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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master-in-Equity

Appellate Case No. 2020-001446
Trial Court Case No. 2020-CP-07-00155

South Carolina CVS Pharmacy, L.L.C,.....Appellant,

v.

KPP Hilton Head, LLC,.....Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. DID THE MASTER ERR WHEN IT FAILED TO FIND THAT CVS TIMELY EXERCISED ITS OPTION TO RENEW THE LEASE?

INTRODUCTION

This case is about whether a tenant, South Carolina CVS Pharmacy, L.L.C. ("CVS"), timely exercised its option to renew a lease for the CVS Pharmacy located at 10 Pope Avenue, Hilton Head Island, South Carolina (the "Lease") when (1) CVS placed its written notice exercising its right to renew the Lease (the "Notice") to the landlord, KPP Hilton Head, LLC ("KPP"), in the mail four days prior to the lease renewal deadline; (2) the Notice arrived at the only place KPP accepts mail (a Post Office Box) one day prior to the Lease renewal deadline; (3) KPP did not go pick up the Notice at its Post Office Box until three days after the Lease renewal deadline; and (4) KPP denied that CVS effectively exercised its right to renew the Lease on the basis that the Notice was not timely delivered because KPP's agent did not "sign for" and take physical possession of the Notice until after the renewal deadline.

The Master found that KPP did not receive the Notice until KPP signed for and physically retrieved the Notice from KPP's Post Office Box. The Master's finding permits KPP to manipulate the date that it received written notice of CVS's decision to renew the Lease based on the date and time that KPP checked its mail, instead of the date the Notice was placed in the mail or was available for KPP to pick up from its Post Office Box.

The Lease at issue in this case contains an initial term of 20 years and includes four renewal option periods, each for an additional five years. **(R. 30)**. To exercise each renewal option, the Lease requires CVS to provide notice to KPP ninety (90) days prior to the expiration of the then-current term (the "Renewal Deadline"). **(R. 30)**. There is no dispute that the Renewal Deadline

was Sunday, November 3, 2019. However, CVS and KPP disagree about whether CVS timely provided notice to KPP prior to the Renewal Deadline.

The Lease sets forth the manner in which CVS must provide notice to KPP when exercising its option to renew the Lease. **(R. 47)**. These requirements are applicable to all situations where either CVS or KPP provides a notice or demand to the other in connection with the Lease. There is no dispute that CVS properly complied with the Lease's requirements when it placed a written copy of the Notice exercising CVS's option to renew the Lease in the mail with the United States Postal Service ("USPS") via certified mail, return receipt requested on Wednesday, October 30, 2019—four days prior to the Renewal Deadline. **(R. 78 & 123)**. There is no dispute that the USPS delivered the Notice to the only place where KPP accepts mail on Saturday, November 2, 2019—one day prior to the Renewal Deadline. **(R. 123)**. The only issue in this case is whether CVS's Notice—mailed four days prior to the Renewal Deadline and delivered to KPP's Post Office Box one day before the Renewal Deadline—was timely.

On November 12, 2019, KPP sent a letter addressed to CVS's Lease Administration Manager purporting to reject the Notice. **(R. 128–29)**. On December 12, 2019, KPP sent a second letter, again purporting to reject the Notice on the basis that the Notice was not timely delivered to KPP. **(R. 125–26)**. Relevantly, the Lease states that the rent is to remain the same throughout the last five years of the initial term and each of the four renewal option periods. **(R. 67–68)**. KPP was and is using CVS's alleged failure to timely deliver the Notice for the sole purpose of exacting higher rent payments from CVS. KPP's intent is evidenced by its December 12, 2019 letter, in which KPP informed CVS that it would discuss a new lease, but only if the new lease contained higher rent payments. **(R. 126)**.

STATEMENT OF THE CASE

On January 24, 2020, CVS filed a Complaint with the Beaufort County Court of Common Pleas seeking (1) a declaratory judgment that CVS timely and effectively exercised its option to renew the Lease for an additional five-year term and that CVS was the prevailing party under the Lease and entitled to an award of attorneys' fees; and (2) an injunction barring KPP from taking any action to remove CVS from the Premises. **(R. 19–129)**. On February 7, 2020, KPP filed an Answer and Counterclaim, seeking a declaratory judgment that KPP was entitled to holdover rent under the Lease and an award of attorneys' fees. **(R. 203–66)**.

