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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.	:	Case Below:
CITGO PETROLEUM CORPORATION,	:	Superior Court of the State of Delaware
Defendant Below, Appellee.	:	C.A. No: N15C-03-051 WCC CCLD

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In 2013, Plaintiff-Below / Appellant Sunline Commercial Carriers, Inc. ("Sunline" or "Appellant") and Defendant-Below / Appellee CITGO Petroleum Corporation ("CITGO" or "Appellee") entered into a contract whereby Sunline agreed to haul barrels of crude oil provided by CITGO between April 1, 2013 and March 31, 2014. The contract contemplated that CITGO would provide a minimum number of barrels that Sunline would haul each month. Even though the parties quibbled then (and now) regarding the quality of the performance and whether the other breached, it is undisputed that CITGO provided barrels, Sunline hauled them, and CITGO paid for Sunline's hauling services under the Contract (comprised of the Master Agreement and the Term Agreement).

It is also undisputed that over the course of the year, in certain months, CITGO did not meet the minimum monthly requirement of barrels to be provided to Sunline. When CITGO fell short, the parties agreed that, to cover Sunline's operating costs, CITGO would pay Sunline 20% of what CITGO would have owed in a given month if CITGO had provided (and Sunline had hauled) the minimum monthly barrel requirement. The parties agreed that 80% of the barrels by which CITGO was short of the monthly minimum (the "shortfall barrels") would be "moved to the end of the contract."

Consistent with that agreement, CITGO provided these "shortfall barrels" for Sunline to haul in April and May 2014, the two months following the expiration of the parties' contract.

But, despite the agreement, Sunline claimed that CITGO had been required to provide the minimum monthly requirements in April and May 2014 (after the parties' Term Agreement expired), and, therefore, CITGO should have provided both the "shortfall barrels" plus the monthly minimum number of barrels during those two months. On that basis, Sunline claimed that CITGO owed Sunline more than $1.9 million.

On March 6, 2015, Sunline filed suit against CITGO in the Superior Court alleging breach of contract and seeking "damages in excess of $1.9 million." A0091-98. On April 28, 2015, CITGO answered, and filed counterclaims alleging breach of contract and breach of the implied covenant of good faith and fair dealing by Plaintiff, and seeking an accounting and the return of amounts by which CITGO overpaid Plaintiff. A0099-A0122. Plaintiff replied to CITGO's counterclaims on May 18, 2015. A0123-A0142. Discovery commenced. Trial was set for January 9, 2017. B0010. On December 2, 2015, while discovery was ongoing, Sunline moved to dismiss CITGO's request for an accounting and its claim for unjust enrichment. A0007-A0008. Both parties filed motions to compel

seeking resolution of issues that had arisen in discovery. A0009-A0022. CITGO filed a motion to amend its counterclaims. A0019.

The Court heard oral argument on February 24, 2016 on Plaintiff's partial motion to dismiss and on the parties' discovery motions. A0201-A0222. At that hearing, Sunline argued in connection with its defense to CITGO's discovery motions that the pricing provision in the Contract was a liquidated damages provision. A0206. The Court ordered supplemental briefing on that issue. A0220. The parties completed their briefing on March 22, 2016, and on May 27, 2016, the Court issued a Letter Opinion ruling that the parties' agreement "does not contain a liquidated damages clause." A0226. The Court also dismissed CITGO's claim for an accounting, but allowed CITGO's unjust enrichment claim to proceed. A0021-A0022.

On November 16, 2016, the Court granted CITGO's Motion to Amend, and CITGO's Answer with Amended Affirmative Defenses and Amended Counterclaims was docketed. A0053-A0054.

On May 16, 2017, the parties each filed motions for summary judgment. A0056-A0059. Sunline moved on its affirmative breach of contract claim and against all of CITGO's counterclaims. A0056-A0059. CITGO moved on three discrete issues related to Sunline's breach of contract claim. A0056-A0059.

Following oral argument but before the Superior Court issued its Memorandum Opinion, CITGO dismissed its counterclaims against Sunline, thereby mooting, in part, Sunline's motion for summary judgment. A0063.

On December 27, 2017, the Superior Court issued its Memorandum Opinion granting Sunline's Motion for Summary Judgment in part.[1] Opinion at 1-23.

The Superior Court held that CITGO had breached the parties' contract by failing to meet its minimum obligation of barrels in certain months.

Noting that the parties' contracts are unambiguous and no extrinsic evidence need be considered, the Superior Court further held that the Term Agreement had expired by its own terms on March 31, 2014, and therefore CITGO had no obligation to provide the minimum number of barrels to Sunline during either April or May 2014. Opinion at 13, 18. The Superior Court found that the parties' Master Agreement terminated as of May 31, 2014, as a result of 60 days' notice provided by CITGO on March 31, 2014. Opinion at 19.

The Superior Court noted that its decision "may be a particularly bitter pill for [Sunline] to swallow," but that "in reality, Sunline is getting exactly what it contracted for." Opinion at 21-22. The Superior Court stated that "to the extent there are any matters remaining to litigate, the Court believes they are limited to

[1] The Court denied CITGO's motion for summary judgment. CITGO is not appealing this denial.

the extent of shortages and what monetary payments have been made to compensate Plaintiff for them . . . the case has been reduced to a simple accounting exercise." Opinion at 21. The Superior Court suggested that "CITGO [] live up to its obligation and pay Sunline for the shortages." *Id.* at 22.

On January 5, 2018, Sunline filed a motion for reconsideration of the Superior Court's December 27, 2017 Opinion, and for the first time in this litigation claimed that the contracts between the parties are ambiguous. A0086-A0087, A1716. Also on January 5, CITGO filed its Motion Seeking Clarification of the December 27, 2017 Memorandum Opinion, requesting that the Superior Court enter a final Order clarifying it Memorandum Opinion declaring that CITGO does not owe Sunline anything. A1729-A1735.

