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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SARN SD3 LLC,	)	
	)	
Plaintiff Below and Appellant/Cross-Appellee,	)	CONSOLIDATED No. 291, 2023 No. 294, 2023
v.	)	
	)	Court Below:
CZECHOSLOVAK GROUP A.S.,	)	Superior Court of the State of Delaware Case No. N17C-12-185 EMD (CCLD)
Defendant Below and Appellee/Cross-Appellant.	)	**PUBLIC VERSION** **Filed: April 4, 2024**

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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Dated: March 20, 2024

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Preliminary Statement

In the Opening Brief on its Cross-Appeal, Czechoslovak Group A.S. ("CSG") explained that the Superior Court erred by construing the October 2016 Call Option Agreement[1] to unambiguously provide that the valuation reports required in Section 2.4.2 of that document are final and binding, not subject to discovery, expert rebuttal, or trial, and do not need to be "independent."[2]

The Superior Court reached this judgment based on one provision of the Call Option Agreement, Section 2.4.2, despite there being no language in that section that says any of these things and despite that a different part of the Agreement, Section 7, provides that the parties submit to the jurisdiction of the courts of this State "to hear and decide any legal proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement." (B0002536, § 7.) The

[1] Referred to herein as the "Call Option Agreement" or "the Agreement," this contract granted cross-appellee SARN SD3 LLC ("Sarn") an option to purchase a 25% equity interest in CSG's then-wholly owned subsidiary, RETIA, A.S. ("Retia"), a radar manufacturer and servicer. (B0002532-38.) [redacted]

[2] Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross Appeal, filed on January 29. 2024, at 14-16, 27-34, 36-39. This brief is referred to herein as the "Opening Brief" and cited as "Opening Br."

Superior Court made such holdings on a premature summary judgment motion, when discovery remained incomplete (and in fact, would not close for months) and expert discovery was months from commencing.

After receiving CSG's brief, Sarn has responded to these points by simply parroting the Superior Court's erroneous opinions and unsupported conclusions. At page 16 of its Answering Brief, Sarn reproduces the trial court's inaccurate description of the words of Section 2.4.2 of the Call Option Agreement without correction, and then quotes the trial court's speculation, in the absence of any evidence, about "the point of the section" and what the parties must have intended—speculation based on the trial court's views about employees of Big Four accounting firms.[3]

What Sarn fails to do in its Answering Brief is identify any language in the Agreement that actually supports the Superior Court's interpretation of the contract as unambiguous. And, as explained in CSG's Opening Brief on Cross-Appeal, Section 2.4.2 and the rest of the Agreement do not say any such things. The Agreement simply provides for the Independent Valuation process. (B0002535, §

[3] Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal, filed February 28, 2024, at 16. This brief is referred to herein as the "Answering Brief" and cited as "Answering Br."

2.4.2.) It does not provide that this is a type of arbitration provision, that discovery is not allowed with respect to the process, or that the valuations cannot be challenged in litigation if they are not independent, are not in accord with valuation accounting principles and GAAP, or are otherwise methodologically flawed. Nothing in the Call Option Agreement suggests an intent to foreclose discovery into the required valuations.

Because Sarn did not prove that its construction of the Call Option Agreement was the only reasonable construction, the Superior Court was required to deny Sarn's motion for summary judgment. "We reaffirm that, in a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

In opposing Sarn's summary judgment motion, CSG only needed to demonstrate that its "interpretation was a reasonable interpretation and that, therefore, plaintiff's interpretation of the [Call Option Agreement] is not the sole reasonable interpretation." *United Rentals, Inc. v. RAM Holdings, Inc.,* 937 A.2d 810, 830 n.104 (Del. Ch. 2007). In that case, the contract is ambiguous and the case cannot be decided on summary judgment, but rather must proceed through

discovery to trial. *Id.* at 830. CSG's interpretation of the Agreement is unquestionably reasonable, as it is based on the plain language of the Agreement, what is said and what is not said. The trial court erred, and the Answering Brief offers nothing but the trial court's erroneous "reasoning." The judgment below should be vacated, and the case remanded for full discovery and trial.

ARGUMENT

I. The Court Erred In Holding that the Call Option Agreement Prevented Discovery and Examination of the "Valuations," but Instead Made Them Final and Binding on the Parties Without Judicial Recourse.

