

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SARN SD3, LLC,)	
)	
Plaintiff)	
)	
v.)	C.A. No.: N17C-12-185 EMD CCLD
)	
CZECHOSLOVAK GROUP A.S.,)	
)	
Defendant.)	
)	

Submitted: February 12, 2021
Decided: November 15, 2021

Upon Breach of “Good Faith and Fair Dealing”

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DAVIS, J.

I. INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. This action involves breach of contract claims brought by Plaintiff SARN SD3 LLC (“SD3”)¹ against Defendant Czechoslovak Group A.S. (“CSG”). SD3 alleges that CSG breached the parties’ Call Option Agreement (the “Agreement”). On December 23, 2020, the Court issued its decision (the “Decision”)² on SD3’s Motion for Partial Summary Judgment (the “Motion”)³ on Count I of the Complaint—Breach of Contract Concerning the Penalty Amount. The Court

¹ Capitalized terms not defined here shall have the meanings ascribed to them in the Decision.

² D.I. No. 222.

³ D.I. No. 183.

granted most of the relief sought in the Motion but deferred ruling on a “good faith and fair dealing” dispute raised by CSG as to the PwC Report (as defined in the Decision).

The Court deferred the issues, allowed limited discovery, and asked the parties to submit supplemental briefing by February 12, 2021. The parties submitted the supplemental briefing and supporting exhibits, including the deposition transcript of Abdul Sirshar Qureshi (collectively, the “Supplements”).⁴ Mr. Qureshi is the author of the PwC Report. The Court has reviewed the Supplements, including the entire deposition transcript of Mr. Qureshi. The Court also re-examined the record provided in support of the Motion.

The Court finds that the evidentiary record demonstrates that the PwC Report does not constitute a breach of good faith and fair dealing. The Court understands that PwC was hired by SD3, though its litigation counsel, but the record fails to support a conclusion that PwC was improperly influenced by SD3, its agents, or its litigation counsel in arriving at the valuation in the PwC Report.

II. DISCUSSION

CSG contends that the discovery demonstrates that PwC was not disinterested and was “incented not to be disinterested.” CSG argues that Mr. Qureshi was “keen to expand” his relationship with SD3 and its counsel.

CSC mostly relies on the fact that PwC was retained both as the valuation expert and as a testifying expert for the litigation. CSC supports its argument with correspondence from SD3 that sets out the scope of work. The SD3 correspondence notes that the litigation part of the engagement will require “significantly more time, documents and fees.” CSG also relies upon the fact that PwC communicated with SD3 after issuing the PwC Report, asking for a call to

⁴ D.I. Nos. 233 and 234.

discuss the “phase 2 report.” CSG claims the facts show Mr. Qureshi’s engagement was tied to the litigation and not the PwC report. CSG notes that Mr. Qureshi was directed not to act until after the Court had decided a jurisdiction issue. In addition, CSG provides that Mr. Qureshi was not provided documents from Ernst & Young until seven months after the documents were produced to SD3.

CSG argues that Mr. Qureshi worked at the direction and under the influence of SD3’s litigation counsel. CSG then cites to several instances where Mr. Qureshi communicated with SD3 or its counsel. CSG claims that information used by PwC regarding RETIA’s value came through SD3’s counsel and not directly from RETIA. Moreover, CSG notes that Mr. Qureshi discussed his conclusions and key assumptions with SD3 prior to a draft being proved to SD3, and that a draft was provided prior to being finalized. CSG provides that Mr. Qureshi incorporated SD3’s suggestions that the PwC Report is based upon the Agreement, that the lawsuit is secondary, and that the PwC Report is an independent valuation.

Finally, CSG takes issue with the fact that Mr. Qureshi was provided information from SD3. CSG contends that Mr. Qureshi failed to disclose this and could not provide a credible reason as to why he did not disclose it.

