THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-In-Equity

The Honorable Charles B. Simmons, Jr. Master-in-Equity

Appellate Case No.: 2022-000897
Civil Action Case Nos.: 2019-CP-23-05954 & 2020-CP-23-04351

Crescent Homes SC, LLC, Appellant/Plaintiff,

v.

CJN, LLC, Respondent/Defendant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal pertains to the enforceability of a Right of First Refusal ("ROFR") granted by CJN, LLC ("CJN" or "Respondent") to Crescent Homes SC, LLC ("Crescent" or "Appellant") (collectively referred to as the "Parties"), a question that the Master-in-Equity determined notwithstanding the absence of any pending offer or contract on the subject property. The ROFR is set forth in the Agreement for Purchase and Sale of Developed Lots ("Agreement") executed by the Parties, both of which are sophisticated commercial entities with extensive real estate experience. The Agreement provides that CJN was to develop and sell to Crescent lots in "Phase 1" of a subdivision development called "River Springs," and that at the Initial Closing of Phase 1, CJN would then grant Crescent a ROFR as to "Phase 2," which is neighboring land that the Parties intended would comprise the remaining lots of the subdivision.

The Parties generally do not dispute the fact that Crescent has a valid ROFR on the *lots* in Phase 2. However, at the trial of this case, CJN argued that the ROFR does not apply to the raw, undeveloped acreage of Phase 2, even though it is the same property that the Parties mutually intended would be divided into lots at a second phase. The record demonstrates that CJN notified Crescent on two separate occasions of offers received by CJN from third parties to purchase the raw, undeveloped land encompassing Phase 2, explicitly granting Crescent the opportunity to exercise the very ROFR that CJN denies exists (as to the "raw" land).

After CJN filed the underlying declaratory judgment action requesting that the Master-in-Equity invalidate the ROFR, a one (1) day trial was held on the limited issue of the enforceability of the ROFR. The Master-in-Equity thereafter found a justiciable controversy existed between the Parties despite there being no pending sale or offer to purchase the land encompassing Phase 2 and found the ROFR was unenforceable as an unreasonable restraint on alienation of interest in land.

The Master-in-Equity then declined to reform the ROFR to comport with the intent of the Parties. This appeal follows.

On October 8, 2018, CJN and Crescent entered into an Agreement for 32 single-family lots located on Standing Springs Road, Greenville County within a subdivision known as River Springs Subdivision ("River Springs Subdivision"), which included the ROFR as to the future phase. Under the Agreement, CJN was to develop and sell to Crescent these 32 lots as part of "Phase 1" ("Phase 1 lots") of the development of the River Springs Subdivision. Crescent would then build single-family homes on these lots and sell them to homebuyers. (CJN Ex. 2.) In addition to Phase 1, the Agreement references a potential "Future Phase" or "Phase 2" of additional lots on property owned by CJN ("Phase 2 Property") that was adjacent to the Phase 1 lots. (CJN Exs. 3 and 5.) The ROFR was an intended part of a contract that was relied upon by Crescent and performed by Crescent.

The Agreement contained a provision granting Crescent a ROFR on the Phase 2 Property using the following language:

> 19. **Right of First Refusal:** At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on **Exhibit "A-2"** as "Future Phase" and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.

(CJN Ex. 5, Paragraph 19.) The timing of the granting of the ROFR to Crescent was based on the occurrence of the Initial Closing for the Phase 1 lots. The occurrence of the Initial Closing was delayed due to numerous breach and defaults of the Agreement on the part of CJN, which Crescent detailed in a notice dated September 5, 2019. (Crescent Exs. 4 and 6; CJN Ex. 5.) On October 11, 2019, Crescent filed a Complaint in the Court of Common Pleas for Greenville County, Civil Action No. 2019-CP-23-5954 against CJN for breach of contract, asserting that CJN was

responsible for a delay in the Initial Closing. (2019-CP-23-5954 Complaint.) Crescent also sought specific performance of the Agreement and stated that CJN failed to ensure that construction access was available to the Phase 1 lots and failed to maintain the lots free from trash and debris.

CJN slowly resolved its defaults in a manner that finally allowed for certain lots in the Initial Phase to be closed, and the first takedown of lots as part of the Initial Closing occurred on or about August 11, 2020. Despite the terms of the Agreement relating to the ROFR, a separate memorandum of the ROFR was never recorded on or around the time of the Initial Closing despite Crescent's good-faith attempts to encourage CJN to commit the details of the ROFR to writing. (Crescent Ex. 12.) Eventually, CJN completely refused to discuss the terms of the memorandum with Crescent, thereby refusing to act in good faith or deal fairly with Crescent as to the ROFR that CJN kept trying to circumvent.

Prior to the Initial Closing, on June 26, 2020, Douglas F. Clark ("Mr. Clark"), an individual who owned property neighboring the River Springs Subdivision, offered to purchase the Phase 2 Property from CJN for $775,000. (CJN Ex. 6.) CJN entered into a Purchase and Sale Agreement with Mr. Clark. (CJN Ex. 6.) CJN included a contingency provision in Mr. Clark's contract acknowledging Crescent's ROFR:

> 1.5 Contingencies. The obligations of the Seller to sell the Property is contingent upon Crescent Homes SC, LLC, A Delaware limited liability company, terminating any and all rights of first refusal for the Property pursuant to that Agreement for Purchase and Sale of Lots and Development with an effective date of October 8, 2018, and any amendments thereto (collectively, the "LPA").

