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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: February 13, 2024**

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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Dated: January 29, 2024

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NATURE OF THE PROCEEDINGS

In October 2016, SARN SD3 LLC ("Sarn") and Czechoslovak Group A.S. ("CSG") entered into a Call Option Agreement ("the Agreement"), which granted 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. (A0100-A106.) CSG had acquired Retia from its founders six months before, on March 30, 2016, for [redacted][1] Section 2.4.1 of the Agreement provided that if CSG ceased to own a majority of Retia before Sarn's call option expired, then CSG would pay Sarn a contractual "penalty amount" equal to 25% of the difference between the exercise price of [redacted] and the value of Retia based on an "Independent Valuation" ("the Penalty Amount"). *Id.* § 2.4.1. The Independent Valuation, in turn, was to be either the value as agreed between CSG and Sarn within 14 days or, absent such agreement, "the average of the two valuations" reached after each party hired "a Big Four accounting firm." *Id.* § 2.4.2.

CSG sold Retia on June 20, 2017, and informed Sarn of the sale on November 5, 2017. (A0118; B0002931.) In that communication CSG said it was prepared to discuss the Independent Valuation of Retia pursuant to Section 2.4.2 of

[1] B0002656-76; B0002677-695.

[redacted]

the Agreement. *Id*. Sarn rejected that offer, instead sending a demand with twenty categories of sweeping discovery, much of which had to do with a theory that CSG had purportedly violated its fiduciary duty to maximize the value of Retia because CSG allegedly was too "pro-Russian." (B0002934-35.) It would have been impossible to comply with Sarn's demand in the 14 days allotted by the contract. Moreover, Sarn's principal had refused, just months earlier, to maintain the confidentiality of such material. (B0002973.) Unable to reach an agreement on value, the parties had to complete the independent valuation process before any "Penalty Amount" came due.

Instead, Sarn sued CSG barely a month after being advised of the sale. Sarn alleged that (1) CSG had breached Section 2.4 by not paying the Penalty Amount ("Count I"), even though it was not yet due, and (2) CSG had breached its purported fiduciary duties because of supposed political positions and personal associations of its owners ("Count II"). (A0120-55.) With respect to Count I and the Penalty Amount, Sarn asked the Superior Court to "enter judgment for "Monetary damages in an amount to be determined at trial for the Penalty Amount owed under the Agreement." *Id.* CSG moved to dismiss, and the court granted the motion with respect to Count II. After Sarn repled, CSG answered and

[redacted]

counterclaimed for defamation.[2] The parties eventually settled Count II and the counterclaim, leaving only Count I to be resolved.[3]

Pursuant to Section 2.4.2 of the Agreement, in August 2018 CSG hired Ernst & Young s.r.o ("EY") to produce an independent valuation of Retia as of June 20, 2017. (A1016-30.) Sarn, however, did not hire a Big Four accounting firm to produce an independent valuation of Retia. Instead, on July 26, 2018, Sarn's litigation counsel hired Sirshar Abdul Qureshi of PricewaterhouseCoopers Česká republika, s.r.o. ("PwC") to act as Sarn's *testifying expert witness* in this case. (B0004200-08.) Under the terms of that engagement, PwC was to produce a valuation of Retia under the direction of litigation counsel *and* act as an expert witness on both counts of the Amended Complaint, producing a report on the second count of the complaint as well. (B0004200.)

On March 5, 2019, EY issued a report determining Retia's value to be [redacted][4] EY had been hired for the sole purpose of producing the independent valuation. It had carte blanche to request whatever documentation it

[2] B0000117-49.

[3] B0004613-14.

[4] B0002591-647, "RETIA, a.s.: Indicative Valuation of a 100% Shareholding, 5 March 2019," prepared by EY (cited as the "EY Independent Valuation").

[redacted]

desired. CSG made no effort to influence the outcome of the report. (B0002494-518.) Litigation counsel for CSG never spoke with the EY personnel involved. This truly independent valuation by EY reflected a modest increase over the amount CSG had paid to purchase Retia from third parties in 2017, despite a lack of actual customer contracts closed by Retia in the interim.

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, or instruct PwC to start its valuation, for *seven months*.[5] 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 attack it. (B0004307.) Even then, Sarn and its counsel funneled only the evidence they found appropriate to PwC.

Meanwhile, and inexplicably if the purpose was to conduct an unbiased valuation of Retia, PwC did not then request any financial or other information

[5] B0004777; B0003964-4011, 73:7-75:7, 98:7-99:17, 112:21-113:19, 118:21-120:14; B0004295-96; B0004306 ("Any idea when we will get the rest of the EY report"?); B0004316-17; B0004325.

[redacted]

from Retia. Indeed, not until November 14, 2019—almost eight months after the EY report and documents were delivered to Sarn—did PwC make its first request for information to Retia. (A0317.) And that request only was made then because the trial court had ordered Sarn to produce the report or risk having its claim dismissed. (B0000709-10, 41:2-11, 43:12-19.)

Unsurprisingly, then, when Mr. Qureshi finally produced his report on March 10, 2020—a year after EY—[redacted] Yet nothing had objectively changed in the business or prospects of the company since the setting of the strike price that would justify this dramatic increase in value.

As even the trial court found, this expert report was not the Independent Valuation "contemplated by Section 2.4.2." Ex. A, Dec. 23, 2020 Order at 20. Discovery was needed of PwC and of those who had injected themselves into PwC's work, including Sarn's principal and counsel. Over three months remained for discovery under the case management order. Moreover, with an expert report in hand, CSG was entitled by the case management order and the Rules of Civil Procedure to expert discovery, which would not even begin until that summer, and to a rebuttal expert.

[redacted]

But before CSG could take discovery on the expert report—indeed, less than a month after Mr. Qureshi issued his expert report—or retain an expert and develop a rebuttal report, Sarn moved for summary judgment on its valuation claim. (A0507-35.) At that time, dispositive motions were not scheduled until October 9, 2020. (A0444-49.) Indeed, on June 17, 2020, the Superior Court vacated the trial date (A0580) and eventually extended fact and expert discovery deadlines into 2022. Meanwhile, when Sarn moved, it had not even produced the documents listed in Appendix B to the Qureshi Expert Report, the items on which Mr. Qureshi had relied. Instead, it had steadfastly refused to produce any documents related to communications with Mr. Qureshi or his work, or the communications or work of anyone else at PwC.[6]

According to the court below, however (at the urging of Sarn), CSG was to simply accept Mr. Qureshi's "Expert report," no questions asked, because that is what the Agreement required. Therefore the trial court terminated discovery on Count I and granted in part the relief sought by Sarn, valuing the Penalty Amount as [redacted][7] CSG was given no opportunity to rebut or obtain a rebuttal

[6] B0002524, ¶ 9; B0002625.

[7] Decision of the Superior Court, December 23, 2020, at 19-20, 23 (attached hereto as Exhibit A and cited herein as "Ex. A, Dec. 23, 2020 Decision"); Decision

[redacted]

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 entitled to do under the Rules of the Superior Court and the Case Management Order in place.[8] The trial court permitted extremely limited discovery of Mr. Qureshi into the sole question of his "good faith," limited to three document requests and a four-hour deposition on that subject. (Ex. A, Dec. 23, 2020 Decision at 23.) The trial court then ignored the plain import of the discovery that was taken.[9]

The Decision concluded that 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." (Ex. A, Dec. 23, 2020 Order, at 21.) To reach this conclusion, the Court ignored the express dispute resolution provision in Section 7 of the Agreement, which gives jurisdiction to the Delaware courts "to settle any disputes, which may arise out of or in connection with this Agreement." (A0104, ¶ 7; A1361-62, 39:9-40:2.) The Court instead treated Section 2.4.2 as an arbitration provision. But there is no exclusive dispute resolution language or any other

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of the Superior Court, November 15, 2021, at 4 (attached hereto as Exhibit B and cited herein as "Ex. B, Nov. 15, 2021 Decision").

[8] B0001003-08.

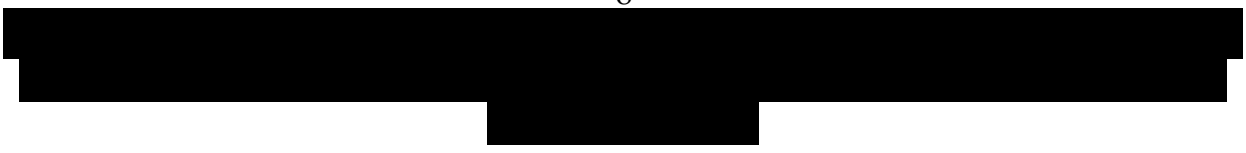
[9] *See* Argument in Support of CSG's Appeal, Section I(C)(5) below.

