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Case Number 185,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT[1]

After concluding that the Term Agreement terminated on March 31, 2014 and that Sunline and CITGO had an undisputed agreement that shortfalls would be made up in April and May 2014, the Superior Court commented that Sunline "is getting exactly what it contracted for" (Opinion at 22) – a phrase CITGO now unsurprisingly embraces. AB 4. Both the Superior Court and CITGO are wrong. After a ramp-up period, Sunline was obligated to have the equipment and personnel sufficient to haul at least 240,000 barrels of petroleum for CITGO every month. A0347. In exchange, what Sunline contracted for was CITGO's guarantee to provide (or pay for) at least 2,680,000 barrels (A0346-A0347; AB 39) and a minimum of 60 days' notice that CITGO was terminating the Contract. A0348; A0346; A0343. Sunline received neither. A review of the Contract and, if necessary, the extrinsic evidence confirms as much and demonstrates that the Superior Court erred, for the reasons set forth herein and in Sunline's Opening Brief, in concluding otherwise.

[1] All capitalized terms not defined herein have the same meanings provided in Appellant's Opening Brief ("Opening Brief" or "OB"). Appellee's Answering Brief is referred to herein as "Answering Brief" or "AB".

ARGUMENT

I. THE SUPERIOR COURT ERRED IN RULING THAT THE TERM AGREEMENT EXPIRED BY ITS OWN TERMS ON MARCH 31, 2014.

A. The Superior Court Failed to Follow Rules of Contract Construction.

CITGO argues that "[t]he Superior Court correctly applied textbook contract construction principles to interpret the Term Agreement to mean that CITGO's obligation to provide 240,000 barrels per month ended on March 31, 2014." AB 19. To the contrary, the Superior Court overlooked cardinal rules of contract construction in concluding that the Term Agreement unambiguously expired by its own terms on March 31, 2014. Critically, CITGO's Answering Brief fails to address these cardinal rules or the legal deficiencies in the Superior Court's interpretation.

1. The Superior Court Failed to Construe the Term Agreement as a Whole, Failed to Give Effect to all Provisions and Terms, and Failed to Consider the Context of the Relevant Provisions Within the Overall Framework of the Term Agreement.

At least two provisions of the Term Agreement make clear that 60 days' notice was required before the Parties' respective contractual obligations terminated - the "Shall Remain in Effect" provision and the "Termination" provision. Specifically, the first sentence of the "Terms and Conditions" of the Term Agreement states "[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). And, under a heading labeled "Termination," the Term Agreement states that "Termination of the [Term] Agreement by either party must be given at least 60 days prior to the expiration of the [Term] Agreement in writing." A0348.

Both of these provision make clear, or at least can be reasonably interpreted to mean that, prior to the Master Agreement's December 31, 2014 end date, the Term Agreement could not terminate absent 60 days' written notice.

The Superior Court ruled, and CITGO does not dispute, that the Master Agreement terminated on May 31, 2014. Opinion at 19; AB 41. By replacing the phrase "until the Master Agreement is expired or terminated" with "May 31, 2014" (the agreed date on which the Master Agreement terminated), the "Shall Remain in Effect" provision more accurately reads "[b]oth parties, CITGO and Sunline agree that the following terms shall remain in effect until [May 31, 2014]." Under the Superior Court's interpretation, the "shall remain in effect" clause is rendered completely meaningless. On that basis alone, the Superior Court's interpretation of the Term Agreement is in error. *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).

Similarly, if the Term Agreement simply expired on its own, as the Superior Court ruled, there is no meaning to the provision requiring written notice of termination "60 days prior to the expiration of the [Term] Agreement." CITGO argues that the Contract does not say what happens if notice is not given. AB 23. The answer is, nothing happens. The Contract does not terminate but "shall continue until the Master Agreement is expired…" (A0346).

