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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 On Appeal from Superior Court C.A. No. N19C-03-045 AML [CCLD] PUBLIC VERSION filed March 28, 2022

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs Lennox Industries Inc. and Allied Air Enterprises LLC's (collectively, "Lennox") appeal challenges the Superior Court's decision granting summary judgment to Defendant Alliance Compressors LLC ("Alliance") on an issue of contract interpretation.[1] The companies involved in this business dispute are Lennox, Trane, and Emerson Electric Co. Lennox and Trane are (and have been for many years) leading manufacturers of air conditioning units. Emerson is (and has been for many years) the leading manufacturer of a critical component of those units – the "compressor" used to circulate the refrigerant that absorbs heat. This litigation arises out of a joint venture (called "Alliance") formed by the three companies in 1996 whereby Alliance would ensure a long-term supply of high-quality compressors to Lennox and Trane.

In this litigation, Lennox has raised an issue regarding the terms of the supply agreement that governs its purchases of compressors from Alliance. The agreement is titled the AC/Lennox Compressor Purchase and Supply Agreement dated December 31, 1996 (as amended, the "Supply Agreement"). It sets forth, among other terms, a requirement that Lennox fill a set percentage [redacted] of its

[1] References to "the Opinion" or "Op. __" refer to the trial court's Memorandum Opinion attached as Exhibit A to Plaintiffs-Appellants' Opening Brief ("App. Br. __").

compressor needs within a specific size range from Alliance. The issue in dispute is whether Lennox is required to buy [redacted] of *all* its compressor needs within a specified size range from Alliance (as Alliance contends), or [redacted] of its needs for only the forms of compressors that Alliance manufactures (as Lennox contends). In other words, the dispute centers on the question of what goes into the "denominator" when calculating whether Lennox is buying enough compressors from Alliance to meet its minimum purchase obligation of [redacted].

As found in the trial court's Memorandum Opinion, the question presented has a clear answer based on the plain language of the Supply Agreement. The Supply Agreement provides that, to calculate the denominator in determining whether Lennox is satisfying its minimum purchase obligation, it must consider its "Total Usage," which is specifically defined in relevant part as [redacted] A302 (emphasis added). Because there can be no dispute that the plain and unambiguous language of the Supply Agreement provides that Lennox must consider [redacted] in the relevant size range to determine whether Lennox has satisfied its minimum purchase obligation, "the plain terms of the supply

agreement include in the total usage calculation all compressor types the plaintiff's business uses," Op. 1-2, including the reciprocating and rotary compressors manufactured by competitors to Alliance (and Emerson). Moreover, as found by the trial court, Lennox has failed to adduce evidence sufficient to invoke the doctrines of waiver, acquiescence, modification, or amendment to alter the plain meaning of the Supply Agreement. Op. 19-24. On appeal, Lennox presents no reason for this Court to overturn the trial court's well-reasoned opinion.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that the Supply Agreement is unambiguous that the total usage calculation includes all compressor types used by Lennox for its business needs. Op. 1-2, 11-17. As found by the trial court, the parenthetical [redacted] in the definition of "Total Usage" makes it clear that the parties included all compressor types used by Lennox, not just those manufactured by Alliance. Op. 11. The trial court further correctly concluded that there is no latent ambiguity in the Supply Agreement because Lennox has adduced no facts demonstrating such an ambiguity exists. Op. 17-19.

2. Denied. The trial court correctly understood how the purchase obligation under the Supply Agreement operates, and its holding that "Alliance's interpretation is the only reasonable reading of the relevant contractual language," Op. 15, is well supported by the language of the Supply Agreement considered as a whole. Lennox's argument that "[n]o reasonable party would enter a 50-year 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," App. Br. 3-4, is belied by the terms of the Supply Agreement, which expressly contemplate that new

compressor types may come to market and require Alliance to ensure its compressors are competitive with those available on the marketplace.

3. Denied. The trial court correctly concluded that, because the Supply Agreement is unambiguous as to how Lennox's purchase obligation is determined, it need not look to extrinsic evidence to determine its meaning. Op. 17-19. The trial court also properly held that, even if extrinsic evidence were considered to determine whether the doctrines of acquiescence, waiver, modification, or amendment apply, as argued by Lennox, such evidence is insufficient to demonstrate that any of these doctrines apply to permit the Supply Agreement to be reinterpreted as Lennox now desires, even when considered in the light most favorable to Lennox. Op. 19-24.

STATEMENT OF FACTS

A. History of Alliance Compressors LLC.

Alliance was first formed in 1993 by subsidiaries of American Standard Inc. and Lennox International Inc. called Standard Compressors Inc. ("SCI") and Heatcraft Technologies Inc. ("HCI"), respectively. A340. American Standard/SCI became Trane in 2007 and was then acquired by Ingersoll Rand in 2008. Alliance was formed to provide a reliable supply of compressors to Lennox and Trane. A427 at 26:1-20.

In 1996, American Standard/SCI (now Trane) and Lennox/HCT admitted Copesub, Newcope, and Emsub to Alliance. A340. Copesub, Newcope, and Emsub were all wholly owned subsidiaries and/or affiliates of Emerson. The Emerson affiliates were added to Alliance because Lennox and Trane were unable to successfully develop the Alliance compressor manufacturing operations, as admitted by Ronnie Yarber, Lennox's Director of Compressor Sourcing and Alliance's primary contact at Lennox during the relevant time period. A427 at 26:1-20. Accordingly, as set forth in the operative Amended and Restated LLC Agreement, today Alliance is comprised of subsidiaries of Trane, Lennox, and Emerson. A340. The common shares of the members of Alliance are Emerson (through Copesub) [redacted], Trane [redacted] and Lennox [redacted]. A226-227; A358. The express purpose

of Alliance, as stated in the operative LLC Agreement, is to "[redacted] primarily to Trane, Lennox and Emerson. *See* A341-342 & A356 ([redacted].

