.</p> <p style="text-align: right;">Page 68</p>
<p>1 but I'm pretty sure it was just a hey, EOG did this, why 2 can't with do it sort of feeling. It wasn't somebody 3 coming to us. It was an internally -- 4 Q. Okay. 5 A. -- thrown idea. 6 Q. Who would have been in the internal discussions 7 about that? 8 A. It would have been myself, Mike Van den Bold, 9 Scott Josey, who is the CEO, and other folks on the 10 operation team. So Steve McVay and Blake Cantley. 11 Q. Okay. 12 A. And Tony Wroten. 13 Q. Tony Wroten? 14 A. Yes. Sorry. 15 Q. When you got to December of 2018. 16 A. Uh-huh (positive response). 17 Q. What happened that caused you to decide to send 18 a letter to Maalt saying that there was a force majeure 19 event? 20 A. We were trying to get rail. And I mean, we 21 tried every avenue we knew as a kind of the teams had 22 kind of these robust logistics teams, these rail teams 23 because we figured those were the ones who could it get 24 it done. And basically everybody told us that, you 25 know, the railroads really aren't open for business and</p> <p style="text-align: right;">Page 67</p>	<p>1 Q. Because you knew if you didn't you were going 2 to start paying the monthly minimums, right? 3 A. That -- that was part of it, yes. 4 Q. Was that most all of it? 5 A. I mean, we thought -- 6 MR. KORNHAUSER: Objection form. 7 A. We thought that it was partly. I mean, we -- 8 we -- we felt like it was -- I mean, we felt like Vista 9 would probably count on the revenue, we wanted them to 10 be aware that this was not -- that -- that we were 11 having these issues. 12 Q. Right. And you knew you were going to have to 13 go online with the minimum monthlies and so you sent the 14 force majeure letter, right? 15 A. We -- we thought that that was a possibility. 16 Q. But you knew it was a possibility, not just a 17 thought didn't you? 18 A. Yes. 19 Q. Okay. 20 MR. KORNHAUSER: Can we take a break when 21 you get a chance. 22 MR. LANTER: Sure. 23 MR. KORNHAUSER: Thanks. 24 MR. LANTER: Let's go now. 25 MR. KORNHAUSER: Okay. Thanks.</p> <p style="text-align: right;">Page 69</p>

<p>1 make cold calls to sell and to buy stuff from vendors 2 and things of that nature don't you? 3 A. I don't personally. 4 Q. People in your organization do don't they? 5 A. I would imagine they do. I am not sure. 6 Q. Did you ever follow-up with Mr. Meador after 7 this e-mail? 8 A. I believe so. I mean, I was in somewhat 9 regular contact with him. 10 Q. So what did you do to follow-up and kind of 11 make sure things continued along toward getting put in 12 place? 13 A. We talked with each other fairly regularly and 14 he was always -- he was on the weekly calls we had. 15 Q. Okay. But you can't tell me anymore 16 specifically than that what you did do follow-up with 17 him and kind of spur this thing along? 18 A. I mean, I always asked what the progress was, 19 but that's -- 20 Q. That would be about it? 21 A. That's about it. 22 Q. Okay. And after you got this information from 23 Travis Morris, did you get with him and say hey, let's 24 get this in place and get it going, I want to see what 25 the rates are and let's see how this is all working out?</p> <p style="text-align: right;">Page 182</p>	<p>1 there was other factors that slowed us down. And I 2 don't remember the exact timing of it, but we had a lot 3 of rain delays. 4 Q. Uh-huh (positive response). 5 A. There is flooding out in the area perpetually, 6 which is anomalous for west Texas. 7 Q. Okay. So mainly weather? 8 A. That's what I recall. 9 MR. LANTER: Let's take a look at 10 Exhibit 60. 11 (Exhibit 60 marked.) 12 THE WITNESS: All right. 13 Q. It looks like you sent Mr. Morris an e-mail on 14 September 13th at 3:54 that you correct a few minutes 15 later, corrected some things on it. But in the original 16 e-mail you've got some bullet points. In the fourth 17 bullet point it says, "I believe the only controversial 18 item could be the deficit volumes concept." 19 A. Uh-huh (positive response). 20 Q. What is the deficit volumes concept? 21 A. I -- I am not positive. 22 Q. What do you think it might mean? 23 A. I really don't know. I -- I'd be assuming or 24 just guessing. 25 Q. Well, since you wrote it, I am going to ask you</p> <p style="text-align: right;">Page 184</p>
<p>1 A. Yeah. 2 MR. KORNHAUSER: Objection, form. 3 A. Yes, I did. 4 Q. And did you get the information? 5 A. It was always another day. 6 Q. So the answer is you never got the information? 7 A. Never got the information. 8 Q. But you still planned on going forward with 9 Jupiter? 10 A. I -- I -- I don't remember the timing of it, 11 but we also looked at other options somewhere around 12 this time frame. 13 Q. The other option was continuing to be Shell? 14 A. Shell and then later on we moved onto other 15 options as well. 16 Q. Why wasn't this terminal done by September 1st? 17 MR. KORNHAUSER: Objection form. 18 A. My recollection is that there were a lot of 19 factors that -- that contributed to it so -- or you mean 20 constructed? 21 Q. Yes. 22 A. Constructed, finish construction. 23 Q. Yes. 24 A. So one of those factors was the fact that Vista 25 Maalt still had sand on the -- at the facility, but</p> <p style="text-align: right;">Page 183</p>	<p>1 to guess and tell me what you believe you meant by that? 2 MR. KORNHAUSER: I am going to object and 3 I'm going to instruct you not to guess and not answer 4 the question. 5 THE WITNESS: Okay. 6 MR. KORNHAUSER: So if you rephrase it, we 7 will answer it. 8 Q. What were you meaning when you wrote the 9 sentence, "I believe the only controversial item would 10 be the deficit volumes concept?" 11 A. I am not sure. I would have to go back and 12 look at a lot of -- or kind of the previous 13 conversations that we had. 14 Q. And you said, "The rationale for is we have 15 made a large capital commitment to the facility and want 16 to make sure it is getting used as we will have no 17 volumes of our own to commit." 18 The facility being the Barnhart 19 transloading facility? 20 A. I would imagine so, yes. 21 Q. And then when you say, "As we will have no 22 volumes of our own to commit," what are you saying 23 there? 24 A. I don't know what that would have been 25 referenced to.</p> <p style="text-align: right;">Page 185</p>

<p>1 possible not though, I don't remember if he was there or 2 not. 3 Q. Was it a phone call or a face-to-face? 4 A. A phone call. 5 Q. And what -- where would I go to find your notes 6 or whatever documentation there might be to reflect what 7 the indicative terms were that they gave you? 8 A. If -- if they have -- if I have it it should be 9 in the discovery that we sent over. I don't -- I don't 10 remember specifically if I had taken them or not. 11 Q. Okay. What happened with that conversation, 12 where did it go from there? 13 A. I believe this was -- well, we -- we decided 14 not to pursue that opportunity. I am not sure if it was 15 at this point or if it was later on. 16 Q. Uh-huh (positive response). 17 A. But we did keep in contact. 18 Q. Never did a deal with them though? 19 A. No. 20 MR. LANTER: Get to 43, Exhibit 43. 21 (Exhibit 43 marked.) 22 THE WITNESS: All right. 23 Q. This is Mr. Fall's e-mail to you and Mr. Wroten 24 talking about Valero. And he says they, I take that 25 means Valero?</p> <p style="text-align: right;">Page 142</p>	<p>1 MR. KORNHAUSER: 444. 2 Q. And it was signed by you as VP and CFO of the 3 company? 4 A. Yes. 5 Q. Is that right? 6 A. It appears to be. 7 Q. Okay. This originated from your offices, 8 Correct? 9 A. I believe so, but I am not certain. 10 Q. Well, as indicated on the third page, it was 11 actually signed by you as the sender of the letter; is 12 that right correct? 13 A. It was signed by me, yes. 14 Q. As the sender of the letter? 15 A. What do you mean by that? 16 Q. Well, it is in the place where you normally 17 sign a letter that you are sending? 18 A. Yes, yes. 19 Q. And then you asked Vista Proppants and 20 Logistics, LLC to agree to this? 21 A. That appears -- I mean, I am not a lawyer, so I 22 don't -- I'm not positive, but that seems. 23 Q. Okay. Who actually penned this letter on your 24 side? 25 A. I don't remember.</p> <p style="text-align: right;">Page 144</p>
<p>1 A. Right. 2 Q. "Are not a candidate for purchase as everything 3 they would offer us. Regardless of location we have a 4 Mid-Cush differential embedded in the price structure." 5 What did you understand him to mean by that 6 statement? 7 A. My understanding was that that Mid-Cush 8 differential, they wouldn't offer us a piece of the 9 arbitrage opportunity. 10 Q. Okay. And did that make it more or less 11 attractive to you? 12 A. It makes it less attractive to us. 13 Q. To the point where you wouldn't want to do the 14 deal? 15 A. We would not want to do the deal, no. 16 MR. LANTER: We marked this the other day, 17 but I'm going to mark it again as Exhibit 44. 18 (Exhibit 44 marked.) 19 Q. I understand this is your letter of intent that 20 you -- that your company prepared and sent to Maalt; is 21 that right? 22 A. I believe so. 23 MR. KORNHAUSER: Are you going to remark 24 this, Jim? 25 MR. LANTER: I did.</p> <p style="text-align: right;">Page 143</p>	<p>1 Q. Was it your in-house lawyer, is his name Mr. 2 Aronowitz? 3 A. Honestly, I don't -- I don't remember. 4 Q. Okay. Is that -- the man I mentioned, is that 5 the proper pronunciation of this name? 6 A. Aronowitz, yes. 7 Q. Does he work as an employee of the Sequitur 8 companies? 9 A. He was contractor at the time, now he's a 10 full-time employee. 11 Q. Okay. And he serves as your in-house attorney? 12 A. He is our assistant general counsel or 13 associate general counsel. 14 Q. Okay. Who is your general counsel? 15 A. Julian Murray. 16 Q. Now, this letter was sent by you guys and 17 contemplated that you would do due diligence before you 18 entered into a definitive agreement; is that right? 19 A. That's correct. 20 Q. And it was not intended to be binding either 21 except to the extent that sections 3 through 10 were 22 intended to be binding. 23 MR. KORNHAUSER: Objection, form. 24 Q. Is that correct? 25 MR. KORNHAUSER: Objection, form.</p> <p style="text-align: right;">Page 145</p>

<p>1 A. I don't know. Does it say that somewhere?</p> <p>2 Q. Look at Paragraph 11.</p> <p>3 A. It appears to say that.</p> <p>4 Q. Okay. And if we look further Paragraph 11</p> <p>5 under the B, it says, "May not be relied upon by either</p> <p>6 party as a basis for a contract by estoppel or</p> <p>7 otherwise, but rather evidence as a nonbinding</p> <p>8 expression of good faith understanding to endeavor</p> <p>9 subject to completion of due diligence to the parties</p> <p>10 satisfaction to negotiate a mutually agreeable</p> <p>11 definitive agreement."</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. And that was words written by someone in your</p> <p>15 office before you signed this?</p> <p>16 A. I don't -- I don't remember, but...</p> <p>17 Q. Do you know who wrote out the term sheet that's</p> <p>18 attached as the last two pages?</p> <p>19 A. I believe I started it, it was a very crude</p> <p>20 beginnings, but I don't remember who -- or who all was</p> <p>21 involved in it.</p> <p>22 MR. LANTER: Would you take a look at</p> <p>23 Exhibit 45, please.</p> <p>24 (Exhibit 45 marked.)</p> <p>25 Q. Does this look like Tony's notes again?</p> <p style="text-align: right;">Page 146</p>	<p>1 A. The numbers. I didn't remember how many, if</p> <p>2 they had 130,000 barrels in the Permian or not. I</p> <p>3 remember it was a big number, but I didn't remember what</p> <p>4 they were.</p> <p>5 Q. Okay. Did y'all do any due diligence to find</p> <p>6 out if they were in fact moving that type of product</p> <p>7 through the Permian?</p> <p>8 A. We talked with out third-party marketing</p> <p>9 consultant about it.</p> <p>10 Q. And who was that?</p> <p>11 A. That's Enmark.</p> <p>12 Q. Okay. That Mr. -- Mr. Falls?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And what did he tell you his research</p> <p>15 about Jupiter showed?</p> <p>16 A. He said that they didn't have -- that they do a</p> <p>17 lot of transportation, but that they didn't have the</p> <p>18 balance sheet and the reputation that -- that Shell had.</p> <p>19 Q. Okay.</p> <p>20 A. Or VP.</p> <p>21 Q. Anything else?</p> <p>22 A. If so, I don't remember.</p> <p>23 Q. Did he give you any type of warning about not</p> <p>24 doing business with him?</p> <p>25 A. He may have. I -- he probably did because he</p> <p style="text-align: right;">Page 148</p>
<p>1 A. These do.</p> <p>2 Q. Do they?</p> <p>3 A. They do.</p> <p>4 Q. Okay. Do you have a memory of the event during</p> <p>5 which he took these notes?</p> <p>6 A. I am not sure if this was a phone call or in</p> <p>7 person meeting. It looks like it was a phone call.</p> <p>8 Q. Do you recall it?</p> <p>9 A. I remember having the phone call, but I don't</p> <p>10 remember -- I remember having this phone call, but I --</p> <p>11 yes. Well, I remember having a phone call with Travis</p> <p>12 before meeting with him.</p> <p>13 Q. Okay. And this looks like -- it says at the</p> <p>14 top Jupiter MLP and then what's the next, C or GBR</p> <p>15 potential customer; is that what that says?</p> <p>16 A. Crude by rail potential customer.</p> <p>17 Q. Okay.</p> <p>18 A. And that would be my guess, I -- I didn't write</p> <p>19 these notes.</p> <p>20 Q. Sure. Do these notes refresh your memory of</p> <p>21 anything that you participated in during that</p> <p>22 discussion?</p> <p>23 MR. KORNHAUSER: Objection, form.</p> <p>24 A. Not really, except for the numbers.</p> <p>25 Q. Pardon me?</p> <p style="text-align: right;">Page 147</p>	<p>1 wants us to use big balance sheet companies.</p> <p>2 Q. Okay. Turn to the second page, it looks like</p> <p>3 your notes of the same day probably.</p> <p>4 A. Uh-huh (positive response).</p> <p>5 Q. Handwriting looks similar in style, so I</p> <p>6 presume it is still Tony's notes?</p> <p>7 A. It is.</p> <p>8 Q. Okay. Carl Freemyer, can you tell us who that</p> <p>9 is?</p> <p>10 A. He is the -- he works for BP. He's -- I think</p> <p>11 he is a rail expert.</p> <p>12 Q. Okay. And were you involved in the</p> <p>13 conversation with him?</p> <p>14 A. I was.</p> <p>15 Q. That these notes reflect?</p> <p>16 A. I believe so.</p> <p>17 Q. Okay. It looks like at the top, "Rationale for</p> <p>18 30 percent split of arb," and it says, "Leasing railcars</p> <p>19 for longer than term freight, other risks involved for</p> <p>20 BP side."</p> <p>21 A. Uh-huh (positive response).</p> <p>22 Q. So they are wanting to give you 30 percent and</p> <p>23 they take 70 percent of the arb?</p> <p>24 A. That's correct.</p> <p>25 Q. And then it goes down and says, "Destination</p> <p style="text-align: right;">Page 149</p>

<p>1 Q. So as of that date we know it was all complete 2 and ready to go, right?</p> <p>3 A. That would be my understanding, but I am not 4 positive.</p> <p>5 Q. If there was anything that remained to be done 6 to have that rail yard fully operational, it would have 7 been noted in these reports wouldn't it?</p> <p>8 A. Nick Eldridge, who typically is our -- or who 9 is our facilities guy, sometimes has a -- an ability to 10 say that things are more complete than are.</p> <p>11 Q. Well, I have been seeing week after week after 12 week of reports and they are very detailed about what 13 electricians can't run wire because of the conduits are 14 muddy and they have a lot of is nitty gritty on it.</p> <p>15 A. Yep.</p> <p>16 Q. Is that what you normally see?</p> <p>17 A. Also, I don't ever really read these reports 18 so.</p> <p>19 Q. Okay. Do you know of anything that hasn't -- 20 wasn't done that prevented the facility to be 21 operational by December 11th?</p> <p>22 A. Operational or we hadn't -- I mean, 23 construction, I don't know, but operational we hadn't 24 ever seen trains and we also to my knowledge received 25 that pollution legal liability form.</p> <p style="text-align: right;">Page 218</p>	<p>1 would have been about that time frame --</p> <p>2 Q. Do you --</p> <p>3 A. -- the one in the same.</p> <p>4 Q. I'm sorry. Do you remember Chris responding to 5 you?</p> <p>6 A. I don't.</p> <p>7 Q. Do you remember anybody responding to you?</p> <p>8 A. I don't.</p> <p>9 Q. Do you -- did you go to look to see what was in 10 your INS system?</p> <p>11 A. I did not personally, no.</p> <p>12 Q. Okay. Did you talk to anybody -- well, let me 13 ask you this. Did you -- as of December 1st of 2018, 14 did you do anything to confirm whether or not there was 15 anything that would prohibit the operation of the 16 facility other than train cars were not there?</p> <p>17 A. I don't remember as of December 1st, but I 18 remember I did have a -- I did tell Chris on the phone 19 once or at least that as a reminder about that pollution 20 legal liability.</p> <p>21 MR. LANTER: Okay. I'm going to object 22 your answer as not responsive.</p> <p>23 THE WITNESS: Why is that?</p> <p>24 Q. My question was as of December 1st, are you -- 25 do you have personal knowledge that there was anything</p> <p style="text-align: right;">Page 220</p>
<p>1 Q. When did you first hear that you hadn't 2 received the pollution liability policy form?</p> <p>3 A. I don't remember.</p> <p>4 Q. Who -- who brought that to your attention?</p> <p>5 A. Our -- I believe it was our legal staff.</p> <p>6 Q. Which legal staff?</p> <p>7 MR. KORNHAUSER: I am going to -- I am 8 going to instruct you not to answer any questions to the 9 extent that they require to divulge attorney-client 10 communications. If you can answer them based upon other 11 information then you can answer.</p> <p>12 THE WITNESS: Okay.</p> <p>13 MR. KORNHAUSER: But with that exception.</p> <p>14 MR. LANTER: I'm not asking what your 15 lawyers told you. I am asking you when you found out.</p> <p>16 MR. KORNHAUSER: Hold on. To the extent 17 that you are going to have to divulge a conversation you 18 had with your law firm and your lawyers to be able to 19 answer that question, don't answer it.</p> <p>20 THE WITNESS: Okay.</p> <p>21 MR. KORNHAUSER: And -- and if you have 22 other information that allows you to answer it then you 23 can, but if you can't then don't.</p> <p>24 A. I don't remember specifically. I do remember I 25 sent Chris, I believe, an e-mail to that regard so it</p> <p style="text-align: right;">Page 219</p>	<p>1 missing that would have been necessary for that facility 2 to be operational?</p> <p>3 MR. KORNHAUSER: Objection, form.</p> <p>4 A. Personal knowledge?</p> <p>5 Q. Yes.</p> <p>6 A. That wasn't conveyed to me by somebody else, 7 you are saying?</p> <p>8 Q. Yes.</p> <p>9 A. I guess the fact that we had no train, so we 10 couldn't operate at the location.</p> <p>11 Q. So the only thing stopping you from operating 12 the facility that you know of on December 1st was lack 13 of trains?</p> <p>14 A. Besides what was told from me from other people 15 in the company, yes.</p> <p>16 Q. Who would the other people in the company be 17 that told you other things?</p> <p>18 A. That would be our legal staff.</p> <p>19 Q. Which person?</p> <p>20 A. Alan Aronowitz.</p> <p>21 Q. Uh-huh (positive response). Anybody else?</p> <p>22 A. Not that I remember.</p> <p>23 Q. And if he was wrong and there was pollution 24 liability coverage in effect as of December 1st that met 25 the five million dollar requirement then there would be</p> <p style="text-align: right;">Page 221</p>

<p>1 nothing that you know of that would prevent -- had</p> <p>2 prevented you from operating that facility other than</p> <p>3 the lack of trains?</p> <p>4 A. To my knowledge, yes.</p> <p>5 MR. LANTER: Okay. I am going to hand you</p> <p>6 Exhibit 75.</p> <p>7 (Exhibit 75 marked.)</p> <p>8 Q. Do you recognize that document?</p> <p>9 A. I do.</p> <p>10 Q. And what is it?</p> <p>11 A. It's our notice of force majeure.</p> <p>12 Q. Signed by you?</p> <p>13 A. It was.</p> <p>14 Q. Does it mention anything about not having a</p> <p>15 pollution liability policy?</p> <p>16 A. No, it does not.</p> <p>17 Q. All right. Do you still have the terminal</p> <p>18 services agreement in front of you, which is Exhibit 13?</p> <p>19 A. I do.</p> <p>20 Q. If you look at Section 8.3, starting on Page 14</p> <p>21 going over to 15, you see that provision down there,</p> <p>22 remedies for default?</p> <p>23 A. Yes.</p> <p>24 Q. Did your company ever send Maalt a default</p> <p>25 notice as it is used in this paragraph stating that you</p> <p style="text-align: right;">Page 222</p>	<p>1 remember that term? You mentioned it in your force</p> <p>2 majeure letter.</p> <p>3 A. Okay.</p> <p>4 Q. And it's your position that once that facility</p> <p>5 is complete that you can simply withhold the written</p> <p>6 notice that's mentioned in that paragraph, so as to</p> <p>7 delay or eliminate your company's obligation to honor</p> <p>8 its obligations under the contract?</p> <p>9 MR. KORNHAUSER: Objection, form.</p> <p>10 A. Say that again, I am sorry.</p> <p>11 Q. Sure. Is it your position that once the</p> <p>12 facility is complete you can merely withhold that letter</p> <p>13 in an effort so that you don't have to comply with the</p> <p>14 terms of the contract?</p> <p>15 MR. KORNHAUSER: Objection, form.</p> <p>16 A. I -- I mean, I am not sure I have a position.</p> <p>17 I mean, I rely on our lawyers to kind of make or to have</p> <p>18 -- to tell me what the contract says.</p> <p>19 Q. Well, I am asking you your thoughts, do you</p> <p>20 believe -- is it your position as you sit here today</p> <p>21 that you can simply withhold that written notice and</p> <p>22 claim that you don't have to honor your obligations</p> <p>23 because you haven't sent that written notice?</p> <p>24 MR. KORNHAUSER: Objection, form.</p> <p>25 A. Just for no reason?</p> <p style="text-align: right;">Page 224</p>
<p>1 don't have a pollution liability policy in place and</p> <p>2 have 30 days from your receipt of the default notice to</p> <p>3 cure that?</p> <p>4 MR. KORNHAUSER: Are you asking if he</p> <p>5 personally?</p> <p>6 MR. LANTER: Mr. Merrill, did you</p> <p>7 understand my question?</p> <p>8 THE WITNESS: Honestly, I don't remember</p> <p>9 your question fully, sir.</p> <p>10 MR. LANTER: Would you read it back,</p> <p>11 please.</p> <p>12 (Requested portion read back.)</p> <p>13 A. Okay. We are just talking about 8.3?</p> <p>14 Q. Yeah the default notice as required by that</p> <p>15 section.</p> <p>16 A. Okay.</p> <p>17 MR. KORNHAUSER: Objection form.</p> <p>18 Q. Did your company -- did your company ever send</p> <p>19 one to Maalt?</p> <p>20 A. Not that I am aware of.</p> <p>21 Q. Okay. Now, a lot of noise has been made in</p> <p>22 this lawsuit about the environmental operations</p> <p>23 commencement date.</p> <p>24 A. Uh-huh (positive response).</p> <p>25 Q. Which is referenced on Page 5 of that, do you</p> <p style="text-align: right;">Page 223</p>	<p>1 Q. Yeah.</p> <p>2 MR. KORNHAUSER: Objection, form.</p> <p>3 A. No, it's not my position.</p> <p>4 Q. Okay. Do you think it would be reasonable to</p> <p>5 withhold that written notice once the facility is</p> <p>6 complete just because you just don't want to have to pay</p> <p>7 your minimum monthly obligation?</p> <p>8 MR. KORNHAUSER: Objection form. Oh,</p> <p>9 you're arguing with him now, Jim. Ask him a proper</p> <p>10 question.</p> <p>11 MR. LANTER: No, I am going to ask this</p> <p>12 question. I have every right to.</p> <p>13 MR. KORNHAUSER: It is inappropriate.</p> <p>14 MR. LANTER: It's inappropriate for you to</p> <p>15 interrupt me except for to make the objection form so.</p> <p>16 MR. KORNHAUSER: It is inappropriate.</p> <p>17 MR. LANTER: I'm going to ask him my</p> <p>18 questions. Mr. Merrill, answer my question, please.</p> <p>19 THE WITNESS: I'm sorry, would you say it</p> <p>20 again.</p> <p>21 MR. LANTER: Would you repeat my last</p> <p>22 question, Patricia.</p> <p>23 (Requested portion read back.)</p> <p>24 MR. KORNHAUSER: Objection, form.</p> <p>25 A. No.</p> <p style="text-align: right;">Page 225</p>

<p>1 options or if they could provide rail services for us. 2 Q. And what was his response? 3 A. He said that he would have to talk with his 4 rail people. And several -- I don't remember the time 5 frame, but that was on the immediate call. But it was 6 that they had no -- they didn't see -- I don't remember. 7 Let me think about this for a second. I am sorry. I -- 8 I mean, my -- my recollection is that they didn't see it 9 as a feasibility -- as a feasible option. 10 Q. Okay. Now Arm is a midstream marketer, right? 11 A. They are. 12 Q. And they are not a logistics company? 13 A. They -- I don't know all of their businesses. 14 Q. Okay. Have you ever found out that they do 15 provide logistic services to anybody? 16 A. I am not aware of those. 17 Q. Their website doesn't seem to indicate that 18 they do, did you ever look at that? 19 A. I -- I don't -- 20 MR. KORNHAUSER: Objection, form. 21 Q. Okay. Did you ever go on the KCS website and 22 pull up the information they have on all of their crude 23 oil terminals? 24 A. I don't remember. 25 Q. Okay. If you go on their website there is a</p> <p style="text-align: right;">Page 230</p>	<p>1 do it without giving it a tray first? 2 MR. KORNHAUSER: Objection, form. 3 A. I mean, I don't know that we made the decision 4 not to do it. 5 Q. But you didn't think they would be as 6 interested because you are not as a big of a player as 7 say Shell? 8 A. We thought that the other parties would be able 9 to get the deal done faster and they knew what they were 10 doing. That's why we were relying on them. 11 MR. LANTER: Exhibit 78. 12 (Exhibit 78 marked.) 13 Q. Can you tell me what that is? 14 A. Okay. This must be my notes of the 15 conversation I had with Les Werme at Arm. 16 Q. Okay. Dated was January 5th, right? 17 A. That's correct. 18 Q. Did you meet with him or just by phone? 19 A. By phone. 20 Q. And then your second line in says, "No unit 21 train capabilities make it more difficult." 22 A. Yes. 23 Q. Why did you write that down, what was he 24 telling you? 25 A. He was telling me that the rails -- that the</p> <p style="text-align: right;">Page 232</p>
<p>1 place you can click that shows a map and has each one of 2 their crude terminals and if you click or hover on the 3 little black dot it pulls up the contact information, 4 you never looked at that? 5 A. Not that I remember. 6 Q. Did you ever or did anybody in your company 7 ever make contact with KCS to find out what the capacity 8 of their crude terminals on the Gulf Coast was? 9 A. KCS's terminals? 10 Q. Yes. 11 A. No. 12 Q. Okay. Why not? 13 A. It was our viewpoint that these larger 14 providers had a better relationship with the railroad 15 and so to -- for us making a cold call, they had 16 relationships with them. It would be better served to 17 use those contacts. 18 Q. Okay. So you decided to not do it just for 19 that reason, no other reason? 20 A. I -- I don't -- I honestly don't remember not 21 doing it. That would just be my rationale if they did. 22 Q. Okay. So you don't have memory of not doing 23 it, but you don't have memory of doing it either do you? 24 A. No. 25 Q. And you didn't -- you made the decision not to</p> <p style="text-align: right;">Page 231</p>	<p>1 railroads didn't have an appetite for the size train 2 that we could put together. 3 Q. Is that because it would have to be a manifest 4 train? 5 A. Yes. 6 Q. Okay. When he says, "Makes it more difficult," 7 were y'all talking about the fact that it would cost 8 more to run cars on a manifest train than on a unit 9 train? 10 A. I honestly don't know what he was referring to. 11 Q. You didn't ask him? 12 A. I -- I don't remember. 13 Q. Okay. There is no memory one way or the other? 14 A. I don't. 15 MR. LANTER: Can you tell me what 16 Exhibit 79 is? 17 (Exhibit 79 marked.) 18 A. I believe these are slides that were provided 19 to our board of directors. 20 Q. And do you know who prepared these slides? 21 A. Tony Wroten did under my direction. 22 Q. Okay. When was this prepared and presented? 23 A. I don't remember. 24 Q. If you look an Page 2. 25 A. Uh-huh (positive response).</p> <p style="text-align: right;">Page 233</p>

<p>1 Q. Under key assumptions, it says, "Based on 2 forward pricing per CME as of 8/20/2018." 3 A. Okay. 4 Q. Does that bring it back in time frame? 5 A. It most likely would have been around that time 6 frame. 7 Q. Okay. And why were you making this 8 presentation to your board? 9 A. We were giving them an update on another topic 10 and they wanted a -- an update on this as well. 11 Q. Was this the first time you had made such a 12 presentation to your board? 13 A. I don't remember. 14 Q. Okay. Don't remember doing an earlier 15 presentation along these lines saying May or June when 16 the topic first came up? 17 A. I -- I don't remember the extent to which we 18 talked -- or we discussed this option with the board. 19 Q. Okay. Who owns Sequitur Permian, LLC, the 20 company that did the terminal services agreement with 21 Maalt? 22 A. It is owned by Sequitur Energy Resources, LLC. 23 Q. Okay. And is SEM Operating also owned by 24 Sequitur Energy Resources? 25 A. It is.</p> <p style="text-align: right;">Page 234</p>	<p>1 on any issues in this case. 2 MR. LANTER: Well, are you instructing him 3 not to answer? 4 MR. KORNHAUSER: I am going for instruct 5 him not to answer. 6 MR. LANTER: Okay. 7 Q. What is your -- do you have a position within 8 Sequitur Energy Resources the parent company? 9 A. Most of our staff is hired through Sequitur -- 10 SEM -- SEM Operating. 11 Q. Okay. So you have a position with that 12 company? 13 A. Yes. 14 Q. And what is that position? 15 A. Vice president and chief financial officer. 16 Q. Okay. With respect to Exhibit 79, where were 17 you getting the numeric number for rail cost? 18 A. I would have to go -- I would have to know when 19 it was exactly. But it would be whichever contract we 20 were -- whichever party we were going to be using as our 21 JV partner. 22 Q. Okay. And then you have transloading fee of 23 \$2.50. How did you come up with that number in August 24 of 2018? 25 A. \$2.50. So the \$2.50, it includes -- it</p> <p style="text-align: right;">Page 236</p>
<p>1 Q. And who are the owners of Sequitur Energy 2 Resources? 3 A. Sequitur Energy Resources is owned -- is our 4 private equity investors, ACON Investments. 5 Q. Uh-huh (positive response). Okay. 6 What percent do they own? 7 A. They and their partners own, I would say, my 8 estimate would be 99 percent. 9 Q. Does Mr. Van den Bold own any interest in the 10 company? 11 A. He does as I understand it. 12 Q. And do you own any interest in the company? 13 A. No. 14 Q. Do you have any options or rights to obtain an 15 interest in the company at any time? 16 A. Right or options to obtain, upon sell. 17 Q. Okay. Have you ever -- has your company ever 18 or the parent company ever considered a public offering 19 of its shares? 20 A. We have. 21 Q. And what happened with that there? 22 MR. KORNHAUSER: Hold on here. I don't see 23 how any of this is relevant about the company's desire 24 to sell or be bought or any of that. That's all private 25 and confidential. I don't see that having any bearing</p> <p style="text-align: right;">Page 235</p>	<p>1 includes a piece that we put in there for a 2 reimbursement on our part for the money that we put into 3 the Barnhart facility. 4 Q. Talking about your capital cost? 5 A. Yes. 6 Q. So you have a transloading fee of \$50 with 7 Maalt per barrel, right? 8 A. Yes. 9 Q. And then you added a dollar per barrel as an 10 attempt to recap -- recoup your capital cost? 11 A. That's correct. 12 Q. Was this presentation made for the purpose of 13 getting board approval to do a deal with somebody? 14 A. I honestly don't remember what the purpose of 15 it was. 16 Q. If we look at these -- these numbers regarding 17 the spread and so forth, would we find these numbers in 18 the spreadsheets that you told me you authored earlier? 19 A. You would find something close to it. But 20 those numbers changed over time, so it may be something 21 different at the point that you have it. 22 Q. Okay. Now, you are talking in this exhibit 23 that there was a \$20 spread between LLS and Mid-Crush? 24 A. Mid-Cush, yes. 25 Q. And if that spread reduced to say \$10, what you</p> <p style="text-align: right;">Page 237</p>

<p>1 needed to do, they had the experience and they access to</p> <p>2 cars, and so we were relying upon that when we made our</p> <p>3 final decision to sign the TSA.</p> <p>4 Q. Okay.</p> <p>5 A. And to actually spend the remainder of the cap</p> <p>6 X at that point.</p> <p>7 Q. Did Mr. Ince or did Mr. Favors promise or</p> <p>8 represent to Sequitur that trains and railcars would be</p> <p>9 available?</p> <p>10 MR. LANTER: Objection, form.</p> <p>11 Q. To your knowledge?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. What do you recall specifically, as best</p> <p>14 you can, being told by Mr. Favors and Mr. Ince in that</p> <p>15 regards?</p> <p>16 A. I remember with railcars -- this is just in</p> <p>17 regards to railcars?</p> <p>18 Q. Yes, sir.</p> <p>19 A. That he represented that he could help us find</p> <p>20 railcars or put us in contact with people who could find</p> <p>21 railcars.</p> <p>22 Q. And did he tell you that trains and railcars</p> <p>23 were available?</p> <p>24 MR. LANTER: Objection, form.</p> <p>25 A. He said it would be a difficult thing to do,</p> <p style="text-align: right;">Page 246</p>	<p>1 transloaders that are no longer in market.</p> <p>2 MR. LANTER: Objection nonresponsive.</p> <p>3 Q. But for the representations and promises that</p> <p>4 were made by Mr. Ince and Mr. Favors to Sequitur about</p> <p>5 the availability trains and railcars, would Sequitur</p> <p>6 have signed the TSA?</p> <p>7 A. No.</p> <p>8 MR. KORNHAUSER: We pass the witness.</p> <p>9 EXAMINATION</p> <p>10 BY MR. LANTER:</p> <p>11 Q. Did your company purchase the transloaders</p> <p>12 before you signed the TSA?</p> <p>13 A. We signed purchase orders for the, I believe,</p> <p>14 but I can't verify that.</p> <p>15 Q. Before the TSA?</p> <p>16 A. Yes.</p> <p>17 Q. And your company has in-house lawyers, right?</p> <p>18 A. That's correct.</p> <p>19 Q. And what's your -- what's your education?</p> <p>20 A. I've got a finance degree and an MBA.</p> <p>21 Q. Okay. So you have people who are highly</p> <p>22 educated people, right?</p> <p>23 A. Yes.</p> <p>24 Q. You are used to doing due diligence?</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 248</p>
<p>1 but that we could -- but that we could do it.</p> <p>2 Q. Okay. Did he tell you from whom that trains or</p> <p>3 railcars would be available?</p> <p>4 A. I don't know that he specifically specified</p> <p>5 whom, but he did tell us in an e-mail, I believe, that</p> <p>6 -- that Jonas Struthers would be able to help us.</p> <p>7 Q. Okay. And did you rely upon these promises and</p> <p>8 representations?</p> <p>9 MR. LANTER: Objection, form.</p> <p>10 A. Yes we did.</p> <p>11 Q. Okay. Did these promises and representations</p> <p>12 prove to be true?</p> <p>13 A. For the railcars?</p> <p>14 Q. Yes and trains?</p> <p>15 A. And what do you mean by trains?</p> <p>16 Q. Well, the power?</p> <p>17 A. The power? Oh, no they did not turn out to be</p> <p>18 true.</p> <p>19 Q. Okay. Has Sequitur suffered damages as a</p> <p>20 result of the promises and representations that you just</p> <p>21 stated not being true?</p> <p>22 MR. LANTER: Objection, form.</p> <p>23 A. Yes, we have spent a lot of money. We have</p> <p>24 spent millions and millions of dollars in cap X on these</p> <p>25 -- upgrading the faculties, which is the sub-cost and</p> <p style="text-align: right;">Page 247</p>	<p>1 Q. You are used to making your decisions based on</p> <p>2 your own due diligence and research, aren't you?</p> <p>3 A. We are.</p> <p>4 Q. Okay. And you had every capability of</p> <p>5 determining whether or not there were railcars available</p> <p>6 on your own, didn't you?</p> <p>7 MR. KORNHAUSER: Objection, form.</p> <p>8 A. We would have had to relied on somebody at some</p> <p>9 point.</p> <p>10 MR. LANTER: Objection nonresponsive.</p> <p>11 Q. You had the capability of making phone calls</p> <p>12 and asking people if railcars were available, didn't</p> <p>13 you?</p> <p>14 MR. KORNHAUSER: Objection, form.</p> <p>15 A. Asking people on the -- yes.</p> <p>16 Q. Yes. Earlier in your deposition I asked you</p> <p>17 about roughly about 10 to 15 railcar manufacturers and</p> <p>18 leasing companies and you said you didn't recall a</p> <p>19 single one of them; that's true isn't it?</p> <p>20 A. That is true.</p> <p>21 Q. But you certainly could have couldn't you?</p> <p>22 A. I could have called them, yes.</p> <p>23 Q. Okay. And you said the -- when did those</p> <p>24 representations that your lawyers asked you about take</p> <p>25 place, was that May and June?</p> <p style="text-align: right;">Page 249</p>

1 A. That was May and June through -- through the
2 signing of the TSA.
3 Q. Okay. And do you have the letter of intent in
4 that stack?
5 A. I sure do. I'm sorry, let me --
6 MR. LANTER: Pull it out and let me see
7 that.
8 THE WITNESS: Oh, wait no letter of intent.
9 MR. KORNHAUSER: Did you remark it, I've
10 got it.
11 MR. LANTER: Yeah I believe it is. And I
12 can find it in my --
13 THE WITNESS: You gave me too many papers.
14 MR. LANTER: -- briefcase, but it might
15 take longer.
16 THE WITNESS: Do you think what exhibit it
17 is by chance?
18 MR. LANTER: Yeah not offhand I don't.
19 There it is. Exhibit 6.
20 THE WITNESS: Okay. Well, you gave it to
21 me later though, right?
22 MR. LANTER: Here, let's do this, why don't
23 we remark it. I will just pull it out of this. Let's
24 go back. We will talk about it as being Exhibit 6
25 today.

Page 250

1 THE WITNESS: Okay. Perfect. Thank you.
2 Q. And your letter of intent, I mean, let's kind
3 of shuffle that, it is dated June 1?
4 A. Yes.
5 Q. 2018, right?
6 A. That's -- I am -- I am not sure, yes.
7 Q. And when you signed this letter of intent, you
8 agreed with Paragraph 8, did you not?
9 A. We -- we signed it.
10 Q. In fact, you wrote it, didn't you? Your --
11 your company wrote it, didn't it?
12 A. I don't remember.
13 Q. Okay. It's not on Maalt or Vista letterhead is
14 it?
15 A. I -- I can I see the --
16 MR. LANTER: Sure.
17 A. No, it is not.
18 Q. Okay. And you signed it first asking Maalt or
19 Vista to execute it as well, didn't you?
20 A. I did.
21 Q. Once you had the introduction made to Jupiter,
22 you guys took it from there and had all of your
23 negotiations just between Sequitur and Jupiter, correct?
24 A. On terms of commercial terms, yes.
25 Q. And you conducted your own due diligence of --

Page 251

1 of Jupiter didn't you?
2 A. We did some, yes.
3 Q. But then less despite your own due diligence
4 and the research you did in that company you decided to
5 make the business decision to move forward with whoever
6 dealings you had with it, right?
7 A. Say that again, I am sorry.
8 Q. Yes. Despite your own due diligence and the
9 research you did into Jupiter, your company made the
10 decision to move forward and do business with it?
11 A. We -- we did make the decision to move forward
12 with the agreement.
13 MR. LANTER: Okay. Pass the witness.
14 MR. KORNHAUSER: We will pass the witness.
15 THE VIDEOGRAPHER: The time is 5:25. We
16 are off the record.
17 [Proceedings concluded at 5:25 p.m.]
18
19
20
21
22
23
24
25

Page 252

1 CORRECTION SHEET
2 WITNESS NAME: BRADEN MERRILL DATE: 11/19/2019
3 PAGE/LINE CHANGE REASON
4 _____
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15 _____
16 _____
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23 _____
24 _____
25 Job No. TX3569876

Page 253

1 SIGNATURE PAGE
2 I, BRADEN MERRILL, have read the foregoing
3 deposition and hereby affix my signature that same is
4 true and correct, except as noted on the correction
5 sheet.
6
7 BRADEN MERRILL
8 THE STATE OF TEXAS)
9 COUNTY OF _____)
10
11 Before me, _____ on this day
12 personally appeared BRADEN MERRILL, known to me (or
13 proved to me under oath or through
14 _____) (description of identity
15 card or other document) to be the person whose name is
16 subscribed to the foregoing instrument and acknowledged
17 to me that they executed the same for the purposes and
18 consideration therein expressed.
19 Given under my hand and seal of office this ____ day
20 of _____, _____.
21
22
23 NOTARY PUBLIC IN AND FOR
24 THE STATE OF _____
25 Commission Expires: _____

Page 254

1 deposition officer at the time said testimony was taken,
2 the following includes counsel for all parties of
3 record:
4 Mr. James Lanter and Mr. Paul O. Wickes,
5 Attorneys for Plaintiff
6 Maalt, LP
7 Mr. Matthew A. Kornhauser and Mr. Christopher
8 J. Kronzer, Attorneys for Defendant
9 Sequitur Permian, LLC
10
11 I further certify that I am neither counsel for,
12 related to, nor employed by any of the parties or
13 attorneys in the action in which this proceeding was
14 taken, and further that I am not financially or
15 otherwise interested in the outcome of the action.
16 Further certification requirements pursuant to Rule
17 203 of TRCP will be certified to after they have
18 occurred.
19 Certified to by me this 9th day of December, 2019.
20
21
22
23
24
25

Page 256

1 CAUSE NO. 19-003
2 MAALT, LP, § IN THE DISTRICT COURT OF
3 §
4 Plaintiff, §
5 §
6 VS. § IRION COUNTY, TEXAS
7 §
8 SEQUITUR PERMIAN, LLC, §
9 §
10 Defendant. § 51st JUDICIAL DISTRICT
11 REPORTER'S CERTIFICATION
12 DEPOSITION OF BRADEN MERRILL
13 NOVEMBER 19, 2019
14
15 I, Patricia Palmer, Certified Shorthand Reporter in
16 and for the State of Texas, hereby certify to the
17 following:
18 That the witness, BRADEN MERRILL, was duly sworn by
19 the officer and that the transcript of the oral
20 deposition is a true record of the testimony given by
21 the witness;
22 That the deposition transcript was submitted on
23 _____, to the witness or to the
24 attorney for the witness for examination, signature and
25 return to me by _____;
26 That the amount of time used by each party at the
27 deposition is as follows:
28 Mr. James Lanter - 05 HRS:31 MINS
29 Mr. Paul O. Wickes - 00 HRS:00 MINS
30 Mr. Matthew A. Kornhauser - 00 HRS:04 MINS
31 Mr. Christopher J. Kronzer - 00 HRS:00 MINS
32
33 That pursuant to information given to the

Page 255

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP
2 The original deposition was/was not returned to the
3 deposition officer on _____;
4 If returned, the attached Changes and Signature
5 page contains any changes and the reasons therefor;
6 If returned, the original deposition was delivered
7 to Mr. James Lanter, Custodial Attorney;
8 That § _____ is the deposition officer's
9 charges to the Plaintiff for preparing the original
10 deposition transcript and any copies of exhibits;
11 That the deposition was delivered in accordance
12 with Rule 203.3, and that a copy of this certificate was
13 served on all parties shown herein on
14 _____, and filed with the Clerk.
15 Certified to by me this ____ day of
16 _____, _____.
17
18
19
20
21
22
23
24
25

Page 257

June 1, 2018

Vista Proppants and Logistics, LLC
4413 Carey St.
Ft. Worth, Texas 76119

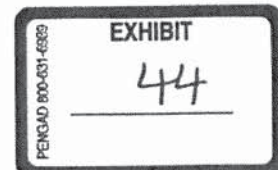
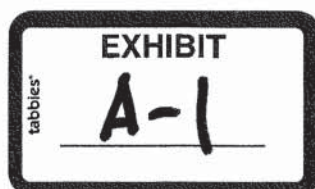
Attn.: Jon Ince

Re: Letter of Intent

Ladies and Gentlemen:

Sequitur Permian, LLC ("Sequitur") and Vista Proppants and Logistics, LLC ("Vista") intend to enter into a transaction pursuant to a service agreement covering Vista's (or an affiliate's) provision of the Service (as defined in Attachment "A" hereto) to Sequitur. Pending the preparation and execution of a Definitive Agreement (as hereinafter defined), this letter will confirm the intent of such parties ("Parties") to enter into the contemplated transaction ("Transaction") to be governed by the Definitive Agreement in accordance with the terms and conditions set forth in this letter. The Parties agree as follows:

1. Term Sheet. The Parties intend to negotiate in good faith a mutually acceptable agreement governing the Service. To the extent there is any conflict between the Term Sheet and this letter, this letter shall control.
2. Definitive Agreement. The Parties shall endeavor to incorporate the terms and conditions expressed herein in a mutually acceptable definitive agreement (the "Definitive Agreement," whether one or more) no later than June 26, 2018 ("LOI Term"), unless extended by the Parties in writing, which the Parties would expect to do if the negotiations toward a Definitive Agreement and other relevant agreements and activities have sufficiently progressed. In the event the Parties do not agree upon and execute the Definitive Agreement by the end of the LOI Term, this letter (and the understandings set forth herein) shall be deemed terminated, and neither Party shall have any further obligation to the other Party, provided, however, that the provisions of Section 3 shall survive the termination of this letter for a period of one (1) year.
3. Confidentiality. The existence of this letter (and its contents) are intended to be confidential and are not to be discussed with or disclosed to any third party, except (i) with the express prior written consent of the other Party hereto, (ii) as may be required or appropriate in response to any summons, subpoena or discovery order or to comply with any applicable law, order, regulation or ruling or (iii) as the Parties or their representatives (who shall also be bound by the confidentiality hereof) reasonably deem appropriate in order to conduct due diligence and other investigations relating to the contemplated Transaction.
4. Exclusive Dealing Period. The Parties agree that from the date of this letter through the end of the LOI Term, neither Party nor any of its controlled affiliates shall, directly or indirectly, enter into any agreements with any other person or entity regarding any transaction similar to the Service or the Transaction or any other transaction related, in whole or in part, to the Service, except as



Vista Proppants and Logistics, LLC
June 1, 2018
Page 2

approved in writing by the other Party. Additionally, neither Vista nor any of its controlled affiliates shall, directly or indirectly, enter into any negotiations, discussions or agreements with BP, Valero, Sunoco, NuStar or Shell, or any of their respective affiliates, for provision of the Service to them, or any other transaction similar to the Service, within 75 miles of Vista's rail facility in Barnhart, Texas, except as approved in writing by the Sequitur. Nothing in this section shall prohibit Vista from selling any service or product more than 75 miles from its rail facility in Barnhart, Texas.

