RECEIVED

Oct 18 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Master-in-Equity

Opinion No. 6005 (S.C. Ct. App. filed July 26, 2023)

South Carolina CVS Pharmacy, L.L.C,……Respondent,

v.

KPP Hilton Head, LLC,……..Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Walter H. Cartin (SC Bar #78405)
Katon E. Dawson, Jr. (SC Bar #101167)
J. Evan Phillips (SC Bar #103679)
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
waltcartin@parkerpoe.com
katondawson@parkerpoe.com
evanphillips@parkerpoe.com

Attorneys for Respondent

Other Counsel of Record:

P. Benjamin Zuckerman, Esq. (SC Bar #7019)
BERGER SINGERMAN LLP
201 Las Olas Blvd., FL 33301
(954) 525-9900

Thomas A. Pendarvis (SC Bar #064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary Street, Unit 1-A
Beaufort, SC 29902
(843) 524-9500

Attorneys for Petitioner

INDEX

QUESTIONS PRESENTED

I. Is the Court of Appeals' decision consistent with South Carolina precedent?

II. Did the Court of Appeals correctly hold that CVS timely exercised its option to renew the Lease?

COUNTER-STATEMENT OF THE CASE

The Lease between CVS, as tenant, and KPP, as landlord, was for an initial term of 20 years and contains four option periods, each for an additional five-year term. (**R. 28–64)**. To renew the Lease, CVS was required to "give or serve" notice on KPP no later than 90 days prior to the expiration of the initial term (the "Notice"). **(R. 30)**. Therefore, CVS was required to "give or serve" the Notice by Sunday, November 3, 2019 (the "Renewal Deadline"). *E.g.,* Petition 3 ¶ (c).[1]

The Lease's general notice and demand provision governs all notices and demands required or permitted under the Lease and states as follows:

> Whenever, pursuant to this Lease, notice or demand shall or may be given to either of the other parties by the other, and whenever either of the parties shall desire to give to the other any notice or demand with respect to this Lease or the Premises, each such notice or demand shall be in writing, and any Laws to the contrary notwithstanding, shall not be effective for any purposes 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 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)**.

[1] KPP's statement that the "Notice was to be received (and, therefore, signed for) by" the Renewal Deadline is not accurate. Pet. at 3 ¶ (c). Instead, the Notice was required to be "given or served" by the Renewal Deadline, and determining this date requires determining when the Notice was "received or accepted" and whether that receipt or acceptance was in the ordinary course of business. *See infra* Arguments § II.

(R. 47) (emphasis added).[2]

The only place KPP accepts mail is a post office box. **(R. 149)**. KPP has no regular mailbox or office location where it can receive mail. *Id.* Overnight courier services are prohibited from delivering mail to post office boxes; only the United States Postal Service ("USPS") may deliver mail to post office boxes **(R. 319)**. Therefore, KPP's designated mailing address precluded CVS from utilizing an overnight courier service as authorized by the Lease to give or serve the Notice on KPP.

On October 30, 2019, CVS caused the Notice to be placed in the mail with USPS via certified mail, return receipt requested. **(R. 78 & 123)**. On Saturday, November 2, 2019, the Notice was delivered to the United States Post Office where KPP's post office box is located (the "Post Office"). **(R. 287 & R. 310–11)**. By 9:45am on Saturday, November 2, 2019, the Notice was available for KPP to pick up from the Post Office. *Id.* The Post Office was open until noon on Saturday, November 2, 2019. **(R. 347)**.