When it joined Alliance in 1996, Emerson invested tens of millions of dollars to build a 400,000 square foot facility in Natchitoches, Louisiana, for the purpose of developing and manufacturing Orbiting Scroll Compressors. A238-239. Emerson has continued to make significant capital investments to expand the Alliance facility's manufacturing capability over time. A435 at 43:25-44:16; A436-437 at 55:18-58:6. Lennox and Trane likewise made capital investments in the Alliance plant according to their membership percentages. A437 at 58:10-20.

B. The Supply Agreement.

Both Trane and Lennox entered into separate supply agreements with Alliance.[2] As admitted by Lennox witness Mr. Yarber, it was [redacted]

[2] Trane has always interpreted the minimum purchase obligation to include "all compressor types," not "just scrolls." A447.

[redacted] A429 at 124:23-125:8.

The Lennox Supply Agreement is dated December 31, 1996. A298. It contains a Delaware choice of law clause. A308 at § 12(i).

In prefatory language, the Supply Agreement provides that

[redacted]

A298 (emphasis added). It further provides that [redacted][3] *Id.*

Section 2(a) of the Supply Agreement sets forth the core obligation of the Agreement, requiring Lennox to [redacted] A302 at § 2(a). The term "Target Level" means [redacted]

A301. In other words, it is undisputed that:

[3] [redacted] A300 at 3.

[redacted]

As set forth above, the critical term "Total Usage" is defined as:

[redacted]

A302 (emphasis added). The term "Business" is defined as [redacted]. A299. The current Purchase Commitment Percentage is [redacted] A313.[4]

Finally, and importantly, the Supply Agreement runs for a [redacted]. A306 at § 9(a); A356-357 at § 2.4. This term was essential to Emerson because it provided assurance that Alliance would have a guaranteed long-term customer base that would allow Emerson to recoup its substantial investment, as well as giving up to Lennox and Trane [redacted] of the profits from the sale of compressors from Alliance. A298 (providing that [redacted]

[4] Pursuant to the definition of "Purchase Commitment Percentage" in the Supply Agreement, the obligation has remained at [redacted] since 2002. A301. The fact that the obligation is stated as a percentage of Lennox's needs (rather than as an absolute number) protects Lennox in the event its needs should decline.

[redacted]; A438 at 86:21-88:21; A454 at 98:23-99:19.

C. Lennox's Performance Under the Supply Agreement.

Lennox has continuously purchased scroll compressors from Alliance since Alliance first started production in approximately 1998. A228. [redacted] A440 at 108:4-109:13.

[redacted] A459 at 122:22-125:2; A455 at 153:3-17, [redacted] A465 at 228:5-13. Thus, in January 2016, Alliance requested a Volume Statement from Lennox for Alliance's fiscal year 2015. A470-471. Under the Supply Agreement, a Volume Statement is required to establish whether Lennox is meeting its purchase requirement by evaluating its [redacted] A304 at § 5(a).

However, it was revealed for the first time in this litigation that, instead of Lennox's Total Usage, Lennox's Volume Statement set forth only the *total number of fixed speed scroll compressors* (*i.e.*, the form of compressor manufactured by

Alliance) it had purchased during fiscal year 2015. A430 at 147:6-16. When it provided this Volume Statement, Lennox did not explain that it had *excluded* forms of compressors not manufactured by Alliance—including rotary, reciprocating, and variable speed compressors—from the denominator when providing its Volume Statement. Instead, Lennox misleadingly stated that its "Lennox Purchase Volume" was [redacted] and its "***Lennox Total Purchase Volume***" was [redacted], for a "% of Total" of [redacted] A473 (emphasis added).

In late 2016, Alliance requested a Volume Statement from Lennox for fiscal year 2016. Again, Lennox misleadingly provided a Volume Statement that calculated its compressor purchase percentage using the total number of fixed speed scroll compressors it had purchased as the denominator, rather than its Total Usage as plainly required by the Supply Agreement. Specifically, Lennox reported that its "Purchased volume" from Alliance was [redacted] while its "Total" "Purchased volume" was [redacted], and that its "% of Total" purchased from Alliance was [redacted] just above the [redacted] required under the Supply Agreement. A476. Nothing in the Volume Statement informed Alliance that Lennox was excluding forms of compressors not manufactured by Alliance.

Based on these deceptive assurances, Alliance believed that Lennox was continuing to honor its minimum purchase obligation under the Supply Agreement.

In actuality, Lennox's internal documents show that when all compressor forms in the relevant size range are included in the denominator, Lennox did not meet the [redacted] requirement for fiscal year 2016. *Compare* A476 *with* A480 (October 2016 COSAC Report showing Lennox's "Total" "Emerson %" of [redacted] for fiscal year 2016, *i.e.*, Lennox purchased only [redacted] of its total compressor needs from Alliance for fiscal year 2016). Lennox's internal documents likewise show that it did not meet its minimum purchase obligation for fiscal year 2017 when all compressors in the 1 ½ to 7 ton range are included in the denominator. A482 (October 2017 COSAC Report showing Lennox "Total" "Emerson %" of [redacted] for fiscal year 2017).

In October 2017, Lennox informed Alliance for the first time that, in its view, and contrary to the plain language of the Supply Agreement, "[i]n calculating the annual Total Level, only compressor types that Supplier manufactures are included in Purchasers' calculation of Total Usage." A485; *see also* A489 (Lennox June 2018 letter stating Lennox did not believe "[t]he minimum purchase obligation … include[s] compressors that the Alliance does not manufacture, including, for example, rotary and variable speed compressors").

D. Procedural Background.

The parties engaged in the contractually-mandated dispute resolution process under the LLC Agreement to attempt to resolve this fundamental dispute regarding

Lennox's minimum purchase obligation. On March 5, 2019, one day after the mediators' issuance of a non-binding recommendation, Lennox filed this action seeking a declaratory judgment that its interpretation of the Supply Agreement is correct. On March 7, 2019, Alliance filed an action in the Court of Chancery seeking a declaratory judgment and for breach of contract, for which breach Alliance sought specific performance. The Court of Chancery dismissed that action, holding that it lacked subject-matter jurisdiction because Alliance had not demonstrated that the equitable remedy of specific performance was necessary to redress Lennox's alleged breach. Alliance then filed counterclaims for declaratory judgment, anticipatory repudiation, and breach of contract in this action. On August 10, 2020, the trial court dismissed Alliance's counterclaims for anticipatory repudiation and breach of contract. On March 5, 2021, Alliance moved for summary judgment.

