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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This case involves claims brought by Delphi Petroleum, Inc. ("Delphi") against Magellan Terminal Holdings L.P. ("Magellan") arising out of two Terminalling Agreements. Under those agreements, Magellan stored oil for Delphi at Magellan's terminal at the Port of Wilmington (the "Terminal") and provided related services. Delphi filed this action in February 2012, claiming Magellan had breached the agreements and their covenants of good faith and fair dealing. Delphi later alleged Magellan had committed fraud by not advising Delphi that Delphi's interpretation of a 2011 Agreement, as drafted by Delphi, was inconsistent with the unambiguous language of the Agreement regarding movements of product into the Terminal by truck.

In an Opinion and Order entered on June 23, 2015, the Superior Court dismissed various claims asserted by Delphi and granted partial summary judgment against Delphi, holding the 2011 Agreement did not require Magellan to permit delivery of oil to the Terminal by truck. Notwithstanding this ruling, the Superior Court erroneously permitted Delphi's fraud claim to proceed to trial.

In July 2015, the Superior Court conducted a five-day bench trial in this case and, on June 27, 2016, it entered an 85-page Decision After Trial ("Decision," Exhibit A), addressing in extensive detail the evidence and arguments presented by

the parties. Delphi appeals various aspects of that Decision, as well as the Superior Court's earlier rejection of other Delphi claims.

Magellan filed a Notice of Cross-Appeal on February 9, 2017. Magellan appeals the Decision on two narrow grounds: (1) the Superior Court erroneously held Delphi could rely on its faulty interpretation of an unambiguous contract provision to recover under a fraud theory; and (2) there was no evidence supporting the determination that Magellan overcharged Delphi for tank heating in 2005 and 2006 or the damages awarded on that claim.

SUMMARY OF ARGUMENT

I. Delphi's Arguments And Magellan's Denials With Specificity

1. DENIED. Delphi did not incur a loss based on Magellan's alleged "overbilling" for tank heating until Delphi made a wire transfer to Magellan on September 25, 2013. Until that time, Delphi owed over $1 million to Magellan for unpaid invoices, an amount far exceeding the amount allegedly "overbilled."

2. DENIED. Delphi did not reasonably mitigate its damages for fraud when it failed to accept Magellan's $2,500 proposal to make modifications to the Terminal that would have permitted Delphi to move product into the Terminal by truck.

3. DENIED. The 2011 Agreement required Delphi to pay an invoice from Magellan within 30 days of receiving it, without setoff or deduction. Delphi paid certain invoices without imposing any limitation on the use of the funds. Those payments were payments on the invoices—not deposits of "collateral"—and Magellan's contingent counterclaim was not triggered.

4. DENIED. Magellan did not waive its clear contractual right to impose interest on past-due invoices merely by declining to seek interest from Delphi earlier in the parties' relationship.

5. DENIED. Section 2.7 of Schedule A of the 2005 Agreement unambiguously required Delphi to pay for the removal of all product and waste from tanks it had vacated. Section 2.8 required Magellan to pay only for the costs of "sand blasting" and "water washing" tanks that were emptied for repairs, maintenance, or inspections, while Delphi bore any remaining costs. Magellan billed Delphi for tank-cleaning in accordance with these requirements.

6. DENIED. The 2005 Agreement did not specify how often Magellan should record the usage of tank heaters. The court properly looked to extrinsic evidence, which established that Magellan adopted the practice used by Delphi personnel when its subsidiary owned the Terminal and that Delphi did not require Magellan to change that practice. The 2011 Agreement also did not require Magellan to track the cost of heating Delphi's tanks with any more precision than was previously used by Delphi personnel.

7. DENIED. The discrepancy between the recorded amount of oil borrowed by Magellan and the recorded amount returned to Delphi likely resulted from the difficulty inherent in measuring product in tanks in the "critical zone."

8. DENIED. Delphi offered no proof it actually lost product as a result of Magellan's alleged failure to mix the tanks prior to measuring product or that such failure constituted negligence.

9. DENIED. The evidence supported the Superior Court's finding that Delphi did not own the product in the Conectiv pipeline.

10. DENIED. Magellan had a contractual right to reject delivery of product that did not conform to the specifications the Agreement. The Asphalt Seminole's load did not conform.

II. Magellan's Summary Of Arguments On Cross-Appeal

1. The Superior Court erred in holding that Magellan committed fraud by permitting Delphi to believe that contract language Delphi's attorney proposed and Magellan accepted would give Delphi the right to deliver oil to the Terminal by truck. The Superior Court correctly held on summary judgment that the 2011 Agreement unambiguously ***does not require*** Magellan to permit such truck deliveries. Delphi has not appealed this ruling, which is binding on appeal. Magellan made no representation to Delphi affirming this non-existent contractual right, nor did Magellan have a duty to disclose to Delphi that the contract language its attorney inserted did not have the legal effect allegedly intended by Delphi. The fraud ruling should be reversed.

2. There is no evidence supporting the Superior Court's finding that Magellan overcharged Delphi for tank heating in 2005 and 2006. Nor were there any facts supporting the amount of damages awarded on that claim.

STATEMENT OF FACTS

This case involves services provided by Magellan to Delphi at a marine terminal at the Port of Wilmington, Delaware (the "Terminal"). A198. The Terminal is used for the intake, storage, and delivery of petroleum products. A198. Delphi buys and sells such products. B61-62.

In 2005, Magellan purchased the Terminal from Delaware Terminal Company ("DTC"), a Delphi subsidiary. A198. In connection with the sale, Delphi entered into a Terminalling Agreement with Magellan ("2005 Agreement"), permitting Delphi to continue using the Terminal to store Delphi's petroleum products. B63, A719. After expiration of the 2005 Agreement, the parties entered into a second Terminalling Agreement in 2011 ("2011 Agreement"). A783. The parties negotiated the 2005 Agreement and the 2011 Agreement (collectively, "Agreements") at arms' length and with assistance of counsel. B63-64, B66. The initial term of the 2011 Agreement expired on August 31, 2014, and was not extended by the parties. B142, B70, A783.

Throughout the parties' relationship, Delphi—the former landlord, turned tenant—engaged in an endless stream of complaints to the Terminal's new landlord, Magellan. This led to numerous disputes regarding the parties' rights and obligations under the Agreements, ultimately resulting in this litigation. The background of the various disputes is described below.

A. Tank Heating

Tanks containing heavy oil are typically heated in cold weather to improve flow from the tanks. B103. Both Agreements contain provisions addressing the heating of Delphi's oil at the Terminal.

1. The 2005 Agreement

Section VII.H of the 2005 Agreement required Delphi to "pay Magellan the actual cost, plus 18% of the fuel consumed for heating. . . . Fuel consumed for heating will be allocated among the Heavy Oil Tankage utilizing the methodology set forth in Schedule C." A722. At Delphi's request, this provision was modified to reference Schedule F, which was added. A763-776. Schedule F provided that if a heater was used to heat a single tank, the heating cost would be charged to that tank. A775. If it was used to heat multiple tanks, the costs were allocated based on the heating factors for the specific tanks set forth on Schedule F. A775. The 2005 Agreement did not require Magellan to record specific times during which a tank was heated or to track the fuel consumption for specific tanks. A719-782.

2. The 2011 Agreement

The 2011 Agreement included as Schedule C a list of heating factors that largely mirror Schedule F of the 2005 Agreement. A808-809. The 2011 Agreement also expressly required Magellan to maintain the temperature of the heavy oil stored for Delphi at the temperature requested by Delphi. A794. To ensure Magellan could heat the oil adequately, the Agreement contained a

provision titled "Maintenance," which required Magellan to "only use the heaters that exist on the Effective Date, or the replacements thereof during the Term of this Agreement, to heat the Tankage unless [Delphi] agrees otherwise in writing." A795, § 2.10(e). Like its predecessor, the 2011 Agreement contained no provision requiring Magellan to record the times a tank was heated or otherwise track the fuel used to heat individual tanks. A783-809.