CITGO fails to address Sunline's argument that the two aforementioned provisions are rendered meaningless under the Superior Court's interpretation. OB 15 – 21. Although CITGO concedes that the Superior Court was required to construe the Term Agreement as a whole (AB 21) and give effect to all provisions (AB 22), it does not explain what effect or meaning these provisions would have under the Superior Court's interpretation.

Pointing to another provision of the Term Agreement, CITGO misquotes (or at least liberally edits) a statement by Sunline, claiming that "Sunline concedes, 'this provision … could be interpreted such that the Term Agreement was simply a one-year agreement,'" and concluding, without any analysis or explanation, that "Sunline is incorrect that there is any alternate reasonable explanation." AB 20. More accurately, Sunline stated that that provision of the Term Agreement "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." OB 17. Of course, Basic rules of contract interpretation prohibit viewing a single provision or clause in isolation. *Stonewall Ins. Co. v. E.I. du Pont Nemours & Co.*, 996 A.2d 1254, 1260 (Del. 2010); *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010).

CITGO likewise fails to refute Sunline's argument that the Superior Court failed to properly consider the context of the termination provisions within the overall framework of the Term Agreement. OB 5, 8, 15-17, 21. CITGO does not, nor can it, dispute the contractual reality that the nature of the services being provided in this case required advance planning and, thus, advance notice of termination. A0838 (Flinn Aff. ¶6). The Superior Court erred by failing to consider that context of the termination provisions in order to discern their meaning and understand why 60 days' notice of termination was required (and memorialized in both the "Shall Remain In Effect" and "Termination" provisions). *Salamone*, 106 A.3d at 372.

Moreover, even if the Term Agreement could be interpreted such that it did terminate on March 31, 2014, the "Shall Remain in Effect" clause makes clear that its terms shall remain in effect until the Master Agreement is expired or terminated. A0346. It is undisputed that the Master Agreement terminated on

May 31, 2014. Opinion at 19; AB 41. Therefore whether terminated or not, the terms of the Term Agreement survived until May 31, 2014.

2. The Plain Language of the Term Agreement Supports Sunline's Argument That the Term Agreement Terminated on May 31, 2014.

On several occasions, CITGO suggests that the Term Agreement specifically defines March 31, 2014 as its end date:

> "The Term Agreement's March 31, 2104 end date trumps the Master Agreement's December 31, 2014 end date." AB 9.
>
> "The plain language of the Contract says conflicts will be resolved in favor of the Term Agreement, which has a March 31, 2014 end date." AB 20.
>
> "Sunline argues that the December 31, 2014 end date in the Master Agreement trumps the March 31, 2014 end date in the Term Agreement." *Id.*
>
> Sunline may not ignore the specific provision defining the Term Agreement's end date." AB 21.

These statements by CITGO are misleading, at best. Unlike the Master Agreement, which specifically identifies December 31, 2014 as its end date (A0343), the Term Agreement does not identify or define March 31, 2014, or any other date, as its end date, a fact acknowledged by the Superior Court. A0345 – A0352; Opinion at 15 – 16.

CITGO and the Superior Court rely on the following provision as unambiguous evidence of a March 31, 2014 end date:

> 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.

As stated above, only when viewed in isolation, does this provision suggest a March 31, 2014 end date. Proper consideration of the Term Agreement as a whole, including the "Shall Remain in Effect" and "Termination" provisions, and the context of all provisions, reveals that 60 days' notice was required before the Term Agreement ended. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) ("The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.").

3. CITGO's Answering Brief Conflates "Renewal" and "Termination".

Throughout its Answering Brief, CITGO claims that Sunline's reading of the Term Agreement (that 60 days' notice was required before termination) is unreasonable because Sunline incorrectly argues that, absent 60 days' notice, the Term Agreement automatically renewed for another year. AB 8-9, 21-23, 26, 29-30, 33. CITGO is conflating two separate issues, renewal and termination.