The Superior Court held oral argument on Sunline's Motion for Reconsideration and CITGO's Motion for Clarification on January 26, 2018 during which, Sunline's counsel stated:

> **SUNLINE'S COUNSEL:** So when you say why don't you just come to an agreement with respect to CITGO on what was owed, the dispute there, is, were April and May specifically designed for making up the shortfalls, or, was that supposed to be at a later date?
>
> And we would argue it would have been at a later date because we thought the contract was still in operation, in April and May.
>
> If your ruling is, no, the – **if you convert what they owed Sunline, in dollars, at the end of March, is**

> **converted to barrels, and if they knew that at least that many barrels in April and May, because the parties agreed that would happen, then you're right, it makes sense to enter into a judgment, judgment,** and then, you know, pursue whatever options we may decide to pursue on appeal.
>
> ...
>
> **There was an agreement that shortfall barrels would be moved – or paid for by the way**. They didn't have to be barrels.
>
> **COURT:** Correct.
>
> **SUNLINE'S COUNSEL:** At the end of the contract; and admittedly, the parties were not perfectly clear on when "at the end of the contract would be" and that, that could be because they didn't decide to terminate us until just before the end of March.
>
> So we didn't know when the end of the contract would be.

A1784 (emphasis added).

The Superior Court denied Sunline's Motion for Reconsideration and CITGO's Motion Seeking Clarification and directed the parties to confer regarding how to proceed to trial then scheduled for February 12, 2018. A1738, A1789.

On March 8, 2018, the Superior Court held a teleconference at which counsel for Sunline reserved its right to appeal, but agreed that applying the reasoning in the Court's December 27, 2017 Opinion resulted in the conclusion that CITGO had paid Sunline for all of the barrels Sunline hauled, and no triable

issue remained. A1746; Order at 1-2. On that basis, the Superior Court stated that it would issue a final, appealable Order in favor of CITGO and against Sunline so that Sunline could appeal. A1746. On March 13, 2018, the Superior Court issued that Order. Order at 1-2. Sunline now appeals both the December 27, 2017 Memorandum Opinion and March 13, 2018 Order. This is CITGO's Answering Brief in opposition to Sunline's appeal.

SUMMARY OF ARGUMENT

1. **Denied.** The Superior Court correctly ruled that the Term Agreement expired by its own terms on March 31, 2014, and therefore CITGO had no obligation to provide a minimum of 240,000 barrels to Sunline during either April or May 2014.

The Superior Court is correct for three reasons. First, the plain language of the one-year Term Agreement starting April 1, 2013 states Sunline and CITGO must agree on the volume and term for any renewal. No agreement regarding volume and term was reached, so the Term Agreement—and the obligation to provide 240,000 barrels per month—expired on March 31, 2014.

Sunline is incorrect that the Term Agreement would automatically renew for another year if no notice to terminate was given 60 days before April 1, 2014. Such a reading would contradict the plain language of the Term Agreement, which says renewal only occurs if there *was* an agreement on the volume and term—not the absence of one.

Second, Sunline's reliance on the 60-day notice requirement is also misplaced for a different reason. This notice requirement allowed the parties to end the Term Agreement before a full year elapsed, but Sunline ignores this purpose of the provision and instead argues that the notice provision allows for automatic renewal, which contradicts the plain language of the Term Agreement.

Third, it is not the law that, as Sunline argues, the general provision (that the Term Agreement "shall remain in effect until the Master Agreement is expired or terminated") supersedes the more specific provision stating that the Term Agreement lasts for one year. Furthermore, the Term Agreement expressly states that conflicts between the two agreements should be resolved in the Term Agreement's favor. That means the Term Agreement's March 31, 2014 end date trumps the Master Agreement's December 31, 2014 end date.

2. **Denied.** The Superior Court correctly ruled that extrinsic evidence is unnecessary in interpreting the Term Agreement, which the parties agreed is unambiguous in the Superior Court, below. It was not until after Sunline moved for – and was granted – summary judgment in its favor that Sunline first argued that either the Term Agreement or the Master Agreement (which together comprise the Contract) was ambiguous. The language of the Term Agreement providing for a one-year term is not susceptible to any other reasonable meaning, and the Superior Court's interpretation of it was proper under Delaware law.

Even if Sunline's contention that the Contract is somehow ambiguous were timely (which it is not), Sunline's arguments regarding the proposed alternative interpretation fail. Sunline's extrinsic evidence conflicts with the plain language and incorrectly assumes that the Term Agreement says it "automatically renewed **for an entire year** if 60 days' notice was not given." Op. Br. at 23-28. But those

words do not appear in the Term Agreement, and, therefore, the extrinsic evidence Sunline cites would vary the unambiguous terms of the Term Agreement (or add new ones). Sunline's interpretation is not reasonable.

3. **Denied.** The Superior Court correctly ruled, based on the evidence and arguments presented on summary judgment, that the parties agreed that CITGO would provide, and Sunline would haul, the shortfall barrels during April and May 2014. The evidence and argument – including that of Sunline's witnesses and Sunline's counsel – establishes the agreement to move shortfall barrels "to the end of the contract." By interpreting the unambiguous Term Agreement as a matter of law, the Superior Court correctly determined that the "end of the contract" was March 31, 2014, which meant that CITGO should (and did) make up the barrels starting April 1, 2014.

It is not correct, as Sunline argues, that the Superior Court's interpretation of the Contract imposed an impermissible oral contract or oral modification. Rather, the Superior Court properly interpreted the Contract pursuant to well-established Delaware law to which Sunline did not object until after the Superior Court's ruling resulted in a finding that CITGO already has paid all that it owes.

COUNTERSTATEMENT OF FACTS

I. Sunline and CITGO Entered Into the Contract.

On January 9, 2013, Sunline and CITGO executed a document entitled "Agreement for Motor Transportation Services" (the "Master Agreement"). A0341-44. The Master Agreement contemplates that Sunline would transport barrels of crude oil for CITGO, and provides guidelines for such, but does not provide the specific pricing or volumes for the barrels. A0341-A0344. To address these details, on March 21, 2013, Sunline and CITGO executed a document also entitled "Agreement for Motor Transportation Services" (the "Term Agreement"), which went into effect on April 1, 2014 and expired on March 31, 2014. A0345-51. The Master Agreement and the Term Agreement operate together to form the parties' contract (the "Contract").

The Master Agreement sets forth the obligations with which "Carrier" (Sunline) agreed to comply, including but not limited to requirements that Sunline would perform its duties under the contract in a professional and workmanlike manner and that Sunline would maintain all insurance, required licenses and permits in compliance with all applicable laws and regulations. A0341-A0344. The Master Agreement was set to expire on December 31, 2014, absent 60-days' notice of termination by either party. A0343.

