**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

| | | |
|---|---|---|
| SUNOCO PARTNERS MARKETING & TERMINALS L.P., | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 17-1390-LPS-CJB |
| POWDER SPRINGS LOGISTICS, LLC AND MAGELLAN MIDSTREAM PARTNERS, L.P., | ) | |
| Defendants. | ) | |

**REPORT AND RECOMMENDATION**

In this action filed by Plaintiff Sunoco Partners Marketing & Terminals, L.P. ("Sunoco") against Defendants Powder Springs Logistics, LLC ("PSL") and Magellan Midstream Partners, L.P.'s ("Magellan" and collectively with Powder Springs, "Defendants"), Sunoco alleges infringement of United States Patent Nos. 6,679,302 (the "'302 patent"), 7,032,629 (the "'629 patent"), 9,207,686 (the "'686 patent"), 9,494,948 (the "'948 patent") and 9,606,548 (the "'548 patent" and collectively with the other patents, "the asserted patents"). Presently before the Court is Sunoco's "Motion for Summary Judgment that Certain References Do Not Quality As Prior Art Under 35 U.S.C. § 102[,]" filed pursuant to Federal Rule of Civil Procedure 56 ("the Motion"). (D.I. 377) For the reasons that follow, the Court recommends that Sunoco's Motion be GRANTED-IN-PART and DENIED-IN-PART.

## I. BACKGROUND

### A. Factual Background

In this case, Sunoco alleges that Defendants' butane blending system, which allows Defendants to inject butane into gasoline product flowing through an interstate pipeline maintained by Colonial Pipeline Company at the Powder Springs facility, and Defendants' related butane blending activities, infringe claim 30 of the '302 patent, claim 3 of the '686 patent, claims 3 and 7 of the '948 patent and claims 3 and 8 of the '548 patent. (D.I. 149 at ¶¶ 2, 19-25; D.I. 404, ex. 5 at ¶¶ 52, 67; D.I. 440 at 1) Sunoco further alleges that Magellan's blending systems and butane blending activities at nine other locations infringe claims 3, 16, 17, 23 and 24 of the '302 patent, and claims 18, 22, 31 and 32 of the '629 patent. (D.I. 149 at ¶¶ 26-33; D.I. 404, ex. 5 at ¶¶ 52, 67; D.I. 440 at 1) The asserted patents relate to systems and methods for the blending of butane into gasoline. (*See* D.I. 171 at 1; D.I. 176 at 1)

### B. Procedural History

The Court incorporates by reference its summary of the procedural history of this case set out in its January 16, 2020 Report and Recommendation ("January 16 R&R"). (D.I. 447 at 2)

## II. STANDARD OF REVIEW

### A. Summary Judgment

The Court incorporates by reference its summary of the standard of review for summary judgment set out in the January 16 R&R. (*Id.* at 2-4)

### B. Qualifying as Prior Art Under 35 U.S.C. § 102

A patent should not be granted "whose effects are to remove existent knowledge from the public domain[.]" *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966); *see also Kimberly-Clark Corp. v. Johnson & Johnson*, 745 F.2d 1437, 1453 (Fed. Cir. 1984). 35 U.S.C. §

102 ("Section 102") identifies the circumstances in which a patent can be invalidated based on "prior art" references or systems. 35 U.S.C. § 102; *see also Sunoco Partners Mktg. & Terminals L.P. v. U.S. Venture, Inc.*, 339 F. Supp. 3d 803, 835 (N.D. Ill. 2018).[1] Patent law has generally not recognized as prior art "that which is not accessible to the public." *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1402 (Fed. Cir. 1997). To that end, the United States Court of Appeals for the Federal Circuit has explained that "[e]arly public disclosure is a linchpin of the patent system." *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983). Thus, "[a]s between a prior inventor who benefits from a process by selling its product but suppresses, conceals, or otherwise keeps the process from the public, and a later inventor who promptly files a patent application from which the public will gain a disclosure of the process, the law favors the latter." *Id.*

Whether a particular reference or system qualifies as prior art under Section 102 is a question of law based on underlying factual determinations. *ATEN Int'l Co. v. Uniclass Tech. Co.*, 932 F.3d 1364, 1367 (Fed. Cir. 2019); *Int'l Bus. Mach. Corp. v. Priceline Grp. Inc.*, 271 F. Supp. 3d 667, 676 (D. Del. 2017). Patents are presumed to be valid under 35 U.S.C. § 282, and Defendants accordingly bear the burden of proving by clear and convincing evidence that an asserted reference or system is prior art under Section 102. *Sandt Tech. Ltd. v. Resco Metal &*

---

[1] The activities at issue occurred before the enactment of the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, § 3, 125 Stat. 284, 285-93 (2011). Therefore, all references to Section 102 are to the earlier version of the statute which governed the activities at issue in this case. *See* AIA § 3(n)(1), 125 Stat. at 293 (providing that the relevant AIA amendments apply only to applications and patents with an effective filing date of March 16, 2013, or later); *see also, e.g., U.S. Water Servs., Inc. v. Novozymes A/S*, 767 F. App'x 950, 954 n.9 (Fed. Cir. 2019); *Alexsam, Inc. v. Gap, Inc.*, 621 F. App'x 983, 988 n.1 (Fed. Cir. 2015).

*Plastics Corp.*, 264 F.3d 1344, 1350 (Fed. Cir. 2001); *Sunoco Partners Mktg. & Terminals L.P.*, 339 F. Supp. 3d at 836.

### 1. Qualifying as Prior Art Under 35 U.S.C. §§ 102(a) and (b)

Section 102(a) establishes that a person cannot patent what is already known to others. *Woodland Tr. v. Flowertree Nursery, Inc.*, 148 F.3d 1368, 1370 (Fed. Cir. 1998). To qualify as prior art under Section 102(a), a reference or system must be "known or used by others . . . before the invention thereof by the applicant for patent[.]" 35 U.S.C. § 102(a). The prior knowledge or use by others must be "accessible to the public." *Woodland Tr.*, 148 F.3d at 1370. For prior art to be "'known[,]'" it must be "sufficient to enable one with ordinary skill in the art to practice the invention[.]" *Minnesota Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1301 (Fed. Cir. 2002) (citation omitted).

