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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SARN SD3 LLC, Plaintiff-Below, Appellant/Cross-Appellee, v. CZECHOSLOVAK GROUP A.S., Defendant-Below, Appellee/Cross-Appellant.	CONSOLIDATED No. 291, 2023 No. 294, 2023 Case Below: Superior Court of the State of Delaware C.A. No. N17C-12-185 EMD (CCLD)

APPELLANT'S OPENING BRIEF

Dated: November 28, 2023

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NATURE OF PROCEEDINGS

SARN SD3 LLC ("SD3") and Czechoslovak Group A.S. ("CSG") were parties to a Call Option Agreement (the "Agreement") that entitled SD3 to a contractual penalty payment (the "Penalty Amount") if CSG sold its interest in a company named RETIA. The Agreement set forth a straightforward process for determining the Penalty Amount: each of CSG and SD3 would hire a Big Four Accounting firm to perform a separate valuation of RETIA, and the Penalty Amount would be based on the average of the two valuations. SD3 filed this action to compel CSG to participate in this contractually required process and to obtain an award for the Penalty Amount determined by that process. (A0129, Am. Compl., Count I.)

As the Superior Court confirmed, a prerequisite to calculating the Penalty Amount under the Agreement was that CSG needed to provide all information necessary and relevant to the contractually required valuations. CSG did not do so—before or during this litigation. Instead, CSG engaged in obstructive tactics that culminated in its failure to produce to SD3 a highly relevant business plan that CSG prepared for its bank (called the "J&T Business Plan") before the court-imposed deadline for PricewaterhouseCoopers ("PwC") —SD3's retained accounting firm—to submit its valuation report. Had CSG timely produced the J&T Business Plan, the Penalty Amount owed to SD3, as determined from the average of the parties' respective valuations, would have been significantly higher.

PwC discovered the J&T Business Plan in March 2022, when expert discovery commenced on a separate claim for breach of a contractual fiduciary duty (Count II of the Complaint). The parties had repeatedly agreed to delay discovery on that claim by more than two years because of the COVID-19 pandemic. By the time PwC discovered the J&T Business Plan in CSG's production relating to Count II, the Superior Court had already calculated the Penalty Amount through its grant of summary judgment on Count I. (Ex. A, Dec. 23, 2020 Decision and Order Granting in Part and Deferring in Part SD3's Motion for Partial Summary Judgment ("December 2020 Decision").)

SD3 immediately asked the Superior Court to order revised valuations by both PwC and Ernst & Young ("EY") —CSG's retained accounting firm—in light of the J&T Business Plan, which would result in a higher Penalty Amount. The Superior Court declined, finding that SD3 had improperly sought that relief under Rule 37 and relied on "the wrong rules and standards." The Superior Court refused to consider the relief under the broad, discretionary standard applicable to Rule 37 and denied the motion without prejudice to SD3 filing a new motion under Superior Court Civil Rule 60.

When SD3 filed a motion under Rule 60, however, the Superior Court denied that motion too. The court held that SD3 could not satisfy the more restrictive standards for relief under Rule 60. Those standards were inapplicable because they

pertain only to *final* judgments and orders, not the Superior Court's interlocutory summary judgment orders on Count I. But, even if the Rule 60 standards properly applied, the Superior Court erred in finding that they were not satisfied by the circumstances of this case.

The result is that Superior Court permitted CSG to frustrate a clear and contractually required process for determining the Penalty Amount to which SD3 is entitled. By failing to apply the correct legal standards to SD3's request to reconsider the interlocutory orders granting summary judgment under Count I, the Superior Court committed reversible error and allowed an incorrect valuation to stand. The Court should reverse and remand to allow the Superior Court to consider SD3's request for relief under the correct legal standards.

Following settlement of the Count II claim, the Superior Court entered judgment in favor of CSG as to the Penalty Amount, plus prejudgment interest. The Superior Court required the parties' to convert the judgment amount from Czech Crowns to U.S. Dollars. That decision was contrary to the Delaware Uniform Foreign-Money Claims Act (10 *Del. C.* § 5201, *et seq*.), which requires the Superior Court to enter a judgment on a foreign-money claim in a foreign amount. Thus, the Court should also reverse the Superior Court's determination as to the foreign-money amount, and remand with instructions to permit the final Penalty Amount to be expressed in Czech Crowns.

SUMMARY OF ARGUMENT

1. The Superior Court misapprehended its authority to address CSG's intentional failure to disclose the J&T Business Plan. Incorrectly believing that it could only amend its grant of summary judgment on Count I under the standards of Rule 60, the court refused to consider the relief requested under the standards applicable to SD3's Rule 37 motion. But Rule 60 *applies only to final orders*. Because the Count I summary judgment orders were non-final, interlocutory orders, the Superior Court had full authority to reconsider, revise, or modify them, including in response to SD3's motion under Rule 37. Remand is therefore appropriate to permit the Superior Court to consider SD3's procedurally proper motion under the correct legal standard.

2. Even if Rule 60 was the proper standard to apply to SD3's requested relief, the Superior Court abused its discretion when it denied SD3's Rule 60 motion because SD3 did not discover the J&T Business Plan until after the resolution of Count I. In reaching that decision, the Superior Court ignored the realities of the case and the reasons for SD3's delay in discovering the J&T Business Plan, including that COVID-19 delayed the discovery deadlines set by this case for nearly two years. As soon as expert discovery on Count II commenced, SD3 discovered the J&T Business Plan and moved for relief under Rule 37. SD3's failure to discover the J&T Business plan before that point was a result of the unique, two-track nature of this

case, and CSG's own obstructive tactics. The Court should therefore, in the alternative, reverse the Superior Court's decision denying SD3's Rule 60 Motion.

3. Finally, the Court committed a separate error when it required the parties to convert the Czech award into U.S. currency. In this case, the Delaware Uniform Foreign-Money Claims Act required the Superior Court to enter a judgment in Czech Crowns. *See* 10 *Del. C*. § 5207(a). The Superior Court compounded that error by using the exchange rate in effect as of the date of the CSG's breach, rather than the rate on the payment date required by Delaware. *See* 10 *Del. C.* § 5205(a).

STATEMENT OF FACTS

A. CSG Breached the Call Option Agreement by Refusing to Provide Information Necessary to the Contractually Required Valuation of RETIA.

The Agreement granted SD3 the option to purchase from CSG up to 25% of shares in RETIA—a Czech company that operates in the field of military electronics—at an "Exercise Price" of CZK 5,400 per 1% of shares purchased. (A0100, Agreement §§ 1.2–1.3.) The Agreement permitted SD3 to exercise this option at any time on or before July 1, 2021 (the "Option Period"). (A0100–01, Agreement § 1.4.)

In addition, the Agreement provided that, if CSG (individually or as a member of a group) no longer held a majority of RETIA's shares at any time during the Option Period, SD3 was entitled to receive the "Penalty Amount." (A0102-03, Agreement § 2.4.1.) The Agreement defined the Penalty Amount as:

> a contractual penalty equaling an amount in CZK (or its equivalent in U.S. dollars) equal to 25% multiplied by the difference between (x) the value of the Company based on the "Independent Valuation of the Company," as defined below, and (y) the valuation of the Company based on the Exercise Price (i.e. CZK 540,000) /the "Penalty Amount"/

(*Id*. § 2.4.1 (emphasis omitted).)

The Agreement provided two paths for determining the "Independent Valuation." First, it permitted SD3 and CSG to agree on the "valuation . . . in writing on a date no later than 14 days following the initial notice of . . . the change in

control." (A0103, Agreement § 2.4.2.) If the parties could not reach an agreement within 14 days, the Agreement then provided that "each of [CSG] and [SD3] shall hire a Big Four account firm, and the Independent Valuation shall equal the average of the two valuations." (*Id.*)

The Agreement also provided that CSG and SD3 "agree that they have a fiduciary duty to [RETIA] to increase the value of [RETIA]. Conduct by either [CSG] or [SD3] that is a breach of this fiduciary duty shall be considered a breach of this Agreement, and the non-breaching party shall have the right to collect consequential damages from the breaching party." (*Id.* § 2.5.) The Agreement is governed by the laws of Delaware. (A0104, Agreement § 7.)

On November 5, 2017, CSG informed SD3 that CSG had transferred its ownership interest in RETIA. (A0118.) The parties were unable to reach an agreement as to the Independent Valuation of RETIA, in part, because CSG refused to provide financial information regarding RETIA to SD3. Accordingly, SD3 filed its original Complaint in this case on December 13, 2017.

Following dispositive motion practice, SD3 filed an Amended Complaint that asserted two counts against CSG. (A0120–155.) In Count I, SD3 alleged that CSG breached the Agreement by failing to timely notify SD3 of the transfer of CSG's interest in RETIA and refusing to provide information that would permit SD3 to value RETIA pursuant to the procedures set forth in section 2.4 of the Agreement.

(A0122–23 at ¶¶ 14–16.) CSG's refusal to participate in good faith negotiations concerning the valuation of RETIA made it impossible for SD3 to value RETIA. (A0123 at ¶¶ 17–18.) SD3 sought to have the Superior Court compel CSG to engage in the Independent Valuation process set forth in section 2.4.2 of the Agreement and to award SD3 the Penalty Amount, to be calculated based on the average between the two valuation reports to be issued once CSG provided all necessary and relevant information. (A0129 at ¶¶ 55–57.)

Count II separately alleged that CSG breached section 2.5 of the Agreement, which created a contractual fiduciary duty of CSG to increase the value of RETIA. (A0130, ¶¶ 61–63.) CSG breached that duty by causing RETIA to lose significant business as a result of CSG's actions. (A0128 at ¶¶ 44–47.)

B. CSG Failed to Provide SD3 with the Information Necessary to Complete the Contractually Required Valuation Procedure in Accordance with the Superior Court's Deadline.

CSG retained EY to perform its valuation of RETIA under section 2.4.2 of the Agreement. (*See generally* A0455–505, PwC Report; *see also* A0460–461.) CSG provided EY with a limited set of documents to conduct its valuation, and on March 5, 2019, EY issued its report valuing RETIA at CZK 555,000,000. (*See generally* A0186–241; EY Report; *see also* A0188.)

SD3 retained PwC to perform its valuation contemplated by section 2.4.2 of the Agreement. Although SD3 and PwC hoped that PwC would be able to request

and obtain information from CSG necessary to PwC's valuation without Court intervention, that hope quickly evaporated.

First, CSG designated the EY Report as "Highly Confidential." As a result, SD3's corporate representatives were unable to access the EY Report or discuss it with PwC. On September 9, 2019, SD3 filed a Motion to Vacate Confidentiality Designations, which the Superior Court granted on October 28, 2019. (A0243– 250; A0252– 315.) At the hearing on the Motion, the Superior Court made clear that CSG was not entitled to limit PwC's access to the information necessary to perform its valuation, because it was entitled to that information under the terms of the Agreement:

> And so what I want to do is, I'm going, you need to release the information . . . *It's contemplated under 2.4.2, you can't redact this document in something you wouldn't have designated as highly confidential under the Agreement and now because you're in litigation rise it to the level.*
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> * * *
>
> *[Y]ou have to provide this to [PwC], and anything that [PwC] says they need to do their 2.4.2 valuation, you have to give them.* Now, it can be designated highly confidential in the interim, okay, because that's what was contemplated by the parties, but I need the 2.4.2 valuation by [PwC], and we're *not going to block them* as to how to do that. Now, we're going *to put a time frame on when* [PwC] is going to do this, because this litigation has been going on for a while, and it doesn't take [PwC] years to produce a 2.4.2 report, all right. So they better get their act together, and you better make sure they get their act together because

> [PwC] is going to do a 2.4.2 report. *And it's not going to be blocked by RETIA, and it's not going to be blocked by CSG, and it's not going to be blocked by [EY].*

(A0291–293, H'ring Tr. at pp. 40–42 (Oct. 28, 2019). The Superior Court also set a deadline for PwC to issue its report by January 17, 2020. (A0294 at p. 43.)

Second, despite the Court's command not to "block" PwC, CSG refused to provide information critical to PwC's report. On November 14, 2019, PwC submitted a list of questions and requests for information to CSG. (A0317–321.) As part of those requests, PwC specifically requested "the latest Business plan ***and*** financial projections of [RETIA] for the next 3 to 5 years provided during your standard forecasting process" and asked CSG to identify "the latest business plan as of the valuation date." (A0320 (emphasis added).) CSG did not respond.

As a result, on December 19, 2019, SD3 was forced (again) to request the Superior Court's intervention. (A0330–332). The next day, on December 20, 2019, the Superior Court (again) required CSG to provide all relevant information to PwC, pursuant to the terms of the Agreement. (A0417, H'ring Tr. at 10:1–20 (Dec. 20, 2019) ("[M]y ruling back [on October 28] was, this is the orderly process that needed to be done and it's got to be done.").) Because of CSG's continued refusal to provide key information, the Superior Court extended the deadline for PwC to submit its report to March 3, 2020. (A0421, H'ring Tr. at 7:4–15 (Dec. 20, 2019).)

When CSG finally responded to PwC's requests in January 2020 and February 2020, it failed to produce the J&T Business Plan. (A0317–321, PwC Request for Information; A0430–442, PwC Request for Clarification.) The J&T Business Plan is an email transmitted from CSG's Head of Treasury to J&T Banka on June 19, 2017—one day before the valuation date under the Agreement——attaching financial projections for the period 2017–2021. (A0108–116.) Among other things, the J&T Business Plan provides: (1) a chart of contracts RETIA anticipates for 2017 through 2021; (2) a profit and loss statement, with projections for 2017–2021; (3) a balance sheet, with projections for 2017–2021; and (4) a cash flow statement, with projections for 2017–2021. (*Id.*) In other words, it provides information that is highly relevant to the valuations required by the Agreement and information specifically requested by PwC for its valuation.

In the list of anticipated contracts, the J&T Business Plan specifically included a series of contracts for radars with the Israeli government called the "MADR Contracts." (A0110.) EY did not include the MADR Contracts in its valuation, but PwC did based on public reports and without the benefit of the J&T Business Plan. (A0464, PwC Report at p. 5.) The disparate treatment of the MADR Contracts created a substantial difference in the independent valuations of the two reports, and that differential was the primary catalyst for CSG's request to demand discovery into PwC's independence. (A0557–563; A0565.)

