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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: April 12, 2022**

APPELLANTS' REPLY BRIEF ON APPEAL

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INTRODUCTION[1]

The parties dispute whether to count compressor types not manufactured by Alliance when calculating Lennox's Purchase Obligation. Lennox has consistently maintained that such compressors do not count, based both on the contract and the parties' conduct and communications. While the contract itself is ambiguous, when read as a whole, the PSA is consistent with Lennox's interpretation. Commercial reasonableness also dictates the same outcome as Alliance's interpretation leads to absurd results. Until recently, Alliance agreed with Lennox. Alliance previously and repeatedly confirmed that it would not count compressor types it did not make unless and until Alliance manufactured them. Aware how Lennox was calculating the Purchase Obligation, Alliance waited years before suddenly reversing position, prompted by decreasing market share and problems with its own compressors. Alliance has since tried to disavow its prior statements and recast its actions, but neither the PSA nor the contemporaneous evidence aligns.

The PSA is intended to supply Lennox with compressors to satisfy its "production needs." But Alliance's interpretation is fundamentally flawed because it would impermissibly force Lennox to buy compressors it does not need and cannot

[1] Terms defined in Lennox's Opening Brief ("OB") shall have the same meaning herein.

use. Alliance's interpretation depends on the erroneous premise that compressors are interchangeable, but the market is highly differentiated and Alliance admits that "specific" compressors are required for "specific" HVAC applications.

Misunderstanding how the PSA operates in practice, the trial court erroneously granted summary judgment for Alliance. The trial court failed to read the contract as a whole, did not reconcile its interpretation with real world results, viewed the evidence in Alliance's favor, and prejudged disputed issues of material fact. This Court should correct these errors and reverse.

ARGUMENT

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

A. The PSA Must be Read as a Whole

It is well settled that a contract must be read as a whole. *Heartland Payment Systems, LLC v. Inteam Associates, LLC*, 171 A.3d 544, 557 (Del. 2017) ("in giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract"); *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corporation*, 206 A.3d 836, 846 (Del. 2019) (courts must give "meaning to each term and avoid[] an interpretation that would render any term 'mere surplusage'"); RESTATEMENT (SECOND) OF CONTRACTS § 203. Alliance does not dispute the law, but ignores these basic principles hoping to salvage its erroneous contract interpretation.

B. The Parenthetical in the Total Usage Definition is Ambiguous

Alliance's insistence that the PSA is clear on its face turns on a single parenthetical phrase, but neither the trial court nor Alliance have a reasonable explanation for the parenthetical. [redacted] A565 (emphases added). Repeating the trial court's error, Alliance

argues the parenthetical is "to clarify" that the phrase [redacted] meant no form of compressor is excluded. Answering Brief ("AB") at 21-22. But that phrase standing alone does not suggest any exclusion or limitation; Alliance merely assumes that it does, but fails to explain how. Redundant, unnecessary language is by definition mere surplusage and, therefore, the parenthetical must mean something else. *Sunline*, 206 A.3d at 846; RESTATEMENT (SECOND) OF CONTRACTS § 203. Moreover, that meaning must harmonize with the rest of the contract.

Alliance further assumes, incorrectly, that the parenthetical refers to compressors manufactured by other suppliers. But the parenthetical's plain language refers only to compressor types. It says nothing about manufacturers and whether it is meant to refer to only Alliance—the only supplier expressly mentioned in the PSA—or other suppliers as well. Alliance contends that for Lennox's interpretation to be correct, the "Total Usage" definition would need to include the words "of the forms manufactured by Alliance." AB at 21. Conversely, for Alliance's interpretation to be correct, the definition would need to include the words "of the forms manufactured by Alliance ***or any other supplier***." Alliance's argument merely underscores that the provision is ambiguous and does not address the compressor manufacturers to be included. The natural reading of the PSA—a

supply agreement with a single supplier, i.e., Alliance—is that it means to refer to Alliance when talking about suppliers, unless indicated otherwise. Here, there is no such indication. If, as Alliance argues, the language of the PSA necessitated that the forms of compressors referenced in the "Total Usage" definition be clarified by a parenthetical, by that same logic, the suppliers of the compressors referenced should also have been clarified, but were not.[2]