To qualify as prior art under Section 102(b), a reference or system must be "in public use or on sale . . . more than one year prior to the date of the application for patent[.]" 35 U.S.C. § 102(b). This section is primarily concerned with a policy that encourages inventors to enter the patent system promptly. *Woodland Trust*, 148 F.3d at 1370. An inventor's own prior commercial use, even if kept secret, may constitute a public use or sale under Section 102(b), barring him from obtaining a patent. *Id.* However, when an asserted prior use is by a third party rather than the inventor (as is the case here), Section 102(b) is not a bar to obtaining a patent when that prior use or knowledge is not available to the public. *Id.* at 1371; *Dey, L.P. v. Sunovion Pharms., Inc.*, 715 F.3d 1351, 1355 (Fed. Cir. 2013) ("[E]ven in the case of third-party uses, being 'accessible to the public' still requires public availability; secret or confidential third-party uses do not invalidate later-filed patents.") (citations omitted).

### 2. Qualifying as Prior Art Under 35 U.S.C. § 102(g)(2)

Section 102(g)(2) operates to "ensure that a patent is awarded only to the first inventor in law." *Fox Grp., Inc. v. Cree, Inc.*, 700 F.3d 1300, 1304 (Fed. Cir. 2012) (internal quotation marks and citation omitted). To qualify as prior art under Section 102(g)(2), a system must be: (1) "made . . . by another inventor[,]" (2) before the claimed invention, and (3) such prior system must not have been "abandoned, suppressed, or concealed[.]" 35 U.S.C. § 102(g)(2). The prior inventor must have: (1) reduced its invention to practice first; or (2) conceived of the invention first and then exercised reasonable diligence in reducing that invention to practice. *Fox Grp.*, 700 F.3d at 1304. Reduction to practice requires a showing that the inventor: (1) constructed an embodiment or performed a process that met all the limitations; and (2) determined that the invention would work for its intended purpose. *Barry v. Medtronic, Inc.*, 914 F.3d 1310, 1332 (Fed. Cir. 2019).

Suppression or concealment is a legal question that is supported by underlying facts. *Flex-Rest, LLC v. Steelcase, Inc.*, 455 F.3d 1351, 1357 (Fed. Cir. 2006). There are two types of suppression or concealment. *Id.* at 1358. First, there are cases in which the inventor intentionally suppresses or conceals his invention. *Id.*; *see also, e.g.*, *Fleming v. Escort Inc.*, 774 F.3d 1371, 1378 (Fed. Cir. 2014); *Fox Grp.*, 700 F.3d at 1305. Second, there are cases in which suppression or concealment may be inferred based on the prior inventor's unreasonable delay in making the invention publicly known. *Flex-Rest, LLC*, 455 F.3d at 1358; *see also Fleming*, 774 F.3d at 1378.

## III. DISCUSSION

With its Motion, Sunoco seeks summary judgment that two systems that Defendants have asserted as prior art in this case—the "TransMontaigne system" and the "OKC-Reno system"—do not qualify as prior art under 35 U.S.C. § 102. The Court considers these systems in turn.

**A. TransMontaigne System**

Defendants assert that a system that was built and used in 1997 at TransMontaigne Terminaling Inc.'s ("TransMontaigne") terminal in Little Rock, Arkansas qualifies as prior art under Sections 102(a), 102(b), and 102(g)(2). (D.I. 384, ex. 1 at ¶ 186) Sunoco, meanwhile, argues that the undisputed evidence demonstrates that the TransMontaigne system was not "available to the public" (and therefore is not prior art under Sections 102(a) and 102(b)) and was suppressed and concealed (and therefore is not prior art under Section 102(g)(2)). (D.I. 379 at 5)[2] For the reasons discussed below, the Court finds that the undisputed facts demonstrate that the TransMontaigne system was not accessible to the public, and was suppressed and concealed. Therefore, the system cannot qualify as prior art under Section 102.

As an initial matter, the evidence of record clearly demonstrates that individuals with knowledge of the TransMontaigne system were under confidentiality obligations. (D.I. 379 at 6-8; D.I. 409 at 1-4) For example, TransMontaigne's contractor entered into a Construction Contract, formed to [redacted]

[2] Sunoco disputes that Defendants have established by clear and convincing evidence that a system reading on the claims was actually built and operated at the TransMontaigne terminal, but for purposes of this Motion, it assumes that some such system was made and used there at the relevant time. (D.I. 379 at 5 & n.1)

[redacted] (D.I. 384, ex. 7 at TPSL 449) That Contract included the following confidentiality provision:

[redacted]

(*Id.* at TPSL 458 (emphasis added); *see also id.* at TPSL 449) The Construction Contract incorporated by reference, *inter alia*, [redacted]. (*Id.* at TPSL 449) And pursuant to the Construction Contract, TransMontaigne agreed to [redacted]. (*Id.* at TPSL 477-78)[3] Mr. Shawn Mongold, a Project Manager/Staff Engineer for TransMontaigne, [redacted]. (*Id.* at TPSL 460) Mr. Mongold testified that it was [redacted]. (*Id.*, ex. 8 at 151) He explained that TransMontaigne was an "operating company" that tended to keep their operations private, and that he considered the operation of the TransMontaigne system to be a trade secret. (*Id.* at 114) Mr. Mongold also testified that as far as he knew, the contractors obeyed the confidentiality provision and kept information confidential. (*Id.* at 152)[4]

---

[3] Another undated document that appears to have been related to the Contract, entitled simply "Trade Secrets" (the "Trade Secrets document"), states that [redacted] (D.I. 384, ex. 10 at TPSL 1039-40; *see also id.*, ex. 8 at 147, 171)

[4] Defendants argue that this evidence does not demonstrate that all individuals with knowledge of the TransMontaigne system were under confidentiality obligations. (D.I. 397 at 26) In making this argument, however, they do not point to the terms of the Construction Contract; instead, they point to the different, separate Trade Secrets document. That document

There is yet additional evidence indicating that details regarding the TransMontaigne system were kept confidential. For example, Brian Moore, a Staff Engineer at TransMontaigne, sent a letter to the North Little Rock City Planning Director on May 30, 1997, which described the TransMontaigne system only at a high level. (*Id.*, ex. 11 at TPSL 113-14 [redacted]) The letter was marked "CONFIDENTIAL" by TransMontaigne. (*Id.* at TPSL 113)[5]

