EFiled: Feb 4 2011 9:40AM EST
Transaction ID 35762703
Case No. 4780-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WIMBLEDON FUND LP – ABSOLUTE RETURN FUND SERIES, a Delaware Limited Partnership,	)	
Plaintiff,	)	
v.	)	C.A. No. 4780-VCS
SV SPECIAL SITUATIONS FUND LP, a Delaware Limited Partnership,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: January 12, 2010
Date Decided: February 4, 2011

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STRINE, Vice Chancellor.

I. Introduction

This action comes back to me by way of a December 20, 2010 order by our Supreme Court remanding the action under Supreme Court Rule 19(c) because the unsuccessful plaintiff in this action, and appellant above, Wimbledon Fund LP-Absolute Return Fund Series, sought on appeal to supplement the record with two documents that were at all relevant times in its own possession. Wimbledon claims to have newly discovered those two documents, albeit in its own files.[1] Wimbledon, a limited partner of defendant SV Special Situations Fund LP ("SV Fund"), lost on cross-motions for summary judgment in this court and I entered a final judgment declaring that Wimbledon's premature request to withdraw from SV Fund was ineffective.[2] Importantly, Wimbledon conducted no discovery, was the first party to seek summary judgment, and declined to file a Rule 56(f) affidavit when faced with SV Fund's cross-motion for summary judgment, opting instead to rely on a single piece of evidence both to buttress its own motion for summary judgment and to defend against SV Fund's cross-motion.

To be candid, the Supreme Court's order is unclear to me. The Supreme Court denied Wimbledon's motion to supplement the record on appeal based on its determination under Supreme Court Rule 8 that it would be procedurally improper to

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[1] *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, No. 430, 2010 (Del. Dec. 20, 2010) (ORDER).

[2] By Supreme Court Rule 19(c), this decision had to be issued by February 21, 2011. The parties were given the chance to comment on the issues on remand, and their papers were completed on January 12, 2011.

allow Wimbledon to do so.[3] But, of course, this court has rules of procedure, too. Those rules make plain that the way for a party to obtain relief from a final judgment is for it to file a motion in this court under Court of Chancery Rule 60(b). Because it is not clear from the Supreme Court's order whether it was granting Wimbledon a right to supplement in this court without satisfying this court's rules of procedure, or whether it means to say that Wimbledon has somehow already met its burden under that rule or an unidentified Supreme Court Rule, I assume that I am in the first instance to determine whether, exercising my own judicial judgment in the first instance, Wimbledon has shown grounds sufficient for it to reopen the case and submit the "supplemental" evidence that it now wishes this court to consider. Therefore, I first determine whether Wimbledon has a basis for relief under Court of Chancery Rule 60(b). Under that rule, as well as under traditional notions of judicial economy and public policy considerations, I find there is no justification for any relief from my final judgment, that the supplemental evidence should not be considered, and that Wimbledon should be forced to live with the strategic decisions it made in this court over one year ago.

But, given that the wording of the Supreme Court's order is open to the interpretation that Wimbledon may supplement the record on remand without showing a proper basis under this court's rules of procedure, I also revisit my summary judgment decision based on the record as supplemented in the way Wimbledon proposes. After doing so, I conclude that, if Wimbledon were given leave to belatedly present the

[3] Supreme Court Rule 8 provides: "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Supr. Ct. R. 8.

supplemental evidence, that evidence does raise genuine issues of material fact such that both motions for summary judgment should be denied and the case should proceed to discovery and later, to trial. If, despite my denial of Wimbledon's right to supplement, the Supreme Court concludes that the supplemental evidence should be considered, any alteration of my judgment against Wimbledon should, at the very least, be conditioned on Wimbledon having to pay all the attorneys fees and expenses incurred by SV Fund in this action since January 11, 2010 — the date on which Wimbledon filed its answering brief to SV Fund's cross-motion for summary judgment. Wimbledon's failure to timely present evidence in its possession or to otherwise use appropriate procedural avenues has caused SV Fund, as well as this court and the Supreme Court, to waste scarce resources.

II. Procedural Posture And Factual Background

Wimbledon filed its one-count complaint in this court on August 5, 2009 seeking a declaratory judgment that it had withdrawn from its participation in SV Fund and that it was therefore a creditor of SV Fund. Without conducting any discovery, Wimbledon filed its motion for summary judgment on October 16, 2009. SV Fund followed suit on December 1, 2009, filing its own cross-motion for summary judgment seeking a contrary declaration that Wimbledon had not withdrawn from the fund and that it was therefore not a creditor of the fund. Without filing a Rule 56(f) affidavit or otherwise seeking discovery, Wimbledon filed its final brief. After SV Fund filed its final brief, oral argument on the cross-motions for summary judgment was held. On June 14, 2010, I issued an opinion (the "Summary Judgment Opinion") in which I denied Wimbledon's

motion for summary judgment and entered judgment in favor of SV Fund.[4] At the beginning of the Summary Judgment Opinion, with which I assume the reader is familiar, I summarized the case and my holding as follows:

