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Case Number 47,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELPHI PETROLEUM, INC.,	)	
	)	
Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 47, 2017
	)	
MAGELLAN TERMINAL HOLDINGS, L.P.,	)	On Appeal From the Superior Court of the State of Delaware
	)	
Appellee and Cross-Appellant.	)	C.A. No. N12C-02-302 FWW

APPELLANT'S OPENING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

This appeal arises from the 2005 and 2011 Terminalling Agreements between Delphi Petroleum, Inc. ("Delphi") and Magellan Terminal Holdings L.P. ("Magellan") pursuant to which Magellan provided oil storage and services to Delphi at Magellan's marine terminal located at the Port of Wilmington (the "Terminal").

Delphi filed its Complaint against Magellan in February 2012. Delphi filed an Amended Complaint on October 8, 2013. Following depositions of Magellan personnel and document discovery, Delphi sought and was granted leave to file a Second Amended Complaint ("SAC"), which was docketed on February 2, 2015.

The trial court ("the court") conducted a bench trial from July 27 through July 31, 2015 and issued its Decision after Trial ("Decision") on June 27, 2016.[1] The court held Magellan liable for fraud, breach of contract, and breach of the covenant of good faith and fair dealing, and awarded Delphi $359,967 in damages in addition to the $421,603 Magellan conceded it had overbilled Delphi.

Delphi filed post-trial motions, which the court denied in an Order and Memorandum dated December 30, 2016.[2] Delphi filed its Notice of Appeal in this Court on January 25, 2017.

[1] A copy of the Decision is attached hereto as Exhibit A.
[2] A copy of the Decision is attached hereto as Exhibit E.

SUMMARY OF ARGUMENT

Delphi raises the following issues on appeal:

1. The court awarded interest on the amount Magellan overbilled Delphi for heating, but only from September 2013. The damages were sustained when Delphi paid the inflated invoices from 2005 through 2010 and Delphi was entitled to interest from the dates of its overpayments.

2. The court found that Magellan fraudulently induced Delphi to sign the 2011 Agreement by representing that Delphi could deliver product to the Terminal by truck; it erred, however, in holding that Delphi failed to mitigate its damages.

3. The court erred in ruling that Delphi had unconditionally paid disputed invoices given that Magellan knew that Delphi's wire transfers and checks were collateral for disputed invoices to secure release of Delphi's product from Magellan's warehouseman's lien and stop the accruing of interest. Magellan asserted a counterclaim for the disputed unpaid invoices but was not required by the court to prove their validity.

4. The court erred in awarding interest to Magellan in an amount far greater than was requested or owed.

5. Magellan overcharged Delphi for tank cleaning. The court misinterpreted the 2005 and 2011 Agreements in finding that Delphi had cleaning responsibilities beyond removing such product and waste as could be removed by

shovel and broom as specified in the Agreements. Even under the court's interpretation that "shovel and broom" covered all product and waste removal except water washing, Magellan overbilled Delphi.

6. The court erred in its interpretation of Schedule F to the 2005 Agreement and Schedule C to the 2011 Agreement, and in its reliance on extraneous evidence to interpret the Schedules. The Schedules require Magellan to measure and charge for heating when Delphi's tanks were heated individually or simultaneously, which Magellan admitted it failed to do.

7. The court erred in ruling that Magellan had no obligation to reimburse Delphi for Magellan's failure to return all product borrowed by Magellan from Delphi.

8. The court erred in ruling that Magellan had no obligation to reimburse Delphi for Magellan's failure to use reasonable care in the safekeeping of Delphi's product.

9. The court erred in ruling that Magellan had no obligation to reimburse Delphi for taking Delphi's product in the Terminal's pipeline.

10. The court erred in ruling that Magellan could reject the product of the Asphalt Seminole.

STATEMENT OF FACTS

A. The Parties and the Agreements

Delphi is a purchaser and seller of petroleum products. A222. Delphi purchased terminalling services from Magellan at the Port of Wilmington terminal ("the Terminal") owned by Magellan. The parties' relationship ran from September 1, 2005 through August 31, 2014 pursuant to two Terminalling Agreements (the "2005 Agreement" and the "2011 Agreement"). See A719, A783. Delphi paid Magellan more than $35 million over the term of the two agreements. A223. Delphi disputed and did not pay approximately $1 million of Magellan's invoices, virtually all for tank cleaning in and after 2010 when Delphi discovered that Magellan was overcharging Delphi; and for the heating of Delphi's product under the 2011 Agreement.

Ronald Gumbaz was Delphi's principal representative in dealings with Magellan. Rob Barnes and Jay Wiese negotiated the 2005 Agreement for Magellan. For most of the parties' relationship, Magellan Area Supervisor, Alan Cosby, was responsible for the operation of the Terminal and Magellan's performance of its duties under the Agreements. Tony Bogle was the Magellan commercial representative who administered the relationship during most of the period relevant to this dispute, and he negotiated the 2011 Agreement. Although Bogle remains employed by Magellan, he did not appear at trial.

B. Delphi's Claims

In its SAC, Delphi alleged, among other things, that Magellan (1) fraudulently induced Delphi to enter into the 2011 Agreement by agreeing that Delphi could deliver oil to the Terminal by truck; (2) overcharged Delphi by more than $500,000 for tank heating and fraudulently concealed the overbill for three years; (3) breached the provision of the Agreements specifying how Magellan was to account and bill for heating oil usage when Delphi's tanks were heated; (4) overcharged Delphi for tank cleaning by routinely passing on costs that included charges that were not Delphi's responsibility to pay; (5) failed to return oil Magellan borrowed from Delphi; (6) failed to use reasonable care in the handling of Delphi's product; (7) transferred Delphi's oil to a third party that did not own it; and (8) wrongfully rejected the product on the Asphalt Seminole. A162-66.

C. Magellan's Fraudulent Inducement

1. The Court's Ruling on Fraud

The court found that Magellan fraudulently induced Delphi to execute the 2011 Agreement and thereafter wrongfully denied Delphi the right to deliver product to the Terminal by truck. See Ex. A at 79-80. The court awarded only $2,500 in damages based on its finding that Delphi had failed to mitigate. Id. at 81-82. The court concluded that had Delphi accepted Magellan's proposed amendment and paid $2,500 for Terminal improvements, Delphi could have

delivered product to the Terminal by truck and would have incurred less damages. Id. at 81.

2. The Mitigation Facts

Delphi made a nomination to deliver 26,000 barrels of product from Exelon to the Terminal in January 2012. A215-28. Magellan rejected that nomination, but said it would allow truck offloading if Delphi would agree to pay Magellan $2,500 to $25,000 to prepare the terminal for truck deliveries. A862. The Trial Court noted that it did not understand why Magellan had simply not made the improvements to the Terminal since Delphi had the right to deliver by truck. Ex. A at 81. On January 24, 2012, Magellan provided Delphi with a proposed amendment to allow truck deliveries. A1314. By that time, however, Delphi had already lost the opportunity to purchase product from Exelon and sell it at a profit of $20/per barrel. A217-18.

Magellan's proposed amendment (i) demanded that Delphi pay $160 per truck to deliver product to the Terminal with a minimum commitment of $28,800 (the 2011 Agreement charged $20/truck when Delphi loaded product at the Terminal) (ii) severely limited the quality of the product that Delphi could deliver; and (iii) did not protect Delphi's claim for damages because of Magellan's refusal to allow truck deliveries. See A1314. Magellan did not offer Delphi the $2,500 alternative cited by the Court.