(CJN Ex. 6, Paragraph 1.5.) CJN's intent to be bound by the ROFR is clear. The Initial Phase and Phase 2, or the "Future Phase," are related, as they were mutually intended to be successive phases of a single development. The relatedness of the Initial Phase and Phase 2 is evident from the use of language in the Agreement denoting a First Phase and a "Future Phase." (CJN Ex. 5, Paragraph

19.) However, Mr. Clark withdrew this offer and, based on the evidence in the record, expressed no further interest in the property.

Furthermore, although CJN maintained at trial it was not required to provide Crescent the opportunity to exercise the ROFR as to the raw, undivided land of the Phase 2 Property, CJN provided a copy of Mr. Clark's offer to Crescent, inquiring if Crescent wanted to exercise the ROFR on the Phase 2 Property on the terms of Mr. Clark's offer. (Trial Tr. p. 26, lines 10 – 17.)

With the closing of the Phase 2 Property days away, Crescent sought to protect its ROFR rights as set forth in the Agreement by filing a lis pendens on the Phase 2 Property. (*Affidavit of Terry*, Paragraph 10.) It was Crescent's position that because the Initial Closing had not yet occurred, the ROFR rights had not been triggered and were not capable of being validly exercised. (Crescent Ex. 10.) As noted above, Mr. Clark withdrew his offer to purchase the Phase 2 Property shortly thereafter, which caused he issue to lack justiciability.

On September 18, 2020, CJN filed a separate lawsuit on in the Greenville Court of Common Pleas, Civil Action No. 2020-CP-23-04351, asserting claims for declaratory judgment, abuse of legal process, tortious interference with contractual relationship, and unfair and deceptive trade practices against Crescent. (2020-CP-23-04351 Complaint.) CJN alleged that the ROFR held by Crescent was invalid and that the lis pendens filed by Crescent was done for the ulterior purpose of preventing the sale of the property to third parties.

Approximately six months later on March 19, 2021, CJN filed a Motion for Partial Summary Judgment alleging that the ROFR held by Crescent was invalid because it constituted an unreasonable restraint on alienation and contained no time limitation in violation of the South Carolina Rule Against Perpetuities. (CJN's Motion for Summary Judgment filed March 19, 2021.) In an Order dated April 20, 2021, the Court denied CJN's Motion for Partial Summary Judgment

on the grounds that there are apparent factual disputes and novel issues that required further factual inquiry to clarify the application of the law. (Order dated April 20, 2021.)

Less than thirty (30) days after unsuccessfully moving for partial summary judgment to invalidate and void the ROFR, CJN coincidentally received a purported offer to purchase the Phase 2 Property from Opus Petrus, LLC ("Opus Petrus"), an entity owned by an individual with whom the principal of CJN has a close personal relationship. (Trial Tr. p. 33, lines 10-21; p. 166, line 22 – p. 167, line 11; Pl. Ex. 8.) The purchase price included in the Opus Petrus offer was $1,250,000, which was $475,000 more (62% more) than the previous offer from Mr. Clark that was tendered by CJN to Crescent less than one (1) year prior.

Despite claiming the ROFR was unenforceable and void, CJN tendered the Opus Petrus offer to Crescent on May 18, 2021, inquiring if Crescent wanted to exercise the ROFR set forth in the Agreement. (CJN Ex. 8.) For numerous reasons, Crescent determined that the Opus Petrus offer was an illegitimate offer manufactured in an attempt to circumvent the ROFR and extract an unreasonable purchase price from Crescent. (CJN Ex. 9.) The terms of the Opus Petrus offer were not commercially reasonable or consistent with the market, whether in terms of the purchase price, the amount of earnest money, the provision for seller financing, the financing terms and maturity date, and the omission of standard contingencies, among other things. (Trial Tr. p. 125, lines 1-25.) Further, no due diligence was conducted by Opus Petrus in advance of its offer to purchase the property, nor were any efforts undertaken to resolve the contingency that was set forth in the Opus Petrus offer relating to septic permits. (Trial Tr. p. 127, line 19 – p. 130, line 1.) As such, Crescent notified CJN that the offer was not *bona fide* and did not affect the ROFR. (Trial Tr. p. 131, line 19 – p. 132, line 1.) Opus Petrus subsequently withdrew its offer to purchase the Phase 2 Property. (CJN Ex. 11.)

CJN then amended its Complaint on October 21, 2021, restating its assertion that the ROFR was invalid and unenforceable and alleging that Crescent's rights under the ROFR were extinguished by Crescent's failure to make an offer better or equal to the offer for purchase submitted by Opus Petrus. (2020-CP-23-4351 Amended Complaint.)

