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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUNLINE COMMERCIAL CARRIERS, INC., Plaintiff Below/Appellant, v. CITGO PETROLEUM CORPORATION, Defendant Below/ Appellee.	:	No. 185, 2018 Trial Court Below: Superior Court Hon. William C. Carpenter Jr. C.A. No. N15C-03-051 WCC CLD

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

In early 2013, Plaintiff Sunline Commercial Carriers, Inc. ("Sunline") and Defendant CITGO Petroleum Corporation ("CITGO") (together, the "Parties") entered into a contract (comprised of two agreements, the Master Agreement and the Term Agreement) under which Sunline provided motor carrier services to CITGO for the transportation of petroleum. On March 6, 2015, Sunline commenced this action by filing a Complaint in the Superior Court alleging that CITGO breached the Parties' contract by failing to pay for "shortfalls" (barrels below an amount that CITGO guaranteed to provide to Sunline for transport each month), and seeking damages of $1,904,371. A0091-A0098. On April 28, 2015, CITGO filed counterclaims alleging breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing and seeking an accounting. A0110-A0120.

The Superior Court dismissed CITGO's accounting claim but not its unjust enrichment claim. A0200. CITGO subsequently filed Affirmative Defenses and Amended Counterclaims against Sunline, which CITGO later amended, still alleging breach of contract, unjust enrichment and breach of the implied covenant of good faith and fair dealing by Sunline. A0227-A0252.

After the completion of discovery, the Parties filed Motions for Summary Judgment. Sunline moved for summary judgment on its breach of contract claim

and for summary judgment in its favor on CITGO's remaining counter-claims. A0282-A0327. CITGO moved for summary judgment on Sunline's breach of contract claim asserting, among other things, that (1) Sunline breached an anti-assignment provision of the Parties' contract, (2) Sunline failed to perform, and lacked the capacity to perform, the Parties' contract, in April and May 2014, and (3) Sunline could not prove damages without an expert.

At oral argument on the Parties' respective motions, the Superior Court denied CITGO's Motion for Summary Judgment with respect to CITGO's assignment and lack of capacity arguments, finding them to be unpersuasive. A1661-A1662. CITGO has not appealed that decision. The Superior Court reserved decision on Sunline's Motion for Summary Judgment on its breach of contract claim and CITGO's counterclaims. A1662.

On November 30, 2017, CITGO abandoned its counterclaims against Sunline, mooting the portion of Sunline's Motion for Summary Judgment that addressed CITGO's counterclaims. A1666-A1667; A1668; Ex. A at 10.

On December 27, 2017, the Superior Court issued its Memorandum Opinion (the "Opinion," attached as Ex. A.) on the Parties' respective summary judgment motions, granting Sunline's motion in part and denying CITGO's motion. Ex. A at 22-23. The Superior Court ruled that CITGO breached the Parties' contract and that Sunline was entitled to summary judgment as to the shortfalls. *Id.* The

Superior Court stated that "it is time for CITGO to live up to its obligation and pay Sunline for the shortages," further adding that CITGO's "performance under this contract was atrocious and reflected a total lack of corporate responsibility." Ex. A at 22. However, within its Opinion, the Superior Court ruled (1) that the Parties' contract had terminated, by its own terms, on March 31, 2014, and (2) that there was an undisputed oral agreement between the Parties that CITGO would make up shortfalls, in April and May 2014, "either by providing petroleum for Sunline to transport or monetarily making up the difference." Ex. A at 20. Despite the Superior Court's declaration that CITGO should "pay Sunline for the shortages," the practical effect of these two rulings was that there was nothing for CITGO to pay because, as the Superior Court later ruled, CITGO provided barrels to Sunline in April and May 2014 that exceeded the shortages that had occurred up to March 31, 2014.

Both Sunline and CITGO filed post-Opinion motions addressing the Opinion's case-dispositive inconsistencies. On January 5, 2018, CITGO filed a Motion Seeking Clarification of the Memorandum Opinion requesting that the Superior Court declare that CITGO owes nothing and that the case be dismissed with prejudice. A1672-A1678. On the same day, Sunline filed a Motion for Reargument, asserting (1) that contrary to the Superior Court's findings, there was no agreement, oral or otherwise, that April and May 2014 were reserved for

making up CITGO's shortfalls, and (2) that the Superior Court's finding that the Parties' contract ended on March 31, 2014 was contrary to unambiguous terms stating otherwise or, alternatively, the contract was ambiguous as to when or how it terminated. A1710-A1717. Oral argument was held on the two motions on January 26, 2018, after which the Superior Court stated that: "The court is not willing to change [its] opinion of December 27, 2017 and the ruling stands as is." A1738.

After subsequent correspondence and a conference call with the Parties, the Superior Court issued an Order on March 13, 2018 (the "Order," attached as Exhibit B), granting judgment in favor of CITGO.

Specifically, the Superior Court's Order stated:

> On December 27, 2017, the Court issued a Memorandum Opinion granting in part [Sunline's] Motion for Summary Judgment. The Court concluded that the one-year term contract had ended on March 31, 2014 and neither party had a continuing obligation beyond that date under the contract. The court further ruled that the parties had agreed to make up any shortage in the monthly minimum barrels that were to be transported each month during the contract term and that shortage would be provided to Plaintiff by CITGO in April and May of 2014 for transport.
>
> Ex. B at ¶1.

On April 11, 2018, Sunline filed its Notice of Appeal. A1747-A1749.

SUMMARY OF ARGUMENT

1. The Superior Court erroneously ruled that the Term Agreement, and all obligations thereunder, terminated by its own terms on March 31, 2014. In reaching this conclusion, the Superior Court erred by not following or applying the cardinal rules of contract interpretation requiring that a contract be construed as a whole, giving effect to all of its provisions, if possible, and giving proper consideration to the context underlying the overall framework of the contract.

There are at least two provisions of the Term Agreement specifically addressing termination—one provision states that "[t]ermination of the Agreement by either party must be given at least 60 days prior to the expiration of the Agreement in writing" (A0348), while another states that the terms of the Term Agreement "shall remain in effect until the Master Agreement is expired or terminated" (A0346). The Superior Court's interpretation of the Term Agreement renders both of these provisions meaningless and illusory. Additionally, the Superior Court's interpretation failed to consider the context or contractual realities of the Parties' agreement, *i.e.* that the nature of the services being provided required advance preparation and advance notice of termination. A proper consideration and application of the rules of contract interpretation reveal the Parties' intent and understanding that written notice was required before the Term

Agreement, or it underlying obligations, could terminate, and that the Term Agreement could not simply terminate on its own.

