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Mortgage Connect Document Solutions
LLC

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NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal from a post-trial judgment of the Superior Court holding that tenant/appellant Mortgage Connect Document Solutions, LLC (“MCDS”) repudiated a commercial lease for warehousing space next to the Denver airport (the “Lease,” A361-404) despite the absence of a clear, absolute, definitive, and unequivocal communication of an intention not to perform. The Superior Court’s decision contravenes Colorado law and the plain terms of the Lease itself. The Superior Court then compounded its error by awarding damages to landlord/appellee Green Industrial Development Group (“Green”) that were foreclosed by the unambiguous terms of the contract and unsupported in the trial record, as the expert advanced by the appellee admitted he had no basis to say whether the opinions he offered were based on a reliable methodology. This Court should reverse the Superior Court’s decision as to liability and damages.

SUMMARY OF ARGUMENT

1) The judgment should be reversed because the Superior Court's conclusion that MCDS breached the Lease is inconsistent with applicable Colorado law and its own fact finding. First, to qualify as repudiation under Colorado law, the party's statement must manifest a clear, absolute, definite and unequivocal intention not to perform under the contract. The Superior Court never found that such an unequivocal statement was made. At most, the allegedly repudiating communication was ambiguous as to its intention, and therefore does not meet the legal requirements for repudiation.

2) Second, the Superior Court acknowledged that it might have found differently had MCDS continued to try to work with Green after sending the December 28 Text that allegedly repudiated, but then ignored its own findings that MCDS did just that.

3) Third, the Superior Court improperly relied on MCDS's internal discussions to find repudiation. But repudiation must be found in the communications between the contractual parties. The Superior Court improperly considered uncommunicated evidence while ignoring the expressed intent behind MCDS's communication to Green.

4) Fourth, the Superior Court found MCDS breached the Lease despite Green's noncompliance with its obligation to give MCDS notice and an opportunity

to cure. In so doing, the Superior Court disregarded the plain language of the Lease which provides that there is no breach until noncompliance has persisted for 30 days after notice.

5) In the alternative, if MCDS breached the Lease, the Judgment should be reversed with respect to damages. Section 23.1 of the Lease describes three categories of available damages: (a) past-due rent; (b) forward-looking lost rent; and (c) other damages—other than lost rent—proximately caused by the breach. The Superior Court committed legal error by re-writing the Lease to include “rent” under Section 23.1(c). By adding the word “rent” to part (c), the Superior Court rendered part (b) of the Lease superfluous, and re-wrote the Lease to create a damages structure the parties had not adopted.

6) The Superior Court also erred by relying on unreliable expert opinion. Green’s expert offered no factual basis to support his conclusion.

FACTS

The parties are MCDS, a provider of communications in the mortgage industry that operates a printing facility in Denver, and Green, a Denver commercial real estate developer. Superior Court’s Post-trial Memorandum Opinion (the “Opinion,” Tab A hereto) at 1-2. The two fact witnesses who testified at trial were the parties’ respective principals, Jeff Coury for MCDS and Dan Green for Green. *Id.* at 2.

A. The Parties Sign the Lease.

In 2021, MCDS began looking for new space for its Denver, Colorado printing operations and was introduced to Green, which had a space in Green’s industrial park (the “Park”) that fit MCDS’s needs. A027 ¶¶ 10-17; Opinion at 2; *see* A047 at 13:18-14:3. On April 27, 2022, the parties signed the Lease for a 46,280 square foot space (the “Premises”). Opinion at 3. The Lease, governed by Colorado law, *id.*, was Green’s “standard form” drafted by its counsel. A113 at 27:15-20.

The Lease supplants the common law definition of breach with a defined set of Events of Default. *See* A376 § 22 (“If one or more of the following events (each an ‘Event of Default’) occurs, such occurrence constitutes a breach of this Lease by Tenant.”). The pertinent definition of breach is found in Section 22.3, which says it is an Event of Default if MCDS “fails to perform or observe any other agreement, covenant, condition or provision of this Lease to be performed or observed by

[MCDS] as and when performance or observance is due . . . and such failure continues for thirty (30) or more days after [Green] delivers written notice thereof to Tenant.” A377 § 22.3. As Dan Green conceded at trial, Green was required “to wait 30 days before the issue [it has] identified has become an event of default or a breach,” and “the point of this 30-day notice period is to give the tenant the chance to correct or cure the issue [Green] identified in [its] notice and thereby avoid an event of default.” A131 at 99:21-100:19.

A central feature of the Lease is the Work Letter incorporated in the Lease that set forth the parties’ agreement related to building out the Premises so that it would “meet MCDS’s operational needs.” Opinion at 3; *see* A028 ¶¶ 19-20; A049 at 22:2-8 (discussing the criticality of the buildout). The Work Letter provided MCDS with a “Tenant Allowance” of \$30 per square foot, totaling about \$1.38 million, as a credit provided towards the cost of the buildout. Opinion at 3; A387 § 5. The buildout work would be done by Green’s affiliate, with Green taking a 10% management fee. A388 § 5(c).

Green was obligated to design the buildout and prepare “Working Drawings” in accordance with MCDS’s specifications. A028 ¶ 22; A386 § 1. If the cost of the buildout would “exceed the Tenant Allowance for any reason,” which the Lease called “Excess Cost,” Green was required to notify MCDS. Opinion at 4; A387-88 § 5(b). MCDS then had the option to (i) proceed with the plans and bear the Excess

Cost, or (ii) work with Green to revise the Working Drawings to reduce the Excess Cost. Opinion at 4. If MCDS chose the second option, Green was obligated to “obtain revised pricing, and the foregoing procedure will be repeated until the Excess Cost has been eliminated or [MCDS] has agreed to” bear the Excess Cost. A387-88 § 5(b). Green conceded that “MCDS was not obligated under the Work Letter to consent to any Budget” that contained Excess Cost, and “[t]he revise or consent process” under Section 5(b) “must ‘be repeated until the Excess cost has been eliminated or [MCDS] has agreed to reimburse [Green].’” A433-34; *see also* A134-35 at 111:19-115:6.

B. The Parties Discuss Budgets and Consider Alternatives.

The parties discussed the budget for the buildout, with Green providing proposals that included millions of dollars of Excess Cost. *See* Opinion at 4-6. MCDS rejected these proposals. On October 4, 2022 Green wrote: “[w]e have really tried to get you the best deal we could, and this is as far as we can go.” A406. Green’s was position that MCDS was contractually bound to accept Green’s proposal, even though it included Excess Cost. A061 at 70:4-10.