Although the Post Office was open for business, KPP did not retrieve the Notice on Saturday, November 2, 2019;[3] Monday, November 4, 2019; or Tuesday November, 5, 2019. On Wednesday, November 6, 2019, KPP retrieved the Notice from the Post Office **(R. 149 & R. 288)**.[4]

---

[2] Contrary to KPP's representation that it is "undisputed" that "[t]he Lease implicitly provides that all notices, including the Renewal Notice at issue, ***be signed for*** by the notified party," Pet. at 2 (emphasis in original), CVS has disputed this interpretation from the beginning of this case, and it was also expressly rejected by the Court of Appeals. 440 S.C. 360, 364–65, 890 S.E.2d 824, 826. The requirement that CVS *request* a "return receipt" if sent by certified mail or a "receipt" if sent by overnight courier does not equate to a signature being required before the Lease deems the Notice effectively given or served.

[3] Although KPP expressly asserts it "did not go [to] the Post Office on Saturday morning, November 2, 2019," Pet. at 5 ¶ (h), the only Record evidence is that KPP does "not *generally* conduct business . . . or obtain their mail on weekends." **(R. 149, 211–12 & 288)** (emphasis added).

[4] KPP states whether it checked its mail on Monday or Wednesday is irrelevant. Pet. at 5, n. 7. CVS disagrees for the reasons set forth below. *See infra* Arguments § II(B); *see also* 74 Am. Jur. 2d Time § 17 ("When the time for the performance of an option falls on Sunday, performance on the next day is in time."); 86 C.J.S. Time § 48 ("The general rule that, when the last day for the performance of an act required by

On November 12, 2019, and December 12, 2019, KPP sent two letters to CVS purporting to reject the Notice as untimely. **(R. 124–29)**. The November 12, 2019 letter stated the Notice was not "received" by KPP until the date KPP physically took possession (November 6), but the December 12, 2019 letter stated KPP received CVS's notice of renewal on Monday, November 4, 2019. *Id.* 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. **(R. 126)**. CVS then initiated this action, seeking a declaratory judgment that CVS timely exercised its option to renew the Lease. **(R. 18–27)**.

After cross-motions for summary judgment, the Master granted summary judgment to KPP on August 27, 2020. The Master found that CVS failed to timely exercise its option to renew the Lease, because KPP did not receive the notice until KPP "signed for" the Notice on Wednesday, November 6, 2019, and the Lease's service upon mailing exception only applied to a party's purposeful refusal to accept its mail. **(R. 4–10)**.

On September 8, 2020, CVS requested the Master reconsider its decision granting summary judgment in KPP's favor because the Master erred when it (1) found the Notice was not 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 also deems the Notice served on the date of mailing because the Notice was received by KPP on a non-business day and also because KPP failed to accept its mail in the ordinary course of business. **(R. 324–39)**.

---

contract falls on a Saturday, Sunday, or legal holiday, the act may be performed on the following business day is usually applied where the landlord and tenant relationship is involved. . . .").

On October 29, 2020, CVS filed its Notice of Appeal with the Court of Appeals. After oral argument, the Court of Appeals reversed the Master's decision and found that CVS timely exercised its option to renew the Lease. KPP seeks a writ of certiorari to review that decision.

ARGUMENTS

KPP admits the Notice was delivered to the only place where KPP accepts mail and was available to KPP one full day prior to the Renewal Deadline. Pet. at 4–5 ¶¶ (e)–(f). KPP admits it had complete and total control over whether it went to the Post Office to physically retrieve the Notice prior to the Renewal Deadline. *See id.* at 6 ¶ (h). Yet, KPP asserts the Notice was untimely simply because KPP did not "sign for" the Notice until after the Renewal Deadline. KPP argues that South Carolina law mandates this result because the terms of the Lease's general notice and demand provision are to be strictly construed against CVS.

Contrary to KPP's arguments, however, South Carolina law does not require the plain and unambiguous terms of the Lease's general notice and demand and provision be construed against or in favor of either party. Even if the law did require this, which it does not, KPP's proposed interpretation of this provision is not the effect of strict construction. Rather, it is an "interpretation" resulting from ignoring material terms and imposing wholly new terms.

