Circuit Court for Montgomery County
Case No. 421796-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 350

September Term, 2018

CRESCENDO BIOSCIENCE, INC.

v.

MESO SCALE DIAGNOSTICS, LLC

Fader, C.J.,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: November 15, 2019

This appeal arises out of a contract dispute between Crescendo Bioscience, Inc. "Crescendo"), appellant/cross-appellee, and Meso Scale Diagnostics, L.L.C. ("MSD"), appellee/cross-appellant. The complicated procedural history of this case will be discussed in detail, *infra*, but can be summarized as follows. In May 2016, MSD filed in the Circuit Court for Montgomery County a complaint against Crescendo alleging breach of contract and anticipatory breach of contract and seeking a declaratory judgment. Crescendo filed a counterclaim and, later, an amended counterclaim. The parties filed cross motions for partial summary judgment which were granted in part and denied in part. Bench trials were held in the Circuit Court for Montgomery County from October 31 through November 2, 2017, and from January 29 through 31, 2018. The court made findings in favor of each party on certain issues and issued declaratory judgments resolving certain contractual disputes and establishing prices for specific goods. The court entered a final judgment in the case on April 4, 2018, and both parties filed timely notices of appeal.

ISSUES PRESENTED

Crescendo presents four issues for our consideration, which we have rephrased as follows:

> I. Whether Crescendo must continue to purchase certain of its requirements from MSD for as long as it has those requirements;
>
> II. Whether Crescendo intended to be bound to purchase supplies exclusively from MSD for the life of Crescendo's sole commercial product;
>
> III. Whether, in making its determination of a "reasonable price" for post-Initial Term purchases, the circuit court erred in excluding material and probative evidence of MSD's costs and profits; and,

IV. Whether Crescendo was entitled to a jury trial for determination of a reasonable price for post-Initial Term purchases.

On cross-appeal, MSD raises the following issue:

V. Whether the circuit court erred in granting summary judgment in favor of Crescendo on MSD's claim for anticipatory breach of contract when there were genuine disputes of material fact as to whether Crescendo repudiated the purchase agreement.

For the reasons set forth below, we shall affirm.

DISCUSSION

MSD is a Delaware limited liability company with headquarters in Rockville, Maryland. It develops and manufactures assays and instruments for measuring molecules in biological samples. At all times pertinent to this case, Jacob Wohlstadter was the President and CEO of MSD and Dr. James Wilbur was the general manager. Crescendo is a Delaware corporation with headquarters in San Francisco, California. It was created in 2007 for the purpose of developing and commercializing the Vectra DA diagnostic blood test, which provides a quantitative measurement of disease activity level in patients diagnosed with rheumatoid arthritis. From the time of its creation until January 2015, William Hagstrom was the President and Chief Executive Officer ("CEO") of Crescendo. Beginning in about 2008, Crescendo began purchasing from MSD the supplies it needed to develop and commercialize the Vectra DA test. MSD invoiced Crescendo for work performed on its behalf and for products and supplies. Ultimately, the parties decided to enter into a more formal arrangement to govern the terms of their business relationship. After negotiations, the parties entered into a Purchase Agreement dated April 2, 2012, which forms the basis of the parties' disputes in the instant case.

A. The Purchase Agreement

The Purchase Agreement, which was signed by Mr. Hagstrom and Mr. Wholstadter, is governed by Delaware law. It sets forth the terms by which Crescendo, the "Customer," would purchase from MSD, the "Supplier," certain specialized plates, diluents, and other materials referred to collectively as "Supplies," that are manufactured by MSD and utilized by Crescendo to perform Vectra DA testing on patient blood samples. The Purchase Agreement's initial term ("Initial Term") was five years, which would "renew automatically for subsequent two (2)-year periods" unless the agreement was terminated. It also contained provisions for certain purchases by Crescendo after the expiration or termination of the agreement.

Two sections of the Purchase Agreement are particularly relevant to the issues before us. Section 3.1 of the Purchase Agreement addressed Crescendo's purchase obligations as follows:

> Purchases. (a) Commencing on the Effective Date, and thereafter during the term of this Agreement, Customer and its Affiliates agree to use exclusively Supplier Technology, Supplies and Products for all of its requirements for the measurement of proteins involving Crescendo Products and Services, including but not limited to those analytes set forth in Exhibit F hereto ("Analytes"). For Customer's Supply requirements other than with respect to the Analytes, Customer shall not be required to use exclusively Supplier's Technology, Supplies and Products if, following a written request from Customer for supplies to enable a particular measurement, (i) Supplier is unwilling to provide such Supplies, (ii) Supplier is unwilling to develop, at Supplier's then current labor and material rates, such Supplies at Customer's sole expense or (iii) the pricing structure set forth in Exhibit C-1 is unavailable for such Supplies. For the avoidance of doubt, Customer is not required to use Supplier's Technology, Supplies and Products in connection with Customer's internal research activities or uses. (b) Customer shall purchase the units of Supply in the quantities and at the prices and in accordance with the payment and delivery terms set forth in Exhibit B hereto

> (the "Guaranteed Purchase"). Customer's Guaranteed Purchase obligations under this Section 3 shall survive any expiration or termination of this Agreement. Customer shall be solely responsible for the cost of and the provision of any Crescendo Material and any replacement Crescendo Material required in connection with the provision of the Supplies hereunder. The prices set forth in Exhibit B, Exhibit C-1 and Exhibit C-2 do not include the cost of such Crescendo Material.

With regard to termination of the Purchase Agreement, § 10.1 provided, in part, as follows:

> After the Initial Term, either party may terminate this Agreement for any reason by providing written notice to the other party setting forth a termination date not less than two (2) years from the date of the notice. Notwithstanding the foregoing or any expiration or termination of this Agreement, Crescendo's obligations under this Agreement, including but not limited to, Section 3.1(a), shall continue indefinitely with respect to Crescendo's requirements for the measurement of proteins with (a) Crescendo Products and Services involving (i) any of the Analytes, (ii) any subset or combination of any of the Analytes, (iii) any Analytes or subset or combination thereof in combination with other analytes or (b) any products and services for which development was initiated by the parties during the Initial Term.

B. Crescendo's Termination of the Purchase Agreement

In February 2014, Crescendo was acquired by Myriad Genetics, Inc. ("Myriad"). In January 2015, Mr. Hagstrom stepped down and Myriad hired Bernie Tobin to serve as the new President and CEO of Crescendo. At that time, because Crescendo was losing money, Mr. Tobin explored ways to help the company become profitable, including the possibility of securing a price reduction from MSD or switching from MSD to an alternative supplier for items needed for the Vectra DA test. Ultimately, Crescendo developed a plan to end its relationship with MSD and to begin purchasing Supplies from one of MSD's competitors, Luminex, which was a supplier to Myriad RBM, a subsidiary of Myriad. By May 2015,

Crescendo had developed a plan that included a 543-day schedule to convert its clinical lab to an alternative platform provided by Luminex. The transition was timed to be finalized before Crescendo ran out of Supplies it had purchased from MSD.

Crescendo and MSD engaged in discussions and negotiations from 2015 to 2016, but were unable to reach an agreement on price for the first two-year renewal term under the Purchase Agreement. In late 2015, Crescendo began warning MSD that if there was no agreement on price, it planned to terminate the Purchase Agreement and use an alternative supplier. Upon learning of Crescendo's intent to switch to an alternative supplier, specifically Luminex, MSD objected on the ground that the planned switch violated § 10.1 of the Purchase Agreement. MSD asserted that it was "the exclusive supplier to Crescendo and that exclusivity survives termination."

