EFiled: Feb 28 2024 01:14PM EST
Filing ID 72191068
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

Dated: February 28, 2024

DUANE MORRIS LLP

Ryan E. Borneman*
Robert M. Palumbos*
Ryan F. Monahan*
30 S. 17th Street
Philadelphia, PA 19103
Telephone: (215) 979-1000
Fax: (215) 689-2407

DUANE MORRIS LLP

Mackenzie M. Wrobel (#6088)
Coleen W. Hill (#6287)
1201 N. Market Street, Suite 501
Wilmington, DE 19801
Telephone: (302) 657-4900
Fax: (302) 657-4901
mmwrobel@duanemorris.com
cwhill@duanemorris.com

**admitted pro hac vice*

Counsel for Plaintiff-Below,
Appellant/Cross-Appellee SARN SD3 LLC

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Rules, Statutes, and Other Authorities

PRELIMINARY STATEMENT

CSG ignores the central argument in SD3's Opening Brief: the Superior Court misapprehended its authority under Rule 37 to issue sanctions and refused to consider the relief requested by SD3 unless it was brought under Rule 60.[1] The Superior Court did so on the mistaken belief that it could only amend its December 2020 Decision under Rule 60. For the reasons set forth in SD3's Opening Brief, that was reversible error, and the Court should remand to the Superior Court to permit it to consider the merits of SD3's Rule 37 Motion.

CSG focuses its attention on the second-half of the Rule 37 analysis: that Rule 37 relief is improper, on the merits, because the Superior Court never issued an "order" compelling discovery and because it "did nothing wrong." That is not only an exceptionally narrow and unsupported view of the Superior Court's authority under Rule 37, *it distorts reality*. The Superior Court repeatedly required CSG to produce documents to SD3 and PwC that were required for PwC's valuation, including with such emphatic statements as, "[CSG has] to provide this to [PwC], and anything that [PwC] says they need to do their 2.4.2 valuation, you have to give them . . . [PWC's valuation is] not going to be blocked by RETIA, and it's not going

---

[1] Abbreviated and capitalized terms used but not defined herein have the same meaning as they do in SD3's Opening Brief, cited herein as "OB" (Trans. ID # 71496449.) Citations to Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Answering Brief") appear as "AB" (Trans. ID # 71895166.)

to be blocked by CSG, and it's not going to be blocked by [EY]." (A0291–293.) In the Superior Court's own words, it "had to ***order*** CSG to provide information to SD3 or PwC." (OB Ex. A at 20 (emphasis added).)

In any event, CSG's attempt to have this Court decide the Rule 37 Motion under the correct standard in the first instance is improper. Whether the Superior Court believes CSG's conduct is sanctionable under Rule 37 is for the Superior Court to decide. For the reasons set forth in SD3's Opening Brief, and this Reply, the Court should reverse the Superior Court's decision denying its Rule 37 Motion and remand to the Superior Court to consider the Rule 37 Motion under the correct legal standards.[2]

CSG also ignores SD3's central argument on the conversion rate issue: that the Delaware Uniform Foreign-Money Claims Act (10 *Del. C.* § 5201, *et seq*.) requires the Superior Court to enter a judgment on a foreign-money claim in a foreign amount. CSG, instead, argues that SD3 waived the argument and focuses its attention on email correspondence with the Superior Court. But SD3 submitted a proposed order that expressed the final judgment award in Czech Crowns. The Superior Court rejected that proposed order, and required the parties to express the final judgment amount in U.S. Dollars. SD3's Proposed Order preserved this issue,

---

[2] In the alternative, for the reasons set forth in SD3's Opening Brief, the Court should reverse the Superior Court's decision denying SD3's Rule 60 Motion,

and the Superior Court's rejection of it was a definitive ruling that can be reviewed. The subsequent dispute about the correct date from which to calculate the conversion rate is irrelevant, and could have been avoided, if the Superior Court accepted SD3's initial proposed order. For the reasons set forth in SD3's Opening Brief, and this Reply, the Court should vacate the judgment and remand so the Superior Court can enter a new judgment expressed in Czech Crowns.

