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.	§	**Adversary No. 20-04064-elm**
	§	
SEQUITUR PERMIAN, LLC,	§	**Removed from Cause No. CV19-003 in the 51st Judicial District Court, Irion County, Texas**
Defendant.	§	
	§	

[1]The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); VPROP Operating, LLC (0269)

PRETRIAL ORDER

TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

Pursuant to Local Bankruptcy Rule 7016-1(a), Maalt, LP ("Maalt"), Vista Proppants and Logistics, LLC ("Vista"), and Sequitur Permian, LLC ("Sequitur") submit this Pretrial Order.

I. Summary of the Claims and Defenses of Each Party

A. Maalt's and Vista's Claims and Defenses

In 2018 and 2019, Maalt operated transloading facilities that transload materials used in the oil and gas industry in Texas and Oklahoma. It typically transloaded materials from rail cars to trucks for delivery to well sites and vice versa. Maalt operated a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacifico 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, BNSF, 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 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 in the Midland, Texas area. Because of that situation, the price of crude oil at Midland was far less in the summer and fall of 2018 than it was for crude oil sold at the Gulf Coast. Sequitur believed that the spread in the prices (arbitrage) made the cost of transporting crude oil by rail attractive and created a substantial financial opportunity if it could transport its crude oil from the Permian Basin to the Gulf Coast by train and sell it at the Gulf Coast. Sequitur wanted to take advantage of that opportunity which promised to provide it with a return of millions of dollars.

On or about June 5, 2018, Sequitur and Maalt signed a letter of intent ("LOI") with respect to the transloading of crude oil at the Barnhart Facility. By that time, Sequitur had already spent millions of dollars on transloading machines and tank storage to be used at the facility. The LOI was drafted by Sequitur, and contained the following provisions outlining each parties' due diligence duties prior to entering a definitive agreement:

("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.

> 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. . ..

The LOI also contained the following provision reflecting that Maalt was to be paid at least $17,136.00 per day (11,424 times $1.50) so that it would be paid as if the minimum volume obligation of Sequitur (11,424 barrels per day) had been met. If more than Sequitur's minimum volume obligation was transloaded, then Maalt would be paid at the $1.50 rate times the excess volume in addition to the minimum volume amount. In other words, Maalt would be guaranteed a minimum of $17,136.00 per day on average from the date the terminal improvements were completed by Sequitur through the end of term of the agreement.

The letter of intent was extended two times at the request of Sequitur, and eventually expired on July 23, 2018. However, notwithstanding the expiration of the letter of intent, Sequitur requested and obtained from Maalt an access agreement in July 2018 allowing it to begin constructing improvements and installing equipment that would be used for the transloading process even though it did not have a definitive agreement for the use of the facility. Sequitur began work on the terminal improvements after the access agreement was signed and before signing the definitive agreement.

On about August 7, 2018, Maalt entered into a Terminal Services Agreement (the "TSA") with Sequitur to provide (i) crude oil transloading services at the Barnhart Facility for Sequitur, (ii) Sequitur with exclusive use of the facility, and (iii) 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 Sequitur 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 averaged on a quarterly basis (for example, 1,028,160 barrels in a 90-day quarter). If Sequitur failed to deliver the required volumes for transloading, it was obligated to pay Maalt a shortfall payment equal to the price per barrel times the minimum daily volume requirement times the number of days in the quarter, less the amount paid for actual transloading (for example, in the case of a 90-day quarter, $1.50 X 11,424 X 90 = $1,542,240.00, less the amount paid for actual transloading) (the "Shortfall Payment"). If Sequitur delivered more than the minimum number of barrels, then Sequitur was required to pay Maalt the amount actual throughput times $1.50 per barrel. In quarters where no oil was provided

for transloading, the Shortfall Payment would equal the daily amount of $17,136.00 times the number of days in the calendar quarter.