By letter dated April 21, 2016, Crescendo notified MSD that it intended to exercise its right to terminate "the Purchase Agreement effective as of April 30, 2018." In its notice of termination letter, Crescendo stated:

> As we have previously informed MSD, Crescendo will provide for the final Guaranteed Purchase volumes for the final 5,000 plates and related supplies as provided for under the Purchase Agreement for the Initial Term. With respect to this final build of 5,000 plates, Crescendo again requests that MSD not produce and invoice Crescendo for diluents which are not necessary for the 5,000 plates as Crescendo has to literally "throw-away" these excess diluents. Thereafter, as additional volumes of Supplies are needed up until the anticipated termination date, Crescendo will reflect those amounts in forecasts and purchase orders under the procedures set forth in the Purchase Agreement.
>
> Finally, please be further advised that starting now and leading up to the termination of the Purchase Agreement in April of 2018, Crescendo will be engaged in extensive preparations to implement an alternative supply of the plates, diluents, reagents and related supplies presently being supplied by

> MSD. As you know, this process could take up to two years, and will involve significant internal expenditures and capital outlays by Crescendo. Accordingly, if MSD contests, for whatever reason, (i) Crescendo's termination notice and the termination date, or (ii) Crescendo's plans for an alternative supply of plates, diluents, reagents and related supplies, please provide Crescendo written notice of such claim in thirty (30) days. Otherwise, Crescendo will rely on your silence as constituting MSD's acceptance of the termination notice and Crescendo's alternative supply of plates, diluents, reagents and related supplies.

C. Underlying Litigation

On May 23, 2016, MSD filed in the circuit court a complaint against Crescendo alleging breach of contract and anticipatory breach of contract and seeking a declaratory judgment. MSD alleged that Crescendo's premature termination of the Purchase Agreement constituted an anticipatory repudiation of the contract. It also asserted that Crescendo breached the contract by failing to negotiate in good faith prices for the period following the initial five-year term of the contract. In addition, MSD alleged that Crescendo failed to abide by post-termination exclusivity obligations included in the Purchase Agreement and sought a declaratory judgment consistent with its other contentions.

Crescendo responded to MSD's complaint by filing an answer, a counterclaim for breach of contract based on an alleged failure to negotiate in good faith regarding a pricing structure for post-Initial Term purchases, a claim based on promissory estoppel, and a request for a declaratory judgment.[1]

First Round of Motions

[1] The Record Extract contains a copy of Crescendo's amended answer and counterclaim, but does not include a copy of the original counterclaim.

MSD filed a motion to dismiss Crescendo's counterclaim, and both parties filed motions for partial summary judgment. MSD argued that the notice of termination could be issued only after the expiration of the Initial Term. Crescendo argued that the notice of termination could be issued at any time, as long as the termination date occurred after the expiration of the Initial Term and was not less than two years from the date of the notice of termination. The parties also raised issues pertaining to Crescendo's obligation under §10.1 to purchase certain Supplies after termination of the Purchase Agreement and each party argued that the other had failed to negotiate in good faith.

Following a hearing on the motions, on January 13, 2017, based on the unambiguous language in §10.1, the circuit court determined that Crescendo's notice of termination letter properly terminated the Purchase Agreement and did not constitute a breach of contract. The court explained its holding as follows:

> Meso Scale contends that the earliest date a party could provide notice of its intent to terminate the Purchase Agreement is at the conclusion of the Initial term, on April 2, 2017. In other words, in its view, any notice given before that date is both ineffective and an anticipatory breach of the contract. That reading, however, would make the Purchase Agreement a contract for a minimum of seven, not five years. This is because the effective date for a no-cause termination must be at least two years after notice is given. Under settled Delaware law, a court "will not destroy or twist [contract] language under the guise of construing it." [quoting *Lazard Technology Partners, LLC v. Qinetiq North America Operations LLC*, 114 A.3d 193, 195 n. 9 (Del. 2015)]. There is no temporal limitation in Section 10.1 as to when a notice of termination without cause may be sent. The only limitation in the plain language of the contract is when the termination becomes effective. The contract language says quite clearly that "a termination date" may not be "less than two (2) years from the date of the notice." Thus, it is the termination date, not the date a notice is issued, that must be . . . two years in advance.

(Footnotes omitted).

With regard to MSD's contention that, under § 10.1, Crescendo had an obligation to purchase certain Supplies from it even after termination of the Purchase Agreement, for as long as Crescendo produced the Vectra DA test, the court denied "summary judgment to either party on this issue, in favor of a fuller exploration of the facts germane to this portion of the Purchase Agreement." (Footnote omitted). Similarly, with respect to each party's argument that the other had failed to negotiate in good faith, the court determined that there were disputes of material fact that could not be resolved on summary judgment.

The court addressed the motion to dismiss Crescendo's counterclaim as follows:

> In count one of the counterclaim, Crescendo alleges that Meso Scale demanded unreasonably high prices for supplies to be sold after the Initial Term, "even though the market price for such Supplies, was dramatically lower that [sic] even the Initial Term prices." According to Crescendo, Meso Scale "refused to negotiate a market rate price because it wanted to extract an onerous premium from Crescendo . . . ." Crescendo also alleges that that [sic] Meso Scale orally agreed to reduce the minimum quantity of certain supplies for 2016, and then reneged on that agreement.
>
> Meso Scale challenges count one on two principal grounds. The first contention is that damages are not pleaded sufficiently. The second is that the contract cannot be modified orally because the Purchase Agreement requires that modifications be written.
>
> The court agrees that Crescendo has insufficiently pleaded its damages claim regarding post-Initial Term prices. Simply alleging that Meso Scale wanted prices that were "too high" does not put the opposing party on sufficient notice of what is being claimed. For this reason, count one will be dismissed, with leave to amend.
>
> The portion of count one that alleges an oral agreement will not be disposed of on a motion to dismiss. The Purchase Agreement's clause as to written modifications is plainly drafted precisely to avoid what Crescendo claims to have occurred in this case. Nonetheless, Delaware adheres to the rule that even clauses of this type may be waived by the conduct of the parties. Whether such a waiver can be established factually cannot be resolved on a motion to dismiss.

> Count two is a claim for promissory estoppel. Quasi-contract remedies are not available under Delaware law when there is an express contract, the subject matter of the dispute is covered by that contract, and any harm may be address [sic] by reference to the law of contract damages. As a consequence, count two of the counterclaim, which pleads promissory estoppel will be dismissed, without leave to amend, as the Purchase Agreement completely covers the claim that it purports to assert.

Second Round of Motions

Subsequent to the court's ruling, Crescendo filed an amended answer and counterclaim asserting a claim for breach of contract based on MSD's alleged failure to adhere to an oral agreement to reduce the minimum purchase requirements for certain Supplies. Crescendo also sought a declaratory judgment, asking the court to declare that: its notice to terminate the Purchase Agreement was valid; MSD breached the Purchase Agreement by refusing to negotiate in good faith with regard to the pricing for Supplies after the Initial Term; Crescendo was relieved of its obligation to purchase Supplies from MSD exclusively; even if MSD did not breach the Purchase Agreement, Crescendo negotiated in good faith with regard to the pricing for Supplies after the Initial Term and, because the parties could not agree on material pricing terms for the purchase of Supplies, Crescendo was relieved of its obligation to purchase Supplies from MSD exclusively; the Purchase Agreement was terminated as of April 30, 2018 and Crescendo was not required to purchase any Supplies from MSD after that date; and, MSD reneged on its promise to amend the Purchase Agreement so as to reduce Crescendo's minimum purchase requirements for certain Supplies and, in doing so, breached the Purchase Agreement.