The Court has reviewed Mr. Qureshi’s deposition transcript and finds him to be responsive. Mr. Qureshi testifies that suggestions from SD3 that were incorporated related to formatting and not substance.⁵ Mr. Qureshi explains that it is common practice to communicate with the client during the process and to share a draft of the valuation.⁶ Mr. Qureshi acknowledged that information about RETIA came from SD3 or its counsel; however, Mr.

⁵ SD3 Supplement, Ex. B, Dep. of Abdul Sirshar Qureshi at 152:20-153:23. Hereinafter “Dep. Tr. at ____.”

⁶ Dep. Tr. at 137:22-138:4.

Qureshi attributes that to the litigation and lack of privity with RETIA.⁷ Interestingly, the Court notes that Mr. Qureshi is clear that he did not change or alter the PwC Report's valuation opinions based on input from SD3 or SD3's counsel.⁸ At the end of the deposition, Mr. Qureshi reaffirmed the statements he made in his declaration to the Court.⁹

A fair reading of the discovery here shows that the PwC Report does not breach a duty of good faith and fair dealing. The Court allowed additional discovery to determine whether PwC was improperly influenced by SD3 and/or SD3's counsel. The Court finds that the record does not demonstrate that PwC was improperly influenced in arriving at the valuation in the PwC Report. Moreover, the additional discovery supports the statements made by Mr. Qureshi in a declaration (the "Qureshi Declaration") submitted in connection with the Motion.¹⁰

Much of the "innuendo" or implication of influence is the result of the litigation and not a demonstration of bad faith. This was discussed at length in the Decision. The Agreement does not talk in terms of "independent" valuations by "Big Four" accounting firms. The Agreement sets out a process where SD3 and CSG each pick a Big Four accounting firm—here PwC and EY. PwC and EY then each prepare a valuation. The "Independent Valuation" is the average of those two valuations.

SD3 retained PwC as its expert. During discovery, CSG produced a "Highly Confidential" copy of the EY Report to SD3's litigation counsel. Given that designation, SD3 could not generally access or review the EY Report, nor could PwC speak with SD3 concerning assumptions or approaches taken by EY in the EY Report.¹¹ SD3 made repeated requests for

⁷ Dep. Tr. at 45:7-50:1.

⁸ Dep. Tr. at 85:16-22.

⁹ Dep. Tr. at 183:2-20.

¹⁰ D.I. No. 195. Qureshi Decl.

¹¹ See Stip. & Order Governing the Production and Exchange of Confidential and Highly Confidential Information at ¶ 2 (Trans. ID 63019730).

CSG to reproduce the EY Report without the overbroad confidentiality designation that prohibited SD3 and PwC's access.¹² CSG never delivered a re-designated EY Report despite representing one was forthcoming.¹³

On September 9, 2019, SD3 filed a Motion to Vacate Confidentiality Designations, which the Court granted on October 28, 2019. After two additional weeks, and following yet another request from SD3, CSG finally produced the re-designated EY Report on November 15, 2019.¹⁴

CSG argues that PwC's delay in producing the PwC Report demonstrates control by SD3's litigation counsel; however, PwC could not start its work until CSG and RETIA provided required information to PwC. CSG did not provide PwC with the limited information it provided to EY until March 22, 2019, at the same time CSG provided the EY Report.¹⁵

Moreover, PwC and SD3 did not get immediate access. PwC and SD3 were delayed until after this Court's Order dated October 28, 2019, and instructions at a December 20, 2019 teleconference. After December 20, 2019, PwC began obtaining answers to its questions from CSG's principals concerning the EY Report. PwC made repeated requests of CSG and RETIA for financial information necessary for its valuation.¹⁶ PwC issued the PwC Report on March 10, 2020.

¹² Nwaeze Decl., Ex. 10 (documenting SD3's requests in May, July, and August of 2019).

¹³ *Id.* at p. 1.

¹⁴ Nwaeze Decl., Ex. 15.

¹⁵ Nwaeze Decl., Ex. 2, p. 5; *see also id.* at Ex. 9 (transmitting CSG's production to SD3's counsel).

