EFiled: May 26 2017 01:27PM EDT
Filing ID 60651268
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 REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

WHITE AND WILLIAMS LLP
Marc S. Casarino (#3613)
Lindsey E. Imbrogno (#5450)
600 N. King Street, Suite 800
Wilmington, DE 19801
(302) 654-0424

and

Peter J. Mooney
Natalie B. Molz
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
(215) 864-7164
Admitted *pro hac vice*

Counsel for Appellant and
Cross-Appellee,
Delphi Petroleum, Inc.

Dated: May 22, 2017 (corrected May 26, 2017)

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

I. Magellan's Arguments on Cross-Appeal and Delphi's Responses 1

II. Delphi's Reply Arguments on Appeal 2

STATEMENT OF FACTS ON CROSS-APPEAL 5

I. Delphi's Fraud Claim 5

II. Damages for 2005-2006 Heating Overbill 8

ARGUMENT ON CROSS APPEAL 10

I. The Court Properly Found Magellan Liable for Fraud. 10

A. Question Presented 10

B. Scope of Review 10

C. Merits of the Argument 10

II. The Court Properly Awarded Delphi Damages for Heating Oil Overcharges for 2005-2006. 15

A. Question Presented 15

B. Scope of Review 15

C. Merits of the Argument 15

REPLY ARGUMENTS IN SUPPORT OF DELPHI'S APPEAL 18

I. Delphi is Entitled to Prejudgment Interest from 2005-2010 18

II. Delphi Did Not Unreasonably Fail to Mitigate Damages. 21

III. Schedule F to the 2005 Agreement Unambiguously Required Magellan to Record Fuel Consumed When Tanks Were Heated Alone or Simultaneously. 23

IV. Schedule C to the 2011 Agreement Unambiguously Required Magellan to Record Fuel Consumed When Tanks Were Heated Alone or Simultaneously. 30

V. Delphi's September 2013 and January 2014 Wire Transfers Were Accepted by Magellan as Collateral. 32

VI. Magellan Overcharged Delphi for Tank Cleaning 35

VII. The Interest Awarded to Magellan Was Excessive. 42

VIII. Magellan Did Not Return All of the Product it Borrowed from Delphi. 45

IX. Delphi Stated a Claim for Fraudulent Concealment. 46

X. Delphi's Lost Product Claim Was Improperly Dismissed. 47

XI. Delphi Owned the Product in the Conectiv Pipeline. 49

XII. The Asphalt Seminole Claim Should Not Have Been Dismissed on Summary Judgment. 50

TABLE OF AUTHORITIES

Page(s)

CASES

Bank of NY Mellon Trust, N.A. v. Liberty Media Corp.,
29 A.2d 225 (Del. 2011) 10

Bhole, Inc. v. Shore Invs.,
67 A.3d 444 (Del. 2013) 15

Biasotto v. Spreen,
1997 WL 527956 (Del. Super. July 30, 1997) 42, 43

Browne v. Robb,
583 A.2d 949 (Del. 1990) 10

Cummings v. Pinder,
574 A.2d 843 (Del. 1990) 15

Estate of Osborn v. Kemp,
991 A.2d 1153 (Del. 2010) 24

Galantino v. Baffone,
46 A.3d 1076 (Del. 2012) 26

George v. AC&S Co.,
1988 WL 22365 (Del. Super. Feb. 16, 1988) 10, 11

Hanner v. Rice,
2000 WL 303458 (Del. Super. Jan. 3, 2000) 21

Interim Healthcare v. Spherion Corp.,
884 A.2d 513 (Del. Super. 2005) 16

Prairie Capital III, LP v. Double E Holding Corp.,
132 A.3d 35 (Del. Ch. 2015) 12, 13

Stevenson v. Capano Dev., Inc.,
462 A.2d 1069 (Del. 1983) 13

TranSched Sys. Ltd. v. Versyss Transit Sols., LLC,
2012 WL 1415466 (Del. Super. Mar. 29, 2012) 20

STATUTES

6 Del. C. § 1¬303(b) 26

6 Del. C. § 1¬303(f) 43

OTHER AUTHORITIES

Black's Law Dictionary 25

SUMMARY OF ARGUMENT

I. Magellan's Arguments on Cross-Appeal and Delphi's Responses

1. Denied. The trial court properly found that Magellan fraudulently induced Delphi to execute the 2011 Agreement by misleading Delphi to believe that Delphi could make truck deliveries of product to the Terminal. Magellan's liability is not based on its failure to speak; it is based on Magellan's deceptive May 13, 2011 e-mail.

2. Denied. Cosby testified that the faulty meters were installed near the inception of the 2005 Agreement. Magellan produced no heating logs for 2005 or 2006. Using Magellan's own data from 2007-2010, Delphi reasonably proved the meter overbills for 2005 and 2006. Magellan offered no rebuttal of the calculation, and the trial court properly accepted it.

II. Delphi's Reply Arguments on Appeal

1. Delphi sustained heating overbill damages from 2005 to 2010 when it paid Magellan's inflated heating invoices, not when Delphi made its first collateral deposit in September 2013. Magellan's new argument that Delphi owed Magellan more than Magellan owed Delphi throughout that period is unsupported and incorrect. Magellan enjoyed the benefit of the overpayments—and Delphi was deprived of its funds—from the time the overpayments were made. There is no windfall to Delphi in awarding interest beginning in 2005.

2. Magellan failed to prove that Delphi unreasonably failed to mitigate the losses caused by Magellan's fraud. Delphi refused Magellan's first proposed amendment to allow Delphi to make truck deliveries because the amendment did not protect Delphi's claim for damages already incurred, placed restrictions on product quality not in the 2011 Agreement, charged a fee approximately eight times greater than the truck fee in the 2011 Agreement, and in any case would not have prevented the damages suffered by Delphi.

3. Schedule F to the 2005 Agreement unambiguously required Magellan to record the fuel consumption when tanks were heated alone or simultaneously. The trial court's resort to extrinsic evidence was error, and in any event does not support the proposition that Magellan had no duty to measure the actual fuel consumed for heating.

4. Schedule C to the 2011 Agreement is identical to Schedule F in unambiguously requiring Magellan to record the fuel consumption when tanks were heated alone or simultaneously. The heating invoices rendered by Magellan were indisputably inaccurate. Moreover, Schedule C included only the heating factors for Delphi's tanks, and not the factors for Magellan's other customers as had Schedule F, so that the formula could not be applied even had Magellan measured fuel consumption properly.

5. Delphi's September 2013 and January 2014 wire transfers were collateral and were conditional. The transfers did not pay disputed invoices, and Magellan acknowledged that.

6. Magellan overcharged Delphi for tank cleaning. The trial court found that Magellan was responsible for water washing, preparatory work and an allocation of mobilization and demobilization costs, yet Magellan's records show that it intentionally billed Delphi for those costs. Moreover, Gumbaz's testimony (supported by contemporaneous documentary evidence) was uncontradicted that the parties agreed that Delphi was responsible only for the initial shovel and broom phase of tank cleaning and Magellan bore responsibility for diesel and water washing.

7. The interest awarded to Magellan was excessive. Magellan evidenced its waiver of interest under the 2005 Agreement in writing and by a six year

unbroken course of performance. In addition, Magellan was awarded approximately $100,000 more interest than it even claimed. Finally, Magellan's interest invoices are not in evidence, and the calculations were inaccurate and unproven.