Upon receipt of the ultimatum, MCDS deemed it prudent to hold internal discussions about its options should Green persist with its stated position regarding Excess Costs. As one MCDS employee stated, given the severity of the situation, it would be necessary to “kill the deal” with Green if unreasonable Excess Costs were

required in order to proceed. Opinion at 6-7; A061-62 at 70:11-73:10. Nonetheless, MCDS's preferred path forward was to continue the "cooperation" process in the Lease and take possession once Excess Costs were eliminated or reduced to an acceptable level. A062 at 73:11-76:15.

When Green presented his October 4 ultimatum, Green was seeking out a new tenant for the Premises. Opinion at 8-9. In internal communications, Green's project manager raised concerns that showing the Premises to other prospective tenants might violate the Lease. A409 (quoting A371 § 12). Nevertheless, Dan Green instructed his team to show the Premises, directing them "NOT" to notify MCDS about what they were doing. *Id.*; A125 at 73:11-21.

Dan Green testified that he did not tell MCDS he was showing the Premises to other prospective tenants because he wanted the parties "focused on finding a path forward," yet on October 19, Green sent MCDS a notice of default (the "First Notice") claiming MCDS had defaulted under the Lease by failing to "approve" a previous budget proposal. Opinion at 9. Green admitted this First Notice was baseless because MCDS had no obligation to approve that budget—or any budget that contained Excess Cost, but he delivered it to MCDS anyway. A143 at 145:21-147:12.

The parties talked on November 2. On November 4, Green sent another new budget, which constituted Green's fourth budget proposal (the "Fourth Budget").

Opinion at 10. Although the Fourth Budget made several changes to the plan and reduced Excess Cost, the Excess Cost nevertheless remained over \$4 million. A412-14. The fact Green was able to reduce Excess Cost at all was notable for its contrast to Green’s claiming in early October that there was nothing else that could be done and MCDS would have to take the Third Budget as is. MCDS exercised its right not to accept the Excess Cost in the Fourth Budget, telling Green its response was “**by no means, the end to our conversations as we would like to continue to work cooperatively so we can see if [we] get to a budget number that works for [MCDS].**” A412 (emphasis added).

C. The Smaller Space Proposal and MCDS’s Response.

Twenty-four days later, on November 28, 2022, Dan Green responded by text that he was “[w]aiting on some info from HVAC, but I think we’ve got a good plan.” A418; *see* A071 at 110:15-111:18; A222 at 178:14-179:7. The parties next spoke a week later on December 5, 2022. *See* Opinion at 11. The parties disputed some of what was discussed on December 5, but this much is undisputed: the only proposal Green made on December 5 was an offer to MCDS to lease a smaller space instead of the Premises (the “Smaller Space Proposal”). *Id.* at 11, 15-16. Green did not propose another budget or modification to the plan. MCDS was willing to consider the Smaller Space Proposal as an alternative, even though it would involve amending the Lease. A072 at 114:23-115:3; A154 at 189:5-11.

Coury was unequivocal in his testimony that Dan Green told him on December 5 that Green had committed the Premises to another tenant. A045 at 8:8-22; A071-72 at 112:16-114:1. Dan Green’s testimony, in contrast, took on several versions. While he denied telling Coury that Green had “committed” the Premises to another tenant, he admitted twice that it was “possible” he told Coury that he was pursuing other plans for the larger part of the Premises, after first denying it, and then claiming a lack of recollection. A153 at 186:2-187:3.

On December 28, 2022, Coury responded to the Smaller Space Proposal in a text that the Superior Court described as the “nexus of this lawsuit” (the “December 28 Text”). Opinion at 11. It said:

Dan hope all is well and you are enjoying your vacation. I worked with my team and your latest proposal does not work. We cannot take the space. I wanted to get to you sooner than later so you can continue to market the space to others. This process, unfortunately has caused my business a lot of issues with operations with delays of equipment, capacity, and client boarding. We have no choice but to look at the other alternatives. Wish you the best. Jeff

Id.

There was no dispute in the testimony before the Superior Court that the Smaller Space Proposal was the only proposal being discussed by the parties at the time. A153-54 at 188:17-190:10 (Green confirming). Coury explained that there was nothing for him to repudiate as of December 28, 2022, because he understood

the larger part of the Premises had already been committed to another tenant, and the parties were only discussing the Smaller Space Proposal. A074 at 123:3-124:2.

D. The Parties Keep Talking About the Lease.

The parties continued to communicate. On January 5, 2023, during a call less than a week after the December 28 Text, Coury explained to Green why the Smaller Space Proposal would not meet MCDS's needs. At that point, Green asked Coury about the original leasehold. Opinion at 11 (citing A074-75 at 124:3-125:4). Coury expressed surprise that the Premises space was still available, but responded, consistent with the Lease, that MCDS would need "the Excess Costs to be reduced before MCDS could agree to the budget." *Id.* At that point, Green announced that any further reduction of the Excess Cost would not be workable and terminated the discussion. *Id.* Regarding what happened during the January 5 call, the Opinion cites the following testimony from Coury:

So on that call Dan wanted to ask me again why is the smaller space not good. I reiterated those reasons to him, why it wasn't good. He then immediately brought up the bigger lease. So I was first taken aback. I was a little confused and shocked at it. I said, Dan, I thought we -- in our discussions in December, that space is off the table.

So, you know, I was a little taken aback, just to say the least. But then he said no, we're going to have to move forward.

I immediately told him, Dan, listen, if that's the case, then we need to get our teams together, and we need to move down the path to cooperate and reduce the cost. His -- he was done. It was, like, we can't go any lower. I'm done

with this process. He threatened to sue MCDS, he threatened to hold me personally liable, and the call ended.

A074-75 at 124:9-125:4 (cited in Opinion at 11-12 nn.78-80, 19-20 nn.128-30).