2. Alternatively, even if it was reasonable to interpret the Term Agreement as expiring by its own terms, the Term Agreement, and specifically the provisions addressed above, can also be reasonably interpreted to require 60 days' written notice of termination. As such, if the Superior Court's interpretation is deemed reasonable, the Term Agreement is ambiguous and the Superior Court erred in not considering extrinsic evidence of the Parties' intent, which reveals the Parties' intent and understanding that written notice was required before the Term Agreement could terminate, and erred in granting summary judgment in CITGO's favor.

3. The Superior Court erroneously ruled that there was an undisputed oral agreement between the Parties that CITGO would make up shortfall barrels in the months of April and May 2014. In reaching this conclusion, the Superior Court erred by not analyzing or applying the correct legal standard for determining the existence of an oral agreement. Specifically, the Superior erred by accepting CITGO's alleged oral agreement despite the fact that there was no mutual assent or meeting of the minds consistent with CITGO's alleged oral agreement and no bargained-for consideration supporting CITGO's alleged oral agreement.

STATEMENT OF FACTS

Sunline and CITGO entered into an Agreement for Motor Transportation Services on January 9, 2013 (the "Master Agreement"), pursuant to which Sunline was engaged to provide to CITGO motor carrier services for the transportation of petroleum. A0341-A0344. On March 18, 2013, Sunline and CITGO clarified specific terms of their agreement through a second Agreement for Motor Transportation Services (the "Term Agreement"). A0345-A0351. The Term Agreement incorporated by reference the terms of the Master Agreement, stating that "[t]o the extent of any inconsistent or conflicting terms between this Agreement and the [earlier] Master Agreement, this Agreement shall govern and control." A0345, ¶3. Together, these two agreements represent the Parties' "Contract."

The Contract states that it "may be amended only by a written document signed by an authorized representative of each party." A0344, ¶20.4. No such written document was ever executed. A0838 (Flinn Aff. ¶5).

The Contract obligated CITGO to use Sunline to transport a guaranteed minimum number of barrels of petroleum every month or, alternatively, pay Sunline for each barrel below the monthly minimum. A0346-A0347 ("Volume/Minimum"); A0382-A0383 (CITGO email attaching Endorsement). Sunline had a corresponding, binding agreement to deliver the guaranteed

minimum number of barrels (if provided by CITGO). A0346-A0347. For each barrel below the guaranteed minimum that CITGO failed to provide ("shortfall barrels" or "shortfalls"), the Contract required CITGO to pay Sunline $3.33 plus an agreed fuel service charge ("FSC") of approximately 28%. *Id.*; A0383 (CITGO Endorsement at 2); A0387; A0585-A0586 (Khan Dep. 39:5-40:3); A0646 (Murchison Dep. 107:7-25).

Beginning in June 2013, the guaranteed monthly minimum CITGO was required to provide to Sunline was 240,000 barrels. A0347 (second paragraph). Correspondingly, beginning June 1, 2013, Sunline "agree[d] to deliver 240,000 [barrels] per month." *Id.*

The Contract states that any party wishing to terminate the Contract must provide 60 days' notice of termination. A0348 ("Termination"). The Contract's 60-day notice requirement was mutually beneficial to both Parties. A0838 (Flinn Aff. ¶6); A0362 (Hedgpeth Dep. 146:10-18). It provided CITGO with the security of knowing it had a carrier to pick up the crude oil from well sites (where the oil is literally coming out of the ground) and deliver it to CITGO's refinery. Similarly, Sunline's contractual obligation to haul a specific volume for CITGO dictated the number of drivers (and other employees) Sunline employed and the number of trucks and tankers it purchased or leased. A0838 (Flinn Aff. ¶6). The 60-day notice requirement ensured that neither party could be caught off-guard. CITGO

could not be put in a position where it was scrambling to find a carrier to pick up its oil and Sunline could not be put in a position where it had excess personnel and equipment with no corresponding work. *Id.*

It is undisputed that Sunline picked up and delivered oil for CITGO every day from mid-January 2013 until, and including, May 31, 2014. A0849 (Flinn Aff. ¶46); A0895-A0905. Additionally, there is no dispute as to the number of barrels hauled by Sunline for CITGO during this time period. A0394-A0395 (¶¶11-12).

Throughout the life of the Contract, CITGO not only tracked its accumulation of shortfalls, but repeatedly acknowledged its contractual payment obligations, confirming the amount it owed to Sunline for shortfalls. A0384; A0387. The sum total of shortfall payments made by CITGO to Sunline during the life of the Contract is also undisputed. A0422, A0432 (Sunline discovery response acknowledging $839,604.14 in shortfall payments received from CITGO); A0394 (CITGO discovery response acknowledging same amount).

CITGO began incurring shortfalls in June 2013, the same month its guaranteed minimum increased to 240,000 barrels. A0394-A0395 (¶¶11-12). When it became apparent that CITGO would also incur shortfalls in July 2013, the Parties began to discuss how CITGO would meet its rapidly accumulating shortfall obligation. A0433. CITGO initially asked, in writing, if Sunline would be amenable to "adding" the shortfalls to "the end of the contract" (A0434), a phrase

which was never further discussed or defined in detail. Sunline notified CITGO that it may be willing to move some shortfall barrels to the end of the Contract if CITGO immediately paid a percentage of the shortfall amount due (with the remaining percentage being pushed to a later date), so that Sunline could cover its operating expenses. A0435-A0436.

The Parties' discussions regarding CITGO's existing (and accumulating) shortfall obligation continued for over three months. A0840-A0841 (Flinn Aff. ¶¶13-17); A0514; A0516. Sunline sent an invoice to CITGO on September 26, 2013 for CITGO's June, July, and August 2013 shortfalls. The invoice identified the total amount due for CITGO's shortfalls and requested immediate payment of 30% of that total (which was what Sunline estimated it needed to cover its operating expenses). A0520; A0524; A0562-A0565. CITGO did not pay this invoice within 15 days as required by the Contract. A0840 (Flinn Aff. ¶14). Although CITGO acknowledged the invoice (A0516), it continued to withhold payment, hoping to negotiate a more favorable resolution. Meanwhile, despite being owed well over $1 million, Sunline continued to pick up and deliver CITGO's petroleum. A0849 (Flinn Aff. ¶46); A0895-A0905.