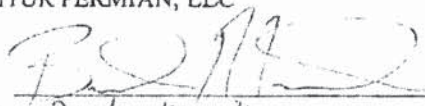
5. Expenses. Each Party shall bear its own costs associated with negotiating and performing under this letter.
6. Due Diligence. Following the execution of this letter until the end of the LOI Term, the Parties and their designated representatives will conduct due diligence reviews to analyze the feasibility of the contemplated Transaction, which reviews have not yet been conducted and completed.
7. Approval. No Party shall be bound by any Definitive Agreement relating to the Transaction until (a) each Party has completed its due diligence to its satisfaction, (b) such Party's senior management, or other governing body or authorized person, shall have approved the Definitive Agreement, (c) such Party shall have executed the Definitive Agreement, and (d) all conditions precedent to the effectiveness of any such Definitive Agreement shall have been satisfied, including obtaining any and all requisite government or third party approvals, licenses and permits (which are satisfactory in form and substance to each Party in its sole discretion), if such approvals, licenses and permits are required.
8. No Oral Agreements. Subject to the foregoing, this letter (and the Term Sheet) sets out the Parties' understanding as of this date, there are no other written or oral agreements or understandings among the Parties.
9. Governing Law. THIS LETTER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES.
10. Assignment. Neither Party shall assign its rights or obligations under this letter without the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed. Any attempted assignment in contravention of this paragraph shall be null and void.
11. Binding Status. Except as to Sections 3 through 10 (which are intended to be binding upon execution and delivery of this letter by both Parties), the Parties understand and agree that this letter (a) is not binding and sets forth the Parties' current understanding of agreements that may be set out in a binding fashion in the Definitive Agreement to be executed at a later date and (b) may not be relied upon by either Party as the basis for a contract by estoppel or otherwise, but rather evidences a non-binding expression of good faith understanding to endeavor, subject to completion of due diligence to the Parties' satisfaction, to negotiate a mutually agreeable Definitive Agreement.

Vista Proppants and Logistics, LLC
June 1, 2018
Page 3

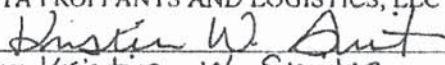
If the terms and conditions of this letter are in accord with your understandings, please sign, and return the enclosed counterpart of this letter to the undersigned, by no later than close of business on June 4, 2018, after which date, if not signed and returned, this letter shall be null and void.

Very truly yours,

SEQUITUR PERMIAN, LLC

By: 
Name: Braden Merrill
Title: VP & CEO

AGREED
this 5 day of June 2018 by:

VISTA PROPPANTS AND LOGISTICS, LLC
By: 
Name: Kristin W. Smith
Title: CEO

ATTACHMENT "A"
to
Letter of Intent
(Term Sheet)

Party A:	Vista Proppants and Logistics, LLC (and any designated affiliates)
Party B:	Sequitur Permian, LLC (and any designated affiliates)
Facility:	Barnhart Railyard
Location:	Barnhart Loading Facility 44485 W. Hwy 67 Barnhart, TX 76930
Term:	September 2018 through December 2019.
Renewal:	Subject to the Survival clause below, the Term may be renewed and extended by Party B for successive 12-month periods by written notice to Party A at least 60 days prior to the end of the then Term, as it may have been previously renewed and extended.
Products:	Crude oil or other hydrocarbons products owned or controlled by Party B or which Party B is obligated to market or deliver.
Commitment:	For the Term, as it may be extended, Party A will limit use of its Barnhart Railyard property and Facility to the sole purpose of loading Party B's Products. Party A will load Products provided by Party B at the Facility, whether from pipeline or trucks.
Service:	Party A's loading of Party B's Products at Location/Facility and related services, including maintenance.
Rate:	\$1.50/barrel of Products loaded into railcars at the Location/Facility.
Volume:	Party B agrees to provide Products sufficient to fill an average of no fewer than sixteen railcars per day (11,424 barrels) during each calendar month. If Party B does not meet its minimum volume obligation for a calendar month, Party A will be compensated in such month, as that month's total settlement, in an amount equal to at least the Rate times 11,424 barrels, or \$17,136, times the number of days in that month so that Party A will be paid as if the minimum volume had been provided by Party B. Should Party B provide more Products than its minimum volume obligation, Party A shall be compensated at the Rate times the excess volume.
Capital Investment:	In no event shall Party A be obligated to provide any capital investment necessary to perform Service. To the extent more capital investment is needed to satisfy incremental Volume, the financial burden required to equip the facility shall be borne by Party B.

Phase I: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from trucks such that loading will commence September 1, 2018.

Phase II: Party B will install (or pay to install) equipment (to be owned by Party B) sufficient to load rail cars from pipeline.

Assignability: The Definitive Agreement would be assignable on sale or disposition, and as otherwise negotiated. Any sale of the Facility property would be subject to the Definitive Agreement.

Survival: If the Term is not extended, then when Party A is not utilizing the Barnhart Railyard for the general course of its sand business and desires to use for loading of oil, the terms of the Definitive Agreement may be reinstated by Party B at its option.

Other Terms: The Definitive Agreement will contain customary provisions for transactions similar to the Service or the Transaction, such as mutual representations, warranties, and covenants, conditions precedent, termination, remedies, force majeure, indemnification, and risk of loss.

THIS SUMMARY OF TERMS AND CONDITIONS IS ATTACHMENT "A" TO A LETTER OF INTENT DATED JUNE 1, 2018, AND IS NOT TO BE CONSIDERED SEPARATELY FROM THE LETTER OF INTENT. EXCEPT AS MAY BE SET OUT IN THE LETTER OF INTENT, THE LETTER OF INTENT AND THIS ATTACHMENT "A" ARE NOT INTENDED TO BE COMPLETE AND ALL-INCLUSIVE OF THE TERMS OF THE PROPOSED TRANSACTION, NOR DOES THE LETTER OF INTENT OR THIS ATTACHMENT "A" CREATE A BINDING AND ENFORCEABLE CONTRACT BETWEEN OR COMMITMENT OR OFFER TO ANY PARTY OR PARTIES, EXCEPT TO THE EXTENT PROVIDED IN SECTION 11 OF THE LETTER OF INTENT.



TERMINAL SERVICES AGREEMENT

This TERMINAL SERVICES AGREEMENT (this "Agreement") is made, entered into and effective as of August 6, 2018 (the "Effective Date"), by and between Maalt, LP, a Texas limited partnership ("Terminal Owner"), and Sequitur Permian, LLC, a Delaware limited liability company ("Customer"). Terminal Owner and Customer shall be referred to herein individually as a "Party" and collectively as the "Parties".

RECITALS

WHEREAS, Terminal Owner owns and operates a rail terminal facility located in Barnhart, Texas as more specifically described on Exhibit A-1 hereto on the land more specifically described on Exhibit A-2 hereto (collectively, the "Terminal"), and Customer is engaged in the transportation and marketing of Product; and

WHEREAS, Terminal Owner desires to make available the Terminal to Customer and perform the services set forth in this Agreement, and, on an exclusive basis, Customer desires to utilize the Terminal for the throughput of Product and related services.

AGREEMENT

NOW, THEREFORE, in and for consideration of the premises and mutual covenants contained in this Agreement, Terminal Owner and Customer hereby agree as follows:

ARTICLE 1 DEFINITIONS

For the purposes of this Agreement, capitalized terms used herein will have the meaning assigned to such terms below:

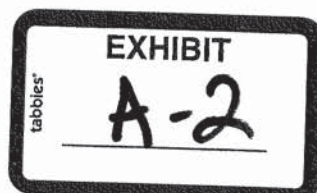
"Actual Quarterly Aggregate Volume" means the sum of the volumes of Product tendered by Customer (or by Customer's third-party customers) for Throughput at the Terminal during the applicable Calendar Quarter.

"Affiliate" means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, Controls, or is Controlled by, or is under common Control with, such Person.

"Agreement" has the meaning given to such term in the Preamble hereto.

"Alternate Service" has the meaning given to such term in Section 8.8. "Alternative Service Notice" has the meaning given to such term in Section 8.8.

"Applicable Law" means any applicable statute, law, regulation, ordinance, rule, judgment, rule of law, order, decree, permit, approval, concession, grant, franchise, license, agreement, requirement, or other governmental restriction or any similar form of decision of, or any provision or condition of any permit, license or other operating authorization issued under any of the foregoing by, or any determination by, any Governmental Authority having or asserting



jurisdiction over the matter or matters in question, whether now or hereafter in effect and in each case as amended (including without limitation, all of the terms and provisions of the common law of such Governmental Authority), as interpreted and enforced at the time in question.

"Barrel" means 42 United States gallons of 231 cubic inches per gallon at sixty degrees Fahrenheit (60° F) and normal atmospheric pressure.

"Business Day" means a Day (other than a Saturday or Sunday) on which banks are open for business in Houston, Texas.

"Calendar Quarter" means a period of 3 consecutive Months beginning on the first day of each January, April, July and October (except for 2018 of the Initial Term, September will be included with October-December 2018). "Calendar Quarterly" shall be construed accordingly.

"Control" means (a) with respect to any Person, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting shares, by contract, or otherwise and (b) with respect to any Product, such Product produced by Customer and owned by it or produced and owned by a Third Party or an Affiliate and with respect to which (i) Customer has the contractual right or obligation (pursuant to a marketing, agency, operating, unit, or similar agreement) to dispose of such Product and (ii) Customer elects or is obligated to dispose of such Product on behalf of the applicable Third Party or Affiliate. "Controlled" shall be construed accordingly.

"Cure Period" has the meaning given to such term in Section 8.3.

"Customer" has the meaning given to such term in the Preamble to this Agreement.

"Customer Parties" means, collectively, Customer, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, customers, and their respective successors and permitted assigns (excluding any Terminal Owner Parties), and individually, a "Customer Party".

"Customer Terminal Modifications" has the meaning given to such term in Section 2.7.

"Day" means a period commencing at 7:00 a.m. Central Standard Time and extending until 7:00 a.m. Central Standard Time on the following calendar day. "Daily" shall be construed accordingly.

"Default Notice" has the meaning given to such term in Section 8.3.

"Defaulting Party" has the meaning given to such term in Section 8.3.

"Delivery Point" means the inlet flange of the applicable railcar.

"Effective Date" has the meaning given to such term in the Preamble to this Agreement.

"Extended Term" has the meaning given to such term in Section 8.1.

"Forecast" has the meaning given to such term in Section 2.6.

"Force Majeure" or "Force Majeure Event" has the meaning given to such term in Section 14.2.

"Governmental Authority" means any federal, state, or local government or any provincial, departmental or other political subdivision thereof, or any entity, body or authority exercising executive, legislative, judicial, regulatory, administrative, legislative, regulatory, taxing or other governmental functions, and any court, department, commission, board, bureau, agency, instrumentality or administrative body of any of the foregoing.

"Group" means either Terminal Owner Parties or Customer Parties, as applicable.

"HSE" has the meaning given to such term in Section 15.4(a).

"HSE Program" has the meaning given to such term in Section 15.4(a).

"Income Taxes" means any income, franchise and similar Taxes.

"Initial Term" has the meaning given to such term in Section 8.1.

"Interest Rate" means an annual rate (based on a three-hundred-sixty (360) Day year) equal to the lesser of (a) two percent (2%) over the prime rate as published under "Money Rates" in the *Wall Street Journal* in effect at the close of the Business Day on which payment was due and (b) the maximum rate permitted by Applicable Law.

"Liabilities" means actions, claims, causes of action, costs, demands, damages, expenses, fines, lawsuits, liabilities, losses, obligations and penalties (including court costs and reasonable attorneys' fees).

"Loss Credit" has the meaning given to such term in Section 7.2(b).

"Loss Allowance" has the meaning given to such term in Section 7.2(a).

"Meter" has the meaning given to such term in Section 5.1.

"Minimum Volume Commitment" has the meaning given to such term in Section 3.1.

"Month" means the period beginning on the first Day of a calendar Month and ending immediately prior to the start of the first Day of the following calendar Month. "Monthly" shall be construed accordingly.

"Non-Defaulting Party" has the meaning given to such term in Section 8.3.

"Party" and "Parties" have the meanings given to such terms in the Preamble to this Agreement.

"Permits" means permits, licenses, consents, clearances, certificates, approvals, authorizations or similar documents or authorities required by any Governmental Authority or pursuant to any Applicable Law and that apply to the Terminal, the Services or a Party.

"Person" means any individual, corporation, limited liability company, partnership, joint venture, unincorporated organization or any other legal entity.

"Phase I Project" has the meaning given to such term in Section 2.7.

"Phase II Project" has the meaning given to such term in Section 2.7.

"PLL" has the meaning given to such term in Section 11.2.

"Product" means crude oil and other liquid hydrocarbon products owned or Controlled by Customer.

"Receipt Point" has the meaning given to such term in Section 7.1.

"Receiving Party" has the meaning given to such term in Section 15.20.

"Regulatory Approval" means any Permit from a Governmental Authority necessary for performance of the Services or the installation of equipment at or operations of the Terminal in connection with the Services, including the following Permits: Spill Prevention, Control, and Countermeasure (SPCC) plan is in place, Storm Water Permit (as it may be required to be amended or updated) issued by the Texas Commission on Environmental Quality (TCEQ) and Permit by Rule (PBR) Air Permit (as it may be required to be amended or updated) issued by TCEQ.

"Representatives" has the meaning given to such term in Section 15.20.

"ROFR Notice" has the meaning given to such term in Section 9.2(b).

"ROFR Offer" has the meaning given to such term in Section 9.2(b).

"ROFR Period" has the meaning given to such term in Section 9.2(a).

"Services" has the meaning given to such term in Section 2.12.

"Shortfall" has the meaning given to such term in Section 3.2(a).

"Shortfall Payment" has the meaning given to such term in Section 3.2(a).

"SPCC" has the meaning given to such term in Section 15.4(a).

"Subsequent Transfer" has the meaning given to such term in Section 9.2(a).

"Subsequently Transferred Interest" has the meaning given to such term in Section 9.2(b).

"Target Terminal Operations Commencement Date" means September 1, 2018, as such date may be extended as mutually agreed in writing by the Parties and subject to Article 14.

"Taxes" means any taxes, assessments, fees, duties or other similar charges imposed by any Governmental Authority, including income, franchise, ad valorem, property, sales, use, excise,

employment, transfer or other charge in the nature of a tax, and any interest, fine, penalty or addition thereto.

“Term” has the meaning given to such term in Section 8.1.

“Terminal” has the meaning given to such term in the Recitals to this Agreement.

“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.

“Terminal Owner” has the meaning given to such term in the Preamble to this Agreement.

“Terminal Owner Parties” means, collectively, Terminal Owner, its Affiliates and its and their equity holders, officers, directors, employees, representatives, agents, contractors, subcontractors, invitees, successors and permitted assigns (excluding any Customer Parties), and individually, a “Terminal Owner Party”.

“Third Party” means any Person other than a Terminal Owner Party and Customer Party.

“Throughput” means the delivery of Product from trucks or pipeline into the Terminal on behalf of Customer or Customer’s third-party customers. The quantity of Product Throughput at the Terminal shall be measured in accordance with Article 5.

“Throughput Fee” has the meaning given to such term in Section 4.1.

“Week” means the period beginning on Sunday at midnight and ending on Saturday at 11:59 p.m. “Weekly” shall be construed accordingly.

ARTICLE 2 SERVICES; FACILITIES AND OPERATIONS

2.1 Regulatory Approval Filings. After the Effective Date, the Parties shall work (at their own cost and expense) together in good faith to obtain prior to the Target Terminal Operations Commencement Date the Regulatory Approvals as provided in this Agreement. Each Party shall promptly, but in no event later than ten (10) Days of receipt of all information from the other Party necessary to be included as part of such Regulatory Approval applications, file or cause to be filed applications for all Regulatory Approvals required to be obtained by it in connection with the transactions contemplated hereby. Such applying Party shall use its commercially reasonable efforts to obtain such Regulatory Approvals at the earliest practicable time. The Parties shall cooperate with each other and communicate regularly regarding their efforts to obtain such Regulatory Approvals. Each Party will provide the other Party with copies of all non-confidential portions of any application, statements or correspondence submitted to or received from any Governmental Authorities in connection with the transactions contemplated by this Agreement.

2.2 Services. Terminal Owner shall receive, load, unload, handle, measure, and

redeliver Product at the Terminal in accordance with Customer's Forecasts and reasonable requirements and will tender such Product to Customer or its or its third-party customers' carriers as directed by Customer, in each case, in accordance with the terms and conditions of this Agreement. Terminal Owner shall furnish and be responsible for all labor, supervision, and materials necessary for its timely and efficient performance of the receipt, loading, unloading, transloading, handling, measuring, redelivery, and related operations and services pursuant to this Agreement and contemplated under this Agreement in order to provide the Services, which in all cases shall be conducted in accordance with generally accepted oil terminalling practices, in a good and workmanlike manner and in compliance with all Applicable Law and the obligations of Terminal Owner to its surface lessors. Terminal Owner shall operate and maintain the Terminal and any other related equipment and property in good and safe condition at all times (all of the foregoing in this Section 2.2, is herein collectively, the "Services").

2.3 Exclusivity. During the Term, (a) Customer shall have exclusive rights to use the Terminal for Product transloading; (b) Customer shall be entitled to utilize 100% of the capacity of the Terminal if required for the transloading of Product, (c) without Customer's prior written consent, Terminal Owner shall not contract with any other Person (including any Affiliates of Terminal Owner) for capacity at the Terminal, provide services at the Terminal to any other Person or develop any additional terminal facilities on the Terminal's land for the transloading of Product, (d) Terminal Owner shall limit the use of the areas of the Terminal designated for the transloading of Product to the sole and exclusive purpose of loading and unloading of Product, and (e) Terminal Owner shall not enter into any agreement with any Third Party for the transloading of oil or other hydrocarbon products at the Terminal. Notwithstanding anything herein to the contrary, after the Effective Date, Terminal Owner may use those areas of the land on which the Terminal is located that are not used for the performance of the Services, including but not limited to the staging and transloading of Product, for another business purpose so long as such purpose does not interfere with or adversely impacts the operations and use of the Terminal for performance of the Services.

2.4 Delivery; Redelivery. Customer may deliver Product to the Terminal by truck or pipeline delivery for receipt by Terminal Owner during the Terminal's operating hours which shall be no less than twenty-four (24) hours per Day, seven (7) Days per week, holidays included. Customer will retain responsibility for all dispatch services associated with the staging and logistics of trucks and railcars, and delivery of Product to and from the Terminal. Customer and Terminal Owner will cooperate with each other in scheduling deliveries, receipts and redeliveries. Receipts shall be issued by Terminal Owner to Customer or Customer's third-party customers for all Product delivered to the Terminal by truck or pipeline by Customer or Customer's third-party customers for unloading, handling, and loading into railcars. Terminal Owner shall redeliver Product to Customer or Customer's third-party customers from the Terminal into railcars. The Terminal will be made available for redelivery twenty-four (24) hours per Day, seven (7) Days per week, holidays included.

2.5 Access. In connection with Terminal Owner's and Customer's obligations under this Agreement, including Customer's exclusive use of the Terminal, Customer's rights with respect to Customer's Terminal Modifications, and the Services provided hereunder with respect to the Product, Terminal Owner does hereby GRANT and CONVEY to Customer and the other Customer Parties, its and their successors and assigns, for the purposes of enforcing and otherwise

realizing the benefits of Customer's rights under this Agreement a non-exclusive right of access over, on, and across the surface of the lands on which the Terminal is located for the duration of the Term and any extensions thereof. Further, from and after the Effective Date, Customer will seek from the owner of the land, and Terminal Owner shall cooperate with Customer in seeking, a non-exclusive easement providing a right of access over, on, across and under the surface of the land on which the Terminal is located. Any access by Customer with respect to Customer Terminal Modifications shall be coordinated in advance with Terminal Owner, and Terminal Owner agrees to permit routine access to a pre-approved list of Customer personnel and representatives. Terminal Owner represents and warrants that it has obtained all the necessary and required consents, if any, of any applicable lessor(s) or other holders of property rights with respect to such grant of easement and right of access. Terminal Owner shall have a duty to maintain in force and effect any underlying agreements that the grant of such non-exclusive easement and right of access by Terminal Owner is based upon. Without limiting the foregoing, Terminal Owner grants Customer's third-party customers access to the Terminal, including the loading racks and railcar areas, at all reasonable times for the purpose of the staging and logistics of trucks and railcars, and delivering and receiving Product, as applicable.

2.6 Monthly Forecasts. Customer will provide Terminal Owner, by email or facsimile, or by other means mutually agreed by Terminal Owner and Customer from time to time, no later than the fifteenth (15th) Day of each Month throughout the Term, a good faith Monthly forecast (a "Forecast") of the volume of each Product that Customer projects it (and its third-party customers, as applicable) will deliver to the Terminal during the following Month. Terminal Owner and Customer will work together cooperatively to schedule deliveries of the Products to the Terminal based on Customer's Forecasts. Customer's Forecasts may exceed the Minimum Volume Commitment, but shall not exceed the maximum design transloading capacity of the Terminal.

2.7 Terminal Modifications. In order to facilitate the Services, Customer will perform (with the full cooperation of Terminal Owner) certain expansions or alterations to the Terminal at Customer's sole cost and expense (collectively, the "Customer Terminal Modifications") as follows: (a) Customer will install equipment and facilities at the Terminal necessary for loading railcars with Product from trucks, such that the loading will commence on the Target Terminal Operations Commencement Date, and as may be described in further detail on Exhibit B hereto ("Phase I Project"), and (b) Customer may, at its sole option, install equipment and facilities necessary for loading railcars from pipelines, and as may be described in further detail on Exhibit C hereto ("Phase II Project"). If Customer elects to perform the Customer Terminal Modification described in (b), it shall provide Terminal Owner with notice of such election. Terminal Owner shall allow Customer (and the Customer Parties) to perform all Customer Terminal Modifications, and shall provide Customer and Customer Parties with such access (including any necessary easements and rights-of-way into, over, under and across the Terminal and associated land to locate equipment and facilities) and full assistance as reasonably required; provided that Terminal Owner shall be permitted to have a representative present at the Terminal for observation when work on a Customer Terminal Modification is being performed. Terminal Owner acknowledges and agrees that title to the equipment and facilities installed by or at the direction of Customer in connection with a Customer Terminal Modification shall remain with and be vested in the Customer; *provided* that ownership of any additional rail tracks that may be installed will be transferred to Terminal Owner upon the expiration of the Term, subject to

Customer's rights under Section 8.8 and Section 9.2. Other than the rail tracks described in the preceding sentence, upon the expiration of the Term, Customer shall be permitted, at its sole cost and expense, to remove any equipment or facilities constituting Customer Terminal Modifications. During the Term, Terminal Owner (i) shall not be required to make any capital investment to facilitate the Services (other than in connection with any maintenance or repair necessary for the Terminal Owner to comply with its obligations under this Agreement), and (ii) shall not be permitted to make any expansion, modification or other alteration (other than routine maintenance and repairs) to the Terminal that interferes with or adversely impacts the operations and use of the Terminal without the prior written consent of Customer.

ARTICLE 3 MINIMUM THROUGHPUT OBLIGATION

3.1 Minimum Volume Obligation. Subject to the terms of this Agreement, including Section 3.3 and Force Majeure, for each Calendar Quarter from and after the Terminal Operations Commencement Date, Customer agrees to Throughput (either directly or via volumes delivered to the Terminal by Customer's third-party customers) an amount of Product through the Terminal on a Monthly basis equal to a minimum of Eleven Thousand Four Hundred and Twenty Four (11,424) Barrels per Day (the "Minimum Volume Commitment") during each Calendar Quarter during the Term after the Termination Operations Commencement Date, or otherwise pay the Shortfall Payment applicable to such Calendar Quarter.

3.2 Shortfall Payment.

(a) Quarterly Shortfall. If, for any Calendar Quarter after the Terminal Operations Commencement Date, the volume of Product actually Throughput during such Calendar Quarter (for the avoidance of doubt, calculated on a Calendar Quarterly, not a Monthly or Daily, basis) is less than the Minimum Volume Commitment (such deficiency, if any, the "Shortfall"), Customer shall pay Terminal Owner an amount equal to the volume of the Shortfall (expressed in Barrels) to the extent not caused or contributed to by Force Majeure, maintenance outages at the Terminal, or Terminal Owner's breach of its obligations under this Agreement, *multiplied by* the Throughput Fee in effect for such Calendar Quarter (collectively, the "Shortfall Payment"). There shall be no Shortfall Payment due and owing for the Shortfall to the extent caused or contributed to by Force Majeure or due to such Terminal Owner breach.

(b) Quarterly True-Up. Promptly following each Calendar Quarter, Terminal Owner will provide to Customer a written statement showing the Minimum Volume Commitment versus the Actual Quarterly Aggregate Volume. If the Actual Quarterly Aggregate Volume exceeds the Minimum Volume Commitment for such Calendar Quarter, Customer shall not owe and shall be relieved from payment to Terminal Owner of any Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter. However, if the Actual Quarterly Aggregate Volume is less than the Minimum Volume Commitment for such Calendar Quarter, Customer shall owe to Terminal Owner a Shortfall Payment determined pursuant to Section 3.2(a) for the applicable Calendar Quarter.

3.3 Adjusted Minimum Volume Commitment. For any partial Calendar Quarter within the Term, the Minimum Volume Commitment shall be prorated accordingly. The

Minimum Volume Commitment for the applicable Calendar Quarter shall also be adjusted downward on a per Barrel basis for any volumes of Product that Customer was not able to Throughput through the Terminal due to Terminal Owner's failure to receive Product within the capacity of the Terminal, Terminal Owner breach of this Agreement, or any other act or an omission of a Terminal Owner Party that prevents or curtails Throughput.

ARTICLE 4 FEES; INVOICES

4.1 Throughput Fee. Subject to the terms of this Agreement, Customer shall pay Terminal Owner a throughput fee equal to One Dollar and Fifty Cents (\$1.50) per Barrel of Product Throughput through the Terminal (the "Throughput Fee").

4.2 Invoices; Payment of Fees. Within twenty-four (24) hours following the end of each Month, Terminal Owner shall issue to Customer an estimate of any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any); *provided* that the Parties agree and acknowledge that Customer shall have no obligation to pay the amounts set forth in such estimate until Terminal Owner delivers to Customer an invoice as described in the remaining portion of this Section 4.2. Terminal Owner shall invoice Customer Weekly for any amounts owed by Customer pursuant to this Article 4 and the quarterly Shortfall Payment (if any) within ten (10) Business Days after the end of each Week for Services that occurred during the preceding Week, including a detailed statement setting forth the amounts included in such invoice. Customer agrees to pay Terminal Owner all undisputed amounts set forth in such invoice within thirty (30) Days of receipt of Terminal Owner's invoice, which shall be the due date for such invoice. If Customer disputes one or more items in an invoice, Customer must notify Terminal Owner promptly (and in any event by the due date therefor) in writing of the item or items under dispute and the reasons therefor. Customer may withhold payment of the disputed portion of such invoice, without the payment of the Interest Rate as described below, until the dispute is resolved. Any portion of a disputed invoice which is later paid will be paid with accrued interest thereon calculated using the Interest Rate from the due date of such invoice until paid. All invoices issued by Terminal Owner under this Agreement shall be issued in United States dollars, and all such invoices and any other amounts due hereunder shall be paid in United States dollars.

4.3 Past Due Interest. Any amount payable by Customer under this Agreement shall, if not paid when due, bear interest from the payment due date until, but excluding the date payment is received by Terminal Owner, at the Interest Rate.

ARTICLE 5 MEASUREMENT

5.1 Measurement Procedures. Measurement shall be in accordance with Terminal Owner's standard measurement procedures, which shall be in accordance with applicable API standards. Terminal Owner shall transload the Product from trucks or pipeline into railcars using, as applicable, a rack, pump and custody transfer meter at the Receipt Point to be provided by Customer and a rack, pump and custody transfer meter at the Delivery Point to be provided by Customer (each meter at the Receipt Point and Delivery Point, a "Meter"). Each Meter shall be provided in accordance with industry standards and in accordance with all Applicable Law. The

quantities of the Products transloaded by Terminal Owner at the Terminal will be determined by the Meters. In the event of a failure of a Meter, the Parties will use railcar waybills and truck bills of lading, as applicable, until the applicable Meter is repaired. Terminal Owner shall be responsible for the maintenance of the Meters, and repair any malfunctioning Meter as soon as commercially practicable. All tests, calibrations, and adjustments of a Meter, to be performed by Terminal Owner at least once per Calendar Quarter, may be witnessed by Customer (or its designated representative) and shall be preceded by reasonable notice to Customer. Upon request of either Party for a special test of any meter or auxiliary equipment, Terminal Owner shall promptly verify the accuracy of same; provided, however, that the cost of such special test shall be borne by the requesting Party, unless the percentage of inaccuracy found is more than one percent (1) % of a recording corresponding to the average hourly rate of Product flow, in which case the cost of such test shall be borne by Terminal Owner.

5.2 Measurement Records. Terminal Owner shall keep accurate records of the receipt and delivery of Product under this Agreement and, subject to the Loss Allowance, shall account for Product receipts and redeliveries at such time and in such manner as shall be reasonably requested by Customer. Terminal Owner will provide Daily updates to Customer as to the metered volumes of the Product Throughput into the Terminal, trucks delivered to the Terminal, and volumes of Product transloaded into railcars at the Terminal.

ARTICLE 6

TERMINAL OWNER OBLIGATIONS

6.1 Warranty. Terminal Owner warrants to Customer that: (a) all Services shall be in accordance with Section 2.2 hereof; (b) all Services will be performed and completed in a safe and environmentally conscientious manner, with Terminal Owner taking all reasonable and necessary actions, including, but not limited to, those in accordance with all Applicable Law, regulations, ordinances and codes, any applicable policies of Customer and prudent industry practices to protect persons, property and the environment; (c) all Services shall be performed professionally, and in accordance with sound engineering practices; (d) all Services will be free from defects in design, workmanship, and materials, and that all Terminal Owner personnel and employees have been trained to work in a safe and competent manner to assure the safety of other persons; and (e) all equipment or property provided or supplied by Terminal Owner in performing the Services has been thoroughly tested and inspected and is safe, sufficient and free of any defects, latent or otherwise, is in good operating condition and is appropriate for the carrying out of the Services.

6.2 Non-Conforming Services. Any Services found defective, unsuitable, or in any way nonconforming with the terms of this Agreement shall be promptly replaced or corrected by Terminal Owner without additional charge to Customer, whether or not the Services have been accepted. Customer may, at its sole discretion and with full reservation of its other rights and remedies, direct Terminal Owner to replace or correct, as applicable, the non-compliant Services. The warranty obligations of Terminal Owner under this Agreement shall not be limited, restricted, or otherwise modified by the indemnity obligations contained elsewhere in this Agreement.

6.3 Observation and Testing of Services. All Services will be subject to Customer's observation and testing. Terminal Owner shall be responsible for inspecting and testing the

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components of the Services. Customer Parties shall (subject to Section 15.2) have the right at any time to review and test the Services at all places and stages of performance, without such action being treated as either discharging Terminal Owner's responsibility or constituting Customer's acceptance of the Services. Notwithstanding any prior test and observation at the Terminal, all Services will be subject to final acceptance at the Terminal. Neither payment for, nor the inspection at the Terminal of any Services shall in any way impair Customer's right to observation, imply acceptance or rejection of non-conforming Services, or reduce or waive any other remedies or warranties to which Customer is entitled.

6.4 Warranty Default. If, after written request by Customer, Terminal Owner fails to replace or correct any non-conforming Services within the shortest time reasonably practicable, but in any event not later than three (3) Days after being notified of the defect, without prejudice to Customer's other rights and remedies under this Agreement or by Applicable Law, Customer (a) may replace or correct such Services itself or through another contractor in any manner that Customer determines in its sole discretion, and charge to Terminal Owner the cost incurred by Customer thereby, which Terminal Owner will pay promptly upon invoice therefor, (b) deduct or withhold the costs and expenses incurred from amounts otherwise due and owing by Customer to Terminal Owner and/or (c) may, without further notice, exercise its remedies under this Agreement for default, in accordance with Article 8 hereof.

6.5 Permits. Terminal Owner shall obtain and maintain in force, and ensure that each Terminal Owner Party obtains and maintains in force (as necessary), all Permits including the Regulatory Approvals. If Customer is required to obtain any Permit that Applicable Law requires to be issued in the name of Terminal Owner or another Terminal Owner Party, Terminal Owner shall provide all reasonable assistance to Customer in connection with Customer's efforts to obtain and maintain such Permit, including by signing and submitting any applications or other documentation required to be in Terminal Owner's or another Terminal Owner Party's name.

ARTICLE 7 TITLE AND RISK OF LOSS; PRODUCT LOSS; DEMURRAGE

7.1 Title; Custody and Control. Customer (or its customer, as the case may be) shall retain title to all Product delivered by it to the Terminal, and Terminal Owner acknowledges that it has no title to or interest in the Product. Care, custody and control of (and risk of loss for) all such Product shall pass to Terminal Owner at the time that such Product passes through the Meter at the outlet flange of the applicable truck or pipeline delivering such Product into the Terminal (the "Receipt Point") and shall remain with Terminal Owner until the railcar receiving such Product from the Terminal is no longer located at the Terminal and such railcar is removed from the Terminal by the applicable rail carrier. Title to Product shall not transfer to Terminal Owner by reason of the performance of the Services. For the avoidance of doubt, Customer Terminal Modifications are considered part of the Terminal for purposes of determining the Receipt Point and other purposes of this Agreement, subject to Section 2.7.

7.2 Loss Allowance; Product Degradation. Customer acknowledges that minor losses (shrinkage) in the handling of crude oil is a normal part of the transloading process and, as a result, minor losses of crude oil related to the unloading and loading of such commodity shall be considered negligible if within the Loss Allowance (as hereinafter defined).

(a) Loss Allowance. If Customer Parties and/or Terminal Owner observe Product spillage or loss while transloading from trucks to railcars or from the pipeline to railcars, Customer Parties and Terminal Owner shall determine the volume of lost Product (as reported on the relevant spill report). Terminal Owner shall not be responsible for any loss of Product provided that such loss does not exceed one barrel per railcar (each a "Loss Allowance"). Terminal Owner shall be responsible for loss of Product that exceeds the Loss Allowance.

(b) Loss Credit. Customer shall not owe Terminal Owner any transloading fees for lost Product in excess of the Loss Allowance. In the event of losses in excess of the Loss Allowance, the loss above the Loss Allowance shall be settled and reflected as a credit (the "Loss Credit") to Customer on Terminal Owner's invoice for such Month in an amount equal to the lost barrels in excess of the Loss Allowance multiplied by the then crude oil barrel price of WTI Midland (ARGUS). While Terminal Owner has care, custody and control of the Product pursuant to Section 7.1, Terminal Owner shall be responsible for securing the Product and protecting the Product against loss (above any Loss Allowance) or theft, and any such loss or theft shall not be the basis of a Force Majeure claim by Terminal Owner under this Agreement. Terminal Owner shall indemnify and hold harmless the Customer Parties from and against any Liabilities arising out of, incident to, or in connection with (a) the loss of Product in excess of the Loss Allowance at the Terminal or otherwise due to the acts or omissions of Terminal Owner, or (b) any contamination, damage, degradation or improper transloading of Product at the Terminal; provided, however, that the limit of the indemnification shall be the Loss Credit given to Customer as provided in this Section.

7.3 Demurrage. Terminal Owner shall be responsible for demurrage, standby, delay and similar charges related to the Services incurred by Customer Parties provided under this Agreement for railcars and trucks if the applicable delay resulted from the acts or omissions of any of the Terminal Owner Parties.

7.4 No Security Interest. Unless Customer has defaulted in its payment obligations under this Agreement and such default is not cured, Terminal Owner, for itself and all Terminal Owner Parties, shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon any of the Product delivered to the Terminal or upon the Customer Terminal Modifications. If Terminal Owner does, it shall indemnify, defend and hold harmless the Customer Parties from and against any such pledge, security interest, lien, levy or other encumbrance. Unless Terminal Owner has defaulted in its obligations under this Agreement and such default is not cured, Customer shall not create, incur or suffer to exist any pledge, security interest, lien, levy or other encumbrance of or upon the Terminal (other than with respect to the Customer Terminal Modifications) in connection with this Agreement. If Customer does, it shall indemnify, defend and hold harmless the Terminal Owner from and against any such pledge, security interest, lien, levy or other encumbrance.

ARTICLE 8 TERM; REMEDIES

8.1 Term. Subject to early termination pursuant to this Article 8, the term of this Agreement shall commence on the Effective Date and shall continue until January 1, 2020 (the "Initial Term"). At Customer's election, the term may be renewed and extended for successive

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three (3) month periods (each such period, an "Extended Term") by written notice from Customer to Terminal Owner at least sixty (60) Days prior to the expiration of the Initial Term or any Extended Term, as applicable (such Initial Term and any Extended Term(s) are herein collectively, the "Term").

8.2 Termination Due to Failure of Conditions. This Agreement may be terminated at any time prior to the Target Terminal Operations Commencement Date by either Customer or Terminal Owner, by the terminating Party's written notice of termination to the other Party, if all conditions set forth below in this Section 8.2 to such terminating Party's obligations have not been fulfilled by the Target Terminal Operations Commencement Date (as it may be extended by the Parties in writing), unless the failure to so fulfill by such time is due to an uncured breach of this Agreement by the Party seeking to terminate.

(a) Conditions to Customer's Obligations. All obligations of Customer under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Customer:

(i) Compliance with Representations, Warranties and Agreements. The representations and warranties made by Terminal Owner in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Terminal Owner shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Terminal Owner prior to or at the Target Terminal Operations Commencement Date, including Terminal Owner's full cooperation with Customer during the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) Necessary Company Actions. Terminal Owner shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) Regulatory Approvals. The Regulatory Approvals shall have been obtained and are effective.

(iv) No Litigation. No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

(v) SPCC & HSE Compliance. Terminal Owner shall have in place an SPCC plan for the Terminal that is reasonably satisfactory to Customer Parties, and shall, upon request, provide to Customer and Customer Parties all HSE and related documentation and maintain practices necessary for Customer to obtain Customer Parties' approval of use of the Terminal.

(vi) Easement. The easement described in Section 2.5 hereof for Customer's benefit shall have been obtained by Target Terminal Operations Commencement Date.

(b) Conditions to Terminal Owner's Obligations. All obligations of Terminal Owner under this Agreement from and after the Terminal Operations Commencement Date are subject to the fulfillment, prior to or on the Target Terminal Operations Commencement Date, of each of the following conditions, any or all of which may be waived in whole or in part by Terminal Owner:

(i) Compliance with Representations, Warranties and Agreements. The representations and warranties made by Customer in this Agreement shall have been true and correct in all material respects as of the Effective Date and as of the Target Terminal Operations Commencement Date with the same force and effect as if such representations and warranties were made at and as of the Target Terminal Operations Commencement Date, except with respect to those representations and warranties specifically made as of an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date). Customer shall have performed or complied in all material respects with all material agreements, terms, covenants and conditions required by this Agreement to be performed or complied with by Customer prior to or at the Target Terminal Operations Commencement Date, including the Phase I Project, except as specifically provided to the contrary in this Agreement.

(ii) Necessary Company Actions. Customer shall have taken any and all requisite company actions and other steps and secured any other company approvals, necessary to authorize and consummate this Agreement and the transactions contemplated hereby.

(iii) Regulatory Approvals. The Regulatory Approvals shall have been obtained and are effective.