A. Sarn Has Not Established that Its Interpretation of the Call Option Agreement is the *Only* Reasonable Interpretation.

With respect to the language of Section 2.4.2, Sarn merely adopts the trial court's reasoning-by-assertion and speculation. Sarn contends that the "unambiguous terms of the Agreement did not permit a party to dispute the independence, methodology, or calculations of the other side's valuation," because the parties agreed "to 'separately hire a Big Four accounting firm, and the Independent Valuation shall equal the average of the two valuations.'" Answering Br. at 15 (misquoting B0002534, § 2.4.1). Sarn then quotes the trial court's December 23, 2020 Opinion where the court erroneously (a) found, without any basis in the language of the Agreement, that the language of Section 2.4.2 precludes discovery and disputes; (b) concluded, by ignoring the plain language of the Agreement, that the "Independent Valuation" of Retia did not need to be independent; and (c) found that Section 2.4.2 "has each party paying for the costs associated with their retained Big Four accounting firm," despite the language of the sections saying the exact opposite. *Id.* at 16. "Any cost and expenses of such

accounting firms shall be borne equally by the Grantor and the Grantee." B0002535, § 2.4.2.

As explained in CSG's Opening Brief, the language of the Call Option Agreement does not support any of these interpretations. But even assuming *arguendo* that Section 2.4.2 could somehow be construed in a manner to prevent discovery, trial, and any examination of the valuations, Sarn would still not be entitled to summary judgment because Sarn did not, and cannot, establish that its construction of the Call Option Agreement is the ***only*** reasonable interpretation. As the moving party, Sarn "has the burden of establishing that its interpretation of Section [2.4.2] is the only reasonable interpretation." *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *4 (Del. Ch. Oct. 25, 2013); *see also, e.g., United Rentals, Inc. v. RAM Holdings, Inc.,* 937 A.2d 810, 830 (Del. Ch. 2007) (citing *Modern Telecomms., Inc. v. Modern Talking Picture Serv.*, 1987 WL 11286, at *3 (Del. Ch. May 27, 1987)) (same).

But Sarn's interpretation plainly is not the only reasonable interpretation. As CSG's Opening Brief reflects, CSG's interpretation is not just reasonable, but also compelling. CSG's interpretation reflects what the words of § 2.4.2 *and* § 7 actually say, as well as what they do not say. It is reasonable to conclude that § 2.4.2 is not an arbitration provision when the section says nothing about it being

one. It is reasonable to construe § 2.4.2 to permit discovery about the valuations when it does not say otherwise. It is reasonable to understand the heading "Independent Valuation" to mean the valuation process set forth in § 2.4.2 will be "independent" within the dictionary definition.[4] It is reasonable to conclude that when the parties required the valuations to be performed by Big Four accounting firms, they did so in anticipation that the accounting firms would apply appropriate valuation methodology, including GAAP and reasonable assumptions based on historical experience at Retia. It is reasonable to conclude that when § 2.4.2 says that "[a]ny cost and expenses of such accounting firms shall be borne equally by the Grantor and the Grantee," it does not mean that each party would be "paying for the costs associated with their retained Big Four accounting firm." (*Compare* B0002535, § 2.4.2 *with* Opening Br. Ex. A at 20). It is reasonable that when the

[4] There is no provision in the Call Option Agreement stating that headings are not to be given interpretive effect. *Cf.* B0002532-38. Therefore, the words of the heading may be considered as additional evidence in interpreting the provision. *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 582 n.35 (Del. Ch. 1998); *Fulkerson v. MHC Operating Ltd*., 2002 WL 32067510, at *5 (Del. Super. Ct. Sept. 24, 2002). "Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court." *NAMA Holdings, LLC v. World Market Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) (citing *Majkowski v. Am. Imaging Mgmt. Serv.*, 913 A.2d 572, 588 (Del. Ch. 2006)). This includes headings. *See* 11 Williston on Contracts § 32:5.

parties used the word "any," they meant "any." It is reasonable that when the parties agreed in Section 7 of the Agreement that the courts of Delaware would "hear and decide any legal proceeding," and "settle any disputes which may arise out of or in connection with this Agreement," that they did not imply an unwritten exception for disputes about the § 2.4.2 valuation. It is reasonable to understand that accepting the jurisdiction of the courts of this State includes accepting the Civil Rules of the Superior Court that govern such cases, including Rule 26.