Whether the Term Agreement automatically renewed for another year is a different question than whether the Term Agreement could (or did) expire on its

own terms or required an affirmative act before it terminated. Because CITGO provided its 60 days' termination notice on March 31, 2014, unequivocally stating that "[t]he transportation services, therefore, will continue thru the month of May, ending on May 31, 2014," (A0576) Sunline is not asking this Court to find that the Term Agreement continued beyond May 31, 2014.

Rather, Sunline is arguing that the obligations in the Term Agreement could not terminate until 60 days after written notice of termination was provided. Although Sunline cited to various documents confirming the Parties' *understanding and belief* that the Term Agreement renewed for another year if notice was not given (OB 24-25), interpreting the Term Agreement as requiring 60 days' notice before it terminates does not require, as CITGO suggests, a ruling that it automatically renewed. CITGO's conflation of the two issues, intentional or not, clouds the real issue – whether the Term Agreement required 60 days' written notice before it terminated.

B. <u>If the Term Agreement is Found to be Ambiguous, Extrinsic Evidence Supports Sunline's Interpretation.</u>

1. Sunline is Not Estopped From Asserting its Alternate Ambiguity Argument.

CITGO argues that "Sunline failed to preserve its alternate argument that the Term Agreement is ambiguous because Sunline failed to make this argument on summary judgment or at any time during the Superior Court proceeding." AB 18.

Although Sunline argued that the Term Agreement was unambiguous in moving for summary judgment, it has not "reversed course," as CITGO suggests. AB 25. Rather, Sunline has consistently argued that the plain language of the Term Agreement reveals that 60 days' notice was required before the obligations therein terminated and, therefore, it terminated on May 31, 2014 (60 days after notice was given by CITGO). That issue – when the Term Agreement terminated – was fully briefed, addressed in oral argument, considered by the Superior Court, and was a primary focus of the Superior Court's Opinion. Ultimately, the Superior Court disagreed with Sunline and ruled that the Term Agreement terminated on March 31, 2014.

In addition, Sunline's presented the Superior Court with extrinsic evidence in support of its interpretation, effectively raising the issue of ambiguity. A1437-A1441, A1443-A1445. Moreover, the Superior Court specifically considered and addressed the issue of ambiguity, ruling that the "Contract is not so ambiguous to require resorting to extrinsic evidence." Opinion at 14. Thus, although the Superior Court declined to do so, it was "fairly presented" with, and given the opportunity to consider, extrinsic evidence supporting Sunline's interpretation of the Term Agreement before issuing its Opinion.

Additionally, in the briefing and oral argument on Sunline's Motion for Reargument and CITGO's Motion for Clarification, Sunline continued to assert its

position that the Term Agreement could not, and did not, terminate on March 31, 2014, and more precisely articulated its alternative argument that the Term Agreement was ambiguous as to its termination date. A1716; A1788. In so doing, Sunline again "fairly presented" the issue to the Superior Court before the Superior Court issued its Order granting summary judgment for CITGO. *See Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) (holding that the mere raising of an issue is sufficient to preserve it for appeal).

CITGO cites *Steinman v. Levine*, 2002 WL 31761252 (Del. Ch. Nov. 27, 2002) for the proposition that Sunline is judicially estopped from "reversing course." AB 25. That case is distinguishable and, thus, not instructive. In *Steinman*, a party who prevailed in one case by arguing that an Event of Default occurred, was estopped from arguing, in another case, that there had been no Event of Default. Here, unlike the *Steinman* case, Sunline's position on when and how the Term Agreement terminated has been wholly consistent and Sunline has argued that its interpretation can be found within the four corners of that document as well as through consideration of extrinsic evidence.

More importantly, no matter how CITGO characterizes the manner in which Sunline presented its argument to the Superior Court, "when the interests of justice so require, th[is] Court may consider and determine any question not so presented [in the trial court]." Moreover, the determination of ambiguity lies within the sole

province of the court. *Osborn*, 991 A.2d at 1160. This Court is "not bound, and the trial court was not bound, by the parties' present claim that the provision is unambiguous. [This Court] determine[s] that question *de novo.*" *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1231 (Del. 1997).

