STATE OF NORTH CAROLINA

WAYNE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 1430

MAXWELL FOODS, LLC,

Plaintiff,

v.

SMITHFIELD FOODS, INC.,

Defendant.

ORDER AND OPINION ON MOTIONS FOR SUMMARY JUDGMENT [Filed Under Seal – Public Version to Follow][1]

1. For over 25 years, Maxwell Foods, LLC sold hogs to Smithfield Foods, Inc. under an output contract. In this lawsuit, each accuses the other of having breached that contract. Discovery is closed, and the parties' motions for summary judgment are pending. For the following reasons, the Court **GRANTS** Maxwell's motion for summary judgment and **GRANTS in part** and **DENIES in part** Smithfield's motion**.**

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips, Charles E. Coble, Eric M. David, Amanda S. Hawkins, and Shana L. Fulton, for Plaintiff Maxwell Foods, LLC.

Robinson, Bradshaw, & Hinson, P.A., by Robert E. Harrington, Ethan R. White, Mark A. Hiller, and Emma W. Perry, and McGuireWoods LLP, by Jonathan Harmon, for Defendant Smithfield Foods, Inc.

Conrad, Judge.

[1] The record related to the pending motions is voluminous and includes over 100 exhibits that the parties filed provisionally under seal. In another order entered today, the Court has unsealed many but not all of these documents. As a result, the Court does not believe that any part of this opinion ought to be sealed. Out of an abundance of caution, however, the Court is filing this opinion under seal temporarily to give the parties a chance to review it and raise any concerns. A public version will follow in thirty days.

I.
BACKGROUND

2. The Court does not make findings of fact when ruling on motions for summary judgment. The following background, drawn from the evidence submitted by the parties, provides context for the Court's analysis and ruling only.

3. Smithfield is the world's largest pork processor. It obtains hogs from many suppliers—including both internal subsidiaries and external producers—and processes the hogs for sale to consumers as pork products. Maxwell used to be one of Smithfield's suppliers but has not produced hogs since 2021.

4. The parties' supply contract—the Production Sales Agreement, or PSA for short—dates to December 1994. In that contract, Smithfield promised "to purchase," and Maxwell promised "to sell and deliver," all hogs "actually produced by Maxwell" each month "up to a maximum of" 155,000. The purchase price is stated as a formula, using a mix of market factors and performance metrics. The formula starts with a base price equal to the average daily price quoted for hogs sold on the Iowa-Southern Minnesota spot market, which Maxwell and Smithfield deemed to be "a relatively stable national market price." To the base price, the formula adds an overage of a few cents per pound. Then, in its last step, the formula adds or subtracts various premiums, discounts, and credits: Smithfield might pay less, for example, if Maxwell's hogs weighed too much or too little, and it might pay more if the hogs had desirable traits as set out in something called a Grade and Yield Matrix. (Production Sales Agreement ["PSA"] §§ 1(b), 3(a), 3(b), 3(f), 5(a)–(c), ECF No. 154.12.)

5. Premiums and discounts were not set in stone. Smithfield could propose changes to the Grade and Yield Matrix from time to time, and Maxwell could accept or decline them. If Maxwell declined, then it would receive a flat "premium paid of $0.45 per one hundredweight" rather than a variable, delivery-by-delivery premium. As for the other components of the formula, Maxwell and Smithfield agreed to "designate a substitute" base price "[i]f the Iowa-Southern Minnesota market ceases to be a viable market" and to arbitrate the matter absent agreement. (PSA §§ 1(b), 5(c).)

6. Either party could terminate the PSA for any reason by giving written notice six years in advance. Otherwise, the PSA specifies no fixed term or end date. In addition, the PSA includes a force majeure clause, stating that "[n]either party shall be liable for failure to perform or for delay in performing any act under this Agreement if prevented by any cause beyond the reasonable control of such party, including, but not limited to, acts of God, wars, epidemics, storms, tornadoes, or explosions." (PSA §§ 3(a), 4, 12.)

7. Negotiations over the PSA appear to have been cordial. To seal the deal, a team of Maxwell's senior officials traveled to the home of Smithfield's CEO, where a typewritten copy of the contract awaited their signatures. The only sticking point was Maxwell's fear that Smithfield might not treat it as well as other major hog suppliers. So, before signing, Maxwell's officials sought written assurance that its deal was as good as the deals Smithfield had given to others. Smithfield agreed, but rather than modify the prewritten PSA to reflect this assurance, the parties signed it

and supplemented it with a letter agreement the next day. (*See* Dep. S. Horsley, 53:11–23, ECF Nos. 154.3, 159.3, 188.7, 193.3, 222.2; Dep. R. Ivey 131:7–140:4, ECF Nos. 154.5, 188.8, 194.1, 230.1, 231.)

8. To assuage Maxwell, the letter agreement contains a most-favored-nation clause. Smithfield "represent[ed] that the [PSA] gives Maxwell Foods the same economic incentives (including any Grade and Yield Matrix) as given all of Smithfield Foods' other major swine suppliers" and promised to offer Maxwell "the benefit of future changes in economic benefits given said major swine suppliers." A handwritten addition states that "[m]ajor swine suppliers include Carroll's Foods, Inc., Murphy Family Farms, Inc., and Prestage Farms, Inc." Among the letter agreement's other miscellaneous terms is Maxwell's acceptance of the Grade and Yield Matrix attached to the PSA. (Letter Agrmt. ¶¶ 1, 6, ECF No. 162.3; *see also* Aff. R. Sharpe ¶¶ 7, 8, ECF No. 161.23.)

9. For the better part of the next three decades, Maxwell delivered hogs to Smithfield under the PSA. Much changed during that time.

10. To start, Smithfield went from being a large pork producer to being the world's largest. In 1994, Smithfield obtained most of its hogs from its three largest external suppliers, Carroll's Foods, Murphy Family Farms, and Prestage Farms. A smaller share came from affiliated companies, including Brown's of North Carolina. Toward the end of the decade, Smithfield acquired Carroll's Foods and Murphy Family Farms, increasing not only its size but also the proportion of hogs supplied by internal as opposed to external suppliers. Today, Smithfield's largest supplier by far

is Murphy-Brown, its subsidiary born from those acquisitions. (*See* Aff. S. Horsley ¶¶ 3–5, ECF No. 52.3; Smithfield 1994 10-K, ECF No. 162.1; Def.'s 2d Am. Resp. to Pl.'s 2d Interrogs. Ex. 1, ECF No. 161.17.)

11. Smithfield also tweaked the way it computed payments for Maxwell's hog deliveries. In 2007, Smithfield jettisoned the Grade and Yield Matrix. Until then, it had used a device called the Fat-O-Meater to measure backfat and loin depth, which were key ingredients in determining the amount of a premium or discount under the Grade and Yield Matrix. After retiring the Fat-O-Meater, Smithfield paid Maxwell a flat amount of $0.63 per hundredweight (a higher premium than the PSA called for when no Grade and Yield Matrix was in effect). There were other pricing adjustments as well, including that Smithfield paid based on "carcass weight" for many deliveries and based on "live weight" for others. Whether these practices line up with the strict letter of the PSA is not always clear. (*See* PSA § 5(c); Oct. 2007 Letter from J. Luckman, ECF No. 160.27; Dep. H. Suggs 42:3–47:23, ECF Nos. 159.17, 188.17, 230.2; Dep. J. Luckman 197:13–200:19, ECF Nos. 159.7, 188.12.)