E. The Memorandum Opinion.

After a one-and-one-half hour argument on July 1, 2021, in its Opinion dated October 25, 2021, the trial court granted Alliance's motion for summary judgment, which Lennox now appeals.

The court first held that the Supply Agreement unambiguously defines Total Usage to include all forms of compressors, not only those manufactured by Alliance. Op. 11. In doing so, the court looked to the plain language of the Supply Agreement,

which defines "Total Usage" as [redacted] *Id.* The court rejected Lennox's argument that the parenthetical qualifies the [redacted] reasoning that there is no logical way to interpret the parenthetical to only refer to forms of compressors manufactured by Alliance. *Id.* at 12-13. The court also rejected Lennox's invitation to look to extrinsic evidence to determine that this language is facially ambiguous under well-settled principles of contract interpretation. *Id.* at 14. The court likewise rejected Lennox's contention that Alliance's interpretation is unreasonable and "draconian" in light of other provisions of the Supply Agreement which expressly provide that Lennox's minimum purchase obligation is contingent on Alliance providing compressors that are competitive as compared to other compressors available in the marketplace. *Id.* at 16.

The trial court further held that no latent ambiguity exists in the Supply Agreement. Op. 17. The court reasoned that Lennox had failed to adduce any evidence demonstrating that the language of the Supply Agreement was reasonably susceptible to two or more possible meanings. Moreover, given that the Supply Agreement expressly contemplates compressor technology changing over time, the court reasoned that Lennox's argument that the Supply Agreement's latent

ambiguity only became apparent after new forms of compressors came on the market fails. *Id.* at 18.

Finally, the trial court held that there are no material facts in dispute that would allow a reasonable factfinder to apply the doctrines of waiver, acquiescence, modification, or amendment to alter the requirements of the Supply Agreement. Op. 19. The court noted that the standards for finding these doctrines to apply are exacting, before holding that Lennox had failed to adduce evidence sufficient to support their application here, even considering the evidence in the light most favorable to Lennox. *Id.* at 20. The court observed that the Supply Agreement contains a valid, unambiguous, and enforceable non-waiver clause and expressly prohibits oral modifications or amendments. *Id.* at 21-22.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE SUPPLY AGREEMENT UNAMBIGUOUSLY REQUIRES THAT LENNOX INCLUDE ALL FORMS OF COMPRESSORS IN CALCULATING ITS MINIMUM PURCHASE OBLIGATION.

A. Question Presented.

Whether the trial court correctly held that the Supply Agreement does not suffer from any facial or latent ambiguity regarding its requirement that Lennox is required to consider all forms of compressors in calculating its minimum purchase obligation. Op. 11-19; A275-279; A1004-1016.

B. Scope of Review.

A trial court's decision on a motion for summary judgment is a matter subject to *de novo* review. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005). The Court reviews the interpretation of a written agreement and conclusions of law *de novo*. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. Merits of Argument.

1. The Supply Agreement is Unambiguous on its Face.

Under the plain and unambiguous language of the Supply Agreement, and consistent with Delaware law, Lennox is required to purchase from Alliance [redacted] of

[redacted].

"Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014) (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract." *Salamone*, 106 A.3d at 368 (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997), and *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003)). "Clear and unambiguous language in [a contract] should be given its ordinary and usual meaning." *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Ops. LLC*, 114 A.3d 193, 195 n.9 (Del. 2015). "Contractual terms are not rendered ambiguous simply because the parties in litigation differ concerning their meaning." *Comet Systems*, 980 A.2d at 1030. "Rather, a contract term is ambiguous only when the provisions in controversy are

reasonable or fairly susceptible of different interpretations or may have two or more different meanings." *Id.*

Where contractual language "'is plain and clear on its face, *i.e.*, it . . . conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent.'" *Equity Tr. Co. v. Interactive Brokers LLC*, 2018 WL 1216082, at *3 (Del. Super. Ct. Mar. 6, 2018); *see also Salamone*, 106 A.3d at 368 (when the language of the contract "is clear and unambiguous . . . there is no need to consider any extrinsic evidence"); *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1198 (Del. 1993) (rejecting a party's attempt to use extrinsic evidence to reinterpret the effect of a contract provision when it would "do[] clear violence to the clear meaning of the language selected").

Here, because the language of the Supply Agreement is crystal clear and unambiguous that Lennox must buy [redacted] of its total compressor needs of whatever technology from Alliance, extrinsic evidence cannot create any genuine issue of material fact, and the analysis should end there. As the trial court found, there can be no valid dispute that the words [redacted] in the definition of "Total Usage" plainly and unambiguously include the rotary, reciprocating, and variable speed scroll

compressors that Lennox purchases from other suppliers, as well as any other compressor technologies Lennox may purchase for the Business. Op. 11-13.

Lennox contends that the parenthetical in the definition of "Total Usage" [redacted] somehow limits the definition of "Total Usage" to compressor types manufactured by Alliance, or at a minimum renders the Supply Agreement ambiguous. App. Br. 18-19. But Lennox's preferred interpretation finds no support in the words of the Supply Agreement, and the law does not allow the Court to edit the contract to satisfy Lennox's latest interpretation. *See V&M Aerospace LLC v. V&M Co.*, 2019 WL 3238920, at *5 (Del. Super. Ct. July 18, 2019) ("This Court may not read limitations or language into [the contract] that the parties themselves did not include during drafting."). Nor does Lennox provide any support for its contention that the parenthetical is "ambiguous." App. Br. 19. To the contrary, the parenthetical specifically clarifies that *all* forms of compressors must be considered in determining Lennox's "Total Usage," no matter whether the compressors are [redacted] As noted by the trial court, reading the parenthetical to somehow limit the forms of compressors to only those manufactured by Alliance would require the Court to ignore the plain language of the parenthetical. Op. 12-13.

