CAUSE NO. 2005-76889

Apache Corp.	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**HARRIS COUNTY, T E X A S**
	§	
Virginia Power Energy Marketing, Inc., et al.	§	**157th JUDICIAL DISTRICT**

Order Granting Motion for Partial Summary Judgment

Plaintiff Apache has moved for partial summary judgment. For the reasons stated in Apache's motion, the motion is granted. This order will discuss some of those reasons.

1. Background

On April 1, 2003, Apache and Virginia Power executed a Base Contract for Sale and Purchase of Natural Gas. This contract was designed to govern future natural gas sales between the parties. At issue in this case are three subsequent contract confirmations. The first transaction confirmation required Apache to deliver 10,000 mmbtu of gas per day in September 2005 at the Tennessee Gas Pipeline 500 pool. The second confirmation was for 10,000 mmbtu of gas per day in October 2005, also to be delivered at the TGP 500 pool. The final confirmation was for 10,000 mmbtu of gas per day in October 2005 to be delivered at the Transco 65 pool. None of the confirmations specified a source for the gas.

In August and September 2005, the Gulf Coast experienced Hurricanes Katrina and Rita. These storms disrupted Apache's ability to produce and deliver gas. As a result, Apache declared force majeure and curtailed deliveries to Virginia Power. This case thus hinges on whether Apache appropriately invoked force majeure and the extent of Apache's obligation to reasonably avoid the adverse impacts of force majeure.

2. The Force Majeure Clause

Section 11 of the Base Contract provides in part:

> 11.1. . . . [N]either party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension. . . ."
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> 11.2. Force Majeure shall include . . . physical events such as acts of God . . . storms or storm warnings, such as hurricanes. . . . Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance.

Virginia Power contends that Apache failed to employ reasonable efforts to avoid the effects of force majeure in at least two ways: Apache could have delivered gas to alternate delivery points and Apache could have found non-equity or other gas to deliver to the agreed upon delivery points.

3. Construction of the Force Majeure Clause

This Court must construe the Force Majeure clause. The threshold question in any contract dispute is whether the contract is ambiguous or unambiguous. Ambiguity is a question of law for the Court to decide. *R&P Enter. v. LaGuarta, Gavrel & Kirk, Inc.,* 596 S.W.2d 517, 518 (Tex. 1980). Courts should determine a contract's ambiguity through analysis of the writing alone, or the four corners of the document. *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131-32 (Tex. App.—Houston [14th Dist.] 2000, pet dism'd). When analyzing a writing to determine ambiguity, courts must apply established rules of interpretation. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951). Courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered

meaningless." *Universal C.I.T. Credit Corp.*, 243 S.W.2d at 157. No single provision, sentence, or clause taken alone will be given controlling effect. *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962).

In this case, the Court finds that the contract is not ambiguous. When construing an unambiguous contract, the court's primary concern is to give effect to the written expression of the parties' intent. *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.,* 925 S.W.2d 565, 574 (Tex.1996). The contract must be considered as a whole and each part of the contract should be given effect because we presume that the parties to a contract intend every clause to have some effect. *Heritage Resources, Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex.1996). As the supreme court stated, "[n]o one phrase, sentence, or section should be isolated from its setting and considered apart from the other provisions." *Forbau v. Aetna Life Ins.* Co., 876 S.W.2d 132, 134 (Tex.1994) (quoting *Guardian Trust Co. v. Bauereisen,* 132 Tex. 396, 121 S.W.2d 579, 583 (1938)). Additionally, controlling effect must be given to specific provisions over general provisions. *Forbau,* 876 S.W.2d at 133-34; *Preferred Risk Mut. Ins. Co. v. Watson,* 937 S.W.2d 148, 149 (Tex. App.-Fort Worth 1997, writ denied).

Virginia Power contends that Apache could have delivered gas at alternative delivery points and Apache's refusal to do so was a failure to "make reasonable efforts to avoid the adverse impacts of a Force Majeure" under § 11.2 of the Base Contract. Apache counters that the "reasonable efforts" provision of § 11.2 does not require it to deviate from the agreed upon delivery points.

There are several problems with Virginia Power's argument. First, Virginia Power's argument is at odds with the express language of the Base Contract. Specifically, § 11.2 requires Apache to make "reasonable efforts . . . to resume performance." Performance means to deliver agreed upon quantities of gas to agreed upon delivery points.

Second, Virginia Power cannot distinguish *Tejas Power Corp. v. Amerada Hess Corp.*, 1999 WL 605550 (Tex. App.—Houston [14th Dist.] 1999, no pet.)(not designated for publication).[1] There, under similar facts, Amerada agreed to sell gas to Tejas but was precluded from doing so for a few days because of frozen wells. Amerada claimed force majeure and litigation ensued. Tejas argued that Amerada could have purchased gas for resale, and therefore did not exercise "due diligence" to prevent or overcome the force majeure. The Court of Appeals disagreed, holding that Tejas' interpretation would mean that a force majeure event would never suspend a party's obligation to deliver gas. "So long as gas could be procured anywhere in the world, at any price, Amerada would be obliged to meet its contractual obligations. . . . We do not find [Tejas'] interpretation of the contract to be reasonable." *Id.* at *3. Like the "reasonable efforts" clause in this case, the *Tejas* contract required the seller to exercise "due diligence." Specifically, force majeure was defined as an act of God "or any other cause of like kind not reasonably within the [seller's] control . . . and which, by the exercise of due diligence of such party, could not have been prevent or is unable to be overcome." *Id.*

In this case, like *Tejas*, Virginia Power's interpretation of "reasonable efforts to avoid the adverse impacts of a Force Majeure" would essentially write the concept of force majeure out of the Base Contract. No act of God or any other interruption would be sufficient to excuse Apache from its delivery obligations. Apache could always deliver gas to Virginia Power somewhere. Under its interpretation, Virginia Power would always be free to argue that Apache was unreasonable in failing to pursue all options to deliver gas to it. This Court finds Virginia Power's interpretation of the contract to be unreasonable.

[1] Although the contract specifies that New York law applies, neither party has sought for the court to apply New York law. In a telephone conference with the parties, both sides agree that the law of New York, with respect to force majeure, is not materially different from Texas.

Virginia Power also argues that Apache was not required to deliver its equity gas to Virginia Power; rather, Apache could have purchased gas from other suppliers and delivered it to Virginia Power at the agreed upon delivery points or elsewhere. Again, Virginia Power's interpretation of the force majeure clause is unreasonable. First, this argument is expressly rejected by *Tejas*. Second, the Base Contract itself provides that Apache is relieved from delivery obligations if there is a "failure of gas supply" caused by a force majeure event. Base Contract, § 11.3(v). Thus, the contract itself appears to foreclose Virginia Power's argument.

Virginia Power's argument under § 2.614 of the Uniform Commercial Code is also unavailing. That section is a gap filler and is supplanted by the express force majeure clause. *InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp*., 719 F.2d 992, 998-1001 (9th Cir. 1984).

4. Conclusion

Apache's motion for partial summary judgment is granted. Apache is not liable for failing to deliver full contract volumes of natural gas to Virginia Power at the TGP 500 pool during September and October 2005 and at the Transco 65 pool during October 2005. Virginia Power was not entitled to withhold payment to Apache as an offset for gas that Apache did not deliver pursuant to the three confirmations at issue in this case. Finally, partial summary judgment should be entered against defendant Dominion Resources, Inc. for breach of its guarantee to Apache.

Signed June 13, 2007.

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Hon. Randy Wilson