The Term Agreement sets forth certain minimum barrels, on a sliding scale varying by month, which CITGO would provide for Sunline to transport. A0346-A0347. Specifically, CITGO agreed to provide 100,000 barrels in the first month, 180,000 barrels in the second month, and 240,000 barrels for the third month through the twelfth month. A0346-A0347.

In addition to the volume and pricing terms, the Term Agreement, at Appendix "A", discusses how long the Term Agreement lasts, any renewal process, and the parameters for providing notice. These provisions are central to this appeal:

Appendix "A"

Terms and Conditions

Both parties, CITGO and Sunline, agree that the following terms shall remain in effect until the Master Agreement is expired or terminated.

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.
....	
Termination:	Termination of the Agreement by either party must be given at least 60 days prior to the expiration of the Agreement in writing.

A0346-A0348.

II. Sunline and CITGO Agreed to Move Shortfall Barrels "to the End of the Contract" to Address Supply Issues.

A. CITGO Fell Short of Meeting Monthly Minimum Requirements, Resulting in "Shortfalls Barrels."

Over the course of the parties' performance of the contract, the number of barrels provided by CITGO for Sunline to haul fluctuated, and fell short of the parties' initial expectations in or around the summer of 2013. Opinion at 2-3. The Superior Court succinctly and correctly tracked the monthly progress of the Contract with the following chart:

Month	Shortfall Barrels	Shortfall Obligation	Shortfall Obligation Met?
June 2013	97,595	$415,989	No
July 2013	81,477	$347,288	No
August 2013	143,372	$611,109	No
September 2013	50,410	$214,445	No
December 2013	49,607	$211,445	No
February 2014	16,402	$69,912	Yes
March 2014	96,085	$409,553	Yes

Opinion at 3.

B. Sunline Feared that CITGO Would Terminate the Contract Early in Light of the Shortfalls.

Sunline President John Flinn realized CITGO could terminate the Contract early while he was negotiating how to handle the shortfall barrels with Jones Khan in October 2013. B1151. Flinn's statement that he did not want Sunline to "lose the business" was made in response to Mohsin (Jones) Khan of CITGO proposing to "[e]xtend term of the contract for an additional month so that the adjusted

shortfall volume of 225,711 barrels is exhausted. New expiration date of April 30, 2014." B1157. Mr. Flinn acknowledged that CITGO had full discretion and could have terminated the Contract without cause. B1151. In fact, that same day, Mr. Flinn wrote to another Sunline employee to report that CITGO might cancel the Agreements. B1233. Sunline realized that it needed to incentivize CITGO not to exercise the right to terminate, thereby leading him to come to a new agreement, as described below.

C. CITGO and Sunline Agreed That, Because of the Shortfalls, CITGO Would Pay for 20% of the Barrels in Dollars Up Front and Move 80% of the Barrels "to the End of the Contract."

The parties ultimately agreed that CITGO would "make up" the shortfalls both monetarily and volumetrically: CITGO would "close out" barrel shortfalls for June, July, August, and September 2013 by paying, upfront, twenty (20) percent of the amount that was owed (20 percent of the expected revenue) in order to cover operating costs, and any remaining barrels would be provided in later months for Sunline to transport. A1400-1406; B0617; B1211; B0270-B0271; A0840-A0841; A0306; B0641; B1228-B1229. Similarly, after CITGO fell short for December 2013, CITGO paid twenty (20) percent of the expected revenue for that month, and Sunline agreed to move the remainder of the December barrels to the extension period (after the expiration of the contract on March 31, 2014) to allow CITGO to make up the shortfall. B1224. There is no dispute that (1) Sunline invoiced

CITGO consistent with this agreement for the months in 2013 with shortfalls; and (2) CITGO paid Sunline 20% for those same months. A1400-1406; B0617; B1221; B0270-B0271; A0840-A0841; A0306; B0641; B1228-B1229. Those invoices also tracked the 80% in barrels to be moved to the end of the contract. B1141; B1224. Although CITGO had shortfalls in February 2014 and March 2014, CITGO paid Sunline in full, and Sunline is not seeking any damages for those two months. A1588 ("They paid 100 percent of their shortfall payment due for February and March. There were substantial amount of shortfalls, but they paid 100 percent, so those are not at issue.").

Although Sunline argues that no such agreement existed, there is evidence in the record, including the testimony of Sunline president John Flinn, individually and as Sunline's corporate representative pursuant to Superior Court Civil Rule 30(b)(6), where Sunline acknowledged the parties' agreement to "move barrels to the end of the contract." B0617 ("Sunline accepted a payment for those [shortfall] barrels at 20% of the contracted price/FSC and moved the unpaid BBLS representing the 80% not paid or 298,283 BBLS to be made up by the end of April 2014"); B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841 ("I ultimately agreed that if CITGO would pay 20% of the then-existing shortfall obligation . . . the remaining 80% [of the barrels could be pushed . . . ."

As of March 31, 2014, CITGO owed Sunline 337,968.8 shortfall barrels. B0293; A0844. That day, Khan provided notice that the relationship between the parties would end in 60 days – allowing for CITGO to make up the remaining shortfalls. A0576. Consistent with Khan's notice, CITGO provided the shortfall amount during those next two months, and even exceeded this amount by more than 20,000 barrels. B0293; A1784; A1786. Specifically, Sunline concedes that CITGO provided 211,163 barrels in April 2014 and 147,782 barrels in May 2014, for a total of at least 358,945 barrels over the two months. B0293; A1784; A1786.

But Sunline contends that CITGO was obligated to provide at least 240,000 barrels per month or pay for the transportation of at least 240,000 barrels per month for both April and May 2014, and on that basis argues that CITGO incurred "shortfalls" in both April and May 2014. Op. Br. at 12. Sunline argued to the Superior Court that CITGO was either required to provide 1) the 240,000 barrel minimum in April 2014 and again in May 2014 – in addition to the total 337,968.8 shortfall barrels from June, July, August, September and December 2013, or 2) that CITGO was required to provide the 240,000 minimum in April 2014 and again in May 2014, with any shortfall barrels to be hauled in June 2014 or later. Op. Br. at 14-22. But the record is clear that Sunline never approached CITGO about making up shortfalls in June 2014 or later. B1386-B1387; B1434-B1435 at 177:20-178:2.

