CAUSE NO. MDL 2022CI02879
BEFORE THE DESIGNATED PRETRIAL COURT

IN RE CPS ENERGY GAS SUPPLIER LITIGATION	§	IN THE DISTRICT COURT
	§	
	§	407TH JUDICIAL DISTRICT
Enterprise Products Operating LLC v. CPS Energy	§	BEXAR COUNTY, TEXAS

Transferred from
CAUSE NO. 2021-24173

ENTERPRISE PRODUCTS OPERATING, LLC,	§	IN THE DISTRICT COURT OF
Plaintiff/Counter-Defendant,	§	
v.	§	334TH JUDICIAL DISTRICT
CITY OF SAN ANTONIO ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD (CPS ENERGY),	§	
Defendant/Counter-Plaintiff.	§	HARRIS COUNTY, TEXAS

CPS ENERGY'S RESPONSE TO ENTERPRISE PRODUCTS OPERATING LLC'S MOTION FOR SUMMARY JUDGMENT ON CPS ENERGY'S COUNTERCLAIMS

TABLE OF CONTENTS

TO THE HONORABLE JUDGE SPECIA:

Defendant/Counter-Plaintiff City of San Antonio, acting by and through its City Public Service Board ("**CPS Energy**") hereby files this Response to Enterprise Products Operating, LLC's ("**Enterprise**") Motion for Summary Judgment on CPS Energy's Counterclaims (the "**Response**") and would respectfully show the Court as follows:

I. INTRODUCTION

1. Enterprise asks the Court for judgment on CPS Energy's counterclaims that relate to Enterprise's failure to deliver natural gas to CPS Energy during Winter Storm Uri. Through a notably disingenuous motion that cherry picks its way through correspondence and circumstances, Enterprise ignores the complete, essential context material to CPS Energy's breach of contract counterclaim. Before illuminating the many misleading "factual" items Enterprise omits, the Court should note the material, undisputed factors surrounding Enterprise's breach. There is no dispute that Enterprise (1) entered into a Firm obligation to deliver gas (i.e., not excusable, unless prevented by Force Majeure), (2) curtailed its firm obligation to deliver natural gas for three days straight, (3) sold higher priced gas to CPS Energy at the same time it was curtailing the lower (though still unconscionable) priced natural gas it was to deliver on a Firm bases, and (4) had numerous alternative available sources of natural gas to meet its firm obligations to CPS Energy. Enterprise controverts none of these matters.

2. Enterprise makes three arguments in support of its claimed entitlement to traditional and no evidence summary judgment on CPS Energy's breach of contract claim. Enterprises argues that: (1) Force Majeure excused its performance,[1] (2) CPS Energy suffered no damages, and (3)

[1] Despite the overwhelming evidence that Enterprise failed to perform, it asserts that CPS Energy's counterclaims address an "alleged under-delivery of natural gas." Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 1. Enterprise goes as far as to say that it "does not concede, and CPSE must prove at trial that Enterprise did, in fact deliver less gas." *Id* at fn. 15. It is unclear how Enterprise squares this position with its Force

CPS Energy waived recovery of damages. However, Enterprise's evidence in support of its contentions consists of a combination of misleading fragments of communications (rather than whole communications necessary to understand the true picture of events) and positions it presents as uncontroverted that are, in fact, controverted.

3. Enterprise's Force Majeure defense has no basis in law or fact.[2] Enterprise never provided the required written notice stating that it was invoking Force Majeure. Enterprise's strained efforts to rely on a letter informing CPS Energy that Enterprise "**may be** required to partially suspend its performance under the Agreement(s) due to an event of Force Majeure" fairs no better.[3] The "we may declare Force Majeure" letter Enterprise sent was not timely and failed to provide reasonably full particulars of the purported Force Majeure event. Assuming *arguendo* that Enterprise did send a valid written notice of Force Majeure (it did not), the facts demonstrate that Enterprise was not prevented from delivering natural gas to CPS Energy. The evidence demonstrates that Enterprise had an array of natural gas available that it could have supplied to CPS Energy. Enterprise chose to sell higher priced natural gas to CPS Energy in lieu of delivering the cheaper (albeit still unconscionable) priced gas it agreed to deliver on a Firm basis. Force Majeure does not excuse Enterprise's decision.

4. For all of Enterprise's bluster that this suit is a "simple contract dispute" and a "contract is a contract that must be enforced," Enterprise certainly does not adopt the same approach in its defense of CPS Energy's counterclaims. Now, suddenly, Winter Storm Uri—

Majeure defense. The defense of Force Majeure excuses performance, thereby necessitating an underlying failure to perform. If Enterprise alleges, in contravention of the evidence and its own witnesses, including purported testifying experts, that it did deliver ***all*** of the Firm quantities of natural gas it was required to deliver, there is no need for it to assert that its performance was excused by Force Majeure.

[2] CPS Energy's No-Evidence Motion for Summary Judgment on Enterprise's Affirmative Defenses; CPS Energy's Traditional Motion for Partial Summary Judgment on Enterprise's First Affirmative Defense for Force Majeure.

[3] Ex. C-14, the Enterprise Letter to CPS Energy, dated February 22, 2021 (CPSE-MDL_000000555) (emphasis added).

which Enterprise claimed was foreseeable and not significant when responding to CPS Energy's claims of exorbitant and unconscionable pricing—suddenly becomes a Force Majeure event that should excuse its performance even though *it could have provided the gas that was promised at the time it cut deliveries of gas to CPS Energy.*

5. As demonstrated below there is ample evidence to support CPS Energy's breach of contract claim that would defeat both a traditional and no evidence summary judgment standard. Moreover, Enterprise failed to establish as a matter of law that CPS Energy's declaratory judgment action should be dismissed, as it seeks unique relief related to the preservation of its contractual right to an offset, which would also entitle CPS Energy to attorneys' fees. Enterprise has failed to establish grounds for summary judgment in its Motion. For these reasons, CPS Energy respectfully requests that Enterprise's Motion be denied in its entirety.

II. INCORPORATION OF PREVIOUS SUMMARY JUDGMENT BRIEFING

6. On January 29, 2024, CPS Energy filed its (1) No-Evidence Motion for Summary Judgment on Enterprise Products Operating LLC's Affirmative Defenses and (2) Motion for Partial Summary Judgment on Enterprise Products Operating LLC's First Affirmative Defense for Force Majeure (collectively, the "**Motions**"). CPS Energy hereby incorporates the Motions and their exhibits in this Response by reference.

III. BACKGROUND

7. Enterprise sells natural gas and provides transportation services to CPS Energy.[4] Enterprise is a Texas limited liability company and is a part of the corporate family of Enterprise Products Partners, L.P.[5] Enterprise provides a variety of midstream energy services, including

[4] Ex. A-7, D. Boss Dep. at 31:8-12.

[5] [redacted] Ex. A-17, 2021 EPD Form 10-K (excerpts from EPO_00107293-107507), at EPO_00107296, EPO_00107497-00107499. Enterprise's contention

natural gas marketing services to producers, end-users, and other entities.[6] Enterprise's natural gas marketing activities include its sales of natural gas to CPS Energy.[7] Enterprise and CPS Energy are parties to a North American Energy Standards Board Base Contract for Sale and Purchase of Natural Gas, dated May 1, 2008 (which, as amended, is referred to as the "**Base Contract**").[8] The Base Contract, however, does not establish the specific terms of natural gas transactions between the parties. Rather, the terms of individual transactions are memorialized in "**Transaction Confirmations**" that specify the quantity, term, delivery obligation, price, and delivery point for the natural gas to be supplied.[9]

8. Enterprise Texas Pipeline LLC ("**Enterprise Pipeline**") is also a part of the Enterprise corporate family.[10] Enterprise Pipeline provides natural gas transportation and storage services within the State of Texas to CPS Energy, among other entities.[11] Specifically, Enterprise Pipeline delivers natural gas to CPS Energy via its intrastate pipeline network and stores some of CPS Energy's natural gas inventory at its Wilson Storage facility.[12] [redacted]

that it is "not a natural gas producer" is completely immaterial to the contract at issue. *See* Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 3.

[6] [redacted]

[7] *Id*, at p.5.

[8] The North American Energy Standards Board Base Contract for Sale and Purchase of Natural Gas is a standard form contract that is widely used in the natural gas industry. A copy of the Base Contract is attached hereto as Ex C-1 (CPSE-MDL_000000583-593).

[9] *See* Ex. A-1, K. Skaer Dep. at 78:2-79:15.

[10] [redacted] Ex. A-17, 2021 EPD Form 10-K, at EPO_00107311, EPO_00107497-00107500.

[11] *Id*.

[12] [redacted] Ex. A-17, 2021 EPD Form 10-K, at EPO_00107311.

[redacted][13] [redacted]

[redacted][14] [redacted]

[redacted]

[redacted].[15]

9. Enterprise Pipeline provides Enterprise with information concerning CPS Energy's activities from time to time.[16] In fact, [redacted].[17] These two sales involved the in-ground storage transfer of 500,000 MMBtus (250,000 MMBtus per sale) on February 18 and 19, 2021, for a total of $12,750,000.00.[18]

A. Enterprise agreed to deliver natural gas to CPS Energy on a Firm basis.

10. The Base Contract permits parties to transact natural gas with either a "**Firm**" or "**Interruptible**" delivery obligation.[19] A Firm delivery obligation permits a party to "interrupt its performance without liability *only to the extent that such performance is prevented* for reasons of

[13] [redacted] *see also* [redacted]

[14] [redacted]

[15] [redacted]

[16] Ex. A-15, ICE Chat Sean Lloyd | Matthew Bain (EPO Dep. Ex. 163, EPO_00031353-31354), *see* timestamp 2021-01-12 13:20:47—2021-01-12 13:22:21; Ex. A-14, ICE Chat Sean Lloyd | Stanton Brown (EPO Dep. Ex. 162 EPO_00031339-31340), *see* timestamp 2021-01-12 13:24:43; [redacted]

[17] [redacted]

[18] [redacted] Ex. A-18, Inventory Transfer on February 18, 2021 (Enterprise Transaction Confirmation with CPS Energy, Deal #504101, dated February 18, 2021, EPO_00108317); Ex. C-2, Inventory Transfer on February 19, 2021 (Enterprise Transaction Confirmation with CPS Energy, Deal #504162, dated February 18, 2021, CPSE-MDL_000006569); Ex. C-3, Enterprise Invoice No. 432242, dated March 23, 2021, at CPSE-MDL_000058919 (CPSE-MDL_000058919-58922).

[19] Ex. C-1, the Base Contract, at §§ 2.17 and 2.20.

