

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CamCara, Inc. d/b/a AST Waterjet,	)	Civil Action No. 21-2264
individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	<b>DEFENDANT’S ANSWER, AFFIRMATIVE</b>
	)	<b>DEFENSES AND COUNTERCLAIMS IN</b>
	)	
v.	)	
	)	
Air Products and Chemicals, Inc.,	)	
	)	
Defendant.	)	

Defendant Air Products and Chemicals, Inc. (“Air Products” or “Defendant”) files this Answer with Affirmative Defenses and Counterclaims to Plaintiff CamCara, Inc. d/b/a AST Waterjet’s (“AST” or “Plaintiff”) First Amended Complaint ( “Complaint”).

1. Admitted in part; denied in part. Air Products admits that it manufactures and sells atmospheric gases. It is unknown what “customers” are being referred to in this Paragraph and Plaintiff’s allegations regarding the same are denied.

2. Admitted in part; denied in part. Air Products admits that it enters into contracts with a portion of its customers. It is unknown what “Agreements” are being referred to in this Paragraph and Plaintiffs’ allegations regarding the same are denied. It is further denied that there is uniformity between customer agreements and/or that these agreements support the certification of a class in this action as suggested by this Paragraph.

3. Admitted in part; denied in part. It is admitted that Air Products enters into contracts with a portion of its customers including contracts containing multi-year terms. It is unknown what “Product Supply Agreements” are being referred to in this Paragraph and allegations regarding the

same are denied. By way of further response, this Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

4. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

5. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied. By way of further response, this Paragraph purports to characterize the instant Complaint, which is also a written document that speaks for itself and any characterization of the same is denied.

6. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied. By way of further response, this Paragraph purports to characterize the instant Complaint, which is also a written document that speaks for itself and any characterization of the same is denied.

### **Surcharges**

7. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

8. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. To the extent a response is required, the allegations are denied. This Paragraph purports to refer to written agreements that speak for themselves. Any characterization of the same is denied. It is further denied that Air Products improperly assessed surcharges against AST or any other members of a purported class of customers.

9. Denied.

10. Denied.

11. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

12. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. By way of further response, this Paragraph purports to rely on statutes, which speak for themselves and any characterization of the same is denied.

13. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

14. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. To the extent a response is required, the allegations are denied. By way of further response, this Paragraph purports to quote from statutes, which speak for themselves and any characterization of the same is denied.

15. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

16. Denied.

#### **Removal Charges**

17. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

18. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

### **Parties**

24. Admitted in part; denied in part. It is admitted upon information and belief that AST is a Texas corporation. Air Products further admits that AST was a customer of Air Products and that the parties executed an agreement. Any attempt to characterize the relationship between the parties is denied. By way of further response, the parties' agreement is a written document that speaks for itself and any characterization of the same is denied. Air Products does not know what time period is being referred to in the last sentence of this Paragraph. Thus, to the extent a response to that allegation is required, denied.

25. Admitted in part; denied in part. It is admitted that Air Products is incorporated in Delaware with its principal place of business in Allentown, Pennsylvania. Any attempt by AST to characterize Air Products' business is denied.

### **Jurisdiction and Venue**

26. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

27. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

### **Factual Allegations**

#### **Plaintiff AST**

28. Admitted upon information and belief.

29. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to a written agreement and that AST has attached to the Complaint as “Exhibit 1” a document that AST alleges is the parties’ agreement. However, “Exhibit 1” speaks for itself and any characterization of the same is denied.

30. Denied. This Paragraph purports to refer to written documents that speak for themselves and any characterization of the same is denied.

31. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to an amendment to their written agreement. However, the amendment speaks for itself and any characterization of the same is denied.

32. Admitted.

33. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to a written agreement and amendment thereto. However, those documents speak for themselves and any characterization of the same is denied. It is further admitted that Air Products and AST terminated their contractual relationship. Any characterization of that termination is denied.

34. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to a written agreement. However, that agreement speaks for itself and any characterization of the same is denied.

35. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to a written agreement. However, that agreement speaks for itself and any characterization of the same is denied.

36. Denied. It is unknown what is meant by “did not assess.” Regardless, the allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded. To the extent a response is required, the allegations are denied.