Therefore, as the Superior Court correctly held, the Contract expired by its own terms, and "[t]here is ample correspondence between the parties to demonstrate a willingness and a mutual assent to move the 2013 shortages to the end of the Term Agreement." Opinion at 20, citing Pl. Ex. A-14 at CITGO 001860 (showing Defendant's understanding that outstanding shortfalls be pushed to the end of the contract), and Pl.'s Ex. A-52 at CITGO 001447, and Flinn Dep. 176:1-24, Jan. 27, 2016 (stating parties intended outstanding shortfalls to be pushed to end of contract).

ARGUMENT

I. The Court Correctly Ruled that the Term Agreement Expired by its Own Terms on March 31, 2014.

A. Question Presented

Whether the Superior Court correctly held that the Parties' Term Agreement expired by its own terms on March 31, 2014, thereby terminating CITGO's 240,000 minimum barrel obligation.

Sunline failed to preserve its alternative 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. Rather, Sunline repeatedly contended the Term Agreement was unambiguous. Also, Sunline failed to "fairly present[]" this argument under Delaware Supreme Court Rule 8 because Sunline mentioned it for the first time in the last sentence its Motion for Reargument, filed after the Superior Court had ruled in its favor on summary judgment. Opinion at 12-14; A1716; A1788.

B. Scope of Review

This Court reviews a Superior Court's grant of summary judgment *de novo*. *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013). This Court also reviews questions of contract interpretation *de novo*. *Exelon Generation Acquisition, LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017) (holding

that Purchase Agreement did not require defendant to pay $14 million earn-out payment).

C. Merits of Argument

1. The Trial Court Properly Construed the Plain Language of the Agreement to Rule that the Term Agreement Ended on March 31, 2014.

The 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. Opinion at 14-16. The proper construction of any contract is well-settled:

> Our objective is to determine the intent of the parties from the language of the contract. This inquiry should focus on the parties' shared experiences 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." If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.

Exelon, 176 A.3d at 1266-67 (citations omitted). "When the language of a contract is plain and unambiguous, binding effect should be given to its evident meaning." *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2009). Clear and unambiguous contract terms are given their ordinary and usual meaning. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). In addition, the law favors reasonable, rather than unreasonable,

interpretations of contracts. *See, e.g., Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (affirming Court of Chancery's ruling as the "only reasonable interpretation" of a contract).

The Term Agreement, which includes the 240,000-barrel monthly minimum requirement, began on April 1, 2013 and expired on March 31, 2014. Opinion at 14-16; A0346-A0348. As Sunline concedes, "this provision...could be interpreted such that the Term Agreement was simply a one-year agreement." Op. Br. at 17. Sunline is incorrect that there is any alternate reasonable interpretation.

a. The Plain Language of the Contract Says Conflicts Will Be Resolved in Favor of Term Agreement, Which Has a March 31, 2014 End Date.

It is not reasonable, as Sunline argues, that the Term Agreement can be interpreted to end on December 31, 2014, instead of March 31, 2014. Op. Br. at 18 citing A0343 ("the following terms shall remain in effect until the Master Agreement is expired or terminated."). Sunline argues that the December 31, 2014 end date in the Master Agreement trumps the March 31, 2014 end date in the Term Agreement. Op. Br. at 18; A0343; A0345-A0348. But Sunline is wrong. The Term Agreement, which was executed after the Master Agreement, explicitly states that conflicts are resolved in the Term Agreement's favor: "To the extent of any inconsistent or conflicting terms between this [Term] Agreement and the Master Agreement, this [Term] Agreement shall govern and control." A0345.

b. Specific Terms, Such as the March 31, 2014 End Date, Govern Over the General Terms Upon Which Sunline Relies.

"Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provisions ordinarily qualifies the meaning of the general one." *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960-61 (Del. 2005) (affirming trial court's ruling that specific provision containing "knowledge qualifier" both conflicted with and governed over general provision on undisclosed liabilities, thereby reducing Seller's indemnity liability). The paragraph following the paragraph on which Sunline relies undermines Sunline's position because it gives the "Term of the Agreement," which is "1 Year agreement with a start date of April 1, 2013." A0346. Sunline may not ignore the specific provision defining the Term Agreement's end date. Sunline is correct that "well settled rules of contract construction require that a contract be construed as a whole, giving effect to the parties' intentions." *See ConAgra*, 889 A.2d at 961. Construing the contract as a whole, it is clear that the Term Agreement ended on March 31, 2014.

c. The Term Agreement Includes a Renewal Procedure, But Sunline's Interpretation Reads It Out of the Term Agreement.

The same provision defining the "Term of the Agreement"—which Sunline ignores—also provides the procedure to renew the contract to extend it beyond

March 31, 2014: "If both parties agree on terms and volumes, this Agreement will be renewed with the agreed upon start date and term of the agreement." A0346. The parties did not renew under this or any other provision. Opinion at 17.

Sunline is incorrect that the Court erred by rejecting Sunline's assertion that the Term Agreement, with its minimum 240,000-barrel requirement, still was in place during April and May 2014. For the Term Agreement to have remained in place, the parties must have had a meeting of the minds as to both volume and pricing, which, as the Court recognized, never occurred. Opinion at 17. No meeting of the minds on terms and volumes means no extension of the Term Agreement—or the 240,000-barrel requirement—beyond March 31, 2014. Opinion at 17; A0346. As Sunline urges, the Court must give effect to all provisions in the Contract to construe its meaning, even the ones, like this one, that Sunline fails to address.

Sunline also argues that "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**." Op. Br. at 19 (emphasis added). Sunline's interpretation means that the Term Agreement would automatically renew until one of the parties gives 60 days' notice. *Id.*, citing A0348 ("Termination of the Agreement by either party must be given at least 60 days prior to the expiration of the Agreement in writing."). But Sunline's

interpretation is flawed for two reasons.