C. Alliance Misstates the Minimum Purchase Obligation

Alliance claims that "Lennox must buy [redacted] of its total compressor needs of whatever technology from Alliance … and the analysis should end there." AB at 18. However, the PSA does not say that, nor does Alliance's loose paraphrase make commercial sense. Rather, the PSA provides that Lennox shall purchase [redacted] A561 (emphasis added). The purchase obligation is limited by Lennox's needs for certain sizes and types of compressors. If Lennox needs compressor types or sizes Alliance

[2] Alliance thus argues inconsistently that "total compressors" clearly refers to compressors manufactured by *all* suppliers (even though there is no express language to that effect), but "total compressors" does not clearly refer to *all* forms of compressors absent the parenthetical. AB at 21-22.

does not manufacture, it must buy them from another supplier and those fall outside Lennox's production needs for the "Products."

Alliance's attempts to neutralize this language are unpersuasive. First, Alliance again loosely paraphrases the PSA, contending that [redacted] (PSA language, A561) (emphasis added) means the same thing as [redacted] (Alliance's rewording) (emphasis added). AB at 22. It plainly does not. "Products" does not mean "all compressors," but rather compressors manufactured by Alliance.[3] A563-564.

Second, Alliance asserts, without any support and contrary to the record, that Lennox's HVAC units can be constructed with multiple forms of compressors. AB at 23. However, different compressor types are not interchangeable. Brent Schroeder, Alliance's general manager, admitted that "specific" model heat pumps and air conditioners require "specific" compressors, and explained that one type

[3] Alliance admits that Lennox's interpretation would be correct if the PSA required Lennox to buy from Alliance a [redacted]. AB at 23. The admission is dispositive because that is effectively what the PSA requires. Lennox must [redacted]. If Alliance makes only scroll compressors, "Products" is limited accordingly. If Alliance expands the compressor types it manufactures, Lennox must buy a percentage of that broader group of "Products."

cannot simply be replaced with another. A832 at 131:22-132:15; A835 at 147:10-148:2; A837 at 156:6-16.

D. Alliance Disregards Express Provisions of the PSA

"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). Unable to reconcile its interpretation with the PSA as a whole, Alliance ignores provisions that contradict its misreading. For example, although Alliance acknowledges that the PSA contemplates that the definition of "Products" [redacted] Alliance asserts that the PSA "does not contemplate that Alliance would manufacture anything but scroll compressors." AB at 21. But that is precisely what the PSA provides—the meaning of "Products" may be changed, which is not surprising given the [redacted]. There is simply no limitation that the [redacted] may relate only to scroll compressors.[4]

[4] Elsewhere Alliance asserts that a limitation may not be read into the contract, AB at 19, which is precisely what it attempts here. Alliance conveniently applies the rule only when it fits neatly with its interpretation.

To support this contrived limitation, Alliance and the trial court impermissibly rely on extrinsic evidence, namely that Alliance has only manufactured scroll compressors to date. OB at 19-20. But when the PSA was entered, it was unknown whether Alliance would manufacture only scroll for the next 50 years, and it remains unknown what it will do over the remaining 25 years of the contract. Per the PSA, [redacted] A561 (emphasis added), not to only ever make scroll compressors. As explained, the definition of "Products" contemplates potential changes that may include compressor types other than scroll.

Alliance similarly disregards the contract when addressing the word "total." Alliance resorts to a dictionary definition, AB at 23, but acknowledges that "courts look to dictionaries for assistance in determining the plain meaning of terms *which are not defined in a contract*." *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006) (emphasis added). Here, "total" is part of several defined terms, including "Total Usage," "Total Actual Partner Purchases," "Total Actual Supplier Sales," "Total Compressors Produced," "Total Target Partner Purchases," and "Total Target Supplier Sales," each with a definition unique to this contract. A564-565. Accordingly, the court must look to the definitions in the contract, not the dictionary.