Interpreting the Lease's general notice and demand provision correctly results in the conclusion that neither a signature nor actual, physical possession is required before a notice or demand will be deemed served. In fact, the Lease clearly contemplates multiple scenarios where a notice or demand will be deemed served before the receiving party "signs for" or takes physical possession. These scenarios include (1) when a notice or demand is received on a non-business day; (2) when the receiving party fails to check its mail on a business day; and (3) when a party intentionally refuses to accept its mail. The facts show that both (1) and (2) occurred in this case.

Application of the facts to the Lease's plain and unambiguous terms—when all terms are given effect and no words are added—shows that CVS strictly complied with all of the Lease's requirements, CVS timely served the Notice on KPP, and CVS effectively exercised its option to renew the Lease. KPP's petition must be denied.

I. THE COURT OF APPEALS DECISION CONFORMS WITH SOUTH CAROLINA PRECEDENT.

KPP asserts that the Court of Appeals' decision conflicts with "long-standing South Carolina Supreme Court precedent" because the decision failed to strictly construe the terms of the Lease's general notice and demand provision against CVS. KPP's argument is without merit. First, KPP misstates the law on how the Lease must be interpreted. Second, no reported South Carolina case has ever decided that an optionee failed to timely exercise an option when all of the optionee's requirements were completed prior to the deadline.

A. South Carolina Law Does Not Require the Plain and Unambiguous Terms of the Lease's General Notice and Demand Provision to be Strictly Construed in Favor of or Against Anyone.

As KPP has done throughout this case, it relies almost entirely on the Court of Appeals' decision in *33 Flavors Stores of Virginia, Inc. v. Hoffman's Candies, Inc.* for the proposition that the plain and unambiguous terms of the Lease's general notice and demand provision must be strictly construed against CVS. However, nowhere in *33 Flavors* is there a holding that a lease's plain and unambiguous terms should be strictly construed against the party claiming the option, especially those terms which are generally applicable and not limited only to the lease's requirements for exercising an option. Rather, *33 Flavors*, like all other South Carolina precedent on the issue, simply holds that a party must strictly comply with the requirements to exercise an option and those requirements are construed against the optionee. *See, e.g.*, 296 S.C. at 40, 370 S.E.2d at 295; *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000).

However, that is not the same as the "strict construction" of a contract's plain and unambiguous terms against one party. Rather, under South Carolina law, "[a]n option contract is interpreted according to its actual terms and the context in which the contract is made." *Ingram*, 340 S.C. at 110, 531 S.E.2d at 293. "[I]f the 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.*; *see also Connor 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"). KPP's proposed "strict construction" of the Lease is simply a guise to render certain material terms meaningless and add other terms into the Lease to reach KPP's desired conclusion.

Additionally, the Court of Appeals correctly recognized the Lease's command that "[t]he language of this Lease **shall** be construed according to its plain meaning, and not strictly for or against Landlord or Tenant." **(R. 59)** (emphasis added).[5] Thus, strictly construing the Lease's general notice and demand provision against CVS would require the Court to disregard the parties' agreement that the Lease's terms shall be construed according to the plain meaning and shall not be construed strictly for or against either party. *Southern Atlantic Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 448, 490 S.E.2d 27, 30 (2003) (holding that "use of words such as 'shall' or 'must' indicates a mandatory requirement") (citing *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002)); *Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014) (holding that courts "are

[5] KPP once acknowledged this directive from the Lease until it became convenient for KPP to argue the opposite. **(R. 213)**.

without authority to alter an unambiguous contract" and "must enforce an unambiguous contract according to its terms").

Further, strict construction does not mean the Court should entirely negate the protections afforded to both parties under this provision. *See U.S. v. Brown*, 338 U.S. 18, 25–26, 68 S.Ct. 376, 380, 92 L.E2d. 442 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident [ ] purpose.").[6] Again, the Lease's general notice and demand provision is applicable to **all** notices or demands permitted or required under the Lease, and there are many different contexts in which a given notice or demand may or must be provided. **(R. 34, 37, 41, & 56)** (tenant termination right prior to possession upon "30 days' written notice"; tenant right to reimbursement for certain costs "within 30 days of receipt of demand"; landlord termination right for casualty "upon no fewer than 45 days prior written notice"; and landlord termination right if tenant ceased continuous operation of business after "giving [t]enant 30 days' written notice of such election"); *see also, e.g.,* Pet. at 2–3, n.1.

