UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 92-2441
Hon. John C. Lifland, U.S.D.J.

WALLWORK BROS., INC., :

Plaintiff, :

vs. :

RHEEM MANUFACTURING COMPANY, :

Defendant. :

:

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**BRIEF IN SUPPORT OF DEFENDANT RHEEM MANUFACTURING COMPANY'S MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

This is an action brought by a former distributor of air-conditioning equipment for Rheem Manufacturing Company ("Rheem") which, after months of negotiations with a Rheem competitor -- The Trane Company ("Trane") -- gave Rheem 30 days' notice that it was terminating their 22-year relationship. There was no written agreement between the parties. The plaintiff, Wallwork Brothers, Inc. ("Wallwork") maintains that it was entitled to a three-month grace period following its notice of termination, during which Rheem would cooperate in Wallwork's process of supplanting it by continuing to supply Wallwork through the transition. Instead, Rheem, seeking to protect its business, severed its support of Wallwork, shifting its resources to finding and supporting a new distributor in the New York region. This lawsuit followed.

Rheem now moves for summary judgment on the grounds that neither the pleadings nor the facts revealed in discovery support a claim for breach of contract. At least five months after beginning secret negotiations with a key Rheem competitor, Wallwork terminated Rheem. Rheem maintains that it acted to minimize its losses at the hands of a competitor. Wallwork's profits have grown substantially since ousting Rheem, but Wallwork wants more. Its position now is that what its own complaint

characterized as Wallwork's termination of Rheem was not a termination at all, but a statement that it intended to carry both the Rheem and the Trane lines. No joint Rheem-Trane distributorship arrangement exists anywhere, however, and deposition testimony of key Trane executives indicates that Trane and Wallwork contemplated that the maintenance of a dual distributorship would be during a transitional stage only.

Wallwork further maintains that, even though Rheem was free to reject Wallwork's "offer" to represent Rheem alongside a chief competitor, Wallwork was damaged by Rheem's refusal to ship new Rheem merchandise and to provide technical support for Wallwork after the termination of Rheem. Wallwork's position is that, despite its own rejection of written contracts incorporating a post-termination transition period, it was entitled to "bank on" grace periods granted other former Rheem distributors, allowing for an orderly transition from Rheem and the retention of good relations with its (Rheem) dealer-customers. Rheem maintains that its actions were justified and commercially necessary to protect its own customer base, and that Wallwork is therefore not entitled to damages as a matter of law.

## PROCEDURAL HISTORY

Wallwork is a New Jersey corporation with its principal place of business in West Caldwell, New Jersey. Rheem is a Delaware corporation with its principal place of business in New York, New York. The plaintiff filed its Complaint in the Superior Court of New Jersey, Law Division, Essex County, on May 12, 1992, alleging breach of contract; the Summons and Complaint were served on May 28, 1992. On June 8, 1992, Rheem removed the case to this Court. Rheem filed its Answer and Counterclaim for monetary damages based on amounts due and owing for Rheem products already shipped to the plaintiff.

On December 22, 1992, Rheem moved for summary judgment on its counterclaim. The motion was denied in a Memorandum and Order filed February 4, 1993. Discovery, including numerous depositions and document productions, as well as exchanges of interrogatories, has proceeded since then, pursuant to various pretrial orders; the most recent, the Fifth Amended Pretrial Scheduling Order, was filed on July 1, 1993.

Pursuant to Fed. R. Civ. P. 56(c), Rheem now moves for summary judgment on Wallwork's claim for breach of contract.

## STATEMENT OF FACTS

Rheem is engaged in, among other things, the manufacture of heating, air conditioning and refrigeration equipment. From approximately 1969 until January of 1992, Rheem sold its products to Wallwork, which acted as an independent distributor of and provided warranty service for Rheem products in New Jersey, New York and Pennsylvania. [Complaint ¶¶ 1-3.] Wallwork prominently identified itself as a Rheem dealer during this period, by advertising with the Rheem logo, engaging in cooperative advertising with Rheem, and displaying the Rheem name and logo at its various facilities. [Certification of Matthias Sheeleigh, III filed Dec. 21, 1992 ("Sheeleigh Certif.") ¶ 13.]

There was no written agreement between Wallwork and Rheem. [Complaint ¶ 4.] Rheem did, however, attempt to set the parties' respective rights and duties in written contracts, in 1983, 1987, 1989, and 1991. Wallwork rebuffed these attempts each time. [Sheeleigh Certif. ¶¶ 19-21.]