The proposed amendment further provided that "Magellan [would] use its commercially reasonable efforts to have the improvements completed within forty-five (45) days from the execution date of this Agreement." A1315. Under any set of facts, Delphi would have lost the Exelon opportunity because the Terminal would not have been ready to accept product by truck for at least another 45 days.

However, Delphi rejected Magellan's proposed amendment – not because of the $28,800 charge (which Delphi offered to pay under protest) – but because of the concessions demanded by Magellan. A1149.

It was not until June 6, 2012 that Magellan added Section 2.12(G) to its proposed amendment, which for the first time protected Delphi's existing rights to seek recovery for damages incurred as a result of "Magellan's interpretation of the 2011 Terminal Agreement and . . . refusal to accept deliveries of product by truck . . . ." A1156. By then, Delphi had lost most of the profit from a second opportunity to deliver Tri Gas oil to the Terminal by truck, as it had nominated to Magellan in May 2012. A219-20; A226-29.

D. Magellan's Warehouseman's Lien and Delphi's Provision of Collateral

Magellan claimed that Delphi owed it money for disputed invoices. A247-48. In September 2013 and January 2014, Magellan threatened and then imposed a warehouseman's lien against Delphi's product, and demanded that Delphi pay the disputed invoices, which included sums for tank cleanings that had not occurred,

and incorrect interest charges on purported late payments. See A1297-99. In response, Delphi transmitted to Magellan more than $2 million in collateral in order to free up its product and stop the running of interest. See A868-69, A870-71. Magellan understood that Delphi disputed the invoices and filed a Counterclaim on the invoices. A194-95.

E. Magellan's Overbilling of Delphi for Heating Oil

Magellan agreed to heat Delphi's product under both the 2005 and 2011 Agreements. See A722; A785. During discovery, in November 2014, Delphi learned that Magellan knew it had overbilled Delphi $421,603 from 2007 through 2010. See A1261; A304.

The Friday before trial commenced, on July 24, 2015, three and a half years after learning it had overbilled Delphi, Magellan paid Delphi $421,603 for the 2007-2010 overbill, without interest. See A201.

Delphi proved that Magellan had overcharged Delphi for heating not only from 2007 through 2010, but for 2005 and 2006 as well. A207-09. The court held that Delphi was entitled to recover an additional $114,547 for 2005 and 2006. Ex. A at 59.

The court also found that Magellan breached its covenant of good faith and fair dealing by intentionally concealing the overbilled heating charges. See Ex. A at 71 ("Magellan knew about the heating 'overbill' due to the use of meters instead

of gauges in 2011. Magellan did not notify Delphi or credit Delphi's account. Instead, Magellan admits that it sent Delphi past-due bills that contained incorrect and excessive amounts. Therefore, the Court finds that Magellan concealed overbilled heating charges.").

Delphi also pled that Magellan had fraudulently concealed its overbilling but the court granted Magellan's motion to dismiss on the basis that Delphi had not relied on overbillings to its disadvantage. See Opinion and Order of June 23, 2015 at 17-18 (attached hereto as Exhibit B).[3] In its post-trial ruling on Delphi's good faith and fair dealing claim, the court found: "It is fundamentally unfair to discover billing errors and not notify the other party when the other party does not have access to the same information. Even more unfair is sending past-due bills on amounts that are known to be inaccurate and excessive." Ex. A at 71. Despite having full knowledge that it wrongfully possessed more than $500,000 of Delphi's funds, Magellan placed a warehouseman's lien on Delphi's product in 2014.

Although the overbilling damages were sustained when Delphi paid the inflated invoices from 2005 through 2010, the court awarded Delphi pre- and post-judgment interest at the statutory rate from September 2013 only. Ex. A at 59.

[3] See also Transcript of Hearing on Defendant's Motion to Dismiss and Cross-Motions for Partial Summary Judgment, April 24, 2015 at 60-62 (attached hereto as Exhibit C).

F. Magellan's Failure to Bill Properly for Heating-2005 Agreement

1. Schedule F to the 2005 Agreement and Magellan's Billing Practices

Schedule F to the 2005 Agreement prescribes the manner in which Magellan was required to bill heating charges when tanks were heated either individually or simultaneously. A775-76.

If a Delphi tank was heated alone, the cost of all heating oil consumed was for Delphi. When tanks of Delphi and other customers were heated simultaneously, Schedule F required Magellan to use the heating factors and formula in the schedule to allocate the heating fuel oil used by the heaters "while such tanks are being heated," or "simultaneously heated." A775-76. At trial, Magellan admitted for the first time that it did not allocate heating charges according to Schedule F. See A302; A208.

Magellan admitted it heated tanks alone and simultaneously. A100; A301; A211. See also, e.g., A1158. On the day before trial, Magellan produced Exhibit D-130 (A1158), a limited portion of Magellan's heating logs. A233. The logs revealed that Magellan consistently measured heating fuel consumption only once each day rather than at the times a tank was heated alone or simultaneously with others. Cosby openly testified:

> **A. [ ] It's my understanding if they had heat that day, then they were billed for 24 hours.**

> Q. So if your tank was heated for three hours, you would be billed for 24 hours?
>
> **A. Correct.**

A302. See also A213 (Hafner) (there would not be any effort to determine the number of hours that each tank was heated).

Magellan never told Delphi that it measured heating oil consumed only once per day. A224-25. Delphi claimed that Magellan's invoices for heating under Schedule F were inaccurate because Magellan never recorded the data needed to charge Delphi correctly. There was no basis from which the court could determine the charges that should have been assessed to Delphi for heating.

2. The Court's Decision

The court decided that Schedule F "does not define a specific unit of time at which Magellan is required to record heating fuel consumption measurements." Ex. A at 63. The court looked outside the four corners of 2005 Agreement and to vague extrinsic evidence of "the parties' custom and practice to determine the parties' intentions." Id. The court concluded that Magellan's once-per-day met Magellan's obligations under Schedule F and Delphi had to inform Magellan if it wanted to have fuel consumption measurements taken more frequently. Id. at 64.

G. Magellan's Failure to Bill Properly for Heating-2011 Agreement

1. Schedule C to the 2011 Agreement and Magellan's Billing Practices

Schedule C of the 2011 Agreement was identical to Schedule F of the prior Agreement except in that it listed only Delphi's six tanks and their respective heating factors.[4] Given that only Delphi's tanks and allocation factors were listed, Cosby was unable to say how Magellan allocated the heating charges as between Delphi and Magellan's other customers under the 2011 Agreement. A302-03.[5]

Magellan continued to heat Delphi's tanks with the tanks of its other customers, recording heater fuel consumption once per day, as it had throughout the 2005 Agreement. All of Magellan's 2011 heating bills were therefore inaccurate. When Magellan produced limited heater logs the day before trial, it did not produce any of the heater logs for the 2011 Agreement except for those from September-December 2011.

Magellan knew that Delphi disputed the 2011 Agreement heating bills. Nonetheless, Magellan unilaterally took $524,104 from Delphi's collateral and paid itself these disputed heating bills. See A1217, A1218; see also A1334-38, A1340-42.

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[4] Schedule F of the 2005 Agreement listed both Delphi's eight tanks and Magellan's other customers' seven tanks, and their respective heating factors.

[5] Schedule C appears at A808.

H. Magellan Overcharged Delphi for Tank Cleaning

Delphi agreed to remove its product and waste from the tanks it used at the Terminal when Magellan wanted to inspect or maintain a tank and at the termination of the Agreement or when an emergency required. See A733; A793.