3. Magellan applied Delphi's allocation formula.

Delphi or its subsidiary, DTC, developed the heating factors designated in Schedules F and C of the Agreements when DTC owned the Terminal, and Delphi included them in the Agreement. B48-49, B15-16. The contracts for other Magellan customers contained the heating factors assigned to the tanks of those customers. B8. Delphi gave Magellan a computer program to apply the factors. B48-49, B14, B126. Magellan used the program to allocate tank heating costs to Delphi. B103-104. Magellan never changed the formula. B103-104, B126.

Magellan took readings to determine heating oil usage once per day, typically at midnight. B42-43. It did not track the length of time each tank was heated. B105, B39. Instead, if a tank was heated on a particular day, Magellan billed Delphi as if the tank was heated for the full 24 hours that day. B015, B39. This conformed with the computer program Delphi provided to Magellan. B39.

There were times when Delphi's product was heated simultaneously with the product of other customers. B16. Magellan then used Delphi's computer program, which applied the formula in Schedules F and C, to allocate the costs of the heating oil between Delphi and the other customers. B16, B6-7.

4. Magellan used meters to measure heating oil usage.

Tank 5 stores fuel oil that powers the heaters for the other tanks at the Terminal. B102. Tank 5 has a side gauge used to measure the amount of product in the tank. B14. Sometime after September 2005, meters were installed on the lines between Tank 5 and the heaters to measure the amount of oil the heaters consumed. B102, B106. Then-Terminal Supervisor Alan Cosby instructed employees not to use the meters for billing purposes unless they could be calibrated. B106-207.

In January 2011, Mr. Cosby learned Magellan employees were using the meters to calculate heating costs billed to customers. B107. He instructed them to stop this practice and to instead utilize the side gauge on Tank 5 for billing purposes. B107-108. For the remainder of the parties' relationship, Magellan used the side gauge to bill Delphi for heating oil. B108.

There is no evidence regarding when the meters were installed or when Magellan began using them for billing purposes. As of July 2015, Paul Hafner had worked at the Terminal for 38 years. B37. Mr. Hafner, the Traffic and Inventory

Controller at the Terminal, testified he does not believe the meters were used in 2005 and 2006. B40. The daily inventory sheets reflecting the measurements taken in Tank 5 cover January 2007 through December 2011. A1158-1216. Magellan could not locate similar data for 2005 and 2006. B38.

5. Magellan reimbursed Delphi for some heating charges.

A Magellan employee prepared a chart comparing the amount of heating oil measured by gauge with the amount measured by the meters for the years 2007-2010. A1273-1277. The transmittal email indicated Magellan could not find enough data to include information from 2006 on the chart. A1273. It made no mention of 2005. A1273. The chart suggested that because the meters were used for billing purposes, Delphi had been "overbill[ed]" by $421,603.06 from 2007-2010. A1273-1277. When Magellan could not satisfy itself as to whether the meters were recording more oil usage than actually occurred, it refunded Delphi $421,603.06. B198, A201.

B. Truck Delivery To The Terminal

Petroleum products typically enter the Terminal through a pipeline connection to marine vessels and are stored in tanks at the Terminal until they exit the Terminal by truck or marine vessel to third parties. B101-102. Under the 2005 Agreement, Delphi did not make any commercial deliveries of product to the

Terminal by truck. A270. Despite this fact, Delphi sought to include in the 2011 Agreement the right for Delphi to deliver product to the Terminal by truck.

1. Negotiation of the 2011 Agreement

Final negotiations of the Agreement occurred via email between Delphi's counsel, Ronald Gumbaz, and Magellan's counsel, Ronnett Beall. A268-271. In an email dated May 13, 2011, Mr. Gumbaz sent Ms. Beall a draft agreement proposing certain changes. A1222-1249. He requested Section 2.1(a) be modified to read:

> Receipt and deliveries of Product from the Terminal via truck will be made to a Carrier in accordance with the Terminal's operating procedures and in accordance with this Schedule A, § 2.4....

A1229 (proposed language underlined). In the transmittal email, Mr. Gumbaz stated, "Delphi had the right to and did deliver to the Terminal by truck in the original agreement and needs that in this Agreement." A1222.

Responding by email the same day, Ms. Beall indicated Magellan was "in agreement with [Delphi's] two changes dealing with improvement costs and truck receipt language." A1250. There were no other communications between Magellan and Delphi regarding Delphi's proposed language. A269. The language proposed by Mr. Gumbaz and accepted by Magellan was included in the executed version of the 2011 Agreement, A789, which represented the entire agreement of the parties on this issue, A271, A786.

Magellan did not believe Delphi's truck receipt language gave Delphi the right to deliver product to the Terminal via truck. B11-12. Ms. Beall did not intend to deceive Delphi by accurately stating that Magellan had accepted Delphi's proposed language. B140. The Superior Court held that, as a matter of law, this provision did not give Delphi the right to deliver product to the terminal by truck. Aplt. Br. Ex. B at 42-49.

2. <u>Delphi sought to deliver product by truck.</u>

In 2012, Delphi sought to bring large amounts of product into the Terminal by truck. B2-3, B54-55, B57-58, A162. Magellan responded that the Terminal was not equipped to receive these deliveries and the Agreement did not require Magellan to permit them. A1148-1149.

On January 13, 2012, Magellan employee Brett Hunter sent an email to Delphi attorney Ron Gumbaz, proposing two possible solutions to the truck-delivery issue. A862. He suggested modifications to the offloading area at the Terminal that would have cost Delphi approximately $28,000 or reactivating a connection line within the Terminal at a cost of about $2,500. A862, A229, A272. Mr. Gumbaz never responded to this proposal. B74. Eleven days later, Magellan sent Delphi a draft amendment to the 2011 Agreement that would have permitted truck deliveries. A1314-1317, A272-273, A229, A1146-1157. Delphi rejected

Magellan's proposals, in part because Mr. Gumbaz was having a "bit of a tiff" with Ms. Beall regarding her construction of the contract. B67-70, A272-273.

3. Superior Court entered summary judgment on Delphi's contract claim regarding truck delivery.

On summary judgment, the Superior Court held that the 2011 Agreement unambiguously did not give Delphi the right to deliver product to the Terminal by truck. Aplt. Br. Ex. B at 42-49. The court concluded that when viewed as a whole, the 2011 Agreement "as written, objectively reflects that the parties' intention was for Delphi to only receive product from the Terminal via truck." *Id.* at 48. Delphi has not appealed this ruling.

C. Borrowed Oil

In August 2011, Hurricane Irene approached the New England coast. B127. The flooding often associated with hurricanes can cause tanks that are empty or low on product to float away, damaging the Terminal and the environment. B128-129. To protect against this, Delphi agreed to loan Magellan product from Delphi's Tank 20 to place in Tanks 1 and 19, which were empty or nearly empty. A1283, B127-134.

The "critical zone" is the first few feet of an oil storage tank measuring from the base, which is cone-shaped. B45-46. This area contains sand and sludge, which builds up unevenly. B46. Employees of both Magellan and Delphi

acknowledged it is difficult to measure product accurately when tanks are in the "critical zone." B44-47, B135-136.

Before it received a transfer of 15,191 barrels of product from Tank 20, Tank 19 contained only 407 barrels of oil and was in the "critical zone." B133, B170. Delphi had vacated Tank 1, so it stood empty. B134. Magellan measured 12,739 barrels of oil moving to Tank 1 as the storm approached. B134, B170. Tank 1 holds 250,000 barrels, so even with the borrowed oil, there was "not very much product in that tank," which was likely in the "critical zone." B133-135.

After the hurricane passed, Magellan measured product movements from Tank 19 (15,085 barrels) and Tank 1 (11,957 barrels) back to Tank 20. A1301. Although this appears to be 301 fewer barrels of product than Magellan borrowed from Tank 20, the tanks were in the "critical zone" and the measurements lacked reliable accuracy. B135. Mr. Cosby explained:

> [T]hey are not exact barrels, if because you start off in the critical zone of a tank and then you come back and you are sucking out of the critical zone in a tank and you just can't always get – the same barrel is never barrel for barrel, and that's understood, it's an [American Petroleum Institute] standard . . . .

B135. Measurement inaccuracies aside, Magellan physically returned all of the product it borrowed from Delphi. B135-136.

