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.

REPLY BRIEF OF APPELLANT

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KPP admits that CVS mailed the Notice on October 30, 2019. Resp't's Br. 6, ¶ 15. KPP admits that the Notice arrived at the Post Office where KPP's Post Office Box is located at 9:45am on November 2, 2019. *Id.* at 10. KPP admits that the Notice was available for KPP to pick up on November 2, 2019. *Id.* at 3 n.2. KPP admits that the Renewal Deadline was November 3, 2019. *See id.* at 2.

In other words, KPP concedes that (1) the Notice was delivered to its final destination prior to the Renewal Deadline and (2) KPP had complete and total control over whether or not it went to the Post Office to physically retrieve the Notice prior to the Renewal Deadline. Yet, KPP simultaneously argues that the Notice was untimely. KPP is asking this Court to affirm a ruling that voided a tenant's decision to exercise its contractually guaranteed right to extend the lease's term when the required notice was delivered to its final destination prior to the notice's deadline, simply because the landlord did not go retrieve its mail until after that deadline. If the Court were to accept this argument, then the Court would have to accept a result that conditions a party's ability to exercise its option rights entirely on the other party's actions. Such a result cannot be the law in South Carolina.

In addition to KPP's arguments that the Notice was untimely because KPP did not go pick up its mail, KPP also incorrectly argues that the Notice was untimely because the Lease does not deem the Notice served until it was "signed for" by the receiving party. To support this argument, KPP continues to assert that the Lease's terms are to be "strictly construed" against CVS. Notwithstanding the fact that KPP improperly invokes this method of contract interpretation under the facts of this case, KPP does not even offer an interpretation that gives effect to all of the Lease's terms. Instead, KPP glosses over material provisions and adds words into the Lease, all in an effort to reach the conclusion it desires. If KPP interpreted the Lease in a manner that comported with

well-settled rules of contract interpretation, then KPP would be forced to recognize the fatal flaws in its own arguments.

The Lease plainly and unambiguously lays out exactly what must occur in order for a notice (or demand) to be effectively served on the receiving party. The Lease also plainly and unambiguously lays out the method for determining when a notice (or demand) is deemed served on the receiving party. These terms are set forth in the Lease's general notice and demand provision, which is applicable to all notices and demands provided to another party pursuant to the Lease. Contrary to KPP's assertions, the Lease's general notice and demand provision does not require a signature or actual physical possession 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 when the receiving party has not "signed for" or taken physical possession of the notice (or demand). 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 in this case 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, the Notice was timely served on KPP, and CVS effectively exercised its option to renew the Lease. For these reasons, and as explained more fully below, KPP's arguments should be rejected. The Master's decision should be reversed.

I. KPP Received the Notice Prior to the Renewal Deadline.

It is undisputed, and KPP admits, that the Notice was delivered to the Post Office where KPP's Post Office Box is located (and the only place where KPP accepts mail) at 9:45am on

Saturday, November 2, 2019. *See* Resp't's Br. 10. Thus, by 9:45am on Saturday, November 2, 2019, there was no other place for the Notice to travel. It had arrived at its final destination.

It is also undisputed, and KPP admits, that the Post Office was open on Saturday, November 2, 2019. *Id.* at 3 n.2. Accordingly, it was entirely possible for KPP to have gone to the Post Office and taken physical possession of the Notice on that day. Therefore, the conclusion must be that the Notice was timely delivered to and received by KPP prior to the Renewal Deadline.

KPP's decision not to take physical possession of the Notice until four days after the Renewal Deadline has no effect on whether the Notice was timely. If KPP went to the Post Office on November 2, 2019 (as it could have done considering the Post Office was open) and took physical possession of the Notice, KPP's argument that the Notice was untimely would completely fall apart. The fact that KPP did not go to the Post Office—when the Notice was sitting there waiting for KPP to pick it up—cannot result in the Notice being untimely.

Other courts have refused to hold that a receiving party is required to take physical possession of certified mail before the applicable time period is triggered. For example, in *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993), 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 that the applicable time period was triggered when the "**letter is 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 same manipulation of the limitations period that concerned the Court in *Harvey*." *Watts-Means*, 7 F.3d at 42 (emphasis added).

KPP states that this case is inapposite because *Watts-Means* dealt with a notice of certified mail that was sent to an individual's home address rather than a Post Office Box. Resp't's Br. 11. However, if anything, this factual distinction further supports CVS's position. The Fourth Circuit found that a recipient's actual physical receipt was not necessary even when the respective letter was at a location different than where that person's mailbox was located. *See* 7 F.3d at 43. Unlike the individual in *Watts-Means*, KPP's "home" for purposes of receiving and accepting mail is the same exact location where the Notice was sitting on November 2, 2019—i.e., the Post Office.