After an additional one-week extension on the court-imposed deadline for PwC's report (A0451–453), PwC produced its report on March 10, 2020, without knowledge or the benefit of the J&T Business Plan. PwC valued RETIA at CZK 980,000,000. (A0464, PwC Report at p. 5.) At that point, the clear terms of the Agreement required that the valuations in the EY and PwC Reports be averaged together to calculate the Penalty Amount. (A0103, Agreement § 2.4.2.) Accordingly, on March 30, 2020, SD3 moved for summary judgment, requesting that the Superior Court perform this calculation. (A0507–535.)

CSG did not provide the J&T Business Plan until May 22, 2020, as part of a production of over 12,000 primarily Czech-language documents, its largest production in the litigation to that point. (A0576.) CSG produced the document and marked it highly confidential *after*:

- denying its existence in January and February 2020 in response to PwC's requests for all contemporaneous valuations of RETIA;
- the court-imposed deadline for PwC to submit its report;
- SD3 filed its motion for partial summary judgment to request that the Superior Court average the independent valuations, as required by section 2.4.2 of the Agreement; and
- CSG filed its opposition to summary judgment.

C. After the Parties Completed the Contractually Required Valuation Process, They Repeatedly Delayed Discovery on the Only Other Claim in the Case Because of COVID-19.

On February 11, 2020, the Parties extended the fact discovery deadline from March 20, 2020, to June 19, 2020, and delayed the commencement of expert discovery from March 27, 2020, to June 29, 2020. (A0444–449.) Given the court-imposed deadline for PwC to complete its independent valuation in early March 2020 (A0421, H'ring Tr. at 7:4–15 (Dec. 20, 2019)), the extension of discovery deadlines related to the only other claim in the case—the breach of a contractual fiduciary duty alleged in Count II of the Amended Complaint.

On June 17, 2020, with the realities of COVID-19 setting in, the Court granted the Parties' request for another "extension of six to nine months of the dates set out in the CMO to have this matter ready for trial." (A0578–580.) Two months later, the Superior Court granted the Parties' request to extend the fact discovery deadline to March 6, 2021, with expert discovery scheduled to begin on March 16, 2021, and expert reports due by April 17, 2021. (A0582–587, Stipulation and Order Further Amending Case Management Order ¶¶ 2–3 (Aug. 10, 2020).)

Those deadlines were extended three more times—on February 10, 2021 (A0589–594), September 7, 2021 (A0596–601), and December 6, 2021 (A603–609)—because of COVID-19's continued impact on the litigation schedule, and the realities of a case that involved international travel to depose witnesses, and

international third party discovery. Each time, the Superior Court extended the deadlines before fact discovery closed, and before expert discovery commenced. (*See id.*) Expert discovery officially commenced on March 14, 2022, more than two years after the initial expert discovery start-date in the case. (A0605, Stipulation and Order Further Amending Case Management Order at ¶ 3 (Dec. 6, 2021).)

D. The Superior Court Calculated the Contractually Required Valuation Based on the Reports That the Parties Submitted *Before* the Production of the J&T Business Plan.

On December 23, 2020, the Superior Court granted SD3's motion for summary judgment in part, performing the straightforward calculation of the Penalty Amount required by section 2.4.2 of the Agreement. (Ex. A, December 2020 Decision.) The court averaged the EY and PwC valuations prepared before the production of the J&T Business Plan, subtracted the Exercise Price, and multiplied it by 25%. That calculation entitled SD3 to a Penalty Amount of 56,875,000 CZK. (Ex. A, December 2020 Decision at p. 12.)

By referencing the difference in treatment of the MADR contract, CSG opposed summary judgment on the ground that PwC was not actually independent, as required by the Agreement. (A0557–563, A0565.) The Superior Court permitted limited discovery relating to PwC's purported lack of independence. (Ex. A, December 2020 Decision at p. 23.) After CSG completed that discovery and supplemental briefing, on November 15, 2021, however, the Superior Court rejected

that argument as well, granting summary judgment in favor of SD3 and awarding it the Penalty Amount. (Ex. B, Decision and Order Granting Summary Judgment as to Count I (Nov. 15, 2021) (together with the December 2020 Decision, the "Count I Decisions").

E. The Superior Court Denied SD3's Requests to Redo the Contractually Required Valuation Process in Light of CSG's Untimely Production of the J&T Business Plan.

PwC and SD3 discovered the J&T Business Plan in March 2022, when expert discovery finally commenced after a nearly two-year-delay because of COVID-19. (A0637–639; A0639–40.) At that time, PwC had begun its review of the documents produced by CSG *after* the submission of the independent valuation reports under section 2.4.2 of the Agreement. (*Id.*)

Immediately upon discovering the J&T Business Plan, SD3 filed a motion for discovery sanctions pursuant to Superior Court Rule 37. (A0630–1484, Motion for Sanctions for Non-Compliance with Discovery ("Rule 37 Motion").) The Rule 37 Motion requested that the Court order PwC and EY "re-do their Section 2.4.2 valuations of RETIA to consider the J&T Business Plan." (A0641.) In SD3's view, if both EY and PwC considered the J&T Business Plan, and included the MADR contracts as well as CSG's projections on revenue, cost, and margins in their valuations (instead of the models PwC and EY were required to create based on their own assumptions), the Penalty Amount would have been several *US million dollars*

higher. (*See* A1494, PwC Supplemental Report at p. 3 (providing an updated valuation of CZK 1,562,000,000).)

On June 8, 2022, the Superior Court denied the Rule 37 Motion on the ground that any request to amend its prior order granting partial summary judgment needed to be made under Rule 60. (Ex. C, Order Denying Rule 37 Motion (the "Rule 37 Order").) The Court found that SD3 sought "relief from the Decision due to newly discovered evidence and not discovery sanctions" and therefore sought relief "under the wrong rules and standards." (Ex. C, Rule 37 Order at ¶ 3.) The Superior Court refused to consider the requested relief based on the legal standards under Rule 37 and denied the motion without prejudice to SD3 filing a motion under Rule 60. (*Id.* at p. 2.)

SD3 then filed a motion under Rule 60, attaching the PwC Supplemental Report (A1581–1620) providing an updated valuation of CZK 1,562,000,000 and argued that the J&T Business Plan constituted newly discovered evidence or, in the alternative, extraordinary circumstances justify the relief requested. (A1581–1620; A1589, PwC Supplemental Report at p. 3.) The Superior Court denied the Rule 60 Motion as well. (Ex. D, Decision and Order Denying Rule 60 Motion (the "Rule 60 Decision").) The Superior Court concluded that the J&T Business Plan was not newly discovered evidence because it was produced in May 2020, and thus it "could have [been] discovered . . . for use in the litigation prior to" the Superior Court's

Count I summary judgment decisions. (Ex. D, Rule 60 Decision at p. 10.) The Superior Court similarly found that no "extraordinary circumstances" justified the relief requested. (*Id.* at p. 11.)

F. The Superior Court Incorrectly Required an Exchange Rate and Calculated It Based on the Valuation Date.

On May 23, 2023, SD3 submitted a proposed final judgment to the Superior Court, which expressed the final amount owed, plus prejudgment interest, in Czech Crowns. (A2485–2492.) Thereafter, the Superior Court required the parties to submit a revised final judgment that expressed the final amount owed by CSG in *U.S. Dollars*. (*See* A2500–A2503.) The parties did so, but disputed the correct exchange rate to be applied. CSG proposed to use the exchange rate in effect on June 20, 2017, the date of RETIA's valuation. (A2502.) The Court adopted that exchange rate and entered final judgment in U.S. Dollars based on it. (Ex. E; Ex. F.)

ARGUMENT

I. THE SUPERIOR COURT ERRED BY REFUSING TO CONSIDER RELIEF UNDER THE STANDARDS OF RULE 37 AND REQUIRING SD3 TO FILE A PROCEDURALLY IMPROPER RULE 60 MOTION.

A. Question Presented.

Did the Superior Court err when it declined to consider relief under the standards of Rule 37, and instead required SD3 to file a Rule 60 motion, when Rule 60 only governs "final" judgments or orders, and SD3 sought sanctions that would, at most, require amendment of a non-final order? (Ex. C, Rule 37 Order at p. 2.)

B. Scope of Review.

The Superior Court's decision to deny SD3's Rule 37 Motion on the basis that it requested relief "under the wrong rules and standards," is a question of law to be reviewed *de novo*. *See Gannett Co., Inc. v. Bd. of Managers of the Del. Crim. Justice Information Sys.*, 840 A.2d 1232, 1239 (Del. 2003) ("This Court reviews de novo . . . the Superior Court's formulation and application of legal principles."); *id.* (applying de novo standard to review trial court's incorrect interpretation and application of FOIA disclosure rules).

C. Merits of Argument.

The Superior Court misapprehended its authority to issue sanctions in response to CSG's intentional failure to disclose the J&T Business Plan. Incorrectly believing that it could only amend its Count I Decisions under the framework of a

Rule 60 Motion, it refused to consider relief under Rule 37 and denied SD3's correctly filed Rule 37 Motion. But Rule 60 *applies only to final orders*. Because the Count I Decisions were non-final, interlocutory orders, the Superior Court had full authority to reconsider, revise, amend, or modify its Count I Decisions at any point, including in response to a motion seeking discovery sanctions. The Court should remand to permit the Superior Court to consider SD3's procedurally proper Rule 37 Motion and to apply the correct legal standard in evaluating that motion.

1. Rule 60 Is Inapplicable to the Count I Decisions Because They Are Interlocutory.

Rule 60 provides that "[o]n motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding." Super Ct. Civ. R. 60(b). "Rule 60(b) applies only to *final* orders. As explained in the advisory notes to the comparable Federal Rule of Civil Procedure 60, 'the addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief'; and hence interlocutory judgments are not brought within the restrictions of the rule." *West v. Access Control Related Enterprises, LLC*, 296 A.3d 378, 385 (Del. 2023) (emphasis in original). When a court's order is interlocutory, Rule 60(b) does not apply. *See id.*

Instead, courts have the authority to reconsider their interlocutory orders at any time before final judgment is entered. Delaware courts have long recognized that "notwithstanding the appeal of finality . . . interlocutory rulings may be set aside

or modified. 'Until the rendition of the final judgment, the interlocutory judgment remains within the control of the court.'" *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 719 (Del. 1983) (quoting 46 Am. Jur.2d *Judgments* § 700 at 851 (1969)). "As long as a court has jurisdiction over a case, it has inherent power over interlocutory orders and can reconsider them when it is consonant with justice to do so." *White v. Town of Elsmere*, 1985 WL 635621, at *1 (Del. Super. 1985); *see also Stern v. Highland Lake Homeowners*, 2021 WL 1164718, at *4–5 (S.D.N.Y. Mar. 26, 2021) (denying relief requested under Federal Rule 60(b), but relying upon the district court's "inherent equitable powers . . . to revisit interlocutory orders").

Here, the Count I Decisions were unquestionably interlocutory orders. In fact, SD3 moved to make the Count I Decisions final under Rule 54(b), and the Superior Court denied that request. Although it recognized the "interlocutory nature" of the Count I Decisions, it found that the case lacked "the exigency necessary to certify under [Rule] 54." (A0625–627, H'ring Tr. at 15–17 (Jan. 31, 2022).) Because the Superior Court did not certify the Count I Decisions as final under Rule 54(b), they were interlocutory. This Court recognized the interlocutory status of the Count I Decisions when it dismissed SD3's prior appeal before the entry of final judgment on August 30, 3023, holding that, until that date, the Superior Court had not yet "dispose[d] of all justiciable matters in this case." (A2492–2498.) The Superior Court, therefore, had full discretion pursuant to Rule 54(b), and its inherent powers,

to revise, amend, or modify the Count I Decisions at any time before entry of final judgment. *See Access Control*, 296 A.3d at 385; Super. Ct. Civ. R. 54(b) ("[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . is subject to revision at any time before the entry of judgment . . .").

The Superior Court refused to do so on the mistaken belief that only Rule 60 would permit it to amend or modify its Count I Decisions. (Ex. C, Rule 37 Order at ¶ 3.) That was an error, which subjected SD3's request for relief to the higher Rule 60 standard. The Superior Court actually had broad discretion, consistent with Rule 54(b) and its inherent powers, to revise its interlocutory Count I Decisions. *See Frank G.W.*, 457 A.2d at 719; *see also Packer v. Glenn O. Hawbaker, Inc.*, 2023 WL 7019187, at *1 (M.D. Pa. Oct. 25, 2023) ("when dealing with a nonfinal, interlocutory order, courts have much broader authority to revise the order 'when consonant with justice to do so.'"); *Fisher v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 145, 149 (S.D. Ind. 1993) (noting "[t]he beneficial aspect of distinguishing between the two methods of relief is readily apparent when the strict standard for granting relief under Rule 60(b) is contrasted with the practically unbridled discretion of a district court to reconsider a previous interlocutory order").

2. Rule 37 Permits a Court to Modify Interlocutory Orders To Redress Sanctionable Conduct.

SD3's request for Rule 37 Motion was procedurally proper. Rule 37 provides that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the

Court may make such orders in regard to the failure as are just." Super. Ct. Civ. R. 37 (emphasis added). Under the analogous Federal Rule 37, Courts routinely permit experts to revise their reports, even after discovery and other deadlines have passed, when documents have been unreasonably withheld. *See, e.g.*, *Vasques v. Robert Bosh Tool Corp.*, 2009 WL 10694786, at *6 (S.D. Tex. July 13, 2009) (applying analogous federal rule and concluding that prejudice from withheld documents can be "cured by granting Bosch's motion to extend the deadlines and requiring Bosch to pay the additional reasonable costs and expert and attorneys' fees Vasques will incur if her expert witness revises his report based on the additional documents"); *Bootheel Ethanol Investments, LLC v. SEMO Ethanol Co-op*, 2011 WL 4549626, at *5 (E.D. Mo. Sept. 30, 2011) (permitting defendants to "prepare and serve a revised expert report" in response to plaintiff's failure to timely disclose damages calculations).