In other words, the TSA was a throughput-or-pay contract (comparable to a take-or-pay contract) that allowed Sequitur to perform its obligations by either (i) providing the minimum or more throughput of crude oil at the Barnhart Facility for Maalt to transload, or (ii) paying the fee for actual transloading together with any Shortfall Payment. Articles 3 and 4 of the TSA provide that Sequitur was required to pay (i) a Shortfall Payment if the throughput is zero, (ii) a Throughput Fee for the volume actually throughput if throughput averages an amount equal to or greater than 11,424 barrels per day, or (iii) a combination of a Shortfall Payment and a Throughput Fee if some crude is throughput but the Minimum Volume Commitment is not met (*e.g.*, throughput between 1 and 11,423 barrels/day). 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, but was 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 amounts required by the TSA 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. 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. Since it never delivered crude oil to the Barnhart Facility, it was obligated to pay Maalt the Shortfall Payment under the TSA for the period of December 10, 2018 through the end of the TSA's term.

Once it realized 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 amounts required by the TSA. It has since refused to pay Maalt the Shortfall Payment it is obligated to pay under the TSA.

On December 7, 2018, knowing that it would have to pay Maalt the Shortfall Payment 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, ship it to the Gulf Coast, share the arbitrage, and that would be an acceptable joint venture partner, 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. According to the experts retained by Sequitur in this case, because Sequitur did not do anything of those things it is nothing more than speculation to contend that transportation services or rail cars were unavailable to it.

In the fall of 2018 and before it alleged force majeure, Sequitur representatives met with Robert Wright with Murex, Ltd. ("Murex") to discuss Murex purchasing Sequitur's oil and shipping it to the Gulf Coast. Murex was willing and able to contract with Sequitur to move Sequitur's crude oil by rail from the Barnhart Facility, but Sequitur did not pursue the deal because the cost and other terms would not result in the arbitrage it sought. At the time, the TXPF was actively looking for crude oil business, and was in fact moving crude oil for other customers in conjunction with the FWWR and KCS railroads. The UP was also moving crude by rail from another transloading facility operated by Maalt in Pecos, Texas. The KCS was also looking for crude oil shipping opportunities during that time. In other words, rail transportation services were available to Sequitur had it chosen to pursue them.

Moreover, in October 2018, Equinor, a buyer of crude, was in discussions with the 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 negotiating with Sequitur to become 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 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. Ultimately, Sequitur did not contract with Jupiter for rail services, and their relationship ended.

On February 8, 2019, Sequitur sent Maalt a second 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 always available, and was never interrupted, delayed or curtailed. Rather, Sequitur was asserting its force majeure claim as a pretext to terminate the TSA. 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 service was higher than it expected or increasing during that time frame. Based on the testimony of Sequitur's retained experts, the price spread that resulted in the

arbitrage opportunity ended in February 2019, not coincidently, the same time as Sequitur attempted to terminate the TSA. It is apparent that Sequitur made the decision to terminate the TSA in order to avoid an unfavorable economic situation. By doing so, Sequitur repudiated the TSA and therefore breached it.

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 Shortfall Payment. It has therefore repudiated the TSA, and by doing so materially breached the TSA. At the time of Sequitur's repudiation, Maalt was ready, willing and able to perform its obligations under the TSA. By sending its February 8, 2019 letter claiming 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 the following ways – it could purchase or take the transloading services at a rate of $1.50 per barrel with minimum quantity requirements or it could pay the Shorfall Payment on the shortfall plus the amount owed for actual transloading. If no oil was delivered for transloading, which is the case here, Sequitur was obligated to pay the Shortfall Payment based on the daily minimum commitment of 11,424 barrels times $1.50, or $17,136 per day. Sequitur did nothing. 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 for which Sequitur is liable. In that respect, Maalt seeks an amount equal to the Shortfall Payment amount for the entire term based on the following calculation as 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 Shortfall Payment owed for the term of the TSA beginning with Sequitur's "in service" date of December 10, 2018 is $6,614,496.00. That is calculated by multiplying the shortfall amount of 11,424 barrels per day times $1.50 times the number of days between December 10, 2018 and the end of the term of the TSA. Interest on that amount, calculated as specified in the TSA is $453,947.00 through August 31, 2020. Interest will continue to accrue at the TSA rate after that date which is 5.25% per annum. Thus, Maalt is entitled to recover $7,068,443.00 which includes interest through August 31, 2020 and additional interest as it accrues and has accrued after that date. Maalt denies that the Shortfall Payment is a penalty, unconscionable, or otherwise against public policy. Under the relevant law, Maalt was not required to mitigate its damages, and is entitled to the foregoing amounts since they result from Sequitur's breach and repudiation of the TSA.