37. Admitted in part; denied in part. It is admitted that AST was sent invoices. However, the invoices are written documents that speak for themselves and any characterization of the same is denied.

38. Denied. Air Products avers that Mr. Woodall was provided with notice and/or an explanation in connection with each Surcharge that was imposed on his account. Specifically, Mr. Woodall was told that, among other things, a nationwide driver shortage was impacting Air Products' delivery costs.

39. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded. To the extent a response is required, the allegations are denied. By way of further response, Air Products lacks knowledge or information sufficient to form an opinion as to the truth of the allegations in this Paragraph and has no idea where this "graph" has originated from or what it is intended to illustrate. Furthermore, Air Products has no idea why AST is focused on these average prices, or this particular time frame, in connection with the instant dispute.

40. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

41. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

42. Admitted in part; denied in part. It is admitted that Air Products and AST are parties to a written agreement. However, that agreement speaks for itself and any characterization of the same is denied.

43. Admitted.

44. Admitted in part; denied in part. It is admitted that AST was sent invoices related to the removal of a 3000L tank utilized for the storage of liquid nitrogen pursuant to the terms of the parties' written agreement. However, the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

45. Admitted in part; denied in part. It is admitted that AST was sent invoices related to the removal of a 3000L tank utilized for the storage of liquid nitrogen pursuant to the terms of the parties' written agreement. However, the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

46. Admitted in part; denied in part. It is admitted that AST was sent invoices related to the removal of a 3000L tank utilized for the storage of liquid nitrogen pursuant to the terms of the parties' written agreement. However, the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

47. Admitted in part; denied in part. It is admitted that AST was sent invoices and that installation costs were amortized pursuant to the terms of the parties' written agreement. However, the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

48. Admitted in part; denied in part. It is admitted that AST was sent invoices and that installation costs were amortized pursuant to the terms of the parties' written agreement. However, the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

49. Admitted in part; denied in part. It is admitted that AST was sent invoices and that installation costs were amortized pursuant to the terms of the parties' written agreement. However,

the invoices and written agreement are written documents that speak for themselves and any characterization of the same is denied.

50. Admitted in part; denied in part. It is admitted that Air Products asserted counterclaims in connection with AST's original complaint in a written document that speaks for itself. Any characterization of the same is denied.

**Defendant Air Products**

51. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied. By way of further response, this Paragraph purports to refer to agreements which are written documents that speak for themselves and any characterization of the same is denied.

52. Denied. This Paragraph purports to refer to "reported financial results" in "publicly reported results," which are written documents that speak for themselves and any characterization of the same is denied.

53. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

54. Denied. This Paragraph purports to refer to a "2019 Annual Report," which is a written document that speaks for itself and any characterization of the same is denied.

55. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.



56. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

57. Denied. This Paragraph purports to refer to “public filings,” which are written documents that speak for themselves and any characterization of the same is denied.

58. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied. By way of further response, this Paragraph purports to refer to agreements that are written documents that speak for themselves. Any characterization of the same is denied.

59. Denied. The allegations in this Paragraph are denied as disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. To the extent a response is required, the allegations are denied. By way of further response, this Paragraph purports to refer to agreements that are written documents that speak for themselves. Any characterization of the same is denied.

**Class Action Allegations**

60. Denied. This Paragraph purports to state the Rule of Civil Procedure pursuant to which Plaintiff is bringing the instant case. No response is required. By way of further response, Air Products avers that class certification should be denied.

61. Denied. This Paragraph purports to state the class of plaintiffs which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. By way of further response, Air Products avers that class certification should be denied.

62. Denied. This Paragraph purports to state the class of plaintiffs which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. By way of further response, Air Products avers that class certification should be denied.

63. Denied. This Paragraph purports to provide information about the class, which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. By way of further response, Air Products avers that class certification should be denied.

64. Denied. This Paragraph purports to provide information about the class, which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. By way of further response, Air Products avers that class certification should be denied.

65. Denied. This Paragraph purports to provide information about the class, which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. To the extent a response is required, Air Products denies that “Plaintiff’s claims are typical of the claims of the [purported] class[.]” By way of further response, Air Products avers that class certification should be denied.