12. In more recent years, the parties discussed dropping the PSA's pricing formula altogether. In February 2014, Smithfield's head of hog procurement, Collette Kaster, told Maxwell that many suppliers were shifting away from the Iowa-Southern Minnesota market, which had become too "thinly traded," in favor of "CME based pricing" or "[c]utout" pricing.[2] Kaster asked Maxwell if it would consider "a CME

[2] CME is short for Chicago Mercantile Exchange. The CME index "is a weighted average of the national data for" both spot-market transactions, such as those on the Iowa-Southern Minnesota market, and transactions involving supply contracts. Cutout pricing "recreate[s]

Index pricing alternative." Maxwell's president, Bob Ivey, responded that the company was "open as long as it is not a step backward on pricing" but opted to "stay with the present market pricing for now until we could model" the change. (Feb. 2014 Kaster/R. Ivey E-mails, ECF No. 160.5.)

13. Sporadic communications about pricing continued from that point forward. The parties view those communications very differently. Smithfield contends that it made several formal contract offers containing index pricing, cutout pricing, and other alternatives to the Iowa-Southern Minnesota market. Maxwell denies that these were genuine offers. Either way, no agreement was ever reached. (*See, e.g.*, May 2014 Allison/T. Ivey E-mail, ECF No. 160.9; Jan. 2018 Allison/Smith E-mails, ECF No. 160.18; Apr. 2016 Allison/R. Ivey E-mail, ECF No. 160.19; Dec. 2017 Allison/R. Ivey E-mail, ECF No. 160.21; Aff. C. Allison ¶¶ 3–12, ECF No. 161.20; Aff. R. Ivey ¶¶ 26–35, ECF No. 189.8.)

14. Throughout the period in which these discussions took place, Maxwell was losing money. It considered a variety of options to shore up or scale down its business. In 2016, it approached Prestage Farms about a merger, and in 2017 and 2018, it gauged whether Smithfield had interest in acquiring it. Neither idea gained traction. Then, in 2019, Maxwell terminated its contracts with certain hog growers and sold some of its own hog farms. Even so, the losses mounted, adding up to more than $100

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what [a] hog was worth" by using the prices of finished "cuts," such as the ham or loins. (Dep. R. Plain 157:8–24, 162:18–163:5, ECF No. 159.12; *see also* Dep. J. Pike 100:13–18, ECF Nos. 154.9, 159.11, 188.14, 193.7.)

million from 2015 to 2020. (*See, e.g.*, Dep. J. Pike 183:11–185:22, 218:5–219:24, 238:15–240:25; Aff. R. Jennings ¶ 4, ECF No. 154.36.)

15. In February 2020, Maxwell returned to Smithfield and asked for better pricing, telling it that "[t]o continue producing hogs . . . we would need an agreement to sell hogs based on a cutout calculation." Smithfield promised an answer in thirty days. A month later, Smithfield's CEO, Ken Sullivan, told Maxwell that the answer was no. Maxwell's CEO, John Pike, responded that "we're going to make our plans to exit the business" in 2021. (Feb. 2020 Pike/Pike E-mail, ECF No. 193.18; Dep. J. Pike 284:9–17, 286:6–17, 287:25–289:20; Dep. K. Sullivan 184:1–13, 197:9–198:20, ECF Nos. 154.11, 159.18, 193.9, 222.4.)

16. This was about the same time that the Covid-19 pandemic began spreading across the country. The pandemic led to labor shortages at Smithfield's plants. Absenteeism reduced its processing capacity, sometimes by half. To manage its diminished capacity, Smithfield began accepting fewer hogs from its suppliers, including Maxwell. From April 2020 until early 2021, Smithfield bought only part of Maxwell's output. To avoid euthanizing hogs, Maxwell sold as much of the surplus as it could to other buyers. (*See* Dep. S. Horsley 222:14–224:4; 30(b)(6) Dep. S. Horsley 85:13–18, 144:18–147:25, ECF Nos. 154.4, 159.4, 188.6, 193.4, 222.1; 30(b)(6) Dep. Maxwell Foods 238:2–239:17, ECF Nos. 154.7, 159.8, 194.2; 2d Aff. R. Jennings ¶¶ 3–7, ECF No. 222.6.)

17. All the while, the rift between Maxwell and Smithfield kept widening. In June 2020, Smithfield's vice president, Shane Horsley, sought confirmation of his

understanding that Maxwell "would be terminating" the PSA in 2021 but that it would supply hogs "at the historical rate through March 2021" before "ramp[ing] down" production. Maxwell responded that it had not "given notice of termination" of the PSA. Rather, Maxwell said, it was "developing a plan to potentially exit the hog business" because Smithfield had "refused to offer . . . a more equitable deal that would allow Maxwell to at least cover their costs and make enough margin to survive." On the heels of that exchange, Maxwell accused Smithfield of breaching the most-favored-nation clause, stating that "there are other major producers within Smithfield's system that have agreements with you that are substantially better than what Maxwell has." Smithfield denied the accusation and countered that Maxwell had repudiated the PSA when it stated that it planned to exit the hog business. (June 2020 Letter from S. Horsley, ECF No. 154.26; June 2020 Letter from J. Pike, ECF No. 154.24; July 2020 Letter from J. Pike, ECF No. 154.25; July 2020 Letter from M. Flemming, ECF No. 154.27.)

18. In August 2020, Maxwell informed its employees and the public that it would stop producing hogs and shut down operations. Maxwell made its last sale to Smithfield in June 2021. (*See* 30(b)(6) Dep. Maxwell Foods 188:21–25; Maxwell Foods Communcs. Plan, ECF No. 154.29; Dep. R. Jennings, 294:4–25, ECF Nos. 154.6, 188.9, 193.6.)

19. In this lawsuit, Maxwell alleges that Smithfield shirked its contractual obligations. Maxwell claims that Smithfield breached the most-favored-nation clause by giving other suppliers better pricing without offering that pricing to Maxwell; that

Smithfield breached the PSA's output provision by buying less than Maxwell's entire output in and after April 2020; and that Smithfield breached the PSA's pricing terms by underpaying for deliveries when using a live-weight formula. (*See* 2d Am. Compl., ECF No. 97.)[3]

20. Smithfield denies any breach and has raised affirmative defenses based on the PSA's force majeure clause and allegations that Maxwell anticipatorily breached the PSA. In its counterclaims, Smithfield alleges that Maxwell breached the PSA by repudiation and by terminating it without sufficient notice. (*See* Countercls., ECF No. 68; Ans. to 2d Am. Compl. & Aff. Defs., ECF No. 134.)

21. Both sides have moved for summary judgment. (*See* ECF Nos. 152, 157.) Their motions have been fully briefed, and the Court held a hearing on 22 January 2024. The motions are ripe for decision.