[redacted]

indicia that the two Big Four Accounting firms were acting as arbitrators, to the exclusion of discovery and the full application of the Delaware Rules of Civil Procedure in a judicial dispute. Certainly Mr. Qureshi and PwC did not see themselves as an arbitrator; they were retained as an expert witness and their valuation report is titled "Expert report."

The trial court committed plain error in granting summary judgment, and CSG appeals from the decisions granting summary judgment and the Revised Final Judgement and Order based on those decisions.

But Sarn was not done. On April 22, 2022, Sarn filed a motion under Rule 37, asking the court to order PwC and EY to re-do their evaluations based on documents produced in discovery that would require the Court to amend its grant of summary judgment. Sarn claimed that CSG had withheld documents in discovery that, Mr. Qureshi now claimed, allowed him to double the "Penalty Amount." Contrary to Sarn's assertions, however, these documents, referred to as the "J&T Banka Documents," were not concealed from Sarn. Instead, they were produced to Sarn on May 22, 2020—when a month still remained in the then-current discovery timeline. Discovery was still ongoing, the J&T Banka Documents were produced as part of the resolution of a motion to compel, and Sarn's counsel had specifically targeted those documents in the agreement to



resolve the motion. Sarn chose to file its summary judgment motion on Count I when discovery was underway, and even then, it still had the J&T Banka Documents before it filed its reply brief on the motion, three months before argument, and seven months before the court ruled. The court denied Sarn's motion.

Sarn moved again, this time under Civil Rules 60(b)(2) ("newly discovered evidence") and 60(b)(6) ("extraordinary circumstances"). The evidence was "newly discovered," Sarn claimed, because its counsel had not bothered to look at it for two years after it was produced. The circumstances were extraordinary, Sarn argued, because of COVID-19 and because it had already moved for summary judgment when the documents were produced, so it did not have to look at the document production it had requested. The court below denied the motion, finding that Sarn could have "discovered" the documents in its own possession after the May 2020 production before the December 23, 2020 or November 15, 2021 summary judgment decisions. The court also properly held that the more exacting standard of Rule 60(b)(6) was unmet, denying Sarn its requested relief.

On September 5, 2023, the trial court issued its Revised Final Judgment and Order, entering judgment on the amount it found in December 2020. (Op. Brief, Ex. F, pgs. 93-97.) The amount of judgment was converted from Czech crowns to

[redacted]

U.S. dollars at the request of the Prothonotary. The court properly applied the conversion rate at the time of valuation, June 20, 2017, and entered judgment for [redacted] with an additional [redacted] in pre-judgment interest. *Id.* at pg. 97.

Sarn now asks this Court to find that the lower court erred in (1) denying its motion for sanctions under Rule 37; (2) directing Sarn to file a new motion under Rule 60 and then denying that motion; and (3) requiring the judgment on Sarn's foreign-money claim to be expressed in U.S. Dollars. CSG opposes each request and asserts that the Superior Court did not err in its rulings on the Rule 37 or Rule 60 motions and that Sarn failed to preserve its foreign-money claim issue for appeal.

[redacted]

SUMMARY OF THE ARGUMENTS

I. CSG's Cross-Appeal

1. The Superior Court committed reversible error by granting Sarn's motion for summary judgment on Count I of the Amended Complaint when it treated Section 2.4.1 of the Agreement as an arbitration or exclusive remedy provision, despite its plain language and the plain language of Section 7 of the Agreement, the latter of which confers jurisdiction on the Delaware courts to settle any disputes arising out of or in connection with this Agreement, including disputes arising from Section 2.4.1.

2. The Superior Court committed reversible error by granting Sarn's motion for summary judgment on Count I of the Amended Complaint based on a determination that CSG was judicially estopped from challenging the assertion that Section 2.4.2 functioned as a kind of arbitration provision for which no discovery was allowed. CSG never asserted this position to the court, the court was never induced to adopt this position by CSG, and no discovery relating to Retia's valuation was withheld on this or any other basis.

3. The Superior Court committed reversible error by granting Sarn's motion for summary judgment on Count I of the Amended Complaint based on a finding

[redacted]

that the contract did not require the "Independent Valuations" called for in Section 2.4.2 to actually be independent.

4. The Superior Court committed reversible error by granting Sarn's motion for summary judgment on Count I when substantial questions about the methodology and conclusions of the Qureshi "Expert report" remained, and discovery on the "Expert report" had not yet occurred.

5. The Superior Court committed reversible error by granting Sarn's motion for summary judgment on Count I of the Amended Complaint when substantial material factual disputes about the independence of the Qureshi "Expert report" remained, and the trial court resolved such factual disputes in favor of Sarn without permitting full discovery.

6. The Superior Court committed error when it granted summary judgment in reliance on evidence first submitted by Sarn with its reply brief, including Mr. Qureshi's declaration, which the trial court relied on heavily.

II. CSG's Opposition to Sarn's Appeal

1. Denied. The Superior Court did not misapprehend its authority in denying Sarn's motion for sanctions under Rule 37. There was no order that was violated that would be remedied by Rule 37 sanctions. The Superior Court correctly understood that what Sarn actually sought was relief due to its own errors

[redacted]

and inattention, and properly instructed Sarn that it was entitled to seek relief under Rule 60, if it so chose.

2. Denied. The Superior Court did not abuse its discretion in denying Sarn's Rule 60 motion. CSG produced the J&T Banka Documents well within the deadlines for Count I discovery and months before the Superior Court ruled on Sarn's motion for summary judgment, such that it cannot constitute newly discovered evidence. Nor are there any extraordinary circumstances that would satisfy Rule 60.

3. Denied. Sarn has failed to preserve for appeal the argument that the court erred by issuing its judgment in dollars rather than Czech crowns. Accordingly, the Court should not consider this argument. The court used the correct exchange rate. The Agreement provided for payment and calculation in crowns, and thus the conversion rate should be the rate at the date the payment became due, June 20, 2017. Using a current rate for the conversion would result in a windfall to the plaintiff.

[redacted]

STATEMENT OF FACTS

A. CSG Acquires Retia.

On March 30, 2016, CSG purchased RETIA, a.s., a privately held joint stock company registered under the laws of the Czech Republic ("Retia").[10] Founded in 1993, Retia is a Czech company in the field of military electronics, with an emphasis on radar and non-military recording systems.[11] CSG purchased Retia in an arms-length transaction with the original founders for a purchase price of [redacted] Czech crowns.[12]

B. The Call Option Agreement

CSG and Sarn entered into the Call Option Agreement, dated October 7, 2016. (A0100-06). The Call Option Agreement provided Sarn with the right to purchase up to 25% of the outstanding common stock of CSG's then-subsidiary, Retia. *Id.* § 1.2. The strike price was determined by the original arms-length purchase price of Retia.

The Call Option Agreement provided that if the option was unexercised and CSG ceased to own a majority of the shares of Retia, CSG would pay Sarn a penalty

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[10] B0002656-76; B0002677-95.

[11] https://www.retia.eu/en/about-us

[12] B0002661, B0002681.

[redacted]

amount equal to 25% of the difference between the value of Retia, based on the "Independent Valuation" of the company, and the contractual valuation of Retia at [redacted] (the "Penalty Amount"). *Id.* § 2.4.1.

> 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. § 2.4.2 (emphasis added).

With respect to resolving disputes under the agreement, the Call Option Agreement provided in Section 7:

> Each of the Parties to the Agreement *irrevocably agrees* that the courts of the state of Delaware shall have jurisdiction to hear and decide any legal proceeding, *and to settle any disputes, which may arise out of or in connection with this Agreement* or its formation or validity and, for these purposes, *each party irrevocably submits to the jurisdiction* of the courts of the state of Delaware.

Id. § 7 (emphasis added).

[redacted]

C. CSG Sells Retia and Gives Notice to Sarn.

Technology CS a.s., a company owned by Michal Strnad (the CEO of CSG) purchased Retia effective June 20, 2017.[13] [redacted][14]

On November 5, 2017, CSG gave notice to Sarn that CSG had ceased to own a majority of the shares of Retia.[15] The notice read in pertinent part:

[redacted]

(B0002931.)

On November 9, 2017, litigation counsel for Sarn sent a response. Instead of accepting CSG's invitation to discuss an agreed-upon valuation, Sarn's counsel demanded twenty sweeping categories of information, most of which had little or

[13] B0002865-80.

[14] B0002732-33 (90:11-91:13); B0002925.

[15] B0002931.

[redacted]

nothing to do with the valuation of Retia. (B0002933-35.) Sarn's letter did not offer to confer on the requested documents or to extend the 14-day period. *Id.*

At the time there would have been no confidentiality protection for the documents, and Sarn's counsel offered none in his letter. *Id.* Therefore, CSG had no choice but to decline at that time to provide Sarn with the sweeping and intrusive documents demanded.