(iv) No Litigation. No action shall have been taken, and no statute, rule, regulation or order shall have been promulgated, enacted, entered or enforced by any Governmental Authority or by any court, including the entry of a preliminary or permanent injunction, that would make this Agreement or the transactions contemplated hereby illegal, invalid or unenforceable. No action or proceeding before any court or Governmental Authority or by any other Person, in each case, as a result of any Third Party action, shall be threatened, instituted or pending that would reasonably be expected to result in any of the consequences referred to in the preceding sentence.

8.3 Remedies for Default. Except as otherwise specifically provided for under the terms of this Agreement, if either Party fails to perform any of the representations, warranties, covenants or other obligations imposed on it by this Agreement in any material respect (the "Defaulting Party"), then the Party to whom the covenant or obligation was owed (the "Non-Defaulting Party") may (without waiving any other remedy for breach hereof, each of which is

hereby reserved), notify in writing the Defaulting Party, stating specifically the nature of the default (the "Default Notice"). The Defaulting Party will have thirty (30) Days after receipt of the Default Notice (the "Cure Period") in which to (i) remedy the cause or causes stated in the Default Notice, (ii) provide adequate security satisfactory to Non-Defaulting Party to fully indemnify the Non-Defaulting Party for any and all consequences of the breach, or (iii) to dispute the claim of breach in good faith. If the Defaulting Party either cures the default or provides such adequate security within the Cure Period, then this Agreement shall remain in full force and effect. If the Defaulting Party fails to timely cure such default or to timely provide such adequate security, then, without prejudice to its other remedies under this Agreement, at law or in equity, the Non-Defaulting Party may suspend the performance of its obligations under this Agreement or terminate this Agreement immediately upon giving written notice of such suspension or termination to the Defaulting Party. In the event of any Terminal Owner uncured default, Customer (or its designee) may, at its option, without prejudice to its other remedies under this Agreement, at law or in equity, perform the Services by whatever method Customer reasonably deems expedient, and in such case, Terminal Owner shall be liable to Customer for Customer's reasonable direct damages and costs of cover and performing the Services, if applicable. The effective date of any termination of this Agreement under this Section 8.3 shall be the date established in the notice of such termination delivered by the Non-Defaulting Party exercising its termination right hereunder.

8.4 Termination for Extended Force Majeure. By written notice to the other Party, a Party shall have the right to terminate this Agreement prior to the end of the Term if the Parties are unable to fulfill the purposes of this Agreement due to Force Majeure for a period equal to or greater than (a) (60) consecutive Days or (b) sixty (60) Days in any one hundred and twenty (120) consecutive Day period. Following the giving of such notice, neither Party shall have any further obligations to the other Party under this Agreement (including, but not limited to, with respect to the Minimum Volume Commitment).

8.5 Effect of Termination. In the event of the termination of this Agreement pursuant to the provisions of Section 8.1, Section 8.2, Section 8.3 or Section 8.4, and except as provided in Section 8.3, no Party to this Agreement shall have any further liability or obligation under or in respect of this Agreement, except that the provisions of this Agreement that by their nature survive its termination (including property rights, indemnities, damage limitations, waivers, releases, warranties, Permits, confidentiality and governing law provisions) shall remain applicable and survive such termination and remain in force and effect; provided, however, that the termination of this Agreement shall not (a) relieve any Party from any expense, liability or obligation or remedy therefor that has accrued or attached prior to the date of such termination, nor (b) defeat or impair the right of any Party to pursue such relief as may otherwise be available to it on account of any breach of this Agreement or any of the representations, warranties, covenants or agreements contained in this Agreement by the other Party.

8.6 Specific Performance and Declaratory Judgments. Damages in the event of breach of this Agreement by a Party hereto may be difficult, if not impossible, to ascertain. Therefore, each Party, in addition to and without limiting any other remedy or right it may have, will have the right to seek a declaratory judgment and will have the right to an injunction or other equitable relief in any court of competent jurisdiction, enjoining any such breach, and enforcing specifically the terms and provisions hereof, and each of the Parties hereto hereby waives any and all defenses

it may have on the ground of lack of jurisdiction or competence of the court to grant such an injunction or other equitable relief. The existence of this right will not preclude any Party from pursuing any other rights and remedies at law or in equity that such Party may have.

8.7 Cumulative Remedies. Except as otherwise expressly stated in this Agreement, the remedies provided under this Agreement are cumulative and in addition to any other rights or remedies either Party may have now or that may subsequently be available at Applicable Law, in equity, by statute, in any other agreement between the Parties, or otherwise. Subject to the express limitations in Section 10.6 hereof, nothing contained in the Agreement shall preclude either Party, in its sole discretion, from (i) enforcing any or all of its rights or remedies against the other Party for any breach of this Agreement by that other Party or (ii) seeking any injunctive relief necessary to prevent the other Party from breaching its obligations under the Agreement or to compel the other Party to perform its obligations. No election of remedies shall be required or implied as a result of a Party's decision to avail itself of a remedy.

8.8 Reinstatement after Termination. If this Agreement is terminated (other than due to Customer's breach), and Terminal Owner plans to utilize or utilizes the Terminal for the purpose of providing services similar to the Services under this Agreement, then, Terminal Owner shall notify Customer in writing prior to the commencement of such services (an "Alternative Service Notice"), detailing the anticipated arrangement or contract ("Alternative Service"). Any such arrangement or contract for Alternative Service by Terminal Owner shall only be permitted if made expressly subject to Customer's rights under this Section 8.8. Customer shall have thirty (30) Days following receipt of an Alternative Service Notice to elect whether to reinstate this Agreement under an Extended Term to commence on the date set forth in such Customer election (to be a date no later than sixty (60) Days following the date of such election). Failure by Customer to respond within such time period shall be deemed an election not to reinstate this Agreement; provided, however that at the expiration of such Alternative Service, Customer shall have the right to reinstate this Agreement. If Customer elects to reinstate this Agreement, the arrangement that is the subject of the Alternative Service Notice shall not be permitted and shall be cancelled promptly, and this Agreement shall be reinstated in accordance with its terms. Any reinstatement of this Agreement would be subject to the Customer's rights under this Section 8.8.

ARTICLE 9 ASSIGNMENT AND TRANSFER

9.1 Assignment.

(a) Except as specifically otherwise provided in this Agreement, and subject to Section 9.2 and Section 9.3, no Party shall have the right to assign its rights and obligations under this Agreement (in whole or in part) to another Person except with the prior consent of the other Party, which consent may not be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, a Party may assign its rights and obligations under this Agreement to an Affiliate of such Party without the consent of the other Party; *provided* that (i) such Person assumes in writing the obligations of the assigning Party under this Agreement reasonably acceptable to the non-assigning Party, (ii) such assignment is made subject to this Agreement, and (iii) the assigning Party shall not be released from any of its obligations under this Agreement without the consent of the non-assigning Party. Any assignment in violation of this Section 9.1 shall be void *ab initio*.

(b) Except as provided in (a) above, nothing in this Section 9.1 shall prevent or restrict Customer's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Customer without Terminal Owner's prior consent, and nothing in this Section 9.1 shall prevent or restrict Terminal Owner's members or owners from transferring their respective interests (whether equity or otherwise and whether in whole or in part) in Terminal Owner without Customer's prior consent. However, if a change of Control of a Party gives rise to a reasonable basis for insecurity on the part of the other Party, such change of Control may be the basis for a request of adequate assurance of performance. Each Party shall have the right without the prior consent of the other Party to (i) mortgage, pledge, encumber or otherwise impress a lien or security interest upon its rights and interest in and to this Agreement, and (ii) make a transfer pursuant to any security interest arrangement described in (i) above, including any judicial or non-judicial foreclosure and any assignment from the holder of such security interest to another Person; provided, in each case, such arrangement or action shall only be permitted if it is expressly subject to and subordinated to the terms of this Agreement.

9.2 Right of First Offer (ROFR).

(a) This Section 9.2 shall apply to any sale, assignment, transfer or disposition of the Terminal or any of the Terminal assets in (i) a singular transaction separate and apart from other non-Terminal assets or interests or (ii) a transaction where the Terminal or such Terminal assets comprise more than fifty percent (50%) of the aggregate value of such transaction (each, a "Subsequent Transfer") by Terminal Owner to any Person that is not an Affiliate of Terminal Owner from the Effective Date until the date that is five (5) years following the end of the Term (such period, the "ROFR Period"); *provided* that any sale, assignment, transfer or disposition to an Affiliate of Terminal Owner shall only be made expressly subject to the restriction in this Section 9.2 with such Affiliate agreeing in writing to be bound by such restriction and *provided further* that a Subsequent Transfer includes those sales, assignments, transfers or dispositions for which a contractual agreement was executed within the ROFR Period, even if such transfer is not consummated until after the ROFR Period.

(b) Once the final terms and conditions of a Subsequent Transfer have been fully negotiated, Terminal Owner shall give the Customer a written notice (the "ROFR Notice") stating the assets to be transferred (the "Subsequently Transferred Interest"), and all such final terms and conditions as are relevant to such Subsequent Transfer, together with a copy of all instruments or relevant portions of instruments establishing such terms and conditions. Customer shall have the right, but not the obligation, to elect, in its sole discretion, to acquire such Subsequently Transferred Interest on the terms and conditions set forth in the ROFR Notice. The ROFR Notice shall constitute a binding offer (the "ROFR Offer") by Terminal Owner to sell, assign, transfer and dispose to Customer the Subsequently Transferred Interest at the price and upon the terms specified in the ROFR Notice and such offer shall be irrevocable for thirty (30) Days following receipt of the ROFR Offer by Customer. In the event that the sale price to be paid for the Subsequently Transferred Interest by a proposed bona fide third-party purchaser consists of or includes properties or assets other than cash, the target price to be paid by Customer shall be equal to the fair market value of such non-cash consideration, as reasonably determined by the Parties, plus the amount of any cash consideration. If the Parties are unable to agree on the fair market value of such non-cash consideration, then the fair market value thereof shall be determined by an independent third-party appraisal, the cost of which will be shared equally by the Parties

challenging the proposed fair market value. The independent third-party appraiser who conducts such appraisal shall be selected by the mutual agreement of the Parties. Customer (or its designated Affiliate) may accept such ROFR Offer and acquire all of the Subsequently Transferred Interest by giving written notice of the same to Terminal Owner within such thirty (30) Day period. The failure by Customer to so notify Terminal Owner within such thirty (30) Day period shall be deemed an election by Customer not to accept such ROFR Offer.

(c) If Customer accepts the ROFR Offer, then Terminal Owner and Customer shall cooperate to consummate the Subsequent Transfer to Customer (or its designated Affiliate) as promptly as practicable following such acceptance.

(d) If Customer does not accept the ROFR Offer, then Terminal Owner may transfer all, but not less than all, of the Subsequently Transferred Interest at any time within one hundred eighty (180) Days following the end of the thirty (30) Day period that Customer had to accept the ROFR Offer. Any such Subsequent Transfer shall be (i) at a price not less than the price set forth in the ROFR Notice and (ii) upon such other terms and conditions not, in the aggregate, more favorable to the acquiring party than those specified in the ROFR Notice. If Terminal Owner does not consummate such Subsequent Transfer on such terms within such one hundred eighty (180) Day period, the Subsequent Transfer shall again become subject to the right of first offer set forth in this Section 9.2.

(e) If Terminal Owner structures a Subsequent Transfer as a merger or sale of equity interests, such Subsequent Transfer shall be subject to the restrictions in this Section 9.2; *provided* that the restrictions contained in this Section 9.2 shall not apply to any such indirect transfer that is (i) a transaction involving a merger or other business consolidation of Terminal Owner's ultimate parent entity with a Third Party or a public securities offering; or (ii) an acquisition with a Third Party in which the assets subject to such Subsequent Transfer were included in a divestiture package and the allocated value of such assets does not constitute more than twenty-five percent (25%) of the aggregate value of the acquisition.

9.3 Covenant Running with the Land. Any transfer of Terminal Owner's interests in the Terminal or any of the land on which the Terminal is located shall be subject to Customer's rights under this Agreement. This Agreement is (a) a covenant running with the Terminal and the land described on Exhibit A-2 hereto to the extent Terminal Owner is able to grant such a covenant with respect to the land, it being recognized that Terminal Owner is a lessee of the land and owns no fee interest in the land; and (b) binding on and enforceable by Customer against Terminal Owner and its successors and assigns and their respective right, title and interest in and to the Terminal and the land described on Exhibit A-2 hereto, and as a benefit to Customer, its successors and assigns. If Terminal Owner sells, transfers, conveys, assigns, grants or otherwise disposes of all or any interest in such Terminal or land, then any such sale, transfer, conveyance, assignment, or other disposition shall be expressly subject to this Agreement and expressly state as such in any instrument of conveyance. Terminal Owner hereby authorizes Customer to record a memorandum of this Agreement in the real property records of the relevant county where the Terminal is to be located. The Parties agree that until Customer provides notice to the contrary, all payment terms and pricing information shall remain confidential and be redacted from any filings in the real property records.

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ARTICLE 10 INDEMNIFICATION; DAMAGES LIMITATION

10.1 Duty to Indemnify Customer Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.12 and except as otherwise provided in this Agreement, TERMINAL OWNER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS CUSTOMER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property, and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Terminal Owner's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF CUSTOMER PARTIES.**

10.2 Duty to Indemnify Terminal Owner Parties. To the fullest extent permitted by Applicable Law, subject to Section 10.1 and except as otherwise provided in this Agreement, CUSTOMER HEREBY AGREES TO RELEASE, PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS TERMINAL OWNER PARTIES from and against any and all Liabilities (inclusive of claims made by or Liabilities of a Third Party) for any (a) injury or death of persons, (b) damage, loss, or injury to any property (excluding Product loss or damage), and (c) pollution or threat of pollution from the Terminal, in each case, directly or indirectly arising out of, incident to, or in connection with performing or failure to perform Customer's obligations under this Agreement, **EXCEPT TO THE EXTENT SUCH LIABILITIES ARISE OUT OF THE GROSS NEGLIGENCE, STRICT LIABILITY, WILLFUL MISCONDUCT, OR OTHER FAULT OR BREACH OF LEGAL DUTY BY ANY MEMBER OF TERMINAL OWNER PARTIES.**

10.3 Term of Indemnity. The provisions of this Article 10 and any other indemnification provisions set forth in this Agreement shall survive the termination or expiration of this Agreement.

10.4 Express Negligence. **THE RELEASE, PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS OBLIGATIONS PROVIDED FOR IN THIS AGREEMENT SHALL BE APPLICABLE WHETHER OR NOT THE LIABILITIES, LOSSES, COSTS, EXPENSES AND DAMAGES IN QUESTION AROSE OR RESULTED SOLELY OR IN PART FROM THE GROSS, SOLE, ACTIVE, PASSIVE, CONCURRENT OR COMPARATIVE NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT OR VIOLATION OF LAW OF OR BY ANY INDEMNIFIED PARTY. CUSTOMER AND TERMINAL OWNER ACKNOWLEDGE THAT THIS STATEMENT COMPLIES WITH THE EXPRESS NEGLIGENCE RULE AND IS "CONSPICUOUS."**

10.5 Notice and Defense. A party indemnified hereunder shall, as soon as practicable after receiving notice of any suit brought against it within this indemnity, furnish to the indemnifying party the full particulars within its knowledge thereof and shall render all reasonable assistance requested by the indemnifying party in the defense of any Liabilities. Each indemnified party shall have the right but not the duty to participate, at its own expense, with counsel of its

own selection, in the defense and/or settlement thereof without relieving the indemnifying party of any obligations hereunder; provided, however, the indemnifying party shall have control over the defense and settlement as long as the settlement does not impose any obligations on the indemnified party. Any claim for indemnification by a member of Customer or Terminal Owner's respective Group may only be brought by Customer or Terminal Owner, as applicable, on behalf of such member seeking indemnification.

10.6 No Consequential Damages. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NEITHER TERMINAL OWNER NOR CUSTOMER SHALL BE LIABLE TO THE OTHER OR ANY MEMBER OF THE OTHER'S GROUP, AND EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND THE OTHER PARTY'S GROUP), FOR ANY INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES, SPECIAL OR PUNITIVE DAMAGES, OR FOR LOST PROFITS, WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF WHETHER IN CONTRACT, TORT OR OTHERWISE; PROVIDED, HOWEVER, THAT THE LIMITATION ON LIABILITY SET FORTH IN THIS SECTION 10.6 SHALL NOT LIMIT EITHER PARTY'S RESPECTIVE INDEMNITY OBLIGATIONS HEREUNDER THIS AGREEMENT FOR ANY LIABILITIES OCCASIONED BY THIRD PARTY CLAIMS, AS EXPRESSLY PROVIDED IN THIS AGREEMENT. FOR THE AVOIDANCE OF DOUBT, THE PARTIES AGREE THAT RECOVERY OF THE ACTUAL DIRECT DAMAGES DESCRIBED IN SECTION 6.4 OR SECTION 8.3 SHALL NOT BE PRECLUDED BY THIS SECTION 10.6.

ARTICLE 11 INSURANCE

11.1 Each Party shall procure and maintain, at its sole expense, policies of insurance (with solvent insurers rated by A.M. Best Company A-VI or higher) set forth in Exhibit D. The insurance provisions of this Agreement, including the minimum required limits of Exhibit D are intended to assure that certain minimum standards of insurance protection are afforded and the specifications herein of any amount or amounts shall be construed to support but not in any way to limit Parties' liabilities and indemnity obligations as specified elsewhere in this Agreement. All required insurance policies shall be endorsed to cover contractual liabilities insuring the indemnifications contained in this Agreement.

11.2 In addition to the insurance required under Section 11.1, Terminal Owner shall procure and maintain at its sole expense a pollution legal liability ("PLL") policy providing coverage for remediation of environmental contamination at the Terminal, for the costs of responding to a spill or release of oil or hazardous materials at or from the Terminal, and for personal injury and property damage claims arising from environmental conditions associated with Terminal operations. The PLL policy shall be in a form reasonably acceptable to Customer, shall name the Customer and its Group as an additional insured, and shall be extended and renewed as necessary to provide coverage that extends for a minimum of two (2) years following the Term, as it may be extended. The PLL policy shall provide for a self-insured retention of not more than \$250,000 and for policy limits of not less than \$5,000,000.

11.3 All insurance carried by either Party (which insurance is in any way related to the Services), whether or not required by this Agreement, shall, but only to the extent of the risk and liabilities assumed by such Party under this Agreement:

(a) Name the other Party's Group as additional insured (except for worker's compensation/employer's liability or professional liability policies (with such additional insured coverage not being restricted to the sole or concurrent negligence of the additional insured and not being restricted to (i) "ongoing operations," (ii) coverage for vicarious liability, or (iii) circumstances in which the named insured is partially negligent);

(b) Waive subrogation as to the other Party's Group; and

(c) Be primary and non-contributory to any insurance of the other Party's Group.

11.4 Although the scope of each Party's insurance obligations is defined by reference to the risks and liabilities assumed under this Agreement, the insurance provisions of this Agreement are, to the extent required to maximize their effectiveness, (a) separately and independently enforceable, and (b) distinct and severable from, and shall not in any way limit any release, protect, defense, indemnity or hold harmless obligations in this Agreement.

11.5 The insolvency, liquidation, bankruptcy, or failure of any insurance company providing insurance for either Party, or failure of any such insurance company to pay claims accruing, shall not be considered a waiver of, nor shall it excuse such Party from complying with, any of the provisions of this Agreement.

11.6 Each Party will promptly provide oral and written notice to the other Party of any accidents or occurrences resulting in injuries to persons or property in any way arising out of or related to the Services and/or occurring on or near the Terminal. For the purpose of this subsection, "promptly" requires oral notification to the other Party within two (2) hours of when the incident occurred.

11.7 Unless specific, prior, written approval is obtained from the other Party, a Party may not self-insure any of its obligations under this Agreement. Where approved, neither Party's decision to self-insure shall in any way act as a prejudice against the other Party and its Group. All deductibles, self-insurance coverage or retentions shall be treated as coverage under an insurance policy, and each Party and its Group will have the same benefits and protection thereunder as though the self-insured Party had secured a policy from a separate insurer.

ARTICLE 12 AUDIT; INSPECTION

12.1 Audits. Customer will have the right, upon reasonable notice, to review for compliance with the terms of this Agreement, (a) the movement of Customer's or Customer's third party customers' Product into, through and out of the Terminal, (b) the relevant portion of all books, records, and information kept by or on behalf of Terminal Owner that reasonably relate to Customer's rights and obligations under this Agreement, and (c) any fees and/or costs charged by Terminal Owner pursuant to this Agreement, except for information subject to attorney-client privilege or confidential information associated with the Terminal's personnel. Terminal Owner

shall retain all such books and records for a period of four (4) years from the date the applicable Services are rendered hereunder, or such greater period as required by Applicable Law. Customer may audit such books and records at Terminal Owner's locations where such books and records are stored. Any such audit will be at Customer's expense and will take place on Business Days and during normal business hours. Any and all information, audits, inspections and observations made by Customer under this Section 12.1 shall: (i) be held in confidence, Customer exercising a degree of care not less than the care used by Customer to protect its own proprietary or confidential information that it does not wish to disclose; (ii) be restricted solely to those with a need to know and not to disclose it to any other person, those persons notified of their obligations with respect to the information; and (iii) be used only in connection with the operations that relate to this Agreement. Terminal Owner shall allow Customer's external auditors access to the Terminal, and shall provide any information or explanations requested by such external auditors that Customer would otherwise have access to pursuant to the terms and conditions of this Agreement.

ARTICLE 13 TAXES

13.1 Customer's Obligations. Customer shall pay, or cause to be paid, and shall indemnify and defend Terminal Owner from and against, all Taxes imposed by Applicable Law on Customer with respect to the Product Throughput under this Agreement. Notwithstanding anything in this Agreement to the contrary, Customer shall not be responsible for or be obligated to indemnify or defend Terminal Owner with respect to (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, or (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Customer shall be responsible for paying any sales, use or similar Taxes imposed on the performance of the Services under this Agreement whether collected by Terminal Owner or otherwise.

13.2 Terminal Owner's Obligations. Terminal Owner shall pay, or cause to be paid, and shall indemnify and defend Customer from and against, (i) all ad valorem, property or similar Taxes imposed by Applicable Law on Terminal Owner with respect to its ownership of the Terminal, (ii) any Income Taxes imposed on Terminal Owner, and (iii) any employment, payroll or similar Taxes imposed with respect to Terminal Owner's employees. Notwithstanding anything in this Agreement to the contrary, Terminal Owner shall not be responsible for or be obligated to indemnify or defend Customer with respect to (i) any Income Taxes imposed on Customer, (ii) any employment, payroll or similar Taxes imposed with respect to Customer's employees, or (iii) any sales, use or similar Taxes imposed on the performance of the Services under this Agreement.

ARTICLE 14 FORCE MAJEURE

14.1 Declaration of Force Majeure Event. Except for Customer's obligation to pay Terminal Owner the monetary amounts provided for in Article 4 of this Agreement for Product actually Throughput at the Terminal, neither Party shall be liable to the other for any failure, delay, or omission in the performance of its obligations under this Agreement, or be liable for damages, for so long as and to the extent such failure, delay, omission, or damage arises directly or indirectly from a Force Majeure occurrence; however, the Term of this Agreement shall not be extended by

such period of Force Majeure delay. It is further agreed that the obligations of the Parties that are affected by such Force Majeure (except as provided above), shall be suspended without liability for breach of this Agreement during the continuance of the Force Majeure but for no longer period. The Party affected by Force Majeure shall use commercially reasonable efforts to remedy the Force Majeure condition with all reasonable dispatch, shall give notice to the other Party of the termination of the Force Majeure, and shall resume performance of any suspended obligation promptly after termination of such Force Majeure.

14.2 Force Majeure. A "Force Majeure Event" or "Force Majeure" means any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party, and includes, but is not limited to, the following events to the extent consistent with the definition above: an act of God; fire; flood; hurricane; explosion; accident; act of the public enemy; riot; sabotage; epidemic; quarantine restriction; strike, lockout, or other industrial disturbance or dispute or difference with workers; labor shortage; civil disturbance; inability to secure or delays in obtaining labor, materials, supplies, easements, surface leases, or rights-of-way, including inability to secure materials by reason of allocations promulgated by an authorized Governmental Authority, so long as such Party has used commercially reasonable efforts to obtain the same; compliance with a request, recommendation, act, rule, regulation or order of a Governmental Authority having or purporting to have jurisdiction; delays or failures by a Governmental Authority to grant Permits applicable to the Terminal so long as the Party experiencing the occurrence has used its commercially reasonable efforts to make any required filings with such Governmental Authority relating to such Permits; unanticipated or emergency shutdowns or turnarounds for maintenance and repair; freezing of wells or delivery facilities, partial or entire failure of wells, and other events beyond the reasonable control of a Party claiming suspension that affect the timing of production or production levels; the plugging of equipment, lines of pipe or other facilities; destruction, breakage and/or accidents to facilities including machinery, lines of pipe, wells or storage caverns or facilities; the necessity for making repairs to or alterations of pipelines; the unavailability, interruption, delay or curtailment of Product transportation services; or, any other cause or causes beyond the reasonable control of the Party claiming suspension, whether similar or not to those listed. The settlement of strikes or differences with workers shall be entirely within the discretion of the Party claiming suspension.

14.3 Notice of Force Majeure Event. If either Party finds it necessary to declare Force Majeure under this Agreement, then as soon as reasonably possible after the occurrence of Force Majeure, such Party shall immediately notify the other Party, first by telephone or e-mail, and then promptly by mail or overnight express courier, giving reasonably full details of such occurrence and its estimated duration. The cause of such Force Majeure occurrence shall, only if the affected Party deems it reasonable and economic, be remedied with all reasonable dispatch and the other Party shall be notified either of the date so remedied or the decision not to remedy as soon as practicable.

ARTICLE 15 GENERAL PROVISIONS

15.1 Certain Representations and Warranties. Each Party represents and warrants, as of the Effective Date, that (a) it is duly organized and validly existing under the laws of the

jurisdiction in which it is incorporated or formed; (b) it has all necessary power and authority to enter into and perform its obligations under this Agreement; (c) other than the Regulatory Approvals, which are required to be pursued under this Agreement, such Party is duly qualified or licensed to do business in all jurisdictions wherein the nature of its business and operations or the character of the properties owned or leased by it make such qualification or licensing necessary and where failure to be so qualified or licensed would impair its ability to perform its obligations under this Agreement or would otherwise have a material adverse effect on the other Party; (d) its execution, delivery and performance of this Agreement has been duly authorized by all necessary action on its part and on the part of its Affiliates (as the case may require); (e) its execution, delivery and (provided the required Regulatory Approvals are obtained) performance of this Agreement and the consummation of the transactions contemplated hereby will not conflict with, or result, by itself or with the giving of notice or the passage of time, in any violation of or default under, any provision of the articles of incorporation or bylaws of such Party or any material mortgage, indenture, lease, agreement or other instrument or any permit, concession, grant, franchise, license, contract, authorization, judgment, order, decree, writ, injunction, statute, law, ordinance, rule or regulation applicable to such Party or its properties; and (f) no consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Authority or other Third Party is required in connection with the execution and delivery of this Agreement by such Party or the consummation by such Party of the transactions contemplated hereby, except for filings required in order to obtain the required Regulatory Approvals, as described in Section 2.1.

15.2 Independent Contractor. This Agreement shall not be construed as creating a partnership, joint venture or establish a principal and agent relationship or any other similar relationship between Customer and Terminal Owner with respect to the subject matter hereof. It is understood and agreed that the relationship created by this Agreement is that of principal and independent operator and not that of principal and agent, master and servant, or employer and employee; and Terminal Owner and its employees and contractors shall not be the employees of Customer for any purpose whatsoever. Customer shall designate the work and services it desires to be performed under this Agreement and the ultimate results to be obtained, but shall defer to Terminal Owner as to the methods and details of performance in accordance with the terms and conditions of this Agreement.

15.3 Notices. Any notice, request, demand or communication required to be given by either Party under this Agreement shall be in writing. It may be delivered or sent to the attention of the contact name and address specified in this Agreement by courier service (which is deemed served when delivered) or fax (which is deemed served on the Business Day it was received with written confirmation made thereof) or by certified mail or its equivalent, postage prepaid, return receipt requested or postage prepaid United States Express Mail or its equivalent (which is deemed served the second Business Day after posting). Unless otherwise provided in this Agreement, Email notice is not sufficient. A Party may change the individual and/or address for notices by giving the other Party notice of such change in the manner set forth above.

If to Terminal Owner:

Maalt, LP
4413 Carey Street

Fort Worth, Texas 76119
Attention: Marty Robertson

With a copy to:

James Lanter
James Lanter, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

If to Customer:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: CFO

With a copy to:

Sequitur Permian, LLC
2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042
Attention: General Counsel

15.4 Compliance with Policies and Laws.

(a) HSE Policies. Terminal Owner shall establish, maintain and implement written health, safety and environmental ("HSE") policies, programs and protection and compliance systems covering operations conducted at the Terminal that conform in all material respects with generally accepted industry best practices (as amended from time to time, an "HSE Program"). Terminal Owner shall (a) monitor on a periodic basis its HSE performance and record performance data, (b) conduct an annual review of its HSE Program, and (c) correct any performance deficiencies identified and update the HSE Program as appropriate. Terminal Owner shall notify Customer as soon as reasonably practicable upon becoming aware of any HSE incident or any other material incidents, conditions or HSE matters that could reasonably be expected to adversely affect Terminal operations or Customer. Without limiting the foregoing, Terminal Owner shall maintain currently effective Spill Prevention, Control and Countermeasure ("SPCC") plans and programs, and shall promptly respond to any spill at the Terminal in a manner that (x) is consistent with the SPCC plans, (y) complies with Applicable Law, and (z) seeks to minimize, correct and eliminate any harm to the environment or human health and safety. Terminal Owner shall also comply with and shall cause its subcontractors and their respective employees and consultants to comply with all applicable Customer rules and regulations (as revised from time to time) known to Terminal Owner that relate to the safety and security of persons and property, protection of the environment, housekeeping and work hours.

(b) Compliance with Laws. Terminal Owner agrees that it will comply with, and shall cause its subcontractors and their respective employees, to comply with, all federal, state, and local employment laws and regulations having jurisdiction over the Services, and all other Applicable Law governing the employment relationship and practices and/or protection of the environment. Terminal Owner represents that each of its employees, agents, contractors, subcontractors involved on Terminal Owner's behalf in carrying out the Services is qualified to work pursuant to written documentation from the appropriate regulatory authorities of the United States.

15.5 Applicable Law. This Agreement is subject to all Applicable Law. If this Agreement or any provision of it is found contrary to or in conflict with any such Applicable Law, this Agreement shall be deemed modified to the extent necessary to comply with same.

15.6 Successors. The provisions of this entire Agreement shall be binding upon the respective successors and permitted assigns of the Parties.

15.7 No Third-Party Beneficiaries. This Agreement is entered into for the benefit of the Parties only, and except as may be specifically set forth herein, including the indemnity provisions, no other Person shall be entitled to enforce any provision hereof or otherwise be a third-party beneficiary hereunder.

15.8 Rebates Prohibited. Neither Party will pay any commission, fee, or rebate to an employee of the other Party or favor an employee of the other Party with any gift or entertainment of significant value.

15.9 No Brokers' Fee. Neither Party has incurred any liability to any financial advisor, broker or finder for any financial advisory, brokerage, finder's or similar fee or commission in connection with the transactions contemplated by this Agreement for which either Party or any of its Affiliates could be liable.

15.10 Waivers; Cumulative Rights. No term, covenant, condition, benefit or right accruing to a Party under this Agreement (or any amendment) shall be deemed to be waived unless the waiver is reduced to writing, expressly refers to this Agreement, and is signed by a duly authorized representative of such Party waiving compliance. No failure or delay in exercising any right hereunder, and no course of conduct or dealing, shall operate as a waiver of any provision of this Agreement or affect in any way the right of such Party at a later time to enforce the performance of such provision. No waiver by any Party of any condition, or any breach of any term or covenant contained in this Agreement, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of any breach of any other term or covenant. The rights of Parties under this Agreement shall be cumulative, and the exercise or partial exercise of any such right shall not preclude the exercise of any other right.

15.11 Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO ITS CHOICE OF LAW PROVISIONS THAT WOULD REQUIRE APPLICATION OF THE SUBSTANTIVE LAWS OF ANOTHER JURISDICTION. TO THE EXTENT PERMITTED BY APPLICABLE LAW,

THE PARTIES WAIVE ALL RIGHTS TO A TRIAL BY JURY IN CONNECTION WITH ANY ACTION OR LITIGATION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY DISPUTE CONCERNING OR INTERPRETATION OF THE AGREEMENT, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE. THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT THIS WAIVER IS MADE KNOWINGLY AND VOLUNTARILY AFTER AN ADEQUATE OPPORTUNITY TO NEGOTIATE THE TERMS.

15.12 Captions. The captions used in this Agreement are for convenience only and shall in no way define, limit or describe the scope or intent of this Agreement or any part thereof.

15.13 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be partially or completely unenforceable, this Agreement shall be deemed to be amended partially or completely to the extent necessary to make such provision enforceable, and the remaining provisions shall remain in full force and effect.

15.14 Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed an original and part of one and the same document.

15.15 Entire Agreement; Amendment. This Agreement constitutes the entire agreement between the Parties regarding the subject matters set forth herein. No variation, modification or change of the Agreement shall be binding upon either Party unless contained in a written instrument executed by a duly authorized representative of each of the Parties.

15.16 Survival. After termination or expiration of this Agreement, the provisions hereof that by their sense and context are intended to survive the expiration or other termination of the Agreement because they reasonably require some action or forbearance after termination or expiration (including, without limitation, the reinstatement, indemnity, hold harmless and similar obligations under this Agreement) shall so survive.

15.17 Publicity. Neither Party may make a press release or other public announcement concerning this Agreement, except to the extent that such press release or other public announcement is required by Applicable Law or rules and regulation of any governmental agency or any stock exchange, in which case, the disclosing Party shall prior to such disclosure (a) notify the other Party of the reasons or basis for such disclosure, (b) make the proposed disclosure available to other Party and (c) obtain the written consent of other Party with respect to the form of such proposed disclosure, which consent shall not be unreasonably withheld.

15.18 Construction. The following rules of construction will govern the interpretation of this Agreement: (a) "years" will mean calendar years unless otherwise defined; (b) "including" does not limit the preceding word or phrase; (c) section titles or headings do not affect interpretation; (d) "hereof," "herein," and "hereunder" and words of similar meaning refer to this Agreement as a whole and not to any particular provision of this Agreement; (e) reference to any agreement (including this Agreement), document or instrument means such agreement, document, or instrument as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms of this Agreement; (f) no rule of construction interpreting this Agreement against the drafter will apply; (g) references to Sections and Exhibits refer to Sections

and Exhibits of this Agreement unless otherwise indicated; (h) references to laws refer to such laws as they may be amended from time to time, and references to particular provisions of a law include any corresponding provisions of any succeeding law; (i) references to money refer to legal currency of the United States, unless otherwise specified; (j) the word "or" is not exclusive; (k) references to any Person includes references to such Persons successors and permitted assigns; and (l) the Exhibits attached hereto are hereby incorporated by reference and included as part of this Agreement.

15.19 Attorneys' Fees. In the event that any suit or action is instituted under or in relation to this Agreement, including without limitation, to enforce any provision in this Agreement, the prevailing Party in such dispute shall be entitled to recover from the losing Party all fees, costs and expenses of enforcing any right of such prevailing Party under or with respect to this Agreement, including without limitation, such reasonable fees and expenses of attorneys and accountants, which shall include, without limitation, all fees, costs and expenses of appeals.

15.20 Confidentiality. All non-public, confidential data and information exchanged by the Parties in connection with or under this Agreement and all pricing terms shall be maintained in strict and absolute confidence, and no Party receiving such data, information or terms ("Receiving Party") shall disclose, without the prior consent of the other Party, any such non-public, confidential data, information or pricing terms unless the release thereof is to Receiving Party's Affiliates, and the employees, owners, officers, directors, consultants, attorneys, agents, or representatives of Receiving Party and its Affiliates (collectively, "Representatives") on a clear need-to-know basis and subject to the confidentiality restrictions hereof, required by Applicable Law (including any requirement associated with an elective filing with a Governmental Authority) or the rules or regulations of any stock exchange on which any securities of the Parties or any Affiliates thereof are traded. Nothing in this Agreement shall prohibit the Parties from disclosing whatever information in such manner as may be required by Applicable Law; nor shall any Party be prohibited by the terms hereof from disclosing information acquired under this Agreement to any Representative or any financial institution or investors providing or proposing financing to a Party or to any Person proposing to purchase the equity in any Party or the assets owned by any Party. Notwithstanding the foregoing, the restrictions in this Section will not apply to data or information that (a) is in the possession of the Person receiving such information prior to disclosure by the other Party, (b) is or becomes known to the public other than as a result of a breach of this Agreement or (c) becomes available to a Party on a non-confidential basis from a source other than the other Party, provided that such source is not bound by a confidentiality agreement with, or other fiduciary obligations of confidentiality to, the other Party. This Section will survive any termination of this Agreement for a period of twenty (24) Months from the end of the year in which the date of such termination occurred.


[Signature Page Follows]

vdb

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their respective authorized officers effective for all purposes as of the Effective Date.

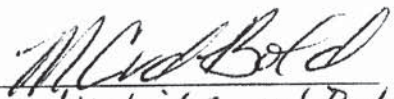
Terminal Owner:

Maalt, LP

By: 
Name: Marty Robertson
Title: President + COO ASB

Customer:

Sequitur Permian, LLC

By: 
Name: Michiel C. vd Bold
Title: President + COO

Signature Page to Terminal Services Agreement

vdB

Exhibit A-1

Rail Terminal Facility

Terminal Facility Address:
Barnhart Loading Facility
44485 W. Hwy 67
Barnhart TX, 76930

Facility description:

Approximately 10,065 ft. of track within a leased (University Lands) site being approximately 2.8 Miles West of the town of Barnhart, being in Irion County, Texas. Rail facility includes #11 (115#) switches (2-mainline & 3-facility) to allow rail extension/access to an existing Texas Pacifico mainline track. Hardwood ties 8' x 6' with #115 lb. new rail with 3 flop over derails and concrete Xing panels. The facility accommodates 6,913 feet of track accessible for crude transloading operations, and includes access roadway from State Highway 67 and all associated drainage/dirt work required on the site. The site has 24/7 capability with all-weather roads and lighting.

Road Access:

Common use, Multi-Tenant Road to the Crude oil off load Terminal.
Hwy 67 access- turn-lanes/ acceleration lanes.

Exhibit A-1

uab

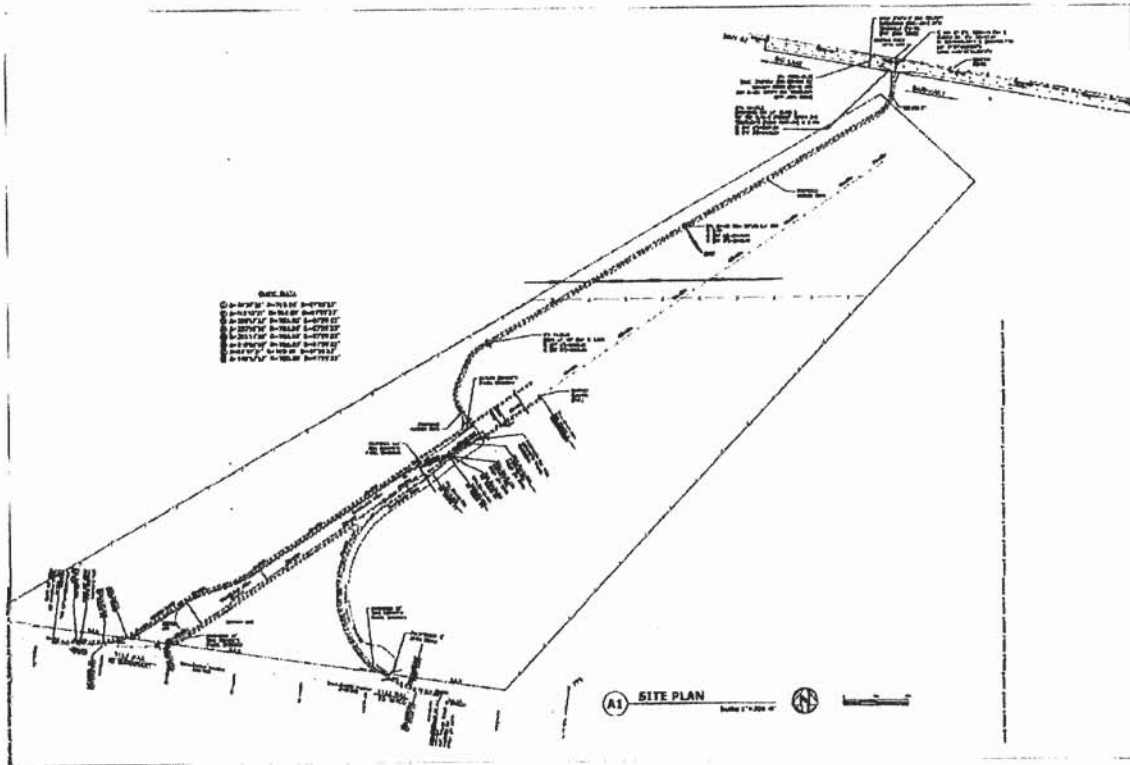


Exhibit A-1

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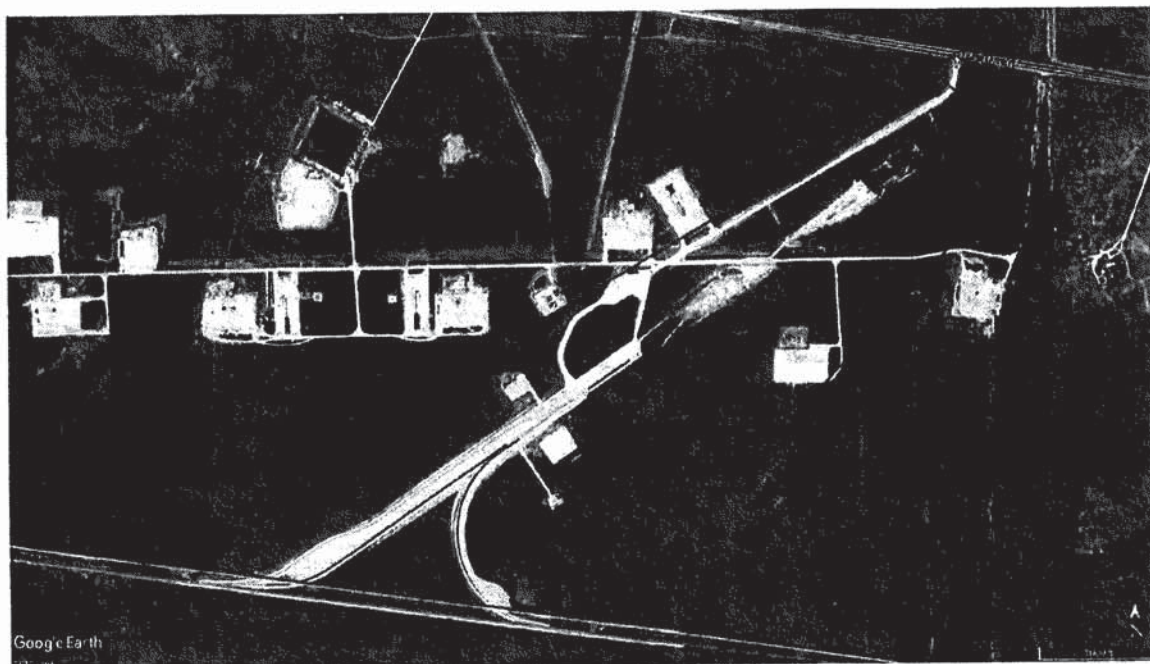


Exhibit A-1

wdk

Exhibit B

Phase I Project

Customer will outfit the Terminal with the following items:

- Vent line for connection to trucks and railcars
- Obtain easement from University Lands for the vent lines
- Flare facility (including a flare, separator and a tank) connected to vent lines for gaseous hydrocarbon byproduct
- Transloaders sufficient to transfer Product from trucks (or pipeline in the event Phase II is implemented) onto railcars
- Hoses, valves and fittings to connect vent lines to trucks, railcars, and flare
- Fire extinguishers at manifolds

Exhibit B

US 5687245

vdb

Exhibit C

Phase II Project

Customer will outfit the Terminal and land near the Terminal with the following items:

- Oil gathering pad with secondary containment, truck racks, charge pumps, electrification, vapor recovery unit, flare, scrubber and automation
- Obtain easements from University Lands for pipelines to the transloading area from nearby land
- Storage tanks with capacity of at least 20,000 barrels sufficient to store oil near the train loading area
- Pipelines connecting the storage tanks to the transloading area
- Fill manifolds tying in the pipelines to the transloaders will be made for transloaders

Exhibit C

US 5687245

colB

Exhibit D**Minimum Insurance Requirements****A. Workers Compensation and Employers Liability (with Alternate Employer):**

Statutory requirements in states where operating, to include all areas involved in Services, but a minimum of.