As to CSG's cross-appeal, it does everything in its power to avoid an obvious fact: the Superior Court interpreted an unambiguous contract and circumscribed discovery based on the plain terms of the Agreement. That was not an abuse of discretion by the Superior Court, which retains ultimate control over the scope of discovery in the case. That decision was also consistent with the rights the parties' bargained for in the Agreement, which did not require "independence" of the valuator, as CSG has chosen to define it. Even so, the Superior Court *gave* CSG discovery into the independence issue, and CSG failed to generate a genuine dispute of material fact over PwC's independence. As a result, CSG's appeal amounts to a complaint that it didn't get the answers it was looking for, on an issue that it wasn't even entitled to dispute. The Court should therefore affirm the Superior Court's Decision and Order Granting Summary Judgment as to Count I (Nov. 15, 2021) (OB Ex. B.).

REPLY ARGUMENTS ON APPEAL

I. THE SUPERIOR COURT SHOULD HAVE CONSIDERED SD3's RULE 37 MOTION, WHICH SOUGHT TO CORRECT CSG'S UNTIMELY DISCLOSURE OF THE J&T BUSINESS PLAN.

The Superior Court erred when it denied SD3's Rule 37 Motion "without prejudice to SD3 [to] seek[] relief under Civil Rule 60." (OB Ex. C at 2.) The Count I decisions were unquestionably interlocutory orders that could be amended and revised, as needed, to account for updated PwC and EY valuations, based on the J&T Business Plan. The Superior Court had broad discretion to do so, consistent with Rule 54(b) and its inherent powers to revise its interlocutory Count I Decisions. *See White v. Town of Elsmere*, 1985 WL 635621, at *1 (Del. Super. 1985). Rule 37 further permits the Superior Court, in response to a discovery violation, to "make such orders in regard to the failure [to provide discovery] as are just." Super. Ct. Civ. R. 37. By contrast, Rule 60 *only* applies to final orders, and a court can only amend or revise a final order if the high bar set by Rule 60 is met.

CSG does not dispute the fact that the Count I Decisions were interlocutory orders, and thus the Superior Court *could have* "vacat[ed]" or "amend[ed]" the Count I Decisions. (OB Ex. C at ¶ 3.) On this basis alone, the Court should vacate the Superior Court's Rule 37 Order and remand to the Superior Court so that it can consider the merits of SD3's Rule 37 Motion.

Instead, CSG only makes two arguments to support affirmance of the Rule 37 Order. *First*, CSG takes issue with SD3's characterization of the Rule 37 Order by suggesting that the Court did not "require" SD3 to file a motion under Rule 60. (AB at 55–56.) But the rationale of the Superior Court's Rule 37 Order, and its effect, are not in serious dispute. The Superior Court stated that "[d]uring the Hearing, the Court noted that the Motion seeks discovery sanctions under Civil Rules 26 and 37 and that relief regarding the Decision should be made under Civil Rule 60." (OB Ex. C at ¶ 1.) It then concluded "[a]llowing new valuation reports based on newly discovered evidence could possibly require vacating or amending the Decision. After reviewing the Motion, the Opposition, the Decision and the relief sought, *the Court continues to find that SD3 is seeking relief from the Decision due to newly discovered evidence and not discovery sanctions. As such, the Motion seeks relief under the wrong rules and standards.*" (*Id.* at ¶ 3 (emphasis added).) Based on that reasoning, the Superior Court denied SD3's Rule 37 Motion "without prejudice to SD3 seeking relief under Civil Rule 60..." (*Id.* at 2.) Under the plain terms of the Rule 37 Order, the Superior Court viewed SD3's Rule 37 Motion as procedurally

improper. To obtain relief, if any, SD3 was required to file a motion under the inapplicable Rule 60.[3]

