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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LENNOX INDUSTRIES INC. and ALLIED AIR ENTERPRISES LLC, Plaintiffs Below, Appellants, v. ALLIANCE COMPRESSORS LLC, Defendant Below, Appellee.	)	No. 371, 2021 Court Below: Superior Court of the State of Delaware C.A. No. N19C-03-045 AML [CCLD] **REDACTED PUBLIC VERSION** **Filed: February 23, 2022**

APPELLANTS' CORRECTED OPENING BRIEF ON APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

STATUTES AND RULES

NATURE OF PROCEEDINGS

This action stems from a dispute about the proper interpretation of a minimum purchase obligation under a [redacted] contract for the purchase and supply of scroll air conditioning compressors. Appellants Lennox Industries Inc. and Allied Air Enterprises LLC (collectively, "Lennox")—the purchasers under the Compressor Purchase and Supply Agreement ("PSA")—assert that the purchase obligation is based on a percentage of the types of compressors that Alliance manufacturers. Alliance only recently disagreed and now contends that the purchase obligation calculation includes all compressors, even types Alliance does not make.

For years, Alliance was Lennox's primary compressor supplier. And for years, there was no dispute. Under the PSA, Alliance is meant to supply Lennox with compressors for a portion of Lennox's production needs, but Alliance only makes certain types of compressors. Both parties understood that Lennox cannot buy from Alliance what Alliance does not make. Accordingly, when the issue of how to treat compressor types not manufactured by Alliance arose, the parties reasonably agreed that compressors not manufactured by Alliance would not be included in Lennox's purchase obligation calculation. Karl Zellmer, Alliance's VP of sales for over 20 years, summed it up best: "I'm not going to count it when we don't have a product. When we have a product, and you choose not to use it, and I

have readily available commercially viable product, we're going to count it. Very – very clear." A881 at 172:9-14.

Lennox planned and managed its product development and compressor supplier relationships relying on the parties' mutual understanding. But several years after confirming how to treat compressors not manufactured by Alliance—in the wake of increased competition, decreasing purchase volumes, and problems with its own compressors—Alliance suddenly reversed course and now claims Alliance did not mean what it had repeatedly said years before. Alliance's new interpretation is illogical and inconsistent with both the PSA and the parties' conduct.

The trial court erroneously granted summary judgment for Alliance, (1) by incorrectly holding that the PSA is unambiguous, (2) misinterpreting the minimum purchase calculation in a way that no reasonable commercial party would ever agree to, and (3) impermissibly resolving disputed evidence on summary judgment in the movant's favor. Lennox respectfully requests that this Court reverse the Superior Court's decision and remand for further proceedings.

SUMMARY OF ARGUMENT

1. Lennox maintains the PSA is ambiguous and does not resolve the parties' competing interpretations. Alliance argues incorrectly that the PSA is unambiguous. Alliance wrongly focuses on a portion of a single definition—the definition of "total usage" —which is itself unclear, without reading the contract as a whole. Alternatively, even if the PSA were not ambiguous on its face, Lennox maintains that there is a latent ambiguity regarding how to calculate the purchase obligation, which arose nearly 20 years after the contract was entered. The trial court erroneously held that "the plain terms of the supply agreement include in the total usage calculation all compressor types the plaintiff's business uses" and that "no latent ambiguity exists." Ex. A at 1-2, 11-19.

2. Both parties argue that the other's interpretation must be rejected because such an interpretation would lead to absurd results. As Lennox maintains, it is axiomatic that Lennox cannot buy from Alliance what Alliance does not make. There are multiple types of compressors and different types are not interchangeable. Additionally, compressors are subject to changing regulations and, like any technology, are continually redesigned and improved. No reasonable party would enter a [redacted] supply agreement that calculated its purchase obligation for the seller's products based on its need for other products that are unavailable from the

seller. Misunderstanding how the purchase obligation operates, the trial court erroneously held that "Alliance's interpretation is the only reasonable reading of the relevant contractual language." Ex. A at 15-16.

3. Lennox further argued that because the PSA is ambiguous, the trial court must look to extrinsic evidence to resolve the dispute. And even if the contract were clear, extrinsic evidence is relevant to show acquiescence, waiver, modification, or amendment. Alliance contends that extrinsic evidence should not be considered because the PSA is not ambiguous, but that, if considered, the evidence is consistent with its interpretation. Although the trial court is required to view the evidence in the light most favorable to the non-moving party on a motion for summary judgment and accept non-movant Lennox's version of any disputed facts, the trial court failed to do so. Instead, the trial court ignored evidence and adopted Alliance's narrative despite the fact that the record strongly supports Lennox's interpretation of the PSA. Ex. A at 2, 19-24.

STATEMENT OF FACTS

I. THE ALLIANCE

Lennox and Trane, both leading air conditioning manufacturers, formed the Alliance in 1993 to manufacture compressors for use in their air conditioning units.[1] A598-645. The partnership was formed after Emerson, the primary compressor supplier at the time, failed to provide adequate supply, and in order to develop new compressor technologies. A904 at 26:1-20; A868 at 75:2-14. By forming the Alliance, Lennox and Trane sought to ensure that they would not be beholden to a single compressor supplier. A904 at 28:2-21.

Compressors vary in size, type, price, efficiency, and performance. HVAC manufacturers use a mix of compressor technologies "[t]o differentiate their products in the market place and within their own production offering." A848 at 98:8-22. Karl Zellmer, Emerson/Alliance's longtime VP of sales, agreed that different types of compressors serve different aspects of the HVAC market, which is tiered by efficiency, and that Emerson's major HVAC customers' product lines include offerings across the whole range. A863 at 56:1-15. Different compressors

[1] The Alliance agreements were entered by subsidiaries and predecessors of Lennox (HCT), Trane (ASI and SCI), and Emerson (Copesub, Copeland, Newcope, and Emsub). References herein to Lennox, Trane, and Emerson include their relevant subsidiaries and predecessors.

types are not readily interchangeable. A832 at 131:22-132:15; A835 at 147:10-148:2; A837 at 156:6-16; A875 at 114:4-21.

In the 1990's, reciprocating compressors were the dominant type. A858-859 at 33:3-34:6. Over time, the market has changed and additional compressor types were introduced, including fixed scroll (1990's), two-stage (2008-2010), variable speed (around 2012), and rotary (last 10 years). A858 at 33:14-22; A862 at 50:23-51:21; A863-864 at 57:19-58:7. The industry is regulated and requirements regarding efficiency ratings and refrigerant have been primary drivers of changes in compressor technology. A861 at 45:1-25; A846-847 at 81:17-82:7.