66. Denied. This Paragraph purports to provide information about the class, which Plaintiff hopes to have certified pursuant to Rule 23. No response is required. To the extent a response is required, Air Products lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. By way of further response, Air Products avers that class certification should be denied.

67. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. No response is required. By way of further response, Air Products avers that class certification should be denied.

68. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. No response is required. By way of further response, Air Products avers that class certification should be denied.

69. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. By way of further response, Air Products avers that class certification should be denied.

### **Causes of Action**

#### **Count I**

70. Admitted in part; denied in part. Air Products admits that it entered into a contract with AST, which is a written document that speaks for itself. Any characterization of the same is denied. Air Products lacks knowledge or information sufficient to form a belief with respect to the remaining allegation in this Paragraph as no “class” has been certified. By way of further response, Air Products avers that class certification should be denied.

71. Denied. This Paragraph purports to quote from written documents that speak for themselves. Any characterization of the same is denied.

72. Denied.

73. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

74. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

75. Denied.

76. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. By way of further response, Air Products avers that class certification should be denied.

### **Count II**

77. Admitted in part; denied in part. Air Products admits that it entered into a contract with AST, which is a written document that speaks for itself. Any characterization of the same is denied. Air Products lacks knowledge or information sufficient to form a belief with respect to the remaining allegation in this Paragraph as no “class” has been certified. By way of further response, Air Products avers that class certification should be denied.

78. Denied. This Paragraph purports to quote from written documents that speak for themselves. Any characterization of the same is denied.

79. Denied.

80. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

81. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied.

82. Denied.

83. Denied. The allegations advanced in this Paragraph are legal conclusions to which no response is required, and are therefore denied. By way of further response, Air Products avers that class certification should be denied.

84. Denied.

### **GENERAL DENIAL**

Defendant Air Products further denies any of the allegations in Plaintiff’s Complaint that are not specifically admitted in the responses set forth in paragraphs 1-84.

### **AFFIRMATIVE DEFENSES**

By way of further answer to Plaintiff's Complaint, Defendant incorporates all of the above Paragraphs as though fully set forth at length herein and asserts the following affirmative defenses:

1. Plaintiff's Complaint, and each of its claims individually, fail to state a claim upon which relief can be granted.
2. Plaintiff's Complaint is barred in whole or in part by their failure to comply with one or more conditions precedent.
3. Plaintiff's claims are barred in whole or in part by its material breaches of its agreement with Defendant.
4. Plaintiff's claims are barred in whole or in part because it failed to perform its obligations under its agreement with Defendant.
5. Plaintiff's Complaint is barred in whole or in part by the doctrine of waiver.
6. Plaintiff's Complaint is barred in whole or in part by the doctrine of estoppel.
7. Plaintiff's Complaint is barred in whole or in part by the doctrine of release.
8. Plaintiff's Complaint is barred in whole or in part by applicable statutes of limitations.
9. Plaintiff's Complaint is barred in whole or in part by the doctrine of unclean hands.
10. Plaintiff's Complaint is barred in whole or in part by the doctrine of laches.
11. Plaintiff's Complaint is barred in whole or in part because Plaintiff failed to mitigate any alleged damages.
12. Plaintiff's Complaint is barred in whole or in part because any alleged harm was the result of Plaintiff's own conduct.
13. Plaintiff's claims are barred by the terms of its agreement with Defendant.

14. Plaintiff's claims are barred because all surcharges were permitted by the terms of its agreement with Defendant and were disclosed to Plaintiff.

15. Plaintiff's claims are barred because removal charges and "unamortized or otherwise unrecovered installation costs and expenses" were permitted by the terms of its agreement with Defendant and were disclosed to Plaintiff.

16. Plaintiff's claims are barred because Defendant's amortization of installation costs was reasonable and appropriate.

17. Plaintiff's claims are barred because it has no damages because it has never paid any outstanding invoices related to removal and/or "unamortized or otherwise unrecovered installation costs and expenses".

18. Plaintiff's claims are barred because it never objected to any surcharge or refused to pay the same.

19. There is no basis in law or in fact for Plaintiff to seek recovery of any sum from Defendant.

20. Plaintiff's Complaint is barred in whole or in part because at all times relevant hereto Defendant acted in good faith.