D. Conectiv Pipeline Oil

A pipeline (the "Conectiv Line") runs between the Terminal and a power plant that was owned by Conectiv. A810-811, B65. In 2010, Magellan discovered that the line contained product. B50-51. Magellan found a transfer order showing that DTC transferred product to Conectiv in December 2004 when DTC owned the Terminal. A812-813, B200. This order, combined with the fact that product in the line flowed only in one direction (*i.e.*, from the Terminal to the power plant), convinced Magellan that Conectiv—not Delphi—owned the product. B51, B53, B138. Before emptying the line, Magellan contacted Delphi representative Karen Peterson, who agreed the product belonged to Conectiv. B17, B52, B138. She maintained that position at trial. B56. Magellan cleared the pipeline of product to prevent leakage. B50-51. Delphi's records show that DTC agreed to transfer product to Conectiv in 2004 to test the Conectiv Line. A810-811.

E. Tank Cleaning

Heavy oil tanks must be cleaned in certain circumstances. For example, prior to an inspection, a tank must be "[d]egassed, cleaned, 100 percent bone dry" to allow inspectors to assess whether metal loss has occurred in the tank. B79-80, B109. Similarly, when a customer vacates the tank, the tank is cleaned to ensure a new tenant's product is not contaminated by the prior tenant's product or waste.

B34-35, B80, B109-110. The 2005 Agreement contains two provisions addressing the parties' tank-cleaning obligations: Sections 2.7 and 2.8 of Schedule A.

1. Section 2.7 required Delphi to pay tank cleaning costs incurred after Delphi's lease expired.

Section 2.7 required Delphi to "promptly remove all Product and waste from the Terminal" upon termination or expiration of the Agreement. A733. The 2005 Agreement terminated effective September 1, 2010, at which point Delphi ceased leasing several tanks at the Terminal. B171-196, *compare* A720-721 *with* A784. Seven of the tanks Delphi vacated (*i.e.*, tanks 1, 4, 9, 10, 12, 21, and 22) were cleaned in 2010 and 2011. A1323-1326, 1329. Likewise, six tanks (*i.e.*, tanks 3, 4, 8, 17, 18, 20) were cleaned in 2014 when Delphi exited the Terminal. A263, A1331. The only work performed on those tanks at that time was the removal of product and waste. A263-264, B93.

2. Where tanks were cleaned for repairs or inspection, Section 2.8 allocated costs between Magellan and Delphi.

Section 2.8 states, "Magellan may clean the Tankage for maintenance, inspections, and upon the expiration or termination of this Agreement, and [Delphi] will be responsible for the cost of the removal of Product and for the cost of the removal and disposal of waste" from the Tanks. A733. It also details the type of notice Magellan must give Delphi regarding events, such as repairs or inspections, that would require taking tanks out of service. A734. It sets deadlines

for Delphi to remove its product from a tank that is taken out of service and provides:

> 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 sand blasting and water washing.

A734. The Agreement does not define "shovel and broom." In negotiating this provision, Magellan proposed that Delphi "get your product and waste out that you can remove by shovel and broom . . . and we'll do all the other cleaning." B71-72. Delphi inserted that provision into the Agreement. B72.

Because the Agreement does not mandate the method by which product and waste should be removed from a tank, Magellan does not require its contractors to utilize a specific removal method. B81-82, B113. There are several methods available, including the use of: (1) diesel or "cutter stock" to flush the tank, A236, A259, B114-115, B117, B197; (2) steam or hot water to pressure wash the tank B113-114; and (3) squeegees or mops, to help push product or cutter stock around in the removal process. B114. Although shovels and brooms could be used to remove product and waste from a heavy oil tank, they are not the safest or most cost-efficient way to do so. B86-87, B94-95. Use of cutter stock is safer, more efficient, and results in recovery of a more usable and marketable product from the

tank. B84-85. Any of these methods removes the same product or waste that "can be" removed by shovel and broom. A258.

Where tanks were cleaned for purposes of making repairs or conducting maintenance or inspections, Section 2.8 required Magellan to pay for sand blasting or water washing the tanks. A734. "Water washing" in this context refers to the use of water to remove rust and scale from a tank, in conjunction with sand blasting, after removal of all product and waste. B87-88, B111-112, B115-116. This additional cleaning may be necessary to remove residue or vapor from the tank before "hot work" (such as welding) occurs, or to remove rust and scale if tank walls or floors need to be scanned as part of an inspection. B111-112.

3. Magellan properly allocated cleaning costs.

Alan Cosby was the area supervisor over the Terminal from 2005 to July 2013, and during that time was responsible for allocating cleaning costs under the Agreements. B101-102, B118-120. He reviewed and approved the invoices in A873-908, determining they reflected costs for removal of product and waste properly chargeable to Delphi under the Agreements. B120-123.

Andy Zaun is the current area supervisor of the Terminal. B76. Prior to that, he was the Terminal's maintenance supervisor, and his responsibilities included overseeing tank cleanings and reviewing charges to be passed on to customers. B76-78, B88-89. Mr. Zaun reviewed and approved the invoices in

A909-1145, concluding they reflected costs for removing product and waste from the tanks and were payable by Delphi. B89-92.

Both Mr. Cosby and Mr. Zaun testified that Magellan charged the costs of any "water washing" and "sand blasting" performed in anticipation of an inspection or repairs to Magellan, not Delphi. B96, B112, B115-116, B119-120, B123-125, A837. Delphi offered only one witness who criticized the cost allocation, Mr. Gumbaz, but he had no personal knowledge of the cleanings. A261-267, A252.

F. Magellan Refused Delivery Of Non-Conforming Product.

Section 2.2 of Schedule A of the 2005 Agreement specified the maximum levels of hydrogen sulfide (H_2S) acceptable for delivery into the Terminal: "100 PPM [parts per million] in any one tank of delivery vessel . . . ." A730. It also set a maximum product temperature of 150º F for delivered product. A730. Under the Agreement, if Delphi attempted to deliver non-conforming product to the Terminal, Magellan could "halt delivery at any time, including during the course of delivery, and refuse to continue to receive the non-conforming Product . . . ." A730.

In February 2010, Delphi attempted to have product delivered to the Terminal by the vessel "Asphalt Seminole." A165. Magellan rejected the delivery because the product did not conform to contractual standards. B18-23. The

"Certificates of Analysis" for the delivery reported H_2S levels ranging up to 200 PPM, *i.e.*, double the maximum amount permitted under the Agreement. B18-27. Testing also showed the product temperature was above the maximum specified in the Agreement. B28-32.

G. Delphi's Failure To Timely Pay Invoices

The 2011 Agreement required Delphi to pay Magellan for services provided within 30 days of the date of the invoice for those services. A796, § 3.4(a). Magellan could impose interest of 1.5% per month (or the highest rate permitted by law, whichever is less) for any invoice Delphi failed to pay within 30 days. A796.

From September 2010 through early 2014, Delphi failed to pay numerous invoices within 30 days of their receipt. A873-A1145, A1217, A1218, A319-320. Magellan properly billed these invoices under the Agreements. B120-123, B78, B88-92. After Delphi filed this action on February 29, 2012, Magellan exercised its right to charge interest on these past-due payments. A247.

On September 25, 2013, following a mediation in which the issue of accruing interest was raised, Delphi paid Magellan $1,085,466.42 of the amount due on invoices then in dispute. A871, A868-869, A277-278. Delphi characterized the payment as "collateral" against the amount Magellan claimed to be due. A868-869, A871. The Agreement contains no provision authorizing cash

"collateral." A783-809. Magellan expressly rejected this characterization and informed Delphi that it "accept[ed] this amount as a partial, unconditional payment by Delphi on the amount owed to Magellan for unpaid invoices, and will treat the payment as such unless you communicate otherwise in writing" by a set time. A870, A279.

Delphi's counsel replied by the deadline but failed to contest Magellan's position that it would accept the money as a "partial, unconditional payment." A870. Instead, he admitted Magellan would have "free use" of the funds and would be asked to repay "only the amount the Court finds Magellan failed to properly claim or erroneously charged Delphi." A870, *see* A248.