---

as noted above, does state that [redacted] (D.I. 384, ex. 10 at TPSL 1040 (emphasis added)) Defendants latch on to this wording, and claim that it shows that only some (not all) TransMontaigne contractors are bound by confidentiality obligations. Yet the Trade Secrets document seems simply to be stating that when it comes to the [redacted]. And in any event, the Trade Secrets document does not create a fact dispute as to whether TransMontaigne's contractor had confidentiality obligations regarding the TransMontaigne system; pursuant to the terms of the Construction Contract, it clearly did. (*See* D.I. 409 at 1 n.1; Tr. at 69-70)

Defendants also suggest that a jury is free to find that the confidentiality provision in the Construction Contract would only cover "information provided" about TransMontaigne's blending system, as opposed to what one might learn simply from viewing the "butane blending equipment" itself. (D.I. 397 at 26-27) Yet the Construction Contract's broad confidentiality provision covered [redacted]—a contract that, again, included reference to [redacted]. (D.I. 384, ex. 7 at TPSL 477-78) It strains credulity to think that this contractual language would not also cover what the contractor would learn or observe from *actually viewing the butane blending system at issue*. (D.I. 409 at 2; *see also* Tr. at 72)

[5] Defendants' response with respect to this letter is that Sunoco admits it "'provid[es] only minimal information'" and a "'few high-level statements.'" (D.I. 397 at 27 n.16) But in the Court's view, that fact is *helpful* to Plaintiff; had the letter itself described the TransMontaigne system in great detail, it could have been argued that this suggested that information regarding the system was *not* confidential.

Defendants also point to testimony from Mr. Mongold that he would not have expected that a letter like this (that is, a letter sent to a city government) could actually be kept

In June 2001 (several months after Sunoco's asserted February 2001 priority date), the TransMontaigne terminals in Little Rock were sold to Williams Pipeline ("Williams"), (D.I. 379 at 2), Magellan's predecessor. The "Facilities Sale Agreement" ("FSA") between TransMontaigne and Williams also contained a confidentiality provision:

> 8.4 Confidentiality. All information provided by one Party to the other Party up to the Effective Date [June 30, 2001] in connection with and as a result of this Agreement shall be deemed "Information", as such term is defined in the Nondisclosure Agreement between Williams Energy Services, LLC and TTI dated February 6, 2001, and shall be governed by the terms and provisions thereof, which agreement Buyer and Seller both agreed and ratified as applying to this transaction under the Letter of Intent between them dated May 17, 2001 and which they both agree and ratify as applying to them under this Agreement.

(D.I. 384, ex. 12 at ¶ 8.4; *see also id.* at ¶ 7.6 ("All information pertaining to the Assets and Facilities shall be subject to the terms of the Nondisclosure Agreement between Seller and Williams Energy Services LLC dated February 6, 2001.")) Defendants' retort is that a jury is free to find that the reference to "information" in these portions of the FSA referred to "things like financials," and not to the blending system itself. (D.I. 397 at 27) But a jury could not reasonably come to such a conclusion here, as it would be contrary to the plain language of the contract. That document makes clear that the "information" at issue includes information about "Assets" (which are defined in the FSA as including equipment for the blending system) and

---

confidential. (D.I. 398, ex. 36 at 156) Yet Mr. Mongold also testified that he would expect a recipient of a letter marked "confidential" to keep it confidential. (*Id.* at 155) And more importantly, this does not change the fact that the letter (sent by another person, Mr. Moore) was in fact marked "Confidential" when sent, (D.I. 409 at 2-3; Tr. at 65-68), and that there is no record evidence that the letter was actually shared with anyone other than the City Planning Director.

"Facilities" (which are defined as the "terminals" in Little Rock). (D.I. 384, ex. 12 at ¶ 7.6; *see also id.* at 5/55, 7/55, 9/55-10/55; D.I. 409 at 3)

Despite this uncontroverted evidence showing that the only individuals who knew of the TransMontaigne system were under confidentiality obligations, Defendants assert that the system was nevertheless publicly accessible as to Sections 102(a) and (b). (*See* D.I. 384, ex. 3 at ¶¶ 105-09) On the question of public accessibility, the Federal Circuit instructs that "a court still must decide whether the *claimed features* of the patents [were placed] in the public's possession" and "if members of the public are not informed of, and cannot readily discern, the *claimed features* of the invention in the allegedly invalidating prior art, the public has not been put in possession of those features." *Dey*, 715 F.3d at 1359 (internal quotation marks and citation omitted) (emphasis added). For the reasons discussed below, Defendants' evidence of purported "public accessibility" does not create a genuine dispute of fact on this issue.

First, Defendants suggest that the TransMontaigne system was publicly accessible since it was utilized to blend butane into gasoline that thereafter was transported "for distribution to the public." (D.I. 397 at 24; D.I. 399, ex. A at ¶ 97) But Defendants do not attempt to explain how the public would possess the claimed features of the inventions (which relate to systems and methods for blending butane with gasoline) merely by purchasing the blended gasoline that was eventually distributed from the TransMontaigne system. (*See* D.I. 379 at 12; D.I. 409 at 4)[6]

---

[6] *See, e.g.*, *W.L. Gore & Assoc.*, 721 F.2d at 1550 (finding that a third party's sale of tape was not a bar to the grant of a patent to the plaintiff on a process used to produce tape, where there was no evidence "that the public could learn the claimed process by examining the tape").

Second, Defendants point to the fact that certain relevant components of the TransMontaigne system were above ground and therefore were visible to the public from outside a fence that surrounded the facility, or from the truck rack area. (D.I. 397 at 24; D.I. 399, ex. A at ¶ 97) More specifically, Mr. Mongold testified that someone located on a nearby highway could look through the chain-link fence that surrounded the TransMontaigne system and see the system's butane and gasoline tanks, as well as certain piping that rose above ground. (D.I. 398, ex. 36 at 235) Mr. Mongold also stated that if someone had gotten into a helicopter and flew above the TransMontaigne facility, he or she could have seen tank trucks stopping at the system's truck racks. (*Id.* at 235-36)

However, as was noted above, the applicable inquiry here is whether the TransMontaigne system placed in the public's possession the "claimed features" of the patents. *Dey*, 715 F.3d at 1359; *see also, e.g.*, *Delano Farms Co. v. Ca. Table Grape Comm'n*, 778 F.3d 1243, 1249-50 (Fed. Cir. 2015). And it is undisputed that other portions of the TransMontaigne system were not in public view, such as "most of the piping" (which was underground) and computers/PLCs (located inside buildings). (D.I. 379 at 9 (citing D.I. 384, ex. 8 at 38-39, 119-20, 140, 231-32)) Accordingly, Mr. Mongold testified that "a fair part of the connections [between components] and how the system worked was not even visible" to one standing "*inside* the fence" of the facility. (D.I. 384, ex. 8 at 140 (emphasis added); *see also id.* at 250-52 (Mr. Mongold stating that one could not tell how the assets of the system were operating from outside of the facility))[7]