Lennox's preferred interpretation of the parenthetical, that it "accounts for anticipated changes in Products manufactured by Alliance over the [redacted] term" of the Supply Agreement, App. Br. 20, finds no support in the text of the Supply Agreement and is nothing more than a *post hoc*, litigation-driven reinterpretation of the Supply Agreement's unambiguous definition of "Total Usage."[5] *See Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 WL 3575709, at *42 (Del. Ch. Aug. 13, 2021) (declining to adopt contract interpretation that was "dreamed up after the fact, for purposes of litigation"). Lennox's interpretation also ignores that the parenthetical includes the catch-all "other" to show that the intent was to capture a minimum purchase requirement for all competitive products.

Lennox's claim that its interpretation is correct because the Supply Agreement "expressly contemplates that Products would be [redacted]

[5] Although the Supply Agreement is facially unambiguous and the Court need not consider any extrinsic evidence to determine its meaning, Lennox's preferred interpretation of the parenthetical also cannot be squared with the undisputed facts that (a) the governing Partnership Agreement provides that Alliance's express purpose is [redacted] A940 (emphasis added), and (b) Alliance has only ever manufactured scroll compressors since that time, "meaning that the parenthetical's reference to [redacted] cannot, based on the four corners of the agreement, mean that Total Usage only refers to the compressors Alliance manufactures." Op. 12; *see also infra* pp. 31-34.

[redacted] App. Br. 20, also cannot withstand scrutiny because "Products" is defined as [redacted] A300. Thus, although the Supply Agreement contemplates that Alliance would develop new types of scroll compressors over time, it does not contemplate that Alliance would manufacture anything but scroll compressors.

For Lennox's interpretation of the parenthetical to be correct, the definition of "Total Usage" would need to include the words [redacted] But those words do not appear in the definition of "Total Usage," and the Court should reject Lennox's attempt to impose a limitation that does not appear in the agreed-upon terms of the contract. *See V&M Aerospace LLC*, 2019 WL 3238920, at *5; *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997) ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable.").

Lennox also insists that, under Alliance's interpretation of the definition of "Total Usage," the parenthetical is redundant or superfluous. App. Br. 19. But it is not superfluous to clarify that when the phrase [redacted] was

used it was to be without exclusion for any form of compressor. Moreover, as the trial court recognized, an interpretation that could be construed as redundant is preferable to one that contravenes the parties' expressed intent. Op. 13 (citing *In re IAC/InterActive Corp.*, 948 A.2d 471, 499 (Del. Ch. 2008), and *U.S. W., Inc. v. Time Warner Inc.*, 1996 WL 307445, at *15 (Del. Ch. June 6, 1996)). In any event, here the parenthetical emphasizes and clarifies that ***all*** forms of compressors are to be included in the definition of "Total Usage." That Lennox attempts to interpret this clear language to mean the opposite underscores the absurdity of its position.

Lennox attempts to save its illogical interpretation by pointing to the Supply Agreement's "statement of intent," App. Br. 21-22, but it does not support Lennox's position. The Supply Agreement's prefatory language provides that [redacted] A298. This language is consistent with the definition of "Total Usage": Lennox must purchase "Products" (*i.e.*, scroll compressors) from Alliance at a certain percentage of Lennox's [redacted]

[redacted] and those units can be constructed with multiple forms of compressors, whether or not those forms are manufactured by Alliance.

Lennox attempts to graft on an additional requirement that it is only required to buy "Products" if it has a "need" for that type of compressor. App. Br. 22-23. This interpretation would be correct only if the provision required it to buy from Alliance a certain percentage of Lennox's total ***scroll*** compressors in the 1 ½ through 7 ton size range for use in its [redacted] Lennox's attempt to rewrite the Supply Agreement should be rejected. *See Emmons*, 697 A.2d at 746.

Lennox's convoluted and nonsensical arguments that the phrases "Total Usage" and "total number of compressors" do not mean that Lennox is in fact required to consider its *total* usage of compressors likewise miss the mark. App. Br. 18-19. "Total" is defined as "comprising or constituting a whole; entire."[6] Lennox must consider its "whole" or "entire" use of compressors in the relevant size range when calculating its minimum purchase obligation in accordance with the plain meaning of these words. *See* Lorillard *Tobacco Co. v. American Legacy*

[6] "Total," Merriam-Webster.com Dictionary, last accessed March 5, 2022.

Foundation, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").

Lennox cites other sections of the Supply Agreement, none of which support its position. Lennox vaguely argues that the Supply Agreement's "overall scheme focuses exclusively on Products (compressor types manufactured by Alliance), not the broader compressor market." App. Br. 24. However, Alliance has never argued that Lennox is required to purchase compressors that Alliance does not make. Lennox is required by the plain terms of the Supply Agreement to purchase a minimum number of *Products* made by Alliance to meet its total compressor needs.

Lennox also cites to its obligation to [redacted] App. Br. 24-25. But that language, read in full, provides only that Lennox [redacted] A302. In other words, Lennox is required to use reasonable efforts to comply with the annual business plan it submitted to Alliance. This language has nothing to do with Lennox's minimum purchase obligation.

Section 4(d) of the Supply Agreement also provides Lennox no support. Lennox paraphrases this provision by stating it permits Alliance to [redacted] A304. Lennox says that under Alliance's interpretation, Lennox would be forced "to continue to purchase the same percentage of all its compressors from Alliance no matter how limited the scope of Products manufactured becomes." App. Br. 25. This doomsday scenario relies on a selective reading of the Supply Agreement. Section 4(b) of the Supply Agreement, known as the "competitive clause," provides that Lennox's [redacted] A303. Thus, as found by the trial court, [redacted] Op. 16. In the hypothetical scenario envisioned by Lennox, Lennox would have the ability to suspend its purchase obligation once this contractually-mandated process

is satisfied, meaning that Lennox's contention that "in such event, there is no adjustment to the Purchase Obligation calculation," App. Br. 25, is false.