Both parties again filed motions for partial summary judgment on the complaint, and MSD filed a motion for partial summary judgment on Crescendo's amended counterclaim. The principle contentions in the cross-motions for partial summary judgment involved whether the Purchase Agreement bound Crescendo to an indefinite and exclusive contract to continue to purchase certain Supplies from MSD, whether Crescendo breached that exclusivity agreement, and whether either party acted in bad faith when negotiating for a specific pricing schedule.

A motions hearing was held on October 10, 2017. In a written memorandum and order filed on October 16, 2017, the court denied summary judgment "on any issue related to the post-termination exclusivity of the contract[,]" on the ground that "the intention of the parties remain[ed] unclear even after the presentation of voluminous extrinsic evidence." The court also denied summary judgment with respect to alleged oral modifications of the Purchase Agreement. The court concluded that the contract provision at issue, § 10.1, was ambiguous and a trial was necessary to determine the intent of the parties. Lastly, the court rejected MSD's contention that Crescendo anticipatorily repudiated the Purchase Agreement with respect to post-termination purchase obligations and held that Crescendo's notice of termination of the Purchase Agreement "did not reach to the level of an unequivocal and unconditional statement that [it] would not perform its post-termination contractual obligations."

Both parties filed motions for reconsideration. After a hearing on October 18, 2017, the court took under advisement MSD's argument with respect to oral modification of the Purchase Agreement. With respect to all other issues raised, the court denied the motions.

Bench Trial on Parties' Intent

A bench trial was held from October 31, 2017 through November 2, 2017 to determine the parties' intent with respect to the post-Initial Term provisions of § 10.1 of the Purchase Agreement. A number of individuals, including but not limited to, Dr. Wilbur, Mr. Hagstrom, Mr. Wohlstadter, and Mr. Tobin testified at trial about the negotiations and draft agreements leading to the execution of the Purchase Agreement on April 2, 2012. We shall discuss their testimony, as necessary, when we address the issues presented. It is sufficient to note here that the evidence presented at trial showed that, in negotiating the Purchase Agreement, Crescendo desired to obtain a stable supply of Supplies at fixed prices. MSD was interested in sharing in Crescendo's success with respect to Vectra DA, and made its interest known to Crescendo. It was concerned about spending time and resources on a start-up company like Crescendo and, subsequently, being dropped when Vectra DA became commercially successful. Because MSD was concerned about exclusivity, it was interested in various ways in which it could share in the success of Vectra DA, such as obtaining a board seat, an equity position in Crescendo, or a royalty arrangement. Crescendo understood MSD's desire to participate in the success of Vectra DA, but it was unwilling to give it equity or a seat on its board due to its commitments to its venture capital investors. As negotiations proceeded, Crescendo understood that MSD would not move forward without some means of sharing in Crescendo's success. Eventually, MSD insisted on the inclusion of § 10.1 in the Purchase Agreement and made clear that it would not execute the agreement without that provision. Crescendo argued that it bargained for a transaction from which it could exit, that Mr. Hagstrom did not

understand that § 10.1 obligated Crescendo to purchase certain Supplies from MSD even after the Purchase Agreement was terminated, and that Crescendo never intended to bind itself to a deal with MSD after the Purchase Agreement was terminated.

In a written memorandum and order filed on December 6, 2017, the court determined that the parties intended their relationship to continue after an event of termination, that Crescendo had post-termination obligations to MSD under the Purchase Agreement, that the provisions of §10.1 were not terminable at will, and the contract was neither illusory nor unenforceable for lack of mutuality of obligation or consideration. In reaching those decisions, the court credited the testimony of Dr. Wilbur "regarding the content of the negotiations that led up to the signing of the Purchase Agreement, and the inclusion of Section 10.1." Specifically, the court credited Dr. Wilbur's testimony that "he told Mr. Hagstrom what Section 10.1 meant and, that without this provision, MSD would not sign the agreement." The court rejected Mr. Hagstrom's testimony that he "did not understand section 10.1 to mean that Crescendo was obligated to purchase proteins from MSD" after the Purchase Agreement was terminated, stating that "Crescendo's contentions that Hagstrom did not understand Section 10.1, and that Wilbur somehow failed to discuss it with him in sufficient detail, strain credulity." (Footnote omitted). According to the court, "Hagstrom knew quite well what [Section 10.1] meant and why MSD insisted that it be in the Purchase Agreement." In support of that finding, the court explained:

> Notably, Crescendo's own Vice President of Laboratory Operations, Dr. William Manning understood that post-termination, Crescendo was still obligated to use MSD as the supplier of proteins for Vectra DA. The court finds that although Hagstrom did not like Section 10.1, he made the business decision to bind Crescendo to its terms rather than to begin a search for a new

> platform and new supplier. Hagstrom could have walked away but, the court finds, he elected not to do so, knowing full well of the consequences of signing the Purchase Agreement with Section 10.1 intact. The court finds that the final version of Section 10.1 represents a business compromise by the parties. The December 23, 2011 draft of the contract reflected broader indefinite exclusivity. This was narrowed considerably in the final agreement that was signed by the parties.

(Footnotes omitted).

The court rejected Crescendo's argument that the law disfavors contracts of indefinite duration and that, if § 10.1 was considered to be such a contract, it was terminable at will. The court explained:

> The court finds that Hagstrom knew that [§ 10.1] was in the contract and that he knew what it meant at the time he signed the contract. The Purchase Agreement, the court finds, was designed to ensure that Crescendo had a reliable source of supply so that it could successfully launch and then market Vectra DA over the long term. It also was designed to ensure that MSD would participate in any upside if Vectra DA were commercially successful, and not be kicked to the curb once the product had gained traction in the marketplace. The post-termination requirements portion of Section 10.1, the court finds, was a central element of the bargained for exchange and a material part of the overall agreement. It is a cardinal principle of construction that a contract should be read to give effect to all of its provisions and not to render any part of it ineffective. To read the Purchase Agreement in the manner suggested by Crescendo, would render the fourth clause of Section 10.1, and a central tenant of the parties' bargain, largely meaningless.

(Footnotes omitted).

With respect to whether § 10.1 of the Purchase Agreement was a contract of indefinite duration, the court concluded that it was not because the language limited the duration of the agreement to the time period when Crescendo has "requirements for the measurement of proteins." The court explained:

> In other words, under Section 10.1, if Crescendo no longer has requirements for the measurement of proteins because it is no longer selling Vectra DA, it no longer has any obligation to purchase products from MSD. This is clearly a limit that makes the contract a valid requirements contract under Delaware law, and not one of "infinite duration."

(Footnotes omitted)

The court concluded:

> In summary, the court finds that the parties intended Crescendo to continue to purchase from MSD supplies for the measurement of proteins for Vectra DA, and for any test developed by Crescendo which uses any of the Analytes that was developed by Crescendo during the Initial Term of the Purchase Agreement. This obligation is a classic requirements contract, meaning that Crescendo has the obligation to meet its requirements from MSD as long as it has those requirements.

The court also rejected Crescendo's argument that the Purchase Agreement was not enforceable because no price had been specified with regard to post-termination purchases. Although the court recognized that the Purchase Agreement was silent as to price, it found that the parties "intended to have contractual rights and obligations, post-termination" and intended to conclude the contract without having the issue of price settled. In addition, the court rejected Crescendo's argument that the post-termination obligations were unenforceable because MSD had the right to reject unilaterally any of its purchase orders. The court found that the Purchase Agreement did not confer such a right on MSD and the parties had intended to be bound once an order was placed.

Several days after the court's decision, Crescendo voluntarily dismissed with prejudice count one of its amended counterclaim, which alleged that MSD reneged on its agreement to reduce the minimum purchase requirements required by the Purchase Agreement.