The Alliance initially contemplated manufacturing multiple compressor types. A867 at 72:15-19. Per the original Alliance partnership agreement, "[redacted]." A600 at § 3. Per the 1994 Amended and Restated Partnership Agreement, the purpose was to "[redacted]." A657 at § 1.35; A660 at § 3.3(a).

In 1996, Emerson, a compressor manufacturer, joined the Alliance as the majority partner, holding [redacted]. A940, A951 at § 3.1. Lennox and Trane each have

a [redacted] interest. *Id.* All of the partners have contributed substantial capital to the Alliance generally proportionate to their interest. *Id.* at §§ 3.1, 3.2; A726 at § 3.1; A729 at § 3.4; A819 at 43:25-44:16. The operative Amended and Restated LLC Agreement is dated May 21, 1999. A698-809.

There was no clear line between Emerson and the Alliance. Key employees had dual responsibilities for Emerson and the Alliance. *See, e.g.* A860 at 39:4-11, 40:2-5; A814-815 at 20:5-24, 23:4-11. Moreover, [redacted] A870-871 at 85:19-86:15; A872 at 90:16-91:4; A816 at 30:10-31:5. [redacted] A878 at 156:8-13.

II. THE PSA

Lennox and Alliance executed the PSA on December 31, 1996. A561-595. The initial term of [redacted] and from year to year thereafter until terminated by one of the partners. A569 at § 9; A724-725 at § 2.4. At the time, [redacted] A860 at 39:4-14. To the extent Emerson had them, [redacted] A860 at 40:24-41:6; A842 at 25:8-15. Zellmer was surprised at the duration of the PSA.

A860 at 40:2-5; A868 at 75:19-76:4. Zellmer conceded that he could not predict what the market would look like in [redacted] and that predictions of [redacted] would depend on how compressor technology develops. A865-866 at 64:20-66:15. Zellmer also confirmed that at the time Emerson joined the Alliance, [redacted] A868-869 at 77:16-78:1.

Under the PSA, Lennox is required to purchase certain compressors from Alliance (the "Purchase Obligation"). The obligation is limited by Lennox's "needs" and subject to commercial reasonableness. The PSA provides: "[redacted]." A561 (emphasis added). The PSA further provides: "[redacted]." A565 at § 2(a). "[redacted]

[redacted]." A563. The parties expressly acknowledged that the list of Products would likely "[redacted]." A563-564. "[redacted]." A564. "[redacted]." A565. For the majority of years, the Purchase Commitment Percentage has been [redacted]. A576 at Exhibit 2.

The Purchase Obligation is variable and calculated annually. There is no exclusivity provision or guarantee regarding the number of compressors Lennox will purchase. Alliance has the right to audit Lennox's purchase volumes. A568 at § 5(b). Alliance could seek a "Shortfall Payment" if the Purchase Obligation is not met. A568 at § 6; A577 at Exhibit 3. [redacted] A828-829 at 113:17-115:17.

III. ALLIANCE WILL NOT COUNT COMPRESSOR TYPES IT DOES NOT MANUFACTURE

The Alliance has been profitable. It currently manufactures approximately [redacted] compressors annually and has grown consistently. A817-818 at 35:21-

36:7, 39:7-40:5. Alliance commands [redacted] of the market, while Emerson, inclusive of Alliance, controls [redacted]. A826 at 79:12-80:9. The market has been [redacted] A834 at 138:14-140:2. [redacted] A845 at 74:18-25. The Alliance has an annual revenue [redacted]. A818 at 40:18-41:17; A872 at 92:1-24. Brent Schroeder, Alliance general manager/Emerson group president of heating and air conditioning, [redacted] A813-815 at 17:20-18:5, 23:4-11; A819 at 42:9-19.

Until recently, the Purchase Obligation was never an issue because Lennox purchased "[redacted]" of its supply from Alliance. A827 at 108:4-109:13. There was no concern that Lennox was not meeting its minimum purchase obligation. *Id.* As the compressor market changed, so did Lennox's purchase volume from Alliance. Not only were new compressor types introduced, including variable speed and rotary—[redacted]—but also new suppliers began competing in the North American market. A823-824 at 68:12-70:8.

Beginning in 2014, Lennox's purchase volume approached [redacted] and has hovered [redacted]. A830 at 124:7-125:13. Thus,

[redacted] A828-829. at 113:17-114:6; A851-852 at 173:21-174:14. This is not surprising because [redacted] A873-874 at 101:21-102:16; A850 at 167:20-168:15.

In 2013, Lennox approached Schroeder about Lennox's need for variable speed for its next-generation high-efficiency systems. A838 at 168:17-169:12. Emerson acknowledged the market need for variable speed and was interested in manufacturing this new technology, including for potential sale through Alliance. A892-893 at 148:2-18, 150:9-24. In mid-2014, Chris Mays, then Director of Alliance Sales, proposed specific terms for a variable speed supply agreement. A907-909. The initial volume contemplated was [redacted], *id.*, but would increase to [redacted] and include Emerson's full variable speed product line. A882 at 181:12-23. [redacted]" A879 at 161:3-14.

While Emerson started testing a variable speed model around 2012, it did not launch a full line until 2015. A862 at 50:23-51:10. Lennox had already gone to market using variable speed compressors from another supplier and Emerson was trying to win some of that volume. A891 at 79:24-80:21; A880 at 168:8-169:10.

Because Alliance did not manufacture variable speed, the variable speed compressors Lennox purchased from other suppliers, including Emerson, were to be excluded from the Purchase Obligation calculation. A874 at 104:25-105:25; A876 at 132:18-133:17; A880 at 168:8-169:10; A881 at 170:4-172:14. Multiple Alliance representatives communicated this to Lennox. One was Pat Carus, Director of Alliance Sales prior to Mays, who told Ronnie Yarber, Lennox's primary contact for compressors. A907; A880 at 168:8-169:10; A887 at 203:9-18. Chris Mays, Carus's successor, confirmed the same message: "I confirmed the volume for VS would not count towards the denominator ([redacted] Alliance requirement). Karl did mention that if we manufactured it in Alliance in the future, it could be open for consideration at that point." A907. Before doing so, Mays consulted Zellmer, his boss, and verified what he planned to say. A894-895 at 213:9-214:23. Zellmer was in meetings with Lennox and reiterated the same point. A880-881 at 169:21-170:3, 171:3-8. Zellmer explained: "Yeah, there were discussions that – I – I'm not going to count it when we don't have a product. When we have a product, and you choose not to use it, and I have readily available commercially viable product, we're going to count it. Very – very clear." A881 at 172:9-14. Zellmer further testified, "we can't sell what we don't make." A881 at 170:19-20. [redacted] A820 at 48:12-15.