E. Green’s Improper Termination of the Lease.

On January 12, 2023, Green terminated the Lease by sending MCDS a Notice of Default, Tenant Delay and Termination of Lease (the “Second Notice”). Opinion at 12; A029 ¶¶ 34-35. The Second Notice asserted that Green had interpreted the December 28 Text as a notification by MCDS that it (i) disapproved of the revised budgets and (ii) was “refus[ing] to proceed with the Lease,” resulting in an Event of Default. A422. The Second Notice said, “**in accordance with Section 23.1 of the Lease, [Green] has elected to terminate the Lease, effective immediately[.]**” *Id.* (boldface in original). The Second Notice continued, its “election to exercise its right to terminate the Lease as set forth above is final. [MCDS] shall have no right to reinstate the Lease by curing the existing Event of Default.” *Id.*

MCDS, through counsel, responded the next day, “rejecting Green’s contention that MCDS was in default under the Lease.” Opinion at 12. MCDS asked Green to return the deposit it had paid when the Lease was executed, *id.*, which MCDS had the right to do if the Lease was terminated when MCDS was not in default, A377 § 24 (“Provided Tenant is not in default, any balance remaining upon termination shall be returned to Tenant.”).

F. Procedural History and the Opinion

The Superior Court held a three-day trial from February 3-5, 2025. Opinion at 13. MCDS claimed Green had breached the Lease by terminating it in the Second Notice without giving any opportunity to cure. Green counterclaimed that MCDS had breached the Lease by repudiating it in the December 28 Text.¹

1. The Superior Court's Liability Conclusion

The Superior Court held MCDS repudiated the Lease in the December 28 Text, and accordingly held MCDS liable for breach of contract. The Superior Court found that, although the first half of the December 28 Text was discussing the Smaller Space Proposal, the last three sentences of the text evidenced MCDS's intent to repudiate the Lease. *Id.* at 16, 18. The Superior Court found those sentences conveyed that the ongoing budgeting process was disrupting MCDS's business, intended to solve that problem by looking for alternatives, and by ending with "wish you the best," signaled a final end to the parties' contract. *Id.* at 18-19. The Superior Court made clear that the "second-to-last sentence's declaration that MCDS would pursue other options provides the most damaging evidence supporting repudiation." *Id.* at 19.

¹ The Superior Court found it unnecessary to reach Green's argument that MCDS breached the Lease by failing to cooperate with Green. *Id.* at 25-26.

In addition to the text itself, the Superior Court considered the parties' subsequent conduct, including the January 5, 2023 phone call, MCDS's January 11, 2023 termination of the vault installation contract, and MCDS's January 13, 2023 letter to Green after Green had terminated the Lease. *Id.* at 21. The Court also relied on MCDS's internal planning that had begun prior to the December 28 Text when finding that, "[a]s a policy matter, a finding against repudiation is unsavory." *Id.* at 24-25.

The Superior Court further held that, had the December 28 Text been **"followed up by MCDS's continued efforts to negotiate a budget, perhaps the Court would not find repudiation."** *Id.* at 19 (emphasis added).

2. The Lease Provisions on Damages, and the Superior Court's Damages Award

The exclusive remedies for a breach of the Lease by MCDS are set out in the three subparts of Section 23.1, each addressing different consequences of a breach: (a) unpaid "rent" due at the time of the breach,² (b) a formula for calculating damages to account for the "rent" that would have been due for the rest of the term of the Lease, and (c) incidental damages proximately caused by the Lease. It says:

In the event of any breach of this Lease by Tenant, Landlord may, at its option, terminate the Lease and

² It is undisputed there was no unpaid rent, so Section 23.1(a) is not at issue.

repossess the Premises pursuant to Colorado law and recover the following from Tenant as damages:

(a) the outstanding balance of any unpaid **Rent** and other amounts due at the time of termination . . . ;

(b) the present value of the balance of the **Rent** for the remainder of the Term after termination less the present value of the fair market value rental of the Premises for said period . . . ; and

(c) any consequential damages or other amount necessary to fully compensate Landlord for all loss or injury proximately caused by Tenant's default or which in the ordinary course of business would be likely to result therefrom, including, without limitation, the unamortized portions of the Tenant Allowance and leasing commissions paid by Landlord in connection with this Lease, amortized on a straight-line basis over the Term of the Lease, the cost of recovering the Premises from Tenant, the cost of removing and storing Tenant's furniture, trade fixtures, equipment, inventory or other property, repairing and/or demolishing the Premises, removing and/or replacing Tenant's signage and other fixtures, excluding the following: the costs of making the Premises ready for a new tenant, the costs of any leasehold improvements, and any allowances and/or concessions provided by Landlord to any such new tenant.

A377 § 23.1 (emphasis added).

Two things about the Lease's remedies language bear emphasis. Section 23.1(b) says the damages for lost forward-looking Rent is not the full amount of the rent that would have been due, but rather the delta between the rent that would have been due and the fair market value of rent for the same period. And in Section

23.1(c)—in contrast to the other two subsections—the Parties did not include “Rent.”

Relevant to this appeal, the parties disputed Green’s entitlement to two types of lost-rent-based damages, both of which the Superior Court awarded. First, the Superior Court awarded Green the full \$890,479 it sought in lost rent damages under Section 23.1(b), which the Opinion terms “Rate Variance Lost Rent,” by deducting “the rent that was contemplated in the MCDS Lease” from the fair market value rental value of the Premises calculated by one of Green’s experts, Bill James, using a comparable-properties analysis. Opinion at 29-30; Judgment (Tab B hereto) ¶ 4(a)(i). Second, the Superior Court awarded Green lost rent under Section 23.1(c), which the Opinion terms “Actual Lost Rent.” Opinion at 35-38; Judgment ¶ 4(a)(ii).

ARGUMENT

I. THE SUPERIOR COURT’S LIABILITY JUDGMENT DISREGARDS COLORADO LAW AND IS INCONSISTENT WITH ITS FACT FINDINGS.

A. Question Presented

Did the Superior Court err by finding that MCDS repudiated the Lease? This question was preserved. A264-73; A286-302.

B. Standard of Review

The Court reviews questions of law, including the Superior Court’s application of its findings of facts to the law of repudiation, *de novo* and without deference to the Superior Court’s legal conclusion. *Caribbean Sun Airlines Inc. v. Halevi Enters. LLC*, 339 A.3d 24, 34 (Del. 2025) (“Despite this deference to the Superior Court’s factual findings, we review the Superior Court’s formulation and application of legal principles *de novo*.”). The Superior Court’s interpretation of the Lease presents a question of law that is reviewed *de novo*. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of the Argument

The Judgment should be reversed because the Superior Court misapplied Colorado legal principles in multiple ways. First, the Superior Court found the December 28 Text repudiated the Lease although it was not a definite, unequivocal statement of intention not to perform. Second, the Superior Court disregarded its own fact findings regarding post-December 28 conduct, which supported that there

was no repudiation. Third, the Court improperly considered evidence uncommunicated between the parties, while ignoring evidence of MCDS's intent. Finally, the Superior Court disregarded MCDS's entitlement to notice and an opportunity to cure under the Lease.