First, the termination language that Sunline cites does not say what happens if notice is not given. A0348. Sunline asks the Court to fill this gap by adding new words into the Term Agreement so that "the obligations under the Term Agreement will continue to extend until 60 days' notice is given." Op. Br. at 19; A0348. The parties did not write those words into the Term Agreement, and Delaware law forbids any attempt to override the parties' intent in this way. *See BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012) (reversing summary judgment ruling where Superior Court interpreted a contract by adding the words "substantially along the lines of" or "materially similar to," instead holding the parties to the plain language of the agreement).

Second, Sunline's argument ignores that the Term Agreement already includes requirements for the parties to renew it. For the Term Agreement to renew, the parties must "review terms 60 days prior to [the] expiration date" and "agree on terms and volumes." A0346. If the Term Agreement automatically renewed, this renewal procedure would be superfluous. Sunline's alternate interpretation of the Term Agreement cannot be reasonable because it ignores this language wholesale. *See BLGH Holdings LLC*, 41 A.3d at 414 ("Where, as here, the plain language of the contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with

the plain meaning and will not resort to extrinsic evidence to determine the parties' intentions.").

2. The Trial Court Properly Determined that the Master Agreement and Term Agreement Are Unambiguous; No Extrinsic Evidence Need Be Considered.

The Superior Court correctly determined as a matter of law that the Contract is unambiguous and no extrinsic evidence is necessary to interpret it. Opinion at 14-16. Having won the battle (summary judgment) but lost the war, Sunline now contends that the Contract is ambiguous. Op. Br. at 21-28. Sunline is estopped from doing so now. Del. Supr. Ct. Rule 8. But, even if this Court were to determine that the Contract is ambiguous, the extrinsic evidence establishes that CITGO's (and the Superior Court's) interpretation, not Sunline's, is the correct one.

a. Sunline Has Repeatedly and Correctly Claimed that the Contract is Unambiguous, and It Is Judicially Estopped from Changing Positions After the Superior Court Granted Summary Judgment in Its Favor.

Before this ruling, both Sunline and CITGO were in agreement that the Contract was unambiguous, and the Superior Court ruled accordingly. Opinion at 12; A0091-A0098; A0227-A0252. Sunline did not plead ambiguity in its Complaint. A0091-A0098. In fact, Sunline pleaded what the Contract "unambiguously" stated. A0093. During the February 24, 2016 oral argument on

Sunline's motion to dismiss and the parties' discovery motions, Sunline asked the Superior Court to construe the Contract, as a matter of law, to have a liquidated damages clause. A0206. Sunline's motion for summary judgment urged the Superior Court that "[t]his is a simple breach of contract case" and "[t]he only matters in dispute are issues of contract formation and interpretation which can easily be resolved by the Court." A0288. Unsurprisingly, the Superior Court stated in its summary judgment ruling that "Plaintiff also contends that the Contract is unambiguous . . . ." Opinion at 12.

Only after the Superior Court agreed with Sunline's argument that the Contract was unambiguous and granted summary judgment in Sunline's favor did Sunline claim that the Contract is ambiguous. A1716. Sunline is judicially estopped from reversing course. *See, e.g., Steinman v. Levine*, 2002 WL 31761252, at *11 (Del. Ch. Nov. 27, 2002) (applying judicial estoppel to estop a party who successfully argued that an Event of Default occurred from later arguing the opposite).

b. Sunline's Extrinsic Evidence Does Not Establish An Alternate Reasonable Interpretation of the Contract.

Sunline spends considerable time pulling various threads together to support its argument that the Term Agreement extends beyond March 31, 2014. Op. Br. at 23-28. But the extrinsic evidence read as a whole refutes Sunline's position.

First, Sunline points to a series of internal CITGO emails and PowerPoints

that showed that certain individuals believed that the Term Agreement automatically renewed if 60 days' notice was not given. Op. Br. at 24; A0376; A0380; A0383; A0465-A0470. However, these individual CITGO employees, who are not qualified to make legal determinations, are simply mistaken because no automatic renewal language—let alone for an entire year—appears in the Contract, and these documents are irrelevant in light of the Contract's merger clause. A0341-A0344; A0345-A0351. *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) ("The true test 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.")

Second, Sunline points to a series of discovery responses referencing an email from Jones Khan to John Flinn about how CITGO "expect[ed] [the] same level of purchases all year." Op. Br. at 25; A1732-A1733; A0395; A0420-A0421. This email does not equate to an agreement regarding pricing and volume that could or did renew the Term Agreement. Op. Br. at 25. The entire email string belies Sunline's argument. When Sunline's Mr. Flinn asked CITGO's Mr. Khan when the parties will negotiate terms, Mr. Khan told Mr. Flinn that "I don't think I'll be doing the negotiation on the term contract. I think Becky's group will be

working on it this time around." B0001; B1771.[2] Mr. Flinn then acknowledged to his team that "we will deal with Becky on terms." Mr. Flinn's words do not indicate an agreement on terms – they indicate the opposite. *Id.*

Third, Sunline claims that CITGO would have "no need to send the termination letter" on March 31, 2014, if CITGO believed there was no automatic extension of the Term Agreement. Op. Br. at 25. But the Superior Court correctly assessed the reason behind the termination letter: CITGO wished to end its relationship with Sunline—including the Master Agreement, which would otherwise last until December 31, 2014—due to the many problems at issue between the parties. Opinion at 19; *see also* B0042-B0052; B0114-B0116; A0576; A0852 (Sunline's President John Flinn acknowledged that CITGO's trucking needs were all going "to a company called JAG Energy."). And, of course, it is reasonable to look to what actually occurred in the 60-day window to determine what the parties intended. During that time, the parties made up the more than 300,000 shortfall barrels "at the end of the contract." B0293; A1784; A1786.