2. Consideration of Extrinsic Evidence Supports Sunline's Interpretation.

CITGO devotes substantial argument addressing the extrinsic evidence cited by Sunline (AB 25 – 34), boldly claiming that "the extrinsic evidence as a whole refutes Sunline's position." AB 25 (emphasis added). Upon closer examination, however, CITGO's argument is merely an attempt to explain away the evidence. Despite its bold claim, CITGO offers no argument or analysis of how the evidence actually refutes Sunline's interpretation of the Term Agreement.

a. CITGO's Employees Prove What a Reasonable Person Would Have Thought.

As CITGO acknowledges, "[t]he true test [of intent] is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."). *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992). Moreover, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Salamone*, 106

A.2d at 368. Proper consideration of the "Shall Remain in Effect" and "Termination" provisions, and their context, can reasonably be interpreted to mean the parties intended that notice be provided before the Term Agreement's obligations terminated. OB 15-21. Indeed, the record evidence demonstrates that that the Parties shared that common meaning. Like Sunline, CITGO's employees, who were not parties to nor involved in the drafting of the Contract, believed and understood that 60 days' notice was required before the Term Agreement terminated. OB 22-28.

CITGO's litigation response is that its employees were "not qualified to make legal determinations" and/or were "simply mistaken." AB 26. Notwithstanding the now-alleged lack of sophistication of CITGO's employees, the evidence, which clearly shows an understanding (by both Parties) that written notice was required before the Term Agreement terminated, speaks for itself and demonstrates what a reasonable person would, and actually did, understand to be the Parties' intent.

Moreover, although the Superior Court held that it was "able to read the Term Agreement and the Master Agreement together and reach reasonable conclusions as to the parties' intentions," (Opinion at 14) it failed to analyze whether its interpretation was the sole reasonable interpretation or that Sunline's interpretation was unreasonable and, therefore, erred.

b. CITGO's Explanation of the Evidence Does Not Undermine or Refute Sunline's Interpretation of the Term Agreement.

CITGO disputes the significance and import of the extrinsic evidence cited by Sunline, but fails to demonstrate how such evidence refutes, or in any way invalidates, Sunline's position.

For example, CITGO references the email exchange, in mid-March 2014, between CITGO's Jones Khan and Sunline's John Flinn regarding expectations for April, as well as the remainder of 2014. After confirming that April volumes would go back to "normal levels," Khan stated "expect same level of purchases all year." B0005; B0001. Flinn understood this exchange to mean that CITGO would be providing Sunline with 8,000 barrels a day for the remainder of the year. B0001, B1771.

Notably, this exchange highlights the importance of the "Shall Remain if Effect" and "Termination" provisions. Given the possibility that negotiations over terms might spill over beyond the one-year window and knowing the nature of the services being provided (in which advance planning was required), those clauses make clear that, in the absence of 60 days' written notice of termination, "the following terms shall remain in effect until the Master Agreement is expired or terminated." A0346; A0348.

Also, distancing itself from its own termination notice, CITGO argues that the Superior Court "correctly assessed [that] CITGO wished to end its relationship with Sunline…due to the many problems at issue between the parties." AB 27. The Superior Court never made that statement. Even if it had, such a statement would have been pure supposition and conjecture by the Superior Court as no evidence supporting that conclusion was presented. Most importantly, CITGO offers no explanation for why, if it truly believed the Term Agreement simple expired on its own terms, a notice of termination was sent.

CITGO argues it is reasonable to look at what actually occurred after the notice of termination was sent. AB 27. If true, CITGO ignores the fact that, after the notice of termination, CITGO acknowledged (in a meeting in early May) responsibility for shortfalls occurring in April, and the fact that the Parties continued applying the material terms of the Term Agreement in April and May. OB 26-27.

