Affirmed as Modified and Opinion filed September 13, 2022.

In the

Fourteenth Court of Appeals

NO. 14-21-00048-CV

TARGA CHANNELVIEW LLC, Appellant

V.

VITOL AMERICAS CORP., Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2018-90859

O P I N I O N

In this commercial contract dispute, appellant Targa Channelview LLC appeals the judgment in favor of appellee Vitol Americas Corp. on Vitol's contract and fraud claims. Because the agreement's unambiguous language supports the judgment in Vitol's favor on its breach-of-contract claim, we affirm that portion of the judgment. Vitol does not oppose modification of the contract to eliminate its recovery on its fraud claim. We accordingly modify the judgment to delete the award of damages for fraud, and as modified, we affirm the trial court's judgment.

I. BACKGROUND

This case arises from the December 2015 Agreement between Noble Americas Corp. and Targa Terminals LLC. After entering into the Agreement, Noble was acquired by another company and renamed Vitol Americas Corp. (Vitol), and Targa Terminals assigned its interest to Targa Channelview LLC (Targa). In effect, then, the contract is between Vitol and Targa.

Vitol contracted to deliver crude oil to a "splitter" facility to be built, owned, and operated by Targa. Targa would purchase the crude oil and split it into components such as jet fuel and naphtha, and Vitol would purchase these products. Vitol could terminate the Agreement if, within 27 months after receiving all necessary permits, Targa failed to achieve "Startup," defined as "the sustained processing of Condensate and Crude Oil through the Splitter for five (5) consecutive days, at a rate equal to at least 80 percent (80%) of the Design Capacity." Vitol was to pay Targa approximately $43 million annually for the first seven years of the Agreement's term, with the money paid denominated as the "Noble Account." After Startup, Targa was to begin issuing monthly invoices showing the balance in the Noble Account, the amounts each party owed to the other, and the net result after offsetting these amounts against each other.

The 27-month period for achieving Startup ended in December 2018. Targa failed to achieve Startup by then, and Vitol terminated the Agreement.

By that time, there was over $129 million in the Noble Account, and both parties claimed a right to the money. Targa relied on the Agreement's Commercial Terms and Conditions (CTC) section 3.4, which provided that termination was Vitol's "sole and exclusive remedy for Targa's failure to achieve Startup." Vitol relied on the Agreement's General Terms and Conditions (GTC) sections 19.1 and 19.2, under which Targa's failure to perform a material provision of the Agreement

constituted a default, entitling Vitol to seek damages for its breach and to exercise any of its other rights and remedies at law or in equity. Vitol alleged that the material provision that Targa failed to perform was GTC section 6.2(c), which required Targa to prepare a final invoice at the conclusion of the Agreement's term, and pursuant to that invoice, to remit any remaining balance in the Noble Account to Vitol.

When Targa failed to remit the balance in the Noble Account, Vitol filed this suit. In addition to a breach-of-contract claim, Vitol alleged that Targa fraudulently induced the Agreement and fraudulently misrepresented Targa's dock's capacity.

After a five-week nonjury trial, the trial court ruled in Vitol's favor, awarding it $129,011,400.00 as contract damages and $10,577,774.90 as fraud damages, plus pre-and post-judgment interest and costs. The trial court issued findings of fact and conclusions of law, denied Targa's motion for new trial or for modification of the judgment, and did not respond to Targa's request for additional or amended findings of fact and conclusions of law.

Targa superseded the judgment and brought this appeal. In two issues, Targa separately challenges the judgment on Vitol's contract claim and its fraud claim.

II. VITOL'S CONTRACT CLAIM

When construing a contract, we apply the de novo standard of review. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). Our primary objective is to effectuate the written expression of the parties' intent. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 889 (Tex. 2019). To do so, we "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." *Id.* (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). We do not consider a provision in isolation and give it controlling effect; rather, we

consider each provision in the context of the contract as a whole. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). We give the contract's words their plain, common, or generally accepted meaning unless the contract shows that the parties used words in a technical or different sense. *Id.* Ordinarily, the writing alone is sufficient to express the parties' intentions, "for it is objective, not subjective, intent that controls." *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam) (quoting *City of Pinehurst v. Spooner Addition Water Co*., 432 S.W.2d 515, 518 (Tex. 1968)).