Courts will also revise prior, interlocutory orders in response to a party's sanctionable conduct. *See Perry v. Neupert*, 2019 WL 719000, at *28–29 (Del. Ch. Feb. 15, 2019) (recognizing a court's power to "revisit an interlocutory ruling" when failure to do so "would result in manifest injustice to hold [plaintiff] to a stipulation she made when the defendants were withholding material information from production."); *Highland Lake Homeowners*, 2021 WL 1164718, at *5 ("A litigant's use of fraud or misrepresentations to the court and other parties is a powerful

equitable basis to reconsider or vacate an order procured through such deception."); *id.* (vacating a prior order when "the entire evidentiary predicate supporting Plaintiffs' motion practice . . . has been proven to consist of misrepresentations.").

Here, despite the Superior Court's insistence that CSG was required to provide PWC "anything that [PwC] says they need to do their 2.4.2 valuation" and its admonition that PwC cannot be "blocked" by RETIA, CSG, or EY, (A0291–293, H'ring Tr. at 40–42 (Oct. 28, 2019)), CSG blocked PwC's access to the J&T Business Plan. It did so despite specific requests from PwC asking for contemporaneous valuations and forecasts of RETIA. (A0317–321.) CSG only produced the J&T Business Plan *two-and-a-half months* after PwC issued its Report, *nearly a year* after EY issued its Report, and *after* SD3 already moved for summary judgment as to Count I. (A0634–639.)

CSG, in fact, produced the J&T Business Plan *one week* after it filed its opposition to SD3's motion for summary judgment on Count I. (*See* A0537–574.) CSG did not suggest in its opposition that it needed time to produce additional documents—such as the J&T Business Plan—relevant to the PwC and EY Reports. Instead, it demanded documents from PwC to challenge "the apparent lack of independence and the significant issues with [PwC's] methodology." (A0565.)

That conduct is sanctionable under Rule 37, because it artificially lowered the average of the two valuations of EY and PwC, and therefore lowered the Penalty

Amount to which SD3 is entitled. If both PwC and EY had the benefit of the J&T Business Plan, EY's valuation would have likely included the MADR contracts and PwC and EY would have both considered CSG's projections on revenue, cost, and margin, and the two valuations would have been significantly closer and higher in value. (A1494, PwC Supplemental Report at p. 3.)

The Superior Court had the power under Rule 37 to permit PwC and EY to revise their reports, and to amend its Count I Decisions accordingly. Its failure to apply the legal standards applicable to a Rule 37 motion, and instead to require SD3 to file a motion under Rule 60, was reversible error. The Court should reverse the Superior Court's holding that it could not grant SD3 relief under Rule 37 and remand so the Superior Court can consider SD3's Rule 37 Motion under the correct legal standards and in light of its authority to revise the Count I Decisions.

II. EVEN UNDER RULE 60, SD3 WAS ENTITLED TO RELIEF.

A. Question Presented.

Did the Superior Court abuse its discretion when it concluded that the J&T Business Plan did not constitute "newly discovered evidence" and extraordinary circumstances to justify relief under Rule 60(b)? (Ex. D, Rule 60 Decision at p. 9.)

B. Scope of Review.

The Superior Court's denial of relief under Rule 60(b) is reviewed for abuse of discretion. *Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 542 (Del. 2006).

C. Merits of Argument.

The Superior Court abused its discretion when it determined that the J&T Business Plan did not constitute newly discovered evidence and extraordinary circumstances justified relief under Rule 60(b), given that COVID-19 had delayed fact and expert discovery for nearly two years.

Under Rule 60(b)(2), a party may seek relief from a final order based on "newly discovered evidence" that "has come to [its] knowledge since the trial; that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; that it is so material and relevant that it will probably change the result if a new trial is granted; that it is not merely cumulative or impeaching in character; and that it is reasonably possible that the evidence will be produced at the trial." *Levine v. Smith*, 591 A.2d 194, 203 (Del. 1991) *overruled on different grounds by Brehm v.*

Eisner, 746 A.2d 244 (Del. 2000) (quoting *In re Missouri-Kansas Pipeline Co.*, 2 A.2d 272 (Del. 1938)). In addition, Rule 60(b)(5) broadly permits relief for "any other reason justifying relief from the operation of the judgment."

The J&T Business Plan meets all of these requirements: It was a valuation of the Company issued *one day before the valuation date* that was hidden from both EY and PwC until *after* the deadline for both firms to issue their Reports, *after* SD3 moved for summary judgment on Count I, and after CSG opposed summary judgment, despite specific requests from PwC for contemporaneous valuations of RETIA. The J&T Business Plan squarely resolved a central difference between the EY and PwC Reports—the inclusion of the "MADR Contracts"—which would have likely raised EY's valuation of RETIA and affected the total Penalty Amount awarded to SD3. PwC concluded the J&T Business Plan was "material and relevant … [to] change the result" and provided the PwC Supplemental Report providing an updated valuation of CZK 1,562,000,000. (*See* A1494, PwC Supplemental Report at p. 3.)

The Superior Court, however, denied relief under Rule 60(b)(2) because "SD3 could have discovered the J&T Business Plan for use in the litigation prior to December 23, 2020 or November 15, 2021." (Ex. D, Rule 60 Decision at p. 10.) It concluded, for the same reasons, that "extraordinary circumstances" did not justify

the relief requested. (*Id.* at pp. 10–11.) The Superior Court ignored two realities of the case in order to reach this conclusion.

First, discovery related to the contractually required valuation process proceeded on a separate track from discovery related to the breach of fiduciary duty claim in Count II. After consistent efforts by CSG to block SD3 and PwC's access to critical documents that were necessary for PwC to perform its independent valuation, the Superior Court required CSG "to provide [the EY Report] to [PwC], and anything that [PwC] says they need to do their 2.4.2 valuation." (A0291, H'ring Tr. at 40 (Oct. 28, 2019); *see also* A0417, H'ring Tr. at 10:12–22 (Dec. 20, 2019); A0422, H'ring Tr. at 15:18–21 (Dec. 20, 2019).)

The Superior Court also set a deadline for PwC to issue its report, which was separate and apart from the other discovery deadlines in the case. (A0294, H'ring Tr. at 43 (Oct. 28, 2019).) In accordance with that deadline, PwC issued its Report months before the initial discovery deadlines were set, and almost two years before fact discovery closed and expert discovery commenced because of several extensions due to COVID-19. Thus, SD3 and PwC could not have reasonably expected discovery relevant to the contractually required valuation process to appear in over 12,000 pages of documents—many of which (including the J&T Business Plan) were in Czech and marked as highly confidential outside the view of SD3's

representatives—produced two months after PwC was required to file its Report. (A0576, Transmittal Email (May 22, 2020).)

SD3 moved for summary judgment after PwC submitted its report because, at that point, no other discovery was necessary to resolve Count I. Instead, Count I only required the Superior Court to average the valuations created by the EY and PwC Report, and calculate the Penalty Amount based on that number. When CSG filed its opposition on May 14, 2020—nearly one week before the production of the J&T Business Plan—it made no mention of additional documents it planned to produce that could be used by PwC and EY to aid in their valuation of RETIA. Instead, PwC argued that it was entitled to discovery as to PwC's independence. (A0565 at p. 23.)

Second, COVID-19 threw a wrench in the deadlines originally set for this case. On June 17, 2020—only three weeks after CSG's belated production of the J&T Business Plan and before expert discovery began—the Superior Court vacated the trial date, and extended the fact and expert discovery deadlines by eight months. (A0578–580.) After several more extensions, expert discovery did not actually commence until almost two years later in March 2022. (A0603–609.) PwC discovered the J&T Business Plans shortly thereafter, and SD3 filed its motion for discovery sanctions one month later, on April 22, 2022. (A0630–1484.)

The Superior Court inappropriately emphasized the time that lapsed between CSG's initial production and the discovery of the J&T Business Plan, ignoring the

reason for the time lapse and that expert discovery had not even commenced until March 2022. As the parties' jointly explained in their initial request to extend the case deadlines, "this matter involves numerous international witnesses, with much of the discovery occurring in the Czech Republic. When the COVID-19 pandemic struck, the parties were part way through discovery, having taken nine depositions between both sides. But the completion of discovery and depositions has been prevented by the international travel restrictions, and even paper discovery has been slowed by Covid restrictions at the relevant businesses and law firms." (A0578–580.)

At a minimum, such facts constituted "extraordinary circumstances" under Rule 60(b)(6) that justified the relief requested. *See, e.g., Smith v. Nations Recovery Center, Inc.*, 2020 WL 3479496, at *1 (N.D.N.Y. June 25, 2020) (recognizing COVID-19 as an "extraordinary circumstance" justifying relief under Rule 60); *MPK, Inc. v. Bernardaud N.A., Inc.*, 2021 WL 4732927, at *1–2 (C.D. Cal. Feb. 2, 2021) (same).

III. THE SUPERIOR COURT ERRED WHEN IT REQUIRED THE PARTIES TO CONVERT THE FOREIGN-MONEY CLAIM TO U.S. DOLLARS AND SELECTED THE WRONG EXCHANGE RATE.

A. Question Presented.

Did the Superior Court err as a matter of law when it required the judgment on SD3's foreign-money claim to be expressed in U.S. Dollars? (A2506.)

B. Scope of Review.

Questions of law are reviewed *de novo*. *See Gannett*, 840 A.2d at 1239 ("This Court reviews de novo . . . the Superior Court's formulation and application of legal principles.").

C. Merits of Argument.

SD3 proposed a final judgment that expressed the Penalty Amount and prejudgment interest owed to it in terms of Czech Crowns. (A2485–2492.) That request was not only proper, it was *required* by Delaware's Uniform Foreign-Money Claims Act, 10 *Del. C.* § 5201, *et seq*. (the "UFMA"). The Superior Court erred when it refused to enter SD3's proposed judgment and required the parties to convert the amount that CSG owed to SD3 from Czech Crowns to United States Dollars. (Ex. F, Revised Final Judgment Entered Sept. 5, 2023; *see also* A2506.)

The UFMA applies to any "foreign-money claim," meaning any "claim upon an obligation to pay or a claim for recovery of a loss expressed in or measured by a foreign money" made in a judicial proceeding. 10 *Del. C.* § 5201(6); *id.* at § 5202. SD3 brought a foreign-money claim under Count I. Indeed, consistent with section

2.4.1 of the Agreement, the Penalty Amount owed to SD3 was "expressed" in Czech Crowns ("CZK") for the entirety of these proceedings before entry of final judgment. PwC and EY valued RETIA in CZK. (A0188, EY Report; A0464, PwC Report.) The Superior Court's Count I decisions expressed the Penalty Amount in Czech Crowns. (Ex. A, December 2020 Decision at pp. 19–20.) And SD3 submitted a proposed final judgment in Czech Crowns. (A2485–2492, Proposed Final Judgment.)

When a party raises a "foreign-money claim," section 2507(a) of the UFMA requires that "a judgment or award on a foreign-money claim *must* be stated in an amount of the money of the claim." 10 *Del. C.* § 2507(a) (emphasis added). As explained by the Uniform Act's drafters, this provision changed state law to the extent it "require[d] all values in legal proceedings to be expressed in United States dollars." *Nat'l Conf. of Comm'ers on Uniform State Laws*, Uniform Foreign-Money Claims Act, at § 2507, Comment 1 (1990). Delaware law now requires such values to be expressed in the applicable foreign currency. *See id.* Prefatory Note at 3 (noting that the Uniform Act "requires judgments and arbitration awards in [foreign-money] cases to be entered in the foreign money rather than in United States dollars"). Because the Superior Court violated the plain terms of 10 *Del. C.* § 2507(a) when it entered a final judgment in U.S. dollars, the Court should therefore vacate the judgment and remand with instructions for the Superior Court to enter a final judgment that is expressed in Czech Crowns.

The Superior Court compounded its error by converting the judgment to U.S. Dollars using the exchange rate in effect on June 20, 2017, the "valuation date" for RETIA under the Agreement. Section 5205(a) of the UFMA requires the amount to be paid to be determined "on the conversion date," 10 *Del. C.* § 5205(a), which the statute defines as the "banking day next preceding the date on which money, in accordance with this chapter, is . . . [p]aid to a claimant in an action," *id.* at § 5201(3). Thus, to the extent the Court does not require the Superior Court to express the final amount owed in Czech Crowns, it should nonetheless vacate the judgment and require the Superior Court to enter a new judgment that uses the exchange rate in effect "on the conversion date," as defined by the UFMA.

CONCLUSION

SD3 respectfully requests the Court reverse the Superior Court's decision denying its Rule 37 Motion and remand to the Superior Court to consider the Rule 37 Motion under the correct legal standards. In the alternative, the Court should reverse the Superior Court's decision denying SD3's Rule 60 Motion.

In addition, SD3 respectfully requests that the Court vacate the judgment and remand so the Superior Court can enter a new judgment expressed in Czech Crowns.

Dated: November 28, 2023

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Appellant/Cross-Appellee SARN SD3 LLC

Exhibit A

to Appellant
SARN SD3's
Opening Brief
on Appeal

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: September 29, 2020[1]
Decided: December 23, 2020

Upon Plaintiff SARN SD3, LLC's Motion for Partial Summary Judgment
GRANTED in part and DEFERRED in part

Oderah C. Nwaeze, Esquire and Mackenzie M. Wrobel, Esquire, Duane Morris LLP, Wilmington, Delaware, Ryan E. Borneman, Esquire, Duane Morris LLP, Philadelphia, Pennsylvania, *Attorneys for Plaintiff SARN SD3 LLC.*

Philip Trainer, Jr., Esquire and Tiffany Geyer Lydon, Esquire, Ashby & Geddes, Wilmington, Delaware, Kenneth J. Pfaehler, Esquire, Dentons US LLP, Washington, D.C., *Attorneys for Defendant Czechoslovak Group A.S.*

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") against Defendant Czechoslovak Group A.S. ("CSG"). SD3 alleges that CSG breached the parties' Call Option Agreement (the "Agreement"). On March 30, 2020, SD3 filed its

[1] D.I. No. 215

Motion for Partial Summary Judgment (the "Motion")[2] on Count I of the Complaint—Breach of Contract Concerning the Penalty Amount.