In December 2013, desperately needing cash to cover its operating costs, and based on CITGO's assurance that it would renew the Contract for another year, Sunline ultimately agreed that if CITGO would pay 20% of the then-existing

shortfall obligation for June, July, August and September of 2013 (all of which were well past due), the remaining 80% could be pushed to a later (undefined) date after the expiration of the Contract. A0840-A0841 (Flinn Aff. ¶16). On December 11, 2013, Sunline submitted a revised invoice to CITGO for 20% of the shortfall amount due. A0566-A0570. CITGO paid that invoice on December 26, 2013. A0432 ("Payments received"), A0394, ¶11.

CITGO again failed to meet its guaranteed minimums in December 2013. Although the Parties had not previously contemplated or negotiated any modification with respect to December shortfalls (as they had yet to incur), Sunline accepted 20% of CITGO's December shortfall payment due with the remaining 80% to be made up "at the end of the Contract," though the parties had not determined when that would be. A0842 (Flinn Aff. ¶22); A0571; A0872-A0876.

In February and March of 2014, CITGO incurred additional shortfalls. A0394, ¶12. Because there had never been a discussion with respect to 2014 shortfalls, CITGO (after initially protesting) paid Sunline 100% of the shortfall payment amounts incurred in February and March of 2014, pursuant to the terms of the Contract. A0402-A0403, ¶13; A0422 (Response No. 10), A0432.

On March 31, 2014, despite CITGO's prior assurance that that Contract would be renewed for another year, CITGO sent Sunline a 60-day cancellation notice. A0576. CITGO's termination notice concluded that "[t]he transportation

services, therefore will continue thru the month of May, ending on May 31st, 2014." *Id.*

In both April and May of 2014, CITGO incurred additional shortfalls. A0843 (Flinn Aff. ¶27). On May 12, 2014, Sunline sent an invoice to CITGO for the April shortfall. A0877-A0881. CITGO did not pay that invoice. A0843 (Flinn Aff. ¶29). On June 25, 2014, Sunline sent an invoice to CITGO for the May shortfall. A0844 (Flinn Aff. ¶30); A0882-A0885. CITGO did not pay that invoice. A0844 (Flinn Aff. ¶30).

Upon the effective termination date of the Contract, May 31, 2014, CITGO had a shortfall balance of 446,784 barrels. A0844 (Flinn Aff. ¶32). This amount included 337,969 shortfall barrels accrued as of March 31, 2014, which CITGO does not dispute (A0394-A0395, ¶12), plus 20,737 in April shortfall barrels and 88,078 in May shortfall barrels. A0844 (Flinn Aff. ¶32).[1] CITGO failed to pay the invoices for the April and May 2014 shortfalls and failed to make any effort to address, through payment or providing additional barrels, the 80% remaining shortfall balance for the months of June, July, August, and December of 2013. A0844 (Flinn Aff. ¶33).

[1] It is undisputed that CITGO provided or was credited for a total of 219,263 barrels in April 2014 and 151,922 barrels in May 2014. A0432 (Sunline discovery response attaching Shortfall Statement); A0612-0615 (Demand Letter attaching Shortfall Statement).

On August 11, 2014, pursuant to the Contract's notice and cure provision (A0343, ¶11), Sunline formally provided CITGO notice of its breach of the Contract, giving CITGO the required 30 days to cure its breach. A0612-A0615. CITGO, however, failed to cure its breach, and has otherwise failed to pay the $1,904,371[2] in shortfall payments it owes Sunline. A0845 (Flinn Aff. ¶35).

[2] This amount is comprised of 337,969 shortfall barrels for 2013 (totaling $1,440,558 in shortfall payments owed for 2013) and 108,815 shortfall barrels for 2014 (totaling $463,813 in shortfall payment owed for 2014). A0844 (Flinn Aff. ¶¶32-33); A0612-A0615 (Demand Letter attaching Shortfall Statement).

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT THE PARTIES' CONTRACT TERMINATED ON MARCH 31, 2014.

A. Question Presented

Whether the Superior Court erred in concluding that the Parties' Term Agreement unambiguously expired by its own terms on March 31, 2014, leaving neither party with any contractual obligations beyond that date, despite provisions within the four corners of that contract, and the integrated Master Agreement, setting forth conditions precedent to the termination of the Parties' contractual obligations.

Sunline preserved argument regarding the termination date of the Parties' contractual obligations by raising the issue in its summary judgment briefing (A0288-A0289, A0291-A0292, A0297, A0303-A0304, A1431-A1441), at the summary judgment hearing (A1570-A1576, A1608-A1615), and in its motion for reargument (A1714-A1716) and related hearing (A1781-A1782).

B. Standard and Scope Review

De novo review applies to a Superior Court's grant of summary judgment. *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013). This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitle the movant to judgment as a matter of law." *Id.* (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del.

1997)). Moreover, *de novo* review applies to judicial interpretation of a contract. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017).

C. Merits of Argument

The Superior Court concluded that the Term Agreement between Sunline and CITGO ended by its own terms on March 31, 2014, and that "neither party had a continuing obligation beyond that date under the contract." Ex. B at ¶1.

The Superior Court erred by overlooking key principles of contract interpretation, the application of which unambiguously confirm that termination of the Term Agreement required 60 days' notice, meaning that the Term Agreement could not have simply terminated by its own terms on March 31, 2014. Alternatively, the Term Agreement is ambiguous as to when and how it terminates – therefore, the Court erred by not considering extrinsic evidence, which demonstrates that both Sunline and CITGO intended and believed that 60 days' notice was required before the obligations under the Term Agreement terminated.

1. In Concluding That The Term Agreement Unambiguously Terminated On March 31, 2014, The Superior Court Erred By Failing To Construe The Term Agreement As A Whole, So As To Give Effect To All Of Its Provisions, And By Overlooking The Context Underlying The Termination Provisions.