On August 11, 2021, Crescent filed a Motion to Consolidate and Merge Civil Action No. 2019-CP-23-5954 and Civil Action No. 2020-CP-23-4351 for the purposes of all remaining discovery and trial. By an Order filed October 22, 2021, the Master-in-Equity (the "Master") consolidated the two cases and held that the ROFR issue raised in Civil Action No. 2020-CP-23-4351 should be bifurcated for trial. (Order dated October 22, 2021.)

On May 4, 2022, the Master presided over the bifurcated portion of the consolidated cases, trying only CJN's claim that it was entitled to a declaration that the ROFR is void and unenforceable. Crescent raised the issues of ripeness and justiciability, but the Master-in-Equity proceeded to hear and resolve the issue. In an Order dated May 27, 2022 (the "Order"), the Master ruled that the ROFR was invalid and enforceable and declined to reform the ROFR, stating: "However, based on the language used in paragraph 19, the Court is unable to interpret and/or give meaning to the parties' agreement without substantially and significantly creating terms and conditions that the parties themselves could have and should have included." (Order, p. 8.)

On June 6, 2022, Crescent filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, requesting that the First Order be withdrawn. (Pl.'s Motion to Alter or Amend filed June 6, 2022.) Additionally, Crescent requested that the Master issue a new order that resolve the issues presented and correct each of the factual errors, legal errors, and other defects. In an Order dated June 10, 2022, the Master denied Crescent's Motion to Alter or Amend. (Order dated June 10, 2022.) On June 29, 2022, Crescent filed a Notice of Appeal of the Master's First Order and Second

Order as these Orders are a final ruling on a claim for declaratory judgment and, therefore, immediately appealable.

STANDARD OF REVIEW

The standard of review that applies to this appeal is one for an action at law. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Kiriakides v. Atlas Food Sys. & Servs., Inc*., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) (*citing Corley v. Ott*, 326 S.C. 89, 92, n. 1, 485 S.E.2d 97, 99, n. 1 (1997)). "Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "Pursuant to the 'main purpose rule,' in actions praying for both money damages and equitable relief, 'characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action.'" *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991).

Furthermore, an action to construe a contract is an action at law. *See Duncan v. Little*, 384 S.C. 420, 682 S.E.2d 788 (2009). In its Amended Complaint, CJN sought a declaration from the trial court that relating to the rights and interests of the Parties to the Agreement, including the Right of First Refusal contained in Paragraph 19. By issuing the Order finding that the ROFR was void and unenforceable, the Master was interpreting a contract, and therefore, resolving a question of law. *See Stecker v. TALX Corp*., 384 S.C. 224, 681 S.E.2d 890 (Ct. App. 2009) (holding that a declaratory judgment action for construction of a contract is a legal action.); *see also Silver v. Abstract Pools & Spas, Inc*., 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008) (holding that the interpretation of a contract is a question of law).

As to findings of law made by a master-in-equity, the appellate court applies a *de novo* standard of review. *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019) (citing *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009). "Questions of law may be decided with no particular deference to the trial court." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (*quoting S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008)). In contrast, the appropriate standard of review for a master-in-equity's findings of fact is more deferential, as the appellate court "reviews factual findings only for evidence which reasonably supports the court's findings." *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998).

ARGUMENT

As an initial matter, this Court should reverse the Master's Order on the basis that the issue of enforceability is not ripe for review in the absence of a bona fide offer to trigger the ROFR. CJN asked to invalidate the ROFR even though there was no pending offer to purchase the Phase 2 Property. For this reason, there was no justiciable controversy as to the ROFR under South Carolina law. Both prior offers were terminated and withdrawn by the offerors. The Master nevertheless issued a ruling on the enforceability despite the lack of a justiciable controversy that was ripe or appropriate for judicial determination.

To the extent the Court finds that there is a justiciable controversy, the Court should reverse the Master's findings that the ROFR is unenforceable. As needed, the Court should reform the language of the ROFR based on the evidence in the record, or apply the rule of reasonableness as to missing time frames or applicable deadlines. The Master should have given weight to the evidence and the testimony from both parties that provided the basis for supplying the reasonable

time frames in which the ROFR had to be exercised. Crescent and CJN entered into the ROFR with the mutual understanding that it was valid and binding. The Parties are sophisticated commercial entities with extensive experience in real estate transactions and contracts and were represented by counsel. The Parties understood that they would continue to work towards finalizing the specific terms relating to price and duration after the occurrence of the Initial Closing. (Trial Tr. p. 106, line 20 – p. 107, line 6; p. 117, line 19 – p. 118, line 5.) For these reasons, the ROFR is not an unreasonable restraint on alienation where the parameters for exercising the right were agreed to and understood by the Parties.

I. THE MASTER ERRED IN RULING ON THE ENFORCEABILITY OF THE RIGHT OF FIRST REFUSAL WHERE THERE WAS NO PENDING SALE OR OFFER OF SALE ON THE PHASE 2 PROPERTY.