For the reasons stated below, the Court **GRANTS in part and DEFERS in part** the Motion. The Court finds no genuine issue as to any material fact and that, as a matter of law, CSG's obligation to pay the Penalty Amount has been triggered under the Agreement. The Court finds there may be a "good faith and fair dealing" dispute as to the PwC Report (as defined below. Accordingly, the Court will grant Civil Rule 56(f) discovery relief to CSG but that the relief will be limited in time and scope.

II. RELEVANT FACTS

SD3 is a Delaware limited liability company.[3] SD3 provides advisory and consulting services to companies in the defense industry.[4] CSG is a Czech Republic holding company that operates and supports a number of enterprises in the defense industry.[5]

A. CSG'S ACQUISITION OF RETIA AND THE AGREEMENT

RETIA is a privately-held joint stock company registered under the laws of the Czech Republic. RETIA operates in the field of military electronics, with an emphasis on radar, and non-military recording systems. On March 30, 2016, CSG purchased RETIA at a price of 540,000,000 Czech Crowns.[6] CSG was not the only entity interested in RETIA and competed with Omnipol, a primary rival of RETIA, for the purchase of RETIA.[7] CSG purchased RETIA as an investment for skills and capacities and not for its short term profitability potential.[8]

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[2] D.I. No. 183.
[3] Am. Compl. ¶ 2.
[4] *Id*.
[5] *Id.* at ¶ 3.
[6] Opp. Ex. 5 p. 6, Ex. 6 p. 6. Hereafter, Czech Crowns will be cited as "CZK."
[7] Opp. Ex. 7, Michal Strnad Tr. at 28:6-23, 31:15-20; Opp. Ex. 8, Jaroslav Strnad Tr. at 112:3-14; Opp. Ex. 9, Klepek Tr. 38:13-18
[8] Opp. Ex. 9, Klepek Tr. at 39:24-43:14.

On or about October 7, 2016, SD3 and CSG entered into the Agreement.[9] Under the Agreement, SD3 has an option to purchase a 25% equity interest in RETIA.[10] When the parties entered the Agreement, RETIA was CSG's wholly-owned subsidiary.[11]

The Agreement provides that SD3 could exercise its option until July 1, 2021 and, if CSG ceased to own the majority of RETIA's shares before July 1, 2021, then CSG must pay SD3 a "Penalty Amount."[12] Under the Agreement, the Penalty Amount is equal to "25% of the difference between the value of RETIA, based on an independent valuation of the company and the exercise price of 540,000,000.00 CZK[.]"[13] The strike price was determined, in part, by the price that CSG paid for RETIA. Section 1.3 provides:

> 1.3. Exercise Price. The "Exercise Price" of the Shares to be paid by the Grantee to the Grantor shall be equal to CZK 5,400.000 per 1% of the Shares, which is an amount calculated using the price that the Grantor paid to acquire the Shares.[14]

The Agreement anticipates a change in control of RETIA. Section 2.4 sets out what happens when there is a change of control during the Option period. Specifically, Section 2.4.1 states:

> 2.4.1 If at any time during the Option period (i) the holder of a majority of Shares ceases to be the Grantor or a member of the group to which the Grantor belongs or the Company transfers a substantial part of its assets without adequate consideration, and (ii) the Grantee does not want to exercise its Option to purchase the Exercised Shares, the Grantors shall pay to the Grantee upon its written demand a contractual penalty equaling an amount in CZK (or its equivalent in US dollars) equal to 25% multiplied by the difference between (s) the value of the Company based on the "Independent Valuation of the Company as defined below, and (y) the valuation of the Company based on the Exercise Price (i.e. CZK 540,000,000)/the "**Penalty Amount**"/. To avoid any doubts, the Grantee is entitled to the Penalty Amount under the previous sentence only if conditions set out in the Article 2.4.1 point (i) have been met and if the value of the Company based on the "Independent

[9] Am. Compl. ¶¶ 4, 8; Nwaeze Decl., Ex. 19, M. Strnad Tr. 39:18–23, 41:5–8; Ex. 20, Richards Tr. 145:19–146:2.
[10] *Id*.
[11] Am. Compl. ¶ 8; Nwaeze Decl., Ex. 18, J. Strnad Tr. 80:20–22.
[12] Am. Compl. ¶¶ 9–10, 52; Nwaeze Decl., Ex. 19, M. Strnad Tr. 39:24–40:4, 41:15–20.
[13] Am. Compl. ¶ 10; *see also* Nwaeze Decl., Ex. 1, § 2.4.
[14] Lydon Dec. Ex. 1 § 1.3.

> Valuation of the Company" is higher than the value of the Company based on the Exercise Price.
> *For example, if the Independent Valuation of the Company equals CZK 740 million, the Penalty Amount equals 25% multiplied by [CZK 740 million minus CZK 540 million], or 25% multiplied by CZK 200 million, which equals CZK 50 million.*[15]

The Agreement defines "Independent Valuation of the Company" in Section 2.4.2. The Independent Valuation of the Company is either (i) a value determined by mutual agreement within 14 days following notice of change of control of RETIA;[16] or (ii) if the parties are unable to agree upon RETIA's value, the average of the valuations of RETIA by two different Big Four accounting firms, one retained by CSG and the other by SD3.[17] Section 2.4.2 expressly provides:

> 2.4.2 The Independent Valuation of the Company equals the valuation of the Company as agreed upon by the Grantor and the Grantee in writing on a date no later than 14 days following the initial notice of the Grantor to the Grantee of the change in control. In the event the Grantor and the Grantee do not reach an agreement within 14 days following such notice, each of the Grantor and the Grantee shall hire a Big Four accounting firm, and the Independent Valuation of the Company shall equal the average of the two valuations. Any cost and expenses of such accounting firms shall be borne equally by the Grantor and the Grantee.[18]

B. THE SALE OF RETIA

On April 4, 2017, CSG offered to sell 100% of RETIA to SD3 for a "more favourable price for 100% shares of RETIA than indicated in the Option Agreement."[19] SD3 declined the offer.[20] Thereafter, on June 20, 2017, CSG sold RETIA to Technology CS a.s. ("TCS"), a

[15] Nwaeze Decl., Ex. 1, § 2.4.1 (emphasis in original).
[16] Am. Compl. ¶ 11; *see also* Nwaeze Decl., Ex. 1, § 2.4.2.
[17] Am. Compl. ¶ 11; *see also* Nwaeze Decl., Ex. 1, § 2.4.2.
[18] Lydon Dec. Ex. 1 § 2.4.2.
[19] Ex. 12, Letter from M. Strnad as CEO of CSG to SD3, April 4, 2017 [SD3's Deposition Exhibit 27].
[20] Ex. 7, Michal Strnad Tr. 82:1-18.

company owned by Michal Strnad (the CEO of CSG).[21] TCS purchased RETIA for 381,200,000 CZK—a price based on a valuation of Retia by Grant Thornton.[22]

On November 5, 2017, CSG informed SD3 that CSG had transferred its ownership interest in RETIA and, therefore, had "initiat[ed] the Independent Valuation of RETIA provided for in Section 2.4.2 of the Agreement," entitling SD3 to the Penalty Amount.[23] The pertinent part of the notice provided by CSG stated:

> As provided in Section 2.4.2 of the Agreement, CSG is prepared to discuss its views on the Independent Valuation of RETIA. If CSG and SARN are unable to agree on the Independent Valuation of RETIA on or before November 15, 2017, CSG is further prepared to engage a Big Four accounting firm as provided in Section 2.4.2 of the Agreement.[24]

SD3 then attempted to negotiate RETIA's value with CSG, in accordance with Section 2.4.2 of the Agreement. In order to do so, SD3 alleged it needed RETIA's financial information, which was exclusively in CSG's possession. On November 9, 2017, SD3 requested from CSG certain documents and information it deemed necessary for SD3 to determine RETIA's value under either method provided by the Agreement.[25] CSG purportedly did not provide all of the requested information.[26]

CSG contends that "SD3 sent a letter demanding twenty sweeping categories of information, many having little or nothing to do with the valuation of Retia, but everything to do with the allegations of Count II of the Complaint, for breach of fiduciary duty, which counsel was drafting at that moment."[27] At the time, CSG claims there would have been no confidentiality protection for the documents, and SD3's counsel offered none in his letter;

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[21] Ex. 13, Share Purchase Agreement between CSG and Technology CS, a.s. [SD3 Depo. Ex. 32]
[22] Ex. 7, M. Strnad Tr. at 90:11-91:13; Ex. 14, Grant Thornton Valuation, at 46 [SD3 Depo. Ex. 66].
[23] Am. Compl. ¶¶ 12–13; Nwaeze Decl., Ex. 2 at 3 & Ex. 6; *id.* at Ex. 19, M. Strnad Tr. 85:20–86:1, 86:24–87:8.
[24] Ex. 16.
[25] Am. Compl. ¶ 14; Nwaeze Decl., Ex. 7.
[26] Am. Compl. ¶ 15.
[27] Opp. at 7; Ex. 16, Letter from R. Borneman to I. Katz, Nov. 9, 2017.

therefore, CSG declined to provide the requested documents.[28] The parties did not reach an agreement on the value of RETIA within 14 days, and CSG did not pay SD3.[29]

C. SD3 COMMENCES THIS ACTION AND EXCHANGE OF INDEPENDENT VALUATIONS

On December 13, 2017, SD3 filed its original Complaint against CSG. CSG moved to dismiss the Complaint. The Court granted in part and denied in part CSG's motion on September 13, 2018. SD3 filed an Amended Complaint on September 28, 2018. CSG filed its original Partial Answer on October 12, 2018. After additional motion practice, CSG filed its Amended Answer and Counterclaim on February 25, 2019.

D. INDEPENDENT VALUATION OF THE COMPANY

i. CSG's Independent Valuation Values RETIA at 555,000,000 CZK

CSG retained Ernst & Young ("EY") as its Big Four accounting firm under Section 2.4.[30] On August 21, 2018, CSGM a.s., an operating subsidiary of CSG, entered into an engagement agreement with EY.[31] CSGM engaged EY to provide "the valuation of 100% shares of RETIA," and "the valuation date will be set at 20 June 2017."[32] Among other things, in the engagement agreement EY stated:

> The valuation will be pursuant to the U.S. Generally Accepted Accounting Principles ("US GAAP") as agreed in the Option Contract.
>
> "*The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.*"[33]

EY issued a report (the "EY Report") valuing RETIA on March 5, 2019. RETIA and CSG apparently did not attempt to influence the valuation contained in the EY Report.[34] Tomáš

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[28] Ex. 17.
[29] Am. Compl. ¶ 16.
[30] Nwaeze Decl., Ex. 11, CSG-012832.
[31] Declaration of Tomáš Hasman, May 13, 2020, ¶ 2 (cited herein as "Hasman Decl.").
[32] Hasman Decl. ¶ 2.
[33] *Id.* Ex. 1 (emphasis in original).
[34] Hasman Decl. ¶¶ 3-6; Ex.10, Kadlecová Tr. at 114:2-12.

Hasman, the General Counsel of CSG, put EY in touch with the relevant persons at RETIA to gather and provide the information requested by EY.[35] Mr. Hasman did not seek to substantively revise the EY Report.[36]

SD3 retained PricewaterhouseCoopers ("PwC") at 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.[37] SD3 made repeated requests for CSG to reproduce the EY Report without the overbroad confidentiality designation that prohibited SD3 and PwC's access.[38] CSG never delivered a re-designated EY Report despite representing one was forthcoming.[39]

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.[40] Therein, EY summarized the scope of its engagement by CSG and the purpose of the EY Report as follows:

> The Option Contract [i.e., the Agreement] regulates the case of potential transfer of the [RETIA] Shares outside the CSG's group ("Transfer"). In case of Shares' Transfer, the Option allows the holder to demand a calculation to determine if there is a contractual 'penalty' amount, which is calculated based on RETIA's value.
>
> We [EY] understand that CSG transferred the Shares outside of the group and that in response SARN has requested a valuation pursuant to the procedure provided by the Option Contract, which provides that if CSG and SARN do not reach an agreement within 14 days of notice of the transfer, each of CSG and SARN shall

[35] Hasman Decl. ¶ 3.
[36] Hasman Decl. ¶ 6.
[37] *See* Stip. & Order Governing the Production and Exchange of Confidential and Highly Confidential Information at ¶ 2 (Trans. ID 63019730).
[38] Nwaeze Decl., Ex. 10 (documenting SD3's requests in May, July, and August of 2019).
[39] *Id.* at p. 1.
[40] Nwaeze Decl., Ex. 15.

> hire a Big Four accounting firm, and the Independent Valuation of the Company shall equal the average of the two valuations.
>
> We therefore provide you with an independent valuation of the 100% shareholding in RETIA for your internal purposes related to the above mentioned Transfer and Option Contract ("Purpose").[41]

The EY Report utilized the income method approach—specifically, the discounted cash-flow method—and determined RETIA's value on June 20, 2017 to be 555,000,000 CZK.[42]

ii. SD3's Independent Valuation Values RETIA at 980,000,000 CZK

As stated above, on July 26, 2018, SD3 engaged PwC as its Big Four accounting firm, as provided by Section 2.4 of the Agreement.[43] 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.[44]

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.[45] PwC issued its report on March 10, 2020 (the "PwC

[41] Nwaeze Decl., Ex. 11, CSG-012832; *id.* at CSG-102833; *id.* at CSG012839; Ex. 19, M. Strnad Tr. 165:22–166:3.
[42] Nwaeze Decl., Ex. 11, CSG-012833, CSG-012837, CSG012855, CSG-012869.
[43] Nwaeze Decl., Ex. 8.
[44] Nwaeze Decl., Ex. 2, p. 5; *see also id.* at Ex. 9 (transmitting CSG's production to SD3's counsel).
[45] Following review of the EY Report, PwC made its first request for additional documents and information in November 201[9]. Nwaeze Decl., Ex. 12, ¶ 49; *id.* at Ex. 14. PwC and CSG discussed the November 201[9] 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).