Fourth, Sunline's reliance on a meeting in early May 2014 between Sunline's John Flinn and Curtis Hagar and CITGO's Jones Khan to create a dispute of fact is misplaced. Op. Br. at 26. Sunline does not mention that the

[2] CITGO has provided the full email for the Court's consideration. Sunline attached only a portion to its briefing before the Superior Court.

meeting was a social outing involving alcohol at a Twin Peaks[3] in Houston. Sunline claims Khan, allegedly without provocation, volunteered at that meeting that Sunline should "send [CITGO] a bill" for shortfall barrels in April 2014. A0843; B1763-B1765 at 37:3-38:17.[4] But there is no documentary record of that conversation, nor could any Sunline witness, when asked at deposition, remember the details of that meeting, such as how this "request" for an invoice came up in conversation. B1763-B1764 at 37:3-38:17; B1767-B1768 at 165:23-167:4. Moreover, Flinn and Hagar cannot recall (1) what amount of money they said was actually owed; (2) how many barrels CITGO was short; (3) how shortfalls were to be handled; and (4) whether Khan had the authority to bind CITGO. B1764 at 38:5-22; B1768 at 166:2-19. Sunline cannot correct its witnesses' deposition testimony by submitting an affidavit on summary judgment and then claiming the new material in the affidavit is uncontested. *See, e.g., In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011) ("Had the differing averments been elicited by defense counsel during deposition, as they readily could have been, the plaintiffs' counsel could have tested the witnesses' assertions through cross-

[3] *See About Us*, TWIN PEAKS, http://www.twinpeaksrestaurant.com/about/ (last accessed on August 14, 2018).

[4] In response to Sunline's arguments seeking to rely on this May 2014 meeting to create an ambiguity on appeal where there was no ambiguity at issue below, CITGO provides this Court with the evidence in the record concerning this meeting. CITGO had moved to preclude references to it at trial. B1751-B1756.

examination. Except on routine or undisputed matters, I have discounted these 'non-adversarial proffers' and relied on the deposition testimony and contemporaneous documents.") (internal citations omitted).

Fifth, even if Sunline were correct in its argument that extrinsic evidence should come into play here – which CITGO denies – Sunline is incorrect that "CITGO never protested, corrected, or sought to clarify this now-alleged misunderstanding." Op. Br. At 26. The Superior Court cited the documentary evidence from the record: on April 2, 2014, CITGO's in-house counsel Gene Riccetti wrote to CITGO stating that "[t]here was no agreement for a one-year extension nor does the [Term Agreement] provide for one"; (2) "[i]n order to renew the [Term Agreement], there was a [renewal procedure] that must be met...[and] [t]hat condition precedent was not met"; (3) "[w]e did not specifically agree on terms and volumes (including minimums) for April and May"; and (4) "[t]he only term we agreed on was to use up the adjusted shortfall [barrels] until such time that volume has been exhausted." Opinion at 6-7; A0705-A0706; A0728.

Sixth, Sunline is incorrect that CITGO and Sunline continuing to do business together in April and May 2014 is any type of admission that the Term Agreement extended beyond March 31, 2014. Op. Br. at 26-27. Instead, as the Superior Court found, it is entirely consistent with the parties' agreement that the

parties would move the hauling of the shortfall barrels "to the end of the contract." Sunline's services in April and May 2014 were completed pursuant to the Master Agreement. A1400-1406; B0617; B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841; A0306; B0641; B1228-B1229 at 22:10-23:15; A0341-A0344. As argued above in Section I.C.1, the Term Agreement expired, and there is no evidence that the parties took the steps necessary to renew.

Finally, Sunline is incorrect that CITGO's Jones Khan "swore, under oath, that the Term Agreement was in place until the end of May 2014." Op. Br. at 27. Rather, Mr. Khan's affidavit[5] states that the "contract had not terminated [as of the last week of May 2014]." A0976-A0977. It is undisputed that the Master Agreement was in effect at that time. A0096; A0681; A0715. And, of course, the last week of May was the end of the time period to resolve the shortfall barrels that had been moved "to the end of the contract." A0576; A0715; A0728.

c. If the Contract is Found to be Ambiguous, the Extrinsic Evidence Establishes that Sunline Believed that CITGO Could Terminate Early and that the 240,000 Barrel Minimum Ended March 31, 2014.

If this Court finds that the Contract is ambiguous, the extrinsic evidence supports CITGO's interpretation, not Sunline's. Sunline argues that both parties

[5] Sunline inaccurately describes the scope of Mr. Khan's knowledge in order to suit its purpose. In fact, 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." A0676; A0690.

understood that there was an extension of the Term Agreement—along with the obligation to provide 240,000 barrels per month—beyond March 31, 2014, but Sunline ignores the evidence demonstrating what the parties actually agreed to: handling shortfall barrels at the end of the contract. A1400-1406; B0617; B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841; A0306; B0641; B1228-B1229 at 22:10-23:15.

CITGO had the right to cancel its Contract with Sunline before March 31, 2014 – thereby precluding the entitlement to damages that Sunline alleges it suffered in April and May 2014. A0343; A0346-A0348. By its terms, the Master Agreement could be "terminated by either party **at any time** and for any reason, with or without cause, upon sixty (60) days prior written notice to the other party." A0343 (emphasis added). In addition, the Term Agreement expressly stated that its "terms shall remain in effect until the Master Agreement is expired **or terminated**." A0348 (emphasis added). These provisions permit CITGO to have terminated in 2013, long before April and May 2014.

Sunline realized CITGO could terminate the Contract early while negotiating how to handle shortfall barrels with CITGO in October 2013. Sunline President John Flinn wrote to CITGO Crude Oil Trader Jones Khan:

> Honestly, I am trying to figure out how to make this better. **I do not want to lose the business** Jones but I do know what else to do. You know my cash loss in August and am trying to figure our [sic] how I can do better is

> tough. **Let me know what CITGO decides as losing the business over something I did not cause is difficult for me to understand.** I thought our proposal was fair considering the size of the full amount and I do not have deep enough pockets to absorb August as I did in June and July.

B1151 (emphasis added). The statement that he did not want Sunline to "lose the business" came in response to Mr. Khan sending an attachment proposing "[e]xtend[ing] term of the contract for an additional month so that the adjusted shortfall volume of 225,711 barrels is exhausted. New expiration date of April 30, 2014." B1157. Mr. Flinn acknowledged that CITGO had full discretion and could have terminated the Agreements without cause. B1151. In fact, that same day, Mr. Flinn wrote to another Sunline employee to report that CITGO might cancel the Agreements: "[Jones Khan] called me this AM and told me they are moving forward on paying us but also said the top guy, Gustavo, **might tell them to stop using us** for charging them." B1233 (emphasis added).