The objective of a Delaware court, when interpreting a contract, is to determine the parties' intent from the language of the contract. *Exelon*, 176 A.3d

at 1267. The inquiry "should focus on the parties' shared expectations at the time they contracted, but because Delaware adheres to an objective theory of contracts, the 'contract's construction should be that which would be understood by an objective, reasonable third party.'" *Id.* The parties' agreement should be construed as a whole, giving effect to all provisions and terms, where possible, so as not to render any provision or term meaningless or illusory. *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014); *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 416 (Del. 2012); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). In attempting to discern the meaning of specific contract provisions, proper consideration should be given "not only [to] the language of the provision itself, but also the context of th[e] provision within the overall framework of the [contract]." *Salamone*, 106 A.3d at 372.

Here, it is undisputed that the Term Agreement obligated CITGO to use Sunline to transport a guaranteed minimum number of barrels every month and correspondingly obligated Sunline to deliver the guaranteed minimum number of barrels (if provided by CITGO). A0346-A0347 ("Volume/Minimum"); A0383 (CITGO PowerPoint). In addition to volumes and minimums, the Term Agreement set forth the specific price to be paid by CITGO for Sunline's services, as well as the Parties' billing, payment and reporting obligations, among other things. A0346-A0348.

These terms were to be in place for at least one year, with an opportunity to negotiate new terms to be applied after the initial one-year period. Specifically, the Term Agreement states:

> Term of Agreement: 1 Year agreement with a start date of April 1, 2013. Both parties agree to review terms 60 days prior to expiration date and review pricing and volumes. If both parties agree on terms and volumes, this Agreement will be renewed with the agreed upon start date and term of agreement. A0346.

Sunline acknowledges that this provision, if viewed in a vacuum, without looking at other provisions of the Term Agreement or considering the context of the provision within the overall framework of the Term Agreement, could be interpreted such that the Term Agreement was simply a one-year agreement. Indeed, the Superior Court interpreted the Contract in that manner, ruling that the Term Agreement was "a one-year agreement from April 1, 2013 to March 31, 2014," and that, absent an agreement "to modify [it] before March 31, 2014, the Term Agreement by its own terms expired." Ex. A at 18. However, the Superior Court erred in reaching this conclusion because it did not properly construe the Contract as a whole, giving effect to other provisions, or consider the context or contractual realities in which the Parties' agreement was made.

The Superior Court incorrectly held that "[Sunline] contends the 'Volume/minimum' provision creates an indefinite obligation for [CITGO] to provide 240,000 barrels per month as of June 1, 2013 as the provision has no

specific end date." Exhibit A at 15. While it is true that the Term Agreement contains no specific end-date, its terms could not continue indefinitely. Rather, the first sentence of the "Terms and Conditions" section of the Term Agreement states that "[b]oth parties, CITGO and Sunline agree that the following terms ***shall remain in effect until the Master Agreement is expired or terminated***." A0346 (emphasis added). The Master Agreement, which commenced on January 13, 2013, states that it "shall continue in full force and effect ***until December 31, 2014, unless [it] is terminated*** by either party at any time and for any reasons, with or without cause, ***upon sixty (60) days prior written notice*** to the other party." A0343 (Master Agreement at 3, ¶11) (emphasis added).

In addition, the Term Agreement contains a separately entitled "Termination" provision which states "Termination of the Agreement by either party must be given ***at least 60 days prior to the expiration of the Agreement in writing***." A0348 (emphasis added). The fact that this provision uses the term "expiration," which "connotes an ending occurring upon the passage of time," rather than "termination," which "connotes a severance of before the natural expiration of a term certain," is significant. *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 103 A.D.3d 456, 457, 960 N.Y.S.2d 16, 17 (N.Y. App. Div. 2013); *see* also, *In re the Petition of U & W, Inc.*, 1991 WL 1179807, *2 (Del. Super. Ct. Dec. 20, 1991). The use of the term "expiration"

shows that the Parties intended that notice was required even before the contract could end upon the passage of time.

Therefore, under the clear language of the Term Agreement, both Parties' contractual obligations continued until the earlier of December 31, 2014 or 60 days after written notice of termination was provided. As stated above, the 60-day notice provisions in both the Term Agreement and the Master Agreement (which is incorporated into the Term Agreement by virtue of the "shall remain in effect" provision) were mutually beneficial to both Sunline and CITGO and essential to the agreement. A0838 (Flinn Aff. ¶6); A0362 (Hedgpeth Dep. 146:10-18). Moreover, consistent with the Parties' intent and understanding, CITGO sent Sunline a 60-day cancellation notice on March 31, 2014, unequivocally stating that "[t]he transportation services, therefore will continue thru the month of May, ending on May 31st, 2014." A0576.

The Superior Court's ruling, that the Term Agreement simply expired by its own terms on March 31, 2014, ignores a cardinal rule of contract construction requiring a court to give effect to all contract terms. *BLGH Holdings*, 41 A.3d at 416 (citing *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)). Under the Superior Court's interpretation, the provision stating that "CITGO and Sunline agree that the following terms shall remain in effect until the Master Agreement is expired or terminated" (A0345) and the provision stating

that "Termination of the Agreement by either party must be given at least 60 days prior to the expiration of the Agreement in writing" (A0348) are given no effect whatsoever but, instead, are rendered meaningless, illusory and "mere surplusage."

It is undisputed that the Master Agreement did not terminate until May 31, 2014 (60 days after CITGO provided its cancellation notice). The Superior Court recognized as much, stating that "the 60 days' notice provided by CITGO [on March 31, 2014] only related to its continued relationship under the Master Agreement." Ex. A at 19. This is critical because, even if the Parties were operating only under the Master Agreement in April and May (as the Superior Court suggests), the Term Agreement makes clear that its specific terms regarding volume, pricing and minimums, among other things, "remain in effect until the Master Agreement is expired or terminated." A0346. This had to be the case because, as the Superior Court noted, the Master Agreement was merely "a formal engagement letter" that "was not intended to set forth the parameters of the specific services and obligations of the parties" and "was silent on pricing." Ex. A at 17. Indeed, the Parties continued to apply the material terms of the Term Agreement (including pricing) in April and May 2014.[3]

In sum, the Superior Court's interpretation of the Term Agreement is in error because it failed to construe the Term Agreement as a whole, giving effect and

[3] *See* pp. 26-27, below.

meaning to each provision and leaving no provision or term meaningless or illusory, and failed to consider the context of the provisions within the overall framework of the Term Agreement (*i.e.* that the very nature of the services being provided required advance planning and, thus, advance notice of termination). Sunline respectfully requests that the Superior Court's ruling that the Term Agreement terminated on March 31, 2014 be reversed.