Responding to Delphi's request that Magellan limit Delphi's responsibility for the removal of product and waste, Magellan proposed that Delphi pay for that which could be removed by shovel and broom. Accordingly, Section 2.8 of the Agreements contained the following limitation:

> At [Delphi's] expense, Magellan will remove the remaining product and waste from the tank that can be removed by shovel and broom . . . . Magellan will be responsible for the expense of sandblasting and water washing.[6]

Delphi discovered in 2010 that Magellan had asked its tank cleaning contractors to submit bids that included the cost of all four steps of a tank cleaning: (1) removal of product and waste by shovel and broom, (2) coil wash, (3) diesel wash, and (4) water wash in one lump sum and then billed Delphi that lump sum. See, e.g., A1290-95. Cosby admitted as much in his June 18, 2007 e-mail: "So if I have [contractors] mark water washing as general cleaning on the invoice then Delphi pay's [sic] the bill." A1260. Cosby also wrote that none of the Magellan-procured invoices "will show 'water wash' (which [Magellan] would pay for

[6] A794.

disposal); they instead say waste wash (which contract states customer pays). So we can save some money by doing the bids ourselves." A87-88.

Magellan's billing philosophy is further highlighted by Cosby's September 28, 2011 e-mail to another employee: "[Hunter] is on board with charging Delphi everything we can. Also he told me his direction from Milford is no holds barred on anything that the contract covers or is grey." A1282. See also A312.

Delphi compiled the improper tank cleaning charges by Magellan in Exhibit P-695. See A1321-33; A261-67. Magellan billed Delphi $173,622 for tank cleaning work beyond the cost of "shovel and broom" removal in the 2006-2009 period, $389,335 for cleanings in 2010 and 2011(all under the 2005 Agreement), and $238,026 for cleanings in 2014, for a total of $800,983 in overcharges. The court ordered a refund to Delphi of only $79,987 and $40,566 for improper administrative charges. Ex. A at 51-52.

The court ruled that "shovel and broom" was susceptible of more than one meaning and covered all cleaning work except water washing, and that Magellan had not billed water washing to Delphi. Ex. A at 25-27. The court also ruled that Delphi was not responsible for preparatory work and that mobilization and demobilization costs had to be allocated between Delphi and Magellan. Id. at 27. However, the invoices in the record clearly show that Delphi was billed for water washing, preparatory work and other costs beyond those costs of removing

Delphi's product and waste "by shovel and broom." See A234. See, e.g., A1292-93($86,000 lump sum charge Tank 9 cleaning); A1294-95 ($22,111 lump sum charge for Tank 9 cleaning), A1290-91 ($105,000 lump sum charge for Tank 1 cleaning). The evidence further shows that Magellan did not allocate mobilization or demobilization costs. Invoice 367865 (summarized at A1329-30); A900-01 (passing to Delphi all mobilization/demobilization charges).

I. Magellan's Failure to Return Borrowed Product

In 2011, Magellan asked Delphi to lend it product to stabilize empty tanks. A245. Delphi lent Magellan product without charge. Id. Magellan failed to return 301 barrels of borrowed product, as documented in its own records. See A1300.

J. Magellan Failed to Use Reasonable Care in Protecting Delphi's Product

Section 4.2 of the Agreements provided that Magellan was responsible for losses of Delphi's product (over an allowance level) if it failed to use reasonable care. The court dismissed Delphi's claim that Magellan lost 5,935 barrels of Delphi's product pursuant to Del. Super. Ct. Rule 41(a). See Tr. 7/29/15 (a.m.) at 60-62 (attached hereto as Exhibit D).

Bogle admitted that Magellan was able to reduce losses of its own flush oil by mixing the product. Cosby admitted that Magellan only started mixing Delphi tanks when Delphi protested the losses "We are taking these extra steps [mixing

the tanks] to try and eliminate some of these small losses that keep popping up in Delphi's tanks" A94-95. Magellan admitted it owed Delphi at least $35,565.72. A872.

K. Magellan Took Delphi's Product

Section 4.2 of the 2005 Agreement provides that Magellan could not intentionally take Delphi's product. A745. But in 2010, Magellan took 1,876 barrels of Delphi product valued at $164,669 that was in the Terminal's pipeline to a power plant, which was then owned by Calpine but had been owned by Conectiv when Delphi's product was placed in the pipeline. Magellan argued that the product was owned by Conectiv even though Cosby admitted that Delphi's President (DiPiero) and Gumbaz had told Magellan that the product was Delphi's. A91-92; A120; A274-75, A282-283.

Even if Magellan believed the product was Conectiv's, Section 3.2 of the 2005 Agreement provided: "If title to any product at the Terminal is transferred to a third party other than another customer of the Terminal, Customer will nevertheless be deemed the owner of the Product . . . ."

Conectiv was not a customer of Magellan's.[7] A316. Therefore, Magellan had no right to transfer Delphi's product to Conectiv, which never claimed the

[7] The court recognized that Gumbaz had testified that the product belonged to Delphi, asserting that Conectiv was not a customer of the Terminal. Exhibit A at 47, note 172.

product. The court also erred when it decided that there was "an invoice that memorializes the transfer from Delphi or DTC to Conectiv. Ex. A at 49-50. No such invoice exists and the two exhibits cited by the Court as being that invoice are not. Ex. A at 50, note 189. Hafner testified he did not know whether Conectiv had purchased the product in the pipeline from Delphi. A214. Therefore, Magellan had no right to transfer Delphi's product to Calpine, whom even Magellan did not allege owned it. The court did not explain why Magellan was entitled to transfer the product to Calpine, an unrelated company.

L. Magellan Wrongfully Rejected the Product on the Asphalt Seminole

The court granted Magellan summary judgment on Delphi's claim for damages arising from Magellan's rejection of the product on board the Asphalt Seminole. See Exhibit B at 33-38. The court ruled that Magellan did not breach the 2005 Agreement because Magellan could reject cargo with a temperature above 150 degrees. However, Magellan's February 19, 2010 rejection notice stated that the product was being rejected based solely on its alleged Hydrogen Sulfide ("H2S") content. An inspection report showed that the cargo met the H2S content limits of Section 2.2. A134.

ARGUMENT

I. The Pre-judgment Interest on Heating Overbilling is Incorrect

A. Question Presented

Where plaintiff overpays for a service and is awarded the amount of the overpayment, does interest run from the date or dates of overpayment? See A598-602.

B. Scope of Review

This question is one of law. Therefore, this Court's scope of review is *de novo*. See Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co., 996 A.2d 1254, 1261 (Del. 2010).

C. Merits of the Argument

The court held that Delphi was entitled to recover interest on the total heating overbill of $536,150. But the court erred in determining that interest ran only from September 25, 2013. See Ex. A at 59. September 25, 2013 bears no relevance to the heating overbill; it is the date Delphi made its first collateral payment. The relevant dates for pre-judgment interest calculation are those when Delphi sustained damages by paying inflated invoices from 2005 through 2010.

"When determining when a period for pre-judgment interest should begin, the Court asks when the plaintiff first suffered a loss at the hands of the defendant." TranSched Sys. Ltd. v. Versyss Transit Sols., LLC, 2012 WL

1415466, at *5 (Del. Super. Mar. 29, 2012). Accordingly, pre-judgment interest accrues from the date of injury under Delaware law. Id.

"By requiring the defendant to pay a fair rate of interest during the period of unjustifiable delay, pre-judgment interest helps make the plaintiff more whole, while depriving the defendant of a windfall." Citrin v. Int'l Airport Ctrs. LLC, 922 A.2d 1164, 1167 (Del. Ch. 2006). By awarding interest only from September 25, 2013, the Court awarded Magellan a windfall and failed to make Delphi whole.