The Master erred in ruling that the ROFR set forth in Paragraph 19 of the Agreement was unenforceable because the issue of enforceability is not ripe and appropriate for judicial determination in the absence of a real and substantial controversy. The South Carolina Supreme Court has held that a "threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *See Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp*., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). Under South Carolina law, "[a] declaratory judgment action must involve an actual, justiciable controversy." *S. Bank & Tr. Co. v. Harrison Sales Co.*, 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985) (citing *Blue Ridge Electric Cooperative v. Combined Utility System*, 279 S.C. 135, 303 S.E.2d 91 (1983). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop. Inc., v. Carolina Power & Light Co*., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983).

The Master improperly relied upon prior contracts with Mr. Clark and Opus Petrus in reaching his conclusion that a justiciable controversy exists. (Order, p. 6.) However, the evidence in the record demonstrates that these two (2) purported offers received by CJN for the Phase 2 Property do not create a justiciable controversy. At the time Mr. Clark allegedly proposed to purchase the Phase 2 Property on or around June 26, 2020, the Initial Closing on the Phase 1 lots had not yet occurred. (Trial Tr. p. 63, line 24 – p. 64, line 2.) Because Paragraph 19 of the Agreement provides that CJN would grant to Crescent the ROFR "at the Initial Closing," Crescent did not yet have the power to exercise the ROFR because it had not received the power to exercise the ROFR by the terms of the Agreement, nor did CJN have the right to circumvent the right it had granted. (Crescent Ex. 10.) The Clark offer was later withdrawn, and therefore, was not a pending offer.

The Opus Petrus offer to purchase the Phase 2 Property also fails to create a justiciable controversy. It was also withdrawn and, based on the record, was not a bona fide offer. Where there is no pending bona fide offer to purchase the property in question, there is no justiciable controversy surrounding the ROFR. *See Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp*., 358 S.C. 460, 476–77, 596 S.E.2d 51, 60 (2004) ("Because Peoples does not have a pending offer for the purchase of its property, there is currently no justiciable controversy concerning the validity of the preemptive right provision in the Covenants. Accordingly, the referee erred by ruling on the enforceability of the right of first refusal provision."); *see also Uno Restaurants, Inc. v. Bos. Kenmore Realty Corp.*, 441 Mass. 376, 383, 805 N.E.2d 957, 963 (2004) ("A third-party offer is bona fide if it was made "honestly and with serious intent," *Mucci v. Brockton Bocce Club, Inc*., 19 Mass.App.Ct. 155, 158, 472 N.E.2d 966 (1985), that is, if the offeror genuinely intends to bind itself to pay the offered price.") "The requirement that triggering offers be bona fide serves

to disable property owners from extinguishing a right of first refusal by simply relaying vague offers that may include indefinite terms from unidentified third parties." *Uno Restaurants, Inc.,* 441 Mass. at 383, 805 N.E.2d at 963.

At trial, Crescent presented evidence that the Opus Petrus offer was not bona fide. CJN's principal admitted that Opus Petrus did not perform any due diligence on the Phase 2 Property, which would be unreasonable and unusual for a buyer paying $1.25 million dollars for the property with the intent of developing it. (Trial Tr. p. 64, lines 3 – 6.) Opus Petrus did not take any action to obtain the permitting necessary for developing the property, such as septic permits, which were critical to building any sort of structure on the property and were the subject of a specific contract contingency. (Trial Tr. p. 127, line 19 – p. 130, line 1; CJN Ex. 9.) Furthermore, there was an established personal relationship between the principal of CJN and the principal of Opus Petrus, with the principals jointly owning rental properties and having entered into dozens of real estate deals in the past. (Trial Tr. p. 33, lines 13 – 21.) The closing date approached under the Opus contract and was extended once, still without any due diligence or efforts to satisfy the contingency of septic permits. The timing, just on the heels of the denial of summary judgment, was also suspect.

The South Carolina Supreme Court has explicitly held that, "[a]bsent a pending sale or offer for sale, or purchase or offer to purchase, or the presence of a third party challenging right of first refusal, there is no justiciable controversy." *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp*., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). Other courts have likened a ROFR to a "dormant option," and have required a determination of whether the ROFR was "dormant" or "active" on the date the request for declaratory judgment is filed to inform whether a justiciable controversy exists. *See Reagan Nat'l Advert. of Austin, Inc. v. Pfeiffer*, No. 03-20-00617-CV, 2022

WL 3048246, at *6 (Tex. App. Aug. 3, 2022) (*citing Carl M. Archer Tr. No. Three v. Tregellas*, 566 S.W.3d 281, 291 (Tex. 2018)).

As evidenced by the record, there was no legitimate offer of sale or pending sale relating to the Phase 2 Property at the time of the hearing. The Master acknowledged that "[a]s of the date of trial, there was no active contract for sale on the property." (Order, p. 4.) This should have been determinative. In the absence of a real and substantial controversy, the Master's findings relating to the enforceability of the ROFR held by Crescent was not ripe and appropriate for judicial determination. For this reason, the Master's Order should be reversed.

II. THE MASTER ERRED BY REFUSING TO CONSIDER AND ACCEPT EVIDENCE OF THE PARTIES' CONDUCT AND INTENT AS TO THE TERMS OF THE RIGHT OF FIRST REFUSAL.