Force Majeure."[20] In contrast, an Interruptible obligation permits a party to "interrupt its performance at any time for any reason."[21] The Base Contract's Force Majeure provisions explicitly require the seller to make reasonable efforts to deliver the contracted quantity of natural gas before declaring Force Majeure. [22]

11. To combat supply disruptions and price volatility, CPS Energy will enter Transaction Confirmations that include a Firm delivery obligation.[23] During Winter Storm Uri, demand for natural gas exceeded any historic metric, so when the natural gas CPS Energy purchases on a Firm basis was curtailed, CPS Energy had to obtain replacement gas by whatever means necessary—and at whatever price demanded—to serve human need. CPS Energy is entitled to recover from Enterprise the difference between the price of the unfulfilled Transaction Confirmation and the cost of procuring replacement supplies (the "**Cover Standard**").[24] As a result, Enterprise shouldered the risks associated with supply shortages when it agreed to deliver natural gas on a Firm basis, except when Enterprise's "failure was caused by [a] Force Majeure."

12. On February 12, 2021, Enterprise agreed to deliver—on a Firm basis—40,000 MMBtus of natural gas to CPS Energy on each day from February 13-16, 2021, at WTX Map, for a total of 160,000 MMBtus under a Transaction Confirmation identified as Enterprise Deal #503805 ("**Deal 503805**").[25] Accordingly, Enterprise could curtail its delivery under Deal 503805

[20] Ex. C-1, the Base Contract, at § 2.17 (emphasis added); [redacted]

[21] Ex. C-1, the Base Contract, at § 2.20. This is also referred to as "best efforts" amongst gas traders.

[22] Ex. C-1, the Base Contract, at § 11.2. Enterprise proffers no evidence showing any efforts it made, let alone reasonable ones, to deliver the contracted-for gas to CPS Energy before declaring Force Majeure.

[23] Ex. C, K. Pollo Aff. at ¶ 4.

[24] Ex. C-1, the Base Contract, at §§ 2.10 and 3.2; Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 16.

[25] Ex. A-12, ICE Chat (Skaer | Lloyd) *see* timestamp 02/12/2021 07:59:26—02/12/2021 08:05:22, at EPO_00000004 (EPO Dep. Ex. 69); Ex. A-20, Enterprise Transaction Confirmation with CPS Energy, Deal #503805, dated February

only to the extent that it was prevented for reasons of Force Majeure.[26] Notably, Enterprise's motion omits reference to the highly important fact that it agreed to supply the natural gas that is the subject to CPS Energy's counterclaim on a Firm basis.[27]

13. The Confirmation for Deal 503805 did not specify the source or origin of the natural gas Enterprise intended to use to satisfy its Firm delivery obligation.[28] There is no evidence showing CPS Energy agreed or even knew that gas under 50385 would come from any source other than Enterprise.[29] Moreover, the Base Contract that would permit Enterprise to unilaterally (and secretly) limit its Firm delivery obligations to CPS Energy to a specific source.[30] Therefore, pursuant to Deal 503805, Enterprise agreed to sell and deliver specific volumes of natural gas to CPS Energy from any source available to Enterprise thereby requiring Enterprise to utilize any of its multiple sources of available supply to deliver natural gas to CPS Energy at the WTX Map Point over the four-day period.[31] Enterprise agreed in its contract with CPS Energy that the risk associated with sourcing the gas it sold—whether from Enterprise's own storage facilities, a third party, or an Enterprise affiliate—would be borne by Enterprise.[32]

12, 2021 (EPO_00001752); [redacted]; Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 4

[26] Ex. C-1, the Base Contract, at § 2.17; Ex. A-20, Enterprise Deal #503805; [redacted] Ex. A-4, J. Kleiderer Dep. at 203:19-204:1; [redacted]

[27] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 4.

[28] Ex. A-12, ICE Chat (Skaer | Lloyd) *see* timestamp 02/12/2021 07:59:26—02/12/2021 08:05:22, at EPO_00000004 (EPO Dep. Ex. 69).

[29] Ex. A-6, Stephanie Brown Dep. at 84:2-17.

[30] *See* Ex. C-1, the Base Contract.

[31] [redacted]; Ex. A-21, Enterprise Storage 9811STIA (EPO_00107287-107288); Ex. A-22, Enterprise Storage 9854STIA (EPO_00107289); Ex. A-23, Enterprise Storage 9891STIA (EPO_00107290); [redacted]

[32] Ex. A-20, Enterprise Deal #503805.

14. [redacted][33] [redacted][34] Enterprise and Enterprise Pipeline, in their sole discretion, determine whether to arrange a back-to-back directly linking its counterparties.[35]

15. After determining how to allocate the gas it would deliver to CPS Energy, Enterprise's scheduler provided CPS Energy with transportation and delivery logistics for Deal 503805.[36] Upon receipt of this information, CPS Energy manually added it into a customer portal and manually added the nominations.[37] Accordingly, CPS Energy was unaware of the identity of Enterprise's upstream suppliers delivering pursuant to Deal 503805 and did not know it was a party to one of Enterprise's back-to-backs when contracting.[38] It turns out that Enterprise (unilaterally) decided to allocate its natural gas supplies from (1) Chevron, (2) West Texas Gas Marketing, and (3) Enterprise.[39]

---

[33] [redacted].

[34] [redacted].

[35] Ex. A-6, Stephanie Brown Dep. at 202:10-14; [redacted]

[36] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown) (CPSE-MDL_000009326-9331), *see* timestamp 02/12/2021 10:19:42—02/12/2021 10:22:46, at CPSE-MDL_000009326-9327; *see also* timestamp 02/15/2021 09:55:51—02/15/2021 09:58:36 at CPSE-MDL_000009327 referring to a change in the Splits for February 15, 2021. "**Splits**" refer to the division or allocation of natural gas volumes amongst counterparties.

[37] Ex. D, A. Irving Aff. ¶ 3.

[38] Ex. D, A. Irving Aff. ¶ 3.

[39] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; [redacted] Ex. 26, ETP GD16 Transport tab "AE7860" *see* rows 430-432 (EPO_00031483); Ex. C-4, Monthly Activity Feb21 West Texas Map Point, at CPSE-MDL_000025855-25856. The upstream contract identified by Ms. Brown as 7860ITSA is an interruptible gas transportation agreement between Enterprise and Enterprise Pipeline. Ex. A--27, Interruptible Gas Transportation Agreement for Intrastate Service No. 7860ITSA (EPO_00022626-22627).

B. Enterprise breaches its Firm delivery obligation.

16. Notwithstanding its Firm delivery obligations to CPS Energy, Enterprise failed to deliver the total daily quantity required under Deal 503805 beginning on February 14, 2021.[40] Pursuant to the instructions provided by Enterprise's scheduler, CPS Energy nominated 7,800 MMBtus of natural gas referencing upstream contract number 5939ITSA as part of the allocation on Deal 503805.[41] Out of the 7,800 MMBtus that were nominated only 526 MMBtus were delivered.[42] As a result, Enterprise shorted CPS Energy 7,274 MMBtus on February 14, 2021.[43]

17. Enterprise claims that it gave CPS Energy oral notice of Force Majeure on February 14, 2021, due to the fact that CPS Energy employee's email states "[Enterprise] also notified us that they are experiencing freeze offs and are concerned about their ability to supply the gas."[44] Enterprise does not include Mr. Skaer's response that "[Enterprise] said he should supply his gas today, but it's Monday and Tuesday that he is concerned about. He said that the gas may be limited to human need or something like that. I said that our gas is for human need and he acknowledged that and seemed to indicate that we would have priority in some way."[45] Enterprise further neglects to mention that it was Mr. Skaer who initially reached out to Enterprise on February 14,

[40] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922; [redacted]

[41] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; Ex. C-5, Scheduled Quantities for Service Requesters Report, dated February 14, 2021, at CPSE-MDL_000002504 (CPSE-MDL_000002504-2505); Ex. A-29, Enterprise Nomination Download for February 14, 2021 (EPO_00109003-109038), at EPO_00109010-109011; [redacted]

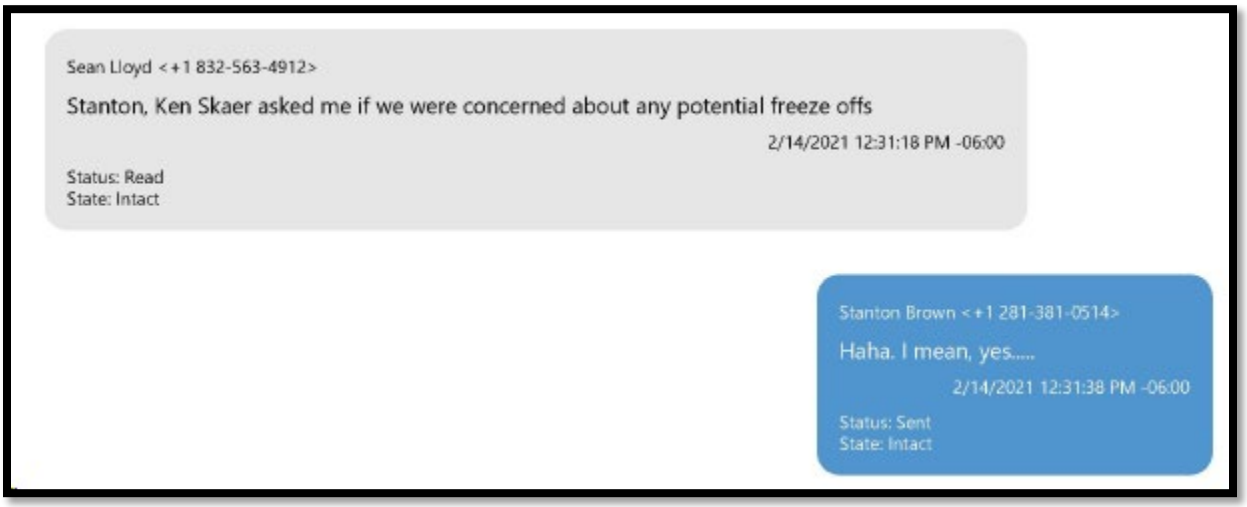
[42] Ex. C- 5, Scheduled Quantities for Service Requesters Report, dated February 14, 2021, at CPSE-MDL_00002504; Ex. A-32, CPS Energy Cut Report for February 14, 2021 (EPO_00095276-95287), at EPO_00095284 [redacted]

[43] *Id*, *see also* Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922.

[44] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 5-6; Ex. C-6, Gas Supply Update for Kevin Email, dated February 14, 2021. (CPSE-MDL_000002394).

[45] Ex. C-7, RE: Gas Supply Update for Kevin Email, dated February 22, 2021 (CPSE-MDL_000031106).

inquiring, "Are you concerned about potential freeze offs[?]"[46] This is likely because Enterprise's gas traders' initial reaction was to chuckle at the inquiry:[47]



18. None of these correspondences indicate that Enterprise was prevented from delivery due to an event or occurrence of Force Majeure; rather, they indicate that Enterprise intended to prioritize CPS Energy in the face of any hurdles. Enterprise failed to do so.