Second, CSG suggests alternative rationales for the Court's decision: that "[SD3's] Rule 37 motion was denied because CSG had not violated any court order" and that "CSG did nothing wrong." (AB at 57–58.) Notably, neither rationale appear in the Rule 37 Order. The Superior Court, not this Court, should decide whether CSG violated one if its orders or "did nothing wrong," in the first instance. *See, e.g.*, *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 991 (Del. 2013) (remanding "to enable [trial judge] to make that determination in the first instance before we enter the debate over what role sufficiency plays in admissibility."); *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 451 (Del. 2013) ("Because the Superior Court did not address any of these alternatives, we must remand for the court to decide this question in the first instance.").

But CSG's rationales are also wrong. CSG failed to disclose the J&T Business Plan until May 22, 2020, *after* denying its existence in January and February 2020 in response to PwC's requests for all contemporaneous valuations of RETIA and more than two months *after* the court-imposed deadline for PwC to submit its report,

---

[3] CSG also offhandedly suggests that the Court did not "promise SD3 a positive outcome." (AB at 55.) But SD3 never stated that it did, and CSG's suggestion otherwise is a mischaracterization of SD3's argument.

which is the last possible date in the litigation the J&T Business Plan would have needed to be provided to PwC. CSG failed to timely disclose the J&T Business Plan in contravention of the Superior Court's order that "anything that [PwC] says they need to do their 2.4.2 valuation, *you have to give them . . . .we're not going to block them . . . it's not going to be blocked by RETIA, and it's not going to be blocked by CSG, and it's not going to be blocked by [EY].*" (A0291–293, H'ring Tr. at pp. 40–42 (Oct. 28, 2019) (emphasis added).) The Superior Court reiterated its order two months later, in December 2019. (A0417, H'ring Tr. at 10:1–20 (Dec. 20, 2019) ("[M]y ruling back [on October 28] was, this is the orderly process that needed to be done and it's got to be done.").) Despite the Superior Court's insistence that CSG provide "anything that PWC says they need to do their 2.4.2 valuation" and despite PwC's specific request for contemporaneous valuations, CSG failed to timely disclose the J&T Business Plan. That conduct is sanctionable under Rules 26 and 37.

CSG downplays its discovery violations when it argues that it did not violate a specific order of the Superior Court, and that "Rule 37 sanctions require the precondition of the court's issuance of a discovery order that is subsequently violated by the nonmoving party." (AB at 56.) CSG did, in fact, violate a court order. In the Superior Court's own words, it "had to *order* CSG to provide information to SD3 or PwC." (OB Ex. A at 20 (emphasis added).) The fact that CSG does not view the

Superior Court's specific demands to provide information to SD3 and PwC as an order is disingenuous, and more importantly, irrelevant, when the Superior Court characterized its own statements to CSG as an order compelling discovery. (*See id*.)

CSG also construes Rules 26 and 37 too narrowly. "A trial court has broad discretion to fashion and impose discovery sanctions," *Genger v. TR Invs.*, 26 A.3d 180, 190 (Del. 2011), not just under the court's discovery rules, but also "under its inherent equitable powers, as well as the Court's 'inherent power to manage its own affairs.'" *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106–07 (2d Cir.2002)); *see also Terramar Retail Centrs, LLC v. Marion #2-Seaport Trust U/A/D June 21, 2002*, 2018 WL 6331622, at *10, n.54 (Del. Ch. Dec. 4, 2018) (describing the "arsenal" of sanctions provided to a court under Rule 37, and stating that "[w]ithout adequate sanctions the procedure for discovery would often be ineffectual. Under Rule 37 . . . any party or person who seeks to evade or thwart full and candid discovery incurs the risk of serious consequences." (citing Wright & Miller, *Federal Practice and Procedure* § 2281 (3d ed. 2010)).