If the contract can be given a definite legal meaning or interpretation, then the contract is not ambiguous, and we will construe it as matter of law. *See El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012) (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am*., 341 S.W.3d 323, 333 (Tex. 2011)). To determine if a contract is ambiguous, we first examine the words the parties chose to use, and considering the business activity to be served, determine whether both proffered interpretations are reasonable. *XCO Prod. Co. v. Jamison*, 194 S.W.3d 622, 628 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). If both interpretations are reasonable, then the contract is ambiguous and the parties' intent is a question of fact. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). But if only one interpretation is reasonable, we will enforce the contract according to its terms. *XCO*, 194 S.W.3d at 628.

A. Targa's Argument That the "Sole and Exclusive Remedy" Provision Allows It to Keep the Money in the Noble Account is Incorrect.

In asserting that it is entitled to keep the money in the Noble Account, Targa relies on CTC section 3.4:

> If Startup shall not have occurred within twenty-seven (27) months from the Permit Date, then [Vitol] may, as its sole and exclusive remedy

> for Targa's failure to achieve Startup, terminate this Agreement upon written notice to Targa without any liability.

Targa's reliance on this provision begs the question of whether the Agreement otherwise provides that Vitol has a right to the money in the Noble Account when the Agreement ends, regardless of whether the Agreement expires by its own terms or by termination. If Vitol has such a right, then Vitol is not seeking a "remedy for Targa's failure to achieve Startup" but instead is seeking a remedy for Targa's breach of the obligation to remit the balance of the Noble Account when the Agreement concluded. Targa's breach of such an obligation then would be governed by GTC sections 19.1(a) and 19.2, on which Vitol relies:

> 19.1 Targa Default: The occurrence of any one or more of the following events shall with respect to Targa shall [sic] constitute a default under this Agreement:
>
> (a) Targa's failure to perform any material provision of this Agreement which failure is not excused by the terms of this Agreement and which continues for more than ninety (90) days after written notice of failure to perform from [Vitol]. . . . .
>
> 19.2 Following the occurrence of any of the foregoing events of default [Vitol] may terminate this Agreement, seek to recover damages for the breach of this Agreement, and exercise any of its other rights and remedies it may have at [l]aw or in equity.

For the reasons set forth below, we conclude that the parties' Agreement unambiguously required Targa, upon termination of the Agreement, to issue a final invoice and remit the balance of the Noble Account to Vitol. Thus, the "sole and exclusive remedy" provision does not bar Vitol's recovery, and Vitol instead is entitled to recover the funds. *See Atrium Med. Ctr., LP v. Houston Red C LLC*, 595 S.W.3d 188, 193 (Tex. 2020) (benefit of the bargain is an available remedy for breach of contract).

B. The Agreement Unambiguously Requires Targa to Remit the Balance of the Noble Account to Vitol upon Termination.

Vitol's breach-of-contract claim relies upon GTC section 6.2(c), which provides as follows:

> *At the conclusion of the Term*, Targa shall remit to [Vitol] the remaining balance of the Noble Account, if any, pursuant to *a final invoice* prepared pursuant to Section 6.2(a).[1]

According to Targa, this provision has not been triggered because there has been no "conclusion of the Term." Targa additionally argues that GTC section 6.2(c) incorporates GTC section 6.2(a), and because 6.2(a) describes the issuance of invoices "[a]fter Startup," section 6.2(c) requires Targa to prepare a final invoice and remit the balance of the Noble Account to Vitol only if the Term concludes after Startup. We address each of these contentions in turn.

1. The termination of the Agreement is included in the expression, "the conclusion of the Term."

"Term" is described in the Agreement's CTC section 3.2:

> The term of this Agreement shall commence on the Effective Date [i.e., December 27, 2015] and shall continue in full force and effect for eighty-four (84) months from Startup (the "Primary Term"). Upon expiration of the Primary Term, unless extended . . . , this Agreement shall automatically expire. [Vitol] may elect to extend the Agreement beyond the Primary Term for up to five (5) successive twelve (12) month periods (each, an "Extension Term" and collectively, the "Extension Terms") by giving written notice to Targa no less than twelve (12) months prior to the expiration date of the Primary Term or the then-current Extension Term (the Primary Term, and Extension Terms, if any, the "Term"). . . . Notwithstanding any expiration or termination of this Agreement, each of the Parties shall remain liable for any unpaid amounts due and owing under this Agreement as of the termination or expiration of the Agreement.

[1] Emphasis added.