In the same October 2, 2013 email, Delphi's counsel declared Delphi was "exercising its right to terminate the [Agreement] as soon as Delphi can remove its products from the tanks . . . ." A870. The Agreement required Delphi to remove its product and waste from the tanks upon termination of the Agreement, A793, and Delphi indicated it was "in the process of arranging for the evacuation of its products from the tanks," A870.

In January 2014, Delphi still had approximately $1 million in unpaid invoices. A1217-1218. Many of these included costs for removing Delphi's product and waste from tanks Delphi was no longer leasing at the Terminal. A873-908.

The 2011 Agreement provided that "Magellan will have a warehouseman's lien upon any Product in the Terminal for any amounts owed to Magellan hereunder which have not been paid when due . . . ." A796-797. In December 2013, to secure the unpaid costs and upcoming cleaning costs, Magellan imposed such a lien on Delphi's product that remained at the Terminal. A1297. Delphi made a wire transfer to Magellan on January 31, 2014, in the amount of $1,008,548.06 to discharge the lien. A1334-1335.

ARGUMENT ON DELPHI'S APPEAL

I. The Superior Court Correctly Calculated Pre-Judgment Interest.

A. Question Presented

Did the Superior Court correctly find that Delphi paid for any "overbill" in the tank heating invoices from Magellan on September 25, 2013, and that pre-judgment interest began accruing on that date?

B. Scope of Review

This Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *In re Viking Pump, Inc.*, 148 A.3d 633, 680 (Del. 2016).

C. Merits of Argument

Magellan voluntarily reimbursed Delphi $421,603.06 for the amount of the alleged tank heating "overbill" from 2007-2010. A1273-1277. The Superior Court held that Magellan owes Delphi an additional $114,547 for the purported "overbill" in 2005 and 2006.[1] Thus, at most, Magellan overbilled Delphi by $536,150.06. The Superior Court awarded Delphi interest at the statutory rate on the total "overbill" for tank heating and held the interest began to run on September 25, 2013. Ex. A at 59. Delphi contends interest should have accrued at

[1] Magellan appeals this holding. *See* Part XIV below.

1.5% per month beginning in 2005, when Magellan allegedly began billing Delphi incorrectly. Aplt. Br. at 20-22. Both arguments are meritless.

Delphi's authorities hold that pre-judgment interest does not begin to accrue until the plaintiff "first suffered a loss at the hand of the defendant." *TransSched Sys., Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *5 (Del. Super. Mar. 29, 2012). Prior to September 25, 2013, Delphi owed Magellan over $1 million in unpaid invoices. A873-A1145, A1217, 1218. On that date, Delphi paid Magellan $1,085,466.42 of the amount due. A871, A868-869, A277-278. The Superior Court correctly found that Delphi did not prove it suffered any loss from Magellan's alleged overbilling until it made the September 2013 wire transfer and brought its account with Magellan closer to "paid." Prior to that time, Delphi's account was in a net negative position and awarding Delphi interest for a period of time when it owed Magellan roughly twice the amount of the heating overbill would give Delphi an unwarranted windfall.

Delphi also challenges the decision to award interest at the statutory rate instead of the rate listed in the Agreements. Aplt. Br. at 21-22. The Agreements address only ***Delphi's*** obligation to pay interest on unpaid invoices. A737, § 3.4 ("Customer will be assessed a late charge of one and one-half percent (1.5%) interest per month . . . for any invoice not paid within thirty (30) days of the invoice."); A796, § 3.4 (same). They do not give Delphi any right to receive

interest from Magellan, nor do they govern the amount of any such interest otherwise available. The Superior Court properly utilized the statutory rate.

II. Delphi Failed To Mitigate Its Alleged Fraud Damages.[2]

A. Question Presented

Did the Superior Court properly conclude that Delphi did not reasonably mitigate its damages for fraud when it failed to accept Magellan's $2,500 proposal to make modifications to the Terminal that would have permitted Delphi to deliver product by truck?

B. Scope of Review

This is a mixed question of law and fact. Findings of fact are "subject to the deferential "clearly erroneous" standard of review. . . . Where there are two permissible views of the evidence, the factfinders' choice between them cannot be clearly erroneous." *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). The issue of whether those facts violated a rule of law is a legal conclusion that is reviewed *de novo*. *Id.*

C. Merits of Argument

The Superior Court held that Magellan fraudulently induced Delphi to enter into the 2011 Agreement. Ex. A at 79. As shown in Part XIII below, this holding was not supported by sufficient evidence and should be reversed. This reversal

[2] Magellan has cross-appealed the Superior Court's fraud finding. *See* Part XIII below. If the Court overturns the fraud award, this issue regarding mitigation of the "fraud damages" becomes moot.

would moot Delphi's appeal of the amount of damages awarded on the fraud claim.

However, if the Court were to affirm the Superior Court's fraud ruling, then it should also affirm the finding that Delphi failed to mitigate its alleged damages. The Superior Court found that "for approximately $25,000 or even $2,500, Delphi could have accomplished the result Delphi desired, truck delivery to the Terminal." Ex. A at 81. The record fully supports this finding, A862, A229, A272, showing that Magellan timely presented a reasonable mitigation opportunity to Delphi's attorney, Mr. Gumbaz, in January 2012, and Mr. Gumbaz never even responded to it. B74. Delphi offers no real challenge to the finding on appeal.[3]

The Superior Court also found "a reasonable party in Delphi's situation would have incurred that nominal cost to 'make a lot of money.'" Ex. A at 81. Delphi does not contest this logical conclusion. Instead, it argues Magellan was in an "equal or better" position to make the Terminal improvements and should have taken those steps to reduce its own liability. Aplt. Br. at 25-26. But there is no evidence Magellan had even a ballpark estimate of the profits Delphi allegedly stood to gain if it could receive truck deliveries at the Terminal. Magellan could not have made a reasoned decision regarding whether the potential profits to

[3] Most of the factual allegations in Delphi's brief simply rehash Magellan's allegedly fraudulent conduct and are not relevant to the mitigation issue. Aplt. Br. at 24-26.

Delphi exceeded the costs of the improvements. By contrast, Delphi should have had the information necessary to make that decision. However, Delphi offered no credible evidence regarding its potential profits at trial, thus failing to provide proof supporting an alternate damages award. A385-386.

Finally, Delphi argues it reasonably rejected Magellan's draft truck-delivery amendment because Delphi was not legally required to enter into a second contract with a party who repudiated an earlier agreement. Aplt. Br. at 26. This ignores the Superior Court's ruling that, as a matter of law, the 2011 Agreement did not contain an agreement for truck deliveries to the Terminal—a ruling Delphi has not appealed. Magellan could not have "repudiated" an agreement that did not exist.

The Court correctly held that Delphi acted unreasonably when it ignored Magellan's offer that Delphi pay $2,500 for Terminal improvements to allow Delphi to receive truck deliveries. If Delphi believed it could profit significantly from those deliveries, it would certainly have paid a mere $2,500. Delphi's damages were properly limited to that amount.

III. The 2005 Agreement Did Not Require Magellan To Record The Specific Amount Of Time Each Tank Was Heated.

A. Question Presented

Did the Superior Court correctly conclude that the 2005 Agreement permitted Magellan to record tank-heater usage only once per day?

B. Scope of Review

This question presents issues regarding the construction of an ambiguous contract provision. This Court considers

> issues involving the language of the contract *de novo*, but to the extent that the Superior Court's interpretation of the contract is based on extrinsic evidence, its findings are entitled to deference "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 process."

Textron Inc. v. Acument Global Techs., Inc., 108 A.3d 1208, 1218-19 (Del. 2015) (citation omitted).

C. Merits of Argument

Delphi contends Magellan breached the 2005 Agreement because Magellan only recorded which tank(s) it was heating once per day, typically at midnight. As a result, if a tank was heated at the midnight recording time, that tank was charged with heating costs for the full 24-hour period, even if it was only heated for a few hours that day. Conversely, if a tank was heated from 12:05 a.m. until 11:55 p.m.,

it would not be charged for heating costs at all that day since it was not heated at midnight.