The term "Total Usage" [redacted] OB at 24. The former is a subset of the latter. Total Usage defines the denominator or total for this specific contract. Alliance does not engage on this point at all. Moreover, "total" is used in several other defined terms; in no case does it include compressor types not manufactured by Alliance. *Id.*

E. The PSA's Overall Scheme Is Consistent with Lennox's Interpretation

Alliance's analysis of several other provisions is also misguided. Without explanation, Alliance proclaims that the Product Mix, A565, "has nothing to do with Lennox's minimum purchase obligation." AB at 24. However, "Product Mix" means [redacted] A563 (emphasis added). Accordingly, the Product Mix is directly tied to and a function of the number of compressors Lennox purchases from Alliance. Alliance's effort to divorce these concepts contradicts the PSA's language and overall scheme, which center on the purchase and supply of the defined "Products," not all compressor

types from all suppliers. The trial court likewise failed to consider, as it must, the contract's overall scheme. *GMG Capital*, 36 A.3d at 779.

Alliance also misinterprets PSA Sections 4(b) and 4(d) and improperly links them together. Under Section 4(d), [redacted] A567. Seeking to downplay 4(d)'s significance, Alliance notes that there is a [redacted]. This is consistent with Lennox's interpretation because the purchase calculation (based on compressor types Alliance manufactures) already accounts for what Alliance makes. OB at 25. The calculation is self-correcting and balances the parties' interests. Lennox must buy a certain percentage of the compressors Alliance offers, but Lennox cannot buy from Alliance what Alliance does not make. A881 at 172:9-14. But under Alliance's interpretation, Alliance [redacted] without any adjustment to the Purchase Obligation. The Purchase Obligation is disconnected from the scope of "Products" offered, contrary to the PSA's essential purpose.

Like the trial court, Alliance attempts to explain away Section 4(d) with Section 4(b), but 4(b) does not save Alliance's interpretation. Section 4(b) entitles [redacted]. A566.

Section 4(b) does not [redacted], and there is no language in the PSA stating otherwise. Rather, 4(b) provides for a [redacted]. OB at 26. Alliance contends that 4(b) applies "regardless of whether the [redacted] are scroll compressors or another form." AB at 26. Alliance is wrong.

First, 4(b) does not contain language indicating that it applies to other compressors *regardless of form*.

Second, logic dictates otherwise. Section 4(b) requires a [redacted], but because Alliance does not make certain compressor types, there is [redacted]. OB at 26. Alliance failed to address this point. The same problem applies if Alliance [redacted] under Section 4(d).

Third, Alliance doubles down on the erroneous assumption that compressors are interchangeable. They are not, a fact Alliance understands well and freely admits. *Supra* at 6-7. [redacted] Moreover, 4(b) states that Lennox's Purchase Obligation [redacted]

A566-567 (emphasis added). Thus, 4(b) expressly [redacted].[5]

F. Whether the PSA Includes Future Products Is Ambiguous

Compressor types, like variable speed, which Lennox maintains should not be included in the purchase calculation, were not invented until over 15 years after the PSA was entered. Alliance effectively concedes that the PSA contains no express language including compressors that may be invented in the future. Instead, Alliance points only to the use of the word [redacted] in the "Total Usage" definition. AB at 27. But that language has no clear temporal component and is, at best, ambiguous.

Nor is it the right place to look for an answer to what products are included in the contract. Oddly, Alliance looks at the definition of "Total Usage," instead of "Products." Notably, the "Products" definition does not include future products and is limited to specific compressor types and sizes. While the PSA contemplates

[5] While Alliance's interpretation of Section 4(b) is wrong, the parties' dispute over 4(b) is not ripe and should not have been relied on by the trial court. OB at 26 n.10. Alliance concedes that the parties tabled whether Alliance breached the PSA under 4(b), AB at 26 n.7, and does not dispute that the mandatory DRM has not been satisfied regarding 4(b). The breach claim turns on the proper interpretation of 4(b). Alliance's belated attempt to introduce this separate dispute and end-run around the DRM is improper. Indeed, Alliance's similar efforts to pursue breach claims against Lennox were rejected for this very reason. A215-224. Alliance's 4(b) argument, first raised in its summary judgment reply, has also been waived. *In re Asbestos Litigation*, 2014 WL 7150472, at *1 (Del. Super. Ct. Dec. 4, 2014) (arguments not raised in opening brief are waived) (collecting cases).

possible changes to the "Products" definition, such changes require amendment, confirming that future products were not meant to be included in the original definition. If the PSA did include unknown, future technology from the outset, amendment would be unnecessary and that provision would be superfluous.