Employers Liability	\$1,000,000 Each Accident
	\$1,000,000 Disease Each Employee
	\$1,000,000 Disease Policy Limit

B. Commercial General Liability (CGL):

Occurrence Form

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Products-Completed operation aggregate	\$2,000,000
Personal and injury	\$1,000,000

Coverage to include: Bodily injury and property damage, including broad form property damage, products-completed operations, sudden and accidental pollution, blanket contractual specifically covering the indemnity obligations in this Agreement, severability of interests, actions over, independent contractor(s), personal injury (with contractual exclusion deleted where required by contract), XCU.

C. Automobile Liability

Bodily injury and property damage	\$1,000,000 combined single limits
Owned, non-owned, and hired autos	per accident
With broadened pollution coverage, and MCS-90 endorsement (if carrying cargo)	

D. Umbrella/Excess Liability (over EL, CGL, and Auto)

Each Occurrence	\$10,000,000
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Exhibit A-1

vdb

Aggregate

\$10,000,000

F. Property

Terminal Owner shall provide first party/property insurance covering its own property in the amount of the replacement cost of the property.

Additional Requirements:

1. All insurance policies of Terminal Owner, in any way related to the Services and whether or not required by this Agreement, shall, but only to the extent of the risks and liabilities assumed hereunder: (i) name Customer Parties as additional insured (except for worker's compensation, employer's liability, OEE/COW, or professional liability policies) (with such additional insured coverage including coverage for the sole or concurrent negligence of the additional insured and not being restricted (a) to "ongoing operations," (b) to coverage for vicarious liability, or (c) to circumstances in which the named insured is partially negligent), (ii) waive subrogation against Customer Parties, and (iii) be primary and non-contributory to any insurance of Customer Parties.
2. Each Party shall have its policies endorsed to provide not less than thirty (30) Days prior notification in the event of non-renewal, cancellation or material change in the policies. Each Party shall be responsible for any deductibles or self-insured retentions stated in its policies.
3. Terminal Owner shall require the same minimum insurance requirements as listed above of all of its subcontractors will include the same indemnity requirements from each subcontractor. Terminal Owner shall be and responsible for any deficiencies in coverage or limits,
4. Each Party shall provide a certificate of insurance on a form satisfactory to the other Party (attaching appropriate copies of endorsements) and all carriers must have an A.M. Best rating of at least A-VI. Copies of certified policies shall be provided upon written request of a Party.
5. Completed operations coverage shall be maintained by Terminal Owner in favor of indemnitee(s) for a period of two (2) years after final payment to Terminal Owner; Customer Parties shall continue to be named as additional insured(s) during this time frame.
6. Insurance limits required above may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an excess or umbrella policy. Coverage provided under any excess or umbrella policy must be at least as broad as the coverage provided by the primary policy(s).
7. Nothing in this section shall be deemed to limit any Party's liability under this Agreement, and a Party's decision to self-insure shall work no prejudice on the other Party.
8. Neither the minimum policy limits of insurance required of the Parties nor the actual amounts of insurance maintained by the Parties under their insurance program shall operate to modify the Parties' liability or indemnity obligations in this Agreement.

Exhibit A-1

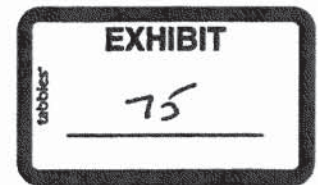
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December 7, 2018

Via email to mrobertson@vprop.com & FedEx
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Marty Robertson

Via email to cfavors@vprop.com
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Chris Favors



Re: Notice of Force Majeure

Gentlemen:

Reference is made to that certain Terminal Services Agreement ("Agreement") dated August 6, 2018 between Sequitur Permian, LLC ("Customer") and Maalt, L.P. ("Terminal Owner") relating to the use of Terminal Owner's rail terminal facility located in Barnhart, Texas ("Terminal"). All capitalized terms not otherwise defined herein have the same meanings as in the Agreement.

Consistent with the ongoing discussions between our companies, and as you are already aware, there presently exists the following situation that is not within the Customer's reasonable control: the unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services ("Existing Force Majeure") to allow for the use of the Terminal for the intended purposes of the Agreement.

Therefore, Customer hereby notifies Terminal Owner of the Existing Force Majeure and hereby finds it necessary to declare Force Majeure under the Agreement. Customer currently anticipates that the Existing Force Majeure will continue for the foreseeable future.

Accordingly, pursuant to the Agreement, Customer is not liable for any failure, delay, or omission of performance arising directly or indirectly from the Force Majeure, and Customer's obligations affected by the Force Majeure, including but not limited to, the obligation to utilize the Terminal for the throughput of Product via rail, are hereby suspended.

Customer will keep Terminal Owner informed of any changes or developments in the status of the existing Force Majeure.

This notice is without prejudice to Customer's rights and remedies, all of which are hereby reserved.

Thank you for your attention to this matter.

Sequitur Permian, LLC
24 Smith Road, Suite 600 • Midland, Texas 79705
P.O. Box 50608 • Midland, Texas 79710
432-218-2001 • f) 888-400-4170

Two BriarLake Plaza • 2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042 • SequiturEnergy.com
713-395-3000 • f) 713-395-3099



Maalt_000002



Letter to Maalt, LP
December 7, 2018
Page 2

Sincerely,

Braden Merrill
CFO

Cc:

Via FedEx

James Lantner
James Lantner, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Sequitur Permian, LLC

24 Smith Road, Suite 600 • Midland, Texas 79705
P.O. Box 50608 • Midland, Texas 79710
432-218-2001 • f) 888-400-4170

Two BriarLake Plaza • 2050 West Sam Houston Parkway S, Suite 1850
Houston, Texas 77042 • SequiturEnergy.com
713-395-3000 • f) 713-395-3099

Maalt_000003

HOOVER SLOVACEK LLP

A REGISTERED LIMITED LIABILITY PARTNERSHIP

T. MICHAEL BALLASES
PARTNER

ATTORNEYS AT LAW
GALLERIA TOWER II
5051 WESTHEIMER, SUITE 1200
HOUSTON, TEXAS 77056

REPLY TO:
P.O. BOX 4547
HOUSTON, TEXAS 77210

ballases@hooverslovacek.com

(713) 977-8686
FAX (713) 977-5395

June 1, 2020

Via CM: RRR No. [INSERT]

First Class Mail

Uptown Appliance Repair, LLC D/B/A Uptown Appliance Repair
Attn: Registered Agent, LegalCorp Solutions, LLC
700 Lavaca Street, Suite 1400 - #5782
Austin, Texas 78701

Via CM: RRR No. [INSERT]

First Class Mail

E-mail to info@uptownappliance repair.com

Robert "Bobby" Fierro
Uptown Appliance Repair, LLC, D/B/A Uptown Appliance Repair
9225 Katy Freeway, Suite 311
Houston, Texas 77024

RE: Invoice from Uptown Appliance Repair ("Uptown") issued to Peter Seffens for purchase and installation of replacement kitchen range on or around March 9, 2020.

FORMAL NOTICE OF CLAIM AND DEMAND LETTER

Gentlemen:

This firm, Hoover Slovacek LLP, represents Peter Seffens ("Mr. Seffens") regarding the purchase of a kitchen range and installation services provided to Mr. Seffens by Uptown. The purpose of this letter is to furnish all parties, to whom this letter is directed, with notice of claims for actions or conduct constituting false, misleading, and deceptive trade practices. This letter is to further provide each of you with the opportunity to cure Mr. Seffens' damages without the need to initiate litigation.¹ Please direct all future correspondence relating to this matter to my attention.

In connection with our firm's representation in this matter, we conferred with our client and commenced an investigation with respect to the matters in issue.

Our investigation indicates that during February 2019, Mr. Seffens hired Uptown to repair his existing Dacor kitchen range unit (the "Dacor Range") at his home. A technician from Uptown examined the Dacor Range and promised Mr. Seffens that it could be repaired by simply replacing the "switches" controlling the Dacor Range. Subsequently, Mr. Robert "Bobby" Fierro ("Fierro"),

¹ This notice letter is afforded to the parties pursuant to the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA") set forth in the Texas Business and Commerce Code Chapter 17 and any and all other notice requirements whether flowing from statute, contract, or otherwise. This notice letter is timely submitted per the applicable legal authorities.

June 1, 2020

Page 2

who is believed to be an owner and manager of Uptown, telephoned Mr. Seffens and represented to him that the Dacor Range is no longer in production, and that a newer, comparable Dacor kitchen range unit could be purchased through and installed by Uptown for approximately \$3,700. Based upon this representation, Mr. Seffens provided Fierro with his personal American Express credit card number to pay for the agreed cost of purchasing the new appliance and labor. On or around February 18, 2020, Uptown initiated a charge on Mr. Seffens' American Express for **\$4,700**, before any services were rendered and without seeking permission from Mr. Seffens to charge an additional \$1,000 to his American Express.

On or around March 9, 2020, a technician from Uptown reported to Mr. Seffens' home to install the new kitchen range when Mr. Seffens was not present to oversee the work performed. Fierro called Mr. Seffens and left him a voicemail message indicating that a new range had been installed and that all warranty documents were left at the house.

To Mr. Seffens' surprise, he came to discover that Uptown installed a Thermador cooktop ("Themador Cooktop") and failed to repair or replace the extraction fan necessary for a fully operational kitchen range. The complete agreed upon labor was never performed because only the cooktop was replaced and not the extraction unit. The Thermador Cooktop retails for approximately \$1,599.00, therefore Uptown charged over \$3,000 for two hours' worth of labor.

That same day, Mr. Seffens received a notification from American Express that Uptown, in addition to already charging him \$4,700, charged an additional of \$11,894.51 to Mr. Seffens' American Express without any explanation and without authorization from Mr. Seffens. Additionally, the Thermador Cooktop installed is defective because multiple burners are not operational, and it is not fit for its ordinary purpose of heating and cooking.

Uptown engaged in a classic bait and switch scam with Mr. Seffens and this is strictly prohibited by Texas law.

Mr. Seffens hereby provides formal notice of his claims. Mr. Seffens has specified in reasonable detail the circumstances surrounding the basis of his claims. He is a consumer within the meaning of the DTPA because he sought to acquire goods and services from Uptown, and the actions and/or conduct referenced above constitute false, misleading, and/or deceptive acts and/or practices in specific violation of the DTPA. In particular, we would make specific reference to the following unlawful acts or practices:

- representing that goods or services have sponsorship, approval, characteristics, uses, or benefits which they do not have;
- representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, when they are of another;
- advertising goods or services with the intent not to sell them as advertised;
- knowingly making false or misleading statements of fact concerning the need for parts, replacement or repair service;
- falsely representing that work or services have been performed on or parts replaced in goods;
- failing to disclose information about goods or services that was known at the time of the transaction to induce the consumer into a transaction that the consumer would not have entered into if the information had been disclosed;

June 1, 2020

Page 3

- engaging in conduct which constitutes an unconscionable action or course of action as defined by the DTPA;
- engaging in conduct which constitutes a breach of an express and/or implied warranty; and
- violating the Texas Debt Collection Act, Tex. Fin. Code §392.404, a tie-in statute to the DTPA, for collecting an amount that was not expressly authorized by agreement or permitted by law.

We would further advise you that our investigation indicates that many of the violations of the DTPA were made negligently and/or knowingly, and that Mr. Seffens has suffered mental anguish and distress relating to the actions and/or omissions set forth above.

Mr. Seffens has been damaged, or will be damaged, from out of pocket expenses including repair or replacement of the Thermador Cooktop, and other miscellaneous items in the amount of at least \$4,700.00. Uptown's actions entitle Mr. Seffens to actual, treble², punitive and exemplary damages along with attorneys' fees, expert witness fees³, court costs, deposition costs and pre and post-judgment interest.

Due to Uptown's conduct, Mr. Seffens has been forced to engage the services of this firm, who will be paid reasonable and customary fees for legal services rendered. Reasonable and necessary fees, costs, and expenses incurred prior to the date of issuance of this letter are \$2,500.00.

Please contact me to discuss this letter. If this matter is not completely resolved in accordance with the terms of this letter within 60 days from the date of receipt, Mr. Seffens intends to file a lawsuit in a court of competent jurisdiction against Uptown for his damages and attorneys' fees relating to the litigation through the trial court and appellate process, if necessary.

Lastly, please preserve and protect all documents, files, correspondence or other items or information relevant to the transactions in issue or any matter noted herein. Also, please forward any and all insurance policies that may cover the damages in question to my attention and place your respective carrier(s) on notice of this claim.

Should you have any questions or concerns, please feel free to contact my office regarding the same. In the meantime, I would ask that any response to this demand be made in writing.

Nothing in this demand constitutes a waiver of any of Mr. Seffen's rights and privileges at law, contract, or in equity, all of which are hereby reserved. Mr. Seffens will either be made whole, or he will tenaciously pursue all available remedies. He prefers the former, but at this point will not hesitate to proceed with the latter. Your prompt attention to this matter is both anticipated and demanded.

² **Error! Main Document Only.** The Texas Deceptive Trade Practices Act entitles Mr. Seffens to treble damages, which means three times his actual damages. See TEX. BUS. & COM. CODE §17.50(h).

³ **Error! Main Document Only.** See TEX. BUS. & COM. CODE §27.01(e).

June 1, 2020

Page 4

Very truly yours,

HOOVER SLOVACEK LLP

T. Michael Ballases

cc: Peter Seffens, *Via Certified Mail, RRR and email to peter@capitalmar.com*

Sequitur Permian, LLC
2050 W. Sam Houston Parkway S., Suite 2050
Houston, Texas 77042

February 8, 2019

Via email to mrobertson@vprop.com & FedEx

Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Marty Robertson

Via email to cfavors@vprop.com & FedEx

Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Chris Favors

Re: Termination of Terminal Services Agreement

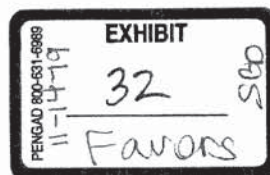
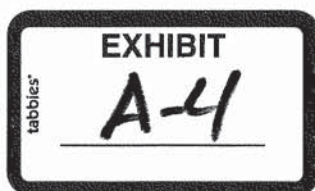
Gentlemen:

Reference is made to (i) that certain Terminal Services Agreement ("Agreement") dated August 6, 2018 between Sequitur Permian, LLC ("Customer") and Maalt, L.P. ("Terminal Owner") relating to the use of Terminal Owner's rail terminal facility located in Barnhart, Texas ("Terminal") and (ii) Customer's letter to Terminal Owner dated December 7, 2018, declaring an existing Force Majeure Event ("Notice of Force Majeure Event"). All capitalized terms not otherwise defined herein have the same meanings as in the Agreement.

The Force Majeure Event described in the Notice of Force Majeure Event has continued for a period of sixty (60) consecutive Days. Accordingly, pursuant to Section 8.4 of the Agreement, Customer hereby notifies Terminal Owner that Customer has elected to terminate the Agreement effective as of the date of this letter. As provided in Section 8.4, Customer shall have no further obligations to Terminal Owner under the Agreement (including, but not limited to, with respect to any Minimum Volume Commitment).

Additionally, pursuant to Section 2.7 of the Agreement, upon termination of the Agreement, Customer, at its sole cost and expense, is permitted to remove any equipment and facilities constituting the Customer Terminal Modifications. As required under the Agreement, Terminal Owner shall provide Customer access to the Terminal to commence and complete the removal of the Customer Terminal Modifications. Customer will be contacting Terminal Owner after the date hereof to (i) discuss the potential acquisition of the Terminal Owner's rights to the surface area and any other appurtenances or (ii) coordinate the removal process.

This notice is without prejudice to Customer's rights and remedies under the Agreement or otherwise, all of which are hereby reserved.



Sequitur_001111

Letter to Maalt, LP
February 8, 2019
Page 2

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Braden Merrill', written over a horizontal line.

Braden Merrill
CFO

Cc:

Via FedEx
James Lantner
James Lantner, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Sequitur_001112

Removal Appendix 0771

Jon Ince

Page 1.4

Page 1	Page 3
<p>1 CAUSE NO. CV19-003</p> <p>2 MAALT, LP, * IN THE DISTRICT COURT</p> <p>3 Plaintiff, *</p> <p>4 V. * IRION COUNTY, TEXAS</p> <p>5 SEQUITUR PERMIAN, LLC, *</p> <p>6 Defendant. * 51ST JUDICIAL DISTRICT</p> <p>7</p> <p>8 VIDEOTAPED</p> <p>9 ORAL DEPOSITION OF</p> <p>10 JON INCE</p> <p>11 TAKEN ON</p> <p>12 NOVEMBER 15, 2019</p> <p>13 VOLUME 1</p> <p>14</p> <p>15</p> <p>16 VIDEOTAPED ORAL DEPOSITION OF JON INCE,</p> <p>17 produced as a witness at the instance of the Defendant</p> <p>18 and duly sworn, was taken in the above-styled and</p> <p>19 -numbered cause on November 15, 2019, from</p> <p>20 9:32 a.m. to 1:06 p.m., before Sonya Britt-Davis, CSR,</p> <p>21 in and for the State of Texas, reported by machine</p> <p>22 shorthand, at the law office of James Lanter, PC,</p> <p>23 located at 560 North Walnut Creek, Suite 120,</p> <p>24 Mansfield, Texas, pursuant to the Texas Rules of Civil</p> <p>25 Procedure and the provisions stated on the record.</p>	<p>1 I N D E X</p> <p>2 PAGE</p> <p>3</p> <p>4 Appearances..... 2</p> <p>5</p> <p>6 Witness: JON INCE</p> <p>7</p> <p>8 Examination by Mr. Kornhauser..... 4</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>Signature and Changes..... 142</p> <p>Reporter's Certification..... 143</p> <p>Reporter's Note: No exhibits marked. All exhibits</p> <p>were previously marked in Mr. Chris Favors' deposition.</p>
Page 2	Page 4
<p>1 A P P E A R A N C E S</p> <p>2 FOR THE PLAINTIFF:</p> <p>3 Mr. Paul O. Wickes</p> <p>4 WICKES LAW, PLLC</p> <p>5 5600 Tennyson Parkway, Suite 205</p> <p>6 Plano, Texas 75024</p> <p>7 Phone: 972.473.6900</p> <p>8 E-mail: pwickes@wickeslaw.com</p> <p>9 AND</p> <p>10 Mr. James Lanter</p> <p>11 JAMES LANTER, PC</p> <p>12 560 North Walnut Creek, Suite 120</p> <p>13 Mansfield, Texas 76063</p> <p>14 Phone: 817.453.4800</p> <p>15 E-mail: jim.lanter@lanter-law.com</p> <p>16</p> <p>17 FOR THE DEFENDANT:</p> <p>18 Mr. Matthew A. Kornhauser</p> <p>19 Mr. Christopher J. Kronzer</p> <p>20 HOOVER SLOVACEK, LLP</p> <p>21 Galleria Tower II</p> <p>22 5051 Westheimer, Suite 1200</p> <p>23 Houston, Texas 77056</p> <p>24 Phone: 713.977.8686</p> <p>25 E-mail: kornhauser@hooverslovacek.com</p> <p>kronzer@hooverslovacek.com</p> <p>Also Present:</p> <p>Mr. Luis Acevedo - Videographer</p>	<p>1 P R O C E E D I N G S:</p> <p>2 THE VIDEOGRAPHER: We're on the record</p> <p>3 for the deposition of Jon Ince. The time is 9:32 a.m.</p> <p>4 on November 15th, 2019.</p> <p>5 If the court reporter can administer the</p> <p>6 oath.</p> <p>7 (Witness sworn.)</p> <p>8 JON INCE,</p> <p>9 having been first duly sworn, testified as follows:</p> <p>10 EXAMINATION</p> <p>11 BY MR. KORNHAUSER:</p> <p>12 Q. Can you please state your name for the record,</p> <p>13 sir?</p> <p>14 A. Jon Ince.</p> <p>15 Q. Mr. Ince, my name is Matthew Kornhauser, and</p> <p>16 I'm a lawyer for Sequitur, the Defendant in this case.</p> <p>17 You're aware of that?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Are you here represented by counsel?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And who's your counsel?</p> <p>22 A. I've got Jim Lanter --</p> <p>23 MR. WICKES: Paul Wickes.</p> <p>24 A. -- and Paul Wickes.</p> <p>25 Q. (BY MR. KORNHAUSER) Okay. Great.</p>



<p>Page 5</p> <p>1 A. Yeah.</p> <p>2 Q. You've just taken a sworn oath in this case.</p> <p>3 You're aware of that?</p> <p>4 A. Yes.</p> <p>5 Q. And you're aware that the answers that you</p> <p>6 give to the questions that I'm going to pose are under</p> <p>7 the pains and penalties of perjury? You understand</p> <p>8 that, sir?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. Have you ever had your deposition taken</p> <p>11 before?</p> <p>12 A. No.</p> <p>13 Q. All right. A few ground rules. If you don't</p> <p>14 understand my question, please tell me. I'll be more</p> <p>15 than glad to rephrase it. Is that agreeable?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Otherwise, I'm going to assume that</p> <p>18 you've given me your best answer to a question you</p> <p>19 understood. You understand that?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Please wait for me to finish my</p> <p>22 question before you give me your answer, and I'll wait</p> <p>23 for you to finish your answer before I make my next</p> <p>24 question. This way the court reporter can have a clean</p> <p>25 record. Is that agreeable?</p>	<p>Page 7</p> <p>1 relevant, and that's the extent of searching on it,</p> <p>2 on -- for documents on my own.</p> <p>3 Q. Okay. So you searched documents that would be</p> <p>4 maybe responsive to a request for production, documents</p> <p>5 in this case?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And you gathered the documents and</p> <p>8 turned them over to whom?</p> <p>9 A. To Jim Lanter and his associates.</p> <p>10 Q. Okay. But you did no further research</p> <p>11 independently to prepare for this deposition?</p> <p>12 A. No.</p> <p>13 Q. Did you visit with anybody or speak with</p> <p>14 anybody over the phone or interact by way of e-mail or</p> <p>15 other electronic communications to prepare for this</p> <p>16 deposition?</p> <p>17 A. Other than counsel.</p> <p>18 Q. Okay. Did you consult with or meet with any</p> <p>19 other employees or representatives of Maalt/Vista in</p> <p>20 the preparation of the deposition?</p> <p>21 A. No.</p> <p>22 Q. Okay. Did you meet with Mr. Favors?</p> <p>23 A. No.</p> <p>24 Q. Okay. Did you meet with Mr. Humphreys or with</p> <p>25 Mr. Robertson?</p>
<p>Page 6</p> <p>1 A. Yes, it is.</p> <p>2 Q. Okay. And you understand the court reporter</p> <p>3 is taking down my question and your answer verbatim?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And that the testimony will be</p> <p>6 potentially used in the proceeding which is presently</p> <p>7 pending. You're aware of that?</p> <p>8 A. Yes.</p> <p>9 Q. All right. You said you never gave your</p> <p>10 deposition before. But have you ever given sworn</p> <p>11 testim- -- testimony in a courtroom before?</p> <p>12 A. No.</p> <p>13 Q. Okay.</p> <p>14 A. I don't believe so.</p> <p>15 Q. All right. So is this the first time that</p> <p>16 you've been a part of a legal proceeding?</p> <p>17 A. Yes.</p> <p>18 Q. All right. What did you do to prepare for the</p> <p>19 deposition today?</p> <p>20 A. I reviewed documents that -- that were</p> <p>21 gathered, reviewed e-mails, stuff like that.</p> <p>22 Q. Okay. Did you search for any records on your</p> <p>23 own?</p> <p>24 A. At the beginning of -- of all of this, you</p> <p>25 know, I just went through e-mails that -- that may be</p>	<p>Page 8</p> <p>1 A. No.</p> <p>2 Q. Okay. Did you speak with Mr. Travis Morris at</p> <p>3 Jupiter?</p> <p>4 A. No.</p> <p>5 Q. Okay. When was the last time you spoke with</p> <p>6 Mr. Morris at Jupiter?</p> <p>7 A. It was quite a while back. I don't know how</p> <p>8 many months. Late -- late 2018, early this year. I</p> <p>9 know that he's no longer with -- with Jupiter, and it</p> <p>10 was probably weeks or -- you know, it was in a time</p> <p>11 frame before he left that I had last spoken with him.</p> <p>12 Q. I see.</p> <p>13 Okay. How are you employed, sir?</p> <p>14 A. I'm employed by a group of companies that does</p> <p>15 business as Vista Proppants and Logistics.</p> <p>16 Q. Okay. You're an employee at Vista?</p> <p>17 A. Yeah, that company, the -- the group of</p> <p>18 company -- I -- I -- I work -- I -- let's see. My --</p> <p>19 my labor and my skills are for the Maalt, Maalt, LP,</p> <p>20 and the Vista, the mining company, so I -- I -- I kind</p> <p>21 of serve at all three companies that together form the</p> <p>22 company doing business as Vista Proppants and</p> <p>23 Logistics.</p> <p>24 Q. I didn't understand much of that.</p> <p>25 A. Right.</p>

Page 13	Page 15
<p>1 A. No, I did not.</p> <p>2 Q. Okay. They did that on their own?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Did -- did they use Jonas Struthers to</p> <p>5 secure their crude by rail?</p> <p>6 A. They talked with Jonas Struthers about</p> <p>7 obtaining railcars, but they ultimately did not use</p> <p>8 him.</p> <p>9 Q. Okay. Do you know who provided the rates and</p> <p>10 who provided the cars as it relates to the transloading</p> <p>11 activities to the Pecos facility of crude by rail?</p> <p>12 A. I believe they used cars provided by Equinor.</p> <p>13 Q. Okay.</p> <p>14 A. Outside of who provided the rates, I -- I do</p> <p>15 not know that. I know that we did not provide any</p> <p>16 rates. And then to move trains, you have to submit</p> <p>17 billing for the -- for the origin and destination to</p> <p>18 the railroads. We did not do that.</p> <p>19 Q. Okay.</p> <p>20 A. That's -- that's usually the stuff that a</p> <p>21 logistics or a third-party logistics would handle.</p> <p>22 Q. Okay. Are there any other instances where you</p> <p>23 were involved in the logistics of moving crude by rail?</p> <p>24 A. I -- not that I can recall. The -- the -- I</p> <p>25 handle the normal stuff of, you know, what you</p>	<p>1 Q. Okay.</p> <p>2 A. -- of 2018.</p> <p>3 Q. Okay. How did you come to learn of Sequitur?</p> <p>4 A. Blake DeNoyer had an e-mail that -- that he</p> <p>5 forwarded to Chris Favors and myself, and that was the</p> <p>6 first introduction of Sequitur.</p> <p>7 Q. Okay. What was Sequitur's purpose for</p> <p>8 interacting with Maalt/Vista back in May 2018 that you</p> <p>9 understood?</p> <p>10 A. With that introduction it was that they were</p> <p>11 looking for an opportunity to remove crude by rail out</p> <p>12 of West Texas. I do -- I do know that prior to that</p> <p>13 there were some opportunities we were pursuing as a</p> <p>14 company to provide them with frac sand, but I don't</p> <p>15 think that ever came to fruition.</p> <p>16 Q. Okay. Were you involved in those efforts?</p> <p>17 A. No.</p> <p>18 Q. Okay. So Blake DeNoyer got the first contact</p> <p>19 from Sequitur? Is that what you understand?</p> <p>20 A. I believe so based off of the documents that</p> <p>21 were produced.</p> <p>22 Q. Okay. And -- and Blake passed on that</p> <p>23 information to you and Chris Favors?</p> <p>24 A. Yes, I believe so.</p> <p>25 Q. Okay. And what did you do with that</p>
Page 14	Page 16
<p>1 consider --</p> <p>2 Q. Right.</p> <p>3 A. -- logistics or the supply chain.</p> <p>4 Q. Right. So most --</p> <p>5 A. Yeah.</p> <p>6 Q. -- of your efforts relate to logistics as it</p> <p>7 relates to transloading frac sand?</p> <p>8 A. By most, if you talk about a percentage, yes,</p> <p>9 but it's definitely -- we'll -- we'll transload</p> <p>10 anything. I mean, one of the key core competencies of</p> <p>11 Maalt, LP, is -- is transloading. So internally, you</p> <p>12 know, whatever business opportunity presents itself,</p> <p>13 we'll definitely take a look at it because that's what</p> <p>14 that business is expert at.</p> <p>15 Q. All right. But mostly frac sand?</p> <p>16 A. Right now, yeah, mostly frac sand.</p> <p>17 Q. Right.</p> <p>18 And the instance that you described for</p> <p>19 us relating to the Pecos facility with Jupiter, that</p> <p>20 was the only instance that you were involved in the</p> <p>21 logistics of in transloading crude by rail?</p> <p>22 A. Yes, sir.</p> <p>23 Q. Okay. When did you first hear about Sequitur?</p> <p>24 A. I believe that was in the May -- April, May,</p> <p>25 June time frame --</p>	<p>1 information?</p> <p>2 A. I reached out -- I can't remember if it was</p> <p>3 Braden Merrill or Tony Wroten, but I reached out to one</p> <p>4 of those two individuals, maybe both, just to set up a</p> <p>5 initial contact to find out what they were interested</p> <p>6 there and see if there was any possibility for us to</p> <p>7 provide services.</p> <p>8 Q. Okay. Let's take a look at Exhibit Number 2.</p> <p>9 You've seen that e-mail before; is that correct, sir?</p> <p>10 A. Yes.</p> <p>11 Q. All right. This is an e-mail that you sent to</p> <p>12 Bra- -- Braden Merrill and -- and Tony over at Sequitur</p> <p>13 on May 9th, 2018; is that correct?</p> <p>14 A. Yes.</p> <p>15 Q. You sent this e-mail?</p> <p>16 A. Oh, yes. I'm sorry. Yes.</p> <p>17 Q. All right. And it reflects a conversation</p> <p>18 that you had with the both of them. What do you recall</p> <p>19 about that conversation?</p> <p>20 A. Nothing really stands out. It -- it -- you</p> <p>21 know, it was an initial conversation.</p> <p>22 Q. Okay. Do you recall anything in particular</p> <p>23 about the conversation?</p> <p>24 A. Nothing -- no, I mean -- nothing really in</p> <p>25 particular. Like I said, it's -- it's just an</p>

<p>Page 17</p> <p>1 introductory conversation and...</p> <p>2 Q. Okay. It says: Great -- it was great talking</p> <p>3 with you, and I look forward to our talks progressing</p> <p>4 on shipping crude at the basin. Feel free to reach out</p> <p>5 to me if you need any help on fleet sizing or routing,</p> <p>6 and I'll do what I can step you through the process.</p> <p>7 (As read.)</p> <p>8 And then in the -- it says: VProp works</p> <p>9 on the belief that we succeed when our partners</p> <p>10 succeed. I will get you the info I promised you in the</p> <p>11 coming days. (As read.)</p> <p>12 What information did you promise to</p> <p>13 provide Tony and Braden on May 9th, 2018?</p> <p>14 A. What information I promised from that</p> <p>15 conversation, I -- I don't recall. But within many of</p> <p>16 these initial conversations that we have, it's -- it</p> <p>17 usually revolves around, you know, how -- how many, in</p> <p>18 this case, barrels can you transload in a day? Do you</p> <p>19 have the facility? What's the timing if the facility</p> <p>20 is available? How many railcars could it hold? A --</p> <p>21 a -- again, a lot of basic fact-finding information</p> <p>22 just that usually comes from an initial phone call like</p> <p>23 that.</p> <p>24 Q. Okay. In this phone call did Sequitur explain</p> <p>25 the term that they desired?</p>	<p>Page 19</p> <p>1 A. It -- it -- it fluctuated to where maybe it</p> <p>2 was going to start off 10-, 11-, 12,000 barrels a day</p> <p>3 or -- yeah, I believe a day and ramping up at the end</p> <p>4 of twenty nine- -- 2018 and into the early part of 2019</p> <p>5 and be pretty steady. But those -- those numbers</p> <p>6 definitely fluctuated. Sequitur's -- Sequitur's</p> <p>7 ability to produce -- they had so many different</p> <p>8 variables just like every --</p> <p>9 Q. Okay.</p> <p>10 A. -- every business does. So I know that number</p> <p>11 did fluctuate.</p> <p>12 Q. So did you explain -- or did you explain to</p> <p>13 Sequitur the number of trains and railcars that would</p> <p>14 be needed to handle that type of volume?</p> <p>15 A. Yeah, within those conversations definitely.</p> <p>16 They -- they seemed to struggle with understanding what</p> <p>17 did they need from a train and a railroad perspective,</p> <p>18 and -- and I would give them some -- some -- some help</p> <p>19 as far as understanding, Here's -- here's how you would</p> <p>20 need to go in the process of finding out how many</p> <p>21 railcars you need.</p> <p>22 Q. Okay. You said they struggled in</p> <p>23 understanding.</p> <p>24 A. Yeah.</p> <p>25 Q. What -- what -- what is it that specifically</p>
<p>Page 18</p> <p>1 A. I don't recall if it was in that phone call or</p> <p>2 not. There was -- there was quite a few phone calls</p> <p>3 about this time, so I -- I don't know if it was in that</p> <p>4 initial one or not.</p> <p>5 Q. Okay. Did Sequitur ever share with you,</p> <p>6 during any of these phone calls, the term they were</p> <p>7 looking for?</p> <p>8 A. Oh, yeah. Yeah.</p> <p>9 Q. Well, what do you understand that term to be?</p> <p>10 A. That term -- while I can't remember the -- you</p> <p>11 know, the specific if it was eighteen to twenty-four</p> <p>12 months, it really revolved around a time frame of about</p> <p>13 eighteen to twenty-four months that -- that coincided</p> <p>14 with the pipeline coming on, and -- and they were just</p> <p>15 trying to take advantage of the price differential</p> <p>16 which was going to be reduced once the pipeline came on</p> <p>17 and allowed inventory to move out of West Texas.</p> <p>18 Q. Okay. And so that was shared with you in</p> <p>19 these phone calls. Now, did they talk with you about</p> <p>20 the volume of -- of -- of crude oil that they were</p> <p>21 looking to transload in these conversations?</p> <p>22 A. Yes. Throughout the -- the conversations that</p> <p>23 we had, that definitely did come up.</p> <p>24 Q. Okay. And what did you understand that volume</p> <p>25 to be?</p>	<p>Page 20</p> <p>1 causes you to reach that conclusion?</p> <p>2 A. I had a phone call with -- with Tony, and</p> <p>3 the -- I had multiple phone calls with Tony where he</p> <p>4 was asking about how many railcars do we need, and that</p> <p>5 same ke- -- question came up, and I would walk him</p> <p>6 through the process of it really just depends on how --</p> <p>7 how fast are you going to be able to get it down to the</p> <p>8 destination and then how fast are they going to get it</p> <p>9 back, you know, and that really determines how many</p> <p>10 railcars you need. And they -- they seemed to -- Tony</p> <p>11 seemed to struggle grasping that because every time we</p> <p>12 talked, that would come up pretty often.</p> <p>13 Q. Would it be fair to say that Sequitur was</p> <p>14 fairly inexperienced with the concept of transporting</p> <p>15 crude by rail?</p> <p>16 A. I can't speak to their -- their -- their</p> <p>17 experience as far as what they've done in the past.</p> <p>18 But the way that they were presenting themselves, they</p> <p>19 seemed to -- to lack a knowledge.</p> <p>20 Q. Okay. So did you tell him how many trains and</p> <p>21 railcars you thought they would need given the term</p> <p>22 that they were looking at, given the volume they were</p> <p>23 looking at, things such as that?</p> <p>24 A. I produced a spreadsheet in Excel, and -- and</p> <p>25 I walked Tony through it, and I -- just how some --</p>

<p style="text-align: right;">Page 89</p> <p>1 A. I don't remember who all -- who all I heard 2 that from, but... 3 Q. Did you talk any business when you were 4 there -- 5 A. No. 6 Q. -- with Mr. Merrill and Mr. Wroten? 7 A. I don't believe so. 8 Q. Okay. And when was this meeting at Gus's 9 chicken? Was it after the signing of the TSA? 10 A. Oh, I really don't know. With -- with me 11 being not a part of the TSA signing and -- and often 12 not at the Carey Street office where this took place, 13 you know, I'll -- I'll go days without seeing 14 Mr. Favors and some of the other group, so I don't know 15 if it happened before or after or around that time. 16 Q. Okay. Was there anything else that Mr. Favors 17 shared with you about the meeting other than the fact 18 that Sequitur was now going to be doing business with 19 Jupiter? 20 A. Not that I recall. 21 Q. You became aware that the TSA was signed, 22 though, at some point in time? 23 A. Yes. 24 Q. Okay. And were you aware of what the target 25 terminal operation commencement date was?</p>	<p style="text-align: right;">Page 91</p> <p>1 would be my responsibility just to follow up, so like 2 with the permitting, it wouldn't be my responsibility 3 for that, but I would check with our -- 4 Q. Okay. 5 A. -- our safety guy. 6 Q. All right. So do you know whether or not all 7 the regulatory requirements were in place for the 8 terminal to be fully operational? 9 A. It was my impression that they were in place. 10 Q. Okay. And what is that impression based on? 11 A. Well, whenever we needed the PBR, the air 12 permit in place, I would follow up with the safety guy, 13 Brian Hecht. Say, you know, is this done? And we 14 would be on the call together. 15 Q. Okay. 16 A. And he'd say, Yeah, that's in place. 17 Q. Are there any documents to reflect that the 18 regulatory approvals were secured, the ones that were 19 needed for the terminal to be fully operational? Are 20 there documents reflecting those regulatory approvals? 21 A. That's an assumption that there are. I know I 22 have never seen it. But it's also not out of -- 23 Q. Okay. 24 A. -- out of -- out of the course of my business 25 dealings with this for me to not see them.</p>
<p style="text-align: right;">Page 90</p> <p>1 A. I believe they wanted to shoot for like 2 September 1st. 3 Q. Right. 4 A. And that was -- that was my understanding. 5 Q. Okay. And what did you understand had to 6 occur in order for the terminal to be fully 7 operational, and what role were you going to play? 8 A. Similar to the previous roles of just the 9 negotiation up to this point of I facilitate -- 10 actually, I think Braden pivoted to facilitate the 11 calls at that point, and we'd just give updates here's 12 where we're at progressing. And I think's a standard 13 terminal operation. You need men -- men in place. You 14 need the -- the structures in place, permitting, the -- 15 going down the -- the -- the -- I guess starting off 16 the meeting of saying, Here's everything we need to 17 have going on, that really wasn't the role that I took. 18 It was, again, a -- a follow-up. If -- if they said, 19 you know, by next week need to have this done, I 20 would -- I would see where we're at that next week. 21 Q. Okay. Was it part of your responsibilities to 22 see to it that these items were handled for the 23 terminal to become fully operational? Was that part of 24 your responsibility or... 25 A. It -- it would be -- I guess you can say it</p>	<p style="text-align: right;">Page 92</p> <p>1 Q. Okay. Were the necessary permits in place? 2 A. I believe so. 3 Q. Okay. Are there documents reflecting that? 4 A. It's the same answer. I've never seen them, 5 but I -- I would expect that there's documentation 6 somewhere. 7 Q. You said men and structures. Is there -- is 8 there anything else other than men, structures, permits 9 and regulatory approvals that needed to happen before 10 the terminal was fully operational? 11 A. Not that I can -- not that I can really think 12 of. 13 Q. Okay. Take a look at the terminal agreement, 14 Page 5. Under terminal operations commencement date, 15 do you see that definition? 16 A. Yes, I do. 17 Q. Are you aware of whether or not Sequitur had 18 sent written notice to Maalt/Vista advising that the 19 terminal was fully operational? 20 A. I do not believe that they have sent written 21 notice advising that the terminal was fully 22 operational. 23 Q. Okay. Is that something that you or anybody 24 else at Maalt/Vista had ever asked for? 25 A. I'm not sure. I -- I -- I know that I did</p>

Page 137	Page 139
<p>1 (Break taken from 12:55 to 1:02.)</p> <p>2 THE VIDEOGRAPHER: We're on the record.</p> <p>3 The time is 1:02.</p> <p>4 Q. (BY MR. KORNHAUSER) Mr. Ince, Maalt/Vista has</p> <p>5 taken the position that they're aware of other shippers</p> <p>6 that were moving crude by rail from other facilities in</p> <p>7 the general area that includes the Barnhart facility</p> <p>8 utilizing the short-line railroads and the Class 1</p> <p>9 railroads. What other shippers are you aware of that</p> <p>10 were moving crude?</p> <p>11 A. And by shippers, you mean the railroads?</p> <p>12 Q. Yeah.</p> <p>13 A. And -- and out of -- out of the Permian West</p> <p>14 Texas basin that we're -- we're discussing?</p> <p>15 Q. Uh-huh. Yeah.</p> <p>16 A. You've got the -- the UP that's moving crude</p> <p>17 by rail, the BNSF, the KCS, and then the two short</p> <p>18 lines that we're discussing here, the Fort Worth and</p> <p>19 Western and TXPF.</p> <p>20 Q. And what are the other facilities that you're</p> <p>21 aware of?</p> <p>22 A. I'm -- I'm aware of the -- the Barnhart</p> <p>23 facility, the CIG --</p> <p>24 Q. Okay.</p> <p>25 A. -- facility just because I've -- I've gone by</p>	<p>1 Q. So it's not personal knowledge that you're</p> <p>2 basing this -- comments on; these are things that</p> <p>3 you've been told or things that you learned through</p> <p>4 other sources?</p> <p>5 A. I -- I -- yeah, this is not directly</p> <p>6 information from the shipper -- from the oil purchaser</p> <p>7 that's taking advantage of the arbitrage. This is from</p> <p>8 the -- the -- the railroads that I'm hearing a lot of</p> <p>9 that.</p> <p>10 Q. Scuttlebutt?</p> <p>11 A. Not scuttlebutt. It's: Your -- your -- your</p> <p>12 train is waiting while this crude train passes.</p> <p>13 Q. Uh-huh. Maalt/Vista has never transloaded any</p> <p>14 crude by rail at the Barnhart facility; is that true?</p> <p>15 A. That is true.</p> <p>16 Q. Even as we speak?</p> <p>17 A. Correct.</p> <p>18 Q. Since the notice of termination of the</p> <p>19 terminal service agreement which was Exhibit 13, which</p> <p>20 was in February of '19, has Maalt/Vista attempted, in</p> <p>21 any way, shape or form, to secure another business</p> <p>22 partner to transload crude by rail out of the Barnhart</p> <p>23 facility?</p> <p>24 A. And by partner, you mean another customer?</p> <p>25 Q. Uh-huh. Someone other than Sequitur.</p>
Page 138	Page 140
<p>1 that facility in my travels.</p> <p>2 Q. Okay.</p> <p>3 A. But outside of that, the other competition, I</p> <p>4 guess you could call it, I'm not too familiar where --</p> <p>5 too familiar with that.</p> <p>6 Q. Okay.</p> <p>7 A. That's --</p> <p>8 Q. Do you -- do you know the volume of -- of oil</p> <p>9 that's being moved by these shippers at these other</p> <p>10 facilities?</p> <p>11 A. I'm not, the specific volumes. But multiple</p> <p>12 trains a week it was at one point.</p> <p>13 Q. When?</p> <p>14 A. In the same time frame that we're discussing</p> <p>15 the -- this Sequitur deal out of our Barnhart facility.</p> <p>16 Q. And what is that information based upon? In</p> <p>17 other words, how do you know that?</p> <p>18 A. The -- the -- the railroads that I'm -- that I</p> <p>19 serve -- or, excuse me, that serves our facility in</p> <p>20 Cresson, Texas, they would -- they would alert me to</p> <p>21 crude trains coming and going because that has a direct</p> <p>22 effect on the sand traffic.</p> <p>23 Q. Okay.</p> <p>24 A. And then also just reports from -- from what</p> <p>25 we're hearing in the field.</p>	<p>1 A. I'm not aware, but that could -- but that</p> <p>2 means that -- that is to be taken that that could</p> <p>3 have -- could have happened, but I'm -- I'm not aware</p> <p>4 of it.</p> <p>5 Q. Was there any attempt to find another partner?</p> <p>6 A. Not one that I'm aware of.</p> <p>7 Q. Okay.</p> <p>8 A. But it could have happened.</p> <p>9 Q. All right. Well, anything could have</p> <p>10 happened, but you just don't know if it did or didn't;</p> <p>11 is that true?</p> <p>12 A. For searching for another partner, yes.</p> <p>13 Q. All right.</p> <p>14 MR. KORNHAUSER: I'll go ahead and pass</p> <p>15 the witness.</p> <p>16 MR. WICKES: We'll reserve our questions</p> <p>17 until trial.</p> <p>18 THE VIDEOGRAPHER: Off the record at</p> <p>19 1:06.</p> <p>20 (End of proceedings at 1:06.)</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 141			Page 143		
1 CHANGES AND SIGNATURE			1 CAUSE NO. CV19-003		
2 WITNESS: JON INCE DATE: 11/15/2019			2 MAALT, LP. * IN THE DISTRICT COURT		
3 PAGE/LINE CHANGE REASON			3 *		
4			3 Plaintiff, *		
5			4 V. * IRION COUNTY, TEXAS		
6			5 SEQUITUR PERMIAN, LLC, *		
7			6 Defendant. * 51ST JUDICIAL DISTRICT		
8			7		
9			8 REPORTER'S CERTIFICATION		
10			8 VIDEOTAPED ORAL DEPOSITION		
11			9 OF JON INCE		
12			9 TAKEN ON		
13			10 NOVEMBER 15, 2019		
14			10 VOLUME 1		
15			11		
16			12		
17			13		
18			14 I, SONYA BRITT-DAVIS, Certified		
19			15 Shorthand Reporter in and for the State of Texas,		
20			16 hereby certify to the following:		
21			17 That the witness, JON INCE, was duly		
22			18 sworn by the officer, and that the transcript of the		
23			19 oral deposition is a true record of the testimony given		
24			20 by the witness;		
25			21 That the deposition transcript was		
			22 submitted on _____, _____, to the		
			23 witness or to the attorney for the witness for		
			24 examination, signature and return to me by _____		
			25 _____;		
Page 142			Page 144		
1 I, JON INCE, have read the foregoing			1 That the amount of time used by each		
2 deposition and hereby affix my signature that same is			2 party at the deposition is as follows:		
3 true and correct, except as noted above.			3 Mr. Kornhauser - 3 hours, 13 minutes.		
4			4 That pursuant to information given to		
5			5 the deposition officer at the time said testimony was		
6			6 taken, the following includes counsel for all parties		
7			7 present:		
8			8 FOR THE PLAINTIFF:		
9			9 Mr. Paul O. Wickes		
10			10 WICKES LAW, PLLC		
11			11 5600 Tennyson Parkway, Suite 205		
12			12 Plano, Texas 75024		
13			13 Phone: 972.473.6900		
14			14 E-mail: pwickes@wickeslaw.com		
15			15 AND		
16			16 Mr. James Lanter		
17			17 JAMES LANTER, PC		
18			18 560 North Walnut Creek, Suite 120		
19			19 Mansfield, Texas 76063		
20			20 Phone: 817.453.4800		
21			21 E-mail: jim.lanter@lanter-law.com		
22			22 FOR THE DEFENDANT:		
23			23 Mr. Matthew A. Kornhauser		
24			24 Mr. Christopher J. Kronzer		
25			25 HOOVER SLOVACEK, LLP		
			26 Galleria Tower II		
			27 5051 Westheimer, Suite 1200		
			28 Houston, Texas 77056		
			29 Phone: 713.977.8686		
			30 E-mail: kornhauser@hooverslovacek.com		
			31 kronzer@hooverslovacek.com		
			32		
			33 I further certify that I am neither		
			34 counsel for, related to, nor employed by any of the		
			35 parties or attorneys in the action in which this		

Page 145

1 proceeding was taken, and further that I am not
2 financially or otherwise interested in the outcome of
3 the action.