2. Alternatively, The Term Agreement Is Ambiguous As To Its Termination Date And, Therefore, The Superior Court Erred In Failing To Consider Extrinsic Evidence And Erred In Granting Summary Judgment In CITGO's Favor.

When interpreting a contract, a threshold question is whether the contract is ambiguous. Ambiguity exists when the provisions in controversy are susceptible of different interpretations or may have two or more meanings. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012). The determination of ambiguity lies within the sole province of the court. *Osborn*, 991 A.2d at 1160. When a contract is ambiguous, the interpreting court must look beyond the language of the contract to ascertain the parties' intent. *GMG Capital*, 36 A.3d at 780. Ambiguities should be resolved against the drafter (*Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 627 (Del. 2003)), in this case, CITGO. A1529 (Flinn Dep. 87:22-88:19); A1716; A0153. In cases involving the interpretation of a contract, summary judgment is appropriate only if the language

of the contract is unambiguous. *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

a. The termination provisions of the Contract can be fairly and reasonably interpreted such that 60 days' notice was required before the Parties were relieved of their contractual obligations.

In this case, the Superior Court began its interpretation of the Parties' Contract by noting:

> While a step up from an oral agreement and a handshake . . . these documents lack the clarity that should be expected in such a relationship, particularly when it involves a corporation the size and significance of [CITGO]. That said, the Court finds that the Contract is not so ambiguous to require resorting to extrinsic evidence.[4]
>
> Ex. A at 14.

As detailed above, the Parties' Contract, when viewed as a whole, giving effect to all provisions, reveals the Parties' intent that 60 days' notice was required before the Parties' contractual obligations terminated. As such, Sunline asserts that the Term Agreement unambiguously terminated on the earlier of December 31, 2014 (the expiration of the Master Agreement) or 60 days after written notice of termination was provided (in this case, May 31, 2014 – 60 days after CITGO's termination notice).

In order to find that a contract is unambiguous, the Court must conclude that it is "reasonably susceptible to only one interpretation." *BLGH Holdings*, 41 A.3d

[4] It is not clear whether, in holding that the Contract was "not so ambiguous," the Superior Court found the Contract to be unambiguous.

at 414. Even if the language cited by the Superior Court can be interpreted to mean that the Term Agreement simply ended on March 31, 2014, the "shall remain in effect" provision and "termination" provisions of the Term Agreement and Master Agreement can also be fairly and reasonably interpreted as requiring 60 days' notice before the Parties' contractual obligations terminated. Under this scenario, even accepting the Superior Court's interpretation, the termination provisions, being reasonably susceptible to more than one interpretation, are ambiguous and the Court erred by not resolving this ambiguity against CITGO or considering extrinsic evidence of the Parties' intent.

b. The extrinsic evidence confirms the Parties' intent and understanding that termination of the Contract required prior written notice.

Although the Court need not look beyond the plain terms of the Term Agreement, in particular the "shall remain in effect" provision discussed above, the record confirms the Parties' understanding and intent that the Term Agreement could only be terminated upon the earlier of the expiration of the Master Agreement or upon 60 days' written notice. Indeed, the Superior Court's interpretation of the Term Agreement, in which neither party had any contractual obligations in April or May 2014, is at odds with both Sunline's and CITGO's interpretations. In fact, as detailed below, CITGO's own witness swore under oath that the Term Agreement was still in place in April and May 2014.

As an initial matter, both Sunline and CITGO believed that failure to provide notice of termination 60 days prior to the Term Agreement's initial one-year term resulted in the agreement renewing for another year. This is confirmed in several internal CITGO documents summarizing the "Key Terms" of the Term Agreement as "1 year agreement starting April 1, 2013 thru March 31, 2014 - ***Cancellation notice 60 days prior or agreement renews for another year***." A0376 (March 2013 CITGO PowerPoint); A0383 (October 2013 CITGO PowerPoint). Also, rather than a specific end date, CITGO's document identifies the time period for CITGO's obligation to provide 240,000 barrels as "June and beyond." *Id*. These CITGO documents were not only circulated internally, but were also shared with Sunline (A0465-A0470), serving to confirm Sunline's similar belief that a cancellation notice was required before the Parties' contractual obligations terminated. A0852.

CITGO's internal emails also confirm the Parties' intent and understanding that notice of termination was required before the Parties were relieved of their contractual obligations. According to CITGO:

- "[T]he contract actually states that we have to give 60 days notice prior to the EXPIRATION of the contract." (emphasis in original). A0367.
- "The contract expires on April 1, 2014. So, *even with 60 days notice* we are committed to the contract till *at least* April 1, 2014." (emphasis added). *Id.*
- "To terminate at the expiration of the Contract we need to give 60 days notice." A0380.

Moreover, CITGO's actions, both before and after its termination notice, confirm this understanding. In mid-March 2014, contrary to the notion that the Term Agreement was expiring by its own terms in less than two weeks, CITGO provided Sunline with its performance expectations for the month of April. Specifically, on March 17, 2014, upon an inquiry regarding Sunline's asset (truck) allocation for April, in which Sunline specifically asked whether "volumes [in April] will go back up to normal levels," CITGO responded "Yes, that's correct." A1732-A1733; A0395 (CITGO discovery responses); A0420-A0421 (Sunline discovery responses). In that same email thread, CITGO provided initial projected well estimates to Sunline totaling over 7,000 barrels per day in April. In response, Sunline specifically asked: "do you expect to buy the same average [barrels] monthly throughout the rest of 2014?" CITGO responded: "Yes, and expect [the] same level of purchases all year." A1732-A1733.

Just days later, on March 31, 2014, CITGO provided its 60-day cancellation notice, which unequivocally states that "[t]he transportation services, therefore will continue thru the month of May, ending on May 31st, 2014." A0576. Had CITGO actually believed, in March of 2014, that the Term Agreement simply ended by its own terms, as the Superior Court ruled, there would have been no need to send the termination letter, much less one that precisely conformed to the 60-day notice requirement contained in the Parties' contract.