19. Enterprise also failed to meet its Firm delivery obligations on February 15, 2021. CPS Energy, again following Enterprise's instructions, nominated 23,800 MMBtus of natural gas referencing upstream contract number 10109FTSA and 12,000 MMBtus referencing upstream contract number 7860ITSA.[48] None of the 23,800 MMBtus of natural gas nominated was delivered

[46] Ex. C-8, Text (Skaer | Lloyd), dated February 14, 2021 (CPSE-MDL_000010290).

[47] Ex. A-33, Enterprise Group Text, dated February 14, 2021, at EPO_00007564.

[48] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; *see also* timestamp 02/15/2021 09:55:51—02/15/2021 09:58:36 at CPSE-MDL_000009327 referring to a change in the splits for February 15, 2021; Ex. C-9, Scheduled Quantities for Service Requesters Report, dated February 15, 2021 (CPSE-MDL_000002910-2912), at CPSE-MDL_000002911; Ex. A-30, Enterprise Nomination Download for February 15, 2021 (EPO_00109039-109073), at EPO_00109046; [redacted]

to CPS Energy.[49] Only 4,108 MMBtus of the 12,000 that were nominated were delivered.[50] As a result, Enterprise shorted CPS Energy 31,692 MMBtus on February 15, 2021.[51]

20. On February 16, 2021, Enterprise's scheduler specifically asked CPS Energy if it was curtailed over the weekend.[52] CPS Energy relayed the curtailments from February 14 and 15, 2021.[53] Enterprise did not explain the curtailments and did not declare Force Majeure.[54] In fact, Enterprise's curtailments continued on February 16, 2021. Pursuant to Enterprise's direction, CPS Energy nominated (1) 17,200 MMBtus of natural gas referencing upstream contract 10109FTSA, (2) 7,800 MMBtus referencing upstream contract 5939ITSA, and (3) 12,000 MMBtus referencing upstream contract 7860ITSA.[55] None of the 17,200 MMBtus of natural gas nominated was delivered to CPS Energy.[56] Only 526 MMBtus of the 7,800 nomination and only 4,108 MMBtus of the 12,000 nomination were delivered to CPS Energy.[57] As a result, Enterprise shorted CPS Energy 32,892 MMBtus on February 16, 2021.[58]

---

[49] Ex. C-9, Scheduled Quantities for Service Requesters Report, dated February 15, 2021, at CPSE-MDL_000002911; Ex. A-35, CPS Energy Cut Report for February 15, 2021 (EPO_00095314-95331), at EPO_00095327; [redacted]

[50] *Id*.

[51] *Id*, *see also* Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922.

[52] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/16/2021 12:50:38—02/16/2021 16:18:16, at CPSE-MDL_000009328.

[53] *Id*.

[54] *Id*.

[55] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; Ex. C-10, Scheduled Quantities for Service Requesters Report, dated February 16, 2021 (CPSE-MDL_000003232-3234), at CPSE-MDL_000003233; Ex. A-36, Enterprise Nomination Download for February 16, 2021 (EPO_00109074-109105), at EPO_00109080; [redacted]

[56] Ex. C-10, Scheduled Quantities for Service Requesters Report, dated February 16, 2021, at CPSE-MDL_000003233; Ex. A-38, CPS Energy Cut Report for February 16, 2021 (EPO_00095370-95397), at EPO_00095393; [redacted]

[57] *Id*.

[58] *Id*, *see also* Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922.

21. In summation, Enterprise curtailed CPS Energy on Deal 503805 as follows:[59]

Deal 503805			
Delivery Date:	**Purchased Qty (MMBtus):**	**Delivered Qty (MMBtus):**	**Undelivered Qty (MMBtus):**
February 13, 2021	40,000	40,000	0
February 14, 2021	40,000	32,726	7,274
February 15, 2021	40,000	8,308	31,692
February 16, 2021	40,000	7,108	32,892
TOTAL:	**160,000**	**88,142**	**71,858**

22. As a result of Enterprise's curtailments, CPS Energy had to use commercially reasonable efforts to obtain natural gas to cover Enterprise's shortfalls, which required CPS Energy to incur higher natural gas costs than it would had Enterprise delivered.[60] The first cover transaction was the purchase of gas in connection with a daily imbalance charge that resulted from CPS Energy's overpull of natural gas volumes on the Houston Pipeline.[61] The second cover transaction was an intraday purchase from Enterprise.[62] The third cover transaction is reflected in the Transaction Confirmation identified as Deal #8608010 with [redacted].[63]

[59] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922.

[60] [redacted]; Ex. C, K. Pollo Aff. at ¶ 4.

[61] *Id*; *see also* Ex. C-15, Houston Pipeline Company Invoice ("HPL Invoice") No. H022021768906, dated March 26, 2021 (CPSE-MDL_000012561-12598), at CPSE-MDL_000012571.

[62] [redacted]; Ex. C-11, Enterprise Transaction Confirmation with CPS Energy, Deal #503910, dated February 16, 2021 (CPSE-MDL_000006364).

[63] [redacted]

23. On February 22, 2021, over a week after CPS Energy suffered Enterprise's curtailments, Enterprise issued a letter to CPS Energy stating that it "**may be** required to partially suspend its performance under the Agreement(s) due to an event of Force Majeure."[64] Enterprise's untimely, vague "Force Majeure" letter does not constitute a valid declaration of Force Majeure. Nor does any purported oral notice invoke the Base Contract's Force Majeure protections.[65]

24. [redacted].[66] [redacted].[67] [redacted].[69]

IV. SUMMARY JUDGMENT EVIDENCE

25. To support the facts in this Response, CPS Energy offers the following summary judgment evidence attached to this Response, and incorporates the evidence into this Response by reference:

[redacted]

[64] Ex. C-14, the Enterprise Letter to CPS Energy, dated February 22, 2021 (CPSE-MDL_000000555). (emphasis added); Ex. A-4, J. Kleiderer Dep. at 195:3-12.

[65] Ex. C-1, the Base Contract § 11.5.

[66] [redacted]

[67] [redacted]

[68] [redacted].

[69] [redacted]

EXHIBIT	DESCRIPTION
A	**Affidavit of Lauren A. Valkenaar and Attached Exhibits A-1 through A-47**
B	**Affidavit of Seabron C. Adamson, Jr. and Attached Exhibits B-1 and B-2**
C	**Affidavit of Kevin Pollo and Attached Exhibits C-1 through C-16**
D	**Affidavit of Amber Irving and Attached Exhibits D-1 and D-2**
E	**Declaration of David Shank and Attached Exhibit E-1**

V. RESPONSE TO NO-EVIDENCE AND TRADITIONAL SUMMARY JUDGMENT ON CPS ENERGY'S CAUSE OF ACTION FOR BREACH OF CONTRACT

A. No-evidence summary judgment standard.

26. When a party moves for summary judgment on both traditional and no-evidence grounds, the Court must consider the no-evidence ground first because if the non-movant fails to produce legally sufficient evidence to meet its burden as to the no-evidence motion than there is no need to analyze whether the movant satisfied its burden under the traditional motion. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). A no-evidence motion for summary judgment is permitted after an adequate time for discovery and challenges the non-movant to produce evidence in support of one or more elements of a cause of action on which it has the burden of proof at trial. TEX. R. CIV. P. 166a(i). The non-movant is not required to marshal its proof to avoid a no-evidence summary judgment; rather, it must only point out evidence that raises a fact issue on the elements challenged by the movant. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008); *see* TEX. R. CIV. P. 166a(i); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014).

27. To raise a genuine issue of material fact, the non-movant must present more than a scintilla of evidence in support of the challenged elements. *Smith v. O'Donnel*, 288 S.W.3d 417, 424 (Tex. 2009); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *see Boerjan*, 436

S.W.3d at 312. Evidence constitutes more than a scintilla if it is sufficient to cause reasonable and fair-minded jurors to differ as to the existence of a challenged fact. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); *see First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). When evaluating whether there is more than a scintilla of evidence, the Court must view the evidence in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Boerjan*, 436 S.W.3d at 311–12; *Timpte Indus. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

28. Enterprise alleges that there is no evidence supporting essential elements of CPS Energy's cause of action for breach of contract.[70] The elements required to succeed on a cause of action for breach of contract are: (1) the existence of a valid contract; (2) that the claimant performed or tendered performance; (3) that the non-performing party breached the contract; and (4) that the claimant was damaged as a result of the breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019). Enterprise contends that there is no evidence to support (A) that it breached the Base Contract and Deal 503805, and (B) that CPS Energy suffered damages as a result of Enterprise's breach.[71] The Court should deny Enterprise's no-evidence motion for summary judgment because CPS Energy has presented sufficient evidence to raise a fact issue on the elements Enterprise challenges.

B. Traditional summary judgment standard.

29. A movant is entitled to summary judgment if it can prove its affirmative defense as a matter of law. *See Draughon v. Johnson*, 631 S.W.3d 81, 88 (Tex. 2021). To meet its burden,

[70] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 8–22.

[71] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 8–22.

Enterprise must show there is no genuine issue of material fact on any element of its affirmative defense. TEX. R. CIV. P. 166a(c). In Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims, Enterprise asserts the affirmative defenses of Force Majeure and waiver to CPS Energy's cause of action for breach of contract. The Court should deny Enterprise's traditional motion for summary judgment because the undisputed facts in this case, and Enterprise's summary judgment evidence fail to conclusively establish each essential element of Force Majeure and waiver.

C. CPS Energy has sufficient competent summary judgment evidence to raise fact issues concerning Enterprise's breach of contract.[72]

30. Although Enterprise alleges, "there is no evidence that Enterprise breached the contract[,]" Enterprise appears to concede its failure to perform and brief its affirmative defense of force majeure by unpersuasively arguing that "any under-deliveries of gas by Enterprise on February 14-16 were contractually excused."[73] This is likely because Enterprise knows the evidence not only raises a fact issue but conclusively establishes Enterprise's breach. Indeed, Enterprise implicitly concedes that it failed to perform, acknowledging it had to adjust its invoice to remove volumes of natural gas that it *never* delivered to CPS Energy.[74] Although presented as a "no-evidence" point, Enterprise's argument is more akin to an argument for traditional summary judgment. Out of an abundance of caution, CPS Energy will address this "no-evidence" argument.

i. <u>There is competent summary judgment evidence of Enterprise's breach of contract.</u>

31. The occurrence of a breach is one of the essential elements of breach of contract claim. *Pathfinder Oil & Gas, Inc.*, 574 S.W.3d at 890. When a party fails to perform as promised,

---

[72] *Id* at p. 6 § E.