Accordingly, 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. *See Alexander's Land Co., L.L.C. v. M & M & K Corp.*, 390 S.C. 582, 599, 703 S.E.2d 207, 216 (2010) (analyzing whether a party timely exercised an option and noting the distinction between

[6] *See also Thomas v. Davis*, 192 F.3d 445, 456 (4th Cir. 1999) (quoting *U.S. v. Brown* while interpreting South Carolina law and stating that strict construction does not demand words "be given the narrowest meaning; it is satisfied if the words are given their fair meaning in accord with manifest intent of the [drafters]"); *cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 (2012) ("Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously.").

contractual terms relating "to the *right* to exercise the option" and the terms "*related to any obligation to perform* under the contract") (emphasis in original).[7]

B. No Reported South Carolina Case Has Ever Held an Optionee Failed to Timely Exercise its Option Rights when all Requirements were Completed Prior to the Deadline.

To support KPP's unreasonable assertion that the Court of Appeals' decision is going to upset long-standing South Carolina precedent, KPP cites four cases in total: *33 Flavors Stores of Virginia, Inc.*, 296 S.C. 37, 370 S.E.2d 293 (Ct. App. 1988); *A.C. Tuxbury Lumber Co. v. Byrd*, 131 S.C. 32, 127 S.E. 267 (1925); *Pope v. Goethe*, 175 S.C. 394, 179 S.E. 319 (1935); and *Southern Silica Min. & Mfg. Co. v. Hoefer*, 215 S.C. 480, 56 S.E.2d 321 (1949). None of these cases supports KPP's position.

In *33 Flavors*, the Court of Appeals analyzed whether a subtenant timely exercised its option to renew a sublease. 296 S.C. at 38, 370 S.E.2d at 294. The Court of Appeals found that the subtenant did not timely exercise its renewal option because it did not place the required notice in the mail until **four days after the time to renew had expired**. *Id.*at 39, 370 S.E.2d at 294.

In *A.C. Tuxbury*, to extend the timber contract at issue, the lessee was required to provide notice of its decision and pay interest on the original purchase price for each additional year it wished to extend. 131 S.C. 32, 127 S.E. at 268. The lessee was required to perform these acts at any time within the initial 15-year term. *Id.* However, the lessee did not provide any notice of its decision to extend the contract **until 37 days after the 15-year contract expired**. *Id.*

In *Pope*, the parties entered into a four-year timber contract. 175 S.C. 394, 179 S.E. at 321. To renew the lease, the lessee was required to provide notice of its decision along with payment

[7] *See also Pack 2000, Inc. v. Cushman*, 311 Conn. 662, 683, n.12, 89 A.3d 869, 883, n.12 (2014) ("[C]ourts 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.").

no later than 90 days before the lease expired. *Id.* However, the lessee did not provide written notice of its decision to renew the lease or tender the required payment until **90 days after the deadline**. *Id.*[8]

These cases, which deal with notices that were not even attempted until 4 days, 37 days, and 90 days after the relevant deadline had expired, are not comparable to the present case. Here, the Notice was sitting at the only place where KPP accepts mail prior to the Renewal Deadline. If KPP wanted to, it could have retrieved its mail on that day.

CVS is not suggesting that KPP was required to go to the Post Office on a Saturday to retrieve its mail, but the point is raised to highlight the absurdity of KPP's argument. If KPP did check its mail on Saturday, November 2, 2019, KPP would have no argument whatsoever. In that scenario, KPP would have either taken physical possession of the Notice or intentionally refused to accept it. KPP is asking this Court to declare that CVS failed to timely renew the Lease not because there was any action left for CVS to take, but because KPP did not act before the Renewal Deadline.