The Order should be reversed on the basis that the Master relied upon erroneous findings of fact. Furthermore, the Master made inconsistent findings relating to the issue of ambiguity of the ROFR. The Court should reverse the Order and reform Paragraph 19 of the Agreement based on the testimony of the Parties and other evidence in the record.

A. The Master's Findings of Fact are Inconsistent with the Record

The Order relies upon findings of fact that are erroneous. The Master found that the Agreement contained no reference to Phase 2 (also referred to as the "Future Phase") outside of the ROFR contained in Paragraph 19. (Order, p. 3.) There is a specific exhibit that depicts the "Future Phase" (Exhibit A-2 to the Agreement), as well as other general terms of the Agreement that apply to Phase 2, including but not limited to Paragraphs 9, 13, 14, 21. (CJN Ex. 5.) Likewise, the Master incorrectly found that Crescent "concedes" that the Agreement does not contain any terms relating to Phase 2. (Order, pp. 3-4.) No such concession was made.

The Order incorrectly states that Crescent filed a lis pendens to "to prevent the sale" of

Phase 2 to Mr. Clark in June 2020. (Order, p. 2.) However, the purpose of Crescent's filing of the lis pendens was not to prevent a sale but to place other potential purchasers on notice that Crescent had a legitimate ROFR in the Phase 2 Property and to address breaches of contract by CJN that violated Crescent's rights and/or were undertaken for the purpose of circumventing Crescent's rights. (Trial Tr. p. 132, lines 8-14.) *See Horry Cnty. v. Ray*, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009) (quoting 51 Am. Jur.2d Lis Pendens § 2 (2020)) ("[L]is pendens is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already public record, *i.e.,* the fact of a suit involving property.") Crescent's intention was to have any justiciable dispute resolved, but the issue became unripe and nonjusticiable as a result of the withdrawal of the contract.

The Master erred in finding that the ROFR contained in Paragraph 19 of the Agreement is unenforceable because it is lacking in specific and critical areas, when any missing time frames could and should have been supplied by the trial court based on the record. At trial, the Master explained the relevant principles of contract construction as: "From my analysis, first question the Court has, is there an ambiguity that allows the Court to go outside the four corners of the document? If so, then testimony as to intent would become relevant. If not, then it doesn't matter what they intended. It's what language they used." (Trial Tr. p. 22, lines 9 – 14.) Although the Master acknowledges the law of South Carolina relating to contract construction, his findings and conclusions are inconsistent with the recognized framework. It is a principle of contract construction that "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001).

In the Order, the Master concluded that, "based on the language used in paragraph 19, the Court is unable to interpret and/or give meaning to the parties' agreement without substantially and significantly creating terms and conditions that the parties themselves could have and should have included." (Order, p. 8.) (emphasis added). Without explicitly saying so, the Master determined that the ROFR is ambiguous. When an agreement is ambiguous, the court should endeavor to determine the parties' intent. *See Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). "Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties." *Hawkins v. Greenwood Dev. Corp*., 328 S.C. 585, 592, 493 S.E.2d 875, 878–79 (Ct. App. 1997).

If the language of the ROFR provision is ambiguous, as the Master appears to conclude in the Order, then he was obligated to interpret the meaning of the ROFR based on evidence of the Parties' intent presented at trial. The Master failed to do so. In declining to make this interpretation, the Master disregarded undisputed evidence in the record that: (i) the Parties intended for there to be an enforceable ROFR on the Phase 2 Property; and (ii) the Parties intended to proceed with the development of the Phase 2 Property.

B. The Parties' Mutual Intent Is Ascertainable From The Record

Although extrinsic evidence is typically inadmissible to vary or contradict the terms of a contract, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties. *See, e.g., Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999). The evidence presented at trial, combined with notions of equity, enabled, and required the Master to specify the procedures for executing the ROFR. "It has long been the law of this state that where a written contract does not conform to the intention of the parties, equity will reform the contract." *Shaw v. Aetna Cas. & Sur. Ins. Co.*, 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980).

"The purpose of reformation is not to make a new contract for the parties that they did not make, or alleviate a hard or oppressive bargain, but to cause an instrument to express the intent of the parties as to the contents of the instrument, giving effect to one actually made by the parties and not accurately reflected in their written agreement. The purpose of the remedy is to make the written contract truly express the intent of the parties and uphold the parties' intent, correcting a defective instrument to reflect the true terms of the parties' actual agreement." 66 Am. Jur. 2d Reformation of Instruments § 6 (2021). The Parties mutually intended that the ROFR be enforceable upon exchange of valuable consideration, which should guide the outcome of the dispute

The evidence in the record provided the Master with parameters to reform the language of the ROFR. The testimony in the record establishes the Parties' mutual intent to develop the Phase 2 Property. In his deposition, CJN's principal admitted the Parties' mutual intent to develop the Phase 2 Property:

Q: All right. There's a reference to a future phase in this Section 19, right?

A: Absolutely.

Q: Alright. And so I'm just asking you that there was a mutual intent that there would be a future phase, correct?

A: Yes.

(Franchina Dep. p. 53, lines 15 – 22.)[1] The principal for Crescent also confirmed this mutual intent.