The court determined that Delphi suffered losses of $27,396 in 2005 and $87,151 in 2006; and Magellan conceded it owed Delphi $421,603 for heating oil charges from 2007 to 2010. See Ex. A at 58; see also A1318. The court erred in awarding Delphi pre-judgment interest from a date more than eight years after "the plaintiff first suffered a loss at the hands of the defendant." TranSched at *5. Delphi sustained losses each month it paid an inflated heating invoice from 2005 through 2010. Delphi is therefore entitled to pre-judgment interest from the dates of its overpayments. See A1318.

Delphi requested interest at the 1.5%/month rate applicable under Section 3.4(a) if Delphi made late payments to Magellan. See A737. Compensating Delphi at any lesser rate would reward Magellan for overbilling and concealing $536,150 (and charging Delphi 1.5% month interest on amounts claimed to be due without giving credit for the concealed funds) by allowing Magellan to collect

from Delphi at 1.5%/month and pay it back at the lesser statutory rate. Delphi alternatively requested interest calculated at the statutory rate. See 6 Del. C. § 2301(a).

II. The Court's Denial of Compensatory Damages for Magellan's Fraud on the Basis of Failure to Mitigate was Erroneous

A. Question Presented

Did the court err in holding that Delphi unreasonably failed to mitigate the damages caused by Magellan's fraud and awarding Delphi only $2500 in damages? See A590-99.

B. Scope of Review

This issue is a mixed question of law and fact. In Zirn v. VLI Corp., this Court held:

> if the trial court's factual conclusions 'are sufficiently supported by the record and are the product of an orderly and logical deductive process . . . we accept them, even though independently we might have reached opposite conclusions.' [ ] Nevertheless, in an appropriate case, this Court may review de novo mixed questions of law and fact, . . . and in certain cases make its own findings of fact upon the record below [ ]. The Court will affirm the trial court's legal rulings unless they represent an 'error in formulating or applying legal principles.'

681 A.2d 1050, 1055 (Del. 1996).

C. Merits of the Argument

The court found "that Magellan fraudulently induced Delphi to enter into the 2011 Agreement." Ex. A at 79. Despite this, the court awarded damages of only $2500 because "a reasonable party in Delphi's situation" would have incurred costs of "approximately $25,000 or even $2,500," to permit truck deliveries to the

Terminal. Ex. A at 81. The court failed to properly apply Delaware law on the duty to mitigate.

It is well-settled under Delaware law that "the duty to mitigate is subject to the rule of reasonableness," and whether a loss is subject to mitigation turns on the circumstances. First State Exteriors, LLC v. Schweiger, 2014 WL 595469, at *7 (Del. Super. Jan. 23, 2014). "All that is required of the nondefaulting party . . . is that he act reasonably so as not unduly to enhance the damages caused by the breach." Hanner v. Rice, 2000 WL 303458, at *2 (Del. Super. Jan. 3, 2000). As such, "if the court decides that the nondefaulting party has made reasonable efforts to minimize [ ] damages, the award will not be limited by the doctrine of avoidable consequences." Id. at *2.

The court determined that Delphi did not act reasonably in avoiding its losses. Ex. A at 81. Delphi did act reasonably when it negotiated for the right to deliver product by truck after being defrauded by Magellan. See A1149 (5/18/2012 e-mail from Gumbaz: "Delphi rejects Magellan's proposed amendment but Delphi, in an attempt to avoid losses and costs in addition to those it has already incurred, and to mitigate damages, will pay, under protest, the $28,800 demanded by Magellan."). Delphi engaged Magellan in continuous negotiations to secure the truck delivery right and to avoid losing business opportunities. Moreover, Delphi minimized its losses when, in Magellan's words, it "purchased

and immediately sold the [Tri Gas] product" after Magellan rejected Delphi's delivery nomination. A386. Rather than losing the full value of the Tri Gas product, Delphi minimized its losses and sold the oil for a lesser profit. See A863, A866, A867.

While "the principle of mitigation of damages is applicable to reduce plaintiff's recovery . . . in a proper factual setting," the principle is inapplicable where "defendant had an equal opportunity" to reduce the damages. McClain v. Faraone, 369 A.2d 1090, 1095 (Del. Super. 1977). See also D. Dobbs, *Law of Remedies* § 3.9, at 384 (2d ed. 1993) ("If, after he has committed a tort or breached a contract, the defendant had an equal and continuing opportunity to minimize damages he has caused, and at a cost no greater than would be required of the plaintiff, the grounds for reducing [the defendant's] liability seem doubtful."). Magellan did not dispute this principle, arguing only that it applied exclusively to contract breaches.

Magellan had an equal or better opportunity to minimize the damages caused by its fraud. See Ex. A at 81-82 ("The Court cannot comprehend why Magellan did not initially propose to complete the improvements at the Terminal for the cost of $25,000 or $2,500."). Indeed, the Court found that Magellan knew, as early as May 13, 2011, that it would reject Delphi's delivery of product by truck several months later. Ex. A at 73-74. See also id. at 81 (Magellan "allowed Delphi to

believe Delphi had the right to deliver Product to the Terminal by truck knowing all along that Magellan would refuse when Delphi inevitably asserted its alleged right.").[8] Magellan was better able than Delphi to improve the Terminal for $25,000 or $2,500 while negotiating the 2011 Agreement, or at any time before depriving Delphi of the Exelon opportunity.

Delphi acted reasonably in rejecting the first amendment proposed by Magellan.[9] "Courts have generally held that it is not necessary for the plaintiff to make another contract with the defendant who has repudiated, even though he offers terms that would result in avoiding loss." 11 *Corbin on Contracts* § 5715 at 344 (rev. ed.2005), quoted in Henkel Corp. v. Innovative Brands Holdings, LLC, 2013 WL 396245, at *5 (Del. Ch. Jan. 31, 2013). Delphi had no duty to accept this amendment because Magellan had already defrauded Delphi, and acceptance would have: (a) resulted in Delphi's sacrifice of substantial rights; and (b) waived Delphi's right to sue under the original agreement. See Henkel, at *5 (finding no duty to renegotiate with a breaching party because "[t]he duty to mitigate is assessed in reference to the exposure of the mitigating party to risk and uncertainty

[8] Bogle had begun planning his response to the truck nominations as early as May 21, 2011 when he e-mailed himself a memorandum laying out what he would say when Delphi made truck nominations, including offering an amendment for more fees. See A109-10.

[9] See A1148 (5/24/2012 email from Gumbaz to Beall explaining that Delphi would accept the proposed amendment if Magellan would agree to a preservation of rights because Delphi believed it had the right to deliver product to the Terminal by truck under the 2011 Agreement).

which is, itself, another form of risk."). Magellan's proposed amendment stipulated that it would take 45 days to repair the Terminal, at which time the Exelon opportunity would have been lost. A1150.

Despite Delphi's continued mitigation efforts, however, Delphi suffered substantial losses as a direct and unavoidable consequence of Magellan's fraud. Accordingly, Delphi respectfully requests that the Court reverse the court's ruling on Delphi's mitigation and remand the matter for a determination of damages.

III. Magellan Charged Delphi for Heating in Violation of Schedule F of the 2005 Agreement

A. Question Presented

Did Magellan charge Delphi for heating in violation of Schedule F to the 2005 Agreement where it failed to record the fuel consumed by the heaters when one tank was heated alone and when two or more tanks were heated simultaneously? See A574-80.