D. CSG Retains EY to Prepare Independent Valuation; Sarn Retains Mr. Qureshi to Prepare "Expert Report."

On August 21, 2018, CSGM a.s., an operating subsidiary of CSG, engaged Ernst & Young, s.r.o. ("EY"), to perform the independent valuation contemplated by the Agreement.[16] Under the terms of the engagement, EY would provide "the valuation of 100% shares of RETIA" as of "June 20th, 2017." The engagement letter further provided that [redacted]

(B0002496, ¶ 2.)

[16] B0002495-98, ¶ 2.

[redacted]

The engagement was for no other purpose. *Id.* No other work was contingent on the outcome and EY was not retained to be an expert in this case.[17] EY did not communicate with CSG's litigation counsel.

[redacted]

On July 24, 2018, litigation counsel for Sarn retained Mr. Qureshi as an expert witness.[18] Mr. Qureshi had been providing forensic accounting and litigation support services for 22 years, but he did not claim to have any significant experience in performing independent valuations. (B0004721-26.) The retainer agreement with SARN was titled "[redacted]" (B0004200.) The agreement provided that litigation counsel had "[redacted]," that Mr. Qureshi also would be providing an expert report on the "calculation of damages caused by the alleged decrease in the value of RETIA"

[17] *Id.*; *see also, e.g.,* B0001402, 25:9-26:8.

[18] B0002939-947.

[redacted]

(*i.e.*, damages on the second count of the Amended Complaint),[19] that Mr. Qureshi would provide a draft of his report for litigation counsel's input, and that litigation counsel had the "[redacted]" (B0004200-01.)

E. Mr. Qureshi Issues His "Expert Report"; Sarn Moves for Summary Judgment Prior to Expert Discovery.

On March 10, 2022, Mr. Qureshi issued his "Expert report." [redacted][20]

At the time, fact discovery was ongoing. Depositions were still outstanding, third-party discovery was not complete, and no expert discovery had yet been taken. (B0001004.) A stipulated case management order, proposed by Sarn, had been entered just six or so weeks before. (B0001003-08.) The case management order included expert discovery, depositions of experts, and the provision of rebuttal expert reports. *Id.* ¶¶ 3-4. Opening expert reports were due July 20, 2020,

[19] Mr. Qureshi did in fact submit an extensive expert report purporting to value the "breach of fiduciary duty" damages in Count II of the Amended Complaint. B0004903-B0004936. He arrived at a valuation of [redacted] in damages.

[20] *Compare* A0100 § 1.3 and B002598 *with* B0002549.

[redacted]

and expert discovery could commence on that date. *Id.* ¶ 3. The deadline for motions for summary judgment was October 9, 2020, *id.* ¶ 4, and an eight-day trial was scheduled for March 29, 2021, *id.* ¶ 1.

On March 30, 2020, just weeks after Mr. Qureshi issued his "Expert report," Sarn moved for partial summary judgment on Count I. (B0001097-119.)

F. CSG and Retia Timely Provided All Information Needed By PwC, While Sarn Withheld that Information From PwC.

Sarn's opening brief falsely claims that CSG failed to provide PwC with the information necessary to complete the contractually required valuation procedure in time. The facts show otherwise, and indeed show that Sarn withheld information requested by Mr. Qureshi to do his work.

First, Sarn directed PwC not to begin work until after the court determined it had jurisdiction of Count II and after the EY report was issued, and Mr. Qureshi agreed.[21] But 2.4.2 contemplated simultaneous valuations, and even that the costs were to be shared. (A0103, § 2.4.2.)

Second, the EY report was delivered to Sarn's counsel on March 22, 2019, and the financial data and documents use by EY were delivered on March 26, 2019. (B0000459-60, ¶¶ 6, 7.) The documents were designated "Highly

[21] B0003933-59 (42:1-24, 59:8-61:9, 66:9-67:21); B0004188.

[redacted]

Confidential," but under the Confidentiality Order such documents could be provided to PwC. (B0000460-61, ¶¶ 10, 11; A0165, ¶8(D).) Indeed, the trial court recognized as much. (B0000686-94, 18:6-26:8.)

Third, after receiving the EY report and documents, Sarn's counsel withheld them from Mr. Qureshi and PwC for *seven months*.[22] Meanwhile PwC was repeatedly requesting the EY report from counsel, and other evidence.[23] Sarn held the information back until Sarn's principals could join in counsel's assessment of how best to instruct Mr. Qureshi to respond to the EY report, rather than letting Mr. Qureshi use his own professional judgment as he determined best.(B0004307.) Sarn also did not give Mr. Qureshi evidence he requested, but filtered that too. (B0004429-31; B0004030-31, 139:19-140:22; B0004595.)

Fourth, on November 14, 2019, Sarn's counsel finally, for the first time, submitted to CSG a list of PwC's requested information and document. (A0317.) Retia immediately got to work gathering the years-old information, slowed by the fact that Sarn insisted on using English when both Retia and PwC were in Prague

[22] B0004777 (documents sent March 26, 2019); B0004322-25 (EY Report sent to Mr. Qureshi from PwC on December 19, 2019).

[23] B0004295-96; B0004306 [redacted]; B0004316-17; B0004325.

[redacted]

and spoke Czech. Although Sarn's appeal brief claims that "Sarn was forced (again) to request the Superior Court's intervention" on December 19, 2019 because of CSG's recalcitrance (Opening Br., p. 10), instead in a hearing the next day, Sarn mischaracterized the facts to the court: Sarn told the court Retia was still unprepared and refusing to discuss the requested information. (B0000750-51.) In fact, a planned call between the principals had occurred that very morning, Retia addressed every topic raised, and nothing was being withheld. (B0000751-54, 5:8-8:15.)

Fifth, Sarn even misleads this Court that "[b]ecause 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. (Opening Br., p. 10.) But the Superior Court extended the deadline 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.)

Sixth, Sarn's persistent false claims that CSG was withholding discovery were adopted by the trial court in its November 15, 2021 Decision, when it held that "PwC did not get immediate access" and "PwC was delayed until this Court's Order dated October 28, 2019." Ex. B, Nov. 15, 2021 Decision at 5. But PwC

[redacted]

could have had access anytime, yet never sought it until November 14, 2019. And, from the March 4, 2019 Confidentiality Order onwards, PwC had the right to review the EY report, the EY documents, and anything else produced in discovery—as the court itself recognized at that hearing—and only did not do so because *Sarn* refused to provide them to its own expert.

Seventh, CSG did not withhold the J&T Banka Documents, as Sarn claims, to prevent the MADR Contract from being considered as part of Mr. Qureshi's valuation. The facts show the contrary. On August 16, 2019, CSG objected to producing communications with all its lenders, including J&T Banka, as irrelevant and burdensome. (A0636.) After meet and confers on a number of production issues, both parties moved to compel. (B0000768-80.) Following the motions, the parties were able to reach agreement in February 2020, and the motions were withdrawn. (B0005576.) The J&T Banka Documents then were specifically requested by Sarn as part of the resolution. (B0005582.) Responsive documents including the J&T Banka Documents then were gathered and produced by CSG, resulting in a large production on May 22, 2020. (A0576.)

Moreover, the J&T Banka Documents were not requested by PwC. PwC requested documents from Retia, not CSG. The J&T Banka Documents are CSG's documents, not Retia's. And PwC did not request "business plans," as the PwC

[redacted]

document information requests show. (B0005578-83.) None of the requests that might relate to business plans calls for anything like the J&T Banka Documents. (A0317-21.)

Eighth, nothing regarding Retia's valuation was withheld from PwC. Mr. Qureshi issued his first Expert Report on March 10, 2020. CSG produced at least 1,135 documents that referenced Retia before March 10, 2020. These documents totaled 4,618 pages. (B0005574, ¶ 4.) Retia separately produced at least 1,530 documents, totaling 3,065 pages, in response to the requests from PwC. *Id.* ¶ 5.

[redacted]

ARGUMENT IN SUPPORT OF CSG'S APPEAL

I. The Superior Court Erred By Granting Sarn's Motion for Summary Judgment on Count I of the Amended Complaint When Discovery Was Incomplete and Genuine Issues of Material Fact Remained.

A. Question Presented

Did the Superior Court err when it granted in part Sarn's motion for summary judgment on Count I of the Amended Complaint in reliance on an "Expert report," when fact discovery was incomplete, expert discovery had not even begun, and numerous genuine issues of material fact remained?

B. Scope of Review

On appeal, the Delaware Supreme Court reviews the trial court's rulings on a motion for summary judgment *de novo*. *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 845 (Del. 2019). Accordingly, no deference to the trial court's factual findings is warranted. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 100 (Del. 1992).

Questions of contract interpretation are reviewed *de novo*. *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). Determinations of judicial estoppel also are questions of law to be reviewed *de novo*. *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

[redacted]

C. Merits of Argument

Summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Del. Super. Ct. Civ. R. 56(c). Summary judgment is not a substitute for the trial of disputed factual issues; rather, it empowers a court to determine whether there are issues of fact to be tried, not to try them itself. *GMG Cap. Invs., LLC*, 36 A.3d at 783.