At some point in the early summer of 1991, Wallwork contacted or was contacted by Hans Reuschmann, Vice President of Dealer Sales for Trane, and began negotiations concerning Wallwork's becoming a Trane distributor. [Deposition of Hans Reuschmann, March 23, 1993

("Reuschmann Dep.") 19:16; Deposition of Matthias Sheeleigh III, April 15, 1993 ("Sheeleigh Dep.") 92:10 (Exh. A hereto).*] On July 22, 1991, Reuschmann wrote to Sheeleigh and thanked him for the "very helpful information" Sheeleigh had mailed him about Wallwork's Rheem distributorship, and requested that Sheeleigh fill in "sales mix sheets" and provide financial data. The letter also included a confidentiality agreement between Trane and Wallwork covering "information, records and data pertaining to financial condition and performance, cost, prices, customers, market share and employees." Sheeleigh countersigned the letter on July 29, 1991. [Exh. B hereto.]

The negotiations continued, and by November Wallwork and Trane effectively had come to a complete agreement. On November 19, 1991, R. Glenn Woodard, Trane's Vice President for Unitary Product Sales, mailed a "Transition Agreement" letter to Sheeleigh, covering issues that would arise in the transition and start-up of Wallwork's independent Trane distributorship complete with its own substantial customer base. [Exh. C hereto.] The letter stated that "The start-up date for Wallwork Bros.,

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*Citations to "Exh. __ hereto" refer to the Exhibits in the Appendix accompanying this Brief.

Inc. is January 2, 1992." [Id. at 1.] The letter spelled out extensive, concrete plans for the transition:

> [T]he initial stocking order shall be entered no later than December 10, 1991, for shipment on or before December 31, 1991. . . .
>
> Don Hall of Trane's Order Service Operation is scheduled to visit your headquarters the week of December 2, 1991.
>
> . . . Lowell Hinsch of Trane's Human Resources Department will conduct an employee meeting in our New Jersey office on December 4, 1991, in the morning to explain their options.

[Id. at 2 - 3.] Those travel plans, in fact, were made the very next day, November 20, 1991, as indicated by Don Hall's travel records. [Exh. D hereto.] The November 19 letter also stated that management from both companies would review account analyses of "the existing customer base of Wallwork Brothers and Trane" in late January, 1992. [Exh. C at 1 (emphasis added).]

On November 25, 1991, Sheeleigh sent an overview of Wallwork and its operations to Phillip C. Horton, Manager of Independent Distributor Sales. [Exh. E hereto.] It included information about Wallwork's finances, sales, marketing, and distribution strategies. Sheeleigh's cover letter indicated that he trusted it would be "useful when you meet with your personnel here in New Jersey."

Meanwhile, Wallwork continued to place orders with Rheem, culminating in large orders for November and December of 1991. [Complaint ¶ 6.] Wallwork did not inform Rheem that Wallwork was negotiating a distributorship deal with Trane [Sheeleigh Dep. 156:20 (Exh. F hereto)], much less that the parties had exchanged proprietary information, settled key terms of the agreement, and made plans for the transition.

In response to indications from Wallwork that it was dissatisfied with its relationship with Rheem, and to rumors that a deal with Trane was in the works, however, Rheem's Neil Cowne, Larry Kraatz, and Mike Kaasa contacted Sheeleigh at his sister-in-law's home over the 1991 Thanksgiving weekend, and arranged for a meeting at a hotel at Newark Airport on December 1, 1991. [Id. 138:15 - 140:24.] Sheeleigh told the Rheem personnel at that meeting that the plaintiff had made no commitment to Trane. "In fact, I believe I said," he later testified, "'We'll go and give it some further thought and get back to you.'" The meeting lasted into the evening. [Id. 140:8 - 141:3; 165:10-11.]