On January 29, 2020, CVS filed a Motion for Temporary Restraining Order requesting that the court prohibit KPP from taking any action to remove CVS from the Premises during the pendency of this action. **(R. 130–46)**. On January 30, 2020, CVS's Motion for Temporary Restraining Order ("TRO") was granted by the circuit court. **(R. 15–17)**. The TRO enjoined and restrained KPP from taking any action to remove CVS from the Premises during the pendency of this action. **(R. 16)**.

On February 10, 2020, the circuit court held a hearing on CVS's Motion for TRO, and on February 11, 2020, the circuit court issued a Form 4 Order extending the TRO "for one hundred (120) days or until a disposition on the merits is rendered, whichever is later." **(R. 13)**. Also on February 11, 2020, the circuit court referred this case to the Master-In-Equity for Beaufort County (the "Master").

On June 1, 2020, KPP filed a Motion for Summary Judgment. **(R. 284–96)**. On July 7, 2020, CVS filed its own Motion for Summary Judgment, arguing that CVS timely served the Notice on KPP and effectively renewed the Lease for an additional five-year term because (1) the Notice was delivered to and available for KPP to pick up at its Post Office Box prior to the Renewal Deadline on Saturday, November 2, 2019; and (2) the Lease's general notice and demand provision

deems the Notice served when it was mailed on Wednesday October 30, 2019, because it was received by KPP on a non-business day (i.e., a Saturday), which is a receipt that occurred outside of the ordinary course of business. **(R. 297–311)**.

On August 13, 2020, a hearing was held before the Master in which both parties argued their respective motions for summary judgment. **(R. 340–70)**. On August 27, 2020, the Master entered the Order granting KPP's Motion for Summary Judgment finding that CVS failed to timely deliver the Notice and, therefore, failed to exercise its option to renew the Lease, because (1) KPP did not receive the notice until KPP "signed for" and took physical possession of the Notice on Wednesday, November 6, 2019, four days after the Renewal Deadline; and (2) the Lease's service upon mailing exception only applied to a party's purposeful refusal to accept its mail.

On September 8, 2020, CVS filed a Rule 59(e) motion requesting the Master reconsider its decision to grant summary judgment in KPP's favor and, instead, grant summary judgment in CVS's favor because the Master erred when it (1) failed to find that the Notice was received when it arrived at KPP's Post Office Box on Saturday, November 2, 2019; (2) found that the Lease required the Notice first be "signed for" and physically retrieved by KPP before service is deemed effective; and (3) failed to find that the Lease deems the Notice served on the date of mailing when the Notice was received by KPP on a non-business day. **(R. 324–39)**. On October 20, 2020, the Master issued an order denying CVS's Motion for Reconsideration. **(R. 1–3)**. On October 29, 2020, CVS filed its Notice of Appeal with this Court.

STATEMENT OF FACTS

On May 7, 1998, KINPIN Partnership entered into the Lease with Revco Discount Drug Centers, Inc. ("Revco"). Compl. ¶ 4 **(R. 20)**; Def.'s Answer ¶ 4 **(R. 203)**. KINPIN Partnership subsequently assigned all of its right, title, and interest in and to the Lease to KPP, and KPP

assumed all of KINPIN Partnership's duties and obligations under the Lease. Compl. ¶ 6 **(R. 20)**; Def.'s Answer ¶ 6 **(R. 203)**.

On July 23, 1998, KINPIN Partnership and Revco entered into the First Lease Amendment (the "First Amendment"). Compl. ¶ 5 **(R. 20)**; Def.'s Answer ¶ 5 **(R. 203)**. The First Amendment set annual rent at $257,860.97, payable in equal monthly installments of $21,488.41 ("Fixed Rent"). Compl. ¶ 11 **(R. 21)**; Def.'s Answer ¶ 11 **(R. 203)**. The Lease contains four option periods, each with additional five-year terms. Compl. Ex. A **(R. 28–64)**; Def.'s Answer ¶ 12 **(R. 204)**. Fixed Rent continues through each of the four five-year option periods. Compl. ¶ 13 **(R. 21)**; Def.'s Answer ¶ 13 **(R. 204)**.

On May 25, 1999, KPP sent a letter to Revco and confirmed the Lease's initial term commenced on April 26, 1999, and expired on January 31, 2020 (the "Initial Term"). Compl. Ex. D **(R. 73–75)**; Def.'s Answer ¶ 8 **(R. 203)**. On January 1, 2011, Revco assigned all of its right, title, and interest in and to the Lease to CVS, and CVS assumed all of Revco's duties and obligations under the Lease. Compl. ¶ 7 **(R. 20);** Def.'s Answer ¶ 7 **(R. 203)**.