8. Delphi proved that Magellan did not return 301 barrels of product it borrowed from Delphi.

9. Delphi's claim that Magellan fraudulently concealed the heating overbill was well pled. In its decision, the trial court found that Magellan had intentionally concealed its heating overcharges.

10. Delphi's lost product claim was improperly dismissed. Magellan admitted that it failed to mix Delphi's product, causing product loss.

11. Section 3.2 of the 2005 Agreement stipulated that Delphi owned the product in the Conectiv pipeline.

12. The Asphalt Seminole claim should not have been dismissed on summary judgment. There was a genuine issue of material fact concerning Magellan's rejection of the vessel.

STATEMENT OF FACTS ON CROSS-APPEAL

I. Delphi's Fraud Claim

Magellan fraudulently induced Delphi to execute the 2011 Agreement. The trial court agreed. See Exhibit A to Appellant's Opening Brief at 72-80 (hereinafter, "Decision"). The facts fully justified the court's conclusion.

In 2011, Magellan rejected Delphi's exercise of its option to extend the 2005 Agreement, but only for six tanks. AR44. Delphi needed only six tanks because its ability to make purchases by barge had substantially decreased, but Delphi foresaw the opportunity to make purchases by truck. Having the right to deliver product to the Terminal by truck was crucial for Delphi. AR42-43.

Delphi then informed Magellan it would vacate the Terminal. Magellan wanted to keep Delphi as a tenant, and proposed a new agreement. Magellan's first draft of the 2011 Agreement, and its May 10, 2011 draft, made significant changes to the "Receipt & Delivery of Product" provision in the 2005 Agreement, and deleted any reference to the delivery of product to the Terminal by truck even though the section remained entitled "Receipt & Delivery of Product." See AR70-71.

"Receipts" was the term used by Magellan to denote the discharge of product into the Terminal. Magellan's Manager of Commercial Development for Marine Facilities, Mark Roles, testified that "receipts" meant bringing product into

the Terminal, whereas "deliveries" meant taking product out of the Terminal. See AR9-15. Cosby and Hafner likewise understood the meaning of "receipts." A315. See also AR23-26 (listing the many instances in which Magellan used the word "receipts" to denote bringing product into the Terminal).

Therefore, on May 12, 2011, Gumbaz inserted the "Receipt and" language in Magellan's May 10 draft to ensure its right to deliver product to the Terminal by truck. See AR62-63. Bogle, Magellan's chief negotiator of the 2011 Agreement, understood that Delphi wanted the right to deliver product by truck during negotiations. See AR17 ("I believe [Delphi] said they would like to begin delivering to the terminal."). Barnes agreed that Magellan "understood that Delphi was requesting the right to deliver product to the Terminal by truck." AR6-7. Magellan further admitted in its Answers to Interrogatories that it "understood that Delphi was requesting the right to deliver product to the Terminal by truck" when it received Delphi's May 13, 2011 email attaching the final draft which included the truck receipt language. AR47-48. Bogle deleted the words "Receipt and." See AR64-65.

On May 13, 2011, at 4:05 p.m., Gumbaz reinserted the "Receipt and" language into Magellan's May 13 draft and returned it to Magellan attached to an email to making it clear that Delphi was requiring the right to deliver product to the Terminal by truck under the 2011 Agreement:

> Please see revised draft. Delphi had the right to, and did, deliver to the terminal by truck in the original agreement and needs that in this agreement . . . .

See A1222, A1229.

Less than one hour later, at 4:40 p.m., Magellan attorney Ronnett Beall sent an email to Delphi, at the instruction of Barnes and Bogle, stating that Magellan "agrees with your two changes dealing with improvement costs and truck receipt language," and attaching a new draft that included Delphi's "Receipt and" wording. A1250.

Barnes, who was present during the entire trial, was never called by Magellan to testify and Bogle never appeared at the trial. Beall testified that Delphi's insertion of "Receipts and" added nothing to the 2011 Agreement, but when asked why Magellan had deleted them from Delphi's May 12 draft, she invoked the attorney-client privilege. AR51.

Bogle admitted that Magellan knew it would not allow Delphi to deliver product by truck when Magellan sent its response agreeing to the truck receipt language. See AR18.

There were no further communications between the parties after Magellan's 4:40 p.m. May 13, 2011 email. Gumbaz, in reliance on Beall's email and the inclusion of "Receipt and" in Section 2.1(a), executed Magellan's draft shortly thereafter on May 13.

On May 22, 2011, nine days after Delphi signed the 2011 Agreement, and more than seven months before Delphi's first truck delivery nomination, Bogle wrote an email to himself detailing the reasons he would give to deny Delphi its truck delivery right:

> Truck receipts are on an ad hoc basis for bad loads or problem loads. Cite historical data. No offload hours or offload rates listed in TA. Will work with Delphi to develop a project to install a dedicated offload system if they want to begin volume truck offloading. Will need to amend the TA to add offload fees and offload hours.

AR58. See also A109-10.

II. Damages for 2005-2006 Heating Overbill

Magellan conceded the Friday before trial that it overcharged Delphi $421,603 for heating Delphi's tanks in 2007-2010. B198. At that time, Magellan had known of the overbilling for more than four years and said nothing. The overbilling was caused by Magellan's use of defective and unauthorized meters to measure fuel oil usage. Decision at 56-57. The 2005 Agreement commenced September 1, 2005, and Cosby testified that the meters were installed soon thereafter. Magellan produced no records of any kind showing heating oil usage from 2005-2006.

The overbill as a percentage of total billings was consistent from 2007-2010, averaging 21.8% of the bills. A233. The court ruled that Delphi appropriately

applied that percentage to the bills rendered for 2005-2006 and awarded Delphi $114,547 for 2005-2006. Magellan offered no alternative calculation.

ARGUMENT ON CROSS APPEAL

I. The Court Properly Found Magellan Liable for Fraud.

A. Question Presented

Did the trial court have sufficient evidence to support its conclusion that Magellan fraudulently induced Delphi to execute the 2011 Agreement?

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 NY Mellon Trust, N.A. v. Liberty Media Corp., 29 A.2d 225, 236 (Del. 2011). The court's legal conclusions based on those findings are reviewed de novo. Id.

C. Merits of the Argument

Delphi's burden was to show by a preponderance of the evidence that Magellan engaged in fraudulent conduct. George v. AC&S Co., 1988 WL 22365 at *1 (Del. Super. Feb. 16, 1988). As the trial court observed:

> The general elements of common law fraud under Delaware law are: (1) defendant's false representation, usually of fact, (2) made either with knowledge or belief or with reckless indifference to its falsity, (3) with an intent to induce the plaintiff to act or refrain from acting, (4) the plaintiff's action or inaction resulted from a reasonable reliance on the representation, and (5) reliance damaged the [plaintiff].

Decision at 78 (citing Browne v. Robb, 583 A.2d 949, 955 (Del. 1990)).