The very next day, December 2, 1991, Sheeleigh, as president of Wallwork, executed the Transition Agreement as well as the Trane Wholesale Distributor Agreement [Exh. G hereto] (the "Trane Distributor Agreement"). On December 4, 1991 -- three days after the meeting, and two

days after executing the Trane Distributor Agreement -- Sheeleigh finally contacted, not any of the meeting participants, but Ross Willis, President of Rheem's Air Conditioning Division, in a letter [Exh. H hereto] (the "Termination Letter"):

> Please accept this letter as notification that we have decided to assume the Trane distributorship in northern New Jersey and Staten Island, effective January 2, 1992.
>
> As you can imagine, this has been a very difficult decision for us to make. The years we have distributed the Rheem Product line have been good and profitable years for our company. Rheem is a well-respected line, and we are confident it will continue to maintain its strong market position.
>
> On Sunday, we spoke with Mike, Neal, and Larry about the reasons why we were contemplating making this change. Although a lot of issues were discussed, the heart of the matter is that we simply cannot enter into 1992 with the possibility of another down year in sales. Our move to Trane assures us this will not happen.
>
> Our new distributorship with The Trane Company does not include the area we are presently serving in Pennsylvania. We would like to continue to distribute your products in this market. Please let us know if this is possible.

On December 5, Mr. Kaasa, Vice President of Sales for Rheem's Air Conditioning Division, responded in a letter acknowledging and accepting the termination by Wallwork, and denying the request that Wallwork be permitted to continue representing Rheem in Pennsylvania.

The letter also indicated that all of Wallwork's "in-house" orders (those already received by Rheem) for equipment and parts were cancelled. [Exh. I hereto.] In response, Sheeleigh wrote a letter on December 10, 1991, asking Rheem to reconsider its position cancelling existing orders, and, for the first time, asserting that no termination was intended by the Termination Letter. [Exh. J hereto.] Sheeleigh did not telephone Mr. Kaasa, nor did he call the other participants in the December 1 meeting, to discuss his contention that no termination was intended. [Sheeleigh Dep. 198:8 - 201:17 (Exh. K hereto).]

In fact, neither he, nor anyone from his organization, had until then told anyone at Rheem that Wallwork intended to carry a dual line. [Id. at 207:18 - 208:17.] Nor is there evidence that they discussed such a possibility with Trane. Indeed, Sheeleigh has since admitted that he did not broach the possibility of handling both lines at the December 1 meeting, even though, from Wallwork's perspective that the lines do not compete, doing so might have assuaged Rheem's concerns about Trane. [Id. at 141:25; 154:20; 246:24 - 248:25; Deposition of Jack Thoele, April 16, 1993 ("Thoele Dep.") 220:6 - 221:3 (Exh. L hereto).]

Besides present Rheem management, others were also clear that Wallwork intended a replacement, not a

supplementation, of Rheem. Under the Transition Agreement and the Trane Distribution Agreement, as discussed supra, Wallwork's first Trane order would be delivered by December 31, 1991. Yet:

- Stephen Rittersbach, a former Wallwork manager, testified that, when the Trane deal was being negotiated, he -- who was in charge of planning Wallwork's warehouse space -- had no conversations regarding obtaining additional warehouse space to accommodate the new line along with the Rheem inventory. [Deposition of Stephen P. Rittersbach, June 24, 1993 ("Rittersbach Dep.") 56:9-15 (Exh. M hereto).]

- Trane's Hans Rueschmann testified that his intention regarding Wallwork was to get "all of [its] business" and "to replace Rheem," and indeed admitted that, if faced with the situation Rheem was in, he "would quickly move and do something else . . . find a different distributor." [Rueschmann Dep. 33:10-11; 37:11 (Exh. N hereto).].

- And Don Hall of Trane testified that Sheeleigh characterized Wallwork's letter to Rheem as notice that "no longer would Wallwork be a distributor for Rheem, but in fact was becoming a distributor of Trane products." [Deposition of Donald Hall, August 11, 1993 ("Hall Dep.") 25:2 - 26:4 (Exh. O hereto).]

In fact, earlier in this litigation, Wallwork itself asserted that, rather than suggesting a dual distributorship, the Termination Letter had "advised the defendant that it was terminating its representation of the defendant in northern New Jersey and Staten Island," and that Wallwork had engaged in the "termination of plaintiff's representation of the defendant." [Complaint ¶¶ 7-8 (emphasis added).]

On December 13, 1991, counsel for Wallwork wrote to Mr. Willis and expressed his objections to Rheem's reaction to being terminated. [Exh. P hereto.] On January 3, 1992, Vincent J. Debo, Esq., Vice President and General Counsel to Rheem, reasserted Rheem's decision in a letter while informing Wallwork's counsel that parts would still be available to satisfy warranty obligations on a cash-in-advance basis. [Exh. Q hereto.]