Having properly set the end date for the Term Agreement, CITGO's post-notice actions also confirm the mutual understanding that the terms of that agreement were in place until May 31, 2014. For example, in early May 2014, at a meeting with Sunline's John Flinn and Curtis Hagar, CITGO's Jones Khan acknowledged that CITGO incurred shortfalls in April, and that Sunline "would have to bill CITGO" for that shortfall. A0843 (Flinn Aff. ¶28); A0739 (Flinn Dep. 166:1-16). Notably, CITGO's summary judgment opposition, and Mr. Khan's affidavit, do not dispute what occurred at this meeting.

In April and May 2014, CITGO received at least four emails from Sunline indicating Sunline's understanding that the Term Agreement (including monthly minimums) was still in effect until the end of May. A0877-A0881; A0882-A0885; A0960-A0963; A1703-A1706. CITGO never protested, corrected or sought to clarify this now-alleged misunderstanding, but rather confirmed (at the meeting in May) that Sunline "would have to bill CITGO" for the April shortfall. A0843 (Flinn Aff. ¶28); A0739 (Flinn Dep. 166:1-16). CITGO either understood (like Sunline) that April and May were business as usual under the Term Agreement or, alternatively, was being duplicitous and took unfair advantage of Sunline's understanding.

Critically, it is undisputed that the parties continued applying the material provisions of the Term Agreement during April and May 2014. As the Superior

Court noted, the Master Agreement did not address many specific terms of the Parties' relationship. Ex. A at 17. Those specifics, including the price to be paid for barrels hauled by Sunline, were set forth in the Term Agreement. CITGO provided approximately 375,000 barrels for Sunline to haul in April and May 2014, which Sunline picked up and delivered. The billing, reporting and payment obligations for those barrels, including the exact price per barrel per mile, which CITGO paid (A1674), were derived by applying the relevant provisions of the Term Agreement, because that agreement was still in place until May 31, 2014. A0349-A0351.

Moreover, CITGO's own witness swore, under oath, that the Term Agreement was in place until the end of May 2014. Specifically, in its opposition to Sunline's Motion for Summary Judgment, CITGO's Jones Khan[5] swore in an affidavit that:

> As a result of Sunline failing to haul CITGO's barrels in May 2014, CITGO was forced to hire another carrier, JAG, to take over crude oil transport services for ***the last week of May 2014, even though the contract had not terminated at that time***.
>
> A0976-77 (Khan Aff. ¶5) (emphasis added).

[5] Mr. Khan was identified by CITGO as its Senior Hydrocarbon Trader with knowledge of "the parties' performance of their respective obligations under the [Master Agreement and Term Agreement]" and "the termination of the Agreements." A0676, A0690 (CITGO discovery response with Khan sworn verification).

CITGO subsequently dropped its counter-claims related to Sunline's alleged failure to perform in May 2014. However, Mr. Khan's sworn affidavit, which cannot so easily be dropped, serves as further confirmation that CITGO knew the Parties' contractual obligations, under the Term Agreement, were in place until the end of May 2014.

Collectively, the extrinsic record evidence confirms the Parties' intent and understanding that termination of the Contract required 60 days' written notice. As such, Sunline respectfully requests that the Superior Court's ruling that the Term Agreement terminated on March 31, 2014 be reversed.

II. THE SUPERIOR COURT ERRED IN RULING THAT SUNLINE AND CITGO HAD AN UNDISPUTED AGREEMENT THAT CITGO WOULD MAKE UP SHORTFALLS BY PROVIDING BARRELS TO SUNLINE IN APRIL AND MAY 2014.

A. Question Presented

Whether the Superior Court erred in concluding that there was an undisputed oral agreement that CITGO's shortfalls would be made up by CITGO providing barrels to Sunline in April and May 2014, without performing an analysis of whether the elements of an oral contract were met.

Sunline preserved argument on the issue of whether there was an agreement with CITGO that shortfalls would be made up in April and May 2014 by raising the issue in its summary judgment briefing (A0303-A0313, A1441-A1443), at the summary judgment hearing (A1584-A1586), and in its motion for reargument (A1711-A1714) and related hearing (A1783-A1784).

B. Standard and Scope Review

De novo review applies to a Superior Court's grant of summary judgment. *State Farm*, 80 A.3d at 632. This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitle the movant to judgment as a matter of law." *Id.* (quoting *United Vanguard*, 693 A.2d at 1079).

C. Merits of Argument

It is undisputed that CITGO failed to provide Sunline with the guaranteed minimums in several months during the Parties' contract. Recognizing that, the

Superior Court granted partial summary judgment in favor of Sunline on the issue of whether CITGO had breached the Term Agreement prior to April 2014. Specifically noting that "there appears to be no dispute regarding [CITGO's] failure to provide the minimum monthly barrel requirements in June, July, August, September, and December of 2013 and February, and March of 2014," Ex. A at 14-16, the Superior Court concluded that "Defendant has breached the Contract and Plaintiff is entitled to summary judgment as to the shortfalls unmet by the Contract." Ex. A at 22-23.

The Superior Court correctly recognized that that did not end the dispute. Noting CITGO's continued failure to meet its monthly minimum barrel requirements, the Superior Court stated that "[i]t appears this [failure] caused the parties to orally agree to a continuation of the relationship for two additional months…" Ex. A at 19-20.

Ultimately, the Superior Court determined that there was an "undisputed agreement" between Sunline and CITGO that CITGO's shortfalls would be made up in April and May 2014. Ex. A at 20, Ex. B at 1. Far from undisputed, there was no such agreement. The Superior Court's ruling, resulting in judgment in favor of CITGO, is in error because (1) the existence and nature of the Parties' oral agreement is very much in dispute and (2) the Superior Court's decision to accept

CITGO's version of the oral agreement, which fails as a matter of law, was not based on an application of appropriate legal standards.

1. The Superior Court Erred In Finding An Undisputed Oral Agreement Between Sunline And CITGO Because It Did Not Analyze Or Apply The Correct Legal Standard For Oral Agreements.

a. There is no written amendment or modification between Sunline and CITGO related to shortfalls.