Bench Trial on Post-Termination Pricing

A second bench trial was held to determine the post-termination pricing structure. Crescendo requested a jury trial, which MSD opposed on the ground that the parties sought only declaratory relief and not monetary damages. The court denied Crescendo's request for a jury trial and a bench trial was held from January 29-31, 2018.

In its written memorandum and opinion, filed on February 22, 2018, the circuit court thoroughly summarized the parties' positions with respect to post-termination pricing:

> Now, under Count III of its complaint, MSD has asked the court "to declare that the pricing for Products and Supplies following the Initial Term, including following any valid termination, be no less than that set forth in Exhibit C-1 to [the] Purchase Agreement, with an annual increase of: (a) one percent; or (b) the percentage increase in the Consumer Price Index over the previous year, whichever is greater." Exhibit C-1 set out the prices that the parties agreed would be paid under the Purchase Agreement for purchases over and above the "Guaranteed Purchases" Crescendo agreed to make during the term of the contract. In other words, the parties had agreed in advance to the prices Crescendo would pay if, during the term of the contract, Crescendo needed additional Supplies. In MSD's view, the prices listed in Exhibit C-1 is a proxy for a reasonable price of Supplies post-termination.
>
> Crescendo disagrees, and contends that the prices stated in the Purchase Agreement are irrelevant because the agreement has been lawfully terminated. According to Crescendo, if a price is to be set, it must be the reasonable market price, or the fair market value of the Products and Supplies, at the time and place of delivery, and not the prices set back in 2012 when the Purchase Agreement was signed. The relevant time and place of delivery will be well after the contract has been terminated, so Crescendo argues that the contract prices are not germane.
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> According to Crescendo, it can, in the near future, create a measurement platform for Vectra DA using a technology licensed from Luminex at a price-per sample of $25, or $1,000 per kit. Crescendo asked this court to use its pricing for the build-out of the Luminex platform as the reasonable price. MSD disagrees because, among other reasons, Luminex is simply not a drop-in replacement for the MSD platform and Crescendo's proposed pricing is not market-based. MSD also asserts that, apart from a

> conditional contract with Luminex on royalty payments, the price of Crescendo's Luminex platform is wholly speculative, being based largely on intra-company discounts and other non-market pricing.

(Footnotes omitted).

The court determined that Vectra DA was "a unique product" because the testing platform for Vectra DA was the only one commercially available. It rejected Crescendo's argument that the Luminex platform could be used to determine a reasonable market price at the time and place of delivery because that platform was not commercially viable. The court also rejected testimony by Crescendo's witnesses concerning an arm's-length negotiated price for Luminex supplies to run the Vectra DA test, finding that Crescendo attempted to leverage MSD into lowering its prices by constructing a hypothetical Luminex price that had "nothing to do with a free market price or a reasonable market price." Relying on § 2-305 of the Uniform Commercial Code ("UCC"), codified in Delaware as 6 Del. C. § 2-305[2], the court concluded that "the only cogent evidence of a reasonable market

[2] Delaware has adopted and codified UCC § 2-305 in Title 6, § 2-305 of the Delaware Code, which provides:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
> (a) nothing is said as to price; or
> (b) the price is left to be agreed by the parties and they fail to agree; or
> (c) the price to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
> (2) A price to be fixed by the seller or by the buyer means a price for him or her to fix in good faith.
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

price in this case is the actual prices that MSD has charged, and Crescendo has paid, for Products and Supplies over the life of their relationship." The court considered evidence of comparable products sold by MSD and a pre-trial market study price analysis conducted by Crescendo which showed pricing consistent with what MSD was charging under the Purchase Agreement. From that evidence, the court found as follows:

> For the reasons discussed above, the price for products is determined to be the list price, minus 20%, as described in § 2.1 of the Purchase Agreement. For hardware and maintenance, the price is the list price minus 10%, as described in § 2.1 of the Purchase Agreement. For Supplies, the pricing is that contained in Exhibit C-1 to the Purchase Agreement for non-forecasted excess purchases and the pricing contained in Exhibit C-2, for forecasted, firm commitment purchases. The court is not persuaded that any automatic price adjustment mechanism, such as the Consumer Price Index, is appropriate in this context.

On March 15, 2018, the circuit court entered a declaratory judgment setting forth the prices determined at trial. In another declaratory judgment, entered on March 28, 2018, the court declared:

> That the obligations under the Purchase Agreement, pursuant to Section 10.1, are not terminable at will and shall continue for as long as Crescendo has requirements for the measurement of proteins with Crescendo Products and Services involving any of the Analytes, any subset or combination of any of the Analytes, and any analytes or subset or combination thereof in combination with other analytes.

Several days later, on April 4, 2018, the court entered final judgment.

> (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

DISCUSSION

I.

Crescendo contends that the Purchase Agreement did not impose any enforceable post-termination obligations on it, but even if it did, those obligations were "indefinite" in duration and, therefore, terminable at will. We disagree and explain.

In the case at hand, we look to Delaware law to determine the parties' obligations under the Purchase Agreement. Under Delaware law, we start with the text of the parties' Purchase Agreement. *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003) ("The [contract] analysis starts with the language[.]"). We interpret the parties' agreement "as a whole" giving effect to "each provision and term . . . so as not to render any part of the contract mere surplusage[.]" *Osborn ex re. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) (quoting *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 395-96 (Del. 2010)). We "will not read a contract to render a provision or term meaningless or illusory." *Id.* at 1159-60. To aid in the interpretation of the text's meaning, "Delaware 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." *Id.* (quotations omitted). "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions," without resort to extrinsic evidence. *Id.* at 1159-60. "When a contract's plain meaning, in the context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, courts may consider extrinsic evidence to resolve the ambiguity." *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014)(citing *In re IBP, Inc.*

S'holders Litig., 789 A.2d 14, 55 (Del. Ch. 2001)). Under Delaware law, we review *de novo* the trial court's findings of law with respect to a contract's ambiguity. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). *Cf. Towson Univ. v. Conte*, 384 Md. 68, 78 (2004) ("The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law, subject to *de novo* review.").

Crescendo maintains that the trial court's determination that its "post-termination obligations will continue for as long as it has requirements for the measurement of the thirteen Analytes identified in the Purchase Agreement, was incorrect as a matter of law." Crescendo points to the use of the word "indefinitely" in § 10.1 of the Purchase Agreement and argues that it was not ambiguous as applied to a period of time. Relying on UCC § 2-309(2), codified in Delaware at Title 6, § 2-309(2) of the Delaware Code[3], and numerous cases dealing with contracts that were indefinite in duration, Crescendo asserts that the agreement was indefinite in duration, that its "post-termination obligations continued only with respect to the listed Analytes, and they continued only until terminated at will by one

[3] Title 6, § 2-309 of the Delaware Code provides:

> (1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.
> (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

party or the other." According to Crescendo, if the parties had intended that Crescendo's post-termination obligation to purchase certain items from MSD would continue for "as long as it has those requirements," they could have added such language to the Purchase Agreement in place of the word "indefinitely." Crescendo goes to some length to distinguish between the words "shall continue indefinitely," which describe the duration of its obligations, and the phrase beginning "with respect to," which it argues describes the nature or scope of its obligations. We are not persuaded.