Alliance's attempt to distinguish *Bell Atlantic Meridian Systems v. Octel Communications Corporation*, 1995 WL 707916 (Del. Ch. Nov. 28, 1995), is unavailing. Alliance sets up a straw man, stating "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." AB at 27. Lennox neither implied nor said any such thing. *See* OB at 27. The question is not whether a contract could ever include future products, but whether this particular one did. To the extent Alliance suggests that future products are included by default, Alliance is wrong and *Bell* instructs otherwise. Here, as in *Bell*—where the definition of "Products" does not refer to future products and lists specific models—absent amendment, the contract will not be interpreted to include future products. *Bell Atl.*, 1995 WL 707916, at *7. Notably, the court in *Bell* held as it did notwithstanding that the contract at issue referred to "new systems." *Id.* Here, by contrast, there is no language that even arguably incorporates yet to be invented compressor types. The trial court failed to consider this issue at all.

G. Alternatively, the PSA Suffers from a Latent Ambiguity

Alliance and the trial court unduly restrict what constitutes a latent ambiguity and failed to consider evidence revealing one exists. "Latent ambiguity exists where the contract language can reasonably, but not obviously, be interpreted multiple ways." *Motors Liquidation Co., Dip Lenders Trust v. Allianz Ins. Co.*, 2013 WL 7095859, at *4 (Del. Super. Ct. Dec. 31, 2013). Because latent ambiguity manifests when the contract is applied, "the court may look to extrinsic evidence to reveal a latent ambiguity." *Id.* Thus, in *Motors Liquidation* the court held it was "necessary" to look to extrinsic evidence regarding both the negotiation and claims reporting processes in assessing whether there was a latent ambiguity regarding the "occurrence reported" language in insurance policies at issue. *Id.* Here, neither the trial court nor Alliance properly considered the evidence set forth by Lennox, *see* OB at 28-31, and instead relied solely on the contract language. Ex. A at 17-19; AB at 28-30. That alone constitutes error.

Moreover, the trial court's observation that the "Products" definition might be amended due to changing technology, Ex. A. at 18, does not end the analysis because there were no such amendments. Rather, as discussed above, that language indicates future products are not included in the "Products" definition absent amendment.

Either way, the trial court did not address the latent ambiguity regarding whether the PSA includes compressor types manufactured only by Alliance or all suppliers.

Citing the classic, but antiquated, *Raffles v. Wichelhaus* case, the trial court failed to acknowledge other, more applicable fact patterns that can establish latent ambiguities. Ex. A. at 17. Most relevant here, "where a writing contains a reference to an object or thing, such as a pump, and it is shown by extrinsic evidence that there are two or more things or objects, such as pumps, to which it might properly apply, a latent ambiguity arises." *Williams v. Idaho Potato Starch Co.*, 245 P.2d 1045, 1048-1049 (Idaho 1952) (collecting cases); 11 WILLISTON ON CONTRACTS § 33:43. In *Williams*, the contract provided that a well be drilled to accommodate a ten inch pump. The court found a latent ambiguity because "while the contract might have been clear on its face by the use of the general words 'a ten inch pump', … extrinsic evidence … shows that there are at least three pumps, any one of which might properly have been in mind." *Williams*, 245 P.2d at 1048. In *Telephone Interconnect Corp. v. Bunch*, 1982 WL 215188 (Va. Cir. Ct. 1982), the court applied the same reasoning to a supply contract for a "complete Crossbar Telephone System," which it found could refer to multiple systems with different capabilities. Finding "the contract contained a latent incompleteness," the court explained that because the goods falling within the general category referenced in the contract were

not interchangeable, extrinsic evidence should be admitted to determine which specific goods were intended. *Id.* at *2-*3 (collecting cases). Similarly here, the PSA refers to an object or thing—compressors—in general terms, but there are multiple possibilities as to which compressors the parties meant. Moreover, just like in *Williams* and *Bunch*, the various compressors are not interchangeable.