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. It did not perform in any of the ways available to it once the Barnhart Facility was completed. Pursuant to Section 8.6 of the TSA, Maalt is entitled to specific performance of Sequitur's obligation to pay the Shortfall Payment 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 Shortfall Payment for the term is $6,614,496.00. Maalt is also entitled to recover interest on the total amount 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 which is 5.25% per annum. 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 and has accrued 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 Shortfall Payment 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, been satisfied, or been waived.

Sequitur's counterclaims and third-party claims based on fraudulent inducement and negligent misrepresentation are 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.

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. 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. Vista is not liable to Sequitur on the basis of vicarious liability or respondent superior. Vista is not liable to Sequitur for any obligations of Maalt, if any, under Texas Business Organization Code Sections 21.223 and 101.002.

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.

With respect to Sequitur's negligent misrepresentation and fraudulent inducement claims, and without admitting any of the allegations made by Sequitur, the alleged false statements, even if false, are not actionable because they constitute "trade" or "sales talk," are not statements of material fact, are opinions, and are statements of future events or results, among other things. Sequitur's reliance on any alleged misrepresentation was not justified or reasonable, and Sequitur disclaimed any reliance on such alleged misrepresentations through the Letter of Intent and otherwise. Further, Sequitur is not entitled to recover any damages under those claims since it has not disclosed any damages or manner of calculating damages although required to have done so under Federal Rule of Civil Procedure 26(a)(1)(A)(iii) and Texas Rule of Civil Procedure 194.2(d).

B. Sequitur's Claims and Defenses

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 the Spring 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 Gulf Coast.

In the Spring of 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 "Barnhart Terminal") to which Sequitur sought access. Vista and/or Maalt ("Maalt" collectively) had experience elsewhere in the Permian Basin for transporting frac sand (a proppant) via railcar at similar facilities. During these 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 Maalt 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. Maalt understood Sequitur to have these specific requirements regarding the operations at the Barnhart Terminal which would include delivery of approximately 20-30 railcars loaded per day with a minimum of approximately 15 railcars. Maalt further understood that Sequitur was looking to place tankage on the property for a pipeline connection. Maalt further understood Sequitur to have no rail experience. Therefore, Maalt took affirmative steps to direct Sequitur into the method of acquiring rail transportation services. Realizing that the train business was one that Sequitur was inexperienced with and could not learn overnight, Sequitur, with the direction of Maalt, decided to seek a business venture with a large oil trader with access to leased rail cars.

Maalt told Sequitur that they were receiving inquiries from other companies. Specifically, Maalt indicated that Jupiter MLP, LLC (the parent of affiliate, Jupiter Marketing & Trading, LLC) (collectively "Jupiter) was also interested in the Terminal. However, Maalt informed Sequitur that they were more interested in doing business with Sequitur because they could offer future additional revenue streams. Despite Maalt determining that Jupiter was not the party for which it sought a contract for the Barnhart Terminal, Maalt repeatedly represented to Sequitur that Jupiter was capable of being the partner that Sequitur sought to provide transportation services.

On August 3, 2018, Maalt contacted Sequitur to pressure Sequitur into entering the Terminal Services Agreement. Specifically, Maalt stated that it had another party willing to enter into a contract for use of the Terminal that day. Knowing that Sequitur was in need of a transportation services provider, Maalt again represented those capabilities of Jupiter as the logistics provider who could ascertain the necessary transportation services for Sequitur under the TSA. In fact, when Sequitur traveled to Maalt's offices to discuss the execution of the TSA, Maalt had invited Jupiter as well to further represent their capabilities.