[73] *Compare* Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 8 § II *with* p. 14.

[74] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 6 § E.

a breach occurs. *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). It is the court's role to determine the requirements of the parties to a contract and, to the extent the parties dispute the failure to perform, disputed fact questions are submitted to the jury; however, if the facts are not disputed or are conclusively established the judge alone will determine if a breach occurred. *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

32. It is undisputed that Enterprise agreed to deliver 40,000 MMBtus of natural gas to CPS Energy—on a Firm basis—each day from February 13-16, 2021, for a total of 160,000 MMBtus pursuant to Deal #503805.[75] [redacted][76] CPS Energy's Transaction Confirmation identified as CPS Trade #62074 corresponds to Deal 503805.[77] [redacted][78]

33. Despite Enterprise's Firm delivery obligation, it cut the gas it made a Firm promise to deliver under Deal 503805 from February 14-16, 2021.[79] Out of the 160,000 MMBtus of natural

[75] Ex. A-12, ICE Chat (Skaer | Lloyd) *see* timestamp 02/12/2021 07:59:26—02/12/2021 08:05:22, at EPO_00000004 (EPO Dep. Ex. 69); Ex. A-20, Enterprise Deal #503805; [redacted] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 4.

[76] [redacted]

[77] Ex. A-13, CPS Trade 62074 dated February 12, 2021 (EPO_00009382, EPO Dep. Ex. 71); [redacted]

[78] [redacted]

[79] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922; Ex. C-5, Scheduled Quantities for Service Requesters Report, dated February 14, 2021, at CPSE-MDL_000002504; Ex. A-32, CPS Energy Cut Report for February 14, 2021, at EPO_00095284; [redacted] Ex. C-9, Scheduled Quantities for Service Requesters Report, dated February 15, 2021, at CPSE-MDL_000002911; Ex. A-35, CPS Energy Cut Report for February 15, 2021, at EPO_00095327; [redacted] Ex. C-10, Scheduled Quantities for Service Requesters Report, dated February 16, 2021, at CPSE-MDL_000003233; Ex. A-38, CPS

gas Enterprise was to deliver to CPS Energy under Deal 503805, 71,332 MMBtus were curtailed.[80] On February 14, 2021, 32,726 MMBtus were delivered to CPS Energy under Deal 503805.[81] On February 15, 2021, only 8,308 MMBtus of natural gas were delivered to CPS Energy under Deal 503805.[82] Then, on February 16, 2021, a mere 7,108 MMBtus were delivered to CPS Energy under Deal 503806.[83]

34. CPS Energy presents summary judgment evidence that not only raises fact issues as to whether Enterprise breached the Base Contract, but that also conclusively establishes that there are no disputed issues of material fact as to Enterprise's breach of its Firm delivery obligation. There simply is no question that Enterprise failed to satisfy its Firm delivery obligation. For these reasons the Court should deny Enterprise's no-evidence motion for summary judgment.

ii. <u>Summary Judgment Evidence establishes that Force Majeure does not excuse Enterprise's breach of contract.</u>

35. A movant is entitled to summary judgment on if it can prove its affirmative defense as a matter of law. *See Draughon*, 631 S.W.3d at 88. To meet its burden, Enterprise must show there is no genuine issue of material fact on any element of its affirmative defense. TEX. R. CIV. P. 166a(c). Whether Force Majeure has been triggered to excuse a party's firm delivery obligation

---

Energy Cut Report for February 16, 2021, at EPO_00095393; [redacted]

[80] [redacted] *see also* [redacted].

[81] [redacted] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922; [redacted].

[82] [redacted] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922; [redacted]

[83] [redacted] Ex. C-3, Enterprise Invoice No. 432242, at CPSE-MDL_000058922; [redacted]

depends on the specific terms of the contract. *Point Energy Partners Permian, LLC v. MRC Permian Co.*, 669 S.W.3d 796, 806-07 (Tex. 2023). The scope and application of Force Majeure is "utterly dependent upon the terms of the contract." *Sun Operating P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied). Force Majeure provisions are construed by their own terms. *Point Energy Partners Permian, LLC*, 669 S.W.3d at 806-07.

36. The Base Contract's Force Majeure provisions set out four conditions that must be met for an obligation to be excused by Force Majeure: (1) the occurrence of a qualifying event of Force Majeure;[84] (2) the non-performing party has been prevented from delivering for reasons of the event of Force Majeure;[85] (3) the non-performing party made reasonable efforts to avoid the effects of the Force Majeure event;[86] and (4) the non-performing party provided written notice with reasonably full particulars of the event or occurrence of Force Majeure as soon as reasonably possible.[87]

37. Enterprise focuses on Section 11.2 of the Base Contract, which provides, "Force Majeure shall include…(ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe."[88] However, Courts must construe a contract to effectuate the parties' intentions "as expressed in the writing." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex. 2012). The Court must examine the entire Base Contract to harmonize and give effect to all of its terms and to avoid

[84] Ex. C-1, the Base Contract §§ 11.2 and 11.3.

[85] Ex. C-1, the Base Contract §§ 2.17 and 11.1; [redacted]

[86] Ex. C-1, the Base Contract § 11.2.

[87] Ex. C-1, the Base Contract § 11.5.

[88] Ex. C-1, the Base Contract § 11.2; Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 9-10.

rewriting the provisions or interpreting them in a manner that conflicts with the parties' intent. *Allegiance Hillview, L.P. v. Range Tex. Prod.*, LLC, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.). Where a contract's terms are "plain, definite, and unambiguous" the court shall enforce them as written without varying the terms. *In re Davenport*, 522 S.W.3d 452, 456–58 (Tex. 2017). Since the Base Contract's Force Majeure provisions are neither uncertain and doubtful nor susceptible to multiple definitions, they are not ambiguous. *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234, 257 (Tex. 2023).

a. Enterprise failed to provide CPS Energy with written notice containing reasonably full particulars as soon as reasonably possible. [89]

38. Whether Force Majeure has been triggered to excuse a party's firm delivery obligation depends on the specific terms of the contract. *Point Energy Partners Permian, LLC*, 669 S.W.3d at 805-07. When Enterprise's performance is affected by Force Majeure, the Base Contract requires it to deliver written notice to CPS Energy.[90] Specifically, Enterprise must send written notice containing reasonably full particulars "as soon as reasonably possible."[91] Absent written notice, the Base Contract does not allow Force Majeure to excuse a Firm obligation to deliver natural gas.[92]

39. Enterprise argues that its February 22, 2021, letter satisfied the Base Contract's written notice requirement. But Enterprise did not timely send that letter as it came *after the storm*.

---

[89] Enterprise suggests that it provided oral notice on February 14, 2021. However, Enterprise merely responded to CPS Energy's inquiry into whether it had concerns. There is no evidence that Enterprise informed CPS Energy, orally or otherwise, that it may declare Force Majeure before February 22, 2021, let alone that it intended to actually declare Force Majeure. In any event, the issue of whether Enterprise provided oral notice of Force Majeure is of no consequence. The Base Contract unequivocally states that "[u]pon providing written Notice of Force Majeure to the other party, the affected party will be relieved of its obligation." Ex. C-1, Base Contract § 11.5. Accordingly, any oral notice Enterprise provided (it provided none) does not relieve it from its Firm obligation.

[90] Ex. C-1, the Base Contract, at § 11.5.

[91] *Id* (emphasis added).

[92] *Id*.

Moreover, the letter does not assert Force Majeure. Rather it merely says that Enterprise "may be required to partially suspend its performance under the Agreement(s) due to an event of Force Majeure" to argue its compliance with the Base Contract.[93] The letter fails to expressly declare that Enterprise has suspended or will suspend performance because of an event of Force Majeure.[94] The specific terms of the Base Contract render Enterprise's vague letter, which only addresses the potential for suspended deliveries, a failure as a means to meet the simple requirement of providing written notice of Force Majeure. *See Point Energy Partners Permian*, *LLC*, 669 S.W.3d at 806-07; *El Paso Field Servs., L.P.*, 389 S.W.3d at 805; *Allegiance Hillview, L.P.*, 347 S.W.3d at 865.

40. Notwithstanding Enterprise's failure to specifically declare Force Majeure, its letter fails to provide reasonably full particulars of the purported event or occurrence of Force Majeure that allegedly prevented its performance.[95] The Base Contract requires a causal nexus between a purported Force Majeure event and a failure to perform a Firm obligation.[96] Accordingly, a notice of Force Majeure under the Base Contract must include particulars as to what was cut and why.[97] Reasonably full particulars include details explaining why the natural gas cannot be supplied.[98]

41. Although Enterprise's letter references the weather event, it fails to describe any particulars, let alone reasonable ones connecting the purported Force Majeure to Enterprise's alleged inability to perform.[99] Contrary to Enterprise's unsupported assertion, the vague

---

[93] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 10-11; Ex. C-14, the Enterprise Letter; Ex. A-4, J. Kleiderer Dep. at 195:3-25; [redacted]

[94] *Id*.

[95] Ex. C-14, the Enterprise Letter.

[96] Ex. C-1, the Base Contract §§ 2.17 and 11.1; [redacted]

[97] Ex. A-9, S. Adamson Dep. at 174:12-20; 177:23-178:16.

[98] Ex. C-1, the Base Contract § 11.5; Ex. A-9, S. Adamson Dep. at 183:14-23.

[99] Ex. C-15, the Enterprise Letter; [redacted] Ex. A-6, Stephanie Brown Dep. at 111:14-113:15.

conclusion in its letter that "resulting low temperatures have caused freezing and a disruption" does not constitute reasonably full particulars.[100] Enterprise did not identify its agreement with CPS Energy as one of the agreements under which it claimed it may suspend performance.[101] Enterprise did not identify the volume of natural gas it cut or anticipated it would cut under its agreement with CPS Energy due to Force Majeure.[102] Enterprise did not identify which, if any, suppliers were unable to produce natural gas.[103] Enterprise did not identify alternative sources of natural gas that were available to it, nor did it state that there were no such sources.[104] Enterprise did not specify whether pipelines were out of service or why.[105]

42. Enterprise's letter further fails to trigger Force Majeure because it was not provided as soon as reasonably possible.[106] *See Point Energy Partners Permian*, *LLC*, 669 S.W.3d at 806-07; *El Paso Field Servs., L.P.*, 389 S.W.3d at 805; *Allegiance Hillview, L.P.*, 347 S.W.3d at 865. Enterprise argues that since the Base Contract's use of the phrase "as soon as reasonably possible" does not specify a deadline, the law will imply a reasonable time.[107] *Allegiance Hillview, L.P.*, 347 S.W.3d at 869. Reasonableness, however, is determined by considering the underlying facts and circumstances. *Id*. Unnecessary delays never constitute a reasonable time; rather, a reasonable time reflects as much promptness as the circumstances permit. *Vlasak v. Taxco, Inc.*, No. 01-16-00191-CV, 2017 Tex. App. LEXIS 6337, at *19 (Tex. App.—Houston [1st Dist.] July 11, 2017,

---

[100] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 11.