If a court can only sanction a party after a specific order compelling specific documents is issued, parties would be free to hide critical, responsive information (as CSG did here) with no fear of reprisal unless and until a specific order compelling

discovery is issued. What is worse, SD3 could not compel the production of the J&T Business Plan, because CSG *denied* its existence. (*See* A0317–321; A0430–442.)

Even so, it is for the Superior Court to decide, on remand, whether its orders were sufficiently clear, such that CSG's failure to timely produce responsive information to PwC's numerous requests was sanctionable. The Superior Court can also decide whether SD3's requested relief, which asks that PwC and EY be permitted to re-issue their reports on an expedited timeline with the benefit of the J&T Business Plan, is appropriately tailored to the punishable conduct. Such requested relief is not a punishment directed to CSG, but a remedy in pursuit of fairness.

II. SD3 DID NOT WAIVE ITS RIGHT TO HAVE THE JUDGMENT EXPRESSED IN CZECH CROWNS.

CSG does not dispute that, under the Delaware Uniform Foreign Money Act ("UFMA"), SD3's initial proposed judgment should have been entered because it correctly expressed the foreign judgment in foreign currency. (*See* AB at 64–66.) Instead, CSG argues that SD3 waived the argument. But SD3 proposed an order that expressed the final judgment in Czech Crowns, which was rejected by the Superior Court because "somewhere in the judgment [the amount] has to be in USD." (A2506.) The issue was considered and passed upon by the Superior Court, and therefore preserved.

Under Delaware Supreme Court Rule 8, a question is preserved for review when it is "fairly presented to the trial court." Del. R. Sup. Ct. 8. Here, on May 23, 2023, SD3 submitted a proposed form of final judgment and order, which expressed the final judgment in Czech Crowns. (A2491.) Notably, CSG did not object to the amount being expressed in foreign currency, and only objected to the date in which post-judgment interest accrues. (A2485–86.) On July 19, 2023, the Superior Court rejected that proposed order because "[t]he 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 . . . [signed] Judge Davis." (A2506.) Thereafter, the parties submitted revised proposed orders, which led to a dispute over the correct

date to use to calculate the "conversion rate" from Czech Crowns to U.S. Dollars. (A2505.)

CSG argues that, after the Superior Court rejected SD3's initial proposed order, which expressed the judgment in Czech Crowns, SD3 should have fought back with the court "by telling the court that it had to be in CZK rather than USD . . ." (AB at 66–67.) But a party is not required to strenuously fight back with a Court's decision in order to preserve an issue for appeal. "To be 'fairly presented' an issue already raised in the trial court need not be re-asserted." *Allen v. Scott*, 257 A.3d 984, 992 (Del. 2021). Instead, all that is required is the issue be 'fairly presented' to the trial court, as it was here. Del. Sup. Ct. R. 8; *see also N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369 (Del. 2014) (finding issue preserved even when appellant presents additional reasoning in support of "broader issue" on appeal).

Even if SD3 waived this argument, the Court should correct the plain error of the Superior Court. Here, section 5207(a) of the UFMA clearly requires that "a judgment or award on a foreign-money claim *must* be stated in an amount of the money of the claim." 10 *Del. C.* § 5207(a) (emphasis added). The Court should apply the plain terms of the UFMA, even under plain error review.

SUMMARY OF ARGUMENTS
IN RESPONSE TO CSG'S CROSS-APPEAL

1. DENIED. The Superior Court did not treat Sections 2.4.1 and 2.4.2 as "arbitration or exclusive remedy" provisions, in contravention of Section 7 of the Agreement. It had jurisdiction over SD3's breach of contract claim pursuant to Section 7 and, consistent with its jurisdiction, applied the unambiguous terms of Sections 2.4.1 and 2.4.2 to require the parties to complete separate valuations, which were averaged to arrive at the Penalty Amount. CSG's request for discovery into the independence of that valuation was appropriately limited in light of the unambiguous language of the Agreement, which did not require "independence," as CSG chooses to define it.

2. DENIED. The Superior Court correctly concluded that CSG took inconsistent positions during the course of discovery, and was foreclosed from seeking the same discovery from PwC. CSG's post-hoc characterization of its discovery positions is unavailing, when, as the Superior Court correctly observed, the objections clearly state that "[m]any of the discovery requests appear to presume that SARN [SD3] can attack the validity of the EY valuation by questioning whether the value should have been more. But the Call Option Agreement does not contemplate or permit this claim… For the foregoing reasons, CSG objects to the document requests and interrogatories [of SD3] to the extent they seek information for the purpose of attacking the amount determined by EY in its Independent

Valuation." (OB Ex A at 20.) Even so, the Superior Court did not solely rely on CSG's inconsistent positions when limiting discovery; it instead relied upon the unambiguous language of the Agreement, which "did not anticipate 'independent' valuations by the two Big Four accounting firms." (OB Ex. A at 20.)

3. DENIED. The Agreement defined the term "Independent Valuation" to mean two, distinct things: (1) the valuation of the Company as agreed upon by SD3 and CSG in writing on a date no later than 14 days following the initial notice of the change of control event; and (2) in the event no agreement is reached, the "Independent Valuation" of the Company equals the average of the two valuations performed by Big Four accounting firms hired separately by SD3 and CSG. By the very structure of Section 2.4.2, which contemplated either an agreed valuation or two disparate valuations that would then be averaged out, the parties did not intend for the two valuations to be "independent." Even so, the PwC Valuation *was* "independent," as the record before the Superior Court proved.

4. DENIED. The Superior Court acted within its discretion when it precluded discovery into the methodology and conclusions of the PwC Valuation, which was not relevant to the dispute based on the unambiguous terms of the Agreement.

5. DENIED. The Superior Court acted within its discretion when it limited discovery on CSG's independence challenge, based on the unambiguous

terms of the Agreement. CSG received more discovery than it was entitled to, and still failed to generate a genuine dispute of material fact.

6. DENIED. The fact that Mr. Qureshi's declaration was attached to SD3's reply brief is inconsequential when the Superior Court deferred its summary judgment decision as to the independence issue until *after* CSG had an opportunity to obtain discovery on the issue and depose Mr. Qureshi regarding his declaration. The parties were even permitted to submit supplemental briefing regarding the issue.

ARGUMENTS ON CROSS-APPEAL

I. THE SUPERIOR COURT CORRECTLY INTERPRETED THE UNAMBIGUOUS TERMS OF THE AGREEMENT TO PRECLUDE CHALLENGES TO THE INDEPENDENCE OF THE VALUATION.

A. Question Presented.

Whether the Superior Court appropriately limited discovery based on the plain terms of the Agreement, which foreclosed a party from challenging the purported independence of the valuation conducted pursuant to Section 2.4.2 of the Agreement.

B. Scope of Review.

Questions of contract interpretation are reviewed *de novo*. *Sunline Comm. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836 (Del. 2019). A grant of summary judgment is also reviewed *de novo. Id.*

C. Merits of Argument.

1. The Agreement Precludes Challenges to the Independence, Methodology, or Calculations of the Valuation.

The unambiguous terms of the Agreement did not permit a party to dispute the independence, methodology, or calculations of the other side's valuation. Instead, the parties agreed—in the absence of mutual agreement as to the value of the Company—to "separately hire a Big Four accounting firm, and the Independent Valuation shall equal the average of the two valuations." (A0103.) The Superior Court correctly concluded that, instead of engaging in the time-and cost-intensive process of challenging and reviewing each side's valuations, the parties:

> Anticipate[d] that the valuations from two Big Four accounting firms may be different. Instead of calling for discovery and disputes, Section 2.4.2 provides that the Independent Valuation of the Company shall be the average of the two valuations. Moreover, Section 2.4.2 does not anticipate 'independent' valuations by the two Big Four accounting firms. Instead, Section 2.4.2 just uses valuation without the using the term "independent valuations," and has each party paying for the costs associated with their retained Big Four accounting firm.

(OB Ex. A at 20.) The fact that Section 2.4.2 required the parties to hire one of the Big Four account firms is, in itself, an assurance that the valuation would be fair: "[n]ow, 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 PriceWaterhouseCoopers is not going to come back with 14 billion . . . ." (A0772–73.) 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.

CSG argues that the Superior Court erred when it treated Section 2.4.2 as an "arbitration or exclusive remedy provision," in contravention of Section 7 of the Agreement. (AB at 7.) But CSG misapprehends Section 7 and its relationship to Section 2.4.2. Importantly, Section 7 does not confer or grant any rights upon the parties to challenge the independence of the valuations set forth in Section 2.4.2. Instead, Section 7, the "Governing Law" provision, provides that:

> This Agreement and all disputes or controversies arising out of or relating to this Agreement or the transactions contemplated hereby shall be governed by, and construed in accordance with, the internal laws of the State of Delaware, without regard to the laws of any other jurisdiction that might be applied because of the conflicts of laws principles of the State of Delaware. Each of the Parties to this 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.

(A0104.) Here, both parties submitted to the jurisdiction of the Superior Court, and applied Delaware law to resolve their dispute. Section 7 was therefore satisfied.

CSG nonetheless suggests that Section 7 permits the Superior Court to "settle any dispute[]," including a dispute over the independence of the valuation. (AB at 28–29.) But there is no dispute—or opportunity to dispute—the competing valuations under Section 2.4.2. To hold otherwise would be to misinterpret a general provision (Section 7) to confer a specific right (the right to challenge the independence of the valuation) that the specific provision (Section 2.4.2) does not permit. *See In re Shorenstein Hays-Nederland Theatres LLC Appeals*, 213 A.3d 39, 62 (Del. 2019) (concluding that the "more narrowly drafted provision" controls the general because "specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

CSG also argues that the Superior Court erred when it "judicially estopped" CSG from challenging the independence of the valuation. But that, too, is a misreading of the Superior Court's decision. *First*, the Superior Court interpreted the unambiguous language of Section 2.4.2 to preclude challenges to the independence of the valuation. (AB Ex. A at 19–20.) That was a standalone reason to preclude CSG's challenge to the independence of the PwC Report and to limit its discovery regarding PwC's independence.

Second, the Superior Court separately limited *CSG*'s discovery regarding PwC's independence because CSG objected to SD3's discovery requests on the basis that "many of the discovery requests appear to presume that [SD3] can attack the validity of the EY valuation by questioning whether the value should have been more. *But the Call Option Agreement does not contemplate or permit this claim*." (OB Ex. A at 19–20 (emphasis added).) The Superior Court need not have reached that issue, in light of its interpretation of the Agreement. It nonetheless correctly concluded that CSG's request to seek discovery regarding PwC's independence as part of CSG's summary judgment response is inconsistent with CSG's earlier objections to discovery, in which it prevented SD3 from obtaining information to challenge the validity of *EY's valuation*. The Superior Court did not abuse its discretion when it "foreclosed [CSG] from taking similar discovery as to the PwC

Report," (*id.*), because of CSG's earlier refusal to provide discovery to SD3 on the same issue.

2. The Superior Court Did Not Abuse its Discretion When it Gave CSG More Discovery than CSG Was Entitled to Under the Unambiguous Terms of the Agreement.

The Superior Court correctly concluded that Section 2.4.2 does not afford the parties the right to challenge the other side's valuation; no other provision, including Section 7, alters Section 2.4.2's clear limitations. It could have stopped there, applied the averaging procedures, calculated the Penalty Amount, and granted summary judgment in favor of SD3 as to Count I. But, in its discretion, the Superior Court gave CSG more discovery than it was entitled to, by permitting CSG to seek documents, and conduct a deposition of Mr. Qureshi related to his independence, and the implied covenant of good faith and fair dealing. (OB Ex. A at 22–23.)

CSG argues that it was entitled to unbridled discovery regarding Mr. Qureshi's independence. *First*, it argues that the PwC Valuation contains "basic flaws" regarding its methodology and cash flow analysis that "reflect Mr. Qureshi's lack of independence." (AB at 39–43.) *Second*, it argues that the Superior Court abused its discretion when it "needed to allow completion of discovery in the case, including (*inter alia*) discovery into (i) the input that [SD3's] principals and litigation counsel were giving to PwC for its valuation; (ii) SD3's counsel's failure to provide information specifically requested by PwC and in the possess of counsel;

and (iii) PwC's reliance on cherry-picked, results driven pieces of information while ignoring substantial adverse information." (AB at 43–44.)

But the Superior Court has 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." *Boatright v. State Farm Ins. Co.*, 2023 WL 8234528, at *3 (Del. Super. Nov. 28, 2023) (quoting *Omnicare, Inc. v. Mariner Health Care Mgmt. Co*., 2009 WL 1515609, at *3 (Del. Ch. May 29, 2009)). Thus, Delaware courts routinely limit the scope of discovery to the actual issues in dispute, and preclude discovery on issues outside that scope. *See id.* (precluding discovery that did not relate to the "core . . . insurance coverage dispute. The dispute centers on whether State Farm owed Christopher coverage under the Policy for the Underlying Lawsuit"); *NSI-MI Holdings, LLC v. Ametek, Inc.*, 2023 WL 7482590, at *8 (Del. Super. Nov. 13, 2023) ("[B]ut the MIPA and Escrow Agreement are clear and unambiguous—the withheld escrow funds must be released. Discovery to gather any additional extra-contractual information is unneeded considering the clear and unambiguous contractual language."); *Bathla v. 913 Market, LLC*, 200 A.3d 754, 763–64 (Del. 2018) (affirming Superior Court's grant of summary judgment, despite argument that "motion for summary judgment was premature because discovery has not yet been completed," because the agreement was unambiguous); *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d

889 (Del. 2000) ("Eon claims that it should have been permitted discovery. But it is well established that when a contract is unambiguous, extrinsic evidence to vary the terms of the contract is inadmissible, and discovery attempts to that end are not permitted."). Here, in light of the unambiguous terms of the Agreement, the Superior Court appropriately limited discovery to those issues that were actually in dispute, and in fact, gave CSG more discovery than it was entitled to regarding the independence issue. That was not an abuse of discretion.

3. The Superior Court, After Permitting Additional Discovery and Supplemental Briefing, Correctly Concluded that CSG Failed to Generate a Genuine Dispute over a Material Fact Regarding Mr. Qureshi's Independence.

After discovery regarding Mr. Qureshi's independence, including a deposition, and following supplemental briefing, the Superior Court correctly concluded that, even if the PwC valuation was required to be "independent" (which it was not required to be under the Agreement), CSG failed to create a genuine issue of material fact and summary judgment was therefore appropriate as to Count I.

Specifically, the Superior Court determined that no genuine dispute existed regarding the substance of Mr. Qureshi's declaration, which stated that:

- the PwC Valuation Report is PwC's ***independent*** valuation of [RETIA];
- At no time did SD3—including its principals—direct PwC to (i) reach a certain value of RETIA; (ii) include or not include specific financials,

> contracts or business plans in PwC's assumptions; or (iii) accept or reject certain aspects of the valuation prepared by EY;
>
> - At no time did SD3's counsel direct PwC as to the same;
> - Instead, [Mr. Qureshi] was at all times instructed to be independent, and at all times . . . acted independently.

(OB Ex. B. at 6–7 (quoting Qureshi Declaration).)

CSG points to various email exchanges between Mr. Qureshi, SD3, and counsel as purported "evidence" of Mr. Qureshi's lack of independence. (AB 47–50.) But, as the Superior Court correctly concluded, those email exchanges do not suggest interestedness or bias; they show, unsurprisingly, that Mr. Qureshi maintained communications with the parties that asked him to perform an independent valuation. (*See* OB Ex. B at 4 (rejecting the "innuendo" or "implication of influence").) Mr. Qureshi's deposition testimony is dispositive on this issue. He testified that:

> at the end of the day, when [PwC] conduct[s] any valuation, ***we look at the information available to us, and then we opine independently what is relevant for our valuation or not***. And as it was, in the valuation that was undertaken [here], we relied upon all documents from the company [i.e., RETIA] itself primarily.

(A2238.)

Mr. Qureshi repeatedly testified that the basis of the PwC Report was o*nly on the EY Report and "additional information received from CSG and RETIA*." (A2244; *see also* A2316 (testifying "I relied upon the information given to me by

CSG and RETIA itself.… that is the purpose of an independent valuation and that's what I've done").) In fact, Mr. Qureshi's assumptions underlying his valuation of RETIA—made without the benefit of the J&T Business Plan—comport with CSG's assumptions in the J&T Business Plan (*e.g.*, the inclusion of the MADR Contracts when calculating RETIA's value) and, in some instances, were more conservative than the J&T Business Plan (*e.g.*, RETIA's margins). The disparate treatment of the MADR Contracts and PwC's higher valuation of RETIA was the primary catalyst for CSG's request to demand discovery into PwC's independence. (*See* A0557–563; A0565.) In reality, PWC's valuation proved to be a conservative, independent assessment of RETIA that more closely aligned with CSG's views of RETIA's value, as represented in the J&T Business Plan.

Even though the Superior Court was not required to entertain CSG's challenge to Mr. Qureshi's independence, it did, and CSG failed to adduce any evidence that Mr. Qureshi lacked independence. Summary Judgment was therefore appropriate.[4]

[4] CSG also suggests that the Superior Court's grant of summary judgment should be reversed because it relied upon Mr. Qureshi's declaration, which was attached to SD3's Reply Brief. But the fact that Mr. Qureshi's declaration was attached to SD3's reply brief is inconsequential when the Superior Court deferred its summary judgment decision as to the independence issue until after CSG had an opportunity to obtain discovery and depose Mr. Qureshi regarding his declaration. The parties were even permitted, and did, submit supplemental briefing regarding the issue.

CONCLUSION

SD3 respectfully reiterates its requests that the Court reverse the Superior Court's decision denying its Rule 37 Motion, and remand to the Superior Court to consider its Rule 37 Motion in light of its authority to amend the Count I Decisions. In the alternative, the Court should reverse the Superior Court's decision denying SD3's Rule 60 Motion. SD3 also respectfully requests the Court deny CSG's Cross-Appeal.

Dated: February 28, 2024

DUANE MORRIS LLP

Ryan E. Borneman*
Robert M. Palumbos*
Ryan F. Monahan*
30 S. 17th Street
Philadelphia, PA 19103
Telephone: (215) 979-1000
Fax: (215) 689-2407

**admitted pro hac vice*

DUANE MORRIS LLP

/s/ Mackenzie M. Wrobel
Mackenzie M. Wrobel (#6088)
Coleen W. Hill (#6287)
1201 N. Market Street, Suite 501
Wilmington, DE 19801
Telephone: (302) 657-4900
Fax: (302) 657-4901
mmwrobel@duanemorris.com
cwhill@duanemorris.com

Counsel for Plaintiff-Below, Appellant/Cross-Appellee SARN SD3 LLC

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

Transaction Details

Court: DE Supreme Court

Document Type: Reply brief on appeal/answering on cross-appeal

Transaction ID: 72191068

Document Title: Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal. (eserved) (jkh)

Submitted Date & Time: Feb 28 2024 1:14PM

Case Details

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