B. Scope of Review

This issue is a matter of interpretation of an unambiguous written contract and this Court's scope of review is *de novo*. See In re Viking Pump, Inc., 148 A.3d 633, 644 (Del. 2016) ("We also review questions of contract interpretation de novo.").

C. Merits of the Argument

Schedule F required Magellan to measure heating fuel consumption when one tank was heated alone and charge that customer the full cost of the fuel consumed during that heating. Schedule F also required Magellan to allocate the cost of the fuel oil consumed when two or more tanks were heated "simultaneously."

The court erred when it looked beyond the unambiguous language of Schedule F to determine that "Magellan's use of one day increments is a reasonable interpretation of the obligations Magellan had under Section VII.H of

the 2005 Agreement." Ex. A at 64. The parties did not contend that Schedule F was ambiguous, and the court did not declare it ambiguous. Nevertheless, the court found "that the provision of the contract does not define a specific unit of time at which Magellan is required to record heating fuel consumption measurements" and ruled in favor of Magellan. Id. at 63.

The court looked for a specific unit of time, and after finding none, interpreted the contract language on the basis of extrinsic evidence. The entirety of the court's discussion relates to its review of the extrinsic evidence and how inferences drawn therefrom support its finding "that Magellan's use of one day increments is a reasonable interpretation of the obligations Magellan had under Section VII.H of the 2005 Agreement." Id. at 64. The court failed to apply appropriate rules of contract construction in construing the terms of Schedule F.

Delaware courts have repeatedly held that the "basic rule of contract construction gives priority to the intention of the parties." E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985) (citing cases). "When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions." Salamone v. Gorman, 106 A.3d 354, 368 (Del. 2014) (quoting Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997)). Only "[w]hen a contract's plain meaning, in the

context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, [may] courts [ ] consider extrinsic evidence to resolve the ambiguity." Id. at 374.

These well-established principles of contract interpretation mandate that the Court view the 2005 Agreement in its entirety. Magellan was required to take the measurements necessary to quantify the amount of fuel consumed for Delphi's benefit in order to charge Delphi for "the actual cost, plus 18% of the fuel consumed for heating" its tanks. A764.

Specifically, Schedule F provides that the "cost of fuel consumed for heating . . . shall be calculated as follows":

> If a therminol heater is operating to heat therminol for the purpose of heating only one tank, the cost of the fuel consumed . . . shall be allocated entirely to the heating of that one tank.
>
> If therminol is being heated to heat the product in more than one tank, the cost of the fuel consumed . . . shall be allocated among the tanks . . . while such tanks are being heated.
>
> For example, if Tanks T1, T9 and T19 are being simultaneously heated . . . , the fuel consumed . . . while such tanks are being heated shall be allocated to [the tanks according to their respective heating factors].

This language is clear and unambiguous. Only by measuring the amount of fuel actually consumed while a tank was heated alone, or while two or more tanks were heated "simultaneously," could Magellan properly allocate its costs and

charge its customers on a "cost-plus" basis. To hold otherwise would nullify the agreed upon language obligating Delphi to "pay Magellan the actual cost, plus 18% of the fuel consumed for heating" its tanks. A764.

Despite this, the court looked to extrinsic evidence and varied the contract's terms. The court credited vague evidence regarding a purported custom and practice once employed by Delphi and determined that Magellan's once-per-day measurements were reasonable. In doing so, the court failed to enforce the unambiguous language of the heavily negotiated contract and rewrote it to allow Magellan to bill Delphi "as if the tank had been heated for 24 hours regardless of the actual length of time it took to heat the tank." Ex. A at 60. This interpretation not only belies the parties' clear intent, but produces an absurd result. See Estate of Osborn v. Kemp, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."). No reasonable person would have agreed to pay for 24 hours of heating if their tank was heated for only 3 hours; and Delphi did not agree to do so when it agreed to "pay Magellan the actual cost, plus 18% of the fuel consumed for heating." A764.

IV. Magellan Charged Delphi for Heating Delphi's Tanks in Violation of Schedule C of the 2011 Agreement

A. Question Presented

Did Magellan violate the 2011 Agreement where it failed to record the times tanks were heated alone or simultaneously? See A571-74.

B. Scope of Review

This issue is a matter of interpretation of an unambiguous written contract and this Court's scope of review is *de novo*. See In re Viking Pump, Inc., 148 A.3d 633 at 644.

C. Merits of the Argument

Magellan violated Schedule C by not tracking the fuel consumption during periods when Delphi's tanks were heated alone or together with other customers' tanks. Schedule C requires allocation of heating charges entirely to the one tank if it is heated alone and with use of the heating factors when two or more tanks were heated "simultaneously" or "at the same time." Just as it had done under Schedule F of the 2005 Agreement, Magellan only recorded fuel consumption once a day.

Magellan admitted it heated Delphi's tanks, at various times and for various durations, with the tanks of other customers, and measured only once per day the amount of fuel it used for heating. Magellan never alleged that the cost allocated to Delphi was the actual cost of the fuel consumed heating Delphi's tanks, as required by Section VII.F.

Furthermore, consistent with its agreement to only heat Delphi tanks, contained in Section 2.10(e), Schedule C listed only Delphi's tanks and their heating factors. See A302. In contrast, Schedule F to the 2005 Agreement listed all the heated tanks in the Terminal and their heating factors. Cosby was unable to say how any allocation calculation of the heating charges could be done under the 2011 Agreement. See A302-03.

Nonetheless, the court found that because Magellan said that the heating factors for other tanks were found in agreements with Magellan's other customers, they could be used. See Ex. A at 14. Resort to extrinsic evidence is not permitted in the face of an unambiguous agreement containing an integration clause. Here, the extrinsic evidence relied upon was neither produced by Magellan, nor introduced into evidence at trial. The alleged contracts between Magellan and its other customers are not part of the record. Magellan did not produce those contracts.

Thus, Magellan failed to prove its entitlement to its heating charges under the 2011 Agreement, and Delphi proved the invoices were inaccurate because Magellan paid no heed to the process for allocating simultaneous heating. This Court should reverse the court's decision on heating charges because Magellan has failed to satisfy its burden of proof. The 2011 heating charges were part of

Magellan's Counterclaim. See A198 ("Magellan has alleged a counterclaim for breach of contract, seeking payment of the [unpaid] invoices.").

When it produced Ex. D-130 (A1158) the day before trial, Magellan failed to produce heating logs for 2012, 2013 and 2014. Magellan introduced only the first page of its invoices for September 2011 through July 2013, which contained no detail other than the total amount of the charge and the month for which it was rendered. See A902-04. Magellan produced no evidence of the actual cost of fuel consumed in heating Delphi's tanks despite the fact that Delphi agreed to pay Magellan on a "cost-plus 18%" basis.

"In a cost-plus contract, '[t]he contractor is under a duty of itemizing each and every expenditure . . . and where the other party denies being indebted [ ] the latter has the burden of proving each and every item of expense.'" JBR Contrs., Inc. v. E & W, LLC, 991 A.2d 18, n.7 (Del. 2010). The proper method of proving such expenses or costs requires "[p]resentation of invoices and statements of account, accompanied by proof of payment." Id. Here, Magellan's proof of its heating expenses consisted of a single-page invoice, with one line item, for the period spanning September 2011 to July 2013. See A905. Magellan never produced invoices for the amounts it claims Delphi owed from 2005, 2006, 2012, 2013 and 2014. Above all, Magellan did not follow Schedule C.

Delphi respectfully requests that this Court reverse and remand the issue to the court with instructions that Magellan violated Schedule C of the 2011 Agreement and to determine appropriate damages.