The Superior Court granted summary judgment based on a litigation expert's report without permitting expert discovery or rebuttal testimony. Instead of allowing discovery to continue and the issue to be tried, the Superior Court incorrectly (i) held that it was precluded from allowing inquiry into the valuation reports, despite the Agreement's express grant of authority for the Court "to settle any and all disputes;" (ii) ignored the language of the Agreement requiring an independent valuation; and (iii) mischaracterized a general objection made for the purpose of preserving a potential position early in the case as judicially estopping CSG from challenging the valuation reports. Worse, the Superior Court's decisions also relied heavily on a declaration given for the first time by Mr. Qureshi with Sarn's reply brief. For these reasons, the judgment of the Superior Court should be reversed.

[redacted]

1. The Court Erred When It Concluded that the Call Option Agreement Prevented the Court From Examining the "Independent Valuations," but Instead Treated Them as Final and Binding on the Parties.

The Superior Court erred on the threshold question of jurisdiction. The court treated the valuation reports as final and binding upon the parties, despite there being no basis in the Agreement for such a decision. The court overlooked the express dispute resolution provisions of the Agreement, which allowed the parties to litigate any disputes arising out of the contract. Accordingly, the court's decision to bind the parties to the valuation reports and deny them their right to litigate them was in error.

(a) The Court Has Jurisdiction Of § 2.4 Disputes.

Section 7 of the Call Option Agreement provided "that the courts of the state of Delaware shall have jurisdiction to hear and decide any legal proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement."[24] The Agreement had no carve-out for disputes regarding the Section 2.4.2 Independent Valuation process. The Agreement placed no limitations on the disputes that must be litigated in the Delaware courts.

[24] A0104, § 7.

[redacted]

When parties agree that all disputes arising under a contract are subject to the jurisdiction of the Delaware courts, and exempt no provisions, a contracting party cannot unilaterally choose particular provisions of the contract and claim the court has no jurisdiction over disputes arising under those provisions. *Cf.* B0005954-61, Hearing Transcript, *B&C Holdings, Inc. v. Temperatsure Holdings*, LLC, C.A. No. N19C-02-105, at 57:22-58:2, 60:20-64:4 (Del. Super. Apr. 18, 2019) (court had jurisdiction over dispute concerning post-sale earnout where note conferred jurisdiction on the Delaware courts to decide "any claim or cause of action arising under or relating to the note"); *Utilipath, LLC v. Hayes*, 2015 WL 1744163, at *4 (Del. Ch. Apr. 15, 2015) (upholding plain language of redemption agreement forum selection clause); *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508, at *3-6 (Del. Ch. Sept. 14, 2011) (jurisdiction provision applied "with respect to any claim or cause of action arising under or relating to this Agreement").

Accepting the jurisdiction of the courts of this State for the resolution of all disputes and controversies arising out of or in connection with the Call Option Agreement thus means submitting to the courts of this State's jurisdiction disputes regarding the valuations. It also means accepting the Rules that govern such cases,

[redacted]

including Rule 26. Sarn did not exempt the Independent Valuation process from this provision. Sarn could have, if that was the parties' intent.

Nor can the language of Section 2.4.2 be read to support an interpretation that CSG was waiving its right to challenge a valuation, no matter how arbitrary, flawed, results-driven, or violative of valuation accounting principles, simply because it was provided by an employee of a Big Four accounting firm. A relinquishment of a right, of course, must be intentional, unequivocal, and express, and there is no such language in the Agreement. [25]

(b) Section 2.4.2 is Not an Arbitration Provision.

In holding that the parties were bound to the valuations, the Superior Court misconstrued Section 2.4.2 against its plain terms. The court concluded that "[i]nstead 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." (Ex. A, Dec. 23, 2020 Order, at 21.). In effect, the court treated Section 2.4.2 as an arbitration provision. However, the terms of Section 2.4.2 do not support any such interpretation.

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"Determining what type of dispute resolution mechanism the parties have agreed to presents a question of contract interpretation." *Penton Bus. Media Holdings, LLC v. Informa PLC*, 252 A.3d 445, 461 (Del. Ch.), *judgment entered*, (Del. Ch. 2018). Delaware adheres to the objective theory of contracts, which holds that "a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014). When interpreting a contract, Delaware courts give priority to the intentions of the parties as reflected within the four corners of the contract, starting with the text. *B&C Holdings, Inc. v. Temperatsure Holdings, LLC*, 2020 WL 1972855, at *14 (Del. Super. Ct. Apr. 22, 2020), *aff'd*, 247 A.3d 686 (Del. 2021). Courts must construe the agreement as a whole and give effect to all of its provisions. *Salamone*, 106 A.3d at 368.

Here, the plain terms of Section 2.4.2 do not support an interpretation of it as an arbitration provision foreclosing any and all challenges to the valuation reports. The Call Option Agreement simply provides for the Independent Valuation process.[26] The agreement does not also provide that this is a type of arbitration provision. The agreement does not provide that discovery is not allowed with

[26] A0103, § 2.4.2.

[redacted]

respect to the Independent Valuation process. It does not provide that the valuations cannot be challenged in litigation if they are not truly independent, or are not in accord with valuation accounting principles, or are otherwise methodologically flawed. Nothing in the Call Option Agreement suggests an intent to foreclose discovery into the required independent valuations performed by the Big Four accounting firms.

The trial court confused the independent expertise called for by Section 2.4.2 with an arbitration role for the Big Four firms involved.

> 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. The court interprets and enforces the contract provisions governing the expert determination; the court does not apply arbitral principles.

Penton Bus. Media Holdings, LLC, 252 A.3d at 456 (internal quotations and citations omitted). When, as here, an arbitration provision is not involved, claims attacking contractually required accounting work could "only be pursued in a court of law, with its attendant protections of discovery, rules of evidence, burdens of proof, and full appellate review." *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 794 N.E.2d 667 (2003). Even where an arbitration-style appraisal provision is included, "judicial review is not unavailable, but is restricted to

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considering a claim that the appraisal is unworthy of respect because it does not, as a result of contractual wrongdoing, represent the genuine impartial judgment on value that the contract contemplates." *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *26 (Del. Ch. May 13, 2013).

Here, unlike *Senior Housing*, the parties did not agree that the "Independent Valuations" would be binding without judicial review or discovery. To the contrary, section 7 of the Agreement establishes the parties' agreement that the court will resolve "*any* disputes, which may arise out of or in connection with this Agreement"—and unlike *Senior Housing*, there is no carve-out for the valuations.

"Any" means any. Courts "may 'interpret clear and unambiguous [contractual] terms according to their ordinary meaning.'" Ex. A, Dec. 23, 2020 Decision at 17, quoting *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A. 3d 776, 780 (Del. 2012). The word "any" could not be clearer or more unambiguous. "'Any' means 'any part, quantity, or number' and 'a or some without reference to quantity or extent.'" *B&C Holdings, Inc.*, 2020 WL 1972855, at *8. The "unambiguous, plain, ordinary meaning of 'any' connotes no limitations." *J.C. Penney Corp., Inc. v. GFM 23, LLC*, 301 A.3d 927 (Pa. Super. Ct.), *appeal denied sub nom. J.C. Penney Corp., Inc. v. Butterfli Holdings 011 LLC*, 305 A.3d 956 (Pa. 2023) (citing Merriam-Webster and www.dictionary.com

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definitions of the word "any"); *see also, e.g., Street v. Town of Newtown*, 2021 WL 4240825, at *17 (Conn. Super. Ct. Aug. 24, 2021) ("'Any' means any and all in common parlance.").

There are no carve-outs to the Section 7 language. Section 2.4.2, for example, does not provide that the parties' failure to agree between themselves on the Independent Valuation is a dispute for the Big Four accounting firms to resolve. Instead, Section 2.4.2 indicates only that if the parties do not agree, they will retain Big Four accounting firms to provide their own valuations.

Equating Section 2.4.2 to a dispute resolution mechanism would allow the Big Four firms to overstep the scope of their mandate. *Cf. Penton Bus. Media Holdings, LLC*, 252 A.3d at 466 (valuation experts have a limited role that does not include making binding decisions on legal disputes).

Nor, as the trial court held, are the Big Four independent valuators allowed under Section 2.4.2 to value Retia without reference to accounting norms or GAAP. As held in response to an analogous argument, "[i]mplied in the operating agreement must be an understanding that the appraiser will utilize accepted professional norms and that a party to the operating agreement reserves the right to challenge the appraisal's results upon the appraiser's failure to conform to accepted

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standards." *Leach v. Princeton Surgiplex, LLC*, 2013 WL 2436045, at *2 (N.J. Super. Ct. App. Div. June 6, 2013).