The court assessed the conduct of Bogle, who authorized Beall's email of May 12, 2011 to Delphi:

> The Court finds that Magellan fraudulently induced Delphi to enter into the 2011 Agreement. Although Magellan focuses on the conduct and written word of Beall, Beall testified that she was a mere conduit for the intention of Bogle of Barnes. Therefore, the Court's focuses on the conduct and understanding Bogle and Barnes had at the time they instructed Beall to send the email. Bogle admitted that, in agreeing to the terms proposed by Delphi, he knew that he would not allow Delphi to deliver product to the Terminal by truck. Therefore, the Court finds that the statement contained in Beall's email that "[w]e are in agreement with your two changes dealing with improvement costs and truck receipt language . . . ." was false. Additionally, Bogle knew the statement was false but instructed that the email be dispatched to Delphi.

Decision at 79.

The court made a specific factual determination that Bogle ordered the email sent "with the intent to induce Delphi into executing the 2011 Agreement." Id. The court noted that Delphi initially proposed the truck receipt language, which Magellan rejected, but ultimately Magellan accepted and incorporated the language into the 2011 Agreement upon Delphi's insistence. The court found "that Magellan's intent in doing so was to placate Delphi so that Delphi could execute the Agreement." Id. at 80.

Magellan claims that the court imposed upon Magellan a duty to inform Delphi that the proposed and accepted language was not effective to permit truck

deliveries. It did not. The court did not rule that Magellan had a duty to tell Gumbaz that his proposed language would not accomplish what Magellan knew was his goal. Nor did the court rule that Magellan had a "duty to speak" to correct any misunderstanding Delphi might have had. Instead, the court found that Magellan spoke on its own initiative, through Beall's deceptive email, with the goal of inducing Delphi to sign the 2011 Agreement and thereby obligating itself to pay Magellan $3.8 million in fees.

Delphi wanted to deliver by truck and Magellan knew that. Magellan also knew that it would not permit truck deliveries. When it received Delphi's email on May 13, 2011, Magellan believed that the language did not accomplish Delphi's goal. It did not remain silent and merely insert the language in the 2011 Agreement. Instead, it crafted a response that it knew would induce Delphi to believe that Magellan agreed to permit truck deliveries.

Magellan relies on Prairie Capital III, LP v. Double E Holding Corp., 132 A.3d 35 (Del. Ch. 2015) for the proposition that a party has no affirmative duty to speak in an arm's length negotiation. However, this case presents a different situation. Magellan chose to speak, and when it did, its words were intentionally deceptive. The Prairie Capital Court recognized this precise factual scenario:

> Of course, if a party in an arm's length negotiation chooses to speak, then it cannot lie . . . . And once the party speaks, it also cannot do so partially or obliquely such that what the party conveys becomes misleading.

132 A.3d at 54 (citing Stevenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983)).

Accordingly, the trial court's ruling does not vary from well-established Delaware law. It is consistent with it. Nor does the trial court's ruling impose new or unprecedented obligations on contracting parties or their counsel.

As a direct result of Magellan's fraudulent misrepresentations and subsequent refusal to allow truck deliveries, Delphi lost two distinct business opportunities. In January 2012, Delphi had an opportunity to purchase 26,000 barrels of No. 6 oil from Exelon on the condition that the product be delivered to the Terminal by truck. AR35-38; A216-18. That opportunity was lost, however, waiting for a response from Magellan regarding the offloading of trucks at the Terminal. A217-18. There was a continual market for No. 4 and No. 6 oil and Delphi had customers that were willing to buy No. 6 oil from Delphi at $20-$40 above Platts, and more for No.4 oil. AR40; A219; A228. Using the $20 per barrel profit figure, Delphi lost $520,000 (26,000 bbl x $20 per barrel).

In May 2012, Delphi had another opportunity to purchase 24,600 barrels of No. 4 oil from Tri Gas that again required delivery by truck. AR40. Delphi purchased the oil, but because Magellan would not permit Delphi to deliver product to the Terminal, Delphi sold the oil to Bominflot, and made $0.10/gallon, or $4.20/barrel, on the sale. A218-20; A863-67; A227-28. Delphi lost $388,680

in profit ($20/bbl - 4.20 bbl x 24,600 bbl). Because Magellan prevented Delphi from making truck deliveries, Delphi also incurred damages from being forced to pay more than $3.8 million for the rental of six tanks it could not use. B69-70.

Magellan attaches significance to the fact that Delphi did not appeal the trial court's summary judgment dismissal of Delphi's breach of contract claim. Delphi did not appeal that ruling because it had no bearing on the validity of the fraud verdict. The breach of contract and fraud claims are distinct. The fraud claim is based on the extra-contractual Beall email, not the language of Section 2.1(a) as written. Whether the contract language was clear or ambiguous does not affect the fraud claim.

II. The Court Properly Awarded Delphi Damages for Heating Oil Overcharges for 2005-2006.

A. Question Presented

Where the admitted overcharges in 2007-2010 were 21.8% of the proper charges, did the trial court err in applying that percentage to the bills for 2005-2006 where the testimony was that the faulty meters were installed shortly after the September 1, 2005 inception date of the 2005 Agreement?

B. Scope of Review

The Court reviews a trial court's damages award for abuse of discretion. Bhole, Inc. v. Shore Invs., 67 A.3d 444, 449 (Del. 2013). The Court "will not disturb findings which are sufficiently supported by the record and the product of an orderly and logical deductive process." Cummings v. Pinder, 574 A.2d 843, 844 (Del. 1990).

C. Merits of the Argument

Magellan admits that it overbilled Delphi for heating by $421,603 in 2007-2010 by using defective meters rather than gauges to measure fuel consumption. B198. Magellan produced no heating logs for 2005-2006 despite demand. Magellan misstates the record in contending that "[t]here is no evidence regarding when the meters were installed . . . ." In fact, Cosby testified that the meters were installed "about a month or two" after he became the commercial supervisor at the Terminal in September 2005 when Delphi became a tenant at the Terminal. A301.

Cosby confirmed that the meters had been used for six years. A305. Hafner agreed: Q. "And in 2006 and 2005 ... was Delphi billed by meter as opposed to gauge . . . ?" A. "I'd say yes . . . ." AR20. At trial, Hafner testified that "I can't really tell when they actually started using the meters. I don't believe it was as early as 2005, 2006. I just don't know for sure."[1] B40. The trial court therefore had a sufficient basis to conclude that Magellan overbilled Delphi for heating in 2005-2006.

So the question became what was the amount of the overbill from September 1, 2005 through December 31, 2006. Without explanation, Magellan produced no records from that period. The records must have existed to allow Magellan to bill Delphi more than $500,000 for heating in 2005-2006. Magellan's records proved that the overcharges were consistent from 2007-2010, equaled 21.8% of gauge billing, and applied that percentage to the charges for 2005-2006. A233-34; A1318-20. That calculation yielded an overbill of $114,547. Decision at 58-59.

"The amount of damages must be established with reasonable, not absolute, certainty. . . . It is sufficient if a reasonable basis for computation of damages is afforded, even though the result will only be approximate." Interim Healthcare v. Spherion Corp., 884 A.2d 513, 570 (Del. Super. 2005). Cosby's and Hafner's testimony supports the finding that Magellan used the same practices during 2005

[1] Magellan only partially quoted Hafner's answer, saying Hafner "testified he did not believe the meters were used in 2005 and 2006." Magellan Br. at 59-60.

and 2006 that it admitted using from 2007 to 2011. Magellan presented no evidence to rebut this inference. Therefore, the court's damage award for the 2005-2006 heating overbill was established with reasonable certainty and the award should be affirmed.

