SUPERIOR COURT
OF THE
STATE OF DELAWARE

PAUL R. WALLACE
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0660

Submitted: August 3, 2026*
Decided: August 21, 2026

Richard L. Renck, Esquire
Robert M. Palumbos, Esquire (*argued*)
Rebecca E. Bazan, Esquire
DUANE MORRIS LLP
1201 North Market Street, Suite 501
Wilmington, Delaware 19801

David E. Ross, Esquire
S. Reiko Rogozen, Esquire
A. Gage Whirley, Esquire
ROSS ARONSTAM & MORITZ LLP
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801

Hugh Q. Gottschalk, Esquire
Eric L. Robertson, Esquire (*argued*)
Danielle L. Trujillo, Esquire
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, Colorado 80202

RE: *Magellan Pipeline Company, L.P. v. Suncor Energy (U.S.A.) Inc., et al.*
<u>C.A. No. N25C-02-418 PRW CCLD</u>
Magellan Pipeline Company, L.P.'s Motion to Dismiss Counterclaims and to Strike Affirmative Defenses

Dear Counsel:

This Letter Decision and Order addresses Magellan's Motion to Dismiss Suncor Energy (U.S.A.) Inc.'s two fraud-related counterclaims and several affirmative defenses arising from those counterclaims (D.I. 65). For the reasons explained now, the Motion is **GRANTED in part and DENIED in part**.

I. FACTUAL BACKGROUND[1]

A. PARTIES

Suncor is a Delaware corporation, with its principal place of business in Colorado.[2] Suncor owns and operates refining assets in Colorado.[3]

Magellan is a limited partnership organized under the laws of Delaware.[4] Magellan owns and operates the Dupont Terminal in Colorado.[5]

B. LEAD UP TO THE AGREEMENTS AND THE PIPELINE EXPANSION "CONCEPT"

In early 2023, Suncor and Magellan entered into several agreements to transport, store, and load gasoline from Commerce City, Colorado, to the Dupont Terminal.[6] After signing those agreements, Aaron Cissell, Magellan's Vice President

---

* While the Court initially believed it would need to consider this matter fully submitted only upon docketing of the hearing transcript (D.I. 74), it has found that its notes and review of all other motion materials has sufficed.

1 The Court draws the following facts from the well-pleaded allegations and documents incorporated by reference in Suncor's Counterclaim. The Court has also laid out some of this background in its earlier decision on Defendants' motions to dismiss. *See Magellan Pipeline Co., L.P. v. Suncor Energy (U.S.A.) Inc.*, 2026 WL 766429, at *1–3 (Del. Super. Ct. Feb. 26, 2026).

2 Countercl., ¶ 12 (D.I. 58).

3 *Id.*, ¶ 13.

4 *Id.*, ¶ 14.

5 *Id.*

6 *Id.*, ¶ 18.

of Commercial, Refined Products, contacted Suncor agents to discuss further strategic opportunities between Suncor and Magellan.[7] Suncor agreed to a meeting to discuss additional opportunities regarding gasoline supply.[8]

Before the meeting, Suncor employee James Piscatelli talked to Magellan representative Fawn McWilliams about a winter fill agreement.[9] Under the proposed winter fill agreement, Suncor would store gasoline in Magellan tanks in Colorado during the winter to capitalize on lower gasoline supply in the Denver area during the summer months.[10]

At the meeting, Magellan representatives presented a slide deck that included a reference to a "Front Range Supply Optimization Concept."[11] The Magellan representatives explained that the concept contemplated Magellan potentially building a pipeline from Scott City, Kansas, to Denver International Airport.[12] The Magellan reps referred to this idea only as a "concept" and didn't share any plans

---

7 *Id.*, ¶ 19.

8 *Id.*, ¶ 20.

9 *Id.*, ¶¶ 21–22.

10 *Id.*, ¶ 22.

11 *Id.*, ¶ 25.