This implication is particularly acute given that Section 2.4.2 does not say that the Independent Valuations are final and binding upon the parties. *Cf. B&C Holdings, Inc.,* 2020 WL 1972855, at *14 (failure to follow contractually defined method of calculation did not supersede the mandate of finality in the contract's dispute resolution provision). Forcing the parties to accept valuations that are not independent or that do not follow accounting and valuation norms defies the logical and commercial expectations of the parties.

2. CSG Was Not Judicially Estopped from Utilizing Post-Valuation Date Evidence to Challenge Qureshi's Valuation.

The Superior Court erred when it refused to allow CSG to challenge the Qureshi Expert Report because CSG had stated a general objection to Sarn's discovery requests before PwC had even begun work on its report.[27] CSG never asserted the position in General Objection B to the trial Court, the Court was never induced to adopt this position by CSG, and no discovery relating to Retia's valuation was withheld on this or any other basis.

[27] Ex. A to Opening Br., pgs. 56-57; A0711-13.

[redacted]

At the time of the discovery objections, August 16, 2019, Sarn had not produced its valuation report. CSG had served a subpoena on PwC, and PwC advised it had never heard of Sarn. (B0000687-88.)

Therefore, CSG felt, in those circumstances, that discovery demanding every bit of financial detail about Retia was improper. Sarn was making sweeping demands for financial documents of Retia when their accountant had not even been retained. (B0004200, dated July 24, 2018.) 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.) General Objection B was made only to preserve a potential position and no discovery ever was withheld based upon it.

Judicial estoppel does not remotely apply in these circumstances. For judicial estoppel to apply, a litigant's previous position must (1) be contradictory to its current position; and (2) have been one that the court was persuaded to accept as the basis for a ruling. "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.*, 958 A.2d at 859–60; *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).

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The Superior Court never relied, and never was asked to rely, upon General Objection B in reaching any decision, so judicial estoppel would not apply. *See Whittington v. Dragon Grp. L.L.C.*, 2011 WL 1457455, at *9 (Del. Ch. Apr. 15, 2011) ("for judicial estoppel to apply the contradictory statement must have been accepted by the court in the earlier action and relied upon by it in reaching its decision"); *Total Containment, Inc. v. Dayco Prod., Inc.*, 177 F. Supp. 2d 332, 337 (E.D. Pa. 2001) (plaintiff's "objections were never the subject of any motion, nor did this court sustain those objections based on TCI's representations); *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. July 13, 1998) (holding judicial estoppel did not apply because "the Court neither accepted, nor did it rely upon, the plaintiff's [previous] claim").

3. The Call Option Agreement Required that the Valuations Be "Independent" of the Parties.

The Superior Court's decision stated that the language of Section 2.4.2 was "plain and unambiguous" and then determined that the mandate of "Independent Valuations" by Big Four accounting firms to be jointly funded by the parties "does not anticipate 'independent' valuations by the two Big Four accounting firms." (Ex. A to Opening Br., pg. 57.) This was plain error.

When interpreting a contract, Delaware courts should avoid an interpretation that renders any term superfluous and should yield general terms in favor of

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specific terms. *Sunline Com. Carriers, Inc.*, 206 A.3d at 847. Clear and unambiguous terms are to be interpreted according to their ordinary meaning. *Id.* An inferred meaning cannot control the entire agreement if it conflicts with the agreement's overall scheme or plan. *GMG Cap. Invs., LLC*, 36 A.3d at 779.

It is reasonable to infer that the two valuations must be independent from the phrase "*Independent* Valuation of the Company." To conclude otherwise is to render the word "Independent" superfluous. It also ignores the commercially reasonable and clear intention of the parties to determine a neutral valuation, uninfluenced by the desires of the parties, by obtaining unbiased valuation reports prepared by qualified non-party entities. *Cf., e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160–61 (Del. 2010) (reading a property sale contract to render an explicit base price term meaningless was absurd). "Independent" as used in Section 2.4.2 must have some meaning; otherwise, the parties to the Agreement would have simply provided that "the Valuation of the Company shall equal the average of the two valuations."

Black's Law Dictionary defines "Independent" as "[n]ot subject to the control or influence of another." INDEPENDENT, Black's Law Dictionary (11th ed. 2019). Persons lack independence when their relationship with a party is characterized by "domination" or "control," *Nelson v. Emerson,* 2008 WL

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1961150, at *9 (Del. Ch. May 6, 2008), or where their relationship interferes in the exercise of independent judgment in carrying out their responsibilities, *Sandys v. Pincus*, 152 A.3d 124, 133 (Del. 2016) (explaining rules of independence for company directors).

And in answer to the next question, independent of whom or what, the answer has to be independent of CSG and Sarn. It cannot mean independent of Retia, which was a stranger to the Agreement with no direct interest in the determination of the Agreement's Independent Valuation. The process for determining the ultimate value of Retia for the purposes of the Agreement needed to function independent of the influence, domination or control of either of those parties.

Allowing either party to hire a Big Four accounting firm to provide a non-independent valuation, such as a testifying expert hired for several purposes and directed by plaintiff's litigation counsel, is an absurd result that a reasonable person would not risk. Thus, the trial court's interpretation is untenable. *Osborn*, 991 A.2d at 1160-61.

The requirement that the Big Four Accounting firms were to act independently and provide an independent valuation, not an expert report created at the direction of litigation counsel for the purpose of litigation, is also reflected in

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Section 2.4.2's provision that "[a]ny cost and expenses of such accounting firms shall be borne equally by the Grantor and the Grantee." A0103, § 2.4.2. What rational party would agree to share in the costs of an accounting report biased against it?

By electing to have the Big Four firms appraise Retia's value, CSG and Sarn effectively removed themselves from the equation. By averaging together two independent valuations instead of requiring a single valuation, the parties added an extra layer of protection to insulate themselves from bias, gratitude, or domination. Allowing one of the valuations to insert such elements back into the equation defies common sense.

4. The Qureshi Expert Report Contains Basic Flaws That Reflect Qureshi's Lack of Independence, Shows that Material Facts are in Dispute, and Mandates Rebuttal Expert Testimony.

In granting summary judgment on Count 1, the court erroneously held that the Qureshi Expert Report was binding on the parties and did not even reach the question of whether there were material facts in dispute. In fact, there are substantial material facts in dispute, including the reliability and methodology of Mr. Qureshi's Expert Report.

The Qureshi Expert Report is unreliable on its face. Like the EY Independent Valuation, the Qureshi Expert Report applies a discounted case flow

[redacted]

methodology, calculating Retia's market value as the present value of its future cash flows. Unlike the EY report, however, Mr. Qureshi used biased and unsupported assumptions to engineer a valuation [redacted] But, as he could have gleaned from even a cursory on-line search, the 2016-2017 negotiations between ELTA and the Czech Government were never finalized, that tender ultimately was withdrawn, and therefore Retia did not and could not have received the MADR contract. Indeed, Sarn pled in its Amended Complaint that the MADR contract had been lost. (A0128-29, ¶¶ 47, 48.)

Mr. Qureshi had to acknowledge the [redacted][28] Yet he applied no factor for that uncertainty. Instead, he relied on three articles—probably cherry-picked by litigation counsel—and a reference in a report by a sales

[28] B0004714, ¶ 82.

[redacted]

director. The articles address an intention to start negotiations[29] and an (erroneous) prediction that "signing of the agreements is approaching."[30] [redacted]

The market will pay more for cash flows the realization of which is more certain (*i.e.*, less risky) and less for cash flows where realization is less certain (*i.e.*, more risky).[31] A discounted cash flow valuation must capture this uncertainty by adjusting expected future cash flows by a factor reflecting the probability of achieving them.[32] Mr. Qureshi did not do so, [redacted].[33]

[29] B0002956-58; B0002960-63.

[30] B0002980.

[31] Shannon Pratt, *Valuing a Business*, 5th ed., 2008, p. 184.

[32] *See* Harold Bierman, Jr., and Seymour Smidt, *The Capital Budgeting Decision*, 8th ed., NJ: Prentice-Hall, 1992.

[33] [redacted]

[redacted]

[redacted]

An important step in any discounted cash flow valuation is developing a reasonable estimate of the profit margin that a company can be expected to earn in the long run. [redacted]

[redacted]

[34] B0002549, ¶ 28; B0002619.

[35] B0002580.

[redacted]

[redacted]

[redacted]

[redacted] Yet he failed explain why he did not at the very least discount those highly uncertain future cash flows. [redacted]

[redacted] These unreasonable and results-driven errors are just two of the unsupportable elements in his valuation, albeit the most glaring. They confirm that Qureshi's "Expert report" does not qualify as an "Independent Valuation" under the terms of Section 2.4.2. At a bare minimum, they reflect that discovery is needed, including a response from CSG's rebuttal expert witness.

5. Genuine Issues of Material Fact Relating to the Independence of the Qureshi Expert Report Required Full Discovery and Precluded Summary Judgment.