REPLY ARGUMENTS IN SUPPORT OF DELPHI'S APPEAL

I. Delphi is Entitled to Prejudgment Interest from 2005-2010

The court awarded Delphi prejudgment interest on Magellan's 2005-2010 heating overcharges at the statutory rate from September 25, 2013. Magellan argues that the court was correct in denying Delphi interest before then because "[p]rior to that time, Delphi's account was in a net negative position." Appellee's Answering Br. ("Magellan Br.") at 25.

First, the court did not employ that reasoning in its Decision. The court did not find that Delphi was in arrears to Magellan in 2005-2010, and indeed, Delphi was not. The first invoice Magellan claimed was unpaid, No. 2547000, was due on September 5, 2010.[2] Magellan did not prove that Delphi owed Magellan more than the heating overcharges plus interest in the entire six year term of the 2005 Agreement. A1218. This is a new argument by Magellan that the Court should reject.

[2] Although Invoice No. 254700 was shown on Magellan's Ex. D-132 (A1218) as unpaid in the amount of $39,589.40 until Magellan seized Delphi's collateral, Magellan admitted that this invoice was overstated by $14,359.20, and the remaining $24,230.20 had been paid from a $75,705.14 credit Magellan owed Delphi. AR52-53. The next two invoices on Magellan's accounting, Invoices 270576 and 281843, had also been paid from the same credit and therefore, nothing was owed to Magellan when it seized more collateral to pay them. AR52-53. This shows that Delphi did not owe Magellan anything until May 6, 2011, at the very earliest.

Second, Magellan overlooks the court's award to Magellan of interest on its past due invoices at 1.5% per month, even under the 2005 Agreement, on which Magellan had never charged interest at all. There is thus no "windfall" to Delphi in granting it prejudgment interest under well settled Delaware law; that is, from the date Delphi paid the overcharges and suffered the loss of its funds.

For the years Magellan concealed the heating overcharge, it assessed Delphi interest at the 1.5%/month rate on invoices it said Delphi had not paid when due, even though Bogle in September 2011had ordered Magellan's accountants not to pursue Delphi on past due invoices "**because they may be eventually covered by a credit we may be giving Delphi.**" AR54 (emphasis added). The clear inference is that Bogle knew Magellan was concealing the overcharge and that the overcharge equaled or exceeded the amount Magellan was claiming Delphi owed on unpaid tank cleaning invoices.

When Delphi sent Magellan its more than $2 million in collateral in response to Magellan's threat, and subsequent imposition, of a warehouseman's lien and Magellan's demand for 1.5% interest on the amounts it claimed Delphi owed it, Delphi conditioned the provision of that collateral on a demand that Magellan pay interest at the same rate of 1.5%/month on any amount the court determined Magellan had no right to demand. A868-71.

Prejudgment interest accrues from the date of injury. The Court determined that Delphi suffered losses of (1) $27,396 in 2005; (2) $87,151 in 2006; and (3) $421,603 from 2007 to 2010. See Decision at 58; see also A1318-20. The court granted Delphi prejudgment interest from a date more than eight years after "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). Delphi is entitled to prejudgment interest at 1.5% per month[3], or at least the statutory rate, from the dates of its overpayments as reflected in the chart attached to Delphi's post-trial brief as Exhibit "A". A609-10. See also A1318-20.

[3] Delphi is entitled to interest at 1.5% per month because it was an explicit precondition of Delphi's sending the collateral to Magellan. If Delphi is awarded interest at the lesser statutory rate, then Magellan will still profit by virtue of charging Delphi interest at a rate of 1.5% per month while concealing the amounts it owed Delphi for so many years.

II. Delphi Did Not Unreasonably Fail to Mitigate Damages.

The court found that "Magellan fraudulently induced Delphi to enter into the 2011 Agreement" knowing the contractual right to bring product into the terminal by truck was a material term of the new 2011 Agreement. Decision at 79. Despite this, the court found that Delphi failed to mitigate its damages and awarded Delphi only $2,500 because a "reasonable party in Delphi's situation would have incurred that nominal cost to 'make a lot of money.'" Decision at 81.

Delphi appealed the trial court's mitigation finding on two separate but related grounds. First, Delphi mitigated its losses under Delaware law because Delphi acted reasonably in the wake of Magellan's fraud. Second, the principle of mitigation of damages is inapplicable here because Magellan had an equal or better opportunity to minimize its own liability after defrauding Delphi.

As a threshold matter, Magellan does not dispute that the duty to mitigate is subject to a reasonableness standard under well-settled Delaware law. Nor does Magellan dispute that, by accepting Magellan's proposed modification to the 2011 Agreement, Delphi would have both (1) abandoned its rights under the original agreement, and (2) relinquished its claims arising from the original agreement. The principle of mitigation only requires that Delphi "act reasonably so as not to unduly enhance the damages" caused by Magellan's fraud. Hanner v. Rice, 2000 WL 303458, at *2 (Del. Super. Jan. 3, 2000). Delphi did so.

Nor does Magellan dispute Delphi's second argument, that the principle of mitigation is inapplicable where the defendant was in an equal or better position to mitigate. Magellan offers no case law or evidence to defend its position that it was not in an "equal or better position" to mitigate. Magellan argues now, for the first time, that it was not in an "equal or better" position to reduce its liability because "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 Br. at 28. This is untrue.

Magellan knows that Delphi explicitly informed Magellan of the profits it would lose if Magellan did not allow truck deliveries. Delphi is concurrently filing a Motion to Supplement the Record with Magellan's Trial Exhibit 69, identified by Magellan as a trial exhibit but not admitted. This email alone shows that Magellan could "have made a reasoned decision regarding whether the potential profits to Delphi exceeded the costs of the improvements" where the damages were much greater than the costs of the improvements. In any event, Magellan cites no authority for its position and therefore, its ability to make a reasoned decision in this instance is neither at issue nor even relevant to the mitigation inquiry.

III. Schedule F to the 2005 Agreement Unambiguously Required Magellan to Record Fuel Consumed When Tanks Were Heated Alone or Simultaneously.

Schedule F is an unambiguous document and this issue can be decided as a matter of law. Notwithstanding its consistent position that the parties' disputes must be resolved within the four corners of the Agreements, Magellan persuaded the Court not to enforce Schedule F as written, not to confine its inquiry to the unambiguous terms of Schedule F, and to venture outside it to credit an alleged practice used when Delaware Terminal Company ("DTC"), not Delphi, owned the Terminal. When Delphi discovered, from the limited production of Magellan's own heating logs on the Sunday afternoon before the trial, that Magellan had not followed Schedule F, Magellan began to claim that the court should ignore the clear language of schedules that were intensely negotiated.