[7] Sunoco rightly points out that in light of the components of the TransMontaigne system that were not visible to the public, it is not disputed that, at a minimum, "connections between the components, how the valves were controlled, and how blend ratios were calculated (manually/automatically)" could not be determined by the public. (D.I. 409 at 4) And therefore, Sunoco states, the public could not tell whether the TransMontaigne system, for example:

Despite the undisputed evidence that only a portion of the claimed features were visible to the public, Defendants assert that a person of ordinary skill in the art ("POSITA") observing such features would nevertheless understand how the TransMontaigne system operated at the level required by the relevant claims. For this, Defendants point to a portion of the report of their invalidity expert, Michael Nikolaou, Ph.D. (D.I. 397 at 24 (citing D.I. 399, ex. B at ¶¶ 105-07)) But all that Dr. Nikolaou states on this topic in the cited paragraphs is that a POSITA, "observing equipment at TransMontaigne that was unquestionably in public view, would have understood how the blending system operated at the level required by the claims of the asserted patents." (D.I. 399, ex. B at ¶ 106) Dr. Nikolaou does not go on to explain *how* this is so. And without any further explanation from their expert about how the entirety of an only partially-visible system would be recognized and understood by a POSITA, Defendants' argument here is wholly conclusory. (D.I. 409 at 5); *Regents of Univ. of Minn. v. AGA Med. Corp.*, 717 F.3d 929, 941 (Fed. Cir. 2013) ("Conclusory expert assertions cannot raise triable issues of material fact on summary judgement.") (internal quotation marks and citations omitted). Thus, Defendants' evidence on this point does not create a genuine dispute of material fact as to public accessibility. *See, e.g.*, *Parallel Networks Licensing, LLC v. Int'l Bus. Machs. Corp.*, Civil Action No. 13-2072 (KAJ), 2017 WL 1045912, at *9 (D. Del. Feb. 22, 2017) (concluding that defendant's use of server technology did not constitute a public use, where the defendant obscured the inner workings of the server and thus the public did not know about how the invention—i.e., claims to

---

"involved blending from a gasoline tank" as required by certain claims recited by the '302 patent, "or a pipeline" as required by the asserted claims of the '686 patent; or "us[ed] a processor to govern the butane flow" and to "automatically calculate blend ratios" as required by all asserted claims. (*Id.* at 4-5)

methods for managing a dynamic Web page generation request to a Web server—actually worked).

Third, Defendants highlight the fact that TransMontaigne invited visitors to a grand opening of its facility, arguing that this creates a dispute of fact as to public accessibility. (D.I. 397 at 25; D.I. 384, ex. 3 at ¶ 109) Mr. Mongold testified that grand opening visitors were given "access to non-secure areas of the terminals for [] barbeque and food" and "*may* have gotten tours" of the butane blending system. (D.I. 398, ex. 36 at 231 (emphasis added)) When questioned further, Mr. Mongold could not recall the date of the grand opening, though he did remember that its focus was upon new bays and facility improvements that came before the facility began to blend butane. (*Id.* at 232-33) And even to the extent that butane blending was occurring during the time of the grand opening: (1) the grand opening was held at the south terminal of the TransMontaigne facility, while most of the blending equipment was located at the north terminal, (D.I. 384, ex. 8 at 36, 50, 109; *id.*, ex. 17; *id.*, ex. 13 at 623-24); and (2) visitors could not see the piping underground, or what valves were controlling butane versus other components, (*id.*, ex. 8 at 231-32). With it undisputed that the visitors at the grand opening were not viewing all relevant components of a complete, fully operational blending system, Defendants' evidence with respect to this event falls short of creating a fact issue here.

Even added together, Defendants' evidence—i.e., that: (1) blended gasoline produced by the TransMontaigne system was sold to the public; (2) certain features of the TransMontaigne system were in public view (while other key features were not); and (3) there was a grand opening at the terminal at some point in time (perhaps before the blending system was even fully operational)—is not sufficient to create a material dispute of fact about whether the

TransMontaigne system was accessible to the public. Section 102 has been applied to invalidate a patent based on third-party use when the third party "made no attempt to maintain confidentiality or to deliberately evade disclosure . . . made no discernible effort to maintain the [invention] as confidential . . . or made no efforts to conceal the device or keep anything about it secret[.]" *Dey*, 715 F.3d at 1355 (internal quotation marks and citations omitted). The facts here are clearly contrary to such scenarios, and "secret or confidential third-party uses do not invalidate later-filed patents." *Id.*

Next the Court turns to Defendants' assertion that the TransMontaigne system is prior art under Section 102(g)(2). Here, the Court also agrees with Sunoco that the undisputed facts show that the TransMontaigne system was suppressed and concealed. (D.I. 379 at 12-13)

With regard to the first type of suppression or concealment—i.e., whether the operators of the TransMontaigne system intentionally suppressed or concealed their invention—here the evidence clearly indicates that they did. As described above, the undisputed facts show that TransMontaigne actively concealed the details of that invention through confidentiality agreements and other measures. (*Id.* at 13)

As to the second type of suppression or concealment—i.e., whether suppression or concealment may be inferred based on TransMontaigne's unreasonable delay in making the invention publicly known—here, such a finding can be made on the undisputed facts. Defendants point to no evidence that TransMontaigne otherwise ever made efforts to make the system (or details about it) publicly known. In fact, the evidence shows the opposite. TransMontaigne did not file any patent applications or publish any documents describing how the system worked. (D.I. 384, ex. 8 at 112-14) And it is undisputed that TransMontaigne was a

secure facility; it was surrounded by a fence (covered with barbed wire), and to enter, a person either had to have obtained card access or be invited by a TransMontaigne employee. (*Id.* at 116-17, 248-49; *id.*, ex. 3 at ¶ 109); *TQP Dev., LLC v. 1-800-Flowers.com, Inc.*, 120 F. Supp. 3d 600, 610-14 (E.D. Tex. 2015) (upholding a jury verdict of no Section 102(g) prior art where the third party "deliberately chose to keep key, claimed aspects of the [prior art system] a trade secret, chose to keep the underlying [system] confidential between the parties, chose to avoid disclosing the full functionality to the public, and chose to avoid disclosure through a patent application").[8]

For the above reasons, the Court recommends that Sunoco's motion be granted with respect to the TransMontaigne system.