For all of these reasons, the trial court erred in holding that the PSA is unambiguous.

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

It is not credible to suggest that Lennox would have committed to using scroll compressors, an unproven technology at the time, for over half of its production for the next [redacted]. Tellingly, Alliance offers no plausible explanation. It is reasonable that Lennox made Alliance its preferred supplier for scroll.

Alliance argues Lennox's interpretation would lead to absurd results, but Alliance's analysis is built on erroneous premises and belied by the record. *See* OB at 32-37. Alliance repeats that it has only manufactured scroll and, therefore, the reference to [redacted]. AB at 32. However, the inclusion of this reference is not the mystery Alliance makes it out to be. Alliance was originally formed to manufacture both scroll *and reciprocating* compressors. A600 at § 3; A657 at § 1.35; A660 at § 3.3(a); A868 at 72:15-19. When the PSA was entered, and for years after, reciprocating compressors remained the dominant type on the market. A868-869 at 77:16-78:1. The stated purpose of the PSA is for [redacted]. A561, A563-564. These facts are undisputed. If Alliance eventually makes reciprocating compressors, they would be counted.

Alliance incorrectly reads the PSA and "Total Usage" definition as static when it is properly understood as a contract designed to govern a [redacted] in a technological, specialized, and regulated industry.

Alliance also contends (using an extreme hypothetical where Lennox ceases using any scroll compressors) that under Lennox's interpretation, the purchase obligation is illusory. AB at 33. Not so. Lennox is bound to use [redacted] to satisfy the minimum purchase obligation. A565. Moreover, scroll compressors are currently the dominant type, A868-869 at 77:16-78:1, and, thus, the suggestion that Lennox could cease using scroll altogether is absurd.[6] Furthermore, Lennox is not only a party to the PSA, but also a partner in Alliance, with a substantial interest in Alliance's success, a fact Alliance ignores.[7] A951 at §§ 3.1, 3.2; A726 at § 3.1; A729 at § 3.4.

Alliance further asserts that "all these forms of compressors compete in the same market for the same customers for the same applications." AB at 33. That is wrong. Schroeder, Alliance's general manager, explained: the "combination of size

[6] That said, "a buyer may 'reduce his requirements to zero if he [is] acting in good faith.'" *XO Comm., LLC v. Level 3 Comm., Inc.*, 948 A.2d 1111, 1120 (Del. Ch. 2007) (quoting Posner, J.).

[7] Even if the hypothetical were not fatally flawed—it is—because, pursuant to Section 4(d), [redacted], the converse is also true and Alliance could cease manufacturing any compressors, making it a wash.

tonnage and efficiency, and whether it's an air conditioner or a heat pump – those combinations would designate a *unique* application that would require a *specific* compressor." A832 at 132:7-11 (emphasis added). Paul Liddell, Director of Alliance Sales, further testified that HVAC manufacturers use a mix of compressor technologies "[t]o differentiate their products in the market place and within their own product offering." A848 at 98:8-22. Karl Zellmer, Alliance's VP of Sales, agreed that different types of compressors serve different aspects of the HVAC market, which is tiered by efficiency, and that product lines include offerings across the whole range. A863 at 56:1-15. Significantly, Alliance acknowledged that different compressors types are not readily interchangeable. *Supra* at 6-7; A875 at 114:4-21. Alliance's arguments imagine a compressor market that does not exist and conflicts with what Alliance's own witnesses describe.

Nor can Alliance support its assertion that Emerson would not have invested in Alliance under Lennox's interpretation. AB at 33-34. Emerson has invested in multiple manufacturing plants to supply other customers, entirely at its own expense and risk, without the protection of long-term supply agreements. A865 at 63:6-14; A848 at 100:7-16. By contrast, Alliance provided Emerson with an opportunity to substantially increase its market share while splitting the risk and cost with its partners, including Lennox. A868 at 75:2-14.