IV. YEARS LATER, IN THE WAKE OF DECREASING PURCHASE VOLUME FROM LENNOX, ALLIANCE ABRUPTLY CHANGES ITS INTERPRETATION OF THE PSA

In November 2014, Emerson began testing its variable speed compressors for Lennox products, to be completed by March 2015 to meet Lennox's product schedule. A912-915. Emerson failed to meet the timeline. By July 2015, after repeated delays, Lennox was forced to go with another supplier. *Id.*; A896 at 219:9-25.

Beginning in 2016, Lennox began experiencing a sound problem with Alliance compressors. A884-885 at 192:5-194:10. Because Alliance did not have a substitute for the affected units, Lennox was forced to obtain [redacted] compressors from another supplier while Alliance attempted to correct the issue. A885 at 194:11-21, 197:7-16; A831-832 at 128:15-130:25. The problem continued into 2017 and was not resolved until 2018. A932-933. In July 2017, while the sound problem lingered, [redacted]. A836 at 152:25-153:12; A844 at 46:17-20.

Shortly thereafter, in September 2017, [redacted]

Alliance suddenly changed its interpretation of the Purchase Obligation. A918-919. Paul Liddell had succeeded Mays as Director of Alliance Sales and also reported to Zellmer. A843 at 32:1-33:17; A886-887 at 201:6-202:3. Despite Zellmer explaining to Liddell the rationale for the parties' prior understanding, Liddell wrote to Yarber that he was "unclear" why Mays had agreed that variable speed would not be included in the volume calculation.[2] A883 at 188:4-189:1. Instead, years after Alliance made clear that it would not count compressors that it did not manufacture, Liddell asserted for the first time that they should be counted, thereby setting in motion the current dispute.[3] A918-919.

V. THE INSTANT LITIGATION

The PSA incorporates the dispute resolution provisions set forth in the LLC Agreement ("DRM"), which is comprised of three stages. A569 at § 11; A784-785 at § 16.1. Members may only commence litigation after mediation, the final stage,

[2] Troy Gasper, similarly indicated that [redacted] A922. Gasper was involved in [redacted] A849 at 148:6-149:25; A854 at 228:10-229:12.

[3] Subsequently, in an internal document, [redacted] A927. Additionally, Liddell states that [redacted] A929.

fails. A785 at § 16.1(b). Lennox raised the contract interpretation issue after Alliance abandoned their long-held mutual understanding and followed the mandated DRM. Alliance never raised the question of breach during the pre-suit dispute resolution process. Following unsuccessful mediation, Lennox filed this action on March 5, 2019, seeking a declaratory judgment to resolve the disputed contract terms. A25-36.

On March 7, 2019, Alliance filed a duplicative action in Chancery Court, asserting a nearly identical claim for declaratory judgment, and claims for specific performance/breach of contract and anticipatory repudiation. (Trans. ID 63030117). On January 6, 2020, the Chancery Court dismissed the complaint for lack of jurisdiction, finding that Alliance had an adequate remedy at law and was not entitled to specific performance or other equitable relief. (Trans. ID 64578451).

Following dismissal of the Chancery Court action, Alliance filed its answer and counterclaims for declaratory judgment, breach of contract and anticipatory repudiation. A37-71. Lennox moved to dismiss Alliance's counterclaims, A72-214, and on August 10, 2020, the Superior Court dismissed the breach of contract and anticipatory repudiation claims as unripe, A215-224. On September 4, 2020, Lennox filed its answer and affirmative defenses to Alliance's counterclaims. A225-254. Following discovery, Alliance moved for summary judgment and, on October

25, 2021, the trial court granted the motion on the remaining declaratory judgment claims, Ex. A. Lennox timely filed a notice of appeal on November 19, 2021.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY HELD THAT THE PSA IS UNAMBIGUOUS.

A. Question Presented

Did the trial court err by holding that the PSA is neither ambiguous on its face nor suffers from a latent ambiguity? Ex. A at 11-19.

B. Scope of Review

"A trial court's decision on a motion for summary judgment is subject to a *de novo* standard of review on appeal." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005). Additionally, the interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997); *Gotham Partners, L.P. v. Hallwood Realty Partners*, *L.P.*, 817 A.2d 160, 170 (Del. 2002).

C. Merits of the Argument

1. The PSA Is Ambiguous on Its Face

Alliance seeks to impose an interpretation of the PSA Alliance first introduced over 20 years after the contract was entered and in contravention of basic contract interpretation principles. Alliance's claim and the trial court's holding turn on reading part of one sentence of the PSA in isolation. But the full sentence and the entire PSA must be read as a whole. When read as a whole, the PSA is ambiguous

and the parties are entitled to prove their respective interpretations at trial. *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corporation*, 206 A.3d 836, 846 (Del. 2019).

"Before stepping through the specific contractual provisions it is helpful to look at the transaction from a distance, because in giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract." *Heartland Payment Systems, LLC v. Inteam Associates, LLC*, 171 A.3d 544 (Del. 2017) (cleaned up). "The contract must … be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'" *Sunline*, 206 A.3d at 846; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203 (giving reasonable meaning to all the terms is preferred to leaving a part unreasonable or of no effect). The trial court violated this principle, focusing on only one part of the definition of Total Usage.

Total Usage means "[redacted]." A565 (emphases added). Thus Total Usage is qualified in several respects. However, according to Alliance, Total Usage means "[redacted]." Alliance effectively

deletes the parenthetical and the reference to Lennox's production needs. The trial court erred by adopting these omissions and thereby changing the intended meaning of the PSA.[4]

Alliance argues that Total Usage means *all* compressors no matter the type. However, the parenthetical qualifies "[redacted]." If the definition meant all compressors without exclusion, the parenthetical would be superfluous. Alliance has no explanation for the parenthetical. The trial court's explanation conflicts with the rest of the PSA. The trial court erroneously found that "the parenthetical removes any doubt that the parties intended to include more than just the compressor types Alliance manufactured." Ex. A at 11. But the trial court failed to explain how the phrase "[redacted]" standing alone could have been misconstrued as being limited. It makes little sense that the parenthetical was added to clarify that which did not need clarifying. Rather, the parenthetical modifies the phrase, adding a limitation, albeit an ambiguous one.