Targa argues that the "conclusion of the Term" will never occur because the "Term," which was not extended, expires eighty-four months after Startup, but because Targa failed to achieve Startup, Vitol terminated the contract. Targa reasons that because the Agreement's termination eliminated the possibility that Startup will ever be achieved, a date eighty-four months after Startup can never be reached, and thus, the "conclusion of the Term" will never occur.

But, Targa is reading words out of the contract, for by its plain language, "Term" is defined to describe "[t]he term *of this Agreement*."[2] Because "term" is a characteristic of "this Agreement," it has no independent existence and cannot outlive the Agreement itself. Stated differently, "Term" refers to the Agreement's lifespan, and that lifespan reaches its conclusion not only when it is passively allowed to "expire" on its own, but also when it is actively terminated.

The parties recognized that both were possible outcomes and used the words "expiration" or "termination" as applicable. For example, the parties agreed that, "[n]otwithstanding any expiration or termination of this Agreement, each of the Parties shall remain liable for any unpaid amounts due and owing under this Agreement as of the termination or expiration of the Agreement."

Targa also takes issue with the word, "conclusion." In arguing that the Agreement's Term has never "concluded," Targa implicitly assumes that the Agreement's Term reaches a "conclusion" only when it is allowed to expire naturally. But "conclusion" is not contractually defined, so its common meaning applies. As Vitol points out, the common meaning of "conclusion" includes

[2] Emphasis added.

"termination."[3] The reverse is also true: "termination" is commonly defined to include "conclusion."[4] If the drafters had intended the Term's "conclusion" to mean only its "expiration date" as described in CTC section 3.2, then they presumably would have said so. *See Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 888 (Tex. 2021) ("As a general proposition, using different language in different parts of a contract means the parties intended different things.").

Here, the parties agreed that the balance of the Noble Account would be remitted at the "conclusion" of the Term, and their choice of the word "conclusion" includes both the Term's expiration and its termination. By filling in the contractual meaning of defined terms and the common meaning of undefined terms, it is clear that GTC section 6.2(c)'s language, "[a]t the conclusion of the Term," applies to "the *termination* of the *term of this Agreement*," or more succinctly, "the *termination of this Agreement*." In contrast, adopting Targa's construction of the contract would require us to substitute the word "expiration" for the word "conclusion," which would be an impermissible rewriting of the parties' Agreement. *See Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 311–13 (Tex. 2005) (per curiam). Moreover, under Targa's interpretation, exercising the option to terminate the Agreement "without liability" would cost Vitol over $129 million, for which it would receive no splitter products in return. We do not consider the words "without liability" to be susceptible to such an interpretation.

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[3] *See, e.g.*, COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 503 (Oxford University Press 1971) ("end, close, finish, termination, 'wind up'"); WEBSTER'S THIRD NEW INT'L DICTIONARY (1981) ("the last part of anything: close, termination, end").

[4] *See, e.g.*, *Termination*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The end of something in time or existence; conclusion or discontinuance . . . ."); COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3265 (Oxford University Press 1971) ("End (in time), cessation, close, conclusion"); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1381 (3d ed. 1996) ("The end of something in space or time; limit bound, conclusion, or finish"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1217 (9th ed. 1991) ("end in time or existence: CONCLUSION").

2. Section 6.2(a)'s "after Startup" language applies to monthly invoices, not to a final invoice.

Targa maintains that GTC section 6.2(c) does not apply to situations in which the "conclusion of the Term" occurs before Startup because section 6.2(c) incorporates GTC section 6.2(a), which applies only "[a]fter Startup." Again, we disagree.

GTC sections 6.2(a) and 6.2(c) each begin by unambiguously identifying the condition that triggers that provision. Each provision then tells us *what* Targa is obligated to do upon the occurrence of the triggering condition, and finally, *how* Targa is to perform that obligation.

Section 6.2(a) addresses monthly invoices and provides as follows:

> *After Startup*, . . . on or before the fifteenth (15th) day of each month (or the first Business Day thereafter if the 15th is not a Business Day), Targa shall issue an invoice to [Vitol] showing all amounts owing between the Parties under this Agreement for the preceding month including: (i) the Feedstock Price that Targa owes to [Vitol] for Crude Oil and Condensate purchased by Targa from [Vitol], (ii) the Sale Price for Splitter Products purchased by [Vitol] from Targa, (iii) any Deficiency Fee [Vitol] owes to Targa; (iv) any Monthly Fuel Adjustment; and (v) any other fees, charges, or payments owing hereunder. In addition, each invoice shall show the balance in the Noble Account as of the invoice date. Targa shall net the values of (i), (ii), (iii), (iv), and (v) above (the "Invoice Amount").[5]