The trial court properly determined that § 10.1 of the Purchase Agreement was ambiguous, denied summary judgment, and determined that a trial was necessary to determine the parties' intent. *See e.g. AIU Ins. Co. v. Philips Elecs. N. Am. Corp.*, No. CV 9852-VCS, 2018 WL 367849, at *7 and n.56 (Del. Ch. 2018)(court may, in its discretion, deny summary judgment so it may inquire into or develop more thoroughly the facts at trial in order to clarify the law or its application).[4] As we have already recognized, under Delaware law, a contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Salamone*, 106 A.3d at 374. Here, the use of the words "shall continue indefinitely" could have more than one possible meaning depending on the context in which they are used and reading the Purchase Agreement as a whole does not definitively resolve that issue. In fact, Mr. Hagstrom acknowledged that fact when he testified that he told Dr. Wilbur the language in § 10.1 was ambiguous. In addition, as the trial court

[4] Although *AIU Ins. Co. v. Philips Elecs. N. Am. Corp.* is an unreported decision, it is considered precedent under Delaware law. *See* Del. Sup. Ct. Rule 17(a) and Rule 14(b)(vi)(B)(2) & (g)(ii).

recognized, although under Title 6, § 2-305(1) of the Delaware Code, the court could fix a reasonable price for post-termination purchases, it could do so only if the parties intended to conclude a contract for sale without settling on a price. Like the trial court, we agree that the Purchase Agreement was ambiguous with respect to Crescendo's post-termination obligations.

After taking evidence of the parties' intent, the trial court also considered all of the provisions of the Purchase Agreement. *In re: Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56-57 (Del. 2019)(citing *Osborn*, 991 A.2d 1153, 1159 (Del. 2010)). Doing so led the trial court to the conclusion that the phrase "shall continue indefinitely" is modified by the language "with respect to Crescendo's requirements for the measurement of proteins[.]" If read as Crescendo suggests, the second passage would effectively be ignored. Moreover, read in the context of the parties' agreement, it is clear that Crescendo's obligation was conditioned on its requirements for the protein measurements for the Vectra DA test. Thus, the express condition to purchase certain items is not one of indefinite duration because it terminates when Crescendo no longer has requirements for the items with respect to Vectra DA.

Contrary to Crescendo's assertion, the agreement is not terminable at will. On that point, Crescendo's reliance on *Jesperson v. 3M*, 700 N.E.2d 1014 (Ill. 1998), is misplaced. In that case, the parties' agreement provided that it "shall continue in force indefinitely" unless terminated by a material breach. *Jesperson*, 700 N.E.2d at 1016. The court in *Jesperson* determined that the parties had failed to agree on the contract's duration and, as a result, the agreement was terminable at will. That is not the case here. The circuit court

did not substitute its own judgment for the parties' intent, but rather implemented the parties' intent as evidenced by both the express provisions of §10.1 and the evidence presented at trial.

The evidence presented at trial, which included the various draft agreements proposed by the parties, supported the trial court's finding that the Purchase Agreement

> was designed to ensure that Crescendo had a reliable source of supply so that it could successfully launch and then market Vectra DA over the long term. It was also designed to ensure that MSD would participate in any upside if Vectra DA were commercially successful, and not be kicked to the curb once the product had gained traction in the marketplace.

The circuit court found that the post-termination requirements portion of § 10.1 was "a central element of the bargained for exchange and a material part of the overall agreement." There was ample evidence showing that this meaning and purpose of § 10.1 was communicated clearly to Crescendo during negotiations, that both parties had the same understanding of the provision, and that the final version of the Purchase Agreement constituted "a business compromise by the parties." Mr. Wohlstadter testified that he conveyed MSD's business goals to Mr. Hagstrom during the course of their negotiations, stating:

> It was critically important for me that we were part of a long term upside potential of this product. . . . I didn't want us to have worked for a long time and really hard on this product and then find out that they were no longer using us for the supply and therefore cutting us out of the benefit of the work that we had done in the development of the product.

On that issue, Mr. Hagstrom testified:

> Q. Now, at this point in time, in September-October 2011 time period, Mr. Hagstrom, you understood, did you not, that Meso Scale had a concern that Crescendo would work with Meso Scale that Vectra DA would become

really successful, and then Crescendo would kick Meso Scale to the curb in lieu of another supplier? You knew in words or substance that that was a concern to Meso Scale, isn't that true?

[Mr. Hagstrom]: They expressed a concern about not wanting to be supplanted in the short-term.

Q. Well, not only in the short-term, but supplanted if and when Vectra became successful, right?

A. I don't recall those exact words.

Q. You don't recall Meso Scale ever, prior to the negotiation of the purchase agreement, communicating to you a concern that Crescendo and Vectra DA would become profitable, and then you would displace Meso Scale for another supplier?

A. That's a different question. Before they've come, before the deal was consummated at that point did it come up.

Q. Okay. And it came up a number of times, did it not?

A. And, and the rationale they tried to use is we –

Q. Did it come up a number of times, sir?

A. It came up, it came up, I can't remember how many times.

Later in his testimony, Mr. Hagstrom again acknowledged MSD's desire not to be displaced by another supplier:

Q. No one wants to kill the golden goose, you or Meso Scale, right?

A. That would be, that would be the objective.

Q. And Meso Scale communicated to you that they wanted to share in the goose if and when it became golden, right?

A. That was their desire.

On February 14, 2012, Mr. Hagstrom sent Dr. Wilbur a revised draft of the Purchase Agreement in which § 10.1 was deleted. MSD objected to the deletion of §10.1 and Mr. Wohlstadter told Dr. Wilbur to advise Mr. Hagstrom that MSD would not sign the agreement without that provision. Mr. Hagstrom acknowledged that he made a business decision to sign the Purchase Agreement with the inclusion of § 10.1. In addition, Crescendo's Vice President of Lab Operations, William Manning, understood that post-termination, Crescendo was still obligated to use MSD as the supplier of proteins for Vectra DA. When questioned about his understanding of the post-termination provisions of § 10.1, Mr. Manning testified, "if you read this, it states after termination, you're still obliged to use Meso Scale to measure the Vector DA analytes."

The trial court "disbelieve[d]" Mr. Hagstrom's testimony that he did not understand that § 10.1 obligated Crescendo to purchase proteins from MSD post-termination. The evidence supported the trial court's finding that Mr. Hagstrom, who was "a very experienced business person," understood § 10.1 and "made the business decision to bind Crescendo to its terms rather than to begin a search for a new platform and new supplier."

Contrary to Crescendo's assertion, it is not "self-evident" that because "the Purchase Agreement specified an 'indefinite' duration for Crescendo's post-termination obligations, those obligations lasted 'indefinitely.'" Crescendo's narrow focus on the word "indefinitely" ignores the other language in the Purchase Agreement and the parties' intent with respect to the agreement. The evidence adduced at trial was sufficient to establish

that the parties intended that their post-termination agreement would apply for as long as Crescendo had requirements for the measurement of proteins.

II.

Crescendo next argues that the trial court erred in finding that it intended to be bound by any obligations following the Initial Term of the Purchase Agreement absent an agreement on price. It maintains that the detailed pricing provisions set forth in the Purchase Agreement demonstrate that "agreement on price was essential to the parties' ongoing relationship" and that the parties' silence as to post-termination prices demonstrates a lack of intention to be bound. We disagree.

Section 2-305(1) of the UCC, codified in Delaware as Title 6, §2-305(1), *supra*, allows parties, "if they so intend," to "conclude a contract for sale even though price is not settled." Whether the parties "so intend" is a fact to be determined by the trier of fact. *See* UCC § 2-305 cmt. 2 (whether the parties "so intend" is, "in most cases, a question to be determined by the trier of fact."). Such a finding is reviewed for clear error. Md. Rule 8-131(c). *Cf. Osborn*, 991 A.2d at 1158 (trial court's factual finding reviewed for clear error); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005)(function of appellate tribunal reviewing a bench trial is to determine whether the trial judge's factual findings are clearly erroneous).

We find no error in the circuit court's finding that the parties intended to be bound notwithstanding the open issue of price. There was no dispute that both parties intended to leave open the issue of price for post-Initial Term purchases. The trial court credited the testimony of Dr. Wilbur, who stated:

> We had a number of conversations about how to handle future pricing. For both of us, as you looked out into the future, you know, the real question was, are we going to specify a mechanism or are we going to leave it open to negotiation. And in the end, we decided the right thing to do for both of us was to leave it open to negotiation.