---

[8] In their brief, Defendants argue that the correct legal standard for whether an inventor abandoned, suppressed or concealed its invention is found in a 1987 case from this District, *Friction Div. Prods., Inc. v. E.I. DuPont de Nemours & Co., Inc.*, 658 F. Supp. 998 (D. Del. 1987). (D.I. 397 at 21-22) In that case, the Court stated that "[m]aking the invention publicly known requires only that the public enjoy the *benefits* or the use of the prior invention" and that "[p]ublic use of the invention, without disclosing the details of it, is sufficient to negate any intention to abandon, suppress or conceal." 658 F. Supp. at 1013-14 (emphasis in original). However, other courts have criticized this articulation of the law, explaining that "[t]he Federal Circuit . . . has not drawn that distinction" and has instead "made clear that a finding of suppression or concealment requires evidence of the inventor's unreasonable delay in making 'the invention' publicly known" and where the "'inner workings' are the essence of the invention, it is those 'inner workings' that must not be suppressed or concealed in order for the invention to be prior art under section 102(g)." *TQP Dev., LLC v. Intuit Inc.*, CASE NO. 2:12-CV-180-WCB, 2014 WL 2809841, at *6 (E.D. Tex. June 20, 2014) (Bryson, J., sitting by designation); *see also TQP Dev., LLC v. 1-800-Flowers.com, Inc.*, 120 F. Supp. 3d 600, 611 (E.D. Tex. 2015). This criticism is, in fact, in line with Federal Circuit precedent. *See, e.g.*, *Apotex USA, Inc. v. Merck & Co., Inc.*, 254 F.3d 1031, 1039 (Fed. Cir. 2001) (concluding that the selling of tablets did not defeat an inference of suppression and concealment, where the public could not learn of the invention from simply inspecting the product); *Palmer v. Dudzik*, 481 F.2d 1377, 1387 (C.C.P.A. 1973). Indeed, during oral argument, Defendants' counsel seemed to concede that such Federal Circuit precedent provides the correct lens through which suppression and concealment should be assessed. (Tr. at 94) For all of these reasons, it is that precedent (not the holding in *Friction Div. Prods.*) that the Court applies here.

### B. OKC-Reno System

Defendants assert that an automated butane blending system was built and used at the Oklahoma City-Reno ("OKC-Reno") terminal owned by Williams in October 2001, and that this system qualifies as prior art under Section 102(g)(2). (*See* D.I. 379 at 13) Specifically, Defendants assert that Williams employees were the first to conceive of the automated butane blending system (i.e., they did so before Sunoco's inventors), but were second to reduce the invention to practice (i.e., they did so after Sunoco's inventors). (*See id.* at 14; D.I. 397 at 1-2) Under these circumstances, Defendants must show that Williams exercised reasonable diligence to reduce the claimed invention to practice. *Brown v. Barbacid*, 436 F.3d 1376, 1378-79 (Fed. Cir. 2006). Reasonable diligence must be shown "from a date just prior to the other party's conception to . . . [the date of] reduction to practice [by the party first to conceive]." *Monsanto Co. v. Mycogen Plant Sci., Inc.*, 261 F.3d 1356, 1363 (Fed. Cir. 2001) (internal quotation marks and citation omitted). Defendants need not demonstrate that Williams worked on reducing its invention to practice every day during the critical period; all that is required is that there was reasonably continuous diligence. *Perfect Surgical Techniques, Inc. v. Olympus Am., Inc.*, 841 F.3d 1004, 1009 (Fed. Cir. 2016). Whether an inventor exercised diligence is a question of fact. *Brown*, 436 F.3d at 1379.

Sunoco argues that it is entitled to summary judgment that the OKC-Reno system does not qualify as prior art, because no reasonable jury could find by clear and convincing evidence that: (1) an automated system was actually reduced to practice at OKC-Reno in October 2001; (2) Williams was diligent in reducing the invention to practice during the critical period; and (3) the OKC-Reno system was not suppressed and concealed. (D.I. 379 at 13-30) For the reasons

discussed below, the Court finds there to be genuine disputes of fact with respect to all three of Sunoco's grounds.

### 1. Reduction to Practice

The Court first assesses whether there is a genuine dispute of fact as to whether Williams reduced its fully automated blending system to practice at OKC-Reno by October 2001. On this record, the Court finds that there is.

In February 1999, Williams engineer Steve Smith circulated a memo describing the proposed automated system to be installed at OKC-Reno. (D.I. 398, ex. 5 at MAG-SUN_00000608-11; *see also* D.I. 399, ex. A at ¶ 115) A year later in February 2000, Williams ordered a Grabner analyzer to be installed at OKC-Reno. (D.I. 398, ex. 13 at MAG-SUN_00000570; *id.*, ex. 2 at 27, 80)

Additionally, Williams employee Troy Hill testified that he recalled an analyzer being at OKC-Reno in 2001, and that in September 2001 he "changed the wiring on the central controllers" and "rewired analog input blocks" so that Williams "could use the inputs, outputs, and analog levels coming back from the Grabner." (*Id.*, ex. 19 at 42-49) Mr. Hill's calendar notes from this time period reflect that he performed this work at OKC-Reno. (*Id.*, ex. 20 at MAG-SUN_00002785, MAG-SUN_00002792-94, MAG-SUN_00002799) He further testified that his "general memory" was that the online analyzer worked "right away" and that if it had not, he "would have been back in Oklahoma City helping them get it up and going, because . . . all that construction was high priority, and my notes show that I went on to other projects after

that." (*Id.*, ex. 19 at 63-64)[9] Mr. Hill recalled that OKC-Reno first began blending butane "shortly after" his work there in September 2001. (*Id.* at 12)

Other witnesses testified similarly. Alan Moyer, a former Manager of Commodities for Magellan, stated that the analyzer was installed and connected at OKC-Reno in September 2001, and that he believed that the butane blending system there was operational by mid-October 2001. (D.I. 398, ex. 2 at 6, 27, 33) Mr. Moyer recalled touring OKC-Reno in the fall of 2001 and seeing screens relating to automated blending. (*Id.* at 42-43) Another Magellan employee, Andy Howerton, testified that he recalled that the fully automated system at OKC-Reno began operation in the fall of 2001; he remembered working there during that time. (*Id.*, ex. 4 at 23, 27, 71, 85)