21. The putative class asserted in the Complaint is inappropriate for class certification because there is no ascertainable class.

22. The putative class asserted in the Complaint is inappropriate for class certification because the class is not so numerous that joinder of all members is impracticable.

23. The putative class asserted in the Complaint is inappropriate for class certification because common issues of law and fact do not predominate over individual issues.

24. The putative class asserted in the Complaint is inappropriate for class certification because there is no well-defined community of interest in or commonality between the questions of law and fact involved in this putative class action.

25. The putative class asserted in the Complaint is inappropriate for class certification because Plaintiff's claims are not typical claims of other members of the asserted putative class.

26. The putative class asserted in the Complaint is inappropriate for class certification because a class action is not superior to other methods for fairly and efficiently adjudicating this controversy.

27. The putative class asserted in the Complaint is inappropriate for class certification because neither Plaintiff nor its counsel are able to fairly and adequately protect the interest of all members of the alleged putative class.

#### **RESERVATION OF ADDITIONAL DEFENSES**

Defendant reserves the right to raise any additional defenses, affirmative or otherwise, and any counterclaims which may become apparent through discovery in the course of this action.

#### **COUNTERCLAIMS**

Counterclaim-Plaintiff, Air Products and Chemicals, Inc. ("Air Products"), asserts the following Counterclaims against Counterclaim-Defendant CamCara, Inc., d/b/a AST Waterjet ("AST") by averring as follows:

#### **THE PARTIES**

1. Air Products is a Delaware Corporation with its principal place of business in Allentown, Pennsylvania.

2. Upon information and belief, Counterclaim-Defendant AST is a Texas corporation and has its principal place of business in Grand Prairie, Texas.

### **BACKGROUND**

**A. Counterclaim-Defendant AST Contracts with Air Products for the Provision of Liquid Nitrogen and Subsequently Terminates the Agreement**

3. AST purchased liquid nitrogen from Air Products for approximately five years from March 2015 until March 2020 pursuant to a Microbulk Product Supply Agreement (the “Agreement”).

4. In or around April 2015, AST and Air Products executed an Amendment to the Agreement (the “Amendment”) which, among other things, provided for the installation of a 3000L VHP Liquid Nitrogen Tank. However, although the parties executed the Amendment in or around April 2015—it did not take effect until the 3000L VHP Liquid Nitrogen Tank was installed in or around May 2016.

5. Paragraph 6 of the Agreement provides, among other things, that “[e]ach party shall keep the terms and conditions of the Agreement confidential.” (Agreement at ¶ 6.)

6. Pursuant to the terms of the parties’ Agreement, Air Products provided AST with liquid nitrogen from 2015 until March 2020 when AST terminated the Agreement at the expiration of the initial term.

7. Air Products satisfied its contractual obligations with respect to the provision of liquid nitrogen despite AST’s refusal to maintain more than one storage tank, or an appropriately sized storage tank, on its property for the storage of liquid nitrogen.

8. The storage tank that AST had on its property was unable to accommodate AST’s liquid nitrogen needs routinely necessitating additional deliveries of liquid nitrogen.

9. The Agreement between the parties consists of six master paragraphs and incorporates an additional set of “Additional Terms and Conditions.”



10. Paragraph 6 of the Agreement's Additional Terms and Conditions states that Air Products has the right to invoice AST for certain removal and installation costs:

Equipment. Title, possession, and control of Equipment supplied by Seller shall at all times remain in Seller (unless and to the extent otherwise provided in an Addendum to this Agreement), and Seller shall maintain and repair Equipment in accordance with Seller's standard practice at its expense except for damage caused by Buyer or third parties, which shall be paid for by Buyer. Seller may remove and replace any item of Equipment at its expense, but if relocation, replacement or addition of Equipment becomes warranted due to changes in Buyer's requirements, methods or locations of use, or changes in the Buyer's facilities, Seller may charge Buyer for costs and expenses incurred and/or change the Monthly Charge and Unit Price, and a new initial Term shall begin from the date of first delivery of Product utilizing the relocated, replaced or additional Equipment. **Upon any termination or expiration of this Agreement, Buyer shall pay Seller's costs to remove the Equipment and shall pay Seller's unamortized or otherwise unrecovered installation costs and expenses, if any, and upon Seller's receipt of same, Buyer's applicable Monthly Charge shall cease.**

(Agreement at Additional Terms and Conditions at ¶ 6 (emphasis added).)