The Superior Court needed to allow completion of discovery in the case, including (*inter alia*) discovery into (i) the input that Sarn's principals and litigation counsel were giving to PwC for its valuation; (ii) Sarn counsel's failure

[36] B0002557,¶ 80.

[redacted]

to provide information specifically requested by PwC and in the possession of counsel; and (iii) PwC's reliance on cherry-picked, results-driven pieces of information while ignoring substantial adverse information. Discovery is needed on whether the parties ever contemplated that a litigation expert witness could be utilized to prepare the "Independent Valuation" called for by the contract—after all, the Superior Court even found "[t]hat was not contemplated by Section 2.4.2." Ex. A, Dec. 23, 2020 Order at 20.[37] Discovery also is needed on whether PwC's valuation followed normal accounting principles and is methodologically flawed, and rebuttal testimony must be permitted because PwC is acting as an avowed expert witness, retained by litigation counsel.

The trial court allowed only "LIMITED discovery relating to the implied covenant of good faith and fair dealing on the declarations listed above and the PwC Retainer Agreement," restricted to "no more than 3 document requests (including subparts) and a four-hour deposition of Mr. Qureshi." (Ex. A, Dec. 23, 2020 Decision at 23.)

[37] CSG has emphasized throughout that the independent valuation cannot be performed by the parties' litigation experts and that the independent valuations are the work of percipient fact witnesses subject to discovery. *See, e.g.,* B0000688-692, 19:10-20:5; 22:16-23:12; 24:3-26:8; B0000751-57, 5:21-6:18; 7:22-8:15; 11:8-18.

[redacted]

But even this straightjacketed discovery, together with the exhibits and appendices to Qureshi's report, made clear that Mr. Qureshi was incentivized not to be disinterested, apparently was not disinterested, was controlled and directed by counsel and Sarn's principal, and at a minimum real discovery is needed into the independence of Mr. Qureshi's "Expert report."

Mr. Qureshi was hired as a litigation expert by litigation counsel for Sarn. In one and the same contract, he agreed to both provide the "independent valuation" of Retia[38] and to testify as an expert witness on Count II of the Amended Complaint.[39] The work on Count II was the more lucrative part of the retention, as Armen Agas, a principal of Sarn, reminded Mr. Qureshi and his colleagues as they began work in the fall of 2019:

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[38] Mr. Qureshi, his report, and Sarn's emails all reflect the parties' understanding of their contract that an "independent valuation" was required. *See* B0003920-27, 29:11-22, 30:22-31:1, 35:4-36:7; B0002545, ¶ 2; B0004286 [redacted].

[39] B0003920-28, 29:11-31:18, 34:10-36:7, 37:6-13; B0004183-84.

[redacted]

B0004286 (emphasis added). In case the message was not clear, Mr. Agas added: [redacted] (B0004287.[40]) Within a week of the valuation report, PwC was asking for a call to discuss the "phase 2 report." (B0004821.)

As a litigation-support professional compensated in part on originations, Mr. Qureshi was keen to expand his relationship with Sarn and its counsel, as reflected in his prompt response to an email explaining that Sarn had been distracted by the other litigation with CSG: [redacted][41]

But why "wait for the EY report"? Section 2.4.2 contemplated simultaneous valuations, after all. The only explanation was for Sarn to gain litigation advantage. Mr. Qureshi's engagement was tied to litigation support, not the call option contract. He was directed not to begin work until after the Court had determined it had jurisdiction of Count II (B0003933-52, 42:1-24, 59:8-61:9; B0004188; B0004210); he agreed not to receive his [redacted] retainer until "[redacted] (B0004202);

[40] *See also* B0004775 ("Keep up the good work to uncover the truth").

[41] B0003975-76, 66:9-67:21; B0004225.

[redacted]

and he was not even provided the documents used by EY until seven months after they were produced to Sarn, and then only a portion appear to have been sent.[42] In lieu of the EY documents, Sarn re-emphasized its litigation purpose and desired outcome by sending Mr. Qureshi eight pleadings and discovery responses with the direction that [redacted] B0004296 (emphasis added).

Mr. Qureshi worked at the direction and under the influence of litigation counsel. (B0004200-01.) There were at least two in-person meetings and ten calls with Sarn and its counsel.[43] Mr. Qureshi repeatedly testified that he was acting at the direction of his client and, for instance, could not imagine directly communicating with Retia without Sarn first vetting the communication.[44] In the last week of October, 2019 Mr. Agas still was instructing Mr. Qureshi to [redacted] until Sarn had conferred and gotten

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[42] 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.

[43] *E.g.*, B0003958-4032, 67:22-69:15, 83:8-84:16, 99:18-101:23, 117:17-118:17, 130:15-133:10, 138:22-139:18, 140:23-141:21; B0004127-34; B0004172-79; B0004238-88; B0004304; B0004316-17; B0004320; B0004423; B0004425; B0004581-93; B0004603; B0004771-72.

[44] *See, e.g.*, B0003953-4005, 62:24-66:5, 75:9-79:20, 84:17-87:14, 112:21-114:17; B0004316-17.

[redacted]

back to him [redacted] (B0004307.) PwC took extensive guidance from Mr. Agas, followed his direction not to even formulate information requests to Retia until provided with his views of the facts, and adopted his work product wholesale into its information requests.[45]

Mr. Qureshi also deferred to Sarn on his Expert Report. On February 21, 2020—17 days before the final report was issued—Mr. Qureshi asked for a call with Sarn's principals and Sarn's counsel [redacted] (B0004028, 9-138:10; B0004590.) Thus, the valuation amount and key assumptions were discussed with Sarn even before a draft report was sent and even before all pertinent information, such as the deposition transcripts, had been received and reviewed. (B0004029, 11-21.) Mr. Qureshi then provided Sarn with a draft of the valuation report on February 28, with specific requests to counsel for input on rewriting the description of the assignment and for his opinion on including particular contentions about the EY report.[46]

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[45] B0004063-64, 172:3-173:14; B0004306-14; B0004749-57. As an example, on [redacted] Agas sent [redacted] (B0004336-39); the next day PwC sent an information request to Retia seeking all of Agas's items, including details about all of Retia's subsidies. B0004757.

[46] B0004035-41, 144:12-151:7; B0004605; B0004613; B0004618.

[redacted]

Counsel commented (B0004643), the comments were dutifully incorporated, and another draft was sent on March 4, 2020 (B0004639-89). It is thus ironic to see counsel's suggestions (duly incorporated) to [redacted] and to [redacted] (B0004634.)

Sarn restricted and cherry-picked the information available to PwC. *See* B0004429-31. Thus, depositions of six CSG witnesses and Sarn principal Steve Richards were taken between January 20 and February 6, 2020. Asked if he wanted the transcripts, Mr. Qureshi replied [redacted][47] Ten days later and after another request (B0004590), Sarn sent only two of the seven.[48] Mr. Qureshi was not provided the transcripts for Andrej Cirtek, Jiri Sauer, or Jaroslav Strnad, who had testified that Retia's hoped-for subcontract in 2017 never occurred and that the operative tender was cancelled.[49] Nor was the transcript for Richards, who

[47] B0004026-28, 135:9-137:3; B0004582.

[48] B0004030-31, 139:19-140:22; B0004595.

[49] B0004780-81, 98:8-99:18; B0004784-85, 120:2-121:17; B0004788-808, 137:19-138:8, 141:13-145:8, 147:11-151:2, 154:18-156:13, 166:25-168:1; *see also,*

[redacted]

testified about Agas identifying risks to the 2016-17 bid, including [redacted] [redacted][50] The withheld information may be why Mr. Qureshi treated the ultimately cancelled 2016-17 tender and negotiations as if they were a finalized contract—resulting in [redacted][51] Notably, Mr. Qureshi could not provide a credible explanation for why his report did not disclose that he obtained substantial information from Sarn. B0004049-56, 158:10-165:6.

The Superior Court was required, at the very least, to allow full discovery into the issue of whether the report was reliable and independent before granting Sarn's motion for summary judgment on Count I. *See e.g.*, *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 498 (Del. 2000) (where, as here, an expert's factual basis, data, principles, or methods or their application are called into question, the trial judge must determine the reliability of the testimony.). When a court is faced with a lack of reliable direct evidence of value, or when doubt exists

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e.g., B0004576-77, ¶ 2 (ELTA discovery response stating [redacted]).

[50] B0004811-17, 342:3-348:6; B0004603.

[51] B0004713-14, ¶¶ 80-86.

[redacted]

as to the accuracy of its findings, it is appropriate for the court, as a fact-finder, to test its conclusions against other evidence in the record before it." *Matter of Shell Oil Co.*, 607 A.2d 1213, 1220 (Del. 1992).[52] This is especially true when it comes to *post hoc*, litigation-driven forecasts which "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. and Cinerama v. Technicolor*, Inc., 2003 WL 23104613, *7 (Del. Ch. Dec. 31, 2003).