Accordingly, in this case, the Notice must be considered timely because (1) it was delivered to the only place where KPP accepts mail prior to the Renewal Deadline and (2) KPP was capable of picking up the Notice prior to the Renewal Deadline. Therefore, the Master's finding that the Notice was not received on Saturday, November 2, 2019, must be reversed.

KPP attempts to muddy the picture by discussing what specific documents were actually placed in its Post Office Box and what it would have been required to do in order to physically retrieve the Notice. *See* Resp't's Br. 10–12. First, KPP is offering facts that are not in the Record on Appeal. KPP did not present or establish facts related to the specific process between the point in time when certified mail is delivered to a United States Post Office, placed in a Post Office Box, and picked up by the receiving party. There are also no findings within the Master's Order related to these specific procedures. These "facts" are improperly being offered by KPP for the first time, and should not be considered. Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); *see also Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015) (citing Rule 210(h), SCACR, and stating that "[t]he appellate court will not consider any fact [that] does not appear in the record on appeal")).

Second, even if it were true that KPP was required to take action while at the Post Office to take physical possession of the Notice, this does not negate the fact that the Notice was delivered to the place where KPP's Post Office Box was located and was available for KPP to pick up a full day prior to the Renewal Deadline. Put more simply: prior to the Renewal Deadline, CVS took all steps required to exercise its option to renew the Lease, and KPP had complete and total control over whether it would accept the Notice prior to the Renewal Deadline. Therefore, the Notice must be considered timely. *See Watts-Means*, 7 F.3d at 42.

II. The Lease Deems the Notice Served on October 30, 2019.

Although the Court need not consider KPP's remaining arguments if the Court finds that the Notice was received on November 2, 2019, the Lease's plain and unambiguous language deems the Notice served on October 30, 2019, because the Notice was neither received nor accepted by KPP in the ordinary course of business.

KPP argues that the Lease's language does not result in this conclusion because the terms of the Lease are to be strictly construed against CVS. However, KPP's strict construction argument is a red-herring and should be ignored for the reasons discussed in CVS's Brief at pages 16–19. Moreover, KPP's "strict construction" interpretation of the Lease ignores certain provisions all together, such as the Lease's service upon mailing exception.

To distill the issue, the Lease contains one provision, and only one provision, which is in any way relevant to determining when the Notice was deemed served on KPP. The relevant terms are located in the Lease's general notice and demand provision, which applies to *all notices or demands* given in accordance with the Lease. In full, it states the following:

> **Whenever, pursuant to this Lease, notice or demand shall or may be given to either of the 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 purpose unless the

> same **shall be given or**[1] **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).**

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

As explained in CVS's Brief at pages 10–13, these terms, when interpreted objectively and in the context of the commercial real estate industry generally, show that the Lease deems the Notice served either on the date the Notice was received or the date the Notice was mailed. Because the Notice was "received" on Saturday, November 2, 2019, as outlined above, the Lease deems the Notice served on the date it was mailed—October 30, 2019—because the Notice was not received or accepted by KPP in the ordinary course of business. *See* Compl. Ex. A 19, ¶ 27 (**R. 47**). The Lease's service upon mailing exception, which states "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," applies in three scenarios: (1) when a notice (or demand) was timely mailed, but not received by the receiving party on a normal business day; (2) when a notice (or demand) was received on a normal business day, but the party did not check its mail; and (3)

[1] KPP incorrectly states that this portion of the Lease states "shall be given **and** served." Resp't's Br. 10 (emphasis added). As shown above, the Lease actually states "shall be given **or** served." Compl. Ex. A 19, ¶ 27 (emphasis added) **(R. 47)**. It is important to call this mistake to the Court's attention, considering that KPP argues the Lease required physical receipt of the Notice and also offers the isolated statement "***by giving Landlord notice***" as proof of this assertion on the previous page of its Brief. *See* Resp't's Br. 9 (quoting Compl. Ex. A, Part II, § 3) (emphasis in original).

when the receiving party purposefully refuses to accept its mail. Pl.'s Resp. to Def.'s Interrog. No. 5(b) **(R. 278–79)**.[2]

The Notice was received by KPP on a Saturday when it arrived at the Post Office and was available for KPP to pick up. A Saturday receipt is outside of the ordinary course of business. Pl.'s Resp. to Def.'s Interrog. No. 5(b) **(R. 278–79)**. Application of this fact to the plain and unambiguous terms of the Lease shows that the Notice was "not received or accepted in the ordinary course of business." Accordingly, the Lease unequivocally deems the Notice served on the date it was mailed. *See* Compl. Ex. A 19, ¶ 27 **(R. 47)**. Therefore, the Master's ruling that the Notice was not timely served on KPP should be reversed.