Sheeleigh wrote to Mr. Willis again on February 19, 1992. [Exhibit R hereto.] Expressing his disappointment, he focused on what he regarded as unfair treatment compared to other former Rheem distributors, writing, "I don't understand why you singled us out for such treatment." Indeed, Wallwork had acted on its understanding that, as a 22-year Rheem "veteran," it would receive at least as much indulgence after terminating Rheem as had other former Rheem distributors. [Sheeleigh Dep. 121:5 - 122:25 (Exh. S hereto).] As Sheeleigh put it,

> I knew that other distributors had terminated their or had their relationship terminated by Rheem in the last few years and in each instance sofar [sic] as I knew, Rheem continued to sell parts and equipment to those organizations . . . .

[Sheeleigh Certif. ¶ 2.] Thus the large November and December orders, made while negotiations with Trane were all but finalized, would have qualified as "in-house" orders which Wallwork calculated that Rheem would

deliver. Wallwork would than have a large enough inventory to serve its existing Rheem clients while it "analyzed" that client base with Trane, pursuant to the executed Transition Agreement.

In fact, contrary to Wallwork's present assertions, the Trane Company competes directly with Rheem in the air conditioning market. [Reuschmann Dep. 24:16-17 (Exh. T hereto). Stephen P. Rittersbach was responsible for managing product lines and buying merchandise, and was privy to Wallwork sales and market analyses [Rittersbach Dep. 18:9 - 19:4; 21:22 - 22:14 (Exh. U hereto)]. He testified that, though each company's dealer base was distinct, the products they sold were similar and the companies were, "to a large degree," competitors who sold air conditioners with the same range of specifications in terms of tonnage, BTU and efficiency. [Id. at 34:22; 39:7-19]. Similarly, Trane's Don Hall testified that, "As General Motors is a competitor of the Ford Motor Company, Rheem is a competitor of the Trane Company." [Hall Dep. 39:4-6 (Exh. V hereto).]

Indeed, Rittersbach testified that, because they are of comparable quality and address similar markets, he knew of no distributors which carried both lines. [Rittersbach Dep. 43:21 - 44:21 (Exhibit W hereto).] Neither did Hans Reuschmann, who is responsible for sales and distribution for The Trane Company in the southeastern

United States [Reuschmann Dep. 11:6-8; 14:12-15 (Exh. X hereto)]. Neither did Paul Trotter, regional manager sales manager for American Standard, Trane's parent [Deposition of Paul Trotter, March 23, 1993, 15:11-16 (Exh. Y hereto)].

Yet Wallwork now maintains that it always intended to retain both Trane and Rheem, permanently, though it recognized that Rheem would not be required to accept this. [Sheeleigh Dep. 162:15-23; Thoele Dep. 215:15-22 (Exh. Z hereto).] The Termination Letter, Sheeleigh now asserts, was merely a matter of "business politeness." [Sheeleigh Cert. ¶ 22.]

Wallwork's Rheem equipment and parts sales for 1990 and 1991 were $6,189,610.11 and $5,588,810.94 respectively. Their 1992 Trane sales were $9,199,306 -- representing an increase of 56% over the average two previous years' sales figures. [Exh. AA hereto.]

## ARGUMENT

### SUMMARY JUDGMENT IS APPROPRIATE ON WALLWORK'S BREACH OF CONTRACT CLAIM SINCE RHEEM COULD NOT, AS A MATTER OF LAW, HAVE BREACHED THE DISTRIBUTION CONTRACT AFTER IT HAD BEEN TERMINATED BY WALLWORK.

This case is about who terminated whom. As a matter of law, a party that terminates a contractual relationship has no cause of action for breach of contract. Because the Complaint alleges that the termination was effected by Wallwork, and the facts support this contention, no cause of action for breach can lie against Rheem. Here the pleadings and facts are such that there is no material issue as to whether Wallwork terminated Rheem.

### A. Standards for summary judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Brown v. Hilton, 492 F. Supp. 771, 774 (D.N.J. 1980). The burden of showing that there is no genuine issue of material fact may be met by the moving party by "showing" that there is an "absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once a properly supported motion for summary judgment is made, the burden shifts to the nonmoving party to "set forth specific facts showing that

there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, 477 U.S. 242, 247-248 (1986).