[1] In advance of trial, undersigned counsel submitted certain deposition excerpts of Nicholas Franchina to be offered at trial pursuant to Rule 32(a)(5), SCRCP. The Master at trial took this under advisement but ultimately never pronounced a ruling. Moreover, the Supreme Court has found that "[a] trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting," such that this evidence should be considered. *See Brown v. Allstate Ins. Co*., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001).

(Trial Tr. p. 142, lines 16-20.) ("There was certainly – there was certainly the intent, you know, to continue from Phase I into Phase II with CJN being the developer and Crescent Homes being the builder.") Use of the term "lots" and term "Future Phase" in the Agreement implies there was a mutual intention and expectation that there would be a Phase 2 that followed Phase 1. CJN's principal further testified that when CJN entered into the Agreement, it intended for the ROFR provision to be enforceable and that if CJN developed the lots on the Phase 2 Property, Crescent would have the ROFR to purchase the lots. (Franchina Dep. p. 45, lines 10 - 17[2]; Trial Tr. p. 58, line 20 – p. 59, line 1[3].) Furthermore, the Parties' intent to proceed with the development of the Phase 2 Property is set forth in a Letter of Intent executed by the Parties stating that: "Seller agrees to proceed with development of Phase 2 in such a matter as to ensure availability of lots according to the timeline established in the takedown schedule without unnecessary delays." (CJN Ex. 4, Section 11.)

Furthermore, although the Master found that the language of the ROFR lacked any specification as to how long the right exists, the evidence in the record demonstrates that the Parties agreed that a ten (10) year term of the RORF would be reasonable. (Trial Tr. p. 155, line 3.) The evidence also showed that CJN included a ten-year right of first refusal in document prepared for

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[2] Q: All right.
When you entered into this contract that included a right of first refusal, did CJN intend for those provisions to be enforceable?
A: Absolutely.
Q: Okay.
A: As long as everything was met with the contract.

[3] Q: Those lots don't exist yet; do they?
A: They do not exist. But if I developed them, Mr. Terry would have the right of first refusal to purchase them.
Q: He would have the right of first refusal to do that?
A: Absolutely. I said that. I've told y'all that six times.

Mr. Clark, which demonstrates CJN's further belief that the term was reasonable. (Trial Tr. p. 51, line 15 – p. 52, line 5.) Based on the evidence in the record, the intent of the Parties was to create a valid and enforceable ROFR. After determining that an ambiguity existed in the language of the ROFR, the Master failed to consider the evidence presented to give meaning to the Parties' intent.

C. The Master Failed to Consider the Parties' Conduct

The Master also failed to consider evidence relating to the Parties' initial understanding relating to the binding nature of the ROFR. As the record demonstrates, the Parties intended to: (i) proceed with development of the Phase 2 Property when entering into the Agreement, (ii) create an enforceable ROFR and (iii) perform the Agreement in good faith. CJN acknowledged it was obligated to act in good faith when performing the Agreement. (Trial Tr. p. 52, lines 6 – 9.) The Parties' obligation to act in good faith when performing the contract is set forth in the Agreement itself in Paragraph 21(E): "The Parties shall act in good faith in performing and discharging their respective duties and obligations hereunder." (CJN Ex. 5, Paragraph 21(E).) Even if this requirement was not stated in the Agreement, the implied covenant of good faith and fair dealing is an implied term of a valid contract in South Carolina. *See RoTec Servs., Inc. v. Encompass Servs., Inc.,* 359 S.C. 467, 472–73, 597 S.E.2d 881, 884 (Ct. App. 2004); *see also Osborn v. U. Med. Assocs of Med. Univ. of South Carolina*, 278 F.Supp.2d 720, 741 (D.S.C. 2003) (citing *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) ("[T]here exists in every contract an implied covenant of good faith and fair dealing.").

Crescent presented evidence to demonstrate that CJN had not acted in good faith in its performance of the Agreement. As discussed above, CJN breached the implied covenant of good faith and fair dealing by tendering the illegitimate offer from Opus Petrus. (CJN Ex. 9.) Additionally, CJN testified that it unilaterally decided not to pursue the development of the Phase

2 Property, which it had been the mutual intent that CJN would do. (Trial Tr. p. 55, lines 3-8.) Although the ROFR contemplates a "Future Phase," CJN testified that CJN intended to do another phase "if it made sense." (Trial Tr. p. 55, lines 13-14.) CJN never indicated to Crescent that it no longer wanted to undertake the Future Phase or that it did not "make sense" to do so. (Trial Tr. p. 59, line 16 – p. 60, line 4.) Instead, CJN simply entered into contracts without prior notice or discussion with Crescent with the intention of circumventing Crescent's rights. The ROFR refers to the "lots" because that was the deal being laid out by the Parties at the time they entered the Agreement. (Trial Tr. p. 143, lines 11-19.)