Absent an amendment or modification, both Parties understood that CITGO was required to pay for shortfalls incurred using a simple formula. A0223-A0225; A0164 (Murchison Dep. 107:7-25); A0177-A0178 (Khan Dep. 41:15 – 42:5).

Because there is no written agreement modifying or relieving CITGO of this contractual obligation, CITGO argued below that the Parties reached an oral agreement modifying the Contract by extending it into April and May 2014, but solely for the purpose of allowing CITGO to make up shortfalls incurred in 2013. Because CITGO's alleged oral modification would have relieved it from preexisting written contractual obligations to simply pay Sunline for shortfalls, CITGO should have faced a high evidentiary burden in proving its oral modification. *See Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1230 (Del. Ch. 2000); *Thornton v. Meridian Consulting Eng'rs*, 2006 WL 1174186, at *1 n.4 (Del. Super. Ct. Feb. 13, 2006). No such burden was imposed by the Superior Court, or met by CITGO.

b. The Superior Court erred in concluding that there was an undisputed agreement that CITGO's shortfalls would be made up in April and May 2014.

Sunline concedes that the Parties attempted to reach an oral agreement regarding CITGO's 2013 shortfalls. After prolonged discussions, Sunline understood that CITGO was agreeing to immediately pay 20% of the shortfall payment due with the remaining 80% to be paid or made up at a later date "at the end of the contract." As consideration for allowing CITGO this concession, Sunline understood that the Term Agreement would be renewed for an additional year. A0841 (Flinn Aff. ¶18); A0871. CITGO, on the other hand, could not recall whether a promise or representation about an additional year was made. A0599-A0600 (Khan Dep. 149:14-150:11).

Having taken it upon itself to "determine what was agreed to by the parties," the Superior Court ruled that:

> Since the Court has held the end of the Term Agreement to be March 31, 2014, all that remains is an undisputed agreement between the Parties that during the months of April and May 2014, CITGO would make up [shortfalls] during these months either by providing petroleum products for [Sunline] to transport or monetarily making up the difference.
>
> Ex. A at 20.[6]

[6] The Superior Court's Order later restated its ruling, stating that "the parties had agreed to make up any shortage in the monthly minimum barrels that were to be transported each month during the contract term and that shortage would be provided to [Sunline] by CITGO in April and May of 2014 for transport." Ex. B at 1. The Superior Court's second version of its ruling eliminated the option that CITGO could make up shortfalls monetarily.

It appears that the Superior Court, recognizing an attempt by the Parties to reach an agreement regarding shortfalls, coupled with its ruling that the Term Agreement ended on March 31, 2014, concluded that the Parties had an undisputed agreement that CITGO would make up shortfalls in April and May. In other words, the Superior Court used its ruling on a highly disputed issue (the end date of the Term Agreement) as the basis for finding an undisputed oral agreement that April and May were reserved for CITGO making up shortfalls.

There was no such agreement, undisputed or otherwise. To the extent the Superior Court based its ruling on the belief that the Parties had an undisputed oral agreement, it erred.

Additionally, and critically, CITGO's alleged oral agreement fails as a matter of law for lack of mutual assent and lack of consideration. The Superior Court erred by not exploring or applying the legal standards for establishing an oral agreement.

c. The Superior Court erred by accepting CITGO's alleged oral agreement without applying appropriate legal standards.

The law is clear that "[n]o modification is possible without 'all the requisite[s] of a valid and enforceable agreement,' including the consent of both parties and consideration." *Haft v. Dart Group Corp.*, 841 F. Supp. 549, 567-8 (D. Del. 1993). Even if those requisites are present, "the new contract must be of such specificity '*as to leave no doubt of the intention of the parties…*'" *Id.* at 568 (citing *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. Super. Ct. 1979)) (emphasis added).

The Superior Court, having found an "undisputed agreement" regarding shortfalls, held that "[t]he parties agree this was a binding agreed-upon obligation, so there is no need for the Court to explore whether [the oral agreement] met the standard for an oral contract." Ex. A at 21. To the contrary, there was no agreement (undisputed, or otherwise) that CITGO would make up its shortfalls in April and May 2014. A0841 (Flinn Aff. ¶17). The Superior Court erred by not exploring whether the agreement it found met the legal standard for an oral contract. Application of the correct standard reveals that CITGO's alleged oral agreement fails as a matter of law.

(i) There was no "meeting of the minds"

To screen out attempts to single-handedly change contracts under the guise of oral modifications, Delaware courts hold that "[a] party asserting an oral modification must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.'" *Continental*, 750 A.2d at 1230.

Had the Superior Court explored the issue, it would have found no evidence, much less specific and direct, of the mutual assent necessary to support CITGO's alleged oral modification. Absent mutual assent, CITGO's purported oral modification fails as a matter of law. *Id.* at 1232; *First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, 2005 WL 2173993, at *8 (Del. Ch. Sept. 6, 2005). At best, the summary judgment evidence shows a misunderstanding as to the terms of the purported oral modification. Under Delaware law, however, there can be "no meeting of the minds on oral modification" in such circumstances. *See Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC*, 2006 WL 1375106, *7-8 (Del. Ch. May 8, 2006); *TWA Res. v. Complete Production Servs., Inc.*, 2013 WL 1304457, *7 (Del. Super. Ct. Mar. 28, 2013).

CITGO has claimed that the oral modification was finalized during a phone call between the Parties on December 10, 2013. A0722 (Barrett Dep. 44:8-11). Importantly, immediately after the December call, the Parties' representatives who

were present on the call recorded their respective understanding of the agreement in emails to their colleagues.

Significantly, the two emails describing the purported agreement are entirely inconsistent. CITGO's representative, Mr. Barrett, indicated that the Parties agreed to extend the term of the written contract by "adding approximately one month of spot business." A0387. Meanwhile, Sunline's representative, Mr. Flinn, indicated that CITGO agreed to extend the Contract by an additional *year*, through May 2015. A0871.

Further, nothing after December 10, 2013 suggests a meeting of the minds consistent with CITGO's version of the oral agreement in which April and May 2014 were reserved for making up shortfalls.