The trial court relied unduly on the "fact that the Alliance only ever manufactured scroll compressors." *Id.* at 12. Alliance's manufacturing experience

[4] The trial court incorrectly states that Lennox disregards the parenthetical. Ex. A at 12-13. The reverse is true; Lennox provides meaning to the parenthetical consistent with the overall contractual scheme. The trial court and Alliance read the provision the same with and without the parenthetical.

post-contract is extrinsic evidence, which the trial court itself noted it could not consider until the trial court finds ambiguity. *Id.* Thus, the holding that the contract is unambiguous was not actually based on the plain language of the PSA and constitutes error. On the contrary, the PSA expressly contemplates that Products would "[redacted]." A563-564. [redacted] and is consistent with Lennox's interpretation.[5]

Recognizing the parenthetical may be superfluous and hedging its ruling, the trial court further erred in also holding that "some redundancy is acceptable *if the construction gives effect to the contract language and discharges the parties' intent*." Ex. A at 13 (cleaned up) (emphasis added). Here, however, treating the parenthetical as redundant does not align with the contract as a whole.[6] Therefore,

[5] Contrary to the trial court's finding, Lennox does not depend on the fact that, prior to the PSA, Alliance expressly planned to manufacture reciprocating and other compressors, in addition to scroll. Ex. A at 12, 14; A600 at § 3; A657 at § 1.35; A660 at § 3.3(a). However, once the PSA is deemed ambiguous, that evidence is relevant to determining the contract's intended meaning and explains the wording used. *See, e.g. U.S West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *15 (Del. Ch. June 6, 1996) (tracing phrasing in disputed contract to prior agreements).

[6] Notably the parenthetical does not contain language such as "for avoidance of doubt" or the like, that would signal it is meant to be confirmatory, rather than qualifying.

there is no basis to deviate from the standard rule of interpretation that requires mere surplusage be avoided. *Sunline*, 206 A.3d at 846; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203. Employing circular reasoning, the trial court found that the parenthetical was redundant because that would ensure the parties' contractual expectations would be fulfilled, but looks to the same parenthetical as the source of the parties' intent. Ex. A at 13-14.

The trial court should have looked to the statement of intent at the beginning of the PSA, but failed to do so. "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (cleaned up). The PSA's overall scheme is set forth on the very first page. It states:

The Purchase Obligation is framed as a percentage of capital "P" "Products" that Lennox needs for its business. It is not a percentage of all compressors, but rather is limited by type and size range. Inserting the meaning of the defined terms into the statement of intent makes this even more clear:

[redacted]

Thus, if Lennox has a production need for the Products (orbiting scroll compressors and, if Alliance makes them, co-rotating scroll compressors), it must purchase [redacted] of those types from Alliance. But the PSA does not require Lennox to buy compressors Lennox does not need, which is precisely the effect of the ruling below.[7] Although the trial court repeatedly invoked the parties' intent, the court disregarded the parties' own statement of what the PSA was intended for.

By failing to even consider the statement of intent, the trial court misinterprets the meaning of "[redacted]" in the Total Usage definition. Ex. A at 15. The trial court erroneously assumed this phrase must mean Lennox's complete business needs for all compressor types because Business is defined to include North and Central America. The trial court's logic is flawed. The

[7] Under Alliance's calculation, for every compressor type not manufactured by Alliance that Lennox purchases, Lennox must also buy additional scroll compressors regardless of whether Lennox has any production need for additional scroll.

geographic scope says nothing about the compressor types covered. Rather, it is clear that "[redacted]" refers back to the statement of intent, which fixes the Purchase Obligation as a percentage of Lennox's production needs for certain compressor types within in a certain size range for the North and Central American of business segment. Indeed, the statement of intent introduces the production needs concept and states that it will be "[redacted]." A561. As then stated in the Total Usage definition, Lennox is only obligated to buy compressors to satisfy its production needs. The language is a limitation;[8] it does not expand the PSA to include compressors Alliance does not manufacture.

The trial court's conclusion is further flawed because it turns on a misreading of the contract. Specifically, the trial court found that Alliance's interpretation is the only reasonable reading because the PSA "plainly states that Lennox's Target Level is the annual percentage of Lennox's *total compressor usage* during the year." Ex. A at 15 (emphasis added). But that is not how "Target Level" is defined. "[redacted]."

[8] The [redacted] language also distinguishes between (i) compressors used in production, which are included, and (ii) compressors used for replacements and warranties, which Alliance concedes are not. A833 at 135:11-137:16; A853 at 222:4-12.

A564 (emphasis added). The meaning of Target Level turns on the Total Usage definition. Again the trial court's reasoning is circular; it assigns a meaning (total compressor usage without limitation) to the disputed Total Usage term without pointing to independent provisions to support that definition.

By conflating the defined term Total Usage with the concept—not found in the PSA—of total compressor usage, the trial court altered the intended meaning. Rather, the term "Total Usage" is simply used [redacted]. Since the former is a subset of the latter, the latter is naturally referred to using the term "total." But "total" does not connote all compressor types and does not compel or eliminate either party's interpretation.[9]

The PSA's overall scheme focuses exclusively on Products (compressor types manufactured by Alliance), not the broader compressor market. Other provisions are thus consistent with Lennox's interpretation, but not Alliance's or the trial court's interpretation. For example, Lennox is required to maintain a certain Product

[9] Indeed, "total" is used in several defined terms and, in no case does it include compressor types not manufactured by Alliance. A564-565 (defining Total Actual Partner Purchases, Total Actual Supplier Sales, etc.).

Mix ([redacted]). A563, A565. Despite acknowledgement that the Product Mix will be affected by market demand, A565, the PSA does not concern itself with the mix of all compressor types, but rather only the Products manufactured by Alliance.