CITGO attempts to discredit the evidence of the May meeting between CITGO's Jones Khan and Sunline's John Flinn and Curtis Hagar by listing certain highly-specific details (such as exact barrel numbers and dollar amounts) that the parties did not recall. AB 28. CITGO ignores the details of the meeting that Flinn and Hagar did recall – most notably, that Khan acknowledged that CITGO did not meet its monthly minimums for April and that Sunline needed to invoice CITGO

for April shortfalls. OB 26. Critically, Khan has never disputed Sunline's account of that meeting.

CITGO largely ignores Sunline's argument regarding the Parties' performance after March 31, 2014, during which the Parties continued to apply the material terms of the Term Agreements (including pricing, reporting, billing, etc.) OB 27. According to CITGO, Sunline's services were completed in those months pursuant to the Master Agreement. AB 30. That could not be the case, however, 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." Opinion at 17.

c. CITGO Cannot Avoid the Khan Affidavit.

Having relied on his affidavit at summary judgment, CITGO reversed course and has attempted to distance itself from the sworn statement of Jones Khan, the primary person at CITGO involved in the Sunline relationship.

CITGO claims that "Sunline is incorrect that Jones Khan 'swore, under oath, that the Term Agreement was in place until the end of May 2014." AB 30. Mr. Khan swore 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.

A0997-77 (Khan Aff. ¶5).

CITGO infers that Khan was referring to the Master Agreement, as opposed to the Term Agreement, by stating that "[i]t is undisputed that the Master Agreement was in effect at that time." AB 30. CITGO's pleadings belie this explanation. Khan's affidavit was executed and filed in support of CITGO's Motion for Summary Judgment and was used as support for CITGO's claim that Sunline failed to perform in April and May 2014. B0019, B0042-52. Specifically, CITGO argued that Sunline "abandoned or repudiated [its] contractual obligations in April and May 2014." B0043. CITGO further argued that it had to hire another company to provide transportation services, "even though the contract had not terminated at that time." B0051. The only contract Khan could have been referring to was the Term Agreement, as Sunline had no performance obligations under the Master Agreement. Opinion at 19. CITGO cites no evidence supporting the notion that Khan was referring to the Master Agreement, as opposed to the Term Agreement.

CITGO also claims that Sunline inaccurately described the scope of Khan's knowledge. According to CITGO, "Mr. Khan stated that he has knowledge of the 'Agreements as modified by the parties,' referring to the obligation to move shortfall barrels 'to the end of the contract.'" AB 30, n. 5. The document cited by CITGO actually reads "Mr. Khan has knowledge of the parties' performance of

their respective obligations under the Master Agreement and [Term] Agreement and under the Agreements as modified by the parties.…" (emphasis added). A0676.

CITGO cannot downplay Khan's involvement or knowledge of the Parties' relationship, or avoid his sworn testimony. Indeed, Khan's testimony, as well as CITGO's now-withdrawn allegations that Sunline breached obligations of the Term Agreement in April and May 2014 (*See, e.g.* B0042-45; B1054-55; B1061-63; B1065; B1380-81) are, themselves, extrinsic evidence that CITGO knew that the Parties' respective contractual obligations continued into April and May 2014. *See, AT&T Corp. v. Lillis*, 970 A.2d 166, 172-73 (Del. 2008) (parties' course of conduct, including statements made in withdrawn pleadings, may be considered as evidence of their intended meaning of an ambiguous contractual term).

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. Sunline Did Not Concede That the Parties' Reached an Agreement With Respect to *April and May 2014*.