Delphi argues Section VII.H and Schedule F required Magellan to take the measurements necessary to quantify the "actual cost" of heating Delphi's tanks. Aplt. Br. at 30. Section VII.H. provides:

> Customer will pay Magellan the actual cost, plus 18% of the fuel consumed for heating, at Customer's request, Heavy Oil . . . . Fuel consumed for heating will be allocated among the Heavy Oil Tankage utilizing the methodology set forth in Schedule "F."

A764. Schedule F addresses the allocation of costs among the tanks. A775-776. If only one tank was heated at a particular recording time, all of the heating costs for the day were allocated to that tank. A775. If Magellan's records showed more than one tank was heated on that day, Schedule F provided the factors for allocating the day's costs among those tanks. A775-776.

Neither Section VII.H nor Schedule F mandates that Magellan record tank-heating usage more frequently than once per day. As the Superior Court noted, the 2005 Agreement "does not define a specific unit of time at which Magellan is required to record heating fuel consumption measurements." Ex. A at 63. Because the contract did not specify how precisely the "actual cost" of the heating fuel should be determined, the Superior Court looked to extrinsic evidence to determine the parties' intent on that issue.

"When a contract's plain meaning, in the context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, courts may consider extrinsic evidence to resolve the ambiguity." *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). This extrinsic evidence includes evidence of prior dealings between the parties, as well as their custom and practice. *Id.* After examining this evidence, "'a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of the negotiation.'" *Id* at 374-75 (citation omitted).

That is precisely what the Superior Court concluded here. After considering all of the evidence provided by the parties, the court expressly found:

> Readings to determine heating oil usage were done once per day. This same procedure [was] used by Delphi when Delphi owned the Terminal. The tank heating factors and computer program Magellan used to calculate heating costs to customers was developed by a Delphi employee when Delphi owned the Terminal. Magellan continued to use the factors and computer program when it purchased the Terminal. The heating factors never changed.

Ex. A at 60. The court thus found that Magellan simply followed the custom and practice established by Delphi in charging for heating costs. It also reasoned that if Delphi had intended to require Magellan to adopt a different practice, Delphi should have inserted that requirement in Schedule F, which the Superior Court found was drafted by Delphi and added to the agreement at Delphi's request. Ex.

A at 63. The record fully supports these findings, and Delphi does not argue otherwise.

Instead, Delphi contends the Superior Court should not have looked to extrinsic evidence because [t]he parties did not contend that Schedule F was ambiguous, and the court did not declare it ambiguous." Aplt. Br. at 29. But the court also did not hold the provisions to be "unambiguous," as it did with respect to other provisions of the Agreements. *See* Ex. A at 14, 25, 54. Although the Superior Court did not declare the provision to be ambiguous, it clearly treated it as such by examining extrinsic evidence. As the fact-finder in a bench trial, this was well within its domain.

Nor did the Superior Court "var[y] the contract's terms." Aplt. Br. at 31. Instead, it concluded the 2005 Agreement was silent on the issue and looked to the parties' conduct to determine their intent. This was entirely appropriate, and its findings are entitled to deference. The decision should be affirmed.

IV. Magellan Did Not Violate The 2011 Agreement By Recording Heating Oil Usage Only Once Per Day.

A. Question Presented

Did the Superior Court properly conclude it was not Magellan's burden to track and prove the precise costs of heating Delphi's tanks?

B. Scope of Review

This question presents two issues. One involves the interpretation of an unambiguous contract provision, which is reviewed *de novo*. *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The second relates to the construction of an ambiguous contract provision. This Court considers *de novo* issues involving the contract language; to the extent the Superior Court's interpretation is based on extrinsic evidence, its findings are entitled to deference. *See Textron*, 108 A.3d at 1218-19.

C. Merits of Argument

Delphi's argument is based on three provisions of the 2011 Agreement. Delphi briefly asserts that Section 2.10(e) prohibited Magellan from heating tanks leased by anyone other than Delphi. Aplt. Br. at 33. Section 2.10(e) merely required Magellan to "only use the heaters that exist on the Effective Date . . . .to heat" Delphi's tanks. A795. The Superior Court held that this provision was unambiguous and merely addressed the heating equipment to be used by Magellan, not the customers for whose benefit the equipment could be used. Ex. A at 12-14.

This construction is the only reasonable interpretation of the language and should be affirmed.

Delphi also relies on Section VII.H of the 2011 Agreement, which is largely identical to the corresponding provision of the 2005 Agreement. *Compare* A785 *with* A764. Like its predecessor, this provision is silent as to when and how often heating usage should be measured. In the 2011 Agreement, the Tank Heating Cost Allocation is found at Schedule C, but it is virtually identical to Schedule F of the 2005 Agreement and also does not address the timing of any measurements. Thus, the Superior Court's interpretation of these provisions in the 2005 Agreement is equally applicable and correct in construing the 2011 Agreement.

Delphi contends Schedule C differs materially from Schedule F because it does not include the heating factors for tanks that were not leased by Delphi. Aplt. Br. at 33. The Superior Court found the "relevant heating factors needed to perform the allocation appeared in the other customers' contracts." Ex. A at 14. The fact that Magellan had to consult other contracts to allocate heating usage simply has no bearing on the frequency with which Magellan was required to record that usage under the Agreement.

Finally, Delphi attempts to shift the burden to Magellan to prove it accurately allocated heating costs. Aplt. Br. at 33-35. This was not Magellan's burden. Delphi claims Magellan breached the parties' agreement by sending

Delphi erroneous heating bills. A163, ¶ 8(b). Delphi paid those invoices and sought to recover the amount of overpayment in this action. It was Delphi's burden to prove its claim, *i.e.*, that the amount invoiced was not accurate.

Magellan's counterclaim did not change this. The counterclaim was "contingent" on the court's characterization of the September 2013 and January 2014 payments from Delphi to Magellan. Magellan alleged:

> Delphi wired payments to Magellan and then, after the funds were received by Magellan, claimed the payments were made under protest. Delphi also has attempted to characterize the payment as "collateral" and has sought to recover the payment made.
>
> If Delphi's payment is determined by the Court to be unconditional (as Magellan believes it should be), then no amount is currently due from Delphi. However, if Delphi's payment is determined to be merely "collateral" or "contingent" then Delphi has breached the parties' Agreements in the amount not unconditionally paid.

A195, ¶¶ 6-7. The Superior Court correctly found that Delphi's wire transfers were "unconditional" and thus "the contingency upon which Magellan's [counter]claim is alleged has not arisen." Ex. A at 84. Because Magellan's contingent counterclaim was never triggered, there is no basis for Delphi's contention that Magellan bore the burden of proof on the heating invoices.

The Superior Court correctly concluded that the 2011 Agreement did not include the requirement urged by Delphi.

V. Delphi's September 2013 And January 2014 Payments Were Not Deposits Of "Collateral."

A. Question Presented

Where the 2011 Agreement required Delphi to pay within 30 days of receiving an invoice without setoff or deduction and Delphi made payments without imposing any limitation on the use of the funds, did the Superior Court correctly find those payments were payments on the invoices and not deposits of "collateral"?

B. Scope of Review

The Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *Viking Pump*, 148 A.3d at 680.

C. Merits of Argument

As noted in Part IV, Magellan's counterclaim was contingent on whether Delphi's wire transfers in September 2013 and January 2014 were "unconditional." A195, ¶¶ 6-7. After hearing and considering all the evidence, the Superior Court found Delphi's payments were not conditional and thus the counterclaim was not triggered. This record fully supports this finding, as does the 2011 Agreement itself.

Section 3.4(a) of Schedule A required Delphi to pay invoices "without setoff or deduction, thirty (30) days from the date of the invoice . . . ." A796. It did not permit Delphi to make payments of "collateral." Despite Delphi's attempt to

characterize the contested wire transfers as "collateral," Magellan expressly rejected the characterization and, in response, Delphi conceded that Magellan would have "free use" of the funds and would be asked to repay "only the amount the Court finds Magellan failed to properly claim or erroneously charged Delphi." A870; A279, A248. This evidence is more than sufficient to support the lower court's finding that Delphi paid the invoices. The contingency that would have given rise to Magellan's contingent counterclaim (*i.e.*, a finding that Delphi's payments were "collateral" or "contingent") did not occur.