12 *Id.*

for actual construction.[13]

Suncor didn't like the "concept." Mr. Piscatelli rejected it and indicated that Suncor wouldn't back the idea because it would hurt Suncor's summer gasoline margins.[14] The parties didn't discuss the concept further and instead continued discussing the winter fill agreement plan.[15] Suncor left the meeting understanding that the concept and the winter fill agreement were mutually exclusive options—that is, if Suncor agreed to the winter fill agreement then Magellan wouldn't pursue the "concept."[16] Eventually, Suncor and Magellan entered into the winter fill plan through the DuPont Storage and Terminalling Agreement ("Terminalling Agreement") and Amendment I to the Ethanol Storage Services Agreement ("Ethanol Agreement") (collectively, "Agreements").[17]

C. Magellan announces Pipeline Expansion Project

Several months after executing the Agreements, Magellan issued a press release introducing the Pipeline Expansion Project.[18] That Project was the Kansas-

---

13 *Id*.

14 *Id*., ¶ 26.

15 *Id*., ¶¶ 26–28.

16 *Id*.

17 *Id*., ¶ 32.

18 *Id*., ¶ 36.

to-Denver pipeline "concept" discussed at the meeting.[19] After some back-and-forth, Suncor told Magellan to stop all work associated with the Agreements.[20] Suncor then notified Magellan that Suncor was electing to rescind the Agreements, and Magellan responded with a notice of default, a notice of termination, and a demand for payment.[21]

D. Relevant Contract Provisions

In the Terminalling Agreement, Suncor disclaimed reliance on any of Magellan's extra-contractual representations:

> **No Warranty; No Reliance.** Except as expressly provided in this Agreement, Magellan makes no representations or warranties, express or implied, including any implied warranty of merchantability or fitness for a particular purpose. In entering into this Agreement, Customer is relying upon its own judgment, and Customer is not relying upon, and disclaims any reliance upon, any representation made by or on behalf of Magellan that is not specified in this Agreement.[22]

The Parties also agreed in the Terminalling Agreement that they had no express relationship:

> **No Partnership.** There is no partnership, joint venture, association or special relationship of any kind, or intent to create one, between or among the parties or their respective Affiliates with respect to the

---

19 *Id*.

20 *Id*., ¶ 40.

21 *Id*., ¶¶ 42–43.

22 Compl., Ex. A [hereinafter the "Terminalling Agreement"] Sched. B, § 7 (D.I. 1).

> arrangements contemplated by this Agreement, and the parties expressly disclaim the formation of any such relationship. Neither this Agreement nor any discussions, conduct or interactions between or among them may be interpreted as creating such a relationship or intent, which may instead only arise when and if documented and approved by the respective boards or other governing bodies of each of the parties. Neither party will be or become liable or bound by any representation, act or omission of the other party.[23]

Finally, the Terminalling Agreement contains an integration clause:

> **Entire Agreement; Amendment.** This Agreement states the entire agreement between the parties with respect to the subject matter hereof, and supersedes all prior agreements, negotiations and understandings, whether oral or written, between the parties with respect to such subject matter. This Agreement may not be amended except by written instrument executed by the parties hereto.[24]

E. SUNCOR'S FRAUDULENT MISREPRESENTATION AND FRAUDULENT NONDISCLOSURE COUNTERCLAIMS

In this action, Suncor now brings two counterclaims against Magellan for: (1) fraudulent misrepresentation; and (2) fraudulent nondisclosure.[25] For Count I, Suncor alleges that Magellan fraudulently misrepresented the truth about Magellan's intentions concerning the expansion project.[26] For Count II, Suncor asserts that Magellan had a duty to disclose and failed to reveal that the expansion concept was

---

[23] Terminalling Agreement § 23.

[24] *Id.*, § 24.

[25] Countercl., ¶ 47.