Even more telling, Section 4(d) provides that [redacted]. A567 at § 4(d). Yet, in such event, there is no adjustment to the Purchase Obligation. That is consistent with Lennox's interpretation—a calculation based on compressor types Alliance manufactures—since it already accounts for what Alliance makes. It is wholly at odds with Alliance's interpretation, which would require Lennox to purchase from Alliance the same percentage of all compressors no matter how limited the scope of Alliance Products becomes. The trial court acknowledged these provisions, but did not reconcile the conflict with Alliance's interpretation and thus failed to properly consider the contract's overall scheme. *GMG Capital*, 36 A.3d at 779.

Instead, the trial court relies on Section 4(b), Ex. A at 16, but misconstrues that provision, which has no application here.[10] Section 4(b) plainly contemplates an apples to apples comparison. [redacted] A566 at § 4(b). Where there is a choice between suppliers, Lennox must buy at least enough from Alliance to meet its Purchase Obligation, unless Alliance's compressors are substandard. But where Lennox needs types Alliance does not make, so that Lennox has no alternative but to purchase from another supplier, Section 4(b) by its own terms cannot apply as there is nothing to compare the competitors' products to.[11]

Alliance also claims that compressor types that did not exist at the time the PSA was entered should be counted, including variable speed, which was not

[10] In the run-up to this litigation, Lennox alleged that Alliance violated Section 4(b). However, the parties agreed that was a separate dispute and decided to table the Section 4(b) issue while the contract interpretation issue was addressed. A129-132. Alliance should not now be permitted to change position, invoking Section 4(b) for first time in its summary judgment reply brief, without having satisfied the mandatory DRM. Accordingly, the dispute over the proper interpretation of Section 4(b) is unripe (like Alliance's dismissed breach claims), *see* A215-224, and the trial court erred in considering Section 4(b).

[11] Contrary to the evidence, the trial court incorrectly assumed that different compressor types are interchangeable. They are not. A832 at 131:22-132:15; A835 at 147:10-148:2; A837 at 156:6-16; A875 at 114:4-21.

introduced until over 15 years later. However, the PSA does not include any indication that the parties intended to include compressor types that may be invented in the future and is, at best, ambiguous on this point. *Bell Atl. Meridian Sys. v. Octel Commc'ns*, 1995 WL 707916 (Del. Ch. Nov. 28, 1995), is instructive. In *Bell*, the parties disputed whether an express provision to provide "new systems" meant newly developed products that did not exist when the contract was entered or only additional units of existing products. Despite the express inclusion of the term "new systems," the court found the contract ambiguous and held that the provision did not include newly developed products. The court relied, in part, on the definition of Products, noting the term did not refer to future products and listed specific models, which is true of the PSA as well. Here there is no language to suggest the broad inclusion of all future compressor products as a means of increasing the minimum purchase commitment. The trial court failed to address this ambiguity at all.

The trial court thus misconstrued the Purchase Obligation because it failed to consider the PSA as a whole. Where, as here, the contract is "reasonably susceptible to two or more interpretations or may have two or more different meanings, then the contract is ambiguous" and the decision below should be reversed. *Sunline*, 206 A.3d at 847 (cleaned up); *GMG Capital*, 36 A.3d at 780.

2. Alternatively, the PSA Suffers from a Latent Ambiguity

"Latent ambiguity exists where the contract language can reasonably, but not obviously, be interpreted multiple ways. Latent ambiguity arises, not from the [contract's] face, but from extrinsic circumstances to which the [] language refers. In other words, latent ambiguity exists when patently unambiguous language becomes ambiguous when applied. The court may look to extrinsic evidence to reveal a latent ambiguity." *Motors Liquidation Co., Dip Lenders Trust v. Allianz Ins. Co.,* 2013 WL 7095859, at *4 (Del. Super. Ct. Dec. 31, 2013) (cleaned up); *see also In Matter of Estate of Gallion,* 1996 WL 422338, at *2 (Del. Ch. Jan. 27, 1996).

The parties did not confront how compressors not manufactured by Alliance should be treated when calculating the Purchase Obligation until nearly 20 years after the PSA was entered. Until then, purchases were so far above the minimum that Alliance had no concern. A827 at 108:4-109:13. But as volumes decreased, having a more precise calculation began to matter. A830 at 124:7-125:13. Thus, when Lennox began purchasing new variable speed technology at least two questions arose under the PSA: (1) how should new compressor technology be treated and (2) should compressors not manufactured by Alliance be counted?

The parties could not have previously considered variable speed technology and the PSA did not address it since variable speed technology was not introduced

until around 2012. A862 at 50:23-51:10. Moreover, [redacted] A820 at 48:12-15. However, there was no dispute. When the issue was raised in 2013 and 2014, multiple Alliance representatives readily "confirmed the volume for VS would not count towards the denominator ([redacted] Alliance requirement). Karl did mention that if we manufactured it in Alliance in the future, it could be open for consideration at that point." A907. No one from Alliance claimed that the PSA required otherwise or that this was a limited, one-time exception. Instead, Zellmer made clear that Alliance was "not going to count it when we don't have a product. When we have a product, and you choose not to use it, and I have readily available commercially viable product, we're going to count it." A881 at 172:9-14.

For several years the parties operated with that understanding without incident. Significantly, [redacted].[12] A828-829 at 113:17-114:6; A851-852 at 173:21-174:14. In September 2017, even though Alliance still had no variable speed product, Alliance completely reversed course. Notably, Alliance took this position [redacted]

[12] Moreover, Alliance independently tracked Lennox's purchases and knew if all compressors were included. A873-874 at 101:22-102:16; A850 at 167:20-168:15.

[redacted]. *See* discussion *supra* at 13-14. Contrary to its own repeated statements, for the first time Alliance claimed that the PSA requires that all of Lennox's compressor purchases be counted, even types Lennox could not buy from Alliance. A918-919. Even then Alliance did not claim its prior statements had been a one-off accommodation, but stated merely that it was "unclear" why Alliance had agreed not to count variable speed volumes. *Id.* Alliance's subsequent, self-serving explanations adopted for litigation do not deserve any weight.

The trial court erroneously found that the words in the contract did not have more than one possible meaning. Ex. A at 18. Alliance's conduct proves otherwise, first interpreting Total Usage one way and then changing position several years later. Ignoring this critical evidence, the trial court mistakenly relies on the fact that "[t]he definition of 'Products' acknowledges that the parties likely would amend the definition at some time due to" changing technology. *Id*. However, there is no evidence such amendment was ever made, leading to the inevitable conclusion that the PSA has not been updated to include new compressor technology introduced many years after the PSA was entered. If the PSA did include unknown, future technology from the outset, no amendment would be necessary and that provision would be superfluous. Similarly, Alliance would have counted the variable speed

compressors all along. The trial court's holding is belied by the evidence and should be reversed.