In opposing Sarn's motion for summary judgment, CSG only needed to demonstrate that its "interpretation was a reasonable interpretation and that, therefore, plaintiff's interpretation of the [Call Option Agreement] is not the sole reasonable interpretation." *United Rentals,* 937 A.2d at 830 n.104; *see also, e.g., Bean v. Fursa Cap. Partners, LP,* 2013 WL 755792, at *8 (Del. Ch. Feb. 28, 2013) (where defendants raised genuine issues of material fact regarding interpretation of an agreement, and it thus was possible the agreement could be interpreted differently, summary judgment was precluded).

CSG more than met its burden in opposition to Sarn's motion. *See* Opening Br. at 26-39. CSG's interpretation is based on the plain language of the contract, read as a whole; it cannot be considered unreasonable as a matter of law. Therefore, the Call Option Agreement is, at a minimum, ambiguous; if Sarn's

interpretation were to be permitted at all, the court would have to deny Sarn's motion for summary judgment and "determine the intent of the parties at trial." *Cooper Tire*, 2013 WL 5787958, at *4; *United Rentals,* 937 A.2d at 830.

B. The Trial Court Found Section 2.4.2 To Be an Arbitration Provision Based On Its Own Views, Unsupported By Evidence.

Sarn's Answering Brief emphasizes, relying on the trial court's holding, that the "fact that Section 2.4.2 required the parties to hire one of the Big Four account [sic] firms is, in itself, an assurance that the valuation would be fair." Answering Br. at 16. Sarn then quotes the trial court:

> Now, the point [of Section 2.4.2] was, Ernst & Young is not going to come back with a value of zero because they have a reputation to uphold. And PriceWaterhouse Coopers is not going to come back with 14 billion . . . .

Id. (citing A0772-73).

Sarn then mimics the trial court in concluding that the "parties therefore unambiguously agreed to not dispute the valuation, and the Superior Court correctly limited CSG's challenges to the independence of PwC on that basis." *Id.*

But agreeing to independent valuations by Big Four Accounting Firms, to be paid for jointly by the parties, certainly can be understood as an attempt to ensure that the "Independent Valuation" was independent, and that GAAP and accounting standards were to be fairly and reasonably applied. It cannot be understood as an

imprimatur for one of the parties to sue the other party first, then hire a professional litigation expert witness with no experience valuing companies in Retia's industry or valuing call option agreements[5] as an expert witness for litigation purposes, and then have that person conduct the valuation under the direction of litigation counsel and the party—all without the ability for the opposing party to challenge the patently unreliable and inflated valuation that, inevitably, resulted from this arrangement. No rational person would agree to such a corrupted arrangement as a part of an unchallengeable arbitration-style valuation provision.

There simply is no "unambiguous agreement to not dispute the valuation." Such an agreed waiver would be a relinquishment of a right to access the courts, a right that arises not just under section 7 of the Agreement, but also at law. A waiver must be unequivocal. "The contractual waiver of a statutory right must be clear to be enforceable. The standards for proving waiver under Delaware law are quite exacting, and the facts relied upon to prove waiver must be unequivocal." *Manti Holdings, LLC v. Authentix Acquisition Co.,* 261 A.3d 1199, 1210-11 (Del. 2021) (internal citations and quotations omitted); *see also, e.g., Dirienzo v. Steel*

[5] B0002565-570.

Partners Holdings L.P., 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009). The trial court confused the independent expertise of the Big Four firms called for by Section 2.4.2 with an arbitration role. "An expert determination—whether by an appraiser, an auditor, or a different type of expert—is not an arbitration unless the parties specifically designate that expert as an arbitrator for that purpose, thereby invoking the body of law governing arbitrators." *Penton Bus. Media Holdings, LLC v. Informa PLC*, 252 A.3d 445, 456 (Del. Ch. 2018).