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.

Per the Agreement, Maalt (also described as "Terminal Owner") was the owner and operator of the Terminal 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.

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."

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.

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 representation to Sequitur of capable third party transportation service providers, 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.

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. 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, claiming that Sequitur had repudiated the contract and that this lawsuit had been filed. As a result of the actions stated supra, Sequitur has brought causes of actions for promissory estoppel, negligent misrepresentation, fraud and breach of contract.

In addition, Sequitur seeks the following declarations:

(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.

Sequitur seeks the damages, or an offset of the amounts incurred as a result of the fraud and negligent misrepresentations which are the actual amounts expended, which is recoverable under the law and the contract. These amounts include the costs for equipment and construction at the Barnhart Terminal.

Sequitur further seeks its recovery of attorneys' fees under the contract and the Texas Civil Practice and Remedies Code.

Sequitur has further denied the following condition precedents have been performed under the TSA:

(a) Occurrence of the Terminal Operations Commencement Date

(b) Notice of the Terminal Operations Commencement Date

(c) Availability of Product Transportation Services

In addition, Sequitur has raised the affirmative defenses to Maalt's claims which include the following:

(a) failure of consideration.

(b) waiver

(c) statute of frauds

(d) force majeure

(e) excuse/justification

(f) failure to mitigate damages

(g) breach of contract and/or repudiation

(h) mutual mistake

II. Statement of Stipulated Facts

The Parties stipulate to the following facts:

1. TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the BNSF, and Fort Worth and Western Railroad ("FWWR").

2. The FWWR in turn interchanges with track owned by BNSF and The Kansas City Southern Railway ("KCS").

3. In approximately May, 2018, Sequitur Permian, LLC ("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.

4. 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 at Midland, Texas.

5. 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.

6. 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.

7. Sequitur wanted to take advantage of that opportunity which promised to provide it with significant financial returns.

8. Maalt and Sequitur entered into an access agreement on or about July 27, 2018 pursuant to which Sequitur was given access to the Barnhart Facility to begin construction of improvements for the transloading of crude oil.

9. Maalt and Sequitur signed the TSA in August 2018, with an effective date of August 6, 2018.

10. On February 8, 2019, Sequitur sent Maalt a letter stating it was terminating the TSA pursuant to the force majeure provisions of the TSA.

III. List of Contested Issues of Fact.

A. *Maalt and Vista believe the following facts are disputed:*

1. In 2018 to 2019, Maalt was in the business of operating transloading facilities that transload materials used in the Texas oil and gas industry.

2. Maalt's transloading activities typically involve transloading materials from rail cars to trucks for delivery to well sites and vice versa.

3. During that time, Maalt operated a transloading facility in Barnhart, Texas (the "Barnhart Facility") that is provided rail service by Texas Pacifico Transportation, Ltd. ("TXPF").

4. TXPF has track that runs through the Permian Basin and interchanges (connects) to tracks owned by other railroads including the Union Pacific, BNSF, and Fort Worth and Western Railroad ("FWWR").

5. The FWWR in turn interchanges with track owned by BNSF and The Kansas City Southern Railway ("KCS").

6. Through TXPF interchanges and railroads, goods can be shipped into and out of the Permian Basin area by rail.

7. 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.

8. On May 23, 2018, Sequitur issued its Purchase Order to Superior Tank Company, Inc. to order storage tanks for use in crude oil transloading operations that would be installed and erected at the Barnhart Facility at a cost of $365,181.81.

9. On May 29, 2018, Sequitur issued its Purchase Order to Flare King to order equipment for use in crude oil transloading operations at the Barnhart Facility at a cost of $23,650.00.

10. On June 1, 2018, Sequitur issued its Purchase Order to Safe Rack, LLC to order eight transloading machines for use in crude oil transloading operations at the Barnhart Facility at a cost of $1,696,392.32.