Lennox claims Section 4(b) "has no application here" because it "plainly contemplates an apples to apples comparison … where both Alliance and its competitors offer the same compressor types, and Lennox seeks to be excused from its Purchase Obligation because Alliance's products are not competitive," App. Br. 26, but this *ipse dixit* argument, unsupported by citation to the record, is contradicted by Section 4(b)'s plain language, which provides that it may apply whenever "Products," *i.e.*, scroll compressors manufactured by Alliance, are not competitive with [redacted] regardless of whether the [redacted] are scroll compressors or another form, such as reciprocating or rotary. There is no requirement in Section 4(b) that the form of compressor must be identical for the provision to apply.[7]

[7] Lennox disingenuously argues that the trial court erred in considering Section 4(b) because the parties "decided to table the Section 4(b) issue while the contract interpretation was addressed." App. Br. 26 n.10. As demonstrated by Lennox's own record citation, what the parties agreed to "table" was the issue of "whether the Alliance is in breach of the [Supply Agreement] … for failure to provide products that are competitive pursuant to the terms of the competitive clause contained in Section 4(b) of the Supply Agreement." A130. Alliance never agreed it would not even refer to Section 4(b) in arguing that its interpretation of the Supply Agreement (and Lennox's minimum purchase obligation thereunder) was correct. Indeed, (Continued . . .)

Finally, Lennox contends that the Supply Agreement "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." App. Br. 27. This is flatly untrue. The Supply Agreement does not make any distinction based on whether a particular form of compressor existed at the time the Supply Agreement was executed; rather, the definition of "Total Usage" includes the catch-all [redacted] to show that the intent was to capture a minimum purchase requirement for all competitive products. Lennox's citation to *Bell Atlantic Meridian Systems v. Octel Communications Corp.*, 1995 WL 707916 (Del. Ch. Nov. 28, 1995), is inapposite because there the issue was whether the contract's reference to "new systems" referred to additional units of existing products or entirely new future products. *Id.* at *7. The court did not hold, as Lennox seems to imply, that contracts cannot be read to refer to or include concepts or items that do not yet exist at the time of contracting as a matter of general contract interpretation.

In sum, the Supply Agreement is facially unambiguous and requires Lennox to buy [redacted] from

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Lennox's argument on this point cannot be reconciled with its own repeated (and correct) contention elsewhere that the Supply Agreement must be considered "as a whole." App. Br. 3, 17, 18, 20, 27.

Alliance. This is true under the key definition of "Total Usage" and supported by the Supply Agreement as a whole.

2. The Supply Agreement Suffers from No Latent Ambiguity.

Lennox presses the argument that the Supply Agreement suffers from a "latent ambiguity" that requires the consideration of extrinsic evidence because "[t]he 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." App. Br. 28. As held by the trial court, this is incorrect. Op. 17-19. The Supply Agreement expressly requires Lennox to purchase a certain percentage of [redacted] by Lennox. In other words, the Supply Agreement does specifically address forms of compressors not manufactured by the Alliance because at the time the Supply Agreement was entered into, Alliance manufactured only scroll compressors in accordance with its express purpose. A341-342.

Further, Lennox misunderstands what constitutes a latent ambiguity. "[A] latent ambiguity is one that appears only as the result of extrinsic or collateral evidence showing that a word, thought to have one meaning, actually has two or

more meanings." *Knight v. Caremark Rx, Inc.*, 2007 WL 143099, at *9 n.46 (Del. Ch. Jan. 12, 2007); *see also* 11 Williston on Contracts § 33:40 at 816 (4th ed. 2003) ("The usual instance of a latent ambiguity is one in which a writing refers to a particular person or a thing and is thus apparently clear on its face, but upon application to external objects is found to fit two or more of them equally."). In *Knight*, the court rejected the plaintiff's argument that "a latent ambiguity arose … as "the sort of end run around unambiguous contracts that the parol evidence rule was created to avoid." *Knight*, 2007 WL 143099, at *10.

Just so here. Lennox fails to demonstrate that the definition of "Total Usage" or that the words [redacted] have some other well understood meaning that has become apparent only recently. Rather, this unambiguous language demonstrates that the parties clearly contemplated the issues of "(1) how should new compressor technology be treated and (2) should compressors not manufactured by Alliance be counted?" App. Br. 28, *at the time of contracting*. As explained by the trial court, "[a] latent ambiguity cannot overcome unambiguous contractual language," Op. 17, and Lennox's contention that a latent ambiguity purportedly arose when it began "purchasing new variable speed technology" is vitiated by the fact that the Supply Agreement itself recognizes that compressor technology would change over the

course of its [redacted] term. A300-301 (definition of "Products"). The mere fact that a dispute did not arise over this issue until 20 years after the Supply Agreement was executed is insufficient to show that it suffers from a latent ambiguity.[8]

As such, the Court should reject Lennox's argument that a "latent ambiguity" exists in the Supply Agreement.

[8] Lennox complains that the trial court erred in concluding that the contract is unambiguous because Alliance purportedly changed its position on whether variable speed compressors counted towards Lennox's minimum purchase obligation. App. Br. 30. As explained below, however, this position is contradicted by the evidence, which shows, at most, that Alliance offered to make a temporary business accommodation in the context of negotiating a separate supply agreement for variable speed compressors. *See infra* pp. 43-47.

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT ALLIANCE'S INTERPRETATION OF THE SUPPLY AGREEMENT IS REASONABLE.

A. Question Presented.

Whether the trial court correctly concluded that Alliance's interpretation of Lennox's minimum purchase obligation under the Supply Agreement is reasonable. Op. 15-17; A279-282; A1013-1016.

B. Scope of Review.

A trial court's decision on a motion for summary judgment is a matter subject to *de novo* review. *AeroGlobal*, 871 A.2d 443. The Court reviews the interpretation of a written agreement and conclusions of law *de novo*. *Schock*, 732 A.2d at 224.

C. Merits of Argument.

1. Lennox's Interpretation Leads to Absurd Results.

As found by the trial court, "Alliance's interpretation is the only reasonable reading of the relevant contractual language." Op. 15. Delaware courts "will reject a party's proffered interpretation of contract language if that construction will yield 'an absurd result or is one that no reasonable person would have accepted when entering the contract.'" *Capella Holdings, LLC v. Anderson*, 2017 WL 5900077, at *5 (Del. Ch. Nov. 29, 2017) (citing *Osborn*, 991 A.2d at 1160).