4 Further certification requirements
5 pursuant to Rule 203 of TRCP will be certified to after
6 they have occurred.

7 Certified to by me this 27th day of
8 November, 2019.

9
10 *Sonya Britt-Davis*
11

12
13 SONYA BRITT-DAVIS, Texas CSR #7205
14 Expiration Date: October 31, 2021
15 Lexitas - Dallas
16 Firm Registration No. 459
17 6500 Greenville Avenue, Suite 445
18 Dallas, Texas 75206
19 Phone: 214.373.4977
20
21
22
23
24
25

Page 146

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2 The original deposition/signature page
3 was/was not returned to the deposition officer on
4 _____;

5 If returned, the attached Changes and
6 Signature page contains any changes and the reasons
7 therefor;

8 If returned, the original deposition was
9 delivered to Mr. Matthew A. Kornhauser, Custodial
10 Attorney;

11 That \$ _____ is the deposition
12 officer's charges to the Defendant, in preparing the
13 original deposition transcript and any copies of
14 exhibits;

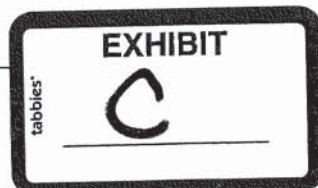
15 That the deposition was delivered in
16 accordance with Rule 203.3, and that a copy of this
17 certificate was served on all parties shown herein on
18 _____ and filed with the Clerk.

19 Certified to by me this _____ day of
20 _____, _____.

21 *Sonya Britt-Davis*

22 SONYA BRITT-DAVIS, Texas CSR #7205
23 Expiration Date: October 31, 2021
24 Lexitas - Dallas
25 Firm Registration No. 459
6500 Greenville Avenue, Suite 445
Dallas, Texas 75206
Phone: 214.373.4977

Page 1		Page 3	
1	CAUSE NO. CV19-003	1	I N D E X
2	MAALT, LP, * IN THE DISTRICT COURT	2	PAGE
3	Plaintiff, *	2	Appearances.....
4	V. * IRION COUNTY, TEXAS	3	Witness: CHRIS FAVORS
5	SEQUITUR PERMIAN, LLC, *	4	Examination by Mr. Kornhauser.....
6	Defendant. * 51ST JUDICIAL DISTRICT	5	Signature and Changes.....
7		6	Reporter's Certification.....
8		7	EXHIBIT INDEX
9	VIDEOTAPED	8	PAGE
10	ORAL DEPOSITION OF	9	Exhibit 1.....
11	CHRIS FAVORS	10	Jupiter000274 and Jupiter000275
12	TAKEN ON	11	Exhibit 2.....
13	NOVEMBER 14, 2019	12	Maalt_000299
14	VOLUME 1	13	Exhibit 3.....
15		14	Maalt_000300 through Maalt_000302
16	VIDEOTAPED ORAL DEPOSITION OF CHRIS	15	Exhibit 4.....
17	FAVORS, produced as a witness at the instance of the	16	Maalt_000079 and Maalt_000080
18	Defendant and duly sworn, was taken in the above-styled	17	Exhibit 5.....
19	and -numbered cause on November 14, 2019, from	18	Maalt_000322 and Maalt_000323
20	9:33 a.m. to 5:00 p.m., before Sonya Britt-Davis, CSR,	19	Exhibit 6.....
21	in and for the State of Texas, reported by machine	20	Sequitur_001756 through Sequitur_001762
22	shorthand, at the law office of James Lanter, PC,	21	Exhibit 7.....
23	located at 560 North Walnut Creek, Suite 120,	22	Sequitur_000995
24	Mansfield, Texas, pursuant to the Texas Rules of Civil	23	Exhibit 8.....
25	Procedure and the provisions stated on the record.	24	Maalt_000231
		25	Exhibit 9.....
			Sequitur_001318
			Exhibit 10.....
			Maalt_000303 and Maalt_000304
			Exhibit 11.....
			Maalt_000275
Page 2		Page 4	
1	A P P E A R A N C E S	1	EXHIBIT INDEX (CONT'D)
2	FOR THE PLAINTIFF:	2	PAGE
3	Mr. Paul O. Wickes	2	Exhibit 12.....
4	WICKES LAW, PLLC	3	Maalt_000289 and Maalt_000290
5	5600 Tennyson Parkway, Suite 205	4	Exhibit 13.....
6	Plano, Texas 75024	5	Terminal Services Agreement
7	Phone: 972.473.6900	6	Exhibit 14.....
8	E-mail: pwickes@wickeslaw.com	7	Sequitur_000319 and Sequitur_000320
9	AND	8	Exhibit 15.....
10	Mr. James Lanter	9	Maalt_000240
11	JAMES LANTER, PC	10	Exhibit 16.....
12	560 North Walnut Creek, Suite 120	11	Sequitur_000835, Sequitur_000836,
13	Mansfield, Texas 76063	12	Sequitur_000913 and Sequitur_000914
14	Phone: 817.453.4800	13	Exhibit 17.....
15	E-mail: jim.lanter@lanter-law.com	14	Jupiter000219
16	FOR THE DEFENDANT:	15	Exhibit 18.....
17	Mr. Matthew A. Kornhauser	16	Jupiter000220 and Jupiter000221
18	Mr. Christopher J. Kronzer	17	Exhibit 19.....
19	HOOVER SLOVACEK, LLP	18	Sequitur_000988
20	Galleria Tower II	19	Exhibit 20.....
21	5051 Westheimer, Suite 1200	20	Sequitur_000931
22	Houston, Texas 77056	21	Exhibit 21.....
23	Phone: 713.977.8686	22	Jupiter000222
24	E-mail: kornhauser@hooverslovacek.com	23	Exhibit 22.....
25	kronzer@hooverslovacek.com	24	Maalt_000095 through Maalt_000098
	Also Present:	25	Exhibit 23.....
	Mr. Luis Acevedo - Videographer		Sequitur_000626
	Mr. Jon Ince		Exhibit 24.....
			Sequitur_000359 and Sequitur_000812
			Exhibit 25.....
			Sequitur_000815
			Exhibit 26.....
			Plaintiff Maalt, LP's First Amended Answers and
			Objections to Defendant's First Interrogatories



Page 5	Page 7
<p>1 EXHIBIT INDEX (CONT'D)</p> <p>2 PAGE</p> <p>3 Exhibit 27..... 215</p> <p>4 Maalt_000157, Maalt_000002 and Maalt_000003</p> <p>5 Exhibit 28..... 220</p> <p>6 Sequitur_000993</p> <p>7 Exhibit 29..... 226</p> <p>8 Sequitur_000829</p> <p>9 Exhibit 30..... 232</p> <p>10 Maalt_000156, and Vista Proppants and Logistics</p> <p>11 Invoice Number: TRA-000001</p> <p>12 Exhibit 31..... 232</p> <p>13 Sequitur_000605 and Sequitur_000606</p> <p>14 Exhibit 32..... 233</p> <p>15 Sequitur_001111 and Sequitur_001112</p> <p>16 Exhibit 33..... 234</p> <p>17 James Lanter, PC, letter dated 2/14/19, and</p> <p>18 Plaintiff's Original Petition</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 A. Yes.</p> <p>2 Q. All right. You've taken a sworn oath to tell</p> <p>3 the truth. You understand that, correct?</p> <p>4 A. Yes, sir.</p> <p>5 Q. And you understand that the pains and</p> <p>6 penalties of perjury apply with respect to your</p> <p>7 testimony today? You're aware of that?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. You're represented by counsel today?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And you've agreed to be here. You've</p> <p>12 been noticed for this deposition; is that correct?</p> <p>13 A. Yes.</p> <p>14 Q. All right. In regard to my questioning today,</p> <p>15 please let me know if you don't understand a question,</p> <p>16 and I'll be more than glad to rephrase the question so</p> <p>17 that you understand it. Is that agreeable?</p> <p>18 A. Yes.</p> <p>19 Q. Otherwise, I'm going to assume that you gave</p> <p>20 me your best answer to a question that you understood.</p> <p>21 Is that agreeable?</p> <p>22 A. Yes.</p> <p>23 Q. All right. And I'll wait for you to finish</p> <p>24 your answer before I ask my next question, and if you</p> <p>25 can wait for me to finish my question before you give</p>
Page 6	Page 8
<p>1 PROCEEDINGS:</p> <p>2 THE VIDEOGRAPHER: We're on the record</p> <p>3 for the deposition of Chris Favors. The time is</p> <p>4 9:33 a.m. on November 14, 2019.</p> <p>5 If the court reporter can administer the</p> <p>6 oath.</p> <p>7 (Witness sworn.)</p> <p>8 THE REPORTER: Any agreements?</p> <p>9 MR. KORNHAUSER: This is by notice.</p> <p>10 MR. WICKES: Correct.</p> <p>11 CHRIS FAVORS,</p> <p>12 having been first duly sworn, testified as follows:</p> <p>13 EXAMINATION</p> <p>14 BY MR. KORNHAUSER:</p> <p>15 Q. Mr. Favors, good morning.</p> <p>16 A. Good morning.</p> <p>17 Q. My name is Matthew Kornhauser, and I represent</p> <p>18 Sequitur in this lawsuit. You're aware of that, sir?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. We're going to be asking you some</p> <p>21 questions with respect to some of the issues in this</p> <p>22 lawsuit that's pending.</p> <p>23 But before we do that, I just wanted to</p> <p>24 get some ground rules established on the record. Is</p> <p>25 that okay with you?</p>	<p>1 me your answer. Is that okay?</p> <p>2 A. Yes.</p> <p>3 Q. This way we'll have a clean record.</p> <p>4 MR. KORNHAUSER: You're going to want to</p> <p>5 read and sign?</p> <p>6 MR. WICKES: Yes.</p> <p>7 MR. KORNHAUSER: Okay. We'll make that</p> <p>8 opportunity available for you. We'll direct the</p> <p>9 deposition, Paul, to you or --</p> <p>10 MR. WICKES: Send to Mr. Lanter's office,</p> <p>11 please.</p> <p>12 MR. KORNHAUSER: Okay. We'll send it to</p> <p>13 Mr. Lanter's office. Okay. That's agreeable.</p> <p>14 Q. (BY MR. KORNHAUSER) So what did you do to</p> <p>15 prepare for deposition today? Can you tell us?</p> <p>16 A. I went through previous e-mail communication</p> <p>17 between myself and the folks over at Sequitur that I</p> <p>18 dealt with.</p> <p>19 Q. Okay. Anything else?</p> <p>20 A. As far as studying those e-mails and -- or</p> <p>21 what do you mean?</p> <p>22 Q. Well, anything other than studying e-mails</p> <p>23 that you mentioned that exist between yourself and</p> <p>24 Sequitur. Anything else you did to prepare for today?</p> <p>25 MR. WICKES: He did meet with counsel.</p>

<p style="text-align: right;">Page 57</p> <p>1 some rehabilitation of the Barnhart facility to make it</p> <p>2 capable of being able to transload crude by rail?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Mr. -- actually, Kristin Smith</p> <p>5 responded: Thanks, Jon. Sounds very interesting.</p> <p>6 (As read.)</p> <p>7 Is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. Mr. Humphreys responded: Why would we not</p> <p>10 move forward with this? Sounds like a great</p> <p>11 opportunity. (As read.)</p> <p>12 You responded by saying: There are five</p> <p>13 or six crude opportunities in the pipeline. Jupiter</p> <p>14 MLP is the largest ToP commitment, and they are</p> <p>15 interested in Pecos West and Barnhart. The Sequitur</p> <p>16 opportunity just popped up the other day. Jon and I</p> <p>17 talked last night and we are moving forward.</p> <p>18 (As read.)</p> <p>19 Did I read that correct?</p> <p>20 A. You did. To clarify, "ToP" is take or pay.</p> <p>21 Q. Oh, take or pay. Okay.</p> <p>22 Now, you say there were five or six crude</p> <p>23 opportunities. What other than Jupiter was in the --</p> <p>24 was in the -- was in the pipeline?</p> <p>25 A. Yeah. So these came fast and furious within</p>	<p style="text-align: right;">Page 59</p> <p>1 Q. So you were going to have to rely upon some</p> <p>2 third party to handle the logistics of that. Is that</p> <p>3 fair to say?</p> <p>4 A. We weren't negotiating rail rates at all for</p> <p>5 crude oil.</p> <p>6 Q. Okay. The -- the logistics, though, of</p> <p>7 inquiring about the rates and trying to reach</p> <p>8 agreements with the railroads to be able to provide for</p> <p>9 transloading of -- and transportation of crude by rail,</p> <p>10 that's not something that anybody at Maalt/Vista had</p> <p>11 experience with?</p> <p>12 A. No.</p> <p>13 Q. So who were you going to lean on to try to</p> <p>14 help make that happen?</p> <p>15 MR. WICKES: Objection, form.</p> <p>16 A. That would be on the customer of each of the</p> <p>17 facilities --</p> <p>18 Q. (BY MR. KORNHAUSER) Okay.</p> <p>19 A. -- that we were looking at. Right?</p> <p>20 Q. So in May of 2018, would it be fair to say</p> <p>21 that Maalt/Vista knew that Sequitur had no rail</p> <p>22 experience?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And do you believe that Sequitur was</p> <p>25 relying upon Maalt/Vista to help them, if this deal was</p>
<p style="text-align: right;">Page 58</p> <p>1 this time frame. There was one with Bio- -- Biourja or</p> <p>2 Biourja. (Pronunciation.)</p> <p>3 Q. Uh-huh.</p> <p>4 A. It's B-I-O-U-R-J-A.</p> <p>5 Q. Right.</p> <p>6 A. There had been -- Valero popped up. So, I</p> <p>7 mean, maybe it was the four of the opportunities, but</p> <p>8 more than just the Sequitur and the Jupiter.</p> <p>9 Q. So what type of capital expenditure would be</p> <p>10 necessary from Maalt/Vista's point of view to get this</p> <p>11 terminal up to speed such that it was capable of being</p> <p>12 operational to be a facility that could transload crude</p> <p>13 by rail? Here we are in May of '18.</p> <p>14 A. Right. I don't know -- I don't know the</p> <p>15 answer to that. From a -- like I said earlier, from a</p> <p>16 Maalt/Vista standpoint, we were providing train labor,</p> <p>17 right, and acquiring the permits and doing all that</p> <p>18 stuff. How much it would cost to reinstall the piping</p> <p>19 and get transloader, I -- I can't even guess.</p> <p>20 Q. Uh-huh.</p> <p>21 Prior to May of 2018, was there anybody</p> <p>22 at Maalt/Vista that had experience in negotiating rates</p> <p>23 with railroads to transport crude by rail out of the</p> <p>24 Permian Basin?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 60</p> <p>1 going to go forward, secure rates and acquire trains</p> <p>2 and railcars?</p> <p>3 A. No.</p> <p>4 Q. Okay. They weren't going to rely upon</p> <p>5 anything from Maalt/Vista?</p> <p>6 A. Not from a negotiating rate standpoint,</p> <p>7 acquiring railcars, no.</p> <p>8 Q. Okay. But we know you made the introduction</p> <p>9 of Mr. Struthers?</p> <p>10 A. Correct.</p> <p>11 Q. And made representations to Sequitur about</p> <p>12 Mr. Struthers' capabilities?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. We know that Mr. Ince did that,</p> <p>15 correct?</p> <p>16 A. Correct.</p> <p>17 Q. And it was reasonable to assume that Sequitur</p> <p>18 would rely upon Mr. Ince's statements; is that not</p> <p>19 true?</p> <p>20 A. That's true.</p> <p>21 Q. Now, you had said that these opportunities had</p> <p>22 developed in May of 2018 due to market conditions.</p> <p>23 Right? In other words, it was no longer maybe as</p> <p>24 desirable to transport or transload frac sand as it was</p> <p>25 crude by rail, correct?</p>

<p style="text-align: right;">Page 61</p> <p>1 A. Correct.</p> <p>2 Q. What was your understanding, if anything,</p> <p>3 regarding the capacity to secure the necessary trains</p> <p>4 and railcars in order to make this business opportunity</p> <p>5 become real?</p> <p>6 A. From the railcar standpoint specifically?</p> <p>7 Q. Yes.</p> <p>8 A. I knew that there was a lot of railcars out</p> <p>9 there. Whether they were the 1232 destination or the</p> <p>10 117 destination, and which railroad allowed which cars</p> <p>11 to move on them, I wasn't as intimately familiar with.</p> <p>12 You had the -- the Barnhart terminal connects to three</p> <p>13 Class 1 railroads, and they each had different</p> <p>14 requirements. Right? So it could have hit three</p> <p>15 different railroads. From the standpoint of Barnhart,</p> <p>16 we didn't really have those conversations with anybody</p> <p>17 other than the TXPF.</p> <p>18 Q. Okay. Did you form the belief that your</p> <p>19 customers would be able to secure the necessary</p> <p>20 railcars and trains to make such a business opportunity</p> <p>21 happen back in May of 2018?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And what was that based on?</p> <p>24 A. There was other opportunities that were</p> <p>25 developing on the same rail line, and those ones came</p>	<p style="text-align: right;">Page 63</p> <p>1 KCS was. So I think they each -- I don't know that it</p> <p>2 was from the FRA or the DOT, but to my understanding,</p> <p>3 each railroad was operating under different guidelines.</p> <p>4 Q. Okay. And in -- in May of 2018, were there</p> <p>5 safety concerns maybe that were greater than previous?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And there were some incidents involving</p> <p>8 derailments around that period of time, May of 2018,</p> <p>9 that caused those safety concerns?</p> <p>10 A. I believe there was one in Iowa.</p> <p>11 Q. Right. Do you know when that was?</p> <p>12 A. I don't.</p> <p>13 Q. Okay. So I guess what I'm asking you is: Do</p> <p>14 you know whether or not in May 2018 these railroads had</p> <p>15 interest in making trains and railcars available to</p> <p>16 transport crude by rail out of the Permian?</p> <p>17 A. I know there was interest. I don't know what</p> <p>18 level of interest.</p> <p>19 Q. Okay. In other words, the opportunity may</p> <p>20 have been there because, you know, frac sand wasn't as</p> <p>21 desirable, and maybe there was a desire to move crude</p> <p>22 by rail. But were the railroads interested in May</p> <p>23 2018? Do you know that or not?</p> <p>24 A. I do not know that.</p> <p>25 Q. Who would know that?</p>
<p style="text-align: right;">Page 62</p> <p>1 to fruition. Right?</p> <p>2 Q. Okay. Which ones did?</p> <p>3 A. So the Biourja opportunity that moved out of</p> <p>4 CIG's terminal came to fruition, and I believe another</p> <p>5 one came down in McCamey as well. Eventually, the</p> <p>6 Pecos opportunity came to fruition with some crude</p> <p>7 moving out of there. And another location, I believe,</p> <p>8 in Wink, Texas --</p> <p>9 Q. Okay.</p> <p>10 A. -- that came to fruition.</p> <p>11 Q. But would it be fair to say that you didn't</p> <p>12 have your finger on the pulse of what the rates were,</p> <p>13 what the availabilities of the trains were, because you</p> <p>14 and Maalt/Vista had never done this before, this</p> <p>15 business of transloading crude by rail? Is that true?</p> <p>16 A. Yes.</p> <p>17 Q. Now, back in May of 2018, and specifically in</p> <p>18 May 2018, was there a requirement by the Department of</p> <p>19 Transportation to have 117s --</p> <p>20 A. I don't know --</p> <p>21 Q. -- in order to --</p> <p>22 A. -- if it was in May or -- and which railroad.</p> <p>23 They operated differently. I know that the -- I had</p> <p>24 seen e-mails when I was looking through these that the</p> <p>25 BNSF was open to moving the 1232s. Maybe UP wasn't.</p>	<p style="text-align: right;">Page 64</p> <p>1 A. The railroads themselves.</p> <p>2 Q. Okay. They would be the best source of that</p> <p>3 information?</p> <p>4 A. Correct.</p> <p>5 Q. Okay.</p> <p>6 (Exhibit 4 marked.)</p> <p>7 Q. (BY MR. KORNHAUSER) Have you seen Exhibit</p> <p>8 Number 4 before, sir?</p> <p>9 A. I have.</p> <p>10 Q. This appears to be an e-mail sent by Mr. Ince</p> <p>11 to Mr. McCarley to you on May 16th, 2018; is that</p> <p>12 correct?</p> <p>13 A. Correct.</p> <p>14 Q. Who is Mr. McCarley?</p> <p>15 A. He served as the vice president of operations</p> <p>16 for the -- for Maalt, LP, the transload business.</p> <p>17 Q. Okay. And Mr. -- Mr. Ince is mentioning that:</p> <p>18 The UPRR has proven to be a barrier for crude shipments</p> <p>19 out of the Permian. (As read.)</p> <p>20 Did I read that correct?</p> <p>21 A. You did.</p> <p>22 Q. What was your understanding as to what the</p> <p>23 barrier was that the UP was putting in place for crude</p> <p>24 shipments out of the Permian in May of 2018?</p> <p>25 A. That what I believe to be, you know, safety</p>

<p style="text-align: right;">Page 65</p> <p>1 concerns. They were requiring the DOT 117 new cars and</p> <p>2 went back and -- and were -- if I remember correctly,</p> <p>3 cancelled their tariff rates and were issuing new rates</p> <p>4 opportunity by opportunity.</p> <p>5 Q. Okay. He -- then Mr. Ince says: I reached</p> <p>6 out to multiple car manufacturers, brokers, and these</p> <p>7 car -- these cars are not available until Q3-Q4 of this</p> <p>8 year. (As read.)</p> <p>9 That was information that Mr. Ince</p> <p>10 secured?</p> <p>11 A. It would appear so.</p> <p>12 Q. Do you know where he got that information</p> <p>13 from?</p> <p>14 A. I do not.</p> <p>15 Q. What specific car manufacturers and brokers?</p> <p>16 A. I do not.</p> <p>17 Q. Okay. Did that concern you regarding --</p> <p>18 A. No.</p> <p>19 Q. -- or relative to this opportunity of</p> <p>20 transloading crude by rail at the Barnhart or other</p> <p>21 facilities?</p> <p>22 A. No.</p> <p>23 Q. Why not?</p> <p>24 A. The -- the opportunity at hand was going to</p> <p>25 fall in the third quarter of 2018 for a start date.</p>	<p style="text-align: right;">Page 67</p> <p>1 A. Yes.</p> <p>2 Q. And would it be fair to say that in May of</p> <p>3 2018, you were considering a couple of different</p> <p>4 horses, if you will, one being Jupiter, one being</p> <p>5 Sequitur, as far as the Barnhart facility is concerned;</p> <p>6 is that correct?</p> <p>7 A. Correct.</p> <p>8 Q. On this transloading of crude by rail?</p> <p>9 A. Yes.</p> <p>10 Q. Again, the Jupiter opportunity is represented</p> <p>11 from -- as being the Pecos and Barnhart, transloading</p> <p>12 truck to railcar with a certain amount -- certain</p> <p>13 number of barrels, certain number of railcars required.</p> <p>14 And then the Sequitur opportunity is laid</p> <p>15 out as well. So it's kind of comparing and</p> <p>16 contrasting, correct?</p> <p>17 A. Correct.</p> <p>18 Q. Now, in the Sequitur portion, it says:</p> <p>19 Sequitur wants to transload from Barnhart September 1.</p> <p>20 (As read.)</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. How does that reconcile with Mr. Ince's</p> <p>24 statement earlier where he says that, according to the</p> <p>25 multiple car manufacturers and brokers, the cars won't</p>
<p style="text-align: right;">Page 66</p> <p>1 And the cars, according to this e-mail, would have been</p> <p>2 available at that time.</p> <p>3 Q. Well, actually it says until Q3 or Q4.</p> <p>4 A. Uh-huh.</p> <p>5 Q. Right?</p> <p>6 A. Correct. Correct.</p> <p>7 Q. Okay. So did it concern you that these --</p> <p>8 that according to these car manufacturers and brokers,</p> <p>9 the cars would not be available until Q3-Q4 of '18?</p> <p>10 A. It did not.</p> <p>11 Q. Okay. Did you share that information or, to</p> <p>12 your knowledge, did Maalt/Vista ever share that</p> <p>13 information with the prospective cus-- prospective</p> <p>14 customer, which would be Jupiter and/or Sequitur?</p> <p>15 A. I don't know that we did.</p> <p>16 Q. Okay. Do you think that would be something</p> <p>17 that Sequitur would want to know?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. But you don't know if it was shared?</p> <p>20 A. Correct.</p> <p>21 Q. You didn't personally?</p> <p>22 A. No.</p> <p>23 Q. And then this e-mail kind of lays out, I</p> <p>24 guess, the comparison of Jupiter and that opportunity</p> <p>25 versus Sequitur and that opportunity, correct?</p>	<p style="text-align: right;">Page 68</p> <p>1 be available until Q3 or Q4 of the year?</p> <p>2 A. I think it -- it falls in line with September</p> <p>3 1st if it's Q3, and Q4 would be a little after that.</p> <p>4 Q. Okay. And I guess one meaningful difference</p> <p>5 is that Sequitur is thinking about transloading from</p> <p>6 storage tanks to railcar, I guess, by way of</p> <p>7 pipeline --</p> <p>8 A. Correct.</p> <p>9 Q. -- at some point in the future?</p> <p>10 A. Yes.</p> <p>11 Q. And that was deemed to be more desirable from</p> <p>12 Maalt/Vista's point of view?</p> <p>13 A. It was.</p> <p>14 Q. All right. So in there Mr. Ince acknowledges</p> <p>15 that Sequitur has no rail experience; is that true?</p> <p>16 A. That is true.</p> <p>17 Q. Whereas Jupiter had some rail experience; is</p> <p>18 that true?</p> <p>19 A. They represented that they did, yes.</p> <p>20 Q. Okay. To your knowledge, did the people at</p> <p>21 Sequitur, when you were courting them in May of 2018,</p> <p>22 make clear that they had no rail experience relative to</p> <p>23 this transloading of crude by rail and that they would</p> <p>24 be looking to Maalt/Vista for assistance in acquiring</p> <p>25 the necessary trains and cars to make any opportunity</p>

<p style="text-align: right;">Page 121</p> <p>1 Q. Do you recall getting back to Mr. Aronowitz or</p> <p>2 Mr. Merrill regarding his perceptions regarding the</p> <p>3 gaps in coverage, specifically the pollution liability</p> <p>4 item in item number 3 in the e-mail?</p> <p>5 A. I do not recall that. Any -- any of these</p> <p>6 requests would have gone through our health and</p> <p>7 safety --</p> <p>8 Q. Okay. Do you --</p> <p>9 A. -- if I remem- --</p> <p>10 Q. -- recall giving this e-mail to anybody or</p> <p>11 sending it to anybody or following up on it in any way,</p> <p>12 shape, or form?</p> <p>13 A. I don't recall specifically. All these -- all</p> <p>14 these requirements were in a Dropbox as well. And to</p> <p>15 the best of my knowledge, they were all addressed.</p> <p>16 Q. Well, what knowledge do you have specifically</p> <p>17 to show that that pollution liability gap was</p> <p>18 addressed? What personal knowledge do you have of</p> <p>19 that?</p> <p>20 A. I'd have to -- I mean, the -- to my knowledge,</p> <p>21 everything was taken care of, from permitting, from</p> <p>22 labor, training, and those would have been</p> <p>23 conversations internally.</p> <p>24 Q. Okay. But you're not answering my question.</p> <p>25 What personal knowledge do you have to</p>	<p style="text-align: right;">Page 123</p> <p>1 Q. Now, prior in time, I believe you advised</p> <p>2 Mr. Merrill and Mr. van den Bold that you were</p> <p>3 receiving pressure to get the agreement signed. Do you</p> <p>4 recall that?</p> <p>5 A. I do.</p> <p>6 Q. What do you recall about that conversation?</p> <p>7 A. That would have been an e-mail that I sent</p> <p>8 those guys, and the -- the deal there was, right, we</p> <p>9 had other -- other opportunities with that terminal.</p> <p>10 Right? And that was simply communicating to them that</p> <p>11 there was other horses in the race, right, and we</p> <p>12 needed to get this thing to the finish line.</p> <p>13 Q. Okay.</p> <p>14 (Exhibit 15 marked.)</p> <p>15 Q. (BY MR. KORNHAUSER) Okay. Exhibit Number 15,</p> <p>16 is this the e-mail that you're talking about?</p> <p>17 A. Yes.</p> <p>18 Q. You sent an e-mail to Mike van den Bold on</p> <p>19 August 3rd. I guess that would be a few days before</p> <p>20 the trip to Maalt/Vista's facilities to have a meeting</p> <p>21 to sign the agreement, correct?</p> <p>22 A. I'm not sure of the exact date of the meeting.</p> <p>23 Q. Okay. Well, this e-mail is dated August 3rd;</p> <p>24 we know that --</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 122</p> <p>1 support your notion that this pollution liability</p> <p>2 policy issue was taken care of satisfactorily per the</p> <p>3 agreement?</p> <p>4 A. Oh, I don't.</p> <p>5 Q. Okay. Do you recall the trip to -- do you</p> <p>6 recall the Sequitur representatives making a trip to</p> <p>7 Maalt/Vista's offices to sign the agreement?</p> <p>8 A. I do.</p> <p>9 Q. What do you recall about that trip and those</p> <p>10 meetings?</p> <p>11 A. It would have been Mike van den Bold, Braden,</p> <p>12 Merrill. Marty Robertson was in that meeting, myself,</p> <p>13 and I can't remember if anybody beyond those four were</p> <p>14 there.</p> <p>15 Q. Okay. Why have a personal meeting?</p> <p>16 A. I can't recall if that was at the request of</p> <p>17 Sequitur or -- or Vista.</p> <p>18 Q. Okay. How long did the meeting take place?</p> <p>19 A. Probably an hour in the conference room and</p> <p>20 then lunch afterwards.</p> <p>21 Q. Okay. Were there any revisions made to the</p> <p>22 agreement during that meeting?</p> <p>23 A. I don't believe so.</p> <p>24 Q. Just signing it?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 124</p> <p>1 Q. -- 2018.</p> <p>2 It says: Here is what I'd like to</p> <p>3 discuss. I'm receiving heavy pressure to get the</p> <p>4 agreement fully executed. (As read.)</p> <p>5 Who were you -- who were you getting</p> <p>6 pressure from?</p> <p>7 A. That would have been from -- from ownership of</p> <p>8 the company.</p> <p>9 Q. Who particularly?</p> <p>10 A. Marty Robertson and Gary Humphreys.</p> <p>11 Q. What were they telling you?</p> <p>12 A. That we needed to get an agreement executed so</p> <p>13 that we could use an asset that wasn't being utilized</p> <p>14 at the time.</p> <p>15 Q. I see.</p> <p>16 We have been offered slightly better</p> <p>17 terms from another party that said they will execute an</p> <p>18 agreement today. (As read.)</p> <p>19 Who was that other party?</p> <p>20 A. I don't recall specifically.</p> <p>21 Q. Well, who else was there --</p> <p>22 A. I don't --</p> <p>23 Q. -- that was in the running?</p> <p>24 A. I mean, really, the -- the only other -- the</p> <p>25 only other company at the time that I can recall was</p>

Page 125	Page 127
<p>1 Jupiter, but that wouldn't have made sense.</p> <p>2 Q. Why?</p> <p>3 A. At the time we -- our -- our preference was to</p> <p>4 work with Sequitur. So I read what -- what is here.</p> <p>5 Right? I just can't recall exactly who it was.</p> <p>6 Q. Well, why would it have been made sense for it</p> <p>7 to be Jupiter?</p> <p>8 A. Why would it not have made sense?</p> <p>9 Q. Right.</p> <p>10 A. The -- the only -- the only thing there is,</p> <p>11 right, we had the two companies interconnected. Right?</p> <p>12 We already had them introduced to one another.</p> <p>13 Now, where it would have made sense to do</p> <p>14 it with Jupiter is if they, you know, were going to</p> <p>15 offer prepayment, better terms, stuff like that.</p> <p>16 Right?</p> <p>17 At the same time, our preference was to</p> <p>18 work with Sequitur.</p> <p>19 Q. Well, I get that. But I'm just trying to</p> <p>20 figure out why would it haven't made sense for that</p> <p>21 other party to be Jupiter?</p> <p>22 A. Okay. Let me back up. Maybe it's not that it</p> <p>23 wouldn't have made sense. It would have made more</p> <p>24 sense to do the deal with Sequitur.</p> <p>25 Q. Okay. Well, I understand that. But you</p>	<p>1 Q. Okay. Well, I'm trying to figure out who said</p> <p>2 that they would execute an agreement today if you</p> <p>3 don't. Who was it?</p> <p>4 A. The -- I can't remember exactly who it was,</p> <p>5 and so I don't know --</p> <p>6 Q. The truth is --</p> <p>7 A. -- like, I don't -- I don't know how.</p> <p>8 Q. So, I mean, were you -- were you just trying</p> <p>9 to use salesmanship here? I mean, what's going on? I</p> <p>10 mean, do you have another party? And, if so, who --</p> <p>11 who was it? And did you have another agreement in your</p> <p>12 hand? That's what I need to know.</p> <p>13 A. I didn't have another agreement in my hand for</p> <p>14 Barnhart.</p> <p>15 Q. Okay.</p> <p>16 A. Right? What I had was an agreement with</p> <p>17 Jupiter, though, that could have been easily amended to</p> <p>18 include Barnhart. Right?</p> <p>19 Q. Okay. So the truth is you had no other</p> <p>20 agreement. We know that, right?</p> <p>21 A. Correct.</p> <p>22 Q. And you don't even know who the other party</p> <p>23 was?</p> <p>24 A. Correct.</p> <p>25 Q. But yet you're pressuring Sequitur to believe</p>
Page 126	Page 128
<p>1 didn't seem to recall if it was Jupiter or not that was</p> <p>2 the other party, and then you said it would haven't</p> <p>3 sense for it to be Jupiter. And I want to know why.</p> <p>4 A. And I explained that. And now I'm saying it</p> <p>5 would make sense, not as much sense. Right?</p> <p>6 Q. Okay. You don't know who the other party was?</p> <p>7 A. No. It's not listed on here.</p> <p>8 Q. But you don't know who else was in the running</p> <p>9 other than Jupiter?</p> <p>10 A. Correct.</p> <p>11 Q. So it had to have been Jupiter --</p> <p>12 A. I don't know.</p> <p>13 Q. -- by default?</p> <p>14 MR. WICKES: Objection, form.</p> <p>15 Q. (BY MR. KORNHAUSER) Wouldn't it?</p> <p>16 A. I don't know.</p> <p>17 Q. Okay. They said that they would execute an</p> <p>18 agreement today.</p> <p>19 Did you have another agreement in your</p> <p>20 hand around this time from another party?</p> <p>21 A. We did, yeah.</p> <p>22 Q. From whom?</p> <p>23 A. Jupiter. Right?</p> <p>24 Q. As it related to Barnhart?</p> <p>25 A. No.</p>	<p>1 that you have another party that's going to execute an</p> <p>2 agreement today, but you didn't have any of that?</p> <p>3 A. It's not my job.</p> <p>4 Q. To what?</p> <p>5 A. To sell and to get deals done. Right?</p> <p>6 Q. Well, I understand that. I don't mean any</p> <p>7 disrespect. But you were using salesmanship here,</p> <p>8 weren't you?</p> <p>9 A. Yeah.</p> <p>10 Q. Let's cut through the --</p> <p>11 A. Yeah.</p> <p>12 Q. -- the nonsense.</p> <p>13 A. Absolutely.</p> <p>14 Q. All right. You didn't have an agreement, and</p> <p>15 you didn't really have another party. You had Jupiter</p> <p>16 that may have converted from just doing Pecos to doing</p> <p>17 Barnhart as well, right?</p> <p>18 A. Correct.</p> <p>19 Q. Okay. Do you recall telling Braden Merrill</p> <p>20 that someone was -- or this other party was going to</p> <p>21 pay \$8 million up front on execution?</p> <p>22 A. I recall 5 million.</p> <p>23 Q. Is that what you told Mr. Merrill?</p> <p>24 A. I believe so.</p> <p>25 Q. And so who offered you \$5 million right on the</p>