[101] Ex. C-14, the Enterprise Letter; [redacted] Ex. A-6, Stephanie Brown Dep. at 111:14-113:15.

[102] Ex. C-14, the Enterprise Letter; [redacted] Ex. A-6, Stephanie Brown Dep. at 111:14-113:15.

[103] Ex. C-14, the Enterprise Letter; [redacted]

[104] Ex. C-14, the Enterprise Letter; [redacted]

[105] Ex. C-14, the Enterprise Letter; [redacted]

[106] Ex. C-1, the Base Contract at § 11.5.

[107] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 12.

pet. denied); *Chen v. Parkwood Creek Owner's Ass'n*, No. 05-10-01511-CV, 2012 Tex. App. LEXIS 7347, at *10 n.4 (Tex. App.—Dallas Aug. 30, 2012, no pet.).

43. Enterprise's letter was sent to CPS Energy ***days after*** the ice had thawed.[108] Enterprise was aware of cuts from its upstream suppliers on Deal No. 503805 as early as February 14, 2021, and received written notice on February 15, 2021, but never notified CPS Energy.[109] CPS Energy also provided Enterprise with information concerning the magnitude of some of the curtailments on February 16, 2021.[110] Enterprise chose not to invoke Force Majeure at that time (or at any other time). Moreover, Enterprise was also an identified upstream supplier for Deal 503805, and there is no reason for its delay in declaring Force Majeure concerning these curtailments if Enterprise did, in fact, intend to declare Force Majeure.[111] Despite Enterprise's knowledge that CPS Energy had been curtailed, it did not promptly notify CPS Energy causing an unnecessary delay under the circumstances. *See Allegiance Hillview, L.P.*, 347 S.W.3d at 869; *Vlasak*, 2017 Tex. App. LEXIS 6337, at *19; *Chen*, 2012 Tex. App. LEXIS 7347, at *10 n.4.

44. To satisfy the Base Contract's Force Majeure provisions, Enterprise was required to provide CPS Energy written notice containing reasonably full particulars as soon as reasonably possible.[112] *See Point Energy Partners Permian*, *LLC*, 669 S.W.3d at 806-07; *El Paso Field Servs., L.P.*, 389 S.W.3d at 805; *Allegiance Hillview, L.P.*, 347 S.W.3d at 865. CPS Energy has

---

[108] Ex. C-14, the Enterprise Letter.

[109] [redacted]; Ex. A-39, Chevron Letter to Enterprise Re; Notice of Force Majeure, dated February 15, 2021 (EPO_00007937).

[110] Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* time stamp 02/16/2021 12:50:55-21:51:37, at CPSE-MDL_000009328.

[111] Ex. A-35, CPS Energy Cut Report for February 15, 2021, at EPO_00095327; Ex. A-38, CPS Energy Cut Report for February 16, 2021, at EPO_00095393; [redacted]; Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* time stamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; [redacted]

[112] Ex. C-1, the Base Contract at § 11.5.

presented sufficient competent summary judgment evidence not only raising a material issue of fact concerning Enterprise's failure to provide written notice of a purported Force Majeure containing reasonably full particulars as soon as reasonably possible, but also conclusively establishing that Enterprise failed to provide written notice (1) containing reasonably full particulars and (2) as soon as reasonably possible. *See Allegiance Hillview, L.P.*, 347 S.W.3d at 869; *Vlasak*, 2017 Tex. App. LEXIS 6337, at *19; *Chen*, 2012 Tex. App. LEXIS 7347, at *10 n.4.

b. The purported Force Majeure event did not prevent Enterprise from performing its firm delivery obligation.

45. While the Base Contract defines Force Majeure events to include weather related events that affect an entire geographic region, it also requires a causal nexus between such a Force Majeure event and a failure to perform a Firm obligation to excuse liability.[113] A Firm obligation is specifically defined to "mean that either party may interrupt its performance ***without liability only to the extent that such performance is prevented for reasons of Force Majeure***."[114] The Base Contract's Force Majeure provisions reiterate this sentiment, providing that "neither party shall be liable to the other for failure to perform a Firm obligation, ***to the extent such failure was caused by Force Majeure***.[115] Accordingly, to be relieved of liability, Enterprise must establish that it was ***prevented*** by reasons of Force Majeure from delivering total Firm quantities of natural gas. *See Oklahoma v. BP Energy Co.*, 642 F. Supp. 3d 802, 804 (W.D. Ark. 2022) (applying Texas law).

[113] Ex. C-1, the Base Contract §§ 2.17 and 11.1; [redacted]

[114] Ex. C-1, the Base Contract § 2.17 (emphasis added).

[115] Ex. C-1, the Base Contract § 11.1 (emphasis added).

46. Enterprise would have the Court believe that under the Base Contract's Force Majeure Provisions, the mere existence of Winter Storm Uri relieved Enterprise of any liability.[116] This is likely because Enterprise cannot credibly argue that it was actually prevented from delivering natural gas to CPS Energy during the curtailment period. In fact, Enterprise claims that [redacted][117] The fact is that Enterprise could have delivered natural gas to CPS Energy from its other available sources but chose not to do so.[118]

47. Enterprise's attempts to point its finger at its upstream suppliers, but these post-fact excuses fail to establish that Enterprise was prevented from performing. Neither Deal 503805 nor the Base Contract required Enterprise to deliver natural gas originating from a specific source or location.[119] A seller's natural gas supply is not limited to an intended or "earmarked" source of gas with respect to any single transaction; rather, "***'gas supply'… refers to the amount or quantity of gas… available to satisfy [the purchaser's] contractual demands.***" *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 407 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (emphasis added) (interpreting the 2003 version of the North American Energy Standards Board Base Contract for Sale and Purchase of Natural Gas ("**NAESB Contract**")).

48. In determining the amount or quantity of gas available to satisfy the buyer's contractual demands, one party's assumption about the source of supply—and the other party's knowledge of that assumption—is not enough to excuse performance ***if alternative sources of supply are still available*** to fulfill the contract." *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De*

---

[116] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 9-10.

[117] [redacted].

[118] [redacted].

[119] Ex. A-20, Enterprise Deal #503805; Ex. C-1, the Base Contract.

Nemours & Co., 118 S.W.3d 60, 68 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (emphasis added). Courts have held that Force Majeure is not available to excuse a seller's performance under a the NAESB Contract where the seller is free to use alternative sources or purchase from the spot market to satisfy its contractual obligations.[120] *Hess Corp. v. ENI Petroleum US, LLC*, 435 N.J. Super. 39, 48, 86 A.3d 723, 728 (App. Div. 2014). Enterprise's reading of the Base Contract is contrary to how Texas courts view Firm delivery obligations. *See Tractebel Energy Mktg.*, 118 S.W.3d at 68; *Va. Power Energy Mktg., Inc.*, 297 S.W.3d at 407.

49. Enterprise had numerous alternative available supplies.[121] For instance, Enterprise purchased natural gas from [redacted].[122] In fact, Enterprise employees repeatedly expressed throughout the storm that Enterprise had an abundance of natural gas at its disposal.[123]

50. Another source available to Enterprise was its storage.[124] On February 16, 2021, [redacted][125] [redacted]

[120] Not all of the gas Enterprise earmarked for use to satisfy its Firm obligation to CPS Energy was sourced from Enterprise's preexisting Chevron purchase. Enterprise's scheduler instructed CPS Energy to nominate 12,000 MMBtus on Enterprise's upstream contract 7860ITSA on each day of the delivery period for a total 48,000 MMBtus over the span of the delivery period. Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:19:42—02/12/2021 10:22:46, at CPSE-MDL_000009326-9327; *see also* timestamp 02/15/2021 09:55:51—02/15/2021 09:58:36, at CPSE-MDL_000009327.

[121] [redacted]

[122] [redacted]

[123] Ex. A-40, Enterprise Group Text, dated February 17, 2021, at EPO_00035742-35743; [redacted] Ex. A-48, Text (Stanton Brown | T. Lawrence) at EPO_00008755 *see* timestamp 2/14/2021 10:51:58 AM (EPO_00008754-8757); Ex. A-49, ICE Chat (Stanton Brown | J. Riley) see timestamp 2021-02-17 13:33:23 (EPO_00008316).

[124] [redacted]

[125] [redacted]

[redacted].[126] [redacted]

[redacted].[127]

51. Another possibility for Enterprise would have been to deliver natural gas to CPS Energy at [redacted].[128] This is further evidenced by the fact that Enterprise entered new interruptible sales—including a higher priced transaction with CPS Energy—for delivery at South Texas Map Point during the curtailment period.[129] These sales included a $200/MMBtu Transaction Confirmation with CPS Energy—a higher priced deal for which Enterprise delivered the total volume of natural gas.[130] Enterprise, however, did not use any of its multiple available sources of natural gas to deliver the total Firm quantities due to CPS Energy under Deal 503805.

52. Regardless of whether Winter Storm Uri was a Force Majeure event as defined by Section 11.2 of the Base Contract, Enterprise is not entitled to the Base Contract's protections of Force Majeure because it was not prevented from performing.[131] *Tractebel Energy Mktg.*, 118 S.W.3d at 68; *Va. Power Energy Mktg., Inc.*, 297 S.W.3d at 407. CPS Energy has presented sufficient competent summary judgment evidence not only raising a material issue of fact

---

[126] [redacted].

[127] [redacted].

[128] [redacted]

[129] [redacted] and Ex. C-11, Enterprise Deal #503910; *See* [redacted].

[130] Ex. C-11, Enterprise Deal #503910.

[131] [redacted] Ex. A-40, Enterprise Group Text, dated February 17, 2021, at EPO_00035742-35743.

concerning Enterprise's ability to perform, but also conclusively establishing that Enterprise was not prevented from performing due to the purported Force Majeure event. This alone is a fatal flaw to Enterprise's defense; however, it is not the only flaw.

c. Enterprise failed to make reasonable efforts to avoid the effects of the purported Force Majeure Event.

53. Although Enterprise focuses on Section 11.2 of the Base Contract, it fails to reference one of its crucial provisions. Enterprise makes no mention of its requirement to use reasonable efforts to avoid the adverse impacts of a Force Majeure event.[132] For the first time in this lawsuit, Enterprise alleges that it had delivery concerns as of February 14, 2021.[133] This new allegation, however, is not supported by the facts.