V. Delphi's Collateral Payments

A. Question Presented

Where Magellan asserted a counterclaim for disputed invoices, did the trial court err in allowing Magellan to retain Delphi's collateral transfers without proving the accuracy of its invoices? See A567-71.

B. Scope of Review

"[T]his Court reviews 'the sufficiency of the evidence and tests the propriety of the findings below.' If the Court is satisfied that the findings are supported by the record and are the product of an orderly and logical deductive process, it will affirm." Miller v. State Farm Mut. Auto. Ins. Co., 841 A.2d 308 (Del. 2004).

C. Merits of the Argument

Without stating the basis of its decision, the court said that "[t]hroughout the Opinion and Order, the Court has treated the wire transfers as payment of a debt Delphi owed to Magellan" and that it saw "no value in characterizing the wire transfers as "collateral payments." Ex. A at 83-84. However, Magellan itself recognized that the wire transfers were collateral, the invoices were disputed, and that Magellan had to prove their validity.

Magellan consistently acknowledged its burden of proving its counterclaim. Magellan stated in the Pretrial Stipulation that "Magellan expects to prove that Delphi failed to timely pay Magellan for services rendered on the following invoices: [listing 53 invoices]. Magellan also expects to show that it is entitled to

payment on these and other invoices contested by Delphi . . . ." A199. Magellan further recognized that "Delphi has disputed and resisted paying certain of the invoices issued by Magellan under the Agreements, especially those related to the removal of product and waste from tanks leased by Delphi . . . Accordingly, Magellan has alleged a counterclaim for breach of contract, seeking payment of the invoices." A199. Magellan offered to drop its counterclaim if Delphi agreed that the payments were unconditional. Delphi never agreed.

The court nonetheless held that Delphi had unconditionally paid all of the disputed invoices. In doing so, the court allowed Magellan to seize Delphi's collateral without first proving that such amounts were owed. Included in these sums were estimated costs of future cleanings which would not take place until after the 2011 Agreement. Ultimately, Magellan overestimated such costs by more than $300,000. Those invoices were not even issued until December 2014.

On post-trial motions, Magellan changed its tack. Magellan represented that it had issued an ultimatum that Magellan would "treat [Delphi's September 25, 2013 $1,085,466.42 wire transfer] as [an unconditional payment] unless you communicate otherwise in writing to me by 5:00 p.m. Eastern Time today, October 2, 2013." See A337-38. See also A870. Magellan told the court that "there is no evidence that Delphi communicated otherwise, and the payment was thus properly considered to be a partial, unconditional payment."

Delphi responded that very day at 3:50 p.m.: "Delphi's stated position in regards to this ***collateral payment*** remains unchanged. Delphi will demand Magellan prove the validity of its invoices at trial. Delphi does not waive any of its rights." A870 (emphasis added). The court took no note of this evidence. See A871.

Delphi repeatedly identified the funds it provided to Magellan to avoid the warehouseman's lien as "collateral," and not payment of disputed invoices. Delphi informed Magellan, before and after its wire transfers, that they were collateral and not payment, and that Delphi demanded Magellan prove its counterclaim. See A868-69; A1296-1299; A1334-48. The court also overlooked seven additional collateral payments Delphi made by check, each paid with a clear declaration that they were "ADDITIONAL COLLATERAL DEPOSIT IN ACCORDANCE WITH MOONEY EMAIL TO KEGLOVITS 10/2/13." A1336-43.

Deciding that Delphi's collateral was voluntary unconditional final payment of the disputed invoices led the court to relieve Magellan of any burden to prove that its disputed invoices were valid and owed by Delphi, and placed the burden of proving the inaccuracy of Magellan's disputed invoices on Delphi. The misallocation of the burden of proof on Magellan's counterclaim allowed Magellan to recover on disputed invoices (and late payment penalties) the validity of which Magellan did not prove.

Delphi requests a new trial on Magellan's claim for its disputed invoices, with instructions to the court that Magellan must prove the validity of those invoices by a preponderance of the evidence.

VI. Magellan Overcharged Delphi for Tank Cleaning

A. Question Presented

Where Section 2.8 of the Agreements provided that Delphi's responsibility for tank cleaning was limited to removal of its product by shovel and broom, did the trial court err in imposing on Delphi the responsibility to wash the tanks and coils? See A578-87.

B. Scope of Review

"To the extent those issues involve the interpretation of contract language, they are questions of law that this Court reviews *de novo* for legal error. To the extent the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings, our review requires us to defer to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." Honeywell Int'l, Inc. v. Air Prods. & Chems., Inc., 872 A.2d 944, 950 (Del. 2005).

C. Merits of the Argument

The trial court made five principal findings in ruling that Magellan properly billed Delphi for tank cleaning:

1. The Section 2.8 "shovel and broom" limitation to Delphi's liability for tank cleaning charges was ambiguous and the parties intended the limitation to

mean that Delphi would be liable for all tank cleaning charges other than water washing. Ex. A at 25. This was error.

2. The "shovel and broom" limitation of Section 2.8 did not apply to tank cleanings effected at the termination of the Agreements under Section 2.7. Ex. A at 25. This was error.

3. Delphi was not liable for preparatory work charges and that mobilization/demobilization charges had to be allocated between Delphi and Magellan in proportion to the work done by the contractor for each party, which Magellan conceded. Ex. A at 24.

4. Magellan had not billed Delphi for water washing. Ex. A at 27.This was error.

5. Delphi had failed to prove that any of Magellan's invoices included charges for preparatory work. Ex. A at 27. This was error.

The court ruled that tank cleanings undertaken at the termination of an Agreement were solely governed by Section 2.7 of the Agreements and that the water washing limitation in Section 2.8 did not apply. In reaching this decision, the court failed to consider the language of Section 2.8, the contemporaneous written record, and Magellan's actual practices.

In Magellan's bid solicitation documents, Magellan detailed the "shovel and broom" removal of product and waste as only the first of four steps of a tank

cleaning, to be followed by coil washing, diesel washing and water washing. A820. Magellan thus admitted that "shovel and broom" did not include coil washing and diesel washing. Zaun testified that Magellan's bid solicitation document was a Magellan standardized form and that Delphi did not have a hand in developing it. A294.

On July 22 and July 24, 2011 Magellan agreed that cleanings were divided into four steps: "(1) removal of product and waste from the tanks that can be removed by shovel and broom; (2) diesel wash heating coils; (3) diesel wash underside of floating roof (T1), floating roof legs (T1), first course of shell and floor (T1 and T19); (4) water wash" and that Delphi was responsible for step 1, while Magellan was responsible for steps 3 and 4. A1251; A1257; A237. The parties "agreed to disagree on which company is responsible for the cost and time of Step 2." Id.

On July 27, 2011 Cosby e-mailed a revised cleaning bid solicitation that reflected "[r]emoval of product and waste from the tanks that can be removed by shovel and broom" as a separate billable line item that contractors were to break out from diesel, coil, and water washing. A237; A818-33. On August 10, 2011, Cosby confirmed that the diesel and water washing of Tanks 1 and 19 was for Magellan's account and would be done after the cleaning contractor had effected

the shovel and broom removal of Delphi's product and waste. See A1256. Cosby agreed that coil washing could be accomplished by water washing. A837.

Magellan presented no expert testimony on the issue of tank cleaning or the meaning of shovel and broom. Wiese, Delphi's expert, testified that personnel go into the tank with shovels and brooms and move the tank bottom material toward the sump where it can be removed. A125. The terminal owner may elect at its expense to perform a more extensive inspection, which is known as an API 653 inspection, or to perform maintenance on the tank. A126. The API 653 inspection may involve using diesel fuel or water washing to remove additional residual material. A126.