Since Emerson joined Alliance in 1996, Alliance has ***never*** manufactured anything other than scroll compressors, and there has never been any intention for Alliance to do so. To the contrary, as set forth in the operative LLC Agreement, [redacted] which are defined as [redacted] A356 at § 2.3(a). If compressor forms not manufactured by Alliance were intended to be excluded from "Total Usage," there would have been no reason to refer to [redacted] in the definition of "Total Usage." A302.

Lennox freely admits that, under its interpretation, reciprocating compressors are *not* included in the "Total Usage" denominator because Alliance does not manufacture reciprocating compressors. A496 at 47:19-48:6; A431 at 151:24-152:4. This interpretation cannot be squared with the plain language of the definition of "Total Usage," which expressly states that it includes [redacted] Reciprocating compressors were widely known and used at the time of contracting, and rotary compressors were also a known technology. A432 at 161:3-9; A453 at 70:22-71:18.

Likewise, Lennox admits that under its interpretation, if it were to cease using scroll compressors in its products and were to instead shift entirely to different forms of compressors not manufactured by Alliance, it would not be obligated to buy ***any*** compressors from Alliance. A494 at 30:13-31:10. This amounts to an admission that, under Lennox's interpretation, Lennox can unilaterally nullify any commitment on its part under the Supply Agreement, rendering its obligation illusory. This makes no sense because all these forms of compressors compete in the same market for the same customers for the same applications. A1037 at 32:3-21. Alliance would obviously never have agreed that the critical minimum purchase obligation could be evaded in this simple manner, and the partners would not have made their significant initial and ongoing investments in Alliance if any of them believed such evasion was possible under the contract terms. Lennox, in turn, protected itself by requiring Alliance scroll compressors to be competitive in the market and meet quality assurance standards under Section 4(b) of the Supply Agreement. A304-305 at § 4(b).

As this Court has consistently held, "[c]ontracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'" *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). For example, in *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177 (Del. 1992), this

Court rejected a contract interpretation that led to "wholly illogical results" and would be "totally inconsistent with the parties' agreement." *Id.* at 1182-83. Similarly, in *Seabreak Homeoners Ass'n, Inc. v. Gresser*, 517 A.2d 263 (Del. Ch. 1986), the Court of Chancery rejected a contract interpretation that would "effectively read [express contract language] out of" the contract. *Id.* at 269.

These cases are instructive here. To interpret the Supply Agreement as Lennox does would lead to "wholly illogical results" because it would permit Lennox to buy ***zero*** compressors from Alliance, even though Alliance was formed for the express purpose of providing compressors to Lennox (and Trane). And, Lennox's interpretation would effectively read the words "whether in scroll, reciprocating or other form" out of the definition of "Total Usage" because it would permit Lennox to exclude reciprocating and other forms of compressors from its minimum purchase obligation because Alliance does not manufacture them.

Moreover, Emerson entered into the Alliance based only on long-term, guaranteed purchase levels from both Lennox and Trane. A298; A438 at 86:21-88:21; A454 at 98:23-99:19. Emerson would never have invested hundreds of millions of dollars into Alliance based on a contract interpretation that would allow Lennox, at any time during the [redacted] term of the Supply Agreement, to stop buying compressors from Alliance altogether. Because Alliance never would have accepted

Lennox's proffered interpretation of its minimum purchase obligation at the time the Supply Agreement was entered into, Lennox's interpretation must be rejected. *Capella Holdings*, 2017 WL 5900077, at *5.

2. Alliance's Interpretation is Reasonable.

Lennox insists that it would be "absurd" and unfair to hold Lennox to the bargain it struck when it entered into the Supply Agreement because "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." App. Br. 34.

Lennox's overheated rhetoric ignores the actual provisions of the freely negotiated Supply Agreement, which are not "draconian" or "ludicrous."[9] *See* App. Br. 34, 37. As explained above, the Supply Agreement contains a "competitive clause" at Section 4(b) that allows Lennox to suspend its purchase obligations if Alliance fails to provide Products that are competitive on an overall basis with other

[9] Lennox repeatedly complains of the [redacted] term of the Supply Agreement, *see* App. Br. 33, 34, 37, but nowhere does Lennox argue that it was misled about the length of the Supply Agreement at the time it entered it. As explained above, the [redacted] term was a critical factor in Emerson's decision to enter into and invest in the Alliance. *See supra* pp. 9-10.

compressors available in the marketplace, and it would not be consigned to purchasing subpar compressors for another [redacted] years without any recourse.

Lennox posits a series of strained examples in an apparent attempt to show that Alliance's interpretation "absurdly require[s] Lennox to buy compressors Lennox cannot use." App. Br. 35-36. To the extent Lennox is arguing that the Supply Agreement limits its ability to buy whatever form of compressor it wants without restriction even if Alliance compressors are competitive in the market,[10] Alliance agrees. That is the nature of entering a long-term requirements contract; a party agrees to undertake certain obligations or to forgo certain rights in exchange for receiving benefits it would not otherwise have been able to secure. Lennox's examples also are predicated on the false premise that it has no role in choosing what form of compressor will be used when it "develop[s] new product lines." App. Br. 37. But, of course, Lennox presumably takes into consideration its obligations under all of its contracts, including the Supply Agreement, when it develops new product lines. As such, Lennox's claim that it will be "punish[ed] … for purchasing from

[10] Lennox again argues Section 4(b) "does not apply to compressor types not manufactured by Alliance," App. Br. 37 n.13, even though by its plain language it permits Lennox to assess whether Alliance's compressors are competitive as compared to [redacted] A303.

other suppliers compressor types it cannot get from Alliance," App. Br. 37, is a red herring.

Lennox also ignores that it entered into the Supply Agreement because it needed to ensure a reliable supply of compressors for its manufacturing operations after Trane and Lennox were [redacted] A427 at 26:1-20; A429 at 124:3-125:8 [redacted] The fact that Lennox appears to now regret the contract it willingly entered into is no reason to absolve Lennox of its obligations. *See V&M Aerospace*, 2019 WL 3238920, at *5 ("[T]he court is bound to enforce" the language of a contract, "even if it is one [the defendant] regrets in hindsight.").