54. [redacted][134] Enterprise's Executive Vice President of Accounting, Risk Control, and Information Technology testified that "there were concerns that our supply would be disruptive -- disrupted. And as the storm progressed, my -- it was my understanding that we obtained enough supply to keep all of our customers whole."[135] But Enterprise did not keep CPS Energy whole.

55. Enterprise failed to make any reasonable efforts to avoid the adverse impacts of a Force Majeure event as required by the Base Contract.[136] [redacted].[137] [redacted]

[132] Ex. C-1, the Base Contract, at § 11.2.

[133] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 10.

[134] [redacted]

[135] Ex. A-7, D. Boss Dep. at 52:7-16.

[136] Ex. C-1, the Base Contract § 11.2.

[137] [redacted]

[redacted].[138] In other words, gas transported via interruptible service may be interrupted or curtailed if the pipeline needs the capacity for firm customers. [redacted].[139] CPS Energy is not involved in Enterprise's decision-making.

56. Enterprise used its interruptible transport service rather than firm transport service.[140] The volumes nominated on Enterprise's interruptible transport service as part of the delivery under Deal 503805 were cut.[141] Enterprise's decision not to use its firm transport service contracts to deliver natural gas to CPS Energy under Deal 503805 was unreasonable.

57. The Base Contract unequivocally requires Enterprise to use reasonable efforts to avoid the adverse impacts of Force Majeure.[142] Enterprise cannot rewrite the Base Contract's Force Majeure provisions to remove essential elements of its terms. *See Point Energy Partners Permian*, *LLC*, 669 S.W.3d at 806-07; *El Paso Field Servs., L.P.*, 389 S.W.3d at 805; *Allegiance Hillview, L.P.*, 347 S.W.3d at 865. CPS Energy has presented sufficient competent summary judgment evidence not only raising a material issue of fact concerning Enterprise's reasonable efforts, if any, to avoid the adverse effects for Force Majeure, but also conclusively establishing that Enterprise failed to make any reasonable efforts to avoid the adverse effects of Force Majeure.

---

[138] [redacted].

[139] [redacted]

[140] *See* Exs. A-45, D-2, and E-1, ICE Chat (Irving | Stephanie Brown), *see* timestamp 02/12/2021 10:22:46, at CPSE-MDL_000009327; [redacted] Ex. A-27, Interruptible Gas Transportation Agreement for Intrastate Service No. 7860ITSA (EPO_0022626-22627); *see also* Ex. A-28, Exhibit A to Interruptible Contract No. 7860ITSA (EPO_00022299-22323).

[141] [redacted] Ex. A-35, CPS Energy Cut Report for February 15, 2021, at EPO_00095327; Ex. A-38, CPS Energy Cut Report for February 16, 2021, at EPO_00095393; [redacted]

[142] Ex. C-1, the Base Contract, at § 11.2.

iii. CPS Energy did not waive its ability to challenge the sufficiency of Enterprise's letter.

58. A movant is entitled to summary judgment on if it can prove its affirmative defense as a matter of law. *See Draughon*, 631 S.W.3d at 88. To meet its burden, Enterprise must show there is no genuine issue of material fact on any element of its affirmative defense. TEX. R. CIV. P. 166a(c). For a waiver to have occurred, CPS Energy must have intentionally relinquished a known right or otherwise behaved in a manner that is inconsistent with such right; it did not. *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 709 (Tex. 2021). Since waiver predominantly concerns intent, an implied waiver is found only if the party's intentions are clearly demonstrated under the circumstances. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). Courts should find waiver only when the intention to waive is "clear, decisive, and unequivocal." *Shannon v. Mem'l Drive Presbyterian Church United States*, 476 S.W.3d 612, 627 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). When the underlying facts and circumstances are in dispute, waiver is a question of fact. *Eagle Oil & Gas Co.*, 619 S.W.3d at 709.

59. The glaring problem with Enterprise's contention is two-fold. First, CPS Energy has asserted its rights against Enterprise through the filing of this lawsuit.[143] CPS Energy's entire conduct towards Enterprise was consistent with preserving its rights. CPS Energy has asserted affirmative claims related to Enterprise's curtailment and answered a number of discovery responses concerning its position related to the curtailments. Accordingly, CPS Energy has consistently asserted its rights related to the failure of Enterprise to deliver, which cannot be

[143] Ex., A-10, CPS Energy's First Amended Answer and Counterclaim.

reconciled with Enterprise's new claim that CPS Energy somehow has "waived" the rights it has been aggressively pursuing.[144]

60. Second, beyond being inconsistent with the legal requirements, Enterprise's position is particularly flawed considering that its letter purportedly declaring Force Majeure, does not actually say that Enterprise is declaring Force Majeure regarding any of its curtailments to CPS Energy during Winter Storm Uri.[145] The letter Enterprise sent to CPS Energy—after the storm—merely states it "may be required to partially suspend its performance under the Agreement(s) due to an event of Force Majeure."[146]

61. Assuming Enterprise's letter unequivocally declared Force Majeure (it did not) Enterprise, strangely, argues that CPS Energy should have "asked Enterprise for more 'reasonably full particulars' or demanded additional information…"[147] The Base Contract, however, does not require the recipient of a Force Majeure notice to take any specific action or to request additional information it deems necessary to evaluate the validity of the Force Majeure declaration.[148] The Supreme Court of Texas, has established that a party's failure to engage in an action it is not obligated to perform pursuant to the underlying contract does not reflect an inconsistency. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 485 (Tex. 2017). Courts may not "superimpose additional requirements." *Id* at 486.

62. Enterprise's reliance on *Tenneco*, though its affiliates were parties to the case, is misplaced. In *Tenneco*, the Tenneco parties successfully argued that the Enterprise parties' actions

---

[144] In Texas, parties have four years to bring a claim for breach of contract. TEX. CIV. PRAC. & REM. CODE § 16.004; TEX. BUS. & COM. CODE § 2.725.

[145] Ex. C-14, the Enterprise Letter.

[146] *Id*.

[147] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 13.

[148] Ex. C-1, the Base Contract at §§ 11.1–11.5.

constituted a waiver of certain contractual rights. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). The Tenneco parties did not establish waiver by a mere showing of the Enterprise parties' silence. Rather, the evidence presented in *Tenneco* established that the Enterprise parties made an affirmative decision not to enforce their contractual rights.[149] *Id*. Indeed, when asked whether the Enterprise parties chose not to enforce the operating agreement, the Enterprise parties testified "I think it's correct to say that at that time [we] chose not to do it, yes." *Id*. Here, CPS Energy did not even know Enterprise ultimately decided to declare Force Majeure.[150]

63. The fact that CPS Energy did not present Enterprise with an opportunity to correct its deficient letter, which plainly fails to declare Force Majeure on its face, is not reflective of a clear, decisive, and unequivocal intention to relinquish a known right. *See Eagle Oil & Gas Co.*, 619 S.W.3d at 709; *Jernigan*, 111 S.W.3d at 156; *Shannon*, 476 S.W.3d at 627; *Tenneco Inc.*, 925 S.W.2d at 643–44. This is especially true where Enterprise alleges CPS Energy's inconsistent actions are the failure to engage in conduct that is not required by the Base Contract. *See Shields Ltd. P'ship*, 526 S.W.3d at 485. CPS Energy has presented sufficient competent summary judgment evidence raising a material issue of fact concerning Enterprise's claim that CPS Energy waived its right to challenge the sufficiency of Enterprise's purported declaration of Force

[149] The summary judgment evidence demonstrated: (1) various owners knew Tenneco Oil transferred its ownership interest to Tenneco Natural Gas Liquids; (2) Tenneco Natural Gas Liquids had not executed an agreement in satisfaction of the provision triggered by the operating agreement; (3) Tenneco Natural Gas Liquids was delivering less barrels per day than was required by the triggered provision; (4) the plant owners accepted Tenneco Natural Gas Liquids as a full-fledged fellow owner; (5) the Enterprise parties executed several amendments and ratifications with Tenneco Natural Gas Liquids; and (6) during the three-year period between the date of the first transfer and the filing of the lawsuit, no owner complained about Tenneco Natural Gas Liquid's failure to comply with the triggered provision. *Tenneco Inc.*, 925 S.W.2d at 643.

[150] Ex. C-14, the Enterprise Letter.

Majeure. The Court should therefore deny Enterprise's request for summary judgment on this point.

iv. CPS Energy was prejudiced by the insufficiency and lack of timeliness of Enterprise's letter.

64. Enterprise's next unpersuasive argument is that its breach is excused by Force Majeure despite its unreasonable delay in providing notice to CPS Energy because it alleges CPS Energy was aware of the force majeure event (it was not).[151] Enterprise uses the vague, undefined term "force majeure event" to cast a false premise.[152] Although CPS Energy was aware of the weather conditions in San Antonio and the fact that volumes were not delivered timely, it did not know that Enterprise claimed, or would claim, that its curtailments were excused by Force Majeure.[153] The Base Contract does not require CPS Energy to investigate whether curtailments were the result of a Force Majeure event; rather, the Base Contract requires Enterprise to notify CPS Energy that it is declaring Force Majeure if the purported event prevents Enterprise from fulfilling its Firm delivery.[154]

65. Enterprise claims that CPS Energy was not prejudiced by its unreasonable delay in providing notice of Force Majeure and relies on *Rowan Cos.* and *PAJ, Inc.* for support.[155] In *Rowan Cos.*, the court found that, under the circumstances in the case, the failure to give notice of force majeure did not preclude the invoking party from collecting a penalty under the clause because (1) the force majeure provision did not indicate that it was a condition precedent and (2) the force majeure provision did not impose a sanction for failing to provide written notice. *Rowan*

[151] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 13-14.

[152] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 13.

[153] Ex. D, K. Pollo Aff. at ¶ 5.

[154] Ex. C-1, the Base Contract § 11.5.

[155] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 13.

Cos. v. Transco Expl. Co., 679 S.W.2d 660, 666 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).[156] In *PAJ, Inc.* the court likewise found the notice provision failed to create a condition precedent. *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636 (Tex. 2008). Unlike *Rowan Cos.* and *PAJ, Inc.*, the notice requirement in the Force Majeure provision of the Base Contract is a condition precedent.[157]

66. A condition precedent exists if an event or occurrence must happen or be performed before a right accrues. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). Courts will look to the terms of the contract in determining whether the parties intended to create a condition precedent. *KIT Projects, LLC v. PLT P'ship*, 479 S.W.3d 519, 525-26 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

67. Here, the Base Contract provides "written Notice with reasonably full particulars of the event or occurrence ***is required as soon as reasonably possible***."[158] The Base Contract continues, "***[u]pon providing written Notice*** of Force to the other party, ***the affected party will be relived*** of its obligation."[159] *Rowan Cos.* and *PAJ, Inc.*, have no applicability to this case since the Base Contract's Force Majeure notice provisions are a condition precedent.[160]

68. Enterprise further claims that CPS Energy should have been aware that Enterprise was claiming Force Majeure, because CPS Energy received "similar" notices from other third

---

[156] *Rowan Cos.*is inapposite to this suit. *Rowan Cos.* involved the court's determination of whether the penalty in the repair rate clause or the force majeure clause of a contract controlled. *Rowan Cos.*, 679 S.W.2d at 663–64. Moreover, because Transco brought claims asserting a right to terminate the contract based on the force majeure provisions it could not claim unfair surprise when Rowan Cos. sought to collect a penalty under the same force majeure provisions Transco asked the court to enforce. *Id* at 665. Here, CPS Energy has not reversed its position on the applicability of the Force Majeure provisions in the Base Contract.