The fundamental error in Magellan's position is its insistence that Schedule F did not require it to take fuel use measurements more than once per day when tanks were heated either alone or simultaneously. Magellan's once-per-day measurements of fuel consumption violated its obligation to charge Delphi "the actual cost" of the fuel consumed for Delphi's benefit, as required by Article VII.H. and Schedule F. Schedule F requires that when one tank was heated alone, the fuel cost must be charged solely to that tank, without allocation to any other tank. A775. Magellan admits this. Magellan Br. at 31. Magellan never explains

how it would meet its obligation to charge a tank heated alone the full cost of that heating. It admits that if it chose to heat two tanks that day it would ignore that it had heated the tanks separately at different times and for different durations and say that the tanks had been heated "simultaneously." Magellan would do this even if one tank had been heated for only three hours and the other had been heated for twenty-one hours.[4]

By making once per day fuel consumption measurements, Magellan did not fulfill its obligation to charge Delphi only for "the actual cost" of the fuel consumed for heating Delphi's tanks and not the tanks of Magellan's other customers as required by Article VII.H. and Schedule F. The trial court's acceptance of Magellan's practice produced an absurd result that no reasonable person would accept. See Estate of Osborn v. Kemp, 991 A.2d 1153, 1160 (Del. 2010).

The court essentially interpreted "simultaneously" and "at the same time" to mean at any point "on the same day." This is unreasonable. The court found that Schedule F "does not define a specific unit of time at which Magellan is required

[4] In its Brief at 30-31, Magellan goes one step further. Magellan now admits that it would not bill a tank heated for twenty-three hours and 50 minutes on a day if that tank was not being heated at midnight. Magellan may have made this new admission to show how a customer might benefit from Magellan's once-per-day measurement practice; however, this practice necessarily requires the other customers to bear those heating costs without the allocation required by Schedule F. Whether or not this new revelation is true, it proves that Magellan did not attempt to tender accurate heating bills under the 2005 and 2011 Agreements.

to record heating fuel consumption measurements." Decision at 63. But "simultaneously" and "at the same time" could hardly be clearer. Black's Law Dictionary defines "simultaneous" as a "term that is applied to the happening at the same time or the same instant." Black's Law Dictionary (2d ed.), available at http://thelawdictionary.org/simultaneous/.

Though Schedule F is unambiguous and resort to extrinsic evidence is therefore impermissible, the court accepted Magellan's claim that an unidentified Delphi employee invented a computer program (which was never produced) when Delphi owned the Terminal, and demanded its use when Magellan purchased the Terminal. The court improperly credited this argument as relevant to the parties' intentions.

However, Delphi never owned the Terminal; DTC owned the Terminal. There is no evidence that any Delphi employee ever worked at the Terminal. There is no evidence that Delphi ever had any hand in operating Magellan's heating system. In fact, Magellan demanded sole control of such operations in both Agreements. See A732.

The Court also found that a course of dealing existed between Magellan and Delphi that permitted the once-per-day measurement. See Decision at 64. However, to establish a course of dealing, there need to be prior transactions between the parties and the inception of the 2005 Agreement was the first time

Magellan and Delphi interacted on heating issues. What happened when DTC owned the Terminal and Delphi was its tenant is not the issue, or even relevant under Delaware law given the existence of unambiguous integrated written contracts between Delphi and Magellan. See Galantino v. Baffone, 46 A.3d 1076, 1081 (Del. 2012) ("The parol evidence rule bars the admission of evidence extrinsic to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract."). Moreover, the DTC-Delphi agreement was never admitted into evidence and there was no competent evidence introduced as to how heating was billed thereunder.

The alleged dealings between DTC and Delphi cannot vary the unambiguous terms of Schedule F. But even if Schedule F were ambiguous, DTC's conduct under a prior agreement would still be irrelevant. For "course of dealing" evidence to be relevant, the conduct must concern previous transactions between the same parties such that it can fairly "be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." 6 Del. C. § 1¬303(b). There was no course of dealing or performance between Delphi and Magellan prior to the inception of the 2005 Agreement, and therefore, the court erred when it considered evidence regarding non-party DTC.

The court found that Delphi proposed Schedule F and insisted that it be included in the 2005 Agreement. Decision at 61, 64. The court cited a March 21,

2006 internal memo written by Magellan attorney James Niedermeyer (written six months after the parties had executed the 2005 Agreement and Magellan had taken control of the Terminal); neither Magellan nor Delphi ever cited the document for any purpose. Niedermeyer admits that Schedule F was being added to the 2005 Agreement to "reflect the entirety of Magellan's agreement with Delphi." Niedermeyer apologized for his delay in getting the proper Schedules into the final Agreement and for not correcting Section VII.H., which obligates Delphi to pay the actual cost of the fuel used to heat Delphi's tanks. Niedermeyer ended his letter: "I wish that I could blame it on Ron Gumbaz [Delphi's Vice President], but he's not to blame." AR61.

It would have been legally impossible for Delphi to have forced Magellan to make any changes to the 2005 Agreement because by the time Niedermeyer acknowledged the errors in the 2005 Agreement and included Schedule F, that Agreement had already been executed by Delphi, and Delphi was legally bound by it. Magellan did not call Neidermeyer to testify. The court ruled that it was Delphi's obligation to have specified shorter time intervals at which Magellan was required to measure heating oil consumption on the sole basis of Niedermeyer's letter. However, the letter does not support the court's finding.

Even had Delphi drafted Schedule F, the parties agreed that no provision of the Agreement could be "construed against or interpreted to the disadvantage of any party by reason of such's party's having drafted such provision." A726.

Gumbaz could not have asked Magellan to make more frequent consumption measurement because Gumbaz did not know that Magellan was making only fuel consumption measurements only once per day. AR39-40. Magellan did not challenge Gumbaz' testimony.

The "computer program" aspect of Magellan's argument is a red herring. Regardless of whether Magellan calculated costs by hand or by computer, Magellan still had to record the fuel consumed when a tank was heated individually and when two or more tanks were heated simultaneously. Magellan did not do so. Only Magellan had the ability to gather and record when and for how long Delphi's tanks were heated alone or simultaneously with the tanks of its other customers. The heating invoices were indisputably inaccurate. Magellan does not contend that they reflect the "actual cost plus 18%" of the fuel consumed to heat Delphi's tanks and they certainly do not.

Magellan could have easily read the heating fuel tank gauge to determine and record how much fuel Magellan had consumed heating a tank alone or two or more tanks simultaneously, but it did not do so. Through no fault of Delphi, Magellan lacked the data it needed to properly bill Delphi.

Delphi acknowledges that it is responsible for heating its product, but not the product of other customers. Delphi carefully reviewed the limited heated logs Magellan produced, and determined that there were a number of days on which Magellan heated only Delphi's tanks, and acknowledged that it was responsible for $466,061 for that heating, calculated using Magellan's fuel consumption measurements on those days, Magellan's cost of fuel, and adding Magellan's 18% profit. See A419. Delphi agrees to pay Magellan that sum but asks this Court to order Magellan to reimburse the remainder of the amount Delphi paid Magellan for heating under the 2005 Agreement. Alternatively, Delphi requests that this matter be remanded to the trial court with the instruction that Magellan may retain heating payments only to the extent the record shows that it charged Delphi the actual cost of the fuel used to heat Delphi's tanks and not the tanks of its other customers.

IV. Schedule C to the 2011 Agreement Unambiguously Required Magellan to Record Fuel Consumed When Tanks Were Heated Alone or Simultaneously.