<p style="text-align: right;">Page 133</p> <p>1 though, if they ever tell told you that they were</p> <p>2 having trouble with Shell, and that if things didn't</p> <p>3 improve, that they were going to pivot to go to Jupiter</p> <p>4 to handle their oil purchase rail and logistics</p> <p>5 partnership?</p> <p>6 A. No, not that I recall.</p> <p>7 Q. Okay. And prior to signing the agreement, do</p> <p>8 you recall recommending to Sequitur a joint venture</p> <p>9 with Jupiter because they had access to the trains and</p> <p>10 the railcars?</p> <p>11 A. Not a joint venture.</p> <p>12 Q. A relationship, logistics relationship?</p> <p>13 A. Sure.</p> <p>14 Q. And would that have been discussed during your</p> <p>15 visit at or around the time the contract was signed,</p> <p>16 the TSA was signed?</p> <p>17 A. It could have been.</p> <p>18 Q. Okay.</p> <p>19 A. Yeah.</p> <p>20 Q. In other words, they came up to sign --</p> <p>21 A. Uh-huh.</p> <p>22 Q. -- I think you said it was about an hour.</p> <p>23 A. Correct.</p> <p>24 Q. And during that conversation, do you recall</p> <p>25 discussions about Jupiter and what role they were going</p>	<p style="text-align: right;">Page 135</p> <p>1 Q. And did you understand that Sequitur's intent</p> <p>2 and purpose as it related to the facility, the Barnhart</p> <p>3 facility, was to transport crude by rail to markets in</p> <p>4 the Louisiana Gulf Coast and take advantage of an</p> <p>5 arbitrage?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. What did you understand about that, and</p> <p>8 who told you?</p> <p>9 A. As far as their intent?</p> <p>10 Q. Yes.</p> <p>11 A. That was at the time there was a spread, which</p> <p>12 is not our core business. Right? We're in frac sand.</p> <p>13 So to the extent my understanding was only what they</p> <p>14 had told me. Right? We can sell it for a spread</p> <p>15 that's higher in Louisiana, or the LLS spread versus</p> <p>16 WTI. It right now makes sense because the spread is</p> <p>17 high enough that you can make more money selling it in</p> <p>18 the Gulf Coast than you can in the Permian.</p> <p>19 Q. Okay. And that what's you understood their</p> <p>20 intended business purpose to be, to take advantage of</p> <p>21 that?</p> <p>22 A. Correct.</p> <p>23 Q. And as a result, the -- the cost involved for</p> <p>24 the rates, if you will, associated with transportation</p> <p>25 by rail was an important factor in that analysis; would</p>
<p style="text-align: right;">Page 134</p> <p>1 to play, things such as that?</p> <p>2 A. Hypothetically, yes.</p> <p>3 Q. Okay. What do you recall specifically about</p> <p>4 that discussion? Do you recall anything?</p> <p>5 A. I don't. I know the -- like I said, at the</p> <p>6 time they were still focused on -- on Shell. Right?</p> <p>7 So if anything, it would have been the -- the prospect</p> <p>8 of Jupiter helping with logistics, and nothing in</p> <p>9 regards to a joint venture or a partnership or anything</p> <p>10 like that.</p> <p>11 Q. Okay. Did you take any notes regarding that</p> <p>12 meeting that occurred at the time the contract was</p> <p>13 signed, the TSA?</p> <p>14 A. I haven't dug through notebooks, but I</p> <p>15 could -- I could.</p> <p>16 Q. Okay.</p> <p>17 A. I mean, not that I know of.</p> <p>18 Q. Did Maalt/Vista understand that acquiring</p> <p>19 access to railcars and trains were essential for the</p> <p>20 performance of the TSA?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And without access to trains and</p> <p>23 railcars, I mean, the TSA was really for naught; would</p> <p>24 you agree with that?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 136</p> <p>1 you agree?</p> <p>2 A. Yes.</p> <p>3 Q. All right. And so getting the right rate was</p> <p>4 important from Sequitur's point of view; would you</p> <p>5 agree?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And you under- -- and Maalt/Vista</p> <p>8 understood that?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. Would the same be true with Jupiter and</p> <p>11 their proposals to you as it related to the Barnhart</p> <p>12 facility?</p> <p>13 A. The Pecos facility?</p> <p>14 Q. Both.</p> <p>15 A. Yeah. The same --</p> <p>16 Q. Because they were transloading --</p> <p>17 A. The same business.</p> <p>18 Q. The same deal, right?</p> <p>19 A. Correct.</p> <p>20 Q. And they were transloading crude by rail --</p> <p>21 A. Right.</p> <p>22 Q. -- hypothetically both?</p> <p>23 A. Right.</p> <p>24 Q. And so they were doing that, I assume, for the</p> <p>25 same purpose as Sequitur was going to do it, which is</p>

<p style="text-align: right;">Page 141</p> <p>1 an obligation to remedy the force majeure event, which</p> <p>2 may be interruption, delay, or curtailment of rail</p> <p>3 service?</p> <p>4 A. Sure.</p> <p>5 MR. WICKES: Objection, form.</p> <p>6 A. I just can't speak to their perception.</p> <p>7 Q. (BY MR. KORNHAUSER) My question is: They're</p> <p>8 not obligated to go out and get rail service at any</p> <p>9 cost?</p> <p>10 MR. WICKES: Objection, form.</p> <p>11 A. I don't know that that --</p> <p>12 Q. (BY MR. KORNHAUSER) Is that your</p> <p>13 understanding?</p> <p>14 A. No, I don't agree with that.</p> <p>15 Q. Why don't you agree with that?</p> <p>16 A. There was a -- a commitment within this TSA,</p> <p>17 right, to move -- to move cars. What -- to the extent</p> <p>18 that we were involved, it was \$1.50 a barrel. Right?</p> <p>19 Q. Is that why you think -- is that your best</p> <p>20 answer?</p> <p>21 MR. WICKES: Objection, form.</p> <p>22 Q. (BY MR. KORNHAUSER) I mean, is that your best</p> <p>23 answer?</p> <p>24 A. I --</p> <p>25 MR. WICKES: Objection, form.</p>	<p style="text-align: right;">Page 143</p> <p>1 A. I don't -- I don't know that I said that</p> <p>2 specifically, no.</p> <p>3 MR. WICKES: Objection, form.</p> <p>4 Q. (BY MR. KORNHAUSER) Well, is that your</p> <p>5 testimony?</p> <p>6 A. I mean, if it was a million dollars a car, I</p> <p>7 think that's unreasonable. Right? I don't think that</p> <p>8 that was the rate, but I don't know what the rail rates</p> <p>9 that were offered were.</p> <p>10 Q. Okay. But if the rail rates were such that we</p> <p>11 couldn't take advantage of the arbitrage that we</p> <p>12 intended to secure, are we obligated to get the</p> <p>13 trains --</p> <p>14 MR. WICKES: Objection, form.</p> <p>15 Q. (BY MR. KORNHAUSER) -- at that price?</p> <p>16 A. There were other parties that did so. So yes.</p> <p>17 Q. Okay. Who?</p> <p>18 A. There -- there was crude oil that moved on</p> <p>19 TXPF line, and I know that, right, under the same</p> <p>20 spread fluctuations as Sequitur was dealing with.</p> <p>21 Q. Okay. Who was that?</p> <p>22 A. Biourja, for example. I mentioned them --</p> <p>23 Q. Who?</p> <p>24 A. -- I mentioned them earlier. Right?</p> <p>25 Biourja.</p>
<p style="text-align: right;">Page 142</p> <p>1 Don't answer that. I mean, that's not a</p> <p>2 question.</p> <p>3 MR. KORNHAUSER: Well, it is.</p> <p>4 A. I -- I'm not going to answer it.</p> <p>5 Q. (BY MR. KORNHAUSER) Okay.</p> <p>6 So is it your testimony that Sequitur</p> <p>7 would have to pay any price if the trains were</p> <p>8 available?</p> <p>9 A. I had no knowledge of the other agreements</p> <p>10 that they had, whether it be at the destination, if</p> <p>11 they were selling for a higher spread, what -- what</p> <p>12 happened to the future spreads. I -- I didn't know.</p> <p>13 So in -- in my opinion, this was enforceable and, yeah,</p> <p>14 they had an obligation.</p> <p>15 Q. So they had to pay any price regardless --</p> <p>16 MR. WICKES: Objection, form.</p> <p>17 Q. (BY MR. KORNHAUSER) -- to get trains?</p> <p>18 A. 1.50 barrel to us. Right?</p> <p>19 Q. I know what you're being paid on the barrel.</p> <p>20 A. Right.</p> <p>21 Q. But I'm just saying -- you're -- you're saying</p> <p>22 that if -- if trains were available, we -- we would</p> <p>23 have to pay whatever price, whatever ransom necessary,</p> <p>24 to get those trains to make this deal happen. Is that</p> <p>25 what you're saying?</p>	<p style="text-align: right;">Page 144</p> <p>1 Q. When was that?</p> <p>2 A. I know that they moved crude.</p> <p>3 I think -- if I remember right in the</p> <p>4 conversation with the railroad, up until two or three</p> <p>5 months ago, in the same -- same window.</p> <p>6 Q. To what region of the country are we talking?</p> <p>7 A. I don't know the answer to that.</p> <p>8 Q. From the Permian?</p> <p>9 A. Yes.</p> <p>10 Q. On what line?</p> <p>11 A. Specifically, from Barnhart on the TXPF.</p> <p>12 Q. Okay. Through what carrier?</p> <p>13 A. I don't know. They can connect with KCS,</p> <p>14 right, UP, or BNSF.</p> <p>15 Q. But you don't know what the rate would have</p> <p>16 been?</p> <p>17 A. I don't.</p> <p>18 Q. You don't know the carrier?</p> <p>19 A. No.</p> <p>20 Q. You don't know the customer?</p> <p>21 A. On the destination side, no.</p> <p>22 Q. Okay. Are you aware of the investment that</p> <p>23 Sequitur put into the Barnhart terminal in terms of the</p> <p>24 costs incurred?</p> <p>25 A. Not in total. I that know they put up two</p>

<p style="text-align: right;">Page 145</p> <p>1 10,000-barrel tanks and the piping and the flare.</p> <p>2 Q. Okay. Anything else?</p> <p>3 A. I don't believe so. Well, the SafeRack</p> <p>4 transload machine.</p> <p>5 Q. Okay. Are you aware that Sequitur spent</p> <p>6 approximately \$4 million on equipment?</p> <p>7 A. I am now.</p> <p>8 Q. And title to that equipment would be theirs,</p> <p>9 obviously; they bought it?</p> <p>10 A. Correct.</p> <p>11 Q. They had it on your -- Maalt/Vista's facility,</p> <p>12 but it's their equipment, correct?</p> <p>13 A. Correct.</p> <p>14 Q. The title never went to Maalt or Vista?</p> <p>15 A. No.</p> <p>16 Q. Do you believe that Sequitur made these</p> <p>17 expenditures in reliance upon representations that</p> <p>18 Maalt/Vista made with respect to the ability to secure</p> <p>19 railcars and trains to transport crude rail -- crude</p> <p>20 oil via rail?</p> <p>21 MR. WICKES: Objection, form.</p> <p>22 A. No.</p> <p>23 Q. (BY MR. KORNHAUSER) What money did Maalt</p> <p>24 invest in the Barnhart terminal project with Sequitur?</p> <p>25 Are you aware of any capital expenditures spent by</p>	<p style="text-align: right;">Page 147</p> <p>1 believe Fort Stockton was still running. So I don't</p> <p>2 know if we shifted people or hired people. That would</p> <p>3 be a question for somebody else.</p> <p>4 Q. Okay. Are you aware that at some point in the</p> <p>5 middle of August of 2018 that Sequitur pivoted to</p> <p>6 Jupiter as the offtaker? Are you aware of that?</p> <p>7 A. I am after going through the e-mails. I</p> <p>8 wasn't made aware of that. So the first -- the first</p> <p>9 time I knew that Sequitur and Jupiter were working</p> <p>10 together is when Travis Morris showed up to our on-site</p> <p>11 meeting that included -- it was supposed to be Shell.</p> <p>12 I can't recall if any Shell employees were there. But</p> <p>13 it was Vista, Sequitur, and the TXPF. It was --</p> <p>14 Q. Okay. When was the first such meeting?</p> <p>15 A. I would have to go back through notes. I -- I</p> <p>16 don't know the exact date. But it was kind of a get</p> <p>17 everybody on the same page type of meeting. It</p> <p>18 happened onsite in Barnhart.</p> <p>19 Q. Okay. Would that have been -- would that have</p> <p>20 been before the target terminal operation commencement</p> <p>21 date of September 1?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. So at that point, it became apparent to</p> <p>24 you that Jupiter was the offtaker going forward?</p> <p>25 A. It -- it became more apparent to me that they</p>
<p style="text-align: right;">Page 146</p> <p>1 Maalt on the trackage or anything like that?</p> <p>2 A. Specifically for transitioning it from frac</p> <p>3 sand to crude?</p> <p>4 Q. Uh-huh.</p> <p>5 A. Not that I'm aware of. There may have been</p> <p>6 some dirt work or something like that, but I don't --</p> <p>7 don't get involved in that.</p> <p>8 Q. So what investment, if any, did Maalt/Vista</p> <p>9 make in regard to this project? Anything?</p> <p>10 A. In assets, you mean or --</p> <p>11 Q. Yeah.</p> <p>12 A. Not that I -- none that I know of.</p> <p>13 Q. Okay. What about manpower, labor?</p> <p>14 A. Yes. So we had -- I don't know how many,</p> <p>15 eight or ten employees that were geared up, trained and</p> <p>16 ready to go on the -- performing the transload</p> <p>17 services.</p> <p>18 Q. Okay. You don't know those figures?</p> <p>19 A. I don't know. No, I don't.</p> <p>20 Q. Did they have -- did Maalt/Vista have to hire</p> <p>21 additional people with -- with particular experience to</p> <p>22 be able to do this?</p> <p>23 A. I don't know the answer to that either.</p> <p>24 Q. Because --</p> <p>25 A. And so we've got Barnhart, Big Lake, and I</p>	<p style="text-align: right;">Page 148</p> <p>1 were directly involved in the Barnhart project. We</p> <p>2 were surprised that he was there.</p> <p>3 Q. Okay. So Travis Morris never told you?</p> <p>4 A. No.</p> <p>5 Q. Did Bra- -- did Mr. Merrill tell you that?</p> <p>6 A. No.</p> <p>7 Q. You just kind of found out when --</p> <p>8 A. When Travis was there.</p> <p>9 Q. Okay. Were you encouraging or promoting</p> <p>10 Sequitur in any way to pivot away from Shell to Jepper</p> <p>11 [sic] -- Jupiter?</p> <p>12 A. No.</p> <p>13 Q. Did you care one way or the other?</p> <p>14 A. No. For us, it was \$1.50 a barrel. You know,</p> <p>15 it was about the throughput.</p> <p>16 Q. Would you agree with me that the minimum</p> <p>17 throughput obligations of Sequitur were not in place</p> <p>18 until after the terminal operation commencement date?</p> <p>19 A. Yes.</p> <p>20 MR. WICKES: Objection, form.</p> <p>21 Q. (BY MR. KORNHAUSER) Okay. So what really has</p> <p>22 to happen for the terminal to be fully operational, in</p> <p>23 your mind?</p> <p>24 A. I would say the permits need to be in place.</p> <p>25 Right? I'll go back to Page 5 of the TSA: Any and all</p>

<p style="text-align: right;">Page 153</p> <p>1 owner, which would be Maalt, was needed in order for</p> <p>2 the terminal to be fully operational?</p> <p>3 MR. WICKES: Objection to form.</p> <p>4 A. No.</p> <p>5 Q. (BY MR. KORNHAUSER) Okay. And why not?</p> <p>6 A. Because a piece of paper that evidences a</p> <p>7 date.</p> <p>8 Q. And just again to be clear, you're not aware</p> <p>9 of such written notice being sent by Sequitur to Maalt?</p> <p>10 A. No.</p> <p>11 Q. Okay. Now, the terminal operational</p> <p>12 commencement date was not met; is that correct? In</p> <p>13 other words, the -- the terminal didn't become fully</p> <p>14 operational on September 1, 2018. You're aware of</p> <p>15 that, right?</p> <p>16 A. Correct.</p> <p>17 Q. So why wasn't it -- why wasn't that date met?</p> <p>18 A. There was a -- there was a lot of things, I</p> <p>19 think, that -- that went on on the construction side.</p> <p>20 Right? It wasn't in relation to -- to people. We had</p> <p>21 those people in place from the sand transloading side.</p> <p>22 It was more -- I know that there was weather issues</p> <p>23 that prevented construction. The electrical side of it</p> <p>24 took longer than initially anticipated. And so it more</p> <p>25 than anything had to do with the -- the improvements to</p>	<p style="text-align: right;">Page 155</p> <p>1 the yard, so...</p> <p>2 MR. KORNHAUSER: Okay. Well, I'll</p> <p>3 clarify.</p> <p>4 MR. WICKES: Is your question, on</p> <p>5 September 1, was there no rails or train cars that</p> <p>6 could have not been available --</p> <p>7 MR. KORNHAUSER: Right.</p> <p>8 MR. WICKES: -- I think is what you're</p> <p>9 asking.</p> <p>10 MR. KORNHAUSER: Okay. I'll -- I'll --</p> <p>11 I'll ask it a better way so to avoid any confusion.</p> <p>12 Q. (BY MR. KORNHAUSER) We -- we know -- we know</p> <p>13 that as of September 1, there were construction delays.</p> <p>14 You talked about that. Weather, electrical issues --</p> <p>15 A. Right.</p> <p>16 Q. -- that caused delays, things such as that.</p> <p>17 And -- and what I was asking you about,</p> <p>18 maybe I wasn't clear, is that on or about September</p> <p>19 1st, 2018, were you aware that there were any trains or</p> <p>20 railcars available, right, to get -- to get to the</p> <p>21 terminal, the Barnhart terminal --</p> <p>22 A. Right.</p> <p>23 Q. -- and then actually transload crude, to get</p> <p>24 them on those trains and get them to market?</p> <p>25 A. Yeah, I -- I believe there was.</p>
<p style="text-align: right;">Page 154</p> <p>1 the yard that needed to be done.</p> <p>2 Q. Well, we know prior to September 1, 2018,</p> <p>3 there were no trains or railcars available; is that</p> <p>4 true?</p> <p>5 A. For what?</p> <p>6 Q. To transload the crude by rail and commence</p> <p>7 with operations.</p> <p>8 A. At the terminal specifically?</p> <p>9 Q. Yeah.</p> <p>10 A. No, there were not.</p> <p>11 Q. Do you know why not?</p> <p>12 A. I do not.</p> <p>13 Q. Okay. So we know, as of September 1, the</p> <p>14 terminal operations commencement date had not happened.</p> <p>15 You had mentioned construction issues, weather delays,</p> <p>16 electrical delays and, of course, the fact there were</p> <p>17 no trains and railcars, right?</p> <p>18 A. On the site.</p> <p>19 MR. WICKES: Objection, form.</p> <p>20 Q. (BY MR. KORNHAUSER) On the site. Okay.</p> <p>21 A. But I also said that --</p> <p>22 MR. WICKES: Are you asking -- I don't --</p> <p>23 I've done good not interrupting. But I think you're</p> <p>24 asking was trains and railcars available generally, and</p> <p>25 he's thinking about were there trains or railcars at</p>	<p style="text-align: right;">Page 156</p> <p>1 Q. What do you base that on?</p> <p>2 A. In -- because I think in August was the first</p> <p>3 train that we shipped out of Pecos.</p> <p>4 Q. Okay.</p> <p>5 A. You needed the same cars; you needed the same</p> <p>6 power, locomotives. Right? You didn't -- it -- it</p> <p>7 doesn't matter -- you're talk about 100 miles apart,</p> <p>8 whatever Barnhart and Pecos is, 150. If they could get</p> <p>9 railcars in Pecos, and if they could get railcars down</p> <p>10 the same line to the west, there were cars available.</p> <p>11 Q. Okay. Just because you got -- just because</p> <p>12 Jupiter got railcars to Pecos, you believe there was an</p> <p>13 availability of trains or railcars to get to Barnhart?</p> <p>14 A. I don't think it was just Ju- -- I don't think</p> <p>15 Jupiter was the only party that was shipping crude by</p> <p>16 rail at the time. Right? What I'll say is I didn't --</p> <p>17 I didn't dig deep -- I'm not a railcar -- that's not my</p> <p>18 core position. Right? And so I didn't have</p> <p>19 conversations with railcar leasing companies and stuff</p> <p>20 like that.</p> <p>21 Q. Well, who was the carrier that got the --</p> <p>22 that -- that provided the railcars to Pecos; do you</p> <p>23 know?</p> <p>24 A. The rail line?</p> <p>25 Q. Yeah.</p>

<p style="text-align: right;">Page 229</p> <p>1 starting to invoice on December 2008 as phase one of</p> <p>2 the facility has been completed.</p> <p>3 We know that the obligation to pay</p> <p>4 doesn't happen until there's a terminal operations</p> <p>5 commencement date, right?</p> <p>6 A. Correct.</p> <p>7 Q. In which case, the terminal is fully</p> <p>8 operational and notice is received, right?</p> <p>9 MR. WICKES: Objection, form.</p> <p>10 Q. (BY MR. KORNHAUSER) Is that true?</p> <p>11 MR. WICKES: The same objection.</p> <p>12 A. It's evidenced by a notice.</p> <p>13 Q. (BY MR. KORNHAUSER) Okay. Why didn't you say</p> <p>14 that the terminal was fully operational? You said the</p> <p>15 facility or phase one of the facility had been</p> <p>16 completed since then. Is there any reason why you used</p> <p>17 those words?</p> <p>18 A. Phase two wasn't completed yet?</p> <p>19 Q. No.</p> <p>20 A. Right.</p> <p>21 Q. Is there any reason you used the word that,</p> <p>22 Phase one was -- phase one had been completed since</p> <p>23 then, as opposed to referencing that the terminal was</p> <p>24 fully operational, which is what triggers the financial</p> <p>25 obligation to pay?</p>	<p style="text-align: right;">Page 231</p> <p>1 approvals as of December 5th, 2018?</p> <p>2 A. To the best of my knowledge.</p> <p>3 Q. Okay. Was there necessary transloading</p> <p>4 equipment?</p> <p>5 A. Yes.</p> <p>6 Q. And the people?</p> <p>7 A. Yes.</p> <p>8 Q. No insurance on the --</p> <p>9 MR. WICKES: Objection, form.</p> <p>10 MR. KORNHAUSER: Let me finish the</p> <p>11 question.</p> <p>12 Q. (BY MR. KORNHAUSER) Was there pollution</p> <p>13 liability insurance as -- as of December 5th, 2018?</p> <p>14 A. I don't know the answer to that.</p> <p>15 Q. Okay. All right. So but at the very least,</p> <p>16 you're saying, as of December 5th, 2018, there were</p> <p>17 permits, regulatory approvals, transloading equipment,</p> <p>18 and people?</p> <p>19 A. Correct.</p> <p>20 Q. But you hadn't seen the permits; you didn't</p> <p>21 see the regulatory approvals?</p> <p>22 A. Right.</p> <p>23 Q. Did you personally witness the equipment?</p> <p>24 A. I did.</p> <p>25 Q. And the people?</p>
<p style="text-align: right;">Page 230</p> <p>1 A. Oh. I don't know. In my mind, you know,</p> <p>2 between Braden, Mike, and myself, we had been talking</p> <p>3 about phase one and phase two. So that's -- that's</p> <p>4 what I referenced.</p> <p>5 Q. Let me ask you this: At the time that you</p> <p>6 sent this invoice out, which was -- I guess it was the</p> <p>7 28th of January. Is that correct? 2019?</p> <p>8 A. I don't know exactly the date on that.</p> <p>9 Q. Well, let me ask you: As of December 5th,</p> <p>10 2018, did you have the necessary permits at the</p> <p>11 Barnhart terminal to translate crude by rail?</p> <p>12 A. I believe so.</p> <p>13 MR. KRONZER: '19, '19.</p> <p>14 MR. KORNHAUSER: Oh, '19. I'm sorry.</p> <p>15 No, no. As of December 5th, 2018.</p> <p>16 MR. KRONZER: Oh.</p> <p>17 A. Correct. I believe that we did. Now, I'm</p> <p>18 not --</p> <p>19 Q. (BY MR. KORNHAUSER) Are there documents to</p> <p>20 evidence that?</p> <p>21 A. There should be. Like I said, that's --</p> <p>22 that's going to fall under our health, safety, and</p> <p>23 environmental. I wasn't directly involved in obtaining</p> <p>24 the permits.</p> <p>25 Q. Okay. Was there the necessary regulatory</p>	<p style="text-align: right;">Page 232</p> <p>1 A. Yes.</p> <p>2 (Exhibit 30 marked.)</p> <p>3 Q. (BY MR. KORNHAUSER) Number 30, have you seen</p> <p>4 that before, sir?</p> <p>5 A. The invoice specifically?</p> <p>6 Q. Yeah.</p> <p>7 A. No.</p> <p>8 Q. Okay. But this is the invoice that you</p> <p>9 reference in your prior correspondence, specifically</p> <p>10 Exhibit Number 29, correct?</p> <p>11 A. Correct.</p> <p>12 Q. And this was sent out at the request of</p> <p>13 Mr. Humphreys?</p> <p>14 A. Yes.</p> <p>15 Q. And Mr. Robertson?</p> <p>16 A. Yes.</p> <p>17 Q. And this would be for the month of December</p> <p>18 '18?</p> <p>19 A. Correct.</p> <p>20 (Exhibit 31 marked.)</p> <p>21 Q. (BY MR. KORNHAUSER) Exhibit 31, this is a</p> <p>22 letter that was sent by Sequitur. Have you seen this</p> <p>23 before, sir?</p> <p>24 A. I have.</p> <p>25 Q. And this is referencing specifically the</p>

<p>Page 233</p> <p>1 invoice dispute and the continuation of the force 2 majeure events; is that correct? 3 A. Correct. 4 Q. So it'd be safe to say that Sequitur is 5 contesting the invoice that was sent previously, 6 correct? 7 A. Correct. 8 Q. The force majeure and other reasons? 9 A. Correct. 10 Q. And Sequi- -- and Maalt/Vista received that, 11 correct? 12 A. Yes. 13 (Exhibit 32 marked.) 14 Q. (BY MR. KORNHAUSER) You've seen Exhibit 32; 15 is that correct, sir? 16 A. Correct. 17 Q. All right. This is a letter written from 18 Sequitur to Maalt/Vista February 8, 2019, notifying 19 them of the termination of the TSA due to force majeure 20 events? 21 A. Yes. 22 Q. Also, it's referencing that under 2.7 of the 23 agreement: Upon termination, customer at its sole cost 24 and expense is permitted to remove any equipment at 25 facilities constituting the customer terminal</p>	<p>Page 235</p> <p>1 the claim of force majeure is simply a pretext asserted 2 in an attempt to avoid contractual obligations. 3 (As read.) 4 It says: In light of your February 8th, 5 2019 letter, Maalt considers your actions a repudiation 6 of the contract and, therefore, a material breach. 7 Accordingly, Maalt will not allow your company access 8 to the Barnhart property to remove equipment or 9 otherwise. Any attempt to access the property will be 10 considered a trespass. (As read.) 11 Do you know why -- well, let me ask it a 12 better way. 13 Do you know upon what grounds Maalt was 14 asserting that it had the right to refuse Sequitur's 15 attempts to access the Barnhart property to remove 16 their equipment? 17 MR. WICKES: I'll caution you to answer 18 that question only if you can without relying on 19 anything you heard from your attorneys. 20 A. No, I have -- I wasn't involved in that. I 21 don't -- can't answer that. I don't know. 22 Q. (BY MR. KORNHAUSER) Okay. But it's fair to 23 say that Maalt was denying Sequitur access to the 24 Barnhart property to remove their own equipment; is 25 that true?</p>
<p>Page 234</p> <p>1 modifications, and that under the agreement, the 2 terminal owner shall provide customer access to the 3 terminal to commence and complete the removal of the 4 customer termination modifications, and that the 5 customer will be contacting terminal owner at the date 6 hereof to discuss the potential acquisition of the 7 terminal owner's rights to the surface area and any 8 other appurtenances or coordinate the removal process. 9 (As read.) 10 Is that correct? 11 A. Correct. 12 Q. Basically they're saying we're terminating the 13 agreement due to the force majeure events, and we also 14 are letting you know that our equipment is out there, 15 and we want it back. 16 A. Right. 17 (Exhibit 33 marked.) 18 Q. (BY MR. KORNHAUSER) Let me show you that. 19 Have you seen Exhibit Number 33, sir? 20 A. I don't know that I have. 21 Q. Okay. It's a letter written by lawyer, 22 Mr. Lanter, February 14, 2009, referencing receipt of 23 the February 8th letter we just talked about, which is 24 Exhibit Number 32; saying that: Maalt disputes that 25 there was a force majeure event. Rather, that they say</p>	<p>Page 236</p> <p>1 A. That -- that's what this says. 2 Q. Right. 3 And they said that any attempt to do so 4 will be considered a trespass? 5 A. That's what it says, yes. 6 Q. Okay. Did you have any conversations with 7 Mr. Humphrey or Mr. Robertson about Sequitur's request 8 to retrieve their property after they purported to 9 terminate the TSA? 10 A. I was not involved in this. As far as 11 equipment goes and whatever else, I wasn't involved. 12 Q. Okay. Are you aware that Sequitur's property 13 was removed from the Barnhart terminal property? 14 A. Yeah. I found out after the fact, yeah. 15 Q. And how did you find that out? 16 A. I think through one of the -- one of my 17 coworkers. 18 Q. What did you learn? 19 A. The -- 20 Q. What did they tell you? 21 A. If I recall the conversation right, it was 22 over at -- down the road at Big Lake. 23 Q. Why was it removed to Big Lake? 24 A. I think it has to do with this letter. But 25 like I said, I wasn't involved directly with it.</p>

Chris Favors

Page 253..256

Page 253		Page 255	
1	MR. KORNHAUSER: All right. Very well.	1	I, CHRIS FAVORS, have read the foregoing
2	THE VIDEOGRAPHER: Off the record at 5:00	2	deposition and hereby affix my signature that same is
3	p.m.	3	true and correct, except as noted above.
4	(End of proceedings at 5:00.)	4	
5		5	
6		6	CHRIS FAVORS
7		7	
8		8	
9		9	STATE OF _____
10		10	COUNTY OF _____
11		11	Before me, _____,
12		12	on this day personally appeared CHRIS FAVORS, known to
13		13	me (or proved to me under oath or through
14		14	_____ (description of identity card or
15		15	other document) to be the person whose name is
16		16	subscribed to the foregoing instrument and acknowledged
17		17	to me that they executed the same for the purposes and
18		18	consideration therein expressed.
19		19	Given under my hand and seal of office
20		20	this _____ day of _____, _____.
21		21	
22		22	NOTARY PUBLIC IN AND FOR
23		23	THE STATE OF _____
24		24	MY COMMISSION EXPIRES:
25		25	

Page 254		Page 256	
1	CHANGES AND SIGNATURE	1	CAUSE NO. CV19-003
2	WITNESS: CHRIS FAVORS DATE: 11/14/2019	2	MAALT, LP, * IN THE DISTRICT COURT
3	PAGE/LINE CHANGE REASON	3	Plaintiff, *
4	_____	4	V. * IRION COUNTY, TEXAS
5	_____	5	SEQUITUR PERMIAN, LLC, *
6	_____	6	Defendant. * 51ST JUDICIAL DISTRICT
7	_____	7	
8	_____	8	REPORTER'S CERTIFICATION
9	_____	9	VIDEOTAPED ORAL DEPOSITION
10	_____	10	OF CHRIS FAVORS
11	_____	11	TAKEN ON
12	_____	12	NOVEMBER 14, 2019
13	_____	13	VOLUME 1
14	_____	14	I, SONYA BRITT-DAVIS, Certified
15	_____	15	Shorthand Reporter in and for the State of Texas,
16	_____	16	hereby certify to the following:
17	_____	17	That the witness, CHRIS FAVORS, was duly
18	_____	18	sworn by the officer, and that the transcript of the
19	_____	19	oral deposition is a true record of the testimony given
20	_____	20	by the witness;
21	_____	21	That the deposition transcript was
22	_____	22	submitted on _____, _____, to the
23	_____	23	witness or to the attorney for the witness for
24	_____	24	examination, signature and return to me by _____
25	_____	25	_____, _____;

Page 257	Page 259
<p>1 That the amount of time used by each</p> <p>2 party at the deposition is as follows:</p> <p>3 Mr. Kornhauser - 5 hours, 38 minutes.</p> <p>4 That pursuant to information given to</p> <p>5 the deposition officer at the time said testimony was</p> <p>6 taken, the following includes counsel for all parties</p> <p>7 present:</p> <p>8 FOR THE PLAINTIFF:</p> <p>9 Mr. Paul O. Wickes</p> <p>10 WICKES LAW, PLLC</p> <p>11 5600 Tennyson Parkway, Suite 205</p> <p>12 Plano, Texas 75024</p> <p>13 Phone: 972.473.6900</p> <p>14 E-mail: pwickes@wickeslaw.com</p> <p>15 AND</p> <p>16 Mr. James Lanter</p> <p>17 JAMES LANTER, PC</p> <p>18 560 North Walnut Creek, Suite 120</p> <p>19 Mansfield, Texas 76063</p> <p>20 Phone: 817.453.4800</p> <p>21 E-mail: jim.lanter@lanter-law.com</p> <p>22 FOR THE DEFENDANT:</p> <p>23 Mr. Matthew A. Kornhauser</p> <p>24 Mr. Christopher J. Kronzer</p> <p>25 HOOVER SLOVACEK, LLP</p> <p>Galleria Tower II</p> <p>5051 Westheimer, Suite 1200</p> <p>Houston, Texas 77056</p> <p>Phone: 713.977.8686</p> <p>E-mail: kornhauser@hooverslovacek.com</p> <p>kronzer@hooverslovacek.com</p> <p>I further certify that I am neither</p> <p>counsel for, related to, nor employed by any of the</p> <p>parties or attorneys in the action in which this</p>	<p>1 FURTHER CERTIFICATION UNDER RULE 203 TRCP</p> <p>2 The original deposition/signature page</p> <p>3 was/was not returned to the deposition officer on</p> <p>4 _____;</p> <p>5 If returned, the attached Changes and</p> <p>6 Signature page contains any changes and the reasons</p> <p>7 therefor;</p> <p>8 If returned, the original deposition was</p> <p>9 delivered to Mr. Matthew A. Kornhauser, Custodial</p> <p>10 Attorney;</p> <p>11 That \$_____ is the deposition</p> <p>12 officer's charges to the Defendant, in preparing the</p> <p>13 original deposition transcript and any copies of</p> <p>14 exhibits;</p> <p>15 That the deposition was delivered in</p> <p>16 accordance with Rule 203.3, and that a copy of this</p> <p>17 certificate was served on all parties shown herein on</p> <p>18 _____ and filed with the Clerk.</p> <p>19 Certified to by me this _____ day of</p> <p>20 _____</p> <p>21 <u>Sonya Britt-Davis</u></p> <p>22 SONYA BRITT-DAVIS, Texas CSR #7205</p> <p>23 Expiration Date: October 31, 2021</p> <p>24 Lexitas - Dallas</p> <p>25 Firm Registration No. 459</p> <p>6500 Greenville Avenue, Suite 445</p> <p>Dallas, Texas 75206</p> <p>Phone: 214.373.4977</p>
<p>1 proceeding was taken, and further that I am not</p> <p>2 financially or otherwise interested in the outcome of</p> <p>3 the action.</p> <p>4 Further certification requirements</p> <p>5 pursuant to Rule 203 of TRCP will be certified to after</p> <p>6 they have occurred.</p> <p>7 Certified to by me this 17th day of</p> <p>8 November, 2019.</p> <p>9</p> <p>10</p> <p>11 <u>Sonya Britt-Davis</u></p> <p>12</p> <p>13 SONYA BRITT-DAVIS, Texas CSR #7205</p> <p>14 Expiration Date: October 31, 2021</p> <p>15 Lexitas - Dallas</p> <p>16 Firm Registration No. 459</p> <p>17 6500 Greenville Avenue, Suite 445</p> <p>18 Dallas, Texas 75206</p> <p>19 Phone: 214.373.4977</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

From: Braden Merrill
To: Chris Favors; Mike van den Bold
Subject: RE: Barnhart Agreement Discussion
Date: Friday, August 3, 2018 11:12:38 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Good Morning Chris,

Sorry for the slow response. Mike and I were in a long meeting this morning. I appreciate where you are and coming to us. We will discuss and get back with you shortly.

Best,
 Braden

From: Chris Favors <cfavors@vprop.com>
Sent: Friday, August 03, 2018 9:09 AM
To: Mike van den Bold <mcvdb@sequiturerenergy.com>; Braden Merrill <bmerrill@sequiturerenergy.com>
Subject: Barnhart Agreement Discussion
Importance: High

Happy Friday, Gentlemen! Do y'all have time for a discussion regarding the Barnhart agreement this morning?

Here is what I would like to discuss:

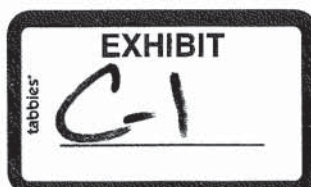
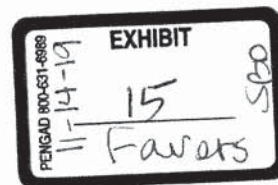
- I am receiving heavy pressure to get the agreement fully executed.
- We have been offered slightly better terms from other party that said they will execute an agreement today. My preference is to work with Sequitur and I am politicking internally for that.
- How can I assure our CEO and President that we will get the agreement signed in the next couple of business days? If there is not a high level of confidence that it will be signed in the next couple of business days, is there a monetary "reservation fee" that Sequitur is willing to put up that would either be applied to the first "x" number of barrels transloaded or forfeited in the event an agreement is not executed?

I am in the office all day today. Please let me know what time works best to talk and I will make myself available.

Regards,



Chris Favors
Business Development
 ☎ (682)-251-5538
 ✉ cfavors@vprop.com
 4413 Carey Street, Ft Worth, TX 76119
www.vprop.com



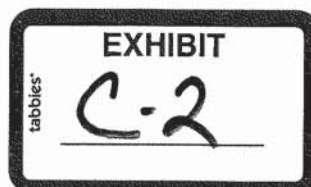
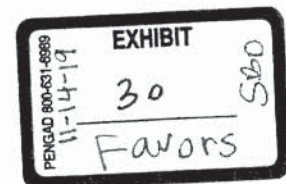
Maalt_000240

From: [Lynn Walkup](#)
To: bmerrill@sequitirenergy.com
Subject: Invoice
Date: Monday, January 28, 2019 2:48:21 PM
Attachments: [TRA_000001_Sequitur.pdf](#)

Thank you,
Lynn



Lynn Walkup
Accounting - Billing Supervisor
817-201-2089
817-563-3550
lwalkup@vprop.com
4413 Carey St. Fort Worth, TX 76119
www.vprop.com



Maalt_000156

**Vista Proppants and Logistics**

4413 Carey Street
 Fort Worth, Texas 76119
 P: 817-563-3550 F: 817-563-3555

INVOICE NUMBER: TRA-000001**INVOICE DATE:** 01/25/2019**PAGE:** 1 of 1**INVOICE****SOLD TO**

Sequitur Permian, LLC.
 Attention: Chief Financial Officer
 2050 West Sam Houston Pkwy S
 Suite 1850
 Houston, TX 77042
 USA

CUSTOMER PO	PRODUCT	PAYMENT TERMS	DUE DATE
		NET 30	02/24/2019
DESCRIPTION	QUANTITY	UNIT PRICE	EXTENSION
4Q 2018 - Quarterly Minimum	1.00	531,216.00	531,216.00

Subtotal: \$531,216.00

Tax: \$0.00

Amount Paid: 0.00

Balance: \$531,216.00

Remit to: Lonestar Prospects, LTD
 4413 Carey Street, Fort Worth, TX 76119
 Phone 817-563-3550

Sequitur Permian, LLC
2050 W. Sam Houston Parkway S., Suite 2050
Houston, Texas 77042

January 31, 2019

Via email to mrobertson@vprop.com & FedEx

Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Marty Robertson

Via email to cfavors@vprop.com

Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
Attention: Chris Favors

Re: Invoice Dispute and Continuation of Force Majeure

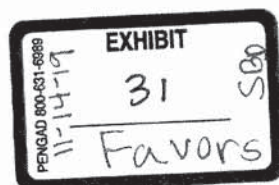
Gentlemen:

Reference is made to (i) that certain Terminal Services Agreement ("Agreement") dated August 6, 2018 between Sequitur Permian, LLC ("Customer") and Maalt, L.P. ("Terminal Owner") relating to the use of Terminal Owner's rail terminal facility located in Barnhart, Texas ("Terminal") and (ii) Customer's letter to Terminal Owner dated December 7, 2018, declaring an existing Force Majeure Event ("Notice of Force Majeure Event"). All capitalized terms not otherwise defined herein have the same meanings as in the Agreement.

Customer received on January 28, 2019 Terminal Owner's invoice dated January 25, 2019 (No. TRA-000001) for \$531,216.00 ("Invoice"). Inasmuch as the existing Force Majeure Event continues to be in effect, Customer does not owe any Throughput Fees, Shortfall Payments or any other amounts to Terminal Owner; accordingly, the Invoice is hereby disputed in its entirety. In addition, without prejudice to the full suspension of Customer's obligations under the Agreement due to the existing Force Majeure Event and without the waiver of any right Customer may have under the Agreement, the Terminal Operations Commencement Date has not occurred as per the terms of the Agreement. Therefore, in accordance with the terms and conditions of the Agreement, the Minimum Volume Commitment is also not in effect, and no amounts are owed by Customer to Terminal Owner.

Customer will keep Terminal Owner informed of any changes or developments in the status of the Existing Force Majeure.

This notice is without prejudice to Customer's rights and remedies under the Agreement or otherwise, all of which are hereby reserved.



Sequitur_000605

Letter to Maalt, LP
January 31, 2019
Page 2

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Braden Merrill', followed by a circular stamp or mark.

Braden Merrill
CFO

Cc:

Via FedEx
James Lantner
James Lantner, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

James Lanter

Professional Corporation
Attorneys at Law

560 N. Walnut Creek
Suite 120
Mansfield, TX 76063
817.453.4800
817.453.4801 fax

James Lanter

jim.lanter@lanter-law.com

February 14, 2019

Sequitur Permian, LLC
Attn: Mr. Braden Merrill
2050 W. Sam Houston Parkway South
Suite 2050
Houston, TX 77042

Via Certified Mail, Return Receipt Requested
7012 2210 0000 0470 5812

Re: Terminal Services Agreement dated August 6, 2018 ("Contract")

Dear Mr. Merrill:

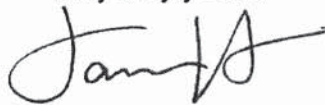
Please be advised that this firm represents Maalt, LP ("Maalt"). We are in receipt of your letter dated February 8, 2019.

Maalt disputes that there was a force majeure event of the type described in your December 7, 2018 letter or that there was any force majeure event that has continued for sixty (60) days. Rather, the claim of force majeure is simply a pretext asserted in an attempt to avoid your contractual obligations.

In light of your February 8, 2019 letter, Maalt considers your actions a repudiation of the Contract and therefore a material breach. Accordingly, Maalt will not allow your company access to the Barnhart property to remove equipment or otherwise. Any attempt to access the property will be considered a trespass.

Enclosed is a copy of the lawsuit filed against your company today. Please forward to your counsel.

Very truly yours,


James Lanter

Enclosure

Cc: Maalt, LP



Ashley Masters

CAUSE NUMBER 19-003

MAALT, LP, Plaintiff	§	IN THE DISTRICT COURT
	§	
VS.	§	51st JUDICIAL DISTRICT
	§	
SEQUITUR PERMIAN, LLC, Defendant	§	IRION COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Maalt, LP ("Maalt"), Plaintiff, and files this its Second Amended Original Petition, and in support thereof, respectfully shows this Court as follows:

DISCOVERY CONTROL PLAN

I.

Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

RULE 47 STATEMENT OF RELIEF REQUESTED

II.

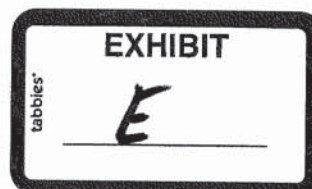
Plaintiff seeks monetary relief over \$1,000,000.00.

PARTIES

III.

Plaintiff, Maalt, LP, is a Texas limited partnership with its principal place of business in Tarrant County, Texas.

Defendant, Sequitur Permian, LLC, ("Sequitur") has appeared and answered.



VENUE

IV.

Venue is proper in Irion County, Texas, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(1) because that is the county in which all or a substantial part of the events giving rise to Maalt's claims and causes of action occurred.

FACTS

V.

Maalt is in the business of operating transloading facilities that transload materials used in the oil and gas industry in Texas. Its transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operates a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacific Transportation, Ltd. ("TXPF"). TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the Union Pacific and Fort Worth and Western Railroad ("FWWR"). The FWWR in turn interchanges with track owned by BNSF and The Kansas City Southern Railway ("KCS"). Through those interchanges and railroads, goods can be shipped into and out of the Permian Basin area by rail. The Barnhart Facility can accept goods brought to it by truck or train from anywhere in the country, and then transloaded to either truck or train for delivery either within the Permian Basin or other areas throughout the country.

VI.

In approximately May, 2018, Sequitur contacted Maalt to discuss arrangements through which Maalt would transload Sequitur's crude oil at Maalt's Barnhart Facility because that facility was adjacent to land on which Sequitur had producing oil wells. At

the time, the pipelines leading from the Permian Basin to various oil markets were at capacity and oil was in a state of oversupply. Because of that situation, the price of crude oil at Midland was far less in early to mid-2018 than it was for crude oil sold at the Gulf Coast. Sequitur believed that the spread in the prices made the cost of transporting crude oil by rail attractive and created an opportunity to transport crude oil from the Permian Basin to the Gulf Coast by train. Sequitur wanted to take advantage of that opportunity which promised to provide it with significant returns.