In order for CVS to effectively renew the Lease for an additional five-year term, CVS was required to serve the Notice on KPP no later than 90 days prior to the expiration of the Initial Term (Sunday, November 3, 2019). Compl. Exs. A, B, & C **(R. 28–64, 65–70, & 71–72);** King Aff. ¶¶ 8, 10, & 14 **(R. 148, 149, & 150)**. Therefore, CVS was required to serve the Notice on KPP by Sunday, November 3, 2019. *See id.* **(R. 28–64, 65–70, 71–72, 148, 149, & 150).**

Under the Lease's general notice and demand provision, all notices, including Lease renewal notices, must be in writing and must be given or served on the other party as follows:

> **by mailing the same to the other party by registered or certified mail, return receipt requested, or by overnight courier service provided a receipt is required**, at its Notice Address set forth in Part I hereof, or at such other address as either party may from time to time designate by notice given to the other. **The date of receipt**

> **of the notice or demand shall be deemed the date of the service thereof (unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof).**

Compl. Ex. A 19, at ¶ 27 (emphasis added) **(R. 47)**.

On October 30, 2019, CVS Health Corporation's Lease Administration Manager, Peter J. Perry, caused a copy of the Notice to be placed in the mail with the United States Postal Service ("USPS") via certified mail, return receipt requested. Compl. Ex. E, at ¶ 13 **(R. 78 & 123)**. The Notice stated CVS's decision to exercise its option to extend the Lease for an additional five-year period. *Id.* Ex. E, at Ex. C **(R. 120–21)**.

On Saturday, November 2, 2019, the Notice was delivered to the United States Post Office where KPP's Post Office Box was located (the "Fairfield Post Office"). *See* Pl.'s Mot. Summ. J. Ex. A, at Ex. A **(R. 310–11)**; Def.'s Mot. Summ. J. 4, at ¶ 10 **(R. 287)**. By 9:45am on Saturday, November 2, 2019, the Notice was available for KPP to pick up from the Fairfield Post Office. *See id.* **(R. 311 & 287)**.

KPP's Post Office Box is the only manner in which KPP accepts its mail. King Aff. ¶ 12 **(R. 149)**. KPP has no regular mailbox or office location where it can receive mail. *Id.* **(R. 149)**. Only the USPS is permitted to deliver mail to post office boxes, and overnight courier services are prohibited from delivering mail to post office boxes Pl.'s Resp. and Mem. of Law in Opp'n to Def.'s Mot. Summ. J. 4, n.3 (citing https://faq.usps.com/s/article/PO-Box-The-Basics#delivery (last visited Jan. 22, 2021)) **(R. 319)**.

On Wednesday, November 6, 2019, KPP's agent, Stefan Cap, went to the Fairfield Post Office and signed for the Notice. Def.'s Mot. Summ. J. 5, at ¶ 14 **(R. 288)**; King Aff. ¶ 11 **(R. 149)**. Stefan Cap is an independent contractor employed by KPP's property manager, Principal Developers, which has no regular employees. Mr. Cap works on behalf of KPP and Principal

Developers on a part time basis, and his duties include checking KPP's Post Office Box for correspondence "once or twice per week." King Aff. ¶ 7 **(R. 148)**. Mr. Cap is the only person with access to KPP's Post Office Box. *Id.* at ¶ 12 **(R. 149)**.

On November 12, 2019, and December 12, 2019, KPP sent two letters addressed to Mr. Perry in response to receiving the Notice. Compl. Exs. F & G **(R. 124–29)**. Both letters purported to reject CVS's decision to exercise its option to renew the Lease on the basis that the Notice was not timely provided to KPP. *See id.* **(R. 124–29)**. KPP's December 12, 2019 letter stated that KPP was willing to discuss a new lease with CVS, but only if the new lease included higher rent payments. *Id.* at Ex. F **(R. 126)**.

STANDARD OF REVIEW

An appellate court "reviews the grant of a summary judgment under the same standard as the trial court pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 239 (2008). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (citing *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* (quoting *Nelson v. Charleston Cty. Parks & Rec. Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004)).