Schedule C to the 2011 Agreement is virtually identical to Schedule F to the 2005 Agreement, and the arguments in the preceding section apply to it as well. In addition, the Court could not and did not find that Delphi drafted Schedule C, or insisted that it be inserted into the 2011 Agreement. Moreover, Schedule C lists only Delphi's tanks but not those of other customers, while Schedule F had, making it impossible (as Cosby conceded) to perform the allocation of fuel usage between Delphi and Magellan's other customers. A302-03. Yet the court accepted Magellan's allegation that the missing heating factors of its other customer's tanks were in those contracts, which were never produced and are not in evidence. In fact, Magellan argued that its dealings with its other customers had no bearing on its dispute with Delphi. See AR22.

Delphi disputed and did not pay the heating invoices Magellan tendered under the 2011 Agreement, part of Magellan's counterclaim, yet the court allowed Magellan to seize $507,129 from Delphi's collateral to pay itself without proving the accuracy thereof. Magellan produced no evidence showing the actual cost of fuel consumed in heating Delphi's tanks and put into evidence only its one page invoice, without any detail, for some of its heating charges (see Ex. D-109 at 121, 126, 131, et seq.), and nothing for heating from August 2013 to August 2014.

Delphi respectfully requests that the Court reverse the trial court's ruling that Magellan was entitled to take $507,129 of Delphi's collateral deposit, and order that that sum, with interest at 1.5% per month, be restored to Delphi.

V. Delphi's September 2013 and January 2014 Wire Transfers Were Accepted by Magellan as Collateral.

The trial court gave no basis for its ruling that Delphi's collateral transfers were unconditional payments. Decision at 83-84. The contemporaneous written record is unambiguous that they were conditional:

(1) Delphi's counsel's September 18, 2013 letter (A870) laid out several specific conditions. Delphi's counsel's September 25, 2013 email, sent prior to Delphi first collateral transfer, stated that the Delphi collateral payment to be made later that day would be pursuant to the September 18, 2013 letter and specified that the transfer would be without prejudice to Delphi's rights. A871.

(2) Magellan denied, but now admits, that it received Delphi's counsel's October 2, 2013 email clearly stating, in response to Magellan's counsel's demand, that Delphi's deposits were collateral and not unconditional payments: "Delphi's stated position in regards to this collateral payment remains unchanged." A871.

(3) Delphi's counsel's January 30, 2014, sent before Delphi's collateral transfer the following day, again states that Delphi's wire transfer in response to Magellan warehouseman's lien demand, will be collateral, and will be conditioned on the immediate release of Delphi's product from Magellan's lien, and reiterates that Delphi demands 1.5%/month interest and is without prejudice. A1297-99.

(4) All of Delphi's eight collateral transfers by check included an unambiguous and bold notice that it was collateral.

Magellan had the burden to prove its counterclaim. Magellan seeks to cast that burden on Delphi; however, at the June 24, 2015 Pre-Trial Conference, Magellan delivered its Answers to Delphi's Fourth Set of Interrogatories together with an attachment marked Exhibit "A". Magellan included the following statement and response to both Interrogatory Nos. 1 and 2:

> Because Delphi has categorized the payments it made to Magellan in late 2013 and early 2014 as the payment of collateral, rather than an unconditional payment of amounts owed by Delphi, Magellan seeks to retain the amount owed in satisfaction of its counterclaim. **Were Delphi to agree** that the payments it made were unconditional payments of amounts owed by Delphi, Magellan would dismiss its counterclaim.

And in its answer to Interrogatory 60, asking Magellan to state its counterclaim as June 19, 2015, Magellan answered:

> Magellan states its damages consist of the unpaid invoices reflected on the attached Exhibit A . . . . Were Delphi to agree that its payments it made were unconditional payments of amounts owed by Delphi, Magellan would dismiss its counterclaim.

Delphi never agreed. Magellan confirmed a month before trial that it was asserting a counterclaim against Delphi for unpaid invoices. See A199. Magellan admitted that the doctrines of estoppel, payment, and accord and satisfaction only applied to "payments prior to the deposits [Delphi] characterized as 'collateral.'" A360. Delphi disputed and never voluntarily or unconditionally paid any of the invoices it disputed, including those Magellan included on its Exhibit A or on

Exhibits D-131 (A1217) and D-132 (A1218). Therefore, Magellan had the burden to prove those invoices were valid and it did not. There was no basis on which the court could conclude, without explanation, that Delphi voluntarily made unconditional and final payments on the invoices when it provided its collateral in response to Magellan's threatened and then imposed warehouseman's lien.

Under these circumstances, Delphi's collateral transfers cannot be deemed "unconditional" or "voluntary" payments.

VI. Magellan Overcharged Delphi for Tank Cleaning

Magellan alleges that all the tanks cleaned in 2010 were expiration of agreement cleanings governed by Section 2.7 because the 2005 Agreement terminated effective September 1, 2010. Magellan Br. at 17. However, the 2005 Agreement did not terminate until August 31, 2011 – a year later. Magellan's mistake as to the expiration date of the 2005 Agreement allowed it to claim all the 2010 cleanings as expiration of the Agreement cleanings and convince the court that only Section 2.7 applied. The 2010 cleanings were not expiration cleanings because the 2005 Agreement had at least one more year to run and Delphi had a unilateral option to extend that Agreement to 2015. AR68.

Magellan also claims that the only work done on the tanks cleaned in 2010, as well as the tanks cleaned in 2011 and 2014, was the removal of Delphi's product and waste. Magellan Br. at 17. This is inaccurate as Magellan's own documents show. For example, Tank 10, cleaned in 2010, had a new floor installed, a maintenance task covered by Section 2.8. AR66-67.

That the 2010 cleanings were not viewed by Magellan as Section 2.7 expiration cleanings is shown by Cosby's July 20, 2011 email to Bogle concerning the 2011 cleaning of Tank 1 and 19. Cosby wrote "the past tank cleanings jobs were done because we [Magellan] had to perform regulatory inspections, and install new floors . . . ." AR68.

Tank 1was cleaned in 2011 at the expiration of the 2005 Agreement and Magellan argued that Section 2.7 required Delphi to remove all its product and waste so that the entire cleaning bill for that tank would be Delphi's responsibility. But Cosby admitted that Tank 1 had already been cleaned by August 25, 2011, when Midwestern had completed only the shovel and broom removal of Delphi's product and had not done any coil, diesel, or water washing. A295.

Delphi disputed, and did not pay, all of Magellan's invoices for the 2010, 2011 and 2014 cleanings.[5] Magellan included those invoices in its counterclaim. See A1217-18. Because the court erroneously found that Delphi had unconditionally paid all the invoices, which the court itself characterized as "contested," it never required Magellan to sustain its burden of proof and rather imposed on Delphi to prove Magellan's invoices wrong. Decision at 27.

A1323-33 details the charges Delphi disputed, which included preparatory work that Bogle—and the court—said was not to be charged to Delphi, mobilization/demobilization charges (which Zaun and the court said should be allocated but were not), and water washing charges, which the court said Delphi did not have to pay under Section 2.8.

[5] Magellan admitted that the doctrines of payment, estoppel and accord and satisfaction did not apply to tank cleaning invoices from 2010 and later. Decision at 23-24.

Magellan asks this Court to affirm the court's award of almost $1,000,000 for twelve tank cleanings, four of which Magellan admitted had been overbilled by more than $100,000 and which Magellan's own records, and the evidence provided by Delphi, show contained many more erroneous charges.