II.
LEGAL STANDARD

22. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must consider the evidence in the light most

[3] In earlier orders, the Court dismissed Maxwell's claims for fraudulent concealment, breach of an alleged duty to negotiate, and unfair or deceptive trade practices under N.C.G.S. § 75-1.1. *See Maxwell Foods, LLC v. Smithfield Foods, Inc.*, 2021 NCBC LEXIS 71, at *15–28 (N.C. Super. Ct. Aug. 26, 2021); *Maxwell Foods, LLC v. Smithfield Foods, Inc.*, 2023 NCBC LEXIS 20, at *5–12 (N.C. Super. Ct. Feb. 3, 2023) ["*Maxwell II*"].

favorable to the nonmoving party, drawing all inferences in the nonmoving party's favor. *See, e.g.*, *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

23. The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). If the moving party carries this burden, the opposing party "may not rest upon the mere allegations or denials of his pleading," N.C. R. Civ. P. 56(e), but must instead "come forward with specific facts establishing the presence of a genuine factual dispute for trial," *Liberty Mut. Ins.,* 356 N.C. at 579. "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982) (quoting *Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 374–75 (1981)).

24. "When the party with the burden of proof moves for summary judgment, a greater burden must be met." *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 578 (1985). The moving party "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985); *see also Kidd v. Early*, 289 N.C. 343, 370 (1976). For that reason, it is "rarely . . . proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

III.
ANALYSIS

25. The parties' motions present three sets of issues. One set concerns the most-favored-nation clause. A second set concerns the PSA's output requirement. And a third set concerns whether Smithfield underpaid Maxwell for certain hog deliveries.

26. Both sides agree that Article 2 of the Uniform Commercial Code ("UCC") governs these contractual disputes because the UCC applies to all "transactions in goods," including livestock. N.C.G.S. § 25-2-102; *see also id.* § 25-2-105(1) (defining "goods" as "all things . . . movable at the time of identification to the contract for sale"). North Carolina's appellate courts have not yet addressed in depth many aspects of the UCC that are debated in the briefs. Thus, when appropriate, the Court looks to persuasive authority from other jurisdictions for guidance. *See, e.g.*, *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 44 (2002) (consulting UCC case law from other jurisdictions); *United Carolina Bank v. First Union Nat'l Bank*, 109 N.C. App. 201, 208 (1993) (same); *see also* N.C.G.S. § 25-1-103(a)(3) (stating that a purpose of the UCC is "[t]o make uniform the law among the various jurisdictions").

A. Most-Favored-Nation Clause

27. In the most-favored-nation clause, Smithfield represented that the PSA gave Maxwell "the same economic incentives . . . as given all of Smithfield['s] other major swine suppliers." Smithfield then promised to offer Maxwell "the benefit of future changes in economic benefits given said major swine suppliers . . . ." (Letter Agrmt. ¶ 1.) Maxwell claims that Smithfield breached that promise by giving six suppliers

more beneficial pricing terms—index or cutout pricing, primarily—without offering it the same terms.

28. Smithfield seeks summary judgment on several grounds. Its chief contention is that it was not required to offer these terms to Maxwell. This is so, according to Smithfield, because five of the six suppliers are not "major swine suppliers" and because pricing formulas based on anything other than the Iowa-Southern Minnesota market are not "economic benefits." Smithfield also presses sundry evidentiary arguments, including an argument that it offered the terms at issue to Maxwell, though not required to do so, only for Maxwell to reject them.

29. Some of these arguments are about the meaning of the most-favored-nation clause. To resolve them, the Court follows traditional rules of contract interpretation, aiming to ascertain the parties' intent at the time the contract was made. *See, e.g., Morrell*, 371 N.C. at 681. Contracting parties are free to define the words used to express their agreement. When they have defined a word, their chosen definition controls; when they haven't, the word takes its ordinary meaning unless another meaning is clear from the surrounding context. *See, e.g.*, *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629 (2003). Under the UCC, contract terms "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by course of performance, course of dealing, or usage of trade." N.C.G.S. § 25-2-202(a).

30. **<u>"Major Swine Suppliers."</u>** Smithfield argues that the phrase "major swine suppliers" means a fixed group of its existing suppliers as of 1994 when the parties signed the PSA. According to Smithfield, the group includes only Carroll's Foods, Murphy Family Farms, and Prestage Farms—the three suppliers named at the end of the most-favored-nation clause. If the phrase "major swine suppliers" includes others, however, then Smithfield's position is that the other suppliers must be similar to the named suppliers. That is, the suppliers must be large, based on the East Coast, and not an affiliate or subsidiary of Smithfield.

31. Maxwell reads "major swine suppliers" more expansively. In its view, the number and identity of "major swine suppliers" could change over time, sweeping in new suppliers that Smithfield added after 1994. The three suppliers named in the clause are, according to Maxwell, merely illustrative. Maxwell also contends that the clause's text and context do not support the geographical and other limitations advocated by Smithfield.

32. The Court concludes that the parties intended "major swine suppliers" to refer to a group of Smithfield's existing suppliers at the time of the PSA.[4] The phrase does not include suppliers that began doing business with Smithfield later.

33. The structure of the clause leaves no doubt about this. When Smithfield represented that it was giving "Maxwell . . . the same economic incentives . . . as given all of [its] other major swine suppliers," it was plainly referring to a group of existing

[4] The "major swine suppliers" in 1994 included at least Carroll's Foods, Murphy Family Farms, and Prestage Farms. There may have been others not expressly named in the most-favored-nation clause, but Maxwell has not identified any as the subject of its claim.

suppliers. Likewise, when Smithfield promised to offer Maxwell any "future changes in economic benefits given *said* major swine suppliers," it was just as plainly referring to the same suppliers mentioned earlier in the clause. (Letter Agrmt. ¶ 1 (emphasis added).) To construe this language to require Smithfield to offer terms given to later-added suppliers would excise the word "said" from the clause, contrary to the canon that "no word in a contract is to be treated as surplusage." *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 239 (1967) (citation and quotation marks omitted); *see also WakeMed v. Surgical Care Affiliates, LLC*, 243 N.C. App. 820, 824 (2015) ("[I]f possible, every word and every provision is to be given effect." (citation and quotation marks omitted)).

34. This interpretation does not rob Maxwell of its bargain, as it contends. Had Maxwell wanted the right to be offered the pricing that Smithfield gave to new suppliers during the PSA's term, it could have negotiated for a more comprehensive most-favored-nation clause. But it didn't. In simple terms, Maxwell bargained for an assurance that Smithfield was treating it as well as existing major suppliers and a promise that Smithfield would continue to treat it as well as those suppliers, and only those suppliers, in the future.

35. Smithfield is therefore entitled to partial summary judgment. Recall that Maxwell bases its claim on the pricing that Smithfield gave to six suppliers. Of those six suppliers, four began doing business with Smithfield long after the PSA. Thus, they are not "major swine suppliers." Even if it is true that Smithfield gave them better terms without offering the same terms to Maxwell, that was not a breach of

the most-favored-nation clause as a matter of law. Having so concluded, the Court need not address Smithfield's alternative arguments that these four suppliers are not "major swine suppliers" due to their geographic location and volume of sales.