[26] *Id.*, ¶¶ 49–52.

more than just a concept.[27] Suncor also pleads affirmative defenses of fraudulent inducement, fraudulent concealment, frustration of purpose, and failure of consideration.[28]

II. PARTIES' CONTENTIONS

Magellan argues that the Court should dismiss the fraud counterclaims because Suncor disclaimed reliance on Magellan's representations in the Terminalling Agreement.[29] Magellan also contends that inquiry notice prevents Suncor from establishing justifiable reliance.[30]

Turning to the fraudulent misrepresentation counterclaim, Magellan asserts that Suncor fails to identify a misrepresentation of a material fact.[31] For the fraudulent nondisclosure counterclaim, Magellan posits it didn't have a duty to unveil its pipeline project intentions.[32] Magellan also avers that Suncor's fraudulent inducement, fraudulent concealment, frustration, and lack-of-consideration affirmative defenses should be dismissed because they are not well pleaded, and the

---

27 *Id.*, ¶ 61.

28 Defs.' Affirmative Defenses 2–3, 6–7 (D.I. 58).

29 *See generally* Magellan Op. Br. at 9–17 (D.I. 66).

30 *See generally id*. at 17–21.

31 *See generally id*. at 21–24.

32 *See generally id*. at 25–32.

fraud-related defenses fail for the same reasons as the fraud-related counterclaims.[33]

In response, Suncor counters that it has pled all the elements of fraudulent misrepresentation and fraudulent nondisclosure, and that the non-reliance clause isn't specific enough to disclaim reliance.[34] Likewise, Suncor replies that the non-reliance provision doesn't cover Magellan's undisclosed intentions relating to the pipeline expansion project.[35] As to the affirmative defenses, Suncor insists they are well-pleaded at the motion-to-dismiss stage.[36]

In reply, Magellan reiterates that the Terminalling Agreement's non-reliance provision is broad enough to cover both claims, and Suncor was otherwise on inquiry notice about the pipeline project, so Suncor cannot prove reliance.[37] Magellan maintains that Suncor fails to plead a false representation under its fraudulent misrepresentation counterclaim, and cannot establish that Magellan had a duty to disclose under the fraudulent nondisclosure claim based on the Restatement (Second) of Torts.[38] Finally, Magellan posits that the Court should dismiss Suncor's

---

33 *See generally id*. at 32–34.

34 *See generally* Suncor's Opp'n at 6–30 (D.I. 71).

35 *See generally id*. at 25–26.

36 *See generally id*. at 31–34.

37 *See generally* Magellan's Reply at 2–11 (D.I. 72).

38 *See generally id*. at 11–21.

affirmative defenses that are derivative of the faulty fraud-related counterclaims under Superior Court Civil Rule 12(f).[39]

The Parties agree that Colorado law governs.[40]

III. STANDARD OF REVIEW

Magellan seeks to dismiss both counterclaims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[41] The governing standard requires the Court to "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, [and] (3) draw all reasonable inferences in favor of the non-moving party."[42] The Court need not "accept every strained interpretation of [Suncor's] allegations"[43] or conclusory statements "unsupported by allegations of specific facts."[44] Dismissal is appropriate only if Suncor "would not be entitled to recover under any reasonably

---

39 *See generally id*. at 21–23.

40 Magellan Op. Br. at 1 n.2; Suncor's Opp'n at 7 n.1.

41 D.I. 65.

42 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

43 *Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

44 *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

conceivable set of circumstances susceptible of proof."[45]

Magellan also seeks to dismiss several of Suncor's affirmative defenses under Rule 12(f). Rule 12(f) permits the Court to "'order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.'"[46] Motions to strike an insufficient defense "focus on the form of the pleading and not its substance."[47] When ruling on such motion, the Court construes all facts in favor of the nonmoving party and denies the motion if the defense is sufficient under law.[48] The Court disfavors motions to strike.[49]

IV. ANALYSIS

Suncor's fraudulent misrepresentation counterclaim fails because Suncor disclaimed reliance on all Magellan representations in the Terminalling Agreement. And Colorado enforces non-reliance provisions that expressly disclaim reliance.