Accordingly, it was error for the Superior Court to grant Sarn's motion for partial summary judgment without allowing CSG to test the reliability of the Qureshi Expert Report.

6. The Trial Court Erred By Relying on Mr. Qureshi's Declaration and Other Evidence First Submitted and Produced With Sarn's Summary Judgment Reply Brief.

The trial court's opinion relied heavily on a declaration given by Mr. Qureshi, and in fact quoted the declaration for almost a full page of its opinion.

[52] This case analyzes the determination of the Chancery Court of the fair value of shareholder stock under an appraisal action brought pursuant to 8 Del. C. § 262. Even though the present case is not an appraisal action, the values extensively tested in those actions are applicable here, where the value of a company is at issue.

[redacted]

(Ex. A, Dec. 23, 2020 Order at 21-22.) This declaration was submitted for the first time with Sarn's reply brief in support of the motion. (B0003184-190.)

In addition to Mr. Qureshi's declaration, with its reply brief Sarn introduced 278 pages in support of the Qureshi Expert Report.

Although these items were referenced in the report, they were not produced to CSG until June 4, three months after the report and three weeks after CSG's deadline to oppose the motion.[53]

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). "Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion. A movant should not hold matters in reserve for reply briefs." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (internal citation omitted); *cf. State v. Jackson*, 2014 WL 4407844, at *10 (Del. Super. Ct. Sept. 3, 2014) ("The Supreme Court disdains sandbagging in reply briefs . . ."); Del. Supr. Ct. R.

[53] The exhibits beg the question of why Mr. Qureshi chose to rely only on this sliver of the total documents if he was performing a truly neutral and independent valuation—and how he selected them—and what he reviewed and did not rely on.

[redacted]

14(c)(i) (a party "shall not reserve material for reply brief which should have been included in a full and fair opening brief"); *see Bako Pathology LP v. Bakotic*, 288 A.3d 252, 270 (Del. 2022) (deeming waived arguments raised for the first time in a reply brief and at oral argument).[54]

7. Summary Judgment Was Premature Because Discovery was Still in Process.

Discovery is not complete on any of the matters involved with the Call Option Agreement. CSG has not been permitted discovery into Mr. Qureshi's and PwC's work or interactions with Sarn or its counsel who is supervising them. Even the materials relied on by Mr. Qureshi in his report have not been produced. Fact discovery is plainly needed. Expert discovery also is plainly needed, especially given the apparent lack of independence and the significant issues with Mr. Qureshi's methodology. Whether Mr. Qureshi is viewed as a percipient or an expert witness, discovery is needed, and the defense has a right to a valuation expert to testify about them.

If there are material factual disputes, that is, if the parties are in disagreement concerning the factual predicate for the legal principles they advance,

[54] This issue was preserved below. (A1380-81.)

[redacted]

summary judgment is not warranted. *Motors Liquidation Co. v. Allianz Ins. Co.*, 2013 WL 7095859, at *1 (Del. Super. Dec. 31, 2013) (*citing Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992)). Summary judgment should not be granted where discovery is incomplete. *See, e.g., Annestella v. GEICO General Ins. Co.*, 2014 WL 4229999, at *1 (Del. Super. Aug. 18, 2014) (summary judgment denied, as it would be premature in absence of further discovery needed for choice of law analysis); *Chavez v. Allstate Ins. Co.*, 2019 WL 994577, at **2-3 (Del. Super. Jan. 29, 2019) (partial summary judgment denied where plaintiff had not yet been able to fully investigate and develop facts that might be pertinent to his claim); *Laine v. Speedway, LLC*, 2016 WL 5946491, at *3 (Del. Super. Oct. 13, 2016) (court denied summary judgment motion without prejudice to refile at close of discovery to give parties additional time to discover evidence); *Wigonsett Cruz-Miranda v. State Farm Mutual Auto. Ins. Co.*, 2014 WL 1677813, at *2 (Del. Super. Apr. 21, 2014) (summary judgment denied because material facts were not yet locked in).

[redacted]

ARGUMENT IN OPPOSITION TO SARN'S APPEAL

I. The Court Did Not Err In Finding that Sarn Was Not Entitled to Sanctions Under Civil Rule 37(b).

A. Question Presented

Did Sarn fail to show that relief was warranted under Superior Court Civil Rule 37(b)?

B. Scope of Review

The Superior Court has broad discretion whether or not to impose discovery sanctions under Rule 37. *Lehman Capital v. Lofland ex rel. Estate of Monroe*, 906 A.2d 122, 131 (Del. 2006) (quoting *In re Rinehardt*, 575 A.2d 1079, 1082 (Del.1990)). Therefore, this Court "will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of discretion." *Id.*

C. Merits of Argument: Sarn Was Not Entitled to Rule 37 Relief.

Under Superior Court Civil Rule 37(b), the trial court may impose sanctions for a party's failure to obey an order to provide or permit discovery. Sarn has failed to identify any order that CSG failed to obey. There is thus no basis for discovery sanctions.

Contrary to Sarn's characterization, the court did not require Sarn to file a motion under Rule 60; it merely observed that Sarn could do so if it thought

[redacted]

appropriate. Nor did the court promise Sarn a positive outcome, but instead provided guidance to Sarn by explaining that the relief it sought was not proper under Rule 37.

Sarn asserts that the Superior Court misapprehended its authority to issue sanctions under Rule 37 and incorrectly interpreted the rules when it "required" Sarn to file a motion under Rule 60. That is not what happened at all, as the transcript of the hearing and subsequent order reflect. (B0004938-0987; A1867-68.)

Under Superior Court Civil Rule 37(b), the court may choose from a menu of different sanctions when a party fails to obey an order to provide or permit discovery. Del. Super. Ct. Civ. R. 37(b)(2); *Keith v. Lamontagne*, 2021 WL 4344158, at *2 (Del. Super. Ct. Sept. 20, 2021). Any sanctions the court orders must be "tailored to the specific violation and its prompt cure." *In re Rinehardt*, 575 A.2d at 1082. It follows that Rule 37 sanctions require the precondition of the court's issuance of a discovery order that is subsequently violated by the non-moving party.

Here, Sarn filed a motion for discovery sanctions under Rule 37(b) against CSG, despite there being no discovery order that CSG violated. In its motion, it asserted that it was harmed by a two-year delay in CSG's production of requested

[redacted]

documents.[55] However, the J&T Banka Documents were produced on May 22, 2020, in direct response to the February 19, 2020 resolution of the parties' motions to compel.[56] That Sarn chose to file a motion for summary judgment before it received the agreed-upon responses to a discovery request does not make CSG culpable of a discovery violation.

Moreover, the J&T Banka Documents were produced a month before Sarn filed its reply brief in support of its motion for partial summary judgment, where it argued against CSG's position that summary judgment was premature as fact discovery was ongoing.[57] This contradicts Sarn's claim that COVID-19 had disrupted timelines and its excuse that it did not tend to the May 22, 2020 document production because it thought discovery on Count I was over. Sarn's failure to discover the documents until two years after they were produced was a product of a lack of diligence on the part of its counsel, not CSG.

Sarn's Rule 37 motion was denied because CSG had not violated any court order. Sarn's Rule 37 motion also was denied because CSG did nothing wrong:

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[55] A0635-36, ¶ 10.

[56] A0576.

[57] B0003177.

[redacted]

the issue was Sarn's failure to read documents in its possession, not CSG's failure to produce them.

[redacted]

II. The Trial Court Did Not Err In Finding that the "J&T Business Plan" Did Not Constitute "Newly Discovered Evidence" and That No "Extraordinary Circumstances Justify Relief Under Rule 60.

A. Questions Presented

Did the Superior Court abuse its discretion when it concluded that the J&T Banka Documents did not constitute "newly discovered evidence" nor extraordinary circumstances to justify relief under Rule 60(b)?

B. Scope of Review

The standard of review of the Superior Court's denial of a motion to reopen judgment under Rule 60(b) is abuse of discretion. *Albu Trading, Inc. v. Allen Fam. Foods, Inc.*, 822 A.2d 396 (Del. 2002).

C. Merits of Argument

The Superior Court correctly concluded that Sarn's belated reading of the J&T Banka Documents did not constitute "newly discovered evidence" that entitled it to relief from the court's Decision under Rule 60(b)(2). The court also correctly concluded that no extraordinary circumstances existed entitling Sarn to relief under Rule 60(b)(6).

Superior Court Civil Rule 60(b) allows the court to relieve a party from a final judgment for six reasons, two of which are at issue here. Under Rule 60(b)(2), relief may be granted for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under

[redacted]

Rule 59(b)." In order to qualify as newly discovered evidence, it must have been "in existence and hidden at the time of judgment." Relief under Rule 60(b)(6), granted for "any other reason justifying relief from the operation of the judgment," requires a showing of "extraordinary circumstances." "Because of the significant interest in preserving the finality of judgments, Rule 60(b) motions are not to be taken lightly or easily granted." *Senu-Oke v. Broomall Condo., Inc.*, 2013 WL 5232192, at *1 (Del. Sept. 16, 2013) (TABLE) (quoting *Wilson v. Montague*, 2011 WL 1661561, at *2 (Del. May 3, 2011) (TABLE)).

The Supplemental Decision was issued on November 15, 2021, making the deadline for the motion ten days later on November 25, 2021. *See* Sup. Ct. Civ. R. 59(b). Sarn's motions, filed eleven months later, is clearly untimely.

Assuming, *arguendo*, that Sarn had timely filed its motion, it still fails. Had Sarn's counsel exercised due diligence upon receiving the May 2020 production of documents, it would have discovered the J&T Banka Documents. Given that the court did not issue the Decision until seven months after CSG produced the documents, there was ample time for Sarn to present the document to the court before it issued its decision. The failure to review the documents in its possession does not make that evidence "newly discovered."

[redacted]

Sarn's complaint is that the J&T Banka Documents were not provided to PwC when they were produced. Indeed, Sarn says it did not bother to look at the documents for two years after production, despite that it had a summary judgment motion pending. Sarn's only excuses for its lassitude were that (1) Count I discovery had finished—which is false, as the Case management order reflects and the trial Court was quick to admonish Sarn; and (2) COVID-19 had disrupted the case timelines."[58] But Sarn had filed its summary judgment motion after the COVID-19 pandemic started. If counsel could review the record, brief and argue the motion, and submit 1,336 pages of exhibits with it, they could readily have reviewed the documents they had insisted be produced, including with a specific request for the J&T Banka Documents.

Nor is there any merit to Sarn's claim that the J&T Banka Documents were concealed from Sarn. As described above, as part of the compromise on dueling motions to compel, on February 19, 2020, Sarn's counsel emailed CSG's counsel the particular discovery requests that Sarn claimed to need, and which CSG had agreed to produce. (B0005578-83.) That list included communications with J&T Banka regarding financing for Retia. The search for responsive documents was

[58] B0004956, 19:19-22.

[redacted]

extensive and took time. On May 22, 2020, CSG produced over 12,000 responsive documents in direct response to PwC's request for production from February 19, 2020.[59] The J&T Banka Documents were part of that production.

As the court had made clear at a May 23, 2022 hearing, it never segmented discovery into two streams — one stream for Count I and another for Count II — as Sarn misleadingly tells this Court.[60] "I did not order discovery to be completed for Count I." (B0004958-59, 21:23-22:3.) CSG produced the documents in the normal course of discovery following a discovery dispute over these very documents. No order from this Court obligated CSG to produce the J&T Banka Documents sooner.

Nor are the J&T Banka documents relevant to the Retia valuation. They were not prepared by Retia. The record indicates that the J&T Banka Documents were [redacted][61] The communications to J&T Banka cannot be read to suggest that the MADR contract

[59] B0004969-970, 32:22-33:17.

[60] B0004957-960, 20:23-23:1.

[61] A1907, 111:3-9; A1814-15, ¶¶ 2-3.

[redacted]

was a certain source of revenue, despite other evidence reflecting that the project's fruition was uncertain and even unlikely.[62] Indeed, the MADR project under consideration in 2017 was cancelled. (A0438.) In its Amended Complaint Sarn has even admitted that the MADR contract was lost—necessarily rendering it irrelevant to Retia's real value in June 2017.[63]

Although COVID-19 has been held to justify Rule 60(b)(6) relief in certain cases, it was no excuse here, where counsel's lack of diligence is the issue. *See O'Rourke v. PNC Bank*, No. CV N20C-08-064 JRJ, 2021 WL 3507666, at *4 (Del. Super. Ct. Aug. 9, 2021) (explaining that PNC's diligence weighed in favor of vacating a default judgment of Rule 60(b)(6), along with the havoc wreaked by COVID-19); *Smith v. Nations Recovery Ctr., Inc.*, No. 119CV1229MADDJS, 2020 WL 3479496, at *1 (N.D.N.Y. June 25, 2020) (excusing failure to timely file an application to reopen the case because "Plaintiff made her request for reinstatement within a reasonable period of time.").

The trial court acted correctly in denying Sarn's Rule 60 motion.

[62] B0004779-819; B0004890, ¶ 12.

[63] A0128-29, ¶¶ 47, 48.

[redacted]

III. The Trial Court Did Not Err When It Converted the Contractual "Penalty Amount" from Czech Crowns to U.S. Dollars on the Date of the Valuation.

A. Question Presented

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

B. Scope of Review

This issue was not preserved for appeal. "Only questions fairly presented to the trial court may be presented for review." Delaware Supreme Court Rule 8. The exception to Rule 8, under which newly raised issues may be reviewed on appeal for plain error, is limited to material defects apparent on the face of the record that clearly show manifest injustice. *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). Should this Court choose to review the issue regardless, the standard of review for the Superior Court's application of the appropriate legal standards is *de novo*. *Dover Hist. Soc., Inc. v. City of Dover Plan. Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

C. Merits of Argument

1. Sarn Failed to Preserve the Issue for Appeal

Sarn asserts that the Superior Court erred when it issued its Final Judgment and Revised Order in two ways: (1) by expressing the Penalty Amount in USD, not CZK, and (2) by converting the judgment to USD using the exchange rate in

[redacted]

effect on June 20, 2017, the valuation date. But Sarn failed to preserve the first argument for appeal, and Sarn is wrong on the second. Nor does the issue rise to the level of plain error.

On May 23, 2023, Sarn submitted a letter brief and proposed order that asserted as follows: The Penalty Amount equaled [redacted] the pre-judgment interest accrued from June 20, 2017 through the date of the court's final judgment and order; the post-judgment interest would accrue from the date of the court's final judgment and interest through the date upon which the judgment is satisfied at a rate of 10.25% per annum. (A2485-A2492.) Sarn submitted a revised letter on June 1, 2023, in response to CSG's May 25, 2023, letter to the court.[64] In its revision, Sarn agreed to a fixed statutory rate of 6.75% as of June 20, 2017 for pre-judgment interest. (B0005776.)

On July 19, 2023, the trial court emailed counsel that "[o]ur case manager says that judgments must be in USD and not CZK. The order needs to have 'a conversion identified' on the order, *i.e.*, somewhere in the judgment it has to be in USD. Please submit an order with USD." (A2506.) Counsel for Sarn responded

[64] B0005776-81.

[redacted]

within ten minutes, saying "We will submit an order with USD as promptly as possible." *Id.*

On July 20, 2023, counsel for Sarn emailed the court a Final Judgment and Order in US dollars. (A2505.) The email explained that the parties were unable to reach an agreement on the correct date of the conversion rate and that "Sarn believes that execution of the judgment was only ripe as of yesterday, and the value of the judgment should be calculated using yesterday's published conversion rate." CSG submitted a letter brief that same day, asserting that "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." (Opening Brief Ex. E at 91.)

On August 23, 2023, the court issued a handwritten order, stating that "the conversion rate at the time of valuation, June 20, 2017, is the applicable rate." (Op. Brief Ex. E, pg.91.) The court relied on the reasoning in *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 323 (6th Cir. 2011).

Sarn did not respond to the Superior Court's request for a new form of Final Order and Judgment by telling the court that it had to be in CZK rather than USD, and it never told the court that thereafter. Instead, Sarn submitted a Proposed Final

[redacted]

Order and Judgment with the value in USD.[65] This matter does not rise to a manifest injustice warranting a plain error review.

2. The Court's Conclusion About the Conversion Date Was Correct.

The Court requested a conversion of the judgment amount from CZK to USD. As the contract provided for payment and calculation in crowns, the conversion rate should be the rate at the date the payment became due, June 20, 2017. That rate was [redacted][66] Using a current rate for the conversion (as opposed to for post-judgment interest) would result in a windfall to the plaintiff.

[65] A2513: "IT IS HEREBY ORDERED, that judgment on Count I shall be entered in favor of SD3 and against CSG in the amount of [redacted] (Penalty Amount) and [redacted] (in pre-judgment interest) for a total judgment in the amount of [redacted], *equivalent to* [redacted] as of the date of this Order . . . ." (Emphasis added.)

[66] https://www.exchangerates.org.uk/USD-CZK-spot-exchange-rates-history-2017.html

[redacted]

CONCLUSION

For the reasons set forth above 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. Should the Court decide to affirm the initial grant of summary judgment on Count I of the Amended Complaint, CSG respectfully requests the Court to deny Sarn's appeal for the reasons set forth above and in the record.

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Dated: January 29, 2024

[redacted]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF SERVICE

I, Tiffany Geyer Lydon, Esquire, do hereby certify that on the 13th day of February 2024, I caused a true and correct copy of the public redacted version of *Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal* and the *Appendix to Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief* on Cross-Appeal to be served on the following counsel of record via File & Serve*Xpress:*

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