II. THE TRIAL COURT ERRONEOUSLY HELD THAT ALLIANCE'S CONTRACT INTERPRETATION IS REASONABLE

A. Question Presented

Did the trial court err by failing to reject Alliance's interpretation of the PSA because it would lead to absurd results? Ex. A at 15-16.

B. Scope of Review

"A trial court's decision on a motion for summary judgment is subject to a *de novo* standard of review on appeal." *AeroGlobal*, 871 A.2d at 443. Additionally, contract interpretation "involves legal questions and thus the standard of review is *de novo*." *Emmons*, 697 A.2d at 744; *Gotham Partners*, 817 A.2d at 170.

C. Merits of the Argument

1. Alliance's Interpretation Would Lead to Absurd Results

Under Delaware law, Alliance's interpretation, which produces an absurd result, must be rejected in favor of a reasonable interpretation. *See, e.g. Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (court will reject interpretation that yields "absurd result or one that no reasonable person would have accepted when entering the contract."); *Axis Reins. Co. v. HLTH Corp*., 993 A.2d 1057, 1063 (Del. 2010) ("[W]here a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes

the affected contract provisions"); *Capella Holdings, LLC v. Anderson*, 2017 WL 5900077, at *5 (Del. Ch. Nov. 29, 2017) (same).

The PSA is a [redacted] supply agreement for compressors, a highly varied and regulated product. A569 at § 9; A724-725 at § 2.4; A861 at 45:1-25; A846-847 at 81:17-82:7. Moreover, different compressor types are not readily interchangeable. A832 at 131:22-132:15; A835 at 147:10-148:2; A837 at 156:6-16; A875 at 114:4-21. Alliance witnesses conceded [redacted] A860 at 39:4-41:6; A868 at 75:19-76:4; A842 at 25:8-15. Alliance also understood that HVAC manufacturers use a mix of compressor technologies to differentiate their products. A848 at 98:8-22; A863 at 56:1-15. From the outset, the parties knew that compressor technology would change over the [redacted] agreement, but could not foresee precisely how. A865-866 at 64:20-66:15. Indeed, with [redacted] left to the term, the dominant type of compressor has already completely changed, new regulatory requirements have been imposed, and several new technologies have been introduced. A858 at 33:14-22; A861-862 at 45:1-25, 50:23-51:21; A863-864 at 57:19-58:7; A868-869 at 77:16-78:1; A846-847 at 81:17-82:7. Given all this, no reasonable business would enter into a supply contract that measures its purchase

obligation for the seller's products based on the purchaser's need for other products (including all unknown, future products) that are unavailable from the seller.

The Alliance was originally formed to manufacture reciprocating and scroll compressors. A600 at § 3; A657 at § 1.35; A660 at § 3.3(a). The language in the Total Usage parenthetical, [redacted]. A565. Although the Alliance decided to focus on scroll compressors as of the time the PSA was entered, reciprocating compressors remained the dominant type on the market. A868-869 at 77:16-78:1. It is ludicrous to suggest that Lennox would have committed to using scroll compressors, an unproven technology, for over half of its production [redacted]. It is reasonable that Lennox made Alliance its preferred supplier for scroll and committed to purchase from Alliance over half of Lennox's need for scroll.

Alliance could have insisted on a fixed minimum purchase volume, but the Purchase Obligation is variable based on Lennox's needs. As was the case for years, if Lennox buys mostly compressor types manufactured by Alliance, the purchase volume will be greater, and if Lennox buys more compressor types not manufactured by Alliance, the volume will decrease. That can work in either party's favor and is a variable both parties accepted. In fact, even with Lennox purchasing around the minimum, [redacted]

[redacted] A845 at 74:18-25. Contrary to the trial court's suggestion, Ex. A at 16-17, this is not a case of buyer's remorse and this is unlike the standard purchaser – supplier relationship. Lennox is a member of the Alliance and is invested in the Alliance's success.

Alliance's interpretation, on the other hand, would absurdly require Lennox to buy compressors Lennox cannot use, which is plainly inconsistent with the purpose of the PSA to supply compressors to satisfy Lennox's production needs. Specifically, if Lennox were already buying [redacted] of all of its compressors from Alliance, then Lennox could not develop and sell additional products requiring compressor types not manufactured by Alliance, [redacted] unless it somehow allocated [redacted] of that additional demand to Alliance scroll compressors.

If Lennox needs [redacted] compressors and [redacted] are types Alliance does not manufacture, it is impossible to comply with the PSA because Lennox would no longer be buying [redacted] of its production needs. Lennox would be buying excess fixed scroll compressors that it does not need, which is the exact opposite of what the PSA requires and contemplates.

By way of further example, assume again that Lennox buys [redacted] total compressors, all scroll, so at least [redacted] must come from Alliance. Then assume

Lennox decides to introduce rotary compressors into its lineup, so Lennox continues to buy [redacted] scroll, but now adds [redacted], for a total volume of [redacted]. [redacted] and so Lennox should be able to buy [redacted] from another supplier. These are not sales that are being taken away from Alliance or that Alliance even competes for. This decision should have nothing to do with Alliance, but under Alliance's interpretation it does. Now Lennox must have at least [redacted] scroll from Alliance in order to hit [redacted]. Simply by buying a very small volume of a compressor type Alliance does not offer, Lennox effectively pays a penalty to Alliance. Lennox is thus forced to buy extra scroll compressors that do not satisfy its production needs. That is both contrary to the terms of the agreement and commercially unreasonable. The problem increases exponentially the more Lennox buys a type of compressor Alliance does not offer. Assume Lennox's production needs call for [redacted] scroll and [redacted] Under Alliance's interpretation, it becomes impossible to both satisfy the PSA and Lennox's production needs.