Furthermore, at trial CJN attempted to create a false distinction between *lots* and *raw, undivided land* of the Phase 2 Property in order to shirk its obligations under the Agreement. However, the evidence demonstrates that CJN offered Crescent the opportunity to purchase the Phase 2 Property when CJN received offers on the Phase 2 Property from two (2) separate buyers, which contradicts CJN's claim of an alleged distinction. (Trial Tr. p. 17, line 24 – p. 18, line 5.). CJN acknowledged the binding nature of the ROFR by making the sale contract with Mr. Clark contingent upon Crescent "terminating" its ROFR. (Trial Tr. p. 25, lines 14-18; CJN Ex. 6, Paragraph 1.5.)

The failure to consider this evidence is reversible error. Accordingly, the Court should reform the language to conform with the Parties' intentions with specific terms and conditions to render the ROFR enforceable.

III. THE MASTER ERRED IN DETERMINING THAT THE RIGHT OF FIRST REFUSAL CREATED AN UNREASONABLE RESTRAINT ON ALIENATION.

The Master found that the ROFR contained in Paragraph 19 of the Agreement creates an unreasonable restraint of alienation of interest in land on the basis that the ROFR lacked specific terms, including terms and conditions of purchase by Crescent, a time allowed for exercise of the ROFR by Crescent, procedures for exercising the right, the purchase price of the lots, and how long the right exists. (Order, pp. 6-7.) The Master concluded that the language of the ROFR would effectively allow Crescent to "indefinitely have rights relative to CJN's ability to transfer, sell or otherwise develop lots" in the Phase 2 Property. (Order, p 7.) The Master's finding is inconsistent with the evidence in the record.

A right of first refusal, which is a pre-emptive right according to South Carolina common law, is subject to the rule against unreasonable restraint on alienation of interest in land. *See Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997); *see also* 61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 110 (2002) (Pre-emptive rights are subject to the rule against restraint of alienation of interest in land). "Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect." *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984). Courts assess several factors when deciding reasonableness of the restraint, such as: "[w]hether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right." *Restatement (Third) of Property (Servitudes)* § 3.4 cmt. f (2000). The ROFR was supported by a legitimate purpose of developing the Phase 2 Property into a subdivision of single-family homes. (Trial Tr., p. 12, lines 16-23; p. 14, lines 7-16.) There is no dispute as to the property encumbered by the ROFR. (Trial Tr. p. 15, line 13 – p. 16, line 3; p. 58, lines 10 – 15; Affidavit of Terry, Paragraph 3.)

The Master's finding is inconsistent with the evidence in the record that the Parties intended for Crescent to purchase the Phase 2 Property at the price that was offered by a third party in a pending offer. (Trial Tr. p. 55, lines 3-8.) The Supreme Judicial Court of Massachusetts has found that a right of first refusal, such as the ROFR contained in Paragraph 19 of the Agreement, is a minimal restraint on alienation. The court in *Bortolotti v. Hayden* found the following*:*

> Unlike an option to purchase at a fixed price, the owner is assured of receiving market value for his property (and thus will not be deterred from improving it or offering it for sale). Nor will potential buyers, knowing that the market value of the property will remain intact, be deterred from purchasing the property.

Bortolotti v. Hayden, 449 Mass. 193, 204–05, 866 N.E.2d 882, 890–91 (2007). If the holder of the ROFR chooses not to buy the property in question, the owner may sell the property to the third party. *Id.* A right of first refusal is reasonable when it can be exercised by matching a current bona fide offer or a fair market appraisal. *See Lorentzen v. Smith,* 129 N.M. 278, 282, 5 P.3d 1082, 1086 (2000) (finding that the rights of first refusal were not unlawful restraints on alienation where the price was based on matching a bona fide offer or a fair market appraisal). The Parties intended for the price at which Crescent could purchase the Phase 2 Property would be equal to or greater than a bona fide third party offer that CJN seriously considered. (Trial Tr. p. 55, lines 3-8; p. 155, line 22 – p. 56, line 5.) Neither Party questioned the price Crescent would need to pay to purchase the Phase 2 Property when CJN extended the right to purchase the property. CJN surrenders nothing by offering the property first to Crescent to see if the price can be matched.

The public policy concerns supporting the rule against unreasonable restraint on alienation as it relates to the reasonableness of time are not at issue in this case. In *Iglehart v. Phillips*, the Florida Supreme Court held that the rule against unreasonable restraints on the use of property "concerns restraints of such duration that they prevent the free alienation of property." *Iglehart v.*

Phillips, 383 So. 2d 610, 614 (Fla. 1980). The court in *Iglehart* recognized that an option restraint is generally accepted as reasonable if the option price is at market or appraised value regardless of the duration of the option. *Iglehart* at 614. The court concluded that the option was invalid because it was no different than a fixed price option of unlimited duration. *Iglehart* at 616. When considering the purpose of the rule against unreasonable restraints on the alienation of property, it follows that a determination of the reasonableness of a restraint "depends upon its long-term effect on the improvement and marketability of the property." *Iglehart* at 614. When an option price for a ROFR is at market price or appraised value, there is little detrimental long-term effect on the improvement and marketability of the property. *Iglehart*, at 614 (citing Restatement of Property § 413 (1944)) ("It is generally agreed that an option restraint is reasonable if the option price is at market or appraised value, irrespective of the duration of the option.").