In December of 2013, after months of discussions as to how and when CITGO was going to meet its contractual obligation to compensate Sunline for shortfalls, the Parties reached an agreement whereby, if CITGO immediately paid 20% of what was owed, the remaining 80% could be pushed to "the end of the contract" and made up volumetrically or paid for in cash. OB 11. As CITGO correctly points out (AB 38), Sunline's position is that, when this agreement was made, the Parties did not know the exact end date of the contract because, according to its terms, its termination was triggered by 60 days' notice, which was not provided until March 31, 2014. OB 11. Because the end date of the contract was open-ended, the timing of CITGO's obligation to make up its shortfalls was similarly open-ended. Therefore, there was never any agreement between the Parties that April and May 2014 were earmarked as "shortfall make-up" months. OB 30-32.

The Superior Court, accepting that there was some agreement to make up shortfalls at the end of the contract, and having decided that the contract ended on March 31, 2014 (which is disputed by Sunline), concluded that the Parties *agreed*

that shortfalls would be made up in April and May 2014. Opinion at 20. The Superior Court's circular logic, adopted by CITGO, does not accurately reflect the Parties' agreement. OB 30-32.

CITGO predictably downplayed this, stating that "[u]ltimately, this timing issue (not whether or not there was an agreement) was resolved by a legal ruling…" AB 38. Notwithstanding CITGO's parenthetical attempt to assure this Court otherwise, this is not a mere timing issue but an issue of whether the Parties entered into an oral agreement. As set forth below and in the Opening Brief, the oral agreement alleged by CITGO fails as a matter of law and the Superior Court erred in accepting CITGO's version of the agreement without applying appropriate legal standards.

B. There Was No "Meeting of the Minds."

Sunline admits that in December 2013 the Parties came to a basic agreement that, with respect to the $1.6 million CITGO owed Sunline by December 2013 (A0387), CITGO would pay 20% immediately and make up the 80% later, at the end of the contract. However, there was never an agreement as to exactly when "then end of the contract" would be. OB 11.

In fact, contemporaneous emails sent by CITGO and Sunline on the date of the alleged agreement reveal that the Parties had not reached a meeting of the minds on the terms of the agreement. 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.

Other than repeatedly referencing the basic 20/80 split and claiming that this is nothing more than a timing issue, CITGO fails to address Sunline's argument that there was no meeting of the minds.

C. The "Consideration" CITGO Allegedly Provided to Sunline is Legally Insufficient and Was Never Part of a Bargained-For Exchange.

CITGO claims that Sunline received at least two forms of consideration for its agreement to move shortfall barrels to April and May. According to CITGO, "(1) CITGO paid Sunline an additional $1 million [more than the parties originally contemplated] for the agreement; and (2) CITGO refrained from exercising its right to terminate the Agreements before March 31, 2014, despite ongoing issues with Sunline's performance." AB 39.[2] Both of these alleged forms of consideration are legally insufficient and neither was part of a bargained-for exchange to move CITGO's shortfall obligations to April and May.

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[2] CITGO previously argued, in summary judgment pleadings, that by extending the Agreements for an additional two months there was valid consideration for its oral modification. A1403-A1404; A1564. Perhaps recognizing the inconsistency in that assertion and its assertion that the Term Agreement ended on March 31, 2014, CITGO abandoned that argument.

The alleged additional $1 million is revisionist number-crunching that has no basis in the Parties' Contract. Under the Term Agreement, Sunline was guaranteed *at least* 2,680,000 barrels over 12 months – no specific dollar amount was ever contemplated. A0346-A0347, AB at 39. Ultimately, CITGO provided 80,000 fewer than the guaranteed amount (A0432; AB 40) over 14 months. Therefore, under CITGO's interpretation, Sunline had to invest sufficient resources for 14 months in order to haul fewer barrel than were guaranteed over 12 months.