III. THE SUPERIOR COURT CORRECTLY HELD THAT THERE ARE NO DISPUTED MATERIAL FACTS TO SUPPORT APPLICATION OF THE DOCTRINES OF WAIVER, ACQUIESCENCE, MODIFICATION, OR AMENDMENT.

A. Question Presented.

Whether the trial court correctly held that 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. Op. 19-24; A283-289; A1018-1024.

B. Scope of Review.

A trial court's decision on a motion for summary judgment is a matter subject to *de novo* review. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005). The Court reviews the interpretation of a written agreement and conclusions of law *de novo*. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. Merits of Argument.

The trial court properly rejected Lennox's argument that the doctrines of waiver, acquiescence, modification, or amendment apply to alter the unambiguous meaning of the Supply Agreement.[11] Op. 19-24.

[11] Because the trial court properly found the Supply Agreement to be unambiguous, extrinsic evidence, including "course of performance" evidence, may not be considered to interpret the intent of the parties. *See, e.g., ITG Brands, LLC v. Reynolds American, Inc.*, 2019 WL 4593495, at *12 (Del. Ch. Sept. 23, 2019) (Continued . . .)

As an initial matter, the proponent of the application of these doctrines is required to satisfy a high evidentiary hurdle. "Waiver is an intentional relinquishment of a known right." *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *7 (Del. Ch. Feb. 18, 1999). "The standards for proving waiver are 'quite exacting,' and the facts relied upon to prove waiver must be unequivocal." *Azadian Group, LLC v. TenX Group, LLC*, 2019 WL 6040299, at *2 (Del. Super. Ct. Nov. 13, 2019). Three elements must be proven before a court "will conclude a party has waived a contractual provision: 1) there is a requirement or condition to be waived; 2) the waiving party knows of the requirement or condition; and 3) the waiving party intended to waive that requirement or condition." *Id.*, 2019 WL 6040299, at *2.

Acquiescence is a "species of waiver." *Frank v. Wilson & Co.*, 9 A.2d 82, 87 (Del. Ch. 1939), *aff'd* 32 A.3d 277, 283 (Del. 1943). "Acquiescence arises where a complainant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; (2) freely does what amounts to recognition of the

("Because the court has concluded from the plain terms of the [contract] that the [at-issue language] supports only one reasonable interpretation and is not ambiguous, course of dealing evidence is irrelevant and may not be considered by the court."). Lennox's suggestions to the contrary should be rejected. App. Br. 38, 44.

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." *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *17 (Del. Ch. Oct. 10, 2006).

As for modification and amendment, Lennox waived these defenses by failing to include them in its Reply and Affirmative Defenses. *See* Del. Super. Ct. Civ. R. 8(c); *Azadian Group, LLC v. TenX Group, LLC*, 2019 WL 6040299, at *2 (Del. Super. Ct. Nov. 13, 2019) (defendants precluded from raising affirmative defenses not raised in their Answer). Lennox claims it was not required to plead them because it is a "plaintiff in a declaratory judgment action," App. Br. 39, but Lennox's claim for declaratory judgment refers only to how the Supply Agreement is to be interpreted in the first instance, not whether it was ever amended or modified. A34-35; *see also* A33 (alleging "Alliance's interpretation of the PSA is wrong").

In any event, the trial court correctly held that these defenses fail on the merits. Op. 22 n.86. "A party claiming modification … must prove the terms of the modification are definite, certain, and intentional; indefinite expressions and mere negotiations for a variance cannot constitute a modification," and "the conduct relied upon must be unequivocal in nature." Op. 22-23 (citing 17A C.J.S. *Contracts* §§ 564, 565).

Here, the trial court correctly held that the record evidence cannot support application of these doctrines under the relevant standards, even "[d]rawing inferences in Lennox's favor."[12] Op. 23. First, as noted by the trial court, the Supply Agreement specifically provides that "[t]he failure or delay by any party in asserting any right hereunder shall not preclude such party from subsequently asserting such right." A307 at § 12(c); *see also id.* ("The waiver of any default or breach hereunder shall not constitute a continuing waiver or the waiver of any subsequent default or breach."). It further provides that "[t]his Agreement may be hereafter amended only by a written document duly executed by each party hereto." *Id.* at § 12(e).

Such "no waiver" provisions give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term … will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable." *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008); *see also AgroFresh Inc. v. MirTech, Inc.*, 257 F. Supp.

[12] Lennox's contention that the trial court improperly weighed the evidence on summary judgment, App. Br. 43, is incorrect. Rather, the trial court held that the evidence could not support application of these doctrines under the applicable, stringent standards, even viewing the facts in the light most favorable to Lennox. Op. 23; *see also* Op. 24 ("At best, Lennox's evidence indicates the parties negotiated for a temporary variance during discussions regarding a separate supply agreement.").

3d 643, 660 (D. Del. 2017) ("In the 'hectic course of day-to-day business,' non-waiver provisions serve an important function, protecting a company against the loss of rights where business people may not have full knowledge of the contract's terms."). "Delaware courts have consistently held that the existence of an express non-waiver provision precludes a contracting party from arguing that the other party's conduct waived a contractual right." *AgroFresh*, 257 F. Supp. 3d at 660 (collecting cases).

In addition, the extrinsic evidence proffered by Lennox is selective and misleadingly cites the record to try to manufacture a genuine issue of material fact sufficient to support application of these doctrines. To support its contention that Alliance has always included only compressor forms it manufactures in determining Lennox's purchase obligation compliance, Lennox misleadingly states that "Alliance independently and accurately tracks Lennox's compressor purchase." App. Br. 11, 29, 43. In fact, as found by the trial court, the undisputed evidence shows that when Alliance tracked Lennox's purchase volumes, it did so using a methodology based on the "total production for the market," including all compressor forms. A508-509; A441 at 138:7-20, 140:7-141:3 [redacted]). And, each of Alliance's deponents, including Karl Zellmer, who oversaw sales from

Alliance from 1998 until his retirement in 2019, as well as Brent Schroeder, the Chairman of Alliance's Management Committee since 2014, testified that it was always their understanding that all forms of compressors must be included in the denominator. A458 at 66:22-67:2; A439 at 104:15-25, A443 at 222:22-223:17.