Affirming the Court of Appeals' decision will not, as KPP absurdly claims, lead to any confusion or "provide many South Carolina litigants with precedent to justify asking the court . . . to disregard the requirement of strict construction of lease options against the option holder." Pet. 7–9. Rather, the Court of Appeals' decision simply stands for this: when an optionee completes all requirements to exercise a renewal option and the required written notice is available to the optionor at the only place the optionor accepts mail before the requisite deadline, the notice was

[8] The final case cited by KPP, *Southern Silica*, has no bearing on the decision before the Court. In that case, determining whether the lessee timely complied with the lease's requirements to exercise the renewal option was not at issue. *See generally* 215 S.C. 480, 56 S.E.2d 321. Rather, the only issue before the Court related to the renewal option was whether the party's material breaches of the lease's other provisions voided its right to exercise the renewal option altogether. *Id.* at 499, 56 S.E.2d at 329.

timely. For these reasons and as further addressed in Section II below, the Court of Appeals correctly held that CVS strictly complied with all of the Lease's renewal requirements and timely and effectively exercised its option to renew the Lease.

C. Other Authorities Deem the Notice Received when it was Available for KPP to Pick Up from the Post Office.

KPP criticizes the Court of Appeals reference to Fourth Circuit case law and the Restatement as persuasive authorities for holding that the Notice was received when it was delivered to the only place KPP accepts mail and was available to KPP. *See* Pet. at 7. KPP's criticism is without merit.

Unlike KPP's proposed interpretation, the Court of Appeals correctly recognized that the Lease plainly contemplated, and expressly distinguished, between when a notice is "given," "served," "received," and "accepted." Based on its interpretation of the entirety of the Lease's general notice and demand provision, the Court of Appeals also correctly recognized that "received" in this context is necessarily different than "accepted." In so doing, the Court of Appeals correctly concluded that actual, physical possession could not be the meaning of "received." Rather, given the disjunctive within the phrase "received or accepted," the Lease expressly contemplated that a party's constructive receipt would be sufficient for purposes of determining when a party "received" a notice or demand under the Lease or else "accepted" would be meaningless. Accordingly, the court ultimately found that when the Notice was delivered to the only place where KPP accepts mail and was available for KPP to take physical possession if it wanted to do so, the Lease deemed the Notice "received."

To further articulate and support this conclusion, the Court of Appeals found Fourth Circuit case law and the Restatement persuasive. Specifically, the Court of Appeals highlighted the Restatement's explanation of when a writing is "received":

> A written revocation, rejection, or acceptance is received when the writing comes into possession of the person addressed, or of some person authorized by him to receive it for him, *or when it is deposited in some place which he has authorized as the place of this or similar communications to be deposited for him*.

440 S.C. at 364, 890 S.E.2d at 826 (emphasis in original) (quoting Restatement (Second) of Contracts § 68 (Am. Law Inst. 1981)).

The Court of Appeals also highlighted a few of the only reported cases to discuss the issue of when certified mail, return receipt requested is considered "received." The primary case relied on was *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993). In that case, the Fourth Circuit discussed the specific policy rationale for finding that when certified mail is sitting at the Post Office, the relevant time period is triggered upon the party's ability to pick up the mail from the Post Office, not when the party actually picks up the mail. In doing so, the Fourth Circuit re-affirmed its prior decision in *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652 (4th Cir. 1987), and held the applicable time period was triggered when the "**letter was available for pickup, and not when the letter is actually picked up**" because **"[r]equiring actual pickup to trigger the period would allow for the [ ] manipulation of the limitations period**. . . ." 7 F.3d at 42 (emphasis added); *see also Harvey*, 813 F.2d at 654. The *Harvey* court made this holding when the respective letter was at a location different than where that person's home mailbox was located. *See* 7 F.3d at 43. That is a far cry from the situation in this case, where KPP's only "home" for purposes of receiving and accepting mail is the exact same location—i.e., the Post Office.[9]