11. Paragraph 8 of the Agreement's Additional Terms and Conditions states that Air Products has the right to impose a surcharge:

Surcharges. **Surcharges may be assessed in order for Seller to recover increases in its production or delivery costs** (e.g., increases in the cost of diesel fuel, natural gas and/or electric power, or increases arising out of utility deregulation or change in laws).

(Agreement at Additional Terms and Conditions at ¶ 8 (emphasis added).)

12. Paragraph 9 states, in relevant part, that AST must raise any claims on any invoice within 30 days or those claims are waived:

Invoicing and Payment. Seller may invoice Buyer as each delivery of Product is made, monthly for monthly charges, and as incurred or at Seller's discretion for other amounts owed. All invoices shall be payable date of invoice by credit card, unless agreed by the parties to be payable by direct debit net 30 days. **All claims of Buyer**

**relating to any invoice must be made in writing within 30 days of receipt of invoice or shall be deemed waived.**

(Agreement at Additional Terms and Conditions at ¶ 9 (emphasis added).)

13. The Agreement states that it is the “entire understanding between the parties, superseding any prior agreements” and that it “cannot be revised or amended unless stated in writing and signed by authorized representatives of each party.” (*Id.* at Additional Terms and Conditions at ¶ 6.)

14. Neither Paragraph 6, 8 or 9 of the Agreement’s Additional Terms and Conditions were amended by the parties.

**B. Counterclaim-Defendant AST Receives Notice of Surcharges and Pays All Surcharges Imposed**

15. Air Products invoiced AST regularly for its usage and delivery costs on either a daily, monthly or per trip basis depending on the delivery schedule throughout the duration of the parties’ relationship.

16. Each invoice received by AST reflected the amount of liquid nitrogen being supplied, the unit price of the invoice, a delivery charge, and a hazmat charge.

17. Certain invoices also reflected a “surcharge” as permitted by the express terms of the parties’ Agreement.

18. AST was notified that this surcharge would be imposed pursuant to an email dated April 18, 2018 which stated in relevant part that it was being sent “to provide notice of a product surcharge adjustment.”

19. The email further explained: “The chart below shows the new surcharge rates and effective dates for your account. The significant increase of our distribution costs over the last

twelve months is illustrated in the Bureau of Labor Statistic's LTL and Diesel index values. Be assured we will continue to monitor these costs, and will adjust the surcharge rates accordingly."

20. During the period that surcharges were assessed against AST, other notices were issued, including press releases, which explained that customers in North America would see surcharge adjustments due to increased costs due, for example, to driver shortages and supply chain issues.

21. Furthermore, in 2019 Mr. Woodall contacted his account manager, Diana Naescher, to ask about the surcharges that were appearing on his invoices. In response, he was informed that a nationwide driver shortage was impacting Air Products' costs necessitating the imposition of a surcharge.

22. After receiving this explanation, Mr. Woodall did not otherwise challenge or refuse to pay any of the surcharges.

23. On February 14, 2020, Mr. Woodall appeared to become upset about the cost of removing the 3000L tank that had been utilized to store liquid nitrogen on AST's property and sent Ms. Naescher an email about both the removal costs and the amount of profit that Air Products was allegedly making on his account and mentioning the "35.41% Product Surcharge" that he had been receiving "for the last 12 months."

24. The same day, Ms. Naescher responded and again explained the surcharges, stating, in relevant part: "Surcharges account for the fluctuations in diesel, energy and general distribution such **as with the national driver shortage** or natural disasters." (Emphasis added.)

25. Mr. Woodall did not respond to this email or otherwise challenge or refuse to pay any surcharges.

26. AST paid each invoice which contained a surcharge.

**C. Counterclaim-Defendant AST Terminates the Agreement**

27. On or around February 28, 2017, in response to notice of a rate increase, AST informed Air Products that it was exercising its right pursuant to the terms of the Agreement to shop for a price from another “responsible supplier[.]”