Contrary to Lennox's contention that "the parties operated for several years with the understanding that compressors not manufactured by Alliance did not count," Alliance did not become aware Lennox was excluding forms of compressors not manufactured by Alliance from its annual Volume Statements until it learned of it during this litigation. *See supra* pp. 10-12. As soon as Alliance became aware that Lennox held a differing view of the Supply Agreement in 2017, it immediately informed Lennox that its interpretation was incorrect. A1043-1044 ("In the future, all variable speed volume should be included in the Lennox 'Volume Statement', per the agreement."). Until that time, Alliance had no reason to believe Lennox interpreted the Supply Agreement other than as required by its clear and unambiguous language, especially when Lennox had submitted misleading Volume Statements that conspicuously failed to explain that Lennox was excluding forms of compressors not manufactured by Alliance.

Lennox selectively cites an email exchange in which a now former Emerson employee, Chris Mays, stated that Lennox's purchases of that volume of "variable

speed" scroll compressors would not count as part of the calculation of the Lennox [redacted] minimum purchase requirement. A499. At the time, Mays was Director of Alliance Sales, but he also sold compressors from Emerson-only plants as well. A462 at 70:2-5, A466 at 230:15-231:11. Mays also stated that "if we manufactured it [*i.e.*, variable-speed scroll compressors] in Alliance in the future, it could be open for consideration at that point." A499. Ignoring the context of this email, which shows that Mays only made this offer in connection with a specific business negotiation of a separate sales agreement, A499-501, Lennox contends this email was a bright-line "interpretation" of the Supply Agreement that only compressors manufactured by Alliance are included in determining Lennox's minimum purchase obligation.

Not so. Mr. Mays' email was not a modification of the Supply Agreement, much less a legally effective one. Mr. Mays testified that he did not at any point offer an interpretation of the contract, but rather a business accommodation for the limited purpose of getting this particular sales transaction done. A466 at 231:17-232:18. Nothing on the face of the email exchange indicates that Mr. Mays was offering Lennox his interpretation of the terms of the Supply Agreement. A499-501.

Moreover, Mr. Mays testified that he offered this business accommodation only because the variable-speed scroll compressors at issue, although not

manufactured by Alliance, *were manufactured by Emerson*. A467 at 234:23-235:22. If Lennox had ever asked if it could exclude forms of compressors not manufactured by Alliance or Emerson, such as rotary compressors, Mr. Mays would have never agreed. A467 at 236:23-237:6. Likewise, if Lennox had ever asked if it could exclude its purchases of variable-speed scroll compressors from another compressor supplier) Mr. Mays would have never agreed. A467 at 235:24-236:21. Ronnie Yarber, Mr. Mays' counterpart at Lennox, admitted that he did not recall anyone at Alliance ever telling him that Lennox's purchases of other compressor types, such as rotary, could be excluded from the minimum purchase obligation denominator. A428 at 91:5-14.

Lennox also selectively cites deposition testimony of Karl Zellmer to the effect that either he or another former Alliance sales representative named Pat Carus told Lennox that Alliance would not count variable speed scroll compressors towards the denominator of Lennox's minimum purchase obligation so long as Alliance did not manufacture variable speed scroll compressors, as an overarching interpretation of the Supply Agreement.[13] *See* App. Br. 1-2, 12, 29, 37, 42 (citing

[13] Lennox also cites an *internal* email sent by Alliance employee Troy Gasper, App. Br. 46, but ignores that when Alliance employee Paul Liddell stated that "[t]he contract explicitly states all forms of compression (include scroll, reciprocating, (Continued . . .)

Zellmer testimony that "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 a readily available commercially viable product, we're going to count it," and that "we can't sell what we don't make."). But Mr. Zellmer never testified that it was Alliance's interpretation of the Supply Agreement that compressors not manufactured by Alliance would not be included in Lennox's purchase obligation calculation. App. Br. 1. Rather, in the context of discussing Chris Mays' 2014 email, Mr. Zellmer repeatedly characterized that discussion "not to count the variable speed compressors towards the minimum purchase obligation as an *accommodation*," not "a changing of the contract" or an interpretation of Lennox's purchase obligations as a general matter. A1047-1048 at 173:15-21, 174:21-23 (emphasis added). Lennox tellingly ignores Mr. Zellmer's testimony elsewhere that Lennox's "minimum buy is … [redacted] of the total compressor usage without any … carveouts," consistent with the Supply Agreement's plain language. A458 at 66:22-67:2.

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etc…)" and asked Mr. Gasper to "[l]et me know if you think otherwise," Mr. Gasper replied "Good response," indicating his agreement with Mr. Liddell's statement. A922.

Finally, the trial court correctly held that Lennox failed to adduce any evidence that any purported modification of the Supply Agreement was supported by consideration.[14] Op. 23. Lennox confusingly claims there was consideration because "Lennox agreed to buy variable speed compressors from Emerson" without citation to any record evidence, App. Br. 46, even though the undisputed record evidence shows that these negotiations were never consummated. A442 at 170:11-25.

[14] Lennox argues the Court should not consider this issue because Alliance did not argue it in the trial court, App. Br. 45-46, but Alliance did repeatedly argue that the negotiation for this separate sales agreement for variable speed compressors was never consummated. *See, e.g.*, A283, A1023, A1078. Even if Alliance had not, the trial court was free to consider this issue *sua sponte*. *See, e.g.*, *West v. State*, 2015 WL 5121059, at *5 (Del. Super. Ct. Aug. 20, 2015) (rejecting argument "that the trial court abused its discretion by applying the law, even though nobody argued that specific law").

CONCLUSION

For the foregoing reasons, the Court should affirm the grant of summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2022, a copy of *[PUBLIC VERISON] Appellee's Answering Brief* was served electronically via File & Serve*Xpress* upon the following counsel of record:

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