[157] Ex. C-1, the Base Contract § 11.5 ("Upon providing written Notice of Force Majeure to [CPS Energy], [Enterprise] will be relieved of its obligation").

[158] Ex. C-1, the Base Contract § 11.5 (emphasis added).

[159] Ex. C-1, the Base Contract § 11.5 (emphasis added).

[160] Ex. C-1, the Base Contract § 11.5.

parties.[161] Unsurprisingly, Enterprise cannot cite to any case law suggesting that it can rely on notices of force majeure provided by other parties to invoke the Base Contract's Force Majeure protection for ***its*** failure to perform.

69. Whether the parties intended to create a condition precedent is generally a question of fact. *R.R. Comm'n of Tex. v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 572-73 (Tex. 2016). CPS Energy has presented sufficient competent summary judgment evidence raising a material issue of fact concerning whether Enterprise's written notice of Force Majeure containing reasonably full particulars as soon as reasonably possible is a condition precedent to invoking the Base Contract's Force Majeure provisions. *See Centex Corp.*, 840 S.W.2d at 956. The Court should therefore deny Enterprise's request for summary judgment on this point.

D. Summary judgment evidence demonstrates fact issues concerning the damages it suffered as a result of Enterprise's breach of contract.

70. Enterprise inaccurately asserts that there is no evidence CPS Energy has suffered injury as a result of Enterprise's breach.[162] Inexplicably, Enterprise asserts that its curtailments saved CPS Energy money.[163] Nothing could be further from the truth.

i. <u>CPS Energy purchased natural gas to cover Enterprise's curtailments.</u>

71. CPS Energy and Enterprise chose the Cover Standard for determining the amount of payment resulting from the breach of a Firm obligation.[164] Under the Cover Standard, when Enterprise's failure to deliver Firm quantities of natural gas is not excused (as it is here), CPS Energy must use commercially reasonable efforts to obtain gas.[165] If CPS Energy obtains gas to

[161] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 14.

[162] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 14-21.

[163] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 14.

[164] Ex. C-1, the Base Contract § 3.2.

[165] Ex. C-1, the Base Contract § 2.10.

replace Enterprise's curtailment (as it did here), it is entitled to the positive difference between the price of the replacement transaction and the curtailed transaction, multiplied by the volume that was curtailed.[166] In the context of Deal 503805, CPS Energy replaced the 71,332 MMBtus of natural gas Enterprise curtailed.

72. Enterprise's conclusory statement that CPS Energy cannot identify replacement transactions is contravened by the competent summary judgment evidence.[167] On February 16, 2021, CPS Energy obtained natural gas via three replacement transactions.[168] First, CPS Energy purchased natural gas from Houston Pipeline as the result of CPS Energy's overpull of natural gas volumes on the Houston Pipeline.[169] Second, was an intraday purchase from Enterprise.[170] Third, is reflected in the Transaction Confirmation identified as Deal #8608010 [redacted].[171] CPS Energy obtained natural gas pursuant to these three cover transactions as a result of Enterprise's curtailments.[172] CPS Energy has presented sufficient competent summary judgment evidence

[166] Ex. C-1, the Base Contract § 3.2.

[167] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 17; [redacted] Ex. A-9, S. Adamson Dep. at 112:2-19; [redacted]

[168] Ex. C-15, HPL Invoice at CPSE-MDL_000012571; Ex. C-11, Enterprise Deal #503910; [redacted]

[169] Ex. C-15, HPL Invoice at CPSE-MDL_000012571; [redacted] Ex. A-9, S. Adamson Dep. at 83:23-84:7; 86:7-15; [redacted]

[170] Ex. C-11, Enterprise Deal #503910; [redacted] Ex. A- 9, S. Adamson Dep. at 66:3-11; [redacted]

[171] [redacted] Ex. A-9, S. Adamson Dep. at 66:3-11; [redacted].

[172] [redacted]; Ex. D.

raising a material issue of fact concerning whether CPS Energy obtained natural gas via replacement transactions. The Court should therefore deny Enterprise's request for summary judgment on this point.

ii. <u>CPS Energy's expert's calculations are consistent with the undisputed evidence, and at a minimum, there is a material fact issue raised as to the amount of damages for which CPS Energy is entitled.</u>

73. CPS Energy's expert, Seabron Adamson ("**Mr. Adamson**") calculates CPS Energy's damages using the three cover transactions identified above. Enterprise challenges Mr. Adamson's inclusion of the natural gas CPS Energy obtained from Houston Pipeline on the basis of its assertion that Section 3.2 of the Base Contract permits CPS Energy to recover of imbalance charges only if it complies with Section 4.3.[173]

74. During Enterprise's curtailment period, CPS Energy took additional gas from the Houston Pipeline to obtain natural gas to meet its human needs demand. The parties had previously negotiated the price Houston Pipeline would charge for the natural gas if an excess volume was taken from the pipeline.[174] However, there is no practical difference in these purchases as both are tools for purchasing more natural gas, which was necessitated by Enterprise's curtailment to CPS Energy. Accordingly, these cashout charges were for the excess volumes of natural gas CPS Energy obtained and purchased from the Houston Pipeline on February 16, 2021.[175] What Enterprise neglects to mention is that Section 3.2 of the Base Contract specifically

[173] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 19.

[174] Ex. C-16, Fourth Amendment to Firm Intrastate Gas Transportation Agreement 97001347, dated July 1, 2018 (CPSE-MDL_000028733-28737), at CPSE-MDL_000028735 ¶ 6.

[175] Ex. C-15, HPL Invoice at CPSE-MDL_000012571.

provides for the adjustment of "commercially reasonable differences in transportation costs."[176] Mr. Adamson's inclusion of Houston Pipeline's cashout assessment is just that.[177]

75. Enterprise then complains that Mr. Adamson did not use the appropriate price for the replacement transactions CPS Energy entered with Enterprise and [redacted].[178] As Enterprise knows, CPS Energy's claim to damages is an alternative pleading.[179] It is pled in the alternative because the extent of CPS Energy's damages is dependent on the Court's ultimate determination regarding the enforceability of the prices Enterprise charged in the transactions that underlie this dispute. If they are not enforceable, then is the amount of offset available to CPS Energy would be diminished. But if those pricing terms are found to be enforceable in any amount greater than what CPS Energy has already paid, then CPS Energy's damages calculation are substantial, and are supported by ample summary judgment evidence.[180] Further, Enterprise disingenuously claims that the evidence shows CPS Energy only paid $38.83/MMBtu to [redacted] for the replacement gas, but the evidence that Enterprise relies on is limited to the invocation of Section 7.4 immediately following Winter Storm Uri with [redacted], the same as occurred with Enterprise.[181]

[redacted].[182]

[176] Ex. C-1, the Base Contract § 3.2.

[177] [redacted]; Ex. C-15, HPL Invoice at CPSE-MDL_000012571.

[178] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 20-21.

[179] Ex. A-11, CPS Energy's Second Amended Answer and Counterclaim.

[180] [redacted].

[181] *See* Motion Ex. 10 at 73:12-74:13 (testifying that he had no "knowledge of the [redacted] transaction"); *see* Ex.A-47; B. Guinn Dep. Transcript at 76:5-23 and Errata of B. Guinn (testifying that "we did not initially pay any supplier more than $38.83 for gas delivered during Winter Storm Uri.").

[182] [redacted].

76. [redacted].[183] [redacted].[184] [redacted].[185] [redacted].[186] [redacted][187] The sheer number of alternative damages models clearly indicate that there is a fact issue concerning the amount of damages that is appropriately determined by the finder of fact.

77. CPS Energy has presented sufficient competent summary judgment evidence raising a material issue of fact concerning whether CPS Energy's expert's calculation of CPS Energy's damages is consistent with the undisputed evidence. The Court should therefore deny Enterprise's request for summary judgment on this point.

E. CPS Energy has sufficient competent summary judgment evidence to raise fact issues concerning Enterprise's claim that CPS Energy waived any right to recover damages.

78. A movant is entitled to summary judgment on if it can prove its affirmative defense as a matter of law. *See Draughon*, 631 S.W.3d at 88. To meet its burden, Enterprise must show there is no genuine issue of material fact on any element of its affirmative defense. TEX. R. CIV. P. 166a(c). Enterprise claims that CPS Energy waived its right to recover damages because it did

[183] [redacted].
[184] [redacted].
[185] [redacted].
[186] [redacted].
[187] [redacted]

not invoice Enterprise for the replacement transactions it executed to cover Enterprise's curtailments.[188] Close examination of the Base Contract, however, reveals that Enterprise misinterprets invoicing under the Cover Standard.

79. Invoices under the Cover Standard are provided for in Section 7.3 of the Base Contract. Section 7.3 unequivocally provides, "[i]n the event payments become due pursuant to [the Cover Standard], the performing party ***may*** submit an invoice to the nonperforming party for an accelerated payment setting forth the basis upon which the invoiced amount was calculated."[189] Both case law and the ordinary meaning of the term "may" indicate permissive authority rather than an obligation. *S. Green Builders, LP v. Cleveland*, 558 S.W.3d 251, 260 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Accordingly, the Base Contract does not require CPS Energy to invoice Enterprise for its replacement transactions.[190]

80. Enterprise ignores Section 7.3, focusing its attention on Section 3.2 instead.[191] The Cover Standard methodology applicable when a performing buyer obtains replacement gas provides for recovery as follows: "in the event of a breach by [Enterprise] on any Day(s), payment by [Enterprise] to [CPS Energy] in an amount equal to the ***positive difference***, if any, between the purchase price paid by [CPS Energy] utilizing the Cover Standard and the Contract Price, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplies by the difference between the Contract Quantity and the quantity actually delivered by [Enterprise] for such days." Where the performing buyer does not obtain replacement gas, which is not applicable here, the Cover Standard provides recovery as follows: "the sole and exclusive

[188] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 21-22.

[189] Ex. C-1, the Base Contract § 7.3 (emphasis added).

[190] Ex. C-1, the Base Contract § 7.3.