---

[45] *Savor*, 812 A.2d at 896–97; *Priveterra Capital, Mgmt., LLC v. Pixium Vision, LLC*, 2026 WL 940227, at *3 (Del. Super. Ct. Apr. 7, 2026).

[46] *DDS Striker Holdings, LLC v. Verisk Analytics, Inc.*, 2024 WL 3983973, at *3 (Del. Super. Ct. Aug. 29, 2024) (quoting Super. Ct. Civ. R. 12(f)).

[47] *Columbus Life Ins. Co. v. Wilmington Tr. Co.*, 2021 WL 537117, at *5 (Del. Super. Ct. Feb. 15, 2021).

[48] *Id*. (citation modified).

[49] *Heisenberg Principals Fund IV, LLC v. Bellrock Intelligence, Inc.*, 2018 WL 3460433, at *1 (Del. Super. Ct. July 17, 2018) (citing *Vannicola v. City of Newark*, 2010 WL 5825345, at *8 (Del. Super. Ct. Dec. 21, 2010))

But the fraudulent nondisclosure counterclaim endures. While Suncor disclaimed reliance on Magellan's representations, Suncor didn't disclaim reliance on Magellan's unstated true intentions about the expansion project. And Suncor has otherwise stated a reasonably conceivable counterclaim of fraudulent nondisclosure.

Finally, Suncor's affirmative defenses are well-pleaded. The fraudulent nondisclosure counterclaim is well-pleaded. And because the affirmative defenses relate to that well-pleaded counterclaim, they survive this early stage of litigation on the same grounds.

A. SUNCOR'S FRAUDULENT MISREPRESENTATION COUNTERCLAIM FAILS TO STATE A CLAIM AS SUNCOR UNAMBIGUOUSLY DISCLAIMED RELIANCE ON ANY MAGELLAN REPRESENTATIONS.

To prevail on a fraud claim, under Colorado law, a party must prove: (1) that the opposing party made a false representation of a material fact; (2) that the one making the representation knew it was false; (3) that the person to whom the representation was made was ignorant of the falsity; (4) that the representation was made with the intention that it be acted upon; and (5) that the reliance resulted in damage to the plaintiff.[50]

For the reliance element, a party must show actual reliance, the reasonableness

---

50 *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1160 (Colo. 2013).

of the reliance, and that the reliance caused damage.[51] Contract language that clearly and specifically disclaims precontract representations or omissions can preempt fraud claims which are based on those statements or omissions.[52] A general integration clause alone will not suffice.[53] Instead, a non-reliance provision "must be couched in clear and specific language."[54]

Here, the Terminalling Agreement has an integration clause.[55] And Suncor disclaimed reliance on "any representation made by or on behalf of Magellan that is not specified in this Agreement."[56] Suncor's fraudulent misrepresentation counterclaim rests entirely upon its reliance on Magellan's representation that the expansion was only a concept and not a definite plan. The Agreements don't mention the pipeline expansion project. So Suncor could not have reasonably relied on this representation, since it disclaimed reliance on any Magellan representations outside the Agreements. Because Suncor cannot prove reasonable reliance on this

---

[51] *Id*.

[52] *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, 74 (Colo. 1991); *LBI Grp., LLC v. Scanlan*, 2024 WL 3947026, at *5 (Colo. App. July 11, 2024).

[53] *LBI Grp.*, 2024 WL 3947026, at *5.

[54] *Keller*, 819 P.2d at 74; *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 19 (Colo. App. 2010), *as modified on denial of reh'g* (Apr. 1, 2010).

[55] Terminalling Agreement § 24.

[56] Terminalling Agreement Sched. B, § 7

representation, Counterclaim Count I is **DISMISSED**.