CITGO's termination notice itself is inconsistent with CITGO's version of the oral agreement. The notice says nothing about April and May being an "extension period" or being used to make up shortfalls. A0576. Rather, it states, "[t]he transportation services, therefore will continue thru the month of May, ending on May 31st, 2014." *Id.*

Additionally, as detailed above,[7] the Parties' actions both before and after CITGO's 60-day notice are inconsistent with CITGO's version of the oral agreement. Rather, the evidence suggests that the Parties never considered

[7] *See* pp. 24-27, above.

CITGO's version of the alleged oral agreement, which was accepted by the Superior Court as "undisputed."

Based on this record, CITGO failed to prove the required meeting of the minds for its alleged oral agreement, much less with the heightened burden of proving oral alterations to a written agreement with "specificity and directness." *Continental*, 750 A.2d at 1230.

(ii) There was no consideration.

The lack of legally-sufficient and bargained-for consideration may be the simplest reason CITGO's version of the oral agreement fails as a matter of law. "A modification of a contract requires consideration, *i.e.*, some benefit to the promisor or detriment to the promisee in exchange for the amendment." *See Peco Logistics, LLC v. Walnut Inv. Partners, L.P.*, 2015 WL 9488249, at *7 (Del. Ch. Dec. 30, 2015); *see also First State Staffing*, 2005 WL 2173993, at *8 (citing *De Cecchis v. Evers*, 174 A.2d 463, 464 (Del. 1961). The Superior Court stated that "[i]f the Court had to, it would have found there was sufficient consideration for an oral agreement." Ex. A at 21, n. 73. However, the Superior Court failed to elaborate on what that consideration may be. The Superior Court erred by not analyzing whether there was consideration sufficient to support CITGO's version of the oral agreement. Had it done so, the summary judgment evidence shows the lack of legally-sufficient, bargained-for consideration supporting CITGO's alleged

oral agreement.

It is undisputed that, by December 2013, CITGO owed Sunline approximately $1.6 million for shortfalls. A0387 (12/10/2013 CITGO email acknowledging owing $1.6MM to Sunline). In exchange for accepting 20% of what was owed, with the 80% pushed to a later date, Sunline believed that CITGO was agreeing to extend the Contract (and all of its terms, including guaranteed minimums) for another year. A0841 (Flinn Aff. ¶18); A0871. Under CITGO's version of the oral modification, however, in which there was no agreement to extend any of the terms of the Contract, Sunline received absolutely nothing in exchange for accepting substantially less than the amount CITGO already owed.

Effectively, CITGO's version of the oral modification did nothing more than give CITGO more time to meet its already-incurred shortfall obligation, with no corresponding benefit to Sunline or detriment to CITGO.

Indeed, CITGO's own representatives, in their depositions, were at a loss to explain what possible benefit Sunline was getting in exchange for its alleged agreement to simply let CITGO "make up" its previous shortfalls at a later date. A0719 (Barret Dep. at 39:3-5); A0598 (Khan Dep. 147:3-14). As a matter of law, "[a] commitment to honor a pre-existing obligation works neither benefit nor detriment; therefore, a promise to fulfill a pre-existing duty, such as a promise to pay a debt owed, cannot support a binding contract because consideration for the

promise is lacking." *Peco Logistics*, 2015 WL 9488249, at *7.

CITGO's alleged promise to provide barrels it had a pre-existing duty to provide or pay for cannot supply the consideration for its alleged oral agreement. Therefore, CITGO's purported oral agreement fails as a matter of law and Sunline was entitled to summary judgment on the issue of lack of consideration. *Continental*, 750 A.2d at 1232 (granting summary judgment rejecting oral modification because party had no evidence of valid consideration and could not rely on past consideration); *Peco Logistics*, 2015 WL 9488259, at *7 (granting motion for judgment on the pleadings on issue of oral modification where party failed to demonstrate "new consideration or that it agreed to modify" the agreement).

The Court should reverse the Superior Court's Order to the extent it found an oral agreement that April and May would be reserved for CITGO making up its existing shortfalls.

d. Absent A Binding Oral Agreement That April And May 2014 Were Reserved For Making Up Shortfalls, CITGO Owes Sunline At Least $1.4 million For Shortfalls Incurred As Of March 31, 2014.

The Superior Court ruled that "there appears to be no dispute regarding [CITGO's] failure to provide the minimum monthly barrel requirements in June, July, August, September, and December of 2013 and February, and March of 2014" (Ex. A at 14-16), ultimately concluding that "Defendant has breached the

Contract and Plaintiff is entitled to summary judgment as to the shortfalls unmet by the Contract." Ex. A at 22-23.

As set forth above, Sunline asserts that the Superior Court erred in concluding, as a matter of law that the Term Agreement ended on March 31, 2014. However, even if the Term Agreement did terminate on that date, CITGO had a contractual obligation to fully compensate Sunline for the shortfalls incurred as of March 31, 2014.

There is no disputing that CITGO had incurred, and not paid for, 337,969 shortfall barrels as of March 31, 2014. A1673, A1680-A1682 (CITGO pleading admitting shortfall balance of 337,969 barrels and attaching CITGO email and spreadsheet showing same). As such, Sunline was owed $1,440,558 for the shortfalls existing as of March 31, 2014.[8] In the absence of a legally binding oral agreement or modification between Sunline and CITGO relieving CITGO of this obligation for shortfalls incurred in 2013, that amount was and is owed to Sunline. No such oral agreement or modification, mutually assented to by both Parties and supported by valid consideration, exists.

Accordingly, even if this Court elected not to reverse the decision of the Superior Court with respect to the termination date of the Term Agreement,

[8] This amount is comprised of 337,969 shortfall barrels for 2013 (totaling $1,440,558 in shortfall payments owed for 2013). A0844 (Flinn Aff. ¶¶32-33); A0612-A0615 (Demand Letter attaching Shortfall Statement).

Sunline respectfully requests that the Court render a decision for Sunline, consistent with the Superior Court's finding of a breach by CITGO, for the undisputed amount of $1,440,558 in shortfall payments due as of March 31, 2014.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the Superior Court's decision that the Term Agreement ended on March 31, 2014 and reverse the Superior Court's decision that the Parties agreed that the shortage would be made up in April and May 2014, and render judgment in favor of Sunline or, alternatively, remand the matter for trial.

COLE SCHOTZ P.C.

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