Report"). PwC summarized the scope of its engagement by SD3 and the purpose of the PwC Report as follows:

> I was instructed by SARN SD3 LLC ("Plaintiff" or "SARN") to act as an expert witness and prepare an independent and objective valuation of a 100% shareholding in RETIA a.s. ("RETIA" or "Company") as of 20 June 2017 (the "Valuation date"). This valuation is for the purpose to assess a Contractual Penalty ("Contractual Penalty") based on the Call Option Agreement ("Agreement" or "Contract") which was concluded between SARN and CZECHOSLOVAK GROUP a.s. ("Defendant" or "CSG") on 7 October 2016 as part of a procedure agreed between parties.
>
> The amount of the Contractual Penalty is derived from the valuation of RETIA. In case SARN and CSG . . . do not reach an agreement regarding the valuation of RETIA, article 2.4.2 of the Contract states that "*each of the Grantor and the Grantee* [the Parties to the Agreement] *shall hire a Big Four accounting firm, and the Independent Valuation of the Company shall equal the average of the two valuations*". To prepare the valuation, the Plaintiff selected PwC whilst the Defendant selected Ernst & Young, s.r.o. ("EY").[46]

PwC issued its valuation of the RETIA (the "PwC Report"). SD3 asserts that, like the EY Report, the PwC Report[47] is an Independent Valuation of the Company.[48] The PwC Report determined RETIA's value on June 20, 2017 to be 980,000,000 CZK.[49]

Abdul Sirshar Qureshi is the author of the PwC Report. Mr. Qureshi has been providing forensic accounting and litigation support services for 22 years, but he does not claim to have any significant experience in performing independent valuations.[50] The retainer agreement (the "PwC Retainer Agreement") is titled "EXPERT SERVICES IN RELATION TO THE CLAIM

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[46] Nwaeze Decl., Ex. 12, ¶¶ 1–2 (emphasis in original); *id.* at ¶ 24 ("I summarize the valuation of RETIA for the purposes of the assessment of the Contractual Penalty.").

[47] SD3 states that the PwC Report explains and defends the few differences between the two reports, one of which is the EY Report's unexplained failure to account for the revenues realized from the publically announced MADR project. Nwaeze Decl., Ex. 12, ¶¶ 28(a)–(e), 29, 115(a)–(e). SD3 claims EY's error significantly decreases the Penalty Amount, but SD3 has opted not to raise that issue with the Court, and instead, moves for summary judgment based on the four corners of the Agreement.

[48] *See* Nwaeze Decl., Ex. 12, ¶¶ 2–3 (confirming PwC was retained to "prepare an independent and objective valuation of a 100% shareholding of RETIA a.s."), *id.* at ¶¶ 30–58 (summarizing PwC's valuation methodology, as defined in International Valuation Standards, and the universe and source of documents and information PwC considered in its analysis); *id.* at ¶¶ 117–23 (providing the declaration of PwC that confirms the "independent view" of the PwC Report); *see also id.* at Ex. 13, Oct. 28, 2019 H'rg Tr. 9:12–15, 12:19–13:3.

[49] Nwaeze Decl., Ex. 12, ¶¶ 25, 53, 56–58, 112, 116.

[50] *See* Ex. 2 at Appendix A.

OF SARN SD3 LLC AGAINST CZECHOSLOVAK GROUP, A.S., Case No. N17C-12-185."[51] The PwC Retainer Agreement provides that: (i) SD3's litigation counsel "is instructing [PwC];" (ii) Mr. Qureshi will also provide an expert report on the "calculation of damages caused by the alleged decrease in the value of RETIA" (*i.e.*, damages on the second count of the Amended Complaint); (iii) Mr. Qureshi will provide a draft of his report for litigation counsel's input; and (iv) SD3's litigation counsel has the "ability to make decisions in relation to the services and [PwC's] recommendations."[52]

PwC values RETIA at 980,000,000 CZK. This valuation is an 81% increase over the exercise price of CZK 540 million provided in the Call Option Agreement and more than 75% higher than the Independent Valuation prepared by EY.[53] CSG contends that the PwC valuation is an expert report of an individual accountant retained and directed by SD3's litigation counsel as an expert for this litigation and prepared with the assistance of SD3's counsel. Moreover, CSG argues that Mr. Qureshi's valuation is unsupported and not in accordance with valuation accounting standards.

SD3 has refused to produce its counsel's communications with Mr. Qureshi and PwC on the basis that he is an expert witness.

iii. The MADR Contract in determining value

The EY Report and the PwC Report valuations appear to differ because the PwC Report includes the MADR contract. PwC's valuation includes the MADR contract, which is a RETIA contract with the Israeli company ELTA, and assesses the probability of entry into the contract as of June 20, 2017 at 100%. CSG and SD3 disagree on whether it is reasonable to include this

[51] Ex. 18 at 1.
[52] Ex. 18 at 1-2.
[53] *Compare* Ex. 1 at § 1.3 and Ex. 3 at 39 *with* Ex. 2 at 19.

contract as part of a RETIA valuation. The parties disagree about the probability that the contract was going to be entered into as of June 20, 2017. CSG argues that the information relied upon by PwC does not support its conclusion.

Mr. Qureshi relies on (a) three online articles apparently supplied by SD3's litigation counsel, and (b) an internal RETIA report. The first of the articles (PWC-17), from March 3, 2016, states that "[t]his week, the government approved the intention of the Ministry of Defense to start negotiations on the purchase of eight MADR mobile radars for 3.6 billion crowns" and that, according "to the Ministry of Defense, the supplier Israeli Elta Systems, the British manufacturer BAE systems, the Swedish SAAB and the French-American company Thales Raytheon Systems are suitable suppliers."[54] The second article, PWC-18, similarly merely notes that the "government approved the intention of the Ministry of Defense to start negotiations with the governments of France, Britain, Israel and Sweden."[55] The third website piece, PWC-19, erroneously predicted that "signing of the agreements is approaching."[56]

Mr. Qureshi cites an internal report in which a sales director at RETIA indicated that, as of May, 2017, he thought there was a 65% chance that RETIA would obtain the contract then being negotiated.[57] However, CSG alleges that this sales director provided no basis for this estimate and there was no procedure governing such estimates.

CSG contends that ELTA and the Czech Government never finalized the 2016 and 2017 negotiations, that the tender was withdrawn, and that RETIA, therefore, did not and could not

[54] Ex. 20, Translation of Mar. 3, 2016 iDNES,cz article, at pages 1-2 (CSG believes this to be the article listed in Qureshi Report Appendix B as item PWC-17).
[55] Ex. 21, Translation of article on www.novinky.cz CSG believes to be the article (listed in Qureshi Report Appendix B as item PWC-18).
[56] Ex. 22, Translation of article on www.e15.cz (CSG believes this to be the article listed in Qureshi Report Appendix B as item PWC-19).
[57] Ex. 23, Translation of "RETIA, a.s. Reporting 05/2017," at page 9 (listed in Qureshi Report Appendix B as item PWC-16).

receive the subcontract discussed in items PWC 16-19. Moreover, SD3 pled in the Amended Complaint that the MADR contract had been lost.[58] CSG argues that Mr. Qureshi overlooked articles reporting that, after the announcement that ELTA had been approved to negotiate a contract with the Czech government, the Defense Minister delayed negotiations, the Defense Minister never signed the contract with ELTA, an investigation was launched into the approval, and finally the approval and original tender were terminated.[59] Thus, the anticipated MADR contract with RETIA in 2017 never came to fruition; instead, a new tender and negotiation was begun directly between the governments of Israel and the Czech Republic, which finally resulted in a new contract being signed last November.[60]

E. CALCULATION OF THE PENALTY AMOUNT USING THE EY REPORT AND THE PWC REPORT

The Agreement unequivocally states "the Independent Valuation of the Company [*i.e.*, RETIA] shall equal the average of the two valuations."[61] EY valued RETIA at 555,000,000 CZK. PwC valued RETIA at 980,000,000 CZK. So, the "Independent Valuation of [RETIA]" is 767,500,000 CZK. The Exercise Price is 540,000,000 CZK. Therefore, the Penalty Amount, per Section 2.4.1, is 56,875,000 CZK—25% of the difference between RETIA's Independent Valuation and the contractually provided Exercise Price:

Independent Valuation	757,500,000 CZK
Exercise Price	540,000,000 CZK
Net Difference	227,500,000 CZK
Percent Multiplied	25%

[58] DI 29, Amended Complaint ¶¶ 47, 48.
[59] *See, e.g.*, Ex. 24, translation of June 9, 2018 media report [Richards Depo. Exhibit 32]; Ex. 25, translation of Dec. 17, 2018 report in iDNES.cz [Richards Depo. Exhibits 34 & 35].
[60] *See, e.g.*, Ex. 26, Cirtek Tr. at 148:7-151:2, 154:18-155:23, 137:19-138:8; Ex. 9, Klepek Tr. at 69:3-71:6, 76:20-77:14; Ex. 7, Michal Strnad Tr. at 155:8-156:1; Ex. 27 SD3 Talking Points/Meeting Notes, N.D. (SD30000013-14); Ex. 28, undated "Handout: Copy of Minutes" (SD3000001-03).
[61] Nwaeze Decl., Ex. 1 at § 2.4.2.

PENALTY AMOUNT 56,875,000 CZK

F. PROCEDURAL POSTURE OF THE CASE

A stipulated Case Management Order ("CMO") governs deadlines in this action. The Court entered the CMO on February 11, 2020. As proposed and as entered, the CMO includes expert discovery, depositions of experts and rebuttal expert reports. Opening expert reports were due July 20, 2020 and expert discovery could commence on that date.[62] The deadline for motions for summary judgment is October 9, 2020, and an eight-day trial is scheduled for March 29, 2021.[63]

CSG claims discovery is underway but still ongoing, and depositions in particular have been interrupted in the last two months due to COVID-19 restrictions.[64] SD3 has deposed six CSG principals, including Michal Strnad and Jarolsav Strnad.[65] CSG has started the deposition of SD3 principal Stephen Richards, with the remainder of the deposition still to be completed.[66] CSC plans to take the depositions of SD3's other two principals of SD3, Armen Agas and Bart Marcois.[67] Mr. Agas' deposition was scheduled but has been indefinitely postponed by the COVID-19 restrictions.[68] CSG provides that other depositions are outstanding, third party discovery is not complete, and no expert discovery has yet been taken.[69]

The Court identified inconsistent litigation positions taken by CSG with respect to the Independent Valuation of the Company. During initial discovery, CSG objected to SD3's

[62] DI 175 at 2 ¶ 3.
[63] *Id.*
[64] Pfaehler Decl. ¶ 9.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*

requests for documents that would allow it to challenge the valuation of EY. Specifically, CSG stated the following in Interrogatories:

> B. Defendant objects to the Definitions and Instructions to the extent they purport to seek documents or information to allow SARN to challenge the independent valuation reached by EY or to assert that it is calculated improperly. Many of the discovery requests appear to presume that SARN can attack the validity of the EY valuation by questioning whether the value should have been more. But the Call Option Agreement does not contemplate or permit this claim. The Call Option Agreement provides for the determination of the Independent Valuation of Retia as follows:
>
> > The Independent Valuation of the Company equals the valuation of the Company as agreed upon by the Grantor and the Grantee in writing on a date no later than 14 days following the initial notice of the Grantor to the Grantee of the change in control. In the event the Grantor and the Grantee do not reach an agreement within 14 days following such notice, each of the Grantor and the Grantee shall hire a Big Four accounting firm, and the Independent Valuation of the Company shall equal the average of the two valuations. Any cost and expenses of such accounting firms shall be borne equally by the Grantor and the Grantee.
> > *Id.* at 4, § 2.4.2.
>
> This independent valuation of Retia has been completed by a Big Four accounting firm selected by CSG. CSG retained EY. On March 5, 2019, EY issued its independent valuation report as of June 30, 2017. On March 22, 2019, EY authorized CSG to produce the report to SARN. On March 22. 2019, CSG produced the report to SARN as Highly Confidential Discovery Material pursuant to the terms and conditions of the Confidentiality Order. The documents needed by SARN's Big Four accounting firm, PriceWaterhouseCoopers, were produced to SARN on March 26, 2019 as Highly Confidential Discovery Material pursuant to the conditions and terms of the Confidentiality Order.
>
> Unless the independent valuation of the Company returns a valuation that exceeds CZK 540 million, SARN has no claim under Count I of its Amended Complaint, which purports to assert a claim for failure to pay the Penalty Amount. However, PriceWaterhouseCoopers still has not provided its Independent Valuation.
>
> For the foregoing reasons, CSG objects to the document requests and interrogatories to the extent they seek information for the purpose of attacking the amount determined by EY in its Independent Valuation.[70]

[70] Nwaeze Decl., Ex. 2, p. 4.

CSG, therefore, took the position that SD3 could not challenge the independent valuation reached by EY or to assert that EY's valuation was calculated improperly. However, CSG now contends that it is permissible for CSG to challenge the independent valuation reached by PwC or to assert that PwC's valuation was calculated improperly. During oral argument, the Court did not receive a satisfactory answer from CSG on why it can take these inconsistent positions.

Furthermore, in the Rule 56(f) Declaration, CSG misquotes the language of Section 2.4.2 of the Agreement. In the Rule 56(f) Declaration, CSG states that "[t]he Independent Valuation, in turn, is either the value as agreed between CSG and SD3 or the average of two 'Independent Valuations of the Company,' each to be obtained by CSG and SD3 from a Big Four accounting firm." Section 2.4.2 does not state that the Independent Valuation of the Company is "the average of two 'Independent Valuations of the Company,'" but instead states that it is "the average of the two valuations."[71] CSG argued to the Court that Delaware law requires the insertion of "independent" into Section 2.4.2 and therefore it was proper for CSG to add the word "independent" even though it is not actually part of the Agreement.

III. PARTIES' CONTENTIONS

A. SD3's CONTENTIONS

SD3 contends that it is entitled to summary judgment Count I because the undisputed facts prove that CSG owes SD3 the Penalty Amount. SD3 argues that the uncontested facts support the existence of a valid, enforceable contract between the parties—the Agreement. SD3 further contends that it is undisputed that CSG triggered its obligations under Section 2.4 of the Agreement and breached the Agreement by failing to pay the Penalty Amount. Lastly, SD3 claims that CSG's breach of the Agreement caused SD3 to suffer easily calculated damages.

[71] *See* Rule 56(f) Decl. ¶ 2; Nwaeze Decl., Ex. 1, § 2.4.2.