Delphi argues that "Magellan itself recognized that the wire transfers were collateral . . . ." Aplt. Br. at 36. Delphi cites only the Pretrial Stipulation, which briefly summarizes the counterclaim. A199. This does not alter the contingent nature of Magellan's pleading. Nor does the fact that ***Delphi*** repeatedly called the payments "collateral," Aplt. Br. at 37-38, change the fact that the contract required Delphi to pay the invoices before challenging them and that Delphi imposed no restriction on Magellan's use of the funds. The Superior Court correctly found that the payments were not collateral and the counterclaim had not been triggered.

VI. Magellan Did Not Overcharge Delphi For Tank Cleaning.

A. Questions Presented

Did the Superior Court correctly conclude that Section 2.7 of Schedule A of the 2005 Agreement required Delphi to pay for the removal of all product and waste from tanks that it had vacated?

Did the Superior Court properly construe Section 2.8 of Schedule A of the 2005 Agreement to require Magellan to pay only for the costs of "sand blasting and water washing" tanks that were emptied for repairs, maintenance, or inspections, while Delphi bore the remaining costs?

Did the Superior Court correctly find that Magellan only billed Delphi for costs allocated to Delphi under the Agreements?

B. Scope of Review

The interpretation of an ***unambiguous*** contract provision is reviewed *de novo*. *GMG Capital*, 36 A.3d at 779. In construing an ***ambiguous*** provision, the Court reviews *de novo* issues involving the language of the provision, but defers to the lower court's findings on the extrinsic evidence supporting its interpretation, "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 process." *Textron*, 108 A.3d at 1218-19.

The Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *Viking Pump*, 148 A.3d at 680.

"'When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, his or her findings will be approved upon review.'" *Jones v. State*, 81 A.3d 1248, 1251 (Del. 2013) (citation omitted).

C. Merits of Argument

1. Section 2.7 required Delphi to pay the full amount for cleaning the tanks Delphi vacated.

Section 2.7 states, "Upon the expiration or termination of this Agreement, [Delphi] will promptly remove all Product and waste from the Terminal." A733. The Superior Court held that this provision "unambiguously provides that Delphi is responsible for the cost of all product and waste removal" in those circumstances. Ex. A at 25. This is the only reasonable construction of that provision and should be affirmed.

In approximately 2010, Delphi's lease expired with respect to seven tanks (*i.e.*, tanks 1, 4, 9, 10, 12, 21, and 22), which were cleaned in 2010 and 2011. A1323-1326, 1329. Six tanks (*i.e.*, tanks 3, 4, 8, 17, 18, 20) were cleaned in 2014 when Delphi exited the Terminal. A263, A1331. Delphi conceded that the only work performed on those tanks at that time was the removal of product and waste, A263-264, B93, which was Delphi's responsibility under Section 2.7. These facts fully support the lower court's finding that "Delphi is responsible for the total

amount of the invoices rendered pursuant to Clause 2.7 of Schedule A." Ex. A at 25.

2. The Superior Court properly interpreted Section 2.8.

As shown in Part E.2 above, Section 2.8 reiterates that Delphi is responsible for the costs of removing product and waste from tanks "upon the expiration or termination of this Agreement." A733. It also extends that obligation to times at which the tank is cleaned for maintenance and inspections. A733. After detailing the procedure for taking tanks out of service for repairs, maintenance, and inspections, Section 2.8 provides:

> 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 sand blasting and water washing.

A734. The Agreement does not define "shovel and broom." A734. The Superior Court determined the provision was "susceptible of more than one meaning" and thus ambiguous. Ex. A at 25.

The court then looked to Mr. Gumbaz's testimony that Magellan proposed Delphi "get your product and waste out that you can remove by shovel and broom . . . and we'll do all the other cleaning." *Id.* at 25-26 (quoting B71-72). Based on this evidence, the court found the parties intended for Magellan to "bear the costs of 'all the other cleaning' besides what the parties considered to be shovel and

broom." *Id.* at 26. Because Section 2.8 specified that Magellan would pay for "water washing" and "sand blasting," the court reasoned that the parties must have intended those to be "all the other cleaning" costs for which Magellan was responsible. *Id.* Thus, it found that "shovel and broom" removal encompasses "any cost that is not 'water washing' or 'sand blasting.'" *Id.* This is a logical interpretation of the extrinsic evidence and the language of the Agreement and should be affirmed.

3. Magellan only billed Delphi for costs allocable to Delphi under the Agreement.

Much of Delphi's argument focuses on its assertion that it should not have been charged for anything that was cleaned by water or could have been cleaned by water. *See, e.g.*, Aplt. Br. at 43 (arguing that "[d]iesel and water washing are . . . interchangeable cleaning steps," so the court should have held Magellan responsible for both). This distorts the Agreement and the facts.

There are two different ways in which water is used to clean a tank. It may be used to pressure wash a tank to remove product and waste. B114-115. This use would be an alternative to diesel or "cutter stock," which can also be used to flush the tank. A236, A259, B114-115, B117, B197. Water may also be used in conjunction with sand blasting to remove rust and scale from a tank ***after*** all product and waste has been removed—a "final" water washing. B82-83, B87-88, B115-116. This is necessary before tank walls or floors are scanned as part of an

inspection. B111-112. Because a shovel and broom could also be used to remove product and waste, Magellan charged Delphi for the first type of water washing. Ex. A at 19 n.64. Magellan did not bill Delphi for any "final" water washing on the tanks. *Id.* at 20 n.64. Based on this evidence, the Superior Court found that "Magellan specifically excluded 'a final water wash' and 'sand blasting' from Delphi's bills." *Id.* at 19.

The trial court received extensive evidence regarding the tank-cleaning billing, including testimony of Magellan employees responsible for reviewing and approving the Delphi bills. Both employees testified the bills only reflected costs for removing product and waste from the tanks, not the costs of final "water washing" or "sand blasting." B89-92, B120-123. The court found this trial testimony to be credible. Based on this "testimony regarding Magellan's billing practices to Delphi," the court concluded Magellan had not breached the Agreement. Ex. A at 27. This finding is based on substantial evidence and should be affirmed.

VII. Magellan Was Entitled To Charge Interest On Delphi's Late Payments.

A. Question Presented

Did the lower court properly find that Magellan did not waive its clear contractual right to impose interest on the past-due invoices merely by declining to seek interest from Delphi earlier in the parties' relationship?

B. Scope of Review

This is a mixed question of law and fact. The trial court's findings of fact are reviewed for clear error. *Bank of N.Y. Mellon Trust*, 29 A.3d at 236. Legal conclusions based on those findings are reviewed *de novo. Id.*

C. Merits of Argument

Delphi does not contest that Section 3.4 of Schedule A of the Agreements "unambiguously allows Magellan to charge interest on past-due invoices." Ex. A at 54; *see* A737, A796. Instead, it argues Magellan waived the right to collect interest under the 2005 Agreement because it did not assess interest during the term of that Agreement. Aplt. Br. at 48-49. Delphi cites no authorities supporting this argument. *Id.* Nor does it distinguish the case law cited by the Superior Court, holding that waiver requires "'more than mere inaction;'" it requires proof that the allegedly waiving party took a "'clear, unequivocal, and decisive act" that was intended to renounce a known right. Ex. A at 54 (quoting *Biasotto v. Spreen*, 1997 WL 527956, at *10 (Del. Super. July 30, 1997)). The court found "Magellan's 'mere inaction' of not enforcing" the interest provision "does not evidence a

knowing and voluntary relinquishment of its right." *Id.* at 54. The evidence Delphi cites (at 48-49) does not undermine that finding.

Delphi also mischaracterizes the trial court's ruling as an "award" of interest to Magellan and reasserts its baseless argument that Magellan bore the burden of proving it was entitled to interest. Aplt. Br. at 49. As discussed above, the Agreement specifically allowed Magellan to charge interest, which it did. Delphi had already paid the interest but then sought to recoup the previously-paid interest in the form of damages for Magellan's alleged breach of contract. A165, ¶ 8(s). Indeed, the trial court awarded Delphi damages based on an estimate of the interest paid on invoices the court had found excessive. Ex. A at 54-55. Delphi had the burden of proof on this issue and failed to prove any additional overcharged interest.