Thus the expert's testimony confirms that "shovel and broom" is a separate step in the tank cleaning process, exclusive of diesel or water washing. Diesel and water washing are additional interchangeable cleaning steps, which would always follow the "shovel and broom" step. A126; A205. Therefore, after deciding that Magellan was responsible for water washing, the court should have ruled that Magellan was also responsible for diesel washing. Allowing Magellan to order a contractor to diesel wash, rather than water wash, and then pass the cost on to Delphi would nullify the water washing limitation on Delphi's cleaning liability.

The "shovel and broom" limitation applies equally to cleanings under Section 2.7. As noted, Magellan agreed that Delphi was liable for the cost of the

"shovel and broom" removal of Delphi's product and waste, and Magellan was responsible for diesel and water washing Tanks 1 and 19, both of which were Section 2.7 tank cleanings occurring at the termination of the 2005 Agreement. See A347-48.

Furthermore Magellan admitted that Section 2.8 referred to all tank cleanings, just as the first paragraph of Section 2.8 read: "Magellan may clean [Delphi's tanks] for maintenance, inspections, and upon the expiration or termination of this Agreement."

In its Motion for Summary Judgment, Magellan argued that the charges for which Delphi was responsible for cleaning Tank 1 in 2011, a Section 2.7 cleaning, were governed by Section 2.8. A128-29. It made the same point with respect to the cleaning of Tank 19 in 2011, another Section 2.7 cleaning. Section 2.8, Magellan said, defined "the parties' rights and obligations . . . including the allocation of contractor charges." Magellan also said that Section 2.8 defined "the parties' rights and obligations for . . . tank cleaning and including the allocation of contractor charges. A128-29.

The court found that the limitations of Section 2.8 did not apply to Section 2.7 termination cleanings because Section 2.7 "unambiguously provides that Delphi is responsible for the cost of all product and waste removal." Ex. A at 25. However, the first paragraph of Section 2.8 reads: "Magellan may clean [Delphi's

tanks] for maintenance, inspections, and upon the expiration or termination of this Agreement . . . ."

Even though Magellan knew that it was responsible for diesel, coil, water washing, prep work and the allocation of mobilization/demobilization costs, it passed those costs on to Delphi. Magellan knew that was not what the Agreements provided. In 2010, Bogle reminded Cosby that "[Delphi] dont [sic] pay for cleaning, only for the removal of their product." A93. Nevertheless Cosby was intent on mischaracterizing cleaning expenses so that they could be passed on to Delphi: "So if I have [contractors] mark water washing as general cleaning on the invoice then Delphi pay's [sic] the bill." A1260. See also A90 (discussing Cosby's e-mail stating that none of the Magellan-procured invoices "will show 'water wash' (which [Magellan] would pay for disposal); they instead say waste wash (which contract states customer pays). So we can save some money by doing the bids ourselves.").

Magellan billed Delphi the $31,587 and $39,916 lump sum cleaning bills for Tanks 4 and 9, respectively, in 2010, which Cosby admitted contained water washing charges. A877-93. Similarly, Magellan billed Delphi the $77,000 lump sum cleaning bill for Tank 10 in 2010, which included water washing charges. A874-76. Lastly, Magellan passed water washing charges on to Delphi when it billed for the cleaning of tank 19 in 2011. A846-50.

Delphi proved that Magellan passed to Delphi the contractor's entire $18,022 mobilization/demobilization charges for cleaning Tank 1 in 2011 when Magellan admitted Delphi was responsible for less than half of the work the contractor performed for Magellan. A900-01. Magellan also passed on to Delphi charges for preparatory work that the Court ruled were not Delphi's liability, billed Delphi a $77,000 lump sum cleaning bill for Tank 10 in 2010, and passed on all corresponding contractor's mobilization/demobilization charges. A874-76.

Delphi's Exhibit P-695 (A1321-33) details all charges included in Magellan's tank cleaning invoices that were not Delphi's obligation to pay. Therefore, the court erred when it decided Magellan had not billed Delphi for water washing and that Delphi had failed to show that Magellan had not allocated mobilization/demobilization charges or that Delphi had been charged preparatory work charges.

Whatever distinction the court perceived between Delphi's obligations under Section 2.7 and 2.8, that distinction did not exist in Magellan's understanding or actual practice. Magellan agreed that it was responsible for diesel washing and water washing; and because coils were washed with water, Magellan was also responsible for coil washing. The court erred when it decided otherwise. Accordingly, Delphi asks this Court to reverse and remand the court's decision on cleaning charges with instructions that Delphi is responsible for the shovel and

broom removal of its product and waste and its share of mobilization/demobilization, and Magellan is responsible for all other costs of cleaning.

VII. The Interest Awarded to Magellan is Erroneous

A. Question Presented

Did the court properly award Magellan interest of $354,738 and hold that Magellan had not waived its right to charge interest under the 2005 Agreement? See Ex. A at 52, 54-55.

B. Scope of Review

This issue is a mixed question of law and fact. Therefore, this Court's review is *de novo*. See Zirn v. VLI Corp., 681 A.2d 1050 at 1055 (cited supra, Argument II).

C. Merits of the Argument

Magellan never charged interest during the 5-year term of the 2005 Agreement, and thereby waived its right to collect interest thereunder. This waiver is evidenced by Bogle's September 1, 2011 email to Magellan's accountant Kelley, stating: "Delphi's new [Terminalling Agreement ("TA")] starts today. Let's begin charging late fees, per the TA, for any late payments under the new TA." When Kelley sough clarification – "OK-just on the new TA correct?"—Bogle unambiguously confirmed: "Yes just on the new TA." A111-12 (citing A1287).

Later, in January 2012, Hunter (Bogle's replacement), wrote to another Magellan accountant: "As a general rule, let's charge Delphi interest when they are late on payments," A907; and "I'd like to see the late fee calculations with and without the tank cleaning invoices. Legally, I'm not sure if we can include that

amount." A907. In response thereto, the accountant replied: "As of now, since we've never charged late fees, I am removing late paid invoices from the calculation." Id.

Magellan asserted a counterclaim for interest and it was therefore Magellan's burden to prove its claim by the preponderance of the evidence. Magellan did not provide any proof as to its claimed interest, except for noting the unadmitted interest invoices reflected in Exhibits D-131 (A1217) and D-132 (A1218). The court acknowledged that Magellan's evidence did not allow the court to assess how Magellan applied the deposits to Delphi's bills. See Ex. A at 54-55. The amount of interest awarded was also incorrect; Magellan claimed only $262,059 in interest.

Delphi respectfully requests that the Court reverse and remand the court's decision on Magellan's interest award and direct that no interest should be awarded to Magellan under the 2005 Agreement, and Magellan can retain from Delphi's collateral only so much interest under the 2011 Agreement as it can prove by a preponderance of the evidence.

VIII. The Court's Ruling on the Loss of 301 Barrels of Product is Erroneous

A. Question Presented

Did the court err in denying Delphi's claim that Magellan did not return 301 barrels of borrowed product? See Delphi Rule 59 Brief at 40.

B. Scope of Review

"In an appeal from the entry of a civil judgment following a Superior Court bench trial, this Court will uphold the judge's factual findings if they are sufficiently supported by the record and not clearly erroneous, and are the product of an orderly and logical deductive process." Lorenzetti v. Hodges, 62 A.3d 1224 (Del. 2013).