CITGO had a shortfall balance of 337,969 barrels as of March 31, 2014. AB 16; A1673 (CITGO conceding that, as of the end of 2013, it had incurred 337,969 in shortfall barrels and that that number did not change in 2014). Therefore, even assuming the Term Agreement ended on March 31, 2014, CITGO owed Sunline over $1.4 million on that date. AB 39 (CITGO admitting that shortfalls were charged at $3.33 per barrel plus a 28% fuel surcharge); A0844 (Flinn Aff. ¶33). Neither CITGO nor the Superior Court pointed to any benefit to Sunline or detriment to CITGO for the alleged undisputed agreement that shortfalls barrels would be provided in April and May 2014. As such, the required consideration is lacking. *See Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1232 (Del. Ch. 2000); *Peco Logistics, LLC v. Walnut Inv. Partners, L.P.*, 2015 WL 9488249, at *7 (Del. Ch. Dec. 30, 2015). Moreover, there is no evidence in the record that the Parties discussed, bargained-for or agreed upon any additional compensation to be

paid to Sunline in exchange for its accommodation to CITGO with respect to the $1.6 million owed as of (but not including) December 2013 (A0387) or the $1.4 million owed for 2013 shortfalls. AB 16.

Similarly, the alleged consideration in the form of CITGO not terminating the Term Agreement was never part of a negotiation or bargained-for exchange. CITGO details a narrative in which Sunline knew that CITGO could terminate the Term Agreement at any time and, in order to avoid that, it reached an agreement with CITGO on how to handle CITGO's shortfall obligations. AB 13-14, 30-31, 36, 39-41. That narrative is entirely fiction.

Initially, Sunline disputes the suggestion that CITGO could simply terminate the Term Agreement at any time. CITGO concedes as much by acknowledging that ***"the contract guaranteed Sunline 2,680,000 barrels across 12 months."*** AB 39 (emphasis added).

More importantly, at no point did Sunline and CITGO discuss the possibility that CITGO was considering or threatening Sunline with early termination, nor did the parties discuss or negotiate any forbearance on CITGO's alleged ability to terminate early. There is no evidence in the record of any threats or discussion regarding early termination.

CITGO points to two emails, both dated October 15, 2013 (two months before the Parties reached any agreement), as evidence that Sunline knew CITGO

could terminate the Contract early and/or might cancel the Agreements. B1151; B1233. Although this correspondence might be read as a threat by CITGO that it would not continue the relationship in the future, neither of these emails mentions early termination.

CITGO strategically cites to only one page of the attachment to one of its emails (B1233), which is a PowerPoint presentation sent by CITGO to Sunline on October 15, 2013 at 8:36 AM. That document (an internal CITGO document) confirmed that CITGO owed Sunline $1.37 million (as of October 2013) and recommended a proposal that CITGO pay 30% immediately and extend the contract to exhaust the shortfall volume. A0468-A0469. Nowhere does the proposal indicate, or suggest, that CITGO could, or would, terminate the Term Agreement early. A0466-A0470. To the contrary, according to CITGO's own document, CITGO had to provide "[c]ancellation notice 60 days prior [to March 31, 2014] or agreement renews for another year." A0467.

Moreover, one month later, CITGO's Michael Barrett emailed John Flinn stating "Jones [Khan] has drafted a document pertaining to this [shortfall] invoice that I will be putting before management next week. We will be in touch as soon as we can. Thank you for your continued support." A0516. This email further confirms that no threat of early termination was being made by CITGO – rather, CITGO was thanking Sunline for its continued support.

In short, at no point during the discussions regarding of CITGO's shortfall obligation, did the Parties negotiate or bargain for (1) CITGO providing Sunline with additional compensation, or (2) CITGO forbearing on any alleged right to terminate the Term Agreement early. As such, CITGO's after-the-fact consideration is illusory and fails as a matter of law.

Absent a meeting of the minds or valid consideration, the Superior Court erred in concluding that the Parties reached an undisputed agreement that shortfalls would be made up in April and May of 2014.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's Opening Brief, 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 CITGO's shortage would be made up in April and May 2014, and render judgment in favor of Sunline or, alternatively, remand the matter for trial.

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