36. The fifth and sixth suppliers are Prestage Farms and Smithfield's subsidiary, Murphy-Brown. The most-favored-nation clause expressly names Prestage Farms as a major supplier, and Smithfield concedes that it is one. The clause also names Murphy Family Farms, from which Murphy-Brown is descended. Although Smithfield contends that Murphy Family Farms ceased to be a major supplier when it became a Smithfield subsidiary, the text of the most-favored-nation clause does not distinguish between internal and external suppliers. Smithfield has not established that the term "major swine suppliers" unambiguously excludes Murphy-Brown.[5]

37. **"Economic Benefits."** Next, Smithfield contends that the phrase "economic benefits" excludes pricing formulas using a base price, or benchmark, other than the Iowa-Southern Minnesota market. According to Smithfield, the most-favored-nation clause does not require it to offer Maxwell all changes in pricing given to another major supplier, only those changes that result in higher prices. But it is impossible, Smithfield says, to know in advance whether any given benchmark—

[5] Smithfield contends that it conducts business with external suppliers in a way that is fundamentally different from the way it conducts business with Murphy-Brown. External suppliers receive money for their hogs; Murphy-Brown receives an "accounting determination" denoted as a "transfer price." (Dep. K. Sullivan 65:3–17.) This evidence, which is outside the four corners of the contract, has more to do with the type of "economic benefits" that Murphy-Brown receives and less to do with Murphy-Brown's status as a "major swine supplier."

say, index or cutout pricing—is better or worse than the PSA's. On that basis, Smithfield insists that it had no duty to offer Maxwell index or cutout pricing given to other suppliers.

38. Maxwell responds that "economic benefits," as used in everyday speech, include benchmark price mechanisms. It also points to evidence that those in the hog industry, including Smithfield, regularly compared pricing benchmarks and concluded that index and cutout pricing were superior to the Iowa-Southern Minnesota market. In any event, Maxwell contends, Smithfield had to offer it any change in pricing, not just better pricing, given to another major supplier.

39. As Maxwell correctly observes, the phrase "economic benefits" is broad. In ordinary usage, "economic" means "capable of or liable to profitable exploitation," and "benefit" means "something that guards, aids, or promotes well-being." (Pl.'s Opp'n Def.'s Mot. Summ. J. 14, ECF No. 187 (quoting Webster's 3d New Int'l Dictionary (Jan. 1993).) Using those definitions, the PSA's price term is certainly an economic benefit. It follows that the components that make up the pricing formula—the base price, the overage, and any premiums or discounts—are also economic benefits. All work together to aid or promote the profitable exploitation of the contractual relationship.

40. The contrary interpretation urged by Smithfield is not reasonable. Smithfield does not discuss, much less dispute, the ordinary meaning of the phrase, arguing instead that pricing benchmarks are not economic benefits because it is

impossible to know in advance whether one will generate higher prices than another. This is unpersuasive for at least three reasons.

41. First, whether one supplier's deal is better than another's is not strictly a matter of dollars and cents. Price stability matters, too. The PSA bears this out, stating that the parties chose the Iowa-Southern Minnesota market "to establish a relatively stable national market price" as the foundation for their pricing formula. (PSA ¶ 1(b).) Quite a bit of evidence suggests that industry observers, including Smithfield, knew as early as 2014 that the Iowa-Southern Minnesota market was "thinly traded" and believed it to be inferior to index and cutout pricing for that reason. (*E.g.*, Feb. 2014 Kaster/R. Ivey E-mails.) The most natural reading of the most-favored-nation clause gives Maxwell the right to receive pricing based on a more stable benchmark if Smithfield gave that pricing to another major supplier. That holds true even if it is not possible to say on the front end that the switch would result in higher prices on any given day and even if the goal of switching benchmarks is to hold prices paid to suppliers steady rather than to increase them.

42. Second, even if dollars and cents are all that matter, it is far from clear that Smithfield and its suppliers had no way to predict or estimate to a reasonable degree the effect of moving from the Iowa-Southern Minnesota market to index or cutout pricing. The likelihood that either Smithfield or its suppliers would make a change on that scale without studying the potential effect is nil. And although Smithfield objects that modeling the future impact involves too many subjective judgments and too much uncertainty, that suggests only that making comparisons is hard, not

impossible. If Smithfield gave a major supplier a formula based on index or cutout pricing with the intent to pay higher prices to that supplier, it stands to reason that Maxwell had the right to receive the same offer.

43. Third, Smithfield and Maxwell negotiated the most-favored-nation clause knowing that pricing benchmarks sometimes change. Take Smithfield's 1992 contract with Prestage Farms as an example. It named the "Peoria, Illinois and East St. Louis, Illinois" markets as the initial benchmark but anticipated choosing a new benchmark "from time to time" out of "any number of the national livestock markets." (Prestage Farms' 1992 Contract at 2, ECF No. 160.1; *see also* Aff. R. Sharpe ¶ 7.) And, in fact, Smithfield and Prestage Farms did choose to switch to the Iowa-Southern Minnesota market at some point before the formation of the PSA. The most-favored-nation clause's promise of equal treatment for the PSA's duration wouldn't have meant much at all if Smithfield could have avoided it at any time just by shifting the major suppliers' pricing to another national livestock market.

44. Smithfield also points to section 1(b) of the PSA, which states that the parties "shall designate a substitute" if "the Iowa-Southern Minnesota Market ceases to be a viable market" and that "either party hereto shall have the right to submit the matter to arbitration." (PSA § 1(b).) This section, Smithfield contends, is the exclusive avenue for changing the base price. That isn't true. The arbitration clause is a failsafe that allows both Maxwell and Smithfield to designate a new benchmark in the worst-case scenario when the Iowa-Southern Minnesota market loses viability. The most-favored-nation clause, by contrast, grants Maxwell the right to receive the

same pricing as Smithfield's other major suppliers whether the Iowa-Southern Minnesota market is viable or not. They are complementary rights.

45. The Court concludes that the phrase "economic benefits" includes the base price or benchmark for a pricing formula. Smithfield is not entitled to summary judgment on this ground.

46. **Statute of Limitations.** Having addressed the parties' interpretive disputes, the Court now turns to their evidentiary disputes, starting with the statute of limitations.[6] Smithfield contends that Maxwell waited too long to bring a claim for breach of the most-favored-nation clause based on the pricing terms given to Murphy-Brown. Smithfield points to evidence to show that Maxwell was aware of Murphy-Brown's pricing as early as July 2015 but waited more than four years to file suit, rendering the claim untimely.

47. Maxwell does not dispute that one of its employees, Harvey Suggs, received and analyzed documents that revealed Murphy-Brown's pricing. It contends instead that Suggs's duties did not include price negotiations and that there is conflicting evidence about whether he shared what he learned with more senior decisionmakers, suggesting that the company may not have been truly aware of the alleged breach. In addition, Maxwell contends that Smithfield should be equitably estopped from

[6] Earlier in the lawsuit, Smithfield moved to dismiss portions of the claim for breach of the most-favored-nation clause as untimely. Noting that Maxwell had alleged at least one breach within the limitations period, the Court declined to employ "an allegation-by-allegation application of the statute of limitations" to any other claimed breach and concluded that disputes about timeliness were better suited to summary judgment. *Maxwell II*, 2023 NCBC LEXIS 20, at *12–13.

relying on the statute of limitations on the ground that it deceived Maxwell about its compliance with the most-favored-nation clause.

48. A plaintiff must bring an action for breach of a contract for sale of goods "within four years after the cause of action has accrued." N.C.G.S. § 25-2-725(1). For many types of claims, "accrual of the limitations period does not begin when the defendant's conduct occurred, but when the plaintiff discovered it." *Inhold, LLC v. PureShield, Inc.*, 2020 NCBC LEXIS 107, at *13 (N.C. Super. Ct. Sept. 22, 2020) (citation and quotation marks omitted). Under the UCC, though, "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." N.C.G.S. § 25-2-725(2).