Section 6.2(a) is triggered by "Startup." After "Startup" has occurred, Targa is obligated to issue an invoice "each month" not later than the first business day that falls on or after the fifteenth day of that month. As to how Targa is to prepare these monthly invoices, section 6.2(a) provides that invoices must (a) "show[] all amounts

[5] Emphasis added.

owing between the Parties," including five specifically enumerated categories of fees, charges, or payments; (b) "show the balance of the Noble Account as of the invoice date"; and (c) "net the values" of the amounts owed between the parties. It makes sense that the obligation to issue monthly invoices arises only after Startup, because before Startup, each party would not be expected to incur charges owed to the other to offset against each other on a monthly basis. For example, prior to Startup Targa would not have any splitter products to sell to Vitol. Because Vitol could not buy splitter products from Targa, there would be no purchase price to be netted against amounts that Targo owed to Vitol each month.

On the other hand, GTC section 6.2(c) addresses Targa's obligation to issue a final invoice and to remit any remaining balance in the Noble Account when the parties' Agreement concludes. Section 6.2(c) follows the same formulation as section 6.2(a), first identifying the condition that triggers the provision, then stating what the triggering condition obligates Targa to do and how Targa is to perform that obligation:

> *At the conclusion of the Term*, Targa shall remit to [Vitol] the remaining balance of the Noble Account, if any, pursuant to a final invoice prepared pursuant to Section 6.2(a).[6]

This provision is triggered by "the conclusion of the Term," and as we have seen, "the conclusion of the Term" includes "the termination of this Agreement." Upon the occurrence of that condition, Targa is required to remit "the remaining balance of the Noble Account, if any, pursuant to a final invoice."[7] Lastly, this provision tells

[6] Emphasis added.

[7] The common meaning of "final" is "of or coming at the end; last; concluding." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 506 (3d ed. 1996).

us how the final invoice is to be prepared: it is prepared "pursuant to Section 6.2(a)."[8] The common meaning of "pursuant to" is "in accordance with";[9] thus, the final invoice is to be prepared in accordance with section 6.2(a). In other words, the "final invoice" required to be issued at the Agreement's conclusion is prepared in the same manner as the monthly invoices required to be issued "[a]fter Startup." Thus, like post-Startup monthly invoices, the post-termination final invoice must show the amounts the parties owe one another, show the balance of the Noble Account, and net the values of the amounts owed. In this manner, the final invoice allows the parties to determine the remaining balance, if any, of the Noble Account, which is then remitted to Vitol.

Targa maintains, however, that "the entirety of the section 6.2 apparatus deals with a post-Startup situation, not a pre-Startup situation." But this is not so. We have already seen that section 6.2(c) applies before or after Startup, and the same is true of subsections (d) and (e). Subsection (d) states, "In the event that this Agreement is terminated by Targa due to a [Vitol] default th[e]n Targa may apply any balance in the Noble Account towards the Default Payment." The "Default Payment" is a liquidated-damages provision that applies to a Vitol default anytime between the Agreement's effective date of December 27, 2015, and the end of the term—

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[8] *See Certain Underwriters at Lloyd's of London Subscribing to Policy Number: FINFR0901509 v. Cardtronics, Inc.*, 438 S.W.3d 770, 782 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (op. on reh'g) ("Under the 'last antecedent' doctrine, a canon of contract and statutory construction, 'relative and qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote.'" (quoting *Montanye v. Transamerica Ins. Co.*, 638 S.W.2d 518, 521 (Tex. App.—Houston [1st Dist.] 1982, no writ))).

[9] *See, e.g.*, *Pursuant to*, BLACK'S LAW DICTIONARY (11th ed. 2019); COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2368 (Oxford University Press 1971); NEW OXFORD AMERICAN DICTIONARY 1419 (Angus Stevenson & Christine Lindberg eds. 3d ed. 2010); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1092 (3d ed. 1996).

including before Startup. The obligations of subsection (e) similarly apply whether or not Startup has occurred. That provision states,

> Notwithstanding anything herein to the contrary, the Parties agree that [Vitol] is obligated to pay the Annual Payments as set forth in Section 6.1 and Noble may not use any balance in the Noble Account to offset any obligation to pay the Annual Payments as set forth in Section 6.1.