VII.

Eventually, in August 2018, Maalt entered into a Terminal Services Agreement (the “TSA”) with Sequitur to provide crude oil transloading services at the Barnhart Facility for Sequitur, Sequitur with exclusive use of the facility, and a right of first offer and refusal to purchase the facility (the “ROFR”). Pursuant to the TSA, Sequitur was to provide and install the equipment needed to transload Sequitur’s crude oil from trucks (and potentially a pipeline) to rail cars, and Maalt was to provide exclusive access to its Barnhart Facility, the labor required for the transloading process, and the ROFR. The TSA granted Sequitur the exclusive right to have crude oil transloaded at the Barnhart Facility to the exclusion of any other transloading operations, whether crude oil, sand, or other goods. In exchange, Sequitur agreed to pay Maalt \$1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $\$1.50 \times 11,424 \times 30 = \$514,080.00$)(the “Minimum Fee”). In other words, the TSA was an alternative or

throughput-or-pay contract (comparable to a take-or-pay contract) that allowed Sequitur to perform its obligations by either (i) providing the minimum throughput of crude oil at the Barnhart Facility for Maalt to transload, or (ii) paying the Minimum Fee. In exchange, Sequitur would receive transloading of its crude oil during the times specified in the TSA, the dedication of manpower for that transloading, the reservation of the Barnhart Facility for Sequitur's exclusive use, and the ROFR.

VIII.

Pursuant to the TSA, Sequitur constructed the Phase I Project improvements at the Barnhart Facility consisting of equipment necessary to transload crude oil brought to the Barnhart Facility by trucks onto railcars. While the completion of the improvements was targeted for early September, 2018, Sequitur's completion of those improvements was delayed and ultimately completed and became operational and/or in service on or about December 10, 2018 according to Sequitur's records. Under the terms of the TSA, Sequitur's obligation to pay Maalt the Minimum Fee began at that time.

IX.

By December, 2018, Sequitur had not procured the logistics necessary to have railcars delivered to the Barnhart Facility for the purpose of carrying crude oil. Rather than implement its own logistics to get crude oil and the necessary rail cars to the Barnhart Facility, Sequitur looked for a crude oil purchaser that already had logistical services in place to purchase its crude oil and serve as a joint venture partner to share the arbitrage. That way, Sequitur would not have to invest the time or manpower necessary to learn the logistical requirements of transporting crude oil by rail. It could simply rely on others to do that while enjoying the arbitrage; that is, the economic value of selling its crude oil at the Gulf Coast for a higher price than it could command in the

Permian Basin. It was, however, unsuccessful in finding such a joint venture partner with the result that it never had crude oil transloaded at the Barnhart Facility.

X.

According to Sequitur's internal records, the Phase 1 Project improvements were completed and the Barnhart Facility was "in service" on December 10, 2018. Despite the completion of the Phase 1 Project improvements, Sequitur did not begin transloading crude oil as required by the TSA. Instead, realizing that it did not have a joint venture partner who could provide the logistical services necessary to move its crude oil from the Permian Basin to the Gulf Coast by rail and did not otherwise take the actions required to get rail cars and service to the Barnhart Facility even though there was no curtailment of rail transportation services, Sequitur declared that a force majeure event occurred so it would not have to pay Maalt the Minimum Fee. It has since refused to pay Maalt the Minimum Fee it is obligated to pay under the TSA.

XI.

On December 7, 2018, knowing that it owed Maalt the Minimum Fee starting on December 10, 2018, Sequitur sent Maalt a letter claiming that it was experiencing a force majeure event because of the "unavailability, interruption, delay, or curtailment of rail transportation services for the Product. . . ." At the time, there was no "interruption, delay, or curtailment of rail transportation services." Rather, Sequitur appears to contend that because it was unable to procure an oil company to purchase its oil and that would be an acceptable joint venture partner that could provide the necessary logistics services, or alternatively, rail transportation at a low enough cost, rail transportation services were "unavailable." Sequitur has persisted in that contention even though it made no effort to develop the logistical services "in-house", made no effort to investigate or retain a third

party logistics provider, and made no effort to negotiate directly with the railroads or any supplier of rail cars to obtain the cars and services necessary to move its crude by rail. On the other hand, there was at least one company that was apparently willing and able to contract with Sequitur to move Sequitur's crude oil by rail from the Barnhart Facility, but the cost to Sequitur would eliminate the arbitrage opportunity it sought.

XII.

Moreover, In October 2018, Equinor, a buyer of crude, was in discussions with the Kansas City Southern Railway Company ("KCS") for the purpose of obtaining rail service to move crude oil out of the Barnhart Facility. At the time, Jupiter Marketing and Trading ("Jupiter") was working with Sequitur as joint venture partners for the purpose of pursuing the arbitrage opportunity through the Barnhart Facility. Equinor had a commercial relationship with Jupiter providing for the purchase of crude oil and the transportation of that oil by rail from the Permian Basin, including the Barnhart Facility. The records obtained by Sequitur from KCS in this case indicate that the KCS was willing and able to provide that rail transportation service, and in fact provided Equinor with rates for that service in October 2018. Jupiter, acting as Sequitur's joint venture partner, also retained a rail logistics consultant to negotiate rail rates with the KCS in November 2018, and was able to do so. However, the rates quoted by the KCS were not low enough to provide an arbitrage advantage. Thus, rail transportation for Sequitur's crude was available, just not at a price that provided Sequitur an economic advantage. In other words, Sequitur could move its oil by rail, but it was not a good deal for it.

XIII.

On February 8, 2019, Sequitur sent Maalt a letter stating it was terminating the TSA pursuant to the force majeure provisions of the TSA. However, in reality there was

never a force majeure event as rail service to the Barnhart Facility was never unavailable, interrupted, delayed or curtailed. Rather, Sequitur was asserting its force majeure claim as a pretext to terminate the TSA simply because it was unable to find an oil buyer who was able to move crude oil by rail while providing the arbitrage benefit to Sequitur, and because it did not want to invest resources into undertaking the logistics efforts itself. In the months before its February 8, 2019 letter, it is believed that Sequitur realized that the spread in crude oil prices, and thus the potential arbitrage it sought, was shrinking while the cost of rail serve was higher than it expected or increasing during that time frame. Based on the information available to Maalt, it is believed that Sequitur made the decision to terminate the TSA in order to avoid an unfavorable economic situation.

XIV.

Sequitur's conduct indicates that at the time of Sequitur's February 8, 2019 letter it was absolutely and unconditionally refusing, and continues to refuse, to perform its obligations under the TSA, including the obligation to pay the minimum payments or fees. It has therefore repudiated the TSA, and by doing so materially breached the TSA. Moreover, by sending its February 8, 2019 letter attempting to terminate the TSA, Sequitur has improperly attempted to terminate the TSA in order to avoid its contractual obligations.

BREACH OF CONTRACT

XV.

Paragraphs IV through XIV are incorporated herein by reference. Sequitur's repudiation of the TSA constitutes a material breach of the TSA. Under the terms of the TSA, Sequitur was able to perform in one of two ways – it could purchase or take the

transloading services at a rate of \$1.50 per barrel with minimum quantity requirements or it could simply perform its obligations by paying the Minimum Fee. Sequitur did neither. Maalt fully performed its obligations under the TSA, which performance was accepted by Sequitur until it repudiated the TSA. As a result, Maalt has sustained actual damages within the Court's jurisdictional limits for which Maalt now sues. In that respect, Maalt seeks an amount equal to the total of the Minimum Fee amounts required by the TSA, as its expectancy/benefit of the bargain, as that amount represents the price Sequitur agreed to pay for the exclusive dedication of the Barnhart Facility to Sequitur's use for the time specified in the TSA and the ROFR, among other things. The minimum payments/fee for the term of the TSA beginning with Sequitur's "in service" date of December 10, 2018 is \$6,614,496.00. Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to recover \$7,068,443.00 which includes interest through August 31, 2020 and additional interest as it accrues after that date.

Alternatively, Maalt is entitled to recover its lost profits as its expectancy/benefit of the bargain damages. Maalt is also entitled to recover interest on its contract damages at the rate of the lessor of 2% over the prime rate as published under "Money Rates" in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA).

Maalt seeks a maximum amount of actual damages of \$6,614,496.00, plus interest as set forth above, attorneys' fees, accountant fees, costs, and expenses which amounts are continuing to accrue.

In addition and further in the alternative, Maalt is entitled to specific performance of the TSA by Sequitur. As mentioned, Sequitur had alternative performance obligations under the TSA – either pay for the transloading services and any shortfall amounts, or pay the Minimum Fee for Maalt's reservation of and exclusive dedication of the Barnhart Facility to Sequitur's exclusive use during the term of the TSA, the ROFR, and other benefits. Pursuant to Section 8.6 of the TSA, Maalt is entitled to specific performance of Sequitur's obligation to pay the Minimum Fee pursuant to Article 3 of the TSA, which in this case is 11,424 barrels per day times \$1.50 for each quarter of the TSA term since Sequitur did not make any payments to Maalt prior to repudiation. The total of the Minimum Fee for the term is \$6,614,496.00. Maalt is also entitled to recover interest on the total Minimum Fee at the rate of the lessor of 2% over the prime rate as published under "Money Rates" in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA). Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to judgment specifically enforcing the TSA and ordering Sequitur to pay Maalt \$7,068,443.00, which includes interest through August 31, 2020 and additional interest as it accrues after that date.

Maalt is also entitled to recover its attorneys' fees, accountants' fees, costs and expenses pursuant to Section 15.19 of the TSA.

DECLARATORY JUDGMENT

XVI.

Paragraphs V through XIII are incorporated herein by reference. Maalt seeks a declaration pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37, of the following:

- a. The Termination Operations Commencement Date under the TSA occurred and the date of its occurrence;
- b. The “force majeure event” alleged by Sequitur did not occur;
- c. The date the payment obligations created by Article 3 of the TSA began;
- d. Sequitur did not have a right to terminate the TSA;
- e. Sequitur repudiated and breached the TSA by refusing to perform its obligations under the TSA; and
- f. Sequitur is obligated to pay Maalt the minimum bill, or Shortfall Payments, equal to 11,424 barrels per day multiplied by \$1.50 per barrel for each day of the term of the TSA

CONDITIONS PRECEDENT

XVII.

All conditions precedent to Maalt’s right of recovery have occurred or been waived.

ATTORNEYS' FEES

XVIII.

Pursuant to Texas Civil Practice and Remedies Code Chapters 37 and 38 and the terms of the TSA, Maalt is entitled to recover its reasonable and necessary attorneys’ fees, accountant fees, and associated litigation and expert costs from Sequitur. Presentment of Maalt’s claim was made within the time required by Texas Civil Practice and Remedies Code Chapter 38.

WHEREFORE, PREMISES CONSIDERED, Maalt, LP, Plaintiff, prays that Defendant be cited to appear and answer herein, and that Plaintiff recover the following:

1. All damages to which it may be entitled;
2. Specific performance of Sequitur's payment obligations under the TSA as plead herein;
3. Its reasonable and necessary attorney's fees, litigation costs, and expert costs;
4. Pre and post judgment interest allowed by law and at the rates provided by the TSA;
5. All costs of Court; and
6. Such other and further such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ James Lanter

James Lanter
State Bar No. 11940700
JAMES LANTER, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063
Phone: 817.453.4800
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Samuel S. Allen
State Bar No. 01057000
JACKSON WALKER LLP
135 W. Twohig Avenue
Suite C
San Angelo, Texas 76093
sallen@jw.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through
the Court's electronic filing service on the date of filing, upon:

HOOVER SLOVACEK LLP
Matthew A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
State Bar No. 24041839
Galleria Tower II
5051 Westheimer, Suite 1200
Houston, Texas 77056
Telephone: 713-977-8686
Facsimile: 713-977-5395
kornhauser@hooverslovacek.com
russell@hooverslovacek.com

GOSSETT, HARRISON,
MILLICAN & STIPANOVIC, P.C.
Paul D. Stipanovic
State Bar No. 00795669
2 S. Koenigheim Street
San Angelo, Texas 76903
Telephone: 325-653-3291
Facsimile: 325-655-6838

/s/ James Lanter

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

**DEFENDANT'S ORIGINAL ANSWER, VERIFIED DENIAL AND AFFIRMATIVE
DEFENSES TO
PLAINTIFF'S SECOND AMENDED PETITION**

COMES NOW, Defendant/Counter-Plaintiff, SEQUITUR PERMIAN, LLC ("Sequitur"), in the above styled and numbered cause and file this its Original Answer, Verified Denial and Affirmative Defenses to Plaintiff's Second Amended Petition and in support thereof would show unto the Court, as follows:

GENERAL DENIAL

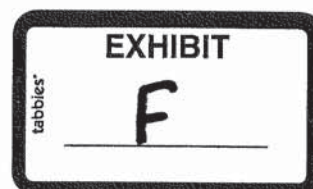
1. Subject to any stipulations, admissions, special exceptions, special and affirmative defenses which may be alleged, Defendant asserts a general denial, in accordance with Rule 92 of the Texas Rules of Civil Procedure, and demands strict proof of the Plaintiff's suit, by a preponderance of the evidence, as required by the Constitution and the laws of the State of Texas.

VERIFIED DENIAL

2. In addition to, or in the alternative, by way of further answer, if such be necessary, and without waiving any of the foregoing, Defendant denies plaintiff's allegation that all conditions precedent have been performed or have occurred. Specifically, Defendants states that the following conditions precedent have not been performed or have not occurred (as applicable):

{171480/00002/01407678.DOCX 1 }

1



- a. Occurrence of the Terminal Operations Commencement Date (as defined in the Terminal Services Agreement (“TSA”), Article 1).
- b. Notice of the Terminal Operations Commencement Date as required by the TSA, Article 1.
- c. Procurement and maintenance of pollution legal liability (PLL) insurance policy as required by and in compliance with Section 11.2 of the TSA.
- d. Availability of Product transportation services, which includes but is not limited to, the availability of rail cars and/or rates to transport Product from the Barnhart Terminal to a specific destination(s) of Sequitur/Sequitur’s customer(s).

AFFIRMATIVE DEFENSES

3. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of consideration.

4. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of waiver, including express contractual waiver and/or implied waiver.

5. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of statute of frauds.

6. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of contractual force majeure.

7. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of excuse and/or justification.

8. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to mitigate damages.

9. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure to perform conditions precedent.

10. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of impossibility.

11. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of prior material breach of contract and/or repudiation.

12. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of commercial impracticability.

13. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of failure of implied condition(s) of the contract, including but not limited to the availability of Product transportation services or the availability of rail cars and/or rates to

transport Product from the Barnhart Terminal to a specific destination(s) of Sequitur/Sequitur's customer(s).

14. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense that the contractual damages provision for which Plaintiff seeks to enforce is a liquidated damages provision that is an unenforceable penalty.

15. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, the affirmative defense of mutual mistake.

16. By way of further answer, if such be necessary, and without waiving any of the foregoing, Sequitur asserts, pursuant to Rule 94 of the Texas Rules of Civil Procedure, that consistent with the terms and/or conditions of the TSA, Sequitur had no obligation to remedy the Force Majeure occurrence because Sequitur, as the affected party, did not deem it reasonable and economic to do so.

ADOPTION BY REFERENCE

17. Pursuant to Rule 58, Defendant adopts by reference as if asserted herein its Third Amended Counterclaims and Second Amended Third-Party Claims in defense of all claims by Plaintiff.

NOTICE OF INTENT TO USE DISCOVERY

18. Pursuant to Rule 193.7, please be advised that Sequitur intends to utilize at trial any and all materials produced by Plaintiff or Third-Party Defendant during the discovery process.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, SEQUITUR PERMIAN, LLC, further requests that Plaintiff recover nothing by its suit; that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC, recover and obtain from Plaintiff/Counter-Defendant, Maalt, LP and Third-Party Defendant, Vista Proppants and Logistics, Inc., all relief requested, including declaratory relief, all damages, and its court costs, expenses, and reasonable and necessary (and equitable and just per UDJA) attorney's fees against the Plaintiff, pursuant to the prevailing party clause in the subject Terminal Services Agreement and Chapter 37 of the UDJA; and that Counter-Plaintiff/Defendant, SEQUITUR PERMIAN, LLC, has such other and further relief to which it is entitled, whether at law or in equity.

Respectfully submitted,

HOOVER SLOVACEK LLP

By: /s/ Matthew A. Kornhauser
Matthew A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
State Bar No. 24041839
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**ATTORNEYS FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

and

**GOSSETT, HARRISON,
MILLICAN & STIPANOVIC, P.C.**

By: /s/ Paul D. Stipanovic
State Bar No. 00795669
Galleria Tower II
2 S. Koenigheim Street
San Angelo, Texas 76903
Telephone: 325-653-3291
Facsimile: 325-655-6838
pauls@ghtxlaw.com

**CO-COUNSEL FOR
DEFENDANT/COUNTER-PLAINTIFF,
SEQUITUR PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 30th day of April 2019, a true and correct copy of the foregoing document was served via e-service to all counsel of record as follows:

James Lanter
JAMES LANTER, PC
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063

Paul O. Wickes
WICKES LAW, PLLC
5600 Tennyson Parkway, Suite 205
Plano, Texas 75024

/s/ Matthew A. Kornhauser
Matthew A. Kornhauser

CAUSE NO. CV19-003

MAALT, LP,
Plaintiff,

v.

SEQUITUR PERMIAN, LLC,
Defendants.

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§

IN THE DISTRICT COURT OF

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

VERIFICATION

STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

"My name is BRADEN MERRILL. I am the CFO of Sequitur Permian, LLC. I am over the age of eighteen (18) years, and I am duly authorized, qualified and competent in all respects to make this Verification.

I have reviewed the Defendant's Original Answer, Verified Denial, and Affirmative Defenses to Plaintiff's Second Amended Petition, and I have personal knowledge of the facts contained in Paragraph 2 of the foregoing pleading, and said facts are true and correct."

My name is BRADEN GERRITT MERRILL, my date of birth is February 6, 1981 and my business address is 2050 W. Sam Houston Parkway S., Suite 1850, Houston, Texas 77042.

I declare under penalty of perjury that the contents of this verification are true and correct.

Executed in Harris County, State of TX, on the 30th day of April, 2020.



No. 19-003

MAALT, LP

Plaintiff,

vs.

SEQUITUR PERMIAN, LLC

Defendant.

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§
§

IN THE DISTRICT COURT

IRION COUNTY, TEXAS

51ST JUDICIAL DISTRICT

**PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S SECOND COMBINED AMENDED
AND SUPPLEMENTAL RESPONSE TO REQUEST FOR DISCLOSURES**

COMES NOW Maalt, LP, Plaintiff, ("Maalt") and Vista Proppants and Logistics, Inc. ("Vista"), and serves this Second Combined Amended and Supplemental Response to Request for Disclosure pursuant to Texas Rule of Civil Procedure 194.

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

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5600 Tennyson Parkway, Ste. 205
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(972) 473-6900
(972) 767-3225 FAX
pwickes@wickeslaw.com

PLAINTIFFS AND THIRD-PARTY DEFENDANT'S SECOND
AMENDED AND SUPPLEMENTAL RESPONSE TO
DEFENDANT'S REQUEST FOR DISCLOSURE



Page 1

Removal Appendix 0821

Samuel S. Allen
State Bar No. 01057000
JACKSON WALKER LLP
135 W. Twohig Avenue
Suite C
San Angelo, Texas 76093
sallen@jw.com

**ATTORNEYS FOR PLAINTIFF
MAALT, LP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's electronic filing service on May 15, 2020, upon:

HOOVER SLOVACEK LLP
Matthew A. Kornhauser
State Bar No. 11684500
Dylan B. Russell
State Bar No. 24041839
Galleria Tower II
5051 Westheimer, Suite 1200
Houston, Texas 77056
Telephone: 713-977-8686
Facsimile: 713-977-5395
kornhauser@hooverslovacek.com
russell@hooverslovacek.com

GOSSETT, HARRISON,
MILLICAN & STIPANOVIC, P.C.
Paul D. Stipanovic
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2 S. Koenigheim Street
San Angelo, Texas 76903
Telephone: 325-653-3291
Facsimile: 325-655-6838

/s/ James Lanter

**PLAINTIFFS AND THIRD-PARTY DEFENDANT'S SECOND
AMENDED AND SUPPLEMENTAL RESPONSE TO
DEFENDANT'S REQUEST FOR DISCLOSURE**

Page 2

RESPONSE TO REQUEST FOR DISCLOSURE

(a) The correct names of the parties to the lawsuit;

The parties are correctly named.

(b) The name, address, and telephone number of any potential parties;

None.

(c) The legal theories and, in general, the factual bases of your claims or defenses:

Maalt is in the business of operating transloading facilities that transload materials used in the oil and gas industry in Texas. Its transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operates a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacific Transportation, Ltd. ("TXPF"). TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the Union Pacific and Fort Worth and Western Railroad ("FWWR"). The FWWR in turn interchanges with track owned by BNSF and The Kansas City Southern Railway ("KCS"). Through those interchanges and railroads, goods can be shipped into and out of the Permian Basin area by rail. The Barnhart Facility can accept goods brought to it by truck or train from anywhere in the country, and then transloaded to either truck or train for delivery either within the Permian Basin or other areas throughout the country.

In approximately May, 2018, Sequitur contacted Maalt to discuss arrangements through which Maalt would transload Sequitur's crude oil at Maalt's Barnhart Facility because that facility was adjacent to land on which Sequitur had producing oil wells. At the time, the pipelines leading from the Permian Basin to various oil markets were at capacity and oil was in a state of oversupply. Because of that situation, the price of crude oil at Midland was far less in early to mid-2018 than it was for crude oil sold at the Gulf Coast. Sequitur believed that the spread in the prices made the cost of transporting crude oil by rail attractive and created an opportunity to transport crude oil from the Permian Basin to the Gulf Coast by train. Sequitur wanted to take advantage of that opportunity which promised to provide it with significant returns.

Eventually, in August 2018, Maalt entered into a Terminal Services Agreement (the "TSA") with Sequitur to provide crude oil transloading services at the Barnhart Facility for Sequitur, Sequitur with exclusive use of the facility, and a right of first offer and refusal to purchase the facility (the "ROFR"). Pursuant to the TSA, Sequitur was to provide and install the equipment needed to transload Sequitur's crude oil from trucks (and potentially a pipeline) to rail cars, and Maalt was to provide exclusive access to its Barnhart Facility, the labor required for the transloading process, and the ROFR. The TSA granted Sequitur the exclusive right to have crude oil transloaded at the Barnhart Facility to the exclusion of any other transloading operations, whether crude oil, sand,

**PLAINTIFFS AND THIRD-PARTY DEFENDANT'S SECOND
AMENDED AND SUPPLEMENTAL RESPONSE TO
DEFENDANT'S REQUEST FOR DISCLOSURE**

Page 3

or other goods. In exchange, Sequitur agreed to pay Maalt \$1.50 per barrel of crude oil transloaded with a minimum daily volume obligation of 11,424 barrels on a monthly basis (for example, 342,720 barrels in a 30-day month). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a minimum fee equal to the price per barrel times the minimum daily volume requirement times the number of days in the month (for example, in the case of a 30 day month, $\$1.50 \times 11,424 \times 30 = \$514,080.00$) (the "Minimum Fee"). In other words, the TSA was an alternative or throughput-or-pay contract (comparable to a take-or-pay contract) that allowed Sequitur to perform its obligations by either (i) providing the minimum throughput of crude oil at the Barnhart Facility for Maalt to transload, or (ii) paying the Minimum Fee. In exchange, Sequitur would receive transloading of its crude oil during the times specified in the TSA, the dedication of manpower for that transloading, the reservation of the Barnhart Facility for Sequitur's exclusive use, and the ROFR.

Pursuant to the TSA, Sequitur constructed the Phase I Project improvements at the Barnhart Facility consisting of equipment necessary to transload crude oil brought to the Barnhart Facility by trucks onto railcars. While the completion of the improvements was targeted for early September, 2018, Sequitur's completion of those improvements was delayed and ultimately completed and became operational and/or in service on or about December 10, 2018 according to Sequitur's records. Under the terms of the TSA, Sequitur's obligation to pay Maalt the Minimum Fee began at that time.

By December, 2018, Sequitur had not procured the logistics necessary to have railcars delivered to the Barnhart Facility for the purpose of carrying crude oil. Rather than implement its own logistics to get crude oil and the necessary rail cars to the Barnhart Facility, Sequitur looked for a crude oil purchaser that already had logistical services in place to purchase its crude oil and serve as a joint venture partner to share the arbitrage. That way, Sequitur would not have to invest the time or manpower necessary to learn the logistical requirements of transporting crude oil by rail. It could simply rely on others to do that while enjoying the arbitrage; that is, the economic value of selling its crude oil at the Gulf Coast for a higher price than it could command in the Permian Basin. It was, however, unsuccessful in finding such a joint venture partner with the result that it never had crude oil transloaded at the Barnhart Facility.

According to Sequitur's internal records, the Phase 1 Project improvements were completed and the Barnhart Facility was "in service" on December 10, 2018. Despite the completion of the Phase 1 Project improvements, Sequitur did not begin transloading crude oil as required by the TSA. Instead, realizing that it did not have a joint venture partner who could provide the logistical services necessary to move its crude oil from the Permian Basin to the Gulf Coast by rail and did not otherwise take the actions required to get rail cars and service to the Barnhart Facility even though there was no curtailment of rail transportation services, Sequitur declared that a force majeure event occurred so it would not have to pay Maalt the Minimum Fee. It has since refused to pay Maalt the Minimum Fee it is obligated to pay under the TSA.

On December 7, 2018, knowing that it owed Maalt the Minimum Fee starting on December 10, 2018, Sequitur sent Maalt a letter claiming that it was experiencing a force majeure event because of the “unavailability, interruption, delay, or curtailment of rail transportation services for the Product. . .” At the time, there was no “interruption, delay, or curtailment of rail transportation services.” Rather, Sequitur appears to contend that because it was unable to procure an oil company to purchase its oil and that would be an acceptable joint venture partner that could provide the necessary logistics services, or alternatively, rail transportation at a low enough cost, rail transportation services were “unavailable.” Sequitur has persisted in that contention even though it made no effort to develop the logistical services “in-house”, made no effort to investigate or retain a third party logistics provider, and made no effort to negotiate directly with the railroads or any supplier of rail cars to obtain the cars and services necessary to move its crude by rail. On the other hand, there was at least one company that was apparently willing and able to contract with Sequitur to move Sequitur’s crude oil by rail from the Barnhart Facility, but the cost to Sequitur would eliminate the arbitrage opportunity it sought.

Moreover, In October 2018, Equinor, a buyer of crude, was in discussions with the Kansas City Southern Railway Company (“KCS”) for the purpose of obtaining rail service to move crude oil out of the Barnhart Facility. At the time, Jupiter Marketing and Trading (“Jupiter”) was working with Sequitur as joint venture partners for the purpose of pursuing the arbitrage opportunity through the Barnhart Facility. Equinor had a commercial relationship with Jupiter providing for the purchase of crude oil and the transportation of that oil by rail from the Permian Basin, including the Barnhart Facility. The records obtained by Sequitur from KCS in this case indicate that the KCS was willing and able to provide that rail transportation service, and in fact provided Equinor with rates for that service in October 2018. Jupiter, acting as Sequitur’s joint venture partner, also retained a rail logistics consultant to negotiate rail rates with the KCS in November 2018, and was able to do so. However, the rates quoted by the KCS were not low enough to provide an arbitrage advantage. Thus, rail transportation for Sequitur’s crude was available, just not at a price that provided Sequitur an economic advantage. In other words, Sequitur could move its oil by rail, but it was not a good deal for it.

On February 8, 2019, Sequitur sent Maalt a letter stating it was terminating the TSA pursuant to the force majeure provisions of the TSA. However, in reality there was never a force majeure event as rail service to the Barnhart Facility was never unavailable, interrupted, delayed or curtailed. Rather, Sequitur was asserting its force majeure claim as a pretext to terminate the TSA simply because it was unable to find an oil buyer who was able to move crude oil by rail while providing the arbitrage benefit to Sequitur, and because it did not want to invest resources into undertaking the logistics efforts itself. In the months before its February 8, 2019 letter, it is believed that Sequitur realized that the spread in crude oil prices, and thus the potential arbitrage it sought, was shrinking while the cost of rail serve was higher than it expected or increasing during that time frame. Based on the information available to Maalt, it is believed that Sequitur

made the decision to terminate the TSA in order to avoid an unfavorable economic situation.

Sequitur's conduct indicates that at the time of Sequitur's February 8, 2019 letter it was absolutely and unconditionally refusing, and continues to refuse, to perform its obligations under the TSA, including the obligation to pay the minimum payments or fees. It has therefore repudiated the TSA, and by doing so materially breached the TSA. Moreover, by sending its February 8, 2019 letter attempting to terminate the TSA, Sequitur has improperly attempted to terminate the TSA in order to avoid its contractual obligations.

Under the terms of the TSA, Sequitur was able to perform in one of two ways – it could purchase or take the transloading services at a rate of \$1.50 per barrel with minimum quantity requirements or it could simply perform its obligations by paying the Minimum Fee. Sequitur did neither. Maalt fully performed its obligations under the TSA, which performance was accepted by Sequitur until it repudiated the TSA. As a result, Maalt has sustained actual damages within the Court's jurisdictional limits for which Maalt now sues. In that respect, Maalt seeks an amount equal to the total of the Minimum Fee amounts required by the TSA, as its expectancy/benefit of the bargain, as that amount represents the price Sequitur agreed to pay for the exclusive dedication of the Barnhart Facility to Sequitur's use for the time specified in the TSA and the ROFR, among other things. The minimum payments/fee for the term of the TSA beginning with Sequitur's "in service" date of December 10, 2018 is \$6,614,496.00. Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to recover \$7,068,443.00 which includes interest through August 31, 2020 and additional interest as it accrues after that date. Maalt denies that the Minimum Fee is a penalty, unconscionable, or otherwise against public policy.

Alternatively, Maalt is entitled to recover its lost profits as its expectancy/benefit of the bargain damages in the amount of \$4,105,378.00. Maalt is also entitled to recover interest on its damages at the rate of the lessor of 2% over the prime rate as published under "Money Rates" in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA).

Maalt seeks a maximum amount of actual damages of \$6,614,496.00, plus interest as set forth above, attorneys' fees, accountant fees, costs, and expenses which amounts are continuing to accrue.

In addition, and further in the alternative, Maalt is entitled to specific performance of the TSA by Sequitur. As mentioned, Sequitur had alternative performance obligations under the TSA – either pay for the transloading services and any shortfall amounts, or pay the Minimum Fee for Maalt's reservation of and exclusive dedication of the Barnhart Facility to Sequitur's exclusive use during the term of the TSA, the ROFR, and other

benefits. Pursuant to Section 8.6 of the TSA, Maalt is entitled to specific performance of Sequitur's obligation to pay the Minimum Fee pursuant to Article 3 of the TSA, which in this case is 11,424 barrels per day times \$1.50 for each quarter of the TSA term since Sequitur did not make any payments to Maalt prior to repudiation. The total of the Minimum Fee for the term is \$6,614,496.00. Maalt is also entitled to recover interest on the total Minimum Fee at the rate of the lessor of 2% over the prime rate as published under "Money Rates" in the Wall Street Journal in effect at the close of the Business Day on which the payment was due and the maximum rate permitted by Applicable Law (as defined in the TSA). Interest on that amount, calculated as specified in the TSA is \$453,947.00 through August 31, 2020 (the approximated anticipated end of trial). Interest will continue to accrue at the TSA rate after that date. Thus, Maalt is entitled to judgment specifically enforcing the TSA and ordering Sequitur to pay Maalt \$7,068,443.00, which includes interest through August 31, 2020 and additional interest as it accrues after that date.

Maalt is also entitled to recover its attorneys' fees, accountants' fees, costs and expenses pursuant to Section 15.19 of the TSA.

Maalt seeks a declaration pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37, of the following:

- a. The Termination Operations Commencement Date under the TSA occurred and the date of its occurrence;
- b. The "force majeure event" alleged by Sequitur did not occur;
- c. The date the payment obligations created by Article 3 of the TSA began;
- d. Sequitur did not have a right to terminate the TSA;
- e. Sequitur repudiated and breached the TSA by refusing to perform its obligations under the TSA; and
- f. Sequitur is obligated to pay Maalt the minimum bill, or Shortfall Payments, equal to 11,424 barrels per day multiplied by \$1.50 per barrel for each day of the term of the TSA.

All conditions precedent to Maalt's right of recovery have occurred or been waived.

Pursuant to Texas Civil Practice and Remedies Code Chapters 37 and 38 and the terms of the TSA, Maalt is entitled to recover its reasonable and necessary attorneys' fees, accountant fees, and associated litigation and expert costs from Sequitur. Presentment of Maalt's claim was made within the time required by Texas Civil Practice and Remedies Code Chapter 38.

Maalt and Vista deny that either of them are liable to Sequitur for any claims asserted in Sequitur's amended counterclaims and third-party claims. The contract between Maalt and Sequitur precludes any promissory estoppel claim by Sequitur. Sequitur's claims are also barred by the statute of frauds.

Vista is not a proper party and is not liable in the capacity sued in that Sequitur did not ever engage in any discussions, negotiations, or other communications with Sequitur, much less any that are tortious or actionable in any way. The people alleged to be employed by Vista are not so employed, do not act as Vista's agents, and are not officers or directors of Vista.

Sequitur's counterclaims and third-party claims are further barred by the doctrines of contributory negligence as its own negligence was a proximate cause of the reliance and other damages sought by Sequitur.

Pursuant to Texas Civil Practice and Remedies Code Chapter 33, Maalt is entitled to findings of the proportional responsibility of the parties and any potential responsible third parties with respect to Sequitur's common law tort claims.

In the event that Maalt or Vista are found to have caused Sequitur damages, which Maalt and Vista deny, those damages should be reduced or disregarded due to Sequitur's failure to mitigate its damages.

Conditions precedent to Defendant's right to assert or recover for breach of contract have not occurred or been satisfied in that Sequitur did not provide Maalt with notice of any claim of breach and opportunity to cure as required by Section 8.3 of the TSA.

With respect to Defendant's negligent misrepresentation and fraudulent inducement claims, and without admitting any of the allegations made by Defendant, Defendant's reliance on any alleged misrepresentation was not justified or reasonable, and Defendant disclaimed any reliance on such alleged misrepresentations.

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

The calculation of Plaintiff's damages is stated in the Contract. The terminal was complete and operational no later than December 10, 2018. Accordingly, Sequitur is obligated to pay \$1.50 per barrel times 11,424 barrels minimum per day times 386 days (December 11, 2018 through December 31, 2018) for a total amount of \$6,614,496.00 for the term of the Contract. It is further entitled to recover interest on such amount in the amount of \$453,947.00 through August 30, 2020 (the anticipated end of trial) plus additional amounts of interest as they accrue.

In the alternative, Maalt is entitled to recover, at a minimum, its lost profits in the amount of \$4,105,378.00, plus interest on such amount at the rate specified in the TSA or the statutory rate of interest as determined by the Court.

Maalt also seeks recovery of its reasonable and necessary attorneys' fees calculated as follows:

- (A) an hourly rate equal to one-half of the usual hourly rates charged by James Lanter and Paul Wickes plus a contingency fee equal to 20% of all amounts recovered from Defendant through the trial and any appeals of this case, plus
- (B) an amount equal to the hourly rates charged by Jackson Walker, LLP for its services in this case.

Maalt also seeks recovery of court costs and litigation expenses, including costs and expenses of appeals.

- (e) **The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;**

Chris Favors
Brian Hecht
Steve McCarley
Jon Ince
Ben Keith
Brandon McFall
Audra Massey
Marty Robertson
David Goodwin
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
(817) 563-3500

The foregoing individuals have knowledge of the business dealings between Plaintiff and Defendant.

Kristin Smith
Patrick Washington
Maalt, LP
4413 Carey Street
Fort Worth, Texas 76119
(817) 563-3500

The foregoing individuals have knowledge of the corporate structure of Vista and whether it employs any employees.

Tony Wroten
Branden Merrill
Mike van den Bold
Russ Perry
Collin Johansen
Sammy Reed
Michael Ybarra
David Pharoah
Nicholas Eldridge
Rudy Ortiz
Derek Davis
Neil Wheat
Rocky Boggs
Alan Aronowitz
Sequitur Permian, LLC
2050 W. Sam Houston Parkway South
Suite 1850
Houston, TX 77042
(713) 395-3000

The foregoing individuals have knowledge of the business dealings between Plaintiff and Defendant, Defendant's efforts to comply with the terms of the Contract, and Defendant's attempts to terminate the Contract based on a purported force majeure.

Jonas Struthers
Address unknown
(647) 989-3552

Mr. Struthers has knowledge regarding the availability of rail cars suitable for the transportation of crude oil.

Stan Meador
Jorge Gonzalez
Denise Melling
Chad Walter
Texas-Pacifico Transportation, Ltd.
106 S. Chadbourne Street
San Angelo, Texas 76903
(325) 942-8164

The foregoing individuals may have knowledge regarding Texas-Pacifico Transportation, Ltd.'s ability to provide rail transportation services to the Barnhart Facility.

Benji Hubbard
Senior Director of Business Development
Fort Worth & Western Railroad
6300 Ridglea Place #200
Fort Worth, Texas 76116

Mr. Hubbard may have knowledge regarding the Fort Worth & Western Railroad's ability to provide rail transportation services to the rail on which the Barnhart Facility is located.

Josh Monroe
The Kansas City Southern Railway
427 West 12th Street
Kansas City, Missouri 64105
(816)983-1774

Mr. Monroe has knowledge of the availability of rail transportation services offered by The Kansas City Southern Railway to move crude oil from the Permian Basin area, including Barnhart, to the Gulf Coast.

Brian Seward
Short Line Development Manager
402-544-1409
Todd Thimjon
(402)544-5112
Mike Fernen
Sr. Director – Short Line & Interline
(402)544-3169
Union Pacific Railroad
1400 Douglas St., Stop 1350
Omaha, NE 68179
Ms. Stephanie S. Cortes
Marketing & Sales Senior Consultant
24125 Aldine Westfield Road
Spring, Texas 77373
(281)350-7643

Individuals have knowledge of the availability of rail transportation services offered by the Union Pacific Railroad to move crude oil from the Permian Basin area, including Barnhart, to the Gulf Coast.

Kirk Bryant
PO Box 2115
Cotuit, MA 02635
(508) 539-4272
(508) 847-3872

Mr. Bryant may have knowledge regarding the availability of rail transportation for crude oil.

Ben Thompson
Charles Daigle
Shell Trading (US) Company
1000 Main Street, Suite 1700
Houston, TX 77002
(713) 767-5300
<https://www.shell.us/business-customers/trading/shell-trading-us-company.html>

Les Werme
Thomas McConnell
Arm Energy
20329 State Highway 249
4th Floor
Houston, Texas 77070
(281) 655-3200

The foregoing individuals have knowledge of Defendant's discussions with Arm Energy regarding Defendant's involvement in the Barnhart Facility.

Dion K. Nicely
American Shipping & Trading, LLC
2009 Chenault Drive
Carrollton, Texas 75006
(808)371-8173

Mr. Nicely has knowledge of the rates he obtained from one or more railroads for the transportation of crude oil from the Barnhart Facility, and the availability of rail service for the purpose of transporting crude oil from the Barnhart Facility to one or more destinations in order to take advantage of the spread in crude prices that existed in 2018-2019.

Spencer Falls
Derek Jones
EnMark Services, Inc.
1700 Pacific Avenue
Suite 2660
Dallas, Texas 75201
(214) 965-9581

The foregoing individuals have knowledge of Defendant's negotiations with Shell and/or Jupiter MLP, LLC or its affiliates for the sale and transportation of crude oil.

Rob Wright
Murex, Ltd.
7160 N. Dallas Parkway
Suite 300
Plano, Texas 75024
(972) 735-3382

Mr. Wright has knowledge of his company's ability to supply rail cars and rail transportation services to Defendant for the transportation of crude oil.

Noah L. Carson
Travis Morris
Nathan Ford
Jupiter MLP, LLC
15851 Dallas Parkway
Suite 650
Addison, Texas 75001
440 Louisiana Street
Suite 700
Houston, Texas 77002
(409) 771-6697

The foregoing individuals have knowledge of Defendant's negotiations with Jupiter MLP, LLC or its affiliates for the sale and transportation of crude oil.

Casey Carmody
Head of Commercial Operations
BioUrja
1080 Eldridge Parkway #1175
Houston, Texas 77077
(832) 775-9062
(312) 451-1716

Mr. Carmody has knowledge of the crude oil shipped by rail by BioUrja Group from the CIG transloading facility in Barnhart, Texas

Matt Morris
Juli Willmott
Russ Morris
Gus Bates Insurance & Investments
3221 Collinsworth Street
Fort Worth, Texas 76107
(817) 335-9547

They have knowledge of the insurance coverage in place for Maalt during the period of June 1, 2018 through June 1, 2019.

Michael Moore
Lockton Companies
777 Main Street, Suite 2790
Fort Worth, Texas 76102
(817) 344-7314

Mr. Moore may have knowledge of the insurance coverage in place for Maalt during the period of June 1, 2018 through June 1, 2019.

Plaintiff also incorporates Defendant's identification of persons who may have knowledge of relevant facts, other individuals identified in the documents produced in discovery, and the identification of those people deposed in this case as if set forth herein verbatim.

(f) For any testifying expert:

- (1) The expert's name, address, and telephone number;**
- (2) The subject matter on which the expert will testify;**
- (3) The general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of The responding party, documents reflecting such information;**
- (4) If the expert is retained by, employed by, or otherwise subject to your control:**
 - (A) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and**
 - (B) The expert's current resume and biography.**

James Lanter

- (1) James Lanter
James Lanter, P.C.
560 N. Walnut Creek, Suite 120
Mansfield, Texas 76063
(817) 453-4800**
- (2) Mr. Lanter will testify to the reasonable and necessary attorney's fees incurred by the Plaintiff in prosecuting his claims in this case as well as any appellate fees for an appeal to the court of appeals and/or the Supreme Court of Texas.**
- (2) Mr. Lanter will testify as to the factors to be considered in establishing a reasonable fee for attorneys' services including those factors set out in Rule 1.04 of the Rules of Professional Conduct and discussed in *Rohrmoos***

Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex. 2019). He will testify as to the fees incurred by the Plaintiff under its fee agreement with its lawyers, and compare the fees on a lodestar basis to those contracted for which include a reduced hourly rate coupled with a contingency fee. Mr. Lanter will testify to the legal services that were performed in this case by the members of his law firm and his co-counsel, the reasonable hourly rates charged by the various members of his firm that worked on this case and co-counsel, the additional contingency fee, the work that went into preparing this case for trial from the filing of the suit through the conclusion of the trial, and the work that goes into the presentation of a case at trial and the work that is necessary for post-trial matters. He will also testify that in his opinion, the services provided by the attorneys representing Plaintiff were reasonable and necessary, that the hourly and contingent charges for those services were reasonable and consistent with the usual and customary fees charged by attorneys in Texas, and that the various causes of action and defenses at issue in this suit are based on the same facts and circumstances and are so inextricably intertwined that it is not possible to segregate the services rendered in connection with any party or particular cause of action or defense. Mr. Lanter will testify that the fees reflected in the billing statements sent to Plaintiff throughout this case, together with the fees charged for the services performed after the last billing statement through trial (based on the number of hours at the hourly rates charged by the members of Mr. Lanter's firm), and the contingent part of the fee to be paid by Plaintiff constitute a reasonable attorneys' fee to be awarded to Plaintiff for the necessary services rendered in this case. Mr. Lanter will also testify as to a reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the court of appeals in this case, and as to an additional reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the Supreme Court of Texas in this case. On a lodestar basis and at non-discounted hourly rates, a reasonable fee for the necessary services in pursuing or responding to (i) an appeal at the court of appeals, or response thereto, would be approximately \$75,000.00 for briefing and oral argument, (ii) a motion for rehearing or response at the court of appeals would be approximately \$20,000.00, (iii) a petition for review or response to the supreme court would be approximately \$25,000.00, (iv) briefing on the merits and oral argument before the supreme court would be approximately \$50,000.00, and (v) a motion for rehearing or response at the supreme court would be approximately \$20,000.00. Mr. Lanter will also testify that during the course of exercising billing judgment, certain services may have been provided at no or a reduced charge and credits may have been issued reducing the amount owed by Plaintiff for such fees.