The ROFR is not an indefinite cloud on the title of the Phase 2 Property as the Order implies, nor does the ROFR hinder CJN's ability to sell the Phase 2 Property. The ROFR is analogous to a contractual obligation on CJN's part to promptly notify Crescent of the terms of any bona fide third-party offer that is acceptable to CJN so that Crescent may match or exceed the third-party offer to purchase the Phase 2 Property. *See Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1288, 2008 WL 2678578 (Fla. 2008) (A right of first refusal is a contractual right.) As summarized in *Bortolotti v. Hayden*:

> …..Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer, if and when the owner decides to sell, **there is no power either to compel an owner to sell the property at an unfavorable price, or to encumber an owner's ability to sell the property for a lengthy period of time. There is no casting of a cloud of uncertainty on the title to the property, and no potential to forestall a sale**.

Bortolotti v. Hayden, 449 Mass. 193, 201–02, 866 N.E.2d 882, 888-9 (2007) (emphasis added).

The Agreement was entered into by the Parties prior to the Initial Closing. As a result, the ROFR contained in Paragraph 19 does not include specific terms relating to timing and price. (Trial Tr. p. 117, line 19 – p. 118, line 5.) Although the ROFR does not provide a time period for the duration of the ROFR, the record demonstrates that the Parties believed that a 3-year, 5-year, or 10-year period would all be reasonable. (Trial Tr. p. 118, line 3 – p. 119, line 14.) The Master erred in finding that the ROFR creates an unreasonable restraint of alienation of interest in land because such finding contradicts the intention of the Parties. The duration of the ROFR can and should have been reformed rather than cast aside.

Accordingly, the Master's finding should be reversed, and the Court should find that the ROFR is for a legitimate purpose, that the Parties' agreed to a reasonable time and duration and therefore, the ROFR is enforceable.

IV. THE MASTER ERRED IN FAILING TO REFORM THE RIGHT OF FIRST REFUSAL IN ACCORDANCE WITH THE SOUTH CAROLINA RULES AGAINST PERPETUITIES STATUTE.

Having found that the ROFR is an unreasonable restraint on alienation, the Master declined to address whether the ROFR violates the South Carolina Rule Against Perpetuities, which would have further enabled the ROFR to be reformed. (Order, p. 9.) As discussed above, the ROFR is not an unreasonable restraint on alienation. Thus, the Master should have determined that the South Carolina Rule Against Perpetuities requires that the provision be reformed rather than forfeited.

Based on the South Carolina Rule Against Perpetuities, any nonvested interest that would be invalid for purposes of the rule, the statute requires the court to reform the interest so that it satisfies the rule at the time of the creation of the interest. Section 27-6-40 of the South Carolina Code provides:

> Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years permitted by this chapter if:
>
> (1) a nonvested property interest or a power of appointment becomes invalid under § 27-6-20;
>
> (2) a class gift is not but may become invalid under § 27-6-20 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
>
> (3) a nonvested property interest that is not validated by § 27-6-20(A)(1) can vest but not within ninety years after its creation.

S.C. Code Ann. § 27-6-40. The statutory rule requires reformation of any instrument violating the rule:

> South Carolina's version of the Uniform Statutory Rule Against Perpetuities provides "that a nonvested interest violates the statutory rule against perpetuities if it fails to satisfy either the common law rule against perpetuities time period or the statutory 90-year wait-and-see time period. If a nonvested interest fails to satisfy either test, section 27-6-60(B) requires that a court reform the disposition. Thus, the statutory rule against perpetuities "effectively allows three bites of the apple to a nonvested interest...."

See Abrams v. Templeton, 320 S.C. 325, 328, 465 S.E.2d 117, 120 (Ct. App. 1995) (citing Medlin and Boyle, *What Every South Carolina Lawyer Should Know About the (Ugh!) Rule Against Perpetuities*, S.C. Lawyer 26, 28 (May/June 1991)); *see also Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2022 WL 3691391, at *16 (D.S.C. Aug. 25, 2022) (same).

If the Parties' failure to specify the procedures for exercising the ROFR were to render the ROFR an unreasonable restraint on alienation of land as the Master found, the South Carolina Rule Against Perpetuities statute requires the Master to reform the language so that Crescent's interest in the Phase 2 Property is vested. The record establishes that the ROFR was specifically bargained for by sophisticated commercial entities who regularly enter into contracts and engaged in land

transactions. Both Parties were represented by counsel and engaged in negotiations relating to the Agreement. (Trial Tr. p. 29, lines 7-17; p. 135, lines 16-22; p. 64, lines 15-25.)

The Master erred by failing to reform the ROFR in accordance with the statutory Rule Against Perpetuities, which provides for a "wait and see" approach for ninety years. *See* S.C. Code § 27-6-20(A). Thus, to the extent the ROFR violates the Rule Against Perpetuities, the Court should have reformed the ROFR to bring it within compliance.

CONCLUSION

Appellant Crescent Homes SC, LLC requests that the Court vacate the Order on the basis that this matter does not involve a justiciable controversy. In the alternative, Crescent respectfully requests that the Court impose the decision that the Master should have made and declare the Right of First Refusal enforceable and should be reformed rather than invalidated.

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