11. On July 9, 2018, Sequitur issued its Purchase Order to TriPoint to order tank equipment for use in crude oil transloading operations at the Barnhart Facility at a cost of $2,709.79.

12. On July 9, 2018, Sequitur issued its Purchase Order to Milford to order pipe for use in crude oil transloading operations at the Barnhart Facility at a cost of $51,300.00.

13. On July 9, 2018, Sequitur issued its Purchase Order to Texas Pipe and Supply Company to order pipe for use in crude oil transloading operations at the Barnhart Facility at a cost of $239,500.00.

14. On July 18, 2018, Sequitur issued its Purchase Order to Jody's Oilfield Service, Inc. to order three Transfer LACTs for use in crude oil transloading operations at the Barnhart Facility at a cost of $390,000.00.

15. Maalt and Sequitur entered into the LOI on or about June 5, 2018 in connection with Sequitur's desire to transload crude oil at the Barnhart Facility.

16. The LOI was extended two times, but ultimately expired on July 23, 2018.

17. The TSA gave Sequitur exclusive use of the facility during the term of the agreement, and a right of first refusal to purchase the facility (the "ROFR").

18. 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.

19. After December 10, 2018, Sequitur did not begin transloading crude oil.

20. 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. . .."

21. Whether the Terminal [became] fully operational to enable the performance and receipt of the Services on or about December 10, 2021.

22. Whether all regulatory approvals and permits required for the transloading of crude oil at the Barnhart Facility had been obtained by December 10, 2018.

23. Whether the Terminal Operations Commencement Date occurred on or about December 10, 2018.

24. Whether Maalt fully performed its obligations under the TSA.

25. Whether an "unavailability, interruption, delay or curtailment of rail transportation services" occurred in December 2018.

26. Whether there was an unavailability of sufficient tank cars complying with federal and individual railroad requirements.

27. Whether there was an unavailability of linehaul transportation with rail carriers to enable delivery from the Terminal to a destination terminal.

28. Whether such unavailability was within the reasonable control of the Defendant.

29. Whether such unavailability could have been avoided or overcome by the exercise of due diligence by the Defendant.

30. Whether during the period of September 2018 through February 2019, rail transportation service was unavailable for crude oil at the Barnhart Facility through the TXPF and other railroads connecting to the TXPF.

31. Whether because Sequitur failed to deliver any crude for transloading after December 10, 2018, it was obligated to pay Maalt a shortfall payment equal to the price per barrel times the minimum daily volume requirement times the number of days in each calendar quarter or part thereof in the term of the TSA (for example, in the case of a 91-day quarter, $1.50 X 11,424 X 30 = $1,559,376.00) (the "Shortfall Payment").

32. Whether the amount of the Shortfall Payment owed for the term of the TSA beginning with Sequitur's "in service" date of December 10, 2018 through January 1, 2020, then end of the TSA, is $6,614,496.00 (386 days * 1.50 per barrel * 11,424 barrels per day).

33. Whether 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 Throughput Fee and the Shortfall Payment as applicable.

34. Whether under the terms of the TSA, Sequitur's obligation to pay Maalt the amounts required by the TSA began on or about December 10, 2018.

35. Whether Sequitur breached the TSA by failing to perform its obligations.

36. Whether Sequitur repudiated the TSA.

37. The amount of damages Maalt is entitled to recover from Sequitur.

38. The amount of reasonable and necessary attorneys' fees, costs and expenses that may be recovered by Maalt with respect to claims under the TSA.

39. The amount of prejudgment interest Maalt is entitled to recover under the contractual interest provision, which provides that Maalt is entitled to recover pre-judgment interest through the date of judgment in the amount of two percent 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.

40. Whether Maalt was ready, willing and able to perform its obligations under the TSA but for Sequitur's repudiation of the contract.

41. Whether Maalt made any false statements of material fact that induced Sequitur to sign the TSA.

42. Whether the statements alleged by Sequitur to have been made by Maalt to induce it into signing the TSA were "trade" or "sales talk," opinions, statements about future performance or events, or otherwise unactionable.