Ultimately, the parties agreed that CITGO would pay for a percentage of barrels upfront to "cover [Sunline's] operating and capital expenses," but "[t]he additional barrels not paid for will be pushed to the end of the contract extending it for 30 days to allow CITGO to purchase the barrels." B0641. In fact, Sunline made that offer in response to a request from CITGO to "mov[e] the shortfall of 225,711 barrels to May 2014." B1077.

Sunline is therefore incorrect that the extrinsic evidence shows that the

parties understood that the failure to give 60 days' notice would result in the Term Agreement renewing for another year. Op. Br. at 23-28. First, as argued in Section I.C.1 above, renewal required agreement on pricing and volume. *Id.* Second, the record is clear that the parties continued their relationship into April and May 2014, but not beyond. Opinion at 6; A0576; B0293. The Court did not determine that there were no obligations in place during April and May 2014, but instead held, consistent with the record, that the Master Agreement was in effect until May 31, 2014 for CITGO to make up the shortfall barrels and for Sunline to transport them. Opinion at 19. Nothing in the record indicates that either party intended that the parties would continue to work together beyond the resolution of the shortfall barrels at the end of May 2014.

d. Sunline Incorrectly Claims that CITGO Drafted the Term Agreement to Support Its Argument that the Term Agreement Should Be Construed Against CITGO.

Sunline incorrectly claims that CITGO was the drafter of the Term Agreement to support its argument that the Term Agreement should be construed against CITGO. Op. Br. at 21. This argument fails.

First, on a summary judgment standard, the non-movant – here, CITGO – is entitled to have inferences drawn in its favor. *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

Second, the parties below did not litigate (and therefore the Superior Court

did not rule on) which party drafted the Contract, and the evidence Sunline cites does not support its contention that CITGO was the drafter. Op. Br. at 21; A1529; A1716; A0153. To the contrary, Mr. Flinn testified that while CITGO drafted the Master Agreement, and "some of the language on the next three pages" of the Term Agreement. A1529. The emails cited by Sunline show that the parties exchanged drafts of the Term Agreement, meaning that some of the words in it were drafted by Sunline. A0153.

II. The Superior Court Correctly Found that Sunline and CITGO Had an Undisputed Agreement that CITGO Would Make Up Shortfall Barrels at the End of the Contract by Providing Those Barrels to Sunline in April and May 2014.

A. Question Presented

Whether the Superior Court correctly found that there was an undisputed agreement that CITGO would make up shortfall barrels at the end of the contract by providing those barrels to Sunline in April and May 2014.

B. Scope of Review

This Court reviews a Superior court's grant of summary judgment *de novo*. *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 entitled the movant to judgment as a matter of law." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997). We "must view the evidence, and all reasonable inferences taken therefrom, in the light most favorable to the non-moving party and determine whether an issue of material fact exists such that summary judgment was improper." *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

C. Merits of Argument

The Superior Court correctly granted summary judgment because there was no issue of material fact regarding the agreement between the parties to move the shortfall barrels "to the end of the contract." Opinion at 18-23; Order at 1-2;

A1400-1406; B0617; B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841; A0306; B0641; B1228-B1229 at 22:10-23:15. The record establishes that Sunline conceded that the parties reached such an agreement. Opinion at 18-23; Order at 1-2; A1400-1406; B0617; B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841; A0306; B0641; B1228-B1229 at 22:10-23:15. And, the record establishes that Sunline made that agreement (and received consideration for it) for two reasons: it prevented CITGO from exercising its right to terminate the Contract early, and it netted Sunline more than an extra million dollars than expected. A1403-A1406. Once the deal was struck, Sunline invoiced CITGO for months, tracking in a separate column how many shortfall barrels were going to the end of the Contract. B1141; B1224.

The Superior Court determined, as a matter of law, that the Term Agreement expired by its own terms. Opinion at 18-19. Therefore, the parties made up the barrels with the Master Agreement in place. Opinion at 18-23; Order at 1-2. It is undisputed that the number of barrels provided by CITGO during April and May 2014 were sufficient to make up for the shortfall that existed as of March 31, 2014. B0293; A1784; A1786. Therefore, Sunline's continuing demand for $1.4 million in damages—the dollar value of the shortfall barrels Sunline already received from CITGO—constitutes an impermissible double recovery. Op. Br. at 39-41.

1. Sunline Conceded the Parties Reached an Agreement about Moving the Shortfall Barrels to the End of the Contract.

Sunline challenges the Superior Court's ruling by claiming that "[f]ar from undisputed, there was no such agreement" that the parties would make up the shortfall barrels in April and May 2014. Op. Br. at 30. But the record is clear that the parties reached agreement on how to address the shortfall barrels. A1400-1406; B0617; B1221 at 107:3-7; B0270-B0271 at 184:10-185:5; A0840-A0841; A0306; B0293; B1228-B1229 at 22:10-23:15. Sunline issued invoices consistent with the agreement to push 80% of the barrels to the end of the contract. In fact, these invoices had an extra column to track those shortfall barrels which were getting moved, such as the "Adjusted Shortfall" column below:

	20% Payment	Payment	In BBLS	Adjusted Shortfall
$	-		-	-
$	-		-	-
$	(83,197.79)	20%	(19,519)	(78,076)
$	(69,457.51)	20%	(16,295)	(65,182)
$	(122,221.76)	20%	(28,674)	(114,698)
$	(42,973.52)	20%	(10,082)	(40,328)
$	(317,850.58)		(74,571)	(298,283)
$	476,776.00			
$	158,925.42			

B1141.

On April 2, 2014, Sunline wrote to CITGO "accept[ing] a payment for those [shortfall] barrels at 20% of the contracted price/FSC and moved the unpaid BBLS representing the 80% not paid or 293,283 BBLS to be made up by the end of April

2014." B0617. At his individual deposition, Mr. Flinn testified that CITGO would provide the barrels short of the monthly minimums at the end of the contract. B1221 at 107:3-7. At his deposition as the 30(b)(6) representative for Sunline, Mr. Flinn testified that the 337,968.8 barrels representing the shortfalls in June, July, August, September, and December of 2013 were moved to the end of the contract, and CITGO would satisfy its obligations for those months by providing 337,968.8 barrels at the end of the contract. B0270-B0271 at 184:10-185:5. In his affidavit submitted in support of Sunline's summary judgment motion, Mr. Flinn stated, "I ultimately agreed that if CITGO would pay 20% of the then-existing shortfall obligation . . . the remaining 80% [of the barrels] could be pushed . . . ." A0840-A0841.