> This matter involves a dispute between an investment fund, SV Special Situations Fund LP ("SV Fund"), and one of its limited partners, Wimbledon Fund LP-Absolute Return Fund Series ("Wimbledon"). Shortly after investing in SV Fund in October 2007, Wimbledon decided that it wanted to withdraw, and sent SV Fund a request to pull out its capital as of the next biannual withdrawal date, which was June 30, 2008. The problem for Wimbledon is that the limited partnership agreement, to which Wimbledon bound itself upon subscribing to SV Fund, prevents members from withdrawing from SV Fund before twelve months have passed since their initial investment. Therefore, Wimbledon's request to withdraw-which came in February 2008, a mere four months after it joined SV Fund-was premature.
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> For months, there was radio silence from SV Fund on the status of Wimbledon's request. There is no evidence in the record that SV Fund responded in any way to Wimbledon's request before the June 30, 2008 withdrawal date. There is also no record evidence indicating that Wimbledon ever followed up with SV Fund about the status of its request to withdraw.
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> It was not until September 2008 that SV Fund responded in the form of a brief letter acknowledging Wimbledon's request. Shortly after sending that letter in September, SV Fund wrote a letter in October 2008 to all of its members indicating that it was suspending all pending and future withdrawal requests. But Wimbledon claims that the suspension does not apply to its withdrawal, because its requested withdrawal was effective on June 30, 2008, before SV Fund announced the suspension. Despite the fact that its request was premature, Wimbledon argues that its request was effective because SV Fund consented to its early withdrawal.

[4] *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, 2010 WL 2368637 (Del. Ch. June 14, 2010) (the "Summary Judgment Opinion").

> *As evidence of SV Fund's*[5] *consent [to Wimbledon's premature withdrawal], Wimbledon points to only one piece of evidence in the record before me, namely the letter SV Fund sent Wimbledon in September 2008 acknowledging its February 2008 request to withdraw*. But, that letter came three months *after* the June 30 withdrawal date, and includes no language clearly indicating that SV Fund consented to the withdrawal. *Based on this meager evidence, it is implausible to infer that SV Fund consented to Wimbledon's request.* Therefore, I conclude that the withdrawal suspension applied to Wimbledon, as it did to all of SV Fund's members.[6]

After I issued my decision, I entered a final judgment and order to that effect on June 16.[7] Wimbledon did not file a motion for a rehearing under Rule 59. Nor did it file any motion for relief from the entry of judgment under Rule 60.

Instead, on July 14, 2010, Wimbledon appealed my decision to the Delaware Supreme Court. Three weeks before oral argument in the Supreme Court, and *after briefing* on the appeal was complete, Wimbledon made a motion to supplement the record with two documents (the "Supplemental Evidence"), neither of which were mentioned or offered as evidence in this court at any time, and both of which Wimbledon admits were in its possession *before it filed for summary judgment and at all times during the briefing of the cross-motions for summary judgment*. Indeed, both documents were sent to Wimbledon before it filed its complaint in this court.

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[5] Under SV Fund's Partnership Agreement, only the general partner has the authority to waive the one year lock-up applicable to all limited partners' capital investment and to consent to premature withdrawals. *See* Summary Judgment Opinion at *2 (quoting Partnership Agreement §§ 6.1(a), 6.1(f)). For purposes of clarity, however, my use of the term "SV Fund" refers in reality to SV Fund as acting through its general partner, Stagg Capital Partners LLC.

[6] Summary Judgment Opinion at *1 (emphasis added).

[7] *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2010 WL 2368637 (Del. Ch. June 16, 2010) (ORDER).

The first document that is part of the Supplemental Evidence is a September 29, 2008 letter from HSBC to Wimbledon's manager, Weston Capital Asset Management LLC (the "HSBC Letter").[8] HSBC served as SV Fund's administrator.[9] Attached to a note introducing it is a one-page "SV Special Situations Fund LP Statement of Partner's Capital" that provides a breakdown of Wimbledon's capital position in SV Fund for the period beginning on July 1, 2008 and ending on July 31, 2008, the first month after the June 30, 2008 date that Wimbledon had hoped its premature withdrawal request would have been effective. The HSBC Letter shows the "Previous Ending Capital" in an amount of $2,103,851 and a "Withdrawal" in like amount resulting in an "Ending Capital" of "0."[10]

The second piece of Supplemental Evidence is SV Fund's 2008 Form K-1 ("SV K-1"), prepared in 2009.[11] The SV K-1 for Wimbledon, as a limited partner in SV Fund, shows that Wimbledon's "Ending" capital investment in SV Fund for the year 2008 is "0.0000000%".[12]

The Supplemental Evidence is odd for the obvious reason that it is comprised of two documents sent to Wimbledon itself and therefore known to Wimbledon and in its own control and possession. This evidence is thus not new in any sense, much less

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[8] Pl. Op. Mem. On Remand Ex. 5 (Letter from HSBC to Weston Capital Asset Management LLC (September 29, 2008)) (the "HSBC Letter").

[9] SV Fund contests this point, arguing that it had terminated HSBC before it sent the HSBC Letter. I deal with that issue below when I conduct a new analysis of the parties' cross-motions for summary judgment in light of the Supplemental Evidence. For now, what is important is that HSBC, at least at one time, was SV Fund's administrator.

[10] HSBC Letter ("Statement of Partner's Capital") at 1.

[11] Pl. Op. Mem. On Remand Ex. 6 (SV Fund's 2008 Schedule K-1).

[12] Pl. Op. Mem. On Remand Ex. 6 (SV Fund's 2008 Schedule K-1) at 84.