C. Merits of the Argument

The court found that the 301 barrel loss was "more likely than not" attributable to Tanks 1 and 19 being in the "critical zone," the area near the bottom of the tanks. Ex. A at 43. The court based its conclusions solely on Cosby's testimony. See id.

However, Cosby admitted that Tank 20 "was probably not in the critical zone" when Magellan chose to take the product out of that tank (A318) and Delphi agreed. A221. Further, Cosby did not know where the critical zone of Tanks 1 and 19 was without seeing a tank strapping chart (A296), but Magellan did not

produce the strapping chart, nor were the charts introduced into evidence.[10] Most importantly, Magellan was to determine the quantity of product transferred into and out of Tanks 1 and 19 based on measurements made on Tank 20, and not Tanks 1 and 19.

Delphi is entitled to payment of $30,491.30, plus interest, based on Magellan's own records showing the loss. Delphi respectfully requests that the Court amend the judgment accordingly or grant a new trial on this claim.

[10] Magellan refused to provide them to Delphi. See A814.

IX. The Court Improperly Dismissed Delphi's Fraud Claim for Magellan's Concealment of Heating Overbilling

A. Question Presented

Did the court err in dismissing Delphi's claim that Magellan fraudulently concealed the heating overbill? See A166.

B. Scope of Review

Trial court rulings granting motions to dismiss are reviewed *de novo*. See Savor, Inc. v. FMR Corp., 812 A.2d 894, 896 (Del. 2002).

C. Merits of the Argument

The court ruled that Magellan overbilled Delphi from 2005 through 2010 the sum of $114,547 in addition to the $421,603 Magellan paid Delphi on July 24, 2015. See Ex. A at 59. The court also ruled that Magellan's multiple failures to reveal the overbilling to Delphi breached Magellan's duty of good faith and fair dealing. Id. at 72.

Delphi alleged in the SAC that Magellan had acted fraudulently in concealing the heating overbill. See A166-71. But on Magellan's motion to dismiss, the court dismissed Delphi's fraudulent concealment claim. See Exhibit B at 56. The court reasoned that Delphi had not alleged that Magellan's concealment of the heating overbill caused Delphi to take any affirmation action to its detriment. Id. However, Delphi indisputably took affirmative action to its detriment when it paid the improper succeeding bills, which gave Delphi no credit

for the overbill and thus should not have been issued, and when it paid Magellan's inflated warehouseman's lien demands.

Accordingly, Delphi asks that its fraud claim be reinstated and tried, such that Delphi may prove its entitlement to punitive damages for Magellan's conscious concealment of its overbilling for heating.

X. Delphi's Lost Product Claim Should Not Have Been Dismissed on Directed Verdict

A. Question Presented

Did the court err in dismissing Delphi's claim that Magellan failed to preserve Delphi's oil from loss? See A605-06.

B. Scope of Review

"On appeal from the Superior Court's denial of a motion for a directed verdict, the standard of review is whether the evidence and all reasonable inferences that can be drawn therefrom, taken in the light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury." Russell v. Kanaga, 571 A.2d 724, 731 (Del. 1990).

C. Merits of the Argument

Delphi claimed that it suffered damages of $360,972, representing for product losses exceeding the 0.25% quarterly loss allowance provided for in the 2005 Agreement.

Among the reasons for the product shortages within Magellan's control were Magellan's failure to mix the tanks. Magellan recognized this and took measures to reduce losses in a tank it stored its own product by mixing that tank, A908, but chose not to implement those important procedures in any of the tanks that it stored Delphi's product.

It was not until 2012 that Magellan began to mix Delphi's tanks before gauging them, having not done so for the first seven years of Delphi's tenancy. See A1253-55 (Cosby November 30, 2011 email chain where Cosby gives instructions to all Terminal personnel that "[w]e are taking these extra steps [mixing and hand gauging] to try and eliminate some of these small losses that keep popping up on Delphi tanks"); A94-96 (agreeing that tank mixing increased volume).

Hafner testified that mixing Delphi's tanks before gauging them was improving the accuracy of the measurements and eliminating some of the losses, but that Magellan only started mixing Delphi's tanks before gauging "probably about three years ago" [i.e. in or about late 2011]. A119. Therefore, there are disputed issues of material fact concerning the product losses Delphi sustained. A directed verdict for Magellan on this claim was therefore error.

XI. The Court Erred in Finding That Calpine Owned the Line Fill in the Pipeline to Conectiv

A. Question Presented

Did the court err in ruling that Magellan properly transferred Delphi's product claimed to a third party? See A606-08.

B. Scope of Review

"To the extent those findings turn on determinations of the credibility of live witness testimony and the acceptance or rejection of particular items of testimony, those findings will be upheld. To the extent the challenged factual findings do not turn on the credibility of live witnesses, this Court will accept those findings if they are supported by the evidence and are the product of an orderly and logical reasoning process." Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27, 50 (Del. 2006).

C. Merits of the Argument

The court held that "Hafner, Cosby and Peterson as well as the business record memorializing the transfer establish more likely than not that the product belonged to Conectiv." Ex. A at 50. The court relied on Hafner's testimony that the pipeline only allowed product to flow to Conectiv and not back to the Terminal. However, Hafner's July 20, 2010 email shows that the line fill could have been displaced back to the Terminal. See A106-08 (citing A1258).

Furthermore, contrary to his testimony, Hafner admitted he did not know whether Conectiv had purchased the line fill from Delphi. A214.

Magellan's rate sheet shows nothing more than that the line fill came out of one of Delphi's tanks and was placed in the pipeline for the sole purpose of diagnosing leaks in the line, and not to sell to Conectiv or deliver into Conectiv's tanks at the power plant. See A813. In comparison, A810, is a contract signed by Conectiv that made clear that Delphi did not sell the product to Conectiv.

Even if Magellan believed the product was Conectiv's, Section 3.2 of the 2005 Agreement provided: "If title to any product at the Terminal is transferred to a third party other than another customer of the Terminal, Customer will nevertheless be deemed the owner of the Product . . . ." Conectiv was not a customer of Magellan's. A316.

In addition, in 2010, Roles, Bogle's and Cissell's boss, said: "It might be Delphi's product" from research Cissell had done. See A1285. Bogle acknowledged that Gumbaz had told him in July 2010 that Delphi owned the product in the line. See A108. Cosby admitted that he was told that Delphi owned the oil. See A274-75, A282. Contrary to Magellan's admission of Delphi's multiple requests for its product in the pipeline, Conectiv never asked for the product for the more than six years it was in the pipeline, and when Magellan

decided to simply give Delphi's product away, it gave it to Calpine, a business entity unrelated to Conectiv.

Delphi respectfully requests that this Court reverse and remand the court's decision on the Conectiv issue with instructions that Delphi did not transfer the line fill to Conectiv, or Calpine, and to assess damages.

XII. The Court Erred in Granting Summary Judgment on The Asphalt Seminole Issue

A. Question Presented

Did the Court err in granting summary judgment on the Asphalt Seminole claim? See A165.

B. Standard of Review

"This Court reviews de novo the Superior Court's grant or denial of summary judgment 'to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." State Farm Mut. Auto. Ins. Co. v. Patterson, 7 A.3d 454, 456 (Del. 2010) (citations omitted).

C. Merits of the Argument

Magellan's rejection notice identified the only problem with the Asphalt Seminole as the H2S level in the vessel. There is a genuine issue of material fact on that question. The court should not have relied on the temperature of the product which was not a practical problem due to cooling of the cargo. The Court should reverse the court's decision and remand the issue for trial.

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