[9] KPP discusses what specific documents were actually placed in its Post Office Box to argue the Notice had not arrived at its final destination because "it had not been placed in Landlord's Post Office Box." Pet. at 4. Even if these "facts" were relevant, which they are not, this still does not negate that the Notice was delivered to the only place where KPP accepts mail and was available to KPP a full day prior to the Renewal Deadline.

II. THE COURT OF APPEALS CORRECTLY HELD THAT CVS TIMELY EXERCISED ITS OPTION TO RENEW THE LEASE.

KPP erroneously argues CVS did not timely renew the Lease because the Lease's general notice and demand provision required that the Notice be "signed for" by the Renewal Deadline. Pet. at 3 ¶ (c). This is not accurate and misstates the Lease's terms. The Lease only required that the Notice be "given or served" by the Renewal Deadline, and determining when this occurred under the Lease is not dependent on whether KPP ever "signed for" the Notice. Rather, determining when the Notice was "given or served" first requires determining when the Notice was "received or accepted" and whether that receipt or acceptance was in the ordinary course of business. As explained below, the Notice was timely because it was received by KPP one day prior to the Renewal Deadline on Saturday, November 2, 2019. And because KPP's receipt was on a non-business day, the Lease deems the Notice "served" on the date it was mailed, which was four days prior to the Renewal Deadline.

A. The Notice was Received by KPP Prior to the Renewal Deadline.

To exercise its renewal option, the Lease required that CVS do two things: (1) not be in default under the Lease; and (2) give Landlord notice of its intention to exercise the option no later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I)." **(R. 34–35**). The Lease imposed no other requirements on CVS to effectively exercise its option to renew the Lease.

Serving KPP with notice of CVS's decision to exercise its option to renew the Lease, like any other notice under the Lease, is governed by Article 27 of Part II of the Lease **(R. 47)**. This required that CVS "give or serve" the Notice

> **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)**.

(R. 47) (emphasis added).

The Record shows, and KPP admits, that CVS caused the Notice to be sent certified mail, return receipt requested on October 30, 2019. Pet. at 3. The Record shows, and KPP admits, that the Notice arrived at the only place KPP accepts mail and was available for KPP to pick up by 9:45am on Saturday, November 2, 2019. *Id.* Therefore, the Notice was received by KPP one full day prior to the Renewal Deadline, and CVS timely exercised its option to renew the Lease.

B. The Lease's Service Upon Mailing Exception Deems the Notice Served on the Date of Mailing.

KPP argues that this provision required that the "Notice was to be received (and, therefore, signed for) by" the Renewal Deadline. Pet. at 3 ¶ (c). This is not accurate. Instead, as the above notice and demand provision provides, the Notice was required to be "given or served" by the Renewal Deadline. Determining when the Notice was "given or served" requires determining when the Notice was "received or accepted" and whether that receipt or acceptance was in the ordinary course of business.

In addition to the fact that KPP received the Notice prior to the Renewal Deadline, the Lease also deems the Notice served on the date it was mailed. The Lease plainly states that the date of receipt will be the date of service "unless the notice of 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." **(R. 47)**. This "service upon mailing exception" applies here for two reasons.

One, the Notice was received on a Saturday before the Renewal Deadline. Because the ordinary course of business in the commercial real estate industry is Monday through Friday,

excepting federal and state holidays, the Notice was not received in the ordinary course of business. **(R. 278–79)**. Thus, the Lease relates the date of service back to the date of mailing.