ARGUMENTS

I. THE MASTER ERRED IN FINDING THAT CVS DID NOT TIMELY EXERCISE ITS OPTION TO RENEW THE LEASE.

The Master incorrectly found that CVS did not timely serve the Notice on KPP and that CVS failed to exercise its option to renew the Lease for an additional five-year term. The Master found the Notice untimely because KPP did not "sign for" the Notice's accompanying return receipt and take physical possession of the Notice until Wednesday, November 6, 2019. However, the Lease does not require the Notice be "signed for" or that actual physical possession occur before the Lease deems the Notice served. Under the Lease, the date of service is determined as follows:

> The date of receipt of the notice or demand shall be deemed the date of the service thereof (unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof).[1]

Compl. Ex. A 19, at ¶ 27 **(R. 47)**.

Thus, the Lease deems the Notice served on either (1) the date the notice was received, or (2) the date the notice was mailed. KPP received the Notice when it was delivered to the only place where KPP accepts mail and was made available for KPP to pick up on Saturday, November 2, 2019. *See* Pl.'s Mot. Summ. J. Ex. A, at Ex. A **(R. 310–11)**; Def.'s Mot. Summ. J. 4, at ¶ 10 **(R. 287)**. Because a Saturday is a non-business day, the Notice was not received by KPP in the ordinary course of business. Therefore, the Lease deems the Notice served when it was mailed on October 30, 2019. Compl. Ex. A 19, at ¶ 27 **(R. 47)**. Either way, the result is the same: CVS timely served

[1] The parenthetical language "unless the notice of demand is not received or accepted in the ordinary course of business" is hereinafter referred to as the "Lease's service upon mailing exception."

the Notice on KPP, and effectively exercised its option to renew the Lease for an additional five-year term prior to the Renewal Deadline.

A. The Notice Was Received by KPP on Saturday, November 2, 2019.

KPP received the Notice prior to the Renewal Deadline. It is undisputed that the Notice arrived at the Fairfield Post Office on Saturday, November 2, 2019, and was available for KPP to pick up by 9:45am. Pl.'s Mot. Summ. J. Ex. A, at Ex. A **(R. 310–11)**; Def.'s Mot. Summ. J. 4, at ¶ 10 **(R. 287)**. Therefore, when the Notice was delivered to the Fairfield Post Office, the Notice was "received" by KPP. *See Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40, 42 (4th Cir. 1993) (holding that receipt of a letter occurred upon delivery of the letter to a post office box, not upon the retrieval of the letter from the post office box); *see also Workman v. Bill M.*, No. CV 6:17-972-RBH-KFM, 2017 WL 4863055, at *3 (D.S.C. Aug. 29, 2017), *report and recommendation adopted*, No. 6:17-CV-00972-RBH, 2017 WL 4843968 (D.S.C. Oct. 26, 2017), *aff'd*, 717 F. App'x 278 (4th Cir. 2018) (stating that "the date of a plaintiff's receipt of his notice is determined by the delivery date and not actual receipt by the plaintiff.")

It is also undisputed that KPP's Post Office Box is the only location KPP accepts mail. King Aff. ¶ 12 **(R. 149)**. Because KPP's Post Office Box is the only location KPP accepts mail, the Notice's arrival at the Fairfield Post Office is no different than if the Notice would have arrived at a regular mailbox or place of business. Certainly, in a situation where the Notice arrived at KPP's regular mailbox or regular place of business (if it had either) on Saturday, November 2, 2019, it would be absurd to argue that there was no "receipt" by KPP on this day.

Furthermore, if KPP were permitted to claim it did not receive the Notice until it "signed for" and took actual physical possession of the Notice, it could completely subvert CVS's Lease rights by simply not checking its mail—even unintentionally. Indeed, when the timeliness of notices delivered to post office boxes is considered in other contexts, courts have recognized that

requiring actual physical possession of a notice would permit parties to manipulate applicable time periods. *See Watts-Means*, 7 F.3d at 42 (stating that "requiring 'actual receipt' to trigger the period would allow some plaintiffs 'open-ended time extension, subject to manipulation at will . . .'"); *see also Bell v. Eagle Motor Lines*, 693 F.2d 1086, 1087 (11th Cir. 1982) (finding a receipt occurred when a letter was delivered because "there is no reason why a plaintiff should enjoy a manipulable open-ended time extension").