43. Whether Sequitur justifiably and reasonably relied on any false statements made by Maalt when it signed the TSA.

44. Whether Sequitur has sustained any damages as a result of any actionable false statements made by Maalt.

45. If so, the amount of any such damages allegedly sustained by Sequitur.

B. ***Sequitur believes the following facts are disputed:***

1. Sequitur is in the crude oil production business.

2. 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.

3. In May 2018, Sequitur contacted Vista Proppants and Logistics, Inc. ("Vista"), of which the Plaintiff Maalt, LP ("Maalt") (collectively, "Maalt/Vista")("Maalt collectively) is an affiliate, about utilizing their transloading facility in Barnhart, Texas (the "Barnhart Terminal") to ship crude oil to the Gulf Coast by rail.

4. 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.

5. Sequitur made it clear to Maalt/Vista that it was inexperienced with rail transportation and securing rail cars.

6. Maalt understood that Sequitur was inexperienced with rail transportation and securing rail cars to transport crude.

7. Maalt represented to Sequitur that it would be able to connect Sequitur with parties who could provide the necessary rail cars and rail service to transport crude from the Barnhart Terminal to the Guld Coast.

8. 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.

9. 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.

10. Maalt introduced Sequitur to representatives of Jupiter Marketing & Trading LLC ("Jupiter").

11. In June 2018, Jupiter entered into a contract to transload crude at another of Maalt's terminals in Pecos, Texas with an effective date of August 1, 2018.

12. Maalt connected Jupiter and Sequitur for the purpose of Jupiter facilitating the logistics of moving crude from the Barnhart Terminal to the Gulf Coast e.g. transportation services.

13. Maalt represented and/or promised Sequitur that Jupiter would be able to deliver the necessary trains/railcars and transportation services to transport crude from the Barnhart Terminal to the Gulf Coast.

14. On August 3, 2018, Maalt informed Sequitur that Maalt had been offered better terms from another party that said they will execute an agreement on that date for the use of the Barnhart Terminal.

15. In August 2018, Sequitur traveled to Maalt's offices to execute the Terminal Services Agreement (the "TSA")

16. On the date of the meeting to execute the TSA, Jupiter representatives were present at Maalt's offices per the requests of Maalt.

17. Sequitur entered into the TSA with Maalt, with an effective date of August 6, 2018.

18. 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.

19. The TSA provided that for a Target Terminal Operations Commencement Date (the "Target Date") of September 1, 2018.

20. Phase I construction was not completed by the Target Date.

21. The Terminal Operations Commencement Date (the "Commencement Date"), is the date in the TSA on which Maalt's transloading services were to begin and the date the Terminal was to become fully operational for the transloading of the crude oil on to trains.

22. Jupiter understood its role to be that of a rail logistics partner to provide transportation services pursuant to the TSA.

23. Maalt understood Jupiter to be a rail logistics partner to provide transportation services pursuant to the TSA.

24. There was an unavailability, interruption, delay or curtailment of Product transportation services at the Barnhart Terminal.

25. 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 Agreement because of the "unavailability, interruption, delay or curtailment of rail transportation services" for the oil, "despite continued efforts to procure such services."

26. At the time the Force Majeure was declared, Sequitur still had not sent written notice to Maalt that the Termination Operations Commencement Date had occurred.

27. Sequitur did not believe the Barnhart Terminal was operational as of the date of the force majeure notice had been sent.

28. The Barnhart Terminal never became operational.

29. Despite the Termination Operations Commencement Date not occurring, on January 25, 2019, Maalt sent an invoice to Sequitur for payment at the Barnhart Terminal.

30. In response, on January 31, 2019, Sequitur sent a letter to Maalt disputing that such Shortfall Payment, Throughput Fees, or "any other amounts" were owed because "the Terminal Operations Commencement Date has not occurred as per the terms of the [TSA]."

31. On February 8, 2019, Sequitur sent Maalt a final written notice that the Force Majeure event could not be remedied, and in accordance the terms of the TSA, Sequitur notified Maalt that the TSA had been terminated.