49. Smithfield must have given Murphy-Brown the disputed pricing terms sometime before July 2015, for that is when Suggs learned about them. Any breach, if there was one, had occurred by that point, and as a result, the four-year limitations period expired in July 2019 at the latest. Because Maxwell began this lawsuit in August 2020, its claim is untimely under section 25-2-725.

50. Maxwell's assertion that it was unaware of Murphy-Brown's pricing is irrelevant. The cause of action accrued whether Maxwell was aware or not. In any event, Suggs's awareness is imputed to Maxwell because his duties included keeping tabs on the purchase price that Smithfield paid under the PSA and because he shared his Murphy-Brown "[p]rice comparison" with Maxwell's president, Bob Ivey. (Dep. H. Suggs 42:3–46:22, 69:21–25, 70:7–18.) Ivey could not recall that conversation but stopped short of denying that it took place. (*See* Aff. R. Ivey ¶ 36.) Thus, Suggs's

testimony stands unrebutted, and Ivey's knowledge of the price comparison "is imputed to" Maxwell. *Jay Grp., Ltd. v. Glasgow*, 139 N.C. App. 595, 601 (2000). And even if Suggs had kept the information to himself, Maxwell "is chargeable with" his knowledge because he received it while acting "within the scope of his authority and in reference to a matter over which his authority extends." *Norburn v. Mackie*, 262 N.C. 16, 24 (1964).

51. Likewise, Maxwell's estoppel argument is unpersuasive. "Equity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987). Maxwell had Murphy-Brown's pricing in hand in 2015. (*See* Dep. H. Suggs 68:24–69:25; July 2015 Taylor/Suggs E-mail, ECF No. 160.16; Murphy-Brown Kill-Cut Sheets, ECF No. 160.17.) It does not point to any evidence to show that Smithfield induced it to delay a lawsuit related to that alleged breach.

52. Because Maxwell's claim for breach of the most-favored-nation clause is untimely as to Murphy-Brown, Smithfield is entitled to partial summary judgment.

53. **Smithfield's Compliance.** Next, Smithfield argues that it complied with the most-favored-nation clause. According to Smithfield, its head of hog procurement on the East Coast, Charles Allison, repeatedly offered Maxwell index and cutout pricing formulas comparable to those given to other suppliers. Each time, Smithfield contends, Maxwell rejected the proposed terms. Maxwell denies having received any

genuine offers and asserts that it would have accepted one or more of the pricing proposals had they been genuinely offered.

54. The evidence is neither undisputed nor subject to only one reasonable interpretation, as Smithfield contends. Smithfield's best written evidence is a May 2014 e-mail from Allison to Ted Ivey (notably, not Maxwell's president, Bob Ivey). The message attached "a draft of [a] proposed contract" with index pricing. Although Smithfield insists that this was a formal contract offer, that is debatable. Allison asked Ted Ivey—who could not accept a contract offer in his position at Maxwell—to "review and provide your thoughts" and stated that "[w]e are also pulling together a cost of production pricing mechanism based off the Iowa State model that we can discuss." (May 2014 Allison/T. Ivey E-mail.) A jury could reasonably infer that Allison was negotiating, not making an offer. *See Yeager v. Dobbins*, 252 N.C. 824, 828 (1960) ("Care should be taken not to construe as offers letters which are intended merely as preliminary negotiations." (citation and quotation marks omitted)).

55. Later communications were even more equivocal. In April 2016, Allison asked Bob Ivey to "run a comparison" of index and cutout pricing options against the PSA's pricing. (Apr. 2016 Allison/R. Ivey E-mail.) In December 2017, Allison sent Bob Ivey a cost-of-production pricing formula and stated "[l]et me know if you have questions." (Dec. 2017 Allison/R. Ivey E-mail.) And in January 2018, Allison and Maxwell's Chad Smith discussed "try[ing] to model" a pricing formula partly based on cutout pricing and partly based on index pricing. (Jan. 2018 Allison/Smith E-mails.) None of these communications indisputably conveyed a contract offer.

56. Allison's deposition testimony is just as equivocal at times. Asked whether he ever formalized the April 2016 e-mail as a contract offer, Allison testified that he "talked about it with" Bob Ivey. (Dep. C. Allison 182:9–19, ECF Nos. 159.1, 188.2, 193.1, 229.1.) Discussing the December 2017 e-mail, Allison stated that "the intent was Bob was going to review this and get back to me if he wanted to move forward with this type of model." (Dep. C. Allison 204:24–205:14.) As to the January 2018 exchange, when asked whether he had made an offer, Allison testified that "[w]e had discussed a proposal." (Dep. C. Allison 217:3–22.)

57. Allison followed up this testimony with an affidavit, representing that a genuine oral or hand-delivered offer of index, cutout, or alternative pricing accompanied each e-mail. (*See* Aff. C. Allison ¶¶ 3–12.) Arguably, his affidavit and deposition testimony are inconsistent.[7] Regardless, Maxwell offered an affidavit from Bob Ivey in rebuttal, stating that "Allison's testimony on this and other points is not true." (Aff. R. Ivey ¶¶ 26–35.) In deciding summary judgment, the Court cannot credit Allison's account over Ivey's; weighing credibility is a task for the jury. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 226 (1999) (holding that a conflict between two witnesses' testimony "cannot be appropriately reconciled on a motion for summary judgment").

[7] Maxwell has moved to strike Allison's affidavit for this reason. (*See* Mot. Strike, ECF No. 184.) Having concluded that a genuine issue of material fact exists even when the affidavit is considered, the Court denies the motion to strike as moot.

58. Because there are genuine issues of material fact about whether Smithfield offered pricing terms comparable to those given to other major suppliers, Smithfield is not entitled to summary judgment on this basis.

59. **Hindsight & Leanness.** Smithfield's remaining arguments are not compelling.[8]

60. Smithfield argues that Maxwell relies on impermissible hindsight, largely repeating its earlier stance that it is impossible to know in advance whether a formula based on index or cutout pricing will be better or worse than a formula based on the Iowa-Southern Minnesota market. For reasons akin to those discussed above, the Court disagrees.

61. As early as 2014 and 2015, Smithfield's own employees had concluded that the Iowa-Southern Minnesota market was "no longer a relevant market," (Feb. 2014 Pope/Manly E-mails, ECF No. 188.20), and was "nonliquid, not representing the true supply and demand equilibrium of price," (Dep. J. Weber 105:11–20, ECF Nos. 159.19, 188.18, 193.10). Allison believed "the spread between the [Iowa-Southern Minnesota market] and the CME [index] was continuing to grow" and likely "to escalate." (Dep. C. Allison 112:17–113:15 ("the ISM you can see from the data was suppressed to the CME").) He went on to testify that he "was trying to get better

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[8] Unlike Maxwell, Smithfield's other suppliers had volume commitments, requiring them to supply a certain number of hogs in a defined period. Smithfield suggests that the lack of a volume commitment was an economic benefit that Maxwell would have had to relinquish as a condition of receiving index or cutout pricing. Even if true, that is not a basis for summary judgment, given the factual disputes about what Smithfield did or didn't offer and whether Maxwell would or wouldn't have traded a volume commitment for a new base price mechanism.

pricing for Maxwell," including that Maxwell "needed to be on a more stable market." (Dep. C. Allison 168:12–22.) By 2017, Smithfield's employees had concluded that the Iowa-Southern Minnesota market was "done." (Apr. 2017 Weber/Schmidt E-mails, ECF No. 188.34.)