The obligation to make Annual Payments began on October 1, 2016—just ten months into the Term—whereas the deadline to achieve Startup was twenty-seven months after Targa obtained the necessary permits. Thus, GTC sections 6.2(c), (d), and (e) each are unaffected by whether Startup has been achieved.

In sum, Targa 's construction of the Agreement would require us to imply that because Vitol exercised its contractual right to terminate the Agreement for Targa's failure to timely achieve Startup, Targa gets to keep all of the money paid into the Noble Account without ever having supplied any splitter products. Such a right would have to be implied, for the Agreement itself does not say this.[10] But the existence of such an implied right could not be harmonized with the Agreement's express provisions.

We conclude that, under the Agreement's unambiguous express terms, Targa was required, upon Vitol's termination of the Agreement, to prepare a final invoice in the manner described in GTC section 6.2(a), and in accordance with that invoice, to remit the balance of the Noble Account to Vitol.

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[10] *But see Lidawi v. Progressive Cty. Mut. Ins. Co.*, 112 S.W.3d 725, 731 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("When a contract is silent on an issue, Texas courts will infer reasonable terms."). Because we conclude that the Agreement is not silent as to the disposition of the Noble Account upon Vitol's termination of the Agreement, it is unnecessary to address Vitol's argument that silence should be construed to avoid forfeiture where possible. *See, e.g.*, *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840–42 (Tex. 2010).

C. Targa's Evidentiary Complaint Was Not Preserved.

In connection with Vitol's breach-of-contract claim, Targa also contends that that the trial court unfairly let Vitol's corporate representative Ben Marshall testify to the meaning of the Agreement on direct examination but did not allow Targa to ask similar questions on cross-examination. We conclude that Targa failed to preserve this complaint in the trial court, as shown by the following sequence of events.

On September 14, 2020, Marshall testified on direct examination to his interpretation of the Agreement. Targa did not object to the testimony. The next day, Targa cross-examined Marshall and the trial court sustained Vitol's objections that Targa's questions called for legal conclusions. At 10:03 p.m. that night, Targa filed a bench brief arguing that Vitol's counsel had opened the door to testimony calling for a legal conclusion. But when calling the bench brief to the trial court's attention the next morning, Targa's counsel said,

> *I don't want to revisit Your Honor's rulings from yesterday*. I want to just bring it to your attention, mainly because the third one down is [Marshall's] testimony or the questions that were asked regarding Section 2.4(b) and that term 'capacity at the dock.' I'm going to have to get into those -- or I'm going to have to revisit his answers on that today and ask a lot of questions about it. So, I just wanted to flag that issue for Your Honor.[11]

Thus, Targa preserved its evidentiary complaint only as to the issue of Targa's "capacity at the dock," which was the subject of Vitol's fraud claim, not its breach-of-contract claim. Moreover, Targa's inability to cross-examine Marshall about his interpretation of the Agreement could not have harmed Targa's defense of Vitol's breach-of-contract claim because, as a matter of law, the Agreement unambiguously

[11] Emphasis added.

required Targa to remit the balance of the Noble Account to Vitol upon termination of the Agreement, regardless of Marshall's interpretation.

We overrule Targa's first issue.

III. VITOL'S FRAUD CLAIMS

In its second issue, Targa challenges the portion of the trial court's judgment awarding Vitol $10,577,774.90 on its fraud claim. Vitol pleaded that Targa fraudulently induced the Agreement and fraudulently misrepresented the capacity of Targa's dock, but the trial court rejected both of those theories in its findings of fact and conclusions of law. The trial court instead awarded Vitol fraud damages based on the theory Targa failed to provide Vitol with updates on the construction of the splitter facility.

Vitol acknowledges that it consistently disclaimed this liability theory in the trial court and states that it does not oppose reversal of this part of the judgment. We therefore sustain Targa's second issue and modify the judgment to eliminate the award of damages on Vitol's fraud claim.

IV. CONCLUSION

We hold that, upon Vitol's termination of the Agreement, GTC section 6.2(c) unambiguously required Targa to prepare a final invoice, and in accordance with that invoice, to remit the balance of the Noble Account to Vitol. Vitol's claim for breach of this provision is not barred by language making termination without liability Vitol's sole and exclusive remedy for Targa's failure to timely achieve Startup. We accordingly affirm the portion of the judgment in Vitol's favor on its breach-of-contract claim. Inasmuch as Vitol does not oppose the elimination of damages on Vitol's fraud claim, we modify the judgment to delete any recovery on Vitol's fraud claim. As modified, we affirm the trial court's judgment.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Wilson.