VIII. Magellan Returned All Of The Borrowed Product.

A. Question Presented

Did the Superior Court correctly find the apparent discrepancy between the measured amount of oil borrowed by Magellan and the measured amount returned to Delphi likely resulted from the difficulty inherent in measuring tanks in the "critical zone"?

B. Scope of Review

The Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *Viking Pump*, 148 A.3d at 680. Fact determinations based on the credibility of testimony at trial "'will be approved upon review.'" *Jones*, 81 A.3d at 1251 (citation omitted).

C. Merits of Argument

Employees of both Magellan and Delphi testified regarding the challenge of accurately measuring product when tanks are in the "critical zone." B44-47, B59-60, B135-136. Delphi does not contest this basic principle. Nor does it dispute the trial court's factual findings that "Tanks 1 and 19 were in the 'critical zone' when the product was transferred from Tank 20 to them" and "there is no persuasive evidence [they] were not in the critical zone after the transfer." Ex. A at 43. Instead, it argues Magellan was required to determine the amount of transferred product based on measurements in Tank 20, which was not in the critical zone. Aplt. Br. at 50-51. The cited evidence, A874, does not support this claim.

The trial court also expressly found "Crosby's testimony that Magellan returned the product it had borrowed to Delphi [was] credible." Ex. A at 43. Because the court based its factual findings on the credibility of a witness who testified "live" at trial, those findings should not be second-guessed on appeal. *See Jones*, 81 A.3d at 1251.

Finally, the Superior Court noted that Magellan transferred at least 55,000 barrels of Delphi's oil but "lost" only 301 barrels. Ex. A at 43 n.160. It found: "301 barrels accounts for about .05% of the total product transferred which the Court finds is insignificant particularly when Delphi has acknowledged that the measurements used to calculate product losses are inaccurate." *Id.* Delphi offers no basis for questioning the soundness of this finding, which should be affirmed.

IX. Delphi Failed To State A Claim For Fraudulent Concealment.

A. Question Presented

Did the Superior Court properly dismiss Delphi's fraudulent concealment claim where Delphi failed to allege Magellan intended to induce Delphi or that Delphi relied on the alleged concealment?

B. Scope of Review

The Court reviews *de novo* trial court rulings granting a motion to dismiss. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002).

C. Merits of Argument

In its Second Amended Complaint, Delphi alleged Magellan fraudulently concealed the heating overbilling. A171-173. The trial court dismissed the claim on two separate bases: (1) Delphi failed to allege "Magellan intended to induce Delphi to act or refrain from acting based on the alleged concealment"; and (2) Delphi failed to allege with particularity that "it did anything in reliance on Magellan's alleged concealment of the overbilling after" Magellan discovered the alleged overbilling in January 2011. Aplt. Br. Ex. B at 16-17. Delphi cites no place in its pleading where it alleged these necessary elements. Indeed, the Second Amended Complaint contains no such allegations. *See* A160-A181. The court properly dismissed the claim.

X. Delphi's Lost Product Claim Failed As A Matter Of Law.

A. Question Presented

Did Delphi's "lost product" claim fail as a matter of law where there was no proof any product was actually "lost" or that any "loss" was caused by Magellan's alleged negligence?

B. Scope of Review

The Court reviews *de novo* the grant of judgment as a matter of law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits of Argument

Under Section 4.2 of Schedule A of the Agreements, Magellan was responsible for product losses in excess of a certain amount, if those losses were caused by Magellan's lack of reasonable care. A745, A802. This issue was tried to the court, which entered judgment as a matter of law in Magellan's favor.

Delphi failed to prove any product was lost. At most, Delphi's evidence suggests that mixing product in the tank may increase the ***measured*** volume of the product, not that mixing actually adds to the ***amount*** of product. Further, Delphi cites no authority or evidence supporting its claim that Magellan was negligent simply because it did not mix Delphi's tanks before measuring them. Indeed, Section VII.B of the Agreements indicates it was Delphi's responsibility to "request[] tank mixing." A722, A784. The trial court properly entered judgment as a matter of law on this baseless claim.

XI. Delphi Did Not Own The Product In The Conectiv Pipeline.

A. Question Presented

Did substantial evidence support the Superior Court's finding that Delphi did not own the product discovered in the Conectiv Pipeline?

B. Scope of Review

The Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *Viking Pump*, 148 A.3d at 680. Factual findings based on the credibility of a witness who testified "live" at trial should be approved upon review. *See Jones*, 81 A.3d at 1251.

C. Merits of Argument

As shown in Part D above, three witnesses—two of whom work or have worked for Delphi—testified that Conectiv owned the product discovered in the Conecitv Pipeline. Documents created contemporaneously with the transfer fully supported this testimony. At most, Delphi's "evidence" shows that its attorney, Mr. Gumbaz, ***claimed*** Delphi owned the product and that there was no proof Conectiv ever actually paid for the product. Aplt. Br. at 56-57. Neither undermines the overwhelming evidence that DTC transferred the product to Conectiv. Further, Delphi again forgets that it bears the burden of proof on its claims. The issue is whether the product belonged to Delphi. There was more than sufficient evidence from which the court could find it did not.

XII. Summary Judgment Was Appropriate On The Asphalt Seminole Claim.

A. Question Presented

Did Magellan comply with the Agreement as a matter of law where it refused delivery of product that did not conform with the contractual requirements?

B. Scope of Review

A trial court's grant of summary judgment is reviewed *de novo*. *Williams*, 671 A.2d at 1375.

C. Merits of Argument

As shown in Part F above, the Agreements authorized Magellan to reject delivery of product that did not conform to the specifications in the Agreement. The undisputed evidence shows the Asphalt Seminole's load failed to conform to those specifications in two ways. Magellan had every right to reject the load, and the court properly granted summary judgment on that issue.

ARGUMENT ON MAGELLAN'S CROSS-APPEAL

XIII. The Superior Court Erred In Holding Magellan Liable For Fraud.

A. Question Presented

Did the trial court err in holding Magellan liable for fraudulent inducement where Magellan's only representation was an accurate statement that it had agreed to contract language proposed by Delphi's attorney? A380-390.

B. Scope of Review

This is a mixed question of law and fact. The trial court's findings of fact are reviewed for clear error. *Bank of N.Y. Mellon Trust*, 29 A.3d at 236. Legal conclusions based on those findings are reviewed *de novo. Id.*

C. Merits of Argument

The Superior Court held Magellan liable for fraudulent inducement based on Delphi's own erroneous drafting of contractual language and Magellan's alleged failure to tell Delphi of its error. This cannot—and should not—form the basis for fraud in an arms' length negotiation between sophisticated parties who are represented by counsel.

1. Magellan did not make a false representation to Delphi.

To prevail on its claim for fraudulent inducement, Delphi must prove that Magellan made a "false representation." *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). It did not. Delphi's fraudulent inducement claim is based solely on email correspondence between Delphi's counsel, Mr. Gumbaz, and Magellan's attorney,

Ms. Beall. Mr. Gumbaz proposed three changes to the then-draft 2011 Agreement. In the requested change relevant to the fraud claim, Mr. Gumbaz inserted the words "receipt and" in the contract provision addressing truck deliveries. A1229. In the email transmitting the draft, Mr. Gumbaz stated, "Delphi had the right to and did deliver to the Terminal by truck in the original agreement and needs that in this Agreement." A1222, A1229. Ms. Beall simply responded that Magellan was "in agreement with [Delphi's] two changes dealing with improvement costs and truck receipt language." A1250. The truck receipt language proposed by Mr. Gumbaz was, in fact, included in the executed version of the 2011 Agreement, A789. But the trial court held on summary judgment that the language unambiguously did not require Magellan to allow truck deliveries. Significantly, Delphi has not appealed that ruling.