Consequently, KPP received the Notice on Saturday, November 2, 2019, when the Notice arrived at the Fairfield Post Office and was available for KPP to pick up at 9:45am. This receipt was prior to the Renewal Deadline of Sunday, November 3, 2019. The date KPP chose to pick up its mail—whether it were a day, week, or a month later—is inconsequential. Accordingly, the Master erred by failing to find that the Notice was received prior to the Renewal Deadline. Therefore, the Master's ruling should be reversed.

B. <u>The Notice Was Served on the Date it was Mailed.</u>

In addition to KPP's receipt of the Notice prior to the Renewal Deadline, the Lease provides an alternative date of service—the date of mailing—when a notice or demand is not received or accepted in the ordinary course of business. Compl. Ex. A 19, at ¶ 27 **(R. 47)**. However, the Master erroneously concluded that the Lease's service upon mailing exception did not apply because (1) KPP did not receive the Notice until KPP went to the Fairfield Post Office and "signed for" and took physical possession of the Notice on Wednesday November 6, 2019; and (2) the Lease's service upon mailing exception only applied to a party's purposeful refusal to accept its mail. Order 5–6 **(R. 8–9)**.

Under the facts of this case, the Lease's general notice and demand provision deems the Notice served on the date it was mailed (October 30, 2019) because the Notice was not received by KPP in the ordinary course of business. KPP received the Notice at 9:45am on Saturday,

November 2, 2019. Pl.'s Mot. Summ. J. Ex. A, at Ex. A **(R. 310–11);** Def.'s Mot. Summ. J. 4, at ¶ 10 **(R. 287)**. A Saturday receipt is a receipt which did not occur in the ordinary course of business. Thus, the Lease deems the notice served when it was mailed by CVS on October 30, 2019. Compl. Ex. A 19, at ¶ 27 **(R. 47)**.

The Lease's general notice and demand provision sets forth the manner for determining when a notice or demand, including the Notice in this case, was served on the other party. It states: "The date of receipt of the notice or demand shall be deemed the date of the service thereof **(unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof)**." Compl. Ex. A 19, at ¶ 27 (emphasis added) **(R. 47)**.

The Lease and its renewal provisions are an option contract, and "[a]n option contract is interpreted according to its actual terms and the context in which the contract was made." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000). When an option contract "is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Id.* A contract is unambiguous when the meaning of its language is clear after being "viewed **objectively** by a reasonably intelligent person who (1) has examined the entire integrated agreement; and (2) is cognizant of the **customs, practices, usages, and terminology as generally understood in the particular trade or business**." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) (emphasis added); *see also McCord v. Laurens Cty. Health Care System*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) ("The Court must enforce the language as written, for it is the objective expression of what the parties meant to agree upon when they made their contract, not the secret subjective meaning one party later reveals.").

As plainly stated in the Lease's general notice and demand provision, the Lease's service upon mailing exception applies when a "notice or demand is **not received or accepted in the ordinary course of business**." Compl. Ex. A at 19, ¶ 27 (emphasis added) **(R. 47)**. "Course of business" is defined as "(t)he normal routine in managing a trade or business." *Course of business*, Black's Law Dictionary (11th ed. 2019). To determine what the parties' "normal routine in managing a trade or business" means in this context, the Court must interpret the phrase within the context of the commercial real estate industry. *See Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302–03 (concluding that interpreting contractual terms requires an understanding of the customs, practices, usages, and terminology **as generally understood in the particular trade or business**) (emphasis added). Accordingly, in this case, "course of business" means "the normal routine in managing a commercial real estate business." *See id.*

CVS's expert witness, H. Haskell Kibler, testified that the phrase "ordinary course of business"—as used in the Lease's general notice and demand provision—is commonly understood within the commercial real estate industry to refer to the regular practice "that property owners/managers (or their designees/agents), including those acting on behalf of landlords, check their mail, including post office boxes, on all non-holiday business days (generally, Monday through Friday)." Pl.'s Resp. to Def.'s Interrog. No. 5(b) **(R. 278–79)**; Def.'s Mot. Summ. J. 5, at ¶ 13 **(R. 288)**. A plain, objective application of the Lease's general notice and demand provision, when read with the customs, practices, usages, and terminology of the commercial real estate industry in mind, shows that the Lease's service upon mailing exception applies in three scenarios: (1) when the notice was timely mailed, but not received by the receiving party on a normal business day (i.e., a non-holiday Monday through Friday); (2) when the Notice was received on a normal business day, but the receiving party failed to check the mail; and (3) when the receiving party purposefully refused to accept the mail on a normal business day. Indeed, Mr. Kibler, testified that

the Lease's general notice provision would be commonly understood within the commercial real estate industry to protect parties providing notices under these exact scenarios. Pl.'s Resp. to Def.'s Interrog. No. 5(b) **(R. 278–79)**.[2]