Mr. Lanter may further testify as to his opinions of the reasonableness and necessity of the services rendered and the fees charged by the attorneys

representing Sequitur. No opinions can be formed at this time as no invoices or other documents reflecting those services and fees have been produced by Sequitur.

- (4) Mr. Lanter will rely on all of the pleadings, discovery instruments, correspondence, depositions, attached documents, and other documents involved in this case to support his opinions to the extent that they show the services provided in this case to Plaintiff. Mr. Lanter's curriculum vitae is attached hereto as Exhibit "A." Mr. Lanter's fee invoices will be provided to Sequitur a reasonable amount of time before trial as the total amount of fees that will be the subject of his opinions are not currently known and are increasing as this lawsuit progresses.

Paul O. Wickes

- (1) Paul O. Wickes
Wickes Law, PLLC
5600 Tennyson Parkway, Ste. 205
Plano, Texas 75024
(972) 473-6900
- (2) Mr. Wickes will testify to the reasonable and necessary attorney's fees incurred by the Plaintiff in prosecuting his claims in this case as well as any appellate fees for an appeal to the court of appeals and/or the Supreme Court of Texas.
- (2) Mr. Wickes will testify as to the factors to be considered in establishing a reasonable fee for attorneys' services including those factors set out in Rule 1.04 of the Rules of Professional Conduct and discussed in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). He will testify as to the fees incurred by the Plaintiff under its fee agreement with its lawyers, and compare the fees on a lodestar basis to those contracted for which include a reduced hourly rate coupled with a contingency fee. Mr. Wickes will testify to the legal services that were performed by his law firm and co-counsel, the reasonable hourly rates charged by his firm and co-counsel, the additional contingency fee, the work that went into preparing this case for trial from the filing of the suit through the conclusion of the trial, and the work that goes into the presentation of a case at trial and the work that is necessary for post-trial matters. He will also testify that in his opinion, the services provided by the attorneys representing Plaintiff were reasonable and necessary, that the hourly and contingent charges for those services were reasonable and consistent with the usual and customary fees charged by attorneys in Texas, and that the various causes of action and defenses at issue in this suit are based on the same facts and circumstances and are so inextricably intertwined that it is not possible to segregate the services rendered in connection with any party or particular cause of action or defense. Mr. Wickes will testify that the fees

reflected in the billing statements sent to Plaintiff throughout this case, together with the fees charged for the services performed after the last billing statement through trial (based on the number of hours at the hourly rates charged by him), and the contingent part of the fee to be paid by Plaintiff constitute a reasonable attorneys' fee to be awarded to Plaintiff for the necessary services rendered in this case. Mr. Wickes will also testify as to a reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the court of appeals in this case, and as to an additional reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the Supreme Court of Texas in this case. On a lodestar basis and at non-discounted hourly rates, a reasonable fee for the necessary services in pursuing or responding to (i) an appeal at the court of appeals, or response thereto, would be approximately \$75,000.00 for briefing and oral argument, (ii) a motion for rehearing or response at the court of appeals would be approximately \$20,000.00, (iii) a petition for review or response to the supreme court would be approximately \$25,000.00, (iv) briefing on the merits and oral argument before the supreme court would be approximately \$50,000.00, and (v) a motion for rehearing or response at the supreme court would be approximately \$20,000.00. Mr. Wickes will also testify that during the course of exercising billing judgment, certain services may have been provided at no or a reduced charge and credits may have been issued reducing the amount owed by Plaintiff for such fees.

Mr. Wickes may further testify as to his opinions of the reasonableness and necessity of the services rendered and the fees charged by the attorneys representing Sequitur. No opinions can be formed at this time as no invoices or other documents reflecting those services and fees have been produced by Sequitur.

- (4) Mr. Wickes will rely on all of the pleadings, discovery instruments, correspondence, depositions, attached documents, and other documents involved in this case to support his opinions to the extent that they show the services provided in this case to Plaintiff. Mr. Wickes' curriculum vitae is attached hereto as Exhibit "B." Mr. Wicke's fee invoices will be provided to Sequitur a reasonable amount of time before trial as the total amount of fees that will be the subject of his opinions are not currently known and are increasing as this lawsuit progresses.

Samuel S. Allen

- (1) Samuel S. Allen
JACKSON WALKER LLP
135 W. Twohig Avenue, Suite C
San Angelo, Texas 76093
(325) 481-2550
- (2) Mr. Allen will testify to the reasonable and necessary attorney's fees incurred by the Plaintiff in prosecuting his claims in this case as well as any appellate fees for an appeal to the court of appeals and/or the Supreme Court of Texas.
- (3) Mr. Allen will testify as to the factors to be considered in establishing a reasonable fee for attorneys' services including those factors set out in Rule 1.04 of the Rules of Professional Conduct and discussed in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). He will testify as to the fees incurred by the Plaintiff under its fee agreement with its lawyers, and compare the fees on a lodestar basis to those contracted for which include a reduced hourly rate coupled with a contingency fee. Mr. Allen will testify to the legal services that were performed in this case by the members of his law firm and co-counsel, the reasonable hourly rates charged by the various members of his firm and co-counsel that worked on this case, the additional contingency fee, the work that went into preparing this case for trial from the filing of the suit through the conclusion of the trial, and the work that goes into the presentation of a case at trial and the work that is necessary for post-trial matters. In particular, Mr. Allen may provide testimony regarding the unique logistical challenges attendant to litigation and trial in rural counties and the additional time and expense incurred in conducting a trial in non-urban locales in central and West Texas. He will also testify that in his opinion, the services provided by the attorneys representing Plaintiff were reasonable and necessary, that the hourly and contingent charges for those services were reasonable and consistent with the usual and customary fees charged by attorneys in Texas, and that the various causes of action and defenses at issue in this suit are based on the same facts and circumstances and are so inextricably intertwined that it is not possible to segregate the services rendered in connection with any party or particular cause of action or defense. Mr. Allen will testify that the fees reflected in the billing statements sent to Plaintiff throughout this case, together with the fees charged for the services performed after the last billing statement through trial (based on the number of hours at the hourly rates charged by the members of Mr. Allen's firm), and the contingent part of the fee to be paid by Plaintiff constitute a reasonable attorneys' fee to be awarded to Plaintiff for the necessary services rendered in this case. Mr. Allen will also testify as to a reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the court of appeals in

this case, and as to an additional reasonable fee for the necessary services involved in perfecting and pursuing an appeal, or responding to an appeal, in the Supreme Court of Texas in this case. On a lodestar basis and at non-discounted hourly rates, a reasonable fee for the necessary services in pursuing or responding to (i) an appeal at the court of appeals, or response thereto, would be approximately \$75,000.00 for briefing and oral argument, (ii) a motion for rehearing or response at the court of appeals would be approximately \$20,000.00, (iii) a petition for review or response to the supreme court would be approximately \$25,000.00, (iv) briefing on the merits and oral argument before the supreme court would be approximately \$50,000.00, and (v) a motion for rehearing or response at the supreme court would be approximately \$20,000.00. Mr. Allen will also testify that during the course of exercising billing judgment, certain services may have been provided at no or a reduced charge and credits may have been issued reducing the amount owed by Plaintiff for such fees.

Mr. Allen may further testify as to his opinions of the reasonableness and necessity of the services rendered and the fees charged by the attorneys representing Sequitur. No opinions can be formed at this time as no invoices or other documents reflecting those services and fees have been produced by Sequitur.

- (4) Mr. Allen will rely on all of the pleadings, discovery instruments, correspondence, depositions, attached documents, and other documents involved in this case to support his opinions to the extent that they show the services provided in this case to Plaintiff. Mr. Allen will also rely on his years of practice in central and West Texas and his familiarity with the customary rates and fee arrangements for legal work in these regions of Texas. Mr. Allen's curriculum vitae is attached hereto as Exhibit "C." Mr. Allen's fee invoices will be provided to Sequitur a reasonable amount of time before trial as the total amount of fees that will be the subject of his opinions are not currently known and are increasing as this lawsuit progresses.

Rob Wright

- (1) Rob Wright
Murex, Ltd.
7160 N. Dallas Parkway
Suite 300
Plano, Texas 75024
(972) 735-3382
- (2) Mr. Wright is a fact witness who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding his company's ability to supply rail cars and rail transportation services to Defendant for the transportation of crude oil, and the logistics of moving crude oil by rail from the Permian Basin to the Gulf Coast. It is anticipated

that he may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast and the means and methods by which that could be accomplished. Mr. Wright has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

- (3) Mr. Wright's mental impressions and opinions are not currently known to Maalt or Vista; however, it is believed that he will testify and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019, albeit at a cost that might not have been acceptable to Sequitur. Documents that may provide insight into his mental impressions and opinions are in the possession and control of Sequitur. The emails produced by Sequitur between it and Mr. Wright have been produced, and certain of those email documents are exhibits to the depositions taken in this case.
- (4) Mr. Wright has not been retained by Maalt or Vista, and he is not employed by or subject to the control of Maalt or Vista.

Travis Morris

Nathan Ford

- (1) Travis Morris
Nathan Ford
Jupiter MLP, LLC
15851 Dallas Parkway
Suite 650
Addison, Texas 75001
440 Louisiana Street
Suite 700
Houston, Texas 77002
(409) 771-6697
- (2) Messrs. Morris and Ford are fact witnesses who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding their company's ability to supply rail cars and rail transportation services to Defendant for the transportation of crude oil, and the logistics of moving crude oil by rail from the Permian Basin to the Gulf Coast. It is anticipated that they may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast and the means and methods by which that could be accomplished. Neither Mr. Morris nor Mr. Ford have not been retained by Maalt or Vista, and are not employed by or subject to the control of Maalt or Vista.
- (3) Messrs. Morris' and Ford's mental impressions and opinions are not currently known to Maalt or Vista; however, it is believed that they will testify

and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019. Documents that may provide insight into their mental impressions and opinions have been obtained by Sequitur through the Jupiter MLP, LLC bankruptcy case and further documents may be obtained by Sequitur through the subpoena issued to Mr. Morris in connection with his deposition.

- (4) Messrs. Morris and Ford have not been retained by Maalt or Vista, and they are not employed by or subject to the control of Maalt or Vista.

Stan Meador

Jorge Gonzalez

- (1) Stan Meador
Jorge Gonzalez
Texas-Pacífico Transportation, Ltd.
106 S. Chadbourne Street
San Angelo, Texas 76903
(325) 942-8164
- (2) Messrs. Meador and Gonzalez are fact witnesses who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the availability of rail transportation services to transport crude oil, and the logistics of moving crude oil by rail, from the Permian Basin to the Gulf Coast. It is anticipated that they may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast and the means and methods by which that could be accomplished. Neither Mr. Meador nor Mr. Gonzalez have not been retained by Maalt or Vista, and are not employed by or subject to the control of Maalt or Vista.
- (3) It is believed that Messrs. Meador and Gonzalez will testify and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019 as their company was involved in the shipment of crude oil by rail from one or more facilities in the Barnhart area to the Gulf Coast. Documents that may provide insight into their mental impressions and opinions have been provided by Texas-Pacífico Transportation, Ltd. to the parties in this case, and Sequitur has a copy of those documents Bates labeled TXPF_000001-000112. It is expected that further documents may be obtained through the subpoena issued by Sequitur to Texas-Pacífico Transportation, Ltd.
- (4) Messrs. Meador and Gonzalez have not been retained by Maalt or Vista, and they are not employed by or subject to the control of Maalt or Vista.

Benji Hubbard

- (1) Benji Hubbard
Senior Director of Business Development
Fort Worth & Western Railroad
6300 Ridglea Place #200
Fort Worth, Texas 76116
- (2) Mr. Hubbard is a fact witness who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the availability of rail transportation services to transport crude oil, and the logistics of moving crude oil by rail, from the Permian Basin to the Gulf Coast through the Fort Worth & Western Railroad. It is anticipated that he may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast and the means and methods by which that could be accomplished. Mr. Hubbard has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.
- (3) It is believed that Mr. Hubbard will testify and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019 as his company was involved in the shipment of crude oil by rail from one or more facilities in the Barnhart area to the Gulf Coast. Documents that may provide insight into his mental impressions and opinions have been produced in discovery in this case.
- (4) Mr. Hubbard not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

Josh Monroe

- (1) Josh Monroe
The Kansas City Southern Railway
427 West 12th Street
Kansas City, MO 64105
(800) 468-6527
- (2) Mr. Monroe is a fact witness who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the availability of rail transportation services to transport crude oil, and the logistics of moving crude oil by rail, from the Permian Basin to the Gulf Coast. It is anticipated that he may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast and the means and methods by which that could be accomplished. Mr. Monroe has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

- (3) It is believed that Mr. Monroe will testify and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019 as his company was involved in the shipment of crude oil by rail originating from one or more facilities in the Barnhart area to the Gulf Coast. Maalt and Vista are not aware of any documents in his possession, although it is anticipated that he may have some to support his opinions.
- (4) Mr. Monroe has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

Dion K. Nicely

- (1) Dion K. Nicely
American Shipping & Trading, LLC
2009 Chenault Drive
Carrollton, Texas 75006
(808)371-8173
- (2) Mr. Nicely is a fact witness who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the availability of rail transportation services to transport crude oil, and the logistics of moving crude oil by rail, from the Permian Basin to the Gulf Coast. It is anticipated that he may testify that rail transportation was available for the purpose of transporting crude oil in 2018 to 2019 from the Barnhart Facility to the Gulf Coast as well as other markets, and the means and methods by which that could be accomplished. Mr. Nicely has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.
- (3) It is believed that Mr. Nicely will testify and/or opine that rail transportation from the Barnhart Facility to the Gulf Coast was available in 2018 to 2019. Maalt and Vista are not aware of any documents in his possession other than email documents that have been produced in discovery, although it is anticipated that he may have some to support his opinions.
- (4) Mr. Nicely has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

Matt Morris, Juli Willmott, Russ Morris

- (1) Matt Morris
Juli Willmott
Russ Morris
Gus Bates Insurance & Investments
3221 Collinsworth Street
Fort Worth, Texas 76107
(817) 335-9547

- (2) These individuals are fact witnesses who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the insurance policies insuring Maalt in 2018 and 2019. It is anticipated that they may testify that Maalt had pollution legal liability insurance in place during the period of June 1, 2018 through June 1, 2019 with limits in excess of \$5 million, and that the Barnhart Facility was insured by those policies. The individuals have not been retained by Maalt or Vista, and are not employed by or subject to the control of Maalt or Vista.
- (3) It is believed that these individuals may testify that Maalt had pollution legal liability insurance in place during the period of June 1, 2018 through June 1, 2019 with limits in excess of \$5 million, and that the Barnhart Facility was insured by those policies. Maalt and Vista are not aware of any documents in their possession that form the basis for those opinions other than insurance documents that have been produced in discovery.
- (4) These individuals have not been retained by Maalt or Vista, and are not employed by or subject to the control of Maalt or Vista.

Michael Moore

- (1) Michael Moore
Lockton Companies
777 Main Street, Suite 2790
Fort Worth, Texas 76102
(817) 344-7314
- (2) Mr. Moore is a fact witnesses who may potentially be asked to testify about opinions and matters that rise to the level of expert testimony regarding the insurance policies insuring Maalt in 2018 and 2019. It is anticipated that he may testify that Maalt had pollution legal liability insurance in place during the period of June 1, 2018 through June 1, 2019 with limits in excess of \$5 million, and that the Barnhart Facility was insured by those policies. Mr. Moore has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.
- (3) It is believed that Mr. Moore may testify that Maalt had pollution legal liability insurance in place during the period of June 1, 2018 through June 1, 2019 with limits in excess of \$5 million, and that the Barnhart Facility was insured by those policies. Maalt and Vista are not aware of any documents in his possession that form the basis for those opinions other than insurance documents that have been produced in discovery.
- (4) Mr. Moore has not been retained by Maalt or Vista, and is not employed by or subject to the control of Maalt or Vista.

Eric Krause

- (1) Eric Krause
Applied Economics Consulting Group, Inc.
1905 N. Lamar Boulevard
Austin, Texas 78705
(512) 474-5860
- (2) Mr. Krause will testify on the subject of the lost profits suffered by Maalt as a result of Sequitur's repudiation of the TSA. He will also testify on the subject of the calculation of the amount of interest due on the total of the Minimum Fee and the lost profits.
- (3) The general substance of Mr. Krause's mental impressions and opinions, together with a brief summary of the basis for them is set for the in the report attached as Exhibit D.
- (4) Mr. Krause's resume is attached to his report. The documents and other materials provided to him, reviewed by him, or prepared by him are identified in his report.

(g) Any discoverable indemnity and insuring agreements:

None.

(h) Any discoverable settlement agreements:

None.

(i) Any discoverable witness statements:

None.

(j) In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills:

Not applicable.

(k) In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party:

Not applicable.

- (l) **The name, address, and telephone number of any person who may be designated as a responsible party:**

None.

CAUSE NUMBER 19-003

MAALT, LP,

Plaintiff,

v.

Sequitur Permian, LLC,

Defendant.

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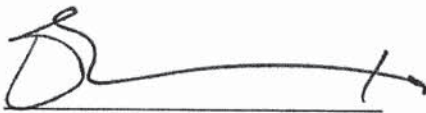
In the District Court

51st Judicial District

Irion County, Texas

EXPERT REPORT

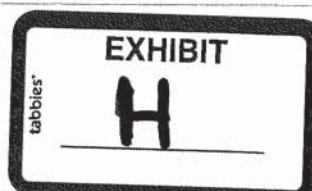
ERIC R. KRAUSE, MBA



ERIC R. KRAUSE

5/15/20

DATE



I. INTRODUCTION AND NATURE OF INVOLVEMENT

1. My name is Eric Krause. I have been retained by James Lanter, PC in its representation of the Plaintiff, Maalt, LP ("Maalt"), in the above captioned matter. Specifically, I have been asked to offer opinions regarding the quantification of financial and economic damages pursuant to the Plaintiff's claims as outlined in its Second Amended Original Petition filed on April 15, 2020. Specifically, Maalt alleges a breach of the executed Terminal Services Agreement ("TSA") between Maalt and the Defendant, Sequitur Permian, LLC ("Sequitur").

II. CREDENTIALS AND COMPENSATION

2. I am a Director at Applied Economics Consulting Group, Inc. ("Applied Economics") in Austin, Texas. Applied Economics conducts economic and financial analyses for a wide variety of clients across a number of industries. I have held my role as Director since 2008 and prior to that, I was a Consultant with the same firm from 2003 to 2008. I have an undergraduate degree in Economics from the University of Texas at Austin and a Master of Business Administration degree with a concentration in Finance from the University of Texas at Austin. A copy of my professional resume is attached to this report as Appendix A.
3. I have significant experience with litigation related to the oil and gas industry and the assessment of facts and circumstances in complex litigation. I have been engaged to assist in the analysis of oil and gas matters on multiple occasions, to review and prepare evaluations of economic damage claims, and present written reports and to provide testimony in a subset of these matters. I have served as both a consulting and testifying expert in multiple matters involving oil and gas valuation, as well as played a project management role in numerous other oil and gas matters in which my colleagues were designated as the testifying expert.

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4. I have relevant experience in and an understanding of the economic issues present in this matter and both my academic and professional experiences qualify me to present this report. Attached, as Appendix B, is a listing of cases in which I have testified. Applied Economics is being compensated at the rate of \$405 per hour for my work on this matter. This compensation is not dependent in any way upon the outcome of this litigation or upon reaching any particular opinion or conclusion.

III. INFORMATION REVIEWED

5. In the course of my work in this matter, Applied Economics staff and I have reviewed documents and materials produced by the parties, as well as materials from third-party sources. I have conducted independent analyses on topics relevant to my assignment. A listing of all these materials is attached to this report as Appendix C. If any additional relevant or supplemental information or data becomes available to me, I will supplement this report as appropriate.

IV. BACKGROUND

The Parties

6. Maalt specializes in operating transloading facilities that transload commodities used in the oil and gas industry in Texas.¹ Maalt's business typically involves transloading commodities from railcars to trucks for delivery to well sites and vice versa.² One such facility operated by Maalt is located in Barnhart, Texas (the "Barnhart Facility").³ Rail service for the Barnhart Facility is provided by Texas Pacifico Transportation, Ltd. ("TPT").⁴

¹ Plaintiff's Second Amended Original Petition, filed April 15, 2020, Page 2.

² Plaintiff's Second Amended Original Petition, filed April 15, 2020, Page 2.

³ Plaintiff's Second Amended Original Petition, filed April 15, 2020, Page 2.

⁴ Plaintiff's Second Amended Original Petition, filed April 15, 2020, Page 2.

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7. Sequitur Permian, LLC is an affiliate of Sequitur Energy Resources, LLC, which is an independent oil producer with assets primarily in the Southern Midland Basin in West Texas.⁵ Its main focus area is on approximately 88,000 net acres located in the adjacent counties of Upton, Reagan, Irion, and Crockett.⁶ Sequitur also has roughly 44,000 net acres in the Buda Rose play.⁷ Sequitur is headquartered in Houston, Texas.
8. I understand the parties' relationship commenced in May of 2018 when Sequitur contacted Maalt to discuss arrangements that would allow Maalt to transload Sequitur's crude oil at the Barnhart Facility, which was owned by Maalt, located on land leased by Maalt, and in proximity to land on which Sequitur had producing oil wells.⁸

Timeline of Events

9. Maalt and Sequitur entered into a TSA on August 6, 2018. Under the agreement, Sequitur received exclusive rights to utilize 100 percent of the capacity of the Barnhart Facility for transloading its products.⁹ In exchange, Sequitur agreed to pay Maalt a Throughput Fee of \$1.50 per barrel of crude oil transloaded.¹⁰ The TSA outlined a primary term extending from August 6, 2019 through January 1, 2020, and contained an option to be renewed and extended for successive 3 month periods at Sequitur's discretion.¹¹
10. The TSA required Sequitur to reach certain minimum volume transloading obligations equal to 11,424 barrels of crude per day on a monthly basis.¹² If Sequitur failed to meet the

⁵ About Us, sequiturerenergy.com, accessed April 22, 2020.

⁶ About Us, sequiturerenergy.com, accessed April 22, 2020.

⁷ About Us, sequiturerenergy.com, accessed April 22, 2020.

⁸ Prior to the deal with Sequitur, Maalt's Barnhart terminal transloaded frac sand. Plaintiff's and Third Party Defendant's Combined Amended and Supplemental Response to Request for Disclosures, dated January 17, 2020, Page 3.

⁹ Terminal Services Agreement, effective August 6, 2018, Article 2.3.

¹⁰ Terminal Services Agreement, effective August 6, 2018, Article 4.1.

¹¹ Terminal Services Agreement, effective August 6, 2018, Article 8.1.

¹² Terminal Services Agreement, effective August 6, 2018, Article 3.1.

minimum requirement threshold, a Shortfall Payment would be due equal to the volume of the shortfall multiplied by the Throughput Fee of \$1.50.¹³ The TSA also specified that Sequitur would perform certain expansions or alternations and install the necessary equipment and facilities, with the full cooperation of Maalt, at its own sole cost and expense.¹⁴ The agreement details two project phases (Phase I Project and Phase II Project, which are explicitly laid out in attached exhibits B and C to the agreement, respectively), and stipulates that the loading was to commence on the Target Terminal Operations Commencement Date, initially defined as September 1, 2018.¹⁵ The contract terms stated that Sequitur's obligations to pay Maalt the minimum payment began once these improvements were operational. Maalt contends that Sequitur completed the Phase I Project improvements no later than December 10, 2018, meaning Sequitur's obligations to pay Maalt the minimum payment began December 11, 2018.¹⁶ I understand that Sequitur claims the Terminal Operations Commencement Date¹⁷ never occurred.

11. On December 7, 2018, Sequitur sent a notice of Force Majeure letter to Maalt, declaring Force Majeure under the terms of the August 2018 TSA due to the "unavailability, interruption, delay, or curtailment of rail transportation services for the Product, despite continued efforts to procure such services..."¹⁸ Sequitur contends it was justified in declaring a Force Majeure Event because crude oil transportation service that would allow for Sequitur to use the Barnhart Facilities was not available "despite diligent efforts to procure such

¹³ Terminal Services Agreement, effective August 6, 2018, Article 3.2(a) and 4.1.

¹⁴ Terminal Services Agreement, effective August 6, 2018, Article 2.7.

¹⁵ Terminal Services Agreement, effective August 6, 2018, Article 1.

¹⁶ Plaintiff's and Third Party Defendant's Combined Amended and Supplemental Response to Request for Disclosures, dated January 17, 2020, Page 4.

¹⁷ The Terminal Operations Commencement Date is defined in the TSA as "the date that the Terminal is fully operational to enable the performance and receipt of the Services..." See Article 1.

¹⁸ Notice of Force Majeure, dated December 7, 2018.

service and capacity.”¹⁹ The letter also stated that, pursuant to the agreement, Sequitur would not be “liable for any failure, delay, or omission of performance arising directly or indirectly from the Force Majeure,” and that its “obligations affected by the force Majeure... [were] hereby suspended.”

12. Article 14 of the TSA address the circumstances and requirements arising from a “Force Majeure Event,” defined as “any cause not within the reasonable control of a Party claiming suspension, and that could not have been avoided or overcome by the exercise of due diligence by such Party.”²⁰ It further states that the “Party affected by Force Majeure shall use commercially reasonable efforts to remedy the Force Majeure condition with all reasonable dispatch, shall give notice to the other Party of the termination of the Force Majeure, and shall resume performance of any suspended obligation promptly after termination of such Force Majeure.”
13. Maalt sent Sequitur an invoice dated January 25, 2019 for \$531,216, which Sequitur disputed in a letter on January 31, 2019.²¹ In its January 31, 2019 letter, Sequitur stated that due to the “existing Force Majeure Event,” it did not owe any Throughput Fees, Shortfall Payments, or any other amounts to Maalt, and that the Terminal Operations Commencement Date had not yet occurred, meaning the Minimum Volume Commitment was also not in effect.
14. The following week, on February 8, 2019, Sequitur sent Maalt a termination letter in which it claimed the Force Majeure Event had continued for a period of 60 consecutive days, and that pursuant to Section 8.4 of the TSA, it was notifying Maalt of its election to terminate the entire agreement, effective the date of the letter.²²

¹⁹ Defendant/Counter-Plaintiff’s Second Amended Response to Request to Request for Disclosure, Pages 3 and 4.

²⁰ Terminal Services Agreement, effective August 6, 2018, Article 14.2.

²¹ Follow-up Notice to Maalt, dated January 31, 2019.

²² Termination Notice, dated February 8, 2019.

Crude Oil Arbitrage in the Permian Basin

15. Beginning in 2010, oil shipments by rail started to become a significant method of transporting crude oil largely due to hydraulic fracturing enabling producers to drill for previously inaccessible oil in the Permian region. Historically, most crude oil has been transported via pipelines. However, huge increases in crude oil production due to the shale boom outpaced the growth in pipeline capacities, resulting in railroads filling the gap.²³ For various periods from 2010 to present, the market for oil in the Gulf Coast of Texas demanded significantly higher prices than for those same crude barrels in the local Permian market in west Texas and there were significant arbitrage opportunities that producers and marketers like Sequitur pursued. This arbitrage meant that otherwise uneconomic transportation options like railcar were far more attractive, even if only temporarily.
16. The concept of arbitrage in the context of transloading crude oil via rail refers to the idea that oil and gas companies will take advantage of the added economic value that comes from selling its crude in markets in which it can command a higher price as long as the cost to access those markets (e.g. transportation) does not exceed the marginal increase in the price achieved.
17. By 2018, the Permian Basin production accounted for more than 35 percent of total U.S. crude oil production, producing more than 3 million barrels per day.²⁴ During this time, the local market prices were depressed relative to other markets and pipelines from the Permian Basin reached capacity as oil was in a state of oversupply.²⁵ As a result of this oversupply, the Midland and Gulf Coast markets had a price differential of approximately \$15 per barrel in

²³ Permian Crude Soon to Move by Rail, oilandgas360.com, September 4, 2018.

²⁴ Permian region is expected to drive U.S. crude oil production growth through 2019, eia.gov, accessed April 27, 2020; Permian Basin, eia.gov, February 2020.

²⁵ Plaintiff's and Third Party Defendant's Combined Amended and Supplemental Response to Request for Disclosures, dated January 17, 2020, Page 3.

contract, delivering at least the minimum volume obligation (or paying the Shortfall Fee if they did not deliver the minimum volume).

19. The methodology for quantifying lost revenue in this case is a straightforward analysis that I have calculated based on the minimum volume obligations set forth in the TSA and the fixed price of transloading pursuant to the TSA. This establishes the amount due to Maalt if the court were to determine that Maalt was entitled to 100% of the revenue it is due under the TSA. For purposes of lost profits, I then reduce the revenue by the avoided expenses and avoided indirect costs that would have burdened those revenues in order to determine the actual lost profits suffered by Maalt. Ideally, I would perform this analysis directly by utilizing data showing the cost to operate the Barnhart Facility. However, because the Barnhart Facility was never utilized by Sequitur under the TSA, I have estimated Maalt's avoided expenses based on contemporaneous evidence of the projected operating costs, as well as evidence of realized variable expenses at a similar facility.

Contractual Revenues under the TSA

20. For purposes of calculating the but-for revenue, I have adhered to the terms set forth in the TSA executed between Maalt and Sequitur. The TSA states that Maalt was to receive a Throughput Fee equal to \$1.50 per barrel of crude oil from Sequitur, and that Sequitur was contractually obligated to meet a minimum volume of product equal to 11,424 barrels per day.²⁸ At a minimum, revenue would therefore be equal to the Throughput Fee multiplied by

²⁸ Terminal Services Agreement, effective August 6, 2018, Articles 3 and 4.

the minimum daily volume multiplied by the number of days Sequitur failed to pay Maalt.²⁹

This is equal to (\$1.50/barrel) X (4,409,664 barrels), or \$6,614,496.³⁰

Maalt's Avoided Costs

21. In accounting for the avoided operating expenses, as well as other avoided overhead costs burdening any additional revenues due to Maalt, I have reviewed data detailing what Maalt projected for the project and estimated what its total operating costs would be at the time of the TSA's execution. I have also reviewed actual accounting data at a corporate level and for a similar facility that operated temporarily in order to assess the reasonableness of those projections.³¹ Because the Barnhart Facility was never operational, I have relied on this data and the contemporaneous evidence showing projected costs produced by Maalt. The projections take into account expected revenue and operating costs associated with the operation of the Barnhart Facility, including payroll, maintenance and repairs, rent, travel, and other expenses.³²
22. I have compared these cost projections to the typical margins realized by Maalt in its overall corporate operations, as well a more direct comparison to its accounting data related to its operation of the Pecos facility (a similar crude transloading facility it operated for Jupiter).³³ In evaluating all of the available data, as well as based on discussions with Maalt personnel, I have concluded that the estimates and projections made at the time by Maalt were reasonable, if not conservative, and thus, I have adopted an assumption that Maalt effectively

²⁹ The number of days is calculated as the number of days from the Terminal Operations Commencement Date (which I have been asked to assume is December 11, 2018) through December 31, 2019, the end of the term of the TSA.

³⁰ See Exhibit 1.

³¹ See Copy of 2018 Pecos W Transload Financials – Barrels.xls; Barnhart Crude Oil Costing Assumptions.xls; Maalt Financial Statements.

³² See Barnhart Crude Oil Costing Assumptions.xls.

³³ Transloading and Storage Services Agreement, dated August 1, 2018; Jupiter000003 - Jupiter000009.

avoided approximately \$181,167 in costs per month over the damages period. Total operating costs from December 2018 through December 2019 equal approximately \$2.35 million.³⁴

Maalt's Contractual Lost Profits

23. Exhibit 1 to this report reflects the quantification of monthly revenues, operating costs, and lost profits due to Maalt under the TSA. The lost profits are calculated on a monthly basis under the assumption that Sequitur and Maalt both fully performed on their respective obligations under the TSA. As indicated by the exhibit, the alleged principal lost profits associated with Maalt's claims in this matter total \$4,105,378.³⁵ As will be discussed in this report, it is worth noting that this total is after offsetting the profits that Maalt was able to achieve in its attempts to mitigate their damages by utilizing the facilities for other customers.³⁶

Contractual Interest

24. Based on the monthly payment schedule required by the TSA, I have been asked to calculate the contractual interest rate (the prime rate for a particular month plus 2 percent) for revenues from the Shortfall Payments Sequitur failed to pay Maalt. For the time period beginning February 2019 (two months after the December 2018 operations month in which

³⁴ This estimate makes the conservative assumption that the monthly costs are fixed and therefore there is no apportionment applied for the month of December 2018.

³⁵ See Exhibit 1.

³⁶ Based on discussions with Maalt personnel, it is my understanding that while they were unable to find any potential customers to utilize the crude oil transloading facilities, they did enter into a storage agreement with a wind power company that partially utilized the facilities. These profits were accounted for in Exhibit 1 and can be found at II.A. - 2019 Transloading Financials.xls.

the Shortfall Payment was due) and ending August 31, 2020 (the approximated anticipated end of trial), I have determined that Sequitur owes \$440,513 in interest.³⁷

Issues related to Mitigation

25. I have been asked to assess, for purposes of the preceding lost revenue and lost profits analysis, whether or not there was an opportunity for Maalt to mitigate its damages by finding a counter-party to enter into an agreement to utilize the capacity at the Barnhart Facility. My understanding is that Maalt did attempt to mitigate its damages, but was unable to find a counter-party through which to transload commodities in order to fully replace the services provided under the TSA. However, I understand that Maalt did enter into a Facility Usage Agreement on a short term basis to store wind energy equipment at the Barnhart Facility.³⁸ From May 2019 through October 2019, Maalt earned \$190,279 in revenues, which led to \$153,951 in gross profits realized.³⁹ This serves to demonstrate that Maalt made an effort to mitigate its losses attributable to Sequitur's alleged failure to perform on its obligations under the TSA. To account for this additional revenue, I have offset the damages owed to Maalt by the \$153,951 it earned in gross profits from this arrangement.
26. Based on my review of the TSA, examination of the transloading market in 2018 and 2019, and discussions with Maalt personnel, it is my opinion that it was not possible for Maalt to further mitigate its damages pursuant to the TSA beyond the discussion of the wind power equipment storage activities, as well as not incurring expenses to operate the facility once Sequitur repudiated.

³⁷ See Exhibit 2.

³⁸ Deposition of Chris Favors, November 14, 2019, 251:18-25.

³⁹ See II.A.1 - 2019 Transload Financials.xlsx.

VI. OTHER ISSUES

Economic Opportunity Costs - Other Potential Profits to Maalt

27. Because Maalt agreed to the TSA with Sequitur and committed to performing on the TSA, it was unable to pursue other opportunities (such as its core business of sand transloading) in order to leverage its facilities at Barnhardt prior to Sequitur's alleged repudiation of the contract and the time necessary to revert the facilities back to sand transloading. My lost profits analysis does not currently account for the lost opportunity cost Maalt was not able to pursue. Given that Maalt typically transloads sand and not oil, entering into a deal with Sequitur ultimately prevented Maalt from potentially procuring other revenue opportunities transloading sand at the Barnhart facility. To the extent I am asked at a future date to quantify any damages associated with these lost opportunity costs, I reserve the right to supplement this report.

VII. CONCLUSION

28. Based on the preceding analysis, it is my opinion that if Maalt were to prevail on its claims against Sequitur under the TSA, the total lost revenues under the TSA would total \$6,614,496.
29. After accounting for Maalt's estimated avoided expenses associated with operating the Barnhardt transloading facility for servicing the minimum volume throughput agreed to by the parties, as well as the mitigating profits earned through its Facility Usage Agreement, the principal lost profits realized by Maalt total \$4,105,378.⁴⁰

⁴⁰ Exhibit 1.

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30. In the event that the lost profits are awarded by the Trial Court in this matter, then, to the extent the Court determines that prejudgment interest on those lost profits are appropriate from the date of repudiation through the trial date, such interest would total \$429,025.⁴¹
31. The contractual interest on these the Shortfall Payments that Sequitur failed to pay through the date of trial would sum to \$440,513.⁴²
32. My work in this matter is ongoing and if additional relevant information is provided to me or becomes otherwise available, I may supplement this report.

⁴¹ Exhibit 3. Assumes an interest "thru-date" of August 31, 2020 and that interest for the full value of the lost profits begins accruing interest on the date of the Defendant's alleged repudiation of the contract based on instruction of Plaintiff's Counsel.

⁴² Exhibit 2. Assumes an interest "thru-date" of August 31, 2020.

Exhibit 1

Lost Profits Damages Model for Barnhart Transloading Facility

Month	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Total
Revenue														
Minimum Daily Barrels :	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	11,424	148,512
Days in Month	21	31	28	31	30	31	30	31	31	30	31	30	31	386
Minimum Monthly Barrels	239,904	354,144	319,872	354,144	342,720	354,144	342,720	354,144	354,144	342,720	354,144	342,720	354,144	4,409,664
Throughput fee (\$/bbl.) ¹	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	1.50	
Throughput Revenue	\$ 359,856	\$ 531,216	\$ 479,808	\$ 531,216	\$ 514,080	\$ 531,216	\$ 514,080	\$ 531,216	\$ 531,216	\$ 514,080	\$ 531,216	\$ 514,080	\$ 531,216	\$ 6,614,400
Total Avoided Expenses²														
Payroll - Wages & Benefits Expenses for Labor	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 138,667	\$ 1,802,667
Maintenance & Repairs Expenses:	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 260,000
Tire Expenses:	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500	\$ 32,500
Other Expenses (Utilities, Fees, Licenses, Computers, etc.)	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 20,000	\$ 260,000
Total Avoided Expenses:	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 181,167	\$ 2,355,167
Subtotal Lost Profits:	\$ 178,689	\$ 350,049	\$ 298,641	\$ 350,049	\$ 332,813	\$ 350,049	\$ 332,813	\$ 350,049	\$ 350,049	\$ 332,813	\$ 350,049	\$ 332,813	\$ 350,049	\$ 4,259,329
Less: Mitigating Profits for Windowner Contingent Storage at Barnhart Facility. ³				\$ 11,846			\$ 23,120	\$ 32,929	\$ 28,777	\$ 23,590	\$ 30,699		\$	\$ 153,951
Net Lost Profits Damages Due to Mail:	\$ 178,689.33	\$ 350,049.33	\$ 298,641.33	\$ 350,049.33	\$ 332,813.33	\$ 350,049.33	\$ 332,813.33	\$ 350,049.33	\$ 350,049.33	\$ 332,813.33	\$ 350,049.33	\$ 332,813.33	\$ 350,049.33	\$ 4,105,378.33

Notes:

¹ Plaintiff's Second Amended Original Petition, Terminal Service Agreement² Terminal Service Agreement Article 3.1³ Terminal Service Agreement Article 4.1⁴ All costs are assumed by the minimum monthly volume scenario in the Barnhart Crude Oil Casing Assumptions⁵ Gross Profits achieved during windowner mitigation at Barnhart Facilities - Source T.A. - 2019 Transloading Financials.xls

Exhibit 2

Contractual Interest Owed by Sequitur for Alleged Failure to Pay Shortfall Fee

Contract Month	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20
Prime Rate, ¹	5.35%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.15%	4.99%	4.75%	4.75%	4.75%	4.75%	3.75%	3.75%	3.25%	3.25%	3.25%	3.25%
Contractual Interest Rate	7.35%	7.50%	7.50%	7.50%	7.50%	7.50%	7.50%	7.50%	7.25%	7.15%	6.99%	6.75%	6.75%	6.75%	6.75%	5.75%	5.75%	5.25%	5.25%	5.25%	5.25%
Monthly Contractual Interest Rate	0.51%	0.53%	0.53%	0.53%	0.53%	0.53%	0.53%	0.53%	0.50%	0.49%	0.58%	0.56%	0.56%	0.56%	0.56%	0.48%	0.48%	0.44%	0.44%	0.44%	0.44%
Shortfall Payments Due	\$ 359,856	\$ 531,216	\$ 479,809	\$ 531,216	\$ 514,090	\$ 531,216	\$ 531,216	\$ 531,216	\$ 531,216	\$ 514,090	\$ 531,216	\$ 531,216	\$ 531,216	\$ 531,216	\$ 531,216	\$ 514,090	\$ 531,216	\$ 531,216	\$ 531,216	\$ 531,216	\$ 531,216
Payments Made	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Cumulative Interest-Sharing Underpayment	\$ -	\$ -	\$ 359,856	\$ 891,072	\$ 1,370,860	\$ 1,902,056	\$ 2,416,176	\$ 2,947,392	\$ 3,461,472	\$ 3,992,688	\$ 4,523,904	\$ 5,037,994	\$ 5,569,200	\$ 6,093,290	\$ 6,614,496	\$ 6,614,496	\$ 6,614,496	\$ 6,614,496	\$ 6,614,496	\$ 6,614,496	\$ 6,614,496
Monthly Interest Due	\$ -	\$ -	\$ 2,249	\$ 5,969	\$ 8,988	\$ 11,898	\$ 15,101	\$ 18,421	\$ 20,913	\$ 23,750	\$ 26,369	\$ 28,339	\$ 31,527	\$ 34,218	\$ 37,207	\$ 31,872	\$ 28,938	\$ 28,938	\$ 28,938	\$ 28,938	\$ 28,938
Total Contractual Interest Due:	\$ 448,513																				

Exhibit 3

Potential Interest Owed by Sequitor on Lost Profits

Contract Month	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20
Prime Rate:	5.35%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.50%	5.15%	4.96%	4.75%	4.75%	4.75%	4.75%	3.78%	3.25%	3.25%	3.25%	3.25%	3.25%
Contractual Interest Rate	7.35%	7.50%	7.50%	7.50%	7.50%	7.50%	7.50%	7.50%	7.50%	7.15%	6.96%	6.75%	6.75%	6.75%	6.75%	5.78%	5.25%	5.25%	5.25%	5.25%	5.25%
Monthly Contractual Interest Rate	0.61%	0.63%	0.63%	0.63%	0.63%	0.63%	0.63%	0.63%	0.60%	0.58%	0.56%	0.56%	0.56%	0.56%	0.56%	0.48%	0.44%	0.44%	0.44%	0.44%	0.44%
Lost Profits Amount as of Termination Date	\$ 178,689	\$ 350,049	\$ 298,641	\$ 350,049	\$ 332,913	\$ 338,203	\$ 306,793	\$ 317,120	\$ 321,272	\$ 309,333	\$ 316,350	\$ 332,813	\$ 350,049	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378	\$ 4,105.378
Pro Rata Multiplier	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Cumulative Interest-Bearing Underpayment	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Monthly Interest Due	\$ -	\$ -	\$ 25,659	\$ 25,659	\$ 25,659	\$ 25,659	\$ 25,659	\$ 25,659	\$ 24,803	\$ 24,461	\$ 23,620	\$ 23,093	\$ 23,093	\$ 23,093	\$ 23,093	\$ 19,782	\$ 17,961	\$ 17,961	\$ 17,961	\$ 17,961	\$ 17,961
Total Contractual Interest Due:	\$ 429,895																				