Nevertheless, the trial court found that Ms. Beall's statement that Magellan was in agreement with Delphi's "truck receipt" change was false because, at the time the statement was made, Magellan's Tony Bogle "knew that he would not allow Delphi to deliver product to the Terminal by truck." Ex. A at 79. But Ms. Beall did not tell Delphi that Magellan ***would*** allow truck deliveries to the Terminal. She told Delphi that Magellan agreed to the truck-receipt language proposed by Delphi's attorney. This was unquestionably true. That language appears in the final agreement executed by the parties. That Mr. Gumbaz failed to

draft a provision that accomplished what he and Delphi claim to have intended does not render Magellan liable for fraud.

The real crux of the trial court's ruling is that because Magellan knew Delphi wanted the right to deliver product to the Terminal by truck and knew Delphi's proposed language would not accomplish this goal, Magellan was somehow obligated to alert Delphi's attorney to the issue and thus provide legal advice to Delphi. The court held:

> Magellan knew that the proposed, and eventually inserted, language did not effectuate Delphi's intentions. Instead of engaging Delphi in a direct dialogue about the appropriateness of the proposed language and potential repercussions, Magellan accepted the language and 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.

Ex. A at 81. This ruling, if affirmed, would significantly expand the tort of fraud to cover instances that clearly involve the responsibilities of attorneys to represent their clients—not the party with whom they are negotiating. It would create irreconcilably conflicting obligations for attorneys, and would fundamentally change the way contracts are negotiated under Delaware law.

Delaware courts have recognized that "[i]n an arms' length contractual setting. . . , a party has no affirmative duty to speak." *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015) (citing *Airborne Health,*

Inc. v. Squid Soap, LP, 2010 WL 2836391, at *9 (Del. Ch. July 20, 2010)). Such an affirmative obligation "only arises where there is 'a fiduciary or other similar relation of trust and confidence' between the parties." *Id.* (citing 37 C.J.S. *Fraud* § 33 (West 2015); *see Prop. Assocs. 14 v. CHR Hldg. Corp*., 2008 WL 963048, at *6 (Del. Ch. April 10, 2008) (noting that there is "no duty to speak absent special circumstances"). "Absent a special relationship, a party is under no duty to disclose 'facts of which he knows the other is ignorant' even if 'he further knows the other, if he knew of them, would regard [them] as material in determining his course of action in the transaction in question.'" *Prairie Capital*, 132 A.3d at 52 (quoting *Prop Assoc.*, 2008 WL 963048, at *6 (quoting Restatement (Second) of Torts § 551 cmt. a (1977)) (alteration in original)).

Here, the trial court expressly found "Magellan's conduct" ***did not*** "involve breach of trust or confidence as both parties involved in the negotiations were sophisticated business entities." Ex. A at 83. Thus, under well-established Delaware law, Magellan had no duty to speak. Because the trial court's fraud finding is premised on its faulty assumption that Magellan was compelled to correct Delphi's misunderstanding regarding the legal effect of the contract language Delphi's own attorney had requested, that ruling is contrary to the law and should be reversed.

If permitted to stand, the trial court's fraud ruling would impose a duty on every contracting party (and its attorneys) to ensure that any contract language requested by the other party accurately reflects the requesting party's intent (whether known or not). Such a duty would place an enormous burden on contracting parties, as well as their attorneys, obligating them essentially to give legal advice to the party with whom they are negotiating, or be subject to tort damages for fraud. This would add unnecessary complexity to contract negotiations and present an impermissible risk to parties choosing to contract under Delaware law.

The trial court's order also puts attorneys in a precarious position. According to the trial court, Magellan's attorney was required to inform Delphi that the language Delphi's attorney had inserted did not protect Delphi's interests—even though the language protected her own client's interests. This is contrary to the ethical duty imposed on Magellan's attorney under Oklahoma law to "seek[] a result advantageous to" Magellan in the negotiations. Preamble to Okla. Rules of Prof. Responsibility. As long as Magellan did not make a misrepresentation to Delphi—and it did not—it was permitted to act in its own self-interest and was not required to save Delphi from its own attorney's mistake.

2. Delphi could not have reasonably relied on the alleged misrepresentation.

To prove fraud, Delphi must also show that it acted in "reasonable reliance" on Magellan's alleged misrepresentation. *Browne*, 583 A.2d at 955. The trial court concluded Delphi reasonably relied on the purported misrepresentation because it "fervently believed" the inserted language "gave it the right to deliver to the Terminal." Ex. A at 80. Although the same trial court concluded the Agreement did not—as a matter of law—give Delphi any such right, the court held this did not foreclose Delphi's reasonable reliance because "hindsight does not inform the intentions and beliefs of Delphi during contract negotiations." *Id.*

This fails to recognize the import of the summary judgment ruling, which Delphi did not appeal and is binding on this case. Regardless of whether Delphi ***subjectively*** believed its language accomplished its intended purpose, the trial court determined that the contract simply was not susceptible to the meaning Delphi sought. Aplt. Br. App. B at 48. The Agreement ***unambiguously*** does not require Magellan to accept truck deliveries to the Terminal by truck. *Id.* Delphi could not have reasonably relied on a "promise" the contract unambiguously did not make.

Further, the parties agreed in Section 4.2 of Schedule A of both Agreements that "[e]xcept as expressly provided in this Agreement, Magellan makes no representations or warranties, express or implied . . . ." A745, A802. A plaintiff cannot show reasonable reliance on any statement outside the contract if it has

expressly acknowledged that no such representations have been made or relied upon. *See Progressive Int'l Corp. v. E.I. Dupont de Nemours & Co*., 2002 WL 1558382, at *5 (Del. Ch. July 9, 2002). The trial court did not address this argument in its Decision.

For all of these reasons, the Court should reverse the trial court's judgment against Magellan on Delphi's fraud claim

XIV. The Lower Court Erred By Awarding Damages For Alleged Tank-Heating Overcharges In 2005 And 2006 In The Absence Of Any Evidence Regarding Those Years.

A. Question Presented

Did the Superior Court err in holding that Magellan overcharged Delphi for tank-heating in 2005 and 2006 where there was no evidence regarding how Magellan charged for heating in those years? A374-377.

B. Scope of Review

The Court defers to a trial court's findings of fact "'if substantial evidence supports them and they are not clearly wrong." *Viking Pump*, 148 A.3d at 680.

C. Merits of Argument

The lower court found that "[b]egining in 2005, Magellan used meters to measure the amount of oil used to heat tanks when billing Delphi." Ex. A at 56-57. The evidence cited in support of this finding, A1158-1216, contains no reference to 2005 or 2006 and thus does not support the court's subsequent finding that "Magellan utilized the same practices in 2005 and 2006 that it admitted to using to calculate heating costs in 2007 through 2011." Ex. A at 58. Although the court recognized "there are no records for heating charges based on meter or gauge readings for 2005 and 2006," it nonetheless awarded Delphi damages of $114,547 plus interest on the claim. *Id.* at 59.

There is no evidence regarding when the meters were installed or when Magellan began using them for billing purposes. Paul Hafner, the Traffic and

Inventory Controller at the Terminal, testified he did not believe the meters were used in 2005 and 2006. B40. The daily inventory sheets reflecting the measurements taken in Tank 5, which stores the heating oil, covers the period of January 2007 through December 2011. A1158-1216. Magellan could not locate any daily inventory sheets or other similar data for 2005 and 2006. B38. Still, the trial court entered a six-figure judgment against Magellan because it was "not satisfied that the meters were ***not*** recording more oil usage than actually occurred in 2005 and 2006." Ex. A at 59. Despite the fact that the issue arose in the context of Delphi's claim for breach of contract, the court shifted the burden to Magellan to prove it did not engage in those billing practices the two prior years. The trial court's judgment against Magellan for overbilling heating charges in 2005 and 2006 was not based on substantial—or any—evidence and should be reversed. Further, there are no records from which the amount of any alleged overbill could be determined. The Court should vacate the award of these speculative damages.

CONCLUSION

For the reasons articulated above, the Court should affirm the Superior Court's rulings on the issues appealed by Delphi and reverse the Superior Court's rulings imposing liability on Magellan for fraud and for tank heating "overbilling" in 2005 and 2006.

Respectfully submitted,

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