B. CSG'S CONTENTIONS

CSG first contends that the PwC Report is not the "Independent Valuation" required by the Agreement. Second, CSG argues that the PwC Report contains basic flaws that reflect Mr. Qureshi's lack of independence and mandate rebuttal expert testimony. Third, CSG claims that partial summary judgment is premature because the parties are still in the discovery process. Fourth, CSG argues that the Court has jurisdiction over disputes concerning the Independent Valuation of RETIA pursuant to the Agreement. Lastly, CSG contends that SD3 is not entitled to pre-judgment interest.

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[72] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[73] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[74] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[75] If

[72] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[73] *Id.*
[74] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[75] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).

the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[76]

V. DISCUSSION

When material facts are in dispute, or it seems desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances, summary judgment is not appropriate.[77] The parties must have a reasonable opportunity to present all facts pertinent to the motion when issues are decided on summary judgment.[78] Generally, parties may first obtain discovery of any matter not privileged that is relevant to the subject of the pending action.[79]

A. CSG OWES SD3 THE PENALTY AMOUNT

In order to prevail on a common law breach of contract claim, a party must establish: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages.[80] Courts evaluating whether a breach occurred may "interpret clear and unambiguous [contractual] terms according to their ordinary meaning."[81]

Here, the record indicates that CSG breached Section 2.4 of the Agreement, and that SD3 is entitled to the Penalty Amount. The existence of a valid, enforceable contract (the Agreement) between CSG and SD3 is uncontested. CSG concedes to the breach throughout its pleadings and discovery responses, and its witnesses testified to the same under oath at their depositions.[82]

Additionally, there is no dispute that CSG triggered its obligations under Section 2.4 and has now breached the Agreement by failing to pay the Penalty Amount. Specifically, Section

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[76] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[77] *Annestella v. GEICO General Ins. Co.*, 2014 WL 4229999, at * 3 (Del. Super. Ct. Aug. 18, 2014); *see also In re Morrow Park Holding LLC*, 2018 WL 2123272, at *2 (Del. Ch. Mar. 28, 2018).
[78] *Mann v. Oppenheimer*, 517 A.3d 1056, 1060 (Del. 1986).
[79] *See id.* at 1061.
[80] *VLIW Tech., LLC v. Hewlett–Packard*, Co., 840 A.2d 606, 612 (Del. 2003).
[81] GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 780 (Del. 2012).
[82] Nwaeze Dec., Ex. 19, M. Strnad Tr. 82:4–5; Ex. 18, J. Strnad Tr. 81:6–10; Ex. 21, I. Kadlecova Tr. 99:11–25.

2.4.1 of the Agreement expressly and unambiguously states that if CSG transferred a majority of its shares in RETIA before July 1, 2021, CSG "shall pay to [SD3] upon its written demand a contractual penalty" in the form of the Penalty Amount.[83]

On June 20, 2017, CSG transferred its shares in RETIA to Technology CS—a company owned by Michal Strnad, CSG's current CEO and owner.[84] CSG informed SD3 of the transfer by way of a letter dated November 5, 2017.[85] The parties were unable to mutually agree within 14 days on the Penalty Amount. Thereafter, the parties engaged two independent Big Four accounting firms to value RETIA. EY and PwC have both completed their valuation reports.

Lastly, CSG's breach of contract has caused SD3 to suffer damages. The Agreement calculates the Penalty Amount as 25% of the difference between RETIA's Independent Valuation and the contractually provided Exercise Price of 540,000,000 CZK.[86] Section 2.4.2 states, "the Independent Valuation of [RETIA] shall equal the average of the two valuations"—i.e., the average of the two valuations determined by EY and PwC in their respective reports.[87] CSG argues that the PwC report is not an independent valuation, but rather an expert report advocating SD3's views on the valuation of RETIA. Therefore, it is undisputed that CSG owes SD3 the Penalty Amount under the Agreement and the Court will grant summary judgment on this point.

Calculation of the Penalty Amount seems straightforward. Section 2.4.1 and Section 2.4.2 control. The Agreement unequivocally states "the Independent Valuation of the Company [*i.e.*, RETIA] shall equal the average of the two valuations."[88] The Agreement provides that the

[83] Nwaeze Dec., Ex. 1; Am. Compl. ¶¶ 9–10, 52; Nwaeze Dec., Ex. 19, M. Strnad Tr. 39:24–40:4, 41:15–20.
[84] Nwaeze Dec., Ex. 2, p. 3; Ex. 3, p. 3 (admitting the same); Ex. 5; Ex. 18, J. Strnad Tr. 162:19–164:1; Ex. 19, M. Strnad Tr. 77:10–18, 78:12–79:18.
[85] Am. Compl. ¶¶ 12–13; Nwaeze Dec., Ex. 6; id. at Ex. 19, M. Strnad Tr. 85:20–86:1, 86:24–87:8.
[86] Nwaeze Dec., Ex. 1 § 2.4.1.
[87] *See* Nwaeze Dec., Ex. 13, Oct. 28, 2019 H'rg Tr. 12:15–13:5.
[88] Nwaeze Decl., Ex. 1 at § 2.4.2.

two valuations are to be a valuation done by a Big Four accounting firm hired by CSG and a valuation by a Big Four accounting firm hired by SD3. EY and PwC are the two Big Four accounting firms hired by CSG and SD3 respectively. The EY Report values RETIA at 555,000,000 CZK and the PwC Report values RETIA at 980,000,000 CZK. The average of these two valuations is 757,500,000 CZK. Thus, RETIA's Independent Valuation is 767,500,000 CZK and the Penalty Amount, per Section 2.4.1, is 56,875,000 CZK—25% of the difference between RETIA's Independent Valuation and the contractually provided Exercise Price:

Independent Valuation	757,500,000 CZK
Exercise Price	540,000,000 CZK
Net Difference	227,500,000 CZK
Percent Multiplied	25%
PENALTY AMOUNT	56,875,000 CZK

However, CSG disputes the independent nature of the PwC Report. CSG also contends that the PwC Report's valuation was calculated improperly. CSG submitted a Civil Rule 56(f) seeking discovery regarding the independent nature of the PwC Report and to challenge the validity of the valuation.

The Court will not allow discovery on the issue of whether the PwC Report's valuation was calculated properly. The Court refuses to allow CSG to take inconsistent litigation positions on that issues. CSG has prevented SD3 from challenging calculation method used in the EY Report. CSG objected to SD3's discovery requests and interrogatories and stated:

> Many of the discovery requests appear to presume that SARN can attack the validity of the EY valuation by questioning whether the value should have been more. But the Call Option Agreement does not contemplate or permit this claim…. For the foregoing reasons, CSG objects to the document requests and

Exhibit B

to Appellant
SARN SD3's
Opening Brief
on Appeal

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 201[9]. Nwaeze Decl., Ex. 12, ¶ 49; *id.* at Ex. 14. PwC and CSG discussed the November 201[9] 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 revied 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.

> interrogatories to the extent they seek information for the purpose of attacking the amount determined by EY in its Independent Valuation.[89]

As such, CSG is now foreclosed from taking similar discovery as to the PwC Report.

In addition, the Court reads the plain and unambiguous language of Section 2.4.2 as consistent with CSG's objection. Section 2.4.2 anticipates that the valuations from two Big Four accounting firms may be different. Instead of calling for discovery and disputes, Section 2.4.2 provides that the Independent Valuation of the Company shall be the average of the two valuations. Moreover, Section 2.4.2 does not anticipate "independent" valuations by the two Big Four accounting firms. Instead, Section 2.4.2 just uses valuation without the using the term "independent valuations," and has each party paying for the costs associated with their retained Big Four accounting firm.

B. LIMITED DISCOVERY IS PERMITTED ON THE INDEPENDENCE OF THE PwC REPORT

The only remaining question is the PwC Report's independence. The parties drafted Section 2.4.2 to avoid litigation. SD3 initiated this civil action. To date, the litigation has been very contentious. For example, the Court had to order CSG to provide information to SD3 or PwC.

The PwC Retainer Agreement seems to indicate that SD3's litigation counsel will have input on valuation. That was not contemplated by Section 2.4.2. The PwC Retainer Agreement provides that: (i) SD3's litigation counsel "is instructing [PwC];" (ii) Mr. Qureshi will also provide an expert report on the "calculation of damages caused by the alleged decrease in the value of RETIA" (*i.e.*, damages on the second count of the Amended Complaint); (iii) Mr. Qureshi will provide a draft of his report for litigation counsel's input; and (iv) SD3's litigation

[89] Nwaeze Decl., Ex. 2, p. 4.

counsel has the "ability to make decisions in relation to the services and [PwC's] recommendations."[90]

Here, it is clear that the "Independent Valuation" relevant to this dispute is the average of two valuations completed by Big Four Accounting Firms. CSG contends that SD3 breached the duty of good faith and fair dealing because Mr. Qureshi did not independently evaluate RETIA. CSG argues that a person lacks independence where their relationship with a party is characterized by "domination" or "control."[91] CSG argues that the PwC Retainer Agreement, email, and the PwC Report all suggest that Mr. Qureshi considers the valuation to be a litigation matter rather than a contractual obligation of the parties. CSG claims that a piece of communication CSG viewed between SD3's counsel and Mr. Qureshi shows argumentative and misleading mischaracterizations that suggest the valuation is for litigation purposes.[92] CSG contends this information warrants additional discovery on the independent nature of the PwC Report—i.e., whether it was issued in "good faith." CSG requested, under Civil Rule 56(f), a deposition of Mr. Qureshi to determine whether SD3 did dominate and control PwC valuation.

Mr. Qureshi authored a declaration in support of the Motion. In that declaration, Mr. Qureshi makes the follow 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.
>
> 8. In preparing the PwC Valuation Report, I was assisted by a qualified team with extensive valuation experience, including Martin Kozak and Bohuslav Cernousek, who are both senior managers within the PwC structure. . . .

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[90] Ex. 18 at 1-2.

[91] *Nelson v. Emerson*, 2008 WL 1961150, at *9 (Del. Ch. May 6, 2008).

[92] Ex. 19, email from Mr. Qureshi to R. Borneman, Dec. 20, 2019, with subject heading "Litigation - Retia, a.s and SD3 - Valuation," and referring to a business plan prepared by Retia for the EY Independent Valuation as being prepared for a "litigation purpose." *Compare with* Hasman Decl. Ex. 2, the minutes of the very substantive December 20, 2019 meeting between RETIA and CSG officers and PwC personnel that Mr. Qureshi claims did not happen.

9. Further, before finalizing the PwC Valuation Report, the report was peer reviewed by Miroslav Bratrych who did not directly assist in the drafting. The purpose of this peer review process is to ensure quality of our final deliverable, particularly of the final valuation in this case. . . .

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." . . . .[93]

[93] D.I. No. 195. Qureshi Decl. at 1-9.

The Court finds this statements to be strong indicators of the independence of Mr. Qureshi and PwC. The Court has no reason to believe that Mr. Qureshi would make improper declarations or sacrifice the reputation of PwC over this litigation. However, the Court notes that some of these declarations are inconsistent with the PwC Retainer Agreement provisions. As such, the Court will allow CSG to test these inconsistencies in discovery.

While the Court will not allow CSG to attack the method of calculating the valuation of RETIA, the Court will allow ***LIMITED*** discovery relating to the implied covenant of good faith and fair dealing on the declarations listed above and the PwC Retainer Agreement. The discovery must be limited in scope and amount. Without leave of the Court, CSG is entitled to no more than 3 document request (including subparts) and a four-hour deposition of Mr. Qureshi. The Court is not suspending the attorney-client privilege or the work product doctrine but documents or testimony withheld on those reasons must be set out on a privilege log. The discovery must be completed no later than February 5, 2021.

After the deposition, the parties will submit supplemental briefing on this sole issue by noon on February 12, 2021. The supplemental briefing shall not exceed five double spaced pages.

VI. CONCLUSION

For the reasons stated above, the Court **GRANTS in part and DEFERS in part** the Motion and will allow for limited discovery on the "independent" nature of the PwC Report.

IT IS SO ORDERED.

December 23, 2020
Wilmington, Delaware

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

cc: File&ServeXpress

Exhibit C

to Appellant
SARN SD3's
Opening Brief
on Appeal

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

ORDER DENYING SARN SD3 LLC'S MOTION FOR SANCTIONS FOR NONCOMPLIANCE WITH DISCOVERY ORDERS

On this 8th day of June, 2022, Plaintiff SARN SD3 LLC's Motion for Sanctions for Non-Compliance with Discovery Orders (the "Motion") filed by Plaintiff SARN SD3 LLC ("SD3") on April 22, 2022; the Defendant Czechoslovak Group, A.S.'s Brief in Opposition to Plaintiff's Motion for Sanctions (the "Opposition") filed by Defendant Czechoslovak Group, A.S. ("CSG") on May 17, 2022; the arguments in support of the Motion and the Opposition made by counsel at the hearing held on May 23, 2022 (the "Hearing"); the entire record pertaining to this civil action,

1. The Court does not find cause to grant the relief sought in the Motion. The Motion seeks an extraordinary discovery sanction/remedy that includes revising a decision (the "Decision") issued by the Court on or about December 23, 2020. During the Hearing, the Court noted that the Motion seeks discovery sanctions under Civil Rules 26 and 37 and that relief regarding the Decision should be made under Civil Rule 60.

2. The Court finds the record is not clear that a discovery violation, if any, would warrant the type of relief sought in the Motion.

3. Allowing new valuation reports based on newly discovered evidence could possibly require vacating or amending the Decision. After reviewing the Motion, the Opposition, the Decision and the relief sought, the Court continues to find that SD3 is seeking relief from the Decision due to newly discovered evidence and not discovery sanctions. As such, the Motion seeks relief under the wrong rules and standards.

IT IS HEREBY ORDERED that the Motion is **DENIED;** and

IT IS HEREBY FURTHER ORDERED that the Motion **DENIED** without prejudice to SD3 seeking relief under Civil Rule 60 with proper notice to CSG; and

IT IS HEREBY FURTHER ORDERED that, if SD3 wants to seek relief under Civil Rule 60, SD3 is entitled to a Rule 30(b)(6) deposition of CSG regarding the "J&T Business Plan" (as defined in the Motion) so that SD3 can clarify whether the J&T Business Plan is a document containing a "[Retia]-prepared business plan for the period 2017-2021" or is, to use CSG's characterization, a document created by CSG for J&T Banka for a loan and does not contain a Retia prepared business plan "as part of Retia's contemporaneous budgeting and business planning."