The trial court focused on the requirement that the independent valuations be performed by a Big Four accounting firm and from that requirement concluded, based solely on its own perception and *without any evidence whatsoever*, that the parties must have intended an arbitration provision that did not require any actual independence on the part of the Big Four accounting firms or the ability to challenge anything they did. Thus, the trial court not only failed to give CSG, as the party opposing summary judgment, the benefit of construing ambiguities in its favor, but also did not even consider CSG's supporting affidavit and evidence, instead substituting its own views about the employees of Big Four accounting firms. This is especially problematic given that *post hoc*, litigation-driven forecasts "have an 'untenably high' probability of containing 'hindsight bias and other cognitive distortions.'" *In re Emerging Commc'ns, Inc. S'holders Litig.*,

2004 WL 1305745, at *15 (Del. Ch. May 3, 2004) (quoting *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 498 (Del. 2000), and *Cinerama v. Technicolor, Inc.,* 2003 WL 23104613, *7 (Del. Ch. Dec. 31, 2003).

C. The Court's Denial of Discovery Was Not an Exercise of Its Discretion to Limit Discovery.

Sarn attempts to transform the trial court's erroneous finding that § 2.4.2 was unambiguously meant to function as an arbitration provision into a simple denial of "inappropriate" discovery. *See* Answering Br. at 18-21. Sarn contends that the summary judgment ruling is just a matter of the Superior Court exercising its broad discretion to "confine the scope of discovery to those matters that are truly relevant and to prevent discovery from evolving into a fishing expedition or from furthering purposes ulterior to the litigation." *Id.* at 20-21; *see also id.* at 13-14, 18-19. But contrary to Sarn's portrayal, the trial court improperly decided that the Agreement was unambiguous—based upon its belief of what it meant—and granted summary judgment on that basis. Opening Br. Ex. A at 19-20.

A principal basis for this ruling was the trial court's erroneous assertion that CSG had taken "inconsistent litigation positions" in a discovery objection and so was foreclosed from challenging PwC's valuation methodology. *Id.* at 19. But CSG did not take "inconsistent litigation positions;" CSG stated a general objection ("General Objection B") to Sarn's discovery requests—before PwC had

even begun work on its report—solely to preserve the objection. (Ex. A to Opening Br. at 56-57; A0711-13.)

"Judicial estoppel operates only where the litigant's position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling." *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859–60 (Del. 2008); *JPMorgan Chase Bank, N.A. v. Ballard*, 213 A.3d 1211, 1223 (Del. Ch. 2019), *cert. denied*, 214 A.3d 449 (Del. Ch. 2019), *and appeal refused*, 214 A.3d 448 (Del. 2019).

CSG never asserted the position in General Objection B as a litigation position in the trial court; the court was never induced to adopt this position by CSG; and, importantly, no discovery relating to Retia's valuation was withheld on this (or any other) basis. (*See* B0003868-69, 75:11-76:14.) The fact is that in March 2019—after PwC had been retained by Sarn—CSG produced *all* of the documents that EY had requested for its work and the EY report. (B0004777.) No discovery was ever withheld on the basis of General Objection B, further demonstrating that it was made only to preserve a potential position.

Additionally, CSG was deprived of the ability to respond to this argument with declarations and evidence because Sarn raised this argument for the first time

in its reply brief on summary judgment. (B0003175.) It was never raised in Sarn's moving brief.

Moreover, contrary to Sarn's contentions and the trial court's discussion in the December, 2020 opinion, CSG was clear in its position that the independent valuations cannot be performed by litigation experts and that they are subject to discovery as the work of percipient witnesses.[6] As the Court observed on December 20, 2019, "the deposition will come" for questions about the valuations. B0000761 at 15:9-17.

D. Sarn's Answering Brief Does Not Refute or Even Address Most of the Core Facts Showing Mr. Qureshi's "Expert Report" Was Neither Independent Not Reliable.

The EY report was delivered to Sarn's counsel on March 22, 2019, and the financial data and documents that Retia had provided to EY at its request were provided to Sarn's counsel on March 26, 2019. (B000459-60, ¶¶ 6, 7.) Rather than forward them to PWC, however, Sarn's counsel withheld the documents and did not provide them to PwC, nor did he instruct PwC to start its valuation, for

[6] B0000687-694 at 19:10-20:5, 22:16-23:12, 24:3-26:8; B0000761 at 5:21-6:18, 7:22-8:15, 11:8-18; B0003461 n.3.

seven months.[7] These facts were laid out in CSG's brief on cross-appeal. Sarn's Answering Brief does not contest them.