In this case, the Lease's service upon mailing exception applies because the Notice was not received by KPP in the ordinary course of business. The Notice was received by KPP when the Notice arrived at the Fairfield Post Office and was available for KPP to pick up on Saturday, November 2, 2019. A receipt on a Saturday is a receipt which did not occur in the ordinary course of business. Thus, the Notice was not received by KPP in the ordinary course of business, and the Lease deems the Notice served on the date it was mailed: October 30, 2019. Therefore, the Master erred when it found that the Notice was received and accepted in the ordinary course of business after the Renewal Deadline. Accordingly, the Master's ruling should be reversed.

C. The Master Erred by Finding that the Lease Requires Notices be "Signed For" Before the Lease Deems Service Effective.

The Master erred when it interpreted the Lease's general notice provision to require KPP to sign for, and take physical possession of, a notice before the notice is deemed served on the receiving party. Specifically, the Master concluded that "the Lease expressly provides that all notices, including the Renewal at issue, be signed for by the notified party." Order 6 **(R. 9)**. Contrary to the Master's statement, nothing in the Lease requires a receiving party "sign for" a notice or demand before service will be deemed effective—nothing. No authority supports such

[2] Mr. Kibler's expert opinions were uncontroverted in this case. CVS's written responses to KPP's First Set of Interrogatories contained Mr. Kibler's expert opinions. Pl.'s Resp. to Def.'s Interrog. **(R. 277–79)**. KPP chose not to designate is own expert witness. In fact, KPP relied on Mr. Kibler's statements to support its argument that KPP's normal routine for checking its mail comports with the "ordinary course of business in the commercial real estate industry." Def.'s Mot. Summ. J. 8 **(R. 291)**.

an unworkable conclusion. To find otherwise would permit a party like KPP to choose when it receives a notice by simply delaying when it checks its mail.

To support the assertion that the Lease "expressly" requires that all notices be "signed for," the Master relied on the terms within the Lease's general notice and demand provision which state, "a notice 'shall not be effective for any purpose unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, *return receipt requested*, or by overnight courier provided a *receipt is required. . . .*'" Order 6 (emphasis in original) **(R. 9)**. In doing so, the Master equated the requirement that a party providing a notice or demand must request either a "return receipt" or a "receipt," with a requirement that a receiving party "sign for" a notice or demand before service will be deemed effective. These concepts are not the same.

As expressly stated in the Lease's general notice and demand provision, if a notice is sent by registered or certified mail, a return receipt must be **requested**. And, if sent by an overnight courier service, a "receipt" must be required. There is no further qualification in the Lease on what type of "receipt" this would be for an overnight courier service. A "receipt" showing that the Notice was delivered would satisfy this requirement, and no signature would have ever been provided by the receiving party. Essentially, a party serving a notice on the other party could have timely complied with all of the Lease's requirements for serving that notice, and yet the Master's interpretation conditions the date of service solely on the actions of the receiving party—specifically, the date the receiving party "signed for" the notice's accompanying receipt. The Master's interpretation leads to an absurd result and is inconsistent with South Carolina law. *See Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 234 (2008) ("An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided."). Moreover, why would sophisticated

parties agree to a provision that conditions the date a notice or demand is served solely on the actions of the party receiving the notice or demand?

KPP's failure to "sign for" the Notice prior to the Renewal Deadline has no bearing on whether or not CVS timely served the Notice. The Lease does not require any party to "sign for" a notice or demand before the Lease deems service effective. Therefore, the Master's interpretation should be rejected.

D. The Master Erred by Failing to Give Effect to All of the Lease's Terms.

In the Order, the Master found that the service upon mailing exception was implicated only in a situation where a party purposefully refused to accept mail in the ordinary course of business. *See* Order 5–6 **(R. 8–9)**. The Master erred when it ignored the pertinent language "received **or** accepted" and, instead, interpreted the Lease's general notice and demand provision in a manner which failed to give effect to all of the Lease's terms. *See, e.g., Stevens Aviation, Inc. v. DynCorp Intern. LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("(A)n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous."); *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 196, n.3, 684 S.E.2d 541, 545, n.3 (2009) (refusing to adopt any interpretation of the contract which rendered a significant provision meaningless).