True, even if only one counterclaim endured the motion-to-dismiss stage, discovery would proceed in largely the same manner. Likewise, Rule 12(b)(6) asks only whether the complaint states a claim upon which relief can be granted, not whether every theory states a claim on which relief can be granted.[57]

> There can be significant value in dispensing with meritless claims at the pleading stage. But a court need not examine the sufficiency of every count in a complaint or consider every argument that a defendant has advanced. That is particularly true when an issue will not result in the dismissal of a defendant from the case and where the case involves a common nucleus of operative fact that will be the focus of discovery in any event. In that setting, the case can readily proceed past the pleading stage.[58]

The counterclaims here indeed arise from the same nucleus of fact. And discovery overlaps substantially since both counterclaims revolve around what was said during the presentation and in the lead-up to the Terminalling Agreement. But it is impossible for Counterclaim Count I to ultimately succeed because the disclaimer expressly covers representations. Even if the "concept" was a done deal at the presentation, and Magellan knew that referring to the done deal as a "concept" was false, the disclaimer encompasses *any* extra-contractual representations. This is also

---

57 *In re EngageSmart, Inc. Stockholder Litig.*, 354 A.3d 796, 863 (Del. Ch. 2026) (cleaned up).

58 *Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, 302 A.3d 430, 464 (Del. Ch. 2023).

true if Magellan represented that the pipeline project and the winter fill plans were mutually exclusive since, again, this is an extra-contractual representation by Magellan. The Court need not punt this counterclaim to summary judgment because further testing of the facts is unnecessary for this counterclaim.[59] Accordingly, Suncor's fraudulent misrepresentation counterclaim fails as a matter of law.[60]

B. But Suncor's fraudulent nondisclosure counterclaim survives, as the non-reliance provision doesn't cover omissions that Magellan kept to itself.

To succeed on a fraudulent nondisclosure or concealment claim under Colorado law,[61] a party must demonstrate: (1) the concealment or nondisclosure of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed or not disclosed; (3) ignorance of that fact on the part of

---

[59] *See, e.g., Powers v. Office of Child Support*, 795 A.2d 1259, 1263 (Vt. 2002) ("The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it."); *see also Total Containment, Inc. v. Environ Products, Inc.*, 1992 WL 208981, at *1 (E.D. Pa. Aug. 19, 1992) (same).

[60] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 169 ("It is well established that a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law.") (quotations omitted).

[61] *See generally Wisehart v. Zions Bancorporation*, 49 P.3d 1200, 1204 (Colo. App. 2002) (acknowledging that the terms fraudulent concealment and fraudulent nondisclosure are used interchangeably and require essentially the same elements). Here, nondisclosure is more accurate because Suncor alleges that Magellan had a duty to disclose that it planned to proceed with the pipeline expansion project.

the one from whom the fact is concealed or not disclosed to; (4) the intention that the concealment or nondisclosure be acted upon; and (5) action on the concealment or nondisclosure resulting in damages.[62]

For the first element, a party must show that the other party held a duty to disclose the material information.[63] Colorado courts look to the Restatement (Second) of Torts § 551(2) to determine whether there was a duty to disclose in equity and good conscience.[64] Relevant to Suncor's counterclaim, a party has a duty to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading."[65]

1. The non-reliance clause only covers representations—not omissions.

Unlike the fraudulent misrepresentation counterclaim, the fraudulent concealment claim avers that Magellan failed to divulge that the pipeline expansion project was more than just a notion. The non-reliance clause doesn't cover this, or any, omission. The clause only covers Magellan's actual representations—not omissions that Magellan never conveyed to Suncor.

---

62 *BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 109 (Colo. 2011); *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937).

63 *Mallon Oil Co. v. Bowen/Edwards Associates, Inc.*, 965 P.2d 105, 111 (Colo. 1998).

64 *Id*.