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

cc: File&ServeXpress

Exhibit D

to Appellant
SARN SD3's
Opening Brief
on Appeal

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: January 18, 2023[1]
Decided: April 27, 2023

Upon Plaintiff SARN SD3 LLC's Rule 60 Motion to Amend the Court's Count I Decision
DENIED

Mackenzie M. Wrobel, Esquire, Duane Morris LLP, Wilmington, Delaware, Ryan E. Borneman, Esquire, Duane Morris LLP, Philadelphia, Pennsylvania, *Attorneys for Plaintiff SARN SD3 LLC*.

Philip Trainer, Jr., Esquire and Tiffany Geyer Lydon, Esquire, Ashby & Geddes, Wilmington, Delaware, Kenneth J. Pfaehler, Esquire, Dentons US LLP, Washington, D.C., *Attorneys for Defendant Czechoslovak Group A.S.*

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")[2] 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")[3] on SD3's Motion for Partial Summary Judgment[4] on Count I of the

[1] D.I. No. 339.
[2] Capitalized terms not defined here shall have the meanings ascribed to them in the Decision.
[3] *SARN SD3 LLC v. Czechoslovak Group A.S.*, 2020 WL 12719975 (Del. Super. Dec. 23, 2020).
[4] D.I. No. 183.

Complaint—Breach of Contract Concerning the Penalty Amount (the "SJ Motion"). The Court 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). On November 15, 2021, the Court found that the evidentiary record demonstrate that the PwC Report does not constitute a breach of good faith and fair dealing (the "Supplemental Decision").[5]

The Court is now addressing Plaintiff SARN SD2 LLC's Rule 60 Motion to Amend the Court's Count I Decision (the "Motion") filed by SD3. SD3 asks the Court to amend the Decision and reset the Penalty Amount. CSG opposes the relief. The Court held a hearing on the Motion on January 10, 2023. At the end of the hearing, the Court took the Motion under advisement. Subsequently, SD3 filed an additional paper to address an issue purportedly arose at the hearing.

For the reasons set forth below, the Court **DENIES** the Motion.

II. BACKGROUND

On December 13, 2017, SD3 filed its original Complaint against CSG. CSG moved to dismiss the Complaint. The Court granted in part and denied in part CSG's motion on September 13, 2018. SD3 filed an Amended Complaint on September 28, 2018. CSG filed its original Partial Answer on October 12, 2018. After additional motion practice, CSG filed its Amended Answer and Counterclaim on February 25, 2019.

SD3 brought two claims against CSG in the Amended Complaint. In Count I, SD3 asserted a claim against CSG for failing to pay the Penalty amount owed under the Agreement. SD3 asserted a separate breach of contractual fiduciary duty claims in Count II.[6]

[5] *SARN SD3 LLC v. Czechoslovak Group A.S.*, 2021 WL 5710897 (Del. Super. Nov. 15, 2021).
[6] SD3 and CSG resolved Count II that resulted in a stipulated dismissal of that claim. Mot ¶ 1 n.4.

The Court entered a confidentiality order on March 4, 2019.[7] The parties then commenced the discovery process.[8] According to the docket, SD3 initiated third-party discovery as early as June 12, 2019.[9] On July 1, 2019, SD3 served a second set of requests for production and interrogatories and CSG propounded its first requests for production of documents and interrogatories.[10] Next, SD3 moved the Court for orders issuing letters rogatory for subpoenas seeking documents.[11] CSG objected to these motions.[12] The Court overruled CSG's objection and granted the motions on July 29, 2019.[13]

The parties each needed one of the Big Four accounting firms to provide a valuation of RETIA in connection with Count I. As discussed in detail in the Decision, these valuations are necessary to determine the Penalty Amount. CSG retained EY. SD3 hired PwC on July 26, 2018.[14] PwC needed information from RETIA and E&Y to calculate the valuation of RETIA for SD3.

The Court needed to get involved in the production of valuation information to PwC.[15] During discovery, CSG produced a "Highly Confidential" copy of the EY Report to SD3's litigation counsel.[16] 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.[17] SD3 made repeated requests for CSG to reproduce the EY Report without the

[7] D.I. No. 43.
[8] SD3 first commenced discovery on CSG on September 6, 2018. D.I. No. 25.
[9] D.I. No. 51.
[10] D.I. Nos. 59 and 60.
[11] D.I. Nos. 61-70.
[12] D.I. No. 77.
[13] D.I. Nos. 83-98.
[14] *SARN SD3 LLC*, 2020 WL 12719975, at *4.
[15] *Id.; see also* D.I. No. 142 and D.I. 145.
[16] *SARN SD3 LLC*, 2020 WL 12719975, at *4
[17] *Id*.

overbroad confidentiality designation that prohibited SD3 and PwC's access.[18] CSG never delivered a re-designated EY Report despite representing that one was forthcoming.[19]

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.[20]

PwC could not start its work until CSG and RETIA provided required information to PwC.[21] PwC and SD3 did not get immediate access.[22] PwC and SD3 were delayed until after this Court's Order dated October 28, 2019 and instructions at a December 20, 2019 teleconference.[23] After December 20, 2019, PwC began obtaining answers to its questions from CSG's principals concerning the EY Report.[24] PwC made repeated requests of CSG and RETIA for financial information necessary for its valuation.[25] PwC issued its report on March 10, 2020.[26]

PwC is also SD3's litigation financial advisor/expert. This role was litigated in connection with Count I. The Court addressed the overlapping roles PwC plays in the Decision[27] and in the Supplemental Decision.[28]

The COVID-19 pandemic (the "Pandemic") interrupted this case. Moreover, the Pandemic made actions in this case even more difficult. All civil proceedings had to continue

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at *5.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at *4-5, *11-12.
[28] *SARN SD3 LLC,* 2021 WL 5710897, at *1-3.

with discovery during the Pandemic, but discovery productions and depositions took on unique challenges. This logistics in this case were challenging. While filed in Delaware, the parties needed discovery from Europe as well as in the United States. The Court had to issue orders for discovery overseas in the form of letters rogatory.[29] At one point, the Court had to correspond with the Ministry of Justice of the Czech Republic on the validity of the Court to issue discovery orders.[30] Not all discovery was in English. Despite this, the parties moved forward.

SD3 filed the SJ Motion on March 30, 2020. SD3 filed the SJ Motion after Count I fact discovery closed and both E&Y and PwC had issued their valuation reports. CSG opposed the SJ Motion on May 14, 2020. Briefing on the SJ Motion was completed in August 2020.

The parties continued the discovery process on Count II after completing the valuation discovery on Count I. On May 22, 2020, CSG made a large production of responsive documents. In this production was the J&T Business Plan. CSG had designated the J&T Business Plan as "Highly Confidential—Subject to Protective Order." This designation restricted access to the J&T Business Plan.

SD3 represents that PwC discovered the J&T Business Plan in March 2022.[31] PwC discovered the J&T Business Plan while preparing its expert report in connection with Count II. The J&T Business Plan is a document transmitted from CSG to J&T Banka on June 19, 2017. The J&T Business Plan contains a RETIA business plan for the period 2017—2021. SD3 represents that the J&T Business Plan was prepared prior to any litigation and is "subject to laws on representations to lenders, making the document reliable for valuation."[32]

[29] *See, e.g.*, D.I. No. 218.
[30] D.I. Nos. 253, 254, 256 and 259.
[31] Mot. ¶ 8.
[32] *Id*. ¶ 9 n.5.

On April 22, 2022, SD3 filed its "Sanctions Motion." The Sanctions Motion sought relief in connection with the J&T Business Plan. The Court denied the Sanctions Motions on June 8, 2022.[33] The Court denied the Sanctions Motion without prejudice to SD3 seeking relief under Superior Court Civil Rule 60 ("Rule 60") with proper notice to CSG. In addition, the Court provides that:

> [I]f SD3 wants to seek relief under Civil Rule 60, SD3 is entitled to a Rule 30(b)(6) deposition of CSG regarding the "J&T Business Plan" (as defined in the [Sanctions] Motion) so that SD3 can clarify whether the J&T Business Plan is a document containing a "[RETIA]-prepared business plan for the period 2017-2021" or is, to use CSG's characterization, a document created by CSG for J&T Banka for a loan and does not contain a RETIA prepared business plan "as part of RETIA's contemporaneous budgeting and business planning."[34]

SD3 took a Rule 30(b)(6) deposition of CSG. The first part of the deposition of Ilona Kadlecova began on August 9, 2022. According to SD3, CSG stopped the deposition and continued the deposition until September 6, 2022. Ms. Kadlecova testified that RETIA representatives (CFO and controller) provided CSG with the initial data for the J&T Business Plan. Ms. Kadlecova also noted that it was important that J&T Banka agreed with the assessed potential of RETIA as of June 2017. Ms. Kadlecova stated that the J&T Business Plan contained information from RETIA that was reviewed and adjusted by CSG in a back-and-forth process between the two entities. Ms. Kadlecova provides that the J&T Business Plan was a document prepared at the "instruction" of CSG so that Technology CS a.s. could obtain a loan to purchase RETIA.

As presented by the parties, the J&T Business plan falls somewhere between how it is characterized by SD3 or CSG. The J&T Business Plan clearly contains financial information

[33] D.I. No. 305.
[34] *Id.*

regarding RETIA; however, the J&T Business Plan does not appear to be "RETIA-prepared business plan for the period 2017-2021."

III. LEGAL STANDARD

Rule 60 governs relief from a final judgment or order. Rule 60(a) allows any party in a civil action to file a motion to correct "clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission."[35] In addition, Rule 60(b) permits the Court, upon such terms that are just, to vacate a final judgment, order, or proceeding for the following reasons:

> (1) Mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.[36]

A court applies those criteria with two important values in mind: "the integrity of the judicial process and the finality of judgments."[37] "A Rule 60(b) motion is not an opportunity for a do-over or an appeal."[38] A Rule 60(b) motion is also not "a substitute for a [Rule 59] motion for a new trial."[39]

"The determination whether to grant a motion for relief pursuant to Rule 60(b) rests in the sound discretion of the trial court."[40] "Because of the significant interest in preserving the

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[35] Super. Ct. Civ. R. 60(a).
[36] Super. Ct. Civ. R. 60(b).
[37] *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996).
[38] *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Gp. (Hldg.)*, 2012 WL 4847089, at *5 (Del. Ch. Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013).
[39] 1 Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 4.09[d][1] at 4-47 (2d ed. 2021).
[40] *Joseph v. Shell Oil Co.*, 1985 WL 21146, at *1 (Del. Ch. June 6, 1985).

finality of judgments, Rule 60(b) motions are not to be taken lightly or easily granted."[41] Although not specifically identified in the rule, "[e]quitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b)."[42] The language of the rule incorporates equitable principles of fairness by calling for the court to grant relief "upon such terms as are just."[43]

SD3 is seeking relief under Rule 60(b)(2) and Rule 60(b)(6).[44]

"Rule 60(b)(2) affords a disappointed litigant an opportunity to obtain judicial reconsideration of the merits of his claim on account of 'newly discovered evidence.'"[45] Because everyone has an interest in the finality of judgments, Delaware courts have held that the newly discovered evidence must indicate "that an injustice is clearly threatened."[46]

To prevail under Rule 60(b)(2), the moving party must show:

> (1) the newly discovered evidence has come to his knowledge since the judgment; (2) that it could not, in the exercise of reasonable diligence, have been discovered for use before the judgment; (3) that it is so material and relevant that it will probably change the result; (4) that it is not merely cumulative or impeaching in character; and (5) that it is reasonably possible that the evidence will be produced at the trial.[47]

Rule 60(b)(6) is the "catchall provision of Rule 60(b)."[48] Delaware has adopted the "extraordinary circumstances" test for Rule 60(b)(6) motions.[49] The "extraordinary

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[41] *Epstein v. Matsushita Elec. Indus. Co., Ltd.* (*In re MCA, Inc. S'holder Litig.*), 785 A.2d 625, 635 (Del. 2001).
[42] 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2857 (3d ed.) Westlaw (database updated Apr. 2022) [hereinafter Wright & Miller].
[43] Super. Civ. R. 60(b).
[44] In the *Plaintiff SARN SD3 LLC's Reply in Further Support of its Rule 60 Motion to Amend the Court's Count I Decision*, SD3 contends that it also sought relief under Rule 60(b)(3). The Motion does not seek relief under Rule 60(b)(3). In the Motion, SD3 specifically quoted language from Rule 60(b)(2) ("…newly discovered evidence…") and Rule 60(b)(6) ("…any other reason justifying relief from the operation of the judgment.") but did not reference Rule 60(b)(3) or relief due to fraud, misrepresentation, or other misconduct of CSC. Mot. ¶ 14.
[45] *Norberg v. Sec. Storage Co.*, 2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002).
[46] *Credit Lyonnais Bank Nederland, N.V.*, 1996 WL 757274, at *1.
[47] *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991)(cleaned up).
[48] *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A. 625, 634 n.9 (Del. 2001).
[49] *Jewell v. Div. of Soc. Serv.*, 401 A.2d 88, 90 (Del. 1979).

circumstances" standard defines the words, "any other reason justifying relief," in Rule 60(b)(6) as "vest[ing] power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[50] Rule 60(b)(6) requires a special showing—*i.e.*, the standard to succeed under Rule 60(b)(6) is more exacting than under the other subsections of Rule 60(b).[51]

IV. DISCUSSION

SD3 seeks to amend the Decision under Rule 60(b)(2) or (b)(6) in order to revise the Penalty Amount. SD3 argues that the Court should consider a new PwC independent valuation of RETIA that includes consideration of the J&T Business Plan. SD3 argues that relief is warranted because (i) the J&T Business Plan constitutes new evidence under Rule 60(b)(2); or (ii) CSG's conduct in producing the J&T Business plan constitutes extraordinary circumstances under Rule 60(b)(6).

CSG opposes the Motion, contending that the J&T Business Plan does not constitute "new evidence" as it was in the possession of SD3 prior to the Decision. CSG does not directly address SD3's Rule 60(b)(6) argument. Instead, CSG attacks the value of the J&T Business Plan and whether it should be used in a valuation.