The Master's interpretation requires the conclusion that the terms "received" and "accepted" are synonymous and have no independent meaning. The Lease's general notice and demand provision combines the operative words "received" and "accepted" by the use of the disjunctive "or." This indicates that "received" and "accepted" are separate and distinct concepts. *See, e.g., Reitner v. Sonotone Corp.*, 442 U.S. 330, 338–39, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."); *Encino Motorcars, LLC v. Navarro*,

138 S.Ct. 1134, 1141, 200 L.Ed.2d 433 (2018); *Garrison Property and Cas. Ins. Co. v. Rickborn*, 226 F.Supp.3d 551 (D.S.C. 2016) (finding that although a list of separate items does not describe what a single item is, "the disjunctive 'or' indicates what it *is not*. . . .") (emphasis in original).

When the phrase "received **or** accepted" is read in context with the phrase "unless the notice or demand is not received **or** accepted in the ordinary course of business," it is clear that the Lease's service upon mailing exception necessarily encompasses more than just one scenario as the Master found. There is no other context within the Lease which indicates that the original parties to the Lease intended the words "received" and "accepted" to have the same meaning. When the terms "received" and "accepted" are considered independently from each other, it is clear that when KPP "received" the Notice and when KPP ultimately "accepted" the Notice were at two different points in time.

KPP received the Notice when it was timely delivered to the only place where KPP accepts mail and was made available for KPP to pick up on Saturday, November 2, 2019. Thus, KPP received the Notice on Saturday, November 2, 2019. The Lease's service upon mailing exception also deems the Notice served when it was mailed on October 30, 2019, because a Saturday receipt is a receipt which did not occur in the ordinary course of business. Either way, the result is the same: CVS timely delivered the Notice to KPP, and effectively exercised its option to renew the Lease for an additional five-year term. Therefore, the Master's ruling should be reversed.

E. The Master Erred by Finding that the Terms of the Lease's General Notice Provision Should Be Strictly Construed Against CVS.

The Master further erred by strictly construing the Lease's language against CVS. In the Order, the Master relied solely on *33 Flavors Stores of Virginia, Inc. v. Hoffman's Candies, Inc.*, 296 S.C. 37, 370 S.E.2d 293 (Ct. App. 1988) when it found that the terms of the Lease's general notice and demand provision should be strictly construed against CVS simply because CVS

exercised its option to renew the Lease. *See* Order 5–6 **(R. 8–9)**. The *33 Flavors* opinion, however, does not lead to the conclusion the Master reached.

In *33 Flavors*, this Court analyzed whether a subtenant timely exercised its option to renew its sublease. *33 Flavors*, 296 S.C. at 38, 370 S.E.2d at 294. The facts of *33 Flavors* are readily distinguishable from this case. First, the Court did not provide any analysis related to its interpretation of the lease's terms in order to determine when the lease deemed the notice served. *See generally* 296 S.C. 37, 370 S.E.2d 293. Second, this Court found that the subtenant "sent a written certified letter attempting to exercise the option to renew . . . **four days after the time to renew had expired**." *Id.* at 39, 370 S.E.2d at 294 (emphasis added). Certainly, placing a notice in the mail *after* the renewal deadline is not comparable to the facts of this case where CVS placed the Notice in the mail four days prior to the Renewal Deadline and the Notice arrived at KPP's Post Office Box and was available for KPP to pick up one day prior to the Renewal Deadline.

Although South Carolina law requires the party claiming an option to strictly comply with the requirements for exercising that option, that is not equivalent to the Master's holding that unambiguous terms of the Lease's general notice or demand provision—which are applicable to all notices and demands provided under the Lease—are to be strictly construed against a party claiming an option. The Master failed to offer any authority which actually supports the rule it posits: that the meaning of the terms within the Lease's (or a contract's) general notice and demand provision are to be strictly construed against the party claiming an option.