"newly discovered."[13] Wimbledon relegates its explanation of its remembrance of crucial documents it received in the past to a footnote in its brief on remand that simply states:

> While the case was on appeal and after briefing was complete, Wimbledon received an inquiry from one of its investors relating to the SV investment. *When Wimbledon reviewed its SV files, it discovered two documents . . . . Wimbledon did not locate these documents in the prior proceedings before this Court due to two office moves and confusion as to where Wimbledon's complete set of SV files were located.*[14]

That, to be mild, weak excuse for not presenting the Supplemental Evidence in a timely way must also be considered in light of the fact that Wimbledon conducted no discovery at all in this case before moving for summary judgment. I reminded Wimbledon of that reality at oral argument on the cross-motions for summary judgment when it began to press at oral argument, a new argument based on evidence not in the summary judgment record.[15] Wimbledon backed off and stated that the reason for its decision to forego discovery was "because [it] thought that [it] could focus on [i.e., depend on to sustain its position] the September [SV Fund] [L]etter,"[16] the only piece of evidence offered by Wimbledon.[17]

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[13] Ct. Ch. R. 60(b)(2) (providing mechanism for court to grant relief from judgments and orders on the grounds of "newly discovered evidence").
[14] Pl. Op. Mem. On Remand at 1 n.1.
[15] *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780, at 24-26 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT).
[16] In the Summary Judgment Opinion, I referred to this letter as the "September 2008 Letter" because it was sent on September 30, 2008. Summary Judgment Opinion at *3. But, because the HSBC Letter was also sent in September, in order to avoid confusion, I refer to that letter in this opinion as the "September SV Fund Letter."
[17] *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780, at 26 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT). *See also* Summary Judgment Opinion at *1 ("As evidence of SV Fund's consent, Wimbledon points to only one piece of

After denying Wimbledon's motion to supplement the record on appeal, the Supreme Court issued its order remanding the case "so that the record can be supplemented" with the two documents Wimbledon unsuccessfully proffered to the Supreme Court.[18]

III. Analysis

As noted, the remand of this case presents two issues. The first is whether Wimbledon is entitled to relief from the judgment against it under Court of Chancery Rule 60(b). In the event that the Supreme Court has ordered that the record be supplemented, irrespective of Wimbledon's failure to identify a procedural justification for permitting it to do so, the second issue is whether the record if supplemented with the Supplemental Evidence (the "Supplemented Record")[19] raises a genuine issue of material fact such that the parties' cross-motions for summary judgment should be denied.

I now address each of these issues in turn, beginning with the question raised by Wimbledon's post-judgment attempt to supplement the record.

A. Wimbledon Is Not Entitled To Relief From The Final Judgment Under Court Of Chancery Rule 60(b)

As an initial matter, it is critical to bear in mind Wimbledon's own chosen strategy in this court. Wimbledon moved for summary judgment without serving a single

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evidence in the record before me, namely the letter SV Fund sent Wimbledon in September 2008 acknowledging its February 2008 request to withdraw.").

[18] *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, No. 430, 2010 (Del. Dec. 20, 2010) (ORDER).

[19] I caveat that I do not find that the record should be or is supplemented. That is for the Supreme Court to determine. The definition of Supplemental Record refers to a state of affairs that might be.

discovery request on SV Fund. In response, SV Fund filed its cross-motion for summary judgment. In the face of that motion, Wimbledon did not seek additional time to conduct discovery by filing a Court of Chancery Rule 56(f) affidavit swearing that it could not "for reasons stated present by affidavit facts essential to justify [its] opposition" to SV Fund's motion for summary judgment.[20] The purpose of a Rule 56(f) affidavit is to avoid situations where an opposing party receives an adverse judgment on a summary judgment record due to a lack of adequate time for discovery but also to require a party who needs discovery to respond to a summary judgment motion to timely explain what discovery it needs to do so.[21]

Here, Wimbledon's decision not to use Rule 56(f), and its related decision to instead proceed full bore in opposition to SV Fund's motion for summary judgment on the basis of one document, were its own.[22] That being the case, there was no reason for

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[20] Ct. Ch. R. 56(f).

[21] *Avacus Partners, L.P. v. Brian*, 1989 WL 120392, at *1; CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2740 (3d ed. 2008) ["WRIGHT & MILLER"]. By analogy, the recently adopted and revised Rule 15(aaa) of this court serves a similar purpose. That rule "requires plaintiffs," "[w]hen confronted with a motion to dismiss . . . to choose between standing on their complaint and answering the motion or amending [their complaint] . . . before the response to the motion is due." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006). "The self-evident purpose of [Rule 15(aaa)] is to reduce the burden on both the courts and the parties encountered when a successful motion to dismiss is met by a motion to replead." *Stern v. LF Capital Partners*, 820 A.2d 1143, 1146 (Del. Ch. 2003).

[22] *See, e.g., Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1033 (Del. Ch. 2008) (citing *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1104-05 (Del. Ch. 2003); *Nagy v. Bistricer*, 770 A.2d 43, 60 n.42 (Del. Ch. 2000); *Shenandoah Life Ins. Co. v. Valero Energy Corp.*, 1988 WL 63491, at *1 (Del. Ch. June 21, 1988)) ("Instead, the Comet shareholders now request (for the first time, 19 months after filing their complaint) an opportunity to take discovery on this issue. *They are too late*. . . . This court has repeatedly denied requests for discovery made in opposition to a motion for summary judgment in the

this court not to rule on the cross-motions for summary judgment on the record Wimbledon proffered as adequate for that purpose. Relief, if any, from the final judgment resulting from the decision on those cross-motions should therefore be obtained by a timely motion made under Rule 60(b). But even after this court granted summary judgment against Wimbledon and issued a final judgment in SV Fund's favor, Wimbledon did not move under Rule 59[23] or Rule 60. Instead, it appealed. And it waited until after the merits briefing was completed to move to supplement above. In doing so, it never cited Rule 60.[24]

Only now, after having failed to use the proper route to present evidence is Wimbledon before this court seeking to present the Supplemental Evidence. But even now, it fails to address the relevant procedural rule, which is Rule 60.[25] Court of Chancery Rule 60(b) is the rule of procedure that affords litigants the opportunity to seek relief from judgments and orders. Rule 60(b) provides in relevant part:

> **Rule 60. Relief from judgment or order.**
> . . .
> (b) *Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (2) *newly discovered evidence*; . . . (5) the judgment has been satisfied, released, or discharged, *or a prior judgment upon which it is based has been reversed or otherwise vacated, or*

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absence of a Rule 56(f) affidavit, instead ordering summary judgment in such cases.") (emphasis added).