65 RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (A.L.I. 1977).

And under Colorado law, a non-reliance provision in an agreement bars fraud claims only when a party expressly disclaims reliance. For instance, in *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*,[66] the Colorado Court of Appeals held that the trial court erred by holding that a non-reliance clause barred reliance on nondisclosure of losses. There, the plaintiff bought a retail coffee shop franchise after receiving the defendant's uniform franchise offering circular (UFOC), which disclosed the gross sales of existing stores, but stated that it contained no data on profits and no guarantee of profitability and advised prospective franchisees to conduct their own financial analyses.[67] The franchise agreement was integrated and contained general exculpatory clauses disclaiming reliance on representations not found in the agreement.[68] The plaintiff asserted a claim for fraudulent nondisclosure based on two theories—that the franchisor had concealed: (1) losses at existing stores; and (2) the franchisor's own losses.[69]

The appellate court determined that "clear and specific language" in the UFOC or the franchise agreement could prove the absence of reasonable reliance on

[66] 251 P.3d 9, 19 (Colo. App. 2010), *as modified on denial of reh'g* (Apr. 1, 2010).

[67] *Id*. at 15–18.

[68] *Id*. at 20–21.

[69] *Id*. at 18.

the purported omissions.[70] The court thus concluded that the UFOC's statements precluded reasonable reliance under the first theory, but that the UFOC and franchise agreement contained no terms that nullified reasonable reliance under the second theory.[71] The reason was that while the plaintiffs disclaimed reliance on affirmative representations outside the transactional documents, there was no disclaimer concerning a failure to disclose material information.[72] In doing so, the court distinguished between disclaiming reliance on affirmative representations outside the transactional documents and a failure to disclose material information.[73]

Here, the non-reliance provision only covers Magellan's representations. Suncor alleges that Magellan failed to disclose that the pipeline expansion project was a sure thing. Although this counterclaim relates to the representation that the pipeline expansion was only a concept, and Suncor disclaimed reliance on this representation:

> [a] statement that is partial or incomplete may be a misrepresentation because it is misleading, when it purports to tell the whole truth and does not. So also may a statement made so ambiguously that it may have two interpretations, one of which is false. When such a statement

---

[70] *Id*. at 19–20.

[71] *Id*. at 19–22.

[72] *Id*. at 19.

[73] *Id*. at 19–21; *see also id*. at 21 (noting that "neither clause disclaims reliance on undisclosed but material information.").

> has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient. In this case there may be recovery either on the basis of the original misleading statement *or of the nondisclosure of the additional facts*.[74]

Magellan's failure to disclose the additional facts may entitle Suncor to recovery. And the disclaimer here doesn't apply to facts that Magellan failed to represent to Suncor. The disclaimer also doesn't state that Suncor is disclaiming reliance on the completeness of Magellan's representations. So the Terminalling Agreement's non-reliance clause doesn't bar the fraudulent non-disclosure counterclaim since the non-reliance clause doesn't cover undisclosed material facts.

2. It is reasonably conceivable that Magellan had a duty to correct its statement that the pipeline project was only a "concept."

Next, Magellan insists that the fraudulent nondisclosure counterclaim fails as it didn't have a duty to disclose that the pipeline expansion project was more than just a concept. Under the Restatement, Magellan had a duty to disclose matters it knew were necessary to prevent its partial or ambiguous statement of the facts from misleading Suncor. Based on the well-pleaded facts in Counterclaim Count II, it is reasonably conceivable that Magellan stated only that there was a pipeline expansion project concept when it had far more definitive plans to complete the project and

---

[74] RESTATEMENT (SECOND) OF TORTS § 551 cmt. 2(g) (A.L.I. 1977) (emphasis added).

knew that calling the expansion a concept would make it seem less like the expansion was already going to happen. It is also reasonably conceivable that Magellan knew the pipeline expansion was a done deal and that Suncor wouldn't sign the Terminalling Agreement if it knew the pipeline expansion was happening. Under these facts, Magellan may have had a duty to correct its partial or ambiguous description of the pipeline project as a concept.