Unable to challenge the multiple examples posed by Lennox demonstrating how Alliance's interpretation leads to absurd results, OB at 35-37, Alliance attempts to sidestep them entirely with another straw man. Lennox's point is not, as Alliance suggests, that the PSA imposes some restrictions and obligations regarding the type and source of compressors Lennox may purchase. AB at 36. Of course it does, and that is true under both parties' interpretations. The issue is that under Alliance's interpretation it does so in a manner that produces an absurd result, and, therefore, 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); *Axis Reins. Co. v. HLTH Corp*., 993 A.2d 1057, 1063 (Del. 2010).

Alliance does not dispute Lennox's analysis and the consequences that flow from Alliance's interpretation, but instead dismisses them as buyer's remorse. Again, the record proves otherwise. Lennox is one of the founders of Alliance and remains a member to this day. OB at 5-7. Lennox could have, but has not, sought to transfer its interest or terminate the joint venture. A757-780. In fact, even with Lennox purchasing around the minimum, Alliance's plant is near maximum capacity and the members, including Lennox, are investing significantly to expand production. A845 at 74:18-25. Try as it might to paint this as a case of regret, Lennox's actions are not consistent with Alliance's narrative.

Nor does Lennox "complain" about the PSA's [redacted]. AB at 35 n.9. The [redacted] is significant—not problematic—because the [redacted] is critical context when interpreting the contract. Inexplicably, Alliance suggests there is no distinction between a [redacted].

Finally, Alliance relies again on Section 4(b), contending that Lennox will not be forced to buy subpar compressors. AB at 35-36. But that is not the issue. Alliance's interpretation leads to absurd results because different compressor types are not interchangeable and the market is highly varied. *Supra* at 18-19. For the same reason, Alliance's unremarkable observation that Lennox has some control over the products it develops is no answer either. Alliance simply ignores the realities of the compressor market (including the lengthy development process, lack of substitutability, differentiated products, and changing regulations) and basic principles of supply and demand.

Alliance begrudges Lennox's interpretation because it could, in some scenarios, result in a lower Purchase Obligation, but that does not make it unreasonable. Alliance's interpretation, on the other hand, forces Lennox to buy compressors it does not need, which is both contrary to the PSA and per se commercially unreasonable.

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

A. The Court Must Consider Extrinsic Evidence

There is no dispute that when, as here, "the contract is ambiguous … courts must resort to extrinsic evidence to determine the parties' contractual intent." *Sunline*, 206 A.3d at 47; *GMG Capital*, 36 A.3d at 780. Alternatively, even if the PSA were clear, extrinsic evidence is relevant to demonstrate, waiver, acquiescence, modification, or amendment. *See, e.g. Motors Liquidation*, 2013 WL 7095859, at *5. Alliance cites no authority to the contrary. *ITG Brands, LLC v. Reynolds American, Inc.*, 2019 WL 4593495, at *12 (Del. Ch. Sept. 23, 2019) is inapposite as these doctrines were not at issue.

B. There Was No Waiver of Modification and Amendment

Since they were expressly pled, Alliance does not contest that the trial court erred in holding that waiver and acquiescence were waived. As for modification and amendment, they are necessarily part of Lennox's well-pled claim for declaratory judgment. OB at 39. But even if treated as affirmative defenses, Alliance does not claim any prejudice or offer any reason why the liberal rules permitting the assertion of such doctrines should not apply. *Weyerhaeuser Co. v. Domtar Corp.*, 204 F.Supp.3d 731, 737 (D. Del. 2016); *Prince v. Ferritto, LLC*, 2019 WL 5787988, at

*1 (Del. Super. Ct. Nov. 6, 2019); Super. Ct. Civ. R. 15(b). This case should be decided on the merits.