There exists no issue for trial unless the non-moving party can demonstrate that there is sufficient evidence favoring the nonmoving party so that a reasonable jury could return a verdict in that party's favor. Id. at 249.

Here there is no genuine issue for trial. It will be shown that, under the pleadings, the facts elicited in discovery, and the documentation in the record, a reasonable jury could only conclude that it was Wallwork which, at its convenience and after months of duplicity, terminated Rheem.

B. Wallwork's own allegations in its Complaint that Wallwork terminated Rheem provide a sufficient basis for summary judgment on Wallwork's claim for breach of contract.

Wallwork has done better than admit that it terminated the distributorship between itself and Rheem: It has alleged it. The Complaint herein reads, in relevant part (emphasis added):

> 7. On or about December 4, 1991, the plaintiff advised the defendant that it was terminating its representation of the defendant in northern New Jersey and Stated Island effective as of January 2, 1992. Notification was given both orally and in written form.

> 8. On or about December 5, 1991, the defendant notified the plaintiff that they had received the formal notification of the termination of plaintiff's representation of the defendant . . .

This in itself is sufficient foundation for a grant of summary judgment here. The plaintiff alleges that it terminated the defendant. In such a case, a complaint of breach cannot stand.

C. No reasonable jury could find that the Termination Letter of December 4, 1993 could be anything but a termination by Wallwork of its distribution relationship with Rheem.

Wallwork maintains that Rheem may have "misunderstood" the Termination Letter. [Complaint ¶ 9.] More recently, it has taken the position that it meant no change at all in the relationship -- that the Termination Letter was merely a display of etiquette. "As a matter of business politeness . . . I felt obligated to advise Rheem of the new relationship . . ." [Sheeleigh Cert. ¶ 22.] In fact, Wallwork now maintains that it intended all along permanently to retain both the Rheem and the Trane lines. [Sheeleigh Dep. 162:16-23.]

But, gracious as it is, the Termination Letter sent by Wallwork to Rheem on December 4, 1993 cannot be read as anything but a positive, unequivocal termination. It is worth reproducing the letter in its entirety:

> Please accept this letter as notification that we have decided to

> assume the Trane distributorship in northern New Jersey and Staten Island, effective January 2, 1992.
>
> As you can imagine, this has been a very difficult decision for us to make. The years we have distributed the Rheem Product line have been good and profitable years for our company. Rheem is a well-respected line, and we are confident it will continue to maintain its strong market position.
>
> On Sunday, we spoke with Mike, Neal, and Larry about the reasons why we were contemplating making this change. Although a lot of issues were discussed, the heart of the matter is that we simply cannot enter into 1992 with the possibility of another down year in sales. Our move to Trane assures us this will not happen.
>
> Our new distributorship with The Trane Company does not include the area we are presently serving in Pennsylvania. We would like to continue to distribute your products in this market. Please let us know if this is possible.

No jury could find that this letter communicated anything but a termination, especially in the context of the chronology set forth in the Statement of Facts, which is based entirely on the Complaint and the testimony of present and past Wallwork and Trane employees.

Yet the strongest single advocate for understanding the Termination Letter as a termination of Rheem is a plain reading of the letter. It reads unmistakenly like a "Dear John" letter. A relationship is being terminated, supplanted. It would be absurd to analyze the letter here, line by line. Given phrases -- even ones

such as "a difficult decision," "our move to Trane," etc. -- can always conceivably be twisted and explained away out of context by creative counsel.*

But as shown infra, it is the context which ultimately damns Wallwork's proferred interpretation.

D. No reasonable jury could find that the facts surrounding the delivery of the Termination Letter point to anything other than a termination by Wallwork of its distribution relationship with Rheem.

Abandonment or rescission of a contract may be inferred not only from express words, but from the circumstances. Invengineering, Inc. v. Foregger Co., 293 F.2d 201, 203 (3d Cir. 1961); Mossberg v. Standard Oil Co. of N.J., 98 N.J. Super. 393, 406 (Law Div. 1967). As set out extensively above, Wallwork had been negotiating with Trane since the summer of 1991. They had been exchanging information. In November of that year they had begun to make concrete plans for the transition. Trane's Don Hall had his plane tickets in hand for his visit to Wallwork, to discuss the stocking of Trane equipment. They had agreed in writing to work hand-in-hand

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*Actually, the paragraph requesting that Wallwork be allowed "to continue to distribute [Rheem] products in this market" -- Pennsylvania -- is impossible to explain away. By analogy to the statutory-construction principle of inclusio unius est exclusio alterius, it is clear Wallwork did not intend to distribute Rheem products anywhere else, but asked to retain Pennsylvania.