3. It is reasonably conceivable that Suncor didn't know that the pipeline expansion project was going to happen.

Magellan also asserts that Suncor cannot state a claim for fraudulent nondisclosure since Suncor cannot establish ignorance of the pipeline expansion project. Magellan cites *Nielson v. Scott*[75] to support this contention. There, the plaintiffs, buyers of an RV park, sued the seller for misrepresenting the seriousness of a wastewater problem in the park. The seller verbally assured the buyers that a $15,000 upgrade could solve the problems with the park's septic system.[76] But the buyers' attorney learned the park needed a groundwater discharge permit from a state agency and that this agency suspected the RV park didn't comply with state

---

[75] 55 P.3d 777, 780 (Colo. App. 2002).

[76] *Id*. at 778.

water quality laws.[77] Despite the attorney's warnings, the buyers proceeded with the purchase, and acknowledged in the sales contract that their "due diligence inspection," including environmental and water issues, had been completed to their satisfaction.[78] When the buyers learned that the septic system did not follow state regulations, and that the problem could not be solved by expanding the septic system, the plaintiffs sued the sellers for fraudulent misrepresentation.[79] The trial court granted the sellers' motion for summary judgment, and the Colorado Court of Appeals affirmed since any reliance on the sellers' representation was not justifiable because the buyers knew there were problems and should have investigated further.[80]

Here, Suncor alleges it didn't know that Magellan was definitely completing the pipeline project and thought if the Parties agreed to the winter fill plan, then the pipeline project wouldn't happen. No doubt, Suncor shoulders a heavy burden to prove that it was under the impression that the pipeline was only a "concept" and that a thorough investigation and due diligence—or even just a few more follow-up questions at the meeting with Magellan—wouldn't have shown that the project was

---

[77] *Id*. at 778–79.

[78] *Id*.

[79] *Id*.

[80] *Id*.

more than just that. But this case is only at the motion-to-dismiss stage. And Suncor has set forth facts showing that it didn't know the pipeline project was a sure thing and that Magellan created an impression that the pipeline project was only a potential idea during negotiations.[81] Accordingly, Suncor has stated a reasonably conceivable counterclaim for fraudulent nondisclosure, and the Court **DENIES** the Motion as to Counterclaim Count II.

C. SUNCOR'S AFFIRMATIVE DEFENSES ARE WELL-PLEADED BECAUSE A FRAUD THEORY REMAINS IN PLAY.

Magellan also moves to dismiss Suncor's affirmative defenses of fraudulent inducement, fraudulent concealment, frustration, and lack of consideration because they are derivative of Suncor's faulty counterclaims.

Here, only Suncor's fraudulent misrepresentation counterclaim fails. The fraudulent concealment counterclaim and its related defenses are still alive and relevant to this action. And the only challenged defenses are those that depend on the Court dismissing both fraud-related counterclaims. But there is still a fraud-related theory in play, and the affirmative defenses linked to the surviving well-

---

[81] *See Wisehart*, 49 P.3d at 1206–07 (holding that trial court erred when ruling that reliance was unjustified at summary judgment when there was a factual dispute over whether the plaintiff availed himself of the invitation to seek more information); *see also Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 n.11 (Colo. 2003), *as modified on denial of reh'g* (Aug. 4, 2003) (recognizing that "inquiry notice depends on extrinsic factual inquiry.").

pleaded counterclaim are also well-pleaded. So, Magellan's Motion is **DENIED** as to Suncor's affirmative defenses.

VI. CONCLUSION

For these reasons, the Court **GRANTS** Magellan's Motion, **in part**, and **DENIES** it, **in part**. Only Counterclaim Count I is **DISMISSED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace

Paul R. Wallace, Judge

cc: All Counsel via File and Serve