From the March 4, 2019 Confidentiality Order onward, PwC had the right to review the EY report, the EY documents, and anything else produced in discovery; it only did not do so because *Sarn, not CSG,* refused to provide them to its own expert. Sarn held the information back until Sarn's principals and counsel could assess the EY report and direct their expert witness, Mr. Qureshi, how best, in their view, to inflate their own valuation. (B0004307.) Even then, Sarn and its counsel funneled only the evidence they found helpful to PwC. *See* footnote 8. These facts were laid out in CSG's brief on cross-appeal. Sarn's Answering Brief does not contest them.

Meanwhile, and inexplicably if the purpose was to conduct an unbiased valuation of Retia, PwC never requested any financial or other information from Retia after being retained. PwC did not make its first information request to Retia until November 14, 2019. (A0317.) That request was made only after the trial court ordered Sarn to produce the report or risk having its claim dismissed.

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[7] B0004777; B0003964-4011, 73:7-75:7, 98:7-99:17, 112:21-113:19, 118:21-120:14; B0004295-96; B0004306 [redacted]; B0004316-17; B0004325.

(B0000709-10, 41:2-11, 43:12-19.) These facts were laid out in CSG's brief on cross-appeal. Sarn's Answering Brief does not contest them.

Mr. Qureshi's report announced that [redacted]. Yet nothing had objectively changed in the business or prospects of Retia during that time to justify this dramatic increase in value. These facts were laid out in CSG's Opening Brief. Sarn's Answering Brief does not contest them.

The trial court recognized that direction and input from counsel on the Independent Valuation was not "contemplated by Section 2.4.2." Opening Br. Ex. A at 20. Yet Sarn's counsel provided direction and input, commented on drafts, and chose which information from PwC's requests to share with them. Sarn's Answering Brief does not contest these points.

Sarn's Answering Brief asserts that "CSG failed to adduce any evidence that Mr. Qureshi lacked independence." Answering Br. at 23. CSG's Opening Brief, however, presented *six pages* of explanation and citation as to why there are credible indications that the Prague-based litigation support professional, who indicates having no experience valuing companies in Retia's industry, valuing call options, or valuing anything outside of litigation (B0002565-570; B0003903, 12:7-

14), was not independent of his clients—who were litigation-driven and not the company being valued—in reaching his valuation. Opening Br. 45-51. Sarn does not respond with specificity to any of this, instead offering only conclusory statements from its retained expert witness and from the trial court. Answering Br. at 22-23. CSG's Opening Brief also presented four more pages explaining the serious reliability and methodology concerns with Mr. Qureshi's "Expert report," including the use of biased and unsupported assumptions concerning unfinalized agreements, the certainty of projects and outcomes of contractual negotiations, profit margins and discounted cash flow analysis. Opening Br. 40-45. No substantive response is made in Sarn's Answering Brief to any of the facts detailed.

And, of course, the trial court prohibited any discovery on the questions raised by Sarn's expert report. CSG was given no opportunity to rebut or obtain a rebuttal expert and report, to pursue full expert discovery of Mr. Qureshi, or to depose and cross-examine him on his report—all of which it was permitted to do under the Rules of the Superior Court and the Case Management Order then in place. (B0001003-08.)

Contrary to Sarn's mischaracterization, the trial court did not order CSG to produce documents, including the J&T Banka documents, in October 2019 or

thereafter. Sarn's Answering Brief still fails to identify any order that CSG failed to obey. Instead, the Answering Brief merely cites to the trial court's incorrect statement in its order granting, in part, Sarn's motion for partial summary judgment that it "had to order CSG to provide information to SD3 or PwC." Answering Br. at 7, citing Opening Br. Ex. A at 20.

In actuality, in October 2019, the trial court ruled on a motion to vacate the confidentiality designations on the EY Valuation Report and the documents underlying that report. "All that's before me is whether [the EY Valuation Report] is, and the documents underlying it are highly confidential." (B0000706.) Indeed, in ordering the release of an unredacted version of the report, the trial court specified that "I'm not saying that you have to produce the underlying information[,]" making clear that it was *not* ordering the production of anything but the unredacted EY Valuation Report. (B0000708.)