1. The December 28 Text Was Not a Repudiation as a Matter of Colorado Law.

Repudiation under Colorado law requires “a party’s definite and unequivocal manifestation of its intention that it will not perform as required by the contract.” Opinion at 17; *accord* 4 Corbin on Contracts § 973 (1951) (“[T]o constitute an anticipatory breach of contract there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arises.”).

A “mere threat” not to perform is not enough. Opinion at 17. The message must instead convey an “absolute” intention not to perform going forward. *See Meinhardt v. Inv. Builders Props. Co.*, 518 P.2d 1376, 1377-79 (Colo. App. 1973) (holding letter threatening to terminate contract if ultimatums were not honored was not repudiation because it was not “absolute”).

The alleged repudiation must be “apparent in the objective sense” and consist of a “present, positive, unequivocal refusal to perform.” Opinion at 17 (quoting *Quinn v. City of Evans Police Dep’t*, 2009 WL 2241955, at *5 (D. Colo. July 24, 2009)). When deciding whether a party has repudiated a contract, “it is the intention

manifested by his acts and words which controls, and not his secret intention.” *J.B. Service Court v. Wharton*, 632 P.2d 943, 945 (Wyo. 1981) (quoting 17 Am. Jur. 2d Contracts § 448 (1964)).³ Thus, if a statement is equivocal or open to interpretation as to its meaning, it cannot meet the definition of repudiation as a matter of law. *See Quinn*, 2009 WL 2241955, at *5-7 (holding a voicemail using equivocal language could not, as a matter of law, constitute repudiation).

a. The Superior Court Misapplied The Law By Finding An Ambiguous Text Constituted Repudiation.

Before finding MCDS repudiated the Lease in the December 28 Text, the Superior Court failed to address the critical threshold question of whether the allegedly repudiating message was an unequivocal refusal to perform under the Lease. Because repudiation under Colorado law must be clear, unequivocal and definite, the first question is not (as the Superior Court framed the issue) whether the December 28 Text could be read as a repudiation, but rather whether repudiation is the **only** reasonable reading of the December 28 Text.

Nowhere in its opinion did the Superior Court find that the December 28 Text between the parties was a clear, unequivocal and definite refusal to perform. Rather, the Superior Court stated that the message could be interpreted in different ways,

³ The Wyoming law on repudiation is nearly identical to that in Colorado. *Compare J.B. Service Court*, 632 P.2d at 945, *with Quinn*, 2009 WL 2241955, at *5.

and that in the event discussions had continued, the Superior Court may not have found repudiation. Opinion at 19.

A message that is susceptible to multiple interpretations is not clear, unequivocal and definite, and therefore cannot constitute repudiation as a matter of law. *See Cheyenne Mountain Sch. Dist. #12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993) (“A document is ambiguous when it is reasonably susceptible to more than one meaning.”); *Quinn*, 2009 WL 2241955, at *5-7 (equivocal language could not, as a matter of law, constitute repudiation).

The December 28 Text was not ambiguous at all regarding whether it was referring only to the Smaller Space Proposal, or also the larger lease as the Superior Court found. The parties acknowledged that the text was referring to the Smaller Space Proposal, *see* A153-54 at 188:17-191:7, but even more compelling is the fact that the Superior Court had to parse the text sentence-by-sentence to arrive at an interpretation of it, *see* Opinion at 18-19, which confirms that the intent of the text—at minimum—is not definite, clear and unequivocal from its words.

The Superior Court also failed to identify any contractual obligation that MCDS unequivocally refused to perform in allegedly repudiating the Lease. The Superior Court acknowledged that the primary evidence supporting repudiation is a line in the December 28 Text stating MCDS had “no choice but to look at the other alternatives.” Opinion at 17. But this statement, even if it had been about the larger

space (which it was not; *see supra* at 8-10, 19) was neither a definite and unequivocal statement, nor did it describe any action MCDS planned to take that would breach the Lease. At most, the text provided that MCDS was going to “look at” alternatives, not take them. The Superior Court also made no findings about what the “alternatives” would be and how those would constitute breach.

Such statements cannot amount to repudiation under Colorado law. *See Meinhardt*, 518 P.2d at 1379 (letter insisting on “alternative proposals” did not constitute a repudiation of a contract, which “must consist of a present, positive, unequivocal refusal to perform the contract, and a mere threat alone to abandon is not a ‘repudiation.’”); *Quinn*, 2009 WL 2241955 at *5 (“[m]ere expression of doubt as to [a party’s] willingness or ability to perform is not enough to constitute a repudiation.”); *San Miguel Valley Corp. v. Town of Telluride*, 2004 Colo. App. LEXIS 3347, at *10-11 (Colo. App. Oct. 14, 2004) (rejecting claim of constructive repudiation even where conduct was inconsistent with performance because the defendant “ha[d] not taken action to withhold [the promised] services from [the plaintiff] when and if a request for such services might arise”). A repudiating statement must unequivocally “manifest an intention on the part of the repudiator **not to render the promised performance when the time fixed for such**

performance in the contract arises.” *San Miguel Valley Corp.*, 2004 Colo. App. LEXIS 3347, at *10-11 (emphasis added). MCDS never made such a statement.⁴

Moreover, any ambiguity in the text results from Green’s own words and actions, and so it should not be held against MCDS. Green said a revised budgeting proposal was forthcoming, which would include an HVAC component that would bridge the Excess Cost gap, but instead made the Smaller Space Proposal. It is undisputed the Smaller Space Proposal was the only proposal the parties were discussing as of December 28. Those facts are behind what Coury wrote in the December 28 Text, not an intention to repudiate.

Accordingly, the Superior Court erred by finding the December 28 Text met the definition of repudiation under Colorado law.

⁴ The cases relied upon by the Superior Court required that the repudiating statement include a specific, admitted refusal to perform a contractual requirement. *See e.g., Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1023 (Colo. App. 2005) (tenant’s admission that he repeatedly told the landlord he “would *not perform* under the lease and, thereafter, suggested that landlord seek another tenant” repudiated the lease (emphasis added)); *Lawry v. Palm*, 192 P.3d 550, 559 (Colo. App. 2008) (defendant’s emails stating “[y]ou are on your own,” ordering removal of his name and “any reference to or about” him from the business, demanding equity, and indicating he would no longer be providing credit to the business constituted repudiation as this was “an unequivocal refusal to perform” five specified obligations under the parties’ agreement); *see also Quinn*, 2009 WL 2241955 at *5-8 (compiling Colorado cases finding repudiation and explaining that in each case “the repudiating language directly states the contract is over and will never be honored”).

b. Post-December 28 Conduct Confirms There Was No Repudiation.

A “Court may look to the alleged repudiator’s post-message conduct to determine whether the party has repudiated,” and the Superior Court did so here. Opinion at 17. However, after finding the December 28 Text evidenced an intent to repudiate, the Superior Court went on to say that if the December 28 Text had been “followed up by MCDS’s continued efforts to negotiate a budget, perhaps the Court would not find repudiation.” *Id.* at 19. But the Superior Court disregarded its fact findings that MCDS *had* continued trying to work with Green, *see id.* at 11-12 (finding that Coury explained on a call after sending the December 28 Text “that MCDS needed the Excess Costs to be reduced before MCDS could agree to the budget”), confirming that MCDS had not unequivocally and positively refused to perform on December 28.

The Opinion discusses Coury and Dan Green’s January 5, 2023 call to discuss the December 28 Text. *Id.* at 19. As a threshold matter, the fact they spoke at all contradicts the idea that the December 28 Text was intended as a final end to their dealings under the Lease. The Superior Court acknowledged in its finding of facts that, during this discussion, Dan Green brought up the full Premises, and Coury reengaged, “explain[ing] that MCDS needed the Excess Costs to be reduced before MCDS could agree on a budget,” as the Lease expressly allowed. *Id.* at 19-20. In the very testimony the Court cited, Coury explained his view that the parties should

get their teams back together to do just that. *See supra* Facts § E. Thus, Coury did exactly what the Lease contemplated—and exactly what the Superior Court said needed to be done to refute that the December 28 Text was intended to repudiate the Lease. Under Colorado law, this is not repudiation. *See Quinn*, 2009 WL 2241955, at *8 (“In a true repudiation, continued discussion relating to the basis for the repudiation should be non-existent: once the contract is nullified, there is no reason for the repudiating party to continue to discuss the details of a non-existent agreement. Continued negotiations, such as occurred in this case, are not consistent with a party’s intention to repudiate.”). Even if the December 28 Text had been a repudiation (it was not), MCDS’s willingness to continue negotiating the budget of the larger space retracted any repudiation. *Id.* at n.44 (“A repudiation may be retracted when the repudiator notifies the injured party that he will proceed with his performance.” (internal quotation and citation omitted)).

The parties’ interactions after the January 5 call likewise do not prove any unequivocal intent to repudiate on MCDS’s part. Only after Green, in contravention of the Lease’s terms, rejected any further effort to try to reduce the Excess Cost did MCDS ask for the Deposit back or cancel the vault installation. That wasn’t MCDS signaling it had meant to repudiate on December 28; that was MCDS reacting to Green refusing to reengage on budget discussions as it was required to do under the Lease. The Superior Court faulted MCDS for not asking to resume negotiations after

receiving the Second Notice where Green wrongfully terminated the lease, but that requires ignoring what Green said in boldface type in that letter: that it was terminating the Lease irrevocably, without opportunity to cure or to reinstate. A421. MCDS taking Green at its word does not show intent on MCDS's part to repudiate or overcome the evidence of what happened on January 5.

The Superior Court relied on *Lawry* for the proposition that an “‘inartful’ repudiating message . . . paired with a subsequent failure to walk back the repudiation” can constitute repudiation. Opinion at 19. However, *Lawry* illustrates why there is no repudiation here. The *Lawry* defendant’s allegedly repudiating emails “were accompanied by defendant’s breach by non-performance,” including ceasing to perform his employment obligations under the agreement, “and, **thus, they amounted to a repudiation.**” Opinion at 17 n.120 (quoting *Lawry*, 192 P.3d at 559 (emphasis added)). In *Lawry*, there was also “no discussion between the parties or between their attorneys that defendant wanted to continue working for” the plaintiff. *Id.* Unlike in *Lawry*, there is no claim that MCDS ever violated the terms of the Lease prior to Green refusing to perform and unlawfully terminating, and MCDS undisputedly expressed a willingness to continue performing under the Lease after the allegedly repudiating text.

Thus, the parties’ undisputed conduct after the December 28 Text demonstrates there was no repudiation as a matter of law.

c. The Court Improperly Relied On Evidence Not Communicated Between The Parties While Disregarding Evidence Of MCDS's Intent.

In addition to misapplying Colorado law, the Superior Court improperly relied on MCDS's internal communications that were not shared with Green when determining MCDS had repudiated, all while disregarding key evidence of MCDS's intent behind the communications it did send to Green. The Superior Court made clear that, in finding repudiation occurred, it was considering what it referred to as "a policy matter" that "a finding against repudiation is unsavory" given MCDS's internal discussions beginning months before the December 28 Text in the event the Lease fell through due to Green's refusal to comply with its obligations. Opinion at 24-25. Not only does the Court cite no authority under Colorado law for making such a "policy" determination, consideration of evidence outside of the intention communicated between the contractual parties is improper. When deciding whether a party has repudiated a contract, "it is the intention **manifested by his acts and words which controls, and not his secret intention.**" *J.B. Service Court*, 632 P.2d at 945 (quoting 17 Am.Jur.2d Contracts § 448 (1964)) (emphasis added); *see also* Restatement (Second) of Contracts § 250 (a repudiating statement "must be made to

an obligee under the contract, including a third-party beneficiary or an assignee.”)⁵ Williston on Contracts § 63:45 (“In determining whether an anticipatory breach has occurred, it is the party’s intention manifested acts and words that is controlling, and not any secret intention that may be held.”). The Opinion is clear that MCDS’s internal plans were not communicated to Green (just as Green’s internal plans to search for a new tenant were not communicated to MCDS), and thus those plans should not have been considered in assessing whether MCDS repudiated the Lease.

Moreover, the Court selectively considered this uncommunicated internal planning from months prior to the December 28 Text while disregarding key evidence as to MCDS’s actual intentions in sending the text, which is a fundamental consideration under Colorado law. *See supra* at 17-18. As Coury explained at trial, when he sent the December 28 Text, he was turning down only the Smaller Space Proposal, the only proposal that was on the table at the time. A074 at 122:23-124:2. Nor would it have made any sense for Coury to be addressing and repudiating the Lease as the Superior Court found. The Superior Court’s findings imply that MCDS

⁵ The Restatement goes on to state that even if a contracting party told “a third person having no right under the contract . . . that he will not perform” and the third person “informs [the contracting counterparty] of this conversation, although not requested by [the contracting party] to do so . . . [the contracting party’s] statement is not a repudiation.” Colorado follows the Restatement (Second) of Contracts § 250 when assessing whether a statement constituted repudiation. *See Johnson v. Benson*, 725 P.2d 21, 25 (Colo. App. 1986) (citing Restatement (Second) of Contracts § 250).

wanted to repudiate beginning in early October but then spent the next two-and-a-half months trying to work out a solution, only to then shoot itself in the foot despite having better options. As Coury explained, he was not so irrational: MCDS still had many options that would not have exposed MCDS to a potential claim for repudiation, including (i) subleasing the Premises as permitted by the Lease; (ii) accepting the Smaller Space Proposal, which would have substantially “reduced [MCDS’s] economic risk,” or (iii) “negotiat[ing] some type of settlement,” amongst others. *Id.* As such, “[i]t never crossed [his] mind that [the December 28 Text] was repudiating the lease or the contract at all.” *Id.* The Superior Court acknowledged that whether a decision to repudiate is economically rational is a factor considered under Colorado law, but handwaved that factor without any meaningful consideration. Opinion at 20.

Although the Superior Court found MCDS had not proven Green rented the Premises to someone else, the Superior Court ignored the relevant consideration: Coury’s intent when he sent the December 28 Text. Whether Green had said he had “committed” the Premises to another tenant is beside the point. Dan Green concedes that he may have stated that Green was pursuing other plans for the larger space at the time the Smaller Space Proposal was made. Reading the December 28 Text through that lens makes absolutely clear that the December 28 Text was declining the *smaller space*, which was the only space being offered to MCDS at that time.

As Coury explained, the full Lease space was not even on his mind when he wrote the December 28 Text, and he did not intend to repudiate the Lease. The Court’s findings about the January 5 call reinforce precisely what Coury said, as Coury was open to continuing negotiations once he knew the larger lease was back on the table.

The evidence regarding the intent behind the December 28 Text is anything but clear and unequivocal, contrary to what Colorado law requires. The Judgment should be reversed.

2. The Lease Entitled MCDS to Notice and an Opportunity to Cure.

Under Colorado law, all the words of the Lease must be given effect, including those regarding the ability of a landlord to exercise “any remedy” in the event of “any default.” *Zurich Am. Ins. Co. v. Dillon Cos., LLC*, 595 F. Supp. 3d 1003, 1008 (D. Colo. 2022). Notice and cure are common features of leases, designed to protect tenants from landlord overreach.⁶ As such, Colorado law enforces time-to-cure provisions in leases. *Nw. Water Corp. v. City of Westminster*, 164 Colo. 61 (1976)

⁶ See, e.g., 49 Am. Jur. 2d Landlord & Tenant § 850 (“If the lessor fails to allow the lessee to cure the default within the time period provided in the lease, the lessor is precluded from suing for possession on the basis of the default. The tenant has a reasonable time in which to cure a default if notice is not given and the lease specifically requires notice.”); 8 Corbin on Contracts § 36.7 (2024) (“A completely different way to prevent defeat of the owner or buyer’s purpose is *cure*, which gives the contractor or seller another chance to perform substantially. Cure also fits in with helping to prevent the forfeiture of the contractor’s bargain. . . .”).

(holding complying with a mandatory default notice requirement in a contract is a condition precedent to the termination thereof); *Carleno Coal Sales v. Ramsay Coal Co.*, 129 Colo. 393 (1954) (holding contract could not be terminated for the other party’s alleged failure of performance when the non-breaching party failed to give the sixty day notice and opportunity to cure as required by the terms of the parties’ contract). It is “axiomatic” that “courts should not rewrite the provisions of an unambiguous [contract].” See *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); *McShane v. Stirling Ranch Prop. Owners Ass’n, Inc.*, 393 P.3d 978, 982 (Colo. 2017) (stating the court “hold[s] no authority to rewrite contracts and must enforce unambiguous documents in accordance with their terms”).

It is significant that the parties included terms in the Lease designed to avoid the uncertainty over whether the Lease had been breached or not, and the Superior Court’s failure to enforce those terms was error. Specifically, Section 22.3 (which is the applicable Event of Default) provides that before *any* failure to comply with a term of the Lease can ripen into an Event of Default—and therefore actionable breach—the failure to comply must continue without cure for 30 days after Green has given MCDS notice.⁷ Had the notice-and-cure provision been followed, there

⁷ See Lease § 22.3 (defining Event of Default as occurring if “[MCDS] fails to perform or observe any other agreement, covenant, condition or provision of this Lease to be performed or observed by [MCDS] as and when performance or

would have been no need to speculate, as the Superior Court did, about whether MCDS had an ulterior motive. *See* Opinion at 24-25.

Yet the Superior Court excused Green from complying with the notice-and-cure provision, holding, despite the words of the Lease, those contract terms are rendered irrelevant when a breach takes the form of repudiation. Opinion at 25 & n.162. For that proposition, the Superior Court relied on *Highlands*, which found, as a matter of fact, that compliance with a notice-and-cure provision in a lease was excused by repudiation because the tenant had repeatedly conceded that it did not intend to perform, and therefore compliance with the notice-and-cure provisions “would have been futile acts.” *Highlands*, 129 P.3d at 1024. *Highlands* is not support for deleting the notice-and-cure provision from the Lease here, particularly where the Superior Court found that MCDS in the January 5 call was offering to continue to perform. Rather, under Colorado law, the words of the Lease control, and Green should not have been excused from giving notice if it considered MCDS to be in default.

observance is due (or immediately if the failure involves a hazardous condition), and such failure continues for thirty (30) or more days after [Green] delivers written notice thereof to Tenant”). Thus, there is only one exception to the notice and opportunity to cure—for hazardous conditions on the Premises—which is irrelevant here.

II. THE SUPERIOR COURT ERRED BY AWARDING TWO CATEGORIES OF DAMAGES UNSUPPORTED BY THE LEASE OR THE RECORD.

A. Question Presented

Were the Superior Court's decisions to award Lost Rent under Section 23.1(b) and (c) of the Lease supported by the terms of the Lease and the record? This question was preserved. A311-23; A340-45.

B. Standard of Review

The Superior Court's interpretation of the Lease presents a question of law that is reviewed *de novo*. *See supra* § I.B. The Superior Court's finding that James's fair market value determination had a sufficient factual basis to support a damages award presents a question of fact that the Court reviews for abuse of discretion. *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009). Fact findings can be sustained only if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of the Argument

The Superior Court erred in its calculation of damages by including rent as a form of consequential damages under Section 23.1(c) contrary to the intent of the parties as expressed in the Lease. The Superior Court further erred in calculating damages by crediting the unsupported expert testimony of Green's expert.

1. Rent-Based Damages Are Unavailable Under Section 23.1(c).

The Superior Court held lost rent is recoverable as damages under “the first part of Section 23.1(c),” Opinion at 38, even though Section 23.1(c)—unlike subsections (a) and (b)—does not contain the word rent. The Superior Court reasoned that Section 23.1(c)’s language referring to “any consequential damages or other amount necessary to fully compensate [Green] for all loss or injury proximately caused by [MCDS]’s default” mirrored Colorado common law on expectation damages, and was thus a catch-all intended to give Green “the value of a full cover tenant, less mitigation. . . .” *Id.* at 37. Based on that reading of the Lease, the Court calculated Section 23.1(c) damages “under an expectation damages theory” by assessing the “actual lost rent” and then deducting the lost-rent damages calculated under Section 23.1(b), ultimately awarding over \$1 million of such damages. *Id.*; Judgment ¶ 4(a)(ii). That holding was erroneous and should be reversed.

Under Colorado law, the Lease must be interpreted “to effectuate the intent of the contracting parties according to the plain language and meaning of the contract.” *Albright v. McDermond*, 14 P.3d 318, 322 (Colo. 2000). Contractual terms should not be read in isolation; instead, they should be read as a whole to give the contract a sensible, harmonious interpretation that gives effect to each of its words. *Copper Mtn., Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 700 (Colo. 2009) (“We choose a

construction of a contract that harmonizes provisions instead of rendering them superfluous”); *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990) (contract language “must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement’s provisions.”). A Court cannot rewrite the contract terms. *See USI*, 938 P.2d at 173.

The language of Section 23.1 as a whole shows, the parties intended for it to provide three separate remedies for three distinct types of harm; the Superior Court’s interpretation contradicts that intention. Subpart (a) is past-due rent. There is no contention that any rent was past due.

Section 23.1(b) is forward-looking lost rent. It defines a specific method for calculating damages for lost post-breach rent: the difference between the remaining rent due under the Lease and the fair market value of rent for the same period. Put simply, there is no reason for the parties to have included a specific provision defining a limited contractual standard for calculating post-breach lost rent damages if the intent was that lost rent damages would mirror the full expectation damages available under the very different common law.

That contradiction is evident from the process of calculating damages the Superior Court employed. The lost rent calculation called for by Section 23.1(b) is straightforward, requiring a simple subtraction exercise: begin with the rent that

would be due for the balance of the Lease and subtract from that number the fair market value of the rent post-breach. If a positive number results from that calculation, that would be the damages. If the result is zero or a negative number, there is no rent damage to award.

Section 23.1(c) covers damages other than lost rent proximately caused by the breach. The provision ensures that even if there is no rent due, the landlord can recover certain other damages caused by the breach. The parties illustrated that intention by using the word rent in subparts (a) and (b), but omitting it from subpart (c). They also illustrated their intent by including examples of the sorts of harm to Green incidental to the breach of the Lease that subpart (c) is meant to remedy: things like recovering out-of-pocket expenditures incurred in connection with the Lease, removing the former tenant's materials and signage from the property, and making the space ready for a new tenant. *See* A377 § 23.1(c) ("the cost of removing and storing Tenant's furniture, trade fixtures, equipment, inventory or other property, repairing and/or demolishing the Premises, removing and/or replacing Tenant's signage and other fixtures. . ."). This shows Section 23.1(c) is not a catchall that re-addresses the subject of rent already covered elsewhere, but rather is designed to capture a category of damages that is distinct from lost rent. Indeed, by re-writing the Lease to include lost rent damages in 23.1(c), the Superior Court not only re-wrote the contract, but rendered 23.1(b) entirely superfluous.

Giving effect to all the language of Section 23.1 shows that lost rent is not recoverable under Section 23.1(c). The Judgment should be reversed to the extent that it awarded such damages.

2. The Superior Court's Calculation of Lost Rent Damages Under Section 23.1(b) was Erroneous.

Separately, the Superior Court's award of \$890,479 in damages under Section 23.1(b) is erroneous because the Court used unsupported figures for both parts of the required calculation—ignoring the terms of the Lease itself.

For the first part of the calculation, the Superior Court misread the Lease when it used the base rent of \$12.50 per square foot for the entire Lease term. Opinion at 32. Under the Lease, the base rent due for the first 10 months of the Lease Term is automatically reduced “[p]rovided that no Event of Default (hereinafter defined) pursuant to Section 22.2 below has occurred.” A366 § 5.1. Specifically, the monthly rent, which is ordinarily \$48,208.33, is reduced to \$0 for the first four months; it is cut in half (to \$24,104.17) for the next three months; and reduced by a quarter (to \$36,156.25) for the next three months. *Id.* The Superior Court failed to factor the contractually agreed-upon abatement into the calculation, resulting in using an incorrect first part of the calculation. It instead held that MCDS had forfeited abatement and owed the full base rent for the first 10 months because there was an Event of Default under Section 22.1. Opinion at 32 n.196. But since the plain language of the Lease says that an Event of Default under Section 22.1 does

not affect rent abatement, the Superior Court’s failure to factor rent abatement into the rent due component of the damages calculation was legal error.

For the second part of the calculation, the Superior Court erred by relying on unreliable expert opinion. *See In re Zantac (Ranitidine) Litig.*, 342 A.3d 1131, 1154-56 (Del. 2025) (reversing denial of motions to exclude expert testimony of unqualified experts whose opinions were based on unreliable methodology). Attempting to prove the fair market rental value of the Premises, Green offered a comparable-properties analysis sponsored by its expert James, who looked at a set of eight properties (the “Cohort”). It consisted of: (i) seven properties “in the vicinity of the Denver airport,” ranging as much as 14 miles away, and (ii) one property in the same Park as the Premises, which James gave double-weight in his analysis. Opinion at 30 & n.180; A170 at 254:13-19; A174 at 269:21-270:5.

For a comparable-property analysis to be reliable, the proponent must show the data points used for the comparison are, in fact, comparable. *See LeBeau v. M.G. Bancorporation, Inc.*, 1998 WL 44993, at *8 (Del. Ch. Jan. 29, 1998) (noting the reliability of a comparables analysis depends on the comparability of the comparators).

The problem is that James offered no factual basis whatsoever to support the conclusion that the seven properties outside the Park used in the Cohort are comparable to the Premises. James admitted on the stand that he: (i) had not selected

the properties in the Cohort, (ii) did not know the criteria used to select the properties for inclusion in the Cohort, (iii) did not know which, if any, properties were considered but rejected for inclusion, and (iv) had not even reviewed any of the leases on the properties in the Cohort, and therefore could not say what made the leases comparable to the Lease. A169 at 249:20-250:22; A170-71 at 255:12-257:20. Instead, it was one of James’s colleagues—whose qualifications are not in the record and who did not testify—who selected the eight properties for the Cohort that James used. A169 at 249:20-250:4. Put simply, there is nothing in the record to support the conclusion that the seven properties in the Cohort located outside the Park were in locations comparable to that of the Premises.

In a footnote, the Superior Court erroneously downplayed James’s admissions, finding that his “reviewal and subsequent approval of” the Cohort his colleague selected alone was a sufficient basis to find his opinion on fair market value reliable. Opinion at 32 n.198. But, again, neither James nor the Opinion identifies any evidence in the record showing that the selection methodology was rational or how the properties in the Cohort were comparable enough to the Premises to provide an indication of its fair market value. In the absence of any factual basis for James to reach the conclusion that the Cohort contained legitimate points of comparison with the Premises, James’s fair market value conclusion is just *ipse dixit*. See *Manichaeian Capital, LLC v. SourceHOV Holdings, Inc.*, 2020 WL 496606,

*21(Del. Ch. Jan. 30, 2020) (discrediting opinion where nothing “connects” the expert’s “opinion evidence . . . to existing data” except “the *ipse dixit* of the expert.” (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997))); *see also Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 545 (Del. 2009) (Steele, C.J., dissenting) (stating it was error to admit an opinion in the absence of evidence showing the principles and methodology used to generate it were reliable). The Superior Court’s reliance on James’s comparable-properties opinion was error.

Furthermore, the Superior Court’s findings compel rejection of the remaining property in the Cohort—the one located inside the Park. In rejecting MCDS’s rebuttal comparable-properties analysis, the Superior Court found “it would not be appropriate to use leases from the same location as the Premises” to ascertain the fair market rental value of the Property. Opinion at 32-33. Yet it did not apply that finding to James’s opinion. Instead, the Superior credited James wholesale despite James having included a property in the Park in the Cohort.

In contrast, MCDS argued the Superior Court should use the market approach to determine the fair market rental value of the Premises. *See* A311-13. Fair market value is the rent that a willing tenant and willing landlord would agree to in an arm’s length lease transaction. Every witness who testified on the subject—James, Dan Green, Coury, and MCDS’s rebuttal expert—each agreed that is the correct definition. A157 at 203:3-20; A166-67 at 240:17-242:16; A201 at 96-11:18. Our

courts use the same definition of fair market value. *See, e.g., Huff Fund Inv. P'ship v. CKx, Inc.*, 2013 WL 5878807, at *1 (Del. Ch. Nov. 1, 2013) (“What is the fair value of an asset? For a simple asset—a piece of real property, for instance—it is the market value.”).

It is undisputed that Green and MCDS engaged in an arm's length negotiation to arrive at the Lease's agreed rent. A130 at 95:9-21; A166 at 240:13-16; A201 at 96:19-97:4. No evidence was presented that the rental market had changed since signing the Lease or would change in any material way over the Lease term. Accordingly, on the facts proven at trial, the rent agreed to under the Lease was market value, and therefore is *the* fair market rental value of the Premises.

The Superior Court did not comment on the evidence that the rent the parties agreed to is the best evidence of the fair rental value of the Premises. Instead, the Superior Court declined to accept the market approach because it yields a damages calculation of \$0 here, saying that would make Section 23.1(b) surplusage. Opinion at 33. That criticism of the market approach is not well taken, and does not overcome the evidence, for two reasons. First, it is inconsistent with the Lease language the parties agreed to limiting damages to the extent to which the Lease rent exceeds fair market value, rather than tying damages to the gross amount of lost rent. The plain intent of that language was to compensate Green only for lost above-market rent, not all lost rent. The fact that a negotiated agreement between arms'-length parties was

on fair market terms is hardly surprising. The fact the market approach yields no damages on these facts is the natural result of the damages structure the parties agreed to. There was no evidence that the market value of the Premises had changed since the Lease was signed or that the parties otherwise agreed to non-market terms.

Second, there is no surplusage concern because the fair market rental value is not necessarily the agreed-upon rent—and thus the damages are not necessarily zero—in all circumstances. There is no guarantee that contract terms are market; market conditions could change. But here, there is no evidence the arms' length negotiated rent is anything but market value.

The Superior Court used incorrect and unreliable inputs for both halves of the Section 23.1(b) damages calculation, and therefore the Judgment awarding those damages should be reversed. The Court should (i) hold that the only reliable evidence of fair market value rental of the Premises is the price agreed in the Lease, resulting in no damages under Section 23.1(b), or (ii) in the alternative, remand for recalculation of damages under Section 23.1(b).

CONCLUSION

For the foregoing reasons, the Judgment of the Superior Court should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2026, a copy of the foregoing **Opening Brief of Plaintiff-Below/Appellant Mortgage Connect Document Solutions, LLC** was served via File & ServeXpress on the following counsel of record:

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