"analyzing" the "Wallwork Bros." customer base -- that is, the Wallwork-supplied Rheem dealers. ("Analyzing," of course, meant analyzing it as a future Trane customer base.) And Wallwork was planning for the arrival of Trane's Transition Team. Meanwhile, Wallwork placed full seasonal orders with Rheem, relying on Rheem's history of indulging turncoat distributors. Wallwork merely had to get its orders for a reserve of Rheem products "in house" before bolting, it seemed, to be assured of their delivery -- and of an inventory cushion for the transition and "analysis" period.

Suddenly, on Thanksgiving weekend, Rheem personnel track down Wallwork's president, Sheeleigh. They have heard the rumors about Trane. Though they can't know that the deal has already closed, they ask Sheeleigh what they can do to keep the account. How does he respond? He does not float a dual distributorship. He does not promote a "win/win" scenario, with Wallwork distributing both lines and no one losing market share. He does not calmly reassure Rheem that Trane is not its competitor. Can he look these men in the eye and tell them that Rheem and Trane don't compete? That Wallwork expects to keep both lines? That no competitive secrets will be passed to Trane? It is easier to push them off. He promises to "get back to" them.

Wasting no time -- realizing that he is found out -- Sheeleigh makes the Trane deal official the very next day and sends in the executed contract. Both the Rheem and the Trane orders are in. He has positioned Wallwork perfectly, though perhaps his hand has been forced by a week or two. Waiting until the documents are received by Trane, Wallwork terminates its Rheem distributorship (Sheeleigh still avoiding the people he's worked with for years, the people who called a special meeting to keep Wallwork in the fold), and waits for everything to fall into place. Sheeleigh expects that Wallwork's existing orders will be filled, and that Rheem will provide Wallwork with a few months' leeway to maximize the profitable "transition" to Trane.

Only this time, Rheem will not be burned. Rheem informs Wallwork that, given Wallwork's termination, it will not cooperate any further.

Meanwhile, Wallwork is already set up with a new supplier, but Rheem has to scramble to find a loyal distributor. Indeed, the only party effectively deprived of notice is Rheem -- getting merely 30 days, and that only after months of jockeying by Wallwork and Rheem's competition.

Rheem, the last to know, was under no obligation to continue playing the sap. Under the rule of Bak-A-Lum Corp. v. Alcoa Building Products, 69 N.J. 123, 128 (1976),

the purpose of notice is to provide the "amount of time the notified party needs to make adjustments and to plan and arrange for business activities to replace those which are to be eliminated." Thus where a replacement vendor is found before the supplier breaks off a relationship, notice is "a meaningless gesture." Gilette Foods, Inc. v. Bayernwald-Fruchterverwertun, GMBH, 1991 WL 25455 (D.N.J. 1991) (Wolin, J.) (appended to this Brief as Exhibit A).

In this case, "notice" by Rheem to Wallwork also would be absurd. Wallwork had already replaced Rheem with Trane, and it waited to inform Rheem of this until the convenient moment. Wallwork ultimately increased its sales with Trane half-again over what it had achieved with Rheem. The evidence now puts to the lie any claim that Wallwork is entitled to these sales -- plus its existing Rheem sales -- if Rheem would only have rolled over. That Rheem reacted by protecting itself gives rise to no claim by Wallwork.

There is no on-point case citation for this situation. There is no reported case of a party terminating a contract to enter into a better replacement arrangement, and then turning around and suing the terminated party for breach. Such a position is impossible. An abandoned contract is unenforceable. Mossberg, 98 N.J. Super. at 407.

The facts stated above, as cited in the Statement of Facts, are uncontrovertable. No jury will be able to read the Termination Letter as anything but a termination letter, whether in or out of context. And the plaintiff itself, whether by Freudian slip or before it shifted strategy in the case, described its actions as a termination in its Complaint. There is no genuine issue for trial.

## CONCLUSION

For the foregoing reasons defendant Rheem Manufacturing Company respectfully requests that its motion for summary judgment on the plaintiff's complaint be granted.

Respectfully submitted,

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Dated: September 9, 1993