The Court does not find that relief under Rule 60(b) is warranted. The J&T Business Plan does not constitute newly discovered evidence. The answer here lies in the undisputed timeline.

SD3 retained PwC on July 26, 2018. PwC advised SD3 both as a valuation expert (Count I) and on litigation (Count II). Although the Court needed to intervene, EY, CSG and RETIA provided financial information to PwC and PwC issued its valuation on

[50] *Id*. (quoting *Klapprott v. United States*, 335 U.S. 601, 615 (1949)).
[51] *MCA, Inc.*, 785 A.2d at 634 n.9.

March 10, 2020. SD3 then moved for summary judgment on Count I. The Court issued Decision on December 23, 2020 and the Supplemental Decision on November 15, 2021.

CSG produced the J&T Business Plan to SD3 on or about May 22, 2020. PwC did not discover the existence of the J&T Business Plan until March 2022. The time between production of the J&T Business Plan and the Decision is seven months. The time between production of the J&T Business Plan and the Supplemental Decision is almost eighteen months**.**

With this timeline, SD3 cannot satisfy the test under Rule 60(b)(2). SD3 discovered the J&T Business Plan after the Decision and the Supplemental Decision. However, SD3 is unable to show that it could not, in the exercise of reasonable due diligence, have discovered the J&T Business Plan before the Court issued the Decision and the Supplemental Decision. PwC has been actively involved and advising SD3 since July 26, 2018. Discovery has been contentious, but CSG produced the J&T Business Plan to SD3 on or about May 22, 2020. SD3 has not been shy in seeking the Court's involvement with the discovery process if a document was not produced or was improperly designated as "Highly Confidential." Moreover, given some of CSG's tactics, SD3 has not merely relied upon CSG's representations when reviewing financial records or other types of document productions.

The Court finds that SD3 could have discovered the J&T Business Plan for use in the litigation prior to December 23, 2020 or November 15, 2021. Accordingly, the Court will deny the Motion as failing to satisfy Rule 60(b)(2).

The Court also finds that SD3 cannot satisfy the more exacting standard of Rule 60(b)(6). The analysis here is substantially similar to one under Rule 60(b)(2) as to

whether SD3 can show "extraordinary circumstances" exist that would warrant amending the Decision. The Court notes that CSG have identified and produced the J&T Business Plan earlier than May 22, 2020. CSG has not been entirely forthcoming or even consistent with its positions on valuation and discovery; however, SD3 should have been more diligent when it received the document production on May 22, 2020. CSG takes the position that the J&T Business Plan is not relevant to the Penalty Amount. SD3 and PwC disagree. The fact remains, however, that SD3 had the J&T Business Plan in May 2020 and, for some reason, did not identify it as relevant.

The Court and the parties have an interest in the finality of judgments. Rule 60(b)(2) and 60(b)(6) provide relief when circumstances warrant revisiting a final judgment. The Court finds that the Motion fails to demonstrate that relief is warranted under Rule 60(b)(2) or Rule 60(b)(6).

V. CONCLUSION

For the reasons stated above, the Motion is **DENIED**.

IT IS SO ORDERED.

April 27, 2023
Wilmington, Delaware

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

cc: File&ServeXpress

Exhibit E

to Appellant
SARN SD3's
Opening Brief
on Appeal

ASHBY & GEDDES

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July 20, 2023

By File & Serve*Xpress* and Email

See order on PS. 4.

The Honorable Eric M. Davis
Delaware Superior Court Judicial Chambers
Leonard L. Williams Justice Center
500 North King Street, Tenth Floor
Wilmington, Delaware 19801

Re: *SARN SD3 LLC v. Czechoslovak Group a.s.*,
C.A. No. N17C-12-185-EMD (CCLD)

Dear Judge Davis:

We write on behalf of Defendant regarding the form of Final Order and Judgment submitted today by Plaintiff. Pursuant to the Court's instruction, Plaintiff amended its original form of Final Order and Judgment by converting the amounts set forth in Czech crowns to U.S. dollars. Despite considerable back-and-forth between counsel for the parties, we have been unable to agree on the appropriate date and corresponding exchange rate to employ in the conversion. The disagreement is not academic, inasmuch as using Plaintiff's exchange rate results in an approximately $375,000 windfall to Plaintiff.

Plaintiff's form of Final Order and Judgment applies a current exchange rate of 21.245 Czech crowns to the dollar, whereas the appropriate rate to be applied is that in effect on June 20, 2017 – the date on which the parties agreed Retia would be valued by their respective independent experts – of 23.601 Czech crowns to the U.S. dollar.

A review of Delaware law has not revealed any decisions directly on point. The Court of Chancery's decision in *In re Transamerica Airlines, Inc.*, 2009 WL 2217748, at *14 (Del. Ch. July 22, 2009), *aff'd sub nom. Transamerica Airlines, Inc. v. Akande*, 991 A.2d 19 (Del. 2010) does address the issue of what date's exchange rate should be used, but in the context of the transfer of a Nigerian judgment to Delaware. Even in that case, though, the Court applied the exchange rate in effect in 1999 when the Nigerian judgment was entered in that country and not the exchange rate in effect when it was entered in Delaware. *Id.*

Courts outside of Delaware that have addressed the issue have tied the exchange rate to the date of the breach or injury, similar to the determination of when pre-judgment interest begins to run. *See, e.g.*, *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 323 (6th Cir. 2011) (affirming conversion date at time of injury as a way to "provide for greater certainty in economic relationships," and noting that judgment date was "arbitrary"); *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 932 F. Supp. 2d 153, 162 (D.D.C. 2013), *aff'd*, 603 F. App'x 1 (D.C. Cir. 2015) ("In

sum, the Court concludes that . . . it is appropriate to convert Continental's foreign currency award using the exchange rates prevailing on the date of the 'breach,' which in the context of an arbitral award confirmation means the day that the award issued, here August 14, 2008.").

As with *Transamerica Airlines*, these decisions do not directly address the situation presented here, where the parties agreed to employ independent experts to determine the value of Retia as of June 20, 2017. The Penalty Amount in Plaintiff's original form of Final Order and Judgment is simply a reflection of that determined value, as of that date, and there is no logical reason why that value – determined in Czech crowns – should be converted as of the date of judgment, a date the 6th Circuit Court of Appeals recognized as "arbitrary." *Ventas, Inc.* at 323.

Arbitrarily applying today's exchange rate would result in a windfall for Plaintiff, effectively increasing the determined Penalty Amount. The whole purpose of the pre-judgment interest that is being awarded is to protect the time value of that Penalty Amount, and Plaintiff's insistence that the conversion to U.S. dollars be as of today – as opposed to June 20, 2017 – constitutes double-dipping. Specifically, fluctuations in exchange rates, like inflation, are subsumed in the time-value of money. Awarding the benefit of a fluctuation in the exchange rate *and* pre-judgment interest constitutes a double recovery.

We are available at the Court's convenience should Your Honor wish to address this matter further.

Respectfully submitted,

/s/ Philip Trainer, Jr.

Philip Trainer, Jr. (#2788)

Words: 606

cc: Prothonotary (by e-filing)
Coleen Hill, Esq. (by e-filing)
Mackenzie M. Wrobel, Esq. (by e-filing)

So Ordered that the conversion rate at time of valuation, June 20, 2017, is the applicable rate. That rate plus pre and post judgment interest protects the expectations of the parties. This decision relies upon the reasoning in Ventas, Inc. v HCP, Inc., 647 F.3d 291, 323 (6th Cir. 2011) (apply Rehnquist 3rd Foreign Judgments and Kentucky law). Plaintiff to submit an order.

Judge
8/23/2023

Exhibit F

to Appellant
SARN SD3's
Opening Brief
on Appeal

So Ordered
/s/ Eric M Davis Sep 05, 2023

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.	)	

REVISED FINAL JUDGMENT AND ORDER

1. **WHEREAS**, on October 7, 2016, Plaintiff SARN SD3 LLC ("***SD3***") and Defendant Czechoslovak Group a.s. ("***CSG***" and, together with SD3, the "***Parties***") entered into a Call Option Agreement ("***Agreement***"), which granted SD3 an option to purchase a 25% equity interest in CSG's then wholly-owned subsidiary RETIA, a.s. ("***RETIA***").

2. **WHEREAS**, pursuant to Section 2.4.1 of the Agreement, the Parties agreed that if at any time before July 1, 2021, CSG ceased to own the majority of the shares of RETIA, then CSG owed SD3 a penalty amount equal to 25% of the difference between the value of RETIA, based on an independent valuation of the company and the exercise price of 540,000,000.00 CZK ("***Penalty Amount***").

3. **WHEREAS**, CSG ceased to own the majority shares of RETIA on June 20, 2017.

4. **WHEREAS**, pursuant to Section 2.4.2 of the Agreement, the Parties agreed that if the Parties disputed the valuation of RETIA, then SD3 and CSG agreed to retain separate Big Four accounting firms to conduct a valuation and the valuation of RETIA would equal the average of the two valuations.

5. **WHEREAS**, on December 13, 2017, SD3 filed a complaint, as amended on September 28, 2018 ("***Complaint***"), against CSG asserting cause of actions for breach of contract concerning payment of the Penalty Amount under the Agreement ("***Count I***") and breach of contract concerning contractually imposed fiduciary duties ("***Count II***").

6. **WHEREAS**, on October 12, 2018, CSG filed a partial answer, which CSG completed and amended on February 25, 2019, asserting against SD3 a counterclaim for defamation.

7. **WHEREAS,** on March 5, 2019, the Big Four accounting firm hired by CSG, Ernst & Young ("***EY***"), issued a report valuing RETIA as of June 20, 2017 at 555,000,000.00 CZK (the "***First EY Report***"). On March 10, 2020, the Big Four accounting firm hired by SD3, PriceWaterhouseCoopers ("***PwC***"), issued a report valuing RETIA as of June 20, 2017 at 980,000,000.00 CZK (the "***First PwC Report***").

8. **WHEREAS**, on March 30, 2020, SD3 filed its Motion for Partial Summary Judgement (the "***MSJ***") on Count I. CSG opposed.

9. **WHEREAS**, after briefing and argument, on December 23, 2020, the Court issued its Memorandum Opinion and Order (Trans. ID 66207945, cited herein as "***Count I Decision***"), granting in part the relief sought in SD3's MSJ on grounds that there existed "no genuine issue as to any material fact and that, as a matter of law, CSG's obligation to the Penalty Amount has been trigged under the Agreement" and determining the Penalty Amount to be 56,875,000 CZK but deferring a "ruling on a 'good faith and fair dealing' dispute raised by CSG as the [First] PwC Report."

10. **WHEREAS,** following certain Court ordered discovery, the Parties submitted supplemental briefing. On November 15, 2021, the Court issued its Memorandum Opinion (Trans. ID 67093479) rejecting CSG's argument and finding "that the evidentiary record demonstrates that the PwC Report does not constitute a breach of good faith and fair dealing," thus fully resolving SD3's MSJ and entitling SD3 to the Penalty Amount as calculated in the Count I Decision.

11. **WHEREAS**, SD3 filed a motion for discovery sanctions concerning the timing of CSG's production of a certain J&T Business Plan. CSG opposed. In an order dated June 8, 2022, the Court denied SD3's motion "without prejudice to SD3 seeking relief under Civil Rule 60" and ordered that SD3 could pursue certain discovery if seeking relief under Civil Rule 60 (Trans. ID 67704644).

12. **WHEREAS**, the parties settled Count II of the Complaint and CSG's counterclaims and those claims were dismissed by stipulation on August 3, 2022 (Trans. ID 67894773).

13. **WHEREAS,** after consideration of the J&T Business Plan and court ordered discovery, PwC issued on October 14, 2022 a "***Second PwC Report***" wherein it calculated the value of RETIA at 1,562,000,000.00 CZK.

14. **WHEREAS**, pursuant to the Court's direction in an order dated June 8, 2022, SD3 filed a Motion pursuant to Rule 60 (Trans. ID 68274389) (the "***Rule 60 Motion***"). CSG opposed.

15. **WHEREAS**, on April 27, 2023, the Court denied the Rule 60 Motion (Trans. ID 69910726), and therefore the Penalty Amount remains the same amount as calculated in the Count I Decision:

PWC Valuation	980,000,000.00 CZK
E&Y Valuation	555,000,000.00 CZK
AVERAGE VALUATION	**767,500,000.00 CZK**
Exercise/Strike Price	540,000,000.00 CZK
NET	**227,500,000.00 CZK**
Percent Multiplied	25%
PENALTY AMOUNT CZK	**56,875,000.00 CZK**

16. **AND WHEREAS**, pre-judgment interest has accrued on the Penalty Amount owed by CSG to SD3 at the rate of 6.75% from June 20, 2017 through August 29, 2023, in accordance with 6 *Del. C.* § 2301, in the amount of $998,808.36, as per the calculation reflected in **Exhibit A** hereto.

IT IS HEREBY ORDERED, that judgment on Count I shall be entered in favor of SD3 and against CSG in the amount of **56,875,000.00 CZK (Penalty Amount), equivalent to 2,388,750.00 U.S. Dollars,**[1] **and $998,808.36 (in pre-judgment interest) for a total judgment in the amount of $3,387,558.36** and, thereafter, in accordance with 6 *Del. C*. § 2301(a), post-judgment interest, which shall accrue on the total amount awarded at the legal rate of 10.25% per annum, which is 5% over the Federal Reserve Discount Rate as of the date of this Judgment, with such accrual beginning from the date of the Court's approval and entry of this judgment through the date upon which judgment is satisfied.

SO ORDERED, on this __ day of _____, 2023.

_____
The Honorable Eric M. Davis

[1] Per the Court's Order dated August 23, 2023 (Trans. ID 70700242), the Treasury Reporting Rates of Exchange applied to this Order is 1.00 U.S. Dollar = 23.601 Czech Republic-Koruna as of June 20, 2017.

Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Supreme Court

Document Type: Opening Brief

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Case Details

Case Number	Case Name
291,2023C	SARN SD3 LLC v. Czechoslovak Group A.S.
294,2023C	Czechoslovak Group A.S. v. SARN SD3 LLC