Moreover, CSG had produced the EY Valuation Report and the documents underlying that report seven months before. Mr. Qureshi could have started working with them then had Sarn actually been interested in receiving an unbiased, independent valuation of Retia. At a hearing on December 20, 2019, the Superior Court extended the deadline for PwC to submit its report to March 3, 2020 because PwC and Retia needed more time, acknowledging that "it does sound like CSG is

endeavoring to get the information back and forth. It just wasn't as easy as we thought when we did the hearing." (B0000760-64, 14:4-18:5.) Sarn's Answering Brief does not respond to this point.

In its Opening Brief, CSG demonstrated that the "J&T Banka Documents" were not concealed from Sarn. Opening Br. at 23-24. Instead, with a month still remaining in the then-current discovery timeline, CSG produced the J&T Banka Documents on May 22, 2020 as part of a resolution of a motion to compel in which Sarn's counsel had specifically targeted the documents. Yet, Sarn made the premature decision to file its summary judgment motion on Count I when discovery was still underway, and—even after receiving the J&T Banka Documents in an anticipated production of documents—chose to file its reply brief on the motion, argue the motion, and wait four months for the court to rule all without bothering to review the documents it had requested and that were in its possession. These facts were laid out in CSG's brief on cross-appeal. While Sarn continues to falsely claim that the documents were withheld, the Answering Brief does not and cannot offer any actual facts in support of this claim.

CSG's brief explained that nothing regarding Retia's valuation was withheld from PwC; CSG produced at least 1,135 documents that referenced Retia before Mr. Qureshi's report, and Retia had separately produced at least 1,530

documents, totaling 3,065 pages, in response to the requests from PwC. (B0005574, ¶ 5.) The Answering Brief does not address these facts.

E. The Trial Court Erred By Deciding Summary Judgment on Argument, a Declaration and Other Evidence First Submitted and Produced With Sarn's Summary Judgment Reply Brief.

A motion for summary judgment cannot be supported by purported evidence introduced for the first time with the reply brief. *See In re Asbestos Litig.*, 2007 WL 2410879, at *4 (Del. Super. Ct. Aug. 27, 2007).

The trial court's opinion relied heavily on a declaration given by Mr. Qureshi, quoting the declaration for over a full page. Opening Br. Ex. A at 21-22. This declaration was improperly submitted for the first time with Sarn's reply brief in support of the motion. (B0003184-190.) In addition to Mr. Qureshi's untimely declaration, Sarn improperly introduced 278 pages in support of the Qureshi Expert Report with its reply brief. The belated introduction of these materials meant that CSG had no opportunity to rebut them in its opposition to the motion.

Sarn's only response on this point is that CSG was allowed the limited discovery on the question of Mr. Qureshi's "good faith." But that did not begin to rectify the harm to CSG. Mr. Qureshi's declaration and the attached exhibits were not limited only to matters of his good faith. (B0003182-406.) CSG did not have the opportunity to offer its own affidavits and exhibits in response. CSG never

even had an opportunity to fully brief a response to the new information and documents provided with the reply brief, as the briefing after the Qureshi deposition was strictly limited by the Superior Court to five pages. (B0003454.)

CSG also was greatly harmed by Sarn arguing for the first time in its reply brief that CSG was taking inconsistent litigation positions on the ability to challenge the valuations under Section 2.4.2. CSG was deprived of the ability to respond to this argument with briefing, declarations and evidence because this argument was raised for the first time by Sarn in its reply brief on summary judgment. (B0003175.) The trial court not only permitted this sandbagging, but embraced it and made the contention a core element of its grant of summary judgment. Opening Br. Ex. A at 19-20.

Conclusion

For the reasons set forth above, in its Opening Brief, and in the record, CSG respectfully requests the Court to vacate the Final Order and Judgment in the case, and remand to the Superior Court for further proceedings.

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Dated: March 20, 2024

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 Court Below: Superior Court of the State of Delaware, C.A. No. N17C-12-185 EMD (CCLD)

CERTIFICATE OF SERVICE

I, Tiffany Geyer Lydon, Esquire, do hereby certify that on the 4th day of April 2024, I caused a true and correct copy of the public version of *Cross-Appellant's Reply Brief on Cross-Appeal* to be served on the following counsel of record via File & Serve*Xpress:*

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