Dr. Wilbur acknowledged that "[p]rice was important to Mr. Hagstrom," but ultimately both parties agreed to leave the price term open for negotiation. Dr. Wilbur testified, "I'm sure [Mr. Hagstrom] would have preferred that the price go down, rather than it being stipulated that it'd increase, and that was one of the things that led us to that agreement." Notwithstanding the fact that the price term was left open, evidence showed that MSD intended to be bound by § 10.1.

Mr. Wohlstadter testified that he had discussions with Dr. Wilbur concerning the open price. According to Mr. Wohlstadter, Dr. Wilbur "didn't want [MSD] to be in a position after the initial term where we weren't able to get the appropriate value for the supplies that we were producing for the basis for the Vectra DA test," and he "wanted to have the opportunity at that time to negotiate with Crescendo what would be a reasonable price." Mr. Wohlstadter testified that he never communicated to Dr. Wilbur that the two-year renewal period was unenforceable because there was no price set in the Purchase Agreement. Similarly, Dr. Wilbur never communicated to him that Mr. Hagstrom believed the post-Initial Term provisions would be unenforceable absent the inclusion of a set price in the Purchase Agreement.

Mr. Hagstrom acknowledged that, during contract negotiations, Crescendo was concerned that the prices were "too high, they need to go down." He testified:

> We knew the price was too high. We didn't know what the price would be on a go-forward basis. And, you know, we didn't know a whole bunch of other things like market conditions, how well our company was doing.
>
> And, lastly, we didn't know if their technology was still going to be relevant in five years.

According to Mr. Hagstrom, it "would be preferable" to leave the price open so it could be negotiated later. Although Mr. Hagstrom testified that he could not recall discussing with Dr. Wilbur the idea of leaving the price term open to negotiation, he acknowledged giving the following testimony in his deposition:

> Q. At the end of the five-year period, was there anything preventing the pricing from going up at that point in time?
>
> [Mr. Hagstrom]: No, that was going to be open to discussing or negotiation.

Clearly, the facts adduced at trial were sufficient to support the conclusion that the parties intended to have contractual rights and obligations post-termination notwithstanding the failure to specify the price terms.

III.

Crescendo contends that the circuit court erred in excluding evidence of MSD's costs and profits when determining what constituted a reasonable post-termination price for Supplies. According to Crescendo, because the court found that it was "confronted with a unique product," "the only fair standard to apply to determine a 'reasonable price' was 'cost plus profits.'" MSD counters that it would have been prejudicial, and that it was unnecessary, to introduce evidence of its profits because there was ample, non-prejudicial evidence from which to determine reasonable post-termination prices for the Supplies,

including the parties' course of performance. Because the Supplies MSD sold to Crescendo were "unique" or "bespoke," as opposed to off-the-shelf items, MSD argued that the reasonable price should be established using the prices set forth in Exhibits C-1 and C-2 to the Purchase Agreements, which established the prices the parties used for excess purchases and firm forecasts of Supplies.

In support of their arguments, both parties direct our attention to *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975). In that case, Spartan Grain and Mill Co. ("Spartan"), a seller of chicken feed, filed suit to recover unpaid balances owed by three "producers." *Spartan Grain*, 517 F.2d at 216. The parties had entered into a series of contracts specifying that, in return for the producers' promises to use only Spartan chicken feed in raising a flock of chickens, Spartan would, subject to certain conditions, purchase all the eggs produced by the flock and arrange for them to be hatched. *Id.* at 217. The contracts did not specify a price for the chicken feed, but Georgia's version of UCC § 2-305 required the price to be "reasonable." *Id.* The producers attempted to show by various methods that Spartan had breached the contracts by charging an unreasonably high price. *Id.*

At trial, the producers attempted to show that other feeds on the market sold at much lower prices, but the court did not permit that evidence because the prices charged by the other sellers could not validly be compared to those charged by Spartan. *Id.* The producers also attempted to prove that Spartan's price was unreasonable by proving its markup over its cost for the feed. The court also rejected that option. Citing *Kuss Machine Tool and Dye Co. v. El-Tronics*, 393 Pa. 353, 143 A.2d 38 (1958), the court noted that "[a]lthough

there may be situations in which such an inquiry is the only possible way in which to determine the reasonableness of prices charged, . . . such is not the case here." *Id.* The court explained that "the possibility of prejudice prevented such an inquiry since another method of proving unreasonableness was available." *Id.* at 218. On appeal, the Fifth Circuit Court of Appeals agreed with the trial court and held that the possibility of prejudice was especially strong. *Id*. It noted that because Spartan was selling its feed as part of a marketing package, its markup on the grain, when introduced in isolation, might well have appeared to be unreasonably high. *Id.*

Crescendo points to *Kuss* for the proposition that where there is no market price for merchandise, a "reasonable" price should be determined based on the actual cost of the item plus a reasonable profit. Like *Spartan Grain*, the *Kuss* case does not support Crescendo's arguments. The Kuss Machine Tool and Die Company entered into an agreement with El-Tronics, Inc. to produce metal relay racks that had to be fabricated according to certain plans and specifications. *Kuss*, 143 A.2d at 39. The parties agreed that prices would be established between the parties at a later date. *Id.* A dispute later arose as to whether the price charged by El-Tronics, Inc. was reasonable. *Id.* at 40. The case was submitted to a Master who found that there was no market price for the product at issue. *Id.* As a result, the Master recommended an award based on the plaintiff's actual costs plus a reasonable profit. *Id.* at 40-41. The Supreme Court of Pennsylvania held that, under the special circumstances of the case, where the defendant did not suggest at trial any better or other measure, "the criterion applied by the Master in determining a reasonable price was the only fair standard to be applied." *Id.* at 41.

In the case at hand, there was no reason to introduce evidence of MSD's costs and profits because there was other evidence available. Pursuant to § 1-303 of the UCC, codified as Title 6, § 1-303 of the Delaware Code, when the express terms of an agreement do not state a price, a court may consider, among other things, the parties' "course of performance[.]" Section 1-303 defines "course of performance" as follows:

> (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
>
> (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
>
> (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

6 Del. C. § 1-303 (a).

The trial court clearly relied on the parties' course of performance in determining the post-termination prices. The court found that there was "no credible evidence of pricing in the marketplace" for the Supplies except for the parties' performance under the Purchase Agreement. It considered that, in August 2014, less than two years before Crescendo issued its notice of termination letter, Crescendo had purchased more than $858,000 worth of Supplies, more than its guaranteed purchases for that year, and that MSD charged Crescendo for the additional purchases in accordance with Exhibit C-2 to the Purchase Agreement.

The court rejected Crescendo's contention that a reasonable price was the one Crescendo would eventually pay to run the Vectra DA test on the Luminex platform, if it was contractually permitted to do so. The court's decision was based on the fact that, at the time of its ruling, the Luminex platform was not a commercially viable and acceptable

substitute for the MSD platform and the Vectra DA test could not be performed commercially on any platform except that provided by MSD. The court also rejected the testimony of Crescendo's witnesses regarding "an arm's-length negotiated price for Luminex supplies to run Vectra DA," stating that the price had "nothing to do with a free market price or a reasonable market price." The court correctly noted that Crescendo's parent company had long-standing ties to Luminex, was willing to spend substantial sums to "legally break" the Purchase Agreement, and offered Crescendo non-market price support in terms of time, expertise, and money. For those reasons, the court did not err in concluding that the Luminex platform was not a comparable product for the court to use to determine the reasonable market price at the time and place of delivery of MSD Products and Supplies under § 2-305 of the UCC.