In addition to this testimony and the above-referenced supporting documents, blending logs from OKC-Reno also suggest that, around October 2001, Williams phased out manual blending from truck to tank and began in-line blending. (*Id.*, ex. 2 at 34; *id.*, ex. 24 at MAG-SUN_00000781; *id.*, ex. 25 at MAG-SUN_00023452; D.I. 399, ex. A at ¶¶ 119-20) The logs also show that butane bullet tanks were first filled in September 2001 and were in service every month thereafter. (D.I. 398, ex. 24 at MAG-SUN_00000781; *id.*, ex. 25 at MAG-SUN_00023452; D.I. 399, ex. A at ¶ 121) Mr. Moyer testified that the butane bullet tanks were installed as part of the same project as the Grabner installation, and that the tanks were not used in a manual blending process. (D.I. 398, ex. 2 at 37-38)

---

[9] Indeed, Dr. Nikolaou opined that electrical schematics and wiring diagrams provided to him by Mr. Hill show: (1) the Grabner being located at OKC-Reno as of July 30, 2001; and (2) how the Grabner was wired to the central controller and PLC as of August 1, 2001 and January 28, 2002. (D.I. 399, ex. A at ¶ 118; D.I. 398, ex. 21 at MAG-SUN_00078640; *id.*, ex. 22 at MAG-SUN_00078641-42; *id.*, ex. 23 at MAG-SUN_00078643-45)

Despite all of the evidence above, Sunoco asserts that there is no genuine dispute of fact as to reduction to practice. It provides two arguments in support, but neither is persuasive.

First, Sunoco asserts that summary judgment is appropriate here because "there are no documents corroborating" that an "automated system" was used at OKC-Reno in October 2001. (D.I. 409 at 10-11) It is true that "[c]orroboration is required of any witness whose testimony alone is asserted to invalidate a patent[.]" *Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1377-78 (Fed. Cir. 2018); *see also Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co., Ltd.*, 379 F. Supp. 3d 53, 84 (D. Mass. 2019) ("Oral testimony of one putative joint inventor is not enough on its own to corroborate the oral testimony of another [joint inventor]. . . . But such testimony can help to corroborate along with other evidence."). Yet the sufficiency of corroborating evidence must be evaluated under a "rule of reason" analysis, which involves "an assessment of the totality of the circumstances including an evaluation of all pertinent evidence[.]" *Id.* (internal quotation marks and citation omitted). And the Federal Circuit has also instructed that assessing the sufficiency of corroborating evidence "is a jury question." *Adenta GmbH v. OrthoArm, Inc.*, 501 F.3d 1364, 1372 (Fed. Cir. 2007)

Here three witnesses (Mr. Moyer, Mr. Hill and Mr. Howerton) testified—based on their memories of their own firsthand experience at the site and based on related documents—that the OKC-Reno system was automatically blending butane into gasoline around October 2001. (D.I. 397 at 13-16) Further, Defendants point to other documents that support this conclusion. (*Id.*) While it is true that Defendants have not pointed to any "operating instructions" with regard to an automated blending system at OKC-Reno, (*see* D.I. 409 at 10), they *have* pointed to plenty of

other evidence that, taken together, is sufficient to establish a genuine dispute of fact as to reduction to practice.[10]

Second, Sunoco contends that the above-referenced witnesses' speculation that the automated system was operational by late 2001 is in conflict with evidence demonstrating that the Grabner analyzer was not fully functional in 2002-2003. (D.I. 379 at 18; D.I. 409 at 10-11) But as Defendants point out, to demonstrate reduction to practice, they are required to make "only a showing that the system 'work[ed] for its intended purpose,' not that it worked perfectly or for 100% of the time." (D.I. 397 at 15 (citation omitted); Tr. at 91)

In light of that, the evidence that Sunoco points to is by no means dispositive—indeed, it could even be seen as "helpful" to Defendants' argument that OKC-Reno was "fully automated and operating" by late 2001. (D.I. 397 at 14) For example, Sunoco cites to a 2002 "Variance Summary" document that describes OKC-Reno's blending program as "progressing nicely" and reports that "the online grabner is reaching full operational status." (D.I. 384, ex. 32 at MAG-SUN_00073468) Meanwhile, this same document reports that at another site, Tulsa, the Grabner was "non-operational." (*Id.* at MAG-SUN_00073467) Likewise, a "Process Analyst Elimination/Transition Plan" describes that for OKC-Reno, a team was being formed by Rob Lawrence "to resolve outstanding mechanical/technical issues with a goal of having the online analyzer declared fully operational and handed off to location technicians by August 1, 2003."

---

[10] *See, e.g.*, *Adenta GmbH*, 501 F.3d at 1371 (concluding that substantial evidence existed in the record to support the jury's verdict that a prior art device invalidated the asserted patent where "this is not a case where one person makes a naked, unsupported assertion years after the fact that he made an invention before a patentee" but instead "there were a number of statements made by different witnesses, all corroborating each other, accompanied by various supportive and consistent documents").

(*Id.*, ex. 33 at MAG-SUN_00022417) For Tulsa, in comparison, this plan indicated that the goal was to have the online analyzer declared "operational." (*Id.*) Mr. Lawrence himself testified that both analyzers "had been used" and the one at Tulsa was "not as reliable and encountering more difficulties" than the one at OKC-Reno. (D.I. 398, ex. 38 at 12-13) For his part, Mr. Moyer recalled that the system may have been "fully operational" as of "October 2001" but then later may have encountered some "issues with reliability or calibration" that "constantly required them to bring in the field chemist to resolve[.]" (*Id.*, ex. 2 at 124-25) Similarly, Mr. Howerton surmised that the reference to "fully operational" in the documents cited by Sunoco may be to "improvements that [Rod Lawrence] wanted made[.]" (*Id.*, ex. 4 at 136) A jury should be free to weigh all of this evidence, including witness testimony, and reach its own conclusion as to whether Williams reduced its automated blending system to practice by October 2001.