¹⁶ Following review of the EY Report, PwC made its first request for additional documents and information in November 2019. Nwaeze Decl., Ex. 12, ¶ 49; *id.* at Ex. 14. PwC and CSG discussed the November 2019 requests by phone on December 19 and 20, 2019. *Id.* at Ex. 12, ¶ 50. After two phone discussions, PwC sent an updated information request on December 23, 2019. *Id.* at Ex. 12, ¶ 51. On January 9, 2020, PwC received the first batch of requested RETIA documents. *Id.* at ¶ 52. Upon review of the January 9 documents, PwC requested additional documents and clarifications on January 16, 2020, which PwC received on February 5, 2020. *Id.*; *see id.* at App. B (listing documents relied upon in the final PwC Report).

The Court reviewed the PwC Retainer Agreement and found that it seemed to indicate that SD3's litigation counsel will have input on valuation. The Court finds that the additional discovery resolves this issue. As discussed above, Mr. Qureshi testified that SD3 did not influence the PwC Report's valuation. The record shows that Mr. Qureshi did independently evaluate RETIA. The record also shows that PwC was not dominated or controlled by SD3 when it came to the PwC Report.

The Qureshi Declaration makes the following statements:

6. As Chartered Accountant and a member of the Institute of Chartered Accountants of England and Wales I am required to be independent and objective in my work, as set out in the code of ethics.

11. To be clear, the PwC Valuation Report is PwC's independent valuation of RETIA, a.s. ("**RETIA**") as required by the Call Option Agreement ("**Agreement**") between SD3 and CSG.

12. At no time did SD3—including its principals Armen Agas and Stephen Richards—direct PwC to (i) reach a certain value of RETIA; (ii) include or not include specific financials, contracts, or business plans in my assumptions; or (iii) accept or reject certain aspects of the valuation prepared by CSG's big four accounting firm—Ernst & Young, s.r.o. ("**EY**")

13. At no time did SD3's counsel—including Ryan E. Borneman—direct PwC to (i) reach a certain value of RETIA; (ii) include or not include specific financials, contracts, or business plans in my assumptions; or (iii) accept or reject certain aspects of the valuation prepared by EY.

14. Instead, I was at all times instructed to be independent and, at all times, I and PwC acted independently.

15. As I stated in the PwC Valuation Report, "I was instructed by SARN SD3 LLC ... to ... *prepare an independent and objective valuation of a 100% shareholding in RETIA* ... as of 20 June 2017 (the "Valuation date"). . . .

17. Consistent with Section 2.4.2 of the Agreement, I was consistently instructed by Mr. Borneman, Mr. Agas, and Mr. Richards that I must act independently.

25. In other words, . . . [a]s I made clear in the PwC Valuation Report: "The opinions expressed in [the PwC Valuation Report] are my own and independent of the Plaintiff's view."

26. I did not base my valuation of RETIA on SD3's view, nor did I consider SD3's opinion in reaching the valuation in the PwC Valuation Report. Mr. Agas and Mr. Richards merely provided me their knowledge of RETIA as of June 2017 to assist me in preparing my initial requests for documents and information to RETIA.

27. Mr. Borneman never provided me with information concerning RETIA, but simply forwarded to me information he received from CSG and provided me guidance on what information was confidential and highly confidential.

33. Again, as I stated in the PwC Valuation Report, "The opinions expressed in this report are my own and independent of the Plaintiff's views."¹⁷

The Court allowed CSG to test the declaration with discovery and a deposition.

The Court has read the entire deposition and reviewed the exhibits. The Court finds that the Qureshi Declaration is fully supported and not contradicted by the discovery and Mr. Qureshi's testimony.

VI. CONCLUSION

For the reasons stated above, the Court finds and holds that the PwC Report does not breach the duty of good faith and fair dealing. The Court denies SD3's request for attorneys' fees and costs.

IT IS SO ORDERED.

November 15, 2021
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

¹⁷ D.I. No. 195. Qureshi Decl. at 1-9.