III. KPP's Proposed Method of Contract Interpretation Adds Certain Terms to the Lease and Fails to Give Full Effect to All of the Lease's Terms.

Instead of actually interpreting the Lease's material language, KPP proclaims certain "requirements" and then cites to portions of the Lease which do not actually support its position. For instance, on three occasions, KPP states in its Brief that the Lease "expressly" and "unambiguously" requires that any notices pursuant to the Lease be "signed for" by the notified party. Resp't's Br. 4–5, ¶ 8; *id.* at 10; *id.* at 11 n.10. Each time, KPP cites to the Lease's general notice and demand provision set forth above. The words "sign" or "signature" (or any other similar term) do not appear anywhere within that provision. Therefore, it cannot be true that the Lease "expressly" or "unambiguously" requires a notice be "signed for" by the notified party.

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[2] KPP incorrectly states that CVS's argument that a Saturday receipt is not within the ordinary course of business is a "late-taken position." Resp't's Br. 13. To the extent this implies that CVS did not properly raise this argument to the Master below, the Record on Appeal clearly shows that CVS has consistently advanced this argument throughout this entire case. Compl. ¶ 21 ("[A] notice that is received on a Saturday is 'not received or accepted in the ordinary course of business,' as contemplated by Part II, Paragraph 27 of the Lease.") **(R. 22)**; Pl.'s Mot. Summ. J. 10 ("Delivery of the Notice . . . on Saturday, November 2, 2019, was receipt which did not occur in the ordinary course of business.") **(R. 306)**.

To the extent that KPP argues that these terms are somehow implied within the Lease's language, this argument should likewise be disregarded. The concept of *requesting* a "return receipt" for certified mail or a "receipt" for overnight courier service does not equate to a signature requirement. *See* Appellant's Br. 13–14. Equating these two concepts would permit a landlord who does not check their mail every day in accordance with the ordinary course of business—like KPP—to claim that notices are untimely simply because they did not check for the mail on any given day. Because the Lease contains no signature requirement, interpreting the Lease in a manner that requires a party to "sign for" a notice or demand before service is effective would require the Court to improperly impose additional terms into the Lease. *See Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) (holding that imposing additional terms into a contract that the parties did not agree on was impermissible) (citing 17A Am. Jur. 2d *Contracts* § 507).

Furthermore, any interpretation of the Lease's general notice and demand provision must give effect to all of the terms found within that provision. *See, e.g., Abel v. S.C. Dep't of Health & Envtl. Control*, 419 S.C. 434, 441, 798 S.E.2d 445, 448 (Ct. App. 2017) (stating that contracts should be interpreted "so as to give effect to all of their provisions") (quoting *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007)). KPP's proposed "interpretation" does not. KPP's "interpretation" fails to consider a number of the other possible instances where the Lease's service upon mailing exception would apply, such as when a notice is received on a weekend or holiday or when a party fails, even if not purposefully, to check its mail on weekdays. KPP offers this "interpretation" under the guise of strictly construing the Lease's terms when, in reality, KPP is simply choosing not to give effect to these terms.

For these reasons, KPP's proposed "interpretation" of the Lease must be rejected. The Master's decision that the Lease requires a party to "sign for" a notice or demand before service is

effective and that the Lease's service upon mailing exception was not implicated by the facts of this case must be reversed.

IV. 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 to interpreting the Lease. It is not. These facts are not even remotely relevant to the analysis of what the Lease means.

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. Resp't's Br. 13. KPP also admits that its mail is only checked "once or twice per week," *id.* at 12, and "based upon the schedule and availability of [KPP's] property manager's agent. . . ." *Id.* at 6, ¶ 13. Thus, it is confusing that KPP also states that "what is in the ordinary course of business for KPP is entirely consistent with what is in the ordinary course of business within its industry." *Id.* at 13. 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 or all business days—does not matter. The ordinary course of business, as objectively defined, must control the meaning of the terms within the Lease. *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.") (emphasis added).

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. *E.g.,* Resp't's Br. 5, ¶ 11 (stating that KPP "signed for the . . . notice . . . ***eleven days after CVS had posted it***. . . .) (emphasis in original). All this shows is that KPP has a lackadaisical approach to checking its mail and signing for notices that 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

For these reasons, 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 incurred in this case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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