32. Whether the Barnhart Terminal was operational

33. Whether the Terminal Operations Commencement Date occurred under the TSA

34. Whether Maalt suffered actual damages as a result of the alleged breach of the TSA by Sequitur.

35. The amount of actual damages incurred by Maalt due to Sequitur's alleged breach

36. Whether Product transportation services were unavailable, interrupted, delayed or curtailed.

37. Whether the unavailability, interruption, delay or curtailment of Product transportation services was within Sequitur's reasonable control and that could not have been avoided or overcome by the exercise of due diligence by Sequitur.

38. Whether Sequitur deemed it reasonable and economic to remedy the Force Majeure occurrence.

IV. List of Contested Issues of Law.

A. Maalt and Vista believe the following issues of law are disputed:

1. Whether Sequitur repudiated the TSA, and by doing so materially breached the TSA.

2. Whether a force majeure event excused Sequitur from performing under the TSA.

3. Whether as a result of Sequitur's breach of the TSA, Maalt has sustained actual damages.

4. The amount of actual damages sustained by Maalt as a result of Sequitur's breach of the TSA.

5. Whether Maalt is entitled to a declaratory judgment declaring: (i) the Termination Operations Commencement Date under the TSA occurred and the date of its occurrence; (ii) the "force majeure event" alleged by Sequitur did not occur; (iii) the date the payment obligations created by Article 3 of the TSA began; (iv) Sequitur did not have a right to terminate the TSA; (v) Sequitur repudiated and breached the TSA by refusing to perform its obligations under the TSA; and (vi) Sequitur is obligated to pay Maalt the Shortfall Payment equal to 11,424 barrels per day multiplied by $1.50 per barrel for each day of the term of the TSA.

6. Whether the Maalt is entitled to an order of specific performance requiring Sequitur to pay the Shortfall Payments required to be paid under the TSA.

7. Whether Maalt is entitled to recover interest on its actual damages calculated as specified in the TSA.

8. The amount under the contractual interest provision that Maalt is entitled to recover in pre-judgment interest through the date of judgment.

9. Whether Maalt is entitled to recover its reasonable and necessary attorneys' fees, accountants' fees, costs and expenses pursuant to Section 15.19 of the TSA and the amount of those fees and expenses.

10. Whether Maalt is entitled to recover its reasonable and necessary attorneys' fees, pursuant to Texas Civil Practice and Remedies Code Chapter 38.

11. Whether Maalt is liable to Sequitur under its negligent misrepresentation or fraudulent inducement claims.

12. Whether Maalt is liable to Sequitur for damages in any amount regardless of the theory of recovery.

B. Sequitur believes the following issues of law are disputed:

1. Whether a force majeure event occurred pursuant to the terms of the TSA.

2. Whether the Barnhart Terminal was operational.

3. The amount and type of damages recoverable by Maalt pursuant to the express terms of the TSA if Sequitur is found in breach.

4. Whether Maalt's representations to Sequitur amount to fraud and/or negligent misrepresentation.

5. The amount of actual damages incurred by Sequitur as a result of the fraud and/or negligent misrepresentations of Maalt.

6. Whether Sequitur is entitled to attorneys' fees under the TSA and/or the Texas Civil Practice and Remedies Code.

7. The amount of attorneys' fees of Sequitur

8. Whether Sequitur is entitled to recission of the TSA.

9. Whether Sequitur is entitled to declaratory judgment declaring: (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.

9. Whether Sequitur is entitled to an offset for the damages it incurred.

10. Whether Sequitur's affirmative defenses bar Maalt's recovery under the contract.

IV. Estimate of the Length of Trial

Maalt estimates that trial in this case will last 3 - 5 days. Sequitur believes that its case in chief alone will require at least five days.

V. Additional Matters That Might Aid in the Disposition of the Case

The Court's rulings on the following motions:

1. Maalt's Third Motion for Partial Summary Judgement (Doc. 91).

SIGNED on _____, 2021.

_____
JUDGE PRESIDING

Respectfully submitted,

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