At the hearing on Sunline's motion for reconsideration, Sunline's counsel conceded that "[t]here was an agreement that shortfall barrels would be moved...[to] the end of the contract." A1784. As Sunline's counsel pointed out, Sunline's true dispute is that the parties "didn't know when the end of the contract would be." A1784. Ultimately, this timing issue (not whether or not there was an agreement) was resolved by a legal ruling: specifically, the Superior Court read the unambiguous contract and ruled when it ended—which is a legal issue suited for summary judgment. Otherwise, Sunline's admissions confirm there was a meeting of the minds as to the shortfall barrels getting moved to the end of the contract.

2. CITGO Gave Sunline Consideration By Paying More than One Million Dollars Extra and Agreeing Not to Cancel the Contract Early.

This Court also should reject Sunline's lack of consideration argument seeking to invalidate the agreement to move shortfall barrels to the end of the contract. Op. Br. at 32-33. Sunline received at least two forms of consideration: (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. A1403-A1406.

According to the Term Agreement, Sunline was entitled to a minimum of (a) 100,000 barrels in April 1, 2013; (b) 180,000 barrels in May 2013; and (c) 240,000 barrels in the ten months from June 2013 to March 2014. A0346-A0347. In total, the contract guaranteed Sunline 2,680,000 barrels across 12 months. A0346-A0347. Under the pricing formula in the Term Agreement (CITGO pays Sunline roughly $4.26 per barrel[6]), Sunline was entitled to approximately $11,416,800 over 12 months for these 2,680,000 barrels. A0346-A0347. With the agreement to move shortfall barrels to the end of the contract, Sunline received even more than it bargained for under the Contract originally:

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[6] The Term Agreement says the "[m]inimum barrels price is based off minimum miles of 100 or $3.33 per barrel plus average [fuel surcharge] per month." A0347. The surcharge that Sunline charged was to add 28% to the purchase price, or roughly $0.93 per barrel. A0347; B0293.

CITGO actually paid $12,899,271.46 across 14 months, which includes (1) the amount of money CITGO paid Sunline to haul barrels in April and May 2014; and (2) the $839,604.14 for shortfall barrels. B3094-B3102; B3106-B3108; B0293. Admittedly, Sunline hauled 80,000 fewer barrels, but their value (had they been hauled) would have been approximately $340,000 under the pricing formula. Taking all this into account, this agreement to move shortfall barrels resulted in more than $1,000,000 of additional revenue to Sunline than if CITGO had merely provided the monthly minimums as originally scheduled. *See JBR Contractors, Inc. v. E&W, LLC*, 2010 WL 802076 at *2 (Del. Mar. 9, 2010) (affirming Superior Court's determination that sufficient consideration existed to modify a contract when "the modification gave JBR the opportunity to earn more than 33% above its costs").

CITGO provided another form of consideration to Sunline: CITGO relinquished the right to terminate the Agreements before March 31, 2014. "[A] promise to forbear enforcement [of a contractual right]...is valid consideration for an agreement." *Hensel v. U.S. Elecs. Corp.*, 262 A.2d 648, 650 (Del. 1970); *see also* 3 WILLISTON ON CONTRACTS § 7:45 (4th ed.) ("In short, forbearance to do something which one is legally entitled to do, of almost any character, will be sufficient, even though no pecuniary loss may be involved."). In *Hensel*, the Delaware Supreme Court determined that the plaintiff gave consideration for a

promissory note by relinquishing his claim in a lawsuit. *Hensel*, 262 A.2d at 650.

CITGO had the right to cancel its Contract with Sunline before March 31, 2014 – thereby precluding the entitlement to damages that Sunline alleges it suffered in April and May 2014. A0343; A0346. By its terms, the Master Agreement could be "terminated by either party **at any time** and for any reason, with or without cause, upon sixty (60) days prior written notice to the other party." A0343 (emphasis added). In addition, the Term Agreement expressly stated that its "terms shall remain in effect until the Master Agreement is expired or terminated." A0346. Under these provisions, CITGO could have terminated earlier.

3. Sunline Conceded that CITGO Provided Sufficient Barrels in April and May 2014 to Cover the Remaining Shortfalls.

Once the Superior Court interpreted the Contract to determine that the Term Agreement ended on March 31, 2014 and that the Master Agreement remained in place until May 31, 2014, the only issue remaining is whether CITGO provided sufficient barrels at the end of the Contract to make up for the shortfalls. Opinion at 21 ("As such, to the extent there are any matters remaining to litigate, the Court believes they are limited to the extent of the shortages and what monetary payments have been made to compensate Plaintiff for them."). Sunline's records establish that CITGO provided more than 350,000 barrels during that two-month

period, which exceeded the required shortfalls by more than 20,000 barrels. B0293; A1784; A1786.

Sunline conceded that under the Superior Court's interpretation of when the Term Agreement ended, Sunline is entitled to no damages:

> If your ruling is, no, the – **if you convert what they owed Sunline, in dollars, at the end of March, is converted to barrels, and if they knew that at least that many barrels in April and May, because the parties agreed that would happen, then you're right, it makes sense to enter into a judgment, judgment,** and then, you know, pursue whatever options we may decide to pursue on appeal.

A1784 (emphasis added). After summary judgment was granted, Sunline's modified articulation of damages – $1.4 million – are a calculation of the dollar amount attributed to the shortfall barrels had CITGO not provided them, and had Sunline not hauled them, in April and May 2014. Op. Br. at 39-41. But CITGO provided them, Sunline hauled them, and CITGO has paid what it owed. *See, e.g.*, *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 534 (Del. 2015) ("In Delaware, a plaintiff is entitled to compensation sufficient to make him whole, but no more.") (internal quotations omitted). Sunline is entitled to no further recovery.

CONCLUSION

For the foregoing reasons, Appellee CITGO Petroleum Corporation respectfully requests that this Court uphold the Superior Court's rulings and dismiss the appeal.

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