Two, the Notice was not accepted by KPP until Wednesday, November 6, 2019. KPP failed to accept its mail on Monday, November 4, 2019. *See* Pet. at 5 ¶ (k). KPP failed to accept its mail on Tuesday, November 5, 2019. *See id.* KPP's failure to accept its mail on all weekdays is a failure to accept mail in the ordinary course of business. **(R. 278–79)**. Thus, the Lease relates the date of service back to the date of mailing—i.e., Wednesday, October 30, 2019.

C. The Lease Did Not Require that KPP "Sign For" the Notice Before the Notice was Effective.

KPP argues that the Court of Appeals decision "disregards the signed receipt required by the Lease." Pet. at 9. That is because the Lease does not require a signature before a notice or demand is deemed "given or served." Giving or serving the Notice only required that CVS send it either by "certified mail, return receipt requested" or "overnight courier service, provided that a receipt is required." Nowhere does the Lease say that a notice will be deemed given or served only after the receiving party signs for it. No authority supports such an unworkable conclusion, which would first require this Court to re-write the Lease—a function this Court may not do. *Dobyns v. S.C. Dept of Parks, Rec. & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) ("The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract.") (quoting *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 149 S.E.2d 915 (1966)).

KPP also seeks to interpret the meaning of the Lease's general notice and demand provision as if certified mail, return receipt requested was the only type of delivery permitted under the Lease. However, if a notice or demand is sent by overnight courier service, only a "receipt" is required. Because there is no further qualification in the Lease on what type of receipt is required

for overnight courier service, a receipt indicating that the mail was "delivered" would be sufficient. In this scenario, the Notice would have been delivered two days earlier and KPP would have never signed anything at all.

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, but KPP'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. This interpretation leads to an absurd result 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, although KPP claims its proposed interpretation is simply a "strict construction," the reality is KPP is attempting to hide behind certain terms while ignoring others. KPP hyper-focuses on the words "given" and "accepted" but fails to grapple with or provide any reasoned analysis about the effect of other words within the Lease's general notice provision such as "served" and "received."[10] When analyzing all terms of the Lease's general notice provision, and not cherry-picking only terms favorable to KPP's position, the Court of Appeals correctly recognized that the Lease plainly contemplates different points in time when a notice or demand is deemed "given," "served," "received," and "accepted." KPP's interpretation fails to acknowledge and give effect to all of the Lease's terms. Therefore, KPP's interpretation must be rejected. *Stevens Aviation, Inc. v. DynCorp Intern. LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153

[10] *See* 440 S.C. at 364, 890 S.E.2d at 825 ("The clause contains multiple disjunctives: it says notice shall be 'given or served' and explains that the notice upon mailing exception applies when notice is not 'received or accepted' in the ordinary course of business. Disjunctives suggest alternatives—this clause implies differences between notice being 'given,' notice being 'served,' notice being 'received,' and notice being 'accepted.'").

(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."); *see also 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 only a purposeful refusal to accept mail as KPP proposes. 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. Thus, when KPP "received" the Notice and when KPP ultimately "accepted" the Notice were necessarily 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. 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 *and* because KPP failed to accept its mail on two business days after the Notice was received. Either way, the result is the same: CVS timely exercised its option to renew the Lease.

D. If the Court Were to Consider Equitable Considerations, those Considerations Favor CVS.

Although the Court need not consider any equitable considerations in this case because CVS timely exercised its option to renew the Lease, if equity weighs in favor of either party, it is CVS and not KPP. KPP argues there was no "extraneous event" which caused the Notice to be delayed, Pet. at 10, but this is not accurate. Both parties are authorized by the Lease to give or serve notices by certified mail or overnight courier. However, KPP has chosen to not have an office and to accept mail only at its Post Office Box. This makes it impossible for CVS to utilize the faster method of delivery service that both parties are authorized by the Lease to use when giving or serving a notice or demand. KPP should not be permitted to unilaterally eviscerate one of CVS's express rights under the Lease and then claim CVS failed to "strictly comply" with the Lease's requirements.