[191] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 21-22.

remedy of the performing party shall be any ***unfavorable difference*** between the Contract Price and the Spot Price, adjusted for such transportation to the applicable Delivery Point, multiplied by the difference between the Contract Quantity and the quantity actually delivered."[192] The Cover Standard concludes by stating that "The amount of such ***unfavorable difference*** shall be payable five Business Days after presentation of the performing party's invoice."[193]

81. The Cover Standard's use of the term "***unfavorable difference***" is an unequivocal reference to the calculation provided in romanette (iii) which is inapplicable when, as here, the performing party obtained gas via replacement transactions. Accordingly, the Base Contract does not require a performing buyer, such as CPS Energy, to invoice a non-performing seller, such as Enterprise, when there is a positive difference between the purchase price of the replacement transaction and the contract price of the curtailed transaction.[194]

82. Even if CPS Energy were required to invoice Enterprise for its replacement transactions, it would not make sense to do so at this time. CPS Energy's counterclaim for breach of contract is pled in the alternative. This is because the extent of CPS Energy's damages is dependent on the Court's ultimate determination regarding the enforceability of the prices Enterprise charged in the transactions that underlie this dispute. If the court deems that Enterprise's charges are unenforceable, there will be no need to invoice Enterprise for certain replacement transactions.

[192] Ex. C-1, the Base Contract § 3.2 (emphasis added).

[193] Ex. C-1, the Base Contract § 3.2 (emphasis added).

[194] *See* Ex. C-1, the Base Contract § 3.2.

83. Enterprise also attempts to rewrite Section 7.6 of the Base Contract to include a provision requiring that invoices be submitted within two years of the month natural gas was delivered.[195] As it stands, Section 7.6 provides, in relevant part:[196]

> All invoices and billings shall be conclusively presumed final and accurate and all associated claims for under- or overpayments shall be deemed waived unless such Invoices or billings are objected to in writing, with adequate explanation and/or documentation, within two years after the Month of Gas delivery.

84. The Base Contract's unambiguous language clearly provides a two-year period for invoiced parties to object to the accuracy of invoices that were actually issued.[197] It plainly does not require a party to issue an invoice within two years of the month of gas delivery. Moreover, Enterprise's attempt to rewrite this provision contradicts the exclusive provision of the Base Contract ***permitting*** invoices pursuant to the Cover Standard.[198]

85. CPS Energy has presented sufficient competent summary judgment evidence raising a material issue of fact concerning whether CPS Energy was required to invoice Enterprise for its replacement transactions. The Court should therefore deny Enterprise's request for summary judgment on this point.

VI. RESPONSE TO ENTERPRISE'S TRADITIONAL SUMMARY JUDGMENT ON CPS ENERGY'S DECLATORY JUDGMENT ACTION

86. Enterprise is only entitled to summary judgment on CPS Energy's counterclaims only if it can establish that CPS Energy's pleading affirmatively demonstrates that no cause of action exists. *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 805 (Tex. 1989). If, however, the pleading can be amended to allege a viable cause of action, the Court must first give CPS Energy

[195] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 22.

[196] Ex. C-1, the Base Contract § 7.6.

[197] Ex. C-1, the Base Contract § 7.6.

[198] Ex. C-1, the Base Contract § 7.3.

the opportunity to amend before it can grant summary judgment. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 54–55 (Tex. 2003); *Pietila v. Crites*, 851 S.W.2d 185, 186 n.2 (Tex. 1993). Here, CPS Energy's pleadings already establish viable claims for declaratory judgment and attorneys' fees.[199]

A. Enterprise has failed to establish that CPS Energy's declaratory judgment counterclaim is not viable and there is competent summary judgment evidence creating a material fact issue preventing disposition by summary judgment.

87. The Uniform Declaratory Judgment act provides that "[a] contract may be construed either before or after there have been a breach." TEX. CIV. PRAC. & REM. CODE § 37.004(b). In Texas, parties are generally prohibited from bringing declaratory judgment actions that seek to settle disputes already pending before the court; this is referred to as the mirror-image rule. *McGehee v. Endeavor Acquisitions, LLC*, 603 S.W.3d 515, 529 (Tex. App.—El Paso 2020, no pet.). Enterprise claims that CPS Energy's request for declaratory judgment is in violation of the mirror-image rule.[200] It is not. Declaratory actions do not—as here—violate the mirror-image rule if they present issues beyond what has already been raised. *McGehee*, 603 S.W.3d at 529. Moreover, a declaratory judgment action is distinct from a claim for breach of contract. *Gulshan Enters. v. Zafar, Inc.*, 530 S.W.3d 298, 307 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

88. While the determination of damages under CPS Energy's alternatively pled breach of contract counterclaim is dependent on the ultimate determination of the enforceability of Enterprise's prices, there is a straightforward contract dispute concerning the application of the Base Contract's Force Majeure provisions that CPS Energy's requested declaratory relief will resolve. That dispute—which is a subject of CPS Energy's request for declaratory relief—pertains

[199] Ex. A-11, CPS Energy's Second Amended Answer and Counterclaim.

[200] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims pp. 22-23.

to whether CPS Energy can preserve its contractual right to an offset, using the calculations provided in the provisions of the Base Contract, should the Court make a final determination that CPS Energy must pay additional amounts for the natural gas it acquired from Enterprise in February 2021.[201] This requested declaration not only is clearly distinct from CPS Energy's alternatively pled breach of contract claim, but also clarifies an important contractual right that directly impacts the import and practical effect of CPS Energy's alternatively pled breach of contract counterclaim. TEX. CIV. PRAC. & REM. CODE § 37.002(b); *Gulshan Enters.*, 530 S.W.3d at 307. Since CPS Energy's requested declaratory relief does not violate the mirror-image rule, the Court should deny Enterprise's request for summary judgment on this point.

B. Summary Judgment is inappropriate for CPS Energy's attorneys' fees claim since Enterprise fails to establish as a matter of law that CPS Energy lacks a viable claim for attorneys' fees.

89. Enterprise claims that CPS Energy is not entitled to attorneys' fees under Chapter 37 of the Uniform Declaratory Judgment Act because CPS Energy's requested declaratory relief violates the mirror-image rule.[202] However, CPS Energy's declaratory judgment action does not violate the mirror-image rule. Furthermore, Enterprise's reliance on *MBM Fin. Corp.*, is misplaced. In *MBM Fin. Corp.*, the court found the requested declarations to be duplicative of the issues that were already before the court. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 671 (Tex. 2009). Where a breach of contract claim is not simply re-pled as a

[201] CPS Energy's request for offset and damages also includes a number of underlying fact issues that must first be resolved by a finder of fact. *See* this Response, Section IV B *and* [redacted]; Ex. C- 15, HPL Invoice at CPSE-MDL_000012571; Ex. C-11, Enterprise Deal #503910; [redacted]; Ex. A-9, S. Adamson Dep. at 66:3-11; 83:23-84:7; 86:7-15; 112:2-19; [redacted].

[202] Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims p. 23.

declaratory action attorneys' fees under Chapter 37 are not precluded. *Gulshan Enters.*, 530 S.W.3d at 306–08. Accordingly, CPS Energy is not precluded from recovering attorneys' fees. TEX. CIV. PRAC. & REM. CODE § 37.009; *Gulshan Enters.*, 530 S.W.3d at 306–08.

VII. CONCLUSION & PRAYER

90. For these reasons, CPS Energy respectfully asks the Court to deny Enterprise's Motion for Summary Judgment on CPS Energy's Counterclaims and grant any further relief to which CPS Energy may be entitled.

Dated: March 1, 2024

Respectfully submitted,

/s/Lauren A. Valkenaar

Lauren A. Valkenaar
Texas Bar No. 24088570
Rick H. Rosenblum
Texas Bar No. 17276100
Dylan R. Fedderman
Texas Bar No. 24105851
Megan D. Sturm
Texas Bar No. 24105779
CHASNOFF VALKENAAR PEPPING & STRIBLING, LLP
1020 N.E. Loop 410, Suite 150
San Antonio, Texas 78209
Telephone: 210-469-4155
Facsimile: 210-855-9898
lvalkenaar@chasnoffstribling.com
rrosenblum@chasnoffstribling.com
dfedderman@chasnoffstribling.com
msturm@chasnoffstribling.com

Counsel for Defendant/Counter-Plaintiff CPS Energy

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon all counsel of record in compliance with the Texas Rules of Civil Procedure on March 1, 2024:

DOBROWSKI STAFFORD & PIERCE LLP
4601 Washington Avenue, Suite 300
Houston, Texas 77007
Telephone: (713) 659-2900
Facsimile: (713) 659-2908
Paul J. Dobrowski
Texas Bar No. 05927100
pjd@doblaw.com
Cody W. Stafford
Texas Bar No. 24068238
cstafford@doblaw.com
Thomas Ashton Leon "Tal" DeBauche
Texas Bar No. 24092331
tdebauche@doblaw.com
Jared McHazlett
Texas Bar No. 24118465
jmchazlett@doblaw.com

DAVIS CEDILLO & MENDOZA, INC.
McCombs Plaza, Suite 250
755 E. Mulberry Avenue
San Antonio, Texas 78212
Telephone: (210) 822-6666
Facsimile: (210) 660-3795
Ricardo G. Cedillo
Texas Bar No. 04043600
rcedillo@lawdcm.com

Counsel for Plaintiff/Counter-Defendant Enterprise Products Operating, LLC

YETTER COLEMAN LLP
811 Main Street, Suite 4100,
Houston, Texas 77002
R. Paul Yetter
State Bar No. 22154200
pyetter@yettercoleman.com
Bryce L. Callahan
State Bar No. 24055248
bcallahan@yettercoleman.com
Robert Durham Woods
State Bar No. 24093389
rwoods@yettercoleman.com

JEFFERSON CANO
112 East Pecan Street, Suite 1650
San Antonio, Texas 78205
Telephone: 210-988-1811
Lamont A. Jefferson
State Bar No. 10607800
ljefferson@jeffersonCano.com
Emma Cano
State Bar No. 24036321
ecano@jeffersonCano.com

Counsel for Houston Pipe Line Company, LP and Oasis Pipeline, LP

SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300 Telephone
(512) 495-6399 Facsimile
David D. Shank
Texas Bar No. 24075056
dshank@scottdoug.com
Santosh Aravind
Texas Bar No. 24095052
saravind@scottdoug.com
Cheryl Joseph LaFond
Texas Bar No. 24104015
clafond@scottdoug.com
Lauren Ditty
Texas Bar No. 24116290
lditty@scottdoug.com

Counsel for CPS Energy in litigation against Houston Pipe Line Company, LP and Oasis Pipeline, LP

/s/ Lauren A. Valkenaar
Lauren A Valkenaar