C. Alliance Knew How Many Compressors Lennox Was Buying and From Whom

Contrary to the record, Alliance claims ignorance about how Lennox was calculating its purchase volumes. But multiple Alliance witnesses admitted that they knew, at least as early as 2014, that Lennox was purchasing compressors from other suppliers. A891 at 79:24-80:21; A880 at 168:8-169:10. Moreover, multiple Alliance witnesses testified that they can and do track Lennox's purchase volumes *independent* of information provided to Alliance by Lennox. A873-874 at 101:21-102:16; A850 at 167:20-168:15. As Zellmer explained, "we lay out the entire unitary market, and we see where everybody's market share is … And we – end of the day, all the numbers add up to 100 percent and we're – we think we're pretty darn accurate." A874 at 102:10-16. Alliance does not address this evidence at all. The testimony Alliance does cite—that Alliance evaluated Lennox's purchases based on the total production for the market—is consistent. AB at 42. Indeed, Alliance admits that it knew both what Lennox was buying from Alliance and calculated what Lennox's total volume was for the entire market. A444 at 140:18-141:3.

Accordingly, it is mathematically impossible for Alliance not to have known how Lennox was calculating the minimum purchase volume and which compressors were (and were not) being included. Moreover, such a claim directly conflicts with what Alliance admitted it repeatedly told Lennox: compressors not manufactured by Alliance are not included in the Purchase Obligation calculation. A907; A880-881 at 168:8-170:3, 171:3-8; A887 at 203:9-18. The suggestion, therefore, that Lennox misled Alliance with its volume statements, or could have even tried, is baseless and ignores evidence of what Alliance knew and had told Lennox. It is undisputed that Alliance never sought to audit Lennox's volume statements, notwithstanding Alliance's independent calculations or how close Lennox was to the [redacted], and not even after the dispute was formally raised. A828-829 at 113:17-114:6; A30 at 124:7-125:2; A851-852 at 173:21-174:14. Clearly an audit was unnecessary because Alliance understood how Lennox was performing the calculation and had agreed that is how it should be done.

D. Excluding Compressors Was Not a Temporary Accommodation

Alliance claims the exclusion of compressors Alliance did not manufacture was a temporary accommodation. There is no *contemporaneous* evidence the

arrangement was temporary, conditional, or qualified, and Alliance identifies none.[8] OB at 12, 42-44. 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.

Alliance attempts to downplay Zellmer's testimony, AB at 46. But if Zellmer was simply offering an accommodation, he would have said they were making an exception, not that Alliance does not count compressors, if they don't make them. Similarly, the fact that Gasper acceded to his boss' misleading response, *id.*, does not change the fact that Liddell deliberately disregarded the actual reason variable speed compressors were not counted, i.e., Alliance did not manufacture them. OB at 46. Alliance does not even attempt to explain away other evidence, including Liddell's internal statements and the various events that prompted Alliance's sudden change of position in 2017. OB at 13-14, 46-47. The trial court was obligated, but failed, to view the evidence in the light most favorable to Lennox. *Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 925 A.2d 1255, 1262-64 (Del. 2007).

[8] Speculation that Alliance would have qualified its statements in other hypothetical scenarios, AB at 45, is not proper summary judgment evidence and should be disregarded.

If Emerson were offering an accommodation to close a deal, that would be apparent on the face of the communications. Moreover, Emerson, a separate supplier, had no right to offer an accommodation on behalf of Alliance for the benefit of Emerson. But Emerson representatives, who had dual roles as Alliance representatives, A860 at 39:4-11, 40:2-5; A814-815 at 20:5-24, 23:4-11, could confirm how the PSA operated, which is precisely what they did.

Alliance does not dispute that its statements and actions were deliberate and knowing or that Lennox relied on them. As such, the PSA's no waiver clause does not shield Alliance here. OB at 41-42. As for consideration, it was never contested and thus the trial court erred in ruling on this issue. *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 630 (Del. 2013). Regardless, consideration is irrelevant to the extent Lennox's interpretation is correct or waiver or acquiescence apply. Nor do modification and amendment always require new consideration, including in circumstances present here. OB at 45. If consideration is assessed, it should only be done on a fully developed record.

At best, Alliance argues there is conflicting evidence and, therefore, the trial court erred in granting summary judgment.

CONCLUSION

This Court should reverse the grant of summary judgment and remand this action for further proceedings.

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