Again, there is no dispute that the Notice was sitting at the only place KPP accepts mail prior to the Renewal Deadline. If KPP wanted to, it could have taken physical possession prior to the Renewal Deadline. The fact that KPP fortuitously (and ostensibly) chose not to go to the Post Office on this day cannot result in the conclusion that CVS failed to timely exercise its renewal option. *See Woods v. Cities Serv. Oil Co.*, 142 So. 2d 168, 169 (La. Ct. App. 1962) ("We are unwilling to hold that the notice was not timely given within the meaning of the contract, when the sole reason it was not received timely is that the lessor was unavailable to receive it because of his absence from the town or because he did not check the mail-box . . . .").

E. KPP's Subjective Course of Business is Not Relevant.

KPP argues that its *subjective* course of business, whether it is KPP's practice of checking the mail once per week or the fact that KPP took 11 days to "sign for" another notice in connection

with another CVS store, is somehow relevant. Pet. at 4, n.3. It is not. These facts are not even remotely relevant to the analysis of whether the Notice was timely.

With respect to how many times per week KPP does or does not check for its mail, KPP admits that the ordinary course of business in the commercial real estate industry is to check for mail on all non-holiday business days. *Id.* at 4–5 ¶ (g). KPP also admits that its mail is only checked "once or twice per week," and "based upon the schedule and availability of [KPP's] property manager's agent. . . ." **(R. 149)**. Clearly, KPP's admissions show that KPP's method of checking for its mail is **not** at all consistent with the ordinary course of business for the commercial real estate industry.

KPP presumably offers this reasoning to the Court to buttress its argument that the Lease's service upon mailing exception does not apply in this case. Whatever KPP's subjective course of business is—whether it is to check its mail once per week, all business days, or every day—does not matter. The ordinary course of business, as objectively defined, must control the meaning of the terms within the Lease, rather than KPP's subjective course of business. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017) ("Interpretation of a contract is governed by the *objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.") (quoting *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015)) (emphasis in original); *McCord v. Laurens Cty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) ("[W]e must enforce the language as written, for it's 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.").

Additionally, neither KPP nor CVS were original parties to the Lease. Thus, even if applying the contracting parties' subjective intent to the Lease's terms were legally correct (which it is not), it would still be completely illogical to apply KPP's subjective course of business to interpret the Lease's meaning. Further, KPP's subjective course of business to check its mail "once or twice per week" conflicts with the objective ordinary course of business standard for the commercial real estate industry of checking for mail on all non-holiday business days. *See* Pl.'s Resp. to Def.'s Interrog. No. 5(b) **(R. 278–79)**.

This same reasoning applies in equal force to KPP's discussion of how long it took KPP to "sign for" a notice in connection with another CVS store. Pet. at 4, n.3. All this shows is that KPP has a lackadaisical approach to checking its mail and signing for notices which does not come close to complying with the ordinary course of business for the commercial real estate industry. Therefore, any facts related to KPP's subjective course of business for checking its mail are in no way relevant to determining when the Notice was received or when the Lease deems the Notice served.

CONCLUSION

CVS took all steps required to exercise its option to renew the Lease. The Notice was delivered to the only place KPP accepts mail one day prior to the Renewal Deadline, and KPP had complete and total control over whether it accepted the Notice prior to the Renewal Deadline. The Notice was timely, and CVS effectively exercised its option to renew the Lease for an additional five-year term. CVS respectfully requests that KPP's petition for writ of certiorari be denied.

[*Signature Page Follows*]

Respectfully submitted,

s/Walter H. Cartin

Walter H. Cartin (SC Bar #78405)
Katon E. Dawson (SC Bar #101167)
J. Evan Phillips (SC Bar #103679)
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
Telephone: (803) 255-8000
waltcartin@parkerpoe.com
katondawson@parkerpoe.com
evanphillips@parkerpoe.com

Attorneys for Respondent

October 18, 2023
Columbia, South Carolina