Whether driven by regulatory requirements, technology advances, or market demand, Lennox would be precluded from buying the compressors it needs. The trial court's finding to the contrary is erroneous as the court failed to consider how

the PSA actually operates.[13] Ex. A at 16. By tying Lennox's obligation to Alliance to its purchases of compressors Alliance does not offer, Alliance's interpretation makes it virtually impossible for Lennox to enter agreements with other suppliers. Similarly, Alliance's interpretation would prohibit Lennox, a large public company, from making acquisitions of smaller HVAC manufacturers if the target primarily used compressor types not manufactured by Alliance. Especially given the [redacted] term, no reasonable business would agree to such draconian restrictions on its ability to engage in common corporate activities such as developing new product lines or considering potential acquisitions. It makes no commercial sense to punish Lennox for purchasing from other suppliers compressor types it cannot get from Alliance. And that is exactly how Alliance saw it as well, agreeing they were "not going to count it when we don't have a product. When we have a product, and you choose not to use it, and I have readily available commercially viable product, we're going to count it. Very – very clear." A881 at 172:9-14. Alliance's recently revised interpretation should be rejected since it leads to commercially unreasonable results.

[13] Section 4(b) does not apply to compressor types not manufactured by Alliance, *see supra* at 26, but even if it did, Section 4(b) is no answer, Ex. A at 16, because different compressor types are not interchangeable, and the absurd results do not depend on a finding that Alliance's Products are not competitive.

III. THE TRIAL COURT ERRONEOUSLY HELD THAT THERE ARE NO MATERIAL FACTS IN DISPUTE

A. Question Presented

Did the trial court err by holding there are no material facts in dispute that would allow a reasonable factfinder to find in Lennox's favor as to waiver, acquiescence, modification, or amendment? Ex. A at 2, 19-24.

B. Scope of Review

"A trial court's decision on a motion for summary judgment is subject to a *de novo* standard of review on appeal." *AeroGlobal*, 871 A.2d at 443. Additionally, contract interpretation "involves legal questions and thus the standard of review is *de novo*." *Emmons*, 697 A.2d at 744; *Gotham Partners*, 817 A.2d at 170.

C. Merits of the Argument

1. The Extrinsic Evidence Supports Lennox's Interpretation

When, as here, "the contract is ambiguous … courts must resort to extrinsic evidence to determine the parties' contractual intent." *Sunline*, 206 A.3d at 847; *GMG Capital*, 36 A.3d at 780. The record shows that the parties agreed on the meaning of the PSA consistent with Lennox's interpretation. Had the trial court properly held the PSA is ambiguous, there would be no question that extrinsic evidence must be considered. Alternatively, even if the PSA were clear, extrinsic evidence, particularly course of performance, is relevant to demonstrate, waiver,

acquiescence, modification, or amendment. *See, e.g. Motors Liquidation*, 2013 WL 7095859, at *5. The court further erred in its analysis of these doctrines.

As an initial matter, the trial court misstated the record and erred in suggesting Lennox waived these doctrines. Ex. A 19, 22. Lennox did plead waiver and acquiescence as affirmative defenses to Alliance's counterclaims; there is no waiver. A252. While Lennox did not expressly plead modification or amendment, these also were not waived. First, , unlike waiver and acquiescence, modification and amendment are not included among the lengthy list of affirmative defenses that must be pled according to Rule 8 of the Delaware Superior Court's Rules of Civil Procedure. Second, but for its mirror declaratory judgment claim, Alliance's counterclaims were dismissed. As plaintiff in a declaratory judgment action, Lennox is not required to assert affirmative defenses in support of its well-pled complaint merely because Alliance asserted a duplicative declaratory claim. *See, e.g. Zohar CDO 2003-1, Ltd. v. Croscill Home LLC*, 2018 WL 881758, at *8 (D. Del. Feb. 14, 2018) (declaratory judgment action effectively reverses alignment of plaintiff and defendant). Third, "even though a motion for summary judgment is not the most appropriate way to raise a previously unpled defense, a defendant does not waive an affirmative defense if he raised the issue at a pragmatically sufficient time, and the plaintiff was not prejudiced in its ability to respond." *Weyerhaeuser Co. v. Domtar*

Corp., 204 F.Supp.3d 731, 737 (D. Del. 2016) (cleaned up) (allowing unpled affirmative defense to be considered on summary judgment) (collecting cases). Alliance claimed no prejudice and the trial court found none. Finally, if deemed affirmative defenses, amendments to the pleadings in a pre-trial stipulation are routinely permitted in Delaware trial courts. *See, e.g.* Transcript of Pre-trial Conference at 14-15, *RCM LS II, LLC v. Lincoln Circle Associates, LLC*, No. 9478-VCL (Del. Ch. May 27, 2014) (compendium); *Prince v. Ferritto, LLC*, 2019 WL 5787988, at *1 (Del. Super. Ct. Nov. 6, 2019) (leave to amend pleadings freely given absent prejudice and Superior Court regularly allows late amendments in pre-trial stipulations). And Rule 15(b) of the Delaware Superior Court's Rules of Civil Procedure allows pleadings to be amended to conform to the evidence presented at trial.

The trial court also erred in using summary judgment as a substitute for trial. "Summary judgment … is not a mechanism for resolving contested issues of fact." *GMG Capital*, 36 A.3d at 783; *see also AeroGlobal*, 871 A.2d at 444. "The Court must view the evidence in the light most favorable to the non-moving party [here Lennox] … and accept the non-movant's version of any disputed facts." *Motors Liquidation*, 2013 WL 7095859, at *1. Instead, the trial court misapplied the law,

ignored critical evidence, and adopted without question Alliance's inaccurate version of events. Ex. A at 19-24.

That the PSA included a non-waiver clause is not dispositive. Ex. A at 20-21. Non-waiver clauses protect against unintended loss of rights, not deliberate actions like Alliance's here. Course of performance is relevant to show waiver of a contractual limitation that is inconsistent with the course of performance. *Personnel Decisions, Inc. v. Bus. Planning Sys.*, 2008 WL 1932404, at *5 n.22 (Del. Ch. May 5, 2008). A waiver of a contractual right may be expressed or implied by a party's conduct. *See* 13 WILLISTON ON CONTRACTS § 39:27. Moreover, "a non-waiver clause in a contract may itself be waived through knowledge, coupled with silence and conduct inconsistent with the terms of the contract." *Good v. Moyer*, 2012 WL 4857367, at *6 (Del. Super. Ct. Oct. 10, 2012); 13 WILLISTON ON CONTRACTS § 39:36 (same).

"Acquiescence applies where a claimant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Fotta v. Morgan*, 2016 WL 775032, at *8 (Del. Ch. Feb.