No South Carolina authority addresses the issue, but the Supreme Court of Connecticut correctly articulated the distinction between strictly complying the requirements for exercising an option and strictly construing the meaning of a contract's terms in *Pack 2000, Inc. v. Cushman*, 311 Conn. 662, 89 A.3d 869 (2014). In relevant part, the Supreme Court of Connecticut held the following:

> . . . [T]he general rule of contract interpretation applicable to [option] contracts, namely, that they are to be construed strictly against the optionee, should apply in the present case. We disagree. . . . [T]o the extent that this rule of strict construction applies to unilateral contracts, it does so because a hallmark of such contracts is the fact that there is "no mutuality of obligation between the parties.". . . In the present case, however, the parties' option agreement is not "a simple unilateral contract of option"; . . . **rather, the option agreement is but one component of the parties' bilateral lease and management agreements**. This court long has acknowledged this distinction. In recognition of this distinction, **courts construe the option provision no differently from the remainder of the bilateral contract, except with respect to the requirements of the option provision that pertain solely to the option, namely, the requirements governing the exercise of the option.** To conclude otherwise would deprive the lessee of his bargained for option rights solely on the basis of his failure to comply strictly with wholly trivial and immaterial terms of the lease.

Id. at 683, n.12, 89 A.3d at 883, n.12 (emphasis added) (internal citation omitted); *see also Ingram*, 340 S.C. at 108–12, 531 S.E.2d 287 at 292–95 (discussing that "exact compliance with the terms of the option are required" while also recognizing that an option contract "must be construed according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense"); *Conner v. Alvarez*, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985) (analyzing whether an option was exercised in a lease agreement and stating that "[w]hen it is perfectly plain and capable of legal construction, the language itself determines the full force and effect of the document" and "[c]ourts are without authority to alter a contract by construction or to make a new contract for the parties").

Rather than requiring the Lease's terms to be strictly construed against CVS, South Carolina law merely requires a party claiming an option to strictly comply with the requirements for doing so. *See 33 Flavors Stores of Virginia, Inc.*, 296 S.C. at 40, 370 S.E.2d at 295. However, in order to determine what those requirements are, the Lease must still be interpreted in accordance with the general principles of contract interpretation. *See, e.g., Ingram*, 340 S.C. at 108–12, 531

S.E.2d 287 at 292–95; *Conner*, 285 S.C. at 101, 328 S.E.2d at 336; *Pack 2000, Inc.*, 311 Conn. at 683, n.12, 89 A.3d at 883, n.12.

Furthermore, the Lease's general notice and demand provision is applicable in all situations where a notice or demand is provided in accordance with the Lease. There are numerous situations within the Lease where either party is required to provide the other party with a notice or demand. *See, e.g.,* Compl. Ex. A 6, ¶ 2 (stating that "Landlord and Tenant each may terminate this Lease by 30 days' written notice to the other party); *id.* at 9, ¶ 7(a) ("Landlord agrees to give at least 30 days' prior written notice to Tenant of the date when such possession will be available to Tenant"); *id.* at 13, ¶ 13(a) ("Landlord may terminate this Lease upon no fewer than 45 days' prior written notice to Tenant, in which event this Lease shall terminate on the date specified in the notice."); *id.* at 28, ¶ 44 ("If Tenant shall cease to operate its business in the Premises for more than 60 consecutive days, Landlord shall have the right, at any time thereafter, for as long as Tenant's cessation to operate is still in effect, to terminate this Lease by giving Tenant 30 days' written notice of such election. . . .") **(R. 34, 37, 41, & 56)**. Should the Lease's general notice and demand provision be strictly construed in the option context, but more fairly in these other contexts? Of course not.

Thus, any interpretation applied to the meaning of the terms in the Lease's general notice and demand provision must be applicable in all situations where a notice or demand is given under the Lease, not only when a notice is provided by a party exercising a renewal option. Therefore, the Master erred when it strictly construed the meaning of the Lease's general notice and provision against CVS. Accordingly, the Court should reject the Master's interpretation and reverse the Master's ruling.

CONCLUSION

CVS respectfully asks this Court to reverse the Master's decision granting summary judgment in KPP's favor, and remand back to the Master with instructions to find:

(1) CVS timely served the Notice on KPP and effectively exercised its option to renew the Lease for an additional five-year term at Fixed Rent; and

(2) CVS is the prevailing party and is entitled to its costs and attorneys' fees of this case.

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May 3, 2021
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master-in-Equity

Appellate Case No. 2020-001446
Trial Court Case No. 2020-CP-07-00155

South Carolina CVS Pharmacy, L.L.C.,.....Appellant,

v.

KPP Hilton Head, LLC,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this **Brief of Appellant** in the above-referenced matter complies with Rule 211(b), SCACR.

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