62. This is not hindsight evidence. It tends to show that Smithfield gave suppliers index and cutout pricing with advance knowledge that they were more stable than, and thus superior to, the Iowa-Southern Minnesota market. It also tends to show that Smithfield itself believed that index and cutout pricing were better than the PSA's pricing by 2014.

63. Smithfield also argues that it paid higher prices for leaner hogs and that Maxwell produced fatter hogs than other suppliers. The disparity in leanness, according to Smithfield, accounts for much or all of the disparity in pricing. Put another way, Smithfield contends that the most-favored-nation clause does not require it to pay Maxwell the same as other suppliers for lower-quality hogs.

64. The evidence on this point is conflicting and often hazy. Before 2007, Smithfield used the Fat-O-Meater to measure backfat and calculate any premium due. Afterward, Smithfield stopped paying a variable premium and instead added a flat amount of "$0.63/cwt" to Maxwell's "base price." At the time, Jeff Luckman, Smithfield's Vice President of Livestock, told Maxwell to expect periodic reviews and possible adjustments to this amount "to reflect the current quality of your hogs." (Oct. 2007 Letter from J. Luckman.) But Luckman could not recall whether any periodic reviews took place and testified that "there was no lean premiums" after 2007. (Dep.

J. Luckman 203:6–25.) And Bob Ivey, in his affidavit, represents that "Luckman specifically told me that leanness was no longer a factor that Smithfield was concerned about with respect to its hog supply." (Aff. R. Ivey ¶ 11.) Even if Smithfield did pay a so-called lean premium after 2007, the evidence does not definitively show how it calculated the premium or how Maxwell's hogs compared with other suppliers' hogs.

65. From this conflicting evidence, a jury could reasonably conclude that Maxwell has not relied on impermissible hindsight and that leanness does not account for any disparity in pricing that it received. Smithfield is not entitled to summary judgment on these grounds.

66. **Conclusion.** In sum, the Court grants in part and denies in part Smithfield's motion as to the claim for breach of the most-favored-nation clause. The Court's construction of the phrase "major swine suppliers" forecloses any alleged breach relating to suppliers that began doing business with Smithfield after the formation of the PSA. In addition, the statute of limitations bars Maxwell's claim as to Murphy-Brown. Smithfield is entitled to summary judgment as to these alleged breaches.

67. But Smithfield is not entitled to summary judgment as to the claim that it breached the clause by failing to offer Maxwell changes in pricing given to Prestage Farms. The claim shall proceed to trial to that extent.

B. Output Provision

68. The PSA is an output contract. This means that the contract defines the number of hogs that Maxwell was to sell and that Smithfield was to buy in terms of Maxwell's output, rather than by specifying an exact number. Apart from a few exceptions that aren't relevant here, the output provision requires Smithfield to buy "all Market Swine actually produced by Maxwell . . . up to a maximum of" 155,000 per month. (PSA § 3(a).)

69. Maxwell claims that Smithfield breached this provision in April 2020 and for several months afterward by buying less than its entire output. Smithfield concedes that it did not buy all hogs produced by Maxwell during those months. But Smithfield denies any liability, contending that the PSA's force majeure clause and Maxwell's repudiation of the PSA excused its performance. In addition, in its counterclaims, Smithfield asserts that Maxwell breached the PSA first by wrongfully repudiating it and terminating it without notice.

70. Both sides have moved for summary judgment on Maxwell's claim for breach of the output provision. Maxwell has also moved for summary judgment on Smithfield's counterclaims and affirmative defenses of force majeure and anticipatory breach.

71. **Force Majeure.** The PSA states that "[n]either party shall be liable for failure to perform . . . any act under [the PSA] if prevented by any cause beyond the reasonable control of such party . . . ." (PSA § 12.) This is known in contract-law jargon as a force majeure clause. The phrase force majeure means a superior or

irresistible force, and the purpose of a force majeure clause is to limit a contracting party's liability when some event beyond its control makes performance impossible or impracticable. *See, e.g.*, *Michel v. Yale Univ.*, 110 F.4th 551, 556 (2d Cir. 2024) (quoting Black's Law Dictionary (12th ed. 2024)).

72. Smithfield contends that the Covid-19 pandemic—an event indisputably "beyond the reasonable control of" the parties—prevented it from buying Maxwell's entire output in and after April 2020. As the pandemic surged, Smithfield says, so did employee absenteeism, which at times halved its capacity to process hogs at its East Coast plants. According to Smithfield, it had to allocate its diminished capacity among its many suppliers, including Maxwell, and the force majeure clause negates any liability that might otherwise result from buying less than Maxwell's entire output. On that basis, Smithfield seeks summary judgment as to Maxwell's claim for breach of the output provision.

73. Maxwell argues that it, not Smithfield, is entitled to summary judgment. In Maxwell's view, the PSA requires Smithfield to purchase hogs, not to process them. Maxwell offers evidence to show that Smithfield could have paid for its entire hog output throughout the pandemic. Likewise, it offers evidence to show that Smithfield could have processed the entire output had Smithfield taken fewer hogs from its internal or other external suppliers, none of which had output contracts. Instead, Maxwell says, Smithfield prioritized hog deliveries from its subsidiary, Murphy-Brown. For these reasons, Maxwell contends that Smithfield's force majeure affirmative defense fails as a matter of law.

74. It wouldn't be reasonable to read the PSA, as Maxwell does, to require Smithfield to do nothing more than pay for Maxwell's hogs. Smithfield's promise "to purchase" the hogs connotes more than payment. (PSA § 3(a).) In everyday speech, to purchase a good means "to obtain" the good as well as to pay for it. *Purchase*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/purchase (last visited Dec. 20, 2024). The letter agreement reinforces this: Smithfield agreed to "have adequate facilities to unload market hogs in a timely manner" and to "provide loading chutes, holding pens, necessary employees, water, etc. required to receive, hold and move all hogs." (Letter Agrmt. ¶ 4.) These terms also jibe with UCC default rules, which state that the obligation "of the buyer is to accept and pay in accordance with the contract," N.C.G.S. § 25-2-301, and that "the buyer must furnish facilities reasonably suited to the receipt of the goods," *id.* § 25-2-503(1)(b).

75. Even so, the undisputed evidence favors Maxwell. Although the Covid-19 pandemic hampered Smithfield's ability to process hogs, the effect was not so great as to prevent it from accepting and processing all that Maxwell produced. The numbers don't lie: at its lowest level, Smithfield's processing capacity exceeded Maxwell's output by about an order of magnitude. Smithfield could have processed the entirety, and it could have done so comfortably. (*See, e.g.*, May 2020 Kill/Cut Summary, ECF No. 222.9; 2d Aff. R. Jennings ¶¶ 4–7; Dep. S. Horsley 230:7–12.)

76. Smithfield maintains that purchasing the entire output would have been impracticable because it would have had to turn away other suppliers' hogs to accommodate Maxwell's. The impracticability standard demands far more than that.