**2. Diligence**

Next, in order to survive summary judgment on Sunoco's Motion regarding OKC-Reno, Defendants must demonstrate a genuine dispute of fact as to whether Williams exercised reasonable diligence from the time just prior to August 1999 (the purported conception date for the Sunoco inventors)[11] until October 2001 (the date that Defendants contend that Williams reduced an automated blending system to practice). (D.I. 379 at 15, 21) The Federal Circuit has explained that "determining whether the required 'reasonable diligence' . . . has been satisfied is

[11] Defendants assert that there is a genuine dispute as to when the critical period starts, arguing that the evidence cited by Sunoco in support of its August 1999 conception date is wanting. (D.I. 397 at 16 n.7) However, because the Court finds that the record demonstrates a genuine dispute of fact as to whether Williams exercised diligence in reducing its automated blending system to practice during the August 1999 to October 2001 time period, it need not resolve this dispute in order to recommend denial of Sunoco's Motion in this regard.

a case specific inquiry" and a "standard task for juries[.]" *Monsanto*, 261 F.3d at 1367, 1369 (citation omitted).

Sunoco points to two reasons why Defendants assertedly cannot establish diligence during the critical period. The Court, however, finds a genuine dispute of fact regarding diligence as to both grounds.

First, Sunoco argues that Defendants cannot show diligence because: (1) Williams could have installed an automated system by December 2000 at Tulsa (2) but it did not because it thought that an automated system would be more useful at OKC-Reno (3) where it delayed installing such a system until October 2001. (D.I. 379 at 21-25; D.I. 409 at 12) The Court does not agree that the record could only support such a conclusion.

As explained above, in February 1999 a Williams engineer circulated an internal memo detailing a proposed fully automated system to be installed at OKC-Reno. (D.I. 398, ex. 5 at MAG-SUN_00000608) OKC-Reno did not have an existing blending butane system at this time, so extensive (and expensive) construction and renovation at the site was required. (D.I. 399, ex. A at ¶¶ 114-18; *id.*, ex. B at ¶¶ 78-79; D.I. 398, ex. 7 at MAG-SUN_00001164-67, MAG-SUN_00001218-19) While the pipeline system at OKC-Reno was under construction, Williams acquired and installed a Grabner on a pipeline at another site—Tulsa—by the fall of 1999 for testing (because Williams had not used a Grabner before). (D.I. 398, ex. 3 at MAG-SUN_00001137, MAG-SUN_00001147; *id.*, ex. 2 at 21-22, 243-46; *id.*, ex. 4 at 14-15, 22-24) By December 2000, the testing at Tulsa had proved successful, with the PLC able to calculate the blend ratio based on RVP measurements received from the Grabner. (D.I. 399, ex. A at ¶ 113) According to Sunoco, these facts show that "Williams *could have* reduced an automated system

to practice in December 2000 at Tulsa, but did not until October 2001 after the 'complete overhaul' of OKC-Reno." (D.I. 409 at 11 (emphasis in original))

"[T]he point of the diligence analysis . . . . is to assure that, in light of the evidence as a whole, the invention was not abandoned or *unreasonably delayed.*" *Perfect Surgical Techniques, Inc.*, 841 F.3d at 1009 (internal quotation marks and citation omitted) (emphasis added). Diligence does not require an inventor to "take the most expeditious course." *Stamicarbon BV v. Sepracor, Inc.*, No. Civ.A. 97-8-GMS, 2001 WL 253118, at *7 (D. Del. Mar. 12, 2001) (citation omitted). The Court agrees with Defendants that a jury could find Williams' testing of the Grabner at Tulsa to be "one in a series of steps (that each took time and effort to accomplish) that went into bringing a fully automated butane blending system online *at OKC-Reno*" (and thus to not find it to be evidence of a *lack* of diligence of reducing the invention to practice *at Tulsa*). (D.I. 397 at 19 (emphasis added)) After all, the Grabner does not constitute the whole of the asserted claims; therefore, testing it was simply "one piece of the blending system[,]"—i.e., one piece of Williams' goal to "build an entire blending system designed in the first instance to be automated." (*Id.* at 21; *see also, e.g.*, D.I. 398, ex. 5 at MAG-SUN_0000609-11 (describing proposed automated blending system at OKC-Reno))[12] And in this vein, a jury could further find that Williams' additional work to get the OKC-Reno system up and running

[12] In contrast, in *Fageol v. Midboe*, 56 F.2d 867 (C.C.P.A. 1932), which Sunoco incorrectly identifies as "exactly like" the facts here, (D.I. 409 at 12), the court found that the inventor was not diligent in reducing the invention (relating to a dual drive for motor vehicles) to practice where the inventor spent time building a bus "which might or might not include the invention in issue[,]" 56 F.2d at 1121-22.

did not constitute unreasonable delay. Therefore, summary judgment is inappropriate on this ground.[13]

Second, Sunoco asserts that Defendants fail to present any evidence for activity occurring during two separate timeframes in the critical period—(1) February 2000 to August 2000; and (2) December 2000 to June 2001—and that its motion may be granted for this alternative reason. (D.I. 379 at 25-26) The Federal Circuit, however, has explained that Williams is "not required to corroborate every day" it worked on reducing the automated system to practice at OKC-Reno, particularly when "the record indisputably shows that activities must have occurred within the relevant timeframe." *Perfect Surgical Techniques, Inc.*, 841 F.3d at 1010. And a jury assessing this record could indeed conclude as much.

With respect to the first period (February 2000 to August 2000), Williams ordered a second Grabner to install at OKC-Reno on February 14, 2000. (D.I. 398, ex. 13 at MAG-SUN_00000570; *id.*, ex. 2 at 27, 80-81) Additional documents demonstrate that Williams was waiting for components of the blending system to be built and shipped in this time period. (*See id.*, ex. 14 at MAG-SUN_00006142; *id.*, ex. 15 at MAG-SUN_00006253) E-mails from March

---

[13] *Cf. Scott v. Koyama*, 281 F.3d 1243, 1247-48 (Fed. Cir. 2002) (finding that the Board of Patent Appeals and Inferences of the United States Patent and Trademark Office improperly excluded as evidence of diligence to reduction to practice activity performed for the purpose of building a manufacturing plant to practice the process of the count, as while "these preparations for manufacture were not of themselves an actual reduction to practice of the claimed process, the preparations were all directly aimed at achieving actual practice of the process on a large scale in the United States"); *Watkins v. Wakefield*, 443 F.2d 1207, 1209-10 (C.C.P.A. 1971) (finding that the first inventor was amply justified for foregoing possible earlier tests on a simulated wellhead "in favor of the far more meaningful procedure of testing the assembly under actual operating conditions" where "the involved device was conceived and designed to be used in a rather unique environment as an element of a large and complex installation").