29, 2016) (cleaned up). Determining whether acquiescence applies is fact intensive. *In re Shaw & Elting LLC*, 2015 WL 4874733, at *37 (Del. Ch. Aug. 13, 2015).

Delaware law recognizes the right to modify any portion of an agreement. *Motors Liquidation*, 2013 WL 7095859, at *5. And contracts can be modified through the parties' conduct, notwithstanding clauses restricting or prohibiting modification. *Good*, 2012 WL 4857367, at *6.

Several senior Alliance representatives on multiple occasions confirmed that compressors not manufactured by Alliance are not included in the Purchase Obligation calculation. Pat Carus, Chris Mays, and Karl Zellmer each communicated to Lennox, unequivocally, that variable speed compressors would not count towards calculating Lennox's minimum purchase requirement. A907; A880-881 at 168:8-170:3, 171:3-8; A887 at 203:9-18. None of them qualified their statements, attached any conditions, or indicated that this was a temporary accommodation. On the contrary, Zellmer explained that Alliance is "not going to count it when we don't have a product," and "we can't sell what we don't make." A881 at 170:19-20, 172:10-11. Inexplicably, the trial court ignored Alliance's damning, contemporaneous admissions and accepted its self-serving statements made during the course of litigation. Ex. A at 24.

The trial court's finding that Mays was not interpreting the PSA, Ex. A at 23, is plainly belied by his 2014 email with Lennox. Yarber specifically requested Mays do just that: "Our understanding is that VS would not count as a part of the denominator for the Alliance [redacted] minimum purchase requirement. Pat Carus communicated that this was his understanding while managing the business. Is this your understanding as well?" Mays unequivocally responded: "I confirmed the volume for VS would not count towards the denominator ([redacted] Alliance requirement)." A907Ex. 11.

Alliance, including Mays, knew that Lennox was already purchasing variable speed compressors from another supplier. A891 at 79:24-80:21; A880 at 168:8-169:10. In fact, [redacted] A873-874 at 101:21-102:16; A850 at 167:20-168:15. This is not "conjecture" by Lennox, Ex. A at 22, but rather admissions from Alliance witnesses. Significantly, [redacted] A828-829 at 113:17-114:6; A851-852 at 173:21-174:14. Doing precisely what is not allowed, the trial court weighed the evidence on summary judgment. Conceding that there is conflicting evidence, Ex. A at 21-22, the trial court erred in adopting Alliance's story, rather

than viewing the evidence, as it must, in the light most favorable to Lennox (the non-moving party). *See, e.g. Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 925 A.2d 1255, 1262-64 (Del. 2007) (reversing summary judgment where trial court failed to take into account "record facts that support an equally reasonable but opposite interpretation).

There is no evidence Alliance intended to make a limited exception. Instead, the parties operated for several years with the understanding that compressors not manufactured by Alliance did not count. And Lennox justifiably relied on Alliance's repeated assurances. For example, Lennox invested significant time and resources into testing Emerson's [redacted] and, based on the parties understanding that they would not count compressor types not manufactured by Alliance, ultimately made commitments to other suppliers [redacted] A912-915; A896 at 219:9-25. Alliance now seeks to disavow its prior interpretation and conduct. But "a course of performance is relevant in ascertaining the meaning of the parties' agreement, and may supplement or qualify the terms of the agreement. A course of performance can also constitute

waiver or modification of a contract." *Motors Liquidation*, 2013 WL 7095859, at *5 (cleaned up).[14]

The trial court's finding regarding consideration, Ex. A. at 23, also constitutes error. Alliance never raised lack of consideration and thus the argument is waived. *See, e.g. Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. April 28, 2003). Additionally, not all modifications require new consideration. "The Supreme Court has established that "where a promise is made by one party under circumstances reasonably expected to induce substantial action by the other party and the other party takes that action in reliance upon the promise, it then becomes binding even though the promise was gratuitous when made." *Simon Prop. Group, L.P. v. Brighton Collectibles, LLC*, 2021 WL 6058522, at *5 (Del. Super. Ct. Dec. 21, 2021) (cleaned up); *see also Camden Fitness, LLC v. Wandless Enterprises, Inc.*, 2013 WL 8854873, at*2-3 (Del. C.P. Feb. 11, 2013) (modification may be binding despite lack of consideration when "fair and equitable based on circumstances not

[14] Provisions that amendment be made by a signed writing can also be waived or modified. *Good*, 2012 WL 4857367, at *6. Nevertheless, an email with a signature block constitutes a signed document. *See, e.g. Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002) (Posner, J.); *Preston Law Firm, LLC v. Mariner Health Care Mgmt. Co.*, 622 F.3d 384, 391 (5th Cir. 2010); *Princeton Indus., Prods., Inc. v. Precision Metals Corp.*, 2015 WL 1810319, at *2 (N.D. Ill. Apr. 16, 2015); *Protherapy Assocs., LLC v. AFS of Bastian, Inc.*, 2010 WL 2696638, at * 2 (W.D. Va. Jul. 7, 2010); 6 *Del. C.* § 12A-101.

anticipated by the parties when the contract was made, or if justice requires … because of material change of position in reliance on the promise"). Even so, to the extent this was a modification, there was consideration. Alliance promised to develop and produce [redacted] for Lennox (which would not count towards the Purchase Obligation denominator), and, relying on that promise, Lennox agreed to buy [redacted] from Emerson. These were not unfinished negotiations and the parties spent substantial time on development; Lennox turned to another supplier only after Emerson [redacted] A912-915; A896 at 219:9-25.

The trial court also ignored other internal documents and evidence that contradict Alliance's story. For example, [redacted] A922. When Alliance reversed its position, [redacted] A849 at 148:6-149:25; A854 at 228:10-229:12. Similarly, Paul Liddell, who succeeded Mays, admitted that [redacted]

[redacted]. A927, A929. Additionally, not only did Alliance's changing interpretation come too late, but also [redacted] A884-885 at 192:5-194:21, 197:7-16; A831-832 at 128:15-130:25; A836 at 152:25-153:12; A844 at 46:17-20. Alliance's reversal was thus simply an attempt to retain market share.

While the record supports Lennox's interpretation, and casts significant doubt on Alliance's version of events, because the facts are disputed, the trial court erred and summary judgment should have been denied.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment and remand this action for further proceedings.

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