Delphi respectfully requests this Court to remand the court's ruling on the 2010, 2011 and 2014 tank cleaning invoices with the instruction that Magellan be required to refund such portion of Delphi's collateral that Magellan seized to pay itself for these tank cleanings that apply to prep work, unallocated mobilization/demobilization coil, diesel, water washing and any other charge not Delphi's responsibility.

Magellan should also reimburse Delphi the overcharges for the 2009 and earlier tank cleaning invoices, as detailed on A1321-33, because Magellan has admitted it required the tank cleaning contractors to bill only one lump sum for all these cleanings, thereby making it impossible for Delphi to isolate the charges for which it should have paid. These tank cleanings were incontestably Section 2.8 cleanings, for which the court decided Delphi was only responsible for the shovel and broom removal of its product and waste and not for any water washing, prep work, and unallocated mobilization and mobilization charges.

Using the information provided by Magellan for the 2014 tank cleanings, Delphi determined a percentage of TriStar's charges which were for the shovel and

broom removal of Delphi's product and waste and applied that percentage, 29.5%, to the lump sum charges Magellan passed on the Delphi for these pre 2010 tank cleanings. Magellan offered no other method for the proper allocation of charges to Delphi.

Cosby was upset that EISCO had water washed Tanks 4 and 9 in 2010, which Magellan alleges were Section 2.7 tank cleanings. See AR2-4. Had Delphi been responsible for water washing under Section 2.7, there would have been no reason for Cosby to object to EISCO's water washing (as opposed to diesel washing) because it would have been Delphi's responsibility. Rather, Cosby objected because he knew that water washing charges were not Delphi's responsibility in 2010. Cosby's EISCO email proves that water wash is interchangeable with diesel wash. Since the court decided water wash was not Delphi's obligation, diesel wash should not be either.

Finally, the same wording that the court relied on in Section 2.7 (that Delphi "shall remove all its product and waste") to make its decision that Delphi had a greater responsibility for cleaning under Section 2.7 is also in Section 2.8, which the court agreed limited Delphi's responsibility to shovel and broom, and excluded water washing.

The trial court accepted Magellan's contention that Delphi had a greater responsibility for tank cleaning under Section 2.7 than under Section 2.8 and

because of that it found that the shovel and broom limitation to Delphi's responsibilities in Section 2.8 did not apply to expiration of Agreement cleanings under Section 2.7. In practice, Magellan believed otherwise and has contended that Delphi also had to remove all its product and waste under Section 2.8.

Magellan's view is that under Section 2.8 it is responsible only for sand blasting and "final" water washing necessary to do inspections and that this occurs only "after all product and waste has been removed." Magellan Br. at 42-43. This would render the distinction that the court drew between Sections 2.7 and 2.8 illusory, as under both sections Magellan demands that Delphi pay for the removal of all of its product and waste and that the only difference between the sections is that Magellan will pay for sand blasting and "final" water wash thereafter under Section 2.8

This is all in addition to the first paragraph of Section 2.8 that states; "Magellan may clean the [Delphi tanks] for maintenance, inspections and upon expiration . . . of this Agreement, and Customer will be responsible for the cost of removal of product." A733, A793 (emphasis added). Section 2.8 therefore applied to end of term cleanings as well.

Magellan agreed that Delphi had demanded a limitation to Delphi's tank product and waste removal responsibilities. Accepting that, there is no reason why Delphi would want the limitation to apply only when a tank was cleaned for

maintenance and not when Delphi knew it would have to clean the thirteen tanks it was occupying under the 2005 Agreement at the expiration of that Agreement.

Gumbaz's testimony was that all Delphi's tank cleaning obligations be limited, not only when Magellan decided to maintain a tank. Magellan agreed to limit those expenses to the cost of shovel and broom removal.

Tank cleaning is dealt with in both Sections 2.7 and 2.8 not because of cleaning cost responsibility differences but because of timing and storage fee differences. Section 2.7 is fundamentally a tenant holdover clause. If Delphi did not remove its product and waste by the scheduled expiration of the Agreement Delphi would have to pay increasing rental fees until it completed the removal, and Section 2.7 so provides. Under Section 2.8, Delphi did not owe the rental fee from the time the tank was taken out of service for cleaning until it was returned.

Tank 1 was cleaned at the expiration of the 2011 Agreement. Magellan argued that Section 2.7 obligated Delphi to remove all its product and waste so that the entire cleaning bill for that tank would be Delphi's responsibility. Cosby admitted that Tank 1 had been cleaned as far as Delphi was concerned by August 25, 2011, when Midwestern had completed only the shovel and broom removal of Delphi's product and had not done any coil, diesel, or water washing. A295.

Magellan included all the 2010 to 2014 tank cleaning invoices in its counterclaim. See A1217-18. Because the court erroneously found that Delphi

had unconditionally paid all the invoices, it never required Magellan to sustain its burden of proof, and instead required that Delphi prove Magellan's invoices wrong. Decision at 27.

VII. The Interest Awarded to Magellan Was Excessive.

The court awarded Magellan the amount of three interest invoices, but Magellan put only one invoice (Invoice No. 4354851) into evidence. The court acknowledged "the evidence . . . does not allow the Court to assess precisely how Magellan applied the deposits to Delphi's past-due bills" and that "the Court lacks relevant dates from which to calculate interest charges." Decision at 55. Yet the Court awarded Magellan $354,738.82 of interest without requiring Magellan to prove its claim.

With respect to Magellan's claim for interest under the 2005 Agreement, the court erred when it gave no effect to Bogle's September 1, 2011 email to Magellan's accountants, A1287, instructing them not to charge Delphi interest under the then-expired 2005 Agreement, and decided that Magellan had not made a clear, unequivocal and decisive act showing that it was relinquishing that right. Decision at 54.

Magellan actions are distinguishable from the "mere inaction" forming the basis of the Superior Court's decision in Biasotto v. Spreen, 1997 WL 527956 (Del. Super. July 30, 1997), which the court cited in its Decision at note 207. There, the court declined to find a waiver on the basis of inaction where the defendant's "inaction [was] anything but unequivocal" in nature. The court reasoned that the defendant's inaction was brief and insufficient to amount to a clear and decisive

intent to relinquish a known right where the "delay simply appear[ed] to have been occasioned by the [parties'] continuing negotiations beyond the time originally contemplated" and nothing more. Id.

Moreover, Magellan established a course of performance from its six-year practice of not charging Delphi interest on past due invoices, a practice upon which Delphi relied. Delaware Code 1.303(f) provides that a course of performance is relevant to show a waiver of any term inconsistent with the course of performance. Magellan made a knowing and voluntary relinquishment of the right to charge interest under the 2005 Agreement. Magellan did not merely fail to act through oversight; it made a conscious decision not to charge interest under the 2005 Agreement and the internal memorandum from Bogle unequivocally confirms Magellan's decision. The amount of interest awarded Magellan under the 2005 Agreement should be refunded to Delphi.

Delphi agrees that Magellan could elect to change its practice and to begin charging interest under the 2011 Agreement, but not retroactively. Magellan did not inform Delphi that it intended to charge interest until February 2012, when it sent Invoice No. 4354851. Magellan should not be permitted to collect interest on any invoices before that time.