2000 reflect a "[R]eno blending meeting" with various vendors to review vendor schedules, hydraulics, electrical connections and process control of the systems. (*Id.*, ex. 6) And Williams' Daily Inspection Reports reflect that its contractor, OCE, worked on various parts of the OKC-Reno system on a near daily basis from early July 2000 through at least September 1, 2000. (*Id.*, ex. 10)[14]

As for the second period (December 2000 to June 2001), Williams certified design data relating to the butane bullet tanks in March 2001. (D.I. 398, ex. 8 at MAG-SUN_00000509) And Williams' contractor sent Williams an invoice for work performed in April 2001. (*Id.*, ex. 7 at MAG-SUN_00001240)

To be sure, there do seem to be time gaps in the evidentiary record during these periods. And it certainly seems possible that a jury could ultimately conclude that Defendants have not shown, by clear and convincing evidence, that Williams was continuously diligent in reducing its invention to practice at OKC-Reno. But the Federal Circuit has also cautioned that the "point of the diligence analysis is not to scour the [asserted first inventor's] corroborating evidence in search of intervals of time where the [asserted first inventor] has failed to substantiate some sort of activity." *Perfect Surgical Techniques, Inc.*, 841 F.3d at 1009; *see also, e.g.*, *Stamicarbon BV*, 2001 WL 253118, at *7 ("[E]vidence of constant effort is not required to establish reasonable diligence."). And so the Court agrees with Defendants that taking the evidence as a whole, there is a genuine dispute of material fact on this question. (D.I. 397 at 19)

### 3. Abandonment, Suppression or Concealment

---

[14] In light of this evidence, the Court does not understand Sunoco's assertion that "Defendants still do not identify any work being performed in the first period[.]" (D.I. 409 at 13 n.15)

The third issue relating to this part of the Motion involves an assessment of whether Williams abandoned, suppressed or concealed its invention at OKC-Reno. That determination is a fact-intensive inquiry. *See Checkpoint Sys., Inc. v. U.S. Int'l Trade Comm'n*, 54 F.3d 756, 761 (Fed. Cir. 1995). Public use of an invention that confers knowledge of the invention to the public can demonstrate public disclosure sufficient to avoid the inference of suppression or concealment. *Apotex USA, Inc. v. Merck & Co.*, 254 F.3d 1031, 1040 (Fed. Cir. 2001); *see also, e.g., Infosint, S.A. v. H. Lundbeck A/S*, 612 F. Supp. 2d 405, 417-20 (S.D.N.Y. 2009).

Sunoco argues that suppression and concealment may be inferred at OKC-Reno based on Williams' unreasonable delay in making the invention publicly known after October 2001. (D.I. 379 at 26; D.I. 397 at 21 n.10; Tr. at 107-08)[15] While the issue is a close one, the Court concludes that Defendants have done just enough to avoid summary judgment on this ground.

Here, Defendants point to evidence that Sunoco's inventor Larry Mattingly learned that Williams had a Grabner through Wheatland (Mr. Mattingly's contractor), who [redacted] (D.I. 398, ex. 28 at 136-42; *see also id.*, ex. 29 at 47-48) [redacted]. (*Id.*, ex. 28 at 139-41, 147) [redacted]. (*Id.* at 137)

In light of this and other evidence of record, a jury could reasonably conclude that "Williams did not restrict access to its systems"—not just its systems at Tulsa, but also to its

---

[15] Sunoco does not argue the other type of suppression or concealment with respect to OKC-Reno (i.e., that Williams intentionally suppressed or concealed the system). (*See* D.I. 379 at 26)

systems at its other blending locations, such as at OKC-Reno—and that it "did not require any confidentiality agreements with contractors or visitors, and . . . [that it] did not protect its blending systems as trade secrets." (D.I. 397 at 22-23; *see also* Tr. at 95-99; D.I. 399, ex. A at ¶ 123; *id.*, ex. B at ¶¶ 88-94) Indeed, certain documents relating to other sites further demonstrate that Williams generally did not protect its blending systems as trade secrets. (D.I. 398, ex. 31 at MAG-SUN_00004711 (noting that the Tulsa site did not contain "Trade Secrets"); *id.*, ex. 32 at MAG-SUN_00006678 (same, as to Williams' Allen site) Moreover, Mr. Mattingly appears to describe the Williams blending systems (including the system at OKC-Reno) in the '686 patent, (Tr. at 100-01, 107; D.I. 397 at 23), which a jury could view as constituting further evidence that details of the Williams systems had been previously made publicly available, (D.I. 385, ex. 3 at 2:60-65 ("These systems continuously monitor the Reid vapor pressure of gasoline that is introduced to a storage tank, and blend butane with the gasoline based upon the vapor pressure measurements. These systems do not continuously monitor the Reid vapor pressure downstream of the blending operation as an integrity check."); D.I. 399, ex. B at ¶ 92; Tr. at 99-101). Defendants' evidence thus demonstrates a material dispute of fact with respect to suppression and concealment.[16]

---

[16] The Court emphasizes again that the summary judgment issue here regarding suppression and concealment was a difficult one. On its side, Sunoco points out, for example, that: (1) there is no direct evidence that a contractor (or anyone else) actually gained access to *OKC-Reno* (as opposed to Tulsa) and viewed all aspects of the blending system there; and (2) the disclosure in the '686 patent was added in 2006, not 2001. (D.I. 409 at 9-10) And Defendants' ultimate evidentiary burden is a high one. That said, viewing the evidence in the light most favorable to Defendants and drawing all reasonable inferences in Defendants' favor (as the Court must at this stage), the Court finds that a reasonable jury weighing the evidence could determine that Williams did not suppress and conceal the OKC-Reno system.

For the above reasons, the Court recommends that Sunoco's motion be denied with respect to the OKC-Reno system.

## IV. CONCLUSION

For the foregoing reasons, the Court recommends that Sunoco's Motion be GRANTED-IN-PART and DENIED-IN-PART. Specifically, the Court recommends that Sunoco's Motion be GRANTED with respect to the TransMontaigne system and DENIED with respect to the OKC-Reno system.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987); *Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Because this Report and Recommendation may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Report and Recommendation. Any such redacted version shall be submitted no later than **February 11, 2020** for review by the Court, along with a motion for redaction that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to

the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: February 6, 2020

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE