

No. 215, 2026

On appeal from the Superior Court
of the State of Delaware,
C.A. No. N23C-01-178

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INTRODUCTION

Green attempts to circumvent the numerous legal errors in the Superior Court's Opinion by insisting this appeal raises only factual disputes, which require deference to the Superior Court. That is not the case. MCDS's appeal of the Superior Court's liability determination challenges the Superior Court's erroneous application of Colorado law to its findings of fact, its legally flawed application of its own findings to the Lease, and its erroneous interpretation of unambiguous Lease terms.

The Superior Court found that the purported repudiation occurred in a December 28 Text. MCDS raises no dispute in this appeal about what the December 28 Text says, only whether it can be a repudiation as a matter of law. Even accepting the Superior Court's interpretation of the text in full, the text cannot constitute repudiation under Colorado law. The Superior Court's Opinion to the contrary suffers from multiple fatal legal flaws.

First, the Superior Court acknowledged the December 28 Text is susceptible to multiple interpretations by stating that it may have interpreted the text differently if discussions between the parties had continued (which they did). A writing that is susceptible to multiple interpretations is ambiguous as a matter of law, and Colorado law is clear that an ambiguous message cannot repudiate a contract.

Second, even accepting the Superior Court’s finding that the second half of the December 28 Text was about the larger space proposal and the Lease as a whole (despite there being no testimony to support that finding), the language the Superior Court relied on is the exact type of statement that Colorado courts have found legally insufficient to constitute repudiation. The Superior Court found the most damaging evidence of repudiation was that MCDS wrote it had “no choice but to look at the other alternatives.” Yet Colorado courts have specifically considered and rejected that language threatening to pursue alternatives can amount to repudiation.

Third, the Superior Court further found that a week after sending the December 28 Text, Green indicated the larger space was available, and MCDS immediately requested the parties return to the negotiating table. This conclusively demonstrates that MCDS did not repudiate under Colorado law, or alternatively MCDS rescinded any repudiation.

The Superior Court also committed a legal error by finding Green was not obligated to provide notice and an opportunity to cure in contravention of the plain terms of the Lease and Colorado law.

The Superior Court again erred by awarding damages to Green that were foreclosed by the unambiguous terms of the Lease and unsupported by the trial record.

Green's recitation of the procedural history of this case, including that the Superior Court denied motions on these issues and conducted a full trial, has no bearing on whether the Superior Court's legal conclusions were correct. They were not, and MCDS respectfully urges this Court to review the Superior Court's legal decisions *de novo* without deference to the prior legal rulings and reverse the Superior Court's decision as to liability and damages.

ARGUMENT

I. THERE WAS NO REPUDIATION AS A MATTER OF LAW.

The Superior Court's judgment should be reversed because its fact findings do not (and cannot) satisfy the requirements for repudiation under Colorado law. There is no dispute that the Superior Court held MCDS's repudiation occurred in the December 28 Text, which the Superior Court described as the "nexus of this lawsuit." Opinion at 11; Ans. Br. at 10-11. For the purposes of this appeal, MCDS does not dispute the Court's factual finding of what the text says. Rather, MCDS appeals against the Superior Court's legal conclusion that the text constituted repudiation.

A. The December 28 Text Was Not A Repudiation As A Matter Of Colorado Law Because The Superior Court Found The Text Ambiguous.

Under Colorado law, a statement must be a definite, unequivocal, and unambiguous manifestation of intent to refuse to perform to constitute repudiation. *See* Op. Br. at 17-18. If a statement is ambiguous, it cannot meet the definition of repudiation as a matter of law. *See Quinn v. City of Evans Police Dep't*, 2009 WL 2241955, at *5-7 (D. Colo. July 24, 2009) (equivocal language could not legally constitute repudiation). Whether a document is ambiguous or unambiguous is a legal question. *See Cheyenne Mountain Sch. Dist. #12 v. Thompson*, 861 P.2d 711,

715 (Colo. 1993). A message is ambiguous as a matter of law “when it is reasonably susceptible to more than one meaning.” *Id.*

The Superior Court never found that the December 28 Text was unambiguous or unequivocal, as required by Colorado law to find repudiation. To the contrary, the Superior Court acknowledged that the December 28 Text could be interpreted in multiple ways, finding that in the event discussions between Green and MCDS had continued (which they did, *see infra* I.C.), then the December 28 Text may not constitute a repudiation. Opinion at 19.

That the December 28 Text is ambiguous is further demonstrated by the fact that the Superior Court required a trial to assess the text’s meaning, parsed the text’s language line-by-line to try to discern its likely meaning, *see id.* at 18-19, and relied on numerous pieces of extrinsic evidence to reach its conclusion that the text was intended to repudiate, *id.* at 24-25. Those steps would not be required if the Court found the December 28 Text unambiguous. *See Sorensen v. USAA Cas. Ins. Co.*, 2024 WL 4850221, at *7 (Colo. App. Nov. 21, 2024) (when language is “clear and unambiguous on its face,” Colorado courts interpret the language “as written” and without consideration of extrinsic evidence).

Since the Superior Court never found the December 28 Text unambiguous, and in fact acknowledged its ambiguity, the text could not have constituted

repudiation under Colorado law. The Superior Court thus misapplied Colorado law by finding that MCDS repudiated in what it found to be an ambiguous text.

B. The December 28 Text Was Not A Repudiation As A Matter Of Colorado Law Because The Text Did Not Include An Unequivocal Refusal To Perform.

Colorado law is explicit that 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)). 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). A “mere threat” not to perform is not enough. Opinion at 17. The message must instead convey a “present, positive, unequivocal refusal to perform” going forward. *See Meinhardt v. Inv. Builders Props. Co.*, 518 P.2d 1376, 1377-79 (Colo. App. 1973) (letter threatening to terminate if ultimatums were not honored was not repudiation).

The Superior Court did not identify any contractual obligation that MCDS unequivocally refused to perform in purportedly repudiating the Lease. Nor could it, as MCDS never stated in the December 28 Text that it would not fulfill a contractual obligation. MCDS never intended to repudiate the Lease in the

December 28 Text; Coury was rejecting a different proposal Green had offered outside of the contract for a different smaller space. A074 at 122:23-124:2.

However, even accepting the Superior Court's finding that the second half of the December 28 Text refers to the Lease itself, MCDS still did not repudiate. Indeed, the Court found that the most "damaging evidence supporting repudiation" in the text was the line: "We have no choice but to look at the other alternatives." Opinion at 17; Ans. Br. at 19. Even if that language were about looking at alternatives to the parties' Lease (as opposed to the extracontractual Smaller Space Proposal), that language cannot constitute repudiation under Colorado law.

MCDS conveying that it was being forced to "*look at*" other options is exactly the type of language that Colorado courts find insufficient to constitute repudiation. 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. At most, this language is a threat to abandon, which is not 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) (repudiation requires “action to withhold [the promised] services from [the plaintiff] when and if a request for such services might arise”). The Superior Court’s decision that the text’s language constitutes repudiation is legal error.

Green’s sole response is that the Superior Court’s decision is a finding of fact requiring deference, but it is not. Ans. Br. at 18-19. For purposes of this appeal, MCDS does not dispute the Superior Court’s factual finding that the text could have referred to the Lease as a whole (as opposed to the Smaller Space Proposal). Nor does MCDS dispute the language the Superior Court relied on as the strongest evidence of repudiation. Rather, MCDS disputes that the Court properly applied Colorado law in determining this language could amount to repudiation since Colorado law is clear that a mere threat of potential non-performance is insufficient to constitute repudiation. That this is a legal question is supported by Green’s defense of the Superior Court’s distinguishment of *Quinn*. See Ans. Br. at 20. Green acknowledges in making its argument that whether the language in the text satisfies Colorado’s requirements for repudiation is a question of law. *Id.*

C. The Court’s Findings Concerning The January 5 Call Confirm There Was No Repudiation, Or In The Alternative, That Any Repudiation Was Rescinded

Even if the December 28 Text could be interpreted as a repudiation under Colorado law (it cannot), a willingness to continue negotiating undermines repudiation as a matter of Colorado law, or in the alternative, rescinds any repudiation. *See Quinn*, 2009 WL 2241955, at *8 & n.44.

The Superior Court’s findings expressly include that Coury and Dan Green had a call on January 5, 2023 following the December 28 Text. Opinion at 11, 19. The Superior Court found that during this discussion, Dan Green “brought up the full Premises in the Lease,” and Coury was open to the discussion but “explained that MCDS needed the Excess Costs to be reduced before MCDS could agree on a budget,” as the Lease expressly allowed. *Id.* at 11-12, 19-20. That Dan Green called Coury to discuss the Lease after the December 28 Text demonstrates he did not interpret the text as an unambiguous repudiation. Moreover, in the testimony the Court cited in its findings of fact, Coury explained his view that the parties should get their teams back together to negotiate—pursuant to the express terms of the Lease—if the larger space was in fact available. *Id.* at n.78. Green cites nothing contradicting this undisputed testimony, and nothing in the Opinion suggests the Superior Court did not credit this recitation of the call, which it included in its findings of fact.

Having found that Coury was still willing to negotiate *after* the December 28 Text, the Superior Court misapplied Colorado law by finding repudiation occurred in that text. Under Colorado law, post-repudiation discussion “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.” *See Quinn*, 2009 WL 2241955, at *8 (“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 as the Superior Court found (it was not), MCDS’s willingness to continue negotiating pursuant to the Lease a week later 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)). Here, the Superior Court credited testimony—repeatedly—that on January 5, MCDS was willing to adhere to the Lease’s express terms by further negotiating the Excess Cost. *See* Opinion at 11-12; Op. Br. at 10-11. Thus, even if the December 28 Text could be construed as a repudiation, that repudiation was plainly rescinded on January 5.

Indeed, the Superior Court even acknowledged 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.” Opinion at 19. But the Superior Court then erroneously ignored its own fact findings that MCDS did just that. It found that

MCDS sought to avail itself of the express Lease provisions regarding the negotiation of the Excess Cost of the budget. Accordingly, the Superior Court's own fact findings are inconsistent with its determination that there was a repudiation, and, in any event, would constitute rescission of any prior repudiation under Colorado law. *See* Op. Br. at 22; *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916-17 (Del. 2004) (reversing where the trial court's own findings of fact failed to support its legal conclusion).

Green baselessly argues in response to this point that the Superior Court discredited Coury's testimony wholesale, including concerning the January 5 Call. *See* Ans. Br. at 27-30. But there is no support for that in the Opinion. The Superior Court did not make a blanket finding against Coury's credibility. In fact, the Superior Court relied on Coury's testimony heavily, including citing his testimony (and *only* his testimony) four times for what happened on the January 5 Call. Opinion at 11-12 nn.78-80, 19-20 nn.128-30. The Superior Court further summarized the testimony as described above in its findings of fact, without any suggestion that it did not find this testimony credible. *Id.* at 19.

Green's focus on events that happened after the January 5 Call are irrelevant, and the Court's reliance on those facts to support repudiation is part of the Court's legal error. The Superior Court's findings of fact acknowledge that Dan Green refused Coury's request to continue negotiating on the January 5 Call. *Id.* at 11

(describing that on the January 5 Call, “Dan Green explained that [Coury’s request for a reduction in Excess Costs to reach agreement for a budget under the Lease] was not workable”). Per those Superior Court findings of fact, Coury only requested return of his deposit and cancelled a vault contract for the Premises after Dan Green’s refusal to continue negotiating. *Id.* at 11-12, 19-20. These facts should have no legal bearing on whether MCDS repudiated because they occurred *after* Coury expressed interest in continuing to negotiate, which rescinded any prior repudiation that may have existed. Thus, it was Green who breached when he refused to continue negotiations, not Coury. Coury’s subsequent conduct cannot support repudiation by MCDS under this set of facts that were found by the Court.

II. THE COURT ERRED BY RELYING ON IMPROPER EVIDENCE AND AN INVENTED “POLICY” STANDARD TO FIND REPUDIATION.

In reaching the legally erroneous conclusion that MCDS repudiated, the Superior Court improperly relied on evidence of internal MCDS correspondence beginning months before the December 28 Text of what MCDS would do in the event the Lease fell through due to Green’s refusal to comply with its obligations. Opinion at 24-25. Such evidence cannot be considered to support repudiation under the law. *See, e.g.*, Williston on Contracts § 63:45 (repudiation relies on “the party’s intention manifested acts and words ... not any secret intention that may be held.”); *J.B. Service Court v. Wharton*, 632 P.2d 943, 945 (Wyo. 1981). The Superior Court not only relied on this evidence, but cited this improper evidence to support its decision that, as “a policy matter,” “a finding against repudiation is unsavory.” Opinion at 24-25. The Superior Court did not cite any Colorado law in support of this invented “policy” standard for finding repudiation, nor to support its use of evidence that was not communicated between the parties and had no bearing on the intent behind the communications between the parties.

In its Answering Brief, Green does not refute that the Superior Court relied on improper evidence, nor does Green provide any support for the Superior Court’s novel “policy” standard for finding repudiation. Green asserts only that MCDS waived the argument. Ans. Br. at 22-24. Not so.

MCDS's counsel agreed only that the Court could look beyond the parties' communications to discern what one party intended to communicate to the other party. A330 at 11:9–20. MCDS's counsel never agreed that the Court could consider evidence of MCDS's internal discussions that were intentionally not communicated between the parties. The law is clear that such evidence of uncommunicated internal strategy cannot be considered to determine whether a party intended to communicate a repudiation. *See* Op. Br. at 25-26. The Plan B discussions the Superior Court relies upon happened months before the December 28 Text that allegedly constituted repudiation and have no bearing on what Coury communicated to Green when sending that text. Indeed, the Superior Court's Opinion is clear that MCDS's internal discussions were not communicated to Green (just as Green's internal plans to search for a new tenant were not communicated to MCDS, *see* Op. Br. at 7), and thus those internal communications should not have been considered in assessing whether MCDS repudiated the Lease. Opinion at 6-7; *J.B. Service Court*, 632 P.2d at 945 (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.") (quoting 17 Am. Jur. 2d Contracts § 448 (1964)); *see also* Restatement (Second) of Contracts § 250 (a repudiating statement "must be made to an obligee under the contract. . .").

Green's only other argument is that the Court did not rely on this evidence as "the sole or independent basis" for its decision. Ans. Br. at 24. But Green cites no authority that a court is permitted to rely on improper evidence as long as it does so only partially. Nor does Green have any basis for asserting the evidence was cited by the Superior Court only as "corroborating evidence." *Id.* at 25. The Superior Court's Opinion never says that. The Opinion does not indicate how much weight the Superior Court attributed to this improper evidence and includes the evidence as an integral part of its factual findings. *See People v. Koon*, 713 P.2d 410, 412 (Colo. 1985) (reversing bench trial judgment where the record showed the trial court relied on improper evidence rather than disregarding it).

Green similarly does not cite any law supporting the Superior Court's erroneous policy determination. Green instead argues only that the policy determination should be viewed as "a common-sense observation" that is severable from the overall decision. Ans. Br. at 25-26. But nothing in the record supports that the Superior Court did not rely on its policy determination, which was included in the legal conclusions of the Superior Court's Opinion, to find repudiation. Opinion at 24-25.

Green provides no basis for this Court to assume the Superior Court did not rely on the improper evidence and erroneous legal conclusions laid out in its Opinion. The Superior Court should not have relied on improper evidence or

unsupported standards at all, and having done so, the Superior Court’s opinion should be reversed for error. *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.*, 2017 WL 6371162, at *4 (Del. Dec. 12, 2017) (reversing Superior Court’s bench trial decision based on the improper application of the elements of the claim).

The Superior Court’s reliance on improper evidence unrelated to the parties’ communications and an invented “policy” standard further demonstrates that the Superior Court did not find the December 28 Text to be an unequivocal, unambiguous and definite statement of repudiation, as required under Colorado law. The Superior Court needed to expand its decision to improper evidence and newly conceived standards to support its conclusion. This Court should not uphold the Superior Court’s erroneous legal finding that an ambiguous communication can constitute repudiation based on the Superior Court’s improper reliance on evidence not permitted to be considered under Colorado law, and subjective standards that are not grounded in any existing Colorado law.

III. THE LEASE ENTITLED MCDS TO NOTICE AND AN OPPORTUNITY TO CURE BEFORE FINDING MCDS BREACHED.

Under Colorado law, courts “must enforce unambiguous documents in accordance with their terms.” *McShane v. Stirling Ranch Prop. Owners Ass’n, Inc.*, 393 P.3d 978, 982 (Colo. 2017). The Superior Court failed to do so by disregarding the Lease’s plain and unambiguous notice and cure provision. In Section 22.3 of the Lease, the parties agreed that a breach of the Lease by MCDS would occur only if MCDS “fail[ed] 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 [MCDS][.]” The Lease provides that the notice and 30-day period to correct any failure to perform or observe the agreement must occur *before* any such failure can ripen into an Event of Default—and therefore a breach.

Green overstates the Superior Court’s decision, which contains only two sentences on this point, stating:

Because MCDS repudiated the Lease, Green was not required to follow the notice and opportunity to cure provisions of the Lease—it was entitled to terminate via the January 12, 2023, letter. MCDS breached the Lease.

Opinion at 25. This decision is legal error. As described above, MCDS did not repudiate the Lease, or in the alternative, MCDS rescinded its repudiation on January

5, 2023. Accordingly, no repudiation existed that could have entitled Green to terminate on January 12, 2023. Nevertheless, even if such a repudiation had occurred, the plain and unambiguous Lease is clear that such a failure to perform or observe the Lease becomes a breach *only following* notice of a failure to perform or observe the Lease and a 30-day window to correct that failure, which indisputably did not occur.

The sole case cited by the Superior Court and Green to support that the notice and cure period can be excused for futility is distinguishable in two key respects. *First*, the tenant in that case admitted to repudiating the contract, so there was no dispute that repudiation had occurred. *See Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1024 (Colo. App. 2005). *Second*, the *Highlands* court assessed whether an opportunity to cure was required of *an existing breach*—the repudiation. *Id.* (describing that the question was whether “landlord was obligated to provide tenant with the contractually required notice of default and opportunity to cure *the breach*.” (emphasis added)). This is distinguishable from the Lease here, which plainly states that **there is no breach** until after notice and a 30-day period to correct any failure to perform or observe the agreement. Thus, the parties contracted around any doctrine that a repudiation can constitute a breach that excuses notice and cure requirements because the parties agreed in the Lease that no failure to observe or perform the contract would ripen into a breach at all until after

notice and a 30-day cure window. *See Condo v. Conners*, 266 P.3d 1110, 1115 (Colo. 2011) (finding a general rule of Colorado law “may be abrogated by the express terms of an . . . agreement.”).

Green baselessly attempts to sidestep Section 22.3 by claiming that the Superior Court found MCDS had abandoned and/or vacated the Premises, which would have been an Event of Default under Section 22.1 of the Lease that did not require notice and an opportunity to cure. Ans. Br. at 28. Green did not argue below that any alleged default by MCDS should be analyzed under Section 22.1, and therefore cannot argue as much now. *See* Rule 8. In any event, the Superior Court analyzed MCDS’s purported repudiation under Section 22.3, recognizing that is the relevant Event of Default under the Lease. *See* Opinion at 25. The Superior Court never found that no notice and cure period applied, only that the purported repudiation rendered the notice and cure requirements unnecessary. What Green says in its brief is what Green wishes the Superior Court had found, not what the Superior Court held.¹

¹ The Superior Court makes a passing reference to Section 22.1 in a footnote concerning damages, but this does not bear on the notice-and-cure analysis. *See* Opinion at 32 n.196. Neither party argued below that an Event of Default had occurred under Section 22.1. The Superior Court neither made fact findings nor analyzed whether the Premises had been vacated or abandoned. In any event, the record makes clear that the parties were still negotiating the build out of the Premises at the time of the supposed repudiation. *See id.* at 15-20. MCDS never moved into the Premises, and therefore could not have abandoned or vacated them.

IV. THE SUPERIOR COURT ERRED BY AWARDING RENT DAMAGES UNDER SECTION 23.1(C).

If MCDS breached the Lease (it did not), 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) when “rent” was intentionally not included as a form of damages that could be recovered under that section of the Lease. *See Albright v. McDermond*, 14 P.3d 318, 322 (Colo. 2000) (the Lease must be interpreted “to effectuate the intent of the contracting parties according to the plain language and meaning of the contract.”). In finding that Section 23.1(c) could include rent-based damages, the Superior Court ignored the structure of the Lease, disregarding that the three categories of potential damages must be read together to effectuate the parties’ intent and avoid rendering any provision superfluous. *See 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”).

When reading the three provisions together, Sections 23.1(a) and (b) were intended to provide the method for calculating the two forms of lost rent the parties could collect as damages, while Section 23.1(c) was intended to provide for *other non-rent* damages that may be required to compensate the non-breaching party. If

Section 23.1(c) provides for rent-based damages with no restrictions on how to calculate those rent damages as the Superior Court found, it would render the parties' specific provisions on how to calculate damages for past-due and future lost rent in Sections 23.1(a) and (b) meaningless, because past due and future rents could be collected in any manner under Section 23.1(c). *See GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan."); *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002) ("[T]he meaning of a contract must be determined by examination of the entire instrument, and not by viewing clauses or phrases in isolation.").

Green's counterargument requires reading Section 23.1(c) in isolation, without the benefit of the context in which that provision appears, namely following specific definitions of lost rent damages. *See* Ans. Br. at 36. Green's reading of the "consequential damages or other amount necessary to fully compensate Landlord for all loss or injury caused by Tenant's default" language in Section 23.1(c) simply swallows up Sections 23.1(a) and (b). On the contrary, the structure of Section 23.1 shows that it contains three different provisions intended to address three different things: back rent, front rent, and then other damages to compensate Landlord for the default. Put simply, if Section 23.1(c) provides for lost rent damages using any type

of calculation, there would be no reason to include Sections 23.1(a) and (b), which specify how to calculate damages for lost past and future rent.²

Moreover, Green's contention that Section 23.1(b) provides full expectation rent damages as a back-up if the contractually agreed upon calculations in Sections 23.1(a) and (b) result in "a relatively small number," *see* Ans. Br. at 37, only further supports that Green's interpretation renders Sections 23.1(a) and (b) mere surplusage. Moreover, there is nothing in the language of the Lease to support Green's contrived back-up damages argument. The parties agreed only to use the calculations provided for in Sections 23.1(a) and (b) to calculate rent-based damages, regardless of the amounts.

Green's (and the Superior Court's) citation of Colorado's common law expectation damages principles similarly has no bearing on what the parties agreed to in the Lease. Ans. Br. at 37. This is a contract case, and the Superior Court was bound by the plain terms of the Lease, which include specific formulas the parties agreed to for calculating rent damages in Sections 23.1(a) and (b). If the parties had intended for Green to be entitled to common law expectation damages, then that's what the contract would say, or the contract would not have defined how to calculate

² Were there any ambiguity in the Lease (there is not), that ambiguity must be resolved against Green who drafted the Lease. A113 at 27:15-20; *Moland v. Indus. Claim Appeals Off. of State*, 2008 Colo. App. LEXIS 4123, at *2 (Colo. App. June 19, 2008).

breach remedies at all. The plain language of Section 23.1(b) shows that the parties defined lost rent damages in terms that are entirely distinct from common law expectation damages, and Green's interpretation of Section 23.1(c) of the Lease as entitling it to such expectation damages notwithstanding the existence of Section 23.1(b) flies in the face of the parties' agreement.

The Superior Court's holding that lost rent could be collected under Section 23.1(c) beyond what is provided for in Sections 23.1(a) and (b) is an erroneous interpretation of the contract that should be reversed.

V. THE SUPERIOR COURT ERRED IN ITS CALCULATION OF LOST RENT DAMAGES UNDER SECTION 23.1(B).

The Superior Court's damages award under Section 23.1(b) should also be reversed because it contravenes the plain terms of the Lease and uses unsupported figures for both parts of the calculation, and Green offers no contrary argument.

For the first part of the calculation—the Rent due under the Lease—Green does not dispute that the amount of rent due must be abated absent an Event of Default under Section 22.2, nor does Green dispute the Superior Court disregarded abatement based on its conclusion that there was an Event of Default under Section 22.1—not Section 22.2. *See* Op. Br. at 35. The Answering Brief offers neither a contrary reading of the Lease, nor any defense of the Superior Court's error. Ans. Br. at 38-39. Thus, it is effectively undisputed that the court erred in calculating the first part of Section 23.1(b) damages.

The Superior Court erred in the second part of the calculation—the fair market rental value—by relying on James, who admitted he had no factual basis whatsoever to support the conclusion that the seven properties used in the Cohort are comparable to the Premises. *See* Op. Br. at 36-37. In response, Green does not point to any evidence that supports James' opinion about the Cohort. Green thus virtually concedes that James' opinion was unreliable, and that the Superior Court erroneously relied on expert *ipse dixit*. *See id.*

Green's reference to the Superior Court crediting James over MCDS's expert Farrell is a red herring. Ans. Br. at 40. MCDS does not dispute the Superior Court's findings concerning Farrell. The sole issue on appeal is whether Green carried its burden of proving that James' opinion about the Cohort was supported by facts in the record. It was not, and Green does not even argue otherwise. It was error for the Court to rely on this unsupported opinion to calculate damages.

In sum, 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.

CONCLUSION

For the foregoing reasons, the Judgment of the Superior Court should be reversed and the case remanded for consideration of MCDS's breach claim. In the alternative, if the Court upholds the Superior Court's liability finding, the Court should reverse the decision on damages and find no damages, or in the alternative, remand for recalculation of damages under Section 23.1(b).

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2026, a copy of the foregoing **Reply 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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