Even had Magellan not waived its right to interest, the interest it claimed was so inaccurately calculated, including incorrect principal amounts, due dates, and

payment dates as to require a complete review, which the court did not do. The trial court awarded Magellan interest of $354,738, despite the fact that Magellan only claimed $262,059 in interest. See A337. At a minimum, therefore, Magellan should be ordered to refund $92,679 to Delphi.

VIII. Magellan Did Not Return All of the Product it Borrowed from Delphi.

The court held that there was no actual loss even though Magellan's official measurement evidenced the 301 barrel loss. Magellan argued that its measurements were inaccurate because it took them from Tanks 1 and 19 while they were in the critical zone. However, Magellan should have taken its measurement of how much oil it took from and returned to Delphi's Tank 20 by measuring that tank, not Tanks 1 and 19 that it alleges were in the critical zone. Magellan says there is no credible evidence that Tank 20 was also not in the critical zone; however, Cosby testified that it probably was not. A318. Magellan had a duty to measure the transfers accurately but it failed to do so. Instead, it took measurements in two tanks in the critical zone rather than Tank 20, which was not in the critical zone.[6]

[6] The trial court noted that Delphi's loss of 301 barrels was insignificant, being only 0.05% of the approximate 55,000 barrels transferred. Decision at 43, n.160. Delphi's loss was actually 0.55%, and 1.08% based on the amount of product Magellan borrowed from Delphi.

IX. Delphi Stated a Claim for Fraudulent Concealment.

The allegations in the Second Amended Complaint demonstrate that Magellan concealed the heating overbill in order to induce Delphi to make further payments to Magellan. A169-70, A179-80. Likewise, Magellan is wrong that "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." Magellan Br. at 48. Delphi adequately alleged that it acted in reliance on Magellan's concealment when it paid Magellan additional sums of money in 2013 and 2014 – more than two years after Magellan's discovery of the heating overbill. A178-80. Accordingly, the court's dismissal of Delphi's fraudulent concealment claim was error.

X. Delphi's Lost Product Claim Was Improperly Dismissed.

The trial court found that the evidence showed "that there was, arguably a loss in excess of the allowable loss." A291. The trial court dismissed Delphi's claim, however, based upon its finding that:

> I've heard no evidence that, in terms of expert testimony or otherwise, that Magellan failed to use due care in maintaining the product. There was reference to mixing, but as a technique for improving measurement, but I don't, **I never heard of mixing as a way of preventing loss of product, so I'm going to grant the motion as to [this claim]**.

A291-92 (emphasis added).

In fact, Magellan's inventory controller, Hafner, testified that mixing *was* a way to prevent product loss:

> Q. Is mixing a way to prevent product loss?
> **A. It helps a little, especially if the tank is stratified.**

AR32-33 (emphasis added). Hafner admitted that Magellan did not mix Delphi's product "the entire time," despite knowing that Delphi was incurring product losses. AR33. See also id. (referring to Bogle's email (AR69) which states: "Based on [Hafner's] data, Ron is only 2bbl off for the period 12/1/10-2/28/11. If Ron's Platts pricing is correct, we would owe Delphi ~$128K for losses during this period."). Hafner further testified at trial that Magellan did not begin to mix Delphi's products until sometime in 2012 – seven years after the commencement of the 2005 Agreement. AR34. When asked by Magellan's attorney what steps

Magellan took to reduce losses, Hafner said "we did go to mixing their tanks before we gauged them . . . ." B44. In 2011, Magellan admitted that mixing was a way it was reducing losses of its own flush oil product. A908.

Now, for the first time, Magellan argues that it was not required to mix Delphi's product because "Section VII.B of the Agreements indicates it was Delphi's responsibility to 'request[ ] tank mixing.'" Magellan Br. at 49 (citing A722, A784). Section VII.B covers only "Tank mixing" that could be requested (for an additional fee) should Delphi want to blend its products and produce a different quality fuel (i.e., to blend No. 6 oil and No. 2 oil in order to produce No. 4 oil). This section of the Agreements does not cover tank mixing in order to prevent product loss. Accordingly, as a result of Magellan's failure to mix Delphi's product, Delphi incurred damages of $360,972 for product losses beyond the 0.25% quarterly allowance.

XI. Delphi Owned the Product in the Conectiv Pipeline.

Section 3.2 of the 2005 Agreement provided in part:

> If title to any Product at the Terminal is transferred to a third party other than another customer of the Terminal, [Delphi] will nevertheless be deemed the owner of the product for the purposes of this Agreement . . . .

Magellan alleges that Conectiv owned the product, but Conectiv was never a customer of the Terminal. A316. Magellan makes no attempt to dispute Delphi's argument that the 2005 Agreement alone establishes that Delphi was the owner of the product. No amount of testimonial evidence can change this fact. On its face, the text of the 2005 Agreement requires that Delphi "be deemed the owner of the [p]roduct . . . ." A737. Even if that were not the case, the letter agreement with Conectiv (see A810-11), does not transfer title of the product placed in the line.

The trial court erred when it looked beyond the unambiguous contract language and found that the product was owned by Conectiv on the basis of testimonial evidence.[7]

[7] Magellan argues that: "Before emptying the line, Magellan contacted Delphi's representative Karen Peterson, who agreed the product belonged to Conectiv. She maintained that position at trial." Magellan Br. at 50. This is misleading. Peterson testified that the conversation occurred *after* the product had been transferred and that she did not remember if she was asked who owned the product. B56.

XII. The Asphalt Seminole Claim Should Not Have Been Dismissed on Summary Judgment.

The trial court erred when it granted Magellan summary judgment and found "that it is undisputed that the product delivered to the Terminal by the Asphalt Seminole in February 2010 was non-conforming product because the temperature exceeded the contractual limitations." Ex. B. to Opening Br. ("Ex. B") at 38. The evidence showed that on February 16, 2010, the temperature of the product exceeded the contract specifications by one to two degrees three days before Magellan rejected the product. B21. Magellan presented no evidence of what the temperature was when it rejected the product. B21. However, the product was not rejected by Magellan until three days later, on February 19, 2010, by which time the temperature of the product was likely within specifications as a result of the vessel remaining idle. B19.

Most importantly, the evidence further showed that Magellan rejected the Asphalt Seminole's delivery of product solely on the basis of alleged excess levels of H2S concentration on the vessel. B19. The court acknowledged that Delphi presented the trial court with conflicting evidence showing that the H2S levels were in fact compliant with the parties' contractual specifications. See Ex. B at 37.

Accordingly, the trial court erred in granting summary judgment because Magellan failed to show that there were no genuine issues of material fact when viewing the evidence in the light most favorable to Delphi.

Respectfully submitted,

WHITE AND WILLIAMS LLP

BY: /s/ Marc S. Casarino

Marc S. Casarino (#3613)
Lindsey E. Imbrogno (#5450)
600 N. King Street, Suite 800
Wilmington, DE 19801
(302) 654-0245

Peter J. Mooney
Natalie B. Molz
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
215-864-7164/7142
Admitted *pro hac vice*

Counsel for Appellant and
Cross-Appellee,
Delphi Petroleum, Inc.

Dated: May 22, 2017 (corrected May 26, 2017)