There was ample evidence before the trial court from which it could determine a price based on the parties' course of performance and there was no need to consider MSD's costs and profits. Accordingly, the trial court did not err in excluding evidence of MSD's costs and profits.

IV.

Crescendo's final argument is that the trial court erred in denying its request for a jury trial to determine a reasonable price for post-termination purchases. We disagree.

After the court set a bench trial to determine the post-termination price structure, Crescendo moved to vacate the trial date and requested a jury trial on count three of MSD's complaint, which sought a declaratory judgment that, *inter alia*, "the minimum pricing after the Initial Term shall be as set forth in Exhibit C-1 to the Purchase Agreement, with

an annual increase of: (a) one percent; or (b) the percentage increase in the Consumer Price Index over the course of the previous year, whichever is greater[.]" MSD opposed Crescendo's request for a jury trial on the ground that count three of the complaint sought only a declaration of the parties' obligations under the Purchase Agreement, and did not seek money damages or other relief at law.

After a hearing on January 18, 2018, the court denied Crescendo's motion for a jury trial. In reaching that decision, the court noted that, in its counterclaim, Crescendo had also sought a declaration on the parties' rights and obligations under § 10.1 of the Purchase Agreement and that neither party had requested money damages as a remedy. The court also noted:

> "Maryland, like the majority of courts, characterizes most of its equitable claims according to the remedies sought by the parties." *Ver Brycke v. Ver Brycke*, 379 Md. 669, 694 (2004). In other words, because Maryland has adopted fact-based pleading the "remedies sought serve to delineate the type of action, whether it be law or equity." *Ver Brycke*, 369 Md. At 696. In this case, neither party asked for money damages in connection with its claims for declaratory relief. The declaratory relief sought in Count III of MSD's complaint, therefore, is not obviously a claim at law based on the remedy sought. *Ver Brycke*, 369 Md. at 698.

(Footnote omitted).

Citing *Fischer Imaging Corp. v. General Elec. Co.*, 187 F.3d 1165, 1172-74 (10th Cir. 1999), the court recognized that the determination of a "reasonable price" under UCC § 2-305 may, in some instances, present a claim for money damages, but determined that "the existence of a nascent damage claim, without more, does not preclude the issuance of a declaratory judgment under Maryland Law and does not invariably sound at law." The court pointed out that Md. Code (2013 Repl. Vol.), § 3-407 of the Courts and Judicial

Proceedings Article ("CJP") [5], permits it to construe a contract before it is breached and, therefore, before a claim for money damage accrues, and concluded that was the case here. The court found that there had not yet been a breach of the relevant provision of the Purchase Order and no party was entitled to monetary relief. The court also relied on CJP § 3-409(c)[6] in finding that "the availability of a concurrent legal or equitable remedy ordinarily does not prevent a party from seeking and obtaining a declaratory judgment." Thus, the court held that because a jury trial is available in Maryland only for claims at law, and there were no such claims presented by the parties, Crescendo was not entitled to a jury trial.

Crescendo maintains that the trial court should have "erred on the side of caution" and permitted a jury trial even though no money damages were sought. In support of its argument, Crescendo directs our attention to *Fischer Imaging Corp.*, which the trial court also referenced. That case involved a dispute between Fischer Imaging Corporation ("Fischer") and General Electric Company ("GE") arising from a purchase agreement for the manufacture and purchase of medical imaging devices referred to as "Tilt C units."

[5] Section 3-407 of the Courts and Judicial Proceedings Article provides that "[a] contract may be construed before or after a breach of the contract."

[6] Section 3-409(c) of the Courts and Judicial Proceedings Article provides:

> (c) *Concurrent remedies not bar for declaratory relief.* – A party may obtain a declaratory judgment or decree notwithstanding a concurrent common-law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute.

Fischer Imaging Corp., 187 F.3d at 1167. Under the terms of the purchase agreement, when the initial period expired, GE retained the unilateral power to extend the term of the agreement for two years. *Id.* Although prices were set for the initial period, they were not set for the extended period. *Id*. Fischer sought a declaratory judgment regarding a reasonable price for the units. *Id*. GE filed a counterclaim seeking specific performance of certain production requirements set forth in the purchase agreement. *Id.* Fischer timely filed a demand for a jury trial, which was denied. *Id.* The court, however, exercised its discretion under the Federal Rules and empaneled an advisory jury. *Id.*

The advisory jury returned a verdict setting a specific price for the Tilt C units, but the court chose not to follow the advisory jury's verdict. Instead, it issued an order setting lower prices for Tilt C units delivered in two specific years and ordered Fischer to perform its obligations under the purchase agreement. *Id.* Fischer appealed. Its sole argument on appeal was that the trial court improperly denied its request for a jury trial. *Id.*

Fischer argued that, under the Seventh Amendment to the United States Constitution[7], it was entitled to have a jury determine the reasonable price of the Tilt C units under the extended term of the agreement because the relief it sought was legal in nature. *Id.* at 1168. GE disagreed, arguing that Fischer's claims were equitable in nature and, as a result, it did not have the right to a jury trial. *Id.* Although the case did not "fit neatly into either" the legal or equitable category, the United States Circuit Court of

[7] The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. Const. amend. VII.

Appeals for the Tenth Circuit determined that the cause of action was one at law. In reaching that conclusion, the court examined various ways in which the case might have come before the court absent declaratory judgment procedures:

> [W]e next consider how this case might have come to the court absent declaratory judgment procedures. Without a declaratory judgment action, Fischer could have delivered the Tilt C units and, upon GE's refusal to pay the demanded price, sued GE for breach of contract seeking monetary damages in the amount of a reasonable price for the goods. In such a case, Fischer would have been entitled to have a jury determine damages. In the alternative, Fischer could have delivered the Tilt C units, invoiced at a price GE believed was unreasonable, and GE could have paid the invoice price and then sued Fischer for breach of contract. In such a case, the damages would be the difference between the invoice price and the contract price, which [UCC § 2-305] provides is a reasonable price. Likewise this claim for monetary damages would be triable to a jury.
>
> If Fischer failed to deliver the Tilt C units, GE could cover and sue Fischer for breach of contract, seeking the difference between the contract prices, as set by [UCC § 2-305] as a reasonable price, and the cover price, as well as any incidental or consequential damages associated with effecting cover. Such a suit for money damages would be tried to a jury. If GE chose not to cover, GE could sue for breach of contract seeking the difference between the market price at the time of the breach and the contract price, i.e., a reasonable price, plus any consequential or incidental damages. Again, this action for money damages would be tried to a jury. Finally, if GE was unable to cover because the good were unique, GE could sue under Colo. Rev. Stat. § 4-2-716 for specific performance for delivery of the Tilt C units. Because specific performance is an equitable remedy, the case would not be tried to a jury. In a suit for specific performance, a determination of a reasonable price would be not necessary to the disposition of the claim.

Id. at 1171-72 (internal citations omitted).

The court concluded that "because Fischer's statutory suit, if not brought as a declaratory action, would sound in contract and seek legal relief," the suit was an action at law. *Id.* at 1172. The court went on to hold that, in light of "relevant historical, precedential

and factual considerations," the question of a reasonable price under UCC § 2-305 was a question to be determined by a jury. *Id.* at 1172-74.

In the instant case, Crescendo argues that the trial judge "misread the *Fischer Imaging Corp.* decision, and erroneously described it as a case "really" involving "a claim for money damages." We are not persuaded.