28. Upon information and belief, in an effort to shop for a better price—AST repeatedly shared the Agreement, the Amendment, and the Agreement’s Terms and Conditions with sales people and executives at competitors of Air Products without Air Products’ knowledge or consent.

29. Upon information and belief, AST sent Air Products a copy of an executed contract with another supplier that AST did not actually intend to utilize to buy liquid nitrogen and requested that Air Products’ competitors supply it with illusory offers as part of a scheme by AST to avoid price increases.

30. Eventually, AST informed Air Products that it was going to terminate the Agreement and pursue a cheaper rate with another supplier of liquid nitrogen.

31. Pursuant to Paragraph 6 of the Agreement’s Additional Terms and Conditions:

**Upon any termination of this Agreement, [AST] shall pay [Air Product’s] costs to remove the Equipment and pay [Air Product’s] unamortized or otherwise unrecovered installation costs and expenses, if any . . . .**

(Agreement at Additional Terms and Conditions at ¶ 6 (emphasis added).)

32. Following AST’s termination of the Agreement, Air Products performed certain services, including the removal of the specialized storage tank located on AST’s property.

33. The total cost of the removal and other costs associated with the termination of services to AST was at least \$13,625.95.

34. Air Products sent AST invoices reflecting Air Products’ removal and unamortized costs on July 17, 2020 and October 16, 2020, respectively.

35. To date, AST has declined to remit payment as required by Paragraph 6 of the Agreement.

36. AST's current outstanding obligations to Air Products total at least \$13,625.95 plus any applicable interest.

**COUNT I – BREACH OF CONTRACT**

37. Air Products incorporates by reference the foregoing paragraphs of this Counterclaim as though the same were set forth at length herein and asserts a claim against Counterclaim-Defendant AST for breach of contract.

38. The Agreement is a valid agreement that was entered into between Air Products and AST.

39. Air Products has fully performed all of its obligations under the Agreement, including the removal of specialized storage equipment from AST's property following its termination of the Agreement.

40. Air Products has not breached the Agreement.

41. AST breached its contractual obligations to Air Products, as detailed above, by (among other things) failing to pay costs associated with the removal of the specialized storage equipment from its property following its termination of the Agreement.

42. Despite Air Products' repeated requests that AST honor the provisions of the Agreement, AST has refused.

43. As a direct and proximate result of AST's breaches of the Agreement, Air Products has sustained, and will continue to sustain, actual damages.

**WHEREFORE**, the Air Products demands judgment in its favor and against AST:

- a. For actual damages that Air Products is entitled to recover as a result of AST's breaches, including without limitation costs incurred pursuant to Paragraph 4 of the Agreement's Additional Terms and Conditions;
- b. For incidental and consequential damages as permitted by law;
- c. For interest;
- d. For Air Products' attorneys' fees and costs; and
- e. For all such other relief as this Court deems appropriate.

### **COUNT II – UNJUST ENRICHMENT**

44. Air Products incorporates by reference the foregoing paragraphs of this Counterclaim as though the same were set forth at length herein and asserts a claim against Counterclaim-Defendant AST for unjust enrichment, in the alternative to its breach of contract count above.

45. Air Products conferred a benefit on AST by providing it specialized storage equipment throughout the term of the parties Agreement and by removing that equipment following AST's termination of the Agreement, and AST had knowledge of that benefit.

46. AST voluntarily accepted and retained the benefits described above.

47. AST has been enriched through its use of and access to the specialized storage tank as well as its removal, but has failed to pay for its use or removal.

48. By benefitting from the use of and access to and removal of the specialized storage tank without paying, AST has been unjustly enriched.

49. It would be inequitable for AST to retain the benefit without paying the value thereof to Air Products.

**WHEREFORE**, the Air Products demands judgment in its favor and against AST:

- a. For actual damages that Air Products is entitled to recover as a result of AST's unjust enrichment;
- b. For incidental and consequential damages as permitted by law;
- c. For interest;
- d. For Air Products' attorneys' fees and costs; and
- e. For all such other relief as this Court deems appropriate.

February 24, 2022

Respectfully submitted,

**BLANK ROME LLP**

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