It is not enough that performance may cause inconvenience. Performance must be untenable due to "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties." *Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (quoting Restatement (Second) of Contracts § 261 cmt. d); *accord Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985); *see also Golden Triangle #3, LLC v. RMP-Mallard Pointe, LLC*, 2022 NCBC LEXIS 88, at *50 (N.C. Super. Ct. Aug. 2, 2022) (citing Restatement (Second) of Contracts § 263).

77. The evidence does not suggest that Smithfield would have faced an extreme, unreasonable difficulty had it performed its obligations under the PSA. Smithfield's subsidiary and largest supplier, Murphy-Brown, does not have an output contract. The same is true for many, perhaps all, external suppliers other than Maxwell. (*See* Dep. S. Horsley 224:16–225:3.) Purchasing all the hogs that Maxwell produced might have forced Smithfield to make difficult business decisions about how to allocate the rest of its purchasing capacity—for example, whether to take fewer hogs from Murphy-Brown or from its myriad external suppliers. But it would not have put Smithfield at risk of breaching a contract with any other supplier.

78. Nor would it have put Smithfield at risk of violating the law. Citing N.C.G.S. § 25-2-615, Smithfield contends that it had no choice other than to allocate its diminished purchasing capacity among all suppliers, including Maxwell. The statute doesn't say anything like that, however. It deals with untimely delivery of goods "by a seller" when performance "has been made impracticable by" unforeseen events. N.C.G.S. § 25-2-615(a). In that circumstance, the seller "must allocate production

and deliveries among his customers" fairly and reasonably. *Id.* § 25-2-615(b). Smithfield is a buyer, not a seller; section 25-2-615 does not apply.

79. To be clear, this does not mean that a buyer can never allocate scarce capacity among suppliers when faced with events beyond its control. The official comment to section 25-2-615 suggests that the statute's "reason" (if not its text) might shield a buyer whose "contract is . . . conditioned on a definite and specific venture or assumption as, for instance, a war procurement sub-contract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture." *Id.* § 25-2-615 cmt. 9. These circumstances are not present here, and Smithfield does not contend otherwise.

80. The bottom line is that Smithfield had the ability to accept and process Maxwell's entire output throughout the pandemic. And no physical, contractual, or legal limitation made it impracticable to process Maxwell's output. Because Smithfield has not marshalled evidence sufficient to permit a jury to conclude that the Covid-19 pandemic prevented it from performing its duties under the PSA, the Court grants summary judgment in favor of Maxwell as to the affirmative defense of force majeure.

81. **<u>Repudiation & Early Termination.</u>** The PSA has no fixed end date. The parties' obligations were to continue until one or the other terminated the agreement on six-years' written notice. (*See* PSA § 4.)

82. Smithfield claims that Maxwell ended the PSA early. Rather than comply with the required six-year notice period, Smithfield contends, Maxwell announced its

intent to close its business in February 2020 and delivered its last hog about a year later. To Smithfield, Maxwell's closure amounts to a wrongful repudiation of the PSA and a termination without notice. That is the basis for Smithfield's overlapping counterclaims for breach of the PSA as well as its affirmative defense of anticipatory breach.

83. Maxwell seeks summary judgment on both counterclaims and the related affirmative defense. It maintains that it went out of business in good faith due to massive financial losses and that nothing in the PSA or the law obligated it to stay in business. The PSA has no minimum output requirement, Maxwell notes, meaning that its decision not to produce any hogs is not a breach so long as it acted in good faith. At no point, Maxwell contends, did it terminate the PSA or repudiate its obligation to sell its output, assuming it had any output, to Smithfield.

84. Elasticity is the defining feature of an output contract. The seller's output may go up or down, sometimes dramatically. *See* N.C.G.S. § 25-2-306(1). No, the seller does not have unbridled freedom to produce as much or as little as it likes. As the party that determines the quantity of goods exchanging hands, it must act fairly and deliver "such actual output . . . as may occur in good faith." *Id.* Still, that leaves a lot of room for business judgment, even to the point of going out of business. A good-faith "discontinuance" of production is just as permissible as any other good-faith variation in output. *Id.* § 25-2-306 cmt. 2.

85. This carries obvious risk for the buyer. As courts elsewhere have observed, "the output contract allocates to the buyer the risk of a change in the seller's business

that makes continuation costly," *Atl. Track & Turnout Co. v. Perini Corp.*, 989 F.2d 541, 545 (1st Cir. 1993), including "the risk that the seller may reduce its production to zero," *Canusa Corp. v. A&R Lobosco*, 986 F. Supp. 723, 730 (E.D.N.Y. 1997). The buyer could mitigate this risk by negotiating to add an estimated output or a guaranteed minimum. "Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur." N.C.G.S. § 25-2-306 cmt. 3.

86. But Smithfield did not negotiate for these safeguards. The PSA has an upper limit that relieves Smithfield of any obligation to buy more than 155,000 hogs per month. (*See* PSA § 3(a).) It has no corresponding lower limit that requires Maxwell to produce and deliver a minimum or estimated number of hogs. This means that Smithfield hedged against the possibility that Maxwell might produce *too many* hogs, not that it might produce *too few*. Stated another way, Smithfield avoided the risk of oversupply but accepted the risk of scarcity, including the risk that market factors might prompt Maxwell to shutter its business in good faith.

87. Undisputed evidence shows that Maxwell did just that. Maxwell sustained huge financial losses in the years leading up to its decision to stop producing hogs. It had negative net income each year from 2015 through 2020—a total loss exceeding $100 million. (*See* Aff. R. Jennings ¶ 4.) Over that period, its credit rating fell as sharply as its debt rose. (*See* Dep. K. Bang 193:18–19, ECF Nos. 154.1, 193.2 ("[W]hat got them there[ ] is a high level of debt relative to where they were at. Lots of debt.

Low earnings. And that got them to a [credit risk rating of] 10."); *see also* Dep. K. Bang 191:21–195:21.) Then, in 2020, its lender declared its loan to be "distressed." (June 2020 Letter from K. Bang, ECF No. 154.28.) At that point, Maxwell's business was reeling from five years of decline. Closing it was a "good-faith, market-based decision." *In re Fieldwood Energy LLC*, 636 B.R. 463, 473 (Bankr. S.D. Tex. 2021) (granting summary judgment in favor of seller that made a "prudent economic decision" to cease production).

88. Smithfield argues that Maxwell could have limped along and, thus, that its decision to stave off further losses by closing its business is evidence of bad faith. That argument runs against the weight of persuasive authority. Courts have made clear that a seller does not act in good faith when it stops production because the contract turns out to be less profitable than expected. *See Feld v. Henry S. Levy & Sons, Inc.,* 37 N.Y.2d 466, 472 (N.Y. Ct. App. 1975) ("[G]ood faith required continued production until cancellation, even if there be no profit."). But a seller "[o]bviously" has a good-faith basis to stop producing when continuing would threaten "a bankruptcy or genuine imperiling of the very existence of its entire business." *Id.* at 471–72. "Absent contract language, appreciable party reliance, or evidence of evasion," a party to an output or requirements contract "does not give up its fundamental managerial right of disengaging from an unprofitable business, and the courts should avoid usurping that right through a restrictive interpretation of good faith." *Schawk, Inc. v. Donruss Trading Cards, Inc.*, 746 N.E.2d 18, 27 (Ill. App. Ct. 2001).