Article 23 of the Maryland Declaration of Rights[8], like the Seventh Amendment of the United States Constitution, guarantees a right to a jury trial in actions at law. *See Mattingly v. Mattingly*, 92 Md. App. 248, 255 (1992). Declaratory judgment actions in Maryland are governed, in part, by CJP § 3-409. The fact that a proceeding is brought under Title 3 of the Courts and Judicial Proceedings Article "does not affect a right to jury trial which otherwise may exist." CJP § 3-404. There is, however, "no right to a jury trial in actions in equity under federal or state law." *Mattingly*, 92 Md. App. at 255 (internal citations omitted). With the merger of law and equity in Maryland in 1984, parties may now "join legal and equitable claims in a single legal action," but the merger of law and equity was not intended to broaden or change the right to a jury trial. *Id.*

The threshold determination, then, is whether MSD's complaint asserted a claim in equity or at law. There are three factors courts generally review in making this

[8] Article 23 of the Maryland Declaration of Rights provides, in relevant part:

> The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $15,000, shall be inviolably preserved.

determination: "1) the customary manner of trying such a cause before the merger of law and equity, 2) the kind of remedy sought by the plaintiff, and 3) the abilities and limitations of a jury in deciding the issues." *Moshyedi v. Council of Unit Owners of Annapolis Rd. Med. Ctr. Condo.*, 132 Md. App. 184, 192 (2000) (citing *Merritt v. Craig*, 130 Md. App. 350, 362 (2000)). We have noted that the second prong of this analysis – the remedy sought – is the most important, and courts should also consider whether the claim traditionally sounded in law or in equity. *Id.*

Here, MSD sought relief based on CJP §§ 3-406 and -407. Section 3-406 permits a person interested under a "written contract, or other writing constituting a contract" to "have determined any question of construction or validity arising under the" contract. As we noted, *supra*, CJP § 3-407 provides that "[a] contract may be construed before or after a breach of contract." MSD asked the court to make a declaration that determined the open price term pursuant to UCC § 2-305. There is no dispute that no right existed at common law with respect to the determination of price under UCC § 2-305.

MSD was not seeking monetary damages at the time its claim was filed. This fact is bolstered by the position Crescendo took at trial with respect to the allegations of anticipatory breach of contract. Crescendo argued vigorously against MSD's assertions that it would refuse to perform under the Purchase Agreement and insisted that there were no facts to support any inference that it would ever refuse to perform its future obligations. As MSD notes, it was on the strength of these and other contentions that the trial court held that Crescendo did not anticipatorily breach the Purchase Agreement as a matter of law. In taking the position that it had not, and would not, anticipatorily breach the Purchase

Agreement, Crescendo assured that MSD cannot presently recover damages. All that remained for the court to address was MSD's request for declaratory relief to determine the price. For these reasons, Crescendo's reliance on *Fischer* is misplaced. In *Fischer*, the court reasoned that the plaintiff could have waited for the defendant to breach and then sued for damages. That was not the case here. Other than a request to the court to declare the validity and to interpret the Purchase Agreement, any other relief would have been in the nature of the equitable relief of specific performance.

As to the abilities and limitations of a jury deciding the issue, it is clear that this case involved a complicated Purchase Agreement in which the parties intended an open price term and provided for exclusive post-termination purchase obligations. The finder of fact was required to determine a reasonable price for a unique product. In light of all these circumstances, the trial court did not err in denying Crescendo's request for a jury trial.

V.

On cross-appeal, MSD challenges the circuit court's grant of summary judgment in favor of Crescendo with regard to its claim that Crescendo's April 21, 2016 notice of termination letter constituted an anticipatory breach of contract. The Court, in granting summary judgment in favor of Crescendo, held the although the letter was drafted so as to terminate the Purchase Agreement after the Initial Term, it did not constitute an anticipatory repudiation with respect to post-termination obligations because the letter conditioned termination of the agreement on MSD's response. The court held that the letter did not contain an unequivocal and unconditional statement that Crescendo would not perform its post-termination obligations. In the letter, Crescendo advised that between the

date of its notice and April 2018, it would prepare to implement an alternative to the Supplies then being provided by MSD. It then conditioned its notice of termination as follows:

> As you know, this process could take up to two years, and will involve significant internal expenditures and capital outlays by Crescendo. Accordingly, if MSD contests, for whatever reason, (i) Crescendo's termination notice and the termination date, or (ii) Crescendo's plans for an alternative supply of plates, diluents, reagents and related supplies, please provide Crescendo written notice of such claim in thirty (30) days. Otherwise, Crescendo will rely on your silence as constituting MSD's acceptance of the termination notice and Crescendo's alternative supply of plates, diluents, reagents and related supplies.

MSD argues that there were genuine disputes of material fact that warranted a trial. It points to the significant evidence presented below that indicated Crescendo's intent to repudiate the Purchase Agreement, including: Crescendo's allocation of nearly $4 million in legal fees to "legally break" the agreement and move to Luminex by 2019; Crescendo's determination that it could save between $22 and $30.6 million using Luminex; Crescendo's investment in time and resources to develop a plan to move to the Luminex platform; Crescendo's plan to complete the transition to Luminex just prior to running out of MSD's Supplies; testimony by Mr. Tobin that he planned to move forward with Luminex because "there wasn't a path forward" with MSD and that he regarded the notice of termination letter as ending Crescendo's relationship with MSD; testimony by Mr. Manning that Crescendo would not be purchasing supplies after the termination because it would switch to Luminex; and, testimony by Dr. Wilbur that Crescendo said several times in writing and in person that it did not plan to purchase more Supplies from MSD and that it intended to replace MSD with Luminex. According to MSD, in granting summary

judgment in favor of Crescendo, the trial court effectively resolved disputes of fact against MSD and failed to give it the benefit of the inferences from the evidence. We are not persuaded.

The Supreme Court of Delaware has looked to the Restatement (Second) of Contracts for a definition of "repudiation." *See CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000). The Restatement (Second) of Contracts defines "repudiation," in relevant part, as "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach[.]" Restatement (Second) of Contracts, § 250 (October 2019 update). According to Williston on Contracts, a repudiation occurs when one party refuses to perform and communicates that refusal distinctly and unqualifiedly to the other party. 23 Williston on Contracts § 63:29 (4th Ed., July 2019 Update)(citing *Dow Chemical Co. v. U.S.*, 226 F.3d 1334, 1344 (Fed. Cir. 2000)). Stated otherwise, a repudiation "is an outright refusal by a party to perform a contract or its conditions" entitling the other contracting party to treat the contract as rescinded. *PAMI-LEMB I, Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004)(citing *CitiSteel*, 758 A.2d at 931). *See also HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376 at *14 (Del. Ch. May 2, 2007)("A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions. . . . To constitute a repudiation, a request for modification of contract terms must be accompanied by an absolute refusal to perform unless the request is granted."); *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *6 (Del. Ch. Jan. 13, 1988)(a claim for breach of contract can be made under a theory of repudiation when

the repudiation is "positive and unconditional"); *Sheehan v. Hepburn*, 138 A.2d 810, 812 (Del. Ch. 1958)("An outright refusal of one party to a contract to perform the contract or its essentials constitutes such a repudiation as to entitle the other contracting party to treat the contract as rescinded.").

In the instant case, the plain wording of the notice of termination letter indicates that Crescendo did not repudiate the agreement. Crescendo set out its plan to secure an "alternative supply" of items and requested MSD to advise if it contested that plan. As a result, Crescendo's termination was conditioned on MSD's response. There was no clear, distinct, unequivocal statement of intent by Crescendo not to perform its post-termination obligations under the agreement. There is no doubt that Crescendo was unhappy with the agreement and that it wanted to get out of it and switch to another provider such as Luminex. Nevertheless, the wording of the letter does not show that Crescendo anticipatorily breached the agreement. On that issue, there was no genuine dispute and the circuit court did not err in granting Crescendo's motion for summary judgment.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.