[23] Ct. Ch. R. 59 (providing mechanism for parties to seek a rehearing or an alteration of judgment).

[24] *See* Pl. Mot. To Supp., No. 430, 2010 (Filing ID 34348285) (Nov. 15, 2010); Pl. Rep. In Support Of Mot. To Supp., No. 430, 2010 (Filing ID 34565379) (Nov. 29, 2010).

[25] Wimbledon only mentions Rule 60(b) in its reply brief *on remand*, in which it argues that in light of the wording of the Supreme Court's order, this court does not enjoy the prerogative to address the issue presented under Rule 60(b). Pl. Rep. Mem. On Remand at 10.

> *it is no longer equitable that the judgment should have prospective application*; or (6) *any other reason justifying relief from the operation of the judgment* . . . .[26]

This situation most clearly implicates Rule 60(b)(2), for "newly discovered evidence." The only other relevant subsections in Rule 60(b) are (b)(5), relief on grounds of equity, and (b)(6), a "catchall provision."[27] I will deal with each one in turn.

In order to succeed under Rule 60(b)(2), the moving party must demonstrate that:

> [1] the newly discovered evidence has come to his knowledge since the trial; [2] that it could not, *in the exercise of reasonable diligence, have been discovered for use at the trial*; [3] that it is so material and relevant that it will probably change the result if a new trial is granted; [4] that it is not merely cumulative or impeaching in character; *and* [5] that it is reasonably possible that the evidence will be produced at the trial.[28]

Without passing on the other four requirements, Wimbledon fails to offer any reason why it could not, through the exercise of reasonable diligence, have discovered the Supplemental Evidence. Indeed, Wimbledon informs the court in its opening brief on remand (in a footnote) that it "discovered" the Supplemental Evidence when it, in response to an investor inquiry, "*reviewed its SV files*."[29] The Supplemental Evidence was sent to Wimbledon, and Wimbledon now considers it vitally important. Wimbledon possessed this evidence all along and it would have been found with any exercise of diligence, let alone reasonable diligence. Wimbledon's weak excuse – "two office moves

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[26] Ct. Ch. R. 60(b) (emphasis added).
[27] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 634 n.9 (Del. 2001).
[28] *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991) (quoting *In re Missouri-Kansas Pipe Line Co.*, 2 A.2d 273, 278 (Del. 1938)) (emphasis added). *See also Norberg v. Sec. Storage Co. of Wash.*, 2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002) (quoting *Missouri-Kansas Pipe Line Co.*, 2 A.2d at 278) (same); *In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *10 (quoting *Missouri-Kansas Pipe Line Co.*, 2 A.2d at 278) (same); *Poole v. N.V. Deli Maatschappij*, 257 A.2d 241, 243 (Del. Ch.1969) (quoting *Missouri-Kansas Pipe Line Co.*, 2 A.2d at 278) (same).
[29] Pl. Op. Mem. On Remand at 1 n.1 (emphasis added).

and confusion as to where Wimbledon's complete set of SV files were located" – [30] must also be considered alongside its decisions to conduct no discovery of its own before moving for summary judgment, and to file no Rule 56(f) affidavit requesting additional time to engage in discovery when served with SV Fund's cross-motion for summary judgment. If it were really the case that Wimbledon lost track of its files, that reality should have provided Wimbledon with a greater incentive to conduct discovery, especially after SV Fund filed its cross-motion for summary judgment, and especially because the documents comprising the Supplemental Evidence were received by Wimbledon and bore closely on the claim that Wimbledon itself filed. Moreover, reasonable diligence would seem to require a plaintiff filing a complaint and seeking summary judgment to have searched its own files diligently before doing so, not only to make sure its pleading was made in good faith and to present a strong summary judgment motion, but also to secure relevant documents from destruction.[31] Wimbledon seems to have easily found these documents in its own possession once the investor asked and it had lost the case below. Courts have denied relief under Rule 60(b)(2) in circumstances more sympathetic than exist here, on the grounds that had the aggrieved party exercised reasonable diligence, the so called "newly discovered" evidence would have been

[30] Pl. Op. Mem. On Remand at 1 n.1.

[31] *See, e.g., Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005) ("'The obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'") (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2011)).

discovered well before the entry of judgment.[32] Finally, if a party can claim on appeal after the entry of judgment, as Wimbledon does here, that letters and documents addressed and sent to it before the complaint was even filed and in its own possession and control constitute "newly discovered evidence," it is hard to imagine what evidence, if any, could not be considered newly discovered. The case law under the federal counterpart to our Rule 60(b)(2) is clear on this point. If before the entry of judgment, the evidence was in the possession of the party seeking to introduce it as "newly discovered," that fact alone disqualifies the moving party, on the reasonable basis that there is no need to inquire about diligence when the moving party had the evidence all along.[33] Of course, I understand the temptation for a losing party "[a]cting under the sting of defeat"[34] to suddenly "discover" (i.e. "remember," "rethink," "recalculate") some documents it now wishes it had offered to the court for consideration. But that desire is

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[32] *See, e.g., In re U.S. Robotics S'holders Litig.*, 1999 WL 160154, at *11 (denying movant's motion under Rule 60(b)(2) with respect to financial results that "came to public attention after the Final Judgment was issued" because "th[ose] facts could have easily been discovered by class counsel through the discovery process."); *Poole v. N.V. Deli Maatschappij*, 257 A.2d 241 (Del. Ch. 1969) (denying relief under Rule 60(b)(2) to unsuccessful plaintiffs who claimed that a method of valuation not offered by their expert was "newly discovered evidence" because the plaintiffs were aware that the defendant's expert relied on such valuation methodology, the defendant's other submissions to the court relied on such methodology, and the plaintiffs never made an application to submit additional expert testimony); *In re Missouri-Kansas Pipe Line Co.*, 2 A.2d 273, 281 (Del. 1938) (refusing to allow petitioners to reopen case to introduce new testimony by a testifying witness on the grounds that petitioners had information "sufficient to put them on notice and to require them, as part of their preparation for the hearing, to make inquiry from the company concerning the facts" regarding the witness' alleged employment, but that the petitioners "did nothing before trial, at the trial, or after the trial for ten months.").

[33] WRIGHT & MILLER § 2859 (citing *Taylor v. Texgas Corp.*, 831 F.2d 255 (11th Cir. 1987)).

[34] *In re Missouri-Kansas Pipe Line Co.*, 2 A.2d 273, 277 (Del. 1938).

not a reason to upset the sound public policy favoring the finality of judgments and adherence to rules of procedure.[35]

Having determined that Wimbledon fails to establish that it is entitled to relief from judgment under Rule 60(b)(2), I now turn to the other two relevant subsections of Rule 60(b), Rules 60(b)(5) and (6). This court has held that relief under Rule 60(b)(5) is granted only upon a showing that "the judgment, if permitted to stand, will cause a manifest injustice to the moving party."[36] For Wimbledon's fate to rise or fall on the summary judgment record it chose does not present a case of manifest injustice. Moreover, the business context the final judgment presented to it was the one most consistent with the contractual lock-up period it agreed to in SV Fund's Partnership Agreement. Finally, it is important to note that Wimbledon has not claimed to have taken any detrimental action in reliance on the September SV Fund Letter, the only communication from SV Fund that Wimbledon supposedly remembered at the time of the original action, and a letter that contained no representation (clear or otherwise) that Wimbledon's capital position in the fund had been zeroed out. The September SV Fund Letter also did not clearly represent, as I held in the Summary Judgment Opinion, that SV

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[35] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 635 (Del. 2000) (citing *Credit Lyonnais Bank Nederland, N.V. v. Pathe Comnc'ns Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996)).

[36] *Cede & Co. v. Technicolor, Inc.*, 1994 WL 1753202, at *1 (Del. Ch. Dec. 6, 1994) (quoting *TV58 Limited Partnership v. Weigel Broadcasting Co.*, 1994 WL 114809, at *1 (Del. Ch. Mar. 23, 1994)). *See also* WRIGHT & MILLER § 2863 (noting that under a similarly drafted Rule 60(b)(5) of the Federal Rules of Civil Procedure the Rule refers to "some change in conditions that makes continued enforcement [of the judgment] inequitable and that a "strong showing is required" before the Rule will be used to modify a judgment); *id.* (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.")).

Fund had permitted Wimbledon to withdraw early. Thus, there was no reasonable basis for Wimbledon to have taken any action on the assumption that it would be permitted to get out of the fund before it was contractually entitled to do so under the Partnership Agreement.

Relief under Rule 60(b)(6) is an "extraordinary remedy,"[37] and the standard under Rule 60(b)(6) is more exacting than any other ground for relief provided for in the Rule.[38] That is, in order for a party to succeed under Rule 60(b)(6), the party must make a showing of "extraordinary situation or circumstances."[39] An adequate showing of extraordinary circumstances does not include "neglect" by the moving party or its counsel.[40] Extraordinary circumstances are also "wholly lacking" where a litigant, like

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[37] *Mendola v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 1173898, at *4 (Del. Super. Apr. 27, 2006) (quoting *Cooke v. Cobbs*, 2003 WL 22535080, at *1 (Del. Super. 2003)) (applying an identical Rule 60(b)(6) of the Superior Court Rules). *See also Cede & Co. v. Technicolor, Inc.*, 1994 WL 1753202, at *1 (Del. Ch. Dec. 6, 1994) (quoting *TV58 Limited Partnership v. Weigel Broadcasting Co.*, C.A. 10798, Chandler, V.C. (March 23, 1994) slip op. at 2)) (noting that Rule 60(b)(6) is "invoked sparingly.").

[38] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d at 634 n.9 (Del. 2001). *See also* WRIGHT & MILLER § 2864 (noting that federal courts have granted relief under a similarly drafted Rule 60(b)(6) of the Federal Rules of Civil Procedure in a set of "narrowly defined situations" that amount to "extraordinary circumstances," the most common of which is "when the losing party fails to receive notice of the entry of judgment in time to file an appeal.").

[39] *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979) (adopting the standard employed by federal case law under Rule 60(b)(6) of the Federal Rules of Civil Procedure). *See, e.g., Klapprott v. United States*, 335 U.S. 949 (1949).

[40] *Mendola*, 2006 WL 1173898, at *4 (holding that an insurance company's failure to realize that two suits were filed based on the same auto accident was neglect and did not rise to the magnitude required for a showing of extraordinary circumstances sufficient to grant relief from the entry of default judgment).

Wimbledon, simply second-guesses its own litigation strategy after achieving suboptimal results in court.[41]

In sum, I conclude that under Rule 60(b) there is no reason why Wimbledon should be afforded relief from the final judgment entered against it.

B. A Genuine Issue Of Material Fact Exists On The Basis Of The Supplemented Record

Even though the determination that Wimbledon failed to utilize Rules 56(f), 59, or 60 in the first instance, and that Wimbledon is not entitled to relief under Rule 60(b) now should end this opinion in its entirety,[42] as I noted earlier, I will nonetheless conduct a new analysis of the parties' competing motions for summary judgment in light of the Supplemented Record in case that is what is expected of me. This entails a reconsideration of the two issues I identified in my June 14, 2010 Summary Judgment Opinion: (i) whether SV Fund consented to Wimbledon's premature withdrawal request or otherwise waived the one year lock-up forbidding Wimbledon to withdraw its capital from the fund for one year following its initial investment; and (ii) whether the Suspension Letter[43] was applicable to Wimbledon. I turn to that task now.

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[41] *U.S. Robotics*, 1999 WL 160154, at *13 ("Movants' motion principally seeks to second-guess the strategic judgment of class counsel . . . . There is nothing extraordinary about a litigant's wish, in retrospect, that litigation on his behalf had been handled differently. That concern is one that the litigant should take up with his counsel, not the other side.")

[42] In this regard, it is important to note that Wimbledon's Rule 56(f) affidavit filed with its reply brief *on remand*, is too late. Rule 56(f) "will not be liberally applied to aid parties who have been lazy or dilatory . . . ." WRIGHT & MILLER § 2740. *See also Morrison v. Carpenter Tech. Corp.*, 193 Fed.Appx. 148, 152 (3d Cir. 2006). Likewise, relief under Rule 56(f) will almost never be granted on appeal. WRIGHT & MILLER § 2740; *Bradley v. United States*, 299 F.3d 197, 207 (3d Cir. 2002).

[43] On October 31, 2008, SV Fund sent the Suspension Letter to all limited partners informing them that the general partner was exercising its authority, under § 6.1(e) of the Partnership Agreement, to suspend all capital withdrawals. Summary Judgment Opinion at *3.

1. Standard Of Review

The standard for reviewing cross-motions for summary judgment is a familiar one. "To prevail, each party must show that there is 'no genuine issue as to any material fact' and that it is 'entitled to judgment as a matter of law.'"[44] A court must always deny summary judgment where a genuine issue of material fact exists.[45] Finally, even on cross-motions for summary judgment, the court must deny summary judgment if it determines that no "*rational* finder of fact could find, on the record presented to the Court of Chancery on summary judgment . . . that the substantive evidentiary burden had been satisfied" by the moving party.[46]

In light of that standard, I pause to say that I adhere to my decision in the Summary Judgment Opinion granting summary judgment in SV Fund's favor. At the time Wimbledon made its withdrawal request it was still subject to the one year lock-up in the Partnership Agreement. As a matter of law, a waiver on the part of SV Fund of

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[44] Where the court is asked to rule upon cross-motions for summary judgment, "and neither party has argued that there is an issue of material fact, the cross-motions are deemed to be a stipulation for a decision based on the submitted record." *Comet*, 980 A.2d at 1029 (quoting Ct. Ch. R. 56(h)). In that situation, the ordinary practice of drawing all favorable inferences to the non-moving party does not apply. *Farmers for Fairness v. Kent County*, 940 A.2d 947, 955 (Del. Ch. 2008) (citing *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005)). Wimbledon argued, for the first time on appeal, that it did present argument to this court that there was a genuine issue of material fact such that Rule 56(h) should not have applied to this court's reasoning in the Summary Judgment Opinion. But the only time Wimbledon raised that argument was at oral argument on the parties' cross-motions for summary judgment. *Wimbledon Fund LP – Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780, at 15-16 (Del. Ch. Mar. 30, 2010) (TRANSCRIPT). Wimbledon did not raise that argument in its briefs, and generally arguments not raised in a party's briefs are deemed waived because they have not been fairly asserted. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003).

[45] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003).

[46] *Cerberus Int'l, Ltd. v. Appollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (emphasis in original).

that one year lock-up would have to be "'clear, unequivocal, and decisive . . . .'"[47] But Wimbledon offered no evidence other than the September SV Fund Letter. In light of settled Delaware law on waiver,[48] I concluded that on the basis of the September SV Fund Letter alone, no *rational* trier of fact could find that Wimbledon had met its substantive evidentiary burden — that SV Fund had clearly and unequivocally waived the one year lock-up and consented to Wimbledon's early withdrawal.[49] Viewed in terms of SV Fund's motion for summary judgment and all the evidence, I concluded that the September SV Fund Letter raised no genuine issues of material fact as to whether SV Fund had not waived the one-year lock up and I therefore granted summary judgment in SV Fund's favor. Relevantly, that evidence included the reality that if Wimbledon was permitted to withdraw on June 30, 2008, then it should have expected to receive 90% of its invested capital within thirty days, or by July 30.[50] But when July 30 came and went without payment, Wimbledon did not complain. And the September SV Fund Letter upon which Wimbledon relied so heavily made no mention of payment being overdue, at best suggesting that when Wimbledon's withdrawal was processed, it was possible

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[47] Summary Judgment Opinion at *4 n.18 (quoting *DiRienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009) (internal citations omitted)).

[48] *See, e.g., AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (observing that the "standards for proving waiver under Delaware law are quite exacting" and that the "facts relied upon to prove waiver must be unequivocal") (internal quotations and citations omitted); *DiRienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944, at *4 (Del. Ch. Dec. 8, 2009) (stating that an implied waiver is found "only if there is a 'clear, unequivocal, and decisive act of the party demonstrating relinquishment of the right.'") (internal citations omitted).

[49] In the Summary Judgment Opinion, I observed that the September SV Fund Letter was "[a]t best . . . ambiguous." Summary Judgment Opinion at *4.

[50] Partnership Agreement § 6.4(a). The balance of a withdrawing limited partner's capital is to paid "following the delivery of the audited financial statements of the Partnership for the Fiscal Year in which such withdrawal date occurs." *Id.*

payment would be made in kind and not in cash.[51] There was no evidence that Wimbledon complained after receiving the September SV Fund Letter that it should have received the bulk of its capital back two months earlier. That reality shows that Wimbledon had no reasonable basis to believe it had already had its withdrawal request granted as of June 30, 2008.

2. The Parties' Arguments On The Supplemented Record

Wimbledon's argument on remand is simple and straightforward. It argues that the Supplemented Record, at the very least, raises genuine issues of material fact as to whether SV Fund consented to the early withdrawal or otherwise waived the one year lock-up applicable to Wimbledon.[52] Thus, says Wimbledon, I should either grant summary judgment in its favor or deny both motions for summary judgment and allow this case to proceed to trial.

In support of that contention, Wimbledon focuses on the two documents comprising the Supplemental Evidence, the HSBC Letter, which indicates that Wimbledon's capital position in SV Fund as of July 31, 2008 was zero, and the SV K-1, which indicates that Wimbledon's capital position in SV Fund as of December 31, 2008 was zero. Wimbledon argues that the only way that could be possible is if its withdrawal

[51] September SV Fund Letter.

[52] Unlike in the original action, where Wimbledon did not argue, at least not properly (*see supra* note 44), that a genuine issue of material fact existed, because Wimbledon argues in its papers on remand that at the very least, the Supplemental Evidence does raise a genuine issue of material fact, Rule 56(h) does not apply. Thus, I view the Supplemented Record in a light most favorable to the non-moving party as the case may be. *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

from SV Fund was granted and made effective on the date it had requested, June 30, 2008.

Wimbledon deals with the second issue — whether the October 2008 Suspension Letter applied to Wimbledon's attempt to withdraw — by building on its previous conclusion that the Supplemented Record supports the inference that SV Fund consented to Wimbledon's withdrawal effective June 30, 2008. That being the case, Wimbledon ceased to be a limited partner on June 30, 2008 by operation of the Partnership Agreement, and SV Fund only has the right "to suspend all capital withdrawals to *Partners* . . . ."[53]

SV Fund, for its part, argues that the Supplemented Record still supports the entry of summary judgment in its favor. First, SV Fund contends that Wimbledon offers nothing in the way of linking the Supplemental Evidence to SV Fund, such that it is not conclusive that either of the documents that make up the Supplemental Evidence was prepared by or at the direction of SV Fund. SV Fund argues that the Supplemented Record "does not (clearly or otherwise) reflect any affirmative consent by [SV Fund]."[54] At best, argues SV Fund, the Supplemental Evidence is "ambiguous, circumstantial evidence of Wimbledon's theory of an implied, retroactive waiver of the Lock-Up . . . ."[55] Moreover, even if the Supplemental Evidence does raise a genuine issue of material fact as to the question of waiver, in light of the Summary Judgment Opinion's holding that under the Partnership Agreement SV Fund could suspend pending withdrawal

[53] Partnership Agreement § 6.1(e) (emphasis added).
[54] Def. Ans. Mem. On Remand at 16.
[55] Def. Ans. Mem. On Remand at 17.

requests, the Supplemental Evidence does nothing to change the fact that SV Fund, by virtue of the Suspension Letter, suspended all pending withdrawals, which it argues Wimbledon's was. Finally, SV Fund argues that the Partnership Agreement precludes implied waivers, which in its opinion is the most the Supplemented Record can support.

3. Both Parties' Motions For Summary Judgment Are Denied Because Of The Existence Of Genuine Issues Of Material Fact

The HSBC Letter indicates that Wimbledon's closing capital position in SV Fund on July 31, 2008 is "0." It shows that the "Previous Ending Capital," for the month of June 2008, was "2,103,851" and a "Withdrawal" in the same amount. The HSBC Letter is consistent with Wimbledon's position that SV Fund consented to an early withdrawal effective on June 30, 2008 or at the latest by July 31, 2008,[56] and is further consistent with the inference that SV Fund, upon receiving Wimbledon's withdrawal request, granted it and zeroed out Wimbledon's account, ended Wimbledon's status as a limited partner, and proceeded to make arrangements for payment. Evidence that SV Fund actually effected the withdrawal of Wimbledon as a limited partner, even though Wimbledon was still subject to the one year lock-up and SV Fund was not required to accede to Wimbledon's request, supports a reasonable inference that SV Fund had clearly

[56] The HSBC Letter provides a summary of Wimbledon's capital position in SV Fund for the month beginning July 1, 2008 and ending on July 31, 2008. It can be read as indicating that Wimbledon had a capital position of $2,103,851 as of July 1 that was reduced to zero sometime during the month of July 2008. HSBC Letter.

waived the one year lock-up and actually effected the withdrawal as of June 30, 2008, or shortly thereafter.[57]

The parties quibble as to whether the HSBC Letter was prepared by or on behalf of SV Fund. But I cannot ignore, on a motion for summary judgment where I am bound to draw all reasonable inferences in favor of the non-moving party, the fact that HSBC, an entity SV Fund admits was at least at one point the fund's administrator, drafted and sent the HSBC Letter to Wimbledon one day before the September SV Fund Letter. Parties like SV Fund employ agents like HSBC precisely to fulfill administrative functions like this and if SV Fund wishes to disclaim HSBC's authority to act for the fund, it must do so by producing evidence at trial. Furthermore, although the Partnership Agreement does have an integration clause requiring that all waivers be in writing, § 6.1(f), contained in the article specifically dealing with withdrawals, provides that "[SV Fund] may, in its sole discretion, waive or modify any of the terms relating to withdrawals pursuant to written agreement with a Limited Partner, or otherwise."[58] The fact that a waiver need not be in writing of course, does not mean that it need not be clear and unambiguous.[59] But written documents evidencing that SV Fund in fact effected Wimbledon's withdrawal on June 30 would be clear and unambiguous evidence of a waiver. The HSBC Letter supports the reasonable inference that SV Fund waived the

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[57] Again, under the Partnership Agreement, withdrawal and payment are separate events. Withdrawal occurs on the effective date (either one of the semi-annual withdrawal dates, June 30 or December 31, or another date if the general partner consents), but payment is accomplished later in accordance with § 6.4(a). *See supra* note 50 and accompanying text.
[58] Partnership Agreement § 6.1(f).
[59] *AeroGlobal Capital Mgmt., LLC*, 871 A.2d at 444.

one year lock-up and actually effected the withdrawal sometime between June 30, 2008 and July 31, 2008, had reduced Wimbledon's capital position in the fund to zero, and was simply deciding in what form to pay Wimbledon back its capital. Accordingly, SV Fund's motion for summary judgment must be denied.

As SV Fund argues, the reality could be otherwise and the communications comprising the Supplemental Evidence could have created a false impression of what actually happened. It may be that SV Fund had not waived the one year lock-up and had not actually allowed Wimbledon to withdraw effective June 30, 2008 or later in July. The fact that SV Fund never made the required payment to Wimbledon of 90% of its capital by July 30, suggests that the waiver of the lock-up and withdrawal request was perhaps not actually granted. But the total of the Supplemental Evidence plus the September SV Fund Letter could also buttress a finding that SV Fund, by the clear and unambiguous act of actually zeroing out Wimbledon's capital position in the fund in the month immediately following the requested June 30 withdrawal date, had waived the one year lock-up and effected Wimbledon's early withdrawal. Because, however, it could be otherwise, Wimbledon's request that I not only consider the Supplemented Record but also grant it summary judgment based on that evidence is denied.

This brings me to the second issue: whether a genuine issue of material fact emerges from the Supplemented Record as to whether the Suspension Letter issued by SV Fund applied to Wimbledon's withdrawal.

In the Summary Judgment Opinion, the resolution of that issue rested on my predicate determination that on the basis of the September SV Fund Letter alone,

"Wimbledon's effort to withdraw from SV Fund prematurely *was not effective* on the June 30, 2008 withdrawal date . . . ."[60] Based on the plain language of the Partnership Agreement, I concluded that SV Fund possessed the authority to suspend all withdrawal requests, both pending and future. Because Wimbledon's withdrawal was not effective as of the date of the Suspension Letter, I held that its withdrawal request was suspended.

The situation I confront now, however, is altered by the existence of the Supplemental Evidence. Because I have concluded that it remains a genuine issue of material fact as to whether SV Fund actually permitted Wimbledon to withdraw on June 30 and reduced its capital position in the fund to zero as of or within a month of that date, I likewise conclude that a genuine issue of material fact exists with respect to whether Wimbledon's withdrawal request is still pending and therefore subject to the Suspension Letter. Under § 6.1(d), "[a]ny limited partner," like Wimbledon, "electing a complete withdrawal pursuant to this Article 6 shall cease to be a Partner as of the effective date of the withdrawal."[61] The Supplemented Record, in particular the HSBC Letter, suggests that Wimbledon's request to withdraw as of June 30 was granted. If SV Fund did permit Wimbledon's withdrawal on June 30, 2008, the Suspension Letter, sent approximately three months later, would not be applicable to Wimbledon because SV Fund only has the power to suspend withdrawals, pending or future, with respect "to Partners."[62] On the other hand, if SV Fund did not in fact permit Wimbledon's early withdrawal, Wimbledon

[60] Summary Judgment Opinion at *5 (emphasis added).
[61] There are two withdrawal dates set forth in the Partnership Agreement, June 30 and December 31. Partnership Agreement § 6.1(a).
[62] Partnership Agreement § 6.1(e).

would still be a partner in October 2008 and thus the Suspension Letter would operate to bar Wimbledon's pending withdrawal request. In other words, the Supplemented Record supports two divergent inferences, a genuine issue of material fact exists, and summary judgment must be denied to both parties.

IV. Conclusion

In this opinion, I have made two conclusions. The first is that under this court's rules of procedure, and in particular Rule 60(b), Wimbledon is not entitled to relief from the entry of judgment and that the Supplemental Evidence should not be considered. I recognize, however, the possibility that the Supreme Court's order requires me to consider the Supplemental Evidence nonetheless. Thus, I conducted an analysis of the Supplemented Record and determined, for the foregoing reasons, that the parties' cross-motions for summary judgment should be denied on the basis of genuine issues of material fact that emerge because of the addition to the record of the Supplemental Evidence. As a trial judge, I fear the incentives that granting Wimbledon relief will create for future cases. If a party, like Wimbledon, who moves for summary judgment without conducting any discovery, receives a cross-motion for summary judgment and again decides not to seek discovery, receives an adverse result and fails to make a timely Rule 59 or Rule 60 motion, is permitted to reopen a judgment by submitting to an appellate court evidence from its own files that it chose not to present to the trial court, the fairness, reliability and efficiency of our litigation process will be undermined, as every losing party can think of different ways it wished it had argued or presented its case to the trial court. In any event, because SV Fund has invested resources in good faith

reliance upon regular order and now could find those resources to have been wasted, any alteration of the final judgment dated June 16, 2010 should be conditioned on Wimbledon paying all fees and costs incurred by SV Fund in prosecuting this action after January 11, 2010, plus an appropriate award of interest.