89. No evidence suggests evasion or reveals other indicia of bad faith. Maxwell didn't sign the PSA and then get cold feet (it supplied hogs to Smithfield for more than two decades). Maxwell didn't stop production following short-term or trivial losses (it continued to produce hogs at a big deficit for years). Maxwell didn't try to swap its deal with Smithfield for a better deal with someone else (it closed its business entirely). And Maxwell didn't go out of business to evade a promise to supply a minimum volume (the PSA has no minimum).

90. The losses that Maxwell sustained were severe, long-lasting, and likely to continue. Neither the PSA nor governing law required Maxwell to continue producing hogs at all costs, such as by diving deeply into debt or by raiding the financial resources of Maxwell's related companies, as Smithfield suggests. Rather, Maxwell retained the right to stanch its steep losses by making the reasonable, good-faith business judgment to stop production. *See In re Fieldwood Energy*, 636 B.R. at 473 ("Valero took the risk that QuarterNorth would lower its output to zero, which it did in good faith."); *Am. Paper Recycling Corp. v. IHC Corp.*, 775 F. Supp. 2d 322, 329–30 (D. Mass. 2011) ("The decision of Ivy to cease doing business simply does not support a viable claim for breach of contract."); *Schawk*, 746 N.E.2d at 27 (concluding in the context of a requirements contract that the defendant "had a legitimate business reason for discontinuing its requirements business" given evidence that it had "suffered dramatic declines in its sales").

91. By closing its business in good faith, Maxwell did not repudiate the PSA or terminate it without notice. The PSA required Maxwell to sell and deliver the hogs

that it actually produced, nothing more. Maxwell has not produced any hogs since June 2021 and has therefore had no hogs to sell to Smithfield. This is not a breach of the PSA. It is compliance. And it reflects the allocation of risk to which the parties agreed. *See* 1 White, Summers, & Hillman, Uniform Commercial Code § 4:21 (6th ed.) ("If a requirements seller wants a guaranteed minimum or a fixed maximum, the seller can and should bargain for it. The same is true for an output buyer."); *see also Neofotistos v. Harvard Brewing Co.*, 171 N.E.2d 865, 868 (Mass. 1961) (concluding that, absent an agreement "for the production of any specific volume . . . or indeed for any production," the parties had "necessarily contemplated . . . that, whatever the production, it would be governed by business conditions").

92. Accordingly, the Court grants Maxwell's motion for summary judgment as to Smithfield's counterclaims and affirmative defense of anticipatory breach.

93. **Maxwell's Output Claim.** It is undisputed that Smithfield did not buy all hogs produced by Maxwell in and after April 2020. Maxwell argues that this is a cut-and-dried breach of contract, leaving no issue for a jury to decide as to Smithfield's liability. In response, Smithfield has not attempted to show that it complied with the PSA's output provision, arguing only that the PSA's force majeure clause and Maxwell's purported anticipatory breach excused its performance.

94. Having disposed of Smithfield's affirmative defenses, and given Smithfield's undisputed noncompliance with its obligation to buy Maxwell's entire output, the Court concludes that this is the rare situation in which it is proper to enter summary judgment in favor of the party having the burden of proof. There are no genuine

issues of fact, no gaps in Maxwell's proof, and no standard that a jury must apply to these facts. *See Parks Chevrolet*, 74 N.C. App. at 721; *see also Kidd*, 289 N.C. at 370.

95. Accordingly, the Court grants summary judgment in favor of Maxwell as to Smithfield's liability for breach of the output provision. The determination of Maxwell's damages shall proceed to trial.

96. **Conclusion.** To recap, the Court grants Maxwell's motion as to Smithfield's counterclaims and affirmative defenses of force majeure and anticipatory breach. The Court also enters summary judgment in Maxwell's favor as to Smithfield's liability for breach of the output provision and denies Smithfield's cross-motion as to that claim.

C. Live-Weight Payments

97. The last dispute concerns Maxwell's claim that Smithfield breached the PSA by underpaying for certain hog deliveries. In its second amended complaint, Maxwell alleges that Smithfield sometimes paid for hogs based on their "live weight," not their "carcass weight . . . as detailed in the PSA." (2d Am. Compl. ¶ 173.) In addition, when paying based on live weight, Smithfield allegedly did not pay the full live-weight price for every delivery. (*See* 2d Am. Compl. ¶ 175.)

98. Smithfield contends that the PSA doesn't say anything about whether to use live weight or carcass weight, meaning that it was free to pay Maxwell using either methodology. Maxwell concedes as much, thus abandoning its claim that every payment based on live weight, as opposed to carcass weight, is a breach of the PSA.

99. But Smithfield offers no argument or evidence concerning the allegation that it sometimes underpaid Maxwell when using the live-weight formula. The failure to pay what is due, if true, is surely a breach of contract. Having made no attempt to show that it paid the appropriate live-weight price for the deliveries at issue, Smithfield has not carried its "initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins.*, 356 N.C. at 579. And in any event, Maxwell has presented evidence to back up its allegation that it received less in live-weight payments than it should have received for certain loads delivered between August 2016 and January 2021. (*See* Dep. N. Piggott 91:7–92:6, ECF No. 188.13.)

100. Accordingly, the Court grants Smithfield's motion as to this claim to the extent based on an allegation that all live-weight pricing is a breach of the PSA. The Court denies Smithfield's motion as to the allegation that it did not pay the full live-weight price for certain deliveries.

IV.
CONCLUSION

101. For all these reasons, the Court **GRANTS in part** and **DENIES in part** Smithfield's motion for summary judgment as follows:

a. The Court **GRANTS** Smithfield's motion for summary judgment as to Maxwell's claim for breach of the most-favored-nation clause to the extent based on allegations that Smithfield failed to offer Maxwell changes in pricing given to any supplier other than Prestage Farms and **DISMISSES** these aspects of the claim with prejudice. The Court

DENIES Smithfield's motion for summary judgment as to this claim to the extent based on the allegation that Smithfield failed to offer Maxwell changes in pricing given to Prestage Farms. The claim shall proceed to trial subject to this limitation.

b. The Court **DENIES** Smithfield's motion for summary judgment as to Maxwell's claim for breach of the PSA's output provision.

c. The Court **GRANTS** Smithfield's motion for summary judgment as to Maxwell's claim for breach of the PSA's pricing term to the extent based on an allegation that the use of live-weight pricing is itself a breach of the PSA and **DISMISSES** this aspect of the claim with prejudice. The Court **DENIES** Smithfield's motion as to this claim to the extent it is based on the allegation that Smithfield did not pay the correct live-weight price for certain deliveries. The claim shall proceed to trial subject to this limitation.

102. In addition, the Court **GRANTS** Maxwell's motion for summary judgment as follows:

a. The Court enters summary judgment in Maxwell's favor as to Smithfield's counterclaims and affirmative defenses of force majeure and anticipatory breach. The counterclaims and these affirmative defenses are **DISMISSED** with prejudice.

b. The Court also enters summary judgment in Maxwell's favor as to Smithfield's liability on the claim for breach of the PSA's output

provision. This claim shall proceed to trial for a determination of Maxwell's damages.

103. Finally, the Court **DENIES** Maxwell's motion to strike the affidavit of